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CODE OF FEDERAL REGULATIONS

Title 12
Banks and Banking

Parts 300 to 346

Revised as of January 1, 2022

Containing a codification of documents
of general applicability and future effect

As of January 1, 2022

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Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 12 CFR 302.1 *refers to title 12, part 302, section 1.*

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

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

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

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OLIVER A. POTTS,
Director,
Office of the Federal Register
January 1, 2022

THIS TITLE

Title 12—BANKS AND BANKING is composed of ten volumes. The parts in these volumes are arranged in the following order: Parts 1–199, 200–219, 220–229, 230–299, 300–346, 347–599, 600–899, 900–1025, 1026–1099, and 1100–end. The contents of these volumes represent all current regulations codified under this title of the CFR as of January 1, 2022.

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

Title 12—Banks and Banking

(This book contains parts 300 to 346)

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CHAPTER III—FEDERAL DEPOSIT INSURANCE CORPORATION

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SUBCHAPTER A—PROCEDURE AND RULES OF PRACTICE

PARTS 300–301 [RESERVED]

PART 302—USE OF SUPERVISORY GUIDANCE

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AUTHORITY: 5 U.S.C. 552; 12 U.S.C. 1818, 1819(a) (Seventh and Tenth), 1831p–1.

SOURCE: 86 FR 12085, Mar. 2, 2021, unless otherwise noted.

§ 302.1 Purpose.

The FDIC issues regulations and guidance as part of its supervisory function. This subpart reiterates the distinctions between regulations and guidance, as stated in the Statement Clarifying the Role of Supervisory Guidance (appendix A to this part) (Statement).

§ 302.2 Implementation of the Statement Clarifying the Role of Supervisory Guidance.

The Statement describes the official policy of the FDIC with respect to the use of supervisory guidance in the supervisory process. The Statement is binding on the FDIC.

§ 302.3 Rule of construction.

This subpart does not alter the legal status of guidelines authorized by statute, including but not limited to, 12 U.S.C. 1831p–1, to create binding legal obligations.

APPENDIX A TO PART 302—STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE

STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE

The FDIC is issuing this statement to explain the role of supervisory guidance and to describe the FDIC's approach to supervisory guidance.

Difference Between Supervisory Guidance and Laws or Regulations

The FDIC issues various types of supervisory guidance, including interagency statements, advisories, policy statements, questions and answers, and frequently asked questions, to its supervised institutions. A law or regulation has the force and effect of law.[1] Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the FDIC does not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the FDIC's supervisory expectations or priorities and articulates the FDIC's general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the FDIC generally considers consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

Ongoing Efforts To Clarify the Role of Supervisory Guidance

The FDIC is clarifying the following policies and practices related to supervisory guidance:

• The FDIC intends to limit the use of numerical thresholds or other ''bright-lines'' in describing expectations in supervisory guidance. Where numerical thresholds are used, the FDIC intends to clarify that the thresholds are exemplary only and not suggestive of requirements. The FDIC will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.

• Examiners will not criticize through supervisory recommendations (including matters requiring board attention) a supervised financial institution for, and the FDIC will not issue an enforcement action on the basis of, a ''violation'' of or ''non-compliance'' with supervisory guidance. In some situations, examiners may reference (including in

[1] Government agencies issue regulations that generally have the force and effect of law. Such regulations generally take effect only after the agency proposes the regulation to the public and responds to comments on the proposal in a final rulemaking document.

writing) supervisory guidance to provide examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations.

• Supervisory criticisms should continue to be specific as to practices, operations, financial conditions, or other matters that could have a negative effect on the safety and soundness of the financial institution, could cause consumer harm, or could cause violations of laws, regulations, final agency orders, or other legally enforceable conditions.

• The FDIC also has at times sought, and may continue to seek, public comment on supervisory guidance. Seeking public comment on supervisory guidance does not mean that the guidance is intended to be a regulation or have the force and effect of law. The comment process helps the FDIC to improve its understanding of an issue, to gather information on institutions' risk management practices, or to seek ways to achieve a supervisory objective most effectively and with the least burden on institutions.

• The FDIC will aim to reduce the issuance of multiple supervisory guidance documents on the same topic and will generally limit such multiple issuances going forward.

The FDIC will continue efforts to make the role of supervisory guidance clear in communications to examiners and to supervised financial institutions and encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

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Subpart N [Reserved]

AUTHORITY: 12 U.S.C. 378, 1463, 1467a, 1813, 1815, 1817, 1818, 1819(a) (Seventh and Tenth), 1820, 1823, 1828, 1831i, 1831e, 1831o, 1831p–1, 1831w, 1831z, 1835a, 1843(l), 3104, 3105, 3108, 3207, 5412; 15 U.S.C. 1601–1607.

SOURCE: 67 FR 79247, Dec. 27, 2002, unless otherwise noted.

§ 303.0 Scope.

(a) This part describes the procedures to be followed by both the FDIC and applicants with respect to applications,

requests, or notices (filings) required to be filed by statute or regulation. Additional details concerning processing are explained in related FDIC statements of policy.

(b) Additional application procedures may be found in the following FDIC regulations:

(1) 12 CFR part 327—Assessments (Request for review of assessment risk classification);

(2) 12 CFR part 328—Advertisement of Membership (Application for temporary waiver of advertising requirements);

(3) 12 CFR part 345—Community Reinvestment (CRA strategic plans and requests for designation as a wholesale or limited purpose institution);

Subpart A—Rules of General Applicability

§ 303.1 Scope.

Subpart A prescribes the general procedures for submitting filings to the FDIC which are required by statute or regulation. This subpart also prescribes the procedures to be followed by the FDIC, applicants and interested parties during the process of considering a filing, including public notice and comment. This subpart explains the availability of expedited processing for eligible depository institutions (defined in § 303.2(r)). Certain terms used throughout this part are also defined in this subpart.

§ 303.2 Definitions.

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

(a) *Act* or *FDI Act* means the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

(b) *Adjusted part 324 total assets* means adjusted 12 CFR part 324 total assets as calculated and reflected in the FDIC's Report of Examination.

(c) *Adverse comment* means any objection, protest, or other adverse written statement submitted by an interested party relative to a filing. The term adverse comment shall not include any comment concerning the Community Reinvestment Act (CRA), fair lending, consumer protection, or civil rights that the appropriate regional director or designee determines to be frivolous (for example, raising issues between the commenter and the applicant that have been resolved). The term adverse comment also shall not include any other comment that the appropriate regional director or designee determines to be frivolous (for example, a non-substantive comment submitted primarily as a means of delaying action on the filing).

(d) *Amended order to pay* means an order to forfeit and pay civil money penalties, the amount of which has been changed from that assessed in the original notice of assessment of civil money penalties.

(e) *Applicant* means a person or entity that submits a filing to the FDIC.

(f) *Application* means a submission requesting FDIC approval to engage in various corporate activities and transactions.

(g) *Appropriate FDIC region* and *appropriate regional director* mean, respectively, the FDIC region and the FDIC regional director which the FDIC designates as follows:

(1) When an institution or proposed institution that is the subject of a filing or administrative action is not and will not be part of a group of related institutions, the appropriate FDIC region for the institution and any individual associated with the institution is the FDIC region in which the institution or proposed institution is or will be located, and the appropriate regional director is the regional director for that region; or

(2) When an institution or proposed institution that is the subject of a filing or administrative action is or will be part of a group of related institutions, the appropriate FDIC region for the institution and any individual associated with the institution is the FDIC region in which the group's major policy and decision makers are located, or any other region the FDIC designates on a case-by-case basis, and the appropriate regional director is the regional director for that region.

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

(i) *Book capital* means total equity capital which is comprised of perpetual preferred stock, common stock, surplus, undivided profits and capital reserves, as those items are defined in the instructions of the Federal Financial Institutions Examination Council (FFIEC) for the preparation of Consolidated Reports of Condition and Income for insured banks.

(j) *Comment* means any written statement of fact or opinion submitted by an interested party relative to a filing.

(k) *Corporation* or *FDIC* means the Federal Deposit Insurance Corporation.

(l) *CRA protest* means any adverse comment from the public related to a pending filing which raises a negative issue relative to the Community Reinvestment Act (CRA) (12 U.S.C. 2901 *et seq.*), whether or not it is labeled a protest and whether or not a hearing is requested.

(m) *Deputy director* means the deputy director of the Division of Supervision and Consumer Protection (DSC) or, in the event such title become obsolete, any official of equivalent or higher authority within the division.

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

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

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

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

(r) *Eligible depository institution* means a depository institution that meets the following criteria:

(1) Received an FDIC-assigned composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (UFIRS) as a result of its most recent federal or state examination;

(2) Received a satisfactory or better Community Reinvestment Act (CRA) rating from its primary federal regulator at its most recent examination, if the depository institution is subject to examination under part 345 of this chapter;

(3) Received a compliance rating of 1 or 2 from its primary federal regulator at its most recent examination;

(4) Is well-capitalized as defined in the appropriate capital regulation and guidance of the institution's primary federal regulator; and

(5) Is not subject to a cease and desist order, consent order, prompt corrective action directive, written agreement, memorandum of understanding, or other administrative agreement with its primary federal regulator or chartering authority.

(s) *Filing* means an application, notice or request submitted to the FDIC under this part.

(t) *General Counsel* means the head of the Legal Division of the FDIC or any official within the Legal Division exercising equivalent authority for purposes of this part.

(u) *Insider* means a person who is or is proposed to be a director, officer, organizer, or incorporator of an applicant; a shareholder who directly or indirectly controls 10 percent or more of any class of the applicant's outstanding voting stock; or the associates or interests of any such person.

(v) *Institution-affiliated party* shall have the same meaning as provided in section 3(u) of the Act (12 U.S.C. 1813(u)).

(w) *Notice* means a submission notifying the FDIC that a depository institution intends to engage in or has commenced certain corporate activities or transactions.

(x) *Notice to primary regulator* means the notice described in section 8(a)(2)(A) of the Act concerning termination of deposit insurance (12 U.S.C. 1818(a)(2)(A)).

(y) *Regional counsel* means a regional counsel of the Legal Division or, in the event the title becomes obsolete, any

official of equivalent authority within the Legal Division.

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

(aa) [Reserved]

(bb) *Standard conditions* means the conditions that the FDIC may impose as a routine matter when approving a filing, whether or not the applicant has agreed to their inclusion. The following conditions, or variations thereof, are standard conditions:

(1) That the applicant has obtained all necessary and final approvals from the appropriate federal or state authority or other appropriate authority;

(2) That if the transaction does not take effect within a specified time period, or unless, in the meantime, a request for an extension of time has been approved, the consent granted shall expire at the end of the specified time period;

(3) That until the conditional commitment of the FDIC becomes effective, the FDIC retains the right to alter, suspend or withdraw its commitment should any interim development be deemed to warrant such action; and

(4) In the case of a merger transaction (as defined in ¶303.61(a) of this part), including a corporate reorganization, that the proposed transaction not be consummated before the 30th calendar day (or shorter time period as may be prescribed by the FDIC with the concurrence of the Attorney General) after the date of the order approving the merger transaction.

(cc) *Tier 1 capital* shall have the same meaning as provided in § 324.2 of this chapter.

(dd) *Total assets* shall have the same meaning as provided in § 324.401(g) of this chapter.

(ee) *FDIC-supervised institution* means any entity for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q).

[67 FR 79247, Dec. 27, 2002, as amended at 68 FR 50459, Aug. 21, 2003; 78 FR 55470, Sept. 10, 2013; 83 FR 17739, Apr. 24, 2018; 85 FR 3243, Jan. 21, 2020; 85 FR 72555, Nov. 13, 2020]

§ 303.3 General filing procedures.

Unless stated otherwise, filings should be submitted to the appropriate FDIC office. Forms and instructions for submitting filings may be obtained from any FDIC regional director. If no form is prescribed, the filing should be in writing; be signed by the applicant or a duly authorized agent; and contain a concise statement of the action requested. For specific filing and content requirements, consult the appropriate subparts of this part. The FDIC may require the applicant to submit additional information.

§ 303.4 Computation of time.

For purposes of this part, and except as otherwise specifically provided, the FDIC begins computing the relevant period on the day after an event occurs (e.g., the day after a substantially complete filing is received by the FDIC or the day after publication begins) through the last day of the relevant period. When the last day is a Saturday, Sunday or federal holiday, the period runs until the end of the next business day.

[67 FR 79247, Dec. 27, 2002, as amended at 68 FR 50459, Aug. 21, 2003]

§ 303.5 Effect of Community Reinvestment Act performance on filings.

Among other factors, the FDIC takes into account the record of performance under the Community Reinvestment Act (CRA) of each applicant in considering a filing for approval of:

(a) The establishment of a domestic branch;

(b) The relocation of the bank's main office or a domestic branch;

(c) The relocation of an insured branch of a foreign bank;

(d) A transaction subject to the Bank Merger Act; and

(e) Deposit insurance.

§ 303.6 Investigations and examinations.

The FDIC may examine or investigate and evaluate facts related to any filing under this chapter to the extent necessary to reach an informed decision and take any action necessary or appropriate under the circumstances.

§ 303.7 Public notice requirements.

(a) *General*. The public must be provided with prior notice of a filing to establish a domestic branch, relocate a domestic branch or the main office, relocate an insured branch of a foreign bank, engage in a merger transaction, initiate a change of control transaction, or request deposit insurance. The public has the right to comment on, or to protest, these types of proposed transactions during the relevant comment period. In order to fully apprise the public of this right, an applicant shall publish a public notice of its filing in a newspaper of general circulation. For specific publication requirements, consult subparts B (Deposit Insurance), C (Branches and Relocations), D (Merger Transactions), E (Change in Bank Control), and J (International Banking) of this part.

(b) *Confirmation of publication*. The applicant shall mail or otherwise deliver a copy of the newspaper notice to the appropriate FDIC office as part of its filing, or, if a copy is not available at the time of filing, promptly after publication.

(c) *Content of notice*. (1) The public notice referred to in paragraph (a) of this section shall consist of the following:

(i) In the case of an application for deposit insurance for a de novo depository institution, include the names of all organizers or incorporators. In the case of an application to establish a branch, include the location of the proposed branch or, in the case of an application to relocate a branch or main office, include the current and proposed address of the office. In the case of a merger application, include the names of all parties to the transaction. In the case of a notice of acquisition of control, include the name(s) of the acquiring parties. In the case of an application to relocate an insured branch of a foreign bank, include the current and proposed address of the branch.

(ii) Type of filing being made;

(iii) Name of the depository institution(s) that is the subject matter of the filing;

(iv) That the public may submit comments to the appropriate FDIC regional director;

(v) The address of the appropriate FDIC office where comments may be sent (the same location where the filing will be made);

(vi) The closing date of the public comment period as specified in the appropriate subpart of this part; and

(vii) That the nonconfidential portions of the application are on file in the appropriate FDIC office and are available for public inspection during regular business hours; photocopies of the nonconfidential portion of the application file will be made available upon request.

(2) The requirements of paragraphs (c)(1)(iv) through (vii) of this section may be satisfied through use of the following notice:

Any person wishing to comment on this application may file his or her comments in writing with the regional director of the Federal Deposit Insurance Corporation at the appropriate FDIC office [insert address of office] not later than [insert closing date of the public comment period specified in the appropriate subpart of part 303]. The nonconfidential portions of the application are on file at the appropriate FDIC office and are available for public inspection during regular business hours. Photocopies of the nonconfidential portion of the application file will be made available upon request.

(d) *Multiple transactions*. The FDIC may consider more than one transaction, or a series of transactions, to be a single filing for purposes of the publication requirements of this section. When publishing a single public notice for multiple transactions, the applicant shall explain in the public notice how the transactions are related. The closing date of the comment period shall be the closing date of the longest public comment period that applies to any of the related transactions.

(e) *Joint public notices*. For a transaction subject to public notice requirements by the FDIC and another federal or state banking authority, the FDIC will accept publication of a single joint notice containing all the information required by both the FDIC and the other federal agency or state banking authority, provided that the notice states that comments must be submitted to the appropriate FDIC office and, if applicable, the other federal or state banking authority.

(f) Where public notice is required, the FDIC may determine on a case-by-case basis that unusual circumstances surrounding a particular filing warrant modification of the publication requirements.

[67 FR 79247, Dec. 27, 2002, as amended at 86 FR 8097, Feb. 3, 2021]

§ 303.8 Public access to filing.

(a) *General.* For filings subject to a public notice requirement, any person may inspect or request a copy of the non-confidential portions of a filing (the public file) until 180 days following final disposition of a filing. Following the 180-day period, non-confidential portions of an application file will be made available in accordance with ' 303.8(c). The public file generally consists of portions of the filing, supporting data, supplementary information, and comments submitted by interested persons (if any) to the extent that the documents have not been afforded confidential treatment. To view or request photocopies of the public file, an oral or written request should be submitted to the appropriate FDIC office. The public file will be produced for review not more than one business day after receipt by the appropriate FDIC office of the request (either written or oral) to see the file. The FDIC may impose a fee for photocopying in accordance with § 309.5(f) of this chapter at the rates the FDIC publishes annually in the FEDERAL REGISTER.

(b) *Confidential treatment.* (1) The applicant may request that specific information be treated as confidential. The following information generally is considered confidential:

(i) Personal information, the release of which would constitute a clearly unwarranted invasion of privacy;

(ii) Commercial or financial information, the disclosure of which could result in substantial competitive harm to the submitter; and

(iii) Information, the disclosure of which could seriously affect the financial condition of any depository institution.

(2) If an applicant requests confidential treatment for information that the FDIC does not consider to be confidential, the FDIC may include that information in the public file after notifying the applicant. On its own initiative, the FDIC may determine that certain information should be treated as confidential and withhold that information from the public file.

(c) *FOIA requests.* A written request for information withheld from the public file, or copies of the public file following closure of the file 180 days after final disposition, should be submitted pursuant to the Freedom of Information Act (5 U.S.C. 552) and part 309 of this chapter to the FDIC, Attn: FOIA/Privacy Group, Legal Division, 550 17th Street, NW., Washington, DC 20429.

§ 303.9 Comments.

(a) *Submission of comments.* For filings subject to a public notice requirement, any person may submit comments to the appropriate FDIC regional director during the comment period.

(b) *Comment period*—(1) *General.* Consult appropriate subparts of this part for the comment period applicable to a particular filing.

(2) *Extension.* The FDIC may extend or reopen the comment period if:

(i) The applicant fails to file all required information on a timely basis to permit review by the public or makes a request for confidential treatment not granted by the FDIC that delays the public availability of that information;

(ii) Any person requesting an extension of time satisfactorily demonstrates to the FDIC that additional time is necessary to develop factual information that the FDIC determines may materially affect the application; or

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

(3) *Solicitation of comments.* Whenever appropriate, the appropriate regional director may solicit comments from any person or institution which might have an interest in or be affected by the pending filing.

(4) *Applicant response.* The FDIC will provide copies of all comments received to the applicant and may give the applicant an opportunity to respond.

§ 303.10 Hearings and other meetings.

(a) *Matters covered.* This section covers hearings and other proceedings in

connection with filings and determinations for or by:

(1) Deposit insurance by a proposed new depository institution or operating non-insured institution;

(2) An insured state nonmember bank to establish a domestic branch or to relocate a main office or domestic branch;

(3) Relocation of an insured branch of a foreign bank;

(4)(i) Merger transaction which requires the FDIC's prior approval under the Bank Merger Act (12 U.S.C. 1828(c));

(ii) Except as otherwise expressly provided, the provisions of this § 303.10 shall not be applicable to any proposed merger transaction which the FDIC Board of Directors determines must be acted upon immediately to prevent the probable failure of one of the institutions involved, or must be handled with expeditious action due to an existing emergency condition, as permitted by the Bank Merger Act (12 U.S.C. 1828(c)(6));

(5) Nullification of a decision on a filing; and

(6) Any other purpose or matter which the FDIC Board of Directors in its sole discretion deems appropriate.

(b) *Hearing requests.* (1) Any person may submit a written request for a hearing on a filing:

(i) To the appropriate regional director before the end of the comment period; or

(ii) To the appropriate regional director, pursuant to a notice to nullify a decision on a filing issued pursuant to § 303.11(g)(2)(i) or (ii).

(2) The request must describe the nature of the issues or facts to be presented and the reasons why written submissions would be insufficient to make an adequate presentation of those issues or facts to the FDIC. A person requesting a hearing shall simultaneously submit a copy of the request to the applicant.

(c) *Action on a hearing request.* The appropriate regional director, after consultation with the Legal Division, may grant or deny a request for a hearing and may limit the issues that he or she deems relevant or material. The FDIC generally grants a hearing request only if it determines that written submissions would be insufficient or that a hearing otherwise would be in the public interest.

(d) *Denial of a hearing request.* If the appropriate regional director, after consultation with the Legal Division, denies a hearing request, he or she shall notify the person requesting the hearing of the reason for the denial. A decision to deny a hearing request shall be a final agency determination and is not appealable.

(e) *FDIC procedures prior to the hearing*—(1) *Notice of hearing.* The FDIC shall issue a notice of hearing if it grants a request for a hearing or orders a hearing because it is in the public interest. The notice of hearing shall state the subject and date of the filing, the time and place of the hearing, and the issues to be addressed. The FDIC shall send a copy of the notice of hearing to the applicant, to the person requesting the hearing, and to anyone else requesting a copy.

(2) The presiding officer shall be the regional director or designee or such other person as may be named by the Board or the Director. The presiding officer is responsible for conducting the hearing and determining all procedural questions not governed by this section.

(f) *Participation in the hearing.* Any person who wishes to appear (participant) shall notify the appropriate regional director of his or her intent to participate in the hearing no later than 10 days from the date that the FDIC issues the Notice of Hearing. At least 5 days before the hearing, each participant shall submit to the appropriate regional director, as well as to the applicant and any other person as required by the FDIC, the names of witnesses, a statement describing the proposed testimony of each witness, and one copy of each exhibit the participant intends to present.

(g) *Transcripts.* The FDIC shall arrange for a hearing transcript. The person requesting the hearing and the applicant each shall bear the cost of one copy of the transcript for his or her use unless such cost is waived by the presiding officer and incurred by the FDIC.

(h) *Conduct of the hearing*—(1) *Presentations.* Subject to the rulings of the presiding officer, the applicant and

participants may make opening and closing statements and present and examine witnesses, material, and data.

(2) *Information submitted.* Any person presenting material shall furnish one copy to the FDIC, one copy to the applicant, and one copy to each participant.

(3) *Laws not applicable to hearings.* The Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the Federal Rules of Evidence (28 U.S.C. Appendix), the Federal Rules of Civil Procedure (28 U.S.C. Rule 1 *et seq.*), and the FDIC's Rules of Practice and Procedure (12 CFR part 308) do not govern hearings under this § 303.10.

(i) *Closing the hearing record.* At the applicant's or any participant's request, or at the FDIC's discretion, the FDIC may keep the hearing record open for up to 10 days following the FDIC's receipt of the transcript. The FDIC shall resume processing the filing after the record closes.

(j) *Disposition and notice thereof.* The presiding officer shall make a recommendation to the FDIC within 20 days following the date the hearing and record on the proceeding are closed. The FDIC shall notify the applicant and all participants of the final disposition of a filing and shall provide a statement of the reasons for the final disposition.

(k) *Computation of time.* In computing periods of time under this section, the provisions of § 308.12 of the FDIC's Rules of Practice and Procedure (12 CFR 308.12) shall apply.

(l) *Informal proceedings.* The FDIC may arrange for an informal proceeding with an applicant and other interested parties in connection with a filing, either upon receipt of a written request for such a meeting made during the comment period, or upon the FDIC's own initiative. No later than 10 days prior to an informal proceeding, the appropriate regional director shall notify the applicant and each person who requested a hearing or oral presentation of the date, time, and place of the proceeding. The proceeding may assume any form, including a meeting with FDIC representatives at which participants will be asked to present their views orally. The regional director may hold separate meetings with each of the participants.

(m) *Authority retained by FDIC Board of Directors to modify procedures.* The FDIC Board of Directors may delegate authority by resolution on a case-by-case basis to the presiding officer to adopt different procedures in individual matters and on such terms and conditions as the Board of Directors determines in its discretion. The resolution shall be made available for public inspection and copying in the Office of the General Counsel, Executive Secretary Section under the Freedom of Information Act (5 U.S.C. 552(a)(2)).

§ 303.11 Decisions.

(a) *General procedures.* The FDIC may approve, conditionally approve, deny, or not object to a filing after appropriate review and consideration of the record. The FDIC will promptly notify the applicant and any person who makes a written request of the final disposition of a filing. If the FDIC denies a filing, the FDIC will immediately notify the applicant in writing of the reasons for the denial.

(b) *Authority retained by FDIC Board of Directors to modify procedures.* In acting on any filing under this part, the FDIC Board of Directors may by resolution adopt procedures which differ from those contained in this part when it deems it necessary or in the public interest to do so. The resolution shall be made available for public inspection and copying in the Office of the General Counsel, Executive Secretary Section under the Freedom of Information Act (5 U.S.C. 552(a)(2)).

(c) *Expedited processing.* (1) A filing submitted by an eligible depository institution as defined in § 303.2(r) will receive expedited processing as specified in the appropriate subparts of this part unless the FDIC determines to remove the filing from expedited processing for any of the reasons set forth in paragraph (c)(2) of this section. Except for filings made pursuant to subpart J (International Banking), expedited processing will not be available for any filing that the appropriate regional director does not have delegated authority to approve.

(2) *Removal of filing from expedited processing*. The FDIC may remove a filing from expedited processing at any time prior to final disposition if:

(i) For filings subject to public notice under § 303.7, an adverse comment is received that warrants additional investigation or review;

(ii) For filings subject to evaluation of CRA performance under § 303.5, a CRA protest is received that warrants additional investigation or review, or the appropriate regional director determines that the filing presents a significant CRA or compliance concern;

(iii) For any filing, the appropriate regional director determines that the filing presents a significant supervisory concern, or raises a significant legal or policy issue; or

(iv) For any filing, the appropriate regional director determines that other good cause exists for removal.

(3) For purposes of this section, a significant CRA concern includes, but is not limited to, a determination by the appropriate regional director that, although a depository institution may have an institution-wide rating of satisfactory or better, a depository institution's CRA rating is less than satisfactory in a state or multi-state metropolitan statistical area, or a depository institution's CRA performance is less than satisfactory in a metropolitan statistical area as defined in 12 CFR 345.12 (MSA) or in the non-MSA portion of a state in which it seeks to expand through approval of an application for a deposit facility as defined in 12 U.S.C. 2902(3).

(4) If the FDIC determines that it is necessary to remove a filing from expedited processing pursuant to paragraph (c)(2) of this section, the FDIC promptly will provide the applicant with a written explanation

(d) *Multiple transactions*. If the FDIC is considering related transactions, some or all of which have been granted expedited processing, then the longest processing time for any of the related transactions shall govern for purposes of approval.

(e) *Abandonment of filing*. A filing must contain all information set forth in the applicable subpart of this part. To the extent necessary to evaluate a filing, the FDIC may require an applicant to provide additional information. If information requested by the FDIC is not provided within the time period specified by the agency, the FDIC may deem the filing abandoned and shall provide written notification to the applicant and any interested parties that submitted comments to the FDIC that the file has been closed.

(f) *Appeals and requests for reconsideration*—(1) *General*. Appeal procedures for a denial of a change in bank control (subpart E), change in senior executive officer or board of directors (subpart F) or denial of an application pursuant to section 19 of the FDI Act (subpart L) are contained in 12 CFR part 308, subparts D, L, and M, respectively. For all other filings covered by this chapter for which appeal procedures are not provided by regulation or other written guidance, the procedures specified in paragraphs (f)(2) and (3) of this section shall apply. A decision to deny a request for a hearing is a final agency determination and is not appealable.

(2) *Filing procedures*. Within 15 days of receipt of notice from the FDIC that its filing has been denied, any applicant may file a request for reconsideration with the appropriate regional director.

(3) *Content of filing*. A request for reconsideration must contain the following information:

(i) A resolution of the board of directors of the applicant authorizing filing of the request if the applicant is a corporation, or a letter signed by the individual(s) filing the request if the applicant is not a corporation;

(ii) Relevant, substantive information that for good cause was not previously set forth in the filing; and

(iii) Specific reasons why the FDIC should reconsider its prior decision.

(4)–(5) [Reserved]

(6) *Processing*. The FDIC will notify the applicant whether reconsideration will be granted or denied within 15 days of receipt of a request for reconsideration. If a request for reconsideration is granted pursuant to § 303.11(f), the FDIC will notify the applicant of the final agency decision on such filing within 60 days of its receipt of the request for reconsideration.

(g) *Nullification, withdrawal, revocation, amendment, and suspension of decisions on filings*—(1) *Grounds for action.* Except as otherwise provided by law or regulation, the FDIC may nullify, withdraw, revoke, amend or suspend a decision on a filing if it becomes aware at anytime:

(i) Of any material misrepresentation or omission related to the filing or of any material change in circumstance that occurred prior to the consummation of the transaction or commencement of the activity authorized by the decision on the filing; or

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

(iii) Any person responsible for a material misrepresentation or omission in a filing or supporting materials may be subject to an enforcement action and other penalties, including criminal penalties provided in title 18 of the United States Code.

(2) *Notice of intent and temporary order.* (i) Except as provided in § 303.11(g)(2)(ii), before taking action under this § 303.11(g), the FDIC shall issue and serve on an applicant written notice of its intent to take such action. A notice of intent to act on a filing shall include:

(A) The reasons for the proposed action; and

(B) The date by which the applicant may file a written response with the FDIC.

(ii) The FDIC may issue a temporary order on a decision on a filing without providing an applicant a prior notice of intent if the FDIC determines that:

(A) It is necessary to reevaluate the impact of a change in circumstance prior to the consummation of the transaction or commencement of the activity authorized by the decision on the filing; or

(B) The activity authorized by the filing may pose a threat to the interests of the depository institution's depositors or may threaten to impair public confidence in the depository institution.

(iii) A temporary order shall provide the applicant with an opportunity to make a written response in accordance with § 303.11(g)(3) of this section.

(3) *Response to notice of intent or temporary order.* An applicant may file a written response to a notice of intent or a temporary order within 15 days from the date of service of the notice or temporary order. The written response should include:

(i) An explanation of why the proposed action or temporary order is not warranted; and

(ii)(A) Any other relevant information, mitigation circumstance, documentation, or other evidence in support of the applicant's position. An applicant may also request a hearing under § 303.10.

(B) Failure by an applicant to file a written response with the FDIC to a notice of intent or a temporary order within the specified time period, shall constitute a waiver of the opportunity to respond and shall constitute consent to a final order under this paragraph (g). The FDIC shall consider any such response, if filed in a timely manner, within 30 days of receiving the response.

(4) *Effective date.* All orders issued pursuant to this section shall become effective immediately upon issuance unless otherwise stated therein.

[67 FR 79247, Dec. 27, 2002, as amended at 68 FR 50459, Aug. 21, 2003]

§ 303.12 Waivers.

(a) The Board of Directors, of the FDIC (Board) may, for good cause and to the extent permitted by statute, waiver the applicability of any provision of this chapter.

(b) The provisions of this chapter may be suspended, revoked, amended or waived for good cause shown, in whole or in part, at any time by the Board, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Board on its own motion or on petition if good cause thereof is shown.

[68 FR 50459, Aug. 21, 2003]

§ 303.13 [Reserved]

§ 303.14 Being "engaged in the business of receiving deposits other than trust funds."

(a) Except as provided in paragraphs (b), (c), and (d) of this section, a depository institution shall be ''engaged in the business of receiving deposits other than trust funds'' only if it maintains one or more non-trust deposit accounts in the minimum aggregate amount of $500,000.

(b) An applicant for federal deposit insurance under section 5 of the FDI Act, 12 U.S.C. 1815(a), shall be deemed to be ''engaged in the business of receiving deposits other than trust funds'' from the date that the FDIC approves deposit insurance for the institution until one year after it opens for business.

(c) Any depository institution that fails to satisfy the minimum deposit standard specified in paragraph (a) of this section as of two consecutive call report dates (*i.e.*, March 31st, June 30th, September 30th, and December 31st) shall be subject to a determination by the FDIC that the institution is not ''engaged in the business of receiving deposits other than trust funds'' and to termination of its insured status under section 8(p) of the FDI Act, 12 U.S.C. 1818(p). For purposes of this paragraph, the first three call report dates after the institution opens for business are excluded.

(d) Notwithstanding any failure by an insured depository institution to satisfy the minimum deposit standard in paragraph (a) of this section, the institution shall continue to be ''engaged in the business of receiving deposits other than trust funds'' for purposes of section 3 of the FDI Act until the institution's insured status is terminated by the FDIC pursuant to a proceeding under section 8(a) or section 8(p) of the FDI Act. 12 U.S.C. 1818(a) or 1818(p).

§ 303.15 Certain limited liability companies deemed incorporated under State law.

(a) For purposes of the definition of ''State bank'' in 12 U.S.C. 1813(a)(2) and this Chapter, a banking institution that is chartered as a limited liability company (LLC) under the law of any State is deemed to be ''incorporated'' under the law of the State, if

(1) The institution is not subject to automatic termination, dissolution, or suspension upon the happening of some event (including, e.g., the death, disability, bankruptcy, expulsion, or withdrawal of an owner of the institution), other than the passage of time;

(2) The exclusive authority to manage the institution is vested in a board of managers or directors that is elected or appointed by the owners, and that operates in substantially the same manner as, and has substantially the same rights, powers, privileges, duties, responsibilities, as a board of directors of a bank chartered as a corporation in the State;

(3) Neither State law, nor the institution's operating agreement, bylaws, or other organizational documents provide that an owner of the institution is liable for the debts, liabilities, and obligations of the institution in excess of the amount of the owner's investment; and

(4) Neither State law, nor the institution's operating agreement, bylaws, or other organizational documents require the consent of any other owner of the institution in order for an owner to transfer an ownership interest in the institution, including voting rights.

(b) For purposes of the Federal Deposit Insurance Act and this chapter:

(1) Each of the terms ''stockholder'' and ''shareholder'' includes an owner of any interest in a depository institution chartered as an LLC, including a member or participant;

(2) The term ''director'' includes a manager or director of a depository institution chartered as an LLC, or other person who has, with respect to such a depository institution, authority substantially similar to that of a director of a corporation;

(3) The term ''officer'' includes an officer of a depository institution chartered as an LLC, or other person who has, with respect to such a depository institution, authority substantially similar to that of an officer of a corporation; and

(4) Each of the terms ''voting stock,'' ''voting shares,'' and ''voting securities'' includes ownership interests in a depository institution chartered as an

LLC, as well as any certificates or other evidence of such ownership interests.

[68 FR 7308, Feb. 13, 2003, as amended at 86 FR 8097, Feb. 3, 2021]

§§ 303.16–303.19 [Reserved]

Subpart B—Deposit Insurance

§ 303.20 Scope.

This subpart sets forth the procedures for applying for deposit insurance for a proposed depository institution or an operating noninsured depository institution under section 5 of the FDI Act (12 U.S.C. 1815). It also sets forth the procedures for requesting continuation of deposit insurance for a state-chartered bank withdrawing from membership in the Federal Reserve System and for interim institutions chartered to facilitate a merger transaction. Each bank that results from the conversion of a Federal savings association into multiple banks pursuant to section 5(i)(5) of the Home Owners' Loan Act, 12 U.S.C. 1464(i)(5), is treated as a proposed depository institution or a de novo institution, as appropriate, for purposes of this subpart.

[67 FR 79247, Dec. 27, 2002, as amended at 73 FR 2145, Jan. 14, 2008]

§ 303.21 Filing procedures.

(a) Applications for deposit insurance shall be filed with the appropriate FDIC office. The relevant application forms and instructions for applying for deposit insurance for an existing or proposed depository institution may be obtained from any FDIC regional director.

(b) An application for deposit insurance for an interim depository institution shall be filed and processed in accordance with the procedures set forth in § 303.24, subject to the provisions of § 303.62(b)(2) regarding deposit insurance for interim institutions. An interim institution is defined as a state- or federally-chartered depository institution that does not operate independently but exists solely as a vehicle to accomplish a merger transaction.

(c) A request for continuation of deposit insurance upon withdrawing from membership in the Federal Reserve System shall be in letter form and shall provide the information prescribed in § 303.25.

§ 303.22 Processing.

(a) *Expedited processing for proposed institutions.* (1) An application for deposit insurance for a proposed institution which will be a subsidiary of an eligible depository institution as defined in § 303.2(r) or an eligible holding company will be acknowledged in writing by the FDIC and will receive expedited processing unless the applicant is notified in writing to the contrary and provided with the basis for that decision. An eligible holding company is defined as a bank or thrift holding company that has consolidated assets of at least $150 million or more; a BOPEC rating of at least ''2'' for bank holding companies or an above average or ''A'' rating for thrift holding companies; and at least 75 percent of its consolidated depository institution assets comprised of eligible depository institutions. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2).

(2) Under expedited processing, the FDIC will take action on an application within 60 days of receipt of a substantially complete application or 5 days after the expiration of the comment period described in § 303.23, whichever is later. Final action may be withheld until the FDIC has assurance that permission to organize the proposed institution will be granted by the chartering authority. Notwithstanding paragraph (a)(1) of this section, if the FDIC does not act within the expedited processing period, it does not constitute an automatic or default approval.

(b) *Standard processing.* For those applications that are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action when the decision is rendered.

[67 FR 79247, Dec. 27, 2002, as amended at 68 FR 50459, Aug. 21, 2003]

§ 303.23 Public notice requirements.

(a) *De novo institutions and operating noninsured institutions.* The applicant shall publish a notice as prescribed in

§ 303.7 in a newspaper of general circulation in the community in which the main office of the depository institution is or will be located. Notice shall be published as close as practicable to, but no sooner than five days before, the date the application is mailed or delivered to the appropriate FDIC office. Comments by interested parties must be received by the appropriate regional director within 30 days following the date of publication, unless the comment period has been extended or reopened in accordance with § 303.9(b)(2).

(b) *Exceptions to public notice requirements.* No publication shall be required in connection with the granting of insurance to a new depository institution established pursuant to the resolution of a depository institution in default, or to an interim depository institution formed solely to facilitate a merger transaction, or for a request for continuation of federal deposit insurance by a state-chartered bank withdrawing from membership in the Federal Reserve System.

§ 303.24 Application for deposit insurance for an interim institution.

(a) *Application required.* Subject to § 303.62(b)(2), a deposit insurance application is required for a state-chartered interim institution if the related merger transaction is subject to approval by a federal banking agency other than the FDIC. A separate application for deposit insurance for an interim institution is not required in connection with any merger requiring FDIC approval pursuant to subpart D of this part.

(b) *Content of separate application.* A letter application for deposit insurance for an interim institution, accompanied by a copy of the related merger application, shall be filed with the appropriate FDIC office. The letter application shall briefly describe the transaction and contain a statement that deposit insurance is being requested for an interim institution that does not operate independently but exists solely as a vehicle to accomplish a merger transaction which will be reviewed by a federal banking agency other than the FDIC.

(c) *Processing.* An application for deposit insurance for an interim depository institution will be acknowledged in writing by the FDIC. Final action will be taken within 21 days after receipt of a substantially complete application, unless the applicant is notified in writing that additional review is warranted. If the FDIC does not act within the expedited processing period, it does not constitute an automatic or default approval.

§ 303.25 Continuation of deposit insurance upon withdrawing from membership in the Federal Reserve System.

(a) *Content of application.* To continue its insured status upon withdrawal from membership in the Federal Reserve System, a state-chartered bank shall submit a letter application to the appropriate FDIC office. A complete application shall consist of the following information:

(1) A copy of the letter, and any attachments thereto, sent to the appropriate Federal Reserve Bank setting forth the bank's intention to terminate its membership;

(2) A copy of the letter from the Federal Reserve Bank acknowledging the bank's notice to terminate membership;

(3) A statement regarding any anticipated changes in the bank's general business plan during the next 12-month period; and

(4)(i) A statement by the bank's management that there are no outstanding or proposed corrective programs or supervisory agreements with the Federal Reserve System.

(ii) If such programs or agreements exist, a statement by the applicant that its Board of Directors is willing to enter into similar programs or agreements with the FDIC which would become effective upon withdrawal from the Federal Reserve System.

(b) *Processing.* An application for deposit insurance under this section will be acknowledged in writing by the FDIC. The FDIC shall notify the applicant, within 15 days of receipt of a substantially complete application, either that federal deposit insurance will continue upon termination of membership in the Federal Reserve System or that

additional review is warranted and the applicant will be notified, in writing, of the FDIC's final decision regarding continuation of deposit insurance. If the FDIC does not act within the expedited processing period, it does not constitute an automatic or default approval.

§§ 303.26–303.39 [Reserved]

Subpart C—Establishment and Relocation of Domestic Branches and Offices

§ 303.40 Scope.

(a) *General.* This subpart sets forth the application requirements and procedures for insured state nonmember banks to establish a branch, relocate a branch or main office, and retain existing branches after the interstate relocation of the main office subject to the approval by the FDIC pursuant to sections 13(f), 13(k), 18(d) and 44 of the FDI Act.

(b) *Merger transaction.* Applications for approval of the acquisition and establishment of branches in connection with a merger transaction under section 18(c) of the FDI Act (12 U.S.C. 1828(c)), are processed in accordance with subpart D (Merger Transactions) of this part.

(c) *Insured branches of foreign banks and foreign branches of domestic banks.* Applications regarding insured branches of foreign banks and foreign branches of domestic banks are processed in accordance with subpart J (International Banking) of this part.

(d) *Interstate acquisition of individual branch.* Applications requesting approval of the interstate acquisition of an individual branch or branches located in a state other than the applicant's home state without the acquisition of the whole bank are treated as interstate bank merger transactions under section 44 of the FDI Act (12 U.S.C. 1831a(u)), and are processed in accordance with subpart D (Merger Transactions) of this part.

§ 303.41 Definitions.

For purposes of this subpart:

(a) *Branch*, except as provided in this paragraph, includes any branch bank, branch office, additional office, or any branch place of business located in any State of the United States or in any territory of the United States, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Northern Mariana Islands at which deposits are received or checks paid or money lent. A branch does not include an automated teller machine, an automated loan machine, a remote service unit, or a facility described in section 303.46. The term branch also includes the following:

(1) A *messenger service* that is operated by a bank or its affiliate that picks up and delivers items relating to transactions in which deposits are received or checks paid or money lent. A messenger service established and operated by a non-affiliated third party generally does not constitute a branch for purposes of this subpart. Banks contracting with third parties to provide messenger services should consult with the FDIC to determine if the messenger service constitutes a branch.

(2) A *mobile branch*, other than a messenger service, that does not have a single, permanent site and uses a vehicle that travels to various locations to enable the public to conduct banking business. A mobile branch may serve defined locations on a regular schedule or may serve a defined area at varying times and locations.

(3) A *temporary branch* that operates for a limited period of time not to exceed one year as a public service, such as during an emergency or disaster situation.

(4) A *seasonal branch* that operates at various periodically recurring intervals, such as during state and local fairs, college registration periods, and other similar occasions.

(b) *Branch relocation* means a move within the same immediate neighborhood of the existing branch that does not substantially affect the nature of the business of the branch or the customers of the branch. Moving a branch to a location outside its immediate neighborhood is considered the closing of an existing branch and the establishment of a new branch. Closing of a branch is covered in the FDIC Statement of Policy Concerning Branch Closing Notices and Policies. 1 FDIC

Law, Regulations, Related Acts 5391; see § 309.4 (a) and (b) of this chapter for availability.

(c) *De novo branch* means a branch of a bank which is established by the bank as a branch and does not become a branch of such bank as a result of:

(1) The acquisition by the bank of an insured depository institution or a branch of an insured depository institution; or

(2) The conversion, merger, or consolidation of any such institution or branch.

(d) *Home state* means the state by which the bank is chartered.

(e) *Host state* means a state, other than the home state of the bank, in which the bank maintains, or seeks to establish and maintain, a branch.

[67 FR 79247, Dec. 27, 2002, as amended at 73 FR 35338, June 23, 2008; 73 FR 55432, Sept. 25, 2008]

§ 303.42 Filing procedures.

(a) *General*. An applicant shall submit an application to the appropriate FDIC office on the date the notice required by § 303.44 is published, or within 5 days after the date of the last required publication.

(b) *Content of filing*. A complete letter application shall include the following information:

(1) A statement of intent to establish a branch, or to relocate the main office or a branch;

(2) The exact location of the proposed site including the street address. With regard to messenger services, specify the geographic area in which the services will be available. With regard to a mobile branch specify the community or communities in which the vehicle will operate and the manner in which it will be used;

(3) Details concerning any involvement in the proposal by an insider of the bank as defined in § 303.2(u), including any financial arrangements relating to fees, the acquisition of property, leasing of property, and construction contracts;

(4) Comments on any changes in services to be offered, the community to be served, or any other effect the proposal may have on the applicant's compliance with the CRA;

(5) A copy of each newspaper publication required by § 303.44 of this subpart, the name and address of the newspaper, and date of the publication;

(6) When an application is submitted to relocate the main office of the applicant from one state to another, a statement of the applicant's intent regarding retention of branches in the state where the main office exists prior to relocation.

(c) *Undercapitalized institutions*. Applications to establish a branch by applicants subject to section 38 of the FDI Act (12 U.S.C. 1831*o*) also should provide the information required by § 303.204. Applications pursuant to sections 38 and 18(d) of the FDI Act (12 U.S.C. 1831*o* and 1828(d)) may be filed concurrently or as a single application.

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

[67 FR 79247, Dec. 27, 2002, as amended at 85 FR 72555, Nov. 13, 2020]

§ 303.43 Processing.

(a) *Expedited processing for eligible depository institutions*. An application filed under this subpart by an eligible depository institution as defined in § 303.2(r) will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, an application processed under expedited processing will be deemed approved on the latest of the following:

(1) The 21st day after receipt by the FDIC of a substantially complete filing;

(2) The 5th day after expiration of the comment period described in § 303.44; or

(3) In the case of an application to establish and operate a de novo branch in a state that is not the applicant's home state and in which the applicant does not maintain a branch, the 5th day after the FDIC receives confirmation from the host state that the applicant has both complied with the filing requirements of the host state and submitted a copy of the application with

the FDIC to the host state bank supervisor.

(b) *Standard processing*. For those applications which are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action when the decision is rendered.

§ 303.44 Public notice requirements.

(a) *Newspaper publications*. For applications to establish or relocate a branch, a notice as described in § 303.7(c) shall be published once in a newspaper of general circulation. For applications to relocate a main office, notice shall be published at least once each week on the same day for two consecutive weeks. The required publication shall be made in the following communities:

(1) *To establish a branch*. In the community in which the main office is located and in the communities to be served by the branch (including messenger services and mobile branches).

(2) *To relocate a main office*. In the community in which the main office is currently located and in the community to which it is proposed the main office will relocate.

(3) *To relocate a branch*. In the community in which the branch is located.

(b) *Public comments*. Comments by interested parties must be received by the appropriate regional director within 15 days after the date of the last newspaper publication required by paragraph (a) of this section, unless the comment period has been extended or reopened in accordance with § 303.9(b)(2).

(c) *Lobby notices*. In the case of applications to relocate a main office or a branch, a copy of the required newspaper publication shall be posted in the public lobby of the office to be relocated for at least 15 days beginning on the date of the last published notice required by paragraph (a) of this section.

§ 303.45 Special provisions.

(a) *Emergency or disaster events*. (1) In the case of an emergency or disaster at a main office or a branch which requires that an office be immediately relocated to a temporary location, applicants shall notify the appropriate FDIC office within 3 days of such temporary relocation.

(2) Within 10 days of the temporary relocation resulting from an emergency or disaster, the bank shall submit a written application to the appropriate FDIC office, that identifies the nature of the emergency or disaster, specifies the location of the temporary branch, and provides an estimate of the duration the bank plans to operate the temporary branch.

(3) As part of the review process, the FDIC will determine on a case by case basis whether additional information is necessary and may waive public notice requirements.

(b) *Redesignation of main office and existing branch*. In cases where an applicant desires to redesignate its main office as a branch and redesignate an existing branch as the main office, a single application shall be submitted. The FDIC may waive the public notice requirements in instances where an application presents no significant or novel policy, supervisory, CRA, compliance or legal concerns. A waiver will be granted only to a redesignation within the applicant's home state.

(c) *Expiration of approval*. Approval of an application expires if within 18 months after the approval date a branch has not commenced business or a relocation has not been completed.

§ 303.46 Financial education programs that include the provision of bank products and services.

No branch application or prior approval is required in order for a state nonmember bank to participate in one or more financial education programs that involve receiving deposits, paying withdrawals, or lending money if:

(a) Such service or services are provided on school premises, or a facility used by the school;

(b) Such service or services are provided at the discretion of the school;

(c) The principal purpose of each program is financial education. For example, the principal purpose of a program would be considered to be financial education if the program is designed to teach students the principles of personal financial management, banking operations, or the benefits of saving for

the future, and is not designed for the purpose of profit-making; and

(d) Each program is conducted in a manner that is consistent with safe and sound banking practices and complies with applicable law.

[73 FR 35338, June 23, 2008]

§§ 303.47–303.59 [Reserved]

Subpart D—Merger Transactions

§ 303.60 Scope.

This subpart sets forth the application requirements and procedures for transactions subject to FDIC approval under the Bank Merger Act, section 18(c) of the FDI Act (12 U.S.C. 1828(c)). Additional guidance is contained in the FDIC ''Statement of Policy on Bank Merger Transactions'' (1 FDIC Law, Regulations, Related Acts 5145; see § 309.4(a) and (b) of this chapter for availability).

§ 303.61 Definitions.

For purposes of this subpart:

(a) *Merger transaction* includes any transaction:

(1) In which an insured depository institution merges or consolidates with any other insured depository institution or, either directly or indirectly, acquires the assets of, or assumes liability to pay any deposits made in, any other insured depository institution; or

(2) In which an insured depository institution merges or consolidates with any noninsured bank or institution or assumes liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution, or in which an insured depository institution transfers assets to any noninsured bank or institution in consideration of the assumption of any portion of the deposits made in the insured depository institution.

(b) *Corporate reorganization* means a merger transaction that involves solely an insured depository institution and one or more of its affiliates.

(c) *Interim merger transaction* means a merger transaction (other than a purchase and assumption transaction) between an operating depository institution and a newly-formed depository institution or corporation that will not operate independently and that exists solely for the purpose of facilitating a corporate reorganization.

(d) *Resulting institution* refers to the acquiring, assuming or resulting institution in a merger transaction.

[67 FR 79247, Dec. 27, 2002, as amended at 71 FR 20526, Apr. 21, 2006; 73 FR 2145, Jan. 14, 2008]

§ 303.62 Transactions requiring prior approval.

(a) *Merger transactions.* The following merger transactions require the prior written approval of the FDIC under this subpart:

(1) Any merger transaction, including any corporate reorganization, interim merger transaction, or optional conversion, in which the resulting institution is to be an FDIC-supervised institution; and

(2) Any merger transaction, including any corporate reorganization, or interim merger transaction, that involves an uninsured bank or institution.

(b) *Related regulations.* Transactions covered by this subpart also may be subject to other regulations or application requirements, including the following:

(1) *Interstate merger transactions.* Merger transactions between insured banks that are chartered in different states are subject to the regulations of section 44 of the FDI Act (12 U.S.C. 1831u). In the case of a merger transaction that consists of the acquisition by an out of state bank of a branch without acquisition of the bank, the branch is treated for section 44 purposes as a bank whose home state is the state in which the branch is located.

(2) *Deposit insurance.* An application for deposit insurance will be required in connection with a merger transaction between a state-chartered interim institution and an insured depository institution if the related merger application is being acted upon by a Federal banking agency other than the FDIC. If the FDIC is the Federal banking agency responsible for acting on the related merger application, a separate application for deposit insurance is not necessary. Procedures for applying for deposit insurance are set forth

in subpart B of this part. An application for deposit insurance will not be required in connection with a merger transaction (other than a purchase and assumption transaction) of a federally-chartered interim institution and an insured institution, even if the resulting institution is to operate under the charter of the Federal interim institution.

(3) *Branch closings*. Branch closings in connection with a merger transaction are subject to the notice requirements of section 42 of the FDI Act (12 U.S.C. 1831r–1), including requirements for notice to customers. These requirements are addressed in the ''Interagency Policy Statement Concerning Branch Closings Notices and Policies'' (1 FDIC Law, Regulations, Related Acts (FDIC) 5391; *see* § 309.4(a) and (b) of this chapter for availability).

(4) *Undercapitalized institutions*. Applications for a merger transaction by applicants subject to section 38 of the FDI Act (12 U.S.C. 1831o) should also provide the information required by § 303.204. Applications pursuant to sections 38 and 18(c) of the FDI Act (12 U.S.C, 1831o and 1828(c)) may be filed concurrently or as a single application.

(5) *Certification of assumption of deposit liability*. Whenever all of the deposit liabilities of an insured depository institution are assumed by one or more insured depository institutions by merger, consolidation, other statutory assumption, or by contract, the transferring insured depository institution, or its legal successor, shall provide an accurate written certification to the FDIC that its deposit liabilities have been assumed, in accordance with 12 CFR part 307.

[85 FR 3243, Jan. 21, 2020]

§ 303.63 Filing procedures.

(a) *General*. Applications required under this subpart shall be filed with the appropriate FDIC office. The appropriate forms and instructions may be obtained upon request from any FDIC regional director.

(b) *Merger transactions*. Applications for approval of merger transactions shall be accompanied by copies of all agreements or proposed agreements relating to the merger transaction and any other information requested by the FDIC.

(c) *Interim merger transactions*. Applications for approval of interim merger transactions and any related deposit insurance applications shall be made by filing the forms and other documents required by paragraphs (a) and (b) of this section and such other information as may be required by the FDIC for consideration of the request for deposit insurance.

[67 FR 79247, Dec. 27, 2002, as amended at 73 FR 2145, Jan. 14, 2008]

§ 303.64 Processing.

(a) *Expedited processing for eligible depository institutions*—(1) *General*. An application filed under this subpart by an eligible depository institution as defined in § 303.2(r) and which meets the additional criteria in paragraph (a)(4) of this section will be acknowledged by the FDIC in writing and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2).

(2) *Timing*. Under expedited processing, the FDIC will take action on an application by the date that is the latest of:

(i) 45 days after the date of the FDIC's receipt of a substantially complete merger application; or

(ii) 10 days after the date of the last notice publication required under § 303.65 of this subpart; or

(iii) 5 days after receipt of the Attorney General's report on the competitive factors involved in the proposed transaction; or

(iv) For an interstate merger transaction subject to the provisions of section 44 of the FDI Act (12 U.S.C. 1831u), 5 days after the FDIC receives confirmation from the host state (as defined in § 303.41(e)) that the applicant has both complied with the filing requirements of the host state and submitted a copy of the FDIC merger application to the host state's bank supervisor.

(3) *No automatic approval*. Notwithstanding paragraph (a)(1) or (2) of this section, if the FDIC does not act within

the expedited processing period, it does not constitute an automatic or default approval.

(4) *Criteria.* The FDIC will process an application using expedited procedures if:

(i) Immediately following the merger transaction, the resulting institution will be ''well-capitalized'' pursuant to subpart H of part 324 of this chapter (12 CFR part 324), as applicable; and

(ii)(A) All parties to the merger transaction are eligible depository institutions as defined in § 303.2(r); or

(B) The acquiring party is an eligible depository institution as defined in § 303.2(r) and the amount of the total assets to be transferred does not exceed an amount equal to 10 percent of the acquiring institution's total assets as reported in its report of condition for the quarter immediately preceding the filing of the merger application.

(b) *Standard processing.* For those applications not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action taken by the FDIC on the application when the decision is rendered.

(c) *Processing for State savings associations.* Notwithstanding paragraphs (a) and (b) of this section, the FDIC will approve or disapprove an application filed by a State savings association to acquire or be acquired by another insured depository institution that is required to be filed with the FDIC within 60 days after the date of the FDIC's receipt of a substantially complete merger application, subject to the FDIC's discretion to extend such period by an additional 30 days if any material information submitted is substantially inaccurate or incomplete.

(1) The FDIC shall notify an applicant that is a State savings association in writing of the date the application is deemed substantially complete. The FDIC may request additional information at any time.

(2) Notwithstanding this paragraph (c), if the FDIC does not approve or disapprove an application within the 60-day or extended processing period it does not constitute an automatic or default approval.

[85 FR 3244, Jan. 21, 2020]

§ 303.65 Public notice requirements.

(a) *General.* Except as provided in paragraph (b) of this section, an applicant for approval of a merger transaction must publish notice of the proposed transaction on at least three occasions at approximately equal intervals in a newspaper of general circulation in the community or communities where the main offices of the merging institutions are located or, if there is no such newspaper in the community, then in the newspaper of general circulation published nearest thereto.

(1) *First publication.* The first publication of the notice should be as close as practicable to the date on which the application is filed with the FDIC, but no more than 5 days prior to the filing date.

(2) *Last publication.* The last publication of the notice shall be on the 25th day after the first publication or, if the newspaper does not publish on the 25th day, on the newspaper's publication date that is closest to the 25th day.

(b) *Exceptions*—(1) *Emergency requiring expeditious action.* If the FDIC determines that an emergency exists requiring expeditious action, notice shall be published twice. The first notice shall be published as soon as possible after the FDIC notifies the applicant of such determination. The second notice shall be published on the 7th day after the first publication or, if the newspaper does not publish on the 7th day, on the newspaper's publication date that is closest to the 7th day.

(2) *Probable failure.* If the FDIC determines that it must act immediately to prevent the probable failure of one of the institutions involved in a proposed merger transaction, publication is not required.

(c) *Content of notice*—(1) *General.* The notice shall conform to the public notice requirements set forth in § 303.7.

(2) *Branches.* If it is contemplated that the resulting institution will operate offices of the other institution(s) as branches, the following statement shall be included in the notice required in § 303.7(b):

It is contemplated that all offices of the above-named institutions will continue to be operated (with the exception of [insert identity and location of each office that will not be operated]).

(3) *Emergency requiring expeditious action*. If the FDIC determines that an emergency exists requiring expeditious action, the notice shall specify as the closing date of the public comment period the date that is the 10th day after the date of the first publication.

(d) *Public comments*. Comments must be received by the appropriate FDIC office within 30 days after the first publication of the notice, unless the comment period has been extended or reopened in accordance with § 303.9(b)(2). If the FDIC has determined that an emergency exists requiring expeditious action, comments must be received by the appropriate FDIC office within 10 days after the first publication.

§§ 303.66–303.79 [Reserved]

Subpart E—Change in Bank Control

SOURCE: 80 FR 65899, Oct. 28, 2015, unless otherwise noted.

§ 303.80 Scope.

This subpart implements the provisions of the Change in Bank Control Act of 1978, section 7(j) of the FDI Act (12 U.S.C. 1817(j)) (CBCA), and sets forth the filing requirements and processing procedures for a notice of change in control with respect to the acquisition of control of a State nonmember bank, a State savings association, or certain parent companies of either a State nonmember bank or a State savings association.

§ 303.81 Definitions.

For purposes of this subpart:

(a) *Acting in concert* means knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a covered institution whether or not pursuant to an express agreement.

(b) *Company* means a company as defined in section 2 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*) and any person that is not an individual including for example, a limited liability company.

(c) *Control* means the power, directly or indirectly, to direct the management or policies of a covered institution or to vote 25 percent or more of any class of voting securities of a covered institution.

(d) *Convertible securities* mean debt or equity interests that may be converted into voting securities.

(e) *Covered institution* means an insured State nonmember bank, an insured State savings association, and any company that controls, directly or indirectly, an insured State nonmember bank or an insured State savings association other than a holding company that is the subject of an exemption described in either section 303.84(a)(3) or (a)(8).

(f) *Immediate family* means a person's parents, mother-in-law, father-in-law, children, step-children, siblings, step-siblings, brothers-in-law, sisters-in-law, grandparents, and grandchildren, whether biological, adoptive, adjudicated, contractual, or *de facto;* the spouse of any of the foregoing; and the person's spouse.

(g) *Person* means an individual, corporation, limited liability company (LLC), partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, voting trust, or any other form of entity; and includes each party to a voting agreement and any group of persons acting in concert.

(h) *Management official* means any officer, LLC manager, director, partner, or trustee of an entity, or other person with similar functions and powers with respect to a company.

(i)(1) *Voting securities* means shares of common or preferred stock, general or limited partnership shares or interests, membership interests, or similar interests if the shares or interests, by statute, charter, or in any manner, entitle the holder:

(i) To vote for, or to select, directors, trustees, managers of an LLC, partners, or other persons exercising similar functions of the issuing entity; or

(ii) To vote on, or to direct, the conduct of the operations or significant policies of the issuing entity.

(2) Nonvoting shares: Shares of common or preferred stock, limited partnership shares or interests, membership interests, or similar interests are not ''voting securities'' if:

(i) Any voting rights associated with the shares or interests are limited solely to the type customarily provided by State statute with regard to matters that would significantly and adversely affect the rights or preference of the security or other interest, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the security or interest, the dissolution of the issuing entity, or the payment of dividends by the issuing entity when preferred dividends are in arrears;

(ii) The shares or interests represent an essentially passive investment or financing device and do not otherwise provide the holder with control over the issuing entity; and

(iii) The shares or interests do not entitle the holder, by statute, charter, or in any manner, to select, or to vote for the selection of, directors, trustees, managers of an LLC, partners, or persons exercising similar functions of the issuing entity.

(3) Class of voting securities: Voting securities issued by a single issuer are deemed to be the same class of voting securities, regardless of differences in dividend rights or liquidation preference, if the securities are voted together as a single class on all matters for which the securities have voting rights other than matters described in paragraph (i)(2)(i) of this section that affect solely the rights or preferences of the securities.

§ 303.82 Transactions that require prior notice.

(a) *Prior notice requirement.* (1) Except as provided in §§ 303.83 and 303.84, no person, acting directly or indirectly, or through or in concert with one or more persons, shall acquire control of a covered institution unless the person shall have given the FDIC prior notice of the proposed acquisition as provided in the CBCA and this subpart, and the FDIC has not disapproved the acquisition within 60 days or such longer period as may be permitted under the CBCA; and

(2) Except as provided in §§ 303.83 and 303.84, and unless waived by the FDIC, no person who has been approved to acquire control of a covered institution and who has maintained that control shall acquire, directly or indirectly, or through or in concert with one or more persons, voting securities of such covered institution if that person's ownership, control, or power to vote will increase from less than 25 percent to 25 percent or more of any class of voting securities of the covered institution, unless the person shall have given the FDIC prior notice of the proposed acquisition as provided in the CBCA and this subpart, and the FDIC has not disapproved the acquisition within 60 days or such longer period as may be permitted under the CBCA.

(b) *Rebuttable presumptions*—(1) *Rebuttable presumptions of control.* The FDIC presumes that an acquisition of voting securities of a covered institution constitutes the acquisition of the power to direct the management or policies of that institution requiring prior notice to the FDIC, if, immediately after the transaction, the acquiring person will own, control, or hold with power to vote 10 percent or more of any class of voting securities of the institution, and if:

(i) The institution has registered securities under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l); or

(ii) No other person will own, control or hold the power to vote a greater percentage of that class of voting securities immediately after the transaction.

(2) *Rebuttable presumptions of acting in concert.* The following persons who own or control, or propose to own or control voting securities in a covered institution, shall be presumed to be acting in concert for purposes of this subpart:

(i) A company and any controlling shareholder or management official of the company;

(ii) An individual and one or more members of the individual's immediate family;

(iii) Companies under common control or a company and each company it controls;

(iv) Two or more persons that have made, or propose to make, a joint filing related to the proposed acquisition under sections 13 or 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78n), and the rules promulgated thereunder by the Securities and Exchange Commission;

(v) A person and any trust for which the person serves as trustee or any trust for which the person is a beneficiary; and

(vi) Persons that are parties to any agreement, contract, understanding, relationship, or other arrangement, whether written or otherwise, regarding the acquisition, voting, or transfer of control of voting securities of a covered institution, other than through revocable proxies as described in § 303.84(a)(5).

(3) *Convertible securities, options, and warrants.* The acquisition of convertible securities, or options or warrants to acquire voting securities is presumed to constitute the acquisition of voting securities.

(4) *Rebuttal of presumptions.* The FDIC will afford any person seeking to rebut a presumption in this paragraph (b) an opportunity to present its views in writing.

(c) *Acquisition of loans in default.* An acquisition of a loan in default that is secured by voting securities of a covered institution is deemed to be an acquisition of the underlying securities for purposes of this subpart. Before acquiring a loan in default that upon foreclosure would result in the acquiring person owning, controlling, or holding with the power to vote a controlling amount of a covered institution's voting securities, the potential acquirer must give the FDIC prior written notice as specified in this subpart.

§ 303.83 Transactions that require notice, but not prior notice.

(a) *Notice within 90 days after the acquisition.* The following acquisitions of voting securities of a covered institution, which otherwise would require prior notice under this subpart, instead require the acquirer to provide to the appropriate FDIC office within 90 calendar days after the acquisition all relevant information requested by the FDIC:

(1) The acquisition of voting securities as a bona fide gift;

(2) The acquisition of voting securities in satisfaction of a debt previously contracted in good faith, except as provided in § 303.82(c); and

(3) The acquisition of voting securities through inheritance.

(b) *Notice within 90 days after receiving notice of the event giving rise to the acquisition of control.* The following acquisitions of control of a covered institution, which otherwise would require prior notice under this subpart, instead require the person acquiring control to provide to the appropriate FDIC office, within 90 calendar days after receiving notice of the event giving rise to the acquisition of control, all relevant information requested by the FDIC:

(1) The acquisition of control resulting from a redemption of voting securities by the issuing covered institution; and

(2) The acquisition of control as a result of any event or action (including without limitation the sale of securities) by any third party that is not within the control of the person acquiring control.

(c) The FDIC may disapprove a notice filed after an acquisition of control, and nothing in this section limits the authority of the FDIC to disapprove a notice pursuant to § 303.86(c).

(d) The relevant information that the FDIC may require under this section may include all information and documents routinely required for a prior notice as provided in § 303.85.

(e) If the FDIC disapproves a Notice filed under this § 303.83, the notificant(s) must divest control of the covered institution which may include, without limitation, disposing of some or all of the voting securities so that the notificant(s) is no longer in control of the covered institution, within such period of time and in the manner that the FDIC may determine.

§ 303.84 Transactions that do not require notice.

(a) *Exempt transactions.* The following transactions do not require notice to the FDIC under this subpart:

(1) The acquisition of additional voting securities of a covered institution by a person who:

(i) Held the power to vote 25 percent or more of any class of voting securities of the institution continuously since the later of March 9, 1979, or the date that the institution commenced business; or

(ii) Is presumed, under § 303.82(b) to have controlled the institution continuously since March 9, 1979, if the aggregate amount of voting securities held does not exceed 25 percent or more of any class of voting securities of the institution or, in other cases, where the FDIC determines that the person has controlled the institution continuously since March 9, 1979;

(2) The acquisition of additional voting securities of a covered institution by a person who has lawfully acquired and maintained control of the institution (for purposes of § 303.82) after obtaining the FDIC's non-objection under the CBCA and the FDIC's regulations or the OTS's non-objection under the repealed Change in Savings and Loan Control Act, 12 U.S.C. 1730(q), and the regulations thereunder then in effect, to acquire control of the institution, unless a notice is required for an increase in ownership described in 12 CFR 303.82(a)(2);

(3) Acquisitions of voting securities subject to approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842(a)), section 18(c) of the FDI Act (12 U.S.C. 1828(c)), or section 10 of the Home Owners' Loan Act (12 U.S.C. 1467a);

(4) Any transaction described in sections 2(a)(5), 3(a)(A), or 3(a)(B) of the Bank Holding Company Act (12 U.S.C. 1841(a)(5), 1842(a)(A), or 1842(a)(B)) by a person described in those provisions;

(5) A customary one-time solicitation of a revocable proxy;

(6) The receipt of voting securities of a covered institution through a pro rata stock dividend or stock split if the proportional interests of the recipients remain substantially the same;

(7) The acquisition of voting securities in a foreign bank that has an insured branch in the United States. (This exemption does not extend to the reports and information required under paragraphs 9, 10, and 12 of the CBCA (12 U.S.C. 1817(j)(9), (10), and (12)); and

(8) The acquisition of voting securities of a depository institution holding company for which the Board of Governors of the Federal Reserve System reviews a notice pursuant to the CBCA (12 U.S.C. 1817(j)).

§ 303.85 Filing procedures.

(a) *Filing notice.* (1) A notice required under this subpart shall be filed with the appropriate FDIC office and shall contain all the information required by paragraph 6 of the CBCA, section 7(j) of the FDI Act, (12 U.S.C. 1817(j)(6)), or prescribed in the designated interagency forms which may be obtained from any FDIC regional director.

(2) The FDIC may waive any of the informational requirements of the notice if the FDIC determines that it is in the public interest.

(3) A notificant shall notify the appropriate FDIC office immediately of any material changes in the information contained in a notice submitted to the FDIC, including changes in financial or other conditions.

(4) When the acquiring person is an individual, or group of individuals acting in concert, the requirement to provide personal financial data may be satisfied by a current statement of assets and liabilities and an income summary, as required in the designated interagency form, together with a statement of any material changes since the date of the statement or summary. The FDIC may require additional information if appropriate.

(b) *Other laws.* Nothing in this subpart shall affect any obligation which the acquiring person(s) may have to comply with the federal securities laws or other laws.

§ 303.86 Processing.

(a) *Acceptance of notice, additional information.* The FDIC shall notify the person or persons submitting a notice under this subpart in writing of the date the notice is accepted as substantially complete. The FDIC may request additional information at any time.

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

(2) The notificant(s) may consummate the proposed transaction before the expiration of the 60-day period, including any extensions, if the FDIC notifies the notificant(s) in writing of its intention not to disapprove the acquisition.

(c) *Disapproval of acquisition of control.* Subpart D of 12 CFR part 308 sets forth the rules of practice and procedure for a notice of disapproval.

§ 303.87 Public notice requirements.

(a) *Publication*—(1) *Newspaper announcement.* Any person(s) filing a notice under this subpart shall publish an announcement soliciting public comment on the proposed acquisition. The announcement shall be published in a newspaper of general circulation in the community in which the home office of the covered institution to be acquired is located.

(2) *Timing of publication.* The announcement shall be published as close as is practicable to the date the notice is filed with the appropriate FDIC office, but in no event more than 10 calendar days before or after the filing date. If the filing is not filed in accordance with the CBCA and this subpart within the time periods specified herein, the acquiring person(s) shall, within 10 days of being directed by the FDIC to file a Notice, publish an announcement of the acquisition of control.

(3) *Contents of newspaper announcement.* The newspaper announcement shall conform to the public notice requirements set forth in § 303.7. If the filing is not filed in accordance with the CBCA and this subpart within the time periods specified herein, the announcement shall also include the date of the acquisition and contain a statement indicating that the FDIC is currently reviewing the acquisition of control.

(b) *Delay of publication.* The FDIC may permit delay in the publication required by this section if the FDIC determines, for good cause, that it is in the public interest to grant such a delay. Requests for delay of publication may be submitted to the appropriate FDIC office.

(c) *Shortening or waiving public comment period, waiving publications; acting before close of public comment period.* The FDIC may shorten the public comment period to a period of not less than 10 days, or waive the public comment or newspaper publication requirements of paragraph (a) of this section, or act on a notice before the expiration of a public comment period, if it determines in writing either that an emergency exists or that disclosure of the notice, solicitation of public comment, or delay until expiration of the public comment period would seriously threaten the safety and soundness of the State nonmember bank or State savings association to be acquired.

(d) *Consideration of public comments.* In acting upon a notice filed under this subpart, the FDIC shall consider all public comments received in writing within 20 days following the required newspaper publication or, if the FDIC has shortened the public comment period pursuant to paragraph (c) of this section, within such shorter period.

§ 303.88 Reporting of stock loans and changes in chief executive officers and directors.

(a) *Requirements of reporting stock loans.* (1) Any foreign bank or affiliate of a foreign bank that has credit outstanding to any person or group of persons, in the aggregate, which is secured, directly or indirectly, by 25 percent or more of any class of voting securities of a covered institution, shall file a consolidated report with the appropriate FDIC office.

(2) Any voting securities of the covered institution held by the foreign bank or any affiliate of the foreign bank as principal must be included in the calculation of the number of voting securities in which the foreign bank or its affiliate has a security interest for purposes of this paragraph (a).

(b) *Definitions.* For purposes of paragraph (a) of this section:

(1) Foreign bank shall have the same meaning as in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(2) Affiliate shall have the same meaning as in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(3) Credit outstanding includes any loan or extension of credit; the issuance of a guarantee, acceptance, or

letter of credit, including an endorsement or standby letter of credit; and any other type of transaction that extends credit or financing to the person or group of persons.

(4) Group of persons includes any number of persons that the foreign bank or any affiliate of a foreign bank has reason to believe:

(i) Are acting together, in concert, or with one another to acquire or control voting securities of the same covered institution, including an acquisition of voting securities of the same covered institution at approximately the same time under substantially the same terms; or

(ii) Have made, or propose to make, a joint filing under section 13 or 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78n), and the rules promulgated thereunder by the Securities and Exchange Commission regarding ownership of the voting securities of the same covered institution.

(c) *Exceptions.* Compliance with paragraph (a) of this section is not required if:

(1) The person or group of persons referred to in paragraph (a) has disclosed the amount borrowed and the security interest therein to the appropriate FDIC office in connection with a notice filed under the CBCA, an application filed under either 12 U.S.C. 1841, *et seq.* or 12 U.S.C. 1467a, or any other application filed with the FDIC as a substitute for a notice under § 303.82 of this subpart, including an application filed under section 18(c) of the FDI Act (Bank Merger Act, 12 U.S.C. 1828(c)) or section 5 of the FDI Act (12 U.S.C. 1815); or

(2) The transaction involves a person or group of persons that has been the owner or owners of record of the stock for a period of one year or more; or, if the transaction involves stock issued by a newly chartered bank, before the bank is opened for business.

(d) *Report requirements for purposes of paragraph (a) of this section.* (1) The consolidated report must indicate the number and percentage of voting securities securing each applicable extension of credit, the identity of the borrower, the number of voting securities held as principal by the foreign bank and any affiliate thereof, and any additional information that the FDIC may require in connection with a particular report.

(2) A foreign bank, or any affiliate of a foreign bank, shall file the consolidated report in writing within 30 days of the date on which the foreign bank or affiliate first believes that the security for any outstanding credit consists of 25 percent or more of any class of voting securities of a covered institution.

(e) *Foreign bank or affiliate not supervised by FDIC.* If the foreign bank, or any affiliate thereof, is not supervised by the FDIC, it shall file a copy of the report filed under paragraph (a) of this section with its appropriate Federal banking agency.

(f) *Reporting requirement.* After the consummation of a change in control, a covered institution must notify the FDIC in writing of any changes or replacements of its chief executive officer or of any director occurring during the 12–month period beginning on the date of consummation. This notice must be filed within 10 days of such change or replacement and must include a statement of the past and current business and professional affiliations of the new chief executive officers or directors.

§§ 303.89–303.99 [Reserved]

Subpart F—Change of Director or Senior Executive Officer

§ 303.100 Scope.

This subpart sets forth the circumstances under which an FDIC-supervised institution must notify the FDIC of a change in any member of its board of directors or any senior executive officer and the procedures for filing such notice. This subpart implements section 32 of the FDI Act (12 U.S.C. 1831i).

[85 FR 3244, Jan. 21, 2020]

§ 303.101 Definitions.

For purposes of this subpart:

(a) *Director* means a person who serves on the board of directors or board of trustees of an FDIC-supervised institution, except that this term does not include an advisory director who:

(1) Is not elected by the shareholders;

(2) Is not authorized to vote on any matters before the board of directors or board of trustees or any committee thereof;

(3) Solely provides general policy advice to the board of directors or board of trustees and any committee thereof; and

(4) Has not been identified by the FDIC as a person who performs the functions of a director for purposes of this subpart.

(b) *Senior executive officer* means a person who holds the title of president, chief executive officer, chief operating officer, chief managing official (in an insured state branch of a foreign bank), chief financial officer, chief lending officer, chief investment officer, or, without regard to title, salary, or compensation, performs the function of one or more of these positions. *Senior executive officer* also includes any other person identified by the FDIC, whether or not hired as an employee, with significant influence over, or who participates in, major policymaking decisions of the FDIC-supervised institution.

(c) *Troubled condition* means any FDIC-supervised institution that:

(1) Has a composite rating, as determined in its most recent report of examination, of 4 or 5 under the Uniform Financial Institutions Rating System (UFIRS), or in the case of an insured state branch of a foreign bank, an equivalent rating; or

(2) Is subject to a proceeding initiated by the FDIC for termination or suspension of deposit insurance; or

(3) Is subject to a cease-and-desist order or written agreement issued by either the FDIC or the appropriate state banking authority that requires action to improve the financial condition of the FDIC-supervised institution or is subject to a proceeding initiated by the FDIC or state authority which contemplates the issuance of an order that requires action to improve the financial condition of the FDIC-supervised institution, unless otherwise informed in writing by the FDIC; or

(4) Is informed in writing by the FDIC that it is in troubled condition for purposes of the requirements of this subpart on the basis of the FDIC-supervised institution's most recent report of condition or report of examination, or other information available to the FDIC.

(d) *FDIC-supervised institution* means any entity for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q).

[67 FR 79247, Dec. 27, 2002, as amended at 85 FR 3244, Jan. 21, 2020]

§ 303.102 Filing procedures and waiver of prior notice.

(a) *FDIC-supervised institutions.* An FDIC-supervised institution shall give the FDIC written notice, as specified in paragraph (c)(1) of this section, at least 30 days prior to adding or replacing any member of its board of directors, employing any person as a senior executive officer of the institution, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive officer position, if the FDIC-supervised institution:

(1) Is not in compliance with all minimum capital requirements applicable to the FDIC-supervised institution as determined on the basis of the institution's most recent report of condition or report of examination;

(2) Is in troubled condition; or

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

(b) *Insured branches of foreign banks.* In the case of the addition of a member of the board of directors or a change in senior executive officer in a foreign bank having an insured state branch, the notice requirement shall not apply to such additions and changes in the foreign bank parent, but only to changes in senior executive officers in the state branch.

(c) *Waiver of prior notice*—(1) *Waiver requests.* The FDIC may permit an individual, upon petition by the FDIC-supervised institution to the appropriate FDIC office, to serve as a senior executive officer or director before filing the notice required under this subpart if the FDIC finds that:

(i) Delay would threaten the safety and soundness of the FDIC-supervised institution;

(ii) Delay would not be in the public interest; or

(iii) Other extraordinary circumstances exist that justify waiver of prior notice.

(2) *Automatic waiver*. The prior 30-day notice is automatically waived in the case of the election of a new director not proposed by management at a meeting of the shareholders of an FDIC-supervised institution, and the individual immediately may begin serving, provided that a complete notice is filed with the appropriate FDIC office within two business days after the individual's election.

(3) *Effect on disapproval authority*. A waiver shall not affect the authority of the FDIC to disapprove a notice within 30 days after a waiver is granted under paragraph (c)(1) of this section or the election of an individual who has filed a notice and is serving pursuant to an automatic waiver under paragraph (c)(2) of this section.

(d)(1) *Content of filing*. The notice required by paragraph (a) of this section shall be filed with the appropriate FDIC office and shall contain information pertaining to the competence, experience, character, or integrity of the individual with respect to whom the notice is submitted, as prescribed in the designated interagency form which is available from any FDIC regional director. The FDIC may require additional information.

(2) *Modification*. The FDIC may modify or accept other information in place of the requirements of paragraph (d)(1) of this section for a notice filed under this subpart.

[67 FR 79247, Dec. 27, 2002, as amended at 85 FR 3245, Jan. 21, 2020]

§ 303.103 Processing.

(a) *Processing*. The 30-day notice period specified in § 303.102(a) shall begin on the date substantially all information required to be submitted by the notificant pursuant to § 303.102(c)(1) is received by the appropriate FDIC office. The FDIC shall notify the FDIC-supervised institution submitting the notice of the date on which the notice is accepted for processing and of the date on which the 30-day notice period will expire. If processing cannot be completed with 30 days, the notificant will be advised in writing, prior to expiration of the 30-day period, of the reason for the delay in processing and of the additional time period, not to exceed 60 days, in which processing will be completed.

(b) *Commencement of service*—(1) *At expiration of period*. A proposed director or senior executive officer may begin service after the end of the 30-day period or any other additional period as provided under paragraph (a) of this section, unless the FDIC disapproves the notice before the end of the period.

(2) *Prior to expiration of the period*. A proposed director or senior executive officer may begin service before the end of the 30-day period or any additional time period as provided under paragraph (a) of this section, if the FDIC notifies the FDIC-supervised institution and the individual in writing of the FDIC's intention not to disapprove the notice.

(c) *Notice of disapproval*. The FDIC may disapprove a notice filed under § 303.102 if the FDIC finds that the competence, experience, character, or integrity of the individual with respect to whom the notice is submitted indicates that it would not be in the best interests of depositors of the FDIC-supervised institution or in the best interests of the public to permit the individual to be employed by, or associated with the FDIC-supervised institution. Subpart L of 12 CFR part 308 sets forth the rules of practice and procedure for a notice of disapproval.

[85 FR 3245, Jan. 21, 2020]

§§ 303.104–303.119 [Reserved]

Subpart G—Activities of Insured State Banks

§ 303.120 Scope.

This subpart sets forth procedures for complying with notice and application requirements contained in subpart A of part 362 of this chapter, governing insured state banks and their subsidiaries engaging in activities which are not permissible for national banks and their subsidiaries. This subpart sets forth procedures for complying with

notice and application requirements contained in subpart B of part 362 of this chapter, governing certain activities of insured state nonmember banks, their subsidiaries, and certain affiliates. This subpart also sets forth procedures for complying with the notice requirements contained in subpart E of part 362 of this chapter, governing subsidiaries of insured state nonmember banks engaging in financial activities.

§ 303.121 Filing procedures.

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

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

(1) *Filings generally.* (i) A brief description of the activity and the manner in which it will be conducted;

(ii) The amount of the bank's existing or proposed direct or indirect investment in the activity as well as calculations sufficient to indicate compliance with any specific capital ratio or investment percentage limitation detailed in subpart A, B, or E of part 362 of this chapter;

(iii) A copy of the bank's business plan regarding the conduct of the activity;

(iv) A citation to the state statutory or regulatory authority for the conduct of the activity;

(v) A copy of the order or other document from the appropriate regulatory authority granting approval for the bank to conduct the activity if such approval is necessary and has already been granted;

(vi) A brief description of the bank's policy and practice with regard to any anticipated involvement in the activity by a director, executive office or principal shareholder of the bank or any related interest of such a person; and

(vii) A description of the bank's expertise in the activity.

(2) [Reserved]

(3) *Copy of application or notice filed with another agency.* If an insured state bank has filed an application or notice with another federal or state regulatory authority which contains all of the information required by paragraph (b)(1) of this section, the insured state bank may submit a copy to the FDIC in lieu of a separate filing.

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

§ 303.122 Processing.

(a) *Expedited processing.* A notice filed by an insured state bank seeking to commence or continue an activity under § 362.3(a)(2)(iii)(A)(2), § 362.4(b)(3)(i), or § 362.4(b)(5) of this chapter will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided a basis for that decision. The FDIC may remove the notice from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, a notice processed under expedited processing is deemed approved 30 days after receipt of a complete notice by the FDIC (subject to extension for an additional 15 days upon written notice to the bank) or on such earlier date authorized by the FDIC in writing.

(b) *Standard processing for applications and notices that have been removed from expedited processing.* For an application filed by an insured state bank seeking to commence or continue an activity under § 362.3(a)(2)(iii)(A)(2), § 362.3(b)(2)(i), § 362.3(b)(2)(ii)(A), § 362.3(b)(2)(ii)(C), § 362.4(b)(1), § 362.4(b)(4), § 362.5(b)(2), or § 362.8(b) or seeking a waiver or modification under § 362.18(e) or § 362.18(g)(3) of this chapter or for notices which are not processed pursuant to the expedited processing procedures, the FDIC will provide the insured State bank with written notification of the final action as soon as the decision is rendered. The FDIC will normally review and act in such cases within 60 days after receipt of a completed application or notice (subject to extension for an additional 30 days upon written notice to the bank), but failure of the FDIC to act prior to the expiration of these periods does not constitute approval.

§§ 303.123–303.139 [Reserved]

Subpart H—Activities of Insured Savings Associations

§ 303.140 Scope.

This subpart sets forth procedures for complying with the notice and application requirements contained in subpart C of part 362 of this chapter, governing insured state savings associations and their service corporations engaging in activities which are not permissible for federal savings associations and their service corporations. This subpart also sets forth procedures for complying with the notice requirements contained in subpart D of part 362 of this chapter, governing insured savings associations which establish or engage in new activities through a subsidiary.

§ 303.141 Filing procedures.

(a) *Where to file.* All applications and notices required by subpart C or subpart D of part 362 of this chapter are to be in writing and filed with the appropriate FDIC office.

(b) *Contents of filing*—(1) *Filings generally.* A complete letter notice or letter application shall include the following information:

(i) A brief description of the activity and the manner in which it will be conducted;

(ii) The amount of the association's existing or proposed direct or indirect investment in the activity as well as calculations sufficient to indicate compliance with any specific capital ratio or investment percentage limitation detailed in subpart C or D of part 362 of this chapter;

(iii) A copy of the association's business plan regarding the conduct of the activity;

(iv) A citation to the state statutory or regulatory authority for the conduct of the activity;

(v) A copy of the order or other document from the appropriate regulatory authority granting approval for the association to conduct the activity if such approval is necessary and has already been granted;

(vi) A brief description of the association's policy and practice with regard to any anticipated involvement in the activity by a director, executive officer or principal shareholder of the association or any related interest of such a person; and

(vii) A description of the association's expertise in the activity.

(2) [Reserved]

(3) *Copy of application or notice filed with another agency.* If an insured savings association has filed an application or notice with another federal or state regulatory authority which contains all of the information required by paragraph (b)(1) of this section, the insured state bank may submit a copy to the FDIC in lieu of a separate filing.

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

§ 303.142 Processing.

(a) *Expedited processing.* A notice filed by an insured state savings association seeking to commence or continue an activity under § 362.11(b)(2)(ii) of this chapter will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided a basis for that decision. The FDIC may remove the notice from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, a notice processed under expedited processing is deemed approved 30 days after receipt of a complete notice by the FDIC (subject to extension for an additional 15 days upon written notice to the bank) or on such earlier date authorized by the FDIC in writing.

(b) *Standard processing for applications and notices that have been removed from expedited processing.* For an application filed by an insured state savings association seeking to commence or continue an activity under § 362.11(a)(2)(ii), § 362.11(b)(2)(i), § 362.12(b)(1) of this chapter or for notices which are not processed pursuant to the expedited processing procedures, the FDIC will provide the insured state savings association with written notification of the final action as soon as the decision is rendered. The FDIC will normally review and act in such cases within 60 days after receipt of a completed application or notice (subject to extension for an additional 30 days upon written notice to the bank), but failure of the

FDIC to act prior to the expiration of these periods does not constitute approval.

(c) *Notices of activities in excess of an amount permissible for a federal savings association; subsidiary notices.* Receipt of a notice filed by an insured state savings association as required by § 362.11(b)(3) or § 362.15 of this chapter will be acknowledged in writing by the FDIC. The notice will be reviewed at the appropriate FDIC office, which will take such action as it deems necessary and appropriate.

§§ 303.143–303.159 [Reserved]

Subpart I—Mutual-To-Stock Conversions

§ 303.160 Scope.

This subpart sets forth the notice requirements and procedures for the conversion of an insured mutual state-chartered savings bank to the stock form of ownership. The substantive requirements governing such conversions are contained in § 333.4 of this chapter.

§ 303.161 Filing procedures.

(a) *Prior notice required.* In addition to complying with the substantive requirements in § 333.4 of this chapter, an insured state-chartered mutually owned savings bank that proposes to convert from mutual to stock form shall file with the FDIC a notice of intent to convert to stock form.

(b) *General.* (1) A notice required under this subpart shall be filed in letter form with the appropriate FDIC office at the same time as required conversion application materials are filed with the institution's state regulator.

(2) An insured mutual savings bank chartered by a state that does not require the filing of a conversion application shall file a notice in letter form with the appropriate FDIC office as soon as practicable after adoption of its plan of conversion.

(c) *Content of notice.* The notice shall provide a description of the proposed conversion and include all materials that have been filed with any state or federal banking regulator and any state or federal securities regulator. At a minimum, the notice shall include, as applicable, copies of:

(1) The plan of conversion, with specific information concerning the record date used for determining eligible depositors and the subscription offering priority established in connection with any proposed stock offering;

(2) Certified board resolutions relating to the conversion;

(3) A business plan, including a detailed discussion of how the capital acquired in the conversion will be used, expected earnings for at least a three-year period following the conversion, and a justification for any proposed stock repurchases;

(4) The charter and bylaws of the converted institution;

(5) The bylaws and operating plans of any other entities formed in connection with the conversion transaction, such as a holding company or charitable foundation;

(6) A full appraisal report, prepared by an independent appraiser, of the value of the converting institution and the pricing of the stock to be sold in the conversion transaction;

(7) Detailed descriptions of any proposed management or employee stock benefit plans or employment agreements and a discussion of the rationale for the level of benefits proposed, individually and by participant group;

(8) Indemnification agreements;

(9) A preliminary proxy statement and sample proxy;

(10) Offering circular(s) and order form;

(11) All contracts or agreements relating to solicitation, underwriting, market-making, or listing of conversion stock and any agreements among members of a group regarding the purchase of unsubscribed shares;

(12) A tax opinion concerning the federal income tax consequences of the proposed conversion;

(13) Consents from experts to use their opinions as part of the notice; and

(14) An estimate of conversion-related expenses.

(d) *Additional information.* The FDIC, in its discretion, may request any additional information it deems necessary to evaluate the proposed conversion. The institution proposing to convert from mutual to stock form shall

promptly provide such information to the FDIC.

(e) *Acceptance of notice.* The 60-day notice period specified in § 303.163 shall commence on the date of receipt of a substantially complete notice. The FDIC shall notify the institution proposing to convert in writing of the date the notice is accepted.

(f) *Related applications.* Related applications that require FDIC action may include:

(1) Applications for deposit insurance, as required by subpart B of this part; and

(2) Applications for consent to merge, as required by subpart D of this part.

§ 303.162 Waiver from compliance.

(a) *General.* An institution proposing to convert from mutual to stock form may file with the appropriate FDIC office a letter requesting waiver of compliance with this subpart or § 333.4 of this chapter:

(1) When compliance with any provision of this section or § 333.4 of this chapter would be inconsistent or in conflict with applicable state law, or

(2) For any other good cause shown.

(b) *Content of filing.* In making a request for waiver under paragraph (a) of this section, the institution shall demonstrate that the requested waiver, if granted, would not result in any effects that would be detrimental to the safety and soundness of the institution, entail a breach of fiduciary duty on part of the institution's management or otherwise be detrimental or inequitable to the institution, its depositors, any other insured depository institution(s), the Deposit Insurance Fund, or to the public interest.

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

§ 303.163 Processing.

(a) *General considerations.* The FDIC shall review the notice and other materials submitted by the institution proposing to convert from mutual to stock form, specifically considering the following factors:

(1) The proposed use of the proceeds from the sale of stock, as set forth in the business plan;

(2) The adequacy of the disclosure materials;

(3) The participation of depositors in approving the transaction;

(4) The form of the proxy statement required for the vote of the depositors/members on the conversion;

(5) Any proposed increased compensation and other remuneration (including stock grants, stock option rights and other similar benefits) to be granted to officers and directors/trustees of the bank in connection with the conversion;

(6) The adequacy and independence of the appraisal of the value of the mutual savings bank for purposes of determining the price of the shares of stock to be sold;

(7) The process by which the bank's trustees approved the appraisal, the pricing of the stock, and the proposed compensation arrangements for insiders;

(8) The nature and apportionment of stock subscription rights; and

(9) The bank's plans to fulfill its commitment to serving the convenience and needs of its community.

(b) *Additional considerations.* (1) In reviewing the notice and other materials submitted under this subpart, the FDIC will take into account the extent to which the proposed conversion transaction conforms with the various provisions of the mutual-to-stock conversion regulations of the Office of Thrift Supervision (OTS) (12 CFR part 563b), as currently in effect at the time the notice is submitted. Any non-conformity with those provisions will be closely reviewed.

(2) Conformity with the OTS requirements will not be sufficient for FDIC regulatory purposes if the FDIC determines that the proposed conversion transaction would pose a risk to the bank's safety or soundness, violate any law or regulation, or present a breach of fiduciary duty.

(c) *Notice period.* (1) The period in which the FDIC may object to the proposed conversion transaction shall be the later of:

(i) 60 days after receipt of a substantially complete notice of proposed conversion; or

(ii) 20 days after the last applicable state or other federal regulator has approved the proposed conversion.

(2) The FDIC may, in its discretion, extend the initial 60-day period for up to an additional 60 days by providing written notice to the institution.

(d) *Letter of non-objection.* If the FDIC determines, in its discretion, that the proposed conversion transaction would not pose a risk to the institution's safety or soundness, violate any law or regulation, or present a breach of fiduciary duty, then the FDIC shall issue to the institution proposing to convert a letter of non-objection to the proposed conversion.

(e) *Letter of objection.* If the FDIC determines, in its discretion, that the proposed conversion transaction poses a risk to the institution's safety or soundness, violates any law or regulation, or presents a breach of fiduciary duty, then the FDIC shall issue a letter to the institution stating its objection(s) to the proposed conversion and advising the institution not to consummate the proposed conversion until such letter is rescinded. A copy of the letter of objection shall be furnished to the institution's primary state regulator and any other state or federal banking regulator and state or federal securities regulator involved in the conversion.

(f) *Consummation of the conversion.* (1) An institution may consummate the proposed conversion upon either:

(i) The receipt of a letter of non-objection; or

(ii) The expiration of the notice period.

(2) If a letter of objection is issued, then the institution shall not consummate the proposed conversion until the FDIC rescinds such letter.

§§ 303.164–303.179 [Reserved]

Subpart J—International Banking

§ 303.180 Scope.

This subpart sets forth procedures for complying with application requirements relating to the foreign activities of insured state nonmember banks, U.S. activities of insured branches of foreign banks, and certain foreign mergers of insured depository institutions.

§ 303.181 Definitions.

For the purposes of this subpart, the following additional definitions apply:

(a) *Board of Governors* means the Board of Governors of the Federal Reserve System.

(b) *Comptroller* means the Office of the Comptroller of the Currency.

(c) *Eligible insured branch.* An insured branch will be treated as an eligible depository institution within the meaning of § 303.2(r) if the insured branch:

(1) Received an FDIC-assigned composite ROCA supervisory rating (which rates risk management, operational controls, compliance, and asset quality) of 1 or 2 as a result of its most recent federal or state examination, and the FDIC, Comptroller, or Board of Governors have not expressed concern about the condition or operations of the foreign banking organization or the support it offers the branch;

(2) Received a satisfactory or better Community Reinvestment Act (CRA) rating from its primary federal regulator at its most recent examination, if the depository institution is subject to examination under part 345 of this chapter;

(3) Received a compliance rating of 1 or 2 from its primary federal regulator at its most recent examination;

(4) Is well-capitalized as defined in subpart H of part 324 of this chapter; and

(5) Is not subject to a cease and desist order, consent order, prompt corrective action directive, written agreement, memorandum of understanding, or other administrative agreement with any U.S. bank regulatory authority.

(d) *Federal branch* means a federal branch of a foreign bank as defined by § 347.202 of this chapter.

(e) *Foreign bank* means a foreign bank as defined by § 347.202 of this chapter.

(f) *Foreign branch* means a foreign branch of an insured state nonmember bank as defined by § 347.102 of this chapter.

(g) *Foreign organization* means a foreign organization as defined by § 347.102 of this chapter.

(h) *Insured branch* means an insured branch of a foreign bank as defined by § 347.202 of this chapter.

(i) *Noninsured branch* means a noninsured branch of a foreign bank as defined by § 347.202 of this chapter.

(j) *State branch* means a state branch of a foreign bank as defined by § 347.202 of this chapter.

[67 FR 79247, Dec. 27, 2002, as amended at 78 FR 55470, Sept. 10, 2013; 83 FR 17739, Apr. 24, 2018]

§ 303.182 Establishing, moving or closing a foreign branch of an insured state nonmember bank.

(a) *Notice procedures for general consent.* Notice in the form of a letter from an eligible depository institution establishing or relocating a foreign branch pursuant to § 347.117(a) of this chapter must be provided to the appropriate FDIC office no later than 30 days after taking such action. The notice must include the location of the foreign branch, including a street address. The FDIC will provide written acknowledgment of receipt of the notice.

(b) *Filing procedures for other branch establishments*—(1) *Where to file.* An applicant seeking to establish a foreign branch other than under § 347.117(a) of this chapter shall submit an application to the appropriate FDIC office.

(2) *Content of filing.* A complete letter application must include the following information:

(i) The exact location of the proposed foreign branch, including the street address.

(ii) Details concerning any involvement in the proposal by an insider of the applicant, as defined in § 303.2(u) of this part, including any financial arrangements relating to fees, the acquisition of property, leasing of property, and construction contracts;

(iii) A brief description of the applicant's business plan with respect to the foreign branch; and

(iv) A brief description of the proposed activities of the branch and, to the extent any of the proposed activities are not authorized by § 347.115 of this chapter, the applicant's reasons why they should be approved.

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

(c) *Processing*—(1) *Expedited processing for eligible depository institutions.* An application filed under § 347.118(a) of this chapter by an eligible depository institution as defined in § 303.2(r) of this part seeking to establish a foreign branch by expedited processing will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove the application from expedited processing for any of the reasons set forth in § 303.11(c)(2) of this part. Absent such removal, an application processed under expedited processing is deemed approved 45 days after receipt of a substantially complete application by the FDIC, or on such earlier date authorized by the FDIC in writing.

(2) *Standard processing.* For those applications that are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action when the decision is rendered.

(d) *Closing.* Notices of branch closing under § 347.121 of this chapter, in the form of a letter including the name, location, and date of closing of the closed branch, shall be filed with the appropriate FDIC office no later than 30 days after the branch is closed.

[70 FR 17558, Apr. 6, 2005, as amended at 85 FR 72555, Nov. 13, 2020]

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

(a) Notice procedures for general consent. Notice in the form of a letter from an eligible depository institution making direct or indirect investments in a foreign organization pursuant to § 347.117(b) of this chapter shall be provided to the appropriate FDIC office no later than 30 days after taking such action. The FDIC will provide written acknowledgment of receipt of the notice.

(b) Filing procedures for other investments—(1) Where to file. An applicant seeking to make a foreign investment other than under § 347.117(b) of this chapter shall submit an application to the appropriate FDIC office.

(2) *Content of filing.* A complete application shall include the following information:

(i) Basic information about the terms of the proposed transaction, the

amount of the investment in the foreign organization and the proportion of its ownership to be acquired;

(ii) Basic information about the foreign organization, its financial position and income, including any available balance sheet and income statement for the prior year, or financial projections for a new foreign organization;

(iii) A listing of all shareholders known to hold ten percent or more of any class of the foreign organization's stock or other evidence of ownership, and the amount held by each;

(iv) A brief description of the applicant's business plan with respect to the foreign organization;

(v) A brief description of any business or activities which the foreign organization will conduct directly or indirectly in the United States, and to the extent such activities are not authorized by subpart A of part 347, the applicant's reasons why they should be approved;

(vi) A brief description of the foreign organization's activities, and to the extent such activities are not authorized by subpart A of part 347, the applicant's reasons why they should be approved; and

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

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

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

(2) *Standard processing*. For those applications which are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action when the decision is rendered.

(d) *Divestiture*. If an insured state nonmember bank holding 50 percent or more of the voting equity interests of a foreign organization or otherwise controlling the foreign organization divests itself of such ownership or control, the insured state nonmember bank shall file a notice in the form of a letter, including the name, location, and date of divestiture of the foreign organization, with the appropriate FDIC office no later than 30 days after the divestiture.

[67 FR 79247, Dec. 27, 2002, as amended at 70 FR 17558, Apr. 6, 2005]

§ 303.184 Moving an insured branch of a foreign bank.

(a) *Filing procedures*—(1) *Where and when to file*. An application by an insured branch of a foreign bank seeking the FDIC's consent to move from one location to another, as required by section 18(d)(1) of the FDI Act (12 U.S.C. 1828(d)(1)), shall be submitted in writing to the appropriate FDIC office on the date the notice required by paragraph (c) of this section is published, or within 5 days after the date of the last required publication.

(2) *Content of filing*. A complete letter application shall include the following information:

(i) The exact location of the proposed site, including the street address;

(ii) Details concerning any involvement in the proposal by an insider of the applicant, as defined in § 303.2(u), including any financial arrangements relating to fees, the acquisition of property, leasing of property, and construction contracts;

(iii) Comments on any changes in services to be offered, the community to be served, or any other effect the proposal may have on the applicant's compliance with the CRA; and

(iv) A copy of the newspaper publication required by paragraph (c) of this

section, as well as the name and address of the newspaper and the date of the publication.

(3) *Comptroller's application*. If the applicant is filing an application with the Comptroller which contains the information required by paragraph (a)(2) of this section, the applicant may submit a copy to the FDIC in lieu of a separate application.

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

(b) Processing—(1) *Expedited processing for eligible insured branches*. An application filed by an eligible insured branch as defined in § 303.181(c) of this part will be acknowledged in writing by the FDIC and will receive expedited processing if the applicant is proposing to move within the same state, unless the applicant is notified to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2) of this part. Absent such removal, an application processed under expedited processing will be deemed approved on the latest of the following:

(i) The 21st day after the FDIC's receipt of a substantially complete application; or

(ii) The 5th day after expiration of the comment period described in paragraph (c) of this section.

(2) *Standard processing*. For those applications that are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action as soon as the decision is rendered.

(c) *Publication requirement and comment period*—(1) *Newspaper publications*. The applicant shall publish a notice of its proposal to move from one location to another, as described in § 303.7(b), in a newspaper of general circulation in the community in which the insured branch is located prior to its being moved and in the community to which it is to be moved. The notice shall include the insured branch's current and proposed addresses.

(2) *Public comments*. All public comments must be received by the appropriate regional director within 15 days after the date of the last newspaper publication required by paragraph (c)(1) of this section, unless the comment period has been extended or reopened in accordance with § 303.9(b)(2).

(3) *Lobby notices*. If the insured branch has a public lobby, a copy of the newspaper publication shall be posted in the public lobby for at least 15 days beginning on the date of the publication required by paragraph (c)(1) of this section.

(d) *Other approval criteria*. (1) The FDIC may approve an application under this section if the criteria in paragraphs (d)(1)(i) through (d)(1)(vi) of this section is satisfied.

(i) The factors set forth in section 6 of the FDI Act (12 U.S.C. 1816) have been considered and favorably resolved;

(ii) The applicant is at least adequately capitalized as defined in subpart H of part 324 of this chapter;

(iii) Any financial arrangements which have been made in connection with the proposed relocation and which involve the applicant's directors, officers, major shareholders, or their interests are fair and reasonable in comparison to similar arrangements that could have been made with independent third parties;

(iv) Compliance with the CRA and any applicable related regulations, including 12 CFR part 345, has been considered and favorably resolved;

(v) No CRA protest as defined in § 303.2(l) has been filed which remains unresolved or, where such a protest has been filed and remains unresolved, the Director or designee concurs that approval is consistent with the purposes of the CRA and the applicant agrees in writing to any conditions imposed regarding the CRA; and

(vi) The applicant agrees in writing to comply with any conditions imposed by the FDIC, other than the standard conditions defined in § 303.2(dd) which may be imposed without the applicant's written consent.

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

(i) Comply with any applicable state laws or regulations of the states affected by the proposed relocation; and

(ii) Obtain any required regulatory approvals from the appropriate state licensing authority of the state to which the insured branch proposes to relocate before relocating the existing branch operations and surrendering its existing license to the appropriate state licensing authority of the state from which the branch is relocating.

[67 FR 79247, Dec. 27, 2002, as amended at 70 FR 17559, Apr. 6, 2005; 78 FR 55470, Sept. 10, 2013; 83 FR 17739, Apr. 24, 2018; 85 FR 72555, Nov. 13, 2020; 86 FR 9433, Feb. 16, 2021]

§ 303.185 Merger transactions involving foreign banks or foreign organizations.

(a) *Merger transactions involving an insured branch of a foreign bank.* Merger transactions requiring the FDIC's prior approval as set forth in § 303.62 include any merger transaction in which the resulting institution is an insured branch of a foreign bank which is not a federal branch, or any merger transaction which involves any insured branch and any uninsured institution. In such cases:

(1) References to an eligible depository institution in subpart D of this part include an eligible insured branch as defined in § 303.181;

(2) The definition of a corporate reorganization in § 303.61(b) includes a merger transaction between an insured branch and other branches, agencies, or subsidiaries in the United States of the same foreign bank; and

(3) For the purposes of § 303.62(b)(1) on interstate mergers, a merger transaction involving an insured branch is one involving the acquisition of a branch of an insured bank without the acquisition of the bank for purposes of section 44 of the FDI Act (12 U.S.C. 1831u) only when the merger transaction involves fewer than all the insured branches of the same foreign bank in the same state.

(b) *Certain merger transactions with foreign organizations outside any State.* Merger transactions requiring the FDIC's prior approval as set forth in § 303.62 include any merger transaction in which an insured depository institution becomes directly liable for obligations which will, after the merger transaction, be treated as deposits under section 3(l)(5)(A)(i)–(ii) of the FDI Act (12 U.S.C. 1813(l)(5)(A)(i)–(ii)), as a result of a merger or consolidation with a foreign organization or an assumption of liabilities of a foreign organization.

§ 303.186 Exemptions from insurance requirements for a state branch of a foreign bank.

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

(2) *Content of filing.* A complete letter application shall include the following information:

(i) The kinds of deposit activities in which the state branch proposes to engage;

(ii) The expected source of deposits;

(iii) The manner in which deposits will be solicited;

(iv) How the activity will maintain or improve the availability of credit to all sectors of the United States economy, including the international trade finance sector;

(v) That the activity will not give the foreign bank an unfair competitive advantage over United States banking organizations; and

(vi) A resolution by the applicant's board of directors, or evidence of approval by senior management if a resolution is not required pursuant to the applicant's organizational documents, authorizing the filing of the application.

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

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

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

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

(a) Filing procedures—(1) *Where to file.* An application by an insured state

branch seeking approval to conduct activities not permissible for a federal branch, as required by § 347.212(a) of this chapter, shall be submitted in writing to the appropriate FDIC office.

(2) *Content of filing*. A complete letter application shall include the following information:

(i) A brief description of the activity, including the manner in which it will be conducted and an estimate of the expected dollar volume associated with the activity;

(ii) An analysis of the impact of the proposed activity on the condition of the United States operations of the foreign bank in general and of the branch in particular, including a copy of the feasibility study, management plan, financial projections, business plan, or similar document concerning the conduct of the activity;

(iii) A resolution by the applicant's board of directors, or evidence of approval by senior management if a resolution is not required pursuant to the applicant's organizational documents, authorizing the filing of the application;

(iv) A statement by the applicant of whether it is in compliance with sections 347.209 and 347.210 of this chapter;

(v) A statement by the applicant that it has complied with all requirements of the Board of Governors concerning applications to conduct the activity in question and the status of each such application, including a copy of the Board of Governors' disposition of such application, if applicable; and

(vi) A statement of why the activity will pose no significant risk to the Deposit Insurance Fund.

(3) *Board of Governors application*. If the application to the Board of Governors contains the information required by paragraph (a) of this section, the applicant may submit a copy to the FDIC in lieu of a separate letter application.

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

(b) Divestiture or cessation—(1) *Where to file*. Divestiture plans necessitated by a change in law or other authority, as required by § 347.212(e) of this chapter, shall be submitted in writing to the appropriate FDIC office.

(2) *Content of filing*. A complete letter application shall include the following information:

(i) A detailed description of the manner in which the applicant proposes to divest itself of or cease the activity in question; and

(ii) A projected timetable describing how long the divestiture or cessation is expected to take.

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

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

§§ 303.188–303.199 [Reserved]

Subpart K—Prompt Corrective Action

§ 303.200 Scope.

(a) *General*. (1) This subpart covers applications filed pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*), which requires insured depository institutions that are not adequately capitalized to receive approval prior to engaging in certain activities. Section 38 restricts or prohibits certain activities and requires an insured depository institution to submit a capital restoration plan when it becomes undercapitalized. The restrictions and prohibitions become more severe as an institution's capital level declines.

(2) Definitions of the capital categories referenced in this Prompt Corrective Action subpart may be found in subpart H of part 324 of this chapter.

(b) *Institutions covered*. Restrictions and prohibitions contained in subpart H of part 324 of this chapter apply primarily to FDIC-supervised institutions, as well as to directors and senior executive officers of those institutions. Portions of subpart H of part 324 of this chapter also apply to all insured depository institutions that are deemed to be critically undercapitalized.

[67 FR 79247, Dec. 27, 2002, as amended at 78 FR 55470, Sept. 10, 2013; 83 FR 17739, Apr. 24, 2018; 85 FR 3245, Jan. 21, 2020]

§ 303.201 Filing procedures.

Applications shall be filed with the appropriate FDIC office. The application shall contain the information specified in each respective section of this subpart, and shall be in letter form as prescribed in § 303.3. Additional information may be requested by the FDIC. Such letter shall be signed by the president, senior officer or a duly authorized agent of the insured depository institution and be accompanied by a certified copy of a resolution adopted by the institution's board of directors or trustees authorizing the application.

§ 303.202 Processing.

The FDIC will provide the applicant with a subsequent written notification of the final action taken as soon as the decision is rendered.

§ 303.203 Applications for capital distributions.

(a) *Scope.* An FDIC-supervised institution shall submit an application for a capital distribution if, after having made a capital distribution, the institution would be undercapitalized, significantly undercapitalized, or critically undercapitalized.

(b) *Content of filing.* An application to repurchase, redeem, retire, or otherwise acquire shares or ownership interests of the FDIC-supervised institution shall describe the proposal, the shares or obligations that are the subject thereof, and the additional shares or obligations of the institution that will be issued in at least an amount equivalent to the distribution. The application also shall explain how the proposal will reduce the institution's financial obligations or otherwise improve its financial condition. If the proposed action also requires an application under § 303.241 of this part regarding prior consent to retire capital, such application should be filed concurrently with, or made a part of, the application filed pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*).

[85 FR 3245, Jan. 21, 2020]

§ 303.204 Applications for acquisitions, branching, and new lines of business.

(a) *Scope.* (1) Any insured State nonmember bank, any insured State savings association, and any insured branch of a foreign bank which is undercapitalized or significantly undercapitalized, and any insured depository institution which is critically undercapitalized, shall submit an application to engage in acquisitions, branching or new lines of business.

(2) A new line of business will include any new activity exercised which, although it may be permissible, has not been exercised by the institution.

(b) *Content of filing.* Applications shall describe the proposal, state the date the institution's capital restoration plan was accepted by its primary Federal regulator, describe the institution's status in implementing the plan, and explain how the proposed action is consistent with and will further the achievement of the plan or otherwise further the purposes of section 38 of the FDI Act. If the FDIC is not the applicant's primary Federal regulator, the application also should state whether approval has been requested from the applicant's primary Federal regulator, the date of such request and the disposition of the request, if any. If the proposed action also requires applications pursuant to section 18 (c) or (d) of the FDI Act (mergers and branches) (12 U.S.C. 1828 (c) or (d)), such applications should be filed concurrently with, or made a part of, the application filed pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*).

[86 FR 8097, Feb. 3, 2021]

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

(a) *Scope.* Any insured State nonmember bank, insured State savings association, or insured branch of a foreign bank that is significantly or critically undercapitalized, or any insured State nonmember bank, any insured State savings association, or any insured branch of a foreign bank that is undercapitalized and which has failed

to submit or implement in any material respect an acceptable capital restoration plan, shall submit an application to pay a bonus or increase compensation for any senior executive officer.

(b) *Content of filing*. Applications shall list each proposed bonus or increase in compensation, and for the latter shall identify compensation for each of the twelve calendar months preceding the calendar month in which the institution became undercapitalized. Applications also shall state the date the institution's capital restoration plan was accepted by the FDIC, and describe any progress made in implementing the plan.

[67 FR 79247, Dec. 27, 2002, as amended at 86 FR 8097, Feb. 3, 2021]

§ 303.206 Application for payment of principal or interest on subordinated debt.

(a) *Scope*. Any critically undercapitalized insured depository institution shall submit an application to pay principal or interest on subordinated debt.

(b) *Content of filing*. Applications shall describe the proposed payment and provide an explanation of action taken under section 38(h)(3)(A)(ii) of the FDI Act (action other than receivership or conservatorship). The application also shall explain how such payments would further the purposes of section 38 of the FDI Act (12 U.S.C. 1831*o*). Existing approvals pursuant to requests filed under section 18(i)(1) of the FDI Act (12 U.S.C. 1828(i)(1)) (capital stock reductions or retirements) shall not be deemed to be the permission needed pursuant to section 38.

§ 303.207 Restricted activities for critically undercapitalized institutions.

(a) *Scope*. Any critically undercapitalized insured depository institution shall submit an application to engage in certain restricted activities.

(b) *Content of filing*. Applications to engage in any of the following activities, as set forth in sections 38(i)(2) (A) through (G) of the FDI Act, shall describe the proposed activity and explain how the activity would further the purposes of section 38 of the FDI Act (12 U.S.C. 1831*o*):

(1) Enter into any material transaction other than in the usual course of business including any action with respect to which the institution is required to provide notice to the appropriate federal banking agency. Materiality will be determined on a case-by-case basis;

(2) Extend credit for any highly leveraged transaction. A highly leveraged transaction means an extension of credit to or investment in a business by an insured depository institution where the financing transaction involves a buyout, acquisition, or recapitalization of an existing business and one of the following criteria is met:

(i) The transaction results in a liabilities-to-assets leverage ratio higher than 75 percent; or

(ii) The transaction at least doubles the subject company's liabilities and results in a liabilities-to-assets leverage ratio higher than 50 percent; or

(iii) The transaction is designated an highly leverage transaction by a syndication agent or a federal bank regulator.

(iv) Loans and exposures to any obligor in which the total financing package, including all obligations held by all participants is $20 million or more, or such lower level as the FDIC may establish by order on a case-by-case basis, will be excluded from this definition.

(3) Amend the institution's charter or bylaws, except to the extent necessary to carry out any other requirement of any law, regulation, or order;

(4) Make any material change in accounting methods;

(5) Engage in any covered transaction (as defined in section 23A(b) of the Federal Reserve Act (12 U.S.C. 371c(b));

(6) Pay excessive compensation or bonuses. Part 364 of this chapter provides guidance for determining excessive compensation; or

(7) Pay interest on new or renewed liabilities at a rate that would increase the institution's weighted average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in the institution's normal market area. Section 337.6 of this chapter (Brokered deposits) provides guidance for defining the relevant terms of this provision; however

this provision does not supersede the general prohibitions contained in § 337.6.

[67 FR 79247, Dec. 27, 2002, as amended at 78 FR 55470, Sept. 10, 2013]

§§ 303.208–303.219 [Reserved]

Subpart L—Section 19 of the FDI Act (Consent to Service of Persons Convicted of, or Who Have Program Entries for, Certain Criminal Offenses)

SOURCE: 85 FR 51319, Aug. 20, 2020, unless otherwise noted.

§ 303.220 What is section 19 of the FDI Act?

(a) This subpart covers applications under section 19 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1829. Under section 19, any person who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering, or has agreed to enter into a pretrial diversion or similar program (program entry) in connection with a prosecution for such offense, may not become, or continue as, an institution-affiliated party (IAP) of an insured depository institution (IDI); own or control, directly or indirectly, any IDI; or otherwise participate, directly or indirectly, in the conduct of the affairs of any IDI without the prior written consent of the FDIC.

(b) In addition, the law bars an IDI from permitting such a person to engage in any conduct or to continue any relationship prohibited by section 19. IDIs should therefore make a reasonable inquiry regarding an applicant's history to ensure that a person who has a conviction or program entry covered by the provisions of section 19 is not hired or permitted to participate in its affairs without the written consent of the FDIC issued under this subpart. FDIC-supervised IDIs may extend a conditional offer of employment contingent on the completion of a background check satisfactory to the institution and to determine if the applicant is barred under section 19, but the job applicant may not work for, be employed by, or otherwise participate in the affairs of the IDI until the IDI has determined that the applicant is not barred under section 19.

(c) If there is a conviction or program entry covered by the bar of section 19, an application under this subpart must be filed seeking the FDIC's consent to become, or to continue as, an IAP; to own or control, directly or indirectly, an IDI; or to otherwise participate, directly or indirectly, in the affairs of the IDI. The application must be filed, and consented to, prior to serving in any of the foregoing capacities unless such application is not required under the subsequent provisions of this subpart. The purpose of an application is to provide the applicant an opportunity to demonstrate that, notwithstanding the bar, a person is fit to participate in the conduct of the affairs of an IDI without posing a risk to its safety and soundness or impairing public confidence in that institution. The burden is upon the applicant to establish that the application warrants approval.

§ 303.221 Who is covered by section 19?

(a) Section 19 covers IAPs, as defined by 12 U.S.C. 1813(u), and others who are participants in the conduct of the affairs of an IDI. Therefore, all employees of an IDI that fall within the scope of section 19, including de facto employees, as determined by the FDIC based upon generally applicable standards of employment law, will also be subject to section 19. Whether other persons who are not IAPs are covered depends upon their degree of influence or control over the management or affairs of an IDI. In the context of the FDIC's application of section 19, coverage would apply to an IDI's holding company's directors and officers to the extent that they have the power to define and direct the management or affairs of an IDI. Similarly, directors and officers of affiliates, subsidiaries or joint ventures of an IDI or its holding company will be covered if they participate in the affairs of the IDI or are in a position to influence or control the management or affairs of the insured institution. Typically, an independent contractor does not have a relationship with the IDI other than the activity for which the institution has contracted. An independent contractor who influences or controls the management or

affairs of the IDI would be covered by section 19.

(b) The term ''person,'' for purposes of section 19, means an individual, and does not include a corporation, firm, or other business entity.

(c) Individuals who file an application with the FDIC under the provisions of section 19 who also seek to participate in the affairs of a bank holding company or savings and loan holding company may have to comply with any filing requirements of the Board of the Governors of the Federal Reserve System under 12 U.S.C. 1829(d) and (e).

(d) Section 19 specifically prohibits a person subject to its provisions from owning or controlling an IDI. The terms ''control'' and ''ownership'' under section 19 shall have the meaning given to the term ''control'' in the Change in Bank Control Act (12 U.S.C. 1817(j)(8)(B)). A person will be deemed to exercise ''control'' if that person has the power to vote 25 percent or more of the voting shares of an IDI (or 10 percent of the voting shares if no other person has more shares) or the ability to direct the management or policies of the institution. Under the same standards, a person will be deemed to ''own'' an IDI if that person owns 25 percent or more of the institution's voting stock, or 10 percent of the voting shares if no other person owns more. These standards would also apply to an individual acting in concert with others so as to have such ownership or control. Absent the FDIC's consent, persons subject to the prohibitions of section 19 will be required to divest their control or ownership of shares above the foregoing limits.

§ 303.222 What offenses are covered under section 19?

(a) The conviction or program entry must be for a criminal offense involving dishonesty, breach of trust, or money laundering. ''Dishonesty'' means directly or indirectly to cheat or defraud, to cheat or defraud for monetary gain or its equivalent, or wrongfully to take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and includes offenses that Federal, state or local laws define as dishonest. ''Breach of trust'' means a wrongful act, use, misappropriation, or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation, or omission.

(b) Whether a crime involves dishonesty, breach of trust, or money laundering will be determined from the statutory elements of the offense itself or from court determinations that the statutory provisions of the offense involve dishonesty, breach of trust, or money laundering.

(c) All convictions or program entries for offenses concerning the illegal manufacture, sale, distribution of, or trafficking in controlled substances shall require an application unless no application is required under this subpart. Convictions or program entries for criminal offenses involving the simple possession of a controlled substance are not covered under section 19.

§ 303.223 What constitutes a conviction under section 19?

(a) *Convictions requiring an application.* There must be a conviction of record. Section 19 does not cover arrests or pending cases not brought to trial, unless the person has a program entry as set out in § 303.224. Section 19 does not cover acquittals or any conviction that has been reversed on appeal, unless the reversal was for the purpose of re-sentencing. A conviction with regard to which an appeal is pending requires an application. A conviction for which a pardon has been granted will require an application.

(b) *Convictions not requiring an application.* When an individual is charged with a covered offense and, in the absence of a program entry as set out in § 303.224, is subsequently convicted of an offense that is not a covered offense, the conviction is not subject to section 19.

(c) *Expungements.* If an order of expungement or an order to seal has been issued in regard to a conviction, or if a record has been otherwise expunged by operation of law, then the conviction shall not be considered a

conviction of record and shall not require an application.

(d) *Youthful offenders.* An adjudication by a court against a person as a ''youthful offender'' under any youth-offender law applicable to minors as defined by state law, or any judgment as a ''juvenile delinquent'' by any court having jurisdiction over minors as defined by state law, does not require an application. Such an adjudication does not constitute a matter covered under section 19 and is not a conviction or program entry for determining the applicability of § 303.227.

§ 303.224 What constitutes a pretrial diversion or similar program (program entry) under section 19?

(a) A program entry is characterized by a suspension or eventual dismissal or reversal of charges or criminal prosecution upon agreement, whether formal or informal, by the accused to treatment, rehabilitation, restitution, or other non-criminal or non-punitive alternatives. Whether the outcome of a case constitutes a program entry is determined by relevant Federal, State, or local law, and, if not so designated under applicable law, then the determination of whether a disposition is a program entry will be made by the FDIC on a case-by-case basis. Program entries prior to November 29, 1990, are not covered by section 19.

(b) When a covered offense either is reduced by a program entry to an offense that would otherwise not be covered by section 19 or is dismissed upon successful completion of a program entry, the covered offense remains a covered offense for purposes of section 19. The covered offense will require an application unless it is *de minimis* as provided by § 303.227 of this subpart.

(c) Expungements or sealings of program entries will be treated the same as those for convictions.

§ 303.225 What are the types of applications that can be filed?

(a*) Institution filing requirement (bank-sponsored applications).* Applications are required to be filed by the IDI, which intends for a person covered by the provisions of section 19 to participate in its affairs. Bank-sponsored applications shall be filed with the appropriate FDIC Regional Office, as required by this subpart.

(b) *Waiver applications.* If an IDI does not file an application regarding an individual, the individual may file a request for a waiver of the institution filing requirement. Such a waiver application shall be filed with the appropriate FDIC Regional Office and shall set forth substantial good cause why the application should be granted.

§ 303.226 When must an application be filed?

Except for situations in which no application is required under this subpart, an application must be filed when there is present a conviction by a court of competent jurisdiction for a covered offense by any adult or minor treated as an adult, or when such person has a program entry regarding that offense. Before an application is considered by the FDIC, all of the sentencing requirements associated with a conviction, or conditions imposed by the program entry, including but not limited to, imprisonment, fines, condition of rehabilitation, and probation requirements, must be completed, and the case must be considered final by the procedures of the applicable jurisdiction. The FDIC's application forms as well as additional information concerning section 19 can be accessed at the FDIC's regional offices or on the FDIC's website.

§ 303.227 When is an application not required for a covered offense or program entry (de minimis offenses)?

(a) *In general.* Approval is automatically granted and an application will not be required where all of the following *de minimis* criteria are met.

(1) The individual has been convicted of, or has program entries for, no more than two covered offenses, including those subject to paragraph (b) of this section; and for each covered offense, all of the sentencing requirements associated with the conviction, or conditions imposed by the program entry, have been completed (the sentence- or program-completion requirement does *not* apply under paragraphs (b)(2) and (4) of this section);

(2) Each covered offense was punishable by imprisonment for a term of one

year or less and/or a fine of $2,500 or less, and the individual served three days or less of jail time for each covered offense. The FDIC considers jail time to include any significant restraint on an individual's freedom of movement which includes, as part of the restriction, confinement to a specific facility or building on a continuous basis where the person may leave temporarily only to perform specific functions or during specified times periods or both. Jail time includes confinement to a psychiatric treatment center in lieu of a jail, prison, or house of correction on mental-competency grounds. The definition is *not* intended to include any of the following:

(i) Persons on probation or parole who may be restricted to a particular jurisdiction, or who must report occasionally to an individual or to a specified location;

(ii) Persons who are restricted to a substance-abuse treatment program facility for part or all of the day; and

(iii) Persons who are ordered to attend outpatient psychiatric treatment;

(3) If there are two convictions or program entries for a covered offense, each conviction or program entry was entered at least three years prior to the date an application would otherwise be required, except as provided in paragraph (b)(1) of this section; and

(4) Each covered offense was not committed against an IDI or insured credit union.

(b) *Other types of offenses for which the* de minimis *exception applies and no application is required*—(1) *Age of person at time of covered offense*. If there are two convictions or program entries for a covered offense, and the actions that resulted in both convictions or program entries all occurred when the individual was 21 years of age or younger, then the *de minimis* criteria in paragraph (a)(3) of this section shall be met if the convictions or program entries were entered at least 18 months prior to the date an application would otherwise be required.

(2) *Convictions or program entries for insufficient funds checks*. Convictions or program entries of record based on the writing of ''bad'' or insufficient funds check(s) shall be considered *de minimis* offenses under this provision if the following conditions apply:

(i) The aggregate total face value of all ''bad'' or insufficient funds check(s) cited across all the conviction(s) or program entry(ies) for ''bad'' or insufficient funds checks is $1,000 or less;

(ii) No IDI or insured credit union was a payee on any of the ''bad'' or insufficient funds checks that were the basis of the conviction(s) or program entry(ies); and

(iii) The individual has no more than one other *de minimis* offense under this section.

(3) *Convictions or program entries for small-dollar, simple theft*. Convictions or program entries based on the simple theft of goods, services, or currency (or other monetary instrument) shall be considered *de minimis* offenses under this provision if the following conditions apply. Simple theft excludes burglary, forgery, robbery, identity theft, and fraud.

(i) The value of the currency, goods, or services taken is $1,000 or less;

(ii) The theft was not committed against an IDI or insured credit union;

(iii) The individual has no more than one other *de minimis* offense under this section; and

(iv) If there are two *de minimis* offenses under this section, each conviction or program entry was entered at least three years prior to the date an application would otherwise be required, or at least 18 months prior to the date an application would otherwise be required if the actions that resulted in the conviction or program entry all occurred when the individual was 21 years of age or younger.

(4) *Convictions or program entries for the use of a fake, false, or altered identification*. A conviction or program entry for the creation or possession of a fake, false, or altered form of identification by a person under the age of 21, or the use of a fake, false, or altered form of identification by such a person to circumvent age-based restrictions on purchases, activities, or premises entry, shall be considered a *de minimis* offense under this provision if the following conditions apply.

(i) The individual has no more than one other *de minimis* offense under this section; and

(ii) If there are two *de minimis* offenses under this section, each conviction or program entry was entered at least three years prior to the date an application would otherwise be required; or at least 18 months prior to the date an application would otherwise be required if the actions that resulted in the conviction or program entry all occurred when the individual was 21 years of age or younger.

(c) *Fidelity bond coverage and disclosure to institutions.* Any person who meets the criteria under this section shall be covered by a fidelity bond to the same extent as others in similar positions, and shall disclose the presence of the conviction(s) or program entry(ies) to all IDIs in the affairs of which he or she intends to participate.

(d) *Non-qualifying convictions or program entries.* No conviction or program entry for a violation of the Title 18 sections set out in 12 U.S.C. 1829(a)(2) can qualify under any of the *de minimis* exceptions set out in this section.

§ 303.228 How to file an application.

Forms and instructions should be obtained from the FDIC's website (*www.fdic.gov*), and the application must be filed with the appropriate FDIC Regional Director. The application must be filed by an IDI on behalf of a person (bank-sponsored) unless the FDIC grants a waiver of that requirement (individual waiver). Individual waivers will be considered on a case-by-case basis where substantial good cause for granting a waiver is shown. A person may request an individual waiver and file an application on her or his own behalf within the same application. The appropriate Regional Office for a bank-sponsored application is the office covering the state where the IDI's home office is located. The appropriate Regional Office for an individual filing for a waiver of the institution filing requirement is the office covering the state where the person resides. States covered by each FDIC Regional Office can be located on the FDIC's website.

§ 303.229 How an application is evaluated.

(a) The ultimate determinations in assessing an application are whether the person has demonstrated his or her fitness to participate in the conduct of the affairs of an IDI, and whether the affiliation, ownership, control, or participation by the person in the conduct of the affairs of the institution may constitute a threat to the safety and soundness of the institution or the interests of its depositors or threaten to impair public confidence in the institution. In determining the degree of risk, the FDIC will consider:

(1) Whether the conviction or program entry is for a criminal offense involving dishonesty, breach of trust, or money laundering and the specific nature and circumstances of the offense;

(2) Whether the participation directly or indirectly by the person in any manner in the conduct of the affairs of the IDI constitutes a threat to the safety and soundness of the institution or the interests of its depositors or threatens to impair public confidence in the institution;

(3) Evidence of rehabilitation including the person's age at the time of the covered offense, the amount of time that has elapsed since the occurrence of the conviction or program entry, and the person's employment history and full legal history;

(4) The position to be held or the level of participation by the person at an IDI;

(5) The amount of influence the person will be able to exercise over the operation, management, or affairs of an IDI;

(6) The ability of management of the IDI to supervise and control the person's activities;

(7) The level of ownership or control the person will have at an insured depository institution;

(8) The applicability of the IDI's fidelity bond coverage to the person; and

(9) Any additional factors in the specific case that appear relevant to the application or the applicant including, but not limited to, the opinion or position of the primary Federal or State regulator.

(b) The question of whether a person, who was convicted of a crime or who agreed to a program entry, was guilty of that crime shall not be at issue in a proceeding under this subpart or under 12 CFR part 308, subpart M.

(c) The foregoing factors will also be applied by the FDIC to determine whether the interests of justice are served in seeking an exception in the appropriate court when an application is made to terminate the ten-year ban prior to its expiration date under 12 U.S.C. 1829(a)(2) for certain Federal offenses.

(d) All approvals and orders will be subject to the condition that the person be covered by a fidelity bond to the same extent as others in similar positions. In cases in which a waiver of the institution filing requirement has been granted to an individual, approval of the application will also be conditioned upon that person disclosing the presence of the conviction(s) or program entry(ies) to all IDIs in the affairs of which he or she wishes to participate.

(e) When deemed appropriate, bank-sponsored applications are to allow the person to work in a specific job at a specific bank and may also be subject to the additional conditions, including that the prior consent of the FDIC will be required for any proposed significant changes in the person's duties or responsibilities. In the case of bank-sponsored applications, such proposed changes may, in the discretion of the Regional Director, require a new application.

(f) In situations in which an approval has been granted for a person to participate in the affairs of a particular IDI and the person subsequently seeks to participate at another IDI, another application must be submitted and approved by the FDIC prior to the person participating in the affairs of the other IDI.

§ 303.230 What will the FDIC do if the application is denied?

(a) The FDIC will inform the applicant in writing that the application has been denied and summarize or cite the relevant considerations specified in § 303.229 of this subpart.

(b) The denial will also notify the applicant that a written request for a hearing under 12 CFR part 308, subpart M, may be filed with the Executive Secretary within 60 days after the denial. The request for a hearing must include the relief desired, the grounds supporting the request for relief, and any supporting evidence.

§ 303.231 Waiting time for a subsequent application if an application is denied.

An application under section 19 may be made in writing at any time more than one year after the issuance of a decision denying an application under section 19. If the original denial is subject to a request for a hearing, then the subsequent application may be filed at any time more than one year after the decision of the Board of Directors, or its designee, denying the application. The prohibition against participating in the affairs of an IDI under section 19 shall continue until the individual has been granted consent in writing to participate in the affairs of an IDI by the Board of Directors or its designee.

Subpart M—Other Filings

§ 303.240 General.

This subpart sets forth the filing procedures to be followed when seeking the FDIC's consent to engage in certain activities or accomplish other matters as specified in the individual sections contained herein. For those matters covered by this subpart that also have substantive FDIC regulations or related statements of policy, references to the relevant regulations or statements of policy are contained in the specific sections.

§ 303.241 Reduce or retire capital stock or capital debt instruments.

(a) *Scope*—(1) *Insured State nonmember banks*. The procedures contained in this section are to be followed by an insured State nonmember bank to seek the prior approval of the FDIC to reduce the amount or retire any part of its common or preferred stock, or to retire any part of its capital notes or debentures pursuant to section 18(i)(1) of the FDI Act (12 U.S.C. 1828(i)(1)).

(2) *Insured State savings associations*. The procedures contained in this section are to be followed by an insured State savings association to seek the prior approval of the FDIC to reduce the amount or retire any part of its common or preferred stock, or to retire

any part of its capital notes or debentures, as if the insured State savings association were a State nonmember bank subject to section 18(i)(1) of the Act (12 U.S.C. 1828(i)(1)).

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

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

(1) The type and amount of the proposed change to the capital structure and the reason for the change;

(2) A schedule detailing the present and proposed capital structure;

(3) The time period that the proposal will encompass;

(4) If the proposal involves a series of transactions affecting Tier 1 capital components which will be consummated over a period of time which shall not exceed twelve months, the application shall certify that the insured depository institution will maintain itself as a well-capitalized institution as defined in part 324 of this chapter both before and after each of the proposed transactions;

(5) If the proposal involves the repurchase of capital instruments, the amount of the repurchase price and the basis for establishing the fair market value of the repurchase price;

(6) A statement that the proposal will be available to all holders of a particular class of outstanding capital instruments on an equal basis, and if not, the details of any restrictions; and

(7) The date that the applicant's board of directors approved the proposal.

(d) *Additional information.* The FDIC may request additional information at any time during processing of the application.

(e) *Undercapitalized institutions.* Procedures regarding applications by an undercapitalized insured depository institution to retire capital stock or capital debt instruments pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*) are set forth in subpart K (Prompt Corrective Action), § 303.203. Applications pursuant to section 38 and this section should be filed concurrently, or as a single application.

(f) *Expedited processing for eligible depository institutions.* An application filed under this section by an eligible depository institution as defined in § 303.2(r) will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, an application processed under expedited processing will be deemed approved 20 days after the FDIC's receipt of a substantially complete application.

(g) *Standard processing.* For those applications that are not processed pursuant to expedited procedures, the FDIC will provide the applicant with written notification of the final action as soon as the decision is rendered.

[67 FR 79247, Dec. 27, 2002, as amended at 78 FR 55470, Sept. 30, 2013; 83 FR 17739, Apr. 24, 2018; 85 FR 3245, Jan. 21, 2020]

§ 303.242 Exercise of trust powers.

(a) *Scope.* This section contains the procedures to be followed by a State nonmember bank or State savings association that seeks to obtain the FDIC's prior written consent to exercise trust powers. The FDIC's prior written consent to exercise trust powers is not required in the following circumstances:

(1) Where a State nonmember bank or State savings association received authority to exercise trust powers from its chartering authority prior to December 1, 1950; or

(2) Where the institution continues to conduct trust activities pursuant to authority granted by its chartering authority subsequent to a charter conversion or withdrawal from membership in the Federal Reserve System.

(b) *Where to file.* Applicants shall submit to the appropriate FDIC office a completed form, ''Application for Consent to Exercise Trust Powers.'' This form may be obtained from any FDIC regional director.

(c) *Content of filing.* The filing shall consist of the completed trust application form.

(d) *Additional information.* The FDIC may request additional information at any time during processing of the filing.

(e) *Expedited processing for eligible depository institutions.* An application filed under this section by an eligible depository institution as defined in § 303.2(r) will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2.). Absent such removal, an application processed under expedited procedures will be deemed approved 30 days after the FDIC's receipt of a substantially complete application.

(f) *Standard processing.* For those applications that are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action when the decision is rendered.

[83 FR 60337, Nov. 26, 2018]

§ 303.243 Brokered deposits.

(a) *Brokered deposit waivers*—(1) *Scope.* Pursuant to section 29 of the FDI Act (12 U.S.C. 1831f) and part 337 of this chapter, an adequately capitalized insured depository institution may not accept, renew or roll over any brokered deposits unless it has obtained a waiver from the FDIC. A well-capitalized insured depository institution may accept brokered deposits without a waiver, and an undercapitalized insured depository institution may not accept, renew or roll over any brokered deposits under any circumstances. This section contains the procedures to be followed to file with the FDIC for a brokered deposit waiver. The FDIC will provide notice to the depository institution's appropriate federal banking agency and any state regulatory agency, as appropriate, that a request for a waiver has been filed and will consult with such agency or agencies, prior to taking action on the institution's request for a waiver. Prior notice and/or consultation shall not be required in any particular case if the FDIC determines that the circumstances require it to take action without giving such notice and opportunity for consultation.

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

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

(i) The time period for which the waiver is requested;

(ii) A statement of the policy governing the use of brokered deposits in the institution's overall funding and liquidity management program;

(iii) The volume, rates and maturities of the brokered deposits held currently and anticipated during the waiver period sought, including any internal limits placed on the terms, solicitation and use of brokered deposits;

(iv) How brokered deposits are costed and compared to other funding alternatives and how they are used in the institution's lending and investment activities, including a detailed discussion of asset growth plans;

(v) Procedures and practices used to solicit brokered deposits, including an identification of the principal sources of such deposits;

(vi) Management systems overseeing the solicitation, acceptance and use of brokered deposits;

(vii) A recent consolidated financial statement with balance sheet and income statements; and

(viii) The reasons the institution believes its acceptance, renewal, or rollover of brokered deposits would pose no undue risk.

(4) *Additional information.* The FDIC may request additional information at any time during processing of the application.

(5) *Expedited processing for eligible depository institutions.* An application filed under this section by an eligible depository institution as defined in this paragraph will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. For the purpose of this section, an applicant will be deemed an eligible depository institution if it satisfies all of the criteria contained in § 303.2(r) except that the applicant may be adequately capitalized rather than well-capitalized. The FDIC may remove an application from expedited processing for any of the reasons set forth

in § 303.11(c)(2). Absent such removal, an application processed under expedited procedures will be deemed approved 21 days after the FDIC's receipt of a substantially complete application.

(6) *Standard processing.* For those filings which are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action as soon as the decision is rendered.

(7) *Conditions for approval.* A waiver issued pursuant to this section shall:

(i) Be for a fixed period, generally no longer than two years, but may be extended upon refiling; and

(ii) May be revoked by the FDIC at any time by written notice to the institution.

(b) *Primary purpose exception notices and applications*—(1) *Scope.* This section sets forth a process for an agent or nominee, or an insured depository institution on behalf of an agent or nominee, to notify the FDIC that it will rely upon a designated exception in § 337.6(a)(5)(v)(I)(*1*)(*i*) and (*ii*) of this chapter. This section also sets forth a process for an agent or nominee, or an insured depository institution on behalf of an agent or nominee, to apply for the primary purpose exception, as described in § 337.6(a)(5)(v)(I)(*2*) of this chapter.

(2) *Definitions.* For purposes of this paragraph (b):

(i) *Third party* means an agent or nominee that submits a notice that it will rely upon a designated exception in § 337.6(a)(5)(v)(I)(*1*)(*i*) and (*ii*) of this chapter or applies to be excluded from the definition of deposit broker pursuant to the primary purpose exception as described in § 337.6(a)(5)(v)(I)(*2*) of this chapter.

(ii) *Notice filer* means a third party or an insured depository institution on behalf of a third party, that submits a written notice that the third party will rely upon a designated business exception in § 337.6(a)(5)(v)(I)(*1*)(*i*) and (*ii*) of this chapter.

(iii) *Applicant* means a third party, or an insured depository institution on behalf of a third party, that applies to be excluded from the definition of deposit broker pursuant to the primary purpose exception, as described in § 337.6(a)(5)(v)(I)(*2*) of this chapter.

(3) *Notice requirement for designated business exceptions.* A third party, or an insured depository institution on behalf of a third party, must notify the FDIC through a written notice that the third party will rely upon a designated business exception described in § 337.6(a)(5)(v)(I)(*1*)(*i*) and (*ii*) of this chapter in order to rely on that designated business exception.

(i) *Contents of notice.* The notice must include: The designated exception upon which the third party will rely; a brief description of the business line; the applicable specific contents for the designated exception; either a statement that there is no involvement of any additional third party who qualifies as a deposit broker or a brief description of any additional third party that may qualify as a deposit broker; and if the notice is provided by a nonbank third party, a list of the insured depository institutions that are receiving deposits by or through the particular business line. The applicable specific contents for the following designated exceptions are:

(A) *25 percent test (as described in § 337.6(a)(5)(v)(I)(1)(i) of this chapter).* (*1*) The total amount of customer assets under administration by the third party for that particular business line; and

(*2*) The total amount of deposits placed by the third party on behalf of its customers, for that particular business line, at all depository institutions, being placed by that third party.

(B) *Enabling transactions test (as described in § 337.6(a)(5)(v)(I)(1)(ii) of this chapter).* (*1*) Contractual evidence that there is no interest, fees, or other remuneration, being paid to any customer accounts; and

(*2*) A certification that all customer deposits that are placed at insured depository institutions are in transaction accounts.

(ii) *Additional information for notices.* The FDIC may request additional information from the notice filer at any time after receipt of the notice.

(iii) *Additional notice filers.* The FDIC may include notice and/or reporting requirements as part of a designated exception identified under § 337.6(a)(5)(v)(I)(*2*)(*xiv*) of this chapter.

(iv) *Subsequent notices.* A notice filer that previously submitted a notice under this section shall submit a subsequent notice to the FDIC if, at any point, the notice filer no longer meets the designated business exception that was the subject of its previous notice.

(v) *Ongoing requirements for notice filers.* Notice filers that submit a notice under *the 25 percent test* must provide quarterly updates to the FDIC on the figures described in paragraph (b)(3)(i)(A) of this section that were provided as part of the written notice. Notice filers that submit a notice under *the enabling transactions test* must provide an annual certification to the FDIC that the third party continues to place all customer funds at insured depository institutions into transaction accounts and that customers do not receive any interest, fees, or other remuneration.

(vi) *Revocation of primary purpose exception.* The FDIC may, with notice, revoke a primary purpose exception of a third party, or a person required to submit a notice under paragraph (b)(3)(iii) of this section, that qualifies for the primary purpose exception due to reliance on a designated exception, if:

(A) The third party no longer meets the criteria for a designated exception;

(B) The notice or subsequent reporting is inaccurate; or

(C) The notice filer fails to submit required reports.

(4) *Application requirements.* A third party, or an insured depository institution on behalf of a third party, may submit an application to the FDIC seeking a primary purpose exception for business relationships not designated in § 337.6(a)(5)(v)(I)(*1*) of this chapter.

(i) *For applications for primary purpose exception to enable transactions with fees, interest, or other remuneration provided to the depositor.* Applicants that seek the primary purpose exception where customer funds that are placed at depository institutions are placed into transaction accounts, and fees, interest, or other remuneration are provided to the depositor, must include the following information, with respect to the particular business line:

(A) Contractual evidence on the amount of interest, fees, or other remuneration, being paid on customer accounts;

(B) Any marketing materials provided by the third party to insured depository institutions or its customers;

(C) The average number of transactions for all customer accounts, and an explanation of how its customers utilize its services for the purpose of making payments and not for the receipt of a deposit placement service or deposit insurance;

(D) The percentage of customer funds placed in deposit accounts that are not transaction accounts;

(E) A description of any additional third parties that provide assistance with the placement of deposits at insured depository institutions; and

(F) Any other information that the FDIC requires to initiate its review and render the application complete.

(ii) *For applications for primary purpose exception not covered by paragraph (b)(4)(i) of this section.* Applicants that seek the primary purpose exception, other than applications under paragraph (b)(4)(i) of this section, must include, to the extent applicable:

(A) A description of the deposit placement arrangements between the third party and insured depository institutions for the particular business line, including the services provided by any relevant third parties;

(B) A description of the particular business line;

(C) A description of the primary purpose of the particular business line;

(D) The total amount of customer assets under management by the third party, with respect to the particular business line;

(E) The total amount of deposits placed by the third party at all insured depository institutions, including the amounts placed with the applicant, if the applicant is an insured depository institution, with respect to the particular business line. This includes the total amount of term deposits and transactional deposits placed by the third party, but should be exclusive of

the amount of brokered CDs, as defined in § 337.6(a)(5)(v)(I)(*3*) of this chapter, being placed by that third party;

(F) Revenue generated from the third party's activities related to the placement, or facilitating the placement, of deposits, with respect to the particular business line;

(G) Revenue generated from the third party's activities not related to the placement, or facilitating the placement, of deposits, with respect to the particular business line;

(H) A description of the marketing activities provided by the third party, with respect to the particular business line;

(I) The reasons the third party meets the primary purpose exception;

(J) Any other information the applicant deems relevant; and

(K) Any other information that the FDIC requires to initiate its review and render the application complete.

(iii) *Additional information for applications*. The FDIC may request additional information from the applicant at any time during processing of the application.

(iv) *Application timing*. (A) An applicant that submits a complete application under this section will receive a written determination by the FDIC within 120 days of receipt of a complete application.

(B) If an application is submitted that is not complete, the FDIC will, within 45 days of submission, notify the applicant and explain what is needed to render the application complete.

(C) The FDIC may extend the 120-day timeframe, if necessary, to complete its review of a complete application, with notice to the applicant, for a maximum of 120 additional days.

(v) *Application approvals*. The FDIC will approve an application—

(A) Submitted under paragraph (b)(4)(i) of this section if the FDIC finds that the third party's marketing materials indicate that the primary purpose of placing customer deposits at insured depository institutions is to enable transactions, and:

(*1*) Nominal interest, fees, or other remuneration is being paid on any customer accounts, or

(*2*) The third party's customers make, on average, more than 6 transactions a month.

(B) Submitted under paragraph (b)(4)(ii) of this section if the FDIC finds that the applicant demonstrates that, with respect to the particular business line under which the third party places or facilitates the placement of deposits, the primary purpose of the third party's business relationship with its customers is a purpose other than the placement or facilitation of the placement of deposits.

(vi) *Ongoing reporting for applications*. (A) The FDIC will describe any reporting requirements, if applicable, as part of its written approval for a primary purpose exception.

(B) Applicants that receive a written approval for the primary purpose exception, shall provide reporting to the FDIC and, in the case of an insured depository institution, to its primary Federal regulator, if required under this section.

(vii) *Requesting additional information, requiring re-application, imposing additional conditions, and withdrawing approvals*. At any time after approval of an application for the primary purpose exception, the FDIC may at its discretion, with written notice and adequate justification:

(A) Require additional information from an applicant to ensure that the approval is still appropriate, or for purposes of verifying the accuracy and correctness of the information provided to an insured depository institution or submitted to the FDIC as part of the application under this section;

(B) Require the applicant to reapply for approval;

(C) Impose additional conditions on an approval; or

(D) Withdraw an approval.

[86 FR 6787, Jan. 22, 2021]

§ 303.244 Golden parachute and severance plan payments.

(a) *Scope*. Pursuant to section 18(k) of the FDI Act (12 U.S.C. 1828(k)) and part 359 of this chapter, an insured depository institution or depository institution holding company may not make golden parachute payments or excess nondiscriminatory severance plan payments unless the depository institution

or holding company obtains permission to make such payments in accordance with the rules contained in part 359 of this chapter. This section contains the procedures to file for the FDIC's consent when such consent is necessary under part 359 of this chapter.

(1) *Golden parachute payments.* A troubled insured depository institution or a troubled depository institution holding company is prohibited from making golden parachute payments (as defined in § 359.1(f)(1) of this chapter) unless it obtains the consent of the appropriate federal banking agency and the written concurrence of the FDIC. Therefore, in the case of golden parachute payments, the procedures in this section apply to all troubled insured depository institutions and troubled depository institution holding companies.

(2) *Excess nondiscriminatory severance plan payments.* In the case of excess nondiscriminatory severance plan payments as provided by § 359.1(f)(2)(v) of this chapter, the FDIC's consent is necessary for state nonmember banks that meet the criteria set forth in § 359.1(f)(1)(ii) of this chapter. In addition, the FDIC's consent is required for all insured depository institutions or depository institution holding companies that meet the same criteria and seek to make payments in excess of the 12-month amount specified in § 359.1(f)(2)(v).

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

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

(1) The reasons why the applicant seeks to make the payment;

(2) An identification of the institution-affiliated party who will receive the payment;

(3) A copy of any contract or agreement regarding the subject matter of the filing;

(4) The cost of the proposed payment and its impact on the institution's capital and earnings;

(5) The reasons why the consent to the payment should be granted; and

(6) Certification and documentation as to each of the points cited in § 359.4(a)(4).

(d) *Additional information.* The FDIC may request additional information at any time during processing of the filing.

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

[67 FR 79247, Dec. 27, 2002, as amended at 68 FR 50461, Aug. 21, 2003]

§ 303.245 Waiver of liability for commonly controlled depository institutions.

(a) *Scope.* Section 5(e) of the FDI Act (12 U.S.C. 1815(e)) creates liability for commonly controlled insured depository institutions for losses incurred or anticipated to be incurred by the FDIC in connection with the default of a commonly controlled insured depository institution or any assistance provided by the FDIC to any commonly controlled insured depository institution in danger of default. In addition to certain statutory exceptions and exclusions contained in sections 5(e)(6), (7) and (8), the FDI Act also permits the FDIC, in its discretion, to exempt any insured depository institution from this liability if it determines that such exemption is in the best interests of the Deposit Insurance Fund. This section describes procedures to request a conditional waiver of liability pursuant to section 5 of the FDI Act (12 U.S.C. 1815(e)(5)(A)).

(b) *Definition.* Conditional waiver of liability means an exemption from liability pursuant to section 5(e) of the FDI Act (12 U.S.C. 1815(e)) subject to terms and conditions.

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

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

(1) The basis for requesting a waiver;

(2) The existence of any significant events (e.g., change in control, capital injection, etc.) that may have an impact upon the applicant and/or any potentially liable institution;

(3) Current, and if applicable, pro forma financial information regarding the applicant and potentially liable institution(s); and

(4) The benefits to the appropriate FDIC insurance fund resulting from the waiver and any related events.

(e) *Additional information*. The FDIC may request additional information at any time during the processing of the filing.

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

(g) *Failure to comply with terms of conditional waiver*. In the event a conditional waiver of liability is issued, failure to comply with the terms specified therein may result in the termination of the conditional waiver of liability. The FDIC reserves the right to revoke the conditional waiver of liability after giving the applicant written notice of such revocation and a reasonable opportunity to be heard on the matter pursuant to § 303.10.

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

§ 303.246 Conversion with diminution of capital.

(a) *Scope*. This section contains the procedures to be followed by an insured federal depository institution seeking the prior written consent of the FDIC pursuant to section 18(i)(2) of the FDI Act (12 U.S.C. 1828(i)(2)) to convert from an insured federal depository institution to an insured state nonmember bank (except a District bank) where the capital stock or surplus of the resulting bank will be less than the capital stock or surplus, respectively, of the converting institution at the time of the shareholders' meeting approving such conversion.

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

(c) *Content of filing*. The application shall contain the following information:

(1) A description of the proposed transaction;

(2) A schedule detailing the present and proposed capital structure; and

(3) A copy of any documents submitted to the state chartering authority with respect to the charter conversion.

(d) *Additional information*. The FDIC may request additional information at any time during the processing.

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

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

§ 303.247 Continue or resume status as an insured institution following termination under section 8 of the FDI Act.

(a) *Scope*. This section relates to an application by a depository institution whose insured status has been terminated under section 8 of the FDI Act (12 U.S.C. 1818) for permission to continue or resume its status as an insured depository institution. This section covers institutions whose deposit insurance continues in effect for any purpose or for any length of time under the terms of an FDIC order terminating deposit insurance, but does not cover operating non-insured depository institutions which were previously insured by the FDIC, or any non-insured, non-operating depository institution whose charter has not been surrendered or revoked.

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

(c) *Content of filing*. The filing shall contain the following information:

(1) A complete statement of the action requested, all relevant facts, and the reason for such requested action; and

(2) A certified copy of the resolution of the depository institution's board of directors authorizing submission of the filing.

(d) *Additional information*. The FDIC may request additional information at any time during processing of the filing.

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

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

§ 303.248 Truth in Lending Act—Relief from reimbursement.

(a) *Scope*. This section applies to requests for relief from reimbursement pursuant to the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) and Regulation Z (12 CFR part 226). Related delegations of authority are also set forth.

(b) *Procedures to be followed in filing initial requests for relief*. Requests for relief from reimbursement shall be filed with the appropriate FDIC office or within 60 days after receipt of the compliance report of examination containing the request to conduct a file search and make restitution to affected customers. The filing shall contain a complete and concise statement of the action requested, all relevant facts, the reasons and analysis relied upon as the basis for such requested action, and all supporting documentation.

(c) *Additional information*. The FDIC may request additional information at any time during processing of any such requests.

(d) *Processing*. The FDIC will acknowledge receipt of the request for reconsideration and provide the applicant with written notification of its determination within 60 days of its receipt of the request for reconsideration.

(e) *Procedures to be followed in filing requests for reconsideration*. Within 15 days of receipt of written notice that its request for relief has been denied, the requestor may petition the appropriate FDIC office for reconsideration of such request in accordance with the procedures set forth in§ 303.11(f).

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

§ 303.249 Management official interlocks.

(a) *Scope*. This section contains the procedures to be followed by an insured State nonmember bank or an insured State savings association to seek the approval of FDIC to establish an interlock pursuant to the Depository Institutions Management Interlocks Act (12 U.S.C. 3207), section 13 of the FDI Act (12 U.S.C. 1823(k)), and part 348 of this chapter.

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

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

(1) A description of the proposed interlock;

(2) A statement of reason as to why the interlock will not result in a monopoly or a substantial lessening of competition; and

(3) If the applicant is seeking an exemption set forth in § 348.6 of this chapter, a description of the particular exemption which is being requested and a statement of reasons as to why the exemption is applicable.

(d) *Additional information*. The FDIC may request additional information at any time during processing of the filing.

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

[67 FR 79247, Dec. 27, 2002. Redesignated at 71 FR 20526, Apr. 21, 2006; 84 FR 2706, Feb. 8, 2019; 86 FR 8097, Feb. 3, 2021]

§ 303.250 Modification of conditions.

(a) *Scope*. This section contains the procedures to be followed by an insured depository institution to seek the prior consent of the FDIC to modify the requirement of a prior approval of a filing issued by the FDIC.

(b) *Where to file*. Applicants should submit a letter application to the appropriate FDIC regional director.

(c) *Content of filing*. The application should contain the following information:

(1) A description of the original approved application;

(2) A description of the modification requested; and

(3) The reason for the request.

(d) *Additional information*. The FDIC may request additional information at any time during processing of the filing.

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

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

§ 303.251 Extension of time.

(a) *Scope*. This section contains the procedures to be followed by an insured depository institution to seek the prior

consent of the FDIC for additional time to fulfill a condition required in an approval of a filing issued by the FDIC or to consummate a transaction which was the subject of an approval by the FDIC.

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

(c) *Content of filing*. The application shall contain the following information:

(1) A description of the original approved application;

(2) Identification of the original time limitation;

(3) The additional time period requested; and

(4) The reason for the request.

(d) *Additional information*. The FDIC may request additional information at any time during processing of the filing.

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

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

§§ 303.252–303.259 [Reserved]

PART 304—FORMS, INSTRUCTIONS, AND REPORTS

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AUTHORITY: 5 U.S.C. 552; 12 U.S.C. 1464, 1817, 1831, 1867.

EFFECTIVE DATE NOTE: At 86 FR 66443, Nov. 23, 2021, the part 304 authority citation was revised, effective Apr. 1, 2022. For the convenience of the user, the revised text is set forth as follows:

AUTHORITY: 5 U.S.C. 552; 12 U.S.C. 1463, 1464, 1811, 1813, 1817, 1819, 1831, and 1861–1867.

SOURCE: 84 FR 29052, June 21, 2019, unless otherwise noted.

Subpart A—In General

§ 304.1 Purpose.

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

EFFECTIVE DATE NOTE: At 86 FR 66443, Nov. 23, 2021, § 304.1 was revised, effective Apr. 1, 2022. For the convenience of the user, the revised text is set forth as follows:

§ 304.1 Purpose.

This subpart informs the public where it may obtain forms and instructions for reports, applications, and other submittals used by the Federal Deposit Insurance Corporation (FDIC), and describes certain forms that are not described elsewhere in FDIC regulations in this chapter.

§ 304.2 Where to obtain forms and instructions.

Forms and instructions used in connection with applications, reports, and other submittals used by the FDIC can be obtained by contacting the FDIC Public Information Center (550 17th Street NW, Washington, DC 20429; telephone: (877) 275–3342 or (703) 562–2200), except as noted in § 304.3. In addition, many forms and instructions can be obtained from FDIC regional offices. A list of FDIC regional offices can be obtained from the FDIC Public Information Center, or found at the FDIC's website at *http://www.fdic.gov*, or in the directory of FDIC Law, Regulations, Related Acts published by the FDIC.

§ 304.3 Reports.

(a) *Consolidated Reports of Condition and Income, Forms FFIEC 031, 041, and 051*. Pursuant to section 7(a) of the Federal Deposit Insurance Act (12 U.S.C. 1817(a)) and other applicable law, every

insured depository institution is required to file Consolidated Reports of Condition and Income (also known as the Call Report) in accordance with the instructions for these reports. All assets and liabilities, including contingent assets and liabilities, must be reported in, or otherwise taken into account in the preparation of, the Call Report. The FDIC uses Call Report data from all insured depository institutions to calculate deposit insurance assessments and monitor the condition, performance, and risk profile of individual banks and the banking industry. Reporting banks must also submit annually such information on small business and small farm lending as the FDIC may need to assess the availability of credit to these sectors of the economy. The report forms and instructions can be obtained from the Division of Insurance and Research (DIR), FDIC, 550 17th Street NW, Washington, DC 20429 or through the website of the Federal Financial Institutions Examination Council, *http://www.ffiec.gov/*.

(b) *Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, Form FFIEC 002*. Pursuant to section 7(a) of the Federal Deposit Insurance Act (12 U.S.C. 1817(a)) and other applicable law, every insured U.S. branch of a foreign bank is required to file a Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks in accordance with the instructions for the report. All assets and liabilities, including contingent assets and liabilities, must be reported in, or otherwise taken into account in the preparation of the report. The FDIC uses the reported data to calculate deposit insurance assessments and monitor the condition, performance, and risk profile of individual insured branches and the banking industry. Insured branches must also submit annually such information on small business and small farm lending as the FDIC may need to assess the availability of credit to these sectors of the economy. Because the Board of Governors of the Federal Reserve System collects and processes this report on behalf of the FDIC, the report forms and instructions can be obtained from Federal Reserve District Banks or through the website of the Federal Financial Institutions Examination Council, *http://www.ffiec.gov/*.

(c) *Summary of Deposits, Form FDIC 8020/05*. Form 8020/05 is a report on the amount of deposits for each authorized office of an insured depository institution with branches; institutions with only a main office are exempt from reporting. Reports as of June 30 of each year must be submitted no later than the immediately succeeding July 31. The report forms and the instructions for completing the reports will be furnished to all such institutions by, or may be obtained upon request from, the Division of Insurance and Research (DIR), FDIC, 550 17th Street NW, Washington, DC 20429.

(d) *Notification of Performance of Bank Services, Form FDIC 6120/06*. Pursuant to section 7 of the Bank Service Company Act (12 U.S.C. 1867), as amended, FDIC-supervised institutions must notify the agency about the existence of a service relationship within thirty days after the making of the contract or the performance of the service, whichever occurs first. Form FDIC 6120/06 may be used to satisfy the notice requirement. The form contains identification, location, and contact information for the institution, the servicer, and a description of the services provided. In lieu of the form, notification may be provided by letter. Either the form or the letter containing the notice information must be submitted to the regional director—Division of Risk Management Supervision (RMS) of the region in which the institution's main office is located.

(Approved by the Office of Management and Budget under control numbers 3064–0052, 7100–0032, 3064–0061, and 3064–0029)

§§ 304.4–304.10 [Reserved]

Subpart B—Implementation of Reduced Reporting Requirement

AUTHORITY: 12 U.S.C. 1464(v), 1817(a), and 1819 Tenth.

§ 304.11 Authority, purpose, and scope.

(a) *Authority*. This subpart is issued pursuant to 12 U.S.C. 1464(v), and section 7 (12 U.S.C. 1817(a)(12)) and section

9 (12 U.S.C. 1819 Tenth) of the Federal Deposit Insurance Act.

(b) *Purpose*. This subpart implements 12 U.S.C. 1817(a)(12) to allow reduced reporting for a covered depository institution when such institution makes its reports of condition for the first and third calendar quarters of a year.

(c) *Scope*. This subpart applies to an insured depository institution, as that term is defined in section 3(c) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c), that meets the definition of a covered depository institution under § 304.12.

(d) *Preservation of authority*. Nothing in this subpart in any way limits the authority of the Corporation under other provisions of applicable law and regulation.

§ 304.12 Definitions.

(a) *Covered depository institution* means an insured depository institution, as such term is defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813, for which the Corporation is the appropriate Federal banking agency and that meets all of the following criteria:

(1) Has less than $5 billion in total consolidated assets as reported in its report of condition for the second calendar quarter of the preceding year;

(2) Has no foreign offices, as defined in this section;

(3) Is not required to or has not elected to use 12 CFR part 324, subpart E, to calculate its risk-based capital requirements;

(4) Is not a large institution or highly complex institution, as such terms are defined in 12 CFR 327.8, or treated as a large institution, as requested under 12 CFR 327.16(f); and

(5) Is not a state-licensed insured branch of a foreign bank, as such terms are defined in section 3(s) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(s).

(6) In determining whether an insured depository institution meets the asset threshold in paragraph (1) of the definition of ''covered depository institution'' in paragraph (a)(1) of this section, for purposes of a report required to be submitted for calendar year 2021, an insured depository institution may refer to the lesser of its total consolidated assets as reported in its report of condition as of December 31, 2019, and its total consolidated assets as reported in its report of condition for the second calendar quarter of 2020.

(b) *Foreign country* refers to one or more foreign nations, and includes the overseas territories, dependencies, and insular possessions of those nations and of the United States.

(c) *Foreign office* means:

(1) A branch or consolidated subsidiary in a foreign country, unless the branch is located on a U.S. military facility;

(2) An international banking facility as such term is defined in 12 CFR 204.8;

(3) A majority-owned Edge Act or Agreement subsidiary including both its U.S. and its foreign offices; and

(4) For an institution chartered or headquartered in any U.S. state or the District of Columbia, a branch or consolidated subsidiary located in a U.S. territory or possession.

(d) *Report of condition* means the FFIEC 031, FFIEC 041, or FFIEC 051 versions of the Consolidated Report of Condition and Income (Call Report) or the FFIEC 002 (Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks), as applicable, and as they may be amended or superseded from time to time in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

(e) *Total consolidated assets* means total assets as reported in an insured depository institution's report of condition.

[84 FR 29052, June 21, 2019, as amended at 85 FR 77363, Dec. 2, 2020]

§ 304.13 Reduced reporting.

A covered depository institution may file the FFIEC 051 version of the report of condition, or any successor thereto, which shall provide for reduced reporting for the reports of condition for the first and third calendar quarters for a year.

§ 304.14 Reservation of authority.

Notwithstanding § 304.13, the Corporation, in consultation with the applicable state chartering authority, may require an otherwise eligible covered depository institution to file the

FFIEC 041 version of the report of condition, or any successor thereto, based on an institution-specific determination. In making this determination, the Corporation may consider criteria including, but not limited to, whether the institution is significantly engaged in one or more complex, specialized, or other higher-risk activities, such as those for which limited information is reported in the FFIEC 051 version of the report of condition compared to the FFIEC 041 version of the report of condition. Nothing in this part shall be construed to limit the Corporation's authority to obtain information from insured depository institutions.

§§ 304.15–304.20 [Reserved]

Subpart C—Computer-Security Incident Notification

SOURCE: 86 FR 66443, Nov. 23, 2021, unless otherwise noted.

EFFECTIVE DATE NOTE: At 86 FR 66443, Nov. 23, 2021, subpart C was added, effective Apr. 1, 2022.

§ 304.21 Authority, purpose, and scope.

(a) *Authority*. This subpart is issued under the authority of 12 U.S.C. 1463, 1811, 1813, 1817, 1819, and 1861–1867.

(b) *Purpose*. This subpart promotes the timely notification of computer-security incidents that may materially and adversely affect FDIC-supervised institutions.

(c) *Scope*. This subpart applies to all insured state nonmember banks, insured state licensed branches of foreign banks, and insured State savings associations. This subpart also applies to bank service providers, as defined in § 304.22(b)(2).

§ 304.22 Definitions.

(a) Except as modified in this subpart, or unless the context otherwise requires, the terms used in this subpart have the same meanings as set forth in 12 U.S.C. 1813.

(b) For purposes of this subpart, the following definitions apply.

(1) *Banking organization* means an FDIC-supervised insured depository institution, including all insured state nonmember banks, insured state-licensed branches of foreign banks, and insured State savings associations; provided, however, that no designated financial market utility shall be considered a banking organization.

(2) *Bank service provider* means a bank service company or other person that performs covered services; provided, however, that no designated financial market utility shall be considered a bank service provider.

(3) *Business line* means a product or service offered by a banking organization to serve its customers or support other business needs.

(4) *Computer-security incident* is an occurrence that results in actual harm to the confidentiality, integrity, or availability of an information system or the information that the system processes, stores, or transmits.

(5) *Covered services* are services performed, by a person, that are subject to the Bank Service Company Act (12 U.S.C. 1861–1867).

(6) *Designated financial market utility* has the same meaning as set forth at 12 U.S.C. 5462(4).

(7) *Notification incident* is a computer-security incident that has materially disrupted or degraded, or is reasonably likely to materially disrupt or degrade, a banking organization's—

(i) Ability to carry out banking operations, activities, or processes, or deliver banking products and services to a material portion of its customer base, in the ordinary course of business;

(ii) Business line(s), including associated operations, services, functions, and support, that upon failure would result in a material loss of revenue, profit, or franchise value; or

(iii) Operations, including associated services, functions and support, as applicable, the failure or discontinuance of which would pose a threat to the financial stability of the United States.

(8) *Person* has the same meaning as set forth at 12 U.S.C. 1817(j)(8)(A).

§ 304.23 Notification.

A banking organization must notify the appropriate FDIC supervisory office, or an FDIC-designated point of contact, about a notification incident through email, telephone, or other similar methods that the FDIC may prescribe. The FDIC must receive this

notification from the banking organization as soon as possible and no later than 36 hours after the banking organization determines that a notification incident has occurred.

§ 304.24 Bank service provider notification.

(a) A bank service provider is required to notify at least one bank-designated point of contact at each affected banking organization customer as soon as possible when the bank service provider determines that it has experienced a computer-security incident that has materially disrupted or degraded, or is reasonably likely to materially disrupt or degrade, covered services provided to such banking organization for four or more hours.

(1) A bank-designated point of contact is an email address, phone number, or any other contact(s), previously provided to the bank service provider by the banking organization customer.

(2) If the banking organization customer has not previously provided a bank-designated point of contact, such notification shall be made to the Chief Executive Officer and Chief Information Officer of the banking organization customer, or two individuals of comparable responsibilities, through any reasonable means.

(b) The notification requirement in paragraph (a) of this section does not apply to any scheduled maintenance, testing, or software update previously communicated to a banking organization customer.

§§ 304.25–304.30 [Reserved]

PARTS 305–306 [RESERVED]

PART 307—CERTIFICATION OF ASSUMPTION OF DEPOSITS AND NOTIFICATION OF CHANGES OF INSURED STATUS

Sec.

307.1 Scope and purpose.
307.2 Certification of assumption of deposit liabilities.
307.3 Notice to depositors when insured status is voluntarily terminated and deposits are not assumed.
APPENDIX A TO PART 307—TRANSFERRING INSTITUTION LETTERHEAD
APPENDIX B TO PART 307—INSTITUTION LETTERHEAD

AUTHORITY: 12 U.S.C. 1818(a)(6); 1818(q); and 1819(a) [Tenth].

SOURCE: 71 FR 8791, Feb. 21, 2006, unless otherwise noted.

§ 307.1 Scope and purpose.

(a) *Scope*. This Part applies to all insured depository institutions, as defined in section 3(c)(2) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1813(c)(2)).

(b) *Purpose*. This Part sets forth the rules governing:

(1) The time and manner for providing certification to the FDIC regarding the assumption of all of the deposit liabilities of an insured depository institution by one or more insured depository institutions; and

(2) The notification that an insured depository institution shall provide its depositors when a depository institution's insured status is being voluntarily terminated without its deposits being assumed by one or more insured depository institutions.

§ 307.2 Certification of assumption of deposit liabilities.

(a) *When certification is required*. Whenever all of the deposit liabilities of an insured depository institution are assumed by one or more insured depository institutions by merger, consolidation, other statutory assumption, or by contract, the transferring insured depository institution, or its legal successor, shall provide an accurate written certification to the FDIC that its deposit liabilities have been assumed. No certification shall be required when deposit liabilities are assumed by an operating insured depository institution from an insured depository institution in default, as defined in section 3(x)(1) of the FDI Act (12 U.S.C. 1813(x)(1)), and that has been placed under FDIC receivership.

(b) *Certification requirements*. The certification required by paragraph (a) of this section shall be provided on official letterhead of the transferring insured depository institution or its legal successor, signed by a duly authorized official, and state the date the assumption took effect. The certification shall

indicate the date on which the transferring institution's authority to engage in banking has terminated or will terminate as well as the method of termination (e.g., whether by the surrender of its charter, by the cancellation of its charter or license to conduct a banking business, or otherwise). The certification may follow the form contained in Appendix A of this part. In a merger or consolidation where there is only one surviving entity which is the legal successor to both the transferring and assuming institutions, the surviving entity shall provide any required certification.

(c) *Filing*. The certification required by paragraph (a) of this section shall be provided within 30 calendar days after the assumption takes effect, and shall be submitted to the appropriate Regional Director of the FDIC's Division of Supervision and Consumer Protection, as defined in 12 CFR 303.2(g).

(d) *Evidence of assumption*. The receipt by the FDIC of an accurate certification for a total assumption as required by paragraphs (a), (b) and (c) of this section shall constitute satisfactory evidence of such deposit assumption, as required by section 8(q) of the FDI Act (12 U.S.C. 1818(q)), and the insured status of the transferring institution shall terminate on the date of the receipt of the certification. In appropriate circumstances, the FDIC, in its sole discretion, may require additional information, or may consider other evidence of a deposit assumption to constitute satisfactory evidence of such assumption for purposes of section 8(q).

(e) *Issuance of an order*. The Executive Secretary, upon request from the Director of the Division of Supervision and Consumer Protection and with the concurrence of the General Counsel, or their respective designees, shall issue an order terminating the insured status of the transferring insured depository institution as of the date of receipt by the FDIC of satisfactory evidence of such assumption, pursuant to section 8(q) of the FDI Act and this regulation. Generally, no order shall be issued, under this paragraph, and insured status shall be cancelled by operation of law:

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

(2) If the transferring institution is an insured depository institution in default and for which the FDIC has been appointed receiver.

§ 307.3 Notice to depositors when insured status is voluntarily terminated and deposits are not assumed.

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

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

(c) *Form of notice*. The notice to depositors required by paragraph (a) of this section shall be provided on the official letterhead of the insured depository institution, shall bear the signature of a duly authorized officer, and, unless otherwise specified by the appropriate Regional Director, may follow the form of the notice contained in Appendix B of this part.

(d) *Other requirements possible*. The FDIC may require the insured depository institution to take such other actions as the FDIC considers necessary and appropriate for the protection of depositors.

APPENDIX A TO PART 307—TRANSFERRING INSTITUTION LETTERHEAD

[Date]

[Name and Address of appropriate FDIC Regional Director]

SUBJECT: *Certification of Total Assumption of Deposits*

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

Sincerely,

By:

[Name and Title of Authorized Representative]

APPENDIX B TO PART 307—INSTITUTION LETTERHEAD

[Date]

[Name and Address of Depositor]

SUBJECT: *Notice to Depositor of Voluntary Termination of Insured Status*

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

This Notice is being provided pursuant to 12 CFR 307.3.

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

Sincerely,

By:

[Name and Title of Authorized Representative]

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AUTHORITY: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1819, 1820, 1828, 1829, 1829(b), 1831i, 1831m(g)(4), 1831*o*, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), 5414(b)(3); 15 U.S.C. 78(h) and (i), 78*o*(c)(4), 78*o*–4(c), 78*o*–5, 78q–1, 78s, 78u, 78u–2, 78u–3, 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Pub. L. 104–134, sec. 31001(s), 110 Stat. 1321; Pub. L. 109–351, 120 Stat. 1966; Pub. L. 111–203, 124 Stat. 1376; Pub. L. 114–74, sec. 701, 129 Stat. 584.

SOURCE: 56 FR 37975, Aug. 9, 1991, unless otherwise noted.

Subpart A—Uniform Rules of Practice and Procedure

§ 308.1 Scope.

This subpart prescribes rules of practice and procedure applicable to adjudicatory proceedings as to which hearings on the record are provided for by the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (''FDIA'') (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Federal Deposit Insurance Corporation (''FDIC''), should issue an order to approve or disapprove a person's proposed acquisition of an institution and/or institution holding company;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78o–5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the FDIC is the appropriate regulatory agency;

(e) Assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of:

(1) Sections 22(h) and 23 of the Federal Reserve Act (FRA), or any regulation issued thereunder, and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1828(j) or 12 U.S.C. 1468;

(2) Section 106(b) of the Bank Holding Company Act Amendments of 1970 (''BHCA Amendments of 1970''), and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1972(2)(F);

(3) Any provision of the Change in Bank Control Act of 1978, as amended (the ''CBCA''), or any regulation or order issued thereunder, and certain unsafe or unsound practices, or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(4) Section 7(a)(1) of the FDIA, pursuant to 12 U.S.C. 1817(a)(1);

(5) Any provision of the International Lending Supervision Act of 1983 (''ILSA''), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(6) Any provision of the International Banking Act of 1978 (''IBA''), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(7) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u–2);

(8) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (''FIRREA'') (12 U.S.C. 3349), or any order or regulation issued thereunder;

(9) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the FDIC or the former Office of Thrift Supervision (OTS), the terms of any condition imposed in writing by the FDIC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein pursuant to 12 U.S.C. 1818(i)(2);

(10) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder; and

(11) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(12) Certain provisions of Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464(d)(1), (5)–(8), (s), and (v);

(13) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d);

(14) Section 10 of HOLA, pursuant to 12 U.S.C. 1467a(a)(2)(D), (g), (i)(2)–(4) and (r); and

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) to impose penalties for violations of the post-employment restrictions under that subsection; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20347, May 6, 1996; 70 FR 69639, Nov. 17, 2005; 80 FR 5011, Jan. 30, 2015]

§ 308.2 Rules of construction.

For purposes of this subpart:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

(c) The term *counsel* includes a non-attorney representative; and

(d) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 308.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

Administrative law judge means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

Administrative Officer means an inferior officer of the Federal Deposit Insurance Corporation, duly appointed by the Board of Directors of the Federal Deposit Insurance Corporation to serve as the Board's designee to hear certain motions or requests in an adjudicatory proceeding and to be the official custodian of the record for the Federal Deposit Insurance Corporation.

Adjudicatory proceeding means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

Assistant Administrative Officer means an inferior officer of the Federal Deposit Insurance Corporation, duly appointed by the Board of Directors of the Federal Deposit Insurance Corporation to serve as the Board's designee to hear certain motions or requests in an adjudicatory proceeding upon the designation or unavailability of the Administrative Officer.

Board of Directors or *Board* means the Board of Directors of the Federal Deposit Insurance Corporation or its designee.

Decisional employee means any member of the Federal Deposit Insurance Corporation's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Board of Directors, the administrative law judge, or the Administrative Officer, or the Assistant Administrative Officer, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

Designee of the Board of Directors means officers or officials of the Federal Deposit Insurance Corporation acting pursuant to authority delegated by the Board of Directors.

Enforcement Counsel means any individual who files a notice of appearance as counsel on behalf of the FDIC in an adjudicatory proceeding.

FDIC means the Federal Deposit Insurance Corporation.

Final order means an order issued by the FDIC with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

Institution includes:

(1) Any bank as that term is defined in section 3(a) of the FDIA (12 U.S.C. 1813(a));

(2) Any bank holding company or any subsidiary (other than a bank) of a bank holding company as those terms are defined in the BHCA (12 U.S.C. 1841 *et seq.*);

(3) Any savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)), any savings and loan holding company or any subsidiary thereof (other than a bank) as those terms are defined in section 10(a) of the HOLA (12 U.S.C. 1467a(a));

(4) Any organization operating under section 25 of the FRA (12 U.S.C. 601 *et seq.*);

(5) Any foreign bank or company to which section 8 of the IBA (12 U.S.C. 3106), applies or any subsidiary (other than a bank) thereof; and

(6) Any federal agency as that term is defined in section 1(b) of the IBA (12 U.S.C. 3101(5)).

Investigation means any investigation conducted pursuant to section 10(c) of the FDIA or pursuant to section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B)).

Local Rules means those rules promulgated by the FDIC in those subparts of this part other than subpart A.

Office of Financial Institution Adjudication (OFIA) means the executive body charged with overseeing the administration of administrative enforcement proceedings of the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve Board (FRB), the FDIC, and the National Credit Union Administration (NCUA).

Party means the FDIC and any person named as a party in any notice.

Person means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, or other entity or organization, including an institution as defined in this section.

Respondent means any party other than the FDIC.

Uniform Rules means those rules in subpart A of this part that pertain to the types of formal administrative enforcement actions set forth at § 308.1 and as specified in subparts B through P of this part.

Violation includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

[56 FR 37975, Aug. 9, 1991, as amended at 80 FR 5012, Jan. 30, 2015; 86 FR 2247, Jan. 12, 2021]

§ 308.4 Authority of Board of Directors.

The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 308.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge

shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas duces tecum, and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or prehearing conferences as set forth in § 308.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board of Directors shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

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

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 308.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the FDIC or an administrative law judge*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the FDIC if such attorney is not currently suspended or debarred from practice before the FDIC.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer; director, or employee is not currently suspended or debarred from practice before the FDIC.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the FDIC, shall file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20347, May 6, 1996]

§ 308.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her

own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: The counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 308.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 308.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20347, May 6, 1996]

§ 308.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the FDIC (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the Board of Directors, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an ex parte communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the FDIC until the date that the Board of Directors issues its final decision pursuant to § 308.40(c):

(1) No interested person outside the FDIC shall make or knowingly cause to be made an ex parte communication to any member of the Board of Directors, the administrative law judge, or a decisional employee; and

(2) No member of the Board of Directors, no administrative law judge, or decisional employee shall make or knowingly cause to be made to any interested person outside the FDIC any ex parte communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, any member of the Board of Directors or other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the ex parte communication, to file responses thereto and to recommend any sanctions that they believe to be appropriate under the circumstances. The administrative law judge or the Board of Directors shall then determine whether any action should be taken concerning the ex parte communication in accordance with paragraph (d) of this section.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Board of Directors or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions.* Except to the extent required for the disposition of ex parte matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the FDIC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 308.40 except as witness or counsel in public proceedings.

[56 FR 37975, Aug. 9, 1991, as amended at 60 FR 24762, May 10, 1995]

§ 308.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 308.25 and 308.26, shall be filed with the OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Board of Directors or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Board of Directors or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section.

(c) *Formal requirements as to papers filed*—(1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8½ × 11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 308.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the FDIC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Board of Directors, or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 308.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding

so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 308.10(c).

(c) *By the Board of Directors.* (1) All papers required to be served by the Board of Directors or the administrative law judge upon a party who has appeared in the proceeding in accordance with § 308.6, shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 308.6, the Board of Directors or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the party's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent which, in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) In such other manner as is reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20347, May 6, 1996]

§ 308.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express Mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection;

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Board of Directors or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the Board of Directors or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20348, May 6, 1996]

§ 308.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Board of Directors pursuant to § 308.38, the Board of Directors may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party or of the Board of Directors after notice and opportunity to respond is afforded all non-moving parties, or on the administrative law judge's own motion.

§ 308.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or depositions shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the FDIC is the party requesting the subpoena. The FDIC shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the FDIC.

§ 308.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any FDIC representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 308.16 FDIC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the FDIC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the FDIC to conduct or continue any form of investigation authorized by law.

§ 308.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court

concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 308.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), a proceeding governed by this subpart is commenced by issuance of a notice by the FDIC.

(ii) The notice must be served by Enforcement Counsel upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with the OFIA.

(2) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the FDIC.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the FDIC's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the FDIC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing shall be filed with OFIA.

[56 FR 37975, Aug. 9, 1991, as amended at 86 FR 2247, Jan. 12, 2021]

§ 308.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 308.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the

respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Board of Directors or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

[61 FR 20348, May 6, 1996]

§ 308.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice.

§ 308.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 308.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, except that following the filing of the recommended decision, motions must be filed with the Administrative Officer for disposition by the Board of Directors.

(d) *Responses.* (1) Except as otherwise provided in this paragraph (d), within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Administrative Officer, any party may file a written response to a motion. The administrative law judge shall not rule

on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 308.29 and 308.30.

[56 FR 37975, Aug. 9, 1991, as amended at 86 FR 2247, Jan. 12, 2021]

§ 308.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term ''documents'' may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by subpart I of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 308.25.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative-process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20348, May 6, 1996]

§ 308.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay

for the copying and shipping charges. Copying charges are the current per page copying rate imposed by 12 CFR part 309 implementing the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 308.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 308.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney-work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 308.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this part, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative

law judge against a party who fails to produce subpoenaed documents.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20348, May 6, 1996; 80 FR 5011, Jan. 30, 2015]

§ 308.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 308.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 308.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 308.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena duces tecum, requiring the attendance of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(3) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 308.28 Interlocutory review.

(a) *General rule.* The Board of Directors may review a ruling of the administrative law judge prior to the certification of the record to the Board of Directors only in accordance with the procedures set forth in this section and § 308.23.

(b) *Scope of review.* The Board of Directors may exercise interlocutory review of a ruling of, the administrative

law judge if the Board of Directors finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure*. Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 308.23. Any party may file a response to a request for interlocutory review in accordance with § 308.23(d). Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Board of Directors for final disposition.

(d) *Suspension of proceeding*. Neither a request for interlocutory review nor any disposition of such a request by the Board of Directors under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Board of Directors.

§ 308.29 Summary disposition.

(a) *In general*. The administrative law judge shall recommend that the Board of Directors issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses*. (1) Any party who believes that there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion*. At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion*. Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Board of Directors. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 308.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a

recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 308.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a ''scheduling conference.'' The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at his or her expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 308.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) Effect of failure to comply. No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 308.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the FDIC, in its discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Administrative Officer a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Administrative Officer. The form of, and procedure for, these requests

and replies are governed by § 308.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20349, May 6, 1996; 86 FR 2248, Jan. 12, 2021]

§ 308.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 308.26(c).

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20349, May 6, 1996]

§ 308.35 Conduct of hearings.

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If

there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree the administrative law judge shall fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20349, May 6, 1996]

§ 308.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or Board of Directors shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by an appropriate Federal financial institution regulatory agency or state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness, either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Board of Directors.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations*. The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing, and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses*. (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 308.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs*. (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party, that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge or within such longer period as may be ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs*. Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required*. The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20349, May 6, 1996]

§ 308.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record*. Within 45 days after expiration of the time allowed for filing reply briefs under § 308.37(b), the administrative law judge shall file with and certify to the Administrative Officer, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index*. At the same time the administrative law judge files with and certifies to the Administrative Officer for final determination the record of the proceeding, the administrative law judge shall furnish to the Administrative Officer a certified index of the entire record of the proceeding. The

certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

[86 FR 2248, Jan. 12, 2021]

§ 308.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 308.38, a party may file with the Administrative Officer written exceptions to the administrative law judge's recommended decision, findings, conclusions, or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Board of Directors if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

[56 FR 37975, Aug. 9, 1991, as amended at 86 FR 2248, Jan. 12, 2021]

§ 308.40 Review by Board of Directors.

(a) *Notice of submission to Board of Directors.* When the Administrative Officer determines that the record in the proceeding is complete, the Administrative Officer shall serve notice upon the parties that the proceeding has been submitted to the Board of Directors for final decision.

(b) *Oral argument before the Board of Directors.* Upon the initiative of the Board of Directors or on the written request of any party filed with the Administrative Officer within the time for filing exceptions, the Board of Directors may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Board of Directors' final decision. Oral argument before the Board of Directors must be on the record.

(c) *Final decision.* (1) Decisional employees may advise and assist the Board of Directors in the consideration and disposition of the case. The final decision of the Board of Directors will be based upon review of the entire record of the proceeding, except that the Board of Directors may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Board of Directors shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Board of Directors orders that the action or any aspect thereof be remanded

to the administrative law judge for further proceedings. Copies of the final decision and order of the Board of Directors shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Board of Directors or required by statute, upon any appropriate state or Federal supervisory authority.

[56 FR 37975, Aug. 9, 1991, as amended at 86 FR 2248, Jan. 12, 2021]

§ 308.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the FDIC may not, unless specifically ordered by the Board of Directors or a reviewing court, operate as a stay of any order issued by the FDIC. The Board of Directors may, in its discretion, and on such terms as it finds just, stay the effectiveness of all or any part of its order pending a final decision on a petition for review of that order.

Subpart B—General Rules of Procedure

§ 308.101 Scope of Local Rules.

(a) Subparts B and C of the Local Rules prescribe rules of practice and procedure to be followed in the administrative enforcement proceedings initiated by the FDIC as set forth in § 308.1 of the Uniform Rules.

(b) Except as otherwise specifically provided, the Uniform Rules and subpart B of the Local Rules shall not apply to subparts D through T of the Local Rules.

(c) Subpart C of the Local Rules shall apply to any administrative proceeding initiated by the FDIC.

(d) Subparts A, B, and C of this part prescribe the rules of practice and procedure to applicable to adjudicatory proceedings as to which hearings on the record are provided for by the assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of section 15(c)(4) of the Exchange Act (15 U.S.C. 78o(c)(4)).

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62100, Nov. 16, 1999; 66 FR 9189, Feb. 7, 2001; 80 FR 5012, Jan. 30, 2015]

§ 308.102 Authority of Board of Directors and Administrative Officer.

(a) *The Board of Directors.* (1) The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the Administrative Officer.

(2) Nothing contained in this part shall be construed to limit the power of the Board of Directors granted by applicable statutes or regulations.

(b) *The Administrative Officer.* (1) When no administrative law judge has jurisdiction over a proceeding, the Administrative Officer may act in place of, and with the same authority as, an administrative law judge, except that the Administrative Officer may not hear a case on the merits or make a recommended decision on the merits to the Board of Directors.

(2) Pursuant to authority delegated by the Board of Directors, the Administrative Officer and Assistant Administrative Officer, upon the advice and recommendation of the Deputy General Counsel for Litigation or, in his absence, the Assistant General Counsel for General Litigation, may issue rulings in proceedings under sections 7(j), 8, 18(j), 19, 32 and 38 of the FDIA (12 U.S.C. 1817(j), 1818, 1828(j), 1829, 1831i and 1831*o*) concerning:

(i) Denials of requests for private hearing;

(ii) Interlocutory appeals;

(iii) Stays pending judicial review;

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

(v) Supplementation of the evidence in the record;

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

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

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

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62100, Nov. 16, 1999; 67 FR 71071, Nov. 29, 2002; 86 FR 2248, Jan. 12, 2021]

§ 308.103 Appointment of administrative law judge.

(a) *Appointment*. Unless otherwise directed by the Board of Directors or as otherwise provided in the Local Rules, a hearing within the scope of this part 308 shall be held before an administrative law judge of the Office of Financial Institution Adjudication (''OFIA'').

(b) *Procedures*. (1) The Enforcement Counsel shall promptly after issuance of the notice file the matter with the Office of Financial Institution Adjudication (''OFIA'') which shall secure the appointment of an administrative law judge to hear the proceeding.

(2) OFIA shall advise the parties, in writing, that an administrative law judge has been appointed.

[56 FR 37975, Aug. 9, 1991, as amended at 86 FR 2248, Jan. 12, 2021]

§ 308.104 Filings with the Board of Directors.

(a) *General rule*. All materials required to be filed with or referred to the Board of Directors in any proceedings under this part shall be filed with the Administrative Officer, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

(b) *Scope*. Filings to be made with the Administrative Officer include pleadings and motions filed during the proceeding; the record filed by the administrative law judge after the issuance of a recommended decision; the recommended decision filed by the administrative law judge following a motion for summary disposition; referrals by the administrative law judge of motions for interlocutory review; motions and responses to motions filed by the parties after the record has been certified to the Board of Directors; exceptions and requests for oral argument; and any other papers required to be filed with the Board of Directors under this part.

[86 FR 2249, Jan. 12, 2021]

§ 308.105 Custodian of the record.

The Administrative Officer is the official custodian of the record when no administrative law judge has jurisdiction over the proceeding. As the official custodian, the Administrative Officer shall maintain the official record of all papers filed in each proceeding.

[86 FR 2249, Jan. 12, 2021]

§ 308.106 Written testimony in lieu of oral hearing.

(a) *General rule*. (1) At any time more than fifteen days before the hearing is to commence, on the motion of any party or on his or her own motion, the administrative law judge may order that the parties present part or all of their case-in-chief and, if ordered, their rebuttal, in the form of exhibits and written statements sworn to by the witness offering such statements as evidence, provided that if any party objects, the administrative law judge shall not require such a format if that format would violate the objecting party's right under the Administrative Procedure Act, or other applicable law, or would otherwise unfairly prejudice that party.

(2) Any such order shall provide that each party shall, upon request, have the same right of oral cross-examination (or redirect examination) as would exist had the witness testified orally rather than through a written statement. Such order shall also provide that any party has a right to call any hostile witness or adverse party to testify orally.

(b) *Scheduling of submission of written testimony*. (1) If written direct testimony and exhibits are ordered under paragraph (a) of this section, the administrative law judge shall require that it be filed within the time period for commencement of the hearing, and the hearing shall be deemed to have commenced on the day such testimony is due.

(2) Absent good cause shown, written rebuttal, if any, shall be submitted and the oral portion of the hearing begun within 30 days of the date set for filing written direct testimony.

(3) The administrative law judge shall direct, unless good cause requires otherwise, that—

(i) All parties shall simultaneously file any exhibits and written direct testimony required under paragraph (b)(1) of this section; and

(ii) All parties shall simultaneously file any exhibits and written rebuttal required under paragraph (b)(2) of this section.

(c) *Failure to comply with order to file written testimony.* (1) The failure of any party to comply with an order to file written testimony or exhibits at the time and in the manner required under this section shall be deemed a waiver of that party's right to present any evidence, except testimony of a previously identified adverse party or hostile witness. Failure to file written testimony or exhibits is, however, not a waiver of that party's right of cross-examination or a waiver of the right to present rebuttal evidence that was not required to be submitted in written form.

(2) Late filings of papers under this section may be allowed and accepted only upon good cause shown.

§ 308.107 Document discovery.

(a) Parties to proceedings set forth at § 308.1 of the Uniform Rules and as provided in the Local Rules may obtain discovery only through the production of documents. No other form of discovery shall be allowed.

(b) Any questioning at a deposition of a person producing documents pursuant to a document subpoena shall be strictly limited to the identification of documents produced by that person and a reasonable examination to determine whether the subpoenaed person made an adequate search for, and has produced, all subpoenaed documents.

[56 FR 37975, Aug. 9, 1991, as amended at 80 FR 5012, Jan. 30, 2015]

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

§ 308.108 Sanctions.

(a) *General rule.* Appropriate sanctions may be imposed when any counsel or party has acted, or failed to act, in a manner required by applicable statute, regulations, or order, and that act or failure to act:

(1) Constitutes contemptuous conduct;

(2) Has in a material way injured or prejudiced some other party in terms of substantive injury, incurring additional expenses including attorney's fees, prejudicial delay, or otherwise;

(3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or

(4) Has unduly delayed the proceeding.

(b) *Sanctions.* Sanctions which may be imposed include any one or more of the following:

(1) Issuing an order against the party;

(2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(3) Precluding the party from contesting specific issues or findings;

(4) Precluding the party from offering certain evidence or from challenging or contesting certain evidence offered by another party;

(5) Precluding the party from making a late filing or conditioning a late filing on any terms that are just; and

(6) Assessing reasonable expenses, including attorney's fees, incurred by any other party as a result of the improper action or failure to act.

(c) *Limits on dismissal as a sanction.* No recommendation of dismissal shall be made by the administrative law judge or granted by the Board of Directors based on the failure to hold a hearing within the time period called for in this part 308, or on the failure of an administrative law judge to render a recommended decision within the time period called for in this part 308, absent a finding:

(1) That the delay resulted solely or principally from the conduct of the FDIC enforcement counsel;

(2) That the conduct of the FDIC enforcement counsel is unexcused;

(3) That the moving respondent took all reasonable steps to oppose and prevent the subject delay;

(4) That the moving respondent has been materially prejudiced or injured; and

(5) That no lesser or different sanction is adequate.

(d) *Procedure for imposition of sanctions.* (1) The administrative law judge,

upon the request of any party, or on his or her own motion, may impose sanctions in accordance with this section, provided that the administrative law judge may only recommend to the Board of Directors the sanction of entering a final order determining the case on the merits.

(2) No sanction, other than refusing to accept late papers, authorized by this section shall be imposed without prior notice to all parties and an opportunity for any counsel or party against whom sanctions would be imposed to be heard. Such opportunity to be heard may be on such notice, and the response may be in such form, as the administrative law judge directs. The opportunity to be heard may be limited to an opportunity to respond orally immediately after the act or inaction covered by this section is noted by the administrative law judge.

(3) Requests for the imposition of sanctions by any party, and the imposition of sanctions, shall be treated for interlocutory review purposes in the same manner as any other ruling by the administrative law judge.

(4) *Section not exclusive.* Nothing in this section shall be read as precluding the administrative law judge or the Board of Directors from taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation.

§ 308.109 Suspension and disbarment.

(a) *Discretionary suspension and disbarment.* (1) The Board of Directors may suspend or revoke the privilege of any counsel to appear or practice before the FDIC if, after notice of and opportunity for hearing in the matter, that counsel is found by the Board of Directors:

(i) Not to possess the requisite qualifications to represent others;

(ii) To be seriously lacking in character or integrity or to have engaged in material unethical or improper professional conduct;

(iii) To have engaged in, or aided and abetted, a material and knowing violation of the FDIA; or

(iv) To have engaged in contemptuous conduct before the FDIC. Suspension or revocation on the grounds set forth in paragraphs (a)(1)(ii), (iii), and (iv) of this section shall only be ordered upon a further finding that the counsel's conduct or character was sufficiently egregious as to justify suspension or revocation.

(2) Unless otherwise ordered by the Board of Directors, an application for reinstatement by a person suspended or disbarred under paragraph (a)(1) of this section may be made in writing at any time more than three years after the effective date of the suspension or disbarment and, thereafter, at any time more than one year after the person's most recent application for reinstatement. The suspension or disbarment shall continue until the applicant has been reinstated by the Board of Directors for good cause shown or until, in the case of a suspension, the suspension period has expired. An applicant for reinstatement under this provision may, in the Board of Directors' sole discretion, be afforded a hearing.

(b) *Mandatory suspension and disbarment.* (1) Any counsel who has been and remains suspended or disbarred by a court of the United States or of any state, territory, district, commonwealth, or possession; or any person who has been and remains suspended or barred from practice before the OCC, Board of Governors, the OTS, the NCUA, the Securities and Exchange Commission, or the Commodity Futures Trading Commission; or any person who has been, within the last ten years, convicted of a felony, or of a misdemeanor involving moral turpitude, shall be suspended automatically from appearing or practicing before the FDIC. A disbarment, suspension, or conviction within the meaning of this paragraph (b) shall be deemed to have occurred when the disbarring, suspending, or convicting agency or tribunal enters its judgment or order, regardless of whether an appeal is pending or could be taken, and includes a judgment or an order on a plea of nolo contendere or on consent, regardless of whether a violation is admitted in the consent.

(2) Any person appearing or practicing before the FDIC who is the subject of an order, judgment, decree, or finding of the types set forth in paragraph (b)(1) of this section shall promptly file with the Administrative

Officer a copy thereof, together with any related opinion or statement of the agency or tribunal involved. Any person who fails to so file a copy of the order, judgment, decree, or finding within 30 days after the entry of the order, judgment, decree, or finding or the date such person initiates practice before the FDIC, for that reason alone may be disqualified from practicing before the FDIC until such time as the appropriate filing shall be made. Failure to file any such paper shall not impair the operation of any other provision of this section.

(3) A suspension or disbarment under paragraph (b)(1) of this section from practice before the FDIC shall continue until the applicant has been reinstated by the Board of Directors for good cause shown, provided that any person suspended or disbarred under paragraph (b)(1) of this section shall be automatically reinstated by the Administrative Officer, upon appropriate application, if all the grounds for suspension or disbarment under paragraph (b)(1) of this section are subsequently removed by a reversal of the conviction (or the passage of time since the conviction) or termination of the underlying suspension or disbarment. An application for reinstatement on any other grounds by any person suspended or disbarred under paragraph (b)(1) of this section may be filed no sooner than one year after the suspension or disbarment, and thereafter, a new request for reinstatement may be made no sooner than one year after the counsel's most recent reinstatement application. The application must comply with the requirements of § 303.3 of this chapter. An applicant for reinstatement under this provision may, in the Board of Directors' sole discretion, be afforded a hearing.

(c) *Hearings under this section.* Hearings conducted under this section shall be conducted in substantially the same manner as other hearings under the Uniform Rules, provided that in proceedings to terminate an existing FDIC suspension or disbarment order, the person seeking the termination of the order shall bear the burden of going forward with an application and with the burden of proving the grounds supporting the application, and that the Board of Directors may, in its sole discretion, direct that any proceeding to terminate an existing suspension or disbarment by the FDIC be limited to written submissions.

(d) *Summary suspension for contemptuous conduct.* A finding by the administrative law judge of contemptuous conduct during the course of any proceeding shall be grounds for summary suspension by the administrative law judge of a counsel or other representative from any further participation in that proceeding for the duration of that proceeding.

(e) *Practice defined.* Unless the Board of Directors orders otherwise, for the purposes of this section, practicing before the FDIC includes, but is not limited to, transacting any business with the FDIC as counsel or agent for any other person and the preparation of any statement, opinion, or other paper by a counsel, which statement, opinion, or paper is filed with the FDIC in any registration statement, notification, application, report, or other document, with the consent of such counsel.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62100, Nov. 16, 1999; 68 FR 48270, Aug. 13, 2003; 80 FR 5012, Jan. 30, 2015; 86 FR 2249, Jan. 12, 2021]

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

§ 308.110 Scope.

Except as specifically indicated in this subpart, the rules and procedures in this subpart, subpart B of the Local Rules, and the Uniform Rules shall apply to proceedings in connection with the disapproval by the Board of Directors or its designee of a proposed acquisition of control of an insured nonmember bank.

§ 308.111 Grounds for disapproval.

The following are grounds for disapproval of a proposed acquisition of control of an insured nonmember bank:

(a) The proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the banking

business in any part of the United States;

(b) The effect of the proposed acquisition of control in any section of the United States may be to substantially lessen competition or to tend to create a monopoly or would in any other manner be in restraint of trade, and the anticompetitive effects of the proposed acquisition of control are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served;

(c) Either the financial condition of any acquiring person or the future prospects of the institution might jeopardize the financial stability of the bank or prejudice the interest of the depositors of the bank.

(d) The competence, experience, or integrity of any acquiring person or of any of the proposed management personnel indicates that it would not be in the interest of the depositors of the bank, or in the interest of the public, to permit such person to control the bank;

(e) Any acquiring person neglects, fails, or refuses to furnish to the FDIC all the information required by the FDIC; or

(f) The FDIC determines that the proposed acquisition would result in an adverse effect on the Deposit Insurance Fund.

[56 FR 37975, Aug. 9, 1991, as amended at 71 FR 20526, Apr. 21, 2006; 73 FR 2145, Jan. 14, 2008]

§ 308.112 Notice of disapproval.

(a) *General rule.* (1) Within three days of the decision by the Board of Directors or its designee to disapprove a proposed acquisition of control of an insured nonmember bank, a written notice of disapproval shall be mailed by first class mail to, or otherwise served upon, the party seeking acquire control.

(2) The notice of disapproval shall:

(i) Contain a statement of the basis for the disapproval; and

(ii) Indicate that a hearing may be requested by filing a written request with the Administrative Officer within ten days after service of the notice of disapproval; and if a hearing is requested, that an answer to the notice of disapproval, as required by § 308.113, must be filed within 20 days after service of the notice of disapproval.

(b) *Waiver of hearing.* Failure to request a hearing pursuant to this section shall constitute a waiver of the opportunity for a hearing and the notice of disapproval shall constitute a final and unappealable order.

(c) Section 308.18(b) of the Uniform Rules shall not apply to the content of the Notice of Disapproval.

[56 FR 37975, Aug. 9, 1991, as amended at 86 FR 2249, Jan. 12, 2021]

§ 308.113 Answer to notice of disapproval.

(a) *Contents.* (1) An answer to the notice of disapproval of a proposed acquisition of control shall be filed within 20 days after service of the notice of disapproval and shall specifically deny those portions of the notice of disapproval which are disputed. Those portions of the notice of disapproval which are not specifically denied are deemed admitted by the applicant.

(2) Any hearing under this subpart shall be limited to those parts of the notice of disapproval that are specifically denied.

(b) *Failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice of disapproval. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file a recommended decision containing the findings and relief sought in the notice. A final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.

§ 308.114 Burden of proof.

The ultimate burden of proof shall be upon the person proposing to acquire a depository institution. The burden of going forward with a *prima facie* case shall be upon the FDIC.

Subpart E—Rules and Procedures Applicable to Proceedings Relating to Assessment of Civil Penalties for Willful Violations of the Change in Bank Control Act

§ 308.115 Scope.

The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings to assess civil penalties against any person for willful violation of the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)), or any regulation or order issued pursuant thereto, in connection with the affairs of an insured nonmember bank.

§ 308.116 Assessment of penalties.

(a) *In general*. The civil money penalty shall be assessed upon the service of a Notice of Assessment which shall become final and unappealable unless the respondent requests a hearing pursuant to § 308.19(c)(2).

(b) *Maximum penalty amounts*. Under 12 U.S.C. 1817(j)(16), a civil money penalty may be assessed for violations of change in control of insured depository institution provisions in the maximum amounts calculated and published in accordance with § 308.132(d).

(c) *Mitigating factors*. In assessing the amount of the penalty, the Board of Directors or its designee shall consider the gravity of the violation, the history of previous violations, respondent's financial resources, good faith, and any other matters as justice may require.

(d) *Failure to answer*. Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice of disapproval. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file a recommended decision containing the findings and relief sought in the notice. A final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 57990, Nov. 12, 1996; 65 FR 64887, Oct. 31, 2000; 69 FR 61305, Oct. 18, 2004; 73 FR 73157, Dec. 2, 2008; 77 FR 75477, Dec. 17, 2012; 81 FR 42239, June 29, 2016; 81 FR 95416, Dec. 28, 2016; 83 FR 1522, Jan. 12, 2018; 83 FR 61114, Nov. 28, 2018]

§ 308.117 Effective date of, and payment under, an order to pay.

If the respondent both requests a hearing and serves an answer, civil penalties assessed pursuant to this subpart are due and payable 60 days after an order to pay, issued after the hearing or upon default, is served upon the respondent, unless the order provides for a different period of payment. Civil penalties assessed pursuant to an order to pay issued upon consent are due and payable within the time specified therein.

§ 308.118 Collection of penalties.

The FDIC may collect any civil penalty assessed pursuant to this subpart by agreement with the respondent, or the FDIC may bring an action against the respondent to recover the penalty amount in the appropriate United States district court. All penalties collected under this section shall be paid over to the Treasury of the United States.

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

§ 308.119 Scope.

(a) *Involuntary termination of insurance pursuant to section 8(a) of the FDIA*. The rules and procedures in this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings in connection with the involuntary termination of the insured status of an insured bank depository institution or an insured branch of a foreign bank pursuant to section 8(a) of the FDIA (12 U.S.C. 1818(a)), except that the Uniform Rules and subpart B of the Local Rules shall not apply to the temporary suspension of insurance pursuant to section 8(a)(8) of the FDIA (12 U.S.C. 1818(a)(8)).

(b) *Involuntary termination of insurance pursuant to section 8(p) of the Act.* The rules and procedures in § 308.124 of this subpart F shall apply to proceedings in connection with the involuntary termination of the insured status of an insured depository institution or an insured branch of a foreign bank pursuant to section 8(p) of the FDIA (12 U.S.C. 1818(p)). The Uniform Rules shall not apply to proceedings under section 8(p) of the FDIA.

§ 308.120 Grounds for termination of insurance.

(a) *General rule.* The following are grounds for involuntary termination of insurance pursuant to section 8(a) of the FDIA:

(1) An insured depository institution or its directors or trustees have engaged or are engaging in unsafe or unsound practices in conducting the business of such depository institution;

(2) An insured depository institution is in an unsafe or unsound condition such that it should not continue operations as an insured depository institution; or

(3) An insured depository institution or its directors or trustees have violated an applicable law, rule, regulation, order, condition imposed in writing by the FDIC in connection with the granting of any application or other request by the insured depository institution or have violated any written agreement entered into between the insured depository institution and the FDIC.

(b) *Extraterritorial acts of foreign banks.* An act or practice committed outside the United States by a foreign bank or its directors or trustees which would otherwise be a ground for termination of insured status under this section shall be a ground for termination if the Board of Directors finds:

(1) The act or practice has been, is, or is likely to be a cause of, or carried on in connection with or in furtherance of, an act or practice committed within any state, territory, or possession of the United States or the District of Columbia that, in and of itself, would be an appropriate basis for action by the FDIC; or

(2) The act or practice committed outside the United States, if proven, would adversely affect the insurance risk of the FDIC.

(c) *Failure of foreign bank to secure removal of personnel.* The failure of a foreign bank to comply with any order of removal or prohibition issued by the Board of Directors or the failure of any person associated with a foreign bank to appear promptly as a party to a proceeding pursuant to section 8(e) of the FDIA (12 U.S.C. 1818(e)), shall be a ground for termination of insurance of deposits in any branch of the bank.

§ 308.121 Notification to primary regulator.

(a) *Service of notification.* (1) Upon a determination by the Board of Directors or its designee pursuant to § 308.120 of an unsafe or unsound practice or condition or of a violation, a notification shall be served upon the appropriate Federal banking agency of the insured depository institution, or the State banking supervisor if the FDIC is the appropriate Federal banking agency.

The notification shall be served not less than 30 days before the Notice of Intent to Terminate Insured Status required by section 8(a)(2)(B) of the FDIA (12 U.S.C. 1818(a)(2)(B)), and § 308.122, except that this period for notification may be reduced or eliminated with the agreement of the appropriate Federal banking agency.

(2) *Appropriate Federal banking agency* shall have the meaning given that term in section 3(q) of the FDIA (12 U.S.C. 1813(q)), and shall be the OCC in the case of a national bank, a District bank or an insured Federal branch of a foreign bank; the FDIC in the case of an insured nonmember bank, including an insured State branch of a foreign bank; the Board of Governors in the case of a state member bank; or the OTS in the case of an insured Federal or state savings association.

(3) In the case of a state nonmember bank, insured Federal branch of a foreign bank, or state member bank, in addition to service of the notification upon the appropriate Federal banking agency, a copy of the notification shall be sent to the appropriate State banking supervisor.

(4) In instances in which a Temporary Order Suspending Insurance is

issued pursuant to section 8(a)(8) of the FDIA (12 U.S.C. 1818(a)(8)), the notification may be served concurrently with such order.

(b) *Contents of notification.* The notification shall contain the FDIC's determination, and the facts and circumstances upon which such determination is based, for the purpose of securing correction of such practice, condition, or violation.

§ 308.122 Notice of intent to terminate.

(a) If, after serving the notification under § 308.121, the Board of Directors determines that any unsafe or unsound practices, condition, or violation, specified in the notification, requires the termination of the insured status of the insured depository institution, the Board of Directors or its designee, if it determines to proceed further, shall cause to be served upon the insured depository institution a notice of its intention to terminate insured status not less than 30 days after service of the notification, unless a shorter time period has been agreed upon by the appropriate Federal banking agency.

(b) The Board of Directors or its designee shall cause a copy of the notice to be sent to the appropriate Federal banking agency and to the appropriate state banking supervisor, if any.

§ 308.123 Notice to depositors.

If the Board of Directors enters an order terminating the insured status of an insured depository institution or branch, the insured depository institution shall, on the day that order becomes final, or on such other day as that order prescribes, mail a notification of termination of insured status to each depositor at the depositor's last address of record on the books of the insured depository institution or branch. The insured depository institution shall also publish the notification in two issues of a local newspaper of general circulation and shall furnish the FDIC with proof of such publications. The notification to depositors shall include information provided in substantially the following form:

Notice

(Date)_____.

1. The status of the _____, as an (insured depository institution) (insured branch) under the provisions of the Federal Deposit Insurance Act, will terminate as of the close of business on the _____ day of_____, 19____.

2. Any deposits made by you after that date, either new deposits or additions to existing deposits, will not be insured by the Federal Deposit Insurance Corporation.

3. Insured deposits in the (depository institution) (branch) on the _____ day of_____, 19____, will continue to be insured, as provided by Federal Deposit Insurance Act, for *2 years* after the close of business on the _____ day of _____, 19____. Provided, however, that any withdrawals after the close of business on the _____ day of _____, 19____, will reduce the insurance coverage by the amount of such withdrawals.

_____

(Name of (depository institution or branch)

_____

(Address)

The notification may include any additional information the depository institution deems advisable, provided that the information required by this section shall be set forth in a conspicuous manner on the first page of the notification.

§ 308.124 Involuntary termination of insured status for failure to receive deposits.

(a) *Notice to show cause.* When the Board of Directors or its designee has evidence that an insured depository institution is not engaged in the business of receiving deposits, other than trust funds, the Board of Directors or its designee shall give written notice of this evidence to the depository institution and shall direct the depository institution to show cause why its insured status should not be terminated under the provisions of section 8(p) of the FDIA (12 U.S.C. 1818(p)). The insured depository institution shall have 30 days after receipt of the notice, or such longer period as is prescribed in the notice, to submit affidavits, other written proof, and any legal arguments that it is engaged in the business of receiving deposits other than trust funds.

(b) *Notice of termination date.* If, upon consideration of the affidavits, other written proof, and legal arguments, the Board of Directors determines that the depository institution is not engaged in the business of receiving deposits, other than trust funds, the finding

shall be conclusive and the Board of Directors shall notify the depository institution that its insured status will terminate at the expiration of the first full semiannual assessment period following issuance of that notification.

(c) *Notification to depositors of termination of insured status.* Within the time specified by the Board of Directors and prior to the date of termination of its insured status, the depository institution shall mail a notification of termination of insured status to each depositor at the depositor's last address of record on the books of the depository institution. The depository institution shall also publish the notification in two issues of a local newspaper of general circulation and shall furnish the FDIC with proof of such publications. The notification to depositors shall include information provided in substantially the following form:

Notice

(Date)_____.

The status of the _____, as an (insured depository institution) (insured branch) under the Federal Deposit Insurance Act, will terminate on the _____ day of_____, 19___, and its deposits will thereupon cease to be insured.

_____

(Name of depository institution or branch)

_____

(Address)

The notification may include any additional information the depository institution deems advisable, provided that the information required by this section shall be set forth in a conspicuous manner on the first page of the notification.

§ 308.125 Temporary suspension of deposit insurance.

(a) If, while an action is pending under section 8(a)(2) of the FDIA (12 U.S.C. 1818(a)(2)), the Board of Directors, after consultation with the appropriate Federal banking agency, finds that an insured depository institution (other than a special supervisory association to which § 308.126 of this subpart applies) has no tangible capital under the capital guidelines or regulations of the appropriate Federal banking agency, the Board of Directors may issue a Temporary Order Suspending Deposit Insurance, pending completion of the proceedings under section 8(a)(2) of the FDIA (12 U.S.C. 1818(a)(2)).

(b) The temporary order shall be served upon the insured institution and a copy sent to the appropriate Federal banking agency and to the appropriate State banking supervisor.

(c) The temporary order shall become effective ten days from the date of service upon the insured depository institution. Unless set aside, limited, or suspended in proceedings under section 8(a)(8)(D) of the FDIA (12 U.S.C. 1818 (a)(8)(D)), the temporary order shall remain effective and enforceable until an order terminating the insured status of the institution is entered by the Board of Directors and becomes final, or the Board of Directors dismisses the proceedings.

(d) *Notification to depositors of suspension of insured status.* Within the time specified by the Board of Directors and prior to the suspension of insured status, the depository institution shall mail a notification of suspension of insured status to each depositor at the depositor's last address of record on the books of the depository institution. The depository institution shall also publish the notification in two issues of a local newspaper of general circulation and shall furnish the FDIC with proof of such publications. The notification to depositors shall include information provided in substantially the following form:

Notice

(Date)_____.

1. The status of the _____, as an (insured depository institution) (insured branch) under the provisions of the Federal Deposit Insurance Act, will be suspended as of the close of business on the _____ day of _____, 19___, pending the completion of administrative proceedings under section 8(a) of the Federal Deposit Insurance Act.

2. Any deposits made by you after that date, either new deposits or additions to existing deposits, will not be insured by the Federal Deposit Insurance Corporation.

3. Insured deposits in the (depository institution) (branch) on the _____ day of _____, 19___, will continue to be insured for _____ after the close of business on the_____ day of _____, 19___. Provided, however, that any withdrawals after the close of business on the _____ day of_____, 19___, will reduce the insurance coverage by the amount of such withdrawals.

(Name of depository institution or branch)

(Address)

The notification may include any additional information the depository institution deems advisable, provided that the information required by this section shall be set forth in a conspicuous manner on the first page of the notification.

§ 308.126 Special supervisory associations.

If the Board of Directors finds that a savings association is a special supervisory association under the provisions of section 8(a)(8)(B) of the FDIA (12 U.S.C. 1818(a)(8)(B)) for purposes of temporary suspension of insured status, the Board of Directors shall serve upon the association its findings with regard to the determination that the capital of the association, as computed using applicable accounting standards, has suffered a material decline; that such association or its directors or officers, is engaging in an unsafe or unsound practice in conducting the business of the association; that such association is in an unsafe or unsound condition to continue operating as an insured association; or that such association or its directors or officers, has violated any law, rule, regulation, order, condition imposed in writing by any Federal banking agency, or any written agreement, or that the association failed to enter into a capital improvement plan acceptable to the Corporation prior to January, 1990.

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

§ 308.127 Scope.

(a) *Cease-and-desist proceedings under sections 8 and 50 of the FDIA.* The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings to order an insured nonmember bank or an institution-affiliated party to cease and desist from practices and violations described in section 8(b) of the FDIA, 12 U.S.C. 1818(b), and section 50 of the FDIA, 12 U.S.C. 1831aa.

(b) *Proceedings under the Securities Exchange Act of 1934.* (1) The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings by the Board of Directors to order a municipal securities dealer to cease and desist from any violation of law or regulation specified in section 15B(c)(5) of the Securities Exchange Act, as amended (15 U.S.C. 78o–4(c)(5)) where the municipal securities dealer is an insured nonmember bank or a subsidiary thereof.

(2) The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings by the Board of Directors to order a clearing agency or transfer agent to cease and desist from failure to comply with the applicable provisions of section 17, 17A and 19 of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78q, 78q-l, 78s), and the applicable rules and regulations thereunder, where the clearing agency or transfer agent is an insured nonmember bank or a subsidiary thereof.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62100, Nov. 16, 1999; 72 FR 67235, Nov. 28, 2007]

§ 308.128 Grounds for cease-and-desist orders.

(a) *General rule.* The Board of Directors or its designee may issue and have served upon any insured nonmember bank or an institution-affiliated party a notice, as set forth in § 308.18 of the Uniform Rules for practices and violations as described in § 308.127.

(b) *Extraterritorial acts of foreign banks.* An act, violation or practice committed outside the United States by a foreign bank or an institution-affiliated party that would otherwise be a ground for issuing a cease-and-desist order under paragraph (a) of this section or a temporary cease-and-desist order under § 308.131 of this subpart, shall be a ground for an order if the Board of Directors or its designee finds that:

(1) The act, violation or practice has been, is, or is likely to be a cause of, or

carried on in connection with or in furtherance of, an act, violation or practice committed within any state, territory, or possession of the United States or the District of Columbia which act, violation or practice, in and of itself, would be an appropriate basis for action by the FDIC; or

(2) The act, violation or practice, if proven, would adversely affect the insurance risk of the FDIC.

§ 308.129 Notice to state supervisory authority.

The Board of Directors or its designee shall give the appropriate state supervisory authority notification of its intent to institute a proceeding pursuant to subpart G of this part, and the grounds thereof. Any proceedings shall be conducted according to subpart G of this part, unless, within the time period specified in such notification, the state supervisory authority has effected satisfactory corrective action. No insured institution or other party who is the subject of any notice or order issued by the FDIC under this section shall have standing to raise the requirements of this subpart as grounds for attacking the validity of any such notice or order.

§ 308.130 Effective date of order and service on bank.

(a) *Effective date.* A cease-and-desist order issued by the Board of Directors after a hearing, and a cease-and-desist order issued based upon a default, shall become effective at the expiration of 30 days after the service of the order upon the bank or its official. A cease-and-desist order issued upon consent shall become effective at the time specified therein. All cease-and-desist orders shall remain effective and enforceable, except to the extent they are stayed, modified, terminated, or set aside by the Board of Directors or its designee or by a reviewing court.

(b) *Service on banks.* In cases where the bank is not the respondent, the cease-and-desist order shall also be served upon the bank.

§ 308.131 Temporary cease-and-desist order.

(a) *Issuance.* (1) When the Board of Directors or its designee determines that the violation, or the unsafe or unsound practice, as specified in the notice, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the bank, or is likely to weaken the condition of the bank or otherwise prejudice the interests of its depositors prior to the completion of the proceedings under section 8(b) of the FDIA (12 U.S.C. 1818(b)) and § 308.128 of this subpart, the Board of Directors or its designee may issue a temporary order requiring the bank or an institution-affiliated party to immediately cease and desist from any such violation, practice or to take affirmative action to prevent such insolvency, dissipation, condition or prejudice pending completion of the proceedings under section 8(b) of the FDIA (12 U.S.C. 1818(b)).

(2) When the Board of Directors or its designee issues a Notice of charges pursuant to 12 U.S.C. 1818(b)(1) which specifies on the basis of particular facts and circumstances that a bank's books and records are so incomplete or inaccurate that the FDIC is unable, through the normal supervisory process, to determine the financial condition of the bank or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of the bank, then the Board of Directors or its designee may issue a temporary order requiring:

(i) The cessation of any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

(ii) Affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under section 8(b) of the FDIA (12 U.S.C. 1818(b)).

(3) The temporary order shall be served upon the bank or the institution-affiliated party named therein and shall also be served upon the bank in the case where the temporary order applies only to an institution-affiliated party.

(b) *Effective date.* A temporary order shall become effective when served upon the bank or the institution-affiliated party. Unless the temporary order is set aside, limited, or suspended by a court in proceedings authorized under

section 8(c)(2) of the FDIA (12 U.S.C. 1818(c)(2)), the temporary order shall remain effective and enforceable pending completion of administrative proceedings pursuant to section 8(b) of the FDIA (12 U.S.C. 1818(b)) and entry of an order which has become final, or with respect to paragraph (a)(2) of this section the FDIC determines by examination or otherwise that the bank's books and records are accurate and reflect the financial condition of the bank.

(c) *Uniform Rules do not apply*. The Uniform Rules and subpart B of the Local Rules shall not apply to the issuance of temporary orders under this section.

Subpart H—Rules and Procedures Applicable to Proceedings Relating to Assessment and Collection of Civil Money Penalties for Violation of Cease-and-Desist Orders and of Certain Federal Statutes, Including Call Report Penalties

§ 308.132 Assessment of penalties.

(a) *Scope*. The rules and procedures of this subpart, subpart B of the Local Rules, and the Uniform Rules shall apply to proceedings to assess and collect civil money penalties.

(b) *Relevant considerations*. In determining the amount of the civil penalty to be assessed, the Board of Directors or its designee shall consider the financial resources and good faith of the institution or official, the gravity of the violation, the history of previous violations, and any such other matters as justice may require.

(c) *Authority of the Board of Directors*. The Board of Directors or its designee may assess civil money penalties under section 8(i) of the FDIA (12 U.S.C. 1818(i)), and § 308.1(e) of the Uniform Rules (this part).

(d) *Maximum civil money penalty amounts*. Under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the Board of Directors or its designee may assess civil money penalties in the maximum amounts using the following framework:

(1) *Statutory formula to calculate inflation adjustments*. The FDIC is required by statute to annually adjust for inflation the maximum amount of each civil money penalty within its jurisdiction to administer. The inflation adjustment is calculated by multiplying the maximum dollar amount of the civil money penalty for the previous calendar year by the cost-of-living inflation adjustment multiplier provided annually by the Office of Management and Budget and rounding the total to the nearest dollar.

(2) *Notice of inflation adjustments*. By January 15 of each calendar year, the FDIC will publish notice in the FEDERAL REGISTER of the maximum penalties that may be assessed after each January 15, based on the formula in paragraph (d)(1) of this section, for conduct occurring on or after November 2, 2015.

(e) *Civil money penalties for violations of 12 U.S.C. 1464(v) and 12 U.S.C. 1817(a)*—(1) *Late filing—Tier One penalties*. Where an institution fails to make or publish its Report of Condition and Income (Call Report) within the appropriate time periods, but where the institution maintains procedures in place reasonably adapted to avoid inadvertent error and the late filing occurred unintentionally and as a result of such error, or where the institution inadvertently transmitted a Call Report that is minimally late, the Board of Directors or its designee may assess a Tier One civil money penalty. The amount of such a penalty shall not exceed the maximum amount calculated and published annually in the FEDERAL REGISTER under paragraph (d)(2) of this section. Such a penalty may be assessed for each day that the violation continues.

(i) *First offense*. Generally, in such cases, the amount assessed shall be an amount calculated and published annually in the FEDERAL REGISTER under paragraph (d)(2) of this section. The FEDERAL REGISTER notice will contain a presumptive penalty amount per day for each of the first 15 days for which the failure continues, and a presumptive amount per day for each subsequent days the failure continues, beginning on the 16th day. The annual FEDERAL REGISTER notice will also provide penalty amounts that generally

may be assessed for institutions with less than $25,000,000 in assets.

(ii) *Subsequent offense.* The FDIC will calculate and publish in the FEDERAL REGISTER a presumptive daily Tier One penalty to be imposed where an institution has been delinquent in making or publishing its Call Report within the preceding five quarters. The published penalty shall identify the amount that will generally be imposed per day for each of the first 15 days for which the failure continues, and the amount that will generally be imposed per day for each subsequent day the failure continues, beginning on the 16th day. The annual FEDERAL REGISTER notice will also provide penalty amounts that generally may be assessed for institutions with less than $25,000,000 in assets.

(iii) *Lengthy or repeated violations.* The amounts set forth in this paragraph (e)(1) will be assessed on a case-by-case basis where the amount of time of the institution's delinquency is lengthy or the institution has been delinquent repeatedly in making or publishing its Call Reports.

(iv) *Waiver.* Absent extraordinary circumstances outside the control of the institution, penalties assessed for late filing shall not be waived.

(2) *Late-filing—Tier Two penalties.* Where an institution fails to make or publish its Call Report within the appropriate time period, the Board of Directors or its designee may assess a Tier Two civil money penalty for each day the failure continues. The amount of such a penalty will not exceed the maximum amount calculated and published annually in the FEDERAL REGISTER under paragraph (d)(2) of this section.

(3) *False or misleading reports or information*—(i) *Tier One penalties.* In cases in which an institution submits or publishes any false or misleading Call Report or information, the Board of Directors or its designee may assess a Tier One civil money penalty for each day the information is not corrected, where the institution maintains procedures in place reasonably adapted to avoid inadvertent error and the violation occurred unintentionally and as a result of such error, or where the institution inadvertently transmits a Call Report or information that is false or misleading. The amount of such a penalty will not exceed the maximum amount calculated and published annually in the FEDERAL REGISTER under paragraph (d)(2) of this section.

(ii) *Tier Two penalties.* Where an institution submits or publishes any false or misleading Call Report or other information, the Board of Directors or its designee may assess a Tier Two civil money penalty for each day the information is not corrected. The amount of such a penalty will not exceed the maximum amount calculated and published annually in the FEDERAL REGISTER under paragraph (d)(2) of this section.

(iii) *Tier Three penalties.* Where an institution knowingly or with reckless disregard for the accuracy of any Call Report or information submits or publishes any false or misleading Call Report or other information, the Board of Directors or its designee may assess a Tier Three civil money penalty for each day the information is not corrected. The penalty shall not exceed the lesser of 1 percent of the institution's total assets per day or the amount calculated and published annually in the FEDERAL REGISTER under paragraph (d)(2) of this section.

(4) *Mitigating factors.* The amounts set forth in paragraphs (e)(1) through (e)(3) of this section may be reduced based upon the factors set forth in paragraph (b) of this section.

[77 FR 75477, Dec. 17, 2012, as amended at 81 FR 42239, June 29, 2016; 81 FR 95416, Dec. 28, 2016; 83 FR 1522, Jan. 12, 2018; 83 FR 61114, Nov. 28, 2018]

§ 308.133 Effective date of, and payment under, an order to pay.

(a) *Effective date.* (1) Unless otherwise provided in the Notice, except in situations covered by paragraph (a)(2) of this section, civil penalties assessed pursuant to this subpart are due and payable 60 days after the Notice is served upon the respondent.

(2) If the respondent both requests a hearing and serves an answer, civil penalties assessed pursuant to this subpart are due and payable 60 days after an order to pay, issued after the hearing or upon default, is served upon the respondent, unless the order provides for a different period of payment. Civil penalties assessed pursuant to an order

to pay issued upon consent are due and payable within the time specified therein.

(b) *Payment.* All penalties collected under this section shall be paid over to the Treasury of the United States.

Subpart I—Rules and Procedures for Imposition of Sanctions Upon Municipal Securities Dealers or Persons Associated With Them and Clearing Agencies or Transfer Agents

§ 308.134 Scope.

The rules and procedures in this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings by the Board of Directors or its designee:

(a) To censure, limit the activities of, suspend, or revoke the registration of, any municipal securities dealer for which the FDIC is the appropriate regulatory agency;

(b) To censure, suspend, or bar from being associated with such a municipal securities dealer, any person associated with such a municipal securities dealer; and

(c) To deny registration, to censure limit the activities of, suspend, or revoke the registration of, any transfer agent or clearing agency for which the FDIC is the appropriate regulatory agency. This subpart and the Uniform Rules shall not apply to proceedings to postpone or suspend registration of a transfer agent or clearing agency pending final determination of denial or revocation of registration.

§ 308.135 Grounds for imposition of sanctions.

(a) *Action under section 15(b)(4) of the Exchange Act.* The Board of Directors or its designee may issue and have served upon any municipal securities dealer for which the FDIC is the appropriate regulatory agency, or any person associated or seeking to become associated with a municipal securities dealer for which the FDIC is the appropriate regulatory agency, a written notice of its intention to censure, limit the activities or functions or operations of, suspend, or revoke the registration of, such municipal securities dealer, or to censure, suspend, or bar the person from being associated with the municipal securities dealer, when the Board of Directors or its designee determines:

(1) That such municipal securities dealer or such person

(i) Has committed any prohibited act or omitted any required act specified in subparagraph (A), (D), or (E) of section 15(b)(4) of the Exchange Act, as amended (15 U.S.C. 78o);

(ii) Has been convicted of any offense specified in section 15(b)(4)(B) of the Exchange Act within ten years of commencement of proceedings under this subpart; or

(iii) Is enjoined from any act, conduct, or practice specified in section 15(b)(4)(C) of the Exchange Act; and

(2) That it is in the public interest to impose any of the sanctions set forth in paragraph (a) of this section.

(b) *Action under sections 17 and 17A of the Exchange Act.* The Board of Directors or its designee may issue, and have served upon any transfer agent or clearing agency for which the FDIC is the appropriate regulatory agency, a written Notice of its intention to deny registration to, censure, place limitations on the activities or function or operations of, suspend, or revoke the registration of, the transfer agent or clearing agency, when the Board of Directors or its designee determines:

(1) That the transfer agent or clearing agency has willfully violated, or is unable to comply with, any applicable provision of section 17 or 17A of the Exchange Act, as amended, or any applicable rule or regulation issued pursuant thereto; and

(2) That it is in the public interest to impose any of the sanctions set forth in paragraph (b) of this section.

§ 308.136 Notice to and consultation with the Securities and Exchange Commission.

Before initiating any proceedings under § 308.135, the FDIC shall:

(a) Notify the Securities and Exchange Commission of the identity of the municipal securities dealer or associated person against whom proceedings are to be initiated, and the nature of and basis for the proposed action; and

(b) Consult with the Commission concerning the effect of the proposed action on the protection of investors and the possibility of coordinating the action with any proceeding by the Commission against the municipal securities dealer or associated person.

§ 308.137 Effective date of order imposing sanctions.

An order issued by the Board of Directors after a hearing or an order issued upon default shall become effective at the expiration of 30 days after the service of the order, except that an order of censure, denial, or revocation of registration is effective when served. An order issued upon consent shall become effective at the time specified therein. All orders shall remain effective and enforceable except to the extent they are stayed, modified, terminated, or set aside by the Board of Directors, its designee, or a reviewing court, provided that orders of suspension shall continue in effect no longer than 12 months.

Subpart J—Rules and Procedures Relating to Exemption Proceedings Under Section 12(h) of the Securities Exchange Act of 1934

§ 308.138 Scope.

The rules and procedures of this subpart J shall apply to proceedings by the Board of Directors or its designee to exempt, in whole or in part, an issuer of securities from the provisions of sections 12(g), 13, 14(a), 14(c), 14(d), or 14(f) of the Exchange Act, as amended (15 U.S.C. 781, 78m, 78n (a), (c) (d) or (f)), or to exempt an officer or a director or beneficial owner of securities of such an issuer from the provisions of section 16 of the Exchange Act (15 U.S.C. 78p).

§ 308.139 Application for exemption.

Any interested person may file a written application for an exemption under this subpart with the Administrative Officer, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429. The application shall specify the exemption sought and the reason therefor, and shall include a statement indicating why the exemption would be consistent with the public interest or the protection of investors.

[86 FR 2249, Jan. 12, 2021]

§ 308.140 Newspaper notice.

(a) *General rule.* If the Board of Directors or its designee, in its sole discretion, decides to further consider an application for exemption, there shall be served upon the applicant instructions to publish one notification in a newspaper of general circulation in the community where the main office of the issuer is located. The applicant shall furnish proof of such publication to the Administrative Officer or such other person as may be directed in the instructions.

(b) *Contents.* The notification shall contain the name and address of the issuer and the name and title of the applicant, the exemption sought, a statement that a hearing will be held, and a statement that within 30 days of publication of the newspaper notice, interested persons may submit to the FDIC written comments on the application for exemption and a written request for an opportunity to be heard. The address of the FDIC must appear in the notice.

[56 FR 37975, Aug. 9, 1991, as amended at 86 FR 2249, Jan. 12, 2021]

§ 308.141 Notice of hearing.

Within ten days after expiration of the period for receipt of comments pursuant to § 308.140, the Administrative Officer shall serve upon the applicant and any person who has requested an opportunity to be heard written notification indicating the place and time of the hearing. The hearing shall be held not later than 30 days after service of the notification of hearing. The notification shall contain the name and address of the presiding officer designated by the Administrative Officer and a statement of the matters to be considered.

[86 FR 2249, Jan. 12, 2021]

§ 308.142 Hearing.

(a) *Proceedings are informal.* Formal rules of evidence, the adjudicative procedures of the APA (5 U.S.C. 554–557),

the Uniform Rules and § 308.108 of subpart B of the Local Rules shall not apply to hearings under this subpart.

(b) *Hearing Procedure.* (1) Parties to the hearing may appear personally or through counsel and shall have the right to introduce relevant and material documents and to make an oral statement.

(2) There shall be no discovery in proceeding under this subpart J.

(3) The presiding officer shall have discretion to permit presentation of witnesses within specified time limits, provided that a list of witnesses is furnished to the presiding officer prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness and each party may cross-examine any witness presented by an opposing party.

(4) The proceedings shall be on the record and the transcript shall be promptly submitted to the Board of Directors. The presiding officer shall make recommendations to the Board of Directors, unless the Board of Directors, in its sole discretion, directs otherwise.

§ 308.143 Decision of Board of Directors.

Following submission of the hearing transcript to the Board of Directors, the Board of Directors may grant the exemption where it determines, by reason of the number of public investors, the amount of trading interest in the securities, the nature and extent of the issuer's activities, the issuer's income or assets, or otherwise, that the exemption is consistent with the public interest or the protection of investors. Any exemption shall be set forth in an order specifying the terms of the exemption, the person to whom it is granted, and the period for which it is granted. A copy of the order shall be served upon each party to the proceeding.

Subpart K—Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA

§ 308.144 Scope.

The procedures of this subpart shall be followed when an investigation is instituted and conducted in connection with any open or failed insured depository institution, any institutions making application to become insured depository institutions, and affiliates thereof, or with other types of investigations to determine compliance with applicable law and regulations, pursuant to section 10(c) of the FDIA (12 U.S.C. 1820(c)) or section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B)). The Uniform Rules and subpart B of the Local Rules shall not apply to investigations under this subpart.

[80 FR 5013, Jan. 30, 2015]

§ 308.145 Conduct of investigation.

An investigation shall be initiated only upon issuance of an order by the Board of Directors; or by the General Counsel, the Director of the Division of Risk Management Supervision, the Director of the Division of Depositor and Consumer Protection, or their respective designees. The order shall indicate the purpose of the investigation and designate FDIC's representative(s) to direct the conduct of the investigation. Upon application and for good cause shown, the persons who issue the order of investigation may limit, quash, modify, or withdraw it. Upon the conclusion of the investigation, an order of termination of the investigation shall be issued by the persons issuing the order of investigation.

[80 FR 5013, Jan. 30, 2015]

§ 308.146 Powers of person conducting investigation.

The person designated to conduct the investigation shall have the power, among other things, to administer oaths and affirmations, to take and preserve testimony under oath, to issue subpoenas and subpoenas duces tecum and to apply for their enforcement to the United States District Court for the judicial district or the United States court in any territory in which the main office of the bank, institution, or affiliate is located or in which the witness resides or conducts business. The person conducting the investigation may obtain the assistance of counsel or others from both within and outside the FDIC. The persons who issue the order of investigation may limit, quash, or modify any subpoena

or subpoena duces tecum, upon application and for good cause shown. The person conducting an investigation may report to the Board of Directors any instance where any attorney has engaged in contemptuous, dilatory, obstructionist, or contumacious conduct or has otherwise violated any provision of this part during the course of an investigation. The Board of Directors, upon motion of the person conducting the investigation, or on its own motion, may make a finding of contempt and may then summarily suspend, without a hearing, any attorney representing a witness from further participation in the investigation.

[80 FR 5013, Jan. 30, 2015]

§ 308.147 Investigations confidential.

Investigations shall be confidential. Information and documents obtained by the FDIC in the course of such investigations shall not be disclosed, except as provided in part 309 of this chapter and as otherwise required by law.

[80 FR 5013, Jan. 30, 2015]

§ 308.148 Rights of witnesses.

In an investigation:

(a) Any person compelled or requested to furnish testimony, documentary evidence, or other information, shall upon request be shown and provided with a copy of the order initiating the proceeding;

(b) Any person compelled or requested to provide testimony as a witness or to furnish documentary evidence may be represented by a counsel who meets the requirements of § 308.6 of the Uniform Rules. That counsel may be present and may:

(1) Advise the witness before, during, and after such testimony;

(2) Briefly question the witness at the conclusion of such testimony for clarification purposes; and

(3) Make summary notes during such testimony solely for the use and benefit of the witness;

(c) All persons testifying shall be sequestered. Such persons and their counsel shall not be present during the testimony of any other person, unless permitted in the discretion of the person conducting the investigation. Neither attorney(s) for the institution that is the subject of the investigation, nor attorney(s) for any other interested persons, shall have any right to be present during the testimony of any witness not personally represented by such attorney;

(d) In cases of a perceived or actual conflict of interest arising out of an attorney's or law firm's representation of multiple witnesses, the person conducting the investigation may require the attorney to comply with the provisions of § 308.8 of the Uniform Rules; and

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

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62100, Nov. 16, 1999; 80 FR 5013, Jan. 30, 2015]

§ 308.149 Service of subpoena.

Service of a subpoena shall be accomplished in accordance with § 308.11 of the Uniform Rules.

§ 308.150 Transcripts.

(a) *General rule.* Transcripts of testimony, if any, shall be recorded by an official reporter, or by any other person or means designated by the person conducting the investigation. A witness may, solely for the use and benefit of the witness, obtain a copy of the transcript of his or her testimony at the conclusion of the investigation or, at the discretion of the person conducting the investigation, at an earlier time, provided that the witness submits a written request for the transcript and the transcript is available. The witness requesting a copy of his or her testimony shall bear the cost thereof.

(b) *Subscription by witness.* The transcript of testimony shall be subscribed by the witness, unless the person conducting the investigation and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the

transcript of the testimony is not subscribed by the witness, the official reporter taking the testimony shall certify that the transcript is a true and complete transcript of the testimony.

[56 FR 37975, Aug. 9, 1991, as amended at 80 FR 5013, Jan. 30, 2015]

Subpart L—Procedures and Standards Applicable to a Notice of Change in Senior Executive Officer or Director Pursuant to Section 32 of the FDIA

§ 308.151 Scope.

The rules and procedures set forth in this subpart shall apply to the notice filed by a state nonmember bank pursuant to section 32 of the FDIA (12 U.S.C. 1831i) and § 303.102 of this chapter for the consent of the FDIC to add or replace an individual on the Board of Directors, or to employ any individual as a senior executive officer, or change the responsibilities of any individual to a position of senior executive officer where:

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

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

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

[64 FR 62100, Nov. 16, 1999]

§ 308.152 Grounds for disapproval of notice.

The Board of Directors or its designee may issue a notice of disapproval with respect to a notice submitted by a state nonmember bank pursuant to section 32 of the FDIA (12 U.S.C. 1831i) where:

(a) The competence, experience, character, or integrity of the individual with respect to whom such notice is submitted indicates that it would not be in the best interests of the depositors of the state nonmember bank to permit the individual to be employed by or associated with such bank; or

(b) The competence, experience, character, or integrity of the individual with respect to whom such notice is submitted indicates that it would not be in the best interests of the public to permit the individual to be employed by, or associated with, the state nonmember bank.

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

§ 308.153 Procedures where notice of disapproval issues pursuant to § 303.103(c) of this chapter.

(a) The Notice of Disapproval shall be served upon the insured state nonmember bank and the candidate for director or senior executive officer. The Notice of Disapproval shall:

(1) Summarize or cite the relevant considerations specified in § 308.152;

(2) Inform the individual and the bank that a request for review of the disapproval may be filed within fifteen days of receipt of the Notice of Disapproval; and

(3) Specify that additional information, if any, must be contained in the request for review.

(b) The request for review must be filed at the appropriate regional office.

(c) The request for review must be in writing and should:

(1) Specify the reasons why the FDIC should reconsider its disapproval; and

(2) Set forth relevant, substantive and material documents, if any, that for good cause were not previously set forth in the notice required to be filed pursuant to section 32 of the FDIA (12 U.S.C. 1831i).

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

§ 308.154 Decision on review.

(a) Within 30 days of receipt of the request for review, the Board of Directors or its designee, shall notify the bank and/or the individual filing the reconsideration (hereafter ''petitioner'') of the FDIC's decision on review.

(b) If the decision is to grant the review and approve the notice, the bank and the individual involved shall be so notified.

(c) A denial of the request for review pursuant to section 32 of the FDIA shall:

(1) Inform the petitioner that a written request for a hearing, stating the relief desired and the grounds therefore, may be filed with the Administrative Officer within 15 days after the receipt of the denial; and

(2) Summarize or cite the relevant considerations specified in § 308.152.

(d) If a decision is not rendered within 30 days, the petitioner may file a request for a hearing within fifteen days from the date of expiration.

[56 FR 37975, Aug. 9, 1991, as amended at 86 FR 2249, Jan. 12, 2021]

§ 308.155 Hearing.

(a) *Hearing dates.* The Administrative Officer shall order a hearing to be commenced within 30 days after receipt of a request for a hearing filed pursuant to § 308.154. Upon request of the petitioner or the FDIC, the presiding officer or the Administrative Officer may order a later hearing date.

(b) *Burden of proof.* The ultimate burden of proof shall be upon the candidate for director or senior executive officer. The burden of going forward with a *prima facie* case shall be upon the FDIC.

(c) *Hearing procedure.* (1) The hearing shall be held in Washington, DC or at another designated place, before a presiding officer designated by the Administrative Officer.

(2) The provisions of §§ 308.6 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§ 308.101 through 308.102, and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The petitioner may appear at the hearing and shall have the right to introduce relevant and material documents and make an oral presentation. Members of the FDIC enforcement staff may attend the hearing and participate as representatives of the FDIC enforcement staff.

(4) There shall be no discovery in proceedings under this subpart.

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the petitioner afforded the hearing.

(6) In the course of or in connection with any hearing under paragraph (c) of this section the presiding officer shall have the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas duces tecum. Where the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the applicant afforded the hearing, or the members of the FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors or its designee, where possible, within fifteen days after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Administrative Officer who shall promptly certify the entire record, including the recommendation to the Board of Directors or its designee. The Administrative Officer's certification shall close the record.

(d) *Written submissions in lieu of hearing.* The petitioner may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(e) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a

hearing in person or through an authorized representative shall constitute a waiver of hearing. If a hearing is waived, the order shall be final and unappealable, and shall remain in full force and effect.

(f) *Decision by Board of Directors or its designee.* Within 45 days following the Administrative Officer's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the affected individual whether the denial of the notice will be continued, terminated, or otherwise modified. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the petitioner. The Board of Directors or its designee shall promptly rescind or modify the denial where the decision is favorable to the petitioner.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62101, Nov. 16, 1999; 86 FR 2249, Jan. 12, 2021]

Subpart M—Procedures Applicable to the Request for and Conduct of a Hearing after Denial of an Application under Section 19 of the FDI Act

SOURCE: 85 FR 51323, Aug. 20, 2020, unless otherwise noted.

§ 308.156 Scope.

The rules and procedures set forth in this subpart shall apply to an application filed under section 19 of the FDI Act, 12 U.S.C. 1829 (section 19), and 12 CFR part 303, subpart L, by an insured depository institution (IDI) or an individual, which individual has been convicted of any criminal offense involving dishonesty, a breach of trust, or money laundering, or who has agreed to enter into a pretrial diversion or similar program in connection with the prosecution of such offense, to seek the prior written consent of the FDIC for the individual to become or continue as an institution-affiliated party (IAP) with respect to an IDI; to own or control directly or indirectly an IDI; or to participate directly or indirectly in any manner in the conduct of the affairs of an IDI; and shall apply only after such application has been denied under part 12 CFR part 303, subpart L.

§ 308.157 Denial of applications.

If an application is denied under 12 CFR part 303, subpart L, then the applicant may request a hearing under this subpart. The applicant will have 60 days after the date of the denial to file a written request with the Administrative Officer. In the request, the applicant shall state the relief desired, the grounds supporting the request for relief, and provide any supporting evidence that the applicant believes is responsive to the grounds for the denial.

[86 FR 2250, Jan. 12, 2021]

§ 308.158 Hearings.

(a) *Hearing dates.* The Administrative Officer shall order a hearing to be commenced within 60 days after receipt of a request for hearing on an application filed under § 308.157. Upon the request of the applicant or FDIC enforcement counsel, the presiding officer or the Administrative Officer may order a later hearing date.

(b) *Burden of proof.* The burden of going forward with a *prima facie* case shall be upon the FDIC. The ultimate burden of proof shall be upon the person proposing to become or continue as an IAP with respect to an IDI; to own or control directly or indirectly an IDI; or to participate directly or indirectly in any manner in the conduct of the affairs of an IDI.

(c) *Hearing procedure.* (1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Administrative Officer.

(2) The provisions of §§ 308.6 through 308.12, 308.16, and 308.21 of the Uniform Rules (subpart A of this part) and §§ 308.101, 308.102, and 308.104 through 308.106 the Local Rules (subpart B of this part) shall apply to hearings held under this subpart.

(3) The applicant may appear at the hearing and shall have the right to introduce relevant and material documents and oral argument. Members of the FDIC enforcement staff may attend the hearing and participate as a party.

(4) There shall be no discovery in proceedings under this subpart.

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the applicant afforded the hearing.

(6) In the course of or in connection with any hearing under this paragraph, the presiding officer shall have the power to administer oaths and affirmations; to take or cause to be taken depositions of unavailable witnesses; and to issue, revoke, quash, or modify subpoenas and subpoenas *duces tecum*. Where the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules (subpart A of this part).

(7) Upon the request of the applicant afforded the hearing, or FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors, where possible, within 20 days after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Administrative Officer who shall promptly certify the entire record, including the recommendation to the Board of Directors or its designee. The Administrative Officer certification shall close the record.

(d) *Written submissions in lieu of hearing*. The applicant or the IDI may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(e) *Failure to request or appear at hearing*. Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of a hearing. If a hearing is waived, the person shall remain barred under section 19.

(f) *Decision by Board of Directors or its designee*. Within 60 days following the Administrative Officer's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the affected person whether the person shall remain barred under section 19. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the applicant.

[85 FR 51323, Aug. 20, 2020, as amended at 86 FR 2250, Jan. 12, 2021]

§§ 308.159–308.160 [Reserved]

Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

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

§ 308.161 Scope.

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

(a) Proceedings to suspend an institution-affiliated party of an insured State nonmember bank, or an insured State savings association, or to prohibit such party from further participation in the conduct of the affairs of any depository institution, if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12), where the individual is the subject of any state or federal information, indictment, or complaint, involving the commission of, or participation in:

(1) A crime involving dishonesty or breach of trust punishable by imprisonment exceeding one year under state or federal law; or

(2) A criminal violation of section 1956, 1957, or 1960 of title 18 or section 5322 or 5324 of title 31.

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

(1) A judgment of conviction or an agreement to enter a pre-trial diversion or other similar program has been entered against such party in connection with a crime described in paragraph (a)(1) of this section that is not subject to further appellate review, if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of title 12); or

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

[72 FR 67235, Nov. 28, 2007, as amended at 80 FR 5013, Jan. 30, 2015]

§ 308.162 Relevant considerations.

(a)(1) In proceedings under § 308.161(a) and (b) for a notice of suspension or prohibition, or a removal or prohibition order, the following shall be considered:

(i) Whether the alleged offense is a crime which is punishable by imprisonment for a term exceeding one year under state or federal law and which involves dishonesty or breach of trust; and

(ii) Whether the alleged offense is a criminal violation of section 1956, 1957, or 1960 of title 18 or section 5322 or 5324 of title 31; and

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

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

§ 308.163 Notice of suspension or prohibition, and orders of removal or prohibition.

(a) Notice of suspension or prohibition.

(1) The Board of Directors or its designee may suspend or prohibit from further participation in the conduct of the affairs of any depository institution an institution-affiliated party by written notice of suspension or prohibition upon a determination by the Board of Directors or its designee that the grounds for such suspension or prohibition exist. The written notice of suspension or prohibition shall be served upon the institution-affiliated party and any depository institution that the subject of the action is affiliated with at the time the notice is issued.

(2) The suspension or prohibition shall be effective immediately upon service on the institution-affiliated party, who shall immediately comply with the requirements thereof, and shall remain in effect until final disposition of the information, indictment, complaint, or until it is terminated by the Board of Directors or its designee under the provisions of § 308.164 or otherwise.

(b) Order of removal or prohibition.

(1) The Board of Directors or its designee may issue an order removing or prohibiting from further participation in the conduct of the affairs of any depository institution an institution-affiliated party, when a final judgment of conviction not subject to further appellate review is entered against the institution-affiliated party for a crime referred to in § 308.161(a)(1) and continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten

to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of title 12).

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

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

(1) Inform the institution-affiliated party that a written request for a hearing, stating the relief desired and grounds therefore, and any supporting evidence, may be filed with the Administrative Officer within 30 days after service of the written notice or order; and

(2) Set forth the basis and facts in support of the notice or order and address the relevant considerations specified in § 308.162.

(d) To obtain a hearing, the institution-affiliated party shall file with the Administrative Officer a written request for a hearing within 30 days after service of the notice of suspension or prohibition or the order of removal or prohibition, which shall:

(1) Admit or deny specifically each allegation in the notice or order, or state that the institution-affiliated party is without knowledge or information, which statement shall have the effect of a denial. Any allegation not denied shall be deemed to be admitted. When an institution-affiliated party intends in good faith to deny only a part of or to qualify an allegation, he shall specify so much of it as is true and shall deny only the remainder; and

(2) Shall state whether the institution-affiliated party is requesting termination or modification of the notice or order, and shall state with particularity how he intends to show that his continued service to or participation in the conduct of the affairs of the depository institution would not, or is not likely to, pose a threat to the interests of its depositors or to impair public confidence in the depository institution.

[72 FR 67235, Nov. 28, 2007, as amended at 80 FR 5014, Jan. 30, 2015; 86 FR 2250, Jan. 12, 2021]

§ 308.164 Hearings.

(a) *Hearing dates.* The Administrative Officer shall order a hearing to be commenced within 30 days after receipt of a request for hearing filed pursuant to § 308.163. Upon the request of the institution-affiliated party, the presiding officer or the Administrative Officer may order a later hearing date.

(b) *Hearing procedure.* (1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Administrative Officer.

(2) The provisions of §§ 308.6 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§ 308.101 through 308.102 and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The institution-affiliated party may appear at the hearing and shall have the right to introduce relevant and material documents. Members of the FDIC enforcement staff may attend the hearing and participate as representatives of the FDIC enforcement staff. Following the introduction of all evidence, the applicant and the representative of the FDIC enforcement staff shall have an opportunity for oral argument; however, the parties may jointly waive the right to oral argument, and, in lieu thereof, elect to submit written argument.

(4) There shall be no discovery in proceedings under this subpart.

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the institution-affiliated party afforded the hearing. A copy of the transcript shall be sent directly to the presiding officer, who shall have authority to correct the record sua sponte or upon the motion of any party.

(6) In the course of or in connection with any hearing under paragraph (b) of this section, the presiding officer shall have the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas duces tecum. Where the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the institution-affiliated party afforded the hearing, or the members of the FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors, where possible, within 10 days after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Administrative Officer who shall promptly certify the entire record, including the recommendation to the Board of Directors. The Administrative Officer's certification shall close the record.

(10) The institution-affiliated party has the burden of showing, by a preponderance of the evidence, that his or her continued service to or participation in the conduct of the affairs of a depository institution does not, or is not likely to, pose a threat to the interests of the depository institution's depositors or threaten to impair public confidence in the depository institution.

(c) *Written submissions in lieu of hearing.* The institution-affiliated party may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(d) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of hearing. If a hearing is waived, the order shall be final and unappealable, and shall remain in full force and effect pursuant to § 308.163.

(e) *Decision by Board of Directors or its designee.* Within 60 days following the Administrative Officer's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the institution-affiliated party whether the notice of suspension or prohibition or the order of removal or prohibition will be continued, terminated, or otherwise modified. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the institution-affiliated party. The Board of Directors or its designee shall promptly rescind or modify a notice of suspension or prohibition or an order of removal or prohibition where the decision is favorable to the institution-affiliated party.

[72 FR 67235, Nov. 28, 2007, as amended at 80 FR 5014, Jan. 30, 2015; 86 FR 2250, Jan. 12, 2021]

Subpart O—Liability of Commonly Controlled Depository Institutions

§ 308.165 Scope.

The rules and procedures in this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings in connection with the assessment of cross-guaranty liability against commonly controlled depository institutions.

§ 308.166 Grounds for assessment of liability.

Any insured depository institution shall be liable for any loss incurred or reasonably anticipated to be incurred by the corporation, subsequent to August 9, 1989, in connection with the default of a commonly controlled insured depository institution, or any loss incurred or reasonably anticipated to be incurred in connection with any assistance provided by the Corporation to any commonly controlled depository institution in danger of default.

§ 308.167 Notice of assessment of liability.

(a) The amount of liability shall be assessed upon service of a Notice of Assessment of Liability upon the liable depository institution, within two years of the date the Corporation incurred the loss.

(b) *Contents of Notice.* (1) The Notice of Assessment of Liability shall set forth:

(i) The basis for the FDIC's jurisdiction over the proceeding;

(ii) A statement of the Corporation's good faith estimate of the amount of loss it has incurred or anticipates incurring;

(iii) A statement of the method by which the estimated loss was calculated;

(iv) A proposed order directing payment by the liable institution of the FDIC's estimated amount of loss, and the schedule under which the payment will be due;

(v) In cases involving more than one liable institution, the estimated amount of each institution's share of the liability.

(2) The Notice of Assessment of Liability shall advise the liable institution(s):

(i) That an answer must be filed within 20 days after service of the Notice;

(ii) That, if a hearing is requested, a request for a hearing must be filed within 20 days after service of the Notice;

(iii) That if a hearing is requested, such hearing will be held within the judicial district in which the liable institution is found, or, in cases involving more than one liable institution, within a judicial district in which at least one liable institution is found;

(iv) That, unless the administrative law judge sets a different date, the hearing will commence 120 days after service of the Notice of Assessment of Liability; and

(v) That failure to request a hearing shall render the Notice of Assessment a final and unappealable order.

§ 308.168 Effective date of and payment under an order to pay.

(a) Unless otherwise provided in the Notice of Assessment of Liability, payment of the assessment shall be due on or before the 21st day after service of the Assessment of Liability, under the terms of the schedule for payment set forth therein.

(b) All payments collected shall be paid to the Corporation.

(c) Failure to request a hearing as prescribed herein shall render the order to pay final and unappealable.

Subpart P—Rules and Procedures Relating to the Recovery of Attorney Fees and Other Expenses

§ 308.169 Scope.

This subpart, and the Equal Access to Justice Act (5 U.S.C. 504), which it implements, apply to adversary adjudications before the FDIC. The types of adjudication covered by this subpart are those listed in § 308.01 of the Uniform Rules. The Uniform Rules and subpart B of the Local Rules apply to any proceedings to recover fees and expenses under this subpart.

§ 308.170 Filing, content, and service of documents.

(a) *Time to file.* An application and any other pleading or document related to the application shall be filed with the Administrative Officer within 30 days after service of the final order of the Board of Directors in disposition of the proceeding whenever:

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

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

(b) *Content.* The application and related documents shall conform to the requirements of § 308.10(b) and (c) of the Uniform Rules.

(c) *Service*. The application and related documents shall be served on all parties to the adversary adjudication in accordance with § 308.11 of the Uniform Rules, except that statements of net worth shall be served only on counsel for the FDIC.

(d) *Referral*. Upon receipt of an application, the Administrative Officer shall refer the matter to the administrative law judge who heard the underlying adversary proceeding, provided that if the original administrative law judge is unavailable, or the Administrative Officer determines, in his or her sole discretion, that there is cause to refer the matter to a different administrative law judge, the matter shall be referred to a different administrative law judge.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62102, Nov. 16, 1999; 86 FR 2250, Jan. 12, 2021]

§ 308.171 Responses to application.

(a) *By FDIC*. (1) Within 20 days after service of an application, counsel for the FDIC may file with the Administrative Officer and serve on all parties an answer to the application. Unless counsel for the FDIC requests and is granted an extension of time for filing or files a statement of intent to negotiate under § 308.179, failure to file an answer within the 20-day period will be treated as a consent to the award requested.

(2) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the FDIC's position. If the answer is based on any alleged facts not already in the record of the proceeding, the answer shall include either supporting affidavits or a request for further proceedings under § 308.180.

(b) *Reply to answer*. The applicant may file a reply with regard to an application filed pursuant to 5 U.S.C. 504 (a)(1), if the FDIC has addressed in its answer any of the following issues: that the position of the FDIC was substantially justified, that the applicant unduly protracted the proceedings, or that special circumstances make an award unjust. The applicant may file a reply with regard to an application filed pursuant to 5 U.S.C. 504 (a)(4), if the FDIC has addressed in its answer any of the following issues: that the applicant has committed a willful violation of law or otherwise acted in bad faith, that the FDIC's demand is reasonable when compared to the decision of the administrative law judge or that special circumstances make an award unjust. The reply shall be filed within 15 days after service of the answer. If the reply is based on any alleged facts not already in the record of the proceeding, the reply shall include either supporting affidavits or a request for further proceedings under § 308.180.

(c) *By other parties*. Any party to the adversary adjudication, other than the applicant and the FDIC, may file comments on an application within 20 days after service of the application. If the applicant is entitled to file a reply to the FDIC's answer under paragraph (b) of this section, another party may file comments on the answer within 15 days after service of the answer. A commenting party may not participate in any further proceedings on the application unless the administrative law judge determines that the public interest requires such participation in order to permit additional exploration of matters raised in the comments.

(d) *Additional response*. Additional filings in the nature of pleadings may be submitted only by leave of the administrative law judge.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62102, Nov. 16, 1999; 86 FR 2250, Jan. 12, 2021]

§ 308.172 Eligibility of applicants.

(a) *General rule*. To be eligible for an award under this subpart, an applicant must have been named or admitted as a party to the proceeding. In addition, the applicant must show that it meets all other conditions of eligibility set out in paragraph (b) of this section.

(b) *Types of eligible applicant*. The types of eligible applicant are:

(1) An individual with a net worth of not more than $2,000,000 at the time the adversary adjudication was initiated; or

(2) Any owner of an unincorporated business, or any partnership, corporation, associations, unit of local government or organization, the net worth of which did not exceed $7,000,000 and

which did not have more than 500 employees at the time the adversary adjudication was initiated.

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

(c) *Factors to be considered.* In determining the types of eligible applicants:

(1) An applicant who owns an unincorporated business shall be considered as an *individual* rather than a *sole owner of an unincorporated business* if the issues on which he or she prevails are related to personal interests rather than to business interests.

(2) An applicant's net worth includes the value of any assets disposed of for the purpose of meeting an eligibility standard and excludes the value of any obligations incurred for this purpose. Transfers of assets or obligations incurred for less than reasonably equivalent value will be presumed to have been made for this purpose.

(3) The net worth of a bank shall be established by the net worth information reported in conformity with applicable instructions and guidelines on the bank's Consolidated Report of Condition and Income filed for the last reporting date before the initiation of the adversary adjudication.

(4) The employees of an applicant include all those persons who were regularly providing services for remuneration for the applicant, under its direction and control, on the date the adversary adjudication was initiated. Part-time employees are included as though they were full-time employees.

(5) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. The aggregated net worth shall be adjusted if necessary to avoid counting the net worth of any entity twice. As used in this subpart, *affiliates* are individuals, corporations, and entities that directly or indirectly or acting through one or more entities control a majority of the voting shares of the applicant; and corporations and entities of which the applicant directly or indirectly owns or controls a majority of the voting shares. The Board of Directors may, however, on the recommendation of the administrative law judge, or otherwise, determine that such aggregation with regard to one or more of the applicant's affiliates would be unjust and contrary to the purposes of this subpart in light of the actual relationship between the affiliated entities. In such a case the net worth and employees of the relevant affiliate or affiliates will not be aggregated with those of the applicant. In addition, the Board of Directors may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(6) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

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

§ 308.173 Prevailing party.

(a) *General rule.* An eligible applicant who, following an adversary adjudication has gained victory on the merits in the proceeding is a ''prevailing party''. An eligible applicant may be a ''prevailing party'' if a settlement of the proceeding was effected on terms favorable to it or if the proceeding against it has been dismissed. In appropriate situations an applicant may also have prevailed if the outcome of the proceeding has substantially vindicated the applicant's position on the significant substantive matters at issue, even though the applicant has not totally avoided adverse final action.

(b) *Segregation of costs.* When a proceeding has presented a number of discrete substantive issues, an applicant may have prevailed even though all the issues were not resolved in its favor. If such an applicant is deemed to have prevailed, any award shall be based on the fees and expenses incurred in connection with the discrete significant substantive issue or issues on which the applicant's position has been upheld. If such segregation of costs is not practicable, the award may be based on a fair proration of those fees and expenses incurred in the entire proceeding which would be recoverable under § 308.175 if proration were not performed, whether separate or prorated treatment is appropriate, and the appropriate proration percentage, shall

be determined on the facts of the particular case. Attention shall be given to the significance and nature of the respective issues and their separability and interrelationship.

§ 308.174 Standards for awards.

(a) For applications filed pursuant to 5 U.S.C. 504(a)(1), a prevailing applicant may receive an award for fees and expenses unless the position of the FDIC during the proceeding was substantially justified or special circumstances make the award unjust. An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceedings. Awards for fees and expenses incurred before the date on which the adversary adjudication was initiated are allowable if their incurrence was necessary to prepare for the proceeding.

(b) For applications filed pursuant to 5 U.S.C. 504(a)(4), an applicant may receive an award unless the demand by the FDIC was reasonable when compared with the decision of the administrative law judge, the applicant has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

[64 FR 62102, Nov. 16, 1999]

§ 308.175 Measure of awards.

(a) *General rule.* Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate, provided that no award under this subpart for the fee of an attorney or agent may exceed $125 per hour. No award to compensate an expert witness may exceed the highest rate at which the FDIC pays expert witnesses. An award may include the reasonable expenses of the attorney, agent, or expert witness as a separate item, if the attorney, agent, or expert witness ordinarily charges clients separately for such expenses. Fees and expenses awarded under 5 U.S.C. 504(a)(4) related to defending against an excessive demand shall be paid only as a consequence of appropriations paid in advance.

(b) *Determination of reasonableness of fees.* In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the administrative law judge shall consider the following:

(1) If the attorney, agent, or expert witness is in private practice, his or her customary fee for like services, or, if he or she is an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(c) *Awards for studies.* The reasonable cost of any study, analysis, test, project, or similar matter prepared on behalf of an applicant may be awarded to the extent that the charge for the service does not exceed the prevailing rate payable for similar services, and the study or other matter was necessary for preparation of the applicant's case and not otherwise required by law or sound business or financial practice.

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

§ 308.176 Application for awards.

(a) *Contents.* An application for an award of fees and expenses under this subpart shall contain:

(1) The name of the applicant and an identification of the proceeding;

(2) For applications filed pursuant to 5 U.S.C. 504(a)(1), a showing that the applicant has prevailed, and an identification of each issue with regard to which the applicant believes that the position of the FDIC in the proceeding was not substantially justified;

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

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

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

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

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

(8) A declaration that the applicant, together with any affiliates, had a net worth not more than the ceiling established for it by § 308.172(b) as of the date the proceeding was initiated;

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

(10) Any other matters that the applicant wishes the FDIC to consider in determining whether and in what amount an award should be made.

(b) *Verification*. The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application and supporting documents is true and correct.

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

§ 308.177 Statement of net worth.

(a) *General rule*. A statement of net worth must be filed with the application for an award of fees. The statement shall reflect the net worth of the applicant and all affiliates of the applicant.

(b) *Contents*. (1) The statement of net worth may be in any form convenient to the applicant which fully discloses all the assets and liabilities of the applicant and all the assets and liabilities of its affiliates, as of the time of the initiation of the adversary adjudication. Unaudited financial statements are acceptable unless the administrative law judge or the Board of Directors otherwise requires. Financial statements or reports to a Federal or state agency, prepared before the initiation of the adversary adjudication for other purposes, and accurate as of a date not more than three months prior to the initiation of the proceeding, are acceptable in establishing net worth as of the time of the initiation of the proceeding, unless the administrative law judge or the Board of Directors otherwise requires.

(2) In the case of applicants or affiliates that are not banks, net worth shall be considered for the purposes of this subpart to be the excess of total assets over total liabilities, as of the date the underlying proceeding was initiated, except as adjusted under § 308.172(c)(2). Assets and liabilities of individuals shall include those beneficially owned within the meaning of the FDIC's rules and regulations.

(3) If the applicant or any of its affiliates is a bank, the portion of the statement of net worth which relates to the bank shall consist of a copy of the bank's last Consolidated Report of Condition and Income filed before the initiation of the adversary adjudication. In all cases the administrative law judge or the Board of Directors may call for additional information needed to establish the applicant's net worth as of the initiation of the proceeding. Except as adjusted by additional information that was called for under the preceding sentence, net worth shall be considered for the purposes of this subpart to be the total equity capital (or, in the case of mutual savings banks, the total surplus accounts) as reported, in conformity with applicable instructions and guidelines, on the bank's Consolidated Report of Condition and Income filed for the last reporting date before the initiation of the proceeding.

(c) *Statement confidential*. Unless otherwise ordered by the Board of Directors or required by law, the statement of net worth shall be for the confidential use of counsel for the FDIC, the Board of Directors, and the administrative law judge.

§ 308.178 Statement of fees and expenses.

The application shall be accompanied by a statement fully documenting the fees and expenses for which an award is sought. A separate itemized statement

shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in work in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services performed. The administrative law judge or the Board of Directors may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 308.179 Settlement negotiations.

If counsel for the FDIC and the applicant believe that the issues in a fee application can be settled, they may jointly file with the Administrative Officer with a copy to the administrative law judge a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer under § 308.171 for an additional 30 days, and further extensions may be granted by the administrative law judge upon the joint request of counsel for the FDIC and the applicant.

[86 FR 2251, Jan. 12, 2021]

§ 308.180 Further proceedings.

(a) *General rule*. Ordinarily, the determination of a recommended award will be made by the administrative law judge on the basis of the written record. However, on request of either the applicant or the FDIC, or on his or her own initiative, the administrative law judge may order further proceedings such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further proceedings will be held only when necessary for full and fair resolution of the issues arising from the application and will be conducted promptly and expeditiously.

(b) *Request for further proceedings*. A request for further proceedings under this section shall specifically identify the information sought or the issues in dispute and shall explain why additional proceedings are necessary.

(c) *Hearing*. Ordinarily, the administrative law judge shall hold an oral evidentiary hearing only on disputed issues of material fact which cannot be adequately resolved through written submissions.

§ 308.181 Recommended decision.

The administrative law judge shall file with the Administrative Officer a recommended decision on the fee application not later than 90 days after the filing of the application or 30 days after the conclusion of the hearing, whichever is later. The recommended decision shall include written proposed findings and conclusions on the applicant's eligibility and its status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount of the recommended award. The recommended decision shall also include, if at issue, proposed findings on whether the FDIC's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. The administrative law judge shall file the record of the proceeding on the fee application and, at the same time, serve upon each party a copy of the recommended decision, findings, conclusions, and proposed order.

[86 FR 2251, Jan. 12, 2021]

§ 308.182 Board of Directors action.

(a) *Exceptions to recommended decision*. Within 20 days after service of the recommended decision, findings, conclusions, and proposed order, the applicant or counsel for the FDIC may file with the Administrative Officer written exceptions thereto. A supporting brief may also be filed.

(b) *Decision of Board of Directors*. The Board of Directors shall render its decision within 60 days after the matter is submitted to it by the Administrative Officer. The Administrative Officer shall furnish copies of the decision and order of the Board of Directors to the parties. Judicial review of the decision and order may be obtained as provided in 5 U.S.C. 504(c)(2).

[86 FR 2251, Jan. 12, 2021]

§ 308.183 Payment of awards.

An applicant seeking payment of an award made by the Board of Directors shall submit to the Administrative Officer a statement that the applicant will not seek judicial review of the decision and order or that the time for seeking further review has passed and no further review has been sought. The FDIC will pay the amount awarded within 30 days after receiving the applicant's statement, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

[86 FR 2251, Jan. 12, 2021]

Subpart Q—Issuance and Review of Orders Pursuant to the Prompt Corrective Action Provisions of the Federal Deposit Insurance Act

SOURCE: 86 FR 8109, Feb. 3, 2021, unless otherwise noted.

§ 308.200 Scope.

The rules and procedures set forth in this subpart apply to FDIC-supervised institutions and senior executive officers and directors of the same that are subject to the provisions of section 38 of the Federal Deposit Insurance Act (section 38) (12 U.S.C. 1831o) and subpart H of part 324 of this chapter. For purposes of this subpart, the term ''FDIC-supervised institution'' means any insured depository institution for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

§ 308.201 Directives to take prompt corrective action.

(a) *Notice of intent to issue directive*—(1) *In general.* The FDIC shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized FDIC-supervised institution prior written notice of the FDIC's intention to issue a directive requiring such FDIC-supervised institution to take actions or to follow proscriptions described in section 38 that are within the FDIC's discretion to require or impose under section 38 of the FDI Act, including section 38 (e)(5), (f)(2), (f)(3), or (f)(5). The FDIC-supervised institution shall have such time to respond to a proposed directive as provided by the FDIC under paragraph (c) of this section.

(2) *Immediate issuance of final directive.* If the FDIC finds it necessary in order to carry out the purposes of section 38 of the FDI Act, the FDIC may, without providing the notice prescribed in paragraph (a)(1) of this section, issue a directive requiring an FDIC-supervised institution immediately to take actions or to follow proscriptions described in section 38 that are within the FDIC's discretion to require or impose under section 38 of the FDI Act, including section 38 (e)(5), (f)(2), (f)(3), or (f)(5). An FDIC-supervised institution that is subject to such an immediately effective directive may submit a written appeal of the directive to the FDIC. Such an appeal must be received by the FDIC within 14 calendar days of the issuance of the directive, unless the FDIC permits a longer period. The FDIC shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the directive shall remain in effect unless the FDIC, in its sole discretion, stays the effectiveness of the directive.

(b) *Contents of notice.* A notice of intention to issue a directive shall include:

(1) A statement of the FDIC-supervised institution's capital measures and capital levels;

(2) A description of the restrictions, prohibitions, or affirmative actions that the FDIC proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of such affirmative actions; and

(4) The date by which the FDIC-supervised institution subject to the directive may file with the FDIC a written response to the notice.

(c) *Response to notice*—(1) *Time for response.* An FDIC-supervised institution may file a written response to a notice of intent to issue a directive within the time period set by the FDIC. The date

shall be at least 14 calendar days from the date of the notice unless the FDIC determines that a shorter period is appropriate in light of the financial condition of the FDIC-supervised institution or other relevant circumstances.

(2) *Content of response.* The response should include:

(i) An explanation why the action proposed by the FDIC is not an appropriate exercise of discretion under section 38;

(ii) Any recommended modification of the proposed directive; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the FDIC-supervised institution regarding the proposed directive.

(d) *FDIC consideration of response.* After considering the response, the FDIC may:

(1) Issue the directive as proposed or in modified form;

(2) Determine not to issue the directive and so notify the FDIC-supervised institution; or

(3) Seek additional information or clarification of the response from the FDIC-supervised institution or any other relevant source.

(e) *Failure to file response.* Failure by an FDIC-supervised institution to file with the FDIC, within the specified time period, a written response to a proposed directive shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the directive.

(f) *Request for modification or rescission of directive.* Any FDIC-supervised institution that is subject to a directive under this subpart may, upon a change in circumstances, request in writing that the FDIC reconsider the terms of the directive and may propose that the directive be rescinded or modified. Unless otherwise ordered by the FDIC, the directive shall continue in place while such request is pending before the FDIC.

§ 308.202 Procedures for reclassifying an FDIC-supervised institution based on criteria other than capital.

(a) *Reclassification based on unsafe or unsound condition or practice*—(1) *Issuance of notice of proposed reclassification*—(i) *Grounds for reclassification.* (A) Pursuant to § 324.403(d) of this chapter, the FDIC may reclassify a well-capitalized FDIC-supervised institution as adequately capitalized or subject an adequately capitalized or undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(*1*) The FDIC determines that the FDIC-supervised institution is in unsafe or unsound condition; or

(*2*) The FDIC, pursuant to section 8(b)(8) of the FDI Act (12 U.S.C. 1818(b)(8)), deems the FDIC-supervised institution to be engaged in an unsafe or unsound practice and not to have corrected the deficiency.

(B) Any action pursuant to this paragraph (a)(1)(i) shall be referred to in this section as *reclassification.*

(ii) *Prior notice to institution.* Prior to taking action pursuant to § 324.403(d) of this chapter, the FDIC shall issue and serve on the FDIC-supervised institution a written notice of the FDIC's intention to reclassify it.

(2) *Contents of notice.* A notice of intention to reclassify an FDIC-supervised institution based on unsafe or unsound condition shall include:

(i) A statement of the FDIC-supervised institution's capital measures and capital levels and the category to which the FDIC-supervised institution would be reclassified;

(ii) The reasons for reclassification of the FDIC-supervised institution; and

(iii) The date by which the FDIC-supervised institution subject to the notice of reclassification may file with the FDIC a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the FDIC determines that a shorter period is appropriate in light of the financial condition of the FDIC-supervised institution or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* An FDIC-supervised institution may file a written response to a notice of proposed reclassification within the time period set by the FDIC. The response should include:

(i) An explanation of why the FDIC-supervised institution is not in an unsafe or unsound condition or otherwise should not be reclassified; and

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the FDIC-supervised institution regarding the reclassification.

(4) *Failure to file response.* Failure by an FDIC-supervised institution to file, within the specified time period, a written response with the FDIC to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(5) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the FDIC under this section. If the FDIC-supervised institution desires to present oral testimony or witnesses at the hearing, the FDIC-supervised institution shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(6) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the FDIC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the FDIC allows further time at the request of the FDIC-supervised institution. The hearing shall be held in Washington, DC, or at such other place as may be designated by the FDIC before a presiding officer(s) designated by the FDIC to conduct the hearing.

(7) *Hearing procedures.* (i) The FDIC-supervised institution shall have the right to introduce relevant written materials and to present oral argument at the hearing. The FDIC-supervised institution may introduce oral testimony and present witnesses only if expressly authorized by the FDIC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in this part apply to an informal hearing under this section unless the FDIC orders that such procedures shall apply.

(ii) The informal hearing shall be recorded, and a transcript shall be furnished to the FDIC-supervised institution upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(iii) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(8) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the FDIC on the reclassification.

(9) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the FDIC will decide whether to reclassify the FDIC-supervised institution and notify the FDIC-supervised institution of the FDIC's decision.

(b) *Request for rescission of reclassification.* Any FDIC-supervised institution that has been reclassified under this section, may, upon a change in circumstances, request in writing that the FDIC reconsider the reclassification and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the FDIC, the FDIC-supervised institution shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the FDIC.

§ 308.203 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the FDIC issues and serves a directive on an FDIC-supervised institution pursuant to § 308.201 requiring the FDIC-supervised institution to dismiss from office any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDI Act, the FDIC shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive*—(1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the FDIC at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement shall include reasons why the Respondent should be reinstated and may include a request for an informal hearing before the FDIC under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the FDIC, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring an FDIC-supervised institution to dismiss from office any director or senior executive officer, the FDIC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the FDIC, before a presiding officer(s) designated by the FDIC to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the FDIC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in this part apply to an informal hearing under this section unless the FDIC orders that such procedures shall apply.

(2) The informal hearing shall be recorded, and a transcript shall be furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the FDIC-supervised institution would materially strengthen the FDIC-supervised institution's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the FDIC-supervised institution's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the FDIC-supervised institution based on supervisory criteria other

than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the FDIC concerning the Respondent's request for reinstatement with the FDIC-supervised institution.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the FDIC shall grant or deny the request for reinstatement and notify the Respondent of the FDIC's decision. If the FDIC denies the request for reinstatement, the FDIC shall set forth in the notification the reasons for the FDIC's action.

§ 308.204 Enforcement of directives.

(a) *Judicial remedies.* Whenever an FDIC-supervised institution fails to comply with a directive issued under section 38, the FDIC may seek enforcement of the directive in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act (12 U.S.C. 1818(i)(1)).

(b) *Administrative remedies*—(1) *Failure to comply with directive.* Pursuant to section 8(i)(2)(A) of the FDI Act, the FDIC may assess a civil money penalty against any FDIC-supervised institution that violates or otherwise fails to comply with any final directive issued under section 38 and against any institution-affiliated party who participates in such violation or noncompliance.

(2) *Failure to implement capital restoration plan.* The failure of an FDIC-supervised institution to implement a capital restoration plan required under section 38, or subpart H of part 324 of this chapter, or the failure of a company having control of an FDIC-supervised institution to fulfill a guarantee of a capital restoration plan made pursuant to section 38(e)(2) of the FDI Act shall subject the FDIC-supervised institution to the assessment of civil money penalties pursuant to section 8(i)(2)(A) of the FDI Act.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the FDIC may seek enforcement of the provisions of section 38 or subpart H of part 324 of this chapter through any other judicial or administrative proceeding authorized by law.

Subpart R—Submission and Review of Safety and Soundness Compliance Plans and Issuance of Orders To Correct Safety and Soundness Deficiencies

SOURCE: 80 FR 65906, Oct. 28,2015, unless otherwise noted.

§ 308.300 Scope.

The rules and procedures set forth in this subpart apply to insured state nonmember banks, to state-licensed insured branches of foreign banks, that are subject to the provisions of section 39 of the Federal Deposit Insurance Act (section 39) (12 U.S.C. 1831p–1), and to state savings associations (in aggregate, bank or banks and state savings association or state savings associations).

§ 308.301 Purpose.

Section 39 of the FDI Act requires the FDIC to establish safety and soundness standards. Pursuant to section 39, a bank or savings association may be required to submit a compliance plan if it is not in compliance with a safety and soundness standard established by guideline under section 39(a) or (b). An enforceable order under section 8 of the FDI Act may be issued if, after being notified that it is in violation of a safety and soundness standard established under section 39, the bank or savings association fails to submit an acceptable compliance plan or fails in any material respect to implement an accepted plan. This subpart establishes procedures for requiring submission of a compliance plan and issuing an enforceable order pursuant to section 39.

§ 308.302 Determination and notification of failure to meet a safety and soundness standard and request for compliance plan.

(a) *Determination.* The FDIC may, based upon an examination, inspection or any other information that becomes

available to the FDIC, determine that a bank or state savings association has failed to satisfy the safety and soundness standards set out in part 364 of this chapter and in the Interagency Guidelines Establishing Standards for Safety and Soundness in appendix A and the Interagency Guidelines Establishing Information Security Standards in appendix B to part 364 of this chapter.

(b) *Request for compliance plan.* If the FDIC determines that a bank or state savings association has failed a safety and soundness standard pursuant to paragraph (a) of this section, the FDIC may request, by letter or through a report of examination, the submission of a compliance plan and the bank or state savings association shall be deemed to have notice of the request three days after mailing of the letter by the FDIC or delivery of the report of examination.

§ 308.303 Filing of safety and soundness compliance plan.

(a) *Schedule for filing compliance plan*—(1) *In general.* A bank or state savings association shall file a written safety and soundness compliance plan with the FDIC within 30 days of receiving a request for a compliance plan pursuant to § 308.302(b), unless the FDIC notifies the bank or state savings association in writing that the plan is to be filed within a different period.

(2) *Other plans.* If a bank or state savings association is obligated to file, or is currently operating under, a capital restoration plan submitted pursuant to section 38 of the FDI Act (12 U.S.C. 1831o), a cease-and-desist order entered into pursuant to section 8 of the FDI Act, a formal or informal agreement, or a response to a report of examination or report of inspection, it may, with the permission of the FDIC, submit a compliance plan under this section as part of that plan, order, agreement, or response, subject to the deadline provided in paragraph (a)(1) of this section.

(b) *Contents of plan.* The compliance plan shall include a description of the steps the bank or state savings association will take to correct the deficiency and the time within which those steps will be taken.

(c) *Review of safety and soundness compliance plans.* Within 30 days after receiving a safety and soundness compliance plan under this subpart, the FDIC shall provide written notice to the bank or state savings association of whether the plan has been approved or seek additional information from the bank or state savings association regarding the plan. The FDIC may extend the time within which notice regarding approval of a plan will be provided.

(d) *Failure to submit or implement a compliance plan*—(1) *Supervisory actions.* If a bank or state savings association fails to submit an acceptable plan within the time specified by the FDIC or fails in any material respect to implement a compliance plan, then the FDIC shall, by order, require the bank or state savings association to correct the deficiency and may take further actions provided in section 39(e)(2)(B). Pursuant to section 39(e)(3), the FDIC may be required to take certain actions if the bank or state savings association commenced operations or experienced a change in control within the previous 24-month period, or the bank or state savings association experienced extraordinary growth during the previous 18-month period.

(2) *Extraordinary growth.* For purposes of paragraph (d)(1) of this section, extraordinary growth means an increase in assets of more than 7.5 percent during any quarter within the 18-month period preceding the issuance of a request for submission of a compliance plan, by a bank or state savings association that is not well capitalized for purposes of section 38 of the FDI Act. For purposes of calculating an increase in assets, assets acquired through merger or acquisition approved pursuant to the Bank Merger Act (12 U.S.C. 1828(c)) will be excluded.

(e) *Amendment of compliance plan.* A bank or state savings association that has filed an approved compliance plan may, after prior written notice to and approval by the FDIC, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the bank or state savings association shall implement the compliance plan as previously approved.

§ 308.304 Issuance of orders to correct deficiencies and to take or refrain from taking other actions.

(a) *Notice of intent to issue order*—(1) *In general.* The FDIC shall provide a bank or state savings association prior written notice of the FDIC's intention to issue an order requiring the bank or state savings association to correct a safety and soundness deficiency or to take or refrain from taking other actions pursuant to section 39 of the FDI Act. The bank or state savings association shall have such time to respond to a proposed order as provided by the FDIC under paragraph (c) of this section.

(2) *Immediate issuance of final order.* If the FDIC finds it necessary in order to carry out the purposes of section 39 of the FDI Act, the FDIC may, without providing the notice prescribed in paragraph (a)(1) of this section, issue an order requiring a bank or state savings association immediately to take actions to correct a safety and soundness deficiency or take or refrain from taking other actions pursuant to section 39. A bank or state savings association that is subject to such an immediately effective order may submit a written appeal of the order to the FDIC. Such an appeal must be received by the FDIC within 14 calendar days of the issuance of the order, unless the FDIC permits a longer period. The FDIC shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the order shall remain in effect unless the FDIC, in its sole discretion, stays the effectiveness of the order.

(b) *Contents of notice.* A notice of intent to issue an order shall include:

(1) A statement of the safety and soundness deficiency or deficiencies that have been identified at the bank or state savings association;

(2) A description of any restrictions, prohibitions, or affirmative actions that the FDIC proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of any required action; and

(4) The date by which the bank or state savings association subject to the order may file with the FDIC a written response to the notice.

(c) *Response to notice*—(1) *Time for response.* A bank or state savings association may file a written response to a notice of intent to issue an order within the time period set by the FDIC. Such a response must be received by the FDIC within 14 calendar days from the date of the notice unless the FDIC determines that a different period is appropriate in light of the safety and soundness of the bank or state savings association or other relevant circumstances.

(2) *Contents of response.* The response should include:

(i) An explanation why the action proposed by the FDIC is not an appropriate exercise of discretion under section 39;

(ii) Any recommended modification of the proposed order; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the bank or state savings association regarding the proposed order.

(d) *Agency consideration of response.* After considering the response, the FDIC may:

(1) Issue the order as proposed or in modified form;

(2) Determine not to issue the order and so notify the bank or state savings association; or

(3) Seek additional information or clarification of the response from the bank or state savings association, or any other relevant source.

(e) *Failure to file response.* Failure by a bank or state savings association to file with the FDIC, within the specified time period, a written response to a proposed order shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the order.

(f) *Request for modification of rescission of order.* Any bank or state savings association that is subject to an order under this subpart may, upon a change in circumstances, request in writing that the FDIC reconsider the terms of the order, and may propose that the order be rescinded or modified. Unless otherwise ordered by the FDIC, the order shall continue in place while

such request is pending before the FDIC.

§ 308.305 Enforcement of orders.

(a) *Judicial remedies*. Whenever a bank or state savings association fails to comply with an order issued under section 39, the FDIC may seek enforcement of the order in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act.

(b) *Failure to comply with order*. Pursuant to section 8(i)(2)(A) of the FDI Act, the FDIC may assess a civil money penalty against any bank or state savings association that violates or otherwise fails to comply with any final order issued under section 39 and against any institution-affiliated party who participates in such violation or noncompliance.

(c) *Other enforcement action*. In addition to the actions described in paragraphs (a) and (b) of this section, the FDIC may seek enforcement of the provisions of section 39 or this part through any other judicial or administrative proceeding authorized by law.

Subpart S—Applications for a Stay or Review of Actions of Bank Clearing Agencies

SOURCE: 61 FR 48403, Sept. 11, 1996, unless otherwise noted.

§ 308.400 Scope.

This subpart is issued by the Corporation pursuant to sections 17A(b)(3)(g), 17A(b)(5)(C), 19 and 23 of the Securities Exchange Act of 1934 (Exchange Act), as amended (15 U.S.C. 78q–1 (b)(3)(g), (b)(5)(C), 78s, 78w). It applies to applications by banks insured by the Corporation (other than members of the Federal Reserve System) for a stay or review of certain actions by clearing agencies registered under the Exchange Act, for which the Securities and Exchange Commission (Commission) is not the appropriate regulatory agency under section 3(a)(34)(B) of the Exchange Act (bank clearing agencies).

§ 308.401 Applications for stays of disciplinary sanctions or summary suspensions by a bank clearing agency.

Applications to the Corporation for a stay of disciplinary action imposed by registered clearing agencies pursuant to section 17(b)(3)(G) of the Exchange Act, or summary suspension or limitation or prohibition of access under section 17(b)(5)(C) of the Exchange Act shall be made according to the rules adopted by the Commission (17 CFR 240.19d–2). References to the ''Commission'' in 17 CFR 240.19d–2 are deemed to refer to the ''Corporation.''

§ 308.402 Applications for review of final disciplinary sanctions, denials of participation, or prohibitions or limitations of access to services imposed by bank clearing agencies.

Proceedings on an application to the Corporation under section 19(d)(2) of the Exchange Act for review of any final disciplinary sanctions, denials of participation, or prohibitions or limitations of access to services imposed by bank clearing agencies shall be conducted according to the procedures set forth in rules adopted by the Commission (17 CFR 240.19d–3). References to the ''Commission'' in 17 CFR 240.19d–3 are deemed to refer to the ''Corporation.''

Subpart T—Program Fraud Civil Remedies and Procedures

SOURCE: 66 FR 9189, Feb. 7, 2001, unless otherwise noted.

§ 308.500 Basis, purpose, and scope.

(a) *Basis*. This subpart implements the Program Fraud Civil Remedies Act, Pub. L. 99-509, sections 6101–6104, 100 Stat. 1874 (October 21, 1986), codified at 31 U.S.C. 3801–3812, (PFCRA) and made applicable to the Federal Deposit Insurance Corporation (FDIC) by section 23 of the Resolution Trust Corporation Completion Act (Pub. L. 103–204, 107 Stat. 2369). 31 U.S.C. 3809 of the statute requires each Authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose*. This subpart:

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

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

(c) *Scope.* This subpart applies only to persons who make, submit, or present or cause to be made, submitted, or presented false, fictitious, or fraudulent claims or written statements to the FDIC or to its agents acting on behalf of the FDIC in connection with FDIC employment matters, FDIC contracting activities, and the FDIC Asset Purchaser Certification Program. It does not apply to false claims or statements made in connection with programs (other than as set forth in the preceding sentence) related to the FDIC's regulatory, supervision, enforcement, insurance, receivership or liquidation responsibilities. The FDIC is restricting the scope of applicability of this subpart because other civil and administrative remedies are adequate to redress fraud in the areas not covered.

§ 308.501 Definitions.

For purposes of this subpart:

(a) *Administrative Law Judge (ALJ)* means the presiding officer appointed by the Office of Financial Institution Adjudication pursuant to 12 U.S.C. 1818 note and 5 U.S.C. 3105.

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

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

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

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

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

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

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

(A) Provided such property or services;

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

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

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

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

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

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

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

(g) *Corporation* means the Federal Deposit Insurance Corporation.

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

(i) *Government* means the United States Government.

(j) *Individual* means a natural person.

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

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

(m) *Knows or has reason to know,* means that a person, with respect to a claim or statement:

(1) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(2) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(3) Acts in reckless disregard of the truth or falsity of the claim or statement.

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

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

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

(q) *Reviewing official* means the General Counsel of the FDIC or his designee who is:

(1) Not subject to supervision by, or required to report to, the investigating official;

(2) Not employed in the organizational unit of the FDIC in which the investigating official is employed; and

(3) Serving in a position that has a rate of basic pay under the pay scale utilized by the FDIC that is equal to or greater than 120 percent of the minimum rate of basic pay for grade 15 under the federal government's General Schedule.

(r) *Statement* means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made:

(1) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(2) With respect to (including relating to eligibility for):

(i) A contract with, or a bid or proposal for a contract with; or

(ii) A grant, loan, or benefit received, directly or indirectly, from the FDIC, or any state, political subdivision of a state, or other party, if the United States government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the government will reimburse such state, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

§ 308.502 Basis for civil penalties and assessments.

(a) *Claims*. (1) A person who makes a false, fictitious, or fraudulent claim to the FDIC is subject to a civil penalty of up to $5,000 per claim. A claim is false, fictitious, or fraudulent if the person making the claim knows, or has reason to know, that:

(i) The claim is false, fictitious, or fraudulent; or

(ii) The claim includes, or is supported by, a written statement that asserts a material fact which is false, fictitious or fraudulent; or

(iii) The claim includes, or is supported by, a written statement that:

(A) Omits a material fact; and

(B) Is false, fictitious, or fraudulent as a result of that omission; and

(C) Is a statement in which the person making the statement has a duty to include the material fact; or

(iv) The claim seeks payment for providing property or services that the person has not provided as claimed.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim will be considered made to the FDIC, recipient, or party when the claim is actually made to an agent, fiscal intermediary, or other entity, including any state or political subdivision thereof, acting for or on behalf of the FDIC, recipient, or party.

(4) Each claim for property, services, or money that constitutes any one of the elements in paragraph (a)(1) of this section is subject to a civil penalty regardless of whether the property, services, or money is actually delivered or paid.

(5) If the FDIC has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section will also be subject to an assessment of not more than twice the amount of such claim (or portion of the claim) that is

determined to constitute a false, fictitious, or fraudulent claim under paragraph (a)(1) of this section. The assessment will be in lieu of damages sustained by the FDIC because of the claims.

(6) The amount of any penalty assessed under paragraph (a)(1) of this section will be adjusted for inflation in accordance with § 308.132(d).

(7) The penalty specified in paragraph (a)(1) of this section is in addition to any other remedy allowable by law.

(b) *Statements.* (1) A person who submits to the FDIC a false, fictitious or fraudulent statement is subject to a civil penalty of up to $5,000 per statement. A statement is false, fictitious or fraudulent if the person submitting the statement to the FDIC knows, or has reason to know, that:

(i) The statement asserts a material fact which is false, fictitious, or fraudulent; or

(ii) The statement omits a material fact that the person making the statement has a duty to include in the statement; and

(iii) The statement contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement will be considered made to the FDIC when the statement is actually made to an agent, fiscal intermediary, or other entity, including any state or political subdivision thereof, acting for or on behalf of the FDIC.

(4) The amount of any penalty assessed under paragraph (a)(1) of this section will be adjusted for inflation in accordance with § 308.132(d).

(5) The penalty specified in paragraph (a)(1) of this section is in addition to any other remedy allowable by law.

(c) *Failure to file declaration/certification.* Where, as a prerequisite to conducting business with the FDIC, a person is required by law to file one or more declarations and/or certifications, and the person intentionally fails to file such declaration/certification, the person will be subject to the civil penalties as prescribed by this subpart.

(d) Civil money penalties that are assessed under this subpart are subject to annual adjustments to account for inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74, sec. 701, 129 Stat. 584) (*see also* 12 CFR 308.132(d)(17)).

(e) *Liability.* (1) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held jointly and severally liable for a civil penalty under this section.

(2) In any case in which it is determined that more than one person is liable for making a claim under this section on which the FDIC has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

[66 FR 9189, Feb. 7, 2001, as amended at 81 FR 42242, June 29, 2016; 83 FR 61115, Nov. 28, 2018]

§ 308.503 Investigations.

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

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

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena will be required to provide the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available, and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the PFCRA may be warranted, the investigating official will submit a report containing

the findings and conclusions of such investigation to the reviewing official.

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

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

§ 308.504 Review by the reviewing official.

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

(b) Such notice will include:

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

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

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

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

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

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

§ 308.505 Prerequisites for issuing a complaint.

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

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

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

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

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

§ 308.506 Complaint.

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

(b) The complaint will state:

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

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

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

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

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

§ 308.507 Service of complaint.

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

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

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

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

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

§ 308.508 Answer.

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

(b) In the answer, the defendant:

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

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

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

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

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

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

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

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

§ 308.509 Default upon failure to file an answer.

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

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

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

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision will become final and binding upon the parties 30 days after it is issued.

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

(f) If, in the motion to reopen under paragraph (e) of this section, the defendant can demonstrate extraordinary circumstances excusing the failure to

file a timely answer, the ALJ will withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and will grant the defendant an opportunity to answer the complaint.

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

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

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

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

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

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

§ 308.510 Referral of complaint and answer to the ALJ.

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

§ 308.511 Notice of hearing.

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

(b) The notice will include:

(1) The tentative time, date, and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Corporation and of the defendant, if any; and

(6) Other matters as the ALJ deems appropriate.

§ 308.512 Parties to the hearing.

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

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

§ 308.513 Separation of functions.

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

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the Board, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ will not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the FDIC will be an attorney employed in the FDIC's Legal Division; however, the representative of the FDIC may not participate or advise in the review of the initial decision by the Board.

§ 308.514 Ex parte contacts.

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

§ 308.515 Disqualification of reviewing official or ALJ.

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

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

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

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

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

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

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

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

§ 308.516 Rights of parties.

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

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

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

(c) Conduct discovery;

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

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

(f) Present and cross-examine witnesses;

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

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

§ 308.517 Authority of the ALJ.

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

(b) The ALJ has the authority to:

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

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

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

(4) Administer oaths and affirmations;

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

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(12) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(13) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this subpart.

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

§ 308.518 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ will schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleading, including the need for a more definite statement;

(3) Stipulations and admissions of fact as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses (subject to the objection of other parties) to waive appearance at an oral hearing and to submit only documentary evidence and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time, date, and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 308.519 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 308.503(b) of this subpart are based, unless such documents are subject to a privilege under federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 308.504 of this subpart is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 308.508 of this subpart.

§ 308.520 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admission of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

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

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

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

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

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought:

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

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

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

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

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

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

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

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

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

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

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

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

§ 308.522 Subpoenas for attendance at hearing.

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

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

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

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

(e) The party seeking the subpoena must serve it in the manner prescribed in § 308.507 of this subpart. A subpoena on a party or upon an individual under

the control of a party may be served by first class mail.

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

§ 308.523 Protective order.

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

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

(1) That the discovery will not be conducted;

(2) That the discovery will be conducted only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery will be conducted only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed or otherwise kept confidential;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 308.524 Witness fees.

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

§ 308.525 Form, filing, and service of papers.

(a) *Form.* (1) Documents filed with the ALJ must include an original and two copies.

(2) Every pleading and paper filed in the proceeding must contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (e.g., motion to quash subpoena).

(3) Every pleading and paper must be signed by, and must contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed by certified or registered mail. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ must, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in § 308.507 of this subpart must be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid, and addressed to the party's last known address. When a party is represented by a representative, service must be made upon such representative in lieu of the actual party. The ALJ may authorize facsimile transmission as an acceptable form of service.

(c) *Proof of service.* A certificate by the individual serving the document by personal delivery or by mail, setting

forth the manner of service, will be proof of service.

§ 308.526 Computation of time.

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

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

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

§ 308.527 Motions.

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

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

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

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

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

§ 308.528 Sanctions.

(a) The ALJ may sanction a person, including any party or representative for:

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

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

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the related pleading or other submissions of the party failing to comply with such request.

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

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

§ 308.529 The hearing and burden of proof.

(a) The ALJ will conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 308.502 of this subpart, and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The FDIC must prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant must prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing will be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 308.530 Determining the amount of penalties and assessments.

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

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

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in a similar transaction;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a state, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

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

(d) Civil money penalties that are assessed under this subpart are subject to annual adjustments to account for inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74, sec. 701, 129 Stat. 584) (*see also* § 308.132(d)).

[66 FR 9189, Feb. 7, 2001, as amended at 83 FR 61115, Nov. 28, 2018]

§ 308.531 Location of hearing.

(a) The hearing may be held:

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement at issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party will have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing will be held at the place and at the time ordered by the ALJ.

§ 308.532 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing will be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. The party offering a written statement must provide all other parties with a copy of the written statement along with the last known address of the witness. Sufficient time must be allowed for other parties to subpoena the witness for cross-examination at the hearing. Prior written statements and deposition transcripts of witnesses identified to testify at the hearing must be exchanged as provided in § 308.521(a) of this subpart.

(c) The ALJ will exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ will permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination will be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ will order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of:

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Corporation engaged in assisting the representative for the Corporation.

§ 308.533 Evidence.

(a) The ALJ will determine the admissibility of evidence.

(b) Except as provided in this subpart, the ALJ will not be bound by the Federal Rules of Evidence (28 U.S.C. App.). However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ will exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under federal law.

(f) Evidence concerning offers of compromise or settlement will be inadmissible to the extent provided in rule 408 of the Federal Rules of Evidence.

(g) The ALJ will permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record must be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 308.523 of this subpart.

§ 308.534 The record.

(a) The hearing will be recorded by audio or videotape and transcribed. Transcripts may be obtained following

the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits, and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Board.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 308.523 of this subpart.

§ 308.535 Post-hearing briefs.

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

§ 308.536 Initial decision.

(a) The ALJ will issue an initial decision based only on the record, which will contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact will include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions of such claims or statements, violate § 308.502 of this subpart; and

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 308.530 of this subpart.

(c) The ALJ will promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ will at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the Board. If the ALJ fails to meet the deadline contained in this paragraph, he or she will notify the parties of the reason for the delay and will set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the Board, or a motion for reconsideration of the initial decision is timely filed, the initial decision will constitute the final decision of the Board and will be final and binding on the parties 30 days after it is issued by the ALJ.

§ 308.537 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service is made by mail, receipt will be presumed to be 5 days from the date of mailing in the absence of proof to the contrary.

(b) Every motion for reconsideration must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. The motion must be accompanied by a supporting brief.

(c) Responses to the motions will be allowed only upon order of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision will constitute the final decision of the FDIC and will be final and binding on all parties 30 days after the ALJ denies the motion, unless the final decision is timely appealed to the Board in accordance with § 308.538 of this subpart.

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

§ 308.538 Appeal to the Board of Directors.

(a) Any defendant who has filed a timely answer and who is determined

in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the Board by filing a notice of appeal with the Board in accordance with this section.

(b)(1) No notice of appeal may be filed until the time period for filing a motion for reconsideration under § 308.537 of this subpart has expired.

(2) If a motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) If no motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ issues the initial decision.

(4) The Board may extend the initial 30-day period for an additional 30 days if the defendant files with the Board a request for an extension within the initial 30-day period and shows good cause.

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

(d) A notice of appeal will be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Corporation may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the Board.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the Board will not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Board that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the Board will remand the matter to the ALJ for consideration of such additional evidence.

(j) The Board may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The Board will promptly serve each party to the appeal with a copy of the decision of the Board and a statement describing the right of any person determined to be liable for a penalty or an assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this subpart and within 60 days after the date on which the Board serves the defendant with a copy of the Board's decision, a determination that a defendant is liable under § 308.502 of this subpart is final and is not subject to judicial review.

§ 308.539 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the Board a written finding that continuation of the administrative process described in this subpart with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the Board will stay the process immediately. The Board may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 308.540 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the Board.

(b) No administrative stay is available following a final decision of the Board.

§ 308.541 Judicial review.

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

§ 308.542 Collection of civil penalties and assessments.

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

§ 308.543 Right to administrative offset.

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

§ 308.544 Deposit in Treasury of United States.

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

§ 308.545 Compromise or settlement.

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

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

(c) The Board has exclusive authority to compromise or settle a case under this subpart any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 308.541 of this subpart or during the pendency of any action to collect penalties and assessments under § 308.542 of this subpart.

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

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

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

§ 308.546 Limitations.

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

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

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

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

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

§ 308.600 Scope.

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

§ 308.601 Definitions.

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

(a) *Accounting firm* means a corporation, proprietorship, partnership, or other business firm providing audit services.

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

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

§ 308.602 Removal, suspension, or debarment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) *Limited scope orders.* An order of removal, suspension (including an immediate suspension), or debarment

may, at the discretion of the Board of Directors, be made applicable to a limited number of insured depository institutions for which the FDIC is the appropriate Federal banking agency.

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

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

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

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

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

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

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

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

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

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

(5) *Decision on petition.* Within 30 calendar days after the hearing, the presiding officer will issue a decision. The presiding officer will grant a stay upon a demonstration that a substantial likelihood exists of the respondent's success on the issues raised by the notice of intention and that, absent such relief, the respondent will suffer immediate and irreparable injury, loss, or damage. In the absence of such a demonstration, the presiding officer will notify the parties that the immediate suspension will be continued pending the completion of the administrative proceedings pursuant to the notice of intention. The presiding officer will serve a copy of the decision on, and simultaneously certify the record to, the Administrative Officer.

(6) *Review of presiding officer's decision.* The parties may seek review of the presiding officer's decision by filing a petition for review with the Administrative Officer within 10 calendar days after service of the decision. Replies must be filed within 10 calendar days after the petition filing date. Upon receipt of a petition for review and any reply, the Administrative Officer will promptly certify the entire record to the Board of Directors. Within 60 calendar days of the Administrative Officer's certification, the Board of Directors will issue an order notifying the affected party whether or not the immediate suspension should be continued or reinstated. The order will state the basis of the Board's decision.

[68 FR 48270, Aug. 13, 2003, as amended at 86 FR 2251, Jan. 12, 2021]

§ 308.603 Automatic removal, suspension, and debarment.

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

(1) Is subject to a final order of removal, suspension, or debarment (other than a limited scope order) issued by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, or the Office of Thrift Supervision under section 36 of the FDIA;

(2) Is subject to a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or bar from further association with any registered public accounting firm issued by the Public Company Accounting Oversight Board or the Securities and Exchange Commission under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B)); or

(3) Is subject to an order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission.

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

§ 308.604 Notice of removal, suspension, or debarment.

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

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

(1) any currently effective order or other action described in §§ 308.602(a)(1)(vi) through (a)(1)(vii) or §§ 308.603(a)(2) through (a)(3); and

(2) any currently effective action by the Public Company Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(C) or (G)).

(c) *Timing and place of notice.* Written notice required by this paragraph shall be given no later than 15 calendar days following the effective date of an order or action, or 15 calendar days before an accountant or accounting firm accepts

an engagement to provide audit services, whichever date is earlier. The written notice must be filed by the independent public accountant or accounting firm with the FDIC, Accounting and Securities Disclosure Section, 550 17th Street, NW., Washington, DC 20429.

[68 FR 48270, Aug. 13, 2003, as amended at 74 FR 32245, July 7, 2009; 74 FR 35745, July 20, 2009]

§ 308.605 Application for reinstatement.

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

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

PART 309—DISCLOSURE OF INFORMATION

Sec.
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AUTHORITY: 5 U.S.C. 552; 12 U.S.C. 1819 ''Seventh'' and ''Tenth.''

SOURCE: 60 FR 61465, Nov. 30, 1995, unless otherwise noted.

§ 309.1 Purpose and scope.

This part sets forth the basic policies of the Federal Deposit Insurance Corporation regarding information it maintains and the procedures for obtaining access to such information, including disclosure of information transferred to Federal Deposit Insurance Corporation from the Office of Thrift Supervision pursuant to section 312 and 323 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203. Section 309.2 sets forth definitions applicable to this part 309. Section 309.3 describes the types of information and documents typically published in the FEDERAL REGISTER. Section 309.4 explains how to access public records maintained on the Federal Deposit Insurance Corporation's World Wide Web page and in the Federal Deposit Insurance Corporation's Public Information Center or ''PIC,'' and describes the categories of records generally found there. Section 309.5 implements the Freedom of Information Act (5 U.S.C. 552). Section 309.6 authorizes the discretionary disclosure of exempt records under certain limited circumstances. Section 309.7 outlines procedures for serving a subpoena or other legal process to obtain information maintained by the FDIC.

[76 FR 35965, June 21, 2011]

§ 309.2 Definitions.

For purposes of this part:

(a) The term *depository institution*, as used in § 309.6, includes depository institutions that have applied to the Corporation for federal deposit insurance, closed depository institutions, presently operating federally insured depository institutions, foreign banks, branches of foreign banks, and all affiliates of any of the foregoing.

(b) The terms *Corporation* or *FDIC* mean the Federal Deposit Insurance Corporation.

(c) The words *disclose* or *disclosure*, as used in § 309.6, mean to give access to a record, whether by producing the written record or by oral discussion of its

contents. Where the Corporation employee authorized to release Corporation documents makes a determination that furnishing copies of the documents is necessary, the words *disclose* or *disclosure* include the furnishing of copies of documents or records. In addition, *disclose* or *disclosure* as used in § 309.6 is synonymous with the term *transfer* as used in the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 *et seq.*).

(d) The term *examination* includes, but is not limited to, formal and informal investigations of irregularities involving suspected violations of federal or state civil or criminal laws, or unsafe and unsound practices as well as such other investigations as may be conducted pursuant to law.

(e) The term *record* means:

(1) Any information that would be an agency record subject to the requirements of this section when maintained by the FDIC in any format, including an electronic format; and

(2) Any information described under paragraph (e)(1) of this section that is maintained for the FDIC by an entity under Government contract, for purposes of records management.

(f) The term *report of examination* includes, but is not limited to, examination reports resulting from examinations of depository institutions conducted jointly by Corporation examiners and state banking authority examiners or other federal financial institution examiners, as well as reports resulting from examinations conducted solely by Corporation examiners. The term also includes compliance examination reports.

(g) The term *customer financial records,* as used in § 309.6, means an original of, a copy of, or information known to have been derived from, any record held by a depository institution pertaining to a customer's relationship with the depository institution but does not include any record that contains information not identified with or identifiable as being derived from the financial records of a particular customer. The term *customer* as used in § 309.6 refers to individuals or partnerships of five or fewer persons.

(h) The term *Director of the Division having primary authority* includes Deputies to the Chairman and directors of FDIC Divisions and Offices that create, maintain custody, or otherwise have primary responsibility for the handling of FDIC records or information.

[60 FR 61465, Nov. 30, 1995, as amended at 63 FR 16404, Apr. 3, 1998; 81 FR 83646, Nov. 22, 2016]

§ 309.3 Federal Register publication.

The FDIC publishes the following information in the FEDERAL REGISTER for the guidance of the public:

(a) Descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions;

(b) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(c) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports or examinations;

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the FDIC;

(e) Every amendment, revision or repeal of the foregoing; and

(f) General notices of proposed rulemaking.

§ 309.4 Publicly available records.

(a) *Records available on the FDIC's World Wide Web page*—(1) *Discretionary release of documents.* The FDIC encourages the public to explore the wealth of resources available on the FDIC's World Wide Web page, located at: *http://www.fdic.gov*. The FDIC has elected to publish a broad range of materials on its World Wide Web page, including consumer guides; financial and statistical information of interest to the banking industry; and information concerning the FDIC's responsibilities and structure.

(2) *Documents required to be made available for inspection in an electronic*

format. (i) The following types of documents created on or after November 1, 1996, and required to be made available for inspection in an electronic format, may be found on the FDIC's World Wide Web page located at: *http://www.fdic.gov:*

(A) Final opinions, including concurring and dissenting opinions, as well as final orders and written agreements, made in the adjudication of cases;

(B) Statements of policy and interpretations adopted by the Board of Directors that are not published in the FEDERAL REGISTER;

(C) Administrative staff manuals and instructions to staff that affect the public;

(D) Copies of all records released to any person under § 309.5:

(*1*) That, because of the nature of their subject matter, the FDIC determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(*2*) That have been requested 3 or more times; and

(E) A general index of the records referred to in paragraph (a)(2)(i)(D) of this section.

(ii) To the extent permitted by law, the FDIC may delete identifying details when it makes available or publishes a final opinion, final order, statement of policy, interpretation or staff manual or instruction. If redaction is necessary, the FDIC will, to the extent technically feasible, indicate the amount of material deleted at the place in the record where such deletion is made unless that indication in and of itself will jeopardize the purpose for the redaction.

(b) *Public Information Center*. The FDIC maintains a Public Information Center or ''PIC'' that contains Corporate records that the Freedom of Information Act requires be made available for regular inspection and copying, as well as any records or information the FDIC, in its discretion, has regularly made available, to the public. The PIC has extensive materials of interest to the public, including many Reports, Summaries and Manuals used or published by the Corporation that are made available, by appointment, for inspection and copying. The PIC is open from 9 a.m. to 4 p.m., Monday through Friday, excepting Federal holidays. It is located at 3501 North Fairfax Drive, Room E–1005, Arlington, VA 22226. The PIC may be reached during business hours by calling 1(877) 275–3342 or 1-(703) 562–2200.

(c) *Applicable fees*. (i) If applicable, fees for furnishing records under this section are as set forth in § 309.5(f) except that all categories of requesters shall be charged duplication costs.

(ii) Information on the FDIC's World Wide Web page is available to the public without charge. If, however, information available on the FDIC's World Wide Web page is provided pursuant to a Freedom of Information Act request processed under § 309.5, then fees apply and will be assessed pursuant to § 309.5(f).

[63 FR 16404, Apr. 3, 1998, as amended at 76 FR 35965, June 21, 2011; 81 FR 83646, Nov. 22, 2016]

§ 309.5 Procedures for requesting records.

(a) *Definitions*. For purposes of this section:

(1) *Commercial use request* means a request from or on behalf of a requester who seeks records for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a request falls within this category, the FDIC will determine the use to which a requester will put the records requested and seek additional information as it deems necessary.

(2) *Direct costs* means those expenditures the FDIC actually incurs in searching for, duplicating, and, in the case of commercial requesters, reviewing records in response to a request for records.

(3) *Duplication* means the process of making a copy of a record necessary to respond to a request for *records* or for inspection of original records that contain exempt material or that cannot otherwise be directly inspected. Such copies can take the form of paper copy, microfilm, audiovisual records, or machine readable records (e.g., magnetic tape or computer disk).

(4) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(5) *Noncommercial scientific institution* means an institution that is not operated on a commercial basis as that term is defined in paragraph (a)(1) of this section, and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(6) *Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of *news*) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media will be considered to be news-media entities. A freelance journalist will be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by that entity. A publication contract would present a solid basis for such an expectation; the FDIC may also consider the past publication record of the requester in making this determination.

(7) *Review* means the process of examining records located in response to a request for records to determine whether any portion of any record is permitted to be withheld as exempt information. It includes processing any record for disclosure, e.g., doing all that is necessary to excise them or otherwise prepare them for release.

(8) *Search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within records. Searches may be done manually and/or by computer using existing programming.

(b) *Making a request for records.* (1) The request shall be submitted in writing to the Freedom of Information Act/Privacy Act Group (''FOIA/PA Group''), Legal Division :

(i) By completing the online request form located on the FDIC's World Wide Web page, found at: *http://www.fdic.gov;*

(ii) By facsimile clearly marked Freedom of Information Act Request to the FOIA/PA Group: (703) 562–2797; or

(iii) By sending a letter to: Federal Deposit Insurance Corporation, Attn: FOIA/PA Group, 550 17th Street, NW., Washington, DC 20429.

(2) The request shall contain the following information:

(i) The name and address of the requester, an electronic mail address, if available, and the telephone number at which the requester may be reached during normal business hours;

(ii) Whether the requester is an educational institution, noncommercial scientific institution, or news media representative;

(iii) A statement agreeing to pay the applicable fees, or a statement identifying a maximum fee that is acceptable to the requester, or a request for a waiver or reduction of fees that satisfies paragraph (f)(1)(x) of this section; and

(iv) The preferred form and format of any responsive information requested, if other than paper copies.

(3) A request for identifiable records shall reasonably describe the records in a way that enables the FDIC's staff to identify and produce the records with reasonable effort and without unduly burdening or significantly interfering with any of the FDIC's operations.

(c) *Defective requests.* The FDIC need not accept or process a request that does not reasonably describe the records requested or that does not otherwise comply with the requirements

of this part. The FDIC may return a defective request, specifying the deficiency. The requester may submit a corrected request, which will be treated as a new request.

(d) *Processing requests*—(1) *Receipt of requests*. Upon receipt of a request that satisfies paragraph (b) of this section, the FOIA/PA Group will acknowledge receipt of the request in writing to the requester and provide the requester with an individualized tracking number for the request. The date of receipt for such request, including one that is addressed incorrectly or that is referred by another agency, is the date the FOIA/PA Group actually receives the request.

(2) *Multitrack processing*. (i) The FDIC provides different levels of processing for categories of requests under this part. Requests for records that are readily identifiable by the FOIA/PA Group, and that have already been cleared for public release may qualify for fast-track processing. All other requests shall be handled under normal processing procedures, unless expedited processing has been granted pursuant to paragraph (d)(3) of this section.

(ii) The FDIC will make the determination whether a request qualifies for fast-track processing. A requester may contact the FOIA/PA Group to learn whether a particular request has been assigned to fast-track processing. If the request has not qualified for fast-track processing, the requester will be given an opportunity to refine the request in order to qualify for fast-track processing. Changes made to requests to obtain faster processing must be in writing.

(3) *Expedited processing*. (i) Where a person requesting expedited access to records has demonstrated a compelling need for the records, or where the FDIC has determined to expedite the response, the FDIC shall process the request as soon as practicable. To show a compelling need for expedited processing, the requester shall provide a statement demonstrating that:

(A) The failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(B) The requester can establish that they are primarily engaged in information dissemination as their main professional occupation or activity, and there is urgency to inform the public of the government activity involved in the request; and

(C) The requester's statement must be certified to be true and correct to the best of the person's knowledge and belief and explain in detail the basis for requesting expedited processing.

(ii) The formality of the certification required to obtain expedited treatment may be waived by the FDIC as a matter of administrative discretion.

(4) A requester seeking expedited processing will be notified whether expedited processing has been granted within ten (10) working days of the receipt of the request. If the request for expedited processing is denied, the requester may file an appeal pursuant to the procedures set forth in paragraph (i) of this section, and the FDIC shall respond to the appeal within ten (10) working days after receipt of the appeal.

(5) *Priority of responses*. Consistent with sound administrative process the FDIC processes requests in the order they are received in the separate processing tracks. However, in the agency's discretion, or upon a court order in a matter to which the FDIC is a party, a particular request may be processed out of turn.

(6) *Checking status of request*. A requester may check on the status of a request using the tracking number assigned to the request to obtain information about the request including the date on which the FDIC originally received the request and an estimated date on which the FDIC will complete action on the request. The status of a request may be obtained:

(i) Online at the FDIC's FOIA Service Center, at *http://www.fdic.gov*, if the request was submitted electronically using the FDIC's online FOIA request form; or

(ii) By calling the FDIC's FOIA Service Center at (202) 898–7021, if the request was submitted by email, facsimile or regular mail.

(7) *Notification*. (i) The time for response to requests will be twenty (20) working days except:

(A) In the case of expedited treatment under paragraph (d)(3) of this section;

(B) Where the running of such time is suspended for the calculation of a cost estimate for the requester if the FDIC determines that the processing of the request may exceed the requester's maximum fee provision or if the charges are likely to exceed $250 as provided for in paragraph (f)(1)(v) of this section;

(C) Where the running of such time is suspended for the payment of fees pursuant to the paragraphs (d)(6)(i)(B) and (f)(1) of this section; or

(D) In unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B) and further described in paragraph (d)(6)(iii) of this section.

(ii) In unusual circumstances as referred to in paragraph (d)(6)(i)(D) of this section, the time limit may be extended for a period of:

(A) Ten (10) working days as provided by written notice to the requester, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched; or

(B) Such alternative time period as agreed to by the requester or as reasonably determined by the FDIC when the FDIC notifies the requester that the request cannot be processed in the specified time limit.

(iii) Unusual circumstances may arise when:

(A) The records are in facilities, such as field offices or storage centers, that are not located at the FDIC's Washington office;

(B) The records requested are voluminous or are not in close proximity to one another; or

(C) There is a need to consult with another agency or among two or more components of the FDIC having a substantial interest in the determination.

(8) *Response to request.* In response to a request that satisfies the requirements of paragraph (b) of this section, a search shall be conducted of records maintained by the FDIC in existence on the date of receipt of the request, and a review made of any responsive information located. The FDIC shall notify the requester of:

(i) The FDIC's determination of the request;

(ii) The reasons for the determination;

(iii) The right of the requester to seek assistance from the FDIC's FOIA Public Liaison; and

(iv) If the response is a denial of an initial request or if any information is withheld, the FDIC will advise the requester in writing:

(A) If the denial is in part or in whole;

(B) The name and title of each person responsible for the denial (when other than the person signing the notification);

(C) The exemptions relied on for the denial;

(D) The right of the requester to appeal the denial to the FDIC's General Counsel within 90 calendar days following receipt of the notification, as specified in paragraph (i) of this section; and

(E) The right of the requester to seek dispute resolution services from the FDIC's FOIA Public Liaison and/or the Office of Government Information Services (OGIS).

(e) *Providing responsive records.* (1) Copies of requested records shall be sent to the requester by regular U.S. mail to the address indicated in the request, unless the requester elects to take delivery of the documents at the FDIC or makes other acceptable arrangements, or the FDIC deems it appropriate to send the documents by another means.

(2) The FDIC shall provide a copy of the record in any form or format requested if the record is readily reproducible by the FDIC in that form or format, but the FDIC need not provide more than one copy of any record to a requester.

(3) By arrangement with the requester, the FDIC may elect to send the responsive records electronically if a substantial portion of the request is in electronic format. If the information requested is made pursuant to the Privacy Act of 1974, 5 U.S.C. 552a, it will not be sent by electronic means unless reasonable security measures can be provided.

(f) *Fees*—(1) *General rules.* (i) Persons requesting records of the FDIC shall be charged for the direct costs of search, duplication, and review as set forth in

paragraphs (f)(2) and (f)(3) of this section, unless such costs are less than the FDIC's cost of processing the requester's remittance.

(ii) Requesters will be charged for search and review costs even if responsive records are not located or, if located, are determined to be exempt from disclosure.

(iii) Multiple requests seeking similar or related records from the same requester or group of requesters will be aggregated for the purposes of this section.

(iv) If the FDIC determines that the estimated costs of search, duplication, or review of requested records will exceed the dollar amount specified in the request, or if no dollar amount is specified, the FDIC will advise the requester of the estimated costs (if greater than the FDIC's cost of processing the requester's remittance). The requester must agree in writing to pay the costs of search, duplication, and review prior to the FDIC initiating any records search.

(v) If the FDIC estimates that its search, duplication, and review costs will exceed $250.00, the requester must pay an amount equal to 20 percent of the estimated costs prior to the FDIC initiating any records search.

(vi) The FDIC shall ordinarily collect all applicable fees under the final invoice before releasing copies of requested records to the requester.

(vii) The FDIC may require any requester who has previously failed to pay the charges under this section within 30 calendar days of mailing of the invoice to pay in advance the total estimated costs of search, duplication, and review. The FDIC may also require a requester who has any charges outstanding in excess of 30 calendar days following mailing of the invoice to pay the full amount due, or demonstrate that the fee has been paid in full, prior to the FDIC initiating any additional records search.

(viii) The FDIC may begin assessing interest charges on unpaid bills on the 31st day following the day on which the invoice was sent. Interest will be at the rate prescribed in section 3717 of title 31 of the United States Code and will accrue from the date of the invoice.

(ix) The time limit for the FDIC to respond to a request will not begin to run until the FDIC has received the requester's written agreement under paragraph (f)(1)(iv) of this section, and advance payment under paragraph (f)(1)(v) or (vii) of this section, or payment of outstanding charges under paragraph (f)(1)(vii) or (viii) of this section.

(x) As part of the initial request, a requester may ask that the FDIC waive or reduce fees if disclosure of the records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Determinations as to a waiver or reduction of fees will be made by the FOIA/PA Group, Legal Division (or designee) and the requester will be notified in writing of his/her determination. A determination not to grant a request for a waiver or reduction of fees under this paragraph may be appealed to the FDIC's General Counsel (or designee) pursuant to the procedure set forth in paragraph (i) of this section.

(2) *Chargeable fees by category of requester.* (i) Commercial use requesters shall be charged search, duplication and review costs.

(ii) Educational institutions, noncommercial scientific institutions and news media representatives shall be charged duplication costs, except for the first 100 pages.

(iii) Requesters not described in paragraph (f)(2)(i) or (ii) of this section shall be charged the full reasonable direct cost of search and duplication, except for the first two hours of search time and first 100 pages of duplication.

(3) *Fee schedule.* The dollar amount of fees which the FDIC may charge to records requesters will be established by the Chief Financial Officer of the FDIC (or designee). The FDIC may charge fees that recoup the full allowable direct costs it incurs. Fees are subject to change as costs change.

(i) *Manual searches for records.* The FDIC will charge for manual searches for records at the basic rate of pay of the employee making the search plus 16 percent to cover employee benefit costs. Where a single class of personnel

(e.g., all clerical, all professional, or all executive) is used exclusively, the FDIC, at its discretion, may establish and charge an average rate for the range of grades typically involved.

(ii) *Computer searches for records.* The fee for searches of computerized records is the actual direct cost of the search, including computer time, computer runs, and the operator's time apportioned to the search. The fee for a computer printout is the actual cost. The fees for computer supplies are the actual costs. The FDIC may, at its discretion, establish and charge a fee for computer searches based upon a reasonable FDIC-wide average rate for central processing unit operating costs and the operator's basic rate of pay plus 16 percent to cover employee benefit costs.

(iii) *Duplication of records.* (A) The per-page fee for paper copy reproduction of documents is the average FDIC-wide cost based upon the reasonable direct costs of making such copies.

(B) For other methods of reproduction or duplication, the FDIC will charge the actual direct costs of reproducing or duplicating the documents.

(iv) *Review of records.* The FDIC will charge commercial use requesters for the review of records at the time of processing the initial request to determine whether they are exempt from mandatory disclosure at the basic rate of pay of the employee making the search plus 16 percent to cover employee benefit costs. Where a single class of personnel (e.g., all clerical, all professional, or all executive) is used exclusively, the FDIC, at its discretion, may establish and charge an average rate for the range of grades typically involved. The FDIC will not charge at the administrative appeal level for review of an exemption already applied. When records or portions of records are withheld in full under an exemption which is subsequently determined not to apply, the FDIC may charge for a subsequent review to determine the applicability of other exemptions not previously considered.

(v) *Other services.* Complying with requests for special services, other than a readily produced electronic form or format, is at the FDIC's discretion. The FDIC may recover the full costs of providing such services to the requester.

(4) *Publication of fee schedule and effective date of changes.* (i) The fee schedule is made available on the FDIC's World Wide Web page, found at *http://www.fdic.gov.*

(ii) The fee schedule will be set forth in the ''Notice of Federal Deposit Insurance Corporation Records Fees'' issued in December of each year or in such ''Interim Notice of Federal Deposit Insurance Corporation Records Fees'' as may be issued. Copies of such notices may be obtained at no charge from the Federal Deposit Insurance Corporation, FOIA/PA Group, 550 17th Street NW., Washington, DC 20429, and are available on the FDIC's World Wide Web page as noted in paragraph (f)(4)(i) of this section.

(iii) The fees implemented in the December or Interim Notice will be effective 30 days after issuance.

(5) *Use of contractors.* The FDIC may contract with independent contractors to locate, reproduce, and/or disseminate records; provided, however, that the FDIC has determined that the ultimate cost to the requester will be no greater than it would be if the FDIC performed these tasks itself. In no case will the FDIC contract out responsibilities which the Freedom of Information Act (FOIA) (5 U.S.C. 552) provides that the FDIC alone may discharge, such as determining the applicability of an exemption or whether to waive or reduce fees.

(g) *Exempt information.* A request for records may be denied if the requested record contains information which falls into one or more of the following categories.[1] If the requested record contains both exempt and nonexempt information, the nonexempt portions which may reasonably be segregated from the exempt portions will be released to the requester. If redaction is

[1] Classification of a record as exempt from disclosure under the provisions of this paragraph (g) shall not be construed as authority to withhold the record if it is otherwise subject to disclosure under the Privacy Act of 1974 (5 U.S.C. 552a) or other federal statute, any applicable regulation of FDIC or any other federal agency having jurisdiction thereof, or any directive or order of any court of competent jurisdiction.

necessary, the FDIC will, to the extent technically feasible, indicate the amount of material deleted at the place in the record where such deletion is made unless that indication in and of itself will jeopardize the purpose for the redaction. The categories of exempt records are as follows:

(1) Records that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

(2) Records related solely to the internal personnel rules and practices of the FDIC;

(3) Records specifically exempted from disclosure by statute, provided that such statute:

(i)(A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(ii) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to 5 U.S.C. 552(b)(3);

(4) Trade secrets and commercial or financial information obtained from a person that is privileged or confidential;

(5) Interagency or intra-agency memoranda or letters that would not be available by law to a private party in litigation with the FDIC;

(6) Personnel, medical, and similar files (including financial files) the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished records on a confidential basis;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual;

(8) Records that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the FDIC or any agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(h) *Dispute resolution.* A requester seeking to engage in dispute resolution may make a request to the FOIA Public Liaison and/or OGIS by following the procedures set forth online in the FDIC's FOIA Service Center at *http://www.fdic.gov*.

(i) *Appeals.* (1) Appeals should be addressed to the Federal Deposit Insurance Corporation, Attn: FOIA/PA Group, FDIC, 550 17th Street, NW., Washington, DC 20429.

(2) A person whose initial request for records under this section, or whose request for a waiver of fees under paragraph (f)(1)(x) of this section, has been denied, either in part or in whole, has the right to appeal the denial to the FDIC's General Counsel (or designee) within 90 calendar days after receipt of notification of the denial. Appeals of denials of initial requests or for a waiver of fees must be in writing and include any additional information relevant to consideration of the appeal.

(3) Except in the case of an appeal for expedited treatment under paragraph (d)(3) of this section, the FDIC will notify the appellant in writing within 20 business days after receipt of the appeal and will state:

(i) Whether it is granted or denied in whole or in part;

(ii) The name and title of each person responsible for the denial (if other than the person signing the notification);

(iii) The exemptions relied upon for the denial in the case of initial requests for records; and

(iv) The right to judicial review of the denial under the FOIA.

(4) If a requester is appealing for denial of expedited treatment, the FDIC will notify the appellant within 10 business days after receipt of the appeal of the FDIC's disposition.

(5) Complete payment of any outstanding fee invoice will be required before an appeal is processed.

(j) *Records of another agency*. If a requested record is the property of another federal agency or department, and that agency or department, either in writing or by regulation, expressly retains ownership of such record, upon receipt of a request for the record the FDIC will promptly inform the requester of this ownership and immediately shall forward the request to the proprietary agency or department either for processing in accordance with the latter's regulations or for guidance with respect to disposition.

[63 FR 16404, Apr. 3, 1998, as amended at 67 FR 71071, Nov. 29, 2002; 76 FR 35965, June 21, 2011; 76 FR 63818, Oct. 14, 2011; 81 FR 83647, Nov. 22, 2016]

§ 309.6 Disclosure of exempt records.

(a) *Disclosure prohibited*. Except as provided in paragraph (b) of this section or by 12 CFR part 310,[2] no person shall disclose or permit the disclosure of any exempt records, or information contained therein, to any persons other than those officers, directors, employees, or agents of the Corporation who have a need for such records in the performance of their official duties. In any instance in which any person has possession, custody or control of FDIC exempt records or information contained therein, all copies of such records shall remain the property of the Corporation and under no circumstances shall any person, entity or agency disclose or make public in any manner the exempt records or information without written authorization from the Director of the Corporation's Division having primary authority over the records or information as provided in this section.

(b) *Disclosure authorized*. Exempt records or information of the Corporation may be disclosed only in accordance with the conditions and requirements set forth in this paragraph (b). Requests for discretionary disclosure of exempt records or information pursuant to this paragraph (b) may be submitted directly to the Division having primary authority over the exempt records or information or to the FOIA/PA Group for forwarding to the appropriate Division having primary authority over the records sought. Such administrative request must clearly state that it seeks discretionary disclosure of exempt records, clearly identify the records sought, provide sufficient information for the Corporation to evaluate whether there is good cause for disclosure, and meet all other conditions set forth in paragraph (b)(1) through (10) of this section. Information regarding the appropriate FDIC Division having primary authority over a particular record or records may be obtained from the FOIA/PA Group. Authority to disclose or authorize disclosure of exempt records of the Corporation is delegated as follows:

(1) *Disclosure to depository institutions*. The Director of the Corporation's Division having primary authority over the exempt records, or designee, may disclose to any director or authorized officer, employee or agent of any depository institution, information contained in, or copies of, exempt records pertaining to that depository institution.

(2) *Disclosure to state banking agencies*. The Director of the Corporation's Division having primary authority over the exempt records, or designee, may in his or her discretion and for good cause, disclose to any authorized officer or employee of any state banking or securities department or agency, copies of any exempt records to the extent the records pertain to a state-chartered depository institution supervised by the agency or authority, or where the exempt records are requested in writing for a legitimate depository institution supervisory or regulatory purpose.

[2] The procedures for disclosing records under the Privacy Act are separately set forth in 12 CFR part 310.

(3) *Disclosure to federal financial institutions supervisory agencies and certain other agencies.* The Director of the Corporation's Division having primary authority over the exempt records, or designee, may in his or her discretion and for good cause, disclose to any authorized officer or employee of any federal financial institution supervisory agency including the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, Bureau of Consumer Financial Protection, the Financial Stability Oversight Council, the Securities and Exchange Commission, the National Credit Union Administration, or any other agency included in section 1101(7) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 *et seq.*) (RFPA), any exempt records for a legitimate depository institution supervisory or regulatory purpose. The Director, or designee, may in his or her discretion and for good cause, disclose exempt records, including customer financial records, to certain other federal agencies as referenced in section 1113 of the RFPA for the purposes and to the extent permitted therein, or to any foreign bank regulatory or supervisory authority as provided, and to the extent permitted, by section 206 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 3109). Finally, the Director, or designee, may in his or her discretion and for good cause, disclose reports of examination or other confidential supervisory information concerning any depository institution or other entity examined by the Corporation under authority of Federal law to: Any other Federal or State agency or authority with supervisory or regulatory authority over the depository institution or other entity; any officer, director, or receiver of such depository institution or entity; and any other person that the Corporation determines to be appropriate.

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

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

(A) Is signed by an authorized official of the agency making the request;

(B) Identifies the record or records to which access is requested; and

(C) Gives the reasons for the request.

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

(A) The General Counsel, or designee, has determined that disclosure is authorized or required by law; or

(B) Disclosure is pursuant to a written request that indicates the information is relevant to a legitimate law enforcement inquiry within the jurisdiction of the requesting agency and:

(*1*) The Director of the Corporation's Division having primary authority over the exempt records, or designee, certifies pursuant to section 1112(a)[3] of

[3]The form of certification generally is as follows. Additional information may be added:

Pursuant to section 1112(a) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3412), I, _____ [name and appropriate title] hereby certify that the financial records described below were transferred to (agency or department) in the belief that they were relevant

Continued

the RFPA that the records are believed relevant to a legitimate law enforcement inquiry within the jurisdiction of the receiving agency; and

(*2*) A copy of such certification and the notice required by section 1112(b)[4] of the RFPA is sent within fourteen days of the disclosure to the customer whose records are disclosed.[5]

(5) *Disclosure to servicers and serviced institutions.* The Director of the Corporation's Division having primary authority over the exempt records, or designee, may disclose copies of any exempt record related to a depository institution data center, service corporation, or any other data center that provides data processing or related services to an insured institution (hereinafter referred to as ''data center'') to:

(i) The examined data center;

(ii) Any insured institution that receives data processing or related services from the examined data center;

(iii) Any state agency or authority which exercises general supervision over an institution serviced by the examined data center; and

(iv) Any federal financial institution supervisory agency which exercises general supervision over an institution serviced by the examined data center. The federal supervisory agency may disclose any such examination report received from the Corporation to an insured institution over which it exercises general supervision and which is serviced by the examined data center.

(6) *Disclosure to third parties.* (i) Except as otherwise provided in paragraphs (c)(1) through (5) of this section, the Director of the Corporation's Division having primary authority over the exempt records, or designee, may in his or her discretion and for good cause, disclose copies of any exempt records to any third party where requested to do so in writing. Any such written request shall:

(A) Specify, with reasonable particularity, the record or records to which access is requested; and

(B) Give the reasons for the request.

(ii) Either prior to or at the time of any disclosure, the Director or designee shall require such terms and conditions as he deems necessary to protect the confidential nature of the record, the financial integrity of any depository institution to which the record relates, and the legitimate privacy interests of any individual named in such records.

(7) *Authorization for disclosure by depository institutions or other third parties.* (i) The Director of the Corporation's Division having primary authority over the exempt records, or designee, may, in his or her discretion and for good cause, authorize any director, officer, employee, or agent of a depository institution to disclose copies of any exempt record in his custody to anyone who is not a director, officer or employee of the depository institution. Such authorization must be in response to a written request from the party seeking the record or from management of the depository institution to which the report or record pertains. Any such request shall specify, with reasonable particularity, the record sought, the party's interest therein, and the party's relationship to the depository institution to which the record relates.

(ii) The Director of the Corporation's Division having primary authority over the exempt records, or designee, may, in his or her discretion and for good cause, authorize any third party, including a federal or state agency, that has received a copy of a Corporation exempt record, to disclose such exempt record to another party or agency. Such authorization must be in response to a written request from the

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to a legitimate law enforcement inquiry, within the jurisdiction of the receiving agency.

[4] The form of notice generally is as follows. Additional information may be added:

Dear Mr./Ms. _____:

Copies of, or information contained in, your financial records lawfully in the possession of the Federal Deposit Insurance Corporation have been furnished to (agency or department) pursuant to the Right to Financial Privacy Act of 1978 for the following purpose: _____. If you believe that this transfer has not been made to further a legitimate law enforcement inquiry, you may have legal rights under the Right to Financial Privacy Act of 1978 or the Privacy Act of 1974.

[5] Whenever the Corporation is subject to a court-ordered delay of the customer notice, the notice shall be sent immediately upon the expiration of the court-ordered delay.

party that has custody of the copy of the exempt record. Any such request shall specify the record sought to be disclosed and the reasons why disclosure is necessary.

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

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

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

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

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

(*1*) That disclosure was made;

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

(*3*) To whom the report was sent; and

(*4*) The date the report was disclosed.

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

(8) *Disclosure by General Counsel.* (i) The Corporation's General Counsel, or designee, may disclose or authorize the disclosure of any exempt record in response to a valid judicial subpoena, court order, or other legal process, and authorize any current or former officer, director, employee, agent of the Corporation, or third party, to appear and testify regarding an exempt record or any information obtained in the performance of such person's official duties, at any administrative or judicial hearing or proceeding where such person has been served with a valid subpoena, court order, or other legal process requiring him or her to testify. The General Counsel shall consider the relevancy of such exempt records or testimony to the litigation, and the interests of justice, in determining whether to disclose such records or testimony. Third parties seeking disclosure of exempt records or testimony in litigation to which the FDIC is not a party shall

submit a request for discretionary disclosure directly to the General Counsel.[6] Such request shall specify the information sought with reasonable particularity and shall be accompanied by a statement with supporting documentation showing in detail the relevance of such exempt information to the litigation, justifying good cause for disclosure, and a commitment to be bound by a protective order. Failure to exhaust such administrative request prior to service of a subpoena or other legal process may, in the General Counsel's discretion, serve as a basis for objection to such subpoena or legal process. Customer financial records may not be disclosed to any federal agency that is not a federal financial supervisory agency pursuant to this paragraph unless notice to the customer and certification as required by the RFPA have been given except where disclosure is subject to the relevant exceptions set forth in the RFPA.

(ii) The General Counsel, or designee, may in his or her discretion and for good cause, disclose or authorize disclosure of any exempt record or testimony by a current or former officer, director, employee, agent of the Corporation, or third party, sought in connection with any civil or criminal hearing, proceeding or investigation without the service of a judicial subpoena, or other legal process requiring such disclosure or testimony, if he or she determines that the records or testimony are relevant to the hearing, proceeding or investigation and that disclosure is in the best interests of justice and not otherwise prohibited by Federal statute. Customer financial records shall not be disclosed to any federal agency pursuant to this paragraph that is not a federal financial supervisory agency, unless the records are sought under the Federal Rules of Civil Procedure (28 U.S.C. appendix) or the Federal Rules of Criminal Procedure (18 U.S.C. appendix) or comparable rules of other courts and in connection with litigation to which the receiving federal agency, employee, officer, director, or agent, and the customer are parties, or disclosure is otherwise subject to the relevant exceptions in the RFPA. Where the General Counsel or designee authorizes a current or former officer, director, employee or agent of the Corporation to testify or disclose exempt records pursuant to this paragraph (b)(8), he or she may, in his or her discretion, limit the authorization to so much of the record or testimony as is relevant to the issues at such hearing, proceeding or investigation, and he or she shall give authorization only upon fulfillment of such conditions as he or she deems necessary and practicable to protect the confidential nature of such records or testimony.

(9) *Authorization for disclosure by the Chairman of the Corporation's Board of Directors.* Except where expressly prohibited by law, the Chairman of the Corporation's Board of Directors may in his or her discretion, authorize the disclosure of any Corporation records. Except where disclosure is required by law, the Chairman may direct any current or former officer, director, employee or agent of the Corporation to refuse to disclose any record or to give testimony if the Chairman determines, in his or her discretion, that refusal to permit such disclosure is in the public interest.

(10) *Limitations on disclosure.* All steps practicable shall be taken to protect the confidentiality of exempt records and information. Any disclosure permitted by paragraph (b) of this section is discretionary and nothing in paragraph (b) of this section shall be construed as requiring the disclosure of information. Further, nothing in paragraph (b) of this section shall be construed as restricting, in any manner, the authority of the Board of Directors, the Chairman of the Board of Directors, the Director of the Corporation's Division having primary authority over the exempt records, the Corporation's General Counsel, or their

[6] This administrative requirement does not apply to subpoenas, court orders or other legal process issued for records of depository institutions held by the FDIC as Receiver or Conservator. Subpoenas, court orders or other legal process issued for such records will be processed in accordance with State and Federal law, regulations, rules and privileges applicable to FDIC as Receiver or Conservator.

designees, or any other Corporation Division or Office head, in their discretion and in light of the facts and circumstances attendant in any given case, to require conditions upon and to limit the form, manner, and extent of any disclosure permitted by this section. Wherever practicable, disclosure of exempt records shall be made pursuant to a protective order and redacted to exclude all irrelevant or non-responsive exempt information.

[60 FR 61465, Nov. 30, 1995, as amended at 63 FR 16408, Apr. 3, 1998; 67 FR 71071, Nov. 29, 2002; 73 FR 2146, Jan. 14, 2008; 76 FR 35965, June 21, 2011]

§ 309.7 Service of process.

(a) *Service*. Any subpoena or other legal process to obtain information maintained by the FDIC shall be duly issued by a court having jurisdiction over the FDIC, and served upon either the Executive Secretary (or designee), FDIC, 550 17th Street, NW., Washington, DC 20429, or the Regional Director or Regional Manager of the FDIC region where the legal action from which the subpoena or process was issued is pending. A list of the FDIC's regional offices is available from the Office of Public Affairs, FDIC, 550 17th Street, NW., Washington, DC 20429 (telephone 202–898–6996). Where the FDIC is named as a party, service of process shall be made pursuant to the Federal Rules of Civil Procedure, and upon the Executive Secretary (or designee), FDIC, 550 17th Street NW., Washington, DC 20429, or upon the agent designated to receive service of process in the state, territory, or jurisdiction in which any insured depository institution is located. Identification of the designated agent in the state, territory, or jurisdiction may be obtained from the Executive Secretary or from the Office of the General Counsel, FDIC, 550 17th Street NW., Washington, DC 20429. The Executive Secretary (or designee), Regional Director or designated agent shall immediately forward any subpoena, court order or legal process to the General Counsel. The Corporation may require the payment of fees, in accordance with the fee schedule referred to in § 309.5(c)(3), prior to the release of any records requested pursuant to any subpoena or other legal process.

(b) *Notification by person served*. If any current or former officer, director, employee or agent of the Corporation, or any other person who has custody of records belonging to the FDIC, is served with a subpoena, court order, or other process requiring that person's attendance as a witness concerning any matter related to official duties, or the production of any exempt record of the Corporation, such person shall promptly advise the General Counsel of such service, of the testimony and records described in the subpoena, and of all relevant facts which may be of assistance to the General Counsel in determining whether the individual in question should be authorized to testify or the records should be produced. Such person should also inform the court or tribunal which issued the process and the attorney for the party upon whose application the process was issued, if known, of the substance of this section.

(c) *Appearance by person served*. Absent the written authorization of the Corporation's General Counsel, or designee, to disclose the requested information, any current or former officer, director, employee, or agent of the Corporation, and any other person having custody of records of the Corporation, who is required to respond to a subpoena or other legal process, shall attend at the time and place therein specified and respectfully decline to produce any such record or give any testimony with respect thereto, basing such refusal on this section.

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

PART 310—PRIVACY ACT REGULATIONS

Sec.

310.1 Purpose and scope.
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310.10 Disclosure of record to person other than the individual to whom it pertains.
310.11 Fees.
310.12 Penalties.
310.13 Exemptions.

AUTHORITY: 5 U.S.C. 552a.

SOURCE: 40 FR 46274, Oct. 6, 1975, unless otherwise noted.

§ 310.1 Purpose and scope.

The purpose of this part is to establish regulations implementing the Privacy Act of 1974, 5 U.S.C. 552a. These regulations delineate the procedures that an individual must follow in exercising his or her access or amendment rights under the Privacy Act to records maintained by the Corporation in systems of records, including information transferred to Federal Deposit Insurance Corporation from the Office of Thrift Supervision pursuant to sections 312 and 323 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203.

[76 FR 35965, June 21, 2011]

§ 310.2 Definitions.

For purposes of this part:

(a) The term *Corporation* means the Federal Deposit Insurance Corporation;

(b) The term *individual* means a natural person who is either a citizen of the United States or an alien lawfully admitted for permanent residence;

(c) The term *maintain* includes maintain, collect, use, disseminate, or control;

(d) The term *record* means any item, collection or grouping of information about an individual that contains his/her name, or the identifying number, symbol, or other identifying particular assigned to the individual;

(e) The term *system of records* means a group of any records under the control of the Corporation from which information is retrieved by the name of the individual or some identifying number, symbol or other identifying particular assigned to the individual;

(f) The term *designated system of records* means a system of records which has been listed and summarized in the FEDERAL REGISTER pursuant to the requirements of 5 U.S.C. 552a(e);

(g) The term *routine use* means, with respect to disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was created;

(h) The terms *amend* or *amendment* mean any correction, addition to or deletion from a record; and

(i) The term *system manager* means the agency official responsible for a designated system of records, as denominated in the FEDERAL REGISTER publication of ''Systems of Records Maintained by the Federal Deposit Insurance Corporation.''

[40 FR 46274, Oct. 6, 1975, as amended at 42 FR 6796, Feb. 4, 1977]

§ 310.3 Procedures for requests pertaining to individual records in a system of records.

(a) Any present or former employee of the Corporation seeking access to, or amendment of, his/her official personnel records maintained by the Corporation shall submit his/her request in such manner as is prescribed by the United States Office of Personnel Management in part 297 of its rules and regulations (5 CFR part 297). For access to, or amendment of, other government-wide records systems maintained by the Corporation, the procedures prescribed in the respective FEDERAL REGISTER Privacy Act system notice shall be followed.

(b) Requests by individuals for access to records pertaining to them and maintained within one of the Corporation's designated systems of records should be submitted in writing to the Federal Deposit Insurance Corporation, Attn: FOIA/PA Group, 550 17th Street, NW., Washington, DC 20429. Each such request should contain a reasonable description of the records sought, the system or systems in which such record may be contained, and any additional identifying information, as specified in the Corporation's FEDERAL REGISTER ''Notice of Systems of Records'' for that particular system,

copies of which are available upon request from the FOIA/PA Group.

[40 FR 46274, Oct. 6, 1975, as amended at 42 FR 6796, Feb. 4, 1977; 61 FR 43419, Aug. 23, 1996; 67 FR 71071, Nov. 29, 2002; 76 FR 35965, June 21, 2011]

§310.4 Times, places, and requirements for identification of individuals making requests.

(a) Individuals may request access to records pertaining to themselves by submitting a written request as provided in §310.3 of these regulations, or by appearing in person on weekdays, other than official holidays, at the Federal Deposit Insurance Corporation, Attn: FOIA/PA Group, 550 17th Street, NW., Washington, DC 20429, between the hours of 8:30 a.m. and 5 p.m.

(b) Individuals appearing in person at the Corporation seeking access to or amendment of their records shall present two forms of reasonable identification, such as employment identification cards, driver's licenses, or other identification cards or documents typically used for identification purposes.

(c) Except for records that must be publicly disclosed pursuant to the Freedom of Information Act, 5 U.S.C. 552, where the Corporation determines it to be necessary for the individual's protection, a certification of a duly commissioned notary public, of any state or territory, attesting to the requesting individual's identity, or an unsworn declaration subscribed to as true under the penalty of perjury under the laws of the United States of America, at the election of the individual, may be required before a written request seeking access to or amendment of a record will be honored. The Corporation may also require that individuals provide minimal identifying data such as full name, date and place of birth, or other personal information necessary to ensure proper identity before processing requests for records.

[40 FR 46274, Oct. 6, 1975, as amended at 42 FR 6796, Feb. 4, 1977; 61 FR 43419, Aug. 23, 1996; 67 FR 71071, Nov. 29, 2002; 76 FR 35966, June 21, 2011]

§310.5 Disclosure of requested information to individuals.

(a) Except to the extent that Corporation records pertaining to an individual:

(1) Are exempt from disclosure under §§310.6 and 310.13 of this part, or

(2) Were compiled in reasonable anticipation of a civil action or proceeding, the Corporation will make such records available upon request for purposes of inspection and copying by the individual (after proper identity verification as provided in §310.4) and, upon the individual's request and written authorization, by another person of the individual's own choosing.

(b) The FOIA/PA Group will notify, in writing, the individual making a request, whenever practicable within ten business days following receipt of the request, whether any specified designated system of records maintained by the Corporation contains a record pertaining to the individual. Where such a record does exist, the FOIA/PA Group also will inform the individual of the system manager's decision whether to grant or deny the request for access. In the event existing records are determined not to be disclosable, the notification will inform the individual of the reasons for which disclosure will not be made and will provide a description of the individual's right to appeal the denial, as more fully set forth in §310.9. Where access is to be granted, the notification will specify the procedures for verifying the individual's identity, as set forth in §310.4.

(c) Individuals will be granted access to records disclosable under this part 310 as soon as is practicable. The FOIA/PA Group will give written notification of a reasonable period within which individuals may inspect disclosable records pertaining to themselves at the offices of the FOIA/PA Group during normal business hours. Alternatively, individuals granted access to records under this part may request that copies of such records be forwarded to them. Fees for copying such records will be assessed as provided in §310.11.

[40 FR 46274, Oct. 6, 1975, as amended at 42 FR 6796, Feb. 4, 1977; 67 FR 71071, Nov. 29, 2002]

§ 310.6 Special procedures: Medical records.

Medical records shall be disclosed on request to the individuals to whom they pertain, except, if in the judgment of the Corporation, the transmission of the medical information directly to the requesting individual could have an adverse effect upon such individual. In the event medical information is withheld from a requesting individual due to any possible adverse effect such information may have upon the individual, the Corporation shall transmit such information to a medical doctor named by the requesting individual for release of the patient.

[40 FR 46274, Oct. 6, 1975, as amended at 61 FR 43420, Aug. 23, 1996]

§ 310.7 Request for amendment of record.

The Corporation will maintain all records it uses in making any determination about any individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual in the determination. An individual may request that the Corporation amend any portion of a record pertaining to that individual which the Corporation maintains in a designated system of records. Such a request should be submitted in writing to the Federal Deposit Insurance Corporation, Attn: FOIA/PA Group, 550 17th Street, NW., Washington, DC 20429 and should contain the individual's reason for requesting the amendment and a description of the record (including the name of the appropriate designated system and category thereof) sufficient to enable the Corporation to identify the particular record or portion thereof with respect to which amendment is sought.

[76 FR 35966, June 21, 2011]

§ 310.8 Agency review of request for amendment of record.

(a) Requests by individuals for the amendment of records will be acknowledged by the FOIA/PA Group, and referred to the system manager of the system of records in which the record is contained for determination, within ten business days following receipt of such requests. Promptly thereafter, the FOIA/PA Group will notify the individual of the system manager's decision to grant or deny the request to amend.

(b) If the system manager denies a request to amend a record, the notification of such denial shall contain the reason for the denial and a description of the individual's right to appeal the denial as more fully set forth in § 310.9.

[40 FR 46274, Oct. 6, 1975, as amended at 42 FR 6796, Feb. 4, 1977; 67 FR 71071, Nov. 29, 2002; 76 FR 35966, June 21, 2011]

§ 310.9 Appeal of adverse initial agency determination on access or amendment.

(a) A system manager's denial of an individual's request for access to or amendment of a record pertaining to him/her may be appealed in writing to the Corporation's General Counsel (or designee) within 30 business days following receipt of notification of the denial. Such an appeal should be addressed to the Federal Deposit Insurance Corporation, Attn: FOIA/PA Group, 550 17th Street, NW., Washington, DC 20429, and contain all the information specified for requests for access in § 310.3 or for initial requests to amend in § 310.7, as well as any other additional information the individual deems relevant for the consideration by the General Counsel (or designee) of the appeal.

(b) The General Counsel (or designee) will normally make a final determination with respect to an appeal made under this part within 30 business days following receipt by the Office of the Executive Secretary of the appeal. The General Counsel (or designee) may, however, extend this 30-day time period for good cause. Where such an extension is required, the individual making the appeal will be notified of the reason for the extension and the expected date upon which a final decision will be given.

(c) If the General Counsel (or designee) affirms the initial denial of a request for access or to amend, he or she will inform the individual affected of the decision, the reason therefor, and the right of judicial review of the decision. In addition, as pertains to a request for amendment, the individual

may at that point submit to the Corporation a concise statement setting forth his or her reasons for disagreeing with the Corporation's refusal to amend.

(d) Any statement of disagreement with the Corporation's refusal to amend, filed with the Corporation by an individual pursuant to § 310.9(c), will be included in the disclosure of any records under the authority of § 310.10(b). The Corporation may in its discretion also include a copy of a concise statement of its reasons for not making the requested amendment.

(e) The General Counsel (or designee) may on his or her own motion refer an appeal to the Board of Directors for a determination, and the Board of Directors on its own motion may consider an appeal.

[52 FR 34290, Sept. 10, 1987, as amended at 61 FR 43420, Aug. 23, 1996; 67 FR 71071, Nov. 29, 2002; 76 FR 35966, June 21, 2011]

§ 310.10 Disclosure of record to person other than the individual to whom it pertains.

(a) Except as provided in paragraph (b) of this section, the Corporation will not disclose any record contained in a designated system of records to any person or agency except with the prior written consent of the individual to whom the record pertains.

(b) The restrictions on disclosure in paragraph (a) of this section do not apply to any of the following disclosures:

(1) To those officers and employees of the Corporation who have a need for the record in the performance of their duties;

(2) Which is required under the Freedom of Information Act (5 U.S.C. 552);

(3) For a routine use listed with respect to a designated system of records;

(4) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13 U.S.C.;

(5) To a recipient who has provided the Corporation with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) To the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or his or her designee to determine whether the record has such value;

(7) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the Corporation specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) To a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if, upon such disclosure, notification is transmitted to the last known address of such individual;

(9) To either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) To the Comptroller General, or any of his or her authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) Pursuant to the order of a court of competent jurisdiction.

(12) To a consumer reporting agency in accordance with section 3711(f) of title 31.

(c) The Corporation will adhere to the following procedures in the case of disclosure of any record pursuant to the authority of paragraphs (b)(3) through (b)(12) of this section.

(1) The Corporation will keep a record of the date, nature and purpose of each such disclosure, as well as the name and address of the person or agency to whom such disclosure is made; and

(2) The Corporation will retain and, with the exception of disclosures made pursuant to paragraph (b)(7) of this section, make available to the individual

named in the record for the greater of five years or the life of the record all material compiled under paragraph (d)(1) of this section with respect to disclosure of such record.

(d) Whenever a record which has been disclosed by the Corporation under authority of paragraph (b) of this section is, within a reasonable amount of time after such disclosure, either amended by the Corporation or the subject of a statement of disagreement, the Corporation will transmit such additional information to any person or agency to whom the record was disclosed, if such disclosure was subject to the accounting requirements of paragraph (c)(1) of this section.

[40 FR 46274, Oct. 6, 1975, as amended at 61 FR 43420, Aug. 23, 1996]

§ 310.11 Fees.

The Corporation, upon a request for records disclosable pursuant to the Privacy Act of 1974 (5 U.S.C. 552a), shall charge a fee of $0.10 per page for duplicating, except as follows:

(a) If the Corporation determines that it can grant access to a record only by providing a copy of the record, no fee will be charged for providing the first copy of the record or any portion thereof;

(b) Whenever the aggregate fees computed under this section do not exceed $10 for any one request, the fee will be deemed waived by the Corporation; or

(c) Whenever the Corporation determines that a reduction or waiver is warranted, it may reduce or waive any fees imposed for furnishing requested information pursuant to this section.

[40 FR 46274, Oct. 6, 1975, as amended at 61 FR 43420, Aug. 23, 1996]

§ 310.12 Penalties.

Subsection (i)(3) of the Privacy Act of 1974 (5 U.S.C. 552a(i)(3)) imposes criminal penalties for obtaining Corporation records on individuals under false pretenses. The subsection provides as follows:

Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

§ 310.13 Exemptions.

The following systems of records are exempt from §§ 310.3 through 310.9 and § 310.10(c)(2) of these rules:

(a) Investigatory material compiled for law enforcement purposes in the following systems of records is exempt from §§ 310.3 through 310.9 and § 310.10(c)(2) of these rules;

Provided, however, That if any individual is denied any right, privilege, or benefit to which he/she would otherwise be entitled under Federal law, or for which he/she would otherwise be eligible, as a result of the maintenance of such material, such material shall be disclosed to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence:

30–64–0002—Financial institutions investigative and enforcement records system.

30–64–0010—Investigative files and records.

(b) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Corporation employment to the extent that disclosure of such material would reveal the identity of a source who furnished information to the Corporation under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence, in the following systems of records, is exempt from §§ 310.3 through 310.9 and § 310.10(c)(2) of these rules:

30–64–0001—Attorney-legal intern applicant system.

30–64–0010—Investigative files and records.

(c) Testing or examination material used solely to determine or assess individual qualifications for appointment or promotion in the Corporation's service, the disclosure of which would compromise the objectivity or fairness of the testing, evaluation, or examination process in the following system of

records, is exempt from §§310.3 through 310.9 and §310.10(c)(2) of these rules:

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

[42 FR 6797, Feb. 4, 1977, as amended at 42 FR 33720, July 1, 1977; 54 FR 38507, Sept. 19, 1989; 61 FR 43420, Aug. 23, 1996]

PART 311—RULES GOVERNING PUBLIC OBSERVATION OF MEETINGS OF THE CORPORATION'S BOARD OF DIRECTORS

Sec.

311.1 Purpose.
311.2 Definitions.
311.3 Meetings.
311.4 Procedures for announcing meetings.
311.5 Regular procedure for closing meetings.
311.6 Expedited procedure for announcing and closing certain meetings.
311.7 General Counsel certification.
311.8 Transcripts and minutes of meetings.

AUTHORITY: 5 U.S.C. 552b and 12 U.S.C. 1819.

SOURCE: 42 FR 14675, Mar. 16, 1977, unless otherwise noted.

§311.1 Purpose.

This part implements the policy of the ''Government in the Sunshine Act'', section 552b of title 5 U.S.C., which is to provide the public with as much information as possible regarding the decision making process of certain Federal agencies, including the Federal Deposit Insurance Corporation, while preserving the rights of individuals and the ability of the agency to carry out its responsibilities.

§311.2 Definitions.

For purposes of this part:

(a) *Board* means Board of Directors of the Federal Deposit Insurance Corporation and includes any subdivision of the Board authorized to act on behalf of the Corporation.

(b) *Meeting* means the deliberations (including those conducted by conference telephone call, or by any other method) of at least three members where such deliberations determine or result in the joint conduct or disposition of agency business but does not include:

(1) Deliberations to determine whether meetings will be open or closed or whether information pertaining to closed meetings will be withheld;

(2) Informal background discussions among Board members and staff which clarify issues and expose varying views;

(3) Decision-making by circulating written material to individual Board members;

(4) Sessions with individuals from outside the Corporation where Board members listen to a presentation and may elicit additional information.

(c) *Member* means a member of the Board.

(d) *Open to public observation* and *open to the public* mean that individuals may witness the meeting, but not participate in the deliberations. The meeting may be recorded, photographed, or otherwise reproduced if the reproduction does not disturb the meeting.

(e) *Public announcement* and *publicly announce* mean making reasonable effort under the particular circumstances of each case to fully inform the public. This may include posting notice on the Corporation's public notice bulletin board maintained in the lobby of its offices located at 550 17th Street, NW., Washington, DC 20429, issuing a press release and employing other methods of notification that may be desirable in a particular situation.

[42 FR 14675, Mar. 16, 1977, as amended at 42 FR 59494, Nov. 18, 1977; 54 FR 38965, Sept. 22, 1989; 61 FR 38357, July 24, 1996]

§311.3 Meetings.

(a) *Open meetings*. Except as provided in paragraph (b) of this section, every portion of every meeting of the Corporation's Board will be open to public observation. Board members will not jointly conduct or dispose of Corporation business other than in accordance with this part.

(b) *When meetings may be closed and announcements and disclosures withheld*. Except where the Board finds that the public interest requires otherwise, a meeting or portion thereof may be closed, and announcements and disclosure pertaining thereto may be withheld when the Board determines that such meeting or portion of the meeting or the disclosure of such information is likely to:

(1) Disclose matters that are: (i) Specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (ii) in fact properly classified pursuant to such Executive order;

(2) Relate solely to the internal personnel rules and practices of the Corporation;

(3) Disclose matters specifically exempted from disclosure by statute (other than the Freedom of Information Act, 5 U.S.C. 552): *Provided*, That such statute: (i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular types of matters to be withheld;

(4) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Involve accusing any person of a crime, or formally censuring any person;

(6) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would: (i) Interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel;

(8) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the Corporation or any other agency responsible for the supervision of financial institutions;

(9) Disclose information the premature disclosure of which would be likely to:

(i)(A) Lead to significant financial speculation in currencies, securities, or commodities, or

(B) Significantly endanger the stability of any financial institution; or

(ii) Significantly frustrate implementation of a proposed Corporation action, except that this paragraph (b)(9)(ii) shall not apply in any instance where the Corporation has already disclosed to the public the content or nature of its proposed action, or where the Corporation is required by law to make such disclosure on its own initiative prior to taking final action on such proposal; or

(10) Specifically concern the Corporation's issuance of a subpoena, or the Corporation's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the Corporation of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

§ 311.4 Procedures for announcing meetings.

(a) *Scope*. Except to the extent that such announcements are exempt from disclosure under § 311.3(b), announcements relating to open meetings, and meetings closed under the regular closing procedures of § 311.5, will be made in the manner set forth in this section.

(b) *Time and content of announcement*. The Corporation will make public announcement at least seven days before the meeting of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and telephone number of the official designated by the Corporation to respond to requests for information about the meeting. This announcement will be made unless a majority of the Board determines by a recorded vote that Corporation business requires that a meeting be called on lesser notice. In such cases, the Corporation will make public announcement of the time, place, and subject matter of the meeting, and whether it is open or closed to the public, at the earliest practicable time, which may be later than the commencement of the meeting.

(c) *Changing time or place of meeting*. The time or place of a meeting may be

changed following the public announcement required by paragraph (b) of this section only if the Corporation publicly announces the change at the earliest practicable time, which may be later than the commencement of the meeting.

(d) *Changing subject matter or nature of meeting*. The subject matter of a meeting, or the determination to open or close a meeting or a portion of a meeting, may be changed following the public announcement only if:

(1) A majority of the entire Board determines by recorded vote that agency business so requires and that no earlier announcement of the change was possible; and,

(2) The Corporation publicly announces the change and the vote of each member upon such change at the earliest practicable time, which may be later than the commencement of the meeting.

(e) *Publication of announcements in Federal Register*. Immediately following each public announcement under this section, such announcement will be submitted for publication in the FEDERAL REGISTER by the Executive Secretary.

[42 FR 14675, Mar. 16, 1977, as amended at 67 FR 71071, Nov. 29, 2002]

§311.5 Regular procedure for closing meetings.

(a) *Scope*. Unless §311.6 is applicable, the procedures for closing meetings will be those set forth in this section.

(b) *Procedure*. (1) A decision to close a meeting or portion of a meeting will be taken only when a majority of the entire Board votes to take such action. In deciding whether to close a meeting or portion of a meeting, the Board will consider whether the public interest requires an open meeting. A separate vote of the Board will be taken with respect to each meeting which is proposed to be closed in whole or in part to the public. A single vote may be taken with respect to a series of meetings which are proposed to be closed in whole or in part to the public, or with respect to any information concerning such series of meetings, so long as each meeting in the series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in the series. The vote of each Board member will be recorded and no proxies will be allowed.

(2) Any individual whose interests may be directly affected may request that the Corporation close any portion of a meeting for any of the reasons referred to in paragraph (b)(5), (6), or (b)(7) of §311.3. Requests should be directed to the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. After receiving notice that an individual desires a portion of a meeting to be closed, the Board, upon request of any one of its members, will vote by recorded vote whether to close the relevant portion of the meeting. This procedure will apply even if the individual's request is made subsequent to the announcement of a decision to hold an open meeting.

(3) The Corporation's General Counsel will make the public certification required by §311.7.

(4) Within 1 day after any vote taken pursuant to paragraphs (b)(1) or (2) of this section, the Corporation will make publicly available a written copy of the vote, reflecting the vote of each Board member. Except to the extent that such information is exempt from disclosure, if a meeting or portion of a meeting is to be closed to the public, the Corporation will make publicly available within 1 day after the required vote a full written explanation of its action, together with a list of all persons expected to attend the meeting and their affiliation.

(5) The Corporation will publicly announce the time, place, and subject matter of the meeting, with determinations as to open and closed portions, in the manner and within the time limits prescribed in §311.4.

[42 FR 14675, Mar. 16, 1977; 42 FR 16616, Mar. 29, 1977, as amended at 42 FR 59494, Nov. 18, 1977; 67 FR 71071, Nov. 29, 2002]

§311.6 Expedited procedure for announcing and closing certain meetings.

(a) *Scope*. Since a majority of its meetings may properly be closed pursuant to paragraph (b)(4), (8), (9)(i), or (b)(10) of §311.3, subsection (d)(4) of the Government in the Sunshine Act (5 U.S.C. 552b) allows the Corporation to

use expedited procedures in closing meetings under these four subparagraphs. Absent a compelling public interest to the contrary, meetings or portions of meetings that can be expected to be closed using these procedures include, but are not limited to: Administrative enforcement proceedings under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818); appointment of the Corporation as conservator of a depository institution, or as receiver, liquidator or liquidating agent of a closed depository institution or a depository institution in danger of closing; and certain management and liquidation activities pursuant to such appointments; possible financial assistance by the Corporation under section 13 of the Federal Deposit Insurance Act (12 U.S.C. 1823); certain depository institution applications including applications to establish or move branches, applications to merge, and applications for insurance; and investigatory activity under section 10(c) of the Federal Deposit Insurance Act (12 U.S.C. 1820(c)). In announcing and closing meetings or portions of meetings under this section, the following procedures will be observed.

(b) *Announcement*. Except to the extent that such information is exempt from disclosure under the provisions of § 311.3(b) the Corporation will make public announcement of the time, place and subject matter of the meeting and of each portion thereof at the earliest practicable time. This announcement will be published in the FEDERAL REGISTER if publication can be effected at least 1 day prior to the scheduled date of the meeting.

(c) *Procedure for closing*. (1) The Corporation's General Counsel will make the public certification required by § 311.7.

(2) At the beginning of a meeting or portion of a meeting to be closed under this section, a recorded vote of the Board will be taken. The Board will determine by its vote whether to proceed with the closing. If a majority of the entire Board votes to close, the meeting will be closed to public observation. Even though a meeting or portion thereof could properly be closed under this section, a majority of the entire Board may find that the public interest requires an open session and vote, reflecting the vote of each Board member, will be made available to the public.

[42 FR 14675, Mar. 16, 1977; 42 FR 16616, Mar. 29, 1977, as amended at 54 FR 38965, Sept. 22, 1989]

§ 311.7 General Counsel certification.

For every meeting or portion thereof closed under § 311.5 or § 311.6, the Corporation's General Counsel will publicly certify that, in the opinion of such General Counsel, the meeting may be closed to the public and will state each relevant exemptive provision. In the absence of the General Counsel, the next ranking official in the Legal Division may perform the certification. If the General Counsel and such next ranking official in the Legal Division are both absent, the official in the Legal Division who is then next in rank may provide the required certification. A copy of this certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, will be retained in the Board's permanent files.

[42 FR 14675, Mar. 16, 1977, as amended at 61 FR 38357, July 24, 1996]

§ 311.8 Transcripts and minutes of meetings.

(a) *When required*. The Corporation will maintain a complete transcript, identifying each speaker, to record fully the proceedings of each meeting or portion of a meeting closed to the public, except that in the case of a meeting or portions of a meeting closed to the public pursuant to paragraph (b)(8), (9)(i), or (10) of § 311.3, the Corporation may, in lieu of a transcript, maintain a set of minutes.

(b) *Content of minutes*. If minutes are maintained, they will fully and clearly describe all matters discussed and will provide a full and accurate summary of any actions taken, and the reasons for taking such action. Minutes will also include a description of each of the views expressed by each person in attendance on any item and the record of any roll call vote, reflecting the vote of each member. All documents considered in connection with any action will be identified in the minutes.

(c) *Available material.* The Corporation will maintain a complete verbatim copy of the transcript or minutes of each meeting or portion of a meeting closed to the public for a period of at least 2 years after the meeting, or until 1 year after the conclusion of any proceeding with respect to which the meeting or portion was held, whichever occurs later. The Corporation will make promptly available to the public the transcript, identifying each speaker, or minutes of items on the agenda or testimony of any witness received at the closed meeting except that in cases where the Privacy Act of 1974 (5 U.S.C. 552a) does not apply, the Corporation may withhold information exempt from disclosure under § 311.3(b). For the convenience of members of the public who may be unable to attend open meetings of the Board, the Corporation will maintain for at least 2 years a set of minutes of each meeting of the Board or portion thereof open to public observation.

(d) *Procedures for inspecting or copying available material.* (1) An individual may inspect materials made available under paragraph (c) of this section at the offices of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429, during normal business hours. If the individual desires a copy of such material, the Corporation will furnish copies at a cost of 10 cents per page. Whenever the Corporation determines that in the public interest a reduction or waiver is warranted, it may reduce or waive any fees imposed under this section.

(2) An individual may also submit a written request for transcripts or minutes, reasonably identifying the records sought, to the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

(e) *Procedures for obtaining documents identified in minutes.* Copies of documents identified in minutes or considered by the Board in connection with any action identified in the minutes may be made available to the public upon request, to the extent permitted by the Freedom of Information Act, under the provisions of 12 CFR part 309, Disclosure of Information.

[42 FR 14675, Mar. 16, 1977, as amended at 61 FR 38357, July 24, 1996; 67 FR 71071, Nov. 29, 2002]

PART 312 [RESERVED]

PART 313—PROCEDURES FOR COLLECTION OF CORPORATE DEBT, CRIMINAL RESTITUTION DEBT, AND CIVIL MONEY PENALTY DEBT

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AUTHORITY: 5 U.S.C. 5514; 12 U.S.C. 1818(i), 1819(a); Pub. L. 104–134, 110 Stat. 1321 (31 U.S.C. 3701, 3711, 3716).

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

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

SOURCE: 86 FR 1742, Jan. 11, 2021, unless otherwise noted.

§ 313.1 Scope.

This part establishes the Federal Deposit Insurance Corporation (FDIC) procedures for the collection of certain debts owed to the United States.

(a) This part applies to collections by the FDIC from:

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

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

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

(4) Civil money penalty debtors assessed civil money penalties by the FDIC.

(b) This part does not apply:

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

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

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

(c) This part applies only to:

(1) Debts owed to and payments made by the FDIC acting in its corporate capacity, that is, in connection with employee matters such as travel-related claims and erroneous overpayments,

contracting activities involving corporate operations, debts related to requests to the FDIC for documents under the Freedom of Information Act (FOIA), or where a request for an offset is received by the FDIC from another Federal agency;

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

(3) Civil money penalties arising out of the FDIC's activities in its supervision or enforcement capacities.

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

(d) Subparts B through G of this part do not apply to the collection of civil money penalty debt.

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

§313.2 Purpose.

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

(1) DCIA at 31 U.S.C. 3711 (collection and compromise of claims); section 3716 (administrative offset), section 3717 (interest and penalty on claims), and section 3718 (contracts for collection services);

(2) 5 U.S.C. 5514 (salary offset);

(3) 5 U.S.C. 5584 (waiver of claims for overpayment);

(4) 31 CFR chapter IX (Federal Claims Collection Standards);

(5) 5 CFR part 550, subpart K (salary offset);

(6) 31 U.S.C. 3720D and 31 CFR 285.11 (administrative wage garnishment);

(7) 26 U.S.C. 6402(d), 31 U.S.C. 3720A, and 31 CFR 285.2 (tax refund offset); and

(8) 5 CFR 831.1801 through 1808 (U.S. Office of Personnel Management (OPM) offset).

(b) Collectively, the statutes and regulations in paragraph (a) of this section prescribe the manner in which Federal agencies should proceed to establish the existence and validity of debts owed to the Federal Government and describe the remedies available to agencies to offset valid debts.

§313.3 Definitions.

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

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

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

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

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

(e) *Chairman* means the Chairman of the FDIC.

(f) *Compromise* means the settlement or forgiveness of a debt under 31 U.S.C.

3711 or 12 U.S.C. 1818(i)(2)(F) (for civil money penalties), in accordance with standards set forth in the FCCS and applicable Federal law.

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

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

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

(j) *Director* means the Director of the Division of Finance (DOF), the Director of the Division of Administration (DOA), the Director of the Division of Resolutions and Receiverships (DRR), the Director of the Division of Risk Management Supervision (RMS), the Director of the Division of Depositor and Consumer Protection (DCP), or the Director of the Division of Complex Institution Supervision and Resolution (CISR), as applicable, or the applicable Director's designee.

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

(1) Federal employment taxes;

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

(3) Medicare deductions;

(4) Health insurance premiums;

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

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

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

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

(l) *Division of Administration* (DOA) means the Division of Administration of the FDIC, or any successor division of the FDIC.

(m) *Division of Complex Institution Supervision and Resolution* (CISR) means the Division of Complex Institution Supervision and Resolution of the FDIC, or any successor division of the FDIC.

(n) *Division of Depositor and Consumer Protection* (DCP) means the Division of Depositor and Consumer Protection of the FDIC, or any successor division of the FDIC.

(o) *Division of Finance* (DOF) means the Division of Finance of the FDIC, or any successor division of the FDIC.

(p) *Division of Resolutions and Receiverships* (DRR) means the Division of Resolutions and Receiverships of the FDIC, or any successor division of the FDIC.

(q) *Division of Risk Management Supervision* (RMS) means the Division of Risk Management Supervision of the FDIC, or any successor division of the FDIC.

(r) *Federal Claims Collection Standards* (FCCS) means standards published at 31 CFR chapter IX.

(s) *Garnishment* means the process of withholding amounts from the disposable pay of a person employed outside the Federal Government, and the paying of those amounts to a creditor in satisfaction of a withholding order.

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

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

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

(w) *Paying agency* means the agency of the Federal Government that employs the individual who owes a debt to an agency of the Federal Government. The same agency may be both the creditor agency and the paying agency.

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

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

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

§ 313.4 Delegations of authority.

Authority to conduct the following activities is delegated as follows: Authority to collect debt, other than criminal restitution debt and civil money penalty debt, on behalf of the FDIC in its corporate capacity is delegated to the Director of DOA or Director of DOF, as applicable, or to the applicable Director's designee; and authority to collect criminal restitution debt on behalf of the FDIC in either its receivership or corporate capacity is delegated to the Director of DRR, or to her or his designee. These individuals, under the delegations in this section, may do the following:

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

(b) Accept or reject compromise offers and suspend or terminate collection actions to the full extent of the FDIC's legal authority under 12 U.S.C. 1819(a) and 1820(a), 31 U.S.C. 3711(a)(2), and any other applicable statute or regulation, provided, however, that no such claim shall be compromised or collection action terminated, except upon the concurrence of the FDIC General Counsel or his or her designee;

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

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

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

§§ 313.5–313.19 [Reserved]

Subpart B—Administrative Offset

§ 313.20 Applicability and scope.

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

§ 313.21 Definitions.

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

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

§ 313.22 Collection.

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

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

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

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

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

§ 313.23 Offset prior to completion of procedures.

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

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

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

§ 313.24 Omission of procedures.

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

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

(b) The debt arises under a contract as set forth in *Cecile Industries, Inc.* v. *Cheney*, 995 F.2d 1052 (Fed. Cir. 1993), which provides that procedural protections under administrative offset do not supplant or restrict established procedures for contractual offsets accommodated by the Contracts Disputes Act; or

(c) In the case of non-centralized administrative offsets, the FDIC first learns of the existence of a debt due when there would be insufficient time to afford the debtor due process under these procedures before the paying agency makes payment to the debtor; in such cases, the Director shall give the debtor notice and an opportunity for review as soon as practical and shall refund any money ultimately found not to be due to the U.S. Government.

§ 313.25 Debtor's rights.

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

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

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

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

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

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

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

§ 313.26 Interest.

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

§ 313.27 Refunds.

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

§ 313.28 No requirement for duplicate notice.

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

§ 313.29 Requests for offset to other federal agencies.

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

(a) That the debtor owes the debt;

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

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

§ 313.30 Requests for offset from other federal agencies.

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

(a) Receipt of written certification from the creditor agency stating:

(1) That the debtor owes the debt;

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

(3) That the agency has complied with its own administrative offset regulations and with the applicable provisions of 31 CFR 901.3, including providing any required hearing or review.

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

§§ 313.31–313.39 [Reserved]

Subpart C—Salary Offset

§ 313.40 Scope.

These salary offset regulations are issued in compliance with 5 U.S.C. 5514 and 5 CFR part 550, subpart K, and apply to the collection of debts owed

by employees of the FDIC or other federal agencies. These salary offset procedures do not apply where an employee consents to the recovery of a debt from his current pay account. These procedures do not apply to debts arising under the Internal Revenue Code, the tariff laws of the United States or to any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute (e.g., travel advances under 5 U.S.C. 5705 and employee training expenses under 5 U.S.C. 4108). These procedures do not preclude an employee from requesting waiver of an erroneous payment under 5 U.S.C. 5584, or in any way questioning the amount or validity of a debt, in the manner specified by law or these agency regulations. This section also does not preclude an employee from requesting waiver of the collection of a debt under any other applicable statutory authority. When possible, salary offset through centralized administrative offset procedures should be attempted before seeking salary offset from a paying agency different than the creditor agency.

§ 313.41 Notice requirement where FDIC is creditor agency.

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

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

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

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

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

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

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

(1) That such requests be made in writing, and identify by name and address the Director or other designated individual to whom the request should be sent; and

(2) That upon receipt of such a request, the Director or the Director's designee shall notify the employee of the time and location where the records may be inspected and copied;

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

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

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

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

(k) That if a hearing is held, the administrative law judge or other hearing

official will issue a decision at the earliest practical date, but not later than 60 days after the filing of the request for the hearing, unless the employee requests a delay in the proceedings which is granted by the hearing official;

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

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

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

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

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

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

§ 313.42 Procedures to request a hearing.

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

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

§ 313.43 Failure to timely submit request for hearing.

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

§ 313.44 Procedure for hearing.

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

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

(2) *Oral hearing*. The hearing official may grant a request for an oral hearing if he or she determines that the issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 313.45 Certification of debt by FDIC as creditor agency.

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

(a) The amount and basis of the debt owed by the employee;

(b) The date the FDIC's right to collect the debt first accrued;

(c) That the FDIC's debt collection regulations have been approved by

OPM pursuant to 5 CFR part 550, subpart K;

(d) If the collection is to be made by lump-sum payment, the amount and date such payment will be collected;

(e) If the collection is to be made in installments through salary offset, the number of installments to be collected, the amount of each installment, and the date of the first installment, if a date other than the next officially established pay period; and

(f) The date the employee was notified of the debt, the action(s) taken pursuant to the FDIC's regulations, and the dates such actions were taken.

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

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

(1) That certification has been issued by the Director or received from another creditor agency;

(2) Of the amount of the debt and of the deductions to be made; and

(3) Of the initiation of salary offset at the next officially established pay interval or as otherwise provided for in the certification.

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

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

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

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

(1) If the Director decides that the proposed repayment agreement is unacceptable, he or she shall notify the employee and the employee shall have 30 calendar days from the date he or she received notice of the decision in which to file a request for a hearing on the proposed repayment agreement, as provided in § 313.42; or

(2) If the Director decides that the proposed repayment agreement is acceptable or the debtor agrees to a modification proposed by the Director, the agreement shall be put in writing and signed by both the employee and the Director.

§ 313.48 Special review of repayment agreement or salary offset due to changed circumstances.

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

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

(1) Income from all sources;

(2) Assets;

(3) Liabilities;

(4) Number of dependents;

(5) Monthly expenses for food, housing, clothing, and transportation;

(6) Medical expenses; and

(7) Exceptional expenses, if any.

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

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

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

§ 313.49 Coordinating salary offset with other agencies.

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

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

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

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

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

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

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

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

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

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

(4) *Employees who transfer from one paying agency to another agency.* If, after the creditor agency has submitted the debt claim to the FDIC, the

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

§ 313.50 Interest, penalties, and administrative costs.

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

§ 313.51 Refunds.

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

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

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

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

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

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

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

§ 313.53 Non-waiver of rights by payments.

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

§ 313.54 Exception to due process procedures.

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

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

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

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

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

§ 313.55 Salary adjustments.

Any negative adjustment to pay arising out of an employee's election of coverage, or a change in coverage,

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

§§ 313.56–313.79 [Reserved]

Subpart D—Administrative Wage Garnishment

§ 313.80 Scope and purpose.

(a) These administrative wage garnishment regulations are issued in compliance with 31 U.S.C. 3720D and 31 CFR 285.11(f). The subpart provides procedures for the FDIC to collect money from a debtor's disposable pay by means of administrative wage garnishment. The receipt of payments pursuant to this subpart does not preclude the FDIC from pursuing other debt collection remedies, including the offset of federal payments. The FDIC may pursue such debt collection remedies separately or in conjunction with administrative wage garnishment. This subpart does not apply to the collection of delinquent debts from the wages of federal employees from their federal employment. Federal pay is subject to the federal salary offset procedures set forth in 5 U.S.C. 5514 and other applicable laws.

§ 313.81 Notice.

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

(a) The nature and amount of the debt;

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

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

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

§ 313.82 Debtor's rights.

The FDIC shall afford the debtor the opportunity:

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

(b) To enter into a written repayment agreement with the FDIC, under terms agreeable to the FDIC; and

(c) To the extent that a debt owed has not been established by judicial or administrative order, to request a hearing concerning the existence or amount of the debt or the terms of the repayment schedule. With respect to debts established by a judicial or administrative order, a debtor may request a hearing concerning the payment or other discharge of the debt. The debtor is not entitled to a hearing concerning the terms of the proposed repayment schedule if these terms have been established by written agreement.

§ 313.83 Form of hearing.

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

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

(c) In cases when it is determined that an oral hearing is not required by this section, the FDIC will accord the debtor a ''paper hearing,'' that is, the

FDIC will decide the issues in dispute based upon a review of the written record.

§ 313.84 Effect of timely request.

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

§ 313.85 Failure to timely request a hearing.

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

§ 313.86 Hearing official.

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

§ 313.87 Procedure.

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

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

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

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

§ 313.88 Format of hearing.

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

§ 313.89 Date of decision.

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

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

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

§ 313.90 Content of decision.

The written decision shall include:

(a) A summary of the facts presented;

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

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

§ 313.91 Finality of agency action.

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

§ 313.92 Failure to appear.

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

§ 313.93 Wage garnishment order.

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

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

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

§ 313.94 Certification by employer.

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

§ 313.95 Amounts withheld.

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

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

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

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

(c) When a debtor's pay is subject to withholding orders with priority, the following shall apply:

(1) Unless otherwise provided by federal law, withholding orders issued under this section shall be paid in the amounts set forth under paragraph (b) of this section and shall have priority over other withholding orders which are served later in time. However, withholding orders for family support shall have priority over withholding orders issued under this section.

(2) If amounts are being withheld from a debtor's pay pursuant to a withholding order served on an employer before a withholding order issued pursuant to this section, or if a withholding order for family support is served on an employer at any time, the amounts withheld pursuant to the withholding order issued under this section shall be the lesser of:

(i) The amount calculated under paragraph (b) of this section; or

(ii) An amount equal to 25% of the debtor's disposable pay less the amount(s) withheld under the withholding order(s) with priority.

(3) If a debtor owes more than one debt to the FDIC, the FDIC may issue multiple withholding orders. The total amount garnished from the debtor's pay for such orders will not exceed the amount set forth in paragraph (b) of this section.

(d) An amount greater than that set forth in paragraphs (b) and (c) of this section may be withheld upon the written consent of the debtor.

(e) The employer shall promptly pay to the FDIC all amounts withheld in accordance with the withholding order issued pursuant to this section.

(f) An employer shall not be required to vary its normal pay and disbursement cycles in order to comply with the withholding order.

(g) Any assignment or allotment by the employee of the employee's earnings shall be void to the extent it interferes with or prohibits execution of the withholding order under this section, except for any assignment or allotment made pursuant to a family support judgment or order.

(h) The employer shall withhold the appropriate amount from the debtor's wages for each pay period until the employer receives notification from the FDIC to discontinue wage withholding. The garnishment order shall indicate a reasonable period of time within which the employer is required to commence wage withholding.

§ 313.96 Exclusions from garnishment.

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

§ 313.97 Financial hardship.

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

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

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

§ 313.98 Ending garnishment.

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

(b) At least annually, the FDIC will review its debtors' accounts to ensure that garnishment has been terminated for accounts that have been paid in full.

§ 313.99 Prohibited actions by employer.

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

§ 313.100 Refunds.

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

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

§ 313.101 Right of action.

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

§§ 313.102–313.119 [Reserved]

Subpart E—Tax Refund Offset

§ 313.120 Scope.

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

§ 313.121 Definitions.

For purposes of this subpart E:

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

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

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

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

§ 313.122 Notification of debt to FMS.

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

§ 313.123 Certification and referral of debt.

When the FDIC refers a past-due, legally enforceable debt to FMS for tax refund offset, it will certify to FMS that:

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

(b) Except in the case of a judgment debt or as otherwise allowed by law, the debt is referred for offset within ten years after the FDIC's right of action accrues;

(c) The FDIC has made reasonable efforts to obtain payment of the debt, in that it has:

(1) Submitted the debt to FMS for collection by administrative offset and complied with the provisions of 31 U.S.C. 3716(a) and related regulations;

(2) Notified, or has made a reasonable attempt to notify, the debtor that the debt is past-due, and unless repaid within 60 days after the date of the notice, will be referred to FMS for tax refund offset;

(3) Given the debtor at least 60 days to present evidence that all or part of the debt is not past-due or legally enforceable, considered any evidence presented by the debtor, and determined that the debt is past-due and legally enforceable; and

(4) Provided the debtor with an opportunity to make a written agreement to repay the debt; and

(d) The debt is at least $25.

§ 313.124 Pre-offset notice and consideration of evidence.

(a) For purposes of § 313.123(c)(2), the FDIC has made a reasonable effort to notify the debtor if it uses the current address information contained in its records related to the debt. The FDIC may, but is not required to, obtain address information from the IRS pursuant to 26 U.S.C. 6103(m)(2), (4), (5).

(b) For purposes of § 313.123(c)(3), if evidence presented by a debtor is considered by an agent of the FDIC, or other entities or persons acting on behalf of the FDIC, the debtor must be accorded at least 30 days from the date the agent or other entity or person determines that all or part of the debt is

past-due and legally enforceable to request review by an officer or employee of the FDIC of any unresolved dispute. The FDIC must then notify the debtor of its decision.

§ 313.125 No requirement for duplicate notice.

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

[71 FR 75661, Dec. 18, 2006]

§ 313.126 Referral of past-due, legally enforceable debt.

The FDIC shall submit past-due, legally enforceable debt information for tax refund offset to FMS, as prescribed by FMS. For each debt, the FDIC will include the following information:

(a) The name and taxpayer identification number (as defined in 26 U.S.C. 6109) of the debtor;

(b) The amount of the past-due and legally enforceable debt;

(c) The date on which the debt became past-due; and

(d) The designation of FDIC as the agency referring the debt.

[67 FR 48527, July 25, 2002. Redesignated at 71 FR 75661, Dec. 18, 2006]

§ 313.127 Correcting and updating referral.

If, after referring a past-due legally enforceable debt to FMS as provided in § 313.125, the FDIC determines that an error has been made with respect to the information transmitted to FMS, or if the FDIC receives a payment or credits a payment to the account of the debtor referred to FMS for offset, or if the debt amount is otherwise incorrect, the FDIC shall promptly notify FMS and make the appropriate correction of the FDIC's records. FDIC will provide certification as required under § 313.123 for any increases to amounts owed. In the event FMS rejects an FDIC certification for failure to comply with § 323.123, the FDIC may resubmit the debt with a corrected certification.

[67 FR 48527, July 25, 2002. Redesignated at 71 FR 75661, Dec. 18, 2006]

§ 313.128 Disposition of amounts collected.

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

[67 FR 48527, July 25, 2002. Redesignated at 71 FR 75661, Dec. 18, 2006]

§§ 313.129–313.139 [Reserved]

Subpart F—Civil Service Retirement and Disability Fund Offset

§ 313.140 Future benefits.

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

§ 313.141 Notification to OPM.

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

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

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

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

§ 313.142 Request for administrative offset.

The Director shall request administrative offset under § 313.140, as soon as practical after completion of the applicable procedures in order to help ensure that offset be initiated prior to expiration of the applicable statute of limitations. At such time as the debtor

makes a claim for payments from the Fund, if at least a year has elapsed since the offset request was originally made, the debtor shall be permitted to offer a satisfactory repayment plan in lieu of offset upon establishing that changed financial circumstances would render the offset unjust.

§ 313.143 Cancellation of deduction.

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

Subpart G—Mandatory Centralized Administrative Offset

§ 313.160 Treasury notification.

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

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

(1) It is in litigation or foreclosure;

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

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

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

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

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

§ 313.161 Certification of debt.

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

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

(b) The FDIC has complied with all due process requirements under 31 U.S.C. 3716 and the FDIC's administrative offset regulations.

§ 313.162 Compliance with 31 CFR part 285.

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

§ 313.163 Notification of debts of 180 days or less.

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

§§ 313.164–313.180 [Reserved]

Subpart H—Civil Money Penalty Debt

SOURCE: 86 FR 1744, Jan. 11, 2021, unless otherwise noted.

§ 313.181 Scope.

This subpart establishes FDIC procedures for the collection of civil money penalty debt.

§ 313.182 Purpose.

The purpose of this subpart is to implement Federal statutes and regulatory standards authorizing the FDIC to collect delinquent civil money penalties.

§ 313.183 Definitions.

Except where the context clearly indicates otherwise or where the term is defined elsewhere in this subpart, the definitions provided at § 313.3 apply to this subpart.

§ 313.184 Collection of civil money penalty debt.

(a) The FDIC will follow Department of Treasury regulations set forth at 31

CFR part 285, as applicable and consistent with this subpart, for the collection of civil money penalty debt, including centralized offset of Federal payments to collect non-tax debts that may be owed to the FDIC, under 31 CFR 285.5.

(b) Nothing in this subpart shall be construed to require the FDIC to provide duplicate notice or other procedural protections that have already been provided or afforded to a civil money penalty debtor in the course of administrative or judicial litigation or otherwise.

(c) For civil money penalty debtors, and for purposes of 31 U.S.C. 3716(b)(1), the FDIC adopts without change the regulations on collection by administrative offset set forth at 31 CFR 901.3 and other relevant sections of the Federal Claims Collection Standards applicable to such offset, to the extent those regulations are consistent with this subpart.

(d) Nothing in this subpart precludes the collection of debts through any other available means or precludes the FDIC from engaging in litigation or the compromise of debt as provided under 12 U.S.C. 1818(i) or any other applicable law or regulation.

§§ 313.185–313.190 [Reserved]

SUBCHAPTER B—REGULATIONS AND STATEMENTS OF GENERAL POLICY

PART 323—APPRAISALS

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323.14 Information to be presented to the Appraisal Subcommittee by participating States.

AUTHORITY: 12 U.S.C. 1818, 1819(a)(''Seventh'' and ''Tenth''), 1831p–1 and 3331 *et seq.*

SOURCE: 55 FR 33888, Aug. 20, 1990, unless otherwise noted.

Subpart A—Appraisals Generally

§ 323.1 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued under 12 U.S.C. 1818, 1819(a)(Seventh and Tenth), 1831p–1 and title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (Pub. L. 101–73, 103 Stat. 183, 12 U.S.C. 3331 *et seq.* (1989)).

(b) *Purpose and scope.* (1) title XI provides protection for federal financial and public policy interests in real estate related transactions by requiring real estate appraisals used in connection with federally related transactions to be performed in writing, in accordance with uniform standards, by appraisers whose competency has been demonstrated and whose professional conduct will be subject to effective supervision. This subpart implements the requirements of title XI and applies to all federally related transactions entered into by the FDIC or by institutions regulated by the FDIC (*regulated institutions*).

(2) This subpart: (i) Identifies which real estate-related financial transactions require the services of an appraiser;

(ii) Prescribes which categories of federally related transactions shall be appraised by a State certified appraiser and which by a State licensed appraiser; and

(iii) Prescribes minimum standards for the performance of real estate appraisals in connection with federally related transactions under the jurisdiction of the FDIC.

[55 FR 33888, Aug. 20, 1990, as amended at 80 FR 32684, June 9, 2015; 83 FR 15036, Apr. 9, 2018]

§ 323.2 Definitions.

(a) *Appraisal* means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information.

(b) *Appraisal Foundation* means the Appraisal Foundation established on November 30, 1987, as a not-for-profit corporation under the laws of Illinois.

(c) *Appraisal Subcommittee* means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(d) *Business loan* means a loan or extension of credit to any corporation, general or limited partnership, business trust, joint venture, pool, syndicate, sole proprietorship, or other business entity.

(e) *Commercial real estate transaction* means a real estate-related financial transaction that is not secured by a

single 1-to-4 family residential property.

(f) Complex appraisal for a residential real estate transaction means one in which the property to be appraised, the form of ownership, or market conditions are atypical.

(g) *Federally related transaction* means any real estate-related financial transactions entered into after the effective date hereof that:

(1) The FDIC or any regulated institution engages in or contracts for; and

(2) Requires the services of an appraiser.

(h) *Market value* means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

(1) Buyer and seller are typically motivated;

(2) Both parties are well informed or well advised, and acting in what they consider their own best interests;

(3) A reasonable time is allowed for exposure in the open market;

(4) Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and

(5) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

(i) *Real estate* or *real property* means an identified parcel or tract of land, with improvements, and includes easements, rights of way, undivided or future interests and similar rights in a tract of land, but does not include mineral rights, timber rights, growing crops, water rights and similar interests severable from the land when the transaction does not involve the associated parcel or tract of land.

(j) *Real estate-related financial transaction* means any transaction involving:

(1) The sale, lease, purchase, investment in or exchange of real property, including interests in property, or the financing thereof; or

(2) The refinancing of real property or interests in real property; or

(3) The use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.

(k) Residential real estate transaction means a real estate-related financial transaction that is secured by a single 1-to-4 family residential property.

(l) *State certified appraiser* means any individual who has satisfied the requirements for certification in a State or territory whose criteria for certification as a real estate appraiser currently meet the minimum criteria for certification issued by the Appraiser Qualifications Board of the Appraisal Foundation. No individual shall be a State certified appraiser unless such individual has achieved a passing grade upon a suitable examination administered by a State or territory that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualifications Board. In addition, the Appraisal Subcommittee must not have issued a finding that the policies, practices, or procedures of a State or territory are inconsistent with title XI of FIRREA. The FDIC may, from time to time, impose additional qualification criteria for certified appraisers performing appraisals in connection with federally related transactions within its jurisdiction.

(m) *State licensed appraiser* means any individual who has satisfied the requirements for licensing in a State or territory where the licensing procedures comply with title XI of FIRREA and where the Appraisal Subcommittee has not issued a finding that the policies, practices, or procedures of the State or territory are inconsistent with title XI. The FDIC may, from time to time, impose additional qualification criteria for licensed appraisers performing appraisals in connection with federally related transactions within its jurisdiction.

(n) *Tract development* means a project of five units or more that is constructed or is to be constructed as a single development.

(o) *Transaction value* means:

(1) For loans or other extensions of credit, the amount of the loan or extension of credit;

(2) For sales, leases, purchases, and investments in or exchanges of real property, the market value of the real property interest involved; and

(3) For the pooling of loans or interests in real property for resale or purchase, the amount of the loan or market value of the real property calculated with respect to each such loan or interest in real property.

[55 FR 33888, Aug. 20, 1990, as amended at 57 FR 9049, Mar. 16, 1992; 59 FR 29501, June 7, 1994; 83 FR 15036, Apr. 9, 2018; 84 FR 53598, Oct. 8, 2019]

§ 323.3 Appraisals required; transactions requiring a State certified or licensed appraiser.

(a) *Appraisals required*. An appraisal performed by a State certified or licensed appraiser is required for all real estate-related financial transactions except those in which:

(1) The transaction is a residential real estate transaction that has a transaction value of $400,000 or less;

(2) A lien on real estate has been taken as collateral in an abundance of caution;

(3) The transaction is not secured by real estate;

(4) A lien on real estate has been taken for purposes other than the real estate's value;

(5) The transaction is a business loan that:

(i) Has a transaction value of $1 million or less; and

(ii) Is not dependent on the sale of, or rental income derived from, real estate as the primary source of repayment;

(6) A lease of real estate is entered into, unless the lease is the economic equivalent of a purchase or sale of the leased real estate;

(7) The transaction involves an existing extension of credit at the lending institution, provided that:

(i) There has been no obvious and material change in market conditions or physical aspects of the property that threatens the adequacy of the institution's real estate collateral protection after the transaction, even with the advancement of new monies; or

(ii) There is no advancement of new monies, other than funds necessary to cover reasonable closing costs;

(8) The transaction involves the purchase, sale, investment in, exchange of, or extension of credit secured by, a loan or interest in a loan, pooled loans, or interests in real property, including mortgaged-backed securities, and each loan or interest in a loan, pooled loan, or real property interest met FDIC regulatory requirements for appraisals at the time of origination;

(9) The transaction is wholly or partially insured or guaranteed by a United States government agency or United States government sponsored agency;

(10) The transaction either:

(i) Qualifies for sale to a United States government agency or United States government sponsored agency; or

(ii) Involves a residential real estate transaction in which the appraisal conforms to the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation appraisal standards applicable to that category of real estate;

(11) The regulated institution is acting in a fiduciary capacity and is not required to obtain an appraisal under other law;

(12) The FDIC determines that the services of an appraiser are not necessary in order to protect Federal financial and public policy interests in real estate-related financial transactions or to protect the safety and soundness of the institution;

(13) The transaction is a commercial real estate transaction that has a transaction value of $500,000 or less; or

(14) The transaction is exempted from the appraisal requirement pursuant to the rural residential exemption under 12 U.S.C. 3356.

(b) *Evaluations required*. For a transaction that does not require the services of a State certified or licensed appraiser under paragraphs (a)(1), (5), (7), (13), or (14) of this section, the institution shall obtain an appropriate evaluation of real property collateral that is consistent with safe and sound banking practices.

(c) *Appraisals to address safety and soundness concerns*. The FDIC reserves

the right to require an appraisal under this subpart whenever the agency believes it is necessary to address safety and soundness concerns.

(d) *Transactions requiring a State certified appraiser*—(1) *All transactions of $1,000,000 or more*. All federally related transactions having a transaction value of $1,000,000 or more shall require an appraisal prepared by a State certified appraiser.

(2) *Commercial real estate transactions of more than $500,000*. All federally related transactions that are commercial real estate transactions having a transaction value of more than $500,000 shall require an appraisal prepared by a State certified appraiser.

(3) *Complex appraisals for residential real estate transactions of more than $400,000*. All complex appraisals for residential real estate transactions rendered in connection with federally related transactions shall require a State certified appraiser if the transaction value is more than $400,000. A regulated institution may presume that appraisals for residential real estate transactions are not complex, unless the institution has readily available information that a given appraisal will be complex. The regulated institution shall be responsible for making the final determination of whether the appraisal is complex. If during the course of the appraisal a licensed appraiser identifies factors that would result in the property, form of ownership, or market conditions being considered atypical, then either:

(i) The regulated institution may ask the licensed appraiser to complete the appraisal and have a certified appraiser approve and co-sign the appraisal; or

(ii) The institution may engage a certified appraiser to complete the appraisal.

(e) *Transactions requiring either a State certified or licensed appraiser*. All appraisals for federally related transactions not requiring the services of a State certified appraiser shall be prepared by either a State certified appraiser or a State licensed appraiser.

(f) *Effective date*. Regulated institutions are required to use state certified or licensed appraisers as set forth in this section no later than December 31, 1992, unless otherwise required by law.

[55 FR 33888, Aug. 20, 1990, as amended at 57 FR 9050, Mar. 16, 1992; 59 FR 29501, June 7, 1994; 80 FR 32684, June 9, 2015; 83 FR 15036, Apr. 9, 2018; 84 FR 53598, Oct. 8, 2019; 85 FR 21317, Apr. 17, 2020; 85 FR 65671, Oct. 16, 2020]

§ 323.4 Minimum appraisal standards.

For federally related transactions, all appraisals shall, at a minimum:

(a) Conform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board of the Appraisal Foundation, 1029 Vermont Ave., NW., Washington, DC 20005, unless principles of safe and sound banking require compliance with stricter standards;

(b) Be written and contain sufficient information and analysis to support the institution's decision to engage in the transaction;

(c) Be subject to appropriate review for compliance with the Uniform Standards of Professional Appraisal Practice;

(d) Analyze and report appropriate deductions and discounts for proposed construction or renovation, partially leased buildings, non-market lease terms, and tract developments with unsold units;

(e) Be based upon the definition of market value as set forth in this subpart; and

(f) Be performed by State licensed or certified appraisers in accordance with requirements set forth in this subpart.

[59 FR 29502, June 7, 1994, as amended at 80 FR 32684, June 9, 2015; 84 FR 53598, Oct. 8, 2019]

§ 323.5 Appraiser independence.

(a) *Staff appraisers*. If an appraisal is prepared by a staff appraiser, that appraiser must be independent of the lending, investment, and collection functions and not involved, except as an appraiser, in the federally related transaction, and have no direct or indirect interest, financial or otherwise, in the property. If the only qualified persons available to perform an appraisal are involved in the lending, investment, or collection functions of the

regulated institution, the regulated institution shall take appropriate steps to ensure that the appraisers exercise independent judgment and that the appraisal is adequate. Such steps include, but are not limited to, prohibiting an individual from performing appraisals in connection with federally related transactions in which the appraiser is otherwise involved and prohibiting directors and officers from participating in any vote or approval involving assets on which they performed an appraisal.

(b) *Fee appraisers.* (1) If an appraisal is prepared by a fee appraiser, the appraiser shall be engaged directly by the regulated institution or its agent, and have no direct or indirect interest, financial or otherwise, in the property or the transaction.

(2) A regulated institution also may accept an appraisal that was prepared by an appraiser engaged directly by another financial services institution, if:

(i) The appraiser has no direct or indirect interest, financial or otherwise, in the property or the transaction; and

(ii) The regulated institution determines that the appraisal conforms to the requirements of this subpart and is otherwise acceptable.

[55 FR 33888, Aug. 20, 1990, as amended at 59 FR 29502, June 7, 1994; 80 FR 32684, June 9, 2015]

§ 323.6 Professional association membership; competency.

(a) *Membership in appraisal organizations.* A State certified appraiser or a State licensed appraiser may not be excluded from consideration for an assignment for a federally related transaction solely by virtue of membership or lack of membership in any particular appraisal organization.

(b) *Competency.* All staff and fee appraisers performing appraisals in connection with federally related transactions must be State certified or licensed, as appropriate. However, a State certified or licensed appraiser may not be considered competent solely by virtue of being certified or licensed. Any determination of competency shall be based upon the individual's experience and educational background as they relate to the particular appraisal assignment for which he or she is being considered.

§ 323.7 Enforcement.

Institutions and institution-affiliated parties, including staff appraisers and fee appraisers, may be subject to removal and/or prohibition orders, cease and desist orders, and the imposition of civil money penalties pursuant to the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, as amended, or other applicable law.

Subpart B—Appraisal Management Company Minimum Requirements

SOURCE: 80 FR 32684, June 9, 2015, unless otherwise noted.

§ 323.8 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued pursuant to12 U.S.C. 1818, 1819 [''Seventh'' and ''Tenth''] and Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) (Pub. L. 111–203, 124 Stat. 1376 (2010)), 12 U.S.C. 3331 *et seq.*

(b) *Purpose.* The purpose of this subpart is to implement sections 1109, 1117, 1121, and 1124 of FIRREA Title XI, 12 U.S.C. 3338, 3346, 3350, and 3353.

(c) *Scope.* This subpart applies to States and to appraisal management companies (AMCs) providing appraisal management services in connection with consumer credit transactions secured by a consumer's principal dwelling or securitizations of those transactions.

(d) *Rule of construction.* Nothing in this subpart should be construed to prevent a State from establishing requirements in addition to those in this subpart. In addition, nothing in this subpart should be construed to alter guidance in, and applicability of, the Interagency Appraisal and Evaluation Guidelines[1] or other relevant agency guidance that cautions banks, bank

[1] *https://www.fdic.gov/regulations/laws/rules/5000–4800.html.*

holding companies, Federal savings associations, state savings association, and credit unions, as applicable, that each such entity is accountable for overseeing the activities of third-party service providers and ensuring that any services provided by a third party comply with applicable laws, regulations, and supervisory guidance applicable directly to the financial institution.

§ 323.9 Definitions.

For purposes of this subpart:

(a) *Affiliate* has the meaning provided in 12 U.S.C. 1841.

(b) *AMC National Registry* means the registry of State-registered AMCs and Federally regulated AMCs maintained by the Appraisal Subcommittee.

(c)(1) *Appraisal management company* (AMC) means a person that:

(i) Provides appraisal management services to creditors or to secondary mortgage market participants, including affiliates;

(ii) Provides such services in connection with valuing a consumer's principal dwelling as security for a consumer credit transaction or incorporating such transactions into securitizations; and

(iii) Within a given 12-month period, as defined in § 323.10(d), oversees an appraiser panel of more than 15 State-certified or State-licensed appraisers in a State or 25 or more State-certified or State-licensed appraisers in two or more States, as described in § 323.12;

(2) An AMC does not include a department or division of an entity that provides appraisal management services only to that entity.

(d) *Appraisal management services* means one or more of the following:

(1) Recruiting, selecting, and retaining appraisers;

(2) Contracting with State-certified or State-licensed appraisers to perform appraisal assignments;

(3) Managing the process of having an appraisal performed, including providing administrative services such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and secondary market participants, collecting fees from creditors and secondary market participants for services provided, and paying appraisers for services performed; and

(4) Reviewing and verifying the work of appraisers.

(e) *Appraiser panel* means a network, list or roster of licensed or certified appraisers approved by an AMC to perform appraisals as independent contractors for the AMC. Appraisers on an AMC's ''appraiser panel'' under this part include both appraisers accepted by the AMC for consideration for future appraisal assignments in covered transactions or for secondary mortgage market participants in connection with covered transactions and appraisers engaged by the AMC to perform one or more appraisals in covered transactions or for secondary mortgage market participants in connection with covered transactions. An appraiser is an independent contractor for purposes of this subpart if the appraiser is treated as an independent contractor by the AMC for purposes of Federal income taxation.

(f) *Appraisal Subcommittee* means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(g) *Consumer credit* means credit offered or extended to a consumer primarily for personal, family, or household purposes.

(h) *Covered transaction* means any consumer credit transaction secured by the consumer's principal dwelling.

(i) *Creditor* means:

(1) A person who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment), and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.

(2) A person regularly extends consumer credit if the person extended credit (other than credit subject to the requirements of 12 CFR 1026.32) more than 5 times for transactions secured by a dwelling in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year. A person regularly extends consumer credit if, in any 12-month period,

the person originates more than one credit extension that is subject to the requirements of 12 CFR 1026.32 or one or more such credit extensions through a mortgage broker.

(j) *Dwelling* means:

(1) A residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence.

(2) A consumer can have only one ''principal'' dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of this section.

(k) *Federally regulated AMC* means an AMC that is owned and controlled by an insured depository institution, as defined in 12 U.S.C. 1813 and regulated by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation.

(l) *Federally related transaction regulations* means regulations established by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the National Credit Union Administration, pursuant to sections 1112, 1113, and 1114 of FIRREA Title XI, 12 U.S.C. 3341–3343.

(m) *Person* means a natural person or an organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit.

(n) *Secondary mortgage market participant* means a guarantor or insurer of mortgage-backed securities, or an underwriter or issuer of mortgage-backed securities. Secondary mortgage market participant only includes an individual investor in a mortgage-backed security if that investor also serves in the capacity of a guarantor, insurer, underwriter, or issuer for the mortgage-backed security.

(o) *States* mean the 50 States and the District of Columbia and the territories of Guam, Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

(p) *Uniform Standards of Professional Appraisal Practice* (USPAP) means the appraisal standards promulgated by the Appraisal Standards Board of the Appraisal Foundation.

§ 323.10 Appraiser panel—annual size calculation.

For purposes of determining whether, within a 12-month period, an AMC oversees an appraiser panel of more than 15 State-certified or State-licensed appraisers in a State or 25 or more State-certified or State-licensed appraisers in two or more States pursuant to § 323.9(c)(1)(iii)—

(a) An appraiser is deemed part of the AMC's appraiser panel as of the earliest date on which the AMC:

(1) Accepts the appraiser for the AMC's consideration for future appraisal assignments in covered transactions or for secondary mortgage market participants in connection with covered transactions; or

(2) Engages the appraiser to perform one or more appraisals on behalf of a creditor for a covered transaction or secondary mortgage market participant in connection with a covered transaction.

(b) An appraiser who is deemed part of the AMC's appraiser panel pursuant to paragraph (a) of this section is deemed to remain on the panel until the date on which the AMC:

(1) Sends written notice to the appraiser removing the appraiser from the appraiser panel, with an explanation of its action; or

(2) Receives written notice from the appraiser asking to be removed from the appraiser panel or notice of the death or incapacity of the appraiser.

(c) If an appraiser is removed from an AMC's appraiser panel pursuant to paragraph (b) of this section, but the AMC subsequently accepts the appraiser for consideration for future assignments or engages the appraiser at any time during the twelve months after the AMC's removal, the removal will be deemed not to have occurred, and the appraiser will be deemed to

have been part of the AMC's appraiser panel without interruption.

(d) The period for purposes of counting appraisers on an AMC's appraiser panel may be the calendar year or a 12-month period established by law or rule of each State with which the AMC is required to register.

§ 323.11 Appraisal management company registration.

Each State electing to register AMCs pursuant to paragraph (b)(1) of this section must:

(a) Establish and maintain within the State appraiser certifying and licensing agency a licensing program that is subject to the limitations set forth in § 323.12 and with the legal authority and mechanisms to:

(1) Review and approve or deny an AMC's application for initial registration;

(2) Review and renew or review and deny an AMC's registration periodically;

(3) Examine the books and records of an AMC operating in the State and require the AMC to submit reports, information, and documents;

(4) Verify that the appraisers on the AMC's appraiser panel hold valid State certifications or licenses, as applicable;

(5) Conduct investigations of AMCs to assess potential violations of applicable appraisal-related laws, regulations, or orders;

(6) Discipline, suspend, terminate, or deny renewal of the registration of an AMC that violates applicable appraisal-related laws, regulations, or orders; and

(7) Report an AMC's violation of applicable appraisal-related laws, regulations, or orders, as well as disciplinary and enforcement actions and other relevant information about an AMC's operations, to the Appraisal Subcommittee.

(b) Impose requirements on AMCs that are not owned and controlled by an insured depository institution and not regulated by a Federal financial institution regulatory agency to:

(1) Register with and be subject to supervision by the State appraiser certifying and licensing agency;

(2) Engage only State-certified or State-licensed appraisers for Federally regulated transactions in conformity with any Federally related transaction regulations;

(3) Establish and comply with processes and controls reasonably designed to ensure that the AMC, in engaging an appraiser, selects an appraiser who is independent of the transaction and who has the requisite education, expertise, and experience necessary to competently complete the appraisal assignment for the particular market and property type;

(4) Direct the appraiser to perform the assignment in accordance with USPAP; and

(5) Establish and comply with processes and controls reasonably designed to ensure that the AMC conducts its appraisal management services in accordance with the requirements of section 129E(a)–(i) of the Truth in Lending Act, 15 U.S.C. 1639e(a)–(i), and regulations thereunder.

§ 323.12 Ownership limitations for State-registered appraisal management companies.

(a) *Appraiser certification or licensing of owners.* (1) An AMC subject to State registration pursuant to this section shall not be registered by a State or included on the AMC National Registry if such AMC, in whole or in part, directly or indirectly, is owned by any person who has had an appraiser license or certificate refused, denied, cancelled, surrendered in lieu of revocation, or revoked in any State for a substantive cause, as determined by the appropriate State appraiser certifying and licensing agency.

(2) An AMC subject to State registration pursuant to this section is not barred by § 323.11(a)(1) from being registered by a State or included on the AMC National Registry if the license or certificate of the appraiser with an ownership interest was not revoked for a substantive cause and has been reinstated by the State or States in which the appraiser was licensed or certified.

(b) *Good moral character of owners.* An AMC shall not be registered by a State if any person that owns more than 10 percent of the AMC—

(1) Is determined by the State appraiser certifying and licensing agency not to have good moral character; or

(2) Fails to submit to a background investigation carried out by the State appraiser certifying and licensing agency.

§ 323.13 Requirements for Federally regulated appraisal management companies.

(a) *Requirements in providing services.* To provide appraisal management services for a creditor or secondary mortgage market participant relating to a covered transaction, a Federally regulated AMC must comply with the requirements in § 323.11(b)(2) through (5).

(b) *Ownership limitations.* (1) A Federally regulated AMC shall not be included on the AMC National Registry if such AMC, in whole or in part, directly or indirectly, is owned by any person who has had an appraiser license or certificate refused, denied, cancelled, surrendered in lieu of revocation, or revoked in any State for a substantive cause, as determined by the ASC.

(2) A Federally regulated AMC is not barred by § 323.12(b) from being included on the AMC National Registry if the license or certificate of the appraiser with an ownership interest was not revoked for a substantive cause and has been reinstated by the State or States in which the appraiser was licensed or certified.

(c) *Reporting information for the AMC National Registry.* A Federally regulated AMC must report to the State or States in which it operates the information required to be submitted by the State pursuant to the Appraisal Subcommittee's policies regarding the determination of the AMC National Registry fee, including but not necessarily limited to the collection of information related to the limitations set forth in § 323.12, as applicable.

§ 323.14 Information to be presented to the Appraisal Subcommittee by participating States.

Each State electing to register AMCs for purposes of permitting AMCs to provide appraisal management services relating to covered transactions in the State must submit to the Appraisal Subcommittee the information required to be submitted by Appraisal Subcommittee regulations or guidance concerning AMCs that operate in the State.

PART 324—CAPITAL ADEQUACY OF FDIC-SUPERVISED INSTITUTIONS

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AUTHORITY: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; 5371; 5412; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note); Pub. L. 111–203, 124 Stat. 1376, 1887 (15 U.S.C. 78o–7 note), Pub. L. 115–174; section 4014 § 201, Pub. L. 116–136, 134 Stat. 281 (15 U.S.C. 9052).

SOURCE: 78 FR 55471, Sept. 10, 2013, unless otherwise noted.

Subpart A—General Provisions

§ 324.1 Purpose, applicability, reservations of authority, and timing.

(a) *Purpose*. This part 324 establishes minimum capital requirements and overall capital adequacy standards for FDIC-supervised institutions. This part 324 includes methodologies for calculating minimum capital requirements, public disclosure requirements related to the capital requirements, and transition provisions for the application of this part 324.

(b) *Limitation of authority*. Nothing in this part 324 shall be read to limit the authority of the FDIC to take action under other provisions of law, including action to address unsafe or unsound practices or conditions, deficient capital levels, or violations of law or regulation, under section 8 of the Federal Deposit Insurance Act.

(c) *Applicability*. Subject to the requirements in paragraphs (d) and (f) of this section:

(1) *Minimum capital requirements and overall capital adequacy standards*. Each FDIC-supervised institution must calculate its minimum capital requirements and meet the overall capital adequacy standards in subpart B of this part.

(2) *Regulatory capital*. Each FDIC-supervised institution must calculate its regulatory capital in accordance with subpart C of this part.

(3) *Risk-weighted assets*. (i) Each FDIC-supervised institution must use the methodologies in subpart D of this part (and subpart F of this part for a market risk FDIC-supervised institution) to calculate standardized total risk-weighted assets.

(ii) Each advanced approaches FDIC-supervised institution must use the methodologies in subpart E (and subpart F of this part for a market risk FDIC-supervised institution) to calculate advanced approaches total risk-weighted assets.

(4) *Disclosures*. (i) Except for an advanced approaches FDIC-supervised institution that is making public disclosures pursuant to the requirements in subpart E of this part, each FDIC-supervised institution with total consolidated assets of $50 billion or more must make the public disclosures described in subpart D of this part.

(ii) Each market risk FDIC-supervised institution must make the public disclosures described in subpart F of this part.

(iii) Each advanced approaches FDIC-supervised institution must make the public disclosures described in subpart E of this part.

(d) *Reservation of authority*—(1) *Additional capital in the aggregate*. The FDIC may require an FDIC-supervised institution to hold an amount of regulatory capital greater than otherwise required under this part if the FDIC determines that the FDIC-supervised institution's capital requirements under this part are not commensurate with the FDIC-supervised institution's credit, market, operational, or other risks.

(2) *Regulatory capital elements*. (i) If the FDIC determines that a particular common equity tier 1, additional tier 1, or tier 2 capital element has characteristics or terms that diminish its ability to absorb losses, or otherwise present

safety and soundness concerns, the FDIC may require the FDIC-supervised institution to exclude all or a portion of such element from common equity tier 1 capital, additional tier 1 capital, or tier 2 capital, as appropriate.

(ii) Notwithstanding the criteria for regulatory capital instruments set forth in subpart C of this part, the FDIC may find that a capital element may be included in an FDIC-supervised institution's common equity tier 1 capital, additional tier 1 capital, or tier 2 capital on a permanent or temporary basis consistent with the loss absorption capacity of the element and in accordance with § 324.20(e).

(3) *Risk-weighted asset amounts.* If the FDIC determines that the risk-weighted asset amount calculated under this part by the FDIC-supervised institution for one or more exposures is not commensurate with the risks associated with those exposures, the FDIC may require the FDIC-supervised institution to assign a different risk-weighted asset amount to the exposure(s) or to deduct the amount of the exposure(s) from its regulatory capital.

(4) *Total leverage.* If the FDIC determines that the total leverage exposure, or the amount reflected in the FDIC-supervised institution's reported average total consolidated assets, for an on- or off-balance sheet exposure calculated by an FDIC-supervised institution under § 324.10 is inappropriate for the exposure(s) or the circumstances of the FDIC-supervised institution, the FDIC may require the FDIC-supervised institution to adjust this exposure amount in the numerator and the denominator for purposes of the leverage ratio calculations.

(5) *Consolidation of certain exposures.* The FDIC may determine that the risk-based capital treatment for an exposure or the treatment provided to an entity that is not consolidated on the FDIC-supervised institution's balance sheet is not commensurate with the risk of the exposure or the relationship of the FDIC-supervised institution to the entity. Upon making this determination, the FDIC may require the FDIC-supervised institution to treat the exposure or entity as if it were consolidated on the balance sheet of the FDIC-supervised institution for purposes of determining the FDIC-supervised institution's risk-based capital requirements and calculating the FDIC-supervised institution's risk-based capital ratios accordingly. The FDIC will look to the substance of, and risk associated with, the transaction, as well as other relevant factors the FDIC deems appropriate in determining whether to require such treatment.

(6) *Other reservation of authority.* With respect to any deduction or limitation required under this part, the FDIC may require a different deduction or limitation, provided that such alternative deduction or limitation is commensurate with the FDIC-supervised institution's risk and consistent with safety and soundness.

(e) *Notice and response procedures.* In making a determination under this section, the FDIC will apply notice and response procedures in the same manner as the notice and response procedures in § 324.5(c).

(f) *Timing.* (1) Subject to the transition provisions in subpart G of this part, an advanced approaches FDIC-supervised institution that is not a savings and loan holding company must:

(i) Except as described in paragraph (f)(1)(ii) of this section, beginning on January 1, 2014, calculate advanced approaches total risk-weighted assets in accordance with subpart E and, if applicable, subpart F of this part and, beginning on January 1, 2015, calculate standardized total risk-weighted assets in accordance with subpart D and, if applicable, subpart F of this part;

(ii) From January 1, 2014 to December 31, 2014:

(A) Calculate risk-weighted assets in accordance with the general risk-based capital rules under 12 CFR part 325, appendix A, and, if applicable appendix C (state nonmember banks), or 12 CFR part 390, subpart Z and, if applicable, 12 CFR part 325, appendix C (state savings associations)[1] and substitute such risk-

[1] For the purpose of calculating its general risk-based capital ratios from January 1, 2014 to December 31, 2014, an advanced approaches FDIC-supervised institution shall adjust, as appropriate, its risk-weighted asset measure (as that amount is calculated under 12 CFR part 325, appendix A, (state nonmember

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weighted assets for standardized total risk-weighted assets for purposes of § 324.10;

(B) If applicable, calculate general market risk equivalent assets in accordance with 12 CFR part 325, appendix C, section 4(a)(3) and substitute such general market risk equivalent assets for standardized market risk-weighted assets for purposes of § 324.20(d)(3); and

(C) Substitute the corresponding provision or provisions of 12 CFR part 325, appendix A, and, if applicable, appendix C (state nonmember banks), and 12 CFR part 390, subpart Z and, if applicable, 12 CFR part 325, appendix C (state savings associations) for any reference to subpart D of this part in: § 324.121(c); § 324.124(a) and (b); § 324.144(b); § 324.154(c) and (d); § 324.202(b) (definition of covered position in paragraph (b)(3)(iv)); and § 324.211(b);[2]

(iii) Beginning on January 1, 2014, calculate and maintain minimum capital ratios in accordance with subparts A, B, and C of this part, provided, however, that such FDIC-supervised institution must:

(A) From January 1, 2014 to December 31, 2014, maintain a minimum common equity tier 1 capital ratio of 4 percent, a minimum tier 1 capital ratio of 5.5 percent, a minimum total capital ratio of 8 percent, and a minimum leverage ratio of 4 percent; and

(B) From January 1, 2015 to December 31, 2017, an advanced approaches FDIC-supervised institution:

(*1*) Is not required to maintain a supplementary leverage ratio; and

(*2*) Must calculate a supplementary leverage ratio in accordance with § 324.10(c), and must report the calculated supplementary leverage ratio on any applicable regulatory reports.

(2) Subject to the transition provisions in subpart G of this part, an FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution or a savings and loan holding company that is an advanced approaches FDIC-supervised institution must:

(i) Beginning on January 1, 2015, calculate standardized total risk-weighted assets in accordance with subpart D, and if applicable, subpart F of this part; and

(ii) Beginning on January 1, 2015, calculate and maintain minimum capital ratios in accordance with subparts A, B and C of this part, provided, however, that from January 1, 2015, to December 31, 2017, a savings and loan holding company that is an advanced approaches FDIC-supervised institution:

(A) Is not required to maintain a supplementary leverage ratio; and

(B) Must calculate a supplementary leverage ratio in accordance with § 324.10(c), and must report the calculated supplementary leverage ratio on any applicable regulatory reports.

(3) Beginning on January 1, 2016, and subject to the transition provisions in subpart G of this part, an FDIC-supervised institution is subject to limitations on distributions and discretionary bonus payments with respect to its capital conservation buffer and any applicable countercyclical capital buffer amount, in accordance with subpart B of this part.

(4) An FDIC-supervised institution that changes from one category of FDIC-supervised institution to another of such categories must comply with the requirements of its category in this part, including applicable transition provisions of the requirements in this part, no later than on the first day of the second quarter following the change in the FDIC-supervised institution's category.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 57448, Sept. 26, 2014; 84 FR 59277, Nov. 1, 2019]

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banks), and 12 CFR part 390, subpart Z (state savings associations) in the general risk-based capital rules) by excluding those assets that are deducted from its regulatory capital under § 324.22.

[2] In addition, for purposes of § 324.201(c)(3), from January 1, 2014 to December 31, 2014, for any circumstance in which the FDIC may require an FDIC-supervised institution to calculate risk-based capital requirements for specific positions or portfolios under subpart D of this part, the FDIC will instead require the FDIC-supervised institution to make such calculations according to 12 CFR part 325, appendix A, and, if applicable, appendix C (state nonmember banks), or 12 CFR part 390, subpart Z and, if applicable, 12 CFR part 325, appendix C (state savings associations).

§ 324.2 Definitions.

As used in this part:

Additional tier 1 capital is defined in § 324.20(c).

Adjusted allowances for credit losses (AACL) means, with respect to an FDIC-supervised institution that has adopted CECL, valuation allowances that have been established through a charge against earnings or retained earnings for expected credit losses on financial assets measured at amortized cost and a lessor's net investment in leases that have been established to reduce the amortized cost basis of the assets to amounts expected to be collected as determined in accordance with GAAP. For purposes of this part, adjusted allowances for credit losses include allowances for expected credit losses on off-balance sheet credit exposures not accounted for as insurance as determined in accordance with GAAP. Adjusted allowances for credit losses exclude ''allocated transfer risk reserves'' and allowances created that reflect credit losses on purchased credit deteriorated assets and available-for-sale debt securities.

Advanced approaches FDIC-supervised institution means an FDIC-supervised institution that is described in § 324.100(b)(1).

Advanced approaches total risk-weighted assets means:

(1) The sum of:

(i) Credit-risk-weighted assets;

(ii) Credit valuation adjustment (CVA) risk-weighted assets;

(iii) Risk-weighted assets for operational risk; and

(iv) For a market risk FDIC-supervised institution only, advanced market risk-weighted assets; minus

(2) Excess eligible credit reserves not included in the FDIC-supervised institution's tier 2 capital.

Advanced market risk-weighted assets means the advanced measure for market risk calculated under § 324.204 multiplied by 12.5.

Affiliate with respect to a company, means any company that controls, is controlled by, or is under common control with, the company.

Allocated transfer risk reserves means reserves that have been established in accordance with section 905(a) of the International Lending Supervision Act, against certain assets whose value U.S. supervisory authorities have found to be significantly impaired by protracted transfer risk problems.

Allowances for loan and lease losses (ALLL) means valuation allowances that have been established through a charge against earnings to cover estimated credit losses on loans, lease financing receivables or other extensions of credit as determined in accordance with GAAP. ALLL excludes ''allocated transfer risk reserves.'' For purposes of this part, ALLL includes allowances that have been established through a charge against earnings to cover estimated credit losses associated with off-balance sheet credit exposures as determined in accordance with GAAP.

Asset-backed commercial paper (ABCP) program means a program established primarily for the purpose of issuing commercial paper that is investment grade and backed by underlying exposures held in a bankruptcy-remote special purpose entity (SPE).

Asset-backed commercial paper (ABCP) program sponsor means an FDIC-supervised institution that:

(1) Establishes an ABCP program;

(2) Approves the sellers permitted to participate in an ABCP program;

(3) Approves the exposures to be purchased by an ABCP program; or

(4) Administers the ABCP program by monitoring the underlying exposures, underwriting or otherwise arranging for the placement of debt or other obligations issued by the program, compiling monthly reports, or ensuring compliance with the program documents and with the program's credit and investment policy.

Assets classified loss means:

(1) When measured as of the date of examination of an FDIC-supervised institution, those assets that have been determined by an evaluation made by a state or Federal examiner as of that date to be a loss; and

(2) When measured as of any other date, those assets:

(i) That have been determined—

(A) By an evaluation made by a state or Federal examiner at the most recent examination of an FDIC-supervised institution to be a loss; or

(B) By evaluations made by the FDIC-supervised institution since its

most recent examination to be a loss; and

(ii) That have not been charged off from the FDIC-supervised institution's books or collected.

Bank means an FDIC-insured, state-chartered commercial or savings bank that is not a member of the Federal Reserve System and for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

Bank holding company means a bank holding company as defined in section 2 of the Bank Holding Company Act.

Bank Holding Company Act means the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*).

Bankruptcy remote means, with respect to an entity or asset, that the entity or asset would be excluded from an insolvent entity's estate in receivership, insolvency, liquidation, or similar proceeding.

Basis derivative contract means a non-foreign-exchange derivative contract (*i.e.*, the contract is denominated in a single currency) in which the cash flows of the derivative contract depend on the difference between two risk factors that are attributable solely to one of the following derivative asset classes: Interest rate, credit, equity, or commodity.

Call Report means Consolidated Reports of Condition and Income.

Carrying value means, with respect to an asset, the value of the asset on the balance sheet of the FDIC-supervised institution as determined in accordance with GAAP. For all assets other than available-for-sale debt securities or purchased credit deteriorated assets, the carrying value is not reduced by any associated credit loss allowance that is determined in accordance with GAAP.

Category II FDIC-supervised institution means:

(1) An FDIC-supervised institution that is a consolidated subsidiary of a company that is identified as a Category II banking organization, as defined pursuant to 12 CFR 252.5 or 12 CFR 238.10, as applicable; or

(2) An FDIC-supervised institution that:

(i) Is not a subsidiary of a depository institution holding company;

(ii)(A) Has total consolidated assets, calculated based on the average of the FDIC-supervised institution's total consolidated assets for the four most recent calendar quarters as reported on the Call Report, equal to $700 billion or more. If the FDIC-supervised institution has not filed the Call Report for each of the four most recent calendar quarters, total consolidated assets is calculated based on its total consolidated assets, as reported on the Call Report, for the most recent quarter or the average of the four most recent quarters, as applicable; or

(B) Has:

(*1*) Total consolidated assets, calculated based on the average of the FDIC-supervised institution's total consolidated assets for the four most recent calendar quarters as reported on the Call Report, of $100 billion or more but less than $700 billion. If the FDIC-supervised institution has not filed the Call Report for each of the four most recent quarters, total consolidated assets is based on its total consolidated assets, as reported on the Call Report, for the most recent quarter or the average of the four most recent quarters, as applicable; and

(*2*) Cross-jurisdictional activity, calculated based on the average of its cross-jurisdictional activity for the four most recent calendar quarters, of $75 billion or more. Cross-jurisdictional activity is the sum of cross-jurisdictional claims and cross-jurisdictional liabilities, calculated in accordance with the instructions to the FR Y–15 or equivalent reporting form.

(iii) After meeting the criteria in paragraph (2)(ii) of this definition, an FDIC-supervised institution continues to be a Category II FDIC-supervised institution until the FDIC-supervised institution has:

(A)(*1*) Less than $700 billion in total consolidated assets, as reported on the Call Report, for each of the four most recent calendar quarters; and

(*2*) Less than $75 billion in cross-jurisdictional activity for each of the four most recent calendar quarters. Cross-jurisdictional activity is the sum of cross-jurisdictional claims and

cross-jurisdictional liabilities, calculated in accordance with the instructions to the FR Y–15 or equivalent reporting form; or

(B) Less than $100 billion in total consolidated assets, as reported on the Call Report, for each of the four most recent calendar quarters.

Category III FDIC-supervised institution means:

(1) An FDIC-supervised institution that is a subsidiary of a Category III banking organization, as defined pursuant to 12 CFR 252.5 or 12 CFR 238.10, as applicable;

(2) An FDIC-supervised institution that is a subsidiary of a depository institution that meets the criteria in paragraph (3)(iii)(A) or (B) of this definition; or

(3) A depository institution that:

(i) Is an FDIC-supervised institution;

(ii) Is not a subsidiary of a depository institution holding company; and

(iii)(A) Has total consolidated assets, calculated based on the average of the depository institution's total consolidated assets for the four most recent calendar quarters as reported on the Call Report, equal to $250 billion or more. If the depository institution has not filed the Call Report for each of the four most recent calendar quarters, total consolidated assets is calculated based on its total consolidated assets, as reported on the Call Report, for the most recent quarter or the average of the four most recent quarters, as applicable; or

(B) Has:

(*1*) Total consolidated assets, calculated based on the average of the depository institution's total consolidated assets for the four most recent calendar quarters as reported on the Call Report, of $100 billion or more but less than $250 billion. If the depository institution has not filed the Call Report for each of the four most recent calendar quarters, total consolidated assets is calculated based on its total consolidated assets, as reported on the Call Report, for the most recent quarter or the average of the four most recent quarters, as applicable; and

(*2*) At least one of the following in paragraphs (3)(iii)(B)(*2*)(*i*) through (*iii*) of this definition, each calculated as the average of the four most recent calendar quarters, or if the depository institution has not filed each applicable reporting form for each of the four most recent calendar quarters, for the most recent quarter or quarters, as applicable:

(*i*) Total nonbank assets, calculated in accordance with the instructions to the FR Y–9LP or equivalent reporting form, equal to $75 billion or more;

(*ii*) Off-balance sheet exposure equal to $75 billion or more. Off-balance sheet exposure is a depository institution's total exposure, calculated in accordance with the instructions to the FR Y–15 or equivalent reporting form, minus the total consolidated assets of the depository institution, as reported on the Call Report; or

(*iii*) Weighted short-term wholesale funding, calculated in accordance with the instructions to the FR Y–15 or equivalent reporting form, equal to $75 billion or more.

(iv) After meeting the criteria in paragraph (3)(iii) of this definition, an FDIC-supervised institution continues to be a Category III FDIC-supervised institution until the FDIC-supervised institution:

(A) Has:

(*1*) Less than $250 billion in total consolidated assets, as reported on the Call Report, for each of the four most recent calendar quarters;

(*2*) Less than $75 billion in total nonbank assets, calculated in accordance with the instructions to the FR Y–9LP or equivalent reporting form, for each of the four most recent calendar quarters;

(*3*) Less than $75 billion in weighted short-term wholesale funding, calculated in accordance with the instructions to the FR Y–15 or equivalent reporting form, for each of the four most recent calendar quarters; and

(*4*) Less than $75 billion in off-balance sheet exposure for each of the four most recent calendar quarters. Off-balance sheet exposure is an FDIC-supervised institution's total exposure, calculated in accordance with the instructions to the FR Y–15 or equivalent reporting form, minus the total consolidated assets of the FDIC-supervised institution, as reported on the Call Report; or

(B) Has less than $100 billion in total consolidated assets, as reported on the Call Report, for each of the four most recent calendar quarters; or

(C) Is a Category II FDIC-supervised institution.

Central counterparty (CCP) means a counterparty (for example, a clearing house) that facilitates trades between counterparties in one or more financial markets by either guaranteeing trades or novating contracts.

CFTC means the U.S. Commodity Futures Trading Commission.

Clean-up call means a contractual provision that permits an originating FDIC-supervised institution or servicer to call securitization exposures before their stated maturity or call date.

Cleared transaction means an exposure associated with an outstanding derivative contract or repo-style transaction that an FDIC-supervised institution or clearing member has entered into with a central counterparty (that is, a transaction that a central counterparty has accepted).

(1) The following transactions are cleared transactions:

(i) A transaction between a CCP and an FDIC-supervised institution that is a clearing member of the CCP where the FDIC-supervised institution enters into the transaction with the CCP for the FDIC-supervised institution's own account;

(ii) A transaction between a CCP and an FDIC-supervised institution that is a clearing member of the CCP where the FDIC-supervised institution is acting as a financial intermediary on behalf of a clearing member client and the transaction offsets another transaction that satisfies the requirements set forth in § 324.3(a);

(iii) A transaction between a clearing member client FDIC-supervised institution and a clearing member where the clearing member acts as a financial intermediary on behalf of the clearing member client and enters into an offsetting transaction with a CCP, provided that the requirements set forth in § 324.3(a) are met; or

(iv) A transaction between a clearing member client FDIC-supervised institution and a CCP where a clearing member guarantees the performance of the clearing member client FDIC-supervised institution to the CCP and the transaction meets the requirements of § 324.3(a)(2) and (3).

(2) The exposure of an FDIC-supervised institution that is a clearing member to its clearing member client is not a cleared transaction where the FDIC-supervised institution is either acting as a financial intermediary and enters into an offsetting transaction with a CCP or where the FDIC-supervised institution provides a guarantee to the CCP on the performance of the client.[3]

Clearing member means a member of, or direct participant in, a CCP that is entitled to enter into transactions with the CCP.

Clearing member client means a party to a cleared transaction associated with a CCP in which a clearing member acts either as a financial intermediary with respect to the party or guarantees the performance of the party to the CCP.

Client-facing derivative transaction means a derivative contract that is not a cleared transaction where the FDIC-supervised institution is either acting as a financial intermediary and enters into an offsetting transaction with a qualifying central counterparty (QCCP) or where the FDIC-supervised institution provides a guarantee to the QCCP on the performance of a client on a transaction between the client and a QCCP.

Collateral agreement means a legal contract that specifies the time when, and circumstances under which, a counterparty is required to pledge collateral to an FDIC-supervised institution for a single financial contract or for all financial contracts in a netting set and confers upon the FDIC-supervised institution a perfected, first-priority security interest (notwithstanding the prior security interest of

[3] For the standardized approach treatment of these exposures, see § 324.34(e) (OTC derivative contracts) or § 324.37(c) (repo-style transactions). For the advanced approaches treatment of these exposures, see § 324.132(c)(8) and (d) (OTC derivative contracts) or § 324.132(b) and 324.132(d) (repo-style transactions) and for calculation of the margin period of risk, see § 324.132(d)(5)(iii)(C) (OTC derivative contracts) and § 324.132(d)(5)(iii)(A) (repo-style transactions).

any custodial agent), or the legal equivalent thereof, in the collateral posted by the counterparty under the agreement. This security interest must provide the FDIC-supervised institution with a right to close-out the financial positions and liquidate the collateral upon an event of default of, or failure to perform by, the counterparty under the collateral agreement. A contract would not satisfy this requirement if the FDIC-supervised institution's exercise of rights under the agreement may be stayed or avoided.

(1) Under applicable law in the relevant jurisdictions, other than:

(i) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar[4] to the U.S. laws referenced in this paragraph (1)(i) in order to facilitate the orderly resolution of the defaulting counterparty;

(ii) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (1)(i) of this definition; or

(2) Other than to the extent necessary for the counterparty to comply with the requirements of part 382 of this title, subpart I of part 252 of this title or part 47 of this title, as applicable.

Commercial end-user means an entity that:

(1)(i) Is using derivative contracts to hedge or mitigate commercial risk; and

(ii)(A) Is not an entity described in section 2(h)(7)(C)(i)(I) through (VIII) of the Commodity Exchange Act (7 U.S.C. 2(h)(7)(C)(i)(I) through (VIII)); or

(B) Is not a ''financial entity'' for purposes of section 2(h)(7) of the Commodity Exchange Act (7 U.S.C. 2(h)) by virtue of section 2(h)(7)(C)(iii) of the Act (7 U.S.C. 2(h)(7)(C)(iii)); or

(2)(i) Is using derivative contracts to hedge or mitigate commercial risk; and

(ii) Is not an entity described in section 3C(g)(3)(A)(i) through (viii) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3(g)(3)(A)(i) through (viii)); or

(3) Qualifies for the exemption in section 2(h)(7)(A) of the Commodity Exchange Act (7 U.S.C. 2(h)(7)(A)) by virtue of section 2(h)(7)(D) of the Act (7 U.S.C. 2(h)(7)(D)); or

(4) Qualifies for an exemption in section 3C(g)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3(g)(1)) by virtue of section 3C(g)(4) of the Act (15 U.S.C. 78c–3(g)(4)).

Commitment means any legally binding arrangement that obligates an FDIC-supervised institution to extend credit or to purchase assets.

Commodity derivative contract means a commodity-linked swap, purchased commodity-linked option, forward commodity-linked contract, or any other instrument linked to commodities that gives rise to similar counterparty credit risks.

Commodity Exchange Act means the Commodity Exchange Act of 1936 (7 U.S.C. 1 *et seq.*)

Common equity tier 1 capital is defined in § 324.20(b).

Common equity tier 1 minority interest means the common equity tier 1 capital of a depository institution or foreign bank that is:

(1) A consolidated subsidiary of an FDIC-supervised institution; and

(2) Not owned by the FDIC-supervised institution.

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

Control. A person or company *controls* a company if it:

(1) Owns, controls, or holds with power to vote 25 percent or more of a class of voting securities of the company; or

(2) Consolidates the company for financial reporting purposes.

Core capital means Tier 1 capital, as defined in § 324.2 of subpart A of this part.

Corporate exposure means an exposure to a company that is not:

(1) An exposure to a sovereign, the Bank for International Settlements, the European Central Bank, the European Commission, the International

[4] The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

Monetary Fund, the European Stability Mechanism, the European Financial Stability Facility, a multi-lateral development bank (MDB), a depository institution, a foreign bank, a credit union, or a public sector entity (PSE);

(2) An exposure to a GSE;

(3) A residential mortgage exposure;

(4) A pre-sold construction loan;

(5) A statutory multifamily mortgage;

(6) A high volatility commercial real estate (HVCRE) exposure;

(7) A cleared transaction;

(8) A default fund contribution;

(9) A securitization exposure;

(10) An equity exposure;

(11) An unsettled transaction;

(12) A policy loan;

(13) A separate account; or

(14) A Paycheck Protection Program covered loan as defined in section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)).

Country risk classification (CRC) with respect to a sovereign, means the most recent consensus CRC published by the Organization for Economic Cooperation and Development (OECD) as of December 31st of the prior calendar year that provides a view of the likelihood that the sovereign will service its external debt.

Covered debt instrument means an unsecured debt instrument that is:

(1) Issued by a global systemically important BHC, as defined in 12 CFR 217.2, and that is an eligible debt security, as defined in 12 CFR 252.61, or that is *pari passu* or subordinated to any eligible debt security issued by the global systemically important BHC; or

(2) Issued by a Covered IHC, as defined in 12 CFR 252.161, and that is an eligible Covered IHC debt security, as defined in 12 CFR 252.161, or that is *pari passu* or subordinated to any eligible Covered IHC debt security issued by the Covered IHC; or

(3) Issued by a global systemically important banking organization, as defined in 12 CFR 252.2 other than a global systemically important BHC, as defined in 12 CFR 217.2; or issued by a subsidiary of a global systemically important banking organization that is not a global systemically important BHC, other than a Covered IHC, as defined in 12 CFR 252.161; and where,

(i) The instrument is eligible for use to comply with an applicable law or regulation requiring the issuance of a minimum amount of instruments to absorb losses or recapitalize the issuer or any of its subsidiaries in connection with a resolution, receivership, insolvency, or similar proceeding of the issuer or any of its subsidiaries; or

(ii) The instrument is *pari passu* or subordinated to any instrument described in paragraph (3)(i) of this definition; for purposes of this paragraph (3)(ii) of this definition, if the issuer may be subject to a special resolution regime, in its jurisdiction of incorporation or organization, that addresses the failure or potential failure of a financial company and any instrument described in paragraph (3)(i) of this definition is eligible under that special resolution regime to be written down or converted into equity or any other capital instrument, then an instrument is *pari passu* or subordinated to any instrument described in paragraph (3)(i) of this definition if that instrument is eligible under that special resolution regime to be written down or converted into equity or any other capital instrument ahead of or proportionally with any instrument described in paragraph (3)(i) of this definition; and

(4) Provided that, for purposes of this definition, *covered debt instrument* does not include a debt instrument that qualifies as tier 2 capital pursuant to 12 CFR 324.20(d) or that is otherwise treated as regulatory capital by the primary supervisor of the issuer.

Covered savings and loan holding company means a top-tier savings and loan holding company other than:

(1) A top-tier savings and loan holding company that is:

(i) A grandfathered unitary savings and loan holding company as defined in section 10(c)(9)(A) of HOLA; and

(ii) As of June 30 of the previous calendar year, derived 50 percent or more of its total consolidated assets or 50 percent of its total revenues on an enterprise-wide basis (as calculated under GAAP) from activities that are not financial in nature under section 4(k) of the Bank Holding Company Act (12 U.S.C. 1842(k));

(2) A top-tier savings and loan holding company that is an insurance underwriting company; or

(3)(i) A top-tier savings and loan holding company that, as of June 30 of the previous calendar year, held 25 percent or more of its total consolidated assets in subsidiaries that are insurance underwriting companies (other than assets associated with insurance for credit risk); and

(ii) For purposes of paragraph 3(i) of this definition, the company must calculate its total consolidated assets in accordance with GAAP, or if the company does not calculate its total consolidated assets under GAAP for any regulatory purpose (including compliance with applicable securities laws), the company may estimate its total consolidated assets, subject to review and adjustment by the Federal Reserve.

Credit derivative means a financial contract executed under standard industry credit derivative documentation that allows one party (the protection purchaser) to transfer the credit risk of one or more exposures (reference exposure(s)) to another party (the protection provider) for a certain period of time.

Credit-enhancing interest-only strip (CEIO) means an on-balance sheet asset that, in form or in substance:

(1) Represents a contractual right to receive some or all of the interest and no more than a minimal amount of principal due on the underlying exposures of a securitization; and

(2) Exposes the holder of the CEIO to credit risk directly or indirectly associated with the underlying exposures that exceeds a pro rata share of the holder's claim on the underlying exposures, whether through subordination provisions or other credit-enhancement techniques.

Credit-enhancing representations and warranties means representations and warranties that are made or assumed in connection with a transfer of underlying exposures (including loan servicing assets) and that obligate an FDIC-supervised institution to protect another party from losses arising from the credit risk of the underlying exposures. Credit-enhancing representations and warranties include provisions to protect a party from losses resulting from the default or nonperformance of the counterparties of the underlying exposures or from an insufficiency in the value of the collateral backing the underlying exposures. Credit-enhancing representations and warranties do not include:

(1) Early default clauses and similar warranties that permit the return of, or premium refund clauses covering, 1–4 family residential first mortgage loans that qualify for a 50 percent risk weight for a period not to exceed 120 days from the date of transfer. These warranties may cover only those loans that were originated within 1 year of the date of transfer;

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

(3) Warranties that permit the return of underlying exposures in instances of misrepresentation, fraud, or incomplete documentation.

Credit risk mitigant means collateral, a credit derivative, or a guarantee.

Credit-risk-weighted assets means 1.06 multiplied by the sum of:

(1) Total wholesale and retail risk-weighted assets as calculated under § 324.131;

(2) Risk-weighted assets for securitization exposures as calculated under § 324.142; and

(3) Risk-weighted assets for equity exposures as calculated under § 324.151.

Credit union means an insured credit union as defined under the Federal Credit Union Act (12 U.S.C. 1751 *et seq.*).

Current Expected Credit Losses (CECL) means the current expected credit losses methodology under GAAP.

Current exposure means, with respect to a netting set, the larger of zero or the fair value of a transaction or portfolio of transactions within the netting set that would be lost upon default of the counterparty, assuming no recovery on the value of the transactions.

Current exposure methodology means the method of calculating the exposure amount for over-the-counter derivative contracts in § 324.34(b).

Custodian means a financial institution that has legal custody of collateral provided to a CCP.

Custody bank means an FDIC-supervised institution that is a subsidiary of a depository institution holding company that is a custodial banking organization under 12 CFR 217.2.

Default fund contribution means the funds contributed or commitments made by a clearing member to a CCP's mutualized loss sharing arrangement.

Depository institution means a depository institution as defined in section 3 of the Federal Deposit Insurance Act.

Depository institution holding company means a bank holding company or savings and loan holding company.

Derivative contract means a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivative contracts, and any other instrument that poses similar counterparty credit risks. Derivative contracts also include unsettled securities, commodities, and foreign exchange transactions with a contractual settlement or delivery lag that is longer than the lesser of the market standard for the particular instrument or five business days.

Discretionary bonus payment means a payment made to an executive officer of an FDIC-supervised institution, where:

(1) The FDIC-supervised institution retains discretion as to whether to make, and the amount of, the payment until the payment is awarded to the executive officer;

(2) The amount paid is determined by the FDIC-supervised institution without prior promise to, or agreement with, the executive officer; and

(3) The executive officer has no contractual right, whether express or implied, to the bonus payment.

Distribution means:

(1) A reduction of tier 1 capital through the repurchase of a tier 1 capital instrument or by other means, except when an FDIC-supervised institution, within the same quarter when the repurchase is announced, fully replaces a tier 1 capital instrument it has repurchased by issuing another capital instrument that meets the eligibility criteria for:

(i) A common equity tier 1 capital instrument if the instrument being repurchased was part of the FDIC-supervised institution's common equity tier 1 capital, or

(ii) A common equity tier 1 or additional tier 1 capital instrument if the instrument being repurchased was part of the FDIC-supervised institution's tier 1 capital;

(2) A reduction of tier 2 capital through the repurchase, or redemption prior to maturity, of a tier 2 capital instrument or by other means, except when an FDIC-supervised institution, within the same quarter when the repurchase or redemption is announced, fully replaces a tier 2 capital instrument it has repurchased by issuing another capital instrument that meets the eligibility criteria for a tier 1 or tier 2 capital instrument;

(3) A dividend declaration or payment on any tier 1 capital instrument;

(4) A dividend declaration or interest payment on any tier 2 capital instrument if the FDIC-supervised institution has full discretion to permanently or temporarily suspend such payments without triggering an event of default; or

(5) Any similar transaction that the FDIC determines to be in substance a distribution of capital.

Dodd-Frank Act means the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. 111–203, 124 Stat. 1376).

Early amortization provision means a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures, unless the provision:

(1) Is triggered solely by events not directly related to the performance of the underlying exposures or the originating FDIC-supervised institution (such as material changes in tax laws or regulations); or

(2) Leaves investors fully exposed to future draws by borrowers on the underlying exposures even after the provision is triggered.

Effective notional amount means for an eligible guarantee or eligible credit derivative, the lesser of the contractual notional amount of the credit risk mitigant and the exposure amount (or EAD for purposes of subpart E of this part) of the hedged exposure, multiplied by the percentage coverage of the credit risk mitigant.

Eligible ABCP liquidity facility means a liquidity facility supporting ABCP, in form or in substance, that is subject to an asset quality test at the time of draw that precludes funding against assets that are 90 days or more past due or in default. Notwithstanding the preceding sentence, a liquidity facility is an eligible ABCP liquidity facility if the assets or exposures funded under the liquidity facility that do not meet the eligibility requirements are guaranteed by a sovereign that qualifies for a 20 percent risk weight or lower.

Eligible clean-up call means a clean-up call that:

(1) Is exercisable solely at the discretion of the originating FDIC-supervised institution or servicer;

(2) Is not structured to avoid allocating losses to securitization exposures held by investors or otherwise structured to provide credit enhancement to the securitization; and

(3)(i) For a traditional securitization, is only exercisable when 10 percent or less of the principal amount of the underlying exposures or securitization exposures (determined as of the inception of the securitization) is outstanding; or

(ii) For a synthetic securitization, is only exercisable when 10 percent or less of the principal amount of the reference portfolio of underlying exposures (determined as of the inception of the securitization) is outstanding.

Eligible credit derivative means a credit derivative in the form of a credit default swap, nth-to-default swap, total return swap, or any other form of credit derivative approved by the FDIC, provided that:

(1) The contract meets the requirements of an eligible guarantee and has been confirmed by the protection purchaser and the protection provider;

(2) Any assignment of the contract has been confirmed by all relevant parties;

(3) If the credit derivative is a credit default swap or nth-to-default swap, the contract includes the following credit events:

(i) Failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and

(ii) Receivership, insolvency, liquidation, conservatorship or inability of the reference exposure issuer to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;

(4) The terms and conditions dictating the manner in which the contract is to be settled are incorporated into the contract;

(5) If the contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(6) If the contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract provide that any required consent to transfer may not be unreasonably withheld;

(7) If the credit derivative is a credit default swap or nth-to-default swap, the contract clearly identifies the parties responsible for determining whether a credit event has occurred, specifies that this determination is not the sole responsibility of the protection provider, and gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event; and

(8) If the credit derivative is a total return swap and the FDIC-supervised institution records net payments received on the swap as net income, the FDIC-supervised institution records offsetting deterioration in the value of

the hedged exposure (either through reductions in fair value or by an addition to reserves).

Eligible credit reserves means:

(1) For an FDIC-supervised institution that has not adopted CECL, all general allowances that have been established through a charge against earnings to cover estimated credit losses associated with on- or off-balance sheet wholesale and retail exposures, including the ALLL associated with such exposures, but excluding allocated transfer risk reserves established pursuant to 12 U.S.C. 3904 and other specific reserves created against recognized losses; and

(2) For an FDIC-supervised institution that has adopted CECL, all general allowances that have been established through a charge against earnings or retained earnings to cover expected credit losses associated with on- or off-balance sheet wholesale and retail exposures, including AACL associated with such exposures. Eligible credit reserves exclude allocated transfer risk reserves established pursuant to 12 U.S.C. 3904, allowances that reflect credit losses on purchased credit deteriorated assets and available-for-sale debt securities, and other specific reserves created against recognized losses.

Eligible guarantee means a guarantee that:

(1) Is written;

(2) Is either:

(i) Unconditional, or

(ii) A contingent obligation of the U.S. government or its agencies, the enforceability of which is dependent upon some affirmative action on the part of the beneficiary of the guarantee or a third party (for example, meeting servicing requirements);

(3) Covers all or a pro rata portion of all contractual payments of the obligated party on the reference exposure;

(4) Gives the beneficiary a direct claim against the protection provider;

(5) Is not unilaterally cancelable by the protection provider for reasons other than the breach of the contract by the beneficiary;

(6) Except for a guarantee by a sovereign, is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced;

(7) Requires the protection provider to make payment to the beneficiary on the occurrence of a default (as defined in the guarantee) of the obligated party on the reference exposure in a timely manner without the beneficiary first having to take legal actions to pursue the obligor for payment;

(8) Does not increase the beneficiary's cost of credit protection on the guarantee in response to deterioration in the credit quality of the reference exposure;

(9) Is not provided by an affiliate of the FDIC-supervised institution, unless the affiliate is an insured depository institution, foreign bank, securities broker or dealer, or insurance company that:

(i) Does not control the FDIC-supervised institution; and

(ii) Is subject to consolidated supervision and regulation comparable to that imposed on depository institutions, U.S. securities broker-dealers, or U.S. insurance companies (as the case may be); and

(10) For purposes of §§ 324.141 through 324.145 and subpart D of this part, is provided by an eligible guarantor.

Eligible guarantor means:

(1) A sovereign, the Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, a Federal Home Loan Bank, Federal Agricultural Mortgage Corporation (Farmer Mac), the European Stability Mechanism, the European Financial Stability Facility, a multilateral development bank (MDB), a depository institution, a bank holding company, a savings and loan holding company, a credit union, a foreign bank, or a qualifying central counterparty; or

(2) An entity (other than a special purpose entity):

(i) That at the time the guarantee is issued or anytime thereafter, has issued and outstanding an unsecured debt security without credit enhancement that is investment grade;

(ii) Whose creditworthiness is not positively correlated with the credit risk of the exposures for which it has provided guarantees; and

(iii) That is not an insurance company engaged predominately in the business of providing credit protection (such as a monoline bond insurer or reinsurer).

Eligible margin loan means:

(1) An extension of credit where:

(i) The extension of credit is collateralized exclusively by liquid and readily marketable debt or equity securities, or gold;

(ii) The collateral is marked to fair value daily, and the transaction is subject to daily margin maintenance requirements; and

(iii) The extension of credit is conducted under an agreement that provides the FDIC-supervised institution the right to accelerate and terminate the extension of credit and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, insolvency, liquidation, conservatorship, or similar proceeding, of the counterparty, provided that, in any such case,

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

(*1*) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs,[5] or laws of foreign jurisdictions that are substantially similar[6] to the U.S. laws referenced in this paragraph (1)(iii)(A)(*1*) in order to facilitate the orderly resolution of the defaulting counterparty; or

(*2*) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (1)(iii)(A)(*1*) of this definition; and

(B) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 382 of this title, subpart I of part 252 of this title or part 47 of this title, as applicable.

(2) In order to recognize an exposure as an eligible margin loan for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 324.3(b) with respect to that exposure.

Eligible servicer cash advance facility means a servicer cash advance facility in which:

(1) The servicer is entitled to full reimbursement of advances, except that a servicer may be obligated to make non-reimbursable advances for a particular underlying exposure if any such advance is contractually limited to an insignificant amount of the outstanding principal balance of that exposure;

(2) The servicer's right to reimbursement is senior in right of payment to all other claims on the cash flows from the underlying exposures of the securitization; and

(3) The servicer has no legal obligation to, and does not make advances to the securitization if the servicer concludes the advances are unlikely to be repaid.

Employee stock ownership plan has the same meaning as in 29 CFR 2550.407d-6.

Equity derivative contract means an equity-linked swap, purchased equity-linked option, forward equity-linked contract, or any other instrument linked to equities that gives rise to similar counterparty credit risks.

Equity exposure means:

(1) A security or instrument (whether voting or non-voting) that represents a direct or an indirect ownership interest in, and is a residual claim on, the assets and income of a company, unless:

(i) The issuing company is consolidated with the FDIC-supervised institution under GAAP;

[5] This requirement is met where all transactions under the agreement are (i) executed under U.S. law and (ii) constitute ''securities contracts'' under section 555 of the Bankruptcy Code (11 U.S.C. 555), qualified financial contracts under section 11(e)(8) of the Federal Deposit Insurance Act, or netting contracts between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act or the Federal Reserve Board's Regulation EE (12 CFR part 231).

[6] The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

(ii) The FDIC-supervised institution is required to deduct the ownership interest from tier 1 or tier 2 capital under this part;

(iii) The ownership interest incorporates a payment or other similar obligation on the part of the issuing company (such as an obligation to make periodic payments); or

(iv) The ownership interest is a securitization exposure;

(2) A security or instrument that is mandatorily convertible into a security or instrument described in paragraph (1) of this definition;

(3) An option or warrant that is exercisable for a security or instrument described in paragraph (1) of this definition; or

(4) Any other security or instrument (other than a securitization exposure) to the extent the return on the security or instrument is based on the performance of a security or instrument described in paragraph (1) of this definition.

ERISA means the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1001 *et seq.*).

Exchange rate derivative contract means a cross-currency interest rate swap, forward foreign-exchange contract, currency option purchased, or any other instrument linked to exchange rates that gives rise to similar counterparty credit risks.

Excluded covered debt instrument means an investment in a covered debt instrument held by an FDIC-supervised institution that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, that:

(1) Is held in connection with market making-related activities permitted under 12 CFR 351.4, provided that a direct exposure or an indirect exposure to a covered debt instrument is held for 30 business days or less; and

(2) Has been designated as an excluded covered debt instrument by the FDIC-supervised institution that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, pursuant to 12 CFR 324.22(c)(5)(iv)(A).

Executive officer means a person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions: president, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, or head of a major business line, and other staff that the board of directors of the FDIC-supervised institution deems to have equivalent responsibility.

Expected credit loss (ECL) means:

(1) For a wholesale exposure to a non-defaulted obligor or segment of non-defaulted retail exposures that is carried at fair value with gains and losses flowing through earnings or that is classified as held-for-sale and is carried at the lower of cost or fair value with losses flowing through earnings, zero.

(2) For all other wholesale exposures to non-defaulted obligors or segments of non-defaulted retail exposures, the product of the probability of default (PD) times the loss given default (LGD) times the exposure at default (EAD) for the exposure or segment.

(3) For a wholesale exposure to a defaulted obligor or segment of defaulted retail exposures, the FDIC-supervised institution's impairment estimate for allowance purposes for the exposure or segment.

(4) Total ECL is the sum of expected credit losses for all wholesale and retail exposures other than exposures for which the FDIC-supervised institution has applied the double default treatment in § 324.135.

Exposure amount means:

(1) For the on-balance sheet component of an exposure (other than an available-for-sale or held-to-maturity security, if the FDIC-supervised institution has made an AOCI opt-out election (as defined in § 324.22(b)(2)); an OTC derivative contract; a repo-style transaction or an eligible margin loan for which the FDIC-supervised institution determines the exposure amount under § 324.37; a cleared transaction; a default fund contribution; or a securitization exposure), the FDIC-supervised institution's carrying value of the exposure.

(2) For a security (that is not a securitization exposure, an equity exposure, or preferred stock classified as an equity security under GAAP) classified as available-for-sale or held-to-maturity if the FDIC-supervised institution has made an AOCI opt-out election

(as defined in § 324.22(b)(2)), the FDIC-supervised institution's carrying value (including net accrued but unpaid interest and fees) for the exposure less any net unrealized gains on the exposure and plus any net unrealized losses on the exposure.

(3) For available-for-sale preferred stock classified as an equity security under GAAP if the FDIC-supervised institution has made an AOCI opt-out election (as defined in § 324.22(b)(2)), the FDIC-supervised institution's carrying value of the exposure less any net unrealized gains on the exposure that are reflected in such carrying value but excluded from the FDIC-supervised institution's regulatory capital components.

(4) For the off-balance sheet component of an exposure (other than an OTC derivative contract; a repo-style transaction or an eligible margin loan for which the FDIC-supervised institution calculates the exposure amount under § 324.37; a cleared transaction; a default fund contribution; or a securitization exposure), the notional amount of the off-balance sheet component multiplied by the appropriate credit conversion factor (CCF) in § 324.33.

(5) For an exposure that is an OTC derivative contract, the exposure amount determined under § 324.34;

(6) For an exposure that is a cleared transaction, the exposure amount determined under § 324.35.

(7) For an exposure that is an eligible margin loan or repo-style transaction for which the FDIC-supervised institution calculates the exposure amount as provided in § 324.37, the exposure amount determined under § 324.37.

(8) For an exposure that is a securitization exposure, the exposure amount determined under § 324.42.

FDIC-supervised institution means any bank or state savings association.

Federal Deposit Insurance Act means the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

Federal Deposit Insurance Corporation Improvement Act means the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102–242, 105 Stat. 2236).

Federal Reserve means the Board of Governors of the Federal Reserve System.

Fiduciary or custodial and safekeeping account means, for purposes of § 324.10(c)(2)(x), an account administered by a custody bank for which the custody bank provides fiduciary or custodial and safekeeping services, as authorized by applicable Federal or state law.

Financial collateral means collateral:

(1) In the form of:

(i) Cash on deposit with the FDIC-supervised institution (including cash held for the FDIC-supervised institution by a third-party custodian or trustee);

(ii) Gold bullion;

(iii) Long-term debt securities that are not resecuritization exposures and that are investment grade;

(iv) Short-term debt instruments that are not resecuritization exposures and that are investment grade;

(v) Equity securities that are publicly traded;

(vi) Convertible bonds that are publicly traded; or

(vii) Money market fund shares and other mutual fund shares if a price for the shares is publicly quoted daily; and

(2) In which the FDIC-supervised institution has a perfected, first-priority security interest or, outside of the United States, the legal equivalent thereof (with the exception of cash on deposit; and notwithstanding the prior security interest of any custodial agent or any priority security interest granted to a CCP in connection with collateral posted to that CCP).

Financial institution means:

(1) A bank holding company; savings and loan holding company; nonbank financial institution supervised by the Federal Reserve under Title I of the Dodd-Frank Act; depository institution; foreign bank; credit union; industrial loan company, industrial bank, or other similar institution described in section 2 of the Bank Holding Company Act; national association, state member bank, or state non-member bank that is not a depository institution; insurance company; securities holding company as defined in section 618 of the Dodd-Frank Act; broker or dealer registered with the SEC under section 15 of the Securities Exchange Act; futures commission merchant as defined

in section 1a of the Commodity Exchange Act; swap dealer as defined in section 1a of the Commodity Exchange Act; or security-based swap dealer as defined in section 3 of the Securities Exchange Act;

(2) Any designated financial market utility, as defined in section 803 of the Dodd-Frank Act;

(3) Any entity not domiciled in the United States (or a political subdivision thereof) that is supervised and regulated in a manner similar to entities described in paragraphs (1) or (2) of this definition; or

(4) Any other company:

(i) Of which the FDIC-supervised institution owns:

(A) An investment in GAAP equity instruments of the company with an adjusted carrying value or exposure amount equal to or greater than $10 million; or

(B) More than 10 percent of the company's issued and outstanding common shares (or similar equity interest), and

(ii) Which is predominantly engaged in the following activities:

(A) Lending money, securities or other financial instruments, including servicing loans;

(B) Insuring, guaranteeing, indemnifying against loss, harm, damage, illness, disability, or death, or issuing annuities;

(C) Underwriting, dealing in, making a market in, or investing as principal in securities or other financial instruments; or

(D) Asset management activities (not including investment or financial advisory activities).

(5) For the purposes of this definition, a company is ''predominantly engaged'' in an activity or activities if:

(i) 85 percent or more of the total consolidated annual gross revenues (as determined in accordance with applicable accounting standards) of the company is either of the two most recent calendar years were derived, directly or indirectly, by the company on a consolidated basis from the activities; or

(ii) 85 percent or more of the company's consolidated total assets (as determined in accordance with applicable accounting standards) as of the end of either of the two most recent calendar years were related to the activities.

(6) Any other company that the FDIC may determine is a financial institution based on activities similar in scope, nature, or operation to those of the entities included in paragraphs (1) through (4) of this definition.

(7) For purposes of this part, ''financial institution'' does not include the following entities:

(i) GSEs;

(ii) Small business investment companies, as defined in section 102 of the Small Business Investment Act of 1958 (15 U.S.C. 661 *et seq.*);

(iii) Entities designated as Community Development Financial Institutions (CDFIs) under 12 U.S.C. 4701 *et seq.* and 12 CFR part 1805;

(iv) Entities registered with the SEC under the Investment Company Act or foreign equivalents thereof;

(v) Entities to the extent that the FDIC-supervised institution's investment in such entities would qualify as a community development investment under section 24 (Eleventh) of the National Bank Act; and

(vi) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of ERISA, a ''governmental plan'' (as defined in 29 U.S.C. 1002(32)) that complies with the tax deferral qualification requirements provided in the Internal Revenue Code, or any similar employee benefit plan established under the laws of a foreign jurisdiction.

First-lien residential mortgage exposure means a residential mortgage exposure secured by a first lien.

Foreign bank means a foreign bank as defined in § 211.2 of the Federal Reserve's Regulation K (12 CFR 211.2) (other than a depository institution).

Forward agreement means a legally binding contractual obligation to purchase assets with certain drawdown at a specified future date, not including commitments to make residential mortgage loans or forward foreign exchange contracts.

FR Y–9LP means the Parent Company Only Financial Statements for Large Holding Companies.

FR Y–15 means the Systemic Risk Report.

GAAP means generally accepted accounting principles as used in the United States.

Gain-on-sale means an increase in the equity capital of an FDIC-supervised institution (as reported on Schedule RC of the Call Report) resulting from a traditional securitization (other than an increase in equity capital resulting from the FDIC-supervised institution's receipt of cash in connection with the securitization or reporting of a mortgage servicing asset on Schedule RC of the Call Report.

General obligation means a bond or similar obligation that is backed by the full faith and credit of a public sector entity (PSE).

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

Guarantee means a financial guarantee, letter of credit, insurance, or other similar financial instrument (other than a credit derivative) that allows one party (beneficiary) to transfer the credit risk of one or more specific exposures (reference exposure) to another party (protection provider).

High volatility commercial real estate (HVCRE) exposure means:

(1) A credit facility secured by land or improved real property that, prior to being reclassified by the FDIC-supervised institution as a non-HVCRE exposure pursuant to paragraph (6) of this definition—

(i) Primarily finances, has financed, or refinances the acquisition, development, or construction of real property;

(ii) Has the purpose of providing financing to acquire, develop, or improve such real property into income-producing real property; and

(iii) Is dependent upon future income or sales proceeds from, or refinancing of, such real property for the repayment of such credit facility.

(2) An HVCRE exposure does not include a credit facility financing—

(i) The acquisition, development, or construction of properties that are—

(A) One- to four-family residential properties. Credit facilities that do not finance the construction of one- to four-family residential structures, but instead solely finance improvements such as the laying of sewers, water pipes, and similar improvements to land, do not qualify for the one- to four-family residential properties exclusion;

(B) Real property that would qualify as an investment in community development; or

(C) Agricultural land;

(ii) The acquisition or refinance of existing income-producing real property secured by a mortgage on such property, if the cash flow being generated by the real property is sufficient to support the debt service and expenses of the real property, in accordance with the FDIC-supervised institution's applicable loan underwriting criteria for permanent financings;

(iii) Improvements to existing income-producing improved real property secured by a mortgage on such property, if the cash flow being generated by the real property is sufficient to support the debt service and expenses of the real property, in accordance with the FDIC-supervised institution's applicable loan underwriting criteria for permanent financings; or

(iv) Commercial real property projects in which—

(A) The loan-to-value ratio is less than or equal to the applicable maximum supervisory loan-to-value ratio as determined by the FDIC;

(B) The borrower has contributed capital of at least 15 percent of the real property's appraised, 'as completed' value to the project in the form of—

(*1*) Cash;

(*2*) Unencumbered readily marketable assets;

(*3*) Paid development expenses out-of-pocket; or

(*4*) Contributed real property or improvements; and

(C) The borrower contributed the minimum amount of capital described under paragraph (2)(iv)(B) of this definition before the FDIC-supervised institution advances funds (other than the advance of a nominal sum made in order to secure the FDIC-supervised institution's lien against the real property) under the credit facility, and such minimum amount of capital contributed by the borrower is contractually required to remain in the project until the HVCRE exposure has

been reclassified by the FDIC-supervised institution as a non-HVCRE exposure under paragraph (6) of this definition;

(3) An HVCRE exposure does not include any loan made prior to January 1, 2015;

(4) An HVCRE exposure does not include a credit facility reclassified as a non-HVCRE exposure under paragraph (6) of this definition.

(5) Value Of contributed real property: For the purposes of this HVCRE exposure definition, the value of any real property contributed by a borrower as a capital contribution is the appraised value of the property as determined under standards prescribed pursuant to section 1110 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3339), in connection with the extension of the credit facility or loan to such borrower.

(6) Reclassification as a non-HVCRE exposure: For purposes of this HVCRE exposure definition and with respect to a credit facility and an FDIC-supervised institution, an FDIC-supervised institution may reclassify an HVCRE exposure as a non-HVCRE exposure upon—

(i) The substantial completion of the development or construction of the real property being financed by the credit facility; and

(ii) Cash flow being generated by the real property being sufficient to support the debt service and expenses of the real property, in accordance with the FDIC-supervised institution's applicable loan underwriting criteria for permanent financings.

(7) For purposes of this definition, an FDIC-supervised institution is not required to reclassify a credit facility that was originated on or after January 1, 2015 and prior to April 1, 2020.

Home country means the country where an entity is incorporated, chartered, or similarly established.

Identified losses means:

(1) When measured as of the date of examination of an FDIC-supervised institution, those items that have been determined by an evaluation made by a state or Federal examiner as of that date to be chargeable against income, capital and/or general valuation allowances such as the allowances for loan and lease losses (examples of identified losses would be assets classified loss, off-balance sheet items classified loss, any provision expenses that are necessary for the FDIC-supervised institution to record in order to replenish its general valuation allowances to an adequate level, liabilities not shown on the FDIC-supervised institution's books, estimated losses in contingent liabilities, and differences in accounts which represent shortages) or the adjusted allowances for credit losses; and

(2) When measured as of any other date, those items:

(i) That have been determined—

(A) By an evaluation made by a state or Federal examiner at the most recent examination of an FDIC-supervised institution to be chargeable against income, capital and/or general valuation allowances; or

(B) By evaluations made by the FDIC-supervised institution since its most recent examination to be chargeable against income, capital and/or general valuation allowances; and

(ii) For which the appropriate accounting entries to recognize the loss have not yet been made on the FDIC-supervised institution's books nor has the item been collected or otherwise settled.

Independent collateral means financial collateral, other than variation margin, that is subject to a collateral agreement, or in which a FDIC-supervised institution has a perfected, first-priority security interest or, outside of the United States, the legal equivalent thereof (with the exception of cash on deposit; notwithstanding the prior security interest of any custodial agent or any prior security interest granted to a CCP in connection with collateral posted to that CCP), and the amount of which does not change directly in response to the value of the derivative contract or contracts that the financial collateral secures.

Indirect exposure means an exposure that arises from the FDIC-supervised institution's investment in an investment fund which holds an investment in the FDIC-supervised institution's

own capital instrument or an investment in the capital of an unconsolidated financial institution. For an advanced approaches FDIC-supervised institution, indirect exposure also includes an investment in an investment fund that holds a covered debt instrument.

Insurance company means an insurance company as defined in section 201 of the Dodd-Frank Act (12 U.S.C. 5381).

Insurance underwriting company means an insurance company as defined in section 201 of the Dodd-Frank Act (12 U.S.C. 5381) that engages in insurance underwriting activities.

Insured depository institution means an insured depository institution as defined in section 3 of the Federal Deposit Insurance Act.

Interest rate derivative contract means a single-currency interest rate swap, basis swap, forward rate agreement, purchased interest rate option, when-issued securities, or any other instrument linked to interest rates that gives rise to similar counterparty credit risks.

International Lending Supervision Act means the International Lending Supervision Act of 1983 (12 U.S.C. 3901 *et seq.*).

Investing bank means, with respect to a securitization, an FDIC-supervised institution that assumes the credit risk of a securitization exposure (other than an originating FDIC-supervised institution of the securitization). In the typical synthetic securitization, the investing FDIC-supervised institution sells credit protection on a pool of underlying exposures to the originating FDIC-supervised institution.

Investment Company Act means the Investment Company Act of 1940 (15 U.S.C. 80 a–1 *et seq.*)

Investment fund means a company:

(1) Where all or substantially all of the assets of the company are financial assets; and

(2) That has no material liabilities.

Investment grade means that the entity to which the FDIC-supervised institution is exposed through a loan or security, or the reference entity with respect to a credit derivative, has adequate capacity to meet financial commitments for the projected life of the asset or exposure. Such an entity or reference entity has adequate capacity to meet financial commitments if the risk of its default is low and the full and timely repayment of principal and interest is expected.

Investment in a covered debt instrument means an FDIC-supervised institution's net long position calculated in accordance with § 324.22(h) in a covered debt instrument, including direct, indirect, and synthetic exposures to the debt instrument, excluding any underwriting positions held by the FDIC-supervised institution for five or fewer business days.

Investment in the capital of an unconsolidated financial institution means a net long position calculated in accordance with § 324.22(h) in an instrument that is recognized as capital for regulatory purposes by the primary supervisor of an unconsolidated regulated financial institution or is an instrument that is part of the GAAP equity of an unconsolidated unregulated financial institution, including direct, indirect, and synthetic exposures to capital instruments, excluding underwriting positions held by the FDIC-supervised institution for five or fewer business days.

Investment in the FDIC-supervised institution's own capital instrument means a net long position calculated in accordance with § 324.22(h) in the FDIC-supervised institution's own common stock instrument, own additional tier 1 capital instrument or own tier 2 capital instrument, including direct, indirect, or synthetic exposures to such capital instruments. An investment in the FDIC-supervised institution's own capital instrument includes any contractual obligation to purchase such capital instrument.

Junior-lien residential mortgage exposure means a residential mortgage exposure that is not a first-lien residential mortgage exposure.

Main index means the Standard & Poor's 500 Index, the FTSE All-World Index, and any other index for which the FDIC-supervised institution can demonstrate to the satisfaction of the FDIC that the equities represented in the index have comparable liquidity, depth of market, and size of bid-ask spreads as equities in the Standard &

Poor's 500 Index and FTSE All-World Index.

Market risk FDIC-supervised institution means an FDIC-supervised institution that is described in § 324.201(b).

Minimum transfer amount means the smallest amount of variation margin that may be transferred between counterparties to a netting set pursuant to the variation margin agreement.

Money market fund means an investment fund that is subject to 17 CFR 270.2a–7 or any foreign equivalent thereof.

Mortgage servicing assets (MSAs) means the contractual rights owned by an FDIC-supervised institution to service for a fee mortgage loans that are owned by others.

Multilateral development bank (MDB) means the International Bank for Reconstruction and Development, the Multilateral Investment Guarantee Agency, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, and any other multilateral lending institution or regional development bank in which the U.S. government is a shareholder or contributing member or which the FDIC determines poses comparable credit risk.

National Bank Act means the National Bank Act (12 U.S.C. 1 *et seq.*).

Net independent collateral amount means the fair value amount of the independent collateral, as adjusted by the standard supervisory haircuts under § 324.132(b)(2)(ii), as applicable, that a counterparty to a netting set has posted to a FDIC-supervised institution less the fair value amount of the independent collateral, as adjusted by the standard supervisory haircuts under § 324.132(b)(2)(ii), as applicable, posted by the FDIC-supervised institution to the counterparty, excluding such amounts held in a bankruptcy remote manner or posted to a QCCP and held in conformance with the operational requirements in § 324.3.

Netting set means a group of transactions with a single counterparty that are subject to a qualifying master netting agreement. For derivative contracts, netting set also includes a single derivative contract between a FDIC-supervised institution and a single counterparty. For purposes of the internal model methodology under § 324.132(d), netting set also includes a group of transactions with a single counterparty that are subject to a qualifying cross-product master netting agreement and does not include a transaction:

(1) That is not subject to such a master netting agreement; or

(2) Where the FDIC-supervised institution has identified specific wrong-way risk.

Non-significant investment in the capital of an unconsolidated financial institution means an investment by an advanced approaches FDIC-supervised institution in the capital of an unconsolidated financial institution where the advanced approaches FDIC-supervised institution owns 10 percent or less of the issued and outstanding common stock of the unconsolidated financial institution.

N^{th}-to-default credit derivative means a credit derivative that provides credit protection only for the nth-defaulting reference exposure in a group of reference exposures.

OCC means the Office of the Comptroller of the Currency, U.S. Treasury.

Operating entity means a company established to conduct business with clients with the intention of earning a profit in its own right.

Original maturity with respect to an off-balance sheet commitment means the length of time between the date a commitment is issued and:

(1) For a commitment that is not subject to extension or renewal, the stated expiration date of the commitment; or

(2) For a commitment that is subject to extension or renewal, the earliest date on which the FDIC-supervised institution can, at its option, unconditionally cancel the commitment.

Originating FDIC-supervised institution, with respect to a securitization, means an FDIC-supervised institution that:

(1) Directly or indirectly originated or securitized the underlying exposures included in the securitization; or

(2) Serves as an ABCP program sponsor to the securitization.

Over-the-counter (OTC) derivative contract means a derivative contract that is not a cleared transaction. An OTC derivative includes a transaction:

(1) Between an FDIC-supervised institution that is a clearing member and a counterparty where the FDIC-supervised institution is acting as a financial intermediary and enters into a cleared transaction with a CCP that offsets the transaction with the counterparty; or

(2) In which an FDIC-supervised institution that is a clearing member provides a CCP a guarantee on the performance of the counterparty to the transaction.

Performance standby letter of credit (or performance bond) means an irrevocable obligation of an FDIC-supervised institution to pay a third-party beneficiary when a customer (account party) fails to perform on any contractual nonfinancial or commercial obligation. To the extent permitted by law or regulation, performance standby letters of credit include arrangements backing, among other things, subcontractors' and suppliers' performance, labor and materials contracts, and construction bids.

Pre-sold construction loan means any one-to-four family residential construction loan to a builder that meets the requirements of section 618(a)(1) or (2) of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991 (Pub. L. 102–233, 105 Stat. 1761) and the following criteria:

(1) The loan is made in accordance with prudent underwriting standards, meaning that the FDIC-supervised institution has obtained sufficient documentation that the buyer of the home has a legally binding written sales contract and has a firm written commitment for permanent financing of the home upon completion;

(2) The purchaser is an individual(s) that intends to occupy the residence and is not a partnership, joint venture, trust, corporation, or any other entity (including an entity acting as a sole proprietorship) that is purchasing one or more of the residences for speculative purposes;

(3) The purchaser has entered into a legally binding written sales contract for the residence;

(4) The purchaser has not terminated the contract;

(5) The purchaser has made a substantial earnest money deposit of no less than 3 percent of the sales price, which is subject to forfeiture if the purchaser terminates the sales contract; provided that, the earnest money deposit shall not be subject to forfeiture by reason of breach or termination of the sales contract on the part of the builder;

(6) The earnest money deposit must be held in escrow by the FDIC-supervised institution or an independent party in a fiduciary capacity, and the escrow agreement must provide that in an event of default arising from the cancellation of the sales contract by the purchaser of the residence, the escrow funds shall be used to defray any cost incurred by the FDIC-supervised institution;

(7) The builder must incur at least the first 10 percent of the direct costs of construction of the residence (that is, actual costs of the land, labor, and material) before any drawdown is made under the loan;

(8) The loan may not exceed 80 percent of the sales price of the presold residence; and

(9) The loan is not more than 90 days past due, or on nonaccrual.

Protection amount (P) means, with respect to an exposure hedged by an eligible guarantee or eligible credit derivative, the effective notional amount of the guarantee or credit derivative, reduced to reflect any currency mismatch, maturity mismatch, or lack of restructuring coverage (as provided in § 324.36 or § 324.134, as appropriate).

Publicly-traded means traded on:

(1) Any exchange registered with the SEC as a national securities exchange under section 6 of the Securities Exchange Act; or

(2) Any non-U.S.-based securities exchange that:

(i) Is registered with, or approved by, a national securities regulatory authority; and

(ii) Provides a liquid, two-way market for the instrument in question.

Public sector entity (PSE) means a state, local authority, or other governmental subdivision below the sovereign level.

Qualifying central bank means:

(1) A Federal Reserve Bank;

(2) The European Central Bank; and

(3) The central bank of any member country of the Organisation for Economic Co-operation and Development, if:

(i) Sovereign exposures to the member country would receive a zero percent risk-weight under § 324.32; and

(ii) The sovereign debt of the member country is not in default or has not been in default during the previous 5 years.

Qualifying central counterparty (QCCP) means a central counterparty that:

(1)(i) Is a designated financial market utility (FMU) under Title VIII of the Dodd-Frank Act;

(ii) If not located in the United States, is regulated and supervised in a manner equivalent to a designated FMU; or

(iii) Meets the following standards:

(A) The central counterparty requires all parties to contracts cleared by the counterparty to be fully collateralized on a daily basis;

(B) The FDIC-supervised institution demonstrates to the satisfaction of the FDIC that the central counterparty:

(*1*) Is in sound financial condition;

(*2*) Is subject to supervision by the Federal Reserve, the CFTC, or the Securities Exchange Commission (SEC), or, if the central counterparty is not located in the United States, is subject to effective oversight by a national supervisory authority in its home country; and

(*3*) Meets or exceeds the risk-management standards for central counterparties set forth in regulations established by the Federal Reserve, the CFTC, or the SEC under Title VII or Title VIII of the Dodd-Frank Act; or if the central counterparty is not located in the United States, meets or exceeds similar risk-management standards established under the law of its home country that are consistent with international standards for central counterparty risk management as established by the relevant standard setting body of the Bank of International Settlements; and

(2)(i) Provides the FDIC-supervised institution with the central counterparty's hypothetical capital requirement or the information necessary to calculate such hypothetical capital requirement, and other information the FDIC-supervised institution is required to obtain under §§ 324.35(d)(3) and 324.133(d)(3);

(ii) Makes available to the FDIC and the CCP's regulator the information described in paragraph (2)(i) of this definition; and

(iii) Has not otherwise been determined by the FDIC to not be a QCCP due to its financial condition, risk profile, failure to meet supervisory risk management standards, or other weaknesses or supervisory concerns that are inconsistent with the risk weight assigned to qualifying central counterparties under §§ 324.35 and 324.133.

(3) *Exception.* A QCCP that fails to meet the requirements of a QCCP in the future may still be treated as a QCCP under the conditions specified in § 324.3(f).

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

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

(2) The agreement provides the FDIC-supervised institution the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case,

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

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar[7] to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

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

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 382 of this title, subpart I of part 252 of this title or part 47 of this title, as applicable;

(3) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it otherwise would make under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement); and

(4) In order to recognize an agreement as a qualifying master netting agreement for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 324.3(d) with respect to that agreement.

Regulated financial institution means a financial institution subject to consolidated supervision and regulation comparable to that imposed on the following U.S. financial institutions: Depository institutions, depository institution holding companies, nonbank financial companies supervised by the Federal Reserve, designated financial market utilities, securities broker-dealers, credit unions, or insurance companies.

Repo-style transaction means a repurchase or reverse repurchase transaction, or a securities borrowing or securities lending transaction, including a transaction in which the FDIC-supervised institution acts as agent for a customer and indemnifies the customer against loss, provided that:

(1) The transaction is based solely on liquid and readily marketable securities, cash, or gold;

(2) The transaction is marked-to-fair value daily and subject to daily margin maintenance requirements;

(3)(i) The transaction is a ''securities contract'' or ''repurchase agreement'' under section 555 or 559, respectively, of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act, or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act or the Federal Reserve's Regulation EE (12 CFR part 231); or

(ii) If the transaction does not meet the criteria set forth in paragraph (3)(i) of this definition, then either:

(A) The transaction is executed under an agreement that provides the FDIC-supervised institution the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case,

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

(*i*) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar[8] to the U.S. laws referenced in this paragraph (3)(ii)(A)(*I*)(*i*)

[7] The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

[8] The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

in order to facilitate the orderly resolution of the defaulting counterparty;

(*ii*) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (3)(ii)(A)(*1*)(*i*) of this definition; and

(*2*) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 382 of this title, subpart I of part 252 of this title or part 47 of this title, as applicable; or

(B) The transaction is:

(*1*) Either overnight or unconditionally cancelable at any time by the FDIC-supervised institution; and

(*2*) Executed under an agreement that provides the FDIC-supervised institution the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set off collateral promptly upon an event of counterparty default; and

(4) In order to recognize an exposure as a repo-style transaction for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 324.3(e) of this part with respect to that exposure.

Resecuritization means a securitization which has more than one underlying exposure and in which one or more of the underlying exposures is a securitization exposure.

Resecuritization exposure means:

(1) An on- or off-balance sheet exposure to a resecuritization;

(2) An exposure that directly or indirectly references a resecuritization exposure.

(3) An exposure to an asset-backed commercial paper program is not a resecuritization exposure if either:

(i) The program-wide credit enhancement does not meet the definition of a resecuritization exposure; or

(ii) The entity sponsoring the program fully supports the commercial paper through the provision of liquidity so that the commercial paper holders effectively are exposed to the default risk of the sponsor instead of the underlying exposures.

Residential mortgage exposure means an exposure (other than a securitization exposure, equity exposure, statutory multifamily mortgage, or presold construction loan):

(1)(i) That is primarily secured by a first or subsequent lien on one-to-four family residential property; or

(ii) With an original and outstanding amount of $1 million or less that is primarily secured by a first or subsequent lien on residential property that is not one-to-four family; and

(2) For purposes of calculating capital requirements under subpart E of this part, managed as part of a segment of exposures with homogeneous risk characteristics and not on an individual-exposure basis.

Revenue obligation means a bond or similar obligation that is an obligation of a PSE, but which the PSE is committed to repay with revenues from the specific project financed rather than general tax funds.

Savings and loan holding company means a savings and loan holding company as defined in section 10 of the Home Owners' Loan Act (12 U.S.C. 1467a).

Securities and Exchange Commission (SEC) means the U.S. Securities and Exchange Commission.

Securities Exchange Act means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Securitization exposure means:

(1) An on-balance sheet or off-balance sheet credit exposure (including credit-enhancing representations and warranties) that arises from a traditional securitization or synthetic securitization (including a resecuritization), or

(2) An exposure that directly or indirectly references a securitization exposure described in paragraph (1) of this definition.

Securitization special purpose entity (securitization SPE) means a corporation, trust, or other entity organized for the specific purpose of holding underlying exposures of a securitization, the activities of which are limited to those appropriate to accomplish this purpose, and the structure of which is intended to isolate the underlying exposures held by the entity from the

credit risk of the seller of the underlying exposures to the entity.

Separate account means a legally segregated pool of assets owned and held by an insurance company and maintained separately from the insurance company's general account assets for the benefit of an individual contract holder. To be a separate account:

(1) The account must be legally recognized as a separate account under applicable law;

(2) The assets in the account must be insulated from general liabilities of the insurance company under applicable law in the event of the insurance company's insolvency;

(3) The insurance company must invest the funds within the account as directed by the contract holder in designated investment alternatives or in accordance with specific investment objectives or policies; and

(4) All investment gains and losses, net of contract fees and assessments, must be passed through to the contract holder, provided that the contract may specify conditions under which there may be a minimum guarantee but must not include contract terms that limit the maximum investment return available to the policyholder.

Servicer cash advance facility means a facility under which the servicer of the underlying exposures of a securitization may advance cash to ensure an uninterrupted flow of payments to investors in the securitization, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the underlying exposures.

Significant investment in the capital of an unconsolidated financial institution means an investment by an advanced approaches FDIC-supervised institution in the capital of an unconsolidated financial institution where the advanced approaches FDIC-supervised institution owns more than 10 percent of the issued and outstanding common stock of the unconsolidated financial institution.

Small Business Act means the Small Business Act (15 U.S.C. 631 *et seq.*).

Small Business Investment Act means the Small Business Investment Act of 1958 (15 U.S.C. 681 *et seq.*).

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

Sovereign default means noncompliance by a sovereign with its external debt service obligations or the inability or unwillingness of a sovereign government to service an existing loan according to its original terms, as evidenced by failure to pay principal and interest timely and fully, arrearages, or restructuring.

Sovereign exposure means:

(1) A direct exposure to a sovereign; or

(2) An exposure directly and unconditionally backed by the full faith and credit of a sovereign.

Specific wrong-way risk means wrong-way risk that arises when either:

(1) The counterparty and issuer of the collateral supporting the transaction; or

(2) The counterparty and the reference asset of the transaction, are affiliates or are the same entity.

Speculative grade means the reference entity has adequate capacity to meet financial commitments in the near term, but is vulnerable to adverse economic conditions, such that should economic conditions deteriorate, the reference entity would present an elevated default risk.

Standardized market risk-weighted assets means the standardized measure for market risk calculated under § 324.204 multiplied by 12.5.

Standardized total risk-weighted assets means:

(1) The sum of:

(i) Total risk-weighted assets for general credit risk as calculated under § 324.31;

(ii) Total risk-weighted assets for cleared transactions and default fund contributions as calculated under § 324.35;

(iii) Total risk-weighted assets for unsettled transactions as calculated under § 324.38;

(iv) Total risk-weighted assets for securitization exposures as calculated under § 324.42;

(v) Total risk-weighted assets for equity exposures as calculated under §§ 324.52 and 324.53; and

(vi) For a market risk FDIC-supervised institution only, standardized market risk-weighted assets; minus

(2) Any amount of the FDIC-supervised institution's allowance for loan and lease losses or adjusted allowance for credit losses, as applicable, that is not included in tier 2 capital and any amount of ''allocated transfer risk reserves.''

State savings association means a State savings association as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3)), the deposits of which are insured by the Corporation. It includes a building and loan, savings and loan, or homestead association, or a cooperative bank (other than a cooperative bank which is a state bank as defined in section 3(a)(2) of the Federal Deposit Insurance Act) organized and operating according to the laws of the State in which it is chartered or organized, or a corporation (other than a bank as defined in section 3(a)(1) of the Federal Deposit Insurance Act) that the Board of Directors of the Federal Deposit Insurance Corporation determine to be operating substantially in the same manner as a state savings association.

Statutory multifamily mortgage means a loan secured by a multifamily residential property that meets the requirements under section 618(b)(1) of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, and that meets the following criteria:[9]

(1) The loan is made in accordance with prudent underwriting standards;

(2) The principal amount of the loan at origination does not exceed 80 percent of the value of the property (or 75 percent of the value of the property if the loan is based on an interest rate that changes over the term of the loan) where the value of the property is the lower of the acquisition cost of the property or the appraised (or, if appropriate, evaluated) value of the property;

(3) All principal and interest payments on the loan must have been made on a timely basis in accordance with the terms of the loan for at least one year prior to applying a 50 percent risk weight to the loan, or in the case where an existing owner is refinancing a loan on the property, all principal and interest payments on the loan being refinanced must have been made on a timely basis in accordance with the terms of the loan for at least one year prior to applying a 50 percent risk weight to the loan;

(4) Amortization of principal and interest on the loan must occur over a period of not more than 30 years and the minimum original maturity for repayment of principal must not be less than 7 years;

(5) Annual net operating income (before making any payment on the loan) generated by the property securing the loan during its most recent fiscal year must not be less than 120 percent of the loan's current annual debt service (or 115 percent of current annual debt service if the loan is based on an interest rate that changes over the term of the loan) or, in the case of a cooperative or other not-for-profit housing project, the property must generate sufficient cash flow to provide comparable protection to the FDIC-supervised institution; and

(6) The loan is not more than 90 days past due, or on nonaccrual.

Sub-speculative grade means the reference entity depends on favorable economic conditions to meet its financial commitments, such that should such economic conditions deteriorate the reference entity likely would default on its financial commitments.

Subsidiary means, with respect to a company, a company controlled by that company.

Synthetic exposure means an exposure whose value is linked to the value of an investment in the FDIC-supervised institution's own capital instrument or to the value of an investment in the capital of an unconsolidated financial institution. For an advanced approaches FDIC-supervised institution, synthetic exposure includes an exposure whose value is linked to the value of an investment in a covered debt instrument.

Synthetic securitization means a transaction in which:

[9] The types of loans that qualify as loans secured by multifamily residential properties are listed in the instructions for preparation of the Call Report.

(1) All or a portion of the credit risk of one or more underlying exposures is retained or transferred to one or more third parties through the use of one or more credit derivatives or guarantees (other than a guarantee that transfers only the credit risk of an individual retail exposure);

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures; and

(4) All or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities).

Tangible capital means the amount of core capital (Tier 1 capital), as defined in accordance with § 324.2, plus the amount of outstanding perpetual preferred stock (including related surplus) not included in Tier 1 capital.

Tangible equity means the amount of Tier 1 capital, as calculated in accordance with § 324.2, plus the amount of outstanding perpetual preferred stock (including related surplus) not included in Tier 1 capital.

Tier 1 capital means the sum of common equity tier 1 capital and additional tier 1 capital.

Tier 1 minority interest means the tier 1 capital of a consolidated subsidiary of an FDIC-supervised institution that is not owned by the FDIC-supervised institution.

Tier 2 capital is defined in § 324.20(d).

Total capital means the sum of tier 1 capital and tier 2 capital.

Total capital minority interest means the total capital of a consolidated subsidiary of an FDIC-supervised institution that is not owned by the FDIC-supervised institution.

Total leverage exposure is defined in § 324.10(c)(2).

Traditional securitization means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties other than through the use of credit derivatives or guarantees;

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures;

(4) All or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities);

(5) The underlying exposures are not owned by an operating company;

(6) The underlying exposures are not owned by a small business investment company defined in section 302 of the Small Business Investment Act;

(7) The underlying exposures are not owned by a firm an investment in which qualifies as a community development investment under section 24 (Eleventh) of the National Bank Act;

(8) The FDIC may determine that a transaction in which the underlying exposures are owned by an investment firm that exercises substantially unfettered control over the size and composition of its assets, liabilities, and off-balance sheet exposures is not a traditional securitization based on the transaction's leverage, risk profile, or economic substance;

(9) The FDIC may deem a transaction that meets the definition of a traditional securitization, notwithstanding paragraph (5), (6), or (7) of this definition, to be a traditional securitization based on the transaction's leverage, risk profile, or economic substance; and

(10) The transaction is not:

(i) An investment fund;

(ii) A collective investment fund (as defined in 12 CFR 344.3 (state nonmember bank), and 12 CFR 390.203 (state savings association);

(iii) An employee benefit plan (as defined in paragraphs (3) and (32) of section 3 of ERISA), a ''governmental plan'' (as defined in 29 U.S.C. 1002(32)) that complies with the tax deferral qualification requirements provided in the Internal Revenue Code, or any similar employee benefit plan established under the laws of a foreign jurisdiction;

(iv) A synthetic exposure to the capital of a financial institution to the extent deducted from capital under § 324.22; or

(v) Registered with the SEC under the Investment Company Act or foreign equivalents thereof.

Tranche means all securitization exposures associated with a securitization that have the same seniority level.

Two-way market means a market where there are independent bona fide offers to buy and sell so that a price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined within one day and settled at that price within a relatively short time frame conforming to trade custom.

Unconditionally cancelable means with respect to a commitment, that an FDIC-supervised institution may, at any time, with or without cause, refuse to extend credit under the commitment (to the extent permitted under applicable law).

Underlying exposures means one or more exposures that have been securitized in a securitization transaction.

Unregulated financial institution means, for purposes of § 324.131, a financial institution that is not a regulated financial institution, including any financial institution that would meet the definition of ''financial institution'' under this section but for the ownership interest thresholds set forth in paragraph (4)(i) of that definition.

U.S. Government agency means an instrumentality of the U.S. Government whose obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the U.S. Government.

Value-at-Risk (VaR) means the estimate of the maximum amount that the value of one or more exposures could decline due to market price or rate movements during a fixed holding period within a stated confidence interval.

Variation margin means financial collateral that is subject to a collateral agreement provided by one party to its counterparty to meet the performance of the first party's obligations under one or more transactions between the parties as a result of a change in value of such obligations since the last time such financial collateral was provided.

Variation margin agreement means an agreement to collect or post variation margin.

Variation margin amount means the fair value amount of the variation margin, as adjusted by the standard supervisory haircuts under § 324.132(b)(2)(ii), as applicable, that a counterparty to a netting set has posted to a FDIC-supervised institution less the fair value amount of the variation margin, as adjusted by the standard supervisory haircuts under § 324.132(b)(2)(ii), as applicable, posted by the FDIC-supervised institution to the counterparty.

Variation margin threshold means the amount of credit exposure of a FDIC-supervised institution to its counterparty that, if exceeded, would require the counterparty to post variation margin to the FDIC-supervised institution pursuant to the variation margin agreement.

Volatility derivative contract means a derivative contract in which the payoff of the derivative contract explicitly depends on a measure of the volatility of an underlying risk factor to the derivative contract.

Wrong-way risk means the risk that arises when an exposure to a particular counterparty is positively correlated with the probability of default of such counterparty itself.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20758, Apr. 14, 2014; 79 FR 44124, July 30, 2014; 79 FR 57748, Sept. 26, 2014; 80 FR 41422, July 15, 2015; 81 FR 71354, Oct. 17, 2016; 82 FR 50260, Oct. 30, 2017; 84 FR 4246, Feb. 14, 2019; 84 FR 35270, July 22, 2019; 84 FR 59277, Nov. 1, 2019; 84 FR 68033, Dec. 13, 2019; 85 FR 4429, Jan. 24, 2020; 85 FR 4578, Jan. 27, 2020; 85 FR 20393, Apr. 13, 2020; 86 FR 739, Jan. 6, 2021]

§ 324.3 Operational requirements for counterparty credit risk.

For purposes of calculating risk-weighted assets under subparts D and E of this part:

(a) *Cleared transaction*. In order to recognize certain exposures as cleared transactions pursuant to paragraphs (1)(ii), (iii), or (iv) of the definition of

''cleared transaction'' in § 324.2, the exposures must meet the applicable requirements set forth in this paragraph (a).

(1) The offsetting transaction must be identified by the CCP as a transaction for the clearing member client.

(2) The collateral supporting the transaction must be held in a manner that prevents the FDIC-supervised institution from facing any loss due to an event of default, including from a liquidation, receivership, insolvency, or similar proceeding of either the clearing member or the clearing member's other clients. Omnibus accounts established under 17 CFR parts 190 and 300 satisfy the requirements of this paragraph (a).

(3) The FDIC-supervised institution must conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that in the event of a legal challenge (including one resulting from a default or receivership, insolvency, liquidation, or similar proceeding) the relevant court and administrative authorities would find the arrangements of paragraph (a)(2) of this section to be legal, valid, binding and enforceable under the law of the relevant jurisdictions.

(4) The offsetting transaction with a clearing member must be transferable under the transaction documents and applicable laws in the relevant jurisdiction(s) to another clearing member should the clearing member default, become insolvent, or enter receivership, insolvency, liquidation, or similar proceedings.

(b) *Eligible margin loan*. In order to recognize an exposure as an eligible margin loan as defined in § 324.2, an FDIC-supervised institution must conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that the agreement underlying the exposure:

(1) Meets the requirements of paragraph (1)(iii) of the definition of eligible margin loan in § 324.2, and

(2) Is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

(c) *Qualifying cross-product master netting agreement*. In order to recognize an agreement as a qualifying cross-product master netting agreement as defined in § 324.101, an FDIC-supervised institution must obtain a written legal opinion verifying the validity and enforceability of the agreement under applicable law of the relevant jurisdictions if the counterparty fails to perform upon an event of default, including upon receivership, insolvency, liquidation, or similar proceeding.

(d) *Qualifying master netting agreement*. In order to recognize an agreement as a qualifying master netting agreement as defined in § 324.2, an FDIC-supervised institution must:

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

(i) The agreement meets the requirements of paragraph (2) of the definition of qualifying master netting agreement in § 324.2; and

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

(2) Establish and maintain written procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of the definition of qualifying master netting agreement in § 324.2.

(e) *Repo-style transaction*. In order to recognize an exposure as a repo-style transaction as defined in § 324.2, an FDIC-supervised institution must conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that the agreement underlying the exposure:

(1) Meets the requirements of paragraph (3) of the definition of repo-style transaction in § 324.2, and

(2) Is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

(f) *Failure of a QCCP to satisfy the rule's requirements*. If an FDIC-supervised institution determines that a CCP ceases to be a QCCP due to the

failure of the CCP to satisfy one or more of the requirements set forth in paragraphs (2)(i) through (2)(iii) of the definition of a QCCP in § 324.2, the FDIC-supervised institution may continue to treat the CCP as a QCCP for up to three months following the determination. If the CCP fails to remedy the relevant deficiency within three months after the initial determination, or the CCP fails to satisfy the requirements set forth in paragraphs (2)(i) through (2)(iii) of the definition of a QCCP continuously for a three-month period after remedying the relevant deficiency, an FDIC-supervised institution may not treat the CCP as a QCCP for the purposes of this part until after the FDIC-supervised institution has determined that the CCP has satisfied the requirements in paragraphs (2)(i) through (2)(iii) of the definition of a QCCP for three continuous months.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20758, Apr. 14, 2014]

§ 324.4 Inadequate capital as an unsafe or unsound practice or condition.

(a) *General.* As a condition of Federal deposit insurance, all insured depository institutions must remain in a safe and sound condition.

(b) *Unsafe or unsound practice.* Any insured depository institution which has less than its minimum leverage capital requirement is deemed to be engaged in an unsafe or unsound practice pursuant to section 8(b)(1) and/or 8(c) of the Federal Deposit Insurance Act (12 U.S.C. 1818(b)(1) and/or 1818(c)). Except that such an insured depository institution which has entered into and is in compliance with a written agreement with the FDIC or has submitted to the FDIC and is in compliance with a plan approved by the FDIC to increase its leverage capital ratio to such level as the FDIC deems appropriate and to take such other action as may be necessary for the insured depository institution to be operated so as not to be engaged in such an unsafe or unsound practice will not be deemed to be engaged in an unsafe or unsound practice pursuant to section 8(b)(1) and/or 8(c) of the Federal Deposit Insurance Act (12 U.S.C. 1818(b)(1) and/or 1818(c)) on account of its capital ratios. The FDIC is not precluded from taking action under section 8(b)(1), section 8(c) or any other enforcement action against an insured depository institution with capital above the minimum requirement if the specific circumstances deem such action to be appropriate.

(c) *Unsafe or unsound condition.* Any insured depository institution with a ratio of tier 1 capital to total assets[10] that is less than two percent is deemed to be operating in an unsafe or unsound condition pursuant to section 8(a) of the Federal Deposit Insurance Act (12 U.S.C. 1818(a)).

(1) An insured depository institution with a ratio of tier 1 capital to total assets of less than two percent which has entered into and is in compliance with a written agreement with the FDIC (or any other insured depository institution with a ratio of tier 1 capital to total assets of less than two percent which has entered into and is in compliance with a written agreement with its primary Federal regulator and to which agreement the FDIC is a party) to increase its tier 1 leverage capital ratio to such level as the FDIC deems appropriate and to take such other action as may be necessary for the insured depository institution to be operated in a safe and sound manner, will not be subject to a proceeding by the FDIC pursuant to 12 U.S.C. 1818(a) on account of its capital ratios.

(2) An insured depository institution with a ratio of tier 1 capital to total assets that is equal to or greater than two percent may be operating in an unsafe or unsound condition. The FDIC is not precluded from bringing an action pursuant to 12 U.S.C. 1818(a) where an insured depository institution has a ratio of tier 1 capital to total assets that is equal to or greater than two percent.

[78 FR 55471, Sept. 10, 2013, as amended at 81 FR 71354, Oct. 17, 2016]

[10] For purposes of this paragraph (c), until January 1, 2015, the term total assets shall have the same meaning as provided in 12 CFR 325.2(x). As of January 1, 2015, the term total assets shall have the same meaning as provided in 12 CFR 324.401(g).

§ 324.5 Issuance of directives.

(a) *General.* A directive is a final order issued to an FDIC-supervised institution that fails to maintain capital at or above the minimum leverage capital requirement as set forth in §§ 324.4 and 324.10. A directive issued pursuant to this section, including a plan submitted under a directive, is enforceable in the same manner and to the same extent as a final cease-and-desist order issued under section 8(b) of the Federal Deposit Insurance Act (12 U.S.C. 1818(b)).

(b) *Issuance of directives.* If an FDIC-supervised institution is operating with less than the minimum leverage capital requirement established by this regulation, the FDIC Board of Directors, or its designee(s), may issue and serve upon any FDIC-supervised institution a directive requiring the FDIC-supervised institution to restore its capital to the minimum leverage capital requirement within a specified time period. The directive may require the FDIC-supervised institution to submit to the appropriate FDIC regional director, or other specified official, for review and approval, a plan describing the means and timing by which the FDIC-supervised institution shall achieve the minimum leverage capital requirement. After the FDIC has approved the plan, the FDIC-supervised institution may be required under the terms of the directive to adhere to and monitor compliance with the plan. The directive may be issued during the course of an examination of the FDIC-supervised institution, or at any other time that the FDIC deems appropriate, if the FDIC-supervised institution is found to be operating with less than the minimum leverage capital requirement.

(c) *Notice and opportunity to respond to issuance of a directive.* (1) If the FDIC makes an initial determination that a directive should be issued to an FDIC-supervised institution pursuant to paragraph (b) of this section, the FDIC, through the appropriate designated official(s), shall serve written notification upon the FDIC-supervised institution of its intent to issue a directive. The notice shall include the current leverage capital ratio, the basis upon which said ratio was calculated, the proposed capital injection, the proposed date for achieving the minimum leverage capital requirement and any other relevant information concerning the decision to issue a directive. When deemed appropriate, specific requirements of a proposed plan for meeting the minimum leverage capital requirement may be included in the notice.

(2) Within 14 days of receipt of notification, the FDIC-supervised institution may file with the appropriate designated FDIC official(s) a written response, explaining why the directive should not be issued, seeking modification of its terms, or other appropriate relief. The FDIC-supervised institution's response shall include any information, mitigating circumstances, documentation, or other relevant evidence which supports its position, and may include a plan for attaining the minimum leverage capital requirement.

(3)(i) After considering the FDIC-supervised institution's response, the appropriate designated FDIC official(s) shall serve upon the FDIC-supervised institution a written determination addressing the FDIC-supervised institution's response and setting forth the FDIC's findings and conclusions in support of any decision to issue or not to issue a directive. The directive may be issued as originally proposed or in modified form. The directive may order the FDIC-supervised institution to:

(A) Achieve the minimum leverage capital requirement established by this regulation by a certain date;

(B) Submit for approval and adhere to a plan for achieving the minimum leverage capital requirement;

(C) Take other action as is necessary to achieve the minimum leverage capital requirement; or

(D) A combination of the above actions.

(ii) If a directive is to be issued, it may be served upon the FDIC-supervised institution along with the final determination.

(4) Any FDIC-supervised institution, upon a change in circumstances, may request the FDIC to reconsider the terms of a directive and may propose changes in the plan under which it is operating to meet the minimum leverage capital requirement. The directive

and plan continue in effect while such request is pending before the FDIC.

(5) All papers filed with the FDIC must be postmarked or received by the appropriate designated FDIC official(s) within the prescribed time limit for filing.

(6) Failure by the FDIC-supervised institution to file a written response to notification of intent to issue a directive within the specified time period shall constitute consent to the issuance of such directive.

(d) *Enforcement of a directive.* (1) Whenever an FDIC-supervised institution fails to follow the directive or to submit or adhere to its capital adequacy plan, the FDIC may seek enforcement of the directive in the appropriate United States district court, pursuant to 12 U.S.C. 3907(b)(2)(B)(ii), in the same manner and to the same extent as if the directive were a final cease-and-desist order. In addition to enforcement of the directive, the FDIC may seek assessment of civil money penalties for violation of the directive against any FDIC-supervised institution, any officer, director, employee, agent, or other person participating in the conduct of the affairs of the FDIC-supervised institution, pursuant to 12 U.S.C. 3909(d).

(2) The directive may be issued separately, in conjunction with, or in addition to, any other enforcement mechanisms available to the FDIC, including cease-and-desist orders, orders of correction, the approval or denial of applications, or any other actions authorized by law. In addition to addressing an FDIC-supervised institution's minimum leverage capital requirement, the capital directive may also address minimum risk-based capital requirements that are to be maintained and calculated in accordance with § 324.10, and, for state savings associations, the minimum tangible capital requirements set for in § 324.10.

§§ 324.6–324.9 [Reserved]

Subpart B—Capital Ratio Requirements and Buffers

§ 324.10 Minimum capital requirements.

(a) *Minimum capital requirements.* (1) An FDIC-supervised institution must maintain the following minimum capital ratios:

(i) A common equity tier 1 capital ratio of 4.5 percent.

(ii) A tier 1 capital ratio of 6 percent.

(iii) A total capital ratio of 8 percent.

(iv) A leverage ratio of 4 percent.

(v) For advanced approaches FDIC-supervised institutions or for Category III FDIC-regulated institutions, a supplementary leverage ratio of 3 percent.

(vi) For state savings associations, a tangible capital ratio of 1.5 percent.

(2) A qualifying community banking organization (as defined in § 324.12), that is subject to the community bank leverage ratio framework (as defined in § 324.12), is considered to have met the minimum capital requirements in this paragraph (a).

(b) *Standardized capital ratio calculations.* Other than as provided in paragraph (c) of this section:

(1) *Common equity tier 1 capital ratio.* An FDIC-supervised institution's common equity tier 1 capital ratio is the ratio of the FDIC-supervised institution's common equity tier 1 capital to standardized total risk-weighted assets;

(2) *Tier 1 capital ratio.* An FDIC-supervised institution's tier 1 capital ratio is the ratio of the FDIC-supervised institution's tier 1 capital to standardized total risk-weighted assets;

(3) *Total capital ratio.* An FDIC-supervised institution's total capital ratio is the ratio of the FDIC-supervised institution's total capital to standardized total risk-weighted assets; and

(4) *Leverage ratio.* An FDIC-supervised institution's leverage ratio is the ratio of the FDIC-supervised institution's tier 1 capital to the FDIC-supervised institution's average total consolidated assets as reported on the FDIC-supervised institution's Call Report minus amounts deducted from tier 1 capital under § 324.22(a), (c), and (d).

(5) *State savings association tangible capital ratio*. (i) Until January 1, 2015, a state savings association shall determine its tangible capital ratio in accordance with 12 CFR 390.468.

(ii) As of January 1, 2015, a state savings association's tangible capital ratio is the ratio of the state savings association's core capital (tier 1 capital) to total assets. For purposes of this paragraph, the term total assets shall have the meaning provided in § 324.401(g).

(c) *Supplementary leverage ratio*. (1) A Category III FDIC-supervised institution or advanced approaches FDIC-supervised institution must determine its supplementary leverage ratio in accordance with this paragraph, beginning with the calendar quarter immediately following the quarter in which the FDIC-supervised institution is identified as a Category III FDIC-supervised institution. An advanced approaches FDIC-supervised institution's or a Category III FDIC-supervised institution's supplementary leverage ratio is the ratio of its tier 1 capital to total leverage exposure, the latter of which is calculated as the sum of:

(i) The mean of the on-balance sheet assets calculated as of each day of the reporting quarter; and

(ii) The mean of the off-balance sheet exposures calculated as of the last day of each of the most recent three months, minus the applicable deductions under § 324.22(a), (c), and (d).

(2) For purposes of this part, *total leverage exposure* means the sum of the items described in paragraphs (c)(2)(i) through (viii) of this section, as adjusted pursuant to paragraph (c)(2)(ix) of this section for a clearing member FDIC-supervised institution and paragraph (c)(2)(x) of this section for a custody bank:

(i) The balance sheet carrying value of all of the FDIC-supervised institution's on-balance sheet assets, *plus* the value of securities sold under a repurchase transaction or a securities lending transaction that qualifies for sales treatment under GAAP, *less* amounts deducted from tier 1 capital under § 324.22(a), (c), and (d), and *less* the value of securities received in security-for-security repo-style transactions, where the FDIC-supervised institution acts as a securities lender and includes the securities received in its on-balance sheet assets but has not sold or re-hypothecated the securities received, and, for an FDIC-supervised institution that uses the standardized approach for counterparty credit risk under § 324.132(c) for its standardized risk-weighted assets, *less* the fair value of any derivative contracts;

(ii)(A) For an FDIC-supervised institution that uses the current exposure methodology under § 324.34(b) for its standardized risk-weighted assets, the potential future credit exposure (PFE) for each derivative contract or each single-product netting set of derivative contracts (including a cleared transaction except as provided in paragraph (c)(2)(ix) of this section and, at the discretion of the FDIC-supervised institution, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP), to which the FDIC-supervised institution is a counterparty as determined under § 324.34, but without regard to § 324.34(c), provided that:

(*1*) An FDIC-supervised institution may choose to exclude the PFE of all credit derivatives or other similar instruments through which it provides credit protection when calculating the PFE under § 324.34, but without regard to § 324.34(c), provided that it does not adjust the net-to-gross ratio (NGR); and

(*2*) An FDIC-supervised institution that chooses to exclude the PFE of credit derivatives or other similar instruments through which it provides credit protection pursuant to this paragraph (c)(2)(ii)(A) must do so consistently over time for the calculation of the PFE for all such instruments; or

(B)(*1*) For an FDIC-supervised institution that uses the standardized approach for counterparty credit risk under section § 324.132(c) for its standardized risk-weighted assets, the PFE for each netting set to which the FDIC-supervised institution is a counterparty (including cleared transactions except as provided in paragraph

(c)(2)(ix) of this section and, at the discretion of the FDIC-supervised institution, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP), as determined under § 324.132(c)(7), in which the term C in § 324.132(c)(7)(i) equals zero, and, for any counterparty that is not a commercial end-user, multiplied by 1.4. For purposes of this paragraph (c)(2)(ii)(B)(*1*), an FDIC-supervised institution may set the value of the term C in § 324.132(c)(7)(i) equal to the amount of collateral posted by a clearing member client of the FDIC-supervised institution in connection with the client-facing derivative transactions within the netting set; and

(*2*) An FDIC-supervised institution may choose to exclude the PFE of all credit derivatives or other similar instruments through which it provides credit protection when calculating the PFE under § 324.132(c), provided that it does so consistently over time for the calculation of the PFE for all such instruments;

(iii)(A)(*1*) For an FDIC-supervised institution that uses the current exposure methodology under § 324.34(b) for its standardized risk-weighted assets, the amount of cash collateral that is received from a counterparty to a derivative contract and that has offset the mark-to-fair value of the derivative asset, or cash collateral that is posted to a counterparty to a derivative contract and that has reduced the FDIC-supervised institution's on-balance sheet assets, unless such cash collateral is all or part of variation margin that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section; and

(*2*) The variation margin is used to reduce the current credit exposure of the derivative contract, calculated as described in § 324.34(b), and not the PFE; and

(*3*) For the purpose of the calculation of the NGR described in § 324.34(b)(2)(ii)(B), variation margin described in paragraph (c)(2)(iii)(A)(*2*) of this section may not reduce the net current credit exposure or the gross current credit exposure; or

(B)(*1*) For an FDIC-supervised institution that uses the standardized approach for counterparty credit risk under § 324.132(c) for its standardized risk-weighted assets, the replacement cost of each derivative contract or single product netting set of derivative contracts to which the FDIC-supervised institution is a counterparty, calculated according to the following formula, and, for any counterparty that is not a commercial end-user, multiplied by 1.4:

$$Replacement\ Cost = \max\{V - CVM_r + CVM_p; 0\}$$

Where:

V equals the fair value for each derivative contract or each single-product netting set of derivative contracts (including a cleared transaction except as provided in paragraph (c)(2)(ix) of this section and, at the discretion of the FDIC-supervised institution, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP);

CVM_r equals the amount of cash collateral received from a counterparty to a derivative contract and that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section, or, in the case of a client-facing derivative transaction on behalf of a clearing member client, the amount of collateral received from the clearing member client; and

CVM_p equals the amount of cash collateral that is posted to a counterparty to a derivative contract and that has not offset the fair value of the derivative contract and that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section, or, in the case of a client-facing derivative transaction on behalf of a clearing member client, the amount of collateral posted to the clearing member client;

(*2*) Notwithstanding paragraph (c)(2)(iii)(B)(*1*) of this section, where multiple netting sets are subject to a single variation margin agreement, an FDIC-supervised institution must apply the formula for replacement cost provided in § 324.132(c)(10)(i), in which the term C_{MA} may only include cash collateral that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section; and

(*3*) For purposes of paragraph (c)(2)(iii)(B)(*1*), an FDIC-supervised institution must treat a derivative contract that references an index as if it were multiple derivative contracts each referencing one component of the

index if the FDIC-supervised institution elected to treat the derivative contract as multiple derivative contracts under § 324.132(c)(5)(vi);

(C) For derivative contracts that are not cleared through a QCCP, the cash collateral received by the recipient counterparty is not segregated (by law, regulation, or an agreement with the counterparty);

(D) Variation margin is calculated and transferred on a daily basis based on the mark-to-fair value of the derivative contract;

(E) The variation margin transferred under the derivative contract or the governing rules of the CCP or QCCP for a cleared transaction is the full amount that is necessary to fully extinguish the net current credit exposure to the counterparty of the derivative contracts, subject to the threshold and minimum transfer amounts applicable to the counterparty under the terms of the derivative contract or the governing rules for a cleared transaction;

(F) The variation margin is in the form of cash in the same currency as the currency of settlement set forth in the derivative contract, provided that for the purposes of this paragraph (c)(2)(iii)(F), currency of settlement means any currency for settlement specified in the governing qualifying master netting agreement and the credit support annex to the qualifying master netting agreement, or in the governing rules for a cleared transaction; and

(G) The derivative contract and the variation margin are governed by a qualifying master netting agreement between the legal entities that are the counterparties to the derivative contract or by the governing rules for a cleared transaction, and the qualifying master netting agreement or the governing rules for a cleared transaction must explicitly stipulate that the counterparties agree to settle any payment obligations on a net basis, taking into account any variation margin received or provided under the contract if a credit event involving either counterparty occurs;

(iv) The effective notional principal amount (that is, the apparent or stated notional principal amount multiplied by any multiplier in the derivative contract) of a credit derivative, or other similar instrument, through which the FDIC-supervised institution provides credit protection, provided that:

(A) The FDIC-supervised institution may reduce the effective notional principal amount of the credit derivative by the amount of any reduction in the mark-to-fair value of the credit derivative if the reduction is recognized in common equity tier 1 capital;

(B) The FDIC-supervised institution may reduce the effective notional principal amount of the credit derivative by the effective notional principal amount of a purchased credit derivative or other similar instrument, provided that the remaining maturity of the purchased credit derivative is equal to or greater than the remaining maturity of the credit derivative through which the FDIC-supervised institution provides credit protection and that:

(*1*) With respect to a credit derivative that references a single exposure, the reference exposure of the purchased credit derivative is to the same legal entity and ranks *pari passu* with, or is junior to, the reference exposure of the credit derivative through which the FDIC-supervised institution provides credit protection; or

(*2*) With respect to a credit derivative that references multiple exposures, the reference exposures of the purchased credit derivative are to the same legal entities and rank *pari passu* with the reference exposures of the credit derivative through which the FDIC-supervised institution provides credit protection, and the level of seniority of the purchased credit derivative ranks *pari passu* to the level of seniority of the credit derivative through which the FDIC-supervised institution provides credit protection;

(*3*) Where an FDIC-supervised institution has reduced the effective notional amount of a credit derivative through which the FDIC-supervised institution provides credit protection in accordance with paragraph (c)(2)(iv)(A) of this section, the FDIC-supervised institution must also reduce the effective notional principal amount of a purchased credit derivative used to offset the credit derivative through which the

FDIC-supervised institution provides credit protection, by the amount of any increase in the mark-to-fair value of the purchased credit derivative that is recognized in common equity tier 1 capital; and

(*4*) Where the FDIC-supervised institution purchases credit protection through a total return swap and records the net payments received on a credit derivative through which the FDIC-supervised institution provides credit protection in net income, but does not record offsetting deterioration in the mark-to-fair value of the credit derivative through which the FDIC-supervised institution provides credit protection in net income (either through reductions in fair value or by additions to reserves), the FDIC-supervised institution may not use the purchased credit protection to offset the effective notional principal amount of the related credit derivative through which the FDIC-supervised institution provides credit protection;

(v) Where an FDIC-supervised institution acting as a principal has more than one repo-style transaction with the same counterparty and has offset the gross value of receivables due from a counterparty under reverse repurchase transactions by the gross value of payables under repurchase transactions due to the same counterparty, the gross value of receivables associated with the repo-style transactions *less* any on-balance sheet receivables amount associated with these repo-style transactions included under paragraph (c)(2)(i) of this section, unless the following criteria are met:

(A) The offsetting transactions have the same explicit final settlement date under their governing agreements;

(B) The right to offset the amount owed to the counterparty with the amount owed by the counterparty is legally enforceable in the normal course of business and in the event of receivership, insolvency, liquidation, or similar proceeding; and

(C) Under the governing agreements, the counterparties intend to settle net, settle simultaneously, or settle according to a process that is the functional equivalent of net settlement, (that is, the cash flows of the transactions are equivalent, in effect, to a single net amount on the settlement date), where both transactions are settled through the same settlement system, the settlement arrangements are supported by cash or intraday credit facilities intended to ensure that settlement of both transactions will occur by the end of the business day, and the settlement of the underlying securities does not interfere with the net cash settlement;

(vi) The counterparty credit risk of a repo-style transaction, including where the FDIC-supervised institution acts as an agent for a repo-style transaction and indemnifies the customer with respect to the performance of the customer's counterparty in an amount limited to the difference between the fair value of the security or cash its customer has lent and the fair value of the collateral the borrower has provided, calculated as follows:

(A) If the transaction is not subject to a qualifying master netting agreement, the counterparty credit risk (E*) for transactions with a counterparty must be calculated on a transaction by transaction basis, such that each transaction *i* is treated as its own netting set, in accordance with the following formula, where E_i is the fair value of the instruments, gold, or cash that the FDIC-supervised institution has lent, sold subject to repurchase, or provided as collateral to the counterparty, and C_i is the fair value of the instruments, gold, or cash that the FDIC-supervised institution has borrowed, purchased subject to resale, or received as collateral from the counterparty:

$E_i^* = \max\{0, [E_i - C_i]\}$; and

(B) If the transaction is subject to a qualifying master netting agreement, the counterparty credit risk (E*) must be calculated as the greater of zero and the total fair value of the instruments, gold, or cash that the FDIC-supervised institution has lent, sold subject to repurchase or provided as collateral to a counterparty for all transactions included in the qualifying master netting agreement (ΣE_i), *less* the total fair value of the instruments, gold, or cash that the FDIC-supervised institution borrowed, purchased subject to resale or received as collateral from the counterparty for those transactions

(ΣC_i), in accordance with the following formula:

$E^* = \max \{0, [\Sigma E_i - \Sigma C_i]\}$

(vii) If an FDIC-supervised institution acting as an agent for a repo-style transaction provides a guarantee to a customer of the security or cash its customer has lent or borrowed with respect to the performance of the customer's counterparty and the guarantee is not limited to the difference between the fair value of the security or cash its customer has lent and the fair value of the collateral the borrower has provided, the amount of the guarantee that is greater than the difference between the fair value of the security or cash its customer has lent and the value of the collateral the borrower has provided;

(viii) The credit equivalent amount of all off-balance sheet exposures of the FDIC-supervised institution, excluding repo-style transactions, repurchase or reverse repurchase or securities borrowing or lending transactions that qualify for sales treatment under GAAP, and derivative transactions, determined using the applicable credit conversion factor under § 324.33(b), provided, however, that the minimum credit conversion factor that may be assigned to an off-balance sheet exposure under this paragraph is 10 percent; and

(ix) For an FDIC-supervised institution that is a clearing member:

(A) A clearing member FDIC-supervised institution that guarantees the performance of a clearing member client with respect to a cleared transaction must treat its exposure to the clearing member client as a derivative contract for purposes of determining its total leverage exposure;

(B) A clearing member FDIC-supervised institution that guarantees the performance of a CCP with respect to a transaction cleared on behalf of a clearing member client must treat its exposure to the CCP as a derivative contract for purposes of determining its total leverage exposure;

(C) A clearing member FDIC-supervised institution that does not guarantee the performance of a CCP with respect to a transaction cleared on behalf of a clearing member client may exclude its exposure to the CCP for purposes of determining its total leverage exposure;

(D) An FDIC-supervised institution that is a clearing member may exclude from its total leverage exposure the effective notional principal amount of credit protection sold through a credit derivative contract, or other similar instrument, that it clears on behalf of a clearing member client through a CCP as calculated in accordance with paragraph (c)(2)(iv) of this section; and

(E) Notwithstanding paragraphs (c)(2)(ix)(A) through (C) of this section, an FDIC-supervised institution may exclude from its total leverage exposure a clearing member's exposure to a clearing member client for a derivative contract, if the clearing member client and the clearing member are affiliates and consolidated for financial reporting purposes on the FDIC-supervised institution's balance sheet.

(x) A custody bank shall exclude from its total leverage exposure the lesser of:

(A) The amount of funds that the custody bank has on deposit at a qualifying central bank; and

(B) The amount of funds in deposit accounts at the custody bank that are linked to fiduciary or custodial and safekeeping accounts at the custody bank. For purposes of this paragraph (c)(2)(x), a deposit account is linked to a fiduciary or custodial and safekeeping account if the deposit account is provided to a client that maintains a fiduciary or custodial and safekeeping account with the custody bank, and the deposit account is used to facilitate the administration of the fiduciary or custodial and safekeeping account.

(d) *Advanced approaches capital ratio calculations.* An advanced approaches FDIC-supervised institution that has completed the parallel run process and received notification from the FDIC pursuant to § 324.121(d) must determine its regulatory capital ratios as described in paragraphs (d)(1) through (3) of this section.

(1) *Common equity tier 1 capital ratio.* The FDIC-supervised institution's common equity tier 1 capital ratio is the lower of:

(i) The ratio of the FDIC-supervised institution's common equity tier 1 capital to standardized total risk-weighted assets; and

(ii) The ratio of the FDIC-supervised institution's common equity tier 1 capital to advanced approaches total risk-weighted assets.

(2) *Tier 1 capital ratio*. The FDIC-supervised institution's tier 1 capital ratio is the lower of:

(i) The ratio of the FDIC-supervised institution's tier 1 capital to standardized total risk-weighted assets; and

(ii) The ratio of the FDIC-supervised institution's tier 1 capital to advanced approaches total risk-weighted assets.

(3) *Total capital ratio*. The FDIC-supervised institution's total capital ratio is the lower of:

(i) The ratio of the FDIC-supervised institution's total capital to standardized total risk-weighted assets; and

(ii) The ratio of the FDIC-supervised institution's advanced-approaches-adjusted total capital to advanced approaches total risk-weighted assets. An FDIC-supervised institution's advanced-approaches-adjusted total capital is the FDIC-supervised institution's total capital after being adjusted as follows:

(A) An advanced approaches FDIC-supervised institution must deduct from its total capital any allowance for loan and lease losses or adjusted allowance for credit losses, as applicable, included in its tier 2 capital in accordance with § 324.20(d)(3); and

(B) An advanced approaches FDIC-supervised institution must add to its total capital any eligible credit reserves that exceed the FDIC-supervised institution's total expected credit losses to the extent that the excess reserve amount does not exceed 0.6 percent of the FDIC-supervised institution's credit risk-weighted assets.

(4) *State savings association tangible capital ratio*. (i) Until January 1, 2014, a state savings association shall determine its tangible capital ratio in accordance with 12 CFR 390.468.

(ii) As of January 1, 2014, a state savings association's tangible capital ratio is the ratio of the state savings association's core capital (tier 1 capital) to total assets. For purposes of this paragraph, the term total assets shall have the meaning provided in 12 CFR 324.401(g).

(e) *Capital adequacy*. (1) Notwithstanding the minimum requirements in this part, An FDIC-supervised institution must maintain capital commensurate with the level and nature of all risks to which the FDIC-supervised institution is exposed.

(2) An FDIC-supervised institution must have a process for assessing its overall capital adequacy in relation to its risk profile and a comprehensive strategy for maintaining an appropriate level of capital.

(3) *Insured depository institutions with less than the minimum leverage capital requirement*. (i) An insured depository institution making an application to the FDIC operating with less than the minimum leverage capital requirement does not have adequate capital and therefore has inadequate financial resources.

(ii) Any insured depository institution operating with an inadequate capital structure, and therefore inadequate financial resources, will not receive approval for an application requiring the FDIC to consider the adequacy of its capital structure or its financial resources.

(iii) In any merger, acquisition, or other type of business combination where the FDIC must give its approval, where it is required to consider the adequacy of the financial resources of the existing and proposed institutions, and where the resulting entity is either insured by the FDIC or not otherwise federally insured, approval will not be granted when the resulting entity does not meet the minimum leverage capital requirement.

(iv) Exceptions. Notwithstanding the provisions of paragraphs (d)(3)(i), (ii) and (iii) of this section:

(A) The FDIC, in its discretion, may approve an application pursuant to the Federal Deposit Insurance Act where it is required to consider the adequacy of capital if it finds that such approval must be taken to prevent the closing of a depository institution or to facilitate the acquisition of a closed depository institution, or, when severe financial conditions exist which threaten the

stability of an insured depository institution or of a significant number of depository institutions insured by the FDIC or of insured depository institutions possessing significant financial resources, if such action is taken to lessen the risk to the FDIC posed by an insured depository institution under such threat of instability.

(B) The FDIC, in its discretion, may approve an application pursuant to the Federal Deposit Insurance Act where it is required to consider the adequacy of capital or the financial resources of the insured depository institution where it finds that the applicant has committed to and is in compliance with a reasonable plan to meet its minimum leverage capital requirements within a reasonable period of time.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20758, Apr. 14, 2014; 79 FR 57748, Sept. 26, 2014; 80 FR 41422, July 15, 2015; 84 FR 4247, Feb. 14, 2019; 84 FR 35270, July 22, 2019; 84 FR 59278, Nov. 1, 2019; 84 FR 61802, Nov. 13, 2019; 85 FR 4430, Jan. 24, 2020; 85 FR 4578, Jan. 27, 2020; 85 FR 57963, Sept. 17, 2020; 86 FR 740, Jan. 6, 2021]

§ 324.11 Capital conservation buffer and countercyclical capital buffer amount.

(a) *Capital conservation buffer*—(1) *Composition of the capital conservation buffer*. The capital conservation buffer is composed solely of common equity tier 1 capital.

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

(i) *Eligible retained income*. The eligible retained income of an FDIC-supervised institution is the greater of:

(A) The FDIC-supervised institution's net income, calculated in accordance with the instructions to the Call Report, for the four calendar quarters preceding the current calendar quarter, net of any distributions and associated tax effects not already reflected in net income; and

(B) The average of the FDIC-supervised institution's net income, calculated in accordance with the instructions to Call Report, for the four calendar quarters preceding the current calendar quarter.

(ii) *Maximum payout ratio*. The maximum payout ratio is the percentage of eligible retained income that an FDIC-supervised institution can pay out in the form of distributions and discretionary bonus payments during the current calendar quarter. The maximum payout ratio is based on the FDIC-supervised institution's capital conservation buffer, calculated as of the last day of the previous calendar quarter, as set forth in Table 1 to § 324.11.

(iii) *Maximum payout amount*. An FDIC-supervised institution's maximum payout amount for the current calendar quarter is equal to the FDIC-supervised institution's eligible retained income, multiplied by the applicable maximum payout ratio, as set forth in Table 1 to § 324.11.

(iv) *Private sector credit exposure*. Private sector credit exposure means an exposure to a company or an individual that is not an exposure to a sovereign, the Bank for International Settlements, the European Central Bank, the European Commission, the European Stability Mechanism, the European Financial Stability Facility, the International Monetary Fund, a MDB, a PSE, or a GSE.

(3) *Calculation of capital conservation buffer*. (i) An FDIC-supervised institution's capital conservation buffer is equal to the lowest of the following ratios, calculated as of the last day of the previous calendar quarter:

(A) The FDIC-supervised institution's common equity tier 1 capital ratio minus the FDIC-supervised institution's minimum common equity tier 1 capital ratio requirement under § 324.10;

(B) The FDIC-supervised institution's tier 1 capital ratio minus the FDIC-supervised institution's minimum tier 1 capital ratio requirement under § 324.10; and

(C) The FDIC-supervised institution's total capital ratio minus the FDIC-supervised institution's minimum total capital ratio requirement under § 324.10; or

(ii) Notwithstanding paragraphs (a)(3)(i)(A)–(C) of this section, if the FDIC-supervised institution's common equity tier 1, tier 1 or total capital ratio is less than or equal to the FDIC-

supervised institution's minimum common equity tier 1, tier 1 or total capital ratio requirement under § 324.10, respectively, the FDIC-supervised institution's capital conservation buffer is zero.

(4) *Limits on distributions and discretionary bonus payments.* (i) An FDIC-supervised institution shall not make distributions or discretionary bonus payments or create an obligation to make such distributions or payments during the current calendar quarter that, in the aggregate, exceed the maximum payout amount.

(ii) An FDIC-supervised institution with a capital conservation buffer that is greater than 2.5 percent plus 100 percent of its applicable countercyclical capital buffer, in accordance with paragraph (b) of this section, is not subject to a maximum payout amount under this section.

(iii) *Negative eligible retained income.* Except as provided in paragraph (a)(4)(iv) of this section, an FDIC-supervised institution may not make distributions or discretionary bonus payments during the current calendar quarter if the FDIC-supervised institution's:

(A) Eligible retained income is negative; and

(B) Capital conservation buffer was less than 2.5 percent as of the end of the previous calendar quarter.

(iv) *Prior approval.* Notwithstanding the limitations in paragraphs (a)(4)(i) through (iii) of this section, the FDIC may permit an FDIC-supervised institution to make a distribution or discretionary bonus payment upon a request of the FDIC-supervised institution, if the FDIC determines that the distribution or discretionary bonus payment would not be contrary to the purposes of this section, or to the safety and soundness of the FDIC-supervised institution. In making such a determination, the FDIC will consider the nature and extent of the request and the particular circumstances giving rise to the request.

TABLE 1 TO § 324.11—CALCULATION OF MAXIMUM PAYOUT AMOUNT

Capital conservation buffer	Maximum payout ratio
Greater than 2.5 percent plus 100 percent of the FDIC-supervised institution's applicable countercyclical capital buffer amount.	No payout ratio limitation applies.
Less than or equal to 2.5 percent plus 100 percent of the FDIC-supervised institution's applicable countercyclical capital buffer amount, *and* greater than 1.875 percent plus 75 percent of the FDIC-supervised institution's applicable countercyclical capital buffer amount.	60 percent.
Less than or equal to 1.875 percent plus 75 percent of the FDIC-supervised institution's applicable countercyclical capital buffer amount, *and* greater than 1.25 percent plus 50 percent of the FDIC-supervised institution's applicable countercyclical capital buffer amount.	40 percent.
Less than or equal to 1.25 percent plus 50 percent of the FDIC-supervised institution's applicable countercyclical capital buffer amount, *and* greater than 0.625 percent plus 25 percent of the FDIC-supervised institution's applicable countercyclical capital buffer amount.	20 percent.
Less than or equal to 0.625 percent plus 25 percent of the FDIC-supervised institution's applicable countercyclical capital buffer amount.	0 percent.

(v) *Other limitations on distributions.* Additional limitations on distributions may apply to an FDIC-supervised institution under 12 CFR 303.241 and subpart H of this part.

(b) *Countercyclical capital buffer amount*—(1) *General.* An advanced approaches FDIC-supervised institution or a Category III FDIC-supervised institution must calculate a countercyclical capital buffer amount in accordance with paragraph (b) of this section for purposes of determining its maximum payout ratio under Table 1 to this section.

(i) *Extension of capital conservation buffer.* The countercyclical capital buffer amount is an extension of the capital conservation buffer as described in paragraph (a) of this section.

(ii) *Amount.* An advanced approaches FDIC-supervised institution or a Category III FDIC-supervised institution has a countercyclical capital buffer amount determined by calculating the

weighted average of the countercyclical capital buffer amounts established for the national jurisdictions where the FDIC-supervised institution's private sector credit exposures are located, as specified in paragraphs (b)(2) and (3) of this section.

(iii) *Weighting*. The weight assigned to a jurisdiction's countercyclical capital buffer amount is calculated by dividing the total risk-weighted assets for the FDIC-supervised institution's private sector credit exposures located in the jurisdiction by the total risk-weighted assets for all of the FDIC-supervised institution's private sector credit exposures. The methodology an FDIC-supervised institution uses for determining risk-weighted assets for purposes of this paragraph (b) must be the methodology that determines its risk-based capital ratios under § 324.10. Notwithstanding the previous sentence, the risk-weighted asset amount for a private sector credit exposure that is a covered position under subpart F of this part is its specific risk add-on as determined under § 324.210 multiplied by 12.5.

(iv) *Location*. (A) Except as provided in paragraphs (b)(1)(iv)(B) and (b)(1)(iv)(C) of this section, the location of a private sector credit exposure is the national jurisdiction where the borrower is located (that is, where it is incorporated, chartered, or similarly established or, if the borrower is an individual, where the borrower resides).

(B) If, in accordance with subparts D or E of this part, the FDIC-supervised institution has assigned to a private sector credit exposure a risk weight associated with a protection provider on a guarantee or credit derivative, the location of the exposure is the national jurisdiction where the protection provider is located.

(C) The location of a securitization exposure is the location of the underlying exposures, or, if the underlying exposures are located in more than one national jurisdiction, the national jurisdiction where the underlying exposures with the largest aggregate unpaid principal balance are located. For purposes of this paragraph (b), the location of an underlying exposure shall be the location of the borrower, determined consistent with paragraph (b)(1)(iv)(A) of this section.

(2) *Countercyclical capital buffer amount for credit exposures in the United States*—(i) *Initial countercyclical capital buffer amount with respect to credit exposures in the United States*. The initial countercyclical capital buffer amount in the United States is zero.

(ii) *Adjustment of the countercyclical capital buffer amount*. The FDIC will adjust the countercyclical capital buffer amount for credit exposures in the United States in accordance with applicable law.[11]

(iii) *Range of countercyclical capital buffer amount*. The FDIC will adjust the countercyclical capital buffer amount for credit exposures in the United States between zero percent and 2.5 percent of risk-weighted assets.

(iv) *Adjustment determination*. The FDIC will base its decision to adjust the countercyclical capital buffer amount under this section on a range of macroeconomic, financial, and supervisory information indicating an increase in systemic risk including, but not limited to, the ratio of credit to gross domestic product, a variety of asset prices, other factors indicative of relative credit and liquidity expansion or contraction, funding spreads, credit condition surveys, indices based on credit default swap spreads, options implied volatility, and measures of systemic risk.

(v) *Effective date of adjusted countercyclical capital buffer amount*—(A) *Increase adjustment*. A determination by the FDIC under paragraph (b)(2)(ii) of this section to increase the countercyclical capital buffer amount will be effective 12 months from the date of announcement, unless the FDIC establishes an earlier effective date and includes a statement articulating the reasons for the earlier effective date.

(B) *Decrease adjustment*. A determination by the FDIC to decrease the established countercyclical capital buffer amount under paragraph (b)(2)(ii) of this section will be effective on the day following announcement of the final

[11] The FDIC expects that any adjustment will be based on a determination made jointly by the Board, OCC, and FDIC.

determination or the earliest date permissible under applicable law or regulation, whichever is later.

(vi) *Twelve month sunset.* The countercyclical capital buffer amount will return to zero percent 12 months after the effective date that the adjusted countercyclical capital buffer amount is announced, unless the FDIC announces a decision to maintain the adjusted countercyclical capital buffer amount or adjust it again before the expiration of the 12-month period.

(3) *Countercyclical capital buffer amount for foreign jurisdictions.* The FDIC will adjust the countercyclical capital buffer amount for private sector credit exposures to reflect decisions made by foreign jurisdictions consistent with due process requirements described in paragraph (b)(2) of this section.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20758, Apr. 14, 2014; 81 FR 71354, Oct. 17, 2016; 84 FR 35270, July 22, 2019; 84 FR 59278, Nov. 1, 2019; 85 FR 15916, Mar. 20, 2020]

§ 324.12 Community bank leverage ratio framework.

(a) *Community bank leverage ratio framework.* (1) Notwithstanding any other provision in this part, a qualifying community banking organization that has made an election to use the community bank leverage ratio framework under paragraph (a)(3) of this section shall be considered to have met the minimum capital requirements under § 324.10, the capital ratio requirements for the well capitalized capital category under § 324.403(b)(1) of this part, and any other capital or leverage requirements to which the qualifying community banking organization is subject, if it has a leverage ratio greater than 9 percent.

(2) For purposes of this section, a qualifying community banking organization means an FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution and that satisfies all of the following criteria:

(i) Has a leverage ratio of greater than 9 percent;

(ii) Has total consolidated assets of less than $10 billion, calculated in accordance with the reporting instructions to the Call Report as of the end of the most recent calendar quarter;

(iii) Has off-balance sheet exposures of 25 percent or less of its total consolidated assets as of the end of the most recent calendar quarter, calculated as the sum of the notional amounts of the exposures listed in paragraphs (a)(2)(iii)(A) through (I) of this section, divided by total consolidated assets, each as of the end of the most recent calendar quarter:

(A) The unused portion of commitments (except for unconditionally cancellable commitments);

(B) Self-liquidating, trade-related contingent items that arise from the movement of goods;

(C) Transaction-related contingent items, including performance bonds, bid bonds, warranties, and performance standby letters of credit;

(D) Sold credit protection through guarantees and credit derivatives;

(E) Credit-enhancing representations and warranties;

(F) Securities lent and borrowed, calculated in accordance with the reporting instructions to the Call Report;

(G) Financial standby letters of credit;

(H) Forward agreements that are not derivative contracts; and

(I) Off-balance sheet securitization exposures; and

(iv) Has total trading assets and trading liabilities, calculated in accordance with the reporting instructions to the Call Report of 5 percent or less of the FDIC-supervised institution's total consolidated assets, each as of the end of the most recent calendar quarter.

(3)(i) A qualifying community banking organization may elect to use the community bank leverage ratio framework if it makes an opt-in election under this paragraph (a)(3).

(ii) For purposes of this paragraph (a)(3), a qualifying community banking organization makes an election to use the community bank leverage ratio framework by completing the applicable reporting requirements of its Call Report.

(iii)(A) A qualifying community banking organization that has elected to use the community bank leverage ratio framework may opt out of the

community bank leverage ratio framework by completing the applicable risk-based and leverage ratio reporting requirements necessary to demonstrate compliance with § 324.10(a)(1) in its Call Report or by otherwise providing the information to the FDIC.

(B) A qualifying community banking organization that opts out of the community bank leverage ratio framework pursuant to paragraph (a)(3)(iii)(A) of this section must comply with § 324.10(a)(1) immediately.

(4)(i) *Temporary relief*—From December 2, 2020 through December 31, 2021, for purposes of determining whether an FDIC-supervised institution satisfies the criterion in paragraph (a)(2)(ii) of this section, except as provided in paragraph (a)(4)(ii) of this section, the total consolidated assets of an FDIC-supervised institution for purposes of paragraph (a)(2)(ii) of this section shall be determined based on the lesser of:

(A) The total consolidated assets reported by the institution in the Call Report as of December 31, 2019; and

(B) The total consolidated assets calculated in accordance with the reporting instructions to the Call Report as of the end of the most recent calendar quarter.

(ii) *Reservation of authority*—The temporary relief provided under this paragraph (a)(4)(i) of this section does not apply to an FDIC-supervised institution if the FDIC determines that permitting the FDIC-supervised institution to determine its assets in accordance with that paragraph would not be commensurate with the risk posed by the institution. When making this determination, the FDIC will consider all relevant factors, including the extent of asset growth of the FDIC-supervised institution since December 31, 2019; the causes of such growth, including whether growth occurred as a result of mergers or acquisitions; whether such growth is likely to be temporary or permanent; whether the FDIC-supervised institution has become involved in any additional activities since December 31, 2019; and the type of assets held by the FDIC-supervised institution. The FDIC will notify an FDIC-supervised institution of a determination under this paragraph. An FDIC-supervised institution may, not later than 30 days after the date of a determination by the FDIC, inform the FDIC, in writing, of why the FDIC-supervised institution should be eligible for the temporary relief. The FDIC will make a final determination after reviewing any response.

(b) *Calculation of the leverage ratio.* A qualifying community banking organization's leverage ratio is calculated in accordance to § 324.10(b)(4), except that a qualifying community banking organization is not required to:

(1) Make adjustments and deductions from tier 2 capital for purposes of § 324.22(c); or

(2) Calculate and deduct from tier 1 capital an amount resulting from insufficient tier 2 capital under § 324.22(f).

(c) *Treatment when ceasing to meet the qualifying community banking organization requirements.* (1) Except as provided in paragraphs (c)(5) and (6) of this section, if an FDIC-supervised institution ceases to meet the definition of a qualifying community banking organization, the FDIC-supervised institution has two reporting periods under its Call Report (grace period) either to satisfy the requirements to be a qualifying community banking organization or to comply with § 324.10(a)(1) and report the required capital measures under § 324.10(a)(1) on its Call Report.

(2) The grace period begins as of the end of the calendar quarter in which the FDIC-supervised institution ceases to satisfy the criteria to be a qualifying community banking organization provided in paragraph (a)(2) of this section. The grace period ends on the last day of the second consecutive calendar quarter following the beginning of the grace period.

(3) During the grace period, the FDIC-supervised institution continues to be treated as a qualifying community banking organization for the purpose of this part and must continue calculating and reporting its leverage ratio under this section unless the FDIC-supervised institution has opted out of using the community bank leverage ratio framework under paragraph (a)(3) of this section.

(4) During the grace period, the qualifying community banking organization continues to be considered to have met the minimum capital requirements

under § 324.10(a)(1), the capital ratio requirements for the well capitalized capital category under § 324.403(b)(1)(i)(A) through (D) of this part, and any other capital or leverage requirements to which the qualifying community banking organization is subject and must continue calculating and reporting its leverage ratio under this section.

(5) Notwithstanding paragraphs (c)(1) through (4) of this section, an FDIC-supervised institution that no longer meets the definition of a qualifying community banking organization as a result of a merger or acquisition has no grace period and immediately ceases to be a qualifying community banking organization. Such an FDIC-supervised institution must comply with the minimum capital requirements under § 324.10(a)(1) and must report the required capital measures under § 324.10(a)(1) for the quarter in which it ceases to be a qualifying community banking organization.

(6) Notwithstanding paragraphs (c)(1) through (4) of this section, an FDIC-supervised institution that has a leverage ratio of 8 percent or less does not have a grace period and must comply with the minimum capital requirements under § 324.10(a)(1) and must report the required capital measures under § 324.10(a)(1) for the quarter in which it reports a leverage ratio of 8 percent or less.

[84 FR 61802, Nov. 13, 2019, as amended at 85 FR 77363, Dec. 2, 2020]

§§ 324.13–324.19 [Reserved]

Subpart C—Definition of Capital

§ 324.20 Capital components and eligibility criteria for regulatory capital instruments.

(a) *Regulatory capital components.* An FDIC-supervised institution's regulatory capital components are:

(1) Common equity tier 1 capital;

(2) Additional tier 1 capital; and

(3) Tier 2 capital.

(b) *Common equity tier 1 capital.* Common equity tier 1 capital is the sum of the common equity tier 1 capital elements in this paragraph (b), minus regulatory adjustments and deductions in § 324.22. The common equity tier 1 capital elements are:

(1) Any common stock instruments (plus any related surplus) issued by the FDIC-supervised institution, net of treasury stock, and any capital instruments issued by mutual banking organizations, that meet all the following criteria:

(i) The instrument is paid-in, issued directly by the FDIC-supervised institution, and represents the most subordinated claim in a receivership, insolvency, liquidation, or similar proceeding of the FDIC-supervised institution;

(ii) The holder of the instrument is entitled to a claim on the residual assets of the FDIC-supervised institution that is proportional with the holder's share of the FDIC-supervised institution's issued capital after all senior claims have been satisfied in a receivership, insolvency, liquidation, or similar proceeding;

(iii) The instrument has no maturity date, can only be redeemed via discretionary repurchases with the prior approval of the FDIC, and does not contain any term or feature that creates an incentive to redeem;

(iv) The FDIC-supervised institution did not create at issuance of the instrument through any action or communication an expectation that it will buy back, cancel, or redeem the instrument, and the instrument does not include any term or feature that might give rise to such an expectation;

(v) Any cash dividend payments on the instrument are paid out of the FDIC-supervised institution's net income and retained earnings and are not subject to a limit imposed by the contractual terms governing the instrument. An FDIC-supervised institution must obtain prior FDIC approval for any dividend payment involving a reduction or retirement of capital stock in accordance with 12 CFR 303.241;

(vi) The FDIC-supervised institution has full discretion at all times to refrain from paying any dividends and making any other distributions on the instrument without triggering an event of default, a requirement to make a payment-in-kind, or an imposition of any other restrictions on the FDIC-supervised institution;

(vii) Dividend payments and any other distributions on the instrument may be paid only after all legal and contractual obligations of the FDIC-supervised institution have been satisfied, including payments due on more senior claims;

(viii) The holders of the instrument bear losses as they occur equally, proportionately, and simultaneously with the holders of all other common stock instruments before any losses are borne by holders of claims on the FDIC-supervised institution with greater priority in a receivership, insolvency, liquidation, or similar proceeding;

(ix) The paid-in amount is classified as equity under GAAP;

(x) The FDIC-supervised institution, or an entity that the FDIC-supervised institution controls, did not purchase or directly or indirectly fund the purchase of the instrument;

(xi) The instrument is not secured, not covered by a guarantee of the FDIC-supervised institution or of an affiliate of the FDIC-supervised institution, and is not subject to any other arrangement that legally or economically enhances the seniority of the instrument;

(xii) The instrument has been issued in accordance with applicable laws and regulations; and

(xiii) The instrument is reported on the FDIC-supervised institution's regulatory financial statements separately from other capital instruments.

(2) Retained earnings.

(3) Accumulated other comprehensive income (AOCI) as reported under GAAP.[12]

(4) Any common equity tier 1 minority interest, subject to the limitations in § 324.21.

(5) Notwithstanding the criteria for common stock instruments referenced above, an FDIC-supervised institution's common stock issued and held in trust for the benefit of its employees as part of an employee stock ownership plan does not violate any of the criteria in paragraph (b)(1)(iii), paragraph (b)(1)(iv) or paragraph (b)(1)(xi) of this section, provided that any repurchase of the stock is required solely by virtue of ERISA for an instrument of an FDIC-supervised institution that is not publicly-traded. In addition, an instrument issued by an FDIC-supervised institution to its employee stock ownership plan does not violate the criterion in paragraph (b)(1)(x) of this section.

(c) *Additional tier 1 capital.* Additional tier 1 capital is the sum of additional tier 1 capital elements and any related surplus, minus the regulatory adjustments and deductions in § 324.22. Additional tier 1 capital elements are:

(1) Instruments (plus any related surplus) that meet the following criteria:

(i) The instrument is issued and paid-in;

(ii) The instrument is subordinated to depositors, general creditors, and subordinated debt holders of the FDIC-supervised institution in a receivership, insolvency, liquidation, or similar proceeding;

(iii) The instrument is not secured, not covered by a guarantee of the FDIC-supervised institution or of an affiliate of the FDIC-supervised institution, and not subject to any other arrangement that legally or economically enhances the seniority of the instrument;

(iv) The instrument has no maturity date and does not contain a dividend step-up or any other term or feature that creates an incentive to redeem; and

(v) If callable by its terms, the instrument may be called by the FDIC-supervised institution only after a minimum of five years following issuance, except that the terms of the instrument may allow it to be called earlier than five years upon the occurrence of a regulatory event that precludes the instrument from being included in additional tier 1 capital, a tax event, or if the issuing entity is required to register as an investment company pursuant to the Investment Company Act. In addition:

(A) The FDIC-supervised institution must receive prior approval from the FDIC to exercise a call option on the instrument.

[12] *See* § 324.22 for specific adjustments related to AOCI.

(B) The FDIC-supervised institution does not create at issuance of the instrument, through any action or communication, an expectation that the call option will be exercised.

(C) Prior to exercising the call option, or immediately thereafter, the FDIC-supervised institution must either: Replace the instrument to be called with an equal amount of instruments that meet the criteria under paragraph (b) of this section or this paragraph (c);[13] or demonstrate to the satisfaction of the FDIC that following redemption, the FDIC-supervised institution will continue to hold capital commensurate with its risk.

(vi) Redemption or repurchase of the instrument requires prior approval from the FDIC.

(vii) The FDIC-supervised institution has full discretion at all times to cancel dividends or other distributions on the instrument without triggering an event of default, a requirement to make a payment-in-kind, or an imposition of other restrictions on the FDIC-supervised institution except in relation to any distributions to holders of common stock or instruments that are pari passu with the instrument.

(viii) Any cash dividend payments on the instrument are paid out of the FDIC-supervised institution's net income or retained earnings. An FDIC-supervised institution must obtain prior FDIC approval for any dividend payment involving a reduction or retirement of capital stock in accordance with 12 CFR 303.241.

(ix) The instrument does not have a credit-sensitive feature, such as a dividend rate that is reset periodically based in whole or in part on the FDIC-supervised institution's credit quality, but may have a dividend rate that is adjusted periodically independent of the FDIC-supervised institution's credit quality, in relation to general market interest rates or similar adjustments.

(x) The paid-in amount is classified as equity under GAAP.

(xi) The FDIC-supervised institution, or an entity that the FDIC-supervised institution controls, did not purchase or directly or indirectly fund the purchase of the instrument.

(xii) The instrument does not have any features that would limit or discourage additional issuance of capital by the FDIC-supervised institution, such as provisions that require the FDIC-supervised institution to compensate holders of the instrument if a new instrument is issued at a lower price during a specified time frame.

(xiii) If the instrument is not issued directly by the FDIC-supervised institution or by a subsidiary of the FDIC-supervised institution that is an operating entity, the only asset of the issuing entity is its investment in the capital of the FDIC-supervised institution, and proceeds must be immediately available without limitation to the FDIC-supervised institution or to the FDIC-supervised institution's top-tier holding company in a form which meets or exceeds all of the other criteria for additional tier 1 capital instruments.[14]

(xiv) For an advanced approaches FDIC-supervised institution, the governing agreement, offering circular, or prospectus of an instrument issued after the date upon which the FDIC-supervised institution becomes subject to this part as set forth in § 324.1(f) must disclose that the holders of the instrument may be fully subordinated to interests held by the U.S. government in the event that the FDIC-supervised institution enters into a receivership, insolvency, liquidation, or similar proceeding.

(2) Tier 1 minority interest, subject to the limitations in § 324.21, that is not included in the FDIC-supervised institution's common equity tier 1 capital.

(3)(i) Any and all instruments that qualified as tier 1 capital under the FDIC's general risk-based capital rules under 12 CFR part 325, appendix A (state nonmember banks) and 12 CFR part 390, subpart Z (state savings associations) as then in effect, that were issued under the Small Business Jobs Act of 2010[15] or prior to October 4, 2010,

[13] Replacement can be concurrent with redemption of existing additional tier 1 capital instruments.

[14] See 77 FR 52856 (August 30, 2012).

[15] Public Law 111–240; 124 Stat. 2504 (2010).

under the Emergency Economic Stabilization Act of 2008.[16]

(ii) Any preferred stock instruments issued under the U.S. Department of the Treasury's Emergency Capital Investment Program pursuant to section 104A of the Community Development Banking and Financial Institutions Act of 1994, added by the Consolidated Appropriations Act, 2021.[17]

(4) Notwithstanding the criteria for additional tier 1 capital instruments referenced above:

(i) An instrument issued by an FDIC-supervised institution and held in trust for the benefit of its employees as part of an employee stock ownership plan does not violate any of the criteria in paragraph (c)(1)(iii) of this section, provided that any repurchase is required solely by virtue of ERISA for an instrument of an FDIC-supervised institution that is not publicly-traded. In addition, an instrument issued by an FDIC-supervised institution to its employee stock ownership plan does not violate the criteria in paragraph (c)(1)(v) or paragraph (c)(1)(xi) of this section; and

(ii) An instrument with terms that provide that the instrument may be called earlier than five years upon the occurrence of a rating agency event does not violate the criterion in paragraph (c)(1)(v) of this section provided that the instrument was issued and included in an FDIC-supervised institution's tier 1 capital prior to the January 1, 2014, and that such instrument satisfies all other criteria under this paragraph (c).

(d) *Tier 2 Capital.* Tier 2 capital is the sum of tier 2 capital elements and any related surplus, minus regulatory adjustments and deductions in § 324.22. Tier 2 capital elements are:

(1) Instruments (plus related surplus) that meet the following criteria:

(i) The instrument is issued and paid-in;

(ii) The instrument is subordinated to depositors and general creditors of the FDIC-supervised institution;

(iii) The instrument is not secured, not covered by a guarantee of the FDIC-supervised institution or of an affiliate of the FDIC-supervised institution, and not subject to any other arrangement that legally or economically enhances the seniority of the instrument in relation to more senior claims;

(iv) The instrument has a minimum original maturity of at least five years. At the beginning of each of the last five years of the life of the instrument, the amount that is eligible to be included in tier 2 capital is reduced by 20 percent of the original amount of the instrument (net of redemptions) and is excluded from regulatory capital when the remaining maturity is less than one year. In addition, the instrument must not have any terms or features that require, or create significant incentives for, the FDIC-supervised institution to redeem the instrument prior to maturity;[18] and

(v) The instrument, by its terms, may be called by the FDIC-supervised institution only after a minimum of five years following issuance, except that the terms of the instrument may allow it to be called sooner upon the occurrence of an event that would preclude the instrument from being included in tier 2 capital, a tax event, or if the issuing entity is required to register as an investment company pursuant to the Investment Company Act. In addition:

(A) The FDIC-supervised institution must receive the prior approval of the FDIC to exercise a call option on the instrument.

(B) The FDIC-supervised institution does not create at issuance, through action or communication, an expectation the call option will be exercised.

(C) Prior to exercising the call option, or immediately thereafter, the FDIC-supervised institution must either: Replace any amount called with an equivalent amount of an instrument that meets the criteria for regulatory capital under this section;[19] or demonstrate to the satisfaction of the

[16] Public Law 110–343, 122 Stat. 3765 (2008).

[17] Public Law 116–260.

[18] An instrument that by its terms automatically converts into a tier 1 capital instrument prior to five years after issuance complies with the five-year maturity requirement of this criterion.

[19] A FDIC-supervised institution may replace tier 2 capital instruments concurrent

Continued

FDIC that following redemption, the FDIC-supervised institution would continue to hold an amount of capital that is commensurate with its risk.

(vi) The holder of the instrument must have no contractual right to accelerate payment of principal or interest on the instrument, except in the event of a receivership, insolvency, liquidation, or similar proceeding of the FDIC-supervised institution.

(vii) The instrument has no credit-sensitive feature, such as a dividend or interest rate that is reset periodically based in whole or in part on the FDIC-supervised institution's credit standing, but may have a dividend rate that is adjusted periodically independent of the FDIC-supervised institution's credit standing, in relation to general market interest rates or similar adjustments.

(viii) The FDIC-supervised institution, or an entity that the FDIC-supervised institution controls, has not purchased and has not directly or indirectly funded the purchase of the instrument.

(ix) If the instrument is not issued directly by the FDIC-supervised institution or by a subsidiary of the FDIC-supervised institution that is an operating entity, the only asset of the issuing entity is its investment in the capital of the FDIC-supervised institution, and proceeds must be immediately available without limitation to the FDIC-supervised institution or the FDIC-supervised institution's top-tier holding company in a form that meets or exceeds all the other criteria for tier 2 capital instruments under this section.[20]

(x) Redemption of the instrument prior to maturity or repurchase requires the prior approval of the FDIC.

(xi) For an advanced approaches FDIC-supervised institution, the governing agreement, offering circular, or prospectus of an instrument issued after the date on which the advanced approaches FDIC-supervised institution becomes subject to this part under § 324.1(f) must disclose that the holders of the instrument may be fully subordinated to interests held by the U.S. government in the event that the FDIC-supervised institution enters into a receivership, insolvency, liquidation, or similar proceeding.

(2) Total capital minority interest, subject to the limitations set forth in § 324.21, that is not included in the FDIC-supervised institution's tier 1 capital.

(3) ALLL or AACL, as applicable, up to 1.25 percent of the FDIC-supervised institution's standardized total risk-weighted assets not including any amount of the ALLL or AACL, as applicable (and excluding in the case of a market risk FDIC-supervised institution, its standardized market risk-weighted assets).

(4)(i) Any instrument that qualified as tier 2 capital under the FDIC's general risk-based capital rules under 12 CFR part 325, appendix A (state nonmember banks) and 12 CFR part 390, appendix Z (state saving associations) as then in effect, that were issued under the Small Business Jobs Act of 2010,[21] or prior to October 4, 2010, under the Emergency Economic Stabilization Act of 2008.[22]

(ii) Any debt instruments issued under the U.S. Department of the Treasury's Emergency Capital Investment Program pursuant to section 104A of the Community Development Banking and Financial Institutions Act of 1994, added by the Consolidated Appropriations Act, 2021.[23]

(5) For an FDIC-supervised institution that makes an AOCI opt-out election (as defined in § 324.22(b)(2), 45 percent of pretax net unrealized gains on available-for-sale preferred stock classified as an equity security under GAAP and available-for-sale equity exposures.

(6) Notwithstanding the criteria for tier 2 capital instruments referenced above, an instrument with terms that provide that the instrument may be called earlier than five years upon the occurrence of a rating agency event

with the redemption of existing tier 2 capital instruments.

[20] A FDIC-supervised institution may disregard *de minimis* assets related to the operation of the issuing entity for purposes of this criterion.

[21] Public Law 111–240; 124 Stat. 2504 (2010)

[22] Public Law 110–343, 122 Stat. 3765 (2008)

[23] Public Law 116–260.

does not violate the criterion in paragraph (d)(1)(v) of this section provided that the instrument was issued and included in an FDIC-supervised institution's tier 1 or tier 2 capital prior to January 1, 2014, and that such instrument satisfies all other criteria under this paragraph (d).

(e) *FDIC approval of a capital element.* (1) An FDIC-supervised institution must receive FDIC prior approval to include a capital element (as listed in this section) in its common equity tier 1 capital, additional tier 1 capital, or tier 2 capital unless the element:

(i) Was included in an FDIC-supervised institution's tier 1 capital or tier 2 capital prior to May 19, 2010, in accordance with the FDIC's risk-based capital rules that were effective as of that date and the underlying instrument may continue to be included under the criteria set forth in this section; or

(ii) Is equivalent, in terms of capital quality and ability to absorb losses with respect to all material terms, to a regulatory capital element the FDIC determined may be included in regulatory capital pursuant to paragraph (e)(3) of this section.

(2) When considering whether an FDIC-supervised institution may include a regulatory capital element in its common equity tier 1 capital, additional tier 1 capital, or tier 2 capital, the FDIC will consult with the OCC and the Federal Reserve.

(3) After determining that a regulatory capital element may be included in an FDIC-supervised institution's common equity tier 1 capital, additional tier 1 capital, or tier 2 capital, the FDIC will make its decision publicly available, including a brief description of the material terms of the regulatory capital element and the rationale for the determination.

[78 FR 55471, Sept. 10, 2013, as amended at 81 FR 71354, Oct. 17, 2016; 84 FR 4247, Feb. 14, 2019; 84 FR 35271, July 22, 2019; 86 FR 15081, Mar. 22, 2021]

§ 324.21 Minority interest.

(a)(1) *Applicability.* For purposes of § 324.20, an FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution is subject to the minority interest limitations in this paragraph (a) if a consolidated subsidiary of the FDIC-supervised institution has issued regulatory capital that is not owned by the FDIC-supervised institution.

(2) *Common equity tier 1 minority interest includable in the common equity tier 1 capital of the FDIC-supervised institution.* The amount of common equity tier 1 minority interest that an FDIC-supervised institution may include in common equity tier 1 capital must be no greater than 10 percent of the sum of all common equity tier 1 capital elements of the FDIC-supervised institution (not including the common equity tier 1 minority interest itself), less any common equity tier 1 capital regulatory adjustments and deductions in accordance with § 324.22(a) and (b).

(3) *Tier 1 minority interest includable in the tier 1 capital of the FDIC-supervised institution.* The amount of tier 1 minority interest that an FDIC-supervised institution may include in tier 1 capital must be no greater than 10 percent of the sum of all tier 1 capital elements of the FDIC-supervised institution (not including the tier 1 minority interest itself), less any tier 1 capital regulatory adjustments and deductions in accordance with § 324.22(a) and (b).

(4) *Total capital minority interest includable in the total capital of the FDIC-supervised institution.* The amount of total capital minority interest that an FDIC-supervised institution may include in total capital must be no greater than 10 percent of the sum of all total capital elements of the FDIC-supervised institution (not including the total capital minority interest itself), less any total capital regulatory adjustments and deductions in accordance with § 324.22(a) and (b).

(b)(1) *Applicability.* For purposes of § 324.20, an advanced approaches FDIC-supervised institution is subject to the minority interest limitations in this paragraph (b) if:

(i) A consolidated subsidiary of the advanced approaches FDIC-supervised institution has issued regulatory capital that is not owned by the FDIC-supervised institution; and

(ii) For each relevant regulatory capital ratio of the consolidated subsidiary, the ratio exceeds the sum of the subsidiary's minimum regulatory

capital requirements plus its capital conservation buffer.

(2) *Difference in capital adequacy standards at the subsidiary level.* For purposes of the minority interest calculations in this section, if the consolidated subsidiary issuing the capital is not subject to capital adequacy standards similar to those of the advanced approaches FDIC-supervised institution, the advanced approaches FDIC-supervised institution must assume that the capital adequacy standards of the advanced approaches FDIC-supervised institution apply to the subsidiary.

(3) *Common equity tier 1 minority interest includable in the common equity tier 1 capital of the FDIC-supervised institution.* For each consolidated subsidiary of an advanced approaches FDIC-supervised institution, the amount of common equity tier 1 minority interest the advanced approaches FDIC-supervised institution may include in common equity tier 1 capital is equal to:

(i) The common equity tier 1 minority interest of the subsidiary; minus

(ii) The percentage of the subsidiary's common equity tier 1 capital that is not owned by the advanced approaches FDIC-supervised institution, multiplied by the difference between the common equity tier 1 capital of the subsidiary and the lower of:

(A) The amount of common equity tier 1 capital the subsidiary must hold, or would be required to hold pursuant to this paragraph (b), to avoid restrictions on distributions and discretionary bonus payments under § 324.11 or equivalent standards established by the subsidiary's home country supervisor; or

(B)(*1*) The standardized total risk-weighted assets of the advanced approaches FDIC-supervised institution that relate to the subsidiary multiplied by

(*2*) The common equity tier 1 capital ratio the subsidiary must maintain to avoid restrictions on distributions and discretionary bonus payments under § 324.11 or equivalent standards established by the subsidiary's home country supervisor.

(4) *Tier 1 minority interest includable in the tier 1 capital of the advanced approaches FDIC-supervised institution.* For each consolidated subsidiary of the advanced approaches FDIC-supervised institution, the amount of tier 1 minority interest the advanced approaches FDIC-supervised institution may include in tier 1 capital is equal to:

(i) The tier 1 minority interest of the subsidiary; minus

(ii) The percentage of the subsidiary's tier 1 capital that is not owned by the advanced approaches FDIC-supervised institution multiplied by the difference between the tier 1 capital of the subsidiary and the lower of:

(A) The amount of tier 1 capital the subsidiary must hold, or would be required to hold pursuant to this paragraph (b), to avoid restrictions on distributions and discretionary bonus payments under § 324.11 or equivalent standards established by the subsidiary's home country supervisor, or

(B)(*1*) The standardized total risk-weighted assets of the advanced approaches FDIC-supervised institution that relate to the subsidiary multiplied by

(*2*) The tier 1 capital ratio the subsidiary must maintain to avoid restrictions on distributions and discretionary bonus payments under § 324.11 or equivalent standards established by the subsidiary's home country supervisor.

(5) *Total capital minority interest includable in the total capital of the FDIC-supervised institution.* For each consolidated subsidiary of the advanced approaches FDIC-supervised institution, the amount of total capital minority interest the advanced approaches FDIC-supervised institution may include in total capital is equal to:

(i) The total capital minority interest of the subsidiary; minus

(ii) The percentage of the subsidiary's total capital that is not owned by the advanced approaches FDIC-supervised institution multiplied by the difference between the total capital of the subsidiary and the lower of:

(A) The amount of total capital the subsidiary must hold, or would be required to hold pursuant to this paragraph (b), to avoid restrictions on distributions and discretionary bonus payments under § 324.11 or equivalent standards established by the subsidiary's home country supervisor, or

(B)(*1*) The standardized total risk-weighted assets of the advanced approaches FDIC-supervised institution that relate to the subsidiary multiplied by

(*2*) The total capital ratio the subsidiary must maintain to avoid restrictions on distributions and discretionary bonus payments under § 324.11 or equivalent standards established by the subsidiary's home country supervisor.

[84 FR 35271, July 22, 2019]

§ 324.22 Regulatory capital adjustments and deductions.

(a) *Regulatory capital deductions from common equity tier 1 capital.* An FDIC-supervised institution must deduct from the sum of its common equity tier 1 capital elements the items set forth in this paragraph (a):

(1)(i) Goodwill, net of associated deferred tax liabilities (DTLs) in accordance with paragraph (e) of this section; and

(ii) For an advanced approaches FDIC-supervised institution, goodwill that is embedded in the valuation of a significant investment in the capital of an unconsolidated financial institution in the form of common stock (and that is reflected in the consolidated financial statements of the advanced approaches FDIC-supervised institution), in accordance with paragraph (d) of this section;

(2) Intangible assets, other than MSAs, net of associated DTLs in accordance with paragraph (e) of this section;

(3) Deferred tax assets (DTAs) that arise from net operating loss and tax credit carryforwards net of any related valuation allowances and net of DTLs in accordance with paragraph (e) of this section;

(4) Any gain-on-sale in connection with a securitization exposure;

(5)(i) Any defined benefit pension fund net asset, net of any associated DTL in accordance with paragraph (e) of this section, held by a depository institution holding company. With the prior approval of the FDIC, this deduction is not required for any defined benefit pension fund net asset to the extent the depository institution holding company has unrestricted and unfettered access to the assets in that fund.

(ii) For an insured depository institution, no deduction is required.

(iii) An FDIC-supervised institution must risk weight any portion of the defined benefit pension fund asset that is not deducted under paragraphs (a)(5)(i) or (a)(5)(ii) of this section as if the FDIC-supervised institution directly holds a proportional ownership share of each exposure in the defined benefit pension fund.

(6) For an advanced approaches FDIC-supervised institution that has completed the parallel run process and that has received notification from the FDIC pursuant to § 324.121(d), the amount of expected credit loss that exceeds its eligible credit reserves; and

(7) With respect to a financial subsidiary, the aggregate amount of the FDIC-supervised institution's outstanding equity investment, including retained earnings, in its financial subsidiaries (as defined in 12 CFR 362.17). An FDIC-supervised institution must not consolidate the assets and liabilities of a financial subsidiary with those of the parent bank, and no other deduction is required under paragraph (c) of this section for investments in the capital instruments of financial subsidiaries.

(8)(i) A state savings association must deduct the aggregate amount of its outstanding investments, (both equity and debt) in, and extensions of credit to, subsidiaries that are not includable subsidiaries as defined in paragraph (a)(8)(iv) of this section and may not consolidate the assets and liabilities of the subsidiary with those of the state savings association. Any such deductions shall be from assets and common equity tier 1 capital, except as provided in paragraphs (a)(8)(ii) and (iii) of this section.

(ii) If a state savings association has any investments (both debt and equity) in, or extensions of credit to, one or more subsidiaries engaged in any activity that would not fall within the scope of activities in which includable subsidiaries as defined in paragraph (a)(8)(iv) of this section may engage, it must deduct such investments and extensions of credit from assets and, thus, common equity tier 1 capital in

accordance with paragraph (a)(8)(i) of this section.

(iii) If a state savings association holds a subsidiary (either directly or through a subsidiary) that is itself a domestic depository institution, the FDIC may, in its sole discretion upon determining that the amount of common equity tier 1 capital that would be required would be higher if the assets and liabilities of such subsidiary were consolidated with those of the parent state savings association than the amount that would be required if the parent state savings association's investment were deducted pursuant to paragraphs (a)(8)(i) and (ii) of this section, consolidate the assets and liabilities of that subsidiary with those of the parent state savings association in calculating the capital adequacy of the parent state savings association, regardless of whether the subsidiary would otherwise be an includable subsidiary as defined in paragraph (a)(8)(iv) of this section.

(iv) For purposes of this section, the term includable subsidiary means a subsidiary of a state savings association that is:

(A) Engaged solely in activities that are permissible for a national bank;

(B) Engaged in activities not permissible for a national bank, but only if acting solely as agent for its customers and such agency position is clearly documented in the state savings association's files;

(C) Engaged solely in mortgage-banking activities;

(D)(*1*) Itself an insured depository institution or a company the sole investment of which is an insured depository institution, and

(*2*) Was acquired by the parent state savings association prior to May 1, 1989; or

(E) A subsidiary of any state savings association existing as a state savings association on August 9, 1989 that—

(*1*) Was chartered prior to October 15, 1982, as a savings bank or a cooperative bank under state law, or

(*2*) Acquired its principal assets from an association that was chartered prior to October 15, 1982, as a savings bank or a cooperative bank under state law.

(9) *Identified losses.* An FDIC-supervised institution must deduct identified losses (to the extent that common equity tier 1 capital would have been reduced if the appropriate accounting entries to reflect the identified losses had been recorded on the FDIC-supervised institution's books).

(b) *Regulatory adjustments to common equity tier 1 capital.* (1) An FDIC-supervised institution must adjust the sum of common equity tier 1 capital elements pursuant to the requirements set forth in this paragraph (b). Such adjustments to common equity tier 1 capital must be made net of the associated deferred tax effects.

(i) An FDIC-supervised institution that makes an AOCI opt-out election (as defined in paragraph (b)(2) of this section) must make the adjustments required under § 324.22(b)(2)(i).

(ii) An FDIC-supervised institution that is an advanced approaches FDIC-supervised institution, and an FDIC-supervised institution that has not made an AOCI opt-out election (as defined in paragraph (b)(2) of this section), must deduct any accumulated net gains and add any accumulated net losses on cash flow hedges included in AOCI that relate to the hedging of items that are not recognized at fair value on the balance sheet.

(iii) An FDIC-supervised institution must deduct any net gain and add any net loss related to changes in the fair value of liabilities that are due to changes in the FDIC-supervised institution's own credit risk. An advanced approaches FDIC-supervised institution must deduct the difference between its credit spread premium and the risk-free rate for derivatives that are liabilities as part of this adjustment.

(2) *AOCI opt-out election.* (i) An FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution may make a one-time election to opt out of the requirement to include all components of AOCI (with the exception of accumulated net gains and losses on cash flow hedges related to items that are not fair-valued on the balance sheet) in common equity tier 1 capital (AOCI opt-out election). An FDIC-supervised institution that makes an AOCI opt-out election in accordance with this paragraph (b)(2)

must adjust common equity tier 1 capital as follows:

(A) Subtract any net unrealized gains and add any net unrealized losses on available-for-sale securities;

(B) Subtract any net unrealized losses on available-for-sale preferred stock classified as an equity security under GAAP and available-for-sale equity exposures;

(C) Subtract any accumulated net gains and add any accumulated net losses on cash flow hedges;

(D) Subtract any amounts recorded in AOCI attributed to defined benefit postretirement plans resulting from the initial and subsequent application of the relevant GAAP standards that pertain to such plans (excluding, at the FDIC-supervised institution's option, the portion relating to pension assets deducted under paragraph (a)(5) of this section); and

(E) Subtract any net unrealized gains and add any net unrealized losses on held-to-maturity securities that are included in AOCI.

(ii) An FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution must make its AOCI opt-out election in the Call Report:

(A) If the FDIC-supervised institution is a Category III FDIC-supervised institution or a Category IV FDIC-supervised institution, during the first reporting period after the FDIC-supervised institution meets the definition of a Category III FDIC-supervised institution or a Category IV FDIC-supervised institution in § 324.2; or

(B) If the FDIC-supervised institution is not a Category III FDIC-supervised institution or a Category IV FDIC-supervised institution, during the first reporting period after the FDIC-supervised institution is required to comply with subpart A of this part as set forth in § 324.1(f).

(iii) With respect to an FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution, each of its subsidiary banking organizations that is subject to regulatory capital requirements issued by the Federal Reserve, the FDIC, or the OCC[22] must elect the same option as the FDIC-supervised institution pursuant to this paragraph (b)(2).

(iv) With prior notice to the FDIC, an FDIC-supervised institution resulting from a merger, acquisition, or purchase transaction and that is not an advanced approaches FDIC-supervised institution may change its AOCI opt-out election in its Call Report filed for the first reporting period after the date required for such FDIC-supervised institution to comply with subpart A of this part as set forth in § 324.1(f) if:

(A) Other than as set forth in paragraph (b)(2)(iv)(C) of this section, the merger, acquisition, or purchase transaction involved the acquisition or purchase of all or substantially all of either the assets or voting stock of another banking organization that is subject to regulatory capital requirements issued by the Federal Reserve, the FDIC, or the OCC;

(B) Prior to the merger, acquisition, or purchase transaction, only one of the banking organizations involved in the transaction made an AOCI opt-out election under this section; and

(C) An FDIC-supervised institution may, with the prior approval of the FDIC, change its AOCI opt-out election under this paragraph (b) in the case of a merger, acquisition, or purchase transaction that meets the requirements set forth at paragraph (b)(2)(iv)(B) of this section, but does not meet the requirements of paragraph (b)(2)(iv)(A). In making such a determination, the FDIC may consider the terms of the merger, acquisition, or purchase transaction, as well as the extent of any changes to the risk profile, complexity, and scope of operations of the FDIC-supervised institution resulting from the merger, acquisition, or purchase transaction.

(c) *Deductions from regulatory capital related to investments in capital instruments or covered debt instruments*[23]—(1)

[22] These rules include the regulatory capital requirements set forth at 12 CFR part 3 (OCC); 12 CFR part 217 (Board); 12 CFR part 324 (FDIC).

[23] The FDIC-supervised institution must calculate amounts deducted under paragraphs (c) through (f) of this section after it calculates the amount of ALLL or AACL, as

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Investment in the FDIC-supervised institution's own capital instruments. An FDIC-supervised institution must deduct an investment in its own capital instruments, as follows:

(i) An FDIC-supervised institution must deduct an investment in the FDIC-supervised institution's own common stock instruments from its common equity tier 1 capital elements to the extent such instruments are not excluded from regulatory capital under § 324.20(b)(1);

(ii) An FDIC-supervised institution must deduct an investment in the FDIC-supervised institution's own additional tier 1 capital instruments from its additional tier 1 capital elements; and

(iii) An FDIC-supervised institution must deduct an investment in the FDIC-supervised institution's own tier 2 capital instruments from its tier 2 capital elements.

(2) *Corresponding deduction approach.* For purposes of subpart C of this part, the corresponding deduction approach is the methodology used for the deductions from regulatory capital related to reciprocal cross holdings (as described in paragraph (c)(3) of this section), investments in the capital of unconsolidated financial institutions for an FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution (as described in paragraph (c)(4) of this section), nonsignificant investments in the capital of unconsolidated financial institutions for an advanced approaches FDIC-supervised institution (as described in paragraph (c)(5) of this section), and non-common stock significant investments in the capital of unconsolidated financial institutions for an advanced approaches FDIC-supervised institution (as described in paragraph (c)(6) of this section). Under the corresponding deduction approach, an FDIC-supervised institution must make deductions from the component of capital for which the underlying instrument would qualify if it were issued by the FDIC-supervised institution itself, as described in paragraphs (c)(2)(i) through (iii) of this section. If the FDIC-supervised institution does not have a sufficient amount of a specific component of capital to effect the required deduction, the shortfall must be deducted according to paragraph (f) of this section.

(i) If an investment is in the form of an instrument issued by a financial institution that is not a regulated financial institution, the FDIC-supervised institution must treat the instrument as:

(A) A common equity tier 1 capital instrument if it is common stock or represents the most subordinated claim in a liquidation of the financial institution; and

(B) An additional tier 1 capital instrument if it is subordinated to all creditors of the financial institution and is senior in liquidation only to common shareholders.

(ii) If an investment is in the form of an instrument issued by a regulated financial institution and the instrument does not meet the criteria for common equity tier 1, additional tier 1 or tier 2 capital instruments under § 324.20, the FDIC-supervised institution must treat the instrument as:

(A) A common equity tier 1 capital instrument if it is common stock included in GAAP equity or represents the most subordinated claim in liquidation of the financial institution;

(B) An additional tier 1 capital instrument if it is included in GAAP equity, subordinated to all creditors of the financial institution, and senior in a receivership, insolvency, liquidation, or similar proceeding only to common shareholders;

(C) A tier 2 capital instrument if it is not included in GAAP equity but considered regulatory capital by the primary supervisor of the financial institution; and

(D) For an advanced approaches FDIC-supervised institution, a tier 2 capital instrument if it is a covered debt instrument.

(iii) If an investment is in the form of a non-qualifying capital instrument (as defined in § 324.300(c)), the FDIC-supervised institution must treat the instrument as:

applicable, includable in tier 2 capital under § 324.20(d)(3).

(A) An additional tier 1 capital instrument if such instrument was included in the issuer's tier 1 capital prior to May 19, 2010; or

(B) A tier 2 capital instrument if such instrument was included in the issuer's tier 2 capital (but not includable in tier 1 capital) prior to May 19, 2010.

(3) *Reciprocal cross holdings in the capital of financial institutions.* (i) An FDIC-supervised institution must deduct an investment in the capital of other financial institutions that it holds reciprocally, where such reciprocal cross holdings result from a formal or informal arrangement to swap, exchange, or otherwise intend to hold each other's capital instruments, by applying the corresponding deduction approach in paragraph (c)(2) of this section.

(ii) An advanced approaches FDIC-supervised institution must deduct an investment in any covered debt instrument that the institution holds reciprocally with another financial institution, where such reciprocal cross holdings result from a formal or informal arrangement to swap, exchange, or otherwise intend to hold each other's capital or covered debt instruments, by applying the corresponding deduction approach in paragraph (c)(2) of this section.

(4) *Investments in the capital of unconsolidated financial institutions.* An FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution must deduct its investments in the capital of unconsolidated financial institutions (as defined in § 324.2) that exceed 25 percent of the sum of the FDIC-supervised institution's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section by applying the corresponding deduction approach in paragraph (c)(2) of this section.[24] The deductions described in this section are net of associated DTLs in accordance with paragraph (e) of this section. In addition, with the prior written approval of the FDIC, an FDIC-supervised institution that underwrites a failed underwriting, for the period of time stipulated by the FDIC, is not required to deduct an investment in the capital of an unconsolidated financial institution pursuant to this paragraph (c) to the extent the investment is related to the failed underwriting.[25]

(5) *Non-significant investments in the capital of unconsolidated financial institutions.* (i) An advanced approaches FDIC-supervised institution must deduct its non-significant investments in the capital of unconsolidated financial institutions (as defined in § 324.2) that, in the aggregate and together with any investment in a covered debt instrument (as defined in § 324.2) issued by a financial institution in which the FDIC-supervised institution does not have a significant investment in the capital of the unconsolidated financial institution (as defined in § 324.2), exceeds 10 percent of the sum of the advanced approaches FDIC-supervised institution's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section (the 10 percent threshold for non-significant investments) by applying the corresponding deduction approach in paragraph (c)(2) of this section.[26] The deductions described in this

[24] With the prior written approval of the FDIC, for the period of time stipulated by the FDIC, an FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution, is not required to deduct an investment in the capital of an unconsolidated financial institution pursuant to this paragraph if the financial institution is in distress and if such investment is made for the purpose of providing financial support to the financial institution, as determined by the FDIC.

[25] Any investments in the capital of an unconsolidated financial institution that do not exceed the 25 percent threshold for investments in the capital of unconsolidated financial institutions under this section must be assigned the appropriate risk weight under subparts D or F of this part, as applicable.

[26] With the prior written approval of the FDIC, for the period of time stipulated by the FDIC, an advanced approaches FDIC-supervised institution is not required to deduct a non-significant investment in the capital of an unconsolidated financial institution or an investment in a covered debt instrument

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paragraph are net of associated DTLs in accordance with paragraph (e) of this section. In addition, with the prior written approval of the FDIC, an advanced approaches FDIC-supervised institution that underwrites a failed underwriting, for the period of time stipulated by the FDIC, is not required to deduct from capital a non-significant investment in the capital of an unconsolidated financial institution or an investment in a covered debt instrument pursuant to this paragraph (c)(5) to the extent the investment is related to the failed underwriting.[27] For any calculation under this paragraph (c)(5)(i), an advanced approaches FDIC-supervised institution may exclude the amount of an investment in a covered debt instrument under paragraph (c)(5)(iii) or (iv) of this section, as applicable.

(ii) For an advanced approaches FDIC-supervised institution, the amount to be deducted under this paragraph (c)(5) from a specific capital component is equal to:

(A) The advanced approaches FDIC-supervised institution's aggregate non-significant investments in the capital of an unconsolidated financial institution and, if applicable, any investments in a covered debt instrument subject to deduction under this paragraph (c)(5), exceeding the 10 percent threshold for non-significant investments, multiplied by

(B) The ratio of the advanced approaches FDIC-supervised institution's aggregate non-significant investments in the capital of an unconsolidated financial institution (in the form of such capital component) to the advanced approaches FDIC-supervised institution's total non-significant investments in unconsolidated financial institutions, with an investment in a covered debt instrument being treated as tier 2 capital for this purpose.

(iii) For purposes of applying the deduction under paragraph (c)(5)(i) of this section, an advanced approaches FDIC-supervised institution that is not a subsidiary of a global systemically important banking organization, as defined in 12 CFR 252.2, may exclude from the deduction the amount of the FDIC-supervised institution's gross long position, in accordance with § 324.22(h)(2), in investments in covered debt instruments issued by financial institutions in which the FDIC-supervised institution does not have a significant investment in the capital of the unconsolidated financial institutions up to an amount equal to 5 percent of the sum of the FDIC-supervised institution's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section, net of associated DTLs in accordance with paragraph (e) of this section.

(iv) Prior to applying the deduction under paragraph (c)(5)(i) of this section:

(A) An FDIC-supervised institution that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, may designate any investment in a covered debt instrument as an excluded covered debt instrument, as defined in § 324.2.

(B) An FDIC-supervised institution that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, must deduct, according to the corresponding deduction approach in paragraph (c)(2) of this section, its gross long position, calculated in accordance with paragraph (h)(2) of this section, in a covered debt instrument that was originally designated as an excluded covered debt instrument, in accordance with paragraph (c)(5)(iv)(A) of this section, but no longer qualifies as an excluded covered debt instrument.

(C) An FDIC-supervised institution that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, must deduct according to the corresponding deduction approach in paragraph (c)(2) of this section the

pursuant to this paragraph if the financial institution is in distress and if such investment is made for the purpose of providing financial support to the financial institution, as determined by the FDIC.

[27] Any non-significant investment in the capital of an unconsolidated financial institution or any investment in a covered debt instrument that is not required to be deducted under this paragraph (c)(5) or otherwise under this section must be assigned the appropriate risk weight under subparts D, E, or F of this part, as applicable.

amount of its gross long position, calculated in accordance with paragraph (h)(2) of this section, in a direct or indirect investment in a covered debt instrument that was originally designated as an excluded covered debt instrument, in accordance with paragraph (c)(5)(iv)(A) of this section, and has been held for more than thirty business days.

(D) An FDIC-supervised institution that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, must deduct according to the corresponding deduction approach in paragraph (c)(2) of this section its gross long position, calculated in accordance with paragraph (h)(2) of this section, of its aggregate position in excluded covered debt instruments that exceeds 5 percent of the sum of the FDIC-supervised institution's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section, net of associated DTLs in accordance with paragraph (e) of this section.

(6) *Significant investments in the capital of unconsolidated financial institutions that are not in the form of common stock.* If an advanced approaches FDIC-supervised institution has a significant investment in the capital of an unconsolidated financial institution, the advanced approaches FDIC-supervised institution must deduct from capital any such investment issued by the unconsolidated financial institution that is held by the FDIC-supervised institution other than an investment in the form of common stock, as well as any investment in a covered debt instrument issued by the unconsolidated financial institution, by applying the corresponding deduction approach in paragraph (c)(2) of this section.[28] The deductions described in this section are net of associated DTLs in accordance with paragraph (e) of this section. In addition, with the prior written approval of the FDIC, for the period of time stipulated by the FDIC, an advanced approaches FDIC-supervised institution that underwrites a failed underwriting is not required to deduct the significant investment in the capital of an unconsolidated financial institution or an investment in a covered debt instrument pursuant to this paragraph (c)(6) if such investment is related to such failed underwriting.

(d) *MSAs and certain DTAs subject to common equity tier 1 capital deduction thresholds.*

(1) An FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution must make deductions from regulatory capital as described in this paragraph (d)(1).

(i) The FDIC-supervised institution must deduct from common equity tier 1 capital elements the amount of each of the items set forth in this paragraph (d)(1) that, individually, exceeds 25 percent of the sum of the FDIC-supervised institution's common equity tier 1 capital elements, less adjustments to and deductions from common equity tier 1 capital required under paragraphs (a) through (c)(3) of this section (the 25 percent common equity tier 1 capital deduction threshold).[29]

(ii) The FDIC-supervised institution must deduct from common equity tier 1 capital elements the amount of DTAs arising from temporary differences that the FDIC-supervised institution could not realize through net operating loss carrybacks, net of any related valuation allowances and net of DTLs, in accordance with paragraph (e) of this section. An FDIC-supervised institution is not required to deduct from the sum of its common equity tier 1 capital elements DTAs (net of any related valuation allowances and net of

[28] With prior written approval of the FDIC, for the period of time stipulated by the FDIC, an advanced approaches FDIC-supervised institution is not required to deduct a significant investment in the capital of an unconsolidated financial institution, including an investment in a covered debt instrument, under this paragraph (c)(6) or otherwise under this section if such investment is made for the purpose of providing financial support to the financial institution as determined by the FDIC.

[29] The amount of the items in paragraph (d)(1) of this section that is not deducted from common equity tier 1 capital must be included in the risk-weighted assets of the FDIC-supervised institution and assigned a 250 percent risk weight.

DTLs, in accordance with § 324.22(e)) arising from timing differences that the FDIC-supervised institution could realize through net operating loss carrybacks. The FDIC-supervised institution must risk weight these assets at 100 percent. For an FDIC-supervised institution that is a member of a consolidated group for tax purposes, the amount of DTAs that could be realized through net operating loss carrybacks may not exceed the amount that the FDIC-supervised institution could reasonably expect to have refunded by its parent holding company.

(iii) The FDIC-supervised institution must deduct from common equity tier 1 capital elements the amount of MSAs net of associated DTLs, in accordance with paragraph (e) of this section.

(iv) For purposes of calculating the amount of DTAs subject to deduction pursuant to paragraph (d)(1) of this section, an FDIC-supervised institution may exclude DTAs and DTLs relating to adjustments made to common equity tier 1 capital under paragraph (b) of this section. An FDIC-supervised institution that elects to exclude DTAs relating to adjustments under paragraph (b) of this section also must exclude DTLs and must do so consistently in all future calculations. An FDIC-supervised institution may change its exclusion preference only after obtaining the prior approval of the FDIC.

(2) An advanced approaches FDIC-supervised institution must make deductions from regulatory capital as described in this paragraph (d)(2).

(i) An advanced approaches FDIC-supervised institution must deduct from common equity tier 1 capital elements the amount of each of the items set forth in this paragraph (d)(2) that, individually, exceeds 10 percent of the sum of the advanced approaches FDIC-supervised institution's common equity tier 1 capital elements, less adjustments to and deductions from common equity tier 1 capital required under paragraphs (a) through (c) of this section (the 10 percent common equity tier 1 capital deduction threshold).

(A) DTAs arising from temporary differences that the advanced approaches FDIC-supervised institution could not realize through net operating loss carrybacks, net of any related valuation allowances and net of DTLs, in accordance with paragraph (e) of this section. An advanced approaches FDIC-supervised institution is not required to deduct from the sum of its common equity tier 1 capital elements DTAs (net of any related valuation allowances and net of DTLs, in accordance with § 324.22(e)) arising from timing differences that the advanced approaches FDIC-supervised institution could realize through net operating loss carrybacks. The advanced approaches FDIC-supervised institution must risk weight these assets at 100 percent. For an FDIC-supervised institution that is a member of a consolidated group for tax purposes, the amount of DTAs that could be realized through net operating loss carrybacks may not exceed the amount that the FDIC-supervised institution could reasonably expect to have refunded by its parent holding company.

(B) MSAs net of associated DTLs, in accordance with paragraph (e) of this section.

(C) Significant investments in the capital of unconsolidated financial institutions in the form of common stock, net of associated DTLs in accordance with paragraph (e) of this section.[30] Significant investments in the capital of unconsolidated financial institutions in the form of common stock subject to the 10 percent common equity tier 1 capital deduction threshold may be reduced by any goodwill embedded in the valuation of such investments deducted by the advanced approaches FDIC-supervised institution pursuant to paragraph (a)(1) of this section. In addition, with the prior written approval of the FDIC, for the period of time stipulated by the FDIC, an advanced approaches FDIC-supervised institution that underwrites a failed

[30] With the prior written approval of the FDIC, for the period of time stipulated by the FDIC, an advanced approaches FDIC-supervised institution is not required to deduct a significant investment in the capital instrument of an unconsolidated financial institution in distress in the form of common stock pursuant to this section if such investment is made for the purpose of providing financial support to the financial institution as determined by the FDIC.

underwriting is not required to deduct a significant investment in the capital of an unconsolidated financial institution in the form of common stock pursuant to this paragraph (d)(2) if such investment is related to such failed underwriting.

(ii) An advanced approaches FDIC-supervised institution must deduct from common equity tier 1 capital elements the items listed in paragraph (d)(2)(i) of this section that are not deducted as a result of the application of the 10 percent common equity tier 1 capital deduction threshold, and that, in aggregate, exceed 17.65 percent of the sum of the advanced approaches FDIC-supervised institution's common equity tier 1 capital elements, minus adjustments to and deductions from common equity tier 1 capital required under paragraphs (a) through (c) of this section, minus the items listed in paragraph (d)(2)(i) of this section (the 15 percent common equity tier 1 capital deduction threshold). Any goodwill that has been deducted under paragraph (a)(1) of this section can be excluded from the significant investments in the capital of unconsolidated financial institutions in the form of common stock.[31]

(iii) For purposes of calculating the amount of DTAs subject to the 10 and 15 percent common equity tier 1 capital deduction thresholds, an advanced approaches FDIC-supervised institution may exclude DTAs and DTLs relating to adjustments made to common equity tier 1 capital under paragraph (b) of this section. An advanced approaches FDIC-supervised institution that elects to exclude DTAs relating to adjustments under paragraph (b) of this section also must exclude DTLs and must do so consistently in all future calculations. An advanced approaches FDIC-supervised institution may change its exclusion preference only after obtaining the prior approval of the FDIC.

(e) *Netting of DTLs against assets subject to deduction*. (1) Except as described in paragraph (e)(3) of this section, netting of DTLs against assets that are subject to deduction under this section is permitted, but not required, if the following conditions are met:

(i) The DTL is associated with the asset; and

(ii) The DTL would be extinguished if the associated asset becomes impaired or is derecognized under GAAP.

(2) A DTL may only be netted against a single asset.

(3) For purposes of calculating the amount of DTAs subject to the threshold deduction in paragraph (d) of this section, the amount of DTAs that arise from net operating loss and tax credit carryforwards, net of any related valuation allowances, and of DTAs arising from temporary differences that the FDIC-supervised institution could not realize through net operating loss carrybacks, net of any related valuation allowances, may be offset by DTLs (that have not been netted against assets subject to deduction pursuant to paragraph (e)(1) of this section) subject to the conditions set forth in this paragraph (e).

(i) Only the DTAs and DTLs that relate to taxes levied by the same taxation authority and that are eligible for offsetting by that authority may be offset for purposes of this deduction.

(ii) The amount of DTLs that the FDIC-supervised institution nets against DTAs that arise from net operating loss and tax credit carryforwards, net of any related valuation allowances, and against DTAs arising from temporary differences that the FDIC-supervised institution could not realize through net operating loss carrybacks, net of any related valuation allowances, must be allocated in proportion to the amount of DTAs that arise from net operating loss and tax credit carryforwards (net of any related valuation allowances, but before any offsetting of DTLs) and of DTAs arising from temporary differences that the FDIC-supervised institution could not realize through net operating loss carrybacks (net of any related valuation allowances, but before any offsetting of DTLs), respectively.

[31] The amount of the items in paragraph (d)(2) of this section that is not deducted from common equity tier 1 capital pursuant to this section must be included in the risk-weighted assets of the advanced approaches FDIC-supervised institution and assigned a 250 percent risk weight.

(4) An FDIC-supervised institution may offset DTLs embedded in the carrying value of a leveraged lease portfolio acquired in a business combination that are not recognized under GAAP against DTAs that are subject to paragraph (d) of this section in accordance with this paragraph (e).

(5) An FDIC-supervised institution must net DTLs against assets subject to deduction under this section in a consistent manner from reporting period to reporting period. An FDIC-supervised institution may change its preference regarding the manner in which it nets DTLs against specific assets subject to deduction under this section only after obtaining the prior approval of the FDIC.

(f) *Insufficient amounts of a specific regulatory capital component to effect deductions.* Under the corresponding deduction approach, if an FDIC-supervised institution does not have a sufficient amount of a specific component of capital to effect the full amount of any deduction from capital required under paragraph (d) of this section, the FDIC-supervised institution must deduct the shortfall amount from the next higher (that is, more subordinated) component of regulatory capital. Any investment by an advanced approaches FDIC-supervised institution in a covered debt instrument must be treated as an investment in the tier 2 capital for purposes of this paragraph (f). Notwithstanding any other provision of this section, a qualifying community banking organization (as defined in § 324.12) that has elected to use the community bank leverage ratio framework pursuant to § 324.12 is not required to deduct any shortfall of tier 2 capital from its additional tier 1 capital or common equity tier 1 capital.

(g) *Treatment of assets that are deducted.* An FDIC-supervised institution must exclude from standardized total risk-weighted assets and, as applicable, advanced approaches total risk-weighted assets any item that is required to be deducted from regulatory capital.

(h) *Net long position*—(1) *In general.* For purposes of calculating the amount of an FDIC-supervised institution's investment in the FDIC-supervised institution's own capital instrument, investment in the capital of an unconsolidated financial institution, and investment in a covered debt instrument under this section, the institution's net long position is the gross long position in the underlying instrument determined in accordance with paragraph (h)(2) of this section, as adjusted to recognize any short position by the FDIC-supervised institution in the same instrument subject to paragraph (h)(3) of this section.

(2) *Gross long position.* A gross long position is determined as follows:

(i) For an equity exposure that is held directly by the FDIC-supervised institution, the adjusted carrying value of the exposure as that term is defined in § 324.51(b);

(ii) For an exposure that is held directly and that is not an equity exposure or a securitization exposure, the exposure amount as that term is defined in § 324.2;

(iii) For each indirect exposure, the FDIC-supervised institution's carrying value of its investment in an investment fund or, alternatively:

(A) An FDIC-supervised institution may, with the prior approval of the FDIC, use a conservative estimate of the amount of its indirect investment in the FDIC-supervised institution's own capital instruments, its indirect investment in the capital of an unconsolidated financial institution, or its indirect investment in a covered debt instrument held through a position in an index, as applicable; or

(B) An FDIC-supervised institution may calculate the gross long position for an indirect exposure to the FDIC-supervised institution's own capital instruments, the capital of an unconsolidated financial institution, or a covered debt instrument by multiplying the FDIC-supervised institution's carrying value of its investment in the investment fund by either:

(*1*) The highest stated investment limit (in percent) for an investment in the FDIC-supervised institution's own capital instruments, an investment in the capital of an unconsolidated financial institution, or an investment in a covered debt instrument, as applicable, as stated in the prospectus, partnership agreement, or similar contract defining permissible investments of the investment fund; or

(*2*) The investment fund's actual holdings (in percent) of the investment in the FDIC-supervised institution's own capital instruments, investment in the capital of an unconsolidated financial institution, or investment in a covered debt instrument, as applicable; and

(iv) For a synthetic exposure, the amount of the FDIC-supervised institution's loss on the exposure if the reference capital or covered debt instrument were to have a value of zero.

(3) *Adjustments to reflect a short position*. In order to adjust the gross long position to recognize a short position in the same instrument under paragraph (h)(1) of this section, the following criteria must be met:

(i) The maturity of the short position must match the maturity of the long position, or the short position must have a residual maturity of at least one year (maturity requirement); or

(ii) For a position that is a trading asset or trading liability (whether on- or off-balance sheet) as reported on the FDIC-supervised institution's Call Report, if the FDIC-supervised institution has a contractual right or obligation to sell the long position at a specific point in time and the counterparty to the contract has an obligation to purchase the long position if the FDIC-supervised institution exercises its right to sell, this point in time may be treated as the maturity of the long position such that the maturity of the long position and short position are deemed to match for purposes of the maturity requirement, even if the maturity of the short position is less than one year; and

(iii) For an investment in an FDIC-supervised institution's own capital instrument under paragraph (c)(1) of this section, an investment in the capital of an unconsolidated financial institution under paragraphs (c)(4) through (6) and (d) of this section (as applicable), and an investment in a covered debt instrument under paragraphs (c)(1), (5), and (6) of this section:

(A) The FDIC-supervised institution may only net a short position against a long position in an investment in the FDIC-supervised institution's own capital instrument under paragraph (c)(1) of this section if the short position involves no counterparty credit risk;

(B) A gross long position in an investment in the FDIC-supervised institution's own capital instrument, an investment in the capital of an unconsolidated financial institution, or an investment in a covered debt instrument due to a position in an index may be netted against a short position in the same index;

(C) Long and short positions in the same index without maturity dates are considered to have matching maturities; and

(D) A short position in an index that is hedging a long cash or synthetic position in an investment in the FDIC-supervised institution's own capital instrument, an investment in the capital instrument of an unconsolidated financial institution, or an investment in a covered debt instrument can be decomposed to provide recognition of the hedge. More specifically, the portion of the index that is composed of the same underlying instrument that is being hedged may be used to offset the long position if both the long position being hedged and the short position in the index are reported as a trading asset or trading liability (whether on- or off-balance sheet) on the FDIC-supervised institution's Call Report, and the hedge is deemed effective by the FDIC-supervised institution's internal control processes, which have not been found to be inadequate by the FDIC.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20759, Apr. 14, 2014; 80 FR 41422, July 15, 2015; 81 FR 71354, Oct. 17, 2016; 83 FR 17740, Apr. 24, 2018; 84 FR 4247, Feb. 14, 2019; 84 FR 35272, July 22, 2019; 84 FR 59279, Nov. 1, 2019; 84 FR 61803, Nov. 13, 2019; 86 FR 742, Jan. 6, 2021]

§§ 324.23–324.29 [Reserved]

Subpart D—Risk-Weighted Assets—Standardized Approach

§ 324.30 Applicability.

(a) This subpart sets forth methodologies for determining risk-weighted assets for purposes of the generally applicable risk-based capital requirements for all FDIC-supervised institutions.

(b) Notwithstanding paragraph (a) of this section, a market risk FDIC-supervised institution must exclude from its calculation of risk-weighted assets under this subpart the risk-weighted asset amounts of all covered positions, as defined in subpart F of this part (except foreign exchange positions that are not trading positions, OTC derivative positions, cleared transactions, and unsettled transactions).

RISK-WEIGHTED ASSETS FOR GENERAL CREDIT RISK

§ 324.31 Mechanics for calculating risk-weighted assets for general credit risk.

(a) *General risk-weighting requirements.* An FDIC-supervised institution must apply risk weights to its exposures as follows:

(1) An FDIC-supervised institution must determine the exposure amount of each on-balance sheet exposure, each OTC derivative contract, and each off-balance sheet commitment, trade and transaction-related contingency, guarantee, repo-style transaction, financial standby letter of credit, forward agreement, or other similar transaction that is not:

(i) An unsettled transaction subject to § 324.38;

(ii) A cleared transaction subject to § 324.35;

(iii) A default fund contribution subject to § 324.35;

(iv) A securitization exposure subject to §§ 324.41 through 324.45; or

(v) An equity exposure (other than an equity OTC derivative contract) subject to §§ 324.51 through 324.53.

(2) The FDIC-supervised institution must multiply each exposure amount by the risk weight appropriate to the exposure based on the exposure type or counterparty, eligible guarantor, or financial collateral to determine the risk-weighted asset amount for each exposure.

(b) Total risk-weighted assets for general credit risk equals the sum of the risk-weighted asset amounts calculated under this section.

§ 324.32 General risk weights.

(a) *Sovereign exposures*—(1) *Exposures to the U.S. government.* (i) Notwithstanding any other requirement in this subpart, an FDIC-supervised institution must assign a zero percent risk weight to:

(A) An exposure to the U.S. government, its central bank, or a U.S. government agency; and

(B) The portion of an exposure that is directly and unconditionally guaranteed by the U.S. government, its central bank, or a U.S. government agency. This includes a deposit or other exposure, or the portion of a deposit or other exposure, that is insured or otherwise unconditionally guaranteed by the FDIC or National Credit Union Administration.

(ii) An FDIC-supervised institution must assign a 20 percent risk weight to the portion of an exposure that is conditionally guaranteed by the U.S. government, its central bank, or a U.S. government agency. This includes an exposure, or the portion of an exposure, that is conditionally guaranteed by the FDIC or National Credit Union Administration.

(iii) An FDIC-supervised institution must assign a zero percent risk weight to a Paycheck Protection Program covered loan as defined in section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)).

(2) *Other sovereign exposures.* In accordance with Table 1 to § 324.32, an FDIC-supervised institution must assign a risk weight to a sovereign exposure based on the CRC applicable to the sovereign or the sovereign's OECD membership status if there is no CRC applicable to the sovereign.

TABLE 1 TO § 324.32—RISK WEIGHTS FOR SOVEREIGN EXPOSURES

		Risk Weight (in percent)
CRC	0–1	0
	2	20
	3	50
	4–6	100
	7	150
OECD Member with No CRC		0
Non-OECD Member with No CRC		100
Sovereign Default		150

(3) *Certain sovereign exposures.* Notwithstanding paragraph (a)(2) of this section, an FDIC-supervised institution may assign to a sovereign exposure a risk weight that is lower than the applicable risk weight in Table 1 to § 324.32 if:

(i) The exposure is denominated in the sovereign's currency;

(ii) The FDIC-supervised institution has at least an equivalent amount of liabilities in that currency; and

(iii) The risk weight is not lower than the risk weight that the home country supervisor allows FDIC-supervised institutions under its jurisdiction to assign to the same exposures to the sovereign.

(4) *Exposures to a non-OECD member sovereign with no CRC.* Except as provided in paragraphs (a)(3), (a)(5) and (a)(6) of this section, an FDIC-supervised institution must assign a 100 percent risk weight to an exposure to a sovereign if the sovereign does not have a CRC.

(5) *Exposures to an OECD member sovereign with no CRC.* Except as provided in paragraph (a)(6) of this section, an FDIC-supervised institution must assign a 0 percent risk weight to an exposure to a sovereign that is a member of the OECD if the sovereign does not have a CRC.

(6) *Sovereign default.* An FDIC-supervised institution must assign a 150 percent risk weight to a sovereign exposure immediately upon determining that an event of sovereign default has occurred, or if an event of sovereign default has occurred during the previous five years.

(b) *Certain supranational entities and multilateral development banks (MDBs).* An FDIC-supervised institution must assign a zero percent risk weight to an exposure to the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, the European Stability Mechanism, the European Financial Stability Facility, or an MDB.

(c) *Exposures to GSEs.* (1) An FDIC-supervised institution must assign a 20 percent risk weight to an exposure to a GSE other than an equity exposure or preferred stock.

(2) An FDIC-supervised institution must assign a 100 percent risk weight to preferred stock issued by a GSE.

(d) *Exposures to depository institutions, foreign banks, and credit unions*—(1) *Exposures to U.S. depository institutions and credit unions.* An FDIC-supervised institution must assign a 20 percent risk weight to an exposure to a depository institution or credit union that is organized under the laws of the United States or any state thereof, except as otherwise provided under paragraph (d)(3) of this section.

(2) *Exposures to foreign banks.* (i) Except as otherwise provided under paragraphs (d)(2)(iii), (d)(2)(v), and (d)(3) of this section, an FDIC-supervised institution must assign a risk weight to an exposure to a foreign bank, in accordance with Table 2 to § 324.32, based on the CRC that corresponds to the foreign bank's home country or the OECD membership status of the foreign bank's home country if there is no CRC applicable to the foreign bank's home country.

TABLE 2 TO § 324.32—RISK WEIGHTS FOR EXPOSURES TO FOREIGN BANKS

	Risk weight (in percent)
CRC:	
0–1	20
2	50
3	100
4–7	150
OECD Member with No CRC	20
Non-OECD Member with No CRC	100
Sovereign Default	150

(ii) An FDIC-supervised institution must assign a 20 percent risk weight to an exposure to a foreign bank whose home country is a member of the OECD and does not have a CRC.

(iii) An FDIC-supervised institution must assign a 20 percent risk-weight to an exposure that is a self-liquidating, trade-related contingent item that arises from the movement of goods and that has a maturity of three months or less to a foreign bank whose home country has a CRC of 0, 1, 2, or 3, or is an OECD member with no CRC.

(iv) An FDIC-supervised institution must assign a 100 percent risk weight to an exposure to a foreign bank whose home country is not a member of the OECD and does not have a CRC, with

the exception of self-liquidating, trade-related contingent items that arise from the movement of goods, and that have a maturity of three months or less, which may be assigned a 20 percent risk weight.

(v) An FDIC-supervised institution must assign a 150 percent risk weight to an exposure to a foreign bank immediately upon determining that an event of sovereign default has occurred in the bank's home country, or if an event of sovereign default has occurred in the foreign bank's home country during the previous five years.

(3) An FDIC-supervised institution must assign a 100 percent risk weight to an exposure to a financial institution if the exposure may be included in that financial institution's capital unless the exposure is:

(i) An equity exposure;

(ii) A significant investment in the capital of an unconsolidated financial institution in the form of common stock pursuant to § 324.22(d)(2)(i)(c);

(iii) Deducted from regulatory capital under § 324.22; or

(iv) Subject to a 150 percent risk weight under paragraph (d)(2)(iv) or Table 2 of paragraph (d)(2) of this section.

(e) *Exposures to public sector entities (PSEs)*—(1) *Exposures to U.S. PSEs.* (i) An FDIC-supervised institution must assign a 20 percent risk weight to a general obligation exposure to a PSE that is organized under the laws of the United States or any state or political subdivision thereof.

(ii) An FDIC-supervised institution must assign a 50 percent risk weight to a revenue obligation exposure to a PSE that is organized under the laws of the United States or any state or political subdivision thereof.

(2) *Exposures to foreign PSEs.* (i) Except as provided in paragraphs (e)(1) and (e)(3) of this section, an FDIC-supervised institution must assign a risk weight to a general obligation exposure to a PSE, in accordance with Table 3 to § 324.32, based on the CRC that corresponds to the PSE's home country or the OECD membership status of the PSE's home country if there is no CRC applicable to the PSE's home country.

(ii) Except as provided in paragraphs (e)(1) and (e)(3) of this section, an FDIC-supervised institution must assign a risk weight to a revenue obligation exposure to a PSE, in accordance with Table 4 to § 324.32, based on the CRC that corresponds to the PSE's home country; or the OECD membership status of the PSE's home country if there is no CRC applicable to the PSE's home country.

(3) An FDIC-supervised institution may assign a lower risk weight than would otherwise apply under Tables 3 or 4 to § 324.32 to an exposure to a foreign PSE if:

(i) The PSE's home country supervisor allows banks under its jurisdiction to assign a lower risk weight to such exposures; and

(ii) The risk weight is not lower than the risk weight that corresponds to the PSE's home country in accordance with Table 1 to § 324.32.

TABLE 3 TO § 324.32—RISK WEIGHTS FOR NON-U.S. PSE GENERAL OBLIGATIONS

		Risk Weight (in percent)
CRC	0–1	20
	2	50
	3	100
	4–7	150
OECD Member with No CRC		20
Non-OECD Member with No CRC		100
Sovereign Default		150

TABLE 4 TO § 324.32—RISK WEIGHTS FOR NON-U.S. PSE REVENUE OBLIGATIONS

		Risk Weight (in percent)
CRC	0–1	50
	2–3	50
	4–7	150
OECD Member with No CRC		50
Non-OECD Member with No CRC		100
Sovereign Default		150

(4) *Exposures to PSEs from an OECD member sovereign with no CRC.* (i) An FDIC-supervised institution must assign a 20 percent risk weight to a general obligation exposure to a PSE

whose home country is an OECD member sovereign with no CRC.

(ii) An FDIC-supervised institution must assign a 50 percent risk weight to a revenue obligation exposure to a PSE whose home country is an OECD member sovereign with no CRC.

(5) *Exposures to PSEs whose home country is not an OECD member sovereign with no CRC.* An FDIC-supervised institution must assign a 100 percent risk weight to an exposure to a PSE whose home country is not a member of the OECD and does not have a CRC.

(6) An FDIC-supervised institution must assign a 150 percent risk weight to a PSE exposure immediately upon determining that an event of sovereign default has occurred in a PSE's home country or if an event of sovereign default has occurred in the PSE's home country during the previous five years.

(f) *Corporate exposures.* (1) An FDIC-supervised institution must assign a 100 percent risk weight to all its corporate exposures, except as provided in paragraphs (f)(2) and (f)(3) of this section.

(2) A FDIC-supervised institution must assign a 2 percent risk weight to an exposure to a QCCP arising from the FDIC-supervised institution posting cash collateral to the QCCP in connection with a cleared transaction that meets the requirements of § 324.35(b)(3)(i)(A) and a 4 percent risk weight to an exposure to a QCCP arising from the FDIC-supervised institution posting cash collateral to the QCCP in connection with a cleared transaction that meets the requirements of § 324.35(b)(3)(i)(B).

(3) A FDIC-supervised institution must assign a 2 percent risk weight to an exposure to a QCCP arising from the FDIC-supervised institution posting cash collateral to the QCCP in connection with a cleared transaction that meets the requirements of § 324.35(c)(3)(i).

(g) *Residential mortgage exposures.* (1) An FDIC-supervised institution must assign a 50 percent risk weight to a first-lien residential mortgage exposure that:

(i) Is secured by a property that is either owner-occupied or rented;

(ii) Is made in accordance with prudent underwriting standards, including standards relating to the loan amount as a percent of the appraised value of the property;

(iii) Is not 90 days or more past due or carried in nonaccrual status; and

(iv) Is not restructured or modified.

(2) An FDIC-supervised institution must assign a 100 percent risk weight to a first-lien residential mortgage exposure that does not meet the criteria in paragraph (g)(1) of this section, and to junior-lien residential mortgage exposures.

(3) For the purpose of this paragraph (g), if an FDIC-supervised institution holds the first-lien and junior-lien(s) residential mortgage exposures, and no other party holds an intervening lien, the FDIC-supervised institution must combine the exposures and treat them as a single first-lien residential mortgage exposure.

(4) A loan modified or restructured solely pursuant to the U.S. Treasury's Home Affordable Mortgage Program is not modified or restructured for purposes of this section.

(h) *Pre-sold construction loans.* An FDIC-supervised institution must assign a 50 percent risk weight to a pre-sold construction loan unless the purchase contract is cancelled, in which case an FDIC-supervised institution must assign a 100 percent risk weight.

(i) *Statutory multifamily mortgages.* An FDIC-supervised institution must assign a 50 percent risk weight to a statutory multifamily mortgage.

(j) *High-volatility commercial real estate (HVCRE) exposures.* An FDIC-supervised institution must assign a 150 percent risk weight to an HVCRE exposure.

(k) *Past due exposures.* Except for an exposure to a sovereign entity or a residential mortgage exposure or a policy loan, if an exposure is 90 days or more past due or on nonaccrual:

(1) An FDIC-supervised institution must assign a 150 percent risk weight to the portion of the exposure that is not guaranteed or that is unsecured;

(2) An FDIC-supervised institution may assign a risk weight to the guaranteed portion of a past due exposure based on the risk weight that applies under § 324.36 if the guarantee or credit derivative meets the requirements of that section; and

(3) An FDIC-supervised institution may assign a risk weight to the collateralized portion of a past due exposure based on the risk weight that applies under § 324.37 if the collateral meets the requirements of that section.

(l) *Other assets.* (1) An FDIC-supervised institution must assign a zero percent risk weight to cash owned and held in all offices of the FDIC-supervised institution or in transit; to gold bullion held in the FDIC-supervised institution's own vaults or held in another depository institution's vaults on an allocated basis, to the extent the gold bullion assets are offset by gold bullion liabilities; and to exposures that arise from the settlement of cash transactions (such as equities, fixed income, spot foreign exchange and spot commodities) with a central counterparty where there is no assumption of ongoing counterparty credit risk by the central counterparty after settlement of the trade and associated default fund contributions.

(2) An FDIC-supervised institution must assign a 20 percent risk weight to cash items in the process of collection.

(3) An FDIC-supervised institution must assign a 100 percent risk weight to DTAs arising from temporary differences that the FDIC-supervised institution could realize through net operating loss carrybacks.

(4) An FDIC-supervised institution must assign a 250 percent risk weight to the portion of each of the following items to the extent it is not deducted from common equity tier 1 capital pursuant to § 324.22(d):

(i) MSAs; and

(ii) DTAs arising from temporary differences that the FDIC-supervised institution could not realize through net operating loss carrybacks.

(5) An FDIC-supervised institution must assign a 100 percent risk weight to all assets not specifically assigned a different risk weight under this subpart and that are not deducted from tier 1 or tier 2 capital pursuant to § 324.22.

(6) Notwithstanding the requirements of this section, an FDIC-supervised institution may assign an asset that is not included in one of the categories provided in this section to the risk weight category applicable under the capital rules applicable to bank holding companies and savings and loan holding companies under 12 CFR part 217, provided that all of the following conditions apply:

(i) The FDIC-supervised institution is not authorized to hold the asset under applicable law other than debt previously contracted or similar authority; and

(ii) The risks associated with the asset are substantially similar to the risks of assets that are otherwise assigned to a risk weight category of less than 100 percent under this subpart.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20759, Apr. 14, 2014; 84 FR 35275, July 22, 2019; 85 FR 4431, Jan. 24, 2020; 85 FR 20394, Apr. 13, 2020; 85 FR 57963, Sept. 17, 2020]

§ 324.33 Off-balance sheet exposures.

(a) *General.* (1) An FDIC-supervised institution must calculate the exposure amount of an off-balance sheet exposure using the credit conversion factors (CCFs) in paragraph (b) of this section.

(2) Where an FDIC-supervised institution commits to provide a commitment, the FDIC-supervised institution may apply the lower of the two applicable CCFs.

(3) Where an FDIC-supervised institution provides a commitment structured as a syndication or participation, the FDIC-supervised institution is only required to calculate the exposure amount for its pro rata share of the commitment.

(4) Where an FDIC-supervised institution provides a commitment, enters into a repurchase agreement, or provides a credit-enhancing representation and warranty, and such commitment, repurchase agreement, or credit-enhancing representation and warranty is not a securitization exposure, the exposure amount shall be no greater than the maximum contractual amount of the commitment, repurchase agreement, or credit-enhancing representation and warranty, as applicable.

(b) *Credit conversion factors*—(1) *Zero percent CCF.* An FDIC-supervised institution must apply a zero percent CCF to the unused portion of a commitment that is unconditionally cancelable by the FDIC-supervised institution.

(2) *20 percent CCF.* An FDIC-supervised institution must apply a 20 percent CCF to the amount of:

(i) Commitments with an original maturity of one year or less that are not unconditionally cancelable by the FDIC-supervised institution; and

(ii) Self-liquidating, trade-related contingent items that arise from the movement of goods, with an original maturity of one year or less.

(3) *50 percent CCF.* An FDIC-supervised institution must apply a 50 percent CCF to the amount of:

(i) Commitments with an original maturity of more than one year that are not unconditionally cancelable by the FDIC-supervised institution; and

(ii) Transaction-related contingent items, including performance bonds, bid bonds, warranties, and performance standby letters of credit.

(4) *100 percent CCF.* An FDIC-supervised institution must apply a 100 percent CCF to the amount of the following off-balance-sheet items and other similar transactions:

(i) Guarantees;

(ii) Repurchase agreements (the off-balance sheet component of which equals the sum of the current fair values of all positions the FDIC-supervised institution has sold subject to repurchase);

(iii) Credit-enhancing representations and warranties that are not securitization exposures;

(iv) Off-balance sheet securities lending transactions (the off-balance sheet component of which equals the sum of the current fair values of all positions the FDIC-supervised institution has lent under the transaction);

(v) Off-balance sheet securities borrowing transactions (the off-balance sheet component of which equals the sum of the current fair values of all non-cash positions the FDIC-supervised institution has posted as collateral under the transaction);

(vi) Financial standby letters of credit; and

(vii) Forward agreements.

§ 324.34 Derivative contracts.

(a) *Exposure amount for derivative contracts*—(1) *FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution.* (i) A FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution must use the current exposure methodology (CEM) described in paragraph (b) of this section to calculate the exposure amount for all its OTC derivative contracts, unless the FDIC-supervised institution makes the election provided in paragraph (a)(1)(ii) of this section.

(ii) A FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution may elect to calculate the exposure amount for all its OTC derivative contracts under the standardized approach for counterparty credit risk (SA–CCR) in § 324.132(c) by notifying the FDIC, rather than calculating the exposure amount for all its derivative contracts using CEM. A FDIC-supervised institution that elects under this paragraph (a)(1)(ii) to calculate the exposure amount for its OTC derivative contracts under SA–CCR must apply the treatment of cleared transactions under § 324.133 to its derivative contracts that are cleared transactions and to all default fund contributions associated with such derivative contracts, rather than applying § 324.35. A FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution must use the same methodology to calculate the exposure amount for all its derivative contracts and, if a FDIC-supervised institution has elected to use SA–CCR under this paragraph (a)(1)(ii), the FDIC-supervised institution may change its election only with prior approval of the FDIC.

(2) *Advanced approaches FDIC-supervised institution.* An advanced approaches FDIC-supervised institution must calculate the exposure amount for all its derivative contracts using SA–CCR in § 324.132(c) for purposes of standardized total risk-weighted assets. An advanced approaches FDIC-supervised institution must apply the treatment of cleared transactions under § 324.133 to its derivative contracts that are cleared transactions and to all default fund contributions associated with such derivative contracts for purposes of standardized total risk-weighted assets.

(b) *Current exposure methodology exposure amount*—(1) *Single OTC derivative contract.* Except as modified by paragraph (c) of this section, the exposure amount for a single OTC derivative contract that is not subject to a qualifying master netting agreement is equal to the sum of the FDIC-supervised institution's current credit exposure and potential future credit exposure (PFE) on the OTC derivative contract.

(i) *Current credit exposure.* The current credit exposure for a single OTC derivative contract is the greater of the fair value of the OTC derivative contract or zero.

(ii) *PFE.* (A) The PFE for a single OTC derivative contract, including an OTC derivative contract with a negative fair value, is calculated by multiplying the notional principal amount of the OTC derivative contract by the appropriate conversion factor in Table 1 to this section.

(B) For purposes of calculating either the PFE under this paragraph (b)(1)(ii) or the gross PFE under paragraph (b)(2)(ii)(A) of this section for exchange rate contracts and other similar contracts in which the notional principal amount is equivalent to the cash flows, notional principal amount is the net receipts to each party falling due on each value date in each currency.

(C) For an OTC derivative contract that does not fall within one of the specified categories in Table 1 to this section, the PFE must be calculated using the appropriate ''other'' conversion factor.

(D) A FDIC-supervised institution must use an OTC derivative contract's effective notional principal amount (that is, the apparent or stated notional principal amount multiplied by any multiplier in the OTC derivative contract) rather than the apparent or stated notional principal amount in calculating PFE.

(E) The PFE of the protection provider of a credit derivative is capped at the net present value of the amount of unpaid premiums.

TABLE 1 TO § 324.34—CONVERSION FACTOR MATRIX FOR DERIVATIVE CONTRACTS [1]

Remaining maturity [2]	Interest rate	Foreign exchange rate and gold	Credit (investment grade reference asset) [3]	Credit (non-investment-grade reference asset)	Equity	Precious metals (except gold)	Other
One year or less	0.00	0.01	0.05	0.10	0.06	0.07	0.10
Greater than one year and less than or equal to five years	0.005	0.05	0.05	0.10	0.08	0.07	0.12
Greater than five years	0.015	0.075	0.05	0.10	0.10	0.08	0.15

[1] For a derivative contract with multiple exchanges of principal, the conversion factor is multiplied by the number of remaining payments in the derivative contract.

[2] For an OTC derivative contract that is structured such that on specified dates any outstanding exposure is settled and the terms are reset so that the fair value of the contract is zero, the remaining maturity equals the time until the next reset date. For an interest rate derivative contract with a remaining maturity of greater than one year that meets these criteria, the minimum conversion factor is 0.005.

[3] A FDIC-supervised institution must use the column labeled ''Credit (investment-grade reference asset)'' for a credit derivative whose reference asset is an outstanding unsecured long-term debt security without credit enhancement that is investment grade. A FDIC-supervised institution must use the column labeled ''Credit (non-investment-grade reference asset)'' for all other credit derivatives.

(2) *Multiple OTC derivative contracts subject to a qualifying master netting agreement.* Except as modified by paragraph (c) of this section, the exposure amount for multiple OTC derivative contracts subject to a qualifying master netting agreement is equal to the sum of the net current credit exposure and the adjusted sum of the PFE amounts for all OTC derivative contracts subject to the qualifying master netting agreement.

(i) *Net current credit exposure.* The net current credit exposure is the greater of the net sum of all positive and negative fair values of the individual OTC derivative contracts subject to the qualifying master netting agreement or zero.

(ii) *Adjusted sum of the PFE amounts.* The adjusted sum of the PFE amounts, Anet, is calculated as Anet = (0.4 × Agross) + (0.6 × NGR × Agross), where:

(A) Agross = the gross PFE (that is, the sum of the PFE amounts as determined under paragraph (b)(1)(ii) of this section for each individual derivative contract subject to the qualifying master netting agreement); and

(B) Net-to-gross Ratio (NGR) = the ratio of the net current credit exposure to the gross current credit exposure. In calculating the NGR, the gross current credit exposure equals the sum of the positive current credit exposures (as determined under paragraph (b)(1)(i) of this section) of all individual derivative contracts subject to the qualifying master netting agreement.

(c) *Recognition of credit risk mitigation of collateralized OTC derivative contracts.* (1) A FDIC-supervised institution using CEM under paragraph (b) of this section may recognize the credit risk mitigation benefits of financial collateral that secures an OTC derivative contract or multiple OTC derivative contracts subject to a qualifying master netting agreement (netting set) by using the simple approach in § 324.37(b).

(2) As an alternative to the simple approach, a FDIC-supervised institution using CEM under paragraph (b) of this section may recognize the credit risk mitigation benefits of financial collateral that secures such a contract or netting set if the financial collateral is marked-to-fair value on a daily basis and subject to a daily margin maintenance requirement by applying a risk weight to the uncollateralized portion of the exposure, after adjusting the exposure amount calculated under paragraph (b)(1) or (2) of this section using the collateral haircut approach in § 324.37(c). The FDIC-supervised institution must substitute the exposure amount calculated under paragraph (b)(1) or (2) of this section for ΣE in the equation in § 324.37(c)(2).

(d) *Counterparty credit risk for credit derivatives*—(1) *Protection purchasers.* A FDIC-supervised institution that purchases a credit derivative that is recognized under § 324.36 as a credit risk mitigant for an exposure that is not a covered position under subpart F of this part is not required to compute a separate counterparty credit risk capital requirement under this subpart provided that the FDIC-supervised institution does so consistently for all such credit derivatives. The FDIC-supervised institution must either include all or exclude all such credit derivatives that are subject to a qualifying master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes.

(2) *Protection providers.* (i) A FDIC-supervised institution that is the protection provider under a credit derivative must treat the credit derivative as an exposure to the underlying reference asset. The FDIC-supervised institution is not required to compute a counterparty credit risk capital requirement for the credit derivative under this subpart, provided that this treatment is applied consistently for all such credit derivatives. The FDIC-supervised institution must either include all or exclude all such credit derivatives that are subject to a qualifying master netting agreement from any measure used to determine counterparty credit risk exposure.

(ii) The provisions of this paragraph (d)(2) apply to all relevant counterparties for risk-based capital purposes unless the FDIC-supervised institution is treating the credit derivative as a covered position under subpart F of this part, in which case the FDIC-supervised institution must compute a supplemental counterparty credit risk capital requirement under this section.

(e) *Counterparty credit risk for equity derivatives.* (1) A FDIC-supervised institution must treat an equity derivative contract as an equity exposure and compute a risk-weighted asset amount for the equity derivative contract under §§ 324.51 through 324.53 (unless the FDIC-supervised institution is treating the contract as a covered position under subpart F of this part).

(2) In addition, the FDIC-supervised institution must also calculate a risk-based capital requirement for the counterparty credit risk of an equity derivative contract under this section if the FDIC-supervised institution is treating the contract as a covered position under subpart F of this part.

(3) If the FDIC-supervised institution risk weights the contract under the Simple Risk-Weight Approach (SRWA)

in § 324.52, the FDIC-supervised institution may choose not to hold risk-based capital against the counterparty credit risk of the equity derivative contract, as long as it does so for all such contracts. Where the equity derivative contracts are subject to a qualified master netting agreement, a FDIC-supervised institution using the SRWA must either include all or exclude all of the contracts from any measure used to determine counterparty credit risk exposure.

(f) *Clearing member FDIC-supervised institution's exposure amount.* The exposure amount of a clearing member FDIC-supervised institution using CEM under paragraph (b) of this section for a client-facing derivative transaction or netting set of client-facing derivative transactions equals the exposure amount calculated according to paragraph (b)(1) or (2) of this section multiplied by the scaling factor the square root of ½ (which equals 0.707107). If the FDIC-supervised institution determines that a longer period is appropriate, the FDIC-supervised institution must use a larger scaling factor to adjust for a longer holding period as follows:

$$\text{Scaling factor} = \sqrt{\frac{H}{10}}$$

Where H = the holding period greater than or equal to five days. Additionally, the FDIC may require the FDIC-supervised institution to set a longer holding period if the FDIC determines that a longer period is appropriate due to the nature, structure, or characteristics of the transaction or is commensurate with the risks associated with the transaction.

[85 FR 4431, Jan. 24, 2020]

§ 324.35 Cleared transactions.

(a) *General requirements*—(1) *Clearing member clients.* An FDIC-supervised institution that is a clearing member client must use the methodologies described in paragraph (b) of this section to calculate risk-weighted assets for a cleared transaction.

(2) *Clearing members.* An FDIC-supervised institution that is a clearing member must use the methodologies described in paragraph (c) of this section to calculate its risk-weighted assets for a cleared transaction and paragraph (d) of this section to calculate its risk-weighted assets for its default fund contribution to a CCP.

(3) *Alternate requirements.* Notwithstanding any other provision of this section, an advanced approaches FDIC-supervised institution or a FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution and that has elected to use SA–CCR under § 324.34(a)(1) must apply § 324.133 to its derivative contracts that are cleared transactions rather than this section.

(b) *Clearing member client FDIC-supervised institutions*—(1) *Risk-weighted assets for cleared transactions.* (i) To determine the risk-weighted asset amount for a cleared transaction, an FDIC-supervised institution that is a clearing member client must multiply the trade exposure amount for the cleared transaction, calculated in accordance with paragraph (b)(2) of this section, by the risk weight appropriate for the cleared transaction, determined in accordance with paragraph (b)(3) of this section.

(ii) A clearing member client FDIC-supervised institution's total risk-weighted assets for cleared transactions is the sum of the risk-weighted asset amounts for all its cleared transactions.

(2) *Trade exposure amount.* (i) For a cleared transaction that is either a derivative contract or a netting set of derivative contracts, the trade exposure amount equals:

(A) The exposure amount for the derivative contract or netting set of derivative contracts, calculated using the

methodology used to calculate exposure amount for OTC derivative contracts under § 324.34; plus

(B) The fair value of the collateral posted by the clearing member client FDIC-supervised institution and held by the CCP, clearing member, or custodian in a manner that is not bankruptcy remote.

(ii) For a cleared transaction that is a repo-style transaction or netting set of repo-style transactions, the trade exposure amount equals:

(A) The exposure amount for the repo-style transaction calculated using the methodologies under § 324.37(c); plus

(B) The fair value of the collateral posted by the clearing member client FDIC-supervised institution and held by the CCP, clearing member, or custodian in a manner that is not bankruptcy remote.

(3) *Cleared transaction risk weights.* (i) For a cleared transaction with a QCCP, a clearing member client FDIC-supervised institution must apply a risk weight of:

(A) 2 percent if the collateral posted by the FDIC-supervised institution to the QCCP or clearing member is subject to an arrangement that prevents any losses to the clearing member client FDIC-supervised institution due to the joint default or a concurrent insolvency, liquidation, or receivership proceeding of the clearing member and any other clearing member clients of the clearing member; and the clearing member client FDIC-supervised institution has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that in the event of a legal challenge (including one resulting from an event of default or from liquidation, insolvency, or receivership proceedings) the relevant court and administrative authorities would find the arrangements to be legal, valid, binding and enforceable under the law of the relevant jurisdictions; or

(B) 4 percent if the requirements of § 324.35(b)(3)(A) are not met.

(ii) For a cleared transaction with a CCP that is not a QCCP, a clearing member client FDIC-supervised institution must apply the risk weight appropriate for the CCP according to this subpart D.

(4) *Collateral.* (i) Notwithstanding any other requirements in this section, collateral posted by a clearing member client FDIC-supervised institution that is held by a custodian (in its capacity as custodian) in a manner that is bankruptcy remote from the CCP, clearing member, and other clearing member clients of the clearing member, is not subject to a capital requirement under this section.

(ii) A clearing member client FDIC-supervised institution must calculate a risk-weighted asset amount for any collateral provided to a CCP, clearing member, or custodian in connection with a cleared transaction in accordance with the requirements under this subpart D.

(c) *Clearing member FDIC-supervised institutions*—(1) *Risk-weighted assets for cleared transactions.* (i) To determine the risk-weighted asset amount for a cleared transaction, a clearing member FDIC-supervised institution must multiply the trade exposure amount for the cleared transaction, calculated in accordance with paragraph (c)(2) of this section, by the risk weight appropriate for the cleared transaction, determined in accordance with paragraph (c)(3) of this section.

(ii) A clearing member FDIC-supervised institution's total risk-weighted assets for cleared transactions is the sum of the risk-weighted asset amounts for all of its cleared transactions.

(2) *Trade exposure amount.* A clearing member FDIC-supervised institution must calculate its trade exposure amount for a cleared transaction as follows:

(i) For a cleared transaction that is either a derivative contract or a netting set of derivative contracts, the trade exposure amount equals:

(A) The exposure amount for the derivative contract, calculated using the methodology to calculate exposure amount for OTC derivative contracts under § 324.34; plus

(B) The fair value of the collateral posted by the clearing member FDIC-supervised institution and held by the CCP in a manner that is not bankruptcy remote.

(ii) For a cleared transaction that is a repo-style transaction or netting set of repo-style transactions, trade exposure amount equals:

(A) The exposure amount for repo-style transactions calculated using methodologies under § 324.37(c); plus

(B) The fair value of the collateral posted by the clearing member FDIC-supervised institution and held by the CCP in a manner that is not bankruptcy remote.

(3) *Cleared transaction risk weight.* (i) A clearing member FDIC-supervised institution must apply a risk weight of 2 percent to the trade exposure amount for a cleared transaction with a QCCP.

(ii) For a cleared transaction with a CCP that is not a QCCP, a clearing member FDIC-supervised institution must apply the risk weight appropriate for the CCP according to this subpart D.

(iii) Notwithstanding paragraphs (c)(3)(i) and (ii) of this section, a clearing member FDIC-supervised institution may apply a risk weight of zero percent to the trade exposure amount for a cleared transaction with a CCP where the clearing member FDIC-supervised institution is acting as a financial intermediary on behalf of a clearing member client, the transaction offsets another transaction that satisfies the requirements set forth in § 324.3(a), and the clearing member FDIC-supervised institution is not obligated to reimburse the clearing member client in the event of the CCP default.

(4) *Collateral.* (i) Notwithstanding any other requirement in this section, collateral posted by a clearing member FDIC-supervised institution that is held by a custodian in a manner that is bankruptcy remote from the CCP is not subject to a capital requirement under this section.

(ii) A clearing member FDIC-supervised institution must calculate a risk-weighted asset amount for any collateral provided to a CCP, clearing member, or a custodian in connection with a cleared transaction in accordance with requirements under this subpart D.

(d) *Default fund contributions*—(1) *General requirement.* A clearing member FDIC-supervised institution must determine the risk-weighted asset amount for a default fund contribution to a CCP at least quarterly, or more frequently if, in the opinion of the FDIC-supervised institution or the FDIC, there is a material change in the financial condition of the CCP.

(2) *Risk-weighted asset amount for default fund contributions to non-qualifying CCPs.* A clearing member FDIC-supervised institution's risk-weighted asset amount for default fund contributions to CCPs that are not QCCPs equals the sum of such default fund contributions multiplied by 1,250 percent, or an amount determined by the FDIC, based on factors such as size, structure and membership characteristics of the CCP and riskiness of its transactions, in cases where such default fund contributions may be unlimited.

(3) *Risk-weighted asset amount for default fund contributions to QCCP*s. A clearing member FDIC-supervised institution's risk-weighted asset amount for default fund contributions to QCCPs equals the sum of its capital requirement, K_{CM} for each QCCP, as calculated under the methodology set forth in paragraphs (d)(3)(i) through (iii) of this section (Method 1), multiplied by 1,250 percent or in paragraph (d)(3)(iv) of this section (Method 2).

(i) *Method 1.* The hypothetical capital requirement of a QCCP (K_{CCP}) equals:

$$K_{CCP} = \sum_{clearing\ member\ i} \max\left(EBRM_i - VM_i - IM_i - DF_i; 0\right) \times RW \times 0.08$$

Where

(A) $EBRM_i$ equals the exposure amount for each transaction cleared through the QCCP by clearing member i, calculated in accordance with § 324.34 for OTC derivative contracts and § 324.37(c)(2) for repo-style transactions, provided that:

(*1*) For purposes of this section, in calculating the exposure amount the FDIC-supervised institution may replace the formula provided in § 324.34(a)(2)(ii) with the following: Anet = (0.15 × Agross) + (0.85 × NGR × Agross); and

(*2*) For option derivative contracts that are cleared transactions, the PFE described in § 324.34(a)(1)(ii) must be adjusted by multiplying the notional principal amount of the derivative contract by the appropriate conversion factor in Table 1 to § 324.34 and the absolute value of the option's delta, that is, the ratio of the change in the value of the derivative contract to the corresponding change in the price of the underlying asset.

(*3*) For repo-style transactions, when applying § 324.37(c)(2), the FDIC-supervised institution must use the methodology in § 324.37(c)(3);

(B) VM_i equals any collateral posted by clearing member i to the QCCP that it is entitled to receive from the QCCP, but has not yet received, and any collateral that the QCCP has actually received from clearing member i;

(C) IM_i equals the collateral posted as initial margin by clearing member i to the QCCP;

(D) DF_i equals the funded portion of clearing member i's default fund contribution that will be applied to reduce the QCCP's loss upon a default by clearing member i;

(E) RW equals 20 percent, except when the FDIC has determined that a higher risk weight is more appropriate based on the specific characteristics of the QCCP and its clearing members; and

(F) Where a QCCP has provided its K_{CCP}, an FDIC-supervised institution must rely on such disclosed figure instead of calculating K_{CCP} under this paragraph (d), unless the FDIC-supervised institution determines that a more conservative figure is appropriate based on the nature, structure, or characteristics of the QCCP.

(ii) For an FDIC-supervised institution that is a clearing member of a QCCP with a default fund supported by funded commitments, K_{CM} equals:

$$K_{CM_i} = \left(1 + \beta \cdot \frac{N}{N-2}\right) \cdot \frac{DF_i}{DF_{CM}} \cdot K^*_{CM}$$

$$K^*_{CM} = \begin{cases} c_2 \cdot \mu \cdot \left(K_{CCP} - DF'\right) + c_2 \cdot DF'_{CM} & if \quad DF' < K_{CCP} \quad (i) \\ c_2 \cdot (K_{CCP} - DF_{CCP}) + c_1 \cdot \left(DF' - K_{CCP}\right) & if \quad DF_{CCP} < K_{CCP} \le DF' \quad (ii) \\ c_1 \cdot DF'_{CM} & if \quad K_{CCP} \le DF_{CCP} \quad (iii) \end{cases}$$

Where

(A) $$\beta = \frac{A_{Net,1} + A_{Net,2}}{\sum_i A_{Net,i}}$$

(A) Subscripts 1 and 2 denote the clearing members with the two largest A_{Net} values. For purposes of this paragraph (d), for derivatives A_{Net} is defined in § 324.34(a)(2)(ii) and for repo-style transactions, A_{Net} means the exposure amount as defined in § 324.37(c)(2) using the methodology in § 324.37(c)(3);

(B) N equals the number of clearing members in the QCCP;

(C) DF_{CCP} equals the QCCP's own funds and other financial resources that would be used to cover its losses before clearing members' default fund contributions are used to cover losses;

(D) DF_{CM} equals funded default fund contributions from all clearing members and any other clearing member contributed financial resources that are available to absorb mutualized QCCP losses;

(E) DF = DF_{CCP} + DF_{CM} (that is, the total funded default fund contribution);

(F) $\overline{DF_i}$ = average $\overline{DF_i}$ = the average funded default fund contribution from an individual clearing member;

(G) $DF'_{CM} = DF_{CM} - 2 \cdot \overline{DF_i} = \sum_i DF_i - 2 \cdot \overline{DF_i}$ (that is, the funded default fund contribution from surviving clearing members assuming that two average clearing members have defaulted and their default fund contributions and initial margins have been used to absorb the resulting losses);

(H) $DF' = DF_{CCP} + DF'_{CM} = DF - 2 \cdot \overline{DF_i}$ (that is, the total funded default fund contributions from the QCCP and the surviving clearing members that are available to mutualize losses, assuming that two average clearing members have defaulted);

(I) $c_1 = Max\left\{\frac{1.6\%}{\left(DF'/K_{CCP}\right)^{0.3}};0.16\%\right\}$ (that is, a decreasing capital factor, between 1.6 percent and 0.16 percent, applied to the excess funded default funds provided by clearing members);

(J) c_2 = 100 percent; and

(K) μ= 1.2;

(iii) (A) For an FDIC-supervised institution that is a clearing member of a QCCP with a default fund supported by unfunded commitments, K_{CM} equals:

$$K_{CM_i} = \frac{DF_i}{DF_{CM}} \cdot K^*_{CM}$$

Where

(*1*) DF_i equals the FDIC-supervised institution's unfunded commitment to the default fund;

(*2*) DF_{CM} equals the total of all clearing members' unfunded commitment to the default fund; and

(*3*) K^*_{CM} as defined in paragraph (d)(3)(ii) of this section.

(B) For an FDIC-supervised institution that is a clearing member of a QCCP with a default fund supported by unfunded commitments and is unable to calculate K_{CM} using the methodology described in paragraph (d)(3)(iii) of this section, K_{CM} equals:

$$K_{CM_i} = \frac{IM_i}{IM_{CM}} \cdot K^*_{CM}$$

Where

(*1*) IM_i = the FDIC-supervised institution's initial margin posted to the QCCP;

(*2*) IM_{CM} equals the total of initial margin posted to the QCCP; and

(*3*) K^*_{CM} as defined in paragraph (d)(3)(ii) of this section.

(iv) *Method 2.* A clearing member FDIC-supervised institution's risk-weighted asset amount for its default fund contribution to a QCCP, RWA_{DF}, equals:

RWA_{DF} = Min {12.5 * DF; 0.18 * TE}

Where

(A) TE equals the FDIC-supervised institution's trade exposure amount to the QCCP, calculated according to § 324.35(c)(2);

(B) DF equals the funded portion of the FDIC-supervised institution's default fund contribution to the QCCP.

(4) *Total risk-weighted assets for default fund contributions.* Total risk-weighted assets for default fund contributions is the sum of a clearing member FDIC-supervised institution's risk-weighted assets for all of its default fund contributions to all CCPs of which the FDIC-supervised institution is a clearing member.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20760, Apr. 14, 2014; 84 FR 35277, July 22, 2019; 85 FR 4433, Jan. 24, 2020]

§ 324.36 Guarantees and credit derivatives: Substitution treatment.

(a) *Scope*—(1) *General.* An FDIC-supervised institution may recognize the credit risk mitigation benefits of an eligible guarantee or eligible credit derivative by substituting the risk weight associated with the protection provider for the risk weight assigned to an exposure, as provided under this section.

(2) This section applies to exposures for which:

(i) Credit risk is fully covered by an eligible guarantee or eligible credit derivative; or

(ii) Credit risk is covered on a pro rata basis (that is, on a basis in which the FDIC-supervised institution and the protection provider share losses proportionately) by an eligible guarantee or eligible credit derivative.

(3) Exposures on which there is a tranching of credit risk (reflecting at least two different levels of seniority) generally are securitization exposures subject to §§ 324.41 through 324.45.

(4) If multiple eligible guarantees or eligible credit derivatives cover a single exposure described in this section, an FDIC-supervised institution may treat the hedged exposure as multiple separate exposures each covered by a single eligible guarantee or eligible credit derivative and may calculate a separate risk-weighted asset amount for each separate exposure as described in paragraph (c) of this section.

(5) If a single eligible guarantee or eligible credit derivative covers multiple hedged exposures described in paragraph (a)(2) of this section, an FDIC-supervised institution must treat each hedged exposure as covered by a separate eligible guarantee or eligible credit derivative and must calculate a separate risk-weighted asset amount for each exposure as described in paragraph (c) of this section.

(b) *Rules of recognition.* (1) An FDIC-supervised institution may only recognize the credit risk mitigation benefits of eligible guarantees and eligible credit derivatives.

(2) An FDIC-supervised institution may only recognize the credit risk mitigation benefits of an eligible credit derivative to hedge an exposure that is different from the credit derivative's reference exposure used for determining the derivative's cash settlement value, deliverable obligation, or occurrence of a credit event if:

(i) The reference exposure ranks *pari passu* with, or is subordinated to, the hedged exposure; and

(ii) The reference exposure and the hedged exposure are to the same legal entity, and legally enforceable cross-default or cross-acceleration clauses are in place to ensure payments under the credit derivative are triggered

when the obligated party of the hedged exposure fails to pay under the terms of the hedged exposure.

(c) *Substitution approach*—(1) *Full coverage*. If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is greater than or equal to the exposure amount of the hedged exposure, an FDIC-supervised institution may recognize the guarantee or credit derivative in determining the risk-weighted asset amount for the hedged exposure by substituting the risk weight applicable to the guarantor or credit derivative protection provider under this subpart D for the risk weight assigned to the exposure.

(2) *Partial coverage*. If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is less than the exposure amount of the hedged exposure, the FDIC-supervised institution must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize the credit risk mitigation benefit of the guarantee or credit derivative.

(i) The FDIC-supervised institution may calculate the risk-weighted asset amount for the protected exposure under this subpart D, where the applicable risk weight is the risk weight applicable to the guarantor or credit derivative protection provider.

(ii) The FDIC-supervised institution must calculate the risk-weighted asset amount for the unprotected exposure under this subpart D, where the applicable risk weight is that of the unprotected portion of the hedged exposure.

(iii) The treatment provided in this section is applicable when the credit risk of an exposure is covered on a partial pro rata basis and may be applicable when an adjustment is made to the effective notional amount of the guarantee or credit derivative under paragraphs (d), (e), or (f) of this section.

(d) *Maturity mismatch adjustment*. (1) An FDIC-supervised institution that recognizes an eligible guarantee or eligible credit derivative in determining the risk-weighted asset amount for a hedged exposure must adjust the effective notional amount of the credit risk mitigant to reflect any maturity mismatch between the hedged exposure and the credit risk mitigant.

(2) A maturity mismatch occurs when the residual maturity of a credit risk mitigant is less than that of the hedged exposure(s).

(3) The residual maturity of a hedged exposure is the longest possible remaining time before the obligated party of the hedged exposure is scheduled to fulfil its obligation on the hedged exposure. If a credit risk mitigant has embedded options that may reduce its term, the FDIC-supervised institution (protection purchaser) must use the shortest possible residual maturity for the credit risk mitigant. If a call is at the discretion of the protection provider, the residual maturity of the credit risk mitigant is at the first call date. If the call is at the discretion of the FDIC-supervised institution (protection purchaser), but the terms of the arrangement at origination of the credit risk mitigant contain a positive incentive for the FDIC-supervised institution to call the transaction before contractual maturity, the remaining time to the first call date is the residual maturity of the credit risk mitigant.

(4) A credit risk mitigant with a maturity mismatch may be recognized only if its original maturity is greater than or equal to one year and its residual maturity is greater than three months.

(5) When a maturity mismatch exists, the FDIC-supervised institution must apply the following adjustment to reduce the effective notional amount of the credit risk mitigant: $Pm = E \times (t-0.25)/(T-0.25)$, where:

(i) Pm equals effective notional amount of the credit risk mitigant, adjusted for maturity mismatch;

(ii) E equals effective notional amount of the credit risk mitigant;

(iii) t equals the lesser of T or the residual maturity of the credit risk mitigant, expressed in years; and

(iv) T equals the lesser of five or the residual maturity of the hedged exposure, expressed in years.

(e) *Adjustment for credit derivatives without restructuring as a credit event*. If

an FDIC-supervised institution recognizes an eligible credit derivative that does not include as a credit event a restructuring of the hedged exposure involving forgiveness or postponement of principal, interest, or fees that results in a credit loss event (that is, a charge-off, specific provision, or other similar debit to the profit and loss account), the FDIC-supervised institution must apply the following adjustment to reduce the effective notional amount of the credit derivative: Pr = Pm × 0.60, where:

(1) Pr equals effective notional amount of the credit risk mitigant, adjusted for lack of restructuring event (and maturity mismatch, if applicable); and

(2) Pm equals effective notional amount of the credit risk mitigant (adjusted for maturity mismatch, if applicable).

(f) *Currency mismatch adjustment*. (1) If an FDIC-supervised institution recognizes an eligible guarantee or eligible credit derivative that is denominated in a currency different from that in which the hedged exposure is denominated, the FDIC-supervised institution must apply the following formula to the effective notional amount of the guarantee or credit derivative: $Pc = Pr \times (1-H_{FX})$, where:

(i) Pc equals effective notional amount of the credit risk mitigant, adjusted for currency mismatch (and maturity mismatch and lack of restructuring event, if applicable);

(ii) Pr equals effective notional amount of the credit risk mitigant (adjusted for maturity mismatch and lack of restructuring event, if applicable); and

(iii) H_{FX} equals haircut appropriate for the currency mismatch between the credit risk mitigant and the hedged exposure.

(2) An FDIC-supervised institution must set H_{FX} equal to eight percent unless it qualifies for the use of and uses its own internal estimates of foreign exchange volatility based on a ten-business-day holding period. An FDIC-supervised institution qualifies for the use of its own internal estimates of foreign exchange volatility if it qualifies for the use of its own-estimates haircuts in § 324.37(c)(4).

(3) An FDIC-supervised institution must adjust H_{FX} calculated in paragraph (f)(2) of this section upward if the FDIC-supervised institution revalues the guarantee or credit derivative less frequently than once every 10 business days using the following square root of time formula:

$$H_{FX} = 8\% \sqrt{\frac{T_M}{10}}$$, where T_M equals the greater of 10 or the number of days between revaluation.

[78 FR 55471, Sept. 10, 2013, as amended at 84 FR 35277, July 22, 2019]

§ 324.37 Collateralized transactions.

(a) *General*. (1) To recognize the risk-mitigating effects of financial collateral, an FDIC-supervised institution may use:

(i) The simple approach in paragraph (b) of this section for any exposure; or

(ii) The collateral haircut approach in paragraph (c) of this section for repo-style transactions, eligible margin loans, collateralized derivative contracts, and single-product netting sets of such transactions.

(2) An FDIC-supervised institution may use any approach described in this section that is valid for a particular type of exposure or transaction; however, it must use the same approach for similar exposures or transactions.

(b) *The simple approach*—(1) *General requirements*. (i) An FDIC-supervised institution may recognize the credit risk mitigation benefits of financial collateral that secures any exposure.

(ii) To qualify for the simple approach, the financial collateral must meet the following requirements:

(A) The collateral must be subject to a collateral agreement for at least the life of the exposure;

(B) The collateral must be revalued at least every six months; and

(C) The collateral (other than gold) and the exposure must be denominated in the same currency.

(2) *Risk weight substitution.* (i) An FDIC-supervised institution may apply a risk weight to the portion of an exposure that is secured by the fair value of financial collateral (that meets the requirements of paragraph (b)(1) of this section) based on the risk weight assigned to the collateral under this subpart D. For repurchase agreements, reverse repurchase agreements, and securities lending and borrowing transactions, the collateral is the instruments, gold, and cash the FDIC-supervised institution has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction. Except as provided in paragraph (b)(3) of this section, the risk weight assigned to the collateralized portion of the exposure may not be less than 20 percent.

(ii) An FDIC-supervised institution must apply a risk weight to the unsecured portion of the exposure based on the risk weight applicable to the exposure under this subpart.

(3) *Exceptions to the 20 percent risk-weight floor and other requirements.* Notwithstanding paragraph (b)(2)(i) of this section:

(i) An FDIC-supervised institution may assign a zero percent risk weight to an exposure to an OTC derivative contract that is marked-to-market on a daily basis and subject to a daily margin maintenance requirement, to the extent the contract is collateralized by cash on deposit.

(ii) An FDIC-supervised institution may assign a 10 percent risk weight to an exposure to an OTC derivative contract that is marked-to-market daily and subject to a daily margin maintenance requirement, to the extent that the contract is collateralized by an exposure to a sovereign that qualifies for a zero percent risk weight under § 324.32.

(iii) An FDIC-supervised institution may assign a zero percent risk weight to the collateralized portion of an exposure where:

(A) The financial collateral is cash on deposit; or

(B) The financial collateral is an exposure to a sovereign that qualifies for a zero percent risk weight under § 324.32, and the FDIC-supervised institution has discounted the fair value of the collateral by 20 percent.

(c) *Collateral haircut approach*—(1) *General.* An FDIC-supervised institution may recognize the credit risk mitigation benefits of financial collateral that secures an eligible margin loan, repo-style transaction, collateralized derivative contract, or single-product netting set of such transactions, and of any collateral that secures a repo-style transaction that is included in the FDIC-supervised institution's VaR-based measure under subpart F of this part by using the collateral haircut approach in this section. An FDIC-supervised institution may use the standard supervisory haircuts in paragraph (c)(3) of this section or, with prior written approval of the FDIC, its own estimates of haircuts according to paragraph (c)(4) of this section.

(2) *Exposure amount equation.* An FDIC-supervised institution must determine the exposure amount for an eligible margin loan, repo-style transaction, collateralized derivative contract, or a single-product netting set of such transactions by setting the exposure amount equal to max $\{0, [(\Sigma E - \Sigma C) + \Sigma(Es \times Hs) + \Sigma(Efx \times Hfx)]\}$, where:

(i)(A) For eligible margin loans and repo-style transactions and netting sets thereof, ΣE equals the value of the exposure (the sum of the current fair values of all instruments, gold, and cash the FDIC-supervised institution has lent, sold subject to repurchase, or posted as collateral to the counterparty under the transaction (or netting set)); and

(B) For collateralized derivative contracts and netting sets thereof, ΣE equals the exposure amount of the OTC derivative contract (or netting set) calculated under § 324.34(b)(1) or (2).

(ii) **Σ**C equals the value of the collateral (the sum of the current fair values of all instruments, gold and cash the FDIC-supervised institution has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction (or netting set));

(iii) Es equals the absolute value of the net position in a given instrument or in gold (where the net position in the instrument or gold equals the sum of the current fair values of the instrument or gold the FDIC-supervised institution has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current fair values of that same instrument or gold the FDIC-supervised institution has borrowed, purchased subject to resale, or taken as collateral from the counterparty);

(iv) Hs equals the market price volatility haircut appropriate to the instrument or gold referenced in Es;

(v) Efx equals the absolute value of the net position of instruments and cash in a currency that is different from the settlement currency (where the net position in a given currency equals the sum of the current fair values of any instruments or cash in the currency the FDIC-supervised institution has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current fair values of any instruments or cash in the currency the FDIC-supervised institution has borrowed, purchased subject to resale, or taken as collateral from the counterparty); and

(vi) Hfx equals the haircut appropriate to the mismatch between the currency referenced in Efx and the settlement currency.

(3) *Standard supervisory haircuts.* (i) An FDIC-supervised institution must use the haircuts for market price volatility (Hs) provided in Table 1 to § 324.37, as adjusted in certain circumstances in accordance with the requirements of paragraphs (c)(3)(iii) and (iv) of this section.

TABLE 1 TO § 324.37—STANDARD SUPERVISORY MARKET PRICE VOLATILITY HAIRCUTS[1]

Residual maturity	Haircut (in percent) assigned based on:						Investment grade securitization exposures (in percent)
	Sovereign issuers risk weight under § 324.32 (in percent)[2]			Non-sovereign issuers risk weight under § 324.32 (in percent)			
	Zero	20 or 50	100	20			
Less than or equal to 1 year	0.5	1.0	15.0	1.0	2.0	4.0	4.0
Greater than 1 year and less than or equal to 5 years	2.0	3.0	15.0	4.0	6.0	8.0	12.0
Greater than 5 years	4.0	6.0	15.0	8.0	12.0	16.0	24.0
Main index equities (including convertible bonds) and gold	15.0						
Other publicly traded equities (including convertible bonds)	25.0						
Mutual funds	Highest haircut applicable to any security in which the fund can invest.						
Cash collateral held	Zero						
Other exposure types	25.0						

[1] The market price volatility haircuts in Table 1 to § 324.37 are based on a 10 business-day holding period.
[2] Includes a foreign PSE that receives a zero percent risk weight.

(ii) For currency mismatches, an FDIC-supervised institution must use a haircut for foreign exchange rate volatility (Hfx) of 8.0 percent, as adjusted in certain circumstances under paragraphs (c)(3)(iii) and (iv) of this section.

(iii) For repo-style transactions and client-facing derivative transactions, a FDIC-supervised institution may multiply the standard supervisory haircuts provided in paragraphs (c)(3)(i) and (ii) of this section by the square root of ½

(which equals 0.707107). For client-facing derivative transactions, if a larger scaling factor is applied under § 324.34(f), the same factor must be used to adjust the supervisory haircuts.

(iv) If the number of trades in a netting set exceeds 5,000 at any time during a quarter, an FDIC-supervised institution must adjust the supervisory haircuts provided in paragraphs (c)(3)(i) and (ii) of this section upward on the basis of a holding period of twenty business days for the following quarter except in the calculation of the exposure amount for purposes of § 324.35. If a netting set contains one or more trades involving illiquid collateral or an OTC derivative that cannot be easily replaced, an FDIC-supervised institution must adjust the supervisory haircuts upward on the basis of a holding period of twenty business days. If over the two previous quarters more than two margin disputes on a netting set have occurred that lasted more than the holding period, then the FDIC-supervised institution must adjust the supervisory haircuts upward for that netting set on the basis of a holding period that is at least two times the minimum holding period for that netting set. An FDIC-supervised institution must adjust the standard supervisory haircuts upward using the following formula:

$$H_A = H_S \sqrt{\frac{T_M}{T_S}}, \text{ where}$$

(A) T_M equals a holding period of longer than 10 business days for eligible margin loans and derivative contracts other than client-facing derivative transactions or longer than 5 business days for repo-style transactions and client-facing derivative transactions;

(B) H_S equals the standard supervisory haircut; and

(C) T_S equals 10 business days for eligible margin loans and derivative contracts other than client-facing derivative transactions or 5 business days for repo-style transactions and client-facing derivative transactions.

(v) If the instrument an FDIC-supervised institution has lent, sold subject to repurchase, or posted as collateral does not meet the definition of financial collateral, the FDIC-supervised institution must use a 25.0 percent haircut for market price volatility (H_s).

(4) *Own internal estimates for haircuts.* With the prior written approval of the FDIC, an FDIC-supervised institution may calculate haircuts (Hs and Hfx) using its own internal estimates of the volatilities of market prices and foreign exchange rates:

(i) To receive FDIC approval to use its own internal estimates, an FDIC-supervised institution must satisfy the following minimum standards:

(A) An FDIC-supervised institution must use a 99th percentile one-tailed confidence interval.

(B) The minimum holding period for a repo-style transaction and client-facing derivative transaction is five business days and for an eligible margin loan and a derivative contract other than a client-facing derivative transaction is ten business days except for transactions or netting sets for which paragraph (c)(4)(i)(C) of this section applies. When a FDIC-supervised institution calculates an own-estimates haircut on a T_N-day holding period, which is different from the minimum holding period for the transaction type, the applicable haircut (H_M) is calculated using the following square root of time formula:

$$H_M = H_N \sqrt{\frac{T_M}{T_N}}, \text{ where}$$

(*1*) T_M equals 5 for repo-style transactions and client-facing derivative transactions and 10 for eligible margin loans and derivative contracts other than client-facing derivative transactions;

(*2*) T_N equals the holding period used by the FDIC-supervised institution to derive H_N; and

(*3*) H_N equals the haircut based on the holding period T_N.

(C) If the number of trades in a netting set exceeds 5,000 at any time during a quarter, an FDIC-supervised institution must calculate the haircut using a minimum holding period of twenty business days for the following quarter except in the calculation of the exposure amount for purposes of § 324.35. If a netting set contains one or more trades involving illiquid collateral or an OTC derivative that cannot be easily replaced, an FDIC-supervised institution must calculate the haircut using a minimum holding period of twenty business days. If over the two previous quarters more than two margin disputes on a netting set have occurred that lasted more than the holding period, then the FDIC-supervised institution must calculate the haircut for transactions in that netting set on the basis of a holding period that is at least two times the minimum holding period for that netting set.

(D) An FDIC-supervised institution is required to calculate its own internal estimates with inputs calibrated to historical data from a continuous 12-month period that reflects a period of significant financial stress appropriate to the security or category of securities.

(E) An FDIC-supervised institution must have policies and procedures that describe how it determines the period of significant financial stress used to calculate the FDIC-supervised institution's own internal estimates for haircuts under this section and must be able to provide empirical support for the period used. The FDIC-supervised institution must obtain the prior approval of the FDIC for, and notify the FDIC if the FDIC-supervised institution makes any material changes to, these policies and procedures.

(F) Nothing in this section prevents the FDIC from requiring an FDIC-supervised institution to use a different period of significant financial stress in the calculation of own internal estimates for haircuts.

(G) An FDIC-supervised institution must update its data sets and calculate haircuts no less frequently than quarterly and must also reassess data sets and haircuts whenever market prices change materially.

(ii) With respect to debt securities that are investment grade, an FDIC-supervised institution may calculate haircuts for categories of securities. For a category of securities, the FDIC-supervised institution must calculate the haircut on the basis of internal volatility estimates for securities in that category that are representative of the securities in that category that the FDIC-supervised institution has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. In determining relevant categories, the FDIC-supervised institution must at a minimum take into account:

(A) The type of issuer of the security;

(B) The credit quality of the security;

(C) The maturity of the security; and

(D) The interest rate sensitivity of the security.

(iii) With respect to debt securities that are not investment grade and equity securities, an FDIC-supervised institution must calculate a separate haircut for each individual security.

(iv) Where an exposure or collateral (whether in the form of cash or securities) is denominated in a currency that differs from the settlement currency, the FDIC-supervised institution must calculate a separate currency mismatch haircut for its net position in each mismatched currency based on estimated volatilities of foreign exchange rates between the mismatched currency and the settlement currency.

(v) An FDIC-supervised institution's own estimates of market price and foreign exchange rate volatilities may not take into account the correlations among securities and foreign exchange rates on either the exposure or collateral side of a transaction (or netting

set) or the correlations among securities and foreign exchange rates between the exposure and collateral sides of the transaction (or netting set).

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20760, Apr. 14, 2014; 84 FR 35277, July 22, 2019; 85 FR 4433, Jan. 24, 2020; 85 FR 57963, Sept. 17, 2020]

RISK-WEIGHTED ASSETS FOR UNSETTLED TRANSACTIONS

§ 324.38 Unsettled transactions.

(a) *Definitions.* For purposes of this section:

(1) Delivery-versus-payment (DvP) transaction means a securities or commodities transaction in which the buyer is obligated to make payment only if the seller has made delivery of the securities or commodities and the seller is obligated to deliver the securities or commodities only if the buyer has made payment.

(2) Payment-versus-payment (PvP) transaction means a foreign exchange transaction in which each counterparty is obligated to make a final transfer of one or more currencies only if the other counterparty has made a final transfer of one or more currencies.

(3) A transaction has a normal settlement period if the contractual settlement period for the transaction is equal to or less than the market standard for the instrument underlying the transaction and equal to or less than five business days.

(4) Positive current exposure of an FDIC-supervised institution for a transaction is the difference between the transaction value at the agreed settlement price and the current market price of the transaction, if the difference results in a credit exposure of the FDIC-supervised institution to the counterparty.

(b) *Scope.* This section applies to all transactions involving securities, foreign exchange instruments, and commodities that have a risk of delayed settlement or delivery. This section does not apply to:

(1) Cleared transactions that are marked-to-market daily and subject to daily receipt and payment of variation margin;

(2) Repo-style transactions, including unsettled repo-style transactions;

(3) One-way cash payments on OTC derivative contracts; or

(4) Transactions with a contractual settlement period that is longer than the normal settlement period (which are treated as OTC derivative contracts as provided in § 324.34).

(c) *System-wide failures.* In the case of a system-wide failure of a settlement, clearing system or central counterparty, the FDIC may waive risk-based capital requirements for unsettled and failed transactions until the situation is rectified.

(d) *Delivery-versus-payment (DvP) and payment-versus-payment (PvP) transactions.* An FDIC-supervised institution must hold risk-based capital against any DvP or PvP transaction with a normal settlement period if the FDIC-supervised institution's counterparty has not made delivery or payment within five business days after the settlement date. The FDIC-supervised institution must determine its risk-weighted asset amount for such a transaction by multiplying the positive current exposure of the transaction for the FDIC-supervised institution by the appropriate risk weight in Table 1 to § 324.38.

TABLE 1 TO § 324.38—RISK WEIGHTS FOR UNSETTLED DVP AND PVP TRANSACTIONS

Number of business days after contractual settlement date	Risk weight to be applied to positive current exposure (in percent)
From 5 to 15	100.0
From 16 to 30	625.0
From 31 to 45	937.5
46 or more	1,250.0

(e) *Non-DvP/non-PvP (non-delivery-versus-payment/non-payment-versus-payment) transactions.* (1) An FDIC-supervised institution must hold risk-based capital against any non-DvP/non-PvP transaction with a normal settlement period if the FDIC-supervised institution has delivered cash, securities, commodities, or currencies to its counterparty but has not received its corresponding deliverables by the end of the same business day. The FDIC-supervised institution must continue to hold risk-based capital against the

transaction until the FDIC-supervised institution has received its corresponding deliverables.

(2) From the business day after the FDIC-supervised institution has made its delivery until five business days after the counterparty delivery is due, the FDIC-supervised institution must calculate the risk-weighted asset amount for the transaction by treating the current fair value of the deliverables owed to the FDIC-supervised institution as an exposure to the counterparty and using the applicable counterparty risk weight under this subpart D.

(3) If the FDIC-supervised institution has not received its deliverables by the fifth business day after counterparty delivery was due, the FDIC-supervised institution must assign a 1,250 percent risk weight to the current fair value of the deliverables owed to the FDIC-supervised institution.

(f) *Total risk-weighted assets for unsettled transactions.* Total risk-weighted assets for unsettled transactions is the sum of the risk-weighted asset amounts of all DvP, PvP, and non-DvP/non-PvP transactions.

[78 FR 55471, Sept. 10, 2013, as amended at 84 FR 35277, July 22, 2019]

§§ 324.39–324.40 [Reserved]

RISK-WEIGHTED ASSETS FOR SECURITIZATION EXPOSURES

§ 324.41 Operational requirements for securitization exposures.

(a) *Operational criteria for traditional securitizations.* An FDIC-supervised institution that transfers exposures it has originated or purchased to a securitization SPE or other third party in connection with a traditional securitization may exclude the exposures from the calculation of its risk-weighted assets only if each condition in this section is satisfied. An FDIC-supervised institution that meets these conditions must hold risk-based capital against any credit risk it retains in connection with the securitization. An FDIC-supervised institution that fails to meet these conditions must hold risk-based capital against the transferred exposures as if they had not been securitized and must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from the transaction. The conditions are:

(1) The exposures are not reported on the FDIC-supervised institution's consolidated balance sheet under GAAP;

(2) The FDIC-supervised institution has transferred to one or more third parties credit risk associated with the underlying exposures;

(3) Any clean-up calls relating to the securitization are eligible clean-up calls; and

(4) The securitization does not:

(i) Include one or more underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit; and

(ii) Contain an early amortization provision.

(b) *Operational criteria for synthetic securitizations.* For synthetic securitizations, an FDIC-supervised institution may recognize for risk-based capital purposes the use of a credit risk mitigant to hedge underlying exposures only if each condition in this paragraph (b) is satisfied. An FDIC-supervised institution that meets these conditions must hold risk-based capital against any credit risk of the exposures it retains in connection with the synthetic securitization. An FDIC-supervised institution that fails to meet these conditions or chooses not to recognize the credit risk mitigant for purposes of this section must instead hold risk-based capital against the underlying exposures as if they had not been synthetically securitized. The conditions are:

(1) The credit risk mitigant is:

(i) Financial collateral;

(ii) A guarantee that meets all criteria as set forth in the definition of ''eligible guarantee'' in § 324.2, except for the criteria in paragraph (3) of that definition; or

(iii) A credit derivative that meets all criteria as set forth in the definition of ''eligible credit derivative'' in § 324.2, except for the criteria in paragraph (3) of the definition of ''eligible guarantee'' in § 324.2.

(2) The FDIC-supervised institution transfers credit risk associated with the underlying exposures to one or more third parties, and the terms and

conditions in the credit risk mitigants employed do not include provisions that:

(i) Allow for the termination of the credit protection due to deterioration in the credit quality of the underlying exposures;

(ii) Require the FDIC-supervised institution to alter or replace the underlying exposures to improve the credit quality of the underlying exposures;

(iii) Increase the FDIC-supervised institution's cost of credit protection in response to deterioration in the credit quality of the underlying exposures;

(iv) Increase the yield payable to parties other than the FDIC-supervised institution in response to a deterioration in the credit quality of the underlying exposures; or

(v) Provide for increases in a retained first loss position or credit enhancement provided by the FDIC-supervised institution after the inception of the securitization;

(3) The FDIC-supervised institution obtains a well-reasoned opinion from legal counsel that confirms the enforceability of the credit risk mitigant in all relevant jurisdictions; and

(4) Any clean-up calls relating to the securitization are eligible clean-up calls.

(c) *Due diligence requirements for securitization exposures.* (1) Except for exposures that are deducted from common equity tier 1 capital and exposures subject to § 324.42(h), if an FDIC-supervised institution is unable to demonstrate to the satisfaction of the FDIC a comprehensive understanding of the features of a securitization exposure that would materially affect the performance of the exposure, the FDIC-supervised institution must assign the securitization exposure a risk weight of 1,250 percent. The FDIC-supervised institution's analysis must be commensurate with the complexity of the securitization exposure and the materiality of the exposure in relation to its capital.

(2) An FDIC-supervised institution must demonstrate its comprehensive understanding of a securitization exposure under paragraph (c)(1) of this section, for each securitization exposure by:

(i) Conducting an analysis of the risk characteristics of a securitization exposure prior to acquiring the exposure, and documenting such analysis within three business days after acquiring the exposure, considering:

(A) Structural features of the securitization that would materially impact the performance of the exposure, for example, the contractual cash flow waterfall, waterfall-related triggers, credit enhancements, liquidity enhancements, fair value triggers, the performance of organizations that service the exposure, and deal-specific definitions of default;

(B) Relevant information regarding the performance of the underlying credit exposure(s), for example, the percentage of loans 30, 60, and 90 days past due; default rates; prepayment rates; loans in foreclosure; property types; occupancy; average credit score or other measures of creditworthiness; average LTV ratio; and industry and geographic diversification data on the underlying exposure(s);

(C) Relevant market data of the securitization, for example, bid-ask spread, most recent sales price and historic price volatility, trading volume, implied market rating, and size, depth and concentration level of the market for the securitization; and

(D) For resecuritization exposures, performance information on the underlying securitization exposures, for example, the issuer name and credit quality, and the characteristics and performance of the exposures underlying the securitization exposures; and

(ii) On an on-going basis (no less frequently than quarterly), evaluating, reviewing, and updating as appropriate the analysis required under paragraph (c)(1) of this section for each securitization exposure.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20760, Apr. 14, 2014]

§ 324.42 Risk-weighted assets for securitization exposures.

(a) *Securitization risk weight approaches.* Except as provided elsewhere in this section or in § 324.41:

(1) An FDIC-supervised institution must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from a securitization and apply

a 1,250 percent risk weight to the portion of a CEIO that does not constitute after-tax gain-on-sale.

(2) If a securitization exposure does not require deduction under paragraph (a)(1) of this section, an FDIC-supervised institution may assign a risk weight to the securitization exposure using the simplified supervisory formula approach (SSFA) in accordance with §§ 324.43(a) through 324.43(d) and subject to the limitation under paragraph (e) of this section. Alternatively, an FDIC-supervised institution that is not subject to subpart F of this part may assign a risk weight to the securitization exposure using the gross-up approach in accordance with § 324.43(e), provided, however, that such FDIC-supervised institution must apply either the SSFA or the gross-up approach consistently across all of its securitization exposures, except as provided in paragraphs (a)(1), (a)(3), and (a)(4) of this section.

(3) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and the FDIC-supervised institution cannot, or chooses not to apply the SSFA or the gross-up approach to the exposure, the FDIC-supervised institution must assign a risk weight to the exposure as described in § 324.44.

(4) If a securitization exposure is a derivative contract (other than protection provided by an FDIC-supervised institution in the form of a credit derivative) that has a first priority claim on the cash flows from the underlying exposures (notwithstanding amounts due under interest rate or currency derivative contracts, fees due, or other similar payments), an FDIC-supervised institution may choose to set the risk-weighted asset amount of the exposure equal to the amount of the exposure as determined in paragraph (c) of this section.

(b) *Total risk-weighted assets for securitization exposures.* An FDIC-supervised institution's total risk-weighted assets for securitization exposures equals the sum of the risk-weighted asset amount for securitization exposures that the FDIC-supervised institution risk weights under §§ 324.41(c), 324.42(a)(1), and 324.43, 324.44, or 324.45, and paragraphs (e) through (j) of this section, as applicable.

(c) *Exposure amount of a securitization exposure*—(1) *On-balance sheet securitization exposures.* The exposure amount of an on-balance sheet securitization exposure (excluding an available-for-sale or held-to-maturity security where the FDIC-supervised institution has made an AOCI opt-out election under § 324.22(b)(2), a repo-style transaction, eligible margin loan, OTC derivative contract, or cleared transaction) is equal to the carrying value of the exposure.

(2) *On-balance sheet securitization exposures held by an FDIC-supervised institution that has made an AOCI opt-out election.* The exposure amount of an on-balance sheet securitization exposure that is an available-for-sale or held-to-maturity security held by an FDIC-supervised institution that has made an AOCI opt-out election under § 324.22(b)(2) is the FDIC-supervised institution's carrying value (including net accrued but unpaid interest and fees), less any net unrealized gains on the exposure and plus any net unrealized losses on the exposure.

(3) *Off-balance sheet securitization exposures.* (i) Except as provided in paragraph (j) of this section, the exposure amount of an off-balance sheet securitization exposure that is not a repo-style transaction, eligible margin loan, cleared transaction (other than a credit derivative), or an OTC derivative contract (other than a credit derivative) is the notional amount of the exposure. For an off-balance sheet securitization exposure to an ABCP program, such as an eligible ABCP liquidity facility, the notional amount may be reduced to the maximum potential amount that the FDIC-supervised institution could be required to fund given the ABCP program's current underlying assets (calculated without regard to the current credit quality of those assets).

(ii) An FDIC-supervised institution must determine the exposure amount of an eligible ABCP liquidity facility for which the SSFA does not apply by multiplying the notional amount of the exposure by a CCF of 50 percent.

(iii) An FDIC-supervised institution must determine the exposure amount

of an eligible ABCP liquidity facility for which the SSFA applies by multiplying the notional amount of the exposure by a CCF of 100 percent.

(4) *Repo-style transactions, eligible margin loans, and derivative contracts.* The exposure amount of a securitization exposure that is a repo-style transaction, eligible margin loan, or derivative contract (other than a credit derivative) is the exposure amount of the transaction as calculated under § 324.34 or § 324.37, as applicable.

(d) *Overlapping exposures.* If an FDIC-supervised institution has multiple securitization exposures that provide duplicative coverage to the underlying exposures of a securitization (such as when an FDIC-supervised institution provides a program-wide credit enhancement and multiple pool-specific liquidity facilities to an ABCP program), the FDIC-supervised institution is not required to hold duplicative risk-based capital against the overlapping position. Instead, the FDIC-supervised institution may apply to the overlapping position the applicable risk-based capital treatment that results in the highest risk-based capital requirement.

(e) *Implicit support.* If an FDIC-supervised institution provides support to a securitization in excess of the FDIC-supervised institution's contractual obligation to provide credit support to the securitization (implicit support):

(1) The FDIC-supervised institution must include in risk-weighted assets all of the underlying exposures associated with the securitization as if the exposures had not been securitized and must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from the securitization; and

(2) The FDIC-supervised institution must disclose publicly:

(i) That it has provided implicit support to the securitization; and

(ii) The risk-based capital impact to the FDIC-supervised institution of providing such implicit support.

(f) *Undrawn portion of a servicer cash advance facility.* (1) Notwithstanding any other provision of this subpart, an FDIC-supervised institution that is a servicer under an eligible servicer cash advance facility is not required to hold risk-based capital against potential future cash advance payments that it may be required to provide under the contract governing the facility.

(2) For an FDIC-supervised institution that acts as a servicer, the exposure amount for a servicer cash advance facility that is not an eligible servicer cash advance facility is equal to the amount of all potential future cash advance payments that the FDIC-supervised institution may be contractually required to provide during the subsequent 12 month period under the contract governing the facility.

(g) *Interest-only mortgage-backed securities.* Regardless of any other provisions in this subpart, the risk weight for a non-credit-enhancing interest-only mortgage-backed security may not be less than 100 percent.

(h) *Small-business loans and leases on personal property transferred with retained contractual exposure.* (1) Regardless of any other provision of this subpart, an FDIC-supervised institution that has transferred small-business loans and leases on personal property (small-business obligations) with recourse must include in risk-weighted assets only its contractual exposure to the small-business obligations if all the following conditions are met:

(i) The transaction must be treated as a sale under GAAP.

(ii) The FDIC-supervised institution establishes and maintains, pursuant to GAAP, a non-capital reserve sufficient to meet the FDIC-supervised institution's reasonably estimated liability under the contractual obligation.

(iii) The small-business obligations are to businesses that meet the criteria for a small-business concern established by the Small Business Administration under section 3(a) of the Small Business Act (15 U.S.C. 632 et seq.).

(iv) The FDIC-supervised institution is well capitalized, as defined in subpart H of this part. For purposes of determining whether an FDIC-supervised institution is well capitalized for purposes of this paragraph (h), the FDIC-supervised institution's capital ratios must be calculated without regard to the capital treatment for transfers of small-business obligations under this paragraph (h).

(2) The total outstanding amount of contractual exposure retained by an

FDIC-supervised institution on transfers of small-business obligations receiving the capital treatment specified in paragraph (h)(1) of this section cannot exceed 15 percent of the FDIC-supervised institution's total capital.

(3) If an FDIC-supervised institution ceases to be well capitalized under subpart H of this part or exceeds the 15 percent capital limitation provided in paragraph (h)(2) of this section, the capital treatment under paragraph (h)(1) of this section will continue to apply to any transfers of small-business obligations with retained contractual exposure that occurred during the time that the FDIC-supervised institution was well capitalized and did not exceed the capital limit.

(4) The risk-based capital ratios of the FDIC-supervised institution must be calculated without regard to the capital treatment for transfers of small-business obligations specified in paragraph (h)(1) of this section for purposes of:

(i) Determining whether an FDIC-supervised institution is adequately capitalized, undercapitalized, significantly undercapitalized, or critically undercapitalized under subpart H of this part; and

(ii) Reclassifying a well-capitalized FDIC-supervised institution to adequately capitalized and requiring an adequately capitalized FDIC-supervised institution to comply with certain mandatory or discretionary supervisory actions as if the FDIC-supervised institution were in the next lower prompt-corrective-action category.

(i) *Nth-to-default credit derivatives*—(1) *Protection provider*. An FDIC-supervised institution may assign a risk weight using the SSFA in § 324.43 to an nth-to-default credit derivative in accordance with this paragraph (i). An FDIC-supervised institution must determine its exposure in the nth-to-default credit derivative as the largest notional amount of all the underlying exposures.

(2) For purposes of determining the risk weight for an nth-to-default credit derivative using the SSFA, the FDIC-supervised institution must calculate the attachment point and detachment point of its exposure as follows:

(i) The attachment point (parameter A) is the ratio of the sum of the notional amounts of all underlying exposures that are subordinated to the FDIC-supervised institution's exposure to the total notional amount of all underlying exposures. The ratio is expressed as a decimal value between zero and one. In the case of a first-to-default credit derivative, there are no underlying exposures that are subordinated to the FDIC-supervised institution's exposure. In the case of a second-or-subsequent-to-default credit derivative, the smallest (n-1) notional amounts of the underlying exposure(s) are subordinated to the FDIC-supervised institution's exposure.

(ii) The detachment point (parameter D) equals the sum of parameter A plus the ratio of the notional amount of the FDIC-supervised institution's exposure in the nth-to-default credit derivative to the total notional amount of all underlying exposures. The ratio is expressed as a decimal value between zero and one.

(3) An FDIC-supervised institution that does not use the SSFA to determine a risk weight for its nth-to-default credit derivative must assign a risk weight of 1,250 percent to the exposure.

(4) *Protection purchaser*—(i) *First-to-default credit derivatives*. An FDIC-supervised institution that obtains credit protection on a group of underlying exposures through a first-to-default credit derivative that meets the rules of recognition of § 324.36(b) must determine its risk-based capital requirement for the underlying exposures as if the FDIC-supervised institution synthetically securitized the underlying exposure with the smallest risk-weighted asset amount and had obtained no credit risk mitigant on the other underlying exposures. An FDIC-supervised institution must calculate a risk-based capital requirement for counterparty credit risk according to § 324.34 for a first-to-default credit derivative that does not meet the rules of recognition of § 324.36(b).

(ii) *Second-or-subsequent-to-default credit derivatives*. (A) An FDIC-supervised institution that obtains credit protection on a group of underlying exposures through a nth-to-default credit

derivative that meets the rules of recognition of § 324.36(b) (other than a first-to-default credit derivative) may recognize the credit risk mitigation benefits of the derivative only if:

(*1*) The FDIC-supervised institution also has obtained credit protection on the same underlying exposures in the form of first-through-(n-1)-to-default credit derivatives; or

(*2*) If n-1 of the underlying exposures have already defaulted.

(B) If an FDIC-supervised institution satisfies the requirements of paragraph (i)(4)(ii)(A) of this section, the FDIC-supervised institution must determine its risk-based capital requirement for the underlying exposures as if the FDIC-supervised institution had only synthetically securitized the underlying exposure with the nth smallest risk-weighted asset amount and had obtained no credit risk mitigant on the other underlying exposures.

(C) An FDIC-supervised institution must calculate a risk-based capital requirement for counterparty credit risk according to § 324.34 for a nth-to-default credit derivative that does not meet the rules of recognition of § 324.36(b).

(j) *Guarantees and credit derivatives other than nth-to-default credit derivatives*—(1) *Protection provider*. For a guarantee or credit derivative (other than an nth-to-default credit derivative) provided by an FDIC-supervised institution that covers the full amount or a pro rata share of a securitization exposure's principal and interest, the FDIC-supervised institution must risk weight the guarantee or credit derivative as if it holds the portion of the reference exposure covered by the guarantee or credit derivative.

(2) *Protection purchaser*. (i) An FDIC-supervised institution that purchases a guarantee or OTC credit derivative (other than an nth-to-default credit derivative) that is recognized under § 324.45 as a credit risk mitigant (including via collateral recognized under § 324.37) is not required to compute a separate counterparty credit risk capital requirement under § 324.31, in accordance with § 324.34(c).

(ii) If an FDIC-supervised institution cannot, or chooses not to, recognize a purchased credit derivative as a credit risk mitigant under § 324.45, the FDIC-supervised institution must determine the exposure amount of the credit derivative under § 324.34.

(A) If the FDIC-supervised institution purchases credit protection from a counterparty that is not a securitization SPE, the FDIC-supervised institution must determine the risk weight for the exposure according to this subpart D.

(B) If the FDIC-supervised institution purchases the credit protection from a counterparty that is a securitization SPE, the FDIC-supervised institution must determine the risk weight for the exposure according to section § 324.42, including § 324.42(a)(4) for a credit derivative that has a first priority claim on the cash flows from the underlying exposures of the securitization SPE (notwithstanding amounts due under interest rate or currency derivative contracts, fees due, or other similar payments).

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§ 324.43 Simplified supervisory formula approach (SSFA) and the gross-up approach.

(a) *General requirements for the SSFA*. To use the SSFA to determine the risk weight for a securitization exposure, an FDIC-supervised institution must have data that enables it to assign accurately the parameters described in paragraph (b) of this section. Data used to assign the parameters described in paragraph (b) of this section must be the most currently available data; if the contracts governing the underlying exposures of the securitization require payments on a monthly or quarterly basis, the data used to assign the parameters described in paragraph (b) of this section must be no more than 91 calendar days old. An FDIC-supervised institution that does not have the appropriate data to assign the parameters described in paragraph (b) of this section must assign a risk weight of 1,250 percent to the exposure.

(b) *SSFA parameters*. To calculate the risk weight for a securitization exposure using the SSFA, an FDIC-supervised institution must have accurate information on the following five inputs to the SSFA calculation:

(1) K_G is the weighted-average (with unpaid principal used as the weight for each exposure) total capital requirement of the underlying exposures calculated using this subpart. K_G is expressed as a decimal value between zero and one (that is, an average risk weight of 100 percent represents a value of K_G equal to 0.08).

(2) Parameter W is expressed as a decimal value between zero and one. Parameter W is the ratio of the sum of the dollar amounts of any underlying exposures of the securitization that meet any of the criteria as set forth in paragraphs (b)(2)(i) through (vi) of this section to the balance, measured in dollars, of underlying exposures:

(i) Ninety days or more past due;

(ii) Subject to a bankruptcy or insolvency proceeding;

(iii) In the process of foreclosure;

(iv) Held as real estate owned;

(v) Has contractually deferred payments for 90 days or more, other than principal or interest payments deferred on:

(A) Federally-guaranteed student loans, in accordance with the terms of those guarantee programs; or

(B) Consumer loans, including non-federally-guaranteed student loans, provided that such payments are deferred pursuant to provisions included in the contract at the time funds are disbursed that provide for period(s) of deferral that are not initiated based on changes in the creditworthiness of the borrower; or

(vi) Is in default.

(3) Parameter A is the attachment point for the exposure, which represents the threshold at which credit losses will first be allocated to the exposure. Except as provided in § 324.42(i) for n^{th}-to-default credit derivatives, parameter A equals the ratio of the current dollar amount of underlying exposures that are subordinated to the exposure of the FDIC-supervised institution to the current dollar amount of underlying exposures. Any reserve account funded by the accumulated cash flows from the underlying exposures that is subordinated to the FDIC-supervised institution's securitization exposure may be included in the calculation of parameter A to the extent that cash is present in the account. Parameter A is expressed as a decimal value between zero and one.

(4) Parameter D is the detachment point for the exposure, which represents the threshold at which credit losses of principal allocated to the exposure would result in a total loss of principal. Except as provided in § 324.42(i) for n^{th}-to-default credit derivatives, parameter D equals parameter A plus the ratio of the current dollar amount of the securitization exposures that are *pari passu* with the exposure (that is, have equal seniority with respect to credit risk) to the current dollar amount of the underlying exposures. Parameter D is expressed as a decimal value between zero and one.

(5) A supervisory calibration parameter, p, is equal to 0.5 for securitization exposures that are not resecuritization exposures and equal to 1.5 for resecuritization exposures.

(c) *Mechanics of the SSFA.* K_G and W are used to calculate K_A, the augmented value of K_G, which reflects the observed credit quality of the underlying exposures. K_A is defined in paragraph (d) of this section. The values of parameters A and D, relative to K_A determine the risk weight assigned to a securitization exposure as described in paragraph (d) of this section. The risk weight assigned to a securitization exposure, or portion of a securitization exposure, as appropriate, is the larger of the risk weight determined in accordance with this paragraph (c) or paragraph (d) of this section and a risk weight of 20 percent.

(1) When the detachment point, parameter D, for a securitization exposure is less than or equal to K_A, the exposure must be assigned a risk weight of 1,250 percent.

(2) When the attachment point, parameter A, for a securitization exposure is greater than or equal to K_A, the FDIC-supervised institution must calculate the risk weight in accordance with paragraph (d) of this section.

(3) When A is less than K_A and D is greater than K_A, the risk weight is a weighted-average of 1,250 percent and 1,250 percent times K_{SSFA} calculated in accordance with paragraph (d) of this section. For the purpose of this weighted-average calculation:

(i) The weight assigned to 1,250 percent equals $\frac{K_A - A}{D - A}$.

(ii) The weight assigned to 1,250 percent times K_{SSFA} equals $\frac{D - K_A}{D - A}$.

(iii) The risk weight will be set equal to:

$$RW = \left[\left(\frac{K_A - A}{D - A}\right) \cdot 1{,}250\ percent\right] + \left[\left(\frac{D - K_A}{D - A}\right) \cdot 1{,}250\ percent \cdot K_{SSFA}\right]$$

(d) SSFA equation. (1) The FDIC-supervised institution must define the following parameters:

$$K_A = (1 - W) \cdot K_G + (0.5 \cdot W)$$

$$a = -\frac{1}{p \cdot K_A}$$

$$u = D - K_A$$

$$l = \max(A - K_A, 0)$$

$e = 2.71828$, the base of the natural logarithms.

(2) Then the FDIC-supervised institution must calculate K_{SSFA} according to the following equation:

$$K_{SSFA} = \frac{e^{a \cdot u} - e^{a \cdot l}}{a(u - l)}$$

(3) The risk weight for the exposure (expressed as a percent) is equal to $K_{SSFA} \times 1{,}250$.

(e) *Gross-up approach*—(1) *Applicability*. An FDIC-supervised institution that is not subject to subpart F of this part may apply the gross-up approach set forth in this section instead of the SSFA to determine the risk weight of its securitization exposures, provided that it applies the gross-up approach to all of its securitization exposures, except as otherwise provided for certain securitization exposures in §§ 324.44 and 324.45.

(2) To use the gross-up approach, an FDIC-supervised institution must calculate the following four inputs:

(i) Pro rata share, which is the par value of the FDIC-supervised institution's securitization exposure as a percent of the par value of the tranche in which the securitization exposure resides;

(ii) Enhanced amount, which is the par value of tranches that are more senior to the tranche in which the FDIC-supervised institution's securitization resides;

(iii) Exposure amount of the FDIC-supervised institution's securitization exposure calculated under § 324.42(c); and

(iv) Risk weight, which is the weighted-average risk weight of underlying exposures of the securitization as calculated under this subpart.

(3) *Credit equivalent amount.* The credit equivalent amount of a securitization exposure under this section equals the sum of:

(i) The exposure amount of the FDIC-supervised institution's securitization exposure; and

(ii) The pro rata share multiplied by the enhanced amount, each calculated in accordance with paragraph (e)(2) of this section.

(4) *Risk-weighted assets.* To calculate risk-weighted assets for a securitization exposure under the gross-up approach, an FDIC-supervised institution must apply the risk weight required under paragraph (e)(2) of this section to the credit equivalent amount calculated in paragraph (e)(3) of this section.

(f) *Limitations.* Notwithstanding any other provision of this section, an FDIC-supervised institution must assign a risk weight of not less than 20 percent to a securitization exposure.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20760, Apr. 14, 2014]

§ 324.44 Securitization exposures to which the SSFA and gross-up approach do not apply.

(a) *General Requirement.* An FDIC-supervised institution must assign a 1,250 percent risk weight to all securitization exposures to which the FDIC-supervised institution does not apply the SSFA or the gross-up approach under § 324.43, except as set forth in this section.

(b) *Eligible ABCP liquidity facilities.* An FDIC-supervised institution may determine the risk-weighted asset amount of an eligible ABCP liquidity facility by multiplying the exposure amount by the highest risk weight applicable to any of the individual underlying exposures covered by the facility.

(c) *A securitization exposure in a second loss position or better to an ABCP program*—(1) *Risk weighting.* An FDIC-supervised institution may determine the risk-weighted asset amount of a securitization exposure that is in a second loss position or better to an ABCP program that meets the requirements of paragraph (c)(2) of this section by multiplying the exposure amount by the higher of the following risk weights:

(i) 100 percent; and

(ii) The highest risk weight applicable to any of the individual underlying exposures of the ABCP program.

(2) *Requirements.* (i) The exposure is not an eligible ABCP liquidity facility;

(ii) The exposure must be economically in a second loss position or better, and the first loss position must provide significant credit protection to the second loss position;

(iii) The exposure qualifies as investment grade; and

(iv) The FDIC-supervised institution holding the exposure must not retain or provide protection to the first loss position.

§ 324.45 Recognition of credit risk mitigants for securitization exposures.

(a) *General.* (1) An originating FDIC-supervised institution that has obtained a credit risk mitigant to hedge its exposure to a synthetic or traditional securitization that satisfies the operational criteria provided in § 324.41 may recognize the credit risk mitigant under §§ 324.36 or 324.37, but only as provided in this section.

(2) An investing FDIC-supervised institution that has obtained a credit risk mitigant to hedge a securitization exposure may recognize the credit risk mitigant under §§ 324.36 or 324.37, but only as provided in this section.

(b) *Mismatches.* An FDIC-supervised institution must make any applicable adjustment to the protection amount of an eligible guarantee or credit derivative as required in § 324.36(d), (e), and (f) for any hedged securitization exposure. In the context of a synthetic

securitization, when an eligible guarantee or eligible credit derivative covers multiple hedged exposures that have different residual maturities, the FDIC-supervised institution must use the longest residual maturity of any of the hedged exposures as the residual maturity of all hedged exposures.

§§ 324.46–324.50 [Reserved]

RISK-WEIGHTED ASSETS FOR EQUITY EXPOSURES

§ 324.51 Introduction and exposure measurement.

(a) *General.* (1) To calculate its risk-weighted asset amounts for equity exposures that are not equity exposures to an investment fund, an FDIC-supervised institution must use the Simple Risk-Weight Approach (SRWA) provided in § 324.52. An FDIC-supervised institution must use the look-through approaches provided in § 324.53 to calculate its risk-weighted asset amounts for equity exposures to investment funds.

(2) An FDIC-supervised institution must treat an investment in a separate account (as defined in § 324.2) as if it were an equity exposure to an investment fund as provided in § 324.53.

(3) *Stable value protection.* (i) Stable value protection means a contract where the provider of the contract is obligated to pay:

(A) The policy owner of a separate account an amount equal to the shortfall between the fair value and cost basis of the separate account when the policy owner of the separate account surrenders the policy; or

(B) The beneficiary of the contract an amount equal to the shortfall between the fair value and book value of a specified portfolio of assets.

(ii) An FDIC-supervised institution that purchases stable value protection on its investment in a separate account must treat the portion of the carrying value of its investment in the separate account attributable to the stable value protection as an exposure to the provider of the protection and the remaining portion of the carrying value of its separate account as an equity exposure to an investment fund.

(iii) An FDIC-supervised institution that provides stable value protection must treat the exposure as an equity derivative with an adjusted carrying value determined as the sum of paragraphs (b)(1) and (3) of this section.

(b) *Adjusted carrying value.* For purposes of §§ 324.51 through 324.53, the adjusted carrying value of an equity exposure is:

(1) For the on-balance sheet component of an equity exposure (other than an equity exposure that is classified as available-for-sale where the FDIC-supervised institution has made an AOCI opt-out election under § 324.22(b)(2)), the FDIC-supervised institution's carrying value of the exposure;

(2) For the on-balance sheet component of an equity exposure that is classified as available-for-sale where the FDIC-supervised institution has made an AOCI opt-out election under § 324.22(b)(2), the FDIC-supervised institution's carrying value of the exposure less any net unrealized gains on the exposure that are reflected in such carrying value but excluded from the FDIC-supervised institution's regulatory capital components;

(3) For the off-balance sheet component of an equity exposure that is not an equity commitment, the effective notional principal amount of the exposure, the size of which is equivalent to a hypothetical on-balance sheet position in the underlying equity instrument that would evidence the same change in fair value (measured in dollars) given a small change in the price of the underlying equity instrument, minus the adjusted carrying value of the on-balance sheet component of the exposure as calculated in paragraph (b)(1) of this section; and

(4) For a commitment to acquire an equity exposure (an equity commitment), the effective notional principal amount of the exposure is multiplied by the following conversion factors (CFs):

(i) Conditional equity commitments with an original maturity of one year or less receive a CF of 20 percent.

(ii) Conditional equity commitments with an original maturity of over one year receive a CF of 50 percent.

(iii) Unconditional equity commitments receive a CF of 100 percent.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20760, Apr. 14, 2014]

§ 324.52 Simple risk-weight approach (SRWA).

(a) *General.* Under the SRWA, an FDIC-supervised institution's total risk-weighted assets for equity exposures equals the sum of the risk-weighted asset amounts for each of the FDIC-supervised institution's individual equity exposures (other than equity exposures to an investment fund) as determined under this section and the risk-weighted asset amounts for each of the FDIC-supervised institution's individual equity exposures to an investment fund as determined under § 324.53.

(b) *SRWA computation for individual equity exposures.* An FDIC-supervised institution must determine the risk-weighted asset amount for an individual equity exposure (other than an equity exposure to an investment fund) by multiplying the adjusted carrying value of the equity exposure or the effective portion and ineffective portion of a hedge pair (as defined in paragraph (c) of this section) by the lowest applicable risk weight in this paragraph (b).

(1) *Zero percent risk weight equity exposures.* An equity exposure to a sovereign, the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, the European Stability Mechanism, the European Financial Stability Facility, an MDB, and any other entity whose credit exposures receive a zero percent risk weight under § 324.32 may be assigned a zero percent risk weight.

(2) *20 percent risk weight equity exposures.* An equity exposure to a PSE, Federal Home Loan Bank or the Federal Agricultural Mortgage Corporation (Farmer Mac) must be assigned a 20 percent risk weight.

(3) *100 percent risk weight equity exposures.* The equity exposures set forth in this paragraph (b)(3) must be assigned a 100 percent risk weight.

(i) *Community development equity exposures.* An equity exposure that qualifies as a community development investment under section 24 (Eleventh) of the National Bank Act, excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act.

(ii) *Effective portion of hedge pairs.* The effective portion of a hedge pair.

(iii) *Non-significant equity exposures.* Equity exposures, excluding significant investments in the capital of an unconsolidated financial institution in the form of common stock and exposures to an investment firm that would meet the definition of a traditional securitization were it not for the application of paragraph (8) of that definition in § 324.2 and has greater than immaterial leverage, to the extent that the aggregate adjusted carrying value of the exposures does not exceed 10 percent of the FDIC-supervised institution's total capital.

(A) To compute the aggregate adjusted carrying value of an FDIC-supervised institution's equity exposures for purposes of this section, the FDIC-supervised institution may exclude equity exposures described in paragraphs (b)(1), (b)(2), (b)(3)(i), and (b)(3)(ii) of this section, the equity exposure in a hedge pair with the smaller adjusted carrying value, and a proportion of each equity exposure to an investment fund equal to the proportion of the assets of the investment fund that are not equity exposures or that meet the criterion of paragraph (b)(3)(i) of this section. If an FDIC-supervised institution does not know the actual holdings of the investment fund, the FDIC-supervised institution may calculate the proportion of the assets of the fund that are not equity exposures based on the terms of the prospectus, partnership agreement, or similar contract that defines the fund's permissible investments. If the sum of the investment limits for all exposure classes within the fund exceeds 100 percent, the FDIC-supervised institution must assume for purposes of this section that the investment fund invests to the maximum extent possible in equity exposures.

(B) When determining which of an FDIC-supervised institution's equity exposures qualify for a 100 percent risk weight under this paragraph (b), an FDIC-supervised institution first must include equity exposures to unconsolidated small business investment companies or held through consolidated

small business investment companies described in section 302 of the Small Business Investment Act, then must include publicly traded equity exposures (including those held indirectly through investment funds), and then must include non-publicly traded equity exposures (including those held indirectly through investment funds).

(4) *250 percent risk weight equity exposures.* Significant investments in the capital of unconsolidated financial institutions in the form of common stock that are not deducted from capital pursuant to § 324.22(d)(2) are assigned a 250 percent risk weight.

(5) *300 percent risk weight equity exposures.* A publicly traded equity exposure (other than an equity exposure described in paragraph (b)(7) of this section and including the ineffective portion of a hedge pair) must be assigned a 300 percent risk weight.

(6) *400 percent risk weight equity exposures.* An equity exposure (other than an equity exposure described in paragraph (b)(7) of this section) that is not publicly traded must be assigned a 400 percent risk weight.

(7) *600 percent risk weight equity exposures.* An equity exposure to an investment firm must be assigned a 600 percent risk weight, provided that the investment firm:

(i) Would meet the definition of a traditional securitization were it not for the application of paragraph (8) of that definition; and

(ii) Has greater than immaterial leverage.

(c) *Hedge transactions*—(1) *Hedge pair.* A hedge pair is two equity exposures that form an effective hedge so long as each equity exposure is publicly traded or has a return that is primarily based on a publicly traded equity exposure.

(2) *Effective hedge.* Two equity exposures form an effective hedge if the exposures either have the same remaining maturity or each has a remaining maturity of at least three months; the hedge relationship is formally documented in a prospective manner (that is, before the FDIC-supervised institution acquires at least one of the equity exposures); the documentation specifies the measure of effectiveness (E) the FDIC-supervised institution will use for the hedge relationship throughout the life of the transaction; and the hedge relationship has an E greater than or equal to 0.8. An FDIC-supervised institution must measure E at least quarterly and must use one of three alternative measures of E as set forth in this paragraph (c).

(i) Under the dollar-offset method of measuring effectiveness, the FDIC-supervised institution must determine the ratio of value change (RVC). The RVC is the ratio of the cumulative sum of the changes in value of one equity exposure to the cumulative sum of the changes in the value of the other equity exposure. If RVC is positive, the hedge is not effective and E equals 0. If RVC is negative and greater than or equal to −1 (that is, between zero and −1), then E equals the absolute value of RVC. If RVC is negative and less than −1, then E equals 2 plus RVC.

(ii) Under the variability-reduction method of measuring effectiveness:

$$E = 1 - \frac{\sum_{t=1}^{T} \left(X_t - X_{t-1} \right)^2}{\sum_{t=1}^{T} \left(A_t - A_{t-1} \right)^2}, \text{ where}$$

(A) $X_t = A_t - B_t$;

(B) A_t = the value at time t of one exposure in a hedge pair; and

(C) B_t = the value at time t of the other exposure in a hedge pair.

(iii) Under the regression method of measuring effectiveness, E equals the coefficient of determination of a regression in which the change in value of one exposure in a hedge pair is the dependent variable and the change in value of the other exposure in a hedge pair is the independent variable. However, if the estimated regression coefficient is positive, then E equals zero.

(3) The effective portion of a hedge pair is E multiplied by the greater of the adjusted carrying values of the equity exposures forming a hedge pair.

(4) The ineffective portion of a hedge pair is (1–E) multiplied by the greater of the adjusted carrying values of the equity exposures forming a hedge pair.

[78 FR 55471, Sept. 10, 2013, as amended at 84 FR 35277, July 22, 2019]

§ 324.53 Equity exposures to investment funds.

(a) *Available approaches.* (1) Unless the exposure meets the requirements for a community development equity exposure under § 324.52(b)(3)(i), an FDIC-supervised institution must determine the risk-weighted asset amount of an equity exposure to an investment fund under the full look-through approach described in paragraph (b) of this section, the simple modified look-through approach described in paragraph (c) of this section, or the alterative modified look-through approach described paragraph (d) of this section, provided, however, that the minimum risk weight that may be assigned to an equity exposure under this section is 20 percent.

(2) The risk-weighted asset amount of an equity exposure to an investment fund that meets the requirements for a community development equity exposure in § 324.52(b)(3)(i) is its adjusted carrying value.

(3) If an equity exposure to an investment fund is part of a hedge pair and the FDIC-supervised institution does not use the full look-through approach, the FDIC-supervised institution must use the ineffective portion of the hedge pair as determined under § 324.52(c) as the adjusted carrying value for the equity exposure to the investment fund. The risk-weighted asset amount of the effective portion of the hedge pair is equal to its adjusted carrying value.

(b) *Full look-through approach.* An FDIC-supervised institution that is able to calculate a risk-weighted asset amount for its proportional ownership share of each exposure held by the investment fund (as calculated under this subpart as if the proportional ownership share of the adjusted carrying value of each exposure were held directly by the FDIC-supervised institution) may set the risk-weighted asset amount of the FDIC-supervised institution's exposure to the fund equal to the product of:

(1) The aggregate risk-weighted asset amounts of the exposures held by the fund as if they were held directly by the FDIC-supervised institution; and

(2) The FDIC-supervised institution's proportional ownership share of the fund.

(c) *Simple modified look-through approach.* Under the simple modified look-through approach, the risk-weighted asset amount for an FDIC-supervised institution's equity exposure to an investment fund equals the adjusted carrying value of the equity exposure multiplied by the highest risk weight that applies to any exposure the fund is permitted to hold under the prospectus, partnership agreement, or similar agreement that defines the fund's permissible investments (excluding derivative contracts that are used for hedging rather than speculative purposes and that do not constitute a material portion of the fund's exposures).

(d) *Alternative modified look-through approach.* Under the alternative modified look-through approach, an FDIC-supervised institution may assign the adjusted carrying value of an equity exposure to an investment fund on a pro rata basis to different risk weight categories under this subpart based on the investment limits in the fund's prospectus, partnership agreement, or similar contract that defines the fund's permissible investments. The risk-weighted asset amount for the FDIC-supervised institution's equity exposure to the investment fund equals the sum of each portion of the adjusted carrying value assigned to an exposure type multiplied by the applicable risk weight under this subpart. If the sum of the investment limits for all exposure types within the fund exceeds 100 percent, the FDIC-supervised institution must assume that the fund invests to the maximum extent permitted under its investment limits in the exposure type with the highest applicable risk weight under this subpart and continues to make investments in order of the exposure type with the next highest applicable risk weight under this subpart until the maximum total investment level is reached. If more than one exposure type applies to an exposure, the FDIC-supervised institution must use the highest applicable risk weight. An FDIC-supervised institution may exclude derivative contracts held by the fund that are used for hedging rather than for speculative purposes and do not constitute a material portion of the fund's exposures.

§§ 324.54–324.60 [Reserved]

DISCLOSURES

§ 324.61 Purpose and scope.

Sections 324.61 through 324.63 of this subpart establish public disclosure requirements related to the capital requirements described in subpart B of this part for an FDIC-supervised institution with total consolidated assets of $50 billion or more as reported on the FDIC-supervised institution's most recent year-end Call Report that is not an advanced approaches FDIC-supervised institution making public disclosures pursuant to § 324.172. An advanced approaches FDIC-supervised institution that has not received approval from the FDIC to exit parallel run pursuant to § 324.121(d) is subject to the disclosure requirements described in §§ 324.62 and 324.63. An FDIC-supervised institution with total consolidated assets of $50 billion or more as reported on the FDIC-supervised institution's most recent year-end Call Report that is not an advanced approaches FDIC-supervised institution making public disclosures subject to § 324.172 must comply with § 324.62 unless it is a consolidated subsidiary of a bank holding company, savings and loan holding company, or depository institution that is subject to the disclosure requirements of § 324.62 or a subsidiary of a non-U.S. banking organization that is subject to comparable public disclosure requirements in its home jurisdiction. For purposes of this section, total consolidated assets are determined based on the average of the FDIC-supervised institution's total consolidated assets in the four most recent quarters as reported on the Call Report; or the average of the FDIC-supervised institution's total consolidated assets in the most recent consecutive quarters as reported quarterly on the FDIC-supervised institution's Call Report if the FDIC-supervised institution has not filed such a report for each of the most recent four quarters.

[84 FR 35278, July 22, 2019]

§ 324.62 Disclosure requirements.

(a) An FDIC-supervised institution described in § 324.61 must provide timely public disclosures each calendar quarter of the information in the applicable tables in § 324.63. If a significant change occurs, such that the most recent reported amounts are no longer reflective of the FDIC-supervised institution's capital adequacy and risk profile, then a brief discussion of this change and its likely impact must be disclosed as soon as practicable thereafter. Qualitative disclosures that typically do not change each quarter (for example, a general summary of the FDIC-supervised institution's risk management objectives and policies, reporting system, and definitions) may be disclosed annually after the end of the fourth calendar quarter, provided that any significant changes are disclosed in the interim. The FDIC-supervised institution's management may provide all of the disclosures required by §§ 324.61 through 324.63 in one place on the FDIC-supervised institution's public Web site or may provide the disclosures in more than one public financial report or other regulatory reports, provided that the FDIC-supervised institution publicly provides a summary table specifically indicating the location(s) of all such disclosures.

(b) An FDIC-supervised institution described in § 324.61 must have a formal disclosure policy approved by the board of directors that addresses its approach for determining the disclosures it makes. The policy must address the associated internal controls and disclosure controls and procedures. The board of directors and senior management are responsible for establishing and maintaining an effective internal control structure over financial reporting, including the disclosures required by this subpart, and must ensure that appropriate review of the disclosures takes place. One or more senior officers of the FDIC-supervised institution must attest that the disclosures meet the requirements of this subpart.

(c) If an FDIC-supervised institution described in § 324.61 concludes that specific commercial or financial information that it would otherwise be required to disclose under this section would be exempt from disclosure by the FDIC under the Freedom of Information Act (5 U.S.C. 552), then the FDIC-supervised institution is not required to disclose that specific information pursuant to this section, but must disclose more general information about the subject matter of the requirement, together with the fact that, and the reason why, the specific items of information have not been disclosed.

§ 324.63 Disclosures by FDIC-supervised institutions described in § 324.61.

(a) Except as provided in § 324.62, an FDIC-supervised institution described in § 324.61 must make the disclosures described in Tables 1 through 10 of this section. The FDIC-supervised institution must make these disclosures publicly available for each of the last three years (that is, twelve quarters) or such shorter period beginning on January 1, 2015.

(b) An FDIC-supervised institution must publicly disclose each quarter the following:

(1) Common equity tier 1 capital, additional tier 1 capital, tier 2 capital, tier 1 and total capital ratios, including the regulatory capital elements and all the regulatory adjustments and deductions needed to calculate the numerator of such ratios;

(2) Total risk-weighted assets, including the different regulatory adjustments and deductions needed to calculate total risk-weighted assets;

(3) Regulatory capital ratios during any transition periods, including a description of all the regulatory capital elements and all regulatory adjustments and deductions needed to calculate the numerator and denominator of each capital ratio during any transition period; and

(4) A reconciliation of regulatory capital elements as they relate to its balance sheet in any audited consolidated financial statements.

TABLE 1 TO § 324.63—SCOPE OF APPLICATION

Qualitative Disclosures	(a)	The name of the top corporate entity in the group to which subpart D of this part applies.
	(b)	A brief description of the differences in the basis for consolidating entities[1] for accounting and regulatory purposes, with a description of those entities: (1) That are fully consolidated; (2) That are deconsolidated and deducted from total capital; (3) For which the total capital requirement is deducted; and (4) That are neither consolidated nor deducted (for example, where the investment in the entity is assigned a risk weight in accordance with this subpart).
	(c)	Any restrictions, or other major impediments, on transfer of funds or total capital within the group.
Quantitative Disclosures	(d)	The aggregate amount of surplus capital of insurance subsidiaries included in the total capital of the consolidated group.
	(e)	The aggregate amount by which actual total capital is less than the minimum total capital requirement in all subsidiaries, with total capital requirements and the name(s) of the subsidiaries with such deficiencies.

[1] Entities include securities, insurance and other financial subsidiaries, commercial subsidiaries (where permitted), and significant minority equity investments in insurance, financial and commercial entities.

TABLE 2 TO § 324.63—CAPITAL STRUCTURE

Qualitative Disclosures	(a)	Summary information on the terms and conditions of the main features of all regulatory capital instruments.
Quantitative Disclosures	(b)	The amount of common equity tier 1 capital, with separate disclosure of: (1) Common stock and related surplus; (2) Retained earnings; (3) Common equity minority interest; (4) AOCI; and (5) Regulatory adjustments and deductions made to common equity tier 1 capital.
	(c)	The amount of tier 1 capital, with separate disclosure of: (1) Additional tier 1 capital elements, including additional tier 1 capital instruments and tier 1 minority interest not included in common equity tier 1 capital; and (2) Regulatory adjustments and deductions made to tier 1 capital.
	(d)	The amount of total capital, with separate disclosure of: (1) Tier 2 capital elements, including tier 2 capital instruments and total capital minority interest not included in tier 1 capital; and (2) Regulatory adjustments and deductions made to total capital.

TABLE 3 TO § 324.63—CAPITAL ADEQUACY

Qualitative disclosures	(a) A summary discussion of the FDIC-supervised institution's approach to assessing the adequacy of its capital to support current and future activities.
Quantitative disclosures	(b) Risk-weighted assets for: (1) Exposures to sovereign entities; (2) Exposures to certain supranational entities and MDBs; (3) Exposures to depository institutions, foreign banks, and credit unions;

TABLE 3 TO § 324.63—CAPITAL ADEQUACY—Continued

	(4) Exposures to PSEs; (5) Corporate exposures; (6) Residential mortgage exposures; (7) Statutory multifamily mortgages and pre-sold construction loans; (8) HVCRE exposures; (9) Past due loans; (10) Other assets; (11) Cleared transactions; (12) Default fund contributions; (13) Unsettled transactions; (14) Securitization exposures; and (15) Equity exposures. (c) Standardized market risk-weighted assets as calculated under subpart F of this part. (d) Common equity tier 1, tier 1 and total risk-based capital ratios: (1) For the top consolidated group; and (2) For each depository institution subsidiary. (e) Total standardized risk-weighted assets.

TABLE 4 TO § 324.63—CAPITAL CONSERVATION BUFFER

Quantitative Disclosures	(a)	At least quarterly, the FDIC-supervised institution must calculate and publicly disclose the capital conservation buffer as described under § 324.11.
	(b)	At least quarterly, the FDIC-supervised institution must calculate and publicly disclose the eligible retained income of the FDIC-supervised institution, as described under § 324.11.
	(c)	At least quarterly, the FDIC-supervised institution must calculate and publicly disclose any limitations it has on distributions and discretionary bonus payments resulting from the capital conservation buffer framework described under § 324.11, including the maximum payout amount for the quarter.

(c) *General qualitative disclosure requirement*. For each separate risk area described in Tables 5 through 10, the FDIC-supervised institution must describe its risk management objectives and policies, including: strategies and processes; the structure and organization of the relevant risk management function; the scope and nature of risk reporting and/or measurement systems; policies for hedging and/or mitigating risk and strategies and processes for monitoring the continuing effectiveness of hedges/mitigants.

TABLE 5 TO § 324.63—CREDIT RISK: GENERAL DISCLOSURES

Qualitative Disclosures	(a)	The general qualitative disclosure requirement with respect to credit risk (excluding counterparty credit risk disclosed in accordance with Table 6 to § 324.63), including the: (1) Policy for determining past due or delinquency status; (2) Policy for placing loans on nonaccrual; (3) Policy for returning loans to accrual status; (4) Definition of and policy for identifying impaired loans (for financial accounting purposes); (5) Description of the methodology that the FDIC-supervised institution uses to estimate its allowance for loan and lease losses or adjusted allowance for credit losses, as applicable, including statistical methods used where applicable; (6) Policy for charging-off uncollectible amounts; and (7) Discussion of the FDIC-supervised institution's credit risk management policy.
Quantitative Disclosures	(b)	Total credit risk exposures and average credit risk exposures, after accounting offsets in accordance with GAAP, without taking into account the effects of credit risk mitigation techniques (for example, collateral and netting not permitted under GAAP), over the period categorized by major types of credit exposure. For example, FDIC-supervised institutions could use categories similar to that used for financial statement purposes. Such categories might include, for instance: (1) Loans, off-balance sheet commitments, and other non-derivative off-balance sheet exposures; (2) Debt securities; and (3) OTC derivatives.[2]
	(c)	Geographic distribution of exposures, categorized in significant areas by major types of credit exposure.[3]
	(d)	Industry or counterparty type distribution of exposures, categorized by major types of credit exposure.
	(e)	By major industry or counterparty type: (1) Amount of impaired loans for which there was a related allowance under GAAP; (2) Amount of impaired loans for which there was no related allowance under GAAP; (3) Amount of loans past due 90 days and on nonaccrual; (4) Amount of loans past due 90 days and still accruing;[4] (5) The balance in the allowance for loan and lease losses or adjusted allowance for credit losses, as applicable, at the end of each period, disaggregated on the basis of the FDIC-supervised institution's impairment method. To disaggregate the information required on the basis of impairment methodology, an entity shall separately disclose the amounts based on the requirements in GAAP; and (6) Charge-offs during the period.
	(f)	Amount of impaired loans and, if available, the amount of past due loans categorized by significant geographic areas including, if practical, the amounts of allowances related to each geographical area[5], further categorized as required by GAAP.
	(g)	Reconciliation of changes in ALLL or AACL, as applicable.[6]
	(h)	Remaining contractual maturity delineation (for example, one year or less) of the whole portfolio, categorized by credit exposure.

[1] Table 5 to § 324.63 does not cover equity exposures, which should be reported in Table 9 to § 324.63.
[2] *See,* for example, ASC Topic 815–10 and 210, as they may be amended from time to time.

[3] Geographical areas may consist of individual countries, groups of countries, or regions within countries. An FDIC-supervised institution might choose to define the geographical areas based on the way the FDIC-supervised institution's portfolio is geographically managed. The criteria used to allocate the loans to geographical areas must be specified.

[4] An FDIC-supervised institution is encouraged also to provide an analysis of the aging of past-due loans.

[5] The portion of the general allowance that is not allocated to a geographical area should be disclosed separately.

[6] The reconciliation should include the following: a description of the allowance; the opening balance of the allowance; charge-offs taken against the allowance during the period; amounts provided (or reversed) for estimated probable loan losses during the period; any other adjustments (for example, exchange rate differences, business combinations, acquisitions and disposals of subsidiaries), including transfers between allowances; and the closing balance of the allowance. Charge-offs and recoveries that have been recorded directly to the income statement should be disclosed separately.

TABLE 6 TO § 324.63—GENERAL DISCLOSURE FOR COUNTERPARTY CREDIT RISK-RELATED EXPOSURES

Qualitative Disclosures	(a)	The general qualitative disclosure requirement with respect to OTC derivatives, eligible margin loans, and repo-style transactions, including a discussion of: (1) The methodology used to assign credit limits for counterparty credit exposures; (2) Policies for securing collateral, valuing and managing collateral, and establishing credit reserves; (3) The primary types of collateral taken; and (4) The impact of the amount of collateral the FDIC-supervised institution would have to provide given a deterioration in the FDIC-supervised institution's own creditworthiness.
Quantitative Disclosures	(b)	Gross positive fair value of contracts, collateral held (including type, for example, cash, government securities), and net unsecured credit exposure.[1] An FDIC-supervised institution also must disclose the notional value of credit derivative hedges purchased for counterparty credit risk protection and the distribution of current credit exposure by exposure type.[2]
	(c)	Notional amount of purchased and sold credit derivatives, segregated between use for the FDIC-supervised institution's own credit portfolio and in its intermediation activities, including the distribution of the credit derivative products used, categorized further by protection bought and sold within each product group.

[1] Net unsecured credit exposure is the credit exposure after considering both the benefits from legally enforceable netting agreements and collateral arrangements without taking into account haircuts for price volatility, liquidity, etc.

[2] This may include interest rate derivative contracts, foreign exchange derivative contracts, equity derivative contracts, credit derivatives, commodity or other derivative contracts, repo-style transactions, and eligible margin loans.

TABLE 7 TO § 324.63—CREDIT RISK MITIGATION[1] [2]

Qualitative Disclosures	(a)	The general qualitative disclosure requirement with respect to credit risk mitigation, including: (1) Policies and processes for collateral valuation and management; (2) A description of the main types of collateral taken by the FDIC-supervised institution; (3) The main types of guarantors/credit derivative counterparties and their creditworthiness; and (4) Information about (market or credit) risk concentrations with respect to credit risk mitigation.
Quantitative Disclosures	(b)	For each separately disclosed credit risk portfolio, the total exposure that is covered by eligible financial collateral, and after the application of haircuts.
	(c)	For each separately disclosed portfolio, the total exposure that is covered by guarantees/credit derivatives and the risk-weighted asset amount associated with that exposure.

[1] At a minimum, an FDIC-supervised institution must provide the disclosures in Table 7 in relation to credit risk mitigation that has been recognized for the purposes of reducing capital requirements under this subpart. Where relevant, FDIC-supervised institutions are encouraged to give further information about mitigants that have not been recognized for that purpose.

[2] Credit derivatives that are treated, for the purposes of this subpart, as synthetic securitization exposures should be excluded from the credit risk mitigation disclosures and included within those relating to securitization (Table 8 to § 324.63).

TABLE 8 TO § 324.63—SECURITIZATION

Qualitative Disclosures	(a) The general qualitative disclosure requirement with respect to a securitization (including synthetic securitizations), including a discussion of: (1) The FDIC-supervised institution's objectives for securitizing assets, including the extent to which these activities transfer credit risk of the underlying exposures away from the FDIC-supervised institution to other entities and including the type of risks assumed and retained with resecuritization activity; [1] (2) The nature of the risks (*e.g.* liquidity risk) inherent in the securitized assets; (3) The roles played by the FDIC-supervised institution in the securitization process [2] and an indication of the extent of the FDIC-supervised institution's involvement in each of them; (4) The processes in place to monitor changes in the credit and market risk of securitization exposures including how those processes differ for resecuritization exposures; (5) The FDIC-supervised institution's policy for mitigating the credit risk retained through securitization and resecuritization exposures; and (6) The risk-based capital approaches that the FDIC-supervised institution follows for its securitization exposures including the type of securitization exposure to which each approach applies. (b) A list of: (1) The type of securitization SPEs that the FDIC-supervised institution, as sponsor, uses to securitize third-party exposures. The FDIC-supervised institution must indicate whether it has exposure to these SPEs, either on- or off-balance sheet; and (2) Affiliated entities: (i) That the FDIC-supervised institution manages or advises; and (ii) That invest either in the securitization exposures that the FDIC-supervised institution has securitized or in securitization SPEs that the FDIC-supervised institution sponsors.[3] (c) Summary of the FDIC-supervised institution's accounting policies for securitization activities, including: (1) Whether the transactions are treated as sales or financings; (2) Recognition of gain-on-sale; (3) Methods and key assumptions applied in valuing retained or purchased interests; (4) Changes in methods and key assumptions from the previous period for valuing retained interests and impact of the changes; (5) Treatment of synthetic securitizations; (6) How exposures intended to be securitized are valued and whether they are recorded under subpart D of this part; and (7) Policies for recognizing liabilities on the balance sheet for arrangements that could require the FDIC-supervised institution to provide financial support for securitized assets.

TABLE 8 TO § 324.63—SECURITIZATION—Continued

	(d) An explanation of significant changes to any quantitative information since the last reporting period.
Quantitative Disclosures	(e) The total outstanding exposures securitized by the FDIC-supervised institution in securitizations that meet the operational criteria provided in § 324.41 (categorized into traditional and synthetic securitizations), by exposure type, separately for securitizations of third-party exposures for which the bank acts only as sponsor.[4] (f) For exposures securitized by the FDIC-supervised institution in securitizations that meet the operational criteria in § 324.41: (1) Amount of securitized assets that are impaired/past due categorized by exposure type;[5] and (2) Losses recognized by the FDIC-supervised institution during the current period categorized by exposure type.[6] (g) The total amount of outstanding exposures intended to be securitized categorized by exposure type. (h) Aggregate amount of: (1) On-balance sheet securitization exposures retained or purchased categorized by exposure type; and (2) Off-balance sheet securitization exposures categorized by exposure type. (i)(1) Aggregate amount of securitization exposures retained or purchased and the associated capital requirements for these exposures, categorized between securitization and resecuritization exposures, further categorized into a meaningful number of risk weight bands and by risk-based capital approach (*e.g.,* SSFA); and (2) Aggregate amount disclosed separately by type of underlying exposure in the pool of any: (i) After-tax gain-on-sale on a securitization that has been deducted from common equity tier 1 capital; and (ii) Credit-enhancing interest-only strip that is assigned a 1,250 percent risk weight. (j) Summary of current year's securitization activity, including the amount of exposures securitized (by exposure type), and recognized gain or loss on sale by exposure type. (k) Aggregate amount of resecuritization exposures retained or purchased categorized according to: (1) Exposures to which credit risk mitigation is applied and those not applied; and (2) Exposures to guarantors categorized according to guarantor creditworthiness categories or guarantor name.

[1] The FDIC-supervised institution should describe the structure of resecuritizations in which it participates; this description should be provided for the main categories of resecuritization products in which the FDIC-supervised institution is active.

[2] For example, these roles may include originator, investor, servicer, provider of credit enhancement, sponsor, liquidity provider, or swap provider.

[3] Such affiliated entities may include, for example, money market funds, to be listed individually, and personal and private trusts, to be noted collectively.

[4] ''Exposures securitized'' include underlying exposures originated by the FDIC-supervised institution, whether generated by them or purchased, and recognized in the balance sheet, from third parties, and third-party exposures included in sponsored transactions. Securitization transactions (including underlying exposures originally on the FDIC-supervised institution's balance sheet and underlying exposures acquired by the FDIC-supervised institution from third-party entities) in which the originating bank does not retain any securitization exposure should be shown separately but need only be reported for the year of inception. FDIC-supervised institutions are required to disclose exposures regardless of whether there is a capital charge under this part.

[5] Include credit-related other than temporary impairment (OTTI).

[6] For example, charge-offs/allowances (if the assets remain on the FDIC-supervised institution's balance sheet) or credit-related OTTI of interest-only strips and other retained residual interests, as well as recognition of liabilities for probable future financial support required of the FDIC-supervised institution with respect to securitized assets.

TABLE 9 TO § 324.63—EQUITIES NOT SUBJECT TO SUBPART F OF THIS PART

Qualitative Disclosures	(a)	The general qualitative disclosure requirement with respect to equity risk for equities not subject to subpart F of this part, including: (1) Differentiation between holdings on which capital gains are expected and those taken under other objectives including for relationship and strategic reasons; and (2) Discussion of important policies covering the valuation of and accounting for equity holdings not subject to subpart F of this part. This includes the accounting techniques and valuation methodologies used, including key assumptions and practices affecting valuation as well as significant changes in these practices.
Quantitative Disclosures	(b)	Value disclosed on the balance sheet of investments, as well as the fair value of those investments; for securities that are publicly traded, a comparison to publicly-quoted share values where the share price is materially different from fair value.
	(c)	The types and nature of investments, including the amount that is: (1) Publicly traded; and (2) Non publicly traded.
	(d)	The cumulative realized gains (losses) arising from sales and liquidations in the reporting period.
	(e)	(1) Total unrealized gains (losses).[1] (2) Total latent revaluation gains (losses).[2] (3) Any amounts of the above included in tier 1 or tier 2 capital.
	(f)	Capital requirements categorized by appropriate equity groupings, consistent with the FDIC-supervised institution's methodology, as well as the aggregate amounts and the type of equity investments subject to any supervisory transition regarding regulatory capital requirements.

[1] Unrealized gains (losses) recognized on the balance sheet but not through earnings.
[2] Unrealized gains (losses) not recognized either on the balance sheet or through earnings.

TABLE 10 TO § 324.63—INTEREST RATE RISK FOR NON-TRADING ACTIVITIES

Qualitative disclosures	(a)	The general qualitative disclosure requirement, including the nature of interest rate risk for non-trading activities and key assumptions, including assumptions regarding loan prepayments and behavior of non-maturity deposits, and frequency of measurement of interest rate risk for non-trading activities.
Quantitative disclosures	(b)	The increase (decline) in earnings or economic value (or relevant measure used by management) for upward and downward rate shocks according to management's method for measuring interest rate risk for non-trading activities, categorized by currency (as appropriate).

(d) A Category III FDIC-supervised institution that is required to publicly disclose its supplementary leverage ratio pursuant to § 324.172(d) is subject to the supplementary leverage ratio disclosure requirement at § 324.173(a)(2).

(e) A Category III FDIC-supervised institution that is required to calculate a countercyclical capital buffer pursuant to § 324.11 is subject to the disclosure requirement at Table 4 to § 324.173, ''Capital Conservation and Countercyclical Capital Buffers,'' and

not to the disclosure requirement at Table 4 to this section, ''Capital Conservation Buffer.''

[78 FR 55471, Sept. 10, 2013, as amended at 78 FR 62417, Oct. 22, 2013; 79 FR 20760, Apr. 14, 2014; 84 FR 4247, Feb. 14, 2019; 84 FR 35278, July 22, 2019; 84 FR 59279, Nov. 1, 2019]

§§ 324.64–324.99 [Reserved]

Subpart E—Risk-Weighted Assets—Internal Ratings-Based and Advanced Measurement Approaches

§ 324.100 Purpose, applicability, and principle of conservatism.

(a) *Purpose.* This subpart E establishes:

(1) Minimum qualifying criteria for FDIC-supervised institutions using institution-specific internal risk measurement and management processes for calculating risk-based capital requirements; and

(2) Methodologies for such FDIC-supervised institutions to calculate their total risk-weighted assets.

(b) *Applicability.* (1) This subpart applies to an FDIC-supervised institution that:

(i) Is a subsidiary of a global systemically important BHC, as identified pursuant to 12 CFR 217.402;

(ii) Is a Category II FDIC-supervised institution;

(iii) Is a subsidiary of a depository institution that uses the advanced approaches pursuant to 12 CFR part 3, subpart E (OCC), 12 CFR part 217, subpart E (Board), or this subpart (FDIC) to calculate its risk-based capital requirements;

(iv) Is a subsidiary of a bank holding company or savings and loan holding company that uses the advanced approaches pursuant to subpart E of 12 CFR part 217 to calculate its risk-based capital requirements; or

(v) Elects to use this subpart to calculate its risk-based capital requirements.

(2) A market risk FDIC-supervised institution must exclude from its calculation of risk-weighted assets under this subpart the risk-weighted asset amounts of all covered positions, as defined in subpart F of this part (except foreign exchange positions that are not trading positions, over-the-counter derivative positions, cleared transactions, and unsettled transactions).

(c) *Principle of conservatism.* Notwithstanding the requirements of this subpart, an FDIC-supervised institution may choose not to apply a provision of this subpart to one or more exposures provided that:

(1) The FDIC-supervised institution can demonstrate on an ongoing basis to the satisfaction of the FDIC that not applying the provision would, in all circumstances, unambiguously generate a risk-based capital requirement for each such exposure greater than that which would otherwise be required under this subpart;

(2) The FDIC-supervised institution appropriately manages the risk of each such exposure;

(3) The FDIC-supervised institution notifies the FDIC in writing prior to applying this principle to each such exposure; and

(4) The exposures to which the FDIC-supervised institution applies this principle are not, in the aggregate, material to the FDIC-supervised institution.

[78 FR 55471, Sept. 10, 2013, as amended at 80 FR 41423, July 15, 2015; 84 FR 59279, Nov. 1, 2019]

§ 324.101 Definitions.

(a) Terms that are set forth in § 324.2 and used in this subpart have the definitions assigned thereto in § 324.2.

(b) For the purposes of this subpart, the following terms are defined as follows:

Advanced internal ratings-based (IRB) systems means an advanced approaches FDIC-supervised institution's internal risk rating and segmentation system; risk parameter quantification system; data management and maintenance system; and control, oversight, and validation system for credit risk of wholesale and retail exposures.

Advanced systems means an advanced approaches FDIC-supervised institution's advanced IRB systems, operational risk management processes, operational risk data and assessment systems, operational risk quantification systems, and, to the extent used by the FDIC-supervised institution, the internal models methodology, advanced CVA approach, double default

excessive correlation detection process, and internal models approach (IMA) for equity exposures.

Backtesting means the comparison of an FDIC-supervised institution's internal estimates with actual outcomes during a sample period not used in model development. In this context, backtesting is one form of out-of-sample testing.

Benchmarking means the comparison of an FDIC-supervised institution's internal estimates with relevant internal and external data or with estimates based on other estimation techniques.

Bond option contract means a bond option, bond future, or any other instrument linked to a bond that gives rise to similar counterparty credit risk.

Business environment and internal control factors means the indicators of an FDIC-supervised institution's operational risk profile that reflect a current and forward-looking assessment of the FDIC-supervised institution's underlying business risk factors and internal control environment.

Credit default swap (CDS) means a financial contract executed under standard industry documentation that allows one party (the protection purchaser) to transfer the credit risk of one or more exposures (reference exposure(s)) to another party (the protection provider) for a certain period of time.

Credit valuation adjustment (CVA) means the fair value adjustment to reflect counterparty credit risk in valuation of OTC derivative contracts.

Default—For the purposes of calculating capital requirements under this subpart:

(1) *Retail*. (i) A retail exposure of an FDIC-supervised institution is in default if:

(A) The exposure is 180 days past due, in the case of a residential mortgage exposure or revolving exposure;

(B) The exposure is 120 days past due, in the case of retail exposures that are not residential mortgage exposures or revolving exposures; or

(C) The FDIC-supervised institution has taken a full or partial charge-off, write-down of principal, or material negative fair value adjustment of principal on the exposure for credit-related reasons.

(ii) Notwithstanding paragraph (1)(i) of this definition, for a retail exposure held by a non-U.S. subsidiary of the FDIC-supervised institution that is subject to an internal ratings-based approach to capital adequacy consistent with the Basel Committee on Banking Supervision's ''International Convergence of Capital Measurement and Capital Standards: A Revised Framework'' in a non-U.S. jurisdiction, the FDIC-supervised institution may elect to use the definition of default that is used in that jurisdiction, provided that the FDIC-supervised institution has obtained prior approval from the FDIC to use the definition of default in that jurisdiction.

(iii) A retail exposure in default remains in default until the FDIC-supervised institution has reasonable assurance of repayment and performance for all contractual principal and interest payments on the exposure.

(2) *Wholesale*. (i) An FDIC-supervised institution's wholesale obligor is in default if:

(A) The FDIC-supervised institution determines that the obligor is unlikely to pay its credit obligations to the FDIC-supervised institution in full, without recourse by the FDIC-supervised institution to actions such as realizing collateral (if held); or

(B) The obligor is past due more than 90 days on any material credit obligation(s) to the FDIC-supervised institution.[29]

(ii) An obligor in default remains in default until the FDIC-supervised institution has reasonable assurance of repayment and performance for all contractual principal and interest payments on all exposures of the FDIC-supervised institution to the obligor (other than exposures that have been fully written-down or charged-off).

Dependence means a measure of the association among operational losses across and within units of measure.

Economic downturn conditions means, with respect to an exposure held by the FDIC-supervised institution, those conditions in which the aggregate default

[29] Overdrafts are past due once the obligor has breached an advised limit or been advised of a limit smaller than the current outstanding balance.

rates for that exposure's wholesale or retail exposure subcategory (or subdivision of such subcategory selected by the FDIC-supervised institution) in the exposure's national jurisdiction (or subdivision of such jurisdiction selected by the FDIC-supervised institution) are significantly higher than average.

Effective maturity (M) of a wholesale exposure means:

(1) For wholesale exposures other than repo-style transactions, eligible margin loans, and OTC derivative contracts described in paragraph (2) or (3) of this definition:

(i) The weighted-average remaining maturity (measured in years, whole or fractional) of the expected contractual cash flows from the exposure, using the undiscounted amounts of the cash flows as weights; or

(ii) The nominal remaining maturity (measured in years, whole or fractional) of the exposure.

(2) For repo-style transactions, eligible margin loans, and OTC derivative contracts subject to a qualifying master netting agreement for which the FDIC-supervised institution does not apply the internal models approach in § 324.132(d), the weighted-average remaining maturity (measured in years, whole or fractional) of the individual transactions subject to the qualifying master netting agreement, with the weight of each individual transaction set equal to the notional amount of the transaction.

(3) For repo-style transactions, eligible margin loans, and OTC derivative contracts for which the FDIC-supervised institution applies the internal models approach in § 324.132(d), the value determined in § 324.132(d)(4).

Eligible double default guarantor, with respect to a guarantee or credit derivative obtained by an FDIC-supervised institution, means:

(1) *U.S.-based entities*. A depository institution, a bank holding company, a savings and loan holding company, or a securities broker or dealer registered with the SEC under the Securities Exchange Act, if at the time the guarantee is issued or anytime thereafter, has issued and outstanding an unsecured debt security without credit enhancement that is investment grade.

(2) *Non-U.S.-based entities*. A foreign bank, or a non-U.S.-based securities firm if the FDIC-supervised institution demonstrates that the guarantor is subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions (or securities broker-dealers), if at the time the guarantee is issued or anytime thereafter, has issued and outstanding an unsecured debt security without credit enhancement that is investment grade.

Eligible operational risk offsets means amounts, not to exceed expected operational loss, that:

(1) Are generated by internal business practices to absorb highly predictable and reasonably stable operational losses, including reserves calculated consistent with GAAP; and

(2) Are available to cover expected operational losses with a high degree of certainty over a one-year horizon.

Eligible purchased wholesale exposure means a purchased wholesale exposure that:

(1) The FDIC-supervised institution or securitization SPE purchased from an unaffiliated seller and did not directly or indirectly originate;

(2) Was generated on an arm's-length basis between the seller and the obligor (intercompany accounts receivable and receivables subject to contra-accounts between firms that buy and sell to each other do not satisfy this criterion);

(3) Provides the FDIC-supervised institution or securitization SPE with a claim on all proceeds from the exposure or a pro rata interest in the proceeds from the exposure;

(4) Has an M of less than one year; and

(5) When consolidated by obligor, does not represent a concentrated exposure relative to the portfolio of purchased wholesale exposures.

Expected exposure (EE) means the expected value of the probability distribution of non-negative credit risk exposures to a counterparty at any specified future date before the maturity date of the longest term transaction in the netting set. Any negative fair values in the probability distribution of fair values to a counterparty at a specified future date are set to zero to convert the probability distribution

of fair values to the probability distribution of credit risk exposures.

Expected operational loss (EOL) means the expected value of the distribution of potential aggregate operational losses, as generated by the FDIC-supervised institution's operational risk quantification system using a one-year horizon.

Expected positive exposure (EPE) means the weighted average over time of expected (non-negative) exposures to a counterparty where the weights are the proportion of the time interval that an individual expected exposure represents. When calculating risk-based capital requirements, the average is taken over a one-year horizon.

Exposure at default (EAD) means:

(1) For the on-balance sheet component of a wholesale exposure or segment of retail exposures (other than an OTC derivative contract, a repo-style transaction or eligible margin loan for which the FDIC-supervised institution determines EAD under § 324.132, a cleared transaction, or default fund contribution), EAD means the FDIC-supervised institution's carrying value (including net accrued but unpaid interest and fees) for the exposure or segment less any allocated transfer risk reserve for the exposure or segment.

(2) For the off-balance sheet component of a wholesale exposure or segment of retail exposures (other than an OTC derivative contract, a repo-style transaction or eligible margin loan for which the FDIC-supervised institution determines EAD under § 324.132, cleared transaction, or default fund contribution) in the form of a loan commitment, line of credit, trade-related letter of credit, or transaction-related contingency, EAD means the FDIC-supervised institution's best estimate of net additions to the outstanding amount owed the FDIC-supervised institution, including estimated future additional draws of principal and accrued but unpaid interest and fees, that are likely to occur over a one-year horizon assuming the wholesale exposure or the retail exposures in the segment were to go into default. This estimate of net additions must reflect what would be expected during economic downturn conditions. For the purposes of this definition:

(i) Trade-related letters of credit are short-term, self-liquidating instruments that are used to finance the movement of goods and are collateralized by the underlying goods.

(ii) Transaction-related contingencies relate to a particular transaction and include, among other things, performance bonds and performance-based letters of credit.

(3) For the off-balance sheet component of a wholesale exposure or segment of retail exposures (other than an OTC derivative contract, a repo-style transaction, or eligible margin loan for which the FDIC-supervised institution determines EAD under § 324.132, cleared transaction, or default fund contribution) in the form of anything other than a loan commitment, line of credit, trade-related letter of credit, or transaction-related contingency, EAD means the notional amount of the exposure or segment.

(4) EAD for OTC derivative contracts is calculated as described in § 324.132. An FDIC-supervised institution also may determine EAD for repo-style transactions and eligible margin loans as described in § 324.132.

Exposure category means any of the wholesale, retail, securitization, or equity exposure categories.

External operational loss event data means, with respect to an FDIC-supervised institution, gross operational loss amounts, dates, recoveries, and relevant causal information for operational loss events occurring at organizations other than the FDIC-supervised institution.

IMM exposure means a repo-style transaction, eligible margin loan, or OTC derivative for which an FDIC-supervised institution calculates its EAD using the internal models methodology of § 324.132(d).

Internal operational loss event data means, with respect to an FDIC-supervised institution, gross operational loss amounts, dates, recoveries, and relevant causal information for operational loss events occurring at the FDIC-supervised institution.

Loss given default (LGD) means:

(1) For a wholesale exposure, the greatest of:

(i) Zero;

(ii) The FDIC-supervised institution's empirically based best estimate of the long-run default-weighted average economic loss, per dollar of EAD, the FDIC-supervised institution would expect to incur if the obligor (or a typical obligor in the loss severity grade assigned by the FDIC-supervised institution to the exposure) were to default within a one-year horizon over a mix of economic conditions, including economic downturn conditions; or

(iii) The FDIC-supervised institution's empirically based best estimate of the economic loss, per dollar of EAD, the FDIC-supervised institution would expect to incur if the obligor (or a typical obligor in the loss severity grade assigned by the FDIC-supervised institution to the exposure) were to default within a one-year horizon during economic downturn conditions.

(2) For a segment of retail exposures, the greatest of:

(i) Zero;

(ii) The FDIC-supervised institution's empirically based best estimate of the long-run default-weighted average economic loss, per dollar of EAD, the FDIC-supervised institution would expect to incur if the exposures in the segment were to default within a one-year horizon over a mix of economic conditions, including economic downturn conditions; or

(iii) The FDIC-supervised institution's empirically based best estimate of the economic loss, per dollar of EAD, the FDIC-supervised institution would expect to incur if the exposures in the segment were to default within a one-year horizon during economic downturn conditions.

(3) The economic loss on an exposure in the event of default is all material credit-related losses on the exposure (including accrued but unpaid interest or fees, losses on the sale of collateral, direct workout costs, and an appropriate allocation of indirect workout costs). Where positive or negative cash flows on a wholesale exposure to a defaulted obligor or a defaulted retail exposure (including proceeds from the sale of collateral, workout costs, additional extensions of credit to facilitate repayment of the exposure, and drawdowns of unused credit lines) occur after the date of default, the economic loss must reflect the net present value of cash flows as of the default date using a discount rate appropriate to the risk of the defaulted exposure.

Obligor means the legal entity or natural person contractually obligated on a wholesale exposure, except that an FDIC-supervised institution may treat the following exposures as having separate obligors:

(1) Exposures to the same legal entity or natural person denominated in different currencies;

(2)(i) An income-producing real estate exposure for which all or substantially all of the repayment of the exposure is reliant on the cash flows of the real estate serving as collateral for the exposure; the FDIC-supervised institution, in economic substance, does not have recourse to the borrower beyond the real estate collateral; and no cross-default or cross-acceleration clauses are in place other than clauses obtained solely out of an abundance of caution; and

(ii) Other credit exposures to the same legal entity or natural person; and

(3)(i) A wholesale exposure authorized under section 364 of the U.S. Bankruptcy Code (11 U.S.C. 364) to a legal entity or natural person who is a debtor-in-possession for purposes of Chapter 11 of the Bankruptcy Code; and

(ii) Other credit exposures to the same legal entity or natural person.

Operational loss means a loss (excluding insurance or tax effects) resulting from an operational loss event. Operational loss includes all expenses associated with an operational loss event except for opportunity costs, forgone revenue, and costs related to risk management and control enhancements implemented to prevent future operational losses.

Operational loss event means an event that results in loss and is associated with any of the following seven operational loss event type categories:

(1) Internal fraud, which means the operational loss event type category that comprises operational losses resulting from an act involving at least one internal party of a type intended to defraud, misappropriate property, or circumvent regulations, the law, or

company policy excluding diversity- and discrimination-type events.

(2) External fraud, which means the operational loss event type category that comprises operational losses resulting from an act by a third party of a type intended to defraud, misappropriate property, or circumvent the law. Retail credit card losses arising from non-contractual, third-party-initiated fraud (for example, identity theft) are external fraud operational losses. All other third-party-initiated credit losses are to be treated as credit risk losses.

(3) Employment practices and workplace safety, which means the operational loss event type category that comprises operational losses resulting from an act inconsistent with employment, health, or safety laws or agreements, payment of personal injury claims, or payment arising from diversity- and discrimination-type events.

(4) Clients, products, and business practices, which means the operational loss event type category that comprises operational losses resulting from the nature or design of a product or from an unintentional or negligent failure to meet a professional obligation to specific clients (including fiduciary and suitability requirements).

(5) Damage to physical assets, which means the operational loss event type category that comprises operational losses resulting from the loss of or damage to physical assets from natural disaster or other events.

(6) Business disruption and system failures, which means the operational loss event type category that comprises operational losses resulting from disruption of business or system failures.

(7) Execution, delivery, and process management, which means the operational loss event type category that comprises operational losses resulting from failed transaction processing or process management or losses arising from relations with trade counterparties and vendors.

Operational risk means the risk of loss resulting from inadequate or failed internal processes, people, and systems or from external events (including legal risk but excluding strategic and reputational risk).

Operational risk exposure means the 99.9th percentile of the distribution of potential aggregate operational losses, as generated by the FDIC-supervised institution's operational risk quantification system over a one-year horizon (and not incorporating eligible operational risk offsets or qualifying operational risk mitigants).

Other retail exposure means an exposure (other than a securitization exposure, an equity exposure, a residential mortgage exposure, a pre-sold construction loan, a qualifying revolving exposure, or the residual value portion of a lease exposure) that is managed as part of a segment of exposures with homogeneous risk characteristics, not on an individual-exposure basis, and is either:

(1) An exposure to an individual for non-business purposes; or

(2) An exposure to an individual or company for business purposes if the FDIC-supervised institution's consolidated business credit exposure to the individual or company is $1 million or less.

Probability of default (PD) means:

(1) For a wholesale exposure to a non-defaulted obligor, the FDIC-supervised institution's empirically based best estimate of the long-run average one-year default rate for the rating grade assigned by the FDIC-supervised institution to the obligor, capturing the average default experience for obligors in the rating grade over a mix of economic conditions (including economic downturn conditions) sufficient to provide a reasonable estimate of the average one-year default rate over the economic cycle for the rating grade.

(2) For a segment of non-defaulted retail exposures, the FDIC-supervised institution's empirically based best estimate of the long-run average one-year default rate for the exposures in the segment, capturing the average default experience for exposures in the segment over a mix of economic conditions (including economic downturn conditions) sufficient to provide a reasonable estimate of the average one-year default rate over the economic cycle for the segment.

(3) For a wholesale exposure to a defaulted obligor or segment of defaulted retail exposures, 100 percent.

Qualifying cross-product master netting agreement means a qualifying master netting agreement that provides for termination and close-out netting across multiple types of financial transactions or qualifying master netting agreements in the event of a counterparty's default, provided that the underlying financial transactions are OTC derivative contracts, eligible margin loans, or repo-style transactions. In order to treat an agreement as a qualifying cross-product master netting agreement for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 324.3(c) of this part with respect to that agreement.

Qualifying revolving exposure (QRE) means an exposure (other than a securitization exposure or equity exposure) to an individual that is managed as part of a segment of exposures with homogeneous risk characteristics, not on an individual-exposure basis, and:

(1) Is revolving (that is, the amount outstanding fluctuates, determined largely by a borrower's decision to borrow and repay up to a pre-established maximum amount, except for an outstanding amount that the borrower is required to pay in full every month);

(2) Is unsecured and unconditionally cancelable by the FDIC-supervised institution to the fullest extent permitted by Federal law; and

(3)(i) Has a maximum contractual exposure amount (drawn plus undrawn) of up to $100,000; or

(ii) With respect to a product with an outstanding amount that the borrower is required to pay in full every month, the total outstanding amount does not in practice exceed $100,000.

(4) A segment of exposures that contains one or more exposures that fails to meet paragraph (3)(ii) of this definition must be treated as a segment of other retail exposures for the 24 month period following the month in which the total outstanding amount of one or more exposures individually exceeds $100,000.

Retail exposure means a residential mortgage exposure, a qualifying revolving exposure, or an other retail exposure.

Retail exposure subcategory means the residential mortgage exposure, qualifying revolving exposure, or other retail exposure subcategory.

Risk parameter means a variable used in determining risk-based capital requirements for wholesale and retail exposures, specifically probability of default (PD), loss given default (LGD), exposure at default (EAD), or effective maturity (M).

Scenario analysis means a systematic process of obtaining expert opinions from business managers and risk management experts to derive reasoned assessments of the likelihood and loss impact of plausible high-severity operational losses. Scenario analysis may include the well-reasoned evaluation and use of external operational loss event data, adjusted as appropriate to ensure relevance to an FDIC-supervised institution's operational risk profile and control structure.

Total wholesale and retail risk-weighted assets means the sum of:

(1) Risk-weighted assets for wholesale exposures that are not IMM exposures, cleared transactions, or default fund contributions to non-defaulted obligors and segments of non-defaulted retail exposures;

(2) Risk-weighted assets for wholesale exposures to defaulted obligors and segments of defaulted retail exposures;

(3) Risk-weighted assets for assets not defined by an exposure category;

(4) Risk-weighted assets for non-material portfolios of exposures;

(5) Risk-weighted assets for IMM exposures (as determined in § 324.132(d));

(6) Risk-weighted assets for cleared transactions and risk-weighted assets for default fund contributions (as determined in § 324.133); and

(7) Risk-weighted assets for unsettled transactions (as determined in § 324.136).

Unexpected operational loss (UOL) means the difference between the FDIC-supervised institution's operational risk exposure and the FDIC-supervised institution's expected operational loss.

Unit of measure means the level (for example, organizational unit or operational loss event type) at which the FDIC-supervised institution's operational risk quantification system generates a separate distribution of potential operational losses.

Wholesale exposure means a credit exposure to a company, natural person, sovereign, or governmental entity (other than a securitization exposure, retail exposure, pre-sold construction loan, or equity exposure).

Wholesale exposure subcategory means the HVCRE or non-HVCRE wholesale exposure subcategory.

[78 FR 55471, Sept. 10, 2013, as 81 FR 71354, Oct. 17, 2016]

§§ 324.102–324.120 [Reserved]

QUALIFICATION

§ 324.121 Qualification process.

(a) *Timing*. (1) An FDIC-supervised institution that is described in § 324.100(b)(1)(i) through (iv) must adopt a written implementation plan no later than six months after the date the FDIC-supervised institution meets a criterion in that section. The implementation plan must incorporate an explicit start date no later than 36 months after the date the FDIC-supervised institution meets at least one criterion under § 324.100(b)(1)(i) through (iv). The FDIC may extend the start date.

(2) An FDIC-supervised institution that elects to be subject to this subpart under § 324.100(b)(1)(v) must adopt a written implementation plan.

(b) *Implementation plan*. (1) The FDIC-supervised institution's implementation plan must address in detail how the FDIC-supervised institution complies, or plans to comply, with the qualification requirements in § 324.122. The FDIC-supervised institution also must maintain a comprehensive and sound planning and governance process to oversee the implementation efforts described in the plan. At a minimum, the plan must:

(i) Comprehensively address the qualification requirements in § 324.122 for the FDIC-supervised institution and each consolidated subsidiary (U.S. and foreign-based) of the FDIC-supervised institution with respect to all portfolios and exposures of the FDIC-supervised institution and each of its consolidated subsidiaries;

(ii) Justify and support any proposed temporary or permanent exclusion of business lines, portfolios, or exposures from the application of the advanced approaches in this subpart (which business lines, portfolios, and exposures must be, in the aggregate, immaterial to the FDIC-supervised institution);

(iii) Include the FDIC-supervised institution's self-assessment of:

(A) The FDIC-supervised institution's current status in meeting the qualification requirements in § 324.122; and

(B) The consistency of the FDIC-supervised institution's current practices with the FDIC's supervisory guidance on the qualification requirements;

(iv) Based on the FDIC-supervised institution's self-assessment, identify and describe the areas in which the FDIC-supervised institution proposes to undertake additional work to comply with the qualification requirements in § 324.122 or to improve the consistency of the FDIC-supervised institution's current practices with the FDIC's supervisory guidance on the qualification requirements (gap analysis);

(v) Describe what specific actions the FDIC-supervised institution will take to address the areas identified in the gap analysis required by paragraph (b)(1)(iv) of this section;

(vi) Identify objective, measurable milestones, including delivery dates and a date when the FDIC-supervised institution's implementation of the methodologies described in this subpart will be fully operational;

(vii) Describe resources that have been budgeted and are available to implement the plan; and

(viii) Receive approval of the FDIC-supervised institution's board of directors.

(2) The FDIC-supervised institution must submit the implementation plan, together with a copy of the minutes of the board of directors' approval, to the FDIC at least 60 days before the FDIC-supervised institution proposes to begin its parallel run, unless the FDIC waives prior notice.

(c) *Parallel run.* Before determining its risk-weighted assets under this subpart and following adoption of the implementation plan, the FDIC-supervised institution must conduct a satisfactory parallel run. A satisfactory parallel run is a period of no less than four consecutive calendar quarters during which the FDIC-supervised institution complies with the qualification requirements in § 324.122 to the satisfaction of the FDIC. During the parallel run, the FDIC-supervised institution must report to the FDIC on a calendar quarterly basis its risk-based capital ratios determined in accordance with § 324.10(b)(1) through (3) and § 324.10(d)(1) through (3). During this period, the FDIC-supervised institution's minimum risk-based capital ratios are determined as set forth in subpart D of this part.

(d) *Approval to calculate risk-based capital requirements under this subpart.* The FDIC will notify the FDIC-supervised institution of the date that the FDIC-supervised institution must begin to use this subpart for purposes of § 324.10 if the FDIC determines that:

(1) The FDIC-supervised institution fully complies with all the qualification requirements in § 324.122;

(2) The FDIC-supervised institution has conducted a satisfactory parallel run under paragraph (c) of this section; and

(3) The FDIC-supervised institution has an adequate process to ensure ongoing compliance with the qualification requirements in § 324.122.

[78 FR 55471, Sept. 10, 2013, as amended at 86 FR 745, Jan. 6, 2021]

§ 324.122 Qualification requirements.

(a) *Process and systems requirements.* (1) An FDIC-supervised institution must have a rigorous process for assessing its overall capital adequacy in relation to its risk profile and a comprehensive strategy for maintaining an appropriate level of capital.

(2) The systems and processes used by an FDIC-supervised institution for risk-based capital purposes under this subpart must be consistent with the FDIC-supervised institution's internal risk management processes and management information reporting systems.

(3) Each FDIC-supervised institution must have an appropriate infrastructure with risk measurement and management processes that meet the qualification requirements of this section and are appropriate given the FDIC-supervised institution's size and level of complexity. Regardless of whether the systems and models that generate the risk parameters necessary for calculating an FDIC-supervised institution's risk-based capital requirements are located at any affiliate of the FDIC-supervised institution, the FDIC-supervised institution itself must ensure that the risk parameters and reference data used to determine its risk-based capital requirements are representative of long run experience with respect to its own credit risk and operational risk exposures.

(b) *Risk rating and segmentation systems for wholesale and retail exposures.* (1)(i) An FDIC-supervised institution must have an internal risk rating and segmentation system that accurately, reliably, and meaningfully differentiates among degrees of credit risk for the FDIC-supervised institution's wholesale and retail exposures. When assigning an internal risk rating, an FDIC-supervised institution may consider a third-party assessment of credit risk, provided that the FDIC-supervised institution's internal risk rating assignment does not rely solely on the external assessment.

(ii) If an FDIC-supervised institution uses multiple rating or segmentation systems, the FDIC-supervised institution's rationale for assigning an obligor or exposure to a particular system must be documented and applied in a manner that best reflects the obligor or exposure's level of risk. An FDIC-supervised institution must not inappropriately allocate obligors or exposures across systems to minimize regulatory capital requirements.

(iii) In assigning ratings to wholesale obligors and exposures, including loss severity ratings grades to wholesale exposures, and assigning retail exposures to retail segments, an FDIC-supervised institution must use all relevant and material information and ensure that the information is current.

(iv) When assigning an obligor to a PD rating or retail exposure to a PD

segment, an FDIC-supervised institution must assess the obligor or retail borrower's ability and willingness to contractually perform, taking a conservative view of projected information.

(2) For wholesale exposures:

(i) An FDIC-supervised institution must have an internal risk rating system that accurately and reliably assigns each obligor to a single rating grade (reflecting the obligor's likelihood of default). An FDIC-supervised institution may elect, however, not to assign to a rating grade an obligor to whom the FDIC-supervised institution extends credit based solely on the financial strength of a guarantor, provided that all of the FDIC-supervised institution's exposures to the obligor are fully covered by eligible guarantees, the FDIC-supervised institution applies the PD substitution approach in § 324.134(c)(1) to all exposures to that obligor, and the FDIC-supervised institution immediately assigns the obligor to a rating grade if a guarantee can no longer be recognized under this part. The FDIC-supervised institution's wholesale obligor rating system must have at least seven discrete rating grades for non-defaulted obligors and at least one rating grade for defaulted obligors.

(ii) Unless the FDIC-supervised institution has chosen to directly assign LGD estimates to each wholesale exposure, the FDIC-supervised institution must have an internal risk rating system that accurately and reliably assigns each wholesale exposure to a loss severity rating grade (reflecting the FDIC-supervised institution's estimate of the LGD of the exposure). An FDIC-supervised institution employing loss severity rating grades must have a sufficiently granular loss severity grading system to avoid grouping together exposures with widely ranging LGDs.

(iii) An FDIC-supervised institution must have an effective process to obtain and update in a timely manner relevant and material information on obligor and exposure characteristics that affect PD, LGD and EAD.

(3) For retail exposures:

(i) An FDIC-supervised institution must have an internal system that groups retail exposures into the appropriate retail exposure subcategory and groups the retail exposures in each retail exposure subcategory into separate segments with homogeneous risk characteristics that provide a meaningful differentiation of risk. The FDIC-supervised institution's system must identify and group in separate segments by subcategories exposures identified in § 324.131(c)(2)(ii) and (iii).

(ii) An FDIC-supervised institution must have an internal system that captures all relevant exposure risk characteristics, including borrower credit score, product and collateral types, as well as exposure delinquencies, and must consider cross-collateral provisions, where present.

(iii) The FDIC-supervised institution must review and, if appropriate, update assignments of individual retail exposures to segments and the loss characteristics and delinquency status of each identified risk segment. These reviews must occur whenever the FDIC-supervised institution receives new material information, but generally no less frequently than quarterly, and, in all cases, at least annually.

(4) The FDIC-supervised institution's internal risk rating policy for wholesale exposures must describe the FDIC-supervised institution's rating philosophy (that is, must describe how wholesale obligor rating assignments are affected by the FDIC-supervised institution's choice of the range of economic, business, and industry conditions that are considered in the obligor rating process).

(5) The FDIC-supervised institution's internal risk rating system for wholesale exposures must provide for the review and update (as appropriate) of each obligor rating and (if applicable) each loss severity rating whenever the FDIC-supervised institution obtains relevant and material information on the obligor or exposure that affects PD, LGD and EAD, but no less frequently than annually.

(c) *Quantification of risk parameters for wholesale and retail exposures.* (1) The FDIC-supervised institution must have a comprehensive risk parameter quantification process that produces accurate, timely, and reliable estimates of the risk parameters on a consistent

basis for the FDIC-supervised institution's wholesale and retail exposures.

(2) An FDIC-supervised institution's estimates of PD, LGD, and EAD must incorporate all relevant, material, and available data that is reflective of the FDIC-supervised institution's actual wholesale and retail exposures and of sufficient quality to support the determination of risk-based capital requirements for the exposures. In particular, the population of exposures in the data used for estimation purposes, the lending standards in use when the data were generated, and other relevant characteristics, should closely match or be comparable to the FDIC-supervised institution's exposures and standards. In addition, an FDIC-supervised institution must:

(i) Demonstrate that its estimates are representative of long run experience, including periods of economic downturn conditions, whether internal or external data are used;

(ii) Take into account any changes in lending practice or the process for pursuing recoveries over the observation period;

(iii) Promptly reflect technical advances, new data, and other information as they become available;

(iv) Demonstrate that the data used to estimate risk parameters support the accuracy and robustness of those estimates; and

(v) Demonstrate that its estimation technique performs well in out-of-sample tests whenever possible.

(3) The FDIC-supervised institution's risk parameter quantification process must produce appropriately conservative risk parameter estimates where the FDIC-supervised institution has limited relevant data, and any adjustments that are part of the quantification process must not result in a pattern of bias toward lower risk parameter estimates.

(4) The FDIC-supervised institution's risk parameter estimation process should not rely on the possibility of U.S. government financial assistance, except for the financial assistance that the U.S. government has a legally binding commitment to provide.

(5) The FDIC-supervised institution must be able to demonstrate which variables have been found to be statistically significant with regard to EAD. The FDIC-supervised institution's EAD estimates must reflect its specific policies and strategies with regard to account management, including account monitoring and payment processing, and its ability and willingness to prevent further drawdowns in circumstances short of payment default. The FDIC-supervised institution must have adequate systems and procedures in place to monitor current outstanding amounts against committed lines, and changes in outstanding amounts per obligor and obligor rating grade and per retail segment. The FDIC-supervised institution must be able to monitor outstanding amounts on a daily basis.

(6) At a minimum, PD estimates for wholesale obligors and retail segments must be based on at least five years of default data. LGD estimates for wholesale exposures must be based on at least seven years of loss severity data, and LGD estimates for retail segments must be based on at least five years of loss severity data. EAD estimates for wholesale exposures must be based on at least seven years of exposure amount data, and EAD estimates for retail segments must be based on at least five years of exposure amount data. If the FDIC-supervised institution has relevant and material reference data that span a longer period of time than the minimum time periods specified above, the FDIC-supervised institution must incorporate such data in its estimates, provided that it does not place undue weight on periods of favorable or benign economic conditions relative to periods of economic downturn conditions.

(7) Default, loss severity, and exposure amount data must include periods of economic downturn conditions, or the FDIC-supervised institution must adjust its estimates of risk parameters to compensate for the lack of data from periods of economic downturn conditions.

(8) The FDIC-supervised institution's PD, LGD, and EAD estimates must be based on the definition of default in § 324.101.

(9) If an FDIC-supervised institution uses internal data obtained prior to becoming subject to this subpart E or external data to arrive at PD, LGD, or EAD estimates, the FDIC-supervised institution must demonstrate to the FDIC that the FDIC-supervised institution has made appropriate adjustments if necessary to be consistent with the definition of default in § 324.101. Internal data obtained after the FDIC-supervised institution becomes subject to this subpart E must be consistent with the definition of default in § 324.101.

(10) The FDIC-supervised institution must review and update (as appropriate) its risk parameters and its risk parameter quantification process at least annually.

(11) The FDIC-supervised institution must, at least annually, conduct a comprehensive review and analysis of reference data to determine relevance of the reference data to the FDIC-supervised institution's exposures, quality of reference data to support PD, LGD, and EAD estimates, and consistency of reference data to the definition of default in § 324.101.

(d) *Counterparty credit risk model.* An FDIC-supervised institution must obtain the prior written approval of the FDIC under § 324.132 to use the internal models methodology for counterparty credit risk and the advanced CVA approach for the CVA capital requirement.

(e) *Double default treatment.* An FDIC-supervised institution must obtain the prior written approval of the FDIC under § 324.135 to use the double default treatment.

(f) *Equity exposures model.* An FDIC-supervised institution must obtain the prior written approval of the FDIC under § 324.153 to use the internal models approach for equity exposures.

(g) *Operational risk.* (1) Operational risk management processes. An FDIC-supervised institution must:

(i) Have an operational risk management function that:

(A) Is independent of business line management; and

(B) Is responsible for designing, implementing, and overseeing the FDIC-supervised institution's operational risk data and assessment systems, operational risk quantification systems, and related processes;

(ii) Have and document a process (which must capture business environment and internal control factors affecting the FDIC-supervised institution's operational risk profile) to identify, measure, monitor, and control operational risk in the FDIC-supervised institution's products, activities, processes, and systems; and

(iii) Report operational risk exposures, operational loss events, and other relevant operational risk information to business unit management, senior management, and the board of directors (or a designated committee of the board).

(2) *Operational risk data and assessment systems.* An FDIC-supervised institution must have operational risk data and assessment systems that capture operational risks to which the FDIC-supervised institution is exposed. The FDIC-supervised institution's operational risk data and assessment systems must:

(i) Be structured in a manner consistent with the FDIC-supervised institution's current business activities, risk profile, technological processes, and risk management processes; and

(ii) Include credible, transparent, systematic, and verifiable processes that incorporate the following elements on an ongoing basis:

(A) *Internal operational loss event data.* The FDIC-supervised institution must have a systematic process for capturing and using internal operational loss event data in its operational risk data and assessment systems.

(*1*) The FDIC-supervised institution's operational risk data and assessment systems must include a historical observation period of at least five years for internal operational loss event data (or such shorter period approved by the FDIC to address transitional situations, such as integrating a new business line).

(*2*) The FDIC-supervised institution must be able to map its internal operational loss event data into the seven operational loss event type categories.

(*3*) The FDIC-supervised institution may refrain from collecting internal

operational loss event data for individual operational losses below established dollar threshold amounts if the FDIC-supervised institution can demonstrate to the satisfaction of the FDIC that the thresholds are reasonable, do not exclude important internal operational loss event data, and permit the FDIC-supervised institution to capture substantially all the dollar value of the FDIC-supervised institution's operational losses.

(B) *External operational loss event data*. The FDIC-supervised institution must have a systematic process for determining its methodologies for incorporating external operational loss event data into its operational risk data and assessment systems.

(C) *Scenario analysis*. The FDIC-supervised institution must have a systematic process for determining its methodologies for incorporating scenario analysis into its operational risk data and assessment systems.

(D) *Business environment and internal control factors*. The FDIC-supervised institution must incorporate business environment and internal control factors into its operational risk data and assessment systems. The FDIC-supervised institution must also periodically compare the results of its prior business environment and internal control factor assessments against its actual operational losses incurred in the intervening period.

(3) *Operational risk quantification systems*. (i) The FDIC-supervised institution's operational risk quantification systems:

(A) Must generate estimates of the FDIC-supervised institution's operational risk exposure using its operational risk data and assessment systems;

(B) Must employ a unit of measure that is appropriate for the FDIC-supervised institution's range of business activities and the variety of operational loss events to which it is exposed, and that does not combine business activities or operational loss events with demonstrably different risk profiles within the same loss distribution;

(C) Must include a credible, transparent, systematic, and verifiable approach for weighting each of the four elements, described in paragraph (g)(2)(ii) of this section, that an FDIC-supervised institution is required to incorporate into its operational risk data and assessment systems;

(D) May use internal estimates of dependence among operational losses across and within units of measure if the FDIC-supervised institution can demonstrate to the satisfaction of the FDIC that its process for estimating dependence is sound, robust to a variety of scenarios, and implemented with integrity, and allows for uncertainty surrounding the estimates. If the FDIC-supervised institution has not made such a demonstration, it must sum operational risk exposure estimates across units of measure to calculate its total operational risk exposure; and

(E) Must be reviewed and updated (as appropriate) whenever the FDIC-supervised institution becomes aware of information that may have a material effect on the FDIC-supervised institution's estimate of operational risk exposure, but the review and update must occur no less frequently than annually.

(ii) With the prior written approval of the FDIC, an FDIC-supervised institution may generate an estimate of its operational risk exposure using an alternative approach to that specified in paragraph (g)(3)(i) of this section. An FDIC-supervised institution proposing to use such an alternative operational risk quantification system must submit a proposal to the FDIC. In determining whether to approve an FDIC-supervised institution's proposal to use an alternative operational risk quantification system, the FDIC will consider the following principles:

(A) Use of the alternative operational risk quantification system will be allowed only on an exception basis, considering the size, complexity, and risk profile of the FDIC-supervised institution;

(B) The FDIC-supervised institution must demonstrate that its estimate of its operational risk exposure generated under the alternative operational risk quantification system is appropriate and can be supported empirically; and

(C) An FDIC-supervised institution must not use an allocation of operational risk capital requirements that includes entities other than depository

institutions or the benefits of diversification across entities.

(h) *Data management and maintenance.* (1) An FDIC-supervised institution must have data management and maintenance systems that adequately support all aspects of its advanced systems and the timely and accurate reporting of risk-based capital requirements.

(2) An FDIC-supervised institution must retain data using an electronic format that allows timely retrieval of data for analysis, validation, reporting, and disclosure purposes.

(3) An FDIC-supervised institution must retain sufficient data elements related to key risk drivers to permit adequate monitoring, validation, and refinement of its advanced systems.

(i) *Control, oversight, and validation mechanisms.* (1) The FDIC-supervised institution's senior management must ensure that all components of the FDIC-supervised institution's advanced systems function effectively and comply with the qualification requirements in this section.

(2) The FDIC-supervised institution's board of directors (or a designated committee of the board) must at least annually review the effectiveness of, and approve, the FDIC-supervised institution's advanced systems.

(3) An FDIC-supervised institution must have an effective system of controls and oversight that:

(i) Ensures ongoing compliance with the qualification requirements in this section;

(ii) Maintains the integrity, reliability, and accuracy of the FDIC-supervised institution's advanced systems; and

(iii) Includes adequate governance and project management processes.

(4) The FDIC-supervised institution must validate, on an ongoing basis, its advanced systems. The FDIC-supervised institution's validation process must be independent of the advanced systems' development, implementation, and operation, or the validation process must be subjected to an independent review of its adequacy and effectiveness. Validation must include:

(i) An evaluation of the conceptual soundness of (including developmental evidence supporting) the advanced systems;

(ii) An ongoing monitoring process that includes verification of processes and benchmarking; and

(iii) An outcomes analysis process that includes backtesting.

(5) The FDIC-supervised institution must have an internal audit function or equivalent function that is independent of business-line management that at least annually:

(i) Reviews the FDIC-supervised institution's advanced systems and associated operations, including the operations of its credit function and estimations of PD, LGD, and EAD;

(ii) Assesses the effectiveness of the controls supporting the FDIC-supervised institution's advanced systems; and

(iii) Documents and reports its findings to the FDIC-supervised institution's board of directors (or a committee thereof).

(6) The FDIC-supervised institution must periodically stress test its advanced systems. The stress testing must include a consideration of how economic cycles, especially downturns, affect risk-based capital requirements (including migration across rating grades and segments and the credit risk mitigation benefits of double default treatment).

(j) *Documentation.* The FDIC-supervised institution must adequately document all material aspects of its advanced systems.

[78 FR 55471, Sept. 10, 2013, as amended at 80 FR 41423, July 15, 2015]

§ 324.123 Ongoing qualification.

(a) *Changes to advanced systems.* An FDIC-supervised institution must meet all the qualification requirements in § 324.122 on an ongoing basis. An FDIC-supervised institution must notify the FDIC when the FDIC-supervised institution makes any change to an advanced system that would result in a material change in the FDIC-supervised institution's advanced approaches total risk-weighted asset amount for an exposure type or when the FDIC-supervised institution makes any significant change to its modeling assumptions.

(b) *Failure to comply with qualification requirements.* (1) If the FDIC determines that an FDIC-supervised institution

that uses this subpart and that has conducted a satisfactory parallel run fails to comply with the qualification requirements in § 324.122, the FDIC will notify the FDIC-supervised institution in writing of the FDIC-supervised institution's failure to comply.

(2) The FDIC-supervised institution must establish and submit a plan satisfactory to the FDIC to return to compliance with the qualification requirements.

(3) In addition, if the FDIC determines that the FDIC-supervised institution's advanced approaches total risk-weighted assets are not commensurate with the FDIC-supervised institution's credit, market, operational, or other risks, the FDIC may require such an FDIC-supervised institution to calculate its advanced approaches total risk-weighted assets with any modifications provided by the FDIC.

§ 324.124 Merger and acquisition transitional arrangements.

(a) *Mergers and acquisitions of companies without advanced systems.* If an FDIC-supervised institution merges with or acquires a company that does not calculate its risk-based capital requirements using advanced systems, the FDIC-supervised institution may use subpart D of this part to determine the risk-weighted asset amounts for the merged or acquired company's exposures for up to 24 months after the calendar quarter during which the merger or acquisition consummates. The FDIC may extend this transition period for up to an additional 12 months. Within 90 days of consummating the merger or acquisition, the FDIC-supervised institution must submit to the FDIC an implementation plan for using its advanced systems for the acquired company. During the period in which subpart D of this part applies to the merged or acquired company, any ALLL or AACL, as applicable, net of allocated transfer risk reserves established pursuant to 12 U.S.C. 3904, associated with the merged or acquired company's exposures may be included in the acquiring FDIC-supervised institution's tier 2 capital up to 1.25 percent of the acquired company's risk-weighted assets. All general allowances of the merged or acquired company must be excluded from the FDIC-supervised institution's eligible credit reserves. In addition, the risk-weighted assets of the merged or acquired company are not included in the FDIC-supervised institution's credit-risk-weighted assets but are included in total risk-weighted assets. If an FDIC-supervised institution relies on this paragraph (a), the FDIC-supervised institution must disclose publicly the amounts of risk-weighted assets and qualifying capital calculated under this subpart for the acquiring FDIC-supervised institution and under subpart D of this part for the acquired company.

(b) *Mergers and acquisitions of companies with advanced systems.* (1) If an FDIC-supervised institution merges with or acquires a company that calculates its risk-based capital requirements using advanced systems, the FDIC-supervised institution may use the acquired company's advanced systems to determine total risk-weighted assets for the merged or acquired company's exposures for up to 24 months after the calendar quarter during which the acquisition or merger consummates. The FDIC may extend this transition period for up to an additional 12 months. Within 90 days of consummating the merger or acquisition, the FDIC-supervised institution must submit to the FDIC an implementation plan for using its advanced systems for the merged or acquired company.

(2) If the acquiring FDIC-supervised institution is not subject to the advanced approaches in this subpart at the time of acquisition or merger, during the period when subpart D of this part applies to the acquiring FDIC-supervised institution, the ALLL or AACL, as applicable associated with the exposures of the merged or acquired company may not be directly included in tier 2 capital. Rather, any excess eligible credit reserves associated with the merged or acquired company's exposures may be included in the FDIC-supervised institution's tier 2 capital up to 0.6 percent of the credit-

risk-weighted assets associated with those exposures.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20760, Apr. 14, 2014; 84 FR 4247, Feb. 14, 2019]

§§ 324.125–324.130 [Reserved]

RISK-WEIGHTED ASSETS FOR GENERAL CREDIT RISK

§ 324.131 Mechanics for calculating total wholesale and retail risk-weighted assets.

(a) *Overview*. An FDIC-supervised institution must calculate its total wholesale and retail risk-weighted asset amount in four distinct phases:

(1) Phase 1—categorization of exposures;

(2) Phase 2—assignment of wholesale obligors and exposures to rating grades and segmentation of retail exposures;

(3) Phase 3—assignment of risk parameters to wholesale exposures and segments of retail exposures; and

(4) Phase 4—calculation of risk-weighted asset amounts.

(b) *Phase 1—Categorization*. The FDIC-supervised institution must determine which of its exposures are wholesale exposures, retail exposures, securitization exposures, or equity exposures. The FDIC-supervised institution must categorize each retail exposure as a residential mortgage exposure, a QRE, or an other retail exposure. The FDIC-supervised institution must identify which wholesale exposures are HVCRE exposures, sovereign exposures, OTC derivative contracts, repo-style transactions, eligible margin loans, eligible purchased wholesale exposures, cleared transactions, default fund contributions, unsettled transactions to which § 324.136 applies, and eligible guarantees or eligible credit derivatives that are used as credit risk mitigants. The FDIC-supervised institution must identify any on-balance sheet asset that does not meet the definition of a wholesale, retail, equity, or securitization exposure, as well as any non-material portfolio of exposures described in paragraph (e)(4) of this section.

(c) *Phase 2—Assignment of wholesale obligors and exposures to rating grades and retail exposures to segments*—(1) *Assignment of wholesale obligors and exposures to rating grades*. (i) The FDIC-supervised institution must assign each obligor of a wholesale exposure to a single obligor rating grade and must assign each wholesale exposure to which it does not directly assign an LGD estimate to a loss severity rating grade.

(ii) The FDIC-supervised institution must identify which of its wholesale obligors are in default.

(2) *Segmentation of retail exposures*. (i) The FDIC-supervised institution must group the retail exposures in each retail subcategory into segments that have homogeneous risk characteristics.

(ii) The FDIC-supervised institution must identify which of its retail exposures are in default. The FDIC-supervised institution must segment defaulted retail exposures separately from non-defaulted retail exposures.

(iii) If the FDIC-supervised institution determines the EAD for eligible margin loans using the approach in § 324.132(b), the FDIC-supervised institution must identify which of its retail exposures are eligible margin loans for which the FDIC-supervised institution uses this EAD approach and must segment such eligible margin loans separately from other retail exposures.

(3) *Eligible purchased wholesale exposures*. An FDIC-supervised institution may group its eligible purchased wholesale exposures into segments that have homogeneous risk characteristics. An FDIC-supervised institution must use the wholesale exposure formula in Table 1 of this section to determine the risk-based capital requirement for each segment of eligible purchased wholesale exposures.

(d) *Phase 3—Assignment of risk parameters to wholesale exposures and segments of retail exposures*—(1) *Quantification process*. Subject to the limitations in this paragraph (d), the FDIC-supervised institution must:

(i) Associate a PD with each wholesale obligor rating grade;

(ii) Associate an LGD with each wholesale loss severity rating grade or assign an LGD to each wholesale exposure;

(iii) Assign an EAD and M to each wholesale exposure; and

(iv) Assign a PD, LGD, and EAD to each segment of retail exposures.

(2) *Floor on PD assignment.* The PD for each wholesale obligor or retail segment may not be less than 0.03 percent, except for exposures to or directly and unconditionally guaranteed by a sovereign entity, the Bank for International Settlements, the International Monetary Fund, the European Commission, the European Central Bank, the European Stability Mechanism, the European Financial Stability Facility, or a multilateral development bank, to which the FDIC-supervised institution assigns a rating grade associated with a PD of less than 0.03 percent.

(3) *Floor on LGD estimation.* The LGD for each segment of residential mortgage exposures may not be less than 10 percent, except for segments of residential mortgage exposures for which all or substantially all of the principal of each exposure is either:

(i) Directly and unconditionally guaranteed by the full faith and credit of a sovereign entity; or

(ii) Guaranteed by a contingent obligation of the U.S. government or its agencies, the enforceability of which is dependent upon some affirmative action on the part of the beneficiary of the guarantee or a third party (for example, meeting servicing requirements).

(4) *Eligible purchased wholesale exposures.* An FDIC-supervised institution must assign a PD, LGD, EAD, and M to each segment of eligible purchased wholesale exposures. If the FDIC-supervised institution can estimate ECL (but not PD or LGD) for a segment of eligible purchased wholesale exposures, the FDIC-supervised institution must assume that the LGD of the segment equals 100 percent and that the PD of the segment equals ECL divided by EAD. The estimated ECL must be calculated for the exposures without regard to any assumption of recourse or guarantees from the seller or other parties.

(5) *Credit risk mitigation: credit derivatives, guarantees, and collateral.* (i) An FDIC-supervised institution may take into account the risk reducing effects of eligible guarantees and eligible credit derivatives in support of a wholesale exposure by applying the PD substitution or LGD adjustment treatment to the exposure as provided in § 324.134 or, if applicable, applying double default treatment to the exposure as provided in § 324.135. An FDIC-supervised institution may decide separately for each wholesale exposure that qualifies for the double default treatment under § 324.135 whether to apply the double default treatment or to use the PD substitution or LGD adjustment treatment without recognizing double default effects.

(ii) An FDIC-supervised institution may take into account the risk reducing effects of guarantees and credit derivatives in support of retail exposures in a segment when quantifying the PD and LGD of the segment. In doing so, an FDIC-supervised institution must consider all relevant available information.

(iii) Except as provided in paragraph (d)(6) of this section, an FDIC-supervised institution may take into account the risk reducing effects of collateral in support of a wholesale exposure when quantifying the LGD of the exposure, and may take into account the risk reducing effects of collateral in support of retail exposures when quantifying the PD and LGD of the segment. In order to do so, an FDIC-supervised institution must have established internal requirements for collateral management, legal certainty, and risk management processes.

(6) *EAD for OTC derivative contracts, repo-style transactions, and eligible margin loans.* An FDIC-supervised institution must calculate its EAD for an OTC derivative contract as provided in § 324.132 (c) and (d). An FDIC-supervised institution may take into account the risk-reducing effects of financial collateral in support of a repo-style transaction or eligible margin loan and of any collateral in support of a repo-style transaction that is included in the FDIC-supervised institution's VaR-based measure under subpart F of this part through an adjustment to EAD as provided in § 324.132(b) and (d). An FDIC-supervised institution that takes collateral into account through such an adjustment to EAD under § 324.132 may not reflect such collateral in LGD.

(7) *Effective maturity.* An exposure's M must be no greater than five years and no less than one year, except that an

exposure's M must be no less than one day if the exposure is a trade related letter of credit, or if the exposure has an original maturity of less than one year and is not part of an FDIC-supervised institution's ongoing financing of the obligor. An exposure is not part of an FDIC-supervised institution's ongoing financing of the obligor if the FDIC-supervised institution:

(i) Has a legal and practical ability not to renew or roll over the exposure in the event of credit deterioration of the obligor;

(ii) Makes an independent credit decision at the inception of the exposure and at every renewal or roll over; and

(iii) Has no substantial commercial incentive to continue its credit relationship with the obligor in the event of credit deterioration of the obligor.

(8) *EAD for exposures to certain central counterparties.* An FDIC-supervised institution may attribute an EAD of zero to exposures that arise from the settlement of cash transactions (such as equities, fixed income, spot foreign exchange, and spot commodities) with a central counterparty where there is no assumption of ongoing counterparty credit risk by the central counterparty after settlement of the trade and associated default fund contributions.

(e) *Phase 4—Calculation of risk-weighted assets*—(1) *Non-defaulted exposures.* (i) An FDIC-supervised institution must calculate the dollar risk-based capital requirement for each of its wholesale exposures to a non-defaulted obligor (except for eligible guarantees and eligible credit derivatives that hedge another wholesale exposure, IMM exposures, cleared transactions, default fund contributions, unsettled transactions, and exposures to which the FDIC-supervised institution applies the double default treatment in § 324.135) and segments of non-defaulted retail exposures by inserting the assigned risk parameters for the wholesale obligor and exposure or retail segment into the appropriate risk-based capital formula specified in Table 1 to § 324.131 and multiplying the output of the formula (K) by the EAD of the exposure or segment. Alternatively, an FDIC-supervised institution may apply a 300 percent risk weight to the EAD of an eligible margin loan if the FDIC-supervised institution is not able to meet the FDIC's requirements for estimation of PD and LGD for the margin loan.

TABLE 1 TO § 324.131 – IRB RISK-BASED CAPITAL FORMULAS FOR WHOLESALE EXPOSURES TO NON-DEFAULTED OBLIGORS AND SEGMENTS OF NON-DEFAULTED RETAIL EXPOSURES[1]

Retail	**Capital Requirement (K) Non-Defaulted Exposures**	$K = \left[LGD \times N\left(\frac{N^{-1}(PD) + \sqrt{R} \times N^{-1}(0.999)}{\sqrt{1-R}} \right) - (LGD \times PD) \right]$
	Correlation Factor (R)	For residential mortgage exposures: $R = 0.15$ For qualifying revolving exposures: $R = 0.04$ For other retail exposures: $R = 0.03 + 0.13 \times e^{-35 \times PD}$
Wholesale	**Capital Requirement (K) Non-Defaulted Exposures**	$K = \left[LGD \times N\left(\frac{N^{-1}(PD) + \sqrt{R} \times N^{-1}(0.999)}{\sqrt{1-R}} \right) - (LGD \times PD) \right] \times \left(\frac{1 + (M - 2.5) \times b}{1 - 1.5 \times b} \right)$
	Correlation Factor (R)	For HVCRE exposures: $R = 0.12 + 0.18 \times e^{-50 \times PD}$ For wholesale exposures to unregulated financial institutions:

$$R = 1.25 \times \left(0.12 + 0.12 \times e^{-50 \times PD}\right)$$

For wholesale exposures to regulated financial institutions with total assets greater than or equal to $100 billion:

$$R = 1.25 \times \left(0.12 + 0.12 \times e^{-50 \times PD}\right)$$

For wholesale exposures other than HVCRE exposures, unregulated financial institutions, and regulated financial institutions with total assets greater than or equal to $100 billion:

$$R = 0.12 + 0.12 \times e^{-50 \times PD}$$

Maturity Adjustment (b)

$$b = \left(0.11852 - 0.05478 \times \ln(PD)\right)^2$$

[1]N(.) means the cumulative distribution function for a standard normal random variable. N^{-1}(.) means the inverse cumulative distribution function for a standard normal random variable. The symbol e refers to the base of the natural logarithms, and the function ln(.) refers to the natural logarithm of the expression within parentheses. The formulas apply when PD is greater than zero. If PD equals zero, the capital requirement K is set equal to zero.

(ii) The sum of all the dollar risk-based capital requirements for each wholesale exposure to a non-defaulted obligor and segment of non-defaulted retail exposures calculated in paragraph (e)(1)(i) of this section and in § 324.135(e) equals the total dollar risk-based capital requirement for those exposures and segments.

(iii) The aggregate risk-weighted asset amount for wholesale exposures to non-defaulted obligors and segments of non-defaulted retail exposures equals the total dollar risk-based capital requirement in paragraph (e)(1)(ii) of this section multiplied by 12.5.

(2) *Wholesale exposures to defaulted obligors and segments of defaulted retail exposures*—(i) *Not covered by an eligible U.S. government guarantee:* The dollar risk-based capital requirement for each wholesale exposure not covered by an eligible guarantee from the U.S. government to a defaulted obligor and each segment of defaulted retail exposures not covered by an eligible guarantee from the U.S. government equals 0.08 multiplied by the EAD of the exposure or segment.

(ii) *Covered by an eligible U.S. government guarantee:* The dollar risk-based capital requirement for each wholesale exposure to a defaulted obligor covered by an eligible guarantee from the U.S. government and each segment of defaulted retail exposures covered by an

eligible guarantee from the U.S. government equals the sum of:

(A) The sum of the EAD of the portion of each wholesale exposure to a defaulted obligor covered by an eligible guarantee from the U.S. government plus the EAD of the portion of each segment of defaulted retail exposures that is covered by an eligible guarantee from the U.S. government and the resulting sum is multiplied by 0.016, and

(B) The sum of the EAD of the portion of each wholesale exposure to a defaulted obligor not covered by an eligible guarantee from the U.S. government plus the EAD of the portion of each segment of defaulted retail exposures that is not covered by an eligible guarantee from the U.S. government and the resulting sum is multiplied by 0.08.

(iii) The sum of all the dollar risk-based capital requirements for each wholesale exposure to a defaulted obligor and each segment of defaulted retail exposures calculated in paragraph (e)(2)(i) of this section plus the dollar risk-based capital requirements each wholesale exposure to a defaulted obligor and for each segment of defaulted retail exposures calculated in paragraph (e)(2)(ii) of this section equals the total dollar risk-based capital requirement for those exposures and segments.

(iv) The aggregate risk-weighted asset amount for wholesale exposures to defaulted obligors and segments of defaulted retail exposures equals the total dollar risk-based capital requirement calculated in paragraph (e)(2)(iii) of this section multiplied by 12.5.

(3) *Assets not included in a defined exposure category.* (i) An FDIC-supervised institution may assign a risk-weighted asset amount of zero to cash owned and held in all offices of the FDIC-supervised institution or in transit and for gold bullion held in the FDIC-supervised institution's own vaults, or held in another depository institution's vaults on an allocated basis, to the extent the gold bullion assets are offset by gold bullion liabilities.

(ii) An FDIC-supervised institution must assign a risk-weighted asset amount equal to 20 percent of the carrying value of cash items in the process of collection.

(iii) An FDIC-supervised institution must assign a risk-weighted asset amount equal to 50 percent of the carrying value to a pre-sold construction loan unless the purchase contract is cancelled, in which case an FDIC-supervised institution must assign a risk-weighted asset amount equal to a 100 percent of the carrying value of the pre-sold construction loan.

(iv) The risk-weighted asset amount for the residual value of a retail lease exposure equals such residual value.

(v) The risk-weighted asset amount for DTAs arising from temporary differences that the FDIC-supervised institution could realize through net operating loss carrybacks equals the carrying value, netted in accordance with § 324.22.

(vi) The risk-weighted asset amount for MSAs, DTAs arising from temporary timing differences that the FDIC-supervised institution could not realize through net operating loss carrybacks, and significant investments in the capital of unconsolidated financial institutions in the form of common stock that are not deducted pursuant to § 324.22(d) equals the amount not subject to deduction multiplied by 250 percent.

(vii) The risk-weighted asset amount for any other on-balance-sheet asset that does not meet the definition of a wholesale, retail, securitization, IMM, or equity exposure, cleared transaction, or default fund contribution and is not subject to deduction under § 324.22(a), (c), or (d) equals the carrying value of the asset.

(viii) The risk-weighted asset amount for a Paycheck Protection Program covered loan as defined in section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) equals zero.

(4) *Non-material portfolios of exposures.* The risk-weighted asset amount of a portfolio of exposures for which the FDIC-supervised institution has demonstrated to the FDIC's satisfaction that the portfolio (when combined with all other portfolios of exposures that the FDIC-supervised institution seeks to treat under this paragraph (e)) is not material to the FDIC-supervised institution is the sum of the carrying values of on-balance sheet exposures plus the notional amounts of off-balance

sheet exposures in the portfolio. For purposes of this paragraph (e)(4), the notional amount of an OTC derivative contract that is not a credit derivative is the EAD of the derivative as calculated in § 324.132.

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§ 324.132 Counterparty credit risk of repo-style transactions, eligible margin loans, and OTC derivative contracts.

(a) *Methodologies for collateral recognition.* (1) Instead of an LGD estimation methodology, an FDIC-supervised institution may use the following methodologies to recognize the benefits of financial collateral in mitigating the counterparty credit risk of repo-style transactions, eligible margin loans, collateralized OTC derivative contracts and single product netting sets of such transactions, and to recognize the benefits of any collateral in mitigating the counterparty credit risk of repo-style transactions that are included in an FDIC-supervised institution's VaR-based measure under subpart F of this part:

(i) The collateral haircut approach set forth in paragraph (b)(2) of this section;

(ii) The internal models methodology set forth in paragraph (d) of this section; and

(iii) For single product netting sets of repo-style transactions and eligible margin loans, the simple VaR methodology set forth in paragraph (b)(3) of this section.

(2) An FDIC-supervised institution may use any combination of the three methodologies for collateral recognition; however, it must use the same methodology for transactions in the same category.

(3) An FDIC-supervised institution must use the methodology in paragraph (c) of this section, or with prior written approval of the FDIC, the internal model methodology in paragraph (d) of this section, to calculate EAD for an OTC derivative contract or a set of OTC derivative contracts subject to a qualifying master netting agreement. To estimate EAD for qualifying cross-product master netting agreements, an FDIC-supervised institution may only use the internal models methodology in paragraph (d) of this section.

(4) An FDIC-supervised institution must also use the methodology in paragraph (e) of this section to calculate the risk-weighted asset amounts for CVA for OTC derivatives.

(b) *EAD for eligible margin loans and repo-style transactions*—(1) *General.* An FDIC-supervised institution may recognize the credit risk mitigation benefits of financial collateral that secures an eligible margin loan, repo-style transaction, or single-product netting set of such transactions by factoring the collateral into its LGD estimates for the exposure. Alternatively, an FDIC-supervised institution may estimate an unsecured LGD for the exposure, as well as for any repo-style transaction that is included in the FDIC-supervised institution's VaR-based measure under subpart F of this part, and determine the EAD of the exposure using:

(i) The collateral haircut approach described in paragraph (b)(2) of this section;

(ii) For netting sets only, the simple VaR methodology described in paragraph (b)(3) of this section; or

(iii) The internal models methodology described in paragraph (d) of this section.

(2) *Collateral haircut approach*—(i) *EAD equation.* An FDIC-supervised institution may determine EAD for an eligible margin loan, repo-style transaction, or netting set by setting EAD equal to max $\{0, [(\Sigma E - \Sigma C) + \Sigma(E_s \times H_s) + \Sigma(E_{fx} \times H_{fx})]\}$, where:

(A) ΣE equals the value of the exposure (the sum of the current fair values of all instruments, gold, and cash the FDIC-supervised institution has lent, sold subject to repurchase, or posted as collateral to the counterparty under the transaction (or netting set));

(B) ΣC equals the value of the collateral (the sum of the current fair values of all instruments, gold, and cash the FDIC-supervised institution has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction (or netting set));

(C) E_s equals the absolute value of the net position in a given instrument or in gold (where the net position in a given instrument or in gold equals the sum of the current fair values of the instrument or gold the FDIC-supervised institution has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current fair values of that same instrument or gold the FDIC-supervised institution has borrowed, purchased subject to resale, or taken as collateral from the counterparty);

(D) H_s equals the market price volatility haircut appropriate to the instrument or gold referenced in E_s;

(E) E_{fx} equals the absolute value of the net position of instruments and cash in a currency that is different from the settlement currency (where the net position in a given currency equals the sum of the current fair values of any instruments or cash in the currency the FDIC-supervised institution has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current fair values of any instruments or cash in the currency the FDIC-supervised institution has borrowed, purchased subject to resale, or taken as collateral from the counterparty); and

(F) H_{fx} equals the haircut appropriate to the mismatch between the currency referenced in E_{fx} and the settlement currency.

(ii) *Standard supervisory haircuts.* (A) Under the standard supervisory haircuts approach:

(*1*) An FDIC-supervised institution must use the haircuts for market price volatility (H_s) in Table 1 to § 324.132, as adjusted in certain circumstances as provided in paragraphs (b)(2)(ii)(A)(*3*) and (*4*) of this section;

TABLE 1 TO § 324.132—STANDARD SUPERVISORY MARKET PRICE VOLATILITY HAIRCUTS [1]

Residual maturity	Haircut (in percent) assigned based on:						Investment grade securitization exposures (in percent)
	Sovereign issuers risk weight under § 324.32 [2] (in percent)			Non-sovereign issuers risk weight under § 324.32 (in percent)			
	Zero	20 or 50	100	20	50	100	
Less than or equal to 1 year	0.5	1.0	15.0	1.0	2.0	4.0	4.0
Greater than 1 year and less than or equal to 5 years	2.0	3.0	15.0	4.0	6.0	8.0	12.0
Greater than 5 years	4.0	6.0	15.0	8.0	12.0	16.0	24.0
Main index equities (including convertible bonds) and gold	15.0						
Other publicly traded equities (including convertible bonds)	25.0						
Mutual funds	Highest haircut applicable to any security in which the fund can invest.						
Cash collateral held	Zero						
Other exposure types	25.0						

[1] The market price volatility haircuts in Table 1 to § 324.132 are based on a 10 business-day holding period.
[2] Includes a foreign PSE that receives a zero percent risk weight.

(*2*) For currency mismatches, an FDIC-supervised institution must use a haircut for foreign exchange rate volatility (H_{fx}) of 8 percent, as adjusted in certain circumstances as provided in paragraphs (b)(2)(ii)(A)(*3*) and (*4*) of this section.

(*3*) For repo-style transactions and client-facing derivative transactions, a FDIC-supervised institution may multiply the supervisory haircuts provided in paragraphs (b)(2)(ii)(A)(*1*) and (*2*) of this section by the square root of ½ (which equals 0.707107). If the FDIC-supervised institution determines that a longer holding period is appropriate for client-facing derivative transactions, then it must use a larger scaling factor to adjust for the longer holding period pursuant to paragraph (b)(2)(ii)(A)(*6*) of this section.

(*4*) A FDIC-supervised institution must adjust the supervisory haircuts upward on the basis of a holding period longer than ten business days (for eligible margin loans) or five business days

(for repo-style transactions), using the formula provided in paragraph (b)(2)(ii)(A)(*6*) of this section where the conditions in this paragraph (b)(2)(ii)(A)(*4*) apply. If the number of trades in a netting set exceeds 5,000 at any time during a quarter, a FDIC-supervised institution must adjust the supervisory haircuts upward on the basis of a minimum holding period of twenty business days for the following quarter (except when a FDIC-supervised institution is calculating EAD for a cleared transaction under § 324.133). If a netting set contains one or more trades involving illiquid collateral, a FDIC-supervised institution must adjust the supervisory haircuts upward on the basis of a minimum holding period of twenty business days. If over the two previous quarters more than two margin disputes on a netting set have occurred that lasted longer than the holding period, then the FDIC-supervised institution must adjust the supervisory haircuts upward for that netting set on the basis of a minimum holding period that is at least two times the minimum holding period for that netting set.

(*5*)(*i*) A FDIC-supervised institution must adjust the supervisory haircuts upward on the basis of a holding period longer than ten business days for collateral associated with derivative contracts (five business days for client-facing derivative contracts) using the formula provided in paragraph (b)(2)(ii)(A)(*6*) of this section where the conditions in this paragraph (b)(2)(ii)(A)(*5*)(*i*) apply. For collateral associated with a derivative contract that is within a netting set that is composed of more than 5,000 derivative contracts that are not cleared transactions, a FDIC-supervised institution must use a minimum holding period of twenty business days. If a netting set contains one or more trades involving illiquid collateral or a derivative contract that cannot be easily replaced, a FDIC-supervised institution must use a minimum holding period of twenty business days.

(*ii*) Notwithstanding paragraph (b)(2)(ii)(A)(*1*) or (*3*) or (b)(2)(ii)(A)(*5*)(*i*) of this section, for collateral associated with a derivative contract in a netting set under which more than two margin disputes that lasted longer than the holding period occurred during the two previous quarters, the minimum holding period is twice the amount provided under paragraph (b)(2)(ii)(A)(*1*) or (*3*) or (b)(2)(ii)(A)(*5*)(*i*) of this section.

(*6*) A FDIC-supervised institution must adjust the standard supervisory haircuts upward, pursuant to the adjustments provided in paragraphs (b)(2)(ii)(A)(*3*) through (*5*) of this section, using the following formula:

$$H_A = H_S \sqrt{\frac{T_M}{T_S}}$$

Where:

T_M equals a holding period of longer than 10 business days for eligible margin loans and derivative contracts other than client-facing derivative transactions or longer than 5 business days for repo-style transactions and client-facing derivative transactions;

Hs equals the standard supervisory haircut; and

Ts equals 10 business days for eligible margin loans and derivative contracts other than client-facing derivative transactions or 5 business days for repo-style transactions and client-facing derivative transactions.

(*7*) If the instrument a FDIC-supervised institution has lent, sold subject to repurchase, or posted as collateral does not meet the definition of financial collateral, the FDIC-supervised institution must use a 25.0 percent haircut for market price volatility (Hs).

(iii) *Own internal estimates for haircuts.* With the prior written approval of the FDIC, an FDIC-supervised institution may calculate haircuts (H_s and H_{fx}) using its own internal estimates of the volatilities of market prices and foreign exchange rates.

(A) To receive FDIC approval to use its own internal estimates, an FDIC-supervised institution must satisfy the following minimum quantitative standards:

(*1*) An FDIC-supervised institution must use a 99th percentile one-tailed confidence interval.

(*2*) The minimum holding period for a repo-style transaction is five business days and for an eligible margin loan is ten business days except for transactions or netting sets for which paragraph (b)(2)(iii)(A)(*3*) of this section applies. When an FDIC-supervised institution calculates an own-estimates haircut on a T_N-day holding period, which is different from the minimum holding period for the transaction type, the applicable haircut (H_M) is calculated using the following square root of time formula:

$$H_M = H_N \sqrt{\frac{T_M}{T_N}}, \text{ where}$$

(*i*) T_M equals 5 for repo-style transactions and 10 for eligible margin loans;

(*ii*) T_N equals the holding period used by the FDIC-supervised institution to derive H_N; and

(*iii*) H_N equals the haircut based on the holding period T_N.

(*3*) If the number of trades in a netting set exceeds 5,000 at any time during a quarter, an FDIC-supervised institution must calculate the haircut using a minimum holding period of twenty business days for the following quarter (except when an FDIC-supervised institution is calculating EAD for a cleared transaction under § 324.133). If a netting set contains one or more trades involving illiquid collateral or an OTC derivative that cannot be easily replaced, an FDIC-supervised institution must calculate the haircut using a minimum holding period of twenty business days. If over the two previous quarters more than two margin disputes on a netting set have occurred that lasted more than the holding period, then the FDIC-supervised institution must calculate the haircut for transactions in that netting set on the basis of a holding period that is at least two times the minimum holding period for that netting set.

(*4*) An FDIC-supervised institution is required to calculate its own internal estimates with inputs calibrated to historical data from a continuous 12-month period that reflects a period of significant financial stress appropriate to the security or category of securities.

(*5*) An FDIC-supervised institution must have policies and procedures that describe how it determines the period of significant financial stress used to calculate the FDIC-supervised institution's own internal estimates for haircuts under this section and must be able to provide empirical support for the period used. The FDIC-supervised institution must obtain the prior approval of the FDIC for, and notify the FDIC if the FDIC-supervised institution makes any material changes to, these policies and procedures.

(*6*) Nothing in this section prevents the FDIC from requiring an FDIC-supervised institution to use a different period of significant financial stress in the calculation of own internal estimates for haircuts.

(*7*) An FDIC-supervised institution must update its data sets and calculate haircuts no less frequently than quarterly and must also reassess data sets and haircuts whenever market prices change materially.

(B) With respect to debt securities that are investment grade, an FDIC-supervised institution may calculate haircuts for categories of securities. For a category of securities, the FDIC-supervised institution must calculate

the haircut on the basis of internal volatility estimates for securities in that category that are representative of the securities in that category that the FDIC-supervised institution has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. In determining relevant categories, the FDIC-supervised institution must at a minimum take into account:

(*1*) The type of issuer of the security;

(*2*) The credit quality of the security;

(*3*) The maturity of the security; and

(*4*) The interest rate sensitivity of the security.

(C) With respect to debt securities that are not investment grade and equity securities, an FDIC-supervised institution must calculate a separate haircut for each individual security.

(D) Where an exposure or collateral (whether in the form of cash or securities) is denominated in a currency that differs from the settlement currency, the FDIC-supervised institution must calculate a separate currency mismatch haircut for its net position in each mismatched currency based on estimated volatilities of foreign exchange rates between the mismatched currency and the settlement currency.

(E) An FDIC-supervised institution's own estimates of market price and foreign exchange rate volatilities may not take into account the correlations among securities and foreign exchange rates on either the exposure or collateral side of a transaction (or netting set) or the correlations among securities and foreign exchange rates between the exposure and collateral sides of the transaction (or netting set).

(3) *Simple VaR methodology*. With the prior written approval of the FDIC, an FDIC-supervised institution may estimate EAD for a netting set using a VaR model that meets the requirements in paragraph (b)(3)(iii) of this section. In such event, the FDIC-supervised institution must set EAD equal to max {0, [(ΣE − ΣC) + PFE]}, where:

(i) ΣE equals the value of the exposure (the sum of the current fair values of all instruments, gold, and cash the FDIC-supervised institution has lent, sold subject to repurchase, or posted as collateral to the counterparty under the netting set);

(ii) ΣC equals the value of the collateral (the sum of the current fair values of all instruments, gold, and cash the FDIC-supervised institution has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the netting set); and

(iii) PFE (potential future exposure) equals the FDIC-supervised institution's empirically based best estimate of the 99th percentile, one-tailed confidence interval for an increase in the value of (ΣE − ΣC) over a five-business-day holding period for repo-style transactions, or over a ten-business-day holding period for eligible margin loans except for netting sets for which paragraph (b)(3)(iv) of this section applies using a minimum one-year historical observation period of price data representing the instruments that the FDIC-supervised institution has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. The FDIC-supervised institution must validate its VaR model by establishing and maintaining a rigorous and regular backtesting regime.

(iv) If the number of trades in a netting set exceeds 5,000 at any time during a quarter, an FDIC-supervised institution must use a twenty-business-day holding period for the following quarter (except when an FDIC-supervised institution is calculating EAD for a cleared transaction under § 324.133). If a netting set contains one or more trades involving illiquid collateral, an FDIC-supervised institution must use a twenty-business-day holding period. If over the two previous quarters more than two margin disputes on a netting set have occurred that lasted more than the holding period, then the FDIC-supervised institution must set its PFE for that netting set equal to an estimate over a holding period that is at least two times the minimum holding period for that netting set.

(c) *EAD for derivative contracts*—(1) *Options for determining EAD*. A FDIC-supervised institution must determine the EAD for a derivative contract using the standardized approach for counterparty credit risk (SA–CCR) under paragraph (c)(5) of this section or using the internal models methodology

described in paragraph (d) of this section. If a FDIC-supervised institution elects to use SA–CCR for one or more derivative contracts, the exposure amount determined under SA–CCR is the EAD for the derivative contract or derivatives contracts. A FDIC-supervised institution must use the same methodology to calculate the exposure amount for all its derivative contracts and may change its election only with prior approval of the FDIC. A FDIC-supervised institution may reduce the EAD calculated according to paragraph (c)(5) of this section by the credit valuation adjustment that the FDIC-supervised institution has recognized in its balance sheet valuation of any derivative contracts in the netting set. For purposes of this paragraph (c)(1), the credit valuation adjustment does not include any adjustments to common equity tier 1 capital attributable to changes in the fair value of the FDIC-supervised institution's liabilities that are due to changes in its own credit risk since the inception of the transaction with the counterparty.

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

(i) *End date* means the last date of the period referenced by an interest rate or credit derivative contract or, if the derivative contract references another instrument, by the underlying instrument, except as otherwise provided in paragraph (c) of this section.

(ii) S*tart date* means the first date of the period referenced by an interest rate or credit derivative contract or, if the derivative contract references the value of another instrument, by underlying instrument, except as otherwise provided in paragraph (c) of this section.

(iii) *Hedging set* means:

(A) With respect to interest rate derivative contracts, all such contracts within a netting set that reference the same reference currency;

(B) With respect to exchange rate derivative contracts, all such contracts within a netting set that reference the same currency pair;

(C) With respect to credit derivative contract, all such contracts within a netting set;

(D) With respect to equity derivative contracts, all such contracts within a netting set;

(E) With respect to a commodity derivative contract, all such contracts within a netting set that reference one of the following commodity categories: Energy, metal, agricultural, or other commodities;

(F) With respect to basis derivative contracts, all such contracts within a netting set that reference the same pair of risk factors and are denominated in the same currency; or

(G) With respect to volatility derivative contracts, all such contracts within a netting set that reference one of interest rate, exchange rate, credit, equity, or commodity risk factors, separated according to the requirements under paragraphs (c)(2)(iii)(A) through (E) of this section.

(H) If the risk of a derivative contract materially depends on more than one of interest rate, exchange rate, credit, equity, or commodity risk factors, the FDIC may require a FDIC-supervised institution to include the derivative contract in each appropriate hedging set under paragraphs (c)(2)(iii)(A) through (E) of this section.

(3) *Credit derivatives.* Notwithstanding paragraphs (c)(1) and (c)(2) of this section:

(i) An FDIC-supervised institution that purchases a credit derivative that is recognized under § 324.134 or § 324.135 as a credit risk mitigant for an exposure that is not a covered position under subpart F of this part is not required to calculate a separate counterparty credit risk capital requirement under this section so long as the FDIC-supervised institution does so consistently for all such credit derivatives and either includes or excludes all such credit derivatives that are subject to a master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes.

(ii) An FDIC-supervised institution that is the protection provider in a credit derivative must treat the credit derivative as a wholesale exposure to the reference obligor and is not required to calculate a counterparty credit risk capital requirement for the

credit derivative under this section, so long as it does so consistently for all such credit derivatives and either includes all or excludes all such credit derivatives that are subject to a master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes (unless the FDIC-supervised institution is treating the credit derivative as a covered position under subpart F of this part, in which case the FDIC-supervised institution must calculate a supplemental counterparty credit risk capital requirement under this section).

(4) *Equity derivatives.* An FDIC-supervised institution must treat an equity derivative contract as an equity exposure and compute a risk-weighted asset amount for the equity derivative contract under §§ 324.151–324.155 (unless the FDIC-supervised institution is treating the contract as a covered position under subpart F of this part). In addition, if the FDIC-supervised institution is treating the contract as a covered position under subpart F of this part, and under certain other circumstances described in § 324.155, the FDIC-supervised institution must also calculate a risk-based capital requirement for the counterparty credit risk of an equity derivative contract under this section.

(5) *Exposure amount.* (i) The exposure amount of a netting set, as calculated under paragraph (c) of this section, is equal to 1.4 multiplied by the sum of the replacement cost of the netting set, as calculated under paragraph (c)(6) of this section, and the potential future exposure of the netting set, as calculated under paragraph (c)(7) of this section.

(ii) Notwithstanding the requirements of paragraph (c)(5)(i) of this section, the exposure amount of a netting set subject to a variation margin agreement, excluding a netting set that is subject to a variation margin agreement under which the counterparty to the variation margin agreement is not required to post variation margin, is equal to the lesser of the exposure amount of the netting set calculated under paragraph (c)(5)(i) of this section and the exposure amount of the netting set calculated as if the netting set were not subject to a variation margin agreement.

(iii) Notwithstanding the requirements of paragraph (c)(5)(i) of this section, the exposure amount of a netting set that consists of only sold options in which the premiums have been fully paid by the counterparty to the options and where the options are not subject to a variation margin agreement is zero.

(iv) Notwithstanding the requirements of paragraph (c)(5)(i) of this section, the exposure amount of a netting set in which the counterparty is a commercial end-user is equal to the sum of replacement cost, as calculated under paragraph (c)(6) of this section, and the potential future exposure of the netting set, as calculated under paragraph (c)(7) of this section.

(v) For purposes of the exposure amount calculated under paragraph (c)(5)(i) of this section and all calculations that are part of that exposure amount, a FDIC-supervised institution may elect, at the netting set level, to treat a derivative contract that is a cleared transaction that is not subject to a variation margin agreement as one that is subject to a variation margin agreement, if the derivative contract is subject to a requirement that the counterparties make daily cash payments to each other to account for changes in the fair value of the derivative contract and to reduce the net position of the contract to zero. If a FDIC-supervised institution makes an election under this paragraph (c)(5)(v) for one derivative contract, it must treat all other derivative contracts within the same netting set that are eligible for an election under this paragraph (c)(5)(v) as derivative contracts that are subject to a variation margin agreement.

(vi) For purposes of the exposure amount calculated under paragraph (c)(5)(i) of this section and all calculations that are part of that exposure amount, a FDIC-supervised institution may elect to treat a credit derivative contract, equity derivative contract, or commodity derivative contract that references an index as if it were multiple derivative contracts each referencing one component of the index.

(6) *Replacement cost of a netting set*—(i) *Netting set subject to a variation margin agreement under which the counterparty must post variation margin.* The replacement cost of a netting set subject to a variation margin agreement, excluding a netting set that is subject to a variation margin agreement under which the counterparty is not required to post variation margin, is the greater of:

(A) The sum of the fair values (after excluding any valuation adjustments) of the derivative contracts within the netting set less the sum of the net independent collateral amount and the variation margin amount applicable to such derivative contracts;

(B) The sum of the variation margin threshold and the minimum transfer amount applicable to the derivative contracts within the netting set less the net independent collateral amount applicable to such derivative contracts; or

(C) Zero.

(ii) *Netting sets not subject to a variation margin agreement under which the counterparty must post variation margin.* The replacement cost of a netting set that is not subject to a variation margin agreement under which the counterparty must post variation margin to the FDIC-supervised institution is the greater of:

(A) The sum of the fair values (after excluding any valuation adjustments) of the derivative contracts within the netting set less the sum of the net independent collateral amount and variation margin amount applicable to such derivative contracts; or

(B) Zero.

(iii) *Multiple netting sets subject to a single variation margin agreement.* Notwithstanding paragraphs (c)(6)(i) and (ii) of this section, the replacement cost for multiple netting sets subject to a single variation margin agreement must be calculated according to paragraph (c)(10)(i) of this section.

(iv) *Netting set subject to multiple variation margin agreements or a hybrid netting set.* Notwithstanding paragraphs (c)(6)(i) and (ii) of this section, the replacement cost for a netting set subject to multiple variation margin agreements or a hybrid netting set must be calculated according to paragraph (c)(11)(i) of this section.

(7) *Potential future exposure of a netting set.* The potential future exposure of a netting set is the product of the PFE multiplier and the aggregated amount.

(i) *PFE multiplier.* The PFE multiplier is calculated according to the following formula:

$$PFE\ multiplier = min\left\{1; 0.05 + 0.95 * e^{\left(\frac{V-C}{1.9*A}\right)}\right\}$$

Where:

V is the sum of the fair values (after excluding any valuation adjustments) of the derivative contracts within the netting set;

C is the sum of the net independent collateral amount and the variation margin amount applicable to the derivative contracts within the netting set; and

A is the aggregated amount of the netting set.

(ii) *Aggregated amount.* The aggregated amount is the sum of all hedging set amounts, as calculated under paragraph (c)(8) of this section, within a netting set.

(iii) *Multiple netting sets subject to a single variation margin agreement.* Notwithstanding paragraphs (c)(7)(i) and (ii) of this section and when calculating the potential future exposure for purposes of total leverage exposure under §324.10(c)(2)(ii)(B), the potential future exposure for multiple netting sets subject to a single variation margin agreement must be calculated according to paragraph (c)(10)(ii) of this section.

(iv) *Netting set subject to multiple variation margin agreements or a hybrid netting set.* Notwithstanding paragraphs (c)(7)(i) and (ii) of this section and when calculating the potential future exposure for purposes of total leverage exposure under §324.10(c)(2)(ii)(B), the

potential future exposure for a netting set subject to multiple variation margin agreements or a hybrid netting set must be calculated according to paragraph (c)(11)(ii) of this section.

(8) *Hedging set amount*—(i) *Interest rate derivative contracts.* To calculate the hedging set amount of an interest rate derivative contract hedging set, a FDIC-supervised institution may use either of the formulas provided in paragraphs (c)(8)(i)(A) and (B) of this section:

(A) Formula 1 is as follows:

$$Hedging\ set\ amount = [(AddOn_{TB1}^{IR})^2 + (AddOn_{TB2}^{IR})^2 + (AddOn_{TB3}^{IR})^2 + 1.4 * AddOn_{TB1}^{IR} * AddOn_{TB2}^{IR} + 1.4 * AddOn_{TB2}^{IR} * AddOn_{TB3}^{IR} + 0.6 * AddOn_{TB1}^{IR} * AddOn_{TB3}^{IR})]^{\frac{1}{2}};\ \text{or}$$

(B) Formula 2 is as follows:

$$Hedging\ set\ amount = |AddOn_{TB1}{}^{IR}| + |AddOn_{TB2}{}^{IR} + |AddOn_{TB3}{}^{IR}|.$$

Where in paragraphs (c)(8)(i)(A) and (B) of this section:

$AddOn_{TB1}{}^{IR}$ is the sum of the adjusted derivative contract amounts, as calculated under paragraph (c)(9) of this section, within the hedging set with an end date of less than one year from the present date;

$AddOn_{TB2}{}^{IR}$ is the sum of the adjusted derivative contract amounts, as calculated under paragraph (c)(9) of this section, within the hedging set with an end date of one to five years from the present date; and

$AddOn_{TB3}{}^{IR}$ is the sum of the adjusted derivative contract amounts, as calculated under paragraph (c)(9) of this section, within the hedging set with an end date of more than five years from the present date.

(ii) *Exchange rate derivative contracts.* For an exchange rate derivative contract hedging set, the hedging set amount equals the absolute value of the sum of the adjusted derivative contract amounts, as calculated under paragraph (c)(9) of this section, within the hedging set.

(iii) *Credit derivative contracts and equity derivative contracts.* The hedging set amount of a credit derivative contract hedging set or equity derivative contract hedging set within a netting set is calculated according to the following formula:

$$Hedging\ set\ amount = [(\sum_{k=1}^{K} \rho_k * AddOn(Ref_k))^2 + \sum_{k=1}^{K}(1 - (\rho_k)^2) * (AddOn(Ref_k))^2\ ]^{\frac{1}{2}}$$

Where:

k is each reference entity within the hedging set.

K is the number of reference entities within the hedging set.

$AddOn(Ref_k)$ equals the sum of the adjusted derivative contract amounts, as determined under paragraph (c)(9) of this section, for all derivative contracts within the hedging set that reference reference entity k.

ρ_k equals the applicable supervisory correlation factor, as provided in Table 3 to this section.

(iv) *Commodity derivative contracts.* The hedging set amount of a commodity derivative contract hedging set within a netting set is calculated according to the following formula:

$$Hedging\ set\ amount = \left[(\rho * \sum_{k=1}^{K} AddOn(Type_k))^2 + (1-(\rho)^2) * \sum_{k=1}^{K}(AddOn(Type_k))^2\right]^{\frac{1}{2}}$$

Where:

k is each commodity type within the hedging set.

K is the number of commodity types within the hedging set.

$AddOn(Type_k)$ equals the sum of the adjusted derivative contract amounts, as determined under paragraph (c)(9) of this section, for all derivative contracts within the hedging set that reference commodity type k.

ρ equals the applicable supervisory correlation factor, as provided in Table 3 to this section.

(v) *Basis derivative contracts and volatility derivative contracts.* Notwithstanding paragraphs (c)(8)(i) through (iv) of this section, a FDIC-supervised institution must calculate a separate hedging set amount for each basis derivative contract hedging set and each volatility derivative contract hedging set. A FDIC-supervised institution must calculate such hedging set amounts using one of the formulas under paragraphs (c)(8)(i) through (iv) that corresponds to the primary risk factor of the hedging set being calculated.

(9) *Adjusted derivative contract amount*—(i) *Summary.* To calculate the adjusted derivative contract amount of a derivative contract, a FDIC-supervised institution must determine the adjusted notional amount of derivative contract, pursuant to paragraph (c)(9)(ii) of this section, and multiply the adjusted notional amount by each of the supervisory delta adjustment, pursuant to paragraph (c)(9)(iii) of this section, the maturity factor, pursuant to paragraph (c)(9)(iv) of this section, and the applicable supervisory factor, as provided in Table 3 to this section.

(ii) *Adjusted notional amount.* (A)(*1*) For an interest rate derivative contract or a credit derivative contract, the adjusted notional amount equals the product of the notional amount of the derivative contract, as measured in U.S. dollars using the exchange rate on the date of the calculation, and the supervisory duration, as calculated by the following formula:

$$\text{Supervisory duration} = max\left\{\frac{e^{-0.05*\left(\frac{S}{250}\right)} - e^{-0.05*\left(\frac{E}{250}\right)}}{0.05}, 0.04\right\}$$

Where:

S is the number of business days from the present day until the start date of the derivative contract, or zero if the start date has already passed; and

E is the number of business days from the present day until the end date of the derivative contract.

(*2*) For purposes of paragraph (c)(9)(ii)(A)(*1*) of this section:

(*i*) For an interest rate derivative contract or credit derivative contract that is a variable notional swap, the notional amount is equal to the time-weighted average of the contractual notional amounts of such a swap over the remaining life of the swap; and

(*ii*) For an interest rate derivative contract or a credit derivative contract that is a leveraged swap, in which the notional amount of all legs of the derivative contract are divided by a factor and all rates of the derivative contract are multiplied by the same factor, the notional amount is equal to the notional amount of an equivalent unleveraged swap.

(B)(*1*) For an exchange rate derivative contract, the adjusted notional amount is the notional amount of the non-U.S. denominated currency leg of

the derivative contract, as measured in U.S. dollars using the exchange rate on the date of the calculation. If both legs of the exchange rate derivative contract are denominated in currencies other than U.S. dollars, the adjusted notional amount of the derivative contract is the largest leg of the derivative contract, as measured in U.S. dollars using the exchange rate on the date of the calculation.

(*2*) Notwithstanding paragraph (c)(9)(ii)(B)(*1*) of this section, for an exchange rate derivative contract with multiple exchanges of principal, the FDIC-supervised institution must set the adjusted notional amount of the derivative contract equal to the notional amount of the derivative contract multiplied by the number of exchanges of principal under the derivative contract.

(C)(*1*) For an equity derivative contract or a commodity derivative contract, the adjusted notional amount is the product of the fair value of one unit of the reference instrument underlying the derivative contract and the number of such units referenced by the derivative contract.

(*2*) Notwithstanding paragraph (c)(9)(ii)(C)(*1*) of this section, when calculating the adjusted notional amount for an equity derivative contract or a commodity derivative contract that is a volatility derivative contract, the FDIC-supervised institution must replace the unit price with the underlying volatility referenced by the volatility derivative contract and replace the number of units with the notional amount of the volatility derivative contract.

(iii) *Supervisory delta adjustments.* (A) For a derivative contract that is not an option contract or collateralized debt obligation tranche, the supervisory delta adjustment is 1 if the fair value of the derivative contract increases when the value of the primary risk factor increases and −1 if the fair value of the derivative contract decreases when the value of the primary risk factor increases.

(B)(*1*) For a derivative contract that is an option contract, the supervisory delta adjustment is determined by the following formulas, as applicable:

Table 2 to §324.132--Supervisory Delta Adjustment for Options Contracts

	Bought	Sold
Call Options	$\Phi\left(\frac{\ln\left(\frac{P+\lambda}{K+\lambda}\right)+0.5*\sigma^2*T/250}{\sigma*\sqrt{T/250}}\right)$	$-\Phi\left(\frac{\ln\left(\frac{P+\lambda}{K+\lambda}\right)+0.5*\sigma^2*T/250}{\sigma*\sqrt{T/250}}\right)$
Put Options	$-\Phi\left(-\frac{\ln\left(\frac{P+\lambda}{K+\lambda}\right)+0.5*\sigma^2*T/250}{\sigma*\sqrt{T/250}}\right)$	$\Phi\left(-\frac{\ln\left(\frac{P+\lambda}{K+\lambda}\right)+0.5*\sigma^2*T/250}{\sigma*\sqrt{T/250}}\right)$

(*2*) As used in the formulas in Table 2 to this section:

(*i*) Φ is the standard normal cumulative distribution function;

(*ii*) P equals the current fair value of the instrument or risk factor, as applicable, underlying the option;

(*iii*) K equals the strike price of the option;

(*iv*) T equals the number of business days until the latest contractual exercise date of the option;

(*v*) λ equals zero for all derivative contracts except interest rate options for the currencies where interest rates have negative values. The same value of λ must be used for all interest rate options that are denominated in the same currency. To determine the value

of λ for a given currency, a FDIC-supervised institution must find the lowest value L of P and K of all interest rate options in a given currency that the FDIC-supervised institution has with all counterparties. Then, λ is set according to this formula: $\lambda = max\{-L + 0.1\%, 0\}$; and

(*vi*) σ equals the supervisory option volatility, as provided in Table 3 to this section.

(C)(*1*) For a derivative contract that is a collateralized debt obligation tranche, the supervisory delta adjustment is determined by the following formula:

$$\text{Supervisory delta adjustment} = \frac{15}{(1+14*\text{A})*(1+14*\text{D})}$$

(*2*) As used in the formula in paragraph (c)(9)(iii)(C)(*1*) of this section:

(*i*) A is the attachment point, which equals the ratio of the notional amounts of all underlying exposures that are subordinated to the FDIC-supervised institution's exposure to the total notional amount of all underlying exposures, expressed as a decimal value between zero and one;[30]

(*ii*) D is the detachment point, which equals one minus the ratio of the notional amounts of all underlying exposures that are senior to the FDIC-supervised institution's exposure to the total notional amount of all underlying exposures, expressed as a decimal value between zero and one; and

(*iii*) The resulting amount is designated with a positive sign if the collateralized debt obligation tranche was purchased by the FDIC-supervised institution and is designated with a negative sign if the collateralized debt obligation tranche was sold by the FDIC-supervised institution.

(iv) *Maturity factor*. (A)(*1*) The maturity factor of a derivative contract that is subject to a variation margin agreement, excluding derivative contracts that are subject to a variation margin agreement under which the counterparty is not required to post variation margin, is determined by the following formula:

$$\text{Maturity factor} = \frac{3}{2}\sqrt{\frac{MPOR}{250}}$$

Where MPOR refers to the period from the most recent exchange of collateral covering a netting set of derivative contracts with a defaulting counterparty until the derivative contracts are closed out and the resulting market risk is re-hedged.

(*2*) Notwithstanding paragraph (c)(9)(iv)(A)(*1*) of this section:

(*i*) For a derivative contract that is not a client-facing derivative transaction, MPOR cannot be less than ten business days plus the periodicity of re-margining expressed in business days minus one business day;

(*ii*) For a derivative contract that is a client-facing derivative transaction, MPOR cannot be less than five business days plus the periodicity of re-margining expressed in business days minus one business day; and

(*iii*) For a derivative contract that is within a netting set that is composed of more than 5,000 derivative contracts

[30] In the case of a first-to-default credit derivative, there are no underlying exposures that are subordinated to the FDIC-supervised institution's exposure. In the case of a second-or-subsequent-to-default credit derivative, the smallest (n − 1) notional amounts of the underlying exposures are subordinated to the FDIC-supervised institution's exposure.

that are not cleared transactions, or a netting set that contains one or more trades involving illiquid collateral or a derivative contract that cannot be easily replaced, MPOR cannot be less than twenty business days.

(*3*) Notwithstanding paragraphs (c)(9)(iv)(A)(*1*) and (*2*) of this section, for a netting set subject to more than two outstanding disputes over margin that lasted longer than the MPOR over the previous two quarters, the applicable floor is twice the amount provided in paragraphs (c)(9)(iv)(A)(*1*) and (*2*) of this section.

(B) The maturity factor of a derivative contract that is not subject to a variation margin agreement, or derivative contracts under which the counterparty is not required to post variation margin, is determined by the following formula:

$$\text{Maturity factor} = \sqrt{\frac{\min\{M;250\}}{250}}$$

Where M equals the greater of 10 business days and the remaining maturity of the contract, as measured in business days.

(C) For purposes of paragraph (c)(9)(iv) of this section, if a FDIC-supervised institution has elected pursuant to paragraph (c)(5)(v) of this section to treat a derivative contract that is a cleared transaction that is not subject to a variation margin agreement as one that is subject to a variation margin agreement, the Board-regulated institution must treat the derivative contract as subject to a variation margin agreement with maturity factor as determined according to (c)(9)(iv)(A) of this section, and daily settlement does not change the end date of the period referenced by the derivative contract.

(v) *Derivative contract as multiple effective derivative contracts.* A FDIC-supervised institution must separate a derivative contract into separate derivative contracts, according to the following rules:

(A) For an option where the counterparty pays a predetermined amount if the value of the underlying asset is above or below the strike price and nothing otherwise (binary option), the option must be treated as two separate options. For purposes of paragraph (c)(9)(iii)(B) of this section, a binary option with strike K must be represented as the combination of one bought European option and one sold European option of the same type as the original option (put or call) with the strikes set equal to 0.95 * K and 1.05 * K so that the payoff of the binary option is reproduced exactly outside the region between the two strikes. The absolute value of the sum of the adjusted derivative contract amounts of the bought and sold options is capped at the payoff amount of the binary option.

(B) For a derivative contract that can be represented as a combination of standard option payoffs (such as collar, butterfly spread, calendar spread, straddle, and strangle), a FDIC-supervised institution must treat each standard option component must be treated as a separate derivative contract.

(C) For a derivative contract that includes multiple-payment options, (such as interest rate caps and floors), a FDIC-supervised institution may represent each payment option as a combination of effective single-payment options (such as interest rate caplets and floorlets).

(D) A FDIC-supervised institution may not decompose linear derivative contracts (such as swaps) into components.

(10) *Multiple netting sets subject to a single variation margin agreement*—(i) *Calculating replacement cost.* Notwithstanding paragraph (c)(6) of this section, a FDIC-supervised institution shall assign a single replacement cost to multiple netting sets that are subject to a single variation margin agreement under which the counterparty

must post variation margin, calculated according to the following formula:

$$Replacement\ Cost = max\{\Sigma_{NS}\ max\{V_{NS};\ 0\} - max\{C_{MA};\ 0\};\ 0\} + max\{\Sigma_{NS}\ min\{V_{NS};\ 0\} - min\{C_{MA};\ 0\};\ 0\}$$

Where:

NS is each netting set subject to the variation margin agreement MA;

V_{NS} is the sum of the fair values (after excluding any valuation adjustments) of the derivative contracts within the netting set NS; and

C_{MA} is the sum of the net independent collateral amount and the variation margin amount applicable to the derivative contracts within the netting sets subject to the single variation margin agreement.

(ii) *Calculating potential future exposure.* Notwithstanding paragraph (c)(5) of this section, a FDIC-supervised institution shall assign a single potential future exposure to multiple netting sets that are subject to a single variation margin agreement under which the counterparty must post variation margin equal to the sum of the potential future exposure of each such netting set, each calculated according to paragraph (c)(7) of this section as if such nettings sets were not subject to a variation margin agreement.

(11) *Netting set subject to multiple variation margin agreements or a hybrid netting set*—(i) *Calculating replacement cost.* To calculate replacement cost for either a netting set subject to multiple variation margin agreements under which the counterparty to each variation margin agreement must post variation margin, or a netting set composed of at least one derivative contract subject to variation margin agreement under which the counterparty must post variation margin and at least one derivative contract that is not subject to such a variation margin agreement, the calculation for replacement cost is provided under paragraph (c)(6)(i) of this section, except that the variation margin threshold equals the sum of the variation margin thresholds of all variation margin agreements within the netting set and the minimum transfer amount equals the sum of the minimum transfer amounts of all the variation margin agreements within the netting set.

(ii) *Calculating potential future exposure.* (A) To calculate potential future exposure for a netting set subject to multiple variation margin agreements under which the counterparty to each variation margin agreement must post variation margin, or a netting set composed of at least one derivative contract subject to variation margin agreement under which the counterparty to the derivative contract must post variation margin and at least one derivative contract that is not subject to such a variation margin agreement, a FDIC-supervised institution must divide the netting set into sub-netting sets (as described in paragraph (c)(11)(ii)(B) of this section) and calculate the aggregated amount for each sub-netting set. The aggregated amount for the netting set is calculated as the sum of the aggregated amounts for the sub-netting sets. The multiplier is calculated for the entire netting set.

(B) For purposes of paragraph (c)(11)(ii)(A) of this section, the netting set must be divided into sub-netting sets as follows:

(*1*) All derivative contracts within the netting set that are not subject to a variation margin agreement or that are subject to a variation margin agreement under which the counterparty is not required to post variation margin form a single sub-netting set. The aggregated amount for this sub-netting set is calculated as if the netting set is not subject to a variation margin agreement.

(*2*) All derivative contracts within the netting set that are subject to variation margin agreements in which the counterparty must post variation margin and that share the same value of the MPOR form a single sub-netting set. The aggregated amount for this sub-netting set is calculated as if the netting set is subject to a variation margin agreement, using the MPOR value shared by the derivative contracts within the netting set.

TABLE 3 TO § 324.132—SUPERVISORY OPTION VOLATILITY, SUPERVISORY CORRELATION PARAMETERS, AND SUPERVISORY FACTORS FOR DERIVATIVE CONTRACTS

Asset class	Subclass	Type	Supervisory option volatility (percent)	Supervisory correlation factor (percent)	Supervisory factor [1] (percent)
Interest rate	N/A	N/A	50	N/A	0.50
Exchange rate	N/A	N/A	15	N/A	4.0
Credit, single name	Investment grade	N/A	100	50	0.46
	Speculative grade	N/A	100	50	1.3
	Sub-speculative grade	N/A	100	50	6.0
Credit, index	Investment Grade	N/A	80	80	0.38
	Speculative Grade	N/A	80	80	1.06
Equity, single name	N/A	N/A	120	50	32
Equity, index	N/A	N/A	75	80	20
Commodity	Energy	Electricity	150	40	40
		Other	70	40	18
	Metals	N/A	70	40	18
	Agricultural	N/A	70	40	18
	Other	N/A	70	40	18

[1] The applicable supervisory factor for basis derivative contract hedging sets is equal to one-half of the supervisory factor provided in this Table 3, and the applicable supervisory factor for volatility derivative contract hedging sets is equal to 5 times the supervisory factor provided in this Table 3.

(d) *Internal models methodology*. (1)(i) With prior written approval from the FDIC, an FDIC-supervised institution may use the internal models methodology in this paragraph (d) to determine EAD for counterparty credit risk for derivative contracts (collateralized or uncollateralized) and single-product netting sets thereof, for eligible margin loans and single-product netting sets thereof, and for repo-style transactions and single-product netting sets thereof.

(ii) An FDIC-supervised institution that uses the internal models methodology for a particular transaction type (derivative contracts, eligible margin loans, or repo-style transactions) must use the internal models methodology for all transactions of that transaction type. An FDIC-supervised institution may choose to use the internal models methodology for one or two of these three types of exposures and not the other types.

(iii) An FDIC-supervised institution may also use the internal models methodology for derivative contracts, eligible margin loans, and repo-style transactions subject to a qualifying cross-product netting agreement if:

(A) The FDIC-supervised institution effectively integrates the risk mitigating effects of cross-product netting into its risk management and other information technology systems; and

(B) The FDIC-supervised institution obtains the prior written approval of the FDIC.

(iv) An FDIC-supervised institution that uses the internal models methodology for a transaction type must receive approval from the FDIC to cease using the methodology for that transaction type or to make a material change to its internal model.

(2) *Risk-weighted assets using IMM*. Under the IMM, an FDIC-supervised institution uses an internal model to estimate the expected exposure (EE) for a netting set and then calculates EAD based on that EE. An FDIC-supervised institution must calculate two EEs and two EADs (one stressed and one unstressed) for each netting set as follows:

(i) $EAD_{unstressed}$ is calculated using an EE estimate based on the most recent data meeting the requirements of paragraph (d)(3)(vii) of this section;

(ii) $EAD_{stressed}$ is calculated using an EE estimate based on a historical period that includes a period of stress to the credit default spreads of the FDIC-supervised institution's counterparties according to paragraph (d)(3)(viii) of this section;

(iii) The FDIC-supervised institution must use its internal model's probability distribution for changes in the fair value of a netting set that are attributable to changes in market variables to determine EE; and

(iv) Under the internal models methodology, EAD = Max (0, α × effective EPE − CVA), or, subject to the prior written approval of FDIC as provided in paragraph (d)(10) of this section, a more conservative measure of EAD.

(A) CVA equals the credit valuation adjustment that the FDIC-supervised institution has recognized in its balance sheet valuation of any OTC derivative contracts in the netting set. For purposes of this paragraph (d), CVA does not include any adjustments to common equity tier 1 capital attributable to changes in the fair value of the FDIC-supervised institution's liabilities that are due to changes in its own credit risk since the inception of the transaction with the counterparty.

$$Effective\ EPE_{t_k} = \sum_{k=1}^{n} Effective\ EE_k \times \Delta t_k$$

(that is, effective EPE is the time-weighted average of effective EE where the weights are the proportion that an individual effective EE represents in a one-year time interval) where:

(*1*) $EffectiveEE_{t_k}$ = max($Effective\ EE_{t_{k-1}}$, EE_{t_k}) (that is, for a specific date t_k, effective EE is the greater of EE at that date or the effective EE at the previous date); and

(*2*) t_k represents the kth future time period in the model and there are n time periods represented in the model over the first year, and

(C) α = 1.4 except as provided in paragraph (d)(6) of this section, or when the FDIC has determined that the FDIC-supervised institution must set α higher based on the FDIC-supervised institution's specific characteristics of counterparty credit risk or model performance.

(v) An FDIC-supervised institution may include financial collateral currently posted by the counterparty as collateral (but may not include other forms of collateral) when calculating EE.

(vi) If an FDIC-supervised institution hedges some or all of the counterparty credit risk associated with a netting set using an eligible credit derivative, the FDIC-supervised institution may take the reduction in exposure to the counterparty into account when estimating EE. If the FDIC-supervised institution recognizes this reduction in exposure to the counterparty in its estimate of EE, it must also use its internal model to estimate a separate EAD for the FDIC-supervised institution's exposure to the protection provider of the credit derivative.

(3) *Prior approval relating to EAD calculation.* To obtain FDIC approval to calculate the distributions of exposures upon which the EAD calculation is based, the FDIC-supervised institution must demonstrate to the satisfaction of the FDIC that it has been using for at least one year an internal model that broadly meets the following minimum standards, with which the FDIC-supervised institution must maintain compliance:

(i) The model must have the systems capability to estimate the expected exposure to the counterparty on a daily basis (but is not expected to estimate or report expected exposure on a daily basis);

(ii) The model must estimate expected exposure at enough future dates to reflect accurately all the future cash flows of contracts in the netting set;

(iii) The model must account for the possible non-normality of the exposure distribution, where appropriate;

(iv) The FDIC-supervised institution must measure, monitor, and control current counterparty exposure and the exposure to the counterparty over the whole life of all contracts in the netting set;

(v) The FDIC-supervised institution must be able to measure and manage current exposures gross and net of collateral held, where appropriate. The FDIC-supervised institution must estimate expected exposures for OTC derivative contracts both with and without the effect of collateral agreements;

(vi) The FDIC-supervised institution must have procedures to identify, monitor, and control wrong-way risk throughout the life of an exposure. The procedures must include stress testing and scenario analysis;

(vii) The model must use current market data to compute current exposures. The FDIC-supervised institution must estimate model parameters using historical data from the most recent three-year period and update the data quarterly or more frequently if market conditions warrant. The FDIC-supervised institution should consider using model parameters based on forward-looking measures, where appropriate;

(viii) When estimating model parameters based on a stress period, the FDIC-supervised institution must use at least three years of historical data that include a period of stress to the credit default spreads of the FDIC-supervised institution's counterparties. The FDIC-supervised institution must review the data set and update the data as necessary, particularly for any material changes in its counterparties. The FDIC-supervised institution must demonstrate, at least quarterly, and maintain documentation of such demonstration, that the stress period coincides with increased CDS or other credit spreads of the FDIC-supervised institution's counterparties. The FDIC-supervised institution must have procedures to evaluate the effectiveness of its stress calibration that include a process for using benchmark portfolios that are vulnerable to the same risk factors as the FDIC-supervised institution's portfolio. The FDIC may require the FDIC-supervised institution to modify its stress calibration to better reflect actual historic losses of the portfolio;

(ix) An FDIC-supervised institution must subject its internal model to an initial validation and annual model review process. The model review should consider whether the inputs and risk factors, as well as the model outputs, are appropriate. As part of the model review process, the FDIC-supervised institution must have a backtesting program for its model that includes a process by which unacceptable model performance will be determined and remedied;

(x) An FDIC-supervised institution must have policies for the measurement, management and control of collateral and margin amounts; and

(xi) An FDIC-supervised institution must have a comprehensive stress testing program that captures all credit exposures to counterparties, and incorporates stress testing of principal market risk factors and creditworthiness of counterparties.

(4) *Calculating the maturity of exposures.* (i) If the remaining maturity of the exposure or the longest-dated contract in the netting set is greater than one year, the FDIC-supervised institution must set M for the exposure or netting set equal to the lower of five years or M(EPE), where:

(A) $$M(EPE) = 1 + \frac{\sum_{t_k > 1\,year}^{maturity} EE_k \times \Delta t_k \times df_k}{\sum_{k=1}^{t_k \le 1\,year} effectiveEE_k \times \Delta t_k \times df_k};$$

(B) df_k is the risk-free discount factor for future time period t_k; and

(C) $\Delta t_k = t_k - t_{k-1}$.

(ii) If the remaining maturity of the exposure or the longest-dated contract in the netting set is one year or less, the FDIC-supervised institution must

set M for the exposure or netting set equal to one year, except as provided in § 324.131(d)(7).

(iii) Alternatively, an FDIC-supervised institution that uses an internal model to calculate a one-sided credit valuation adjustment may use the effective credit duration estimated by the model as M(EPE) in place of the formula in paragraph (d)(4)(i) of this section.

(5) *Effects of collateral agreements on EAD.* An FDIC-supervised institution may capture the effect on EAD of a collateral agreement that requires receipt of collateral when exposure to the counterparty increases, but may not capture the effect on EAD of a collateral agreement that requires receipt of collateral when counterparty credit quality deteriorates. Two methods are available to capture the effect of a collateral agreement, as set forth in paragraphs (d)(5)(i) and (ii) of this section:

(i) With prior written approval from the FDIC, an FDIC-supervised institution may include the effect of a collateral agreement within its internal model used to calculate EAD. The FDIC-supervised institution may set EAD equal to the expected exposure at the end of the margin period of risk. The margin period of risk means, with respect to a netting set subject to a collateral agreement, the time period from the most recent exchange of collateral with a counterparty until the next required exchange of collateral, plus the period of time required to sell and realize the proceeds of the least liquid collateral that can be delivered under the terms of the collateral agreement and, where applicable, the period of time required to re-hedge the resulting market risk upon the default of the counterparty. The minimum margin period of risk is set according to paragraph (d)(5)(iii) of this section; or

(ii) As an alternative to paragraph (d)(5)(i) of this section, an FDIC-supervised institution that can model EPE without collateral agreements but cannot achieve the higher level of modeling sophistication to model EPE with collateral agreements can set effective EPE for a collateralized netting set equal to the lesser of:

(A) An add-on that reflects the potential increase in exposure of the netting set over the margin period of risk, plus the larger of:

(*1*) The current exposure of the netting set reflecting all collateral held or posted by the FDIC-supervised institution excluding any collateral called or in dispute; or

(*2*) The largest net exposure including all collateral held or posted under the margin agreement that would not trigger a collateral call. For purposes of this section, the add-on is computed as the expected increase in the netting set's exposure over the margin period of risk (set in accordance with paragraph (d)(5)(iii) of this section); or

(B) Effective EPE without a collateral agreement plus any collateral the FDIC-supervised institution posts to the counterparty that exceeds the required margin amount.

(iii) For purposes of this part, including paragraphs (d)(5)(i) and (ii) of this section, the margin period of risk for a netting set subject to a collateral agreement is:

(A) Five business days for repo-style transactions subject to daily remargining and daily marking-to-market, and ten business days for other transactions when liquid financial collateral is posted under a daily margin maintenance requirement, or

(B) Twenty business days if the number of trades in a netting set exceeds 5,000 at any time during the previous quarter (except if the FDIC-supervised institution is calculating EAD for a cleared transaction under § 324.133) or contains one or more trades involving illiquid collateral or any derivative contract that cannot be easily replaced. If over the two previous quarters more than two margin disputes on a netting set have occurred that lasted more than the margin period of risk, then the FDIC-supervised institution must use a margin period of risk for that netting set that is at least two times the minimum margin period of risk for that netting set. If the periodicity of the receipt of collateral is N-days, the minimum margin period of risk is the minimum margin period of risk under this paragraph (d) plus N minus 1. This period should be extended to cover any impediments to prompt re-hedging of any market risk.

(C) Five business days for an OTC derivative contract or netting set of OTC derivative contracts where the FDIC-supervised institution is either acting as a financial intermediary and enters into an offsetting transaction with a CCP or where the FDIC-supervised institution provides a guarantee to the CCP on the performance of the client. An FDIC-supervised institution must use a longer holding period if the FDIC-supervised institution determines that a longer period is appropriate. Additionally, the FDIC may require the FDIC-supervised institution to set a longer holding period if the FDIC determines that a longer period is appropriate due to the nature, structure, or characteristics of the transaction or is commensurate with the risks associated with the transaction.

(6) *Own estimate of alpha.* With prior written approval of the FDIC, an FDIC-supervised institution may calculate alpha as the ratio of economic capital from a full simulation of counterparty exposure across counterparties that incorporates a joint simulation of market and credit risk factors (numerator) and economic capital based on EPE (denominator), subject to a floor of 1.2. For purposes of this calculation, economic capital is the unexpected losses for all counterparty credit risks measured at a 99.9 percent confidence level over a one-year horizon. To receive approval, the FDIC-supervised institution must meet the following minimum standards to the satisfaction of the FDIC:

(i) The FDIC-supervised institution's own estimate of alpha must capture in the numerator the effects of:

(A) The material sources of stochastic dependency of distributions of fair values of transactions or portfolios of transactions across counterparties;

(B) Volatilities and correlations of market risk factors used in the joint simulation, which must be related to the credit risk factor used in the simulation to reflect potential increases in volatility or correlation in an economic downturn, where appropriate; and

(C) The granularity of exposures (that is, the effect of a concentration in the proportion of each counterparty's exposure that is driven by a particular risk factor).

(ii) The FDIC-supervised institution must assess the potential model uncertainty in its estimates of alpha.

(iii) The FDIC-supervised institution must calculate the numerator and denominator of alpha in a consistent fashion with respect to modeling methodology, parameter specifications, and portfolio composition.

(iv) The FDIC-supervised institution must review and adjust as appropriate its estimates of the numerator and denominator of alpha on at least a quarterly basis and more frequently when the composition of the portfolio varies over time.

(7) *Risk-based capital requirements for transactions with specific wrong-way risk.* An FDIC-supervised institution must determine if a repo-style transaction, eligible margin loan, bond option, or equity derivative contract or purchased credit derivative to which the FDIC-supervised institution applies the internal models methodology under this paragraph (d) has specific wrong-way risk. If a transaction has specific wrong-way risk, the FDIC-supervised institution must treat the transaction as its own netting set and exclude it from the model described in paragraph (d)(2) of this section and instead calculate the risk-based capital requirement for the transaction as follows:

(i) For an equity derivative contract, by multiplying:

(A) K, calculated using the appropriate risk-based capital formula specified in Table 1 of § 324.131 using the PD of the counterparty and LGD equal to 100 percent, by

(B) The maximum amount the FDIC-supervised institution could lose on the equity derivative.

(ii) For a purchased credit derivative by multiplying:

(A) K, calculated using the appropriate risk-based capital formula specified in Table 1 of § 324.131 using the PD of the counterparty and LGD equal to 100 percent, by

(B) The fair value of the reference asset of the credit derivative.

(iii) For a bond option, by multiplying:

(A) K, calculated using the appropriate risk-based capital formula specified in Table 1 of § 324.131 using the PD of the counterparty and LGD equal to 100 percent, by

(B) The smaller of the notional amount of the underlying reference asset and the maximum potential loss under the bond option contract.

(iv) For a repo-style transaction or eligible margin loan by multiplying:

(A) K, calculated using the appropriate risk-based capital formula specified in Table 1 of § 324.131 using the PD of the counterparty and LGD equal to 100 percent, by

(B) The EAD of the transaction determined according to the EAD equation in § 324.132(b)(2), substituting the estimated value of the collateral assuming a default of the counterparty for the value of the collateral in ΣC of the equation.

(8) *Risk-weighted asset amount for IMM exposures with specific wrong-way risk.* The aggregate risk-weighted asset amount for IMM exposures with specific wrong-way risk is the sum of an FDIC-supervised institution's risk-based capital requirement for purchased credit derivatives that are not bond options with specific wrong-way risk as calculated under paragraph (d)(7)(ii) of this section, an FDIC-supervised institution's risk-based capital requirement for equity derivatives with specific wrong-way risk as calculated under paragraph (d)(7)(i) of this section, an FDIC-supervised institution's risk-based capital requirement for bond options with specific wrong-way risk as calculated under paragraph (d)(7)(iii) of this section, and an FDIC-supervised institution's risk-based capital requirement for repo-style transactions and eligible margin loans with specific wrong-way risk as calculated under paragraph (d)(7)(iv) of this section, multiplied by 12.5.

(9) *Risk-weighted assets for IMM exposures.* (i) The FDIC-supervised institution must insert the assigned risk parameters for each counterparty and netting set into the appropriate formula specified in Table 1 of § 324.131 and multiply the output of the formula by the $EAD_{unstressed}$ of the netting set to obtain the unstressed capital requirement for each netting set. An FDIC-supervised institution that uses an advanced CVA approach that captures migrations in credit spreads under paragraph (e)(3) of this section must set the maturity adjustment (b) in the formula equal to zero. The sum of the unstressed capital requirement calculated for each netting set equals $K_{unstressed}$.

(ii) The FDIC-supervised institution must insert the assigned risk parameters for each wholesale obligor and netting set into the appropriate formula specified in Table 1 of § 324.131 and multiply the output of the formula by the $EAD_{stressed}$ of the netting set to obtain the stressed capital requirement for each netting set. An FDIC-supervised institution that uses an advanced CVA approach that captures migrations in credit spreads under paragraph (e)(6) of this section must set the maturity adjustment (b) in the formula equal to zero. The sum of the stressed capital requirement calculated for each netting set equals $K_{stressed}$.

(iii) The FDIC-supervised institution's dollar risk-based capital requirement under the internal models methodology equals the larger of $K_{unstressed}$ and $K_{stressed}$. An FDIC-supervised institution's risk-weighted assets amount for IMM exposures is equal to the capital requirement multiplied by 12.5, plus risk-weighted assets for IMM exposures with specific wrong-way risk in paragraph (d)(8) of this section and those in paragraph (d)(10) of this section.

(10) *Other measures of counterparty exposure.* (i) With prior written approval of the FDIC, a FDIC-supervised institution may set EAD equal to a measure of counterparty credit risk exposure, such as peak EAD, that is more conservative than an alpha of 1.4 times the larger of $EPE_{unstressed}$ and $EPE_{stressed}$ for every counterparty whose EAD will be measured under the alternative measure of counterparty exposure. The FDIC-supervised institution must demonstrate the conservatism of the measure of counterparty credit risk exposure used for EAD. With respect to paragraph (d)(10)(i) of this section:

(A) For material portfolios of new OTC derivative products, the FDIC-supervised institution may assume that the standardized approach for

counterparty credit risk pursuant to paragraph (c) of this section meets the conservatism requirement of this section for a period not to exceed 180 days.

(B) For immaterial portfolios of OTC derivative contracts, the FDIC-supervised institution generally may assume that the standardized approach for counterparty credit risk pursuant to paragraph (c) of this section meets the conservatism requirement of this section.

(ii) To calculate risk-weighted assets for purposes of the approach in paragraph (d)(10)(i) of this section, the FDIC-supervised institution must insert the assigned risk parameters for each counterparty and netting set into the appropriate formula specified in Table 1 of § 324.131, multiply the output of the formula by the EAD for the exposure as specified above, and multiply by 12.5.

(e) *Credit valuation adjustment (CVA) risk-weighted assets*—(1) *In general*. With respect to its OTC derivative contracts, an FDIC-supervised institution must calculate a CVA risk-weighted asset amount for its portfolio of OTC derivative transactions that are subject to the CVA capital requirement using the simple CVA approach described in paragraph (e)(5) of this section or, with prior written approval of the FDIC, the advanced CVA approach described in paragraph (e)(6) of this section. An FDIC-supervised institution that receives prior FDIC approval to calculate its CVA risk-weighted asset amounts for a class of counterparties using the advanced CVA approach must continue to use that approach for that class of counterparties until it notifies the FDIC in writing that the FDIC-supervised institution expects to begin calculating its CVA risk-weighted asset amount using the simple CVA approach. Such notice must include an explanation of the FDIC-supervised institution's rationale and the date upon which the FDIC-supervised institution will begin to calculate its CVA risk-weighted asset amount using the simple CVA approach.

(2) *Market risk FDIC-supervised institutions*. Notwithstanding the prior approval requirement in paragraph (e)(1) of this section, a market risk FDIC-supervised institution may calculate its CVA risk-weighted asset amount using the advanced CVA approach if the FDIC-supervised institution has FDIC approval to:

(i) Determine EAD for OTC derivative contracts using the internal models methodology described in paragraph (d) of this section; and

(ii) Determine its specific risk add-on for debt positions issued by the counterparty using a specific risk model described in § 324.207(b).

(3) *Recognition of hedges*. (i) An FDIC-supervised institution may recognize a single name CDS, single name contingent CDS, any other equivalent hedging instrument that references the counterparty directly, and index credit default swaps (CDS_{ind}) as a CVA hedge under paragraph (e)(5)(ii) of this section or paragraph (e)(6) of this section, provided that the position is managed as a CVA hedge in accordance with the FDIC-supervised institution's hedging policies.

(ii) An FDIC-supervised institution shall not recognize as a CVA hedge any tranched or n^{th}-to-default credit derivative.

(4) *Total CVA risk-weighted assets*. Total CVA risk-weighted assets is the CVA capital requirement, K_{CVA}, calculated for an FDIC-supervised institution's entire portfolio of OTC derivative counterparties that are subject to the CVA capital requirement, multiplied by 12.5.

(5) *Simple CVA approach*. (i) Under the simple CVA approach, the CVA capital requirement, K_{CVA}, is calculated according to the following formula:

$$K_{CVA} = 2.33 \times \sqrt{\left(\sum_i 0.5 \times w_i \times \left(M_i \times EAD_i^{total} - M_i^{hedge} \times B_i \right) - \sum_{ind} w_{ind} \times M_{ind} \times B_{ind} \right)^2 + A}$$

Where:

$$A = \sum_i 0.75 \times w_i^2 \times \left(M_i \times EAD_i^{total} - M_i^{hedge} \times B_i \right)^2$$

(A) w_i equals the weight applicable to counterparty i under Table 4 to this section;

(B) M_i equals the EAD-weighted average of the effective maturity of each netting set with counterparty i (where each netting set's effective maturity can be no less than one year.)

(C) EAD_i^{total} equals the sum of the EAD for all netting sets of OTC derivative contracts with counterparty i calculated using the standardized approach for counterparty credit risk described in paragraph (c) of this section or the internal models methodology described in paragraph (d) of this section. When the FDIC-supervised institution calculates EAD under paragraph (c) of this section, such EAD may be adjusted for purposes of calculating EAD_i^{total} by multiplying EAD by $(1\text{-exp}(-0.05 \times M_i))/(0.05 \times M_i)$, where ''exp'' is the exponential function. When the FDIC-supervised institution calculates EAD under paragraph (d) of this section, EAD_i^{total} equals $EAD_{unstressed}$.

(D) M_i^{hedge} equals the notional weighted average maturity of the hedge instrument.

(E) B_i equals the sum of the notional amounts of any purchased single name CDS referencing counterparty i that is used to hedge CVA risk to counterparty i multiplied by $(1\text{-exp}(-0.05 \times M_i^{hedge}))/(0.05 \times M_i^{hedge})$.

(F) M_{ind} equals the maturity of the CDS_{ind} or the notional weighted average maturity of any CDS_{ind} purchased to hedge CVA risk of counterparty i.

(G) B_{ind} equals the notional amount of one or more CDS_{ind} purchased to hedge CVA risk for counterparty i multiplied by $(1\text{-exp}(-0.05 \times M_{ind}))/(0.05 \times M_{ind})$

(H) w_{ind} equals the weight applicable to the CDS_{ind} based on the average weight of the underlying reference names that comprise the index under Table 4 to this section.

(ii) The FDIC-supervised institution may treat the notional amount of the index attributable to a counterparty as a single name hedge of counterparty i (B_i,) when calculating K_{CVA}, and subtract the notional amount of B_i from the notional amount of the $CDS_{ind.}$ An FDIC-supervised institution must treat the CDS_{ind} hedge with the notional amount reduced by B_i as a CVA hedge.

TABLE 4 TO § 324.132—ASSIGNMENT OF COUNTERPARTY WEIGHT

Internal PD (in percent)	Weight w_i (in percent)
0.00–0.07	0.70
>0.070–0.15	0.80
>0.15–0.40	1.00
>0.40–2.00	2.00
>2.00–6.00	3.00
>6.00	10.00

(6) *Advanced CVA approach.* (i) An FDIC-supervised institution may use the VaR model that it uses to determine specific risk under § 324.207(b) or another VaR model that meets the quantitative requirements of § 324.205(b) and § 324.207(b)(1) to calculate its CVA capital requirement for a counterparty by modeling the impact of changes in the counterparties' credit spreads, together with any recognized CVA hedges, on the CVA for the counterparties, subject to the following requirements:

(A) The VaR model must incorporate only changes in the counterparties' credit spreads, not changes in other risk factors. The VaR model does not need to capture jump-to-default risk;

(B) An FDIC-supervised institution that qualifies to use the advanced CVA approach must include in that approach any immaterial OTC derivative portfolios for which it uses the standardized approach for counterparty

credit risk in paragraph (c) of this section according to paragraph (e)(6)(viii) of this section; and

(C) An FDIC-supervised institution must have the systems capability to calculate the CVA capital requirement for a counterparty on a daily basis (but is not required to calculate the CVA capital requirement on a daily basis).

(ii) Under the advanced CVA approach, the CVA capital requirement, K_{CVA}, is calculated according to the following formulas:

where VaR_j^{CVA} is the 99% VaR reflecting changes of CVA_j and fair value of eligible hedges (aggregated across all counterparties and eligible hedges) resulting from simulated changes of credit spreads over a 10-day time horizon. CVA_j for a given counterparty must be calculated according to

$$CVA_j = \left(LGD_{MKT}\right) \times \sum_{i=1}^{T} Max\left(0; \exp\left(-\frac{s_{i-1} \times t_{i-1}}{LGD_{MKT}}\right) - \exp\left(-\frac{s_i \times t_i}{LGD_{MKT}}\right)\right) \times \left(\frac{EE_{i-1} \times D_{i-1} + EE_i \times D_i}{2}\right)$$

Where

(A) t_i equals the time of the i-th revaluation time bucket starting from $t_0 = 0$.

(B) t_T equals the longest contractual maturity across the OTC derivative contracts with the counterparty.

(C) s_i equals the CDS spread for the counterparty at tenor t_i used to calculate the CVA for the counterparty. If a CDS spread is not available, the FDIC-supervised institution must use a proxy spread based on the credit quality, industry and region of the counterparty.

(D) LGD_{MKT} equals the loss given default of the counterparty based on the spread of a publicly traded debt instrument of the counterparty, or, where a publicly traded debt instrument spread is not available, a proxy spread based on the credit quality, industry, and region of the counterparty. Where no market information and no reliable proxy based on the credit quality, industry, and region of the counterparty are available to determine LGD_{MKT}, an FDIC-supervised institution may use a conservative estimate when determining LGD_{MKT}, subject to approval by the FDIC.

(E) EE_i equals the sum of the expected exposures for all netting sets with the counterparty at revaluation time t_i, calculated according to paragraphs (e)(6)(iv)(A) and (e)(6)(v)(A) of this section.

(F) D_i equals the risk-free discount factor at time t_i, where $D_0 = 1$.

(G) Exp is the exponential function.

(H) The subscript j refers either to a stressed or an unstressed calibration as described in paragraphs (e)(6)(iv) and (v) of this section.

(iii) Notwithstanding paragraphs (e)(6)(i) and (e)(6)(ii) of this section, an FDIC-supervised institution must use the formulas in paragraphs (e)(6)(iii)(A) or (e)(6)(iii)(B) of this section to calculate credit spread sensitivities if its VaR model is not based on full repricing.

(A) If the VaR model is based on credit spread sensitivities for specific tenors, the FDIC-supervised institution must calculate each credit spread sensitivity according to the following formula:

$$\text{Regulatory CS01} = 0.0001 \times t_i \times exp\left(-\frac{s_i \times t_i}{LGD_{MKT}}\right) \times \left(\frac{EE_{i-1} \times D_{i-1} - EE_{i+1} \times D_{i+1}}{2}\right)$$

(B) If the VaR model uses credit spread sensitivities to parallel shifts in credit spreads, the FDIC-supervised institution must calculate each credit spread sensitivity according to the following formula:

$$\text{Regulatory CS01} = 0.0001 \times \sum_{i=1}^{T} \left(t_i \times \exp\left(-\frac{s_i \times t_i}{LGD_{MKT}} \right) - t_{i-1} \times \exp\left(-\frac{s_{i-1} \times t_{i-1}}{LGD_{MKT}} \right) \right) \times \left(\frac{EE_{i-1} \times D_{i-1} + EE_i \times D_i}{2} \right)$$

For the final time bucket i = T, the corresponding formula is

$$\text{Regulatory CS01} = 0.0001 \times t_i \times \exp\left(-\frac{s_i \times t_i}{LGD_{MKT}} \right) \times \left(\frac{EE_{i-1} \times D_{i-1} + EE_T \times D_T}{2} \right)$$

(iv) To calculate the $CVA_{Unstressed}$ measure for purposes of paragraph (e)(6)(ii) of this section, the FDIC-supervised institution must:

(A) Use the EE_i calculated using the calibration of paragraph (d)(3)(vii) of this section, except as provided in § 324.132 (e)(6)(vi), and

(B) Use the historical observation period required under § 324.205(b)(2).

(v) To calculate the $CVA_{Stressed}$ measure for purposes of paragraph (e)(6)(ii) of this section, the FDIC-supervised institution must:

(A) Use the EE_i calculated using the stress calibration in paragraph (d)(3)(viii) of this section except as provided in paragraph (e)(6)(vi) of this section.

(B) Calibrate VaR model inputs to historical data from the most severe twelve-month stress period contained within the three-year stress period used to calculate EE_i. The FDIC may require an FDIC-supervised institution to use a different period of significant financial stress in the calculation of the $CVA_{Stressed}$ measure.

(vi) If an FDIC-supervised institution captures the effect of a collateral agreement on EAD using the method described in paragraph (d)(5)(ii) of this section, for purposes of paragraph (e)(6)(ii) of this section, the FDIC-supervised institution must calculate EE_i using the method in paragraph (d)(5)(ii) of this section and keep that EE constant with the maturity equal to the maximum of:

(A) Half of the longest maturity of a transaction in the netting set, and

(B) The notional weighted average maturity of all transactions in the netting set.

(vii) For purposes of paragraph (e)(6) of this section, the FDIC-supervised institution's VaR model must capture the basis between the spreads of any CDS_{ind} that is used as the hedging instrument and the hedged counterparty exposure over various time periods, including benign and stressed environments. If the VaR model does not capture that basis, the FDIC-supervised institution must reflect only 50 percent of the notional amount of the CDS_{ind} hedge in the VaR model.

(viii) If a FDIC-supervised institution uses the standardized approach for counterparty credit risk pursuant to paragraph (c) of this section to calculate the EAD for any immaterial portfolios of OTC derivative contracts, the FDIC-supervised institution must use that EAD as a constant EE in the formula for the calculation of CVA with the maturity equal to the maximum of:

(A) Half of the longest maturity of a transaction in the netting set; and

(B) The notional weighted average maturity of all transactions in the netting set.

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§ 324.133 Cleared transactions.

(a) *General requirements*—(1) *Clearing member clients*. A FDIC-supervised institution that is a clearing member client

must use the methodologies described in paragraph (b) of this section to calculate risk-weighted assets for a cleared transaction.

(2) *Clearing members.* A FDIC-supervised institution that is a clearing member must use the methodologies described in paragraph (c) of this section to calculate its risk-weighted assets for a cleared transaction and paragraph (d) of this section to calculate its risk-weighted assets for its default fund contribution to a CCP.

(b) *Clearing member client FDIC-supervised institutions*—(1) *Risk-weighted assets for cleared transactions.* (i) To determine the risk-weighted asset amount for a cleared transaction, a FDIC-supervised institution that is a clearing member client must multiply the trade exposure amount for the cleared transaction, calculated in accordance with paragraph (b)(2) of this section, by the risk weight appropriate for the cleared transaction, determined in accordance with paragraph (b)(3) of this section.

(ii) A clearing member client FDIC-supervised institution's total risk-weighted assets for cleared transactions is the sum of the risk-weighted asset amounts for all of its cleared transactions.

(2) *Trade exposure amount.* (i) For a cleared transaction that is a derivative contract or a netting set of derivative contracts, trade exposure amount equals the EAD for the derivative contract or netting set of derivative contracts calculated using the methodology used to calculate EAD for derivative contracts set forth in § 324.132(c) or (d), plus the fair value of the collateral posted by the clearing member client FDIC-supervised institution and held by the CCP or a clearing member in a manner that is not bankruptcy remote. When the FDIC-supervised institution calculates EAD for the cleared transaction using the methodology in § 324.132(d), EAD equals $EAD_{unstressed}$.

(ii) For a cleared transaction that is a repo-style transaction or netting set of repo-style transactions, trade exposure amount equals the EAD for the repo-style transaction calculated using the methodology set forth in § 324.132(b)(2) or (3) or (d), plus the fair value of the collateral posted by the clearing member client FDIC-supervised institution and held by the CCP or a clearing member in a manner that is not bankruptcy remote. When the FDIC-supervised institution calculates EAD for the cleared transaction under § 324.132(d), EAD equals $EAD_{unstressed}$.

(3) *Cleared transaction risk weights.* (i) For a cleared transaction with a QCCP, a clearing member client FDIC-supervised institution must apply a risk weight of:

(A) 2 percent if the collateral posted by the FDIC-supervised institution to the QCCP or clearing member is subject to an arrangement that prevents any loss to the clearing member client FDIC-supervised institution due to the joint default or a concurrent insolvency, liquidation, or receivership proceeding of the clearing member and any other clearing member clients of the clearing member; and the clearing member client FDIC-supervised institution has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that in the event of a legal challenge (including one resulting from an event of default or from liquidation, insolvency, or receivership proceedings) the relevant court and administrative authorities would find the arrangements to be legal, valid, binding, and enforceable under the law of the relevant jurisdictions.

(B) 4 percent, if the requirements of paragraph (b)(3)(i)(A) of this section are not met.

(ii) For a cleared transaction with a CCP that is not a QCCP, a clearing member client FDIC-supervised institution must apply the risk weight applicable to the CCP under subpart D of this part.

(4) *Collateral.* (i) Notwithstanding any other requirement of this section, collateral posted by a clearing member client FDIC-supervised institution that is held by a custodian (in its capacity as a custodian) in a manner that is bankruptcy remote from the CCP, clearing member, and other clearing member clients of the clearing member, is not subject to a capital requirement under this section.

(ii) A clearing member client FDIC-supervised institution must calculate a risk-weighted asset amount for any

collateral provided to a CCP, clearing member or a custodian in connection with a cleared transaction in accordance with requirements under subparts E or F of this part, as applicable.

(c) *Clearing member FDIC-supervised institution*—(1) *Risk-weighted assets for cleared transactions.* (i) To determine the risk-weighted asset amount for a cleared transaction, a clearing member FDIC-supervised institution must multiply the trade exposure amount for the cleared transaction, calculated in accordance with paragraph (c)(2) of this section by the risk weight appropriate for the cleared transaction, determined in accordance with paragraph (c)(3) of this section.

(ii) A clearing member FDIC-supervised institution's total risk-weighted assets for cleared transactions is the sum of the risk-weighted asset amounts for all of its cleared transactions.

(2) *Trade exposure amount.* A clearing member FDIC-supervised institution must calculate its trade exposure amount for a cleared transaction as follows:

(i) For a cleared transaction that is a derivative contract or a netting set of derivative contracts, trade exposure amount equals the EAD calculated using the methodology used to calculate EAD for derivative contracts set forth in § 324.132(c) or (d), plus the fair value of the collateral posted by the clearing member FDIC-supervised institution and held by the CCP in a manner that is not bankruptcy remote. When the clearing member FDIC-supervised institution calculates EAD for the cleared transaction using the methodology in § 324.132(d), EAD equals $EAD_{unstressed}$.

(ii) For a cleared transaction that is a repo-style transaction or netting set of repo-style transactions, trade exposure amount equals the EAD calculated under § 324.132(b)(2) or (3) or (d), plus the fair value of the collateral posted by the clearing member FDIC-supervised institution and held by the CCP in a manner that is not bankruptcy remote. When the clearing member FDIC-supervised institution calculates EAD for the cleared transaction under § 324.132(d), EAD equals $EAD_{unstressed}$.

(3) *Cleared transaction risk weights.* (i) A clearing member FDIC-supervised institution must apply a risk weight of 2 percent to the trade exposure amount for a cleared transaction with a QCCP.

(ii) For a cleared transaction with a CCP that is not a QCCP, a clearing member FDIC-supervised institution must apply the risk weight applicable to the CCP according to subpart D of this part.

(iii) Notwithstanding paragraphs (c)(3)(i) and (ii) of this section, a clearing member FDIC-supervised institution may apply a risk weight of zero percent to the trade exposure amount for a cleared transaction with a QCCP where the clearing member FDIC-supervised institution is acting as a financial intermediary on behalf of a clearing member client, the transaction offsets another transaction that satisfies the requirements set forth in § 324.3(a), and the clearing member FDIC-supervised institution is not obligated to reimburse the clearing member client in the event of the QCCP default.

(4) *Collateral.* (i) Notwithstanding any other requirement of this section, collateral posted by a clearing member FDIC-supervised institution that is held by a custodian (in its capacity as a custodian) in a manner that is bankruptcy remote from the CCP, clearing member, and other clearing member clients of the clearing member, is not subject to a capital requirement under this section.

(ii) A clearing member FDIC-supervised institution must calculate a risk-weighted asset amount for any collateral provided to a CCP, clearing member or a custodian in connection with a cleared transaction in accordance with requirements under subparts E or F of this part, as applicable.

(d) *Default fund contributions*—(1) *General requirement.* A clearing member FDIC-supervised institution must determine the risk-weighted asset amount for a default fund contribution to a CCP at least quarterly, or more frequently if, in the opinion of the FDIC-supervised institution or the FDIC, there is a material change in the financial condition of the CCP.

(2) *Risk-weighted asset amount for default fund contributions to nonqualifying*

CCPs. A clearing member FDIC-supervised institution's risk-weighted asset amount for default fund contributions to CCPs that are not QCCPs equals the sum of such default fund contributions multiplied by 1,250 percent, or an amount determined by the FDIC, based on factors such as size, structure, and membership characteristics of the CCP and riskiness of its transactions, in cases where such default fund contributions may be unlimited.

(3) *Risk-weighted asset amount for default fund contributions to QCCPs*. A clearing member FDIC-supervised institution's risk-weighted asset amount for default fund contributions to QCCPs equals the sum of its capital requirement, K_{CM} for each QCCP, as calculated under the methodology set forth in paragraph (d)(4) of this section, multiplied by 12.5.

(4) *Capital requirement for default fund contributions to a QCCP*. A clearing member FDIC-supervised institution's capital requirement for its default fund contribution to a QCCP (K_{CM}) is equal to:

$$K_{CM} = \max\{K_{CCP} * \left(\frac{DF^{pref}}{DF_{CCP}+DF^{pref}_{CCPCM}}\right); 0.16\ percent * DF^{pref}\}$$

Where:

K_{CCP} is the hypothetical capital requirement of the QCCP, as determined under paragraph (d)(5) of this section;

DF^{pref} is the prefunded default fund contribution of the clearing member FDIC-supervised institution to the QCCP;

DF_{CCP} is the QCCP's own prefunded amount that are contributed to the default waterfall and are junior or pari passu with prefunded default fund contributions of clearing members of the QCCP; and

DF^{pref}_{CCPCM} is the total prefunded default fund contributions from clearing members of the QCCP to the QCCP.

(5) *Hypothetical capital requirement of a QCCP*. Where a QCCP has provided its K_{CCP}, an FDIC-supervised institution must rely on such disclosed figure instead of calculating K_{CCP} under this paragraph (d)(5), unless the FDIC-supervised institution determines that a more conservative figure is appropriate based on the nature, structure, or characteristics of the QCCP. The hypothetical capital requirement of a QCCP (K_{CCP}), as determined by the FDIC-supervised institution, is equal to:

$$K_{CCP} = \Sigma_{CMi}\ EAD_i * 1.6\ percent$$

Where:

$_{CMi}$ is each clearing member of the QCCP; and

EAD_i is the exposure amount of the QCCP to each clearing member of the QCCP, as determined under paragraph (d)(6) of this section.

(6) *EAD of a QCCP to a clearing member*. (i) The EAD of a QCCP to a clearing member is equal to the sum of the EAD for derivative contracts determined under paragraph (d)(6)(ii) of this section and the EAD for repo-style

transactions determined under paragraph (d)(6)(iii) of this section.

(ii) With respect to any derivative contracts between the QCCP and the clearing member that are cleared transactions and any guarantees that the clearing member has provided to the QCCP with respect to performance of a clearing member client on a derivative contract, the EAD is equal to the exposure amount of the QCCP to the clearing member for all such derivative contracts and guarantees of derivative contracts calculated under SA–CCR in § 324.132(c) (or, with respect to a QCCP located outside the United States, under a substantially identical methodology in effect in the jurisdiction) using a value of 10 business days for purposes of § 324.132(c)(9)(iv); less the value of all collateral held by the QCCP posted by the clearing member or a client of the clearing member in connection with a derivative contract for which the clearing member has provided a guarantee to the QCCP and the amount of the prefunded default fund contribution of the clearing member to the QCCP.

(iii) With respect to any repo-style transactions between the QCCP and a clearing member that are cleared transactions, EAD is equal to:

$$EAD_I = \max\{EBRM_I - IM_i - DF_I; 0\}$$

Where:

$EBRM_i$ is the exposure amount of the QCCP to each clearing member for all repo-style transactions between the QCCP and the clearing member, as determined under § 324.132(b)(2) and without recognition of the initial margin collateral posted by the clearing member to the QCCP with respect to the repo-style transactions or the prefunded default fund contribution of the clearing member institution to the QCCP;

IM_i is the initial margin collateral posted by each clearing member to the QCCP with respect to the repo-style transactions; and

DF_i is the prefunded default fund contribution of each clearing member to the QCCP that is not already deducted in paragraph (d)(6)(ii) of this section.

(iv) EAD must be calculated separately for each clearing member's sub-client accounts and sub-house account (*i.e.*, for the clearing member's proprietary activities). If the clearing member's collateral and its client's collateral are held in the same default fund contribution account, then the EAD of that account is the sum of the EAD for the client-related transactions within the account and the EAD of the house-related transactions within the account. For purposes of determining such EADs, the independent collateral of the clearing member and its client must be allocated in proportion to the respective total amount of independent collateral posted by the clearing member to the QCCP.

(v) If any account or sub-account contains both derivative contracts and repo-style transactions, the EAD of that account is the sum of the EAD for the derivative contracts within the account and the EAD of the repo-style transactions within the account. If independent collateral is held for an account containing both derivative contracts and repo-style transactions, then such collateral must be allocated to the derivative contracts and repo-style transactions in proportion to the respective product specific exposure amounts, calculated, excluding the effects of collateral, according to § 324.132(b) for repo-style transactions and to § 324.132(c)(5) for derivative contracts.

(vi) Notwithstanding any other provision of paragraph (d) of this section, with the prior approval of the FDIC, a FDIC-supervised institution may determine the risk-weighted asset amount for a default fund contribution to a QCCP according to § 324.35(d)(3)(ii).

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§ 324.134 Guarantees and credit derivatives: PD substitution and LGD adjustment approaches.

(a) *Scope*. (1) This section applies to wholesale exposures for which:

(i) Credit risk is fully covered by an eligible guarantee or eligible credit derivative; or

(ii) Credit risk is covered on a pro rata basis (that is, on a basis in which the FDIC-supervised institution and the protection provider share losses proportionately) by an eligible guarantee or eligible credit derivative.

(2) Wholesale exposures on which there is a tranching of credit risk (reflecting at least two different levels of seniority) are securitization exposures subject to §§ 324.141 through 324.145.

(3) An FDIC-supervised institution may elect to recognize the credit risk mitigation benefits of an eligible guarantee or eligible credit derivative covering an exposure described in paragraph (a)(1) of this section by using the PD substitution approach or the LGD adjustment approach in paragraph (c) of this section or, if the transaction qualifies, using the double default treatment in § 324.135. An FDIC-supervised institution's PD and LGD for the hedged exposure may not be lower than the PD and LGD floors described in § 324.131(d)(2) and (d)(3).

(4) If multiple eligible guarantees or eligible credit derivatives cover a single exposure described in paragraph (a)(1) of this section, an FDIC-supervised institution may treat the hedged exposure as multiple separate exposures each covered by a single eligible guarantee or eligible credit derivative and may calculate a separate risk-based capital requirement for each separate exposure as described in paragraph (a)(3) of this section.

(5) If a single eligible guarantee or eligible credit derivative covers multiple hedged wholesale exposures described in paragraph (a)(1) of this section, an FDIC-supervised institution must treat each hedged exposure as covered by a separate eligible guarantee or eligible credit derivative and must calculate a separate risk-based capital requirement for each exposure as described in paragraph (a)(3) of this section.

(6) An FDIC-supervised institution must use the same risk parameters for calculating ECL as it uses for calculating the risk-based capital requirement for the exposure.

(b) *Rules of recognition.* (1) An FDIC-supervised institution may only recognize the credit risk mitigation benefits of eligible guarantees and eligible credit derivatives.

(2) An FDIC-supervised institution may only recognize the credit risk mitigation benefits of an eligible credit derivative to hedge an exposure that is different from the credit derivative's reference exposure used for determining the derivative's cash settlement value, deliverable obligation, or occurrence of a credit event if:

(i) The reference exposure ranks *pari passu* (that is, equally) with or is junior to the hedged exposure; and

(ii) The reference exposure and the hedged exposure are exposures to the same legal entity, and legally enforceable cross-default or cross-acceleration clauses are in place to assure payments under the credit derivative are triggered when the obligor fails to pay under the terms of the hedged exposure.

(c) *Risk parameters for hedged exposures*—(1) *PD substitution approach*—(i) *Full coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is greater than or equal to the EAD of the hedged exposure, an FDIC-supervised institution may recognize the guarantee or credit derivative in determining the FDIC-supervised institution's risk-based capital requirement for the hedged exposure by substituting the PD associated with the rating grade of the protection provider for the PD associated with the rating grade of the obligor in the risk-based capital formula applicable to the guarantee or credit derivative in Table 1 of § 324.131 and using the appropriate LGD as described in paragraph (c)(1)(iii) of this section. If the FDIC-supervised institution determines that full substitution of the protection provider's PD leads to an inappropriate degree of risk mitigation, the FDIC-supervised institution may substitute a higher PD than that of the protection provider.

(ii) *Partial coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and P of the guarantee or credit derivative is less than the EAD of the hedged exposure, the FDIC-supervised institution must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize the credit risk mitigation benefit of the guarantee or credit derivative.

(A) The FDIC-supervised institution must calculate its risk-based capital requirement for the protected exposure

under § 324.131, where PD is the protection provider's PD, LGD is determined under paragraph (c)(1)(iii) of this section, and EAD is P. If the FDIC-supervised institution determines that full substitution leads to an inappropriate degree of risk mitigation, the FDIC-supervised institution may use a higher PD than that of the protection provider.

(B) The FDIC-supervised institution must calculate its risk-based capital requirement for the unprotected exposure under § 324.131, where PD is the obligor's PD, LGD is the hedged exposure's LGD (not adjusted to reflect the guarantee or credit derivative), and EAD is the EAD of the original hedged exposure minus P.

(C) The treatment in paragraph (c)(1)(ii) of this section is applicable when the credit risk of a wholesale exposure is covered on a partial pro rata basis or when an adjustment is made to the effective notional amount of the guarantee or credit derivative under paragraphs (d), (e), or (f) of this section.

(iii) *LGD of hedged exposures.* The LGD of a hedged exposure under the PD substitution approach is equal to:

(A) The lower of the LGD of the hedged exposure (not adjusted to reflect the guarantee or credit derivative) and the LGD of the guarantee or credit derivative, if the guarantee or credit derivative provides the FDIC-supervised institution with the option to receive immediate payout upon triggering the protection; or

(B) The LGD of the guarantee or credit derivative, if the guarantee or credit derivative does not provide the FDIC-supervised institution with the option to receive immediate payout upon triggering the protection.

(2) *LGD adjustment approach*—(i) *Full coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is greater than or equal to the EAD of the hedged exposure, the FDIC-supervised institution's risk-based capital requirement for the hedged exposure is the greater of:

(A) The risk-based capital requirement for the exposure as calculated under § 324.131, with the LGD of the exposure adjusted to reflect the guarantee or credit derivative; or

(B) The risk-based capital requirement for a direct exposure to the protection provider as calculated under § 324.131, using the PD for the protection provider, the LGD for the guarantee or credit derivative, and an EAD equal to the EAD of the hedged exposure.

(ii) *Partial coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is less than the EAD of the hedged exposure, the FDIC-supervised institution must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize the credit risk mitigation benefit of the guarantee or credit derivative.

(A) The FDIC-supervised institution's risk-based capital requirement for the protected exposure would be the greater of:

(*1*) The risk-based capital requirement for the protected exposure as calculated under § 324.131, with the LGD of the exposure adjusted to reflect the guarantee or credit derivative and EAD set equal to P; or

(*2*) The risk-based capital requirement for a direct exposure to the guarantor as calculated under § 324.131, using the PD for the protection provider, the LGD for the guarantee or credit derivative, and an EAD set equal to P.

(B) The FDIC-supervised institution must calculate its risk-based capital requirement for the unprotected exposure under § 324.131, where PD is the obligor's PD, LGD is the hedged exposure's LGD (not adjusted to reflect the guarantee or credit derivative), and EAD is the EAD of the original hedged exposure minus P.

(3) *M of hedged exposures.* For purposes of this paragraph (c), the M of the hedged exposure is the same as the M of the exposure if it were unhedged.

(d) *Maturity mismatch.* (1) An FDIC-supervised institution that recognizes an eligible guarantee or eligible credit derivative in determining its risk-based capital requirement for a hedged

exposure must adjust the effective notional amount of the credit risk mitigant to reflect any maturity mismatch between the hedged exposure and the credit risk mitigant.

(2) A maturity mismatch occurs when the residual maturity of a credit risk mitigant is less than that of the hedged exposure(s).

(3) The residual maturity of a hedged exposure is the longest possible remaining time before the obligor is scheduled to fulfil its obligation on the exposure. If a credit risk mitigant has embedded options that may reduce its term, the FDIC-supervised institution (protection purchaser) must use the shortest possible residual maturity for the credit risk mitigant. If a call is at the discretion of the protection provider, the residual maturity of the credit risk mitigant is at the first call date. If the call is at the discretion of the FDIC-supervised institution (protection purchaser), but the terms of the arrangement at origination of the credit risk mitigant contain a positive incentive for the FDIC-supervised institution to call the transaction before contractual maturity, the remaining time to the first call date is the residual maturity of the credit risk mitigant.[31]

(4) A credit risk mitigant with a maturity mismatch may be recognized only if its original maturity is greater than or equal to one year and its residual maturity is greater than three months.

(5) When a maturity mismatch exists, the FDIC-supervised institution must apply the following adjustment to the effective notional amount of the credit risk mitigant: $P_m = E \times (t-0.25)/(T-0.25)$, where:

(i) P_m equals effective notional amount of the credit risk mitigant, adjusted for maturity mismatch;

(ii) E equals effective notional amount of the credit risk mitigant;

(iii) t equals the lesser of T or the residual maturity of the credit risk mitigant, expressed in years; and

(iv) T equals the lesser of five or the residual maturity of the hedged exposure, expressed in years.

(e) *Credit derivatives without restructuring as a credit event.* If an FDIC-supervised institution recognizes an eligible credit derivative that does not include as a credit event a restructuring of the hedged exposure involving forgiveness or postponement of principal, interest, or fees that results in a credit loss event (that is, a charge-off, specific provision, or other similar debit to the profit and loss account), the FDIC-supervised institution must apply the following adjustment to the effective notional amount of the credit derivative: $P_r = P_m \times 0.60$, where:

(1) P_r equals effective notional amount of the credit risk mitigant, adjusted for lack of restructuring event (and maturity mismatch, if applicable); and

(2) P_m equals effective notional amount of the credit risk mitigant adjusted for maturity mismatch (if applicable).

(f) *Currency mismatch.* (1) If an FDIC-supervised institution recognizes an eligible guarantee or eligible credit derivative that is denominated in a currency different from that in which the hedged exposure is denominated, the FDIC-supervised institution must apply the following formula to the effective notional amount of the guarantee or credit derivative: $P_c = P_r \times (1-H_{FX})$, where:

(i) P_c equals effective notional amount of the credit risk mitigant, adjusted for currency mismatch (and maturity mismatch and lack of restructuring event, if applicable);

(ii) P_r equals effective notional amount of the credit risk mitigant (adjusted for maturity mismatch and lack of restructuring event, if applicable); and

(iii) H_{FX} equals haircut appropriate for the currency mismatch between the credit risk mitigant and the hedged exposure.

(2) An FDIC-supervised institution must set H_{FX} equal to 8 percent unless it qualifies for the use of and uses its

[31] For example, where there is a step-up in cost in conjunction with a call feature or where the effective cost of protection increases over time even if credit quality remains the same or improves, the residual maturity of the credit risk mitigant will be the remaining time to the first call.

own internal estimates of foreign exchange volatility based on a ten-business-day holding period and daily marking-to-market and remargining. An FDIC-supervised institution qualifies for the use of its own internal estimates of foreign exchange volatility if it qualifies for:

(i) The own-estimates haircuts in § 324.132(b)(2)(iii);

(ii) The simple VaR methodology in § 324.132(b)(3); or

(iii) The internal models methodology in § 324.132(d).

(3) An FDIC-supervised institution must adjust H_{FX} calculated in paragraph (f)(2) of this section upward if the FDIC-supervised institution revalues the guarantee or credit derivative less frequently than once every ten business days using the square root of time formula provided in § 324.132(b)(2)(iii)(A)(*2*).

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§ 324.135 Guarantees and credit derivatives: Double default treatment.

(a) *Eligibility and operational criteria for double default treatment.* An FDIC-supervised institution may recognize the credit risk mitigation benefits of a guarantee or credit derivative covering an exposure described in § 324.134(a)(1) by applying the double default treatment in this section if all the following criteria are satisfied:

(1) The hedged exposure is fully covered or covered on a pro rata basis by:

(i) An eligible guarantee issued by an eligible double default guarantor; or

(ii) An eligible credit derivative that meets the requirements of § 324.134(b)(2) and that is issued by an eligible double default guarantor.

(2) The guarantee or credit derivative is:

(i) An uncollateralized guarantee or uncollateralized credit derivative (for example, a credit default swap) that provides protection with respect to a single reference obligor; or

(ii) An nth-to-default credit derivative (subject to the requirements of § 324.142(m)).

(3) The hedged exposure is a wholesale exposure (other than a sovereign exposure).

(4) The obligor of the hedged exposure is not:

(i) An eligible double default guarantor or an affiliate of an eligible double default guarantor; or

(ii) An affiliate of the guarantor.

(5) The FDIC-supervised institution does not recognize any credit risk mitigation benefits of the guarantee or credit derivative for the hedged exposure other than through application of the double default treatment as provided in this section.

(6) The FDIC-supervised institution has implemented a process (which has received the prior, written approval of the FDIC) to detect excessive correlation between the creditworthiness of the obligor of the hedged exposure and the protection provider. If excessive correlation is present, the FDIC-supervised institution may not use the double default treatment for the hedged exposure.

(b) *Full coverage.* If a transaction meets the criteria in paragraph (a) of this section and the protection amount (P) of the guarantee or credit derivative is at least equal to the EAD of the hedged exposure, the FDIC-supervised institution may determine its risk-weighted asset amount for the hedged exposure under paragraph (e) of this section.

(c) *Partial coverage.* If a transaction meets the criteria in paragraph (a) of this section and the protection amount (P) of the guarantee or credit derivative is less than the EAD of the hedged exposure, the FDIC-supervised institution must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize double default treatment on the protected portion of the exposure:

(1) For the protected exposure, the FDIC-supervised institution must set EAD equal to P and calculate its risk-weighted asset amount as provided in paragraph (e) of this section; and

(2) For the unprotected exposure, the FDIC-supervised institution must set EAD equal to the EAD of the original exposure minus P and then calculate its risk-weighted asset amount as provided in § 324.131.

(d) *Mismatches.* For any hedged exposure to which an FDIC-supervised institution applies double default treatment under this part, the FDIC-supervised institution must make applicable adjustments to the protection amount as required in §§ 324.134(d), (e), and (f).

(e) *The double default dollar risk-based capital requirement.* The dollar risk-based capital requirement for a hedged exposure to which an FDIC-supervised institution has applied double default treatment is K_{DD} multiplied by the EAD of the exposure. K_{DD} is calculated according to the following formula: $K_{DD} = K_o \times (0.15 + 160 \times PD_g)$,

where:

(1)

$$K_O = LGD_g \times \left[N\left(\frac{N^{-1}(PD_o) + N^{-1}(0.999)\sqrt{\rho_{os}}}{\sqrt{1-\rho_{os}}} \right) - PD_o \right] \times \left[\frac{1+(M-2.5)\times b}{1-1.5\times b} \right]$$

(2) PD_g equals PD of the protection provider.

(3) PD_o equals PD of the obligor of the hedged exposure.

(4) LGD_g equals:

(i) The lower of the LGD of the hedged exposure (not adjusted to reflect the guarantee or credit derivative) and the LGD of the guarantee or credit derivative, if the guarantee or credit derivative provides the FDIC-supervised institution with the option to receive immediate payout on triggering the protection; or

(ii) The LGD of the guarantee or credit derivative, if the guarantee or credit derivative does not provide the FDIC-supervised institution with the option to receive immediate payout on triggering the protection; and

(5) ρ_{os} (asset value correlation of the obligor) is calculated according to the appropriate formula for (R) provided in Table 1 in § 324.131, with PD equal to PD_o.

(6) b (maturity adjustment coefficient) is calculated according to the formula for b provided in Table 1 in § 324.131, with PD equal to the lesser of PD_o and PD_g; and

(7) M (maturity) is the effective maturity of the guarantee or credit derivative, which may not be less than one year or greater than five years.

§ 324.136 Unsettled transactions.

(a) *Definitions.* For purposes of this section:

(1) Delivery-versus-payment (DvP) transaction means a securities or commodities transaction in which the buyer is obligated to make payment only if the seller has made delivery of the securities or commodities and the seller is obligated to deliver the securities or commodities only if the buyer has made payment.

(2) Payment-versus-payment (PvP) transaction means a foreign exchange transaction in which each counterparty is obligated to make a final transfer of one or more currencies only if the other counterparty has made a final transfer of one or more currencies.

(3) A transaction has a normal settlement period if the contractual settlement period for the transaction is equal to or less than the market standard for the instrument underlying the transaction and equal to or less than five business days.

(4) The positive current exposure of an FDIC-supervised institution for a transaction is the difference between the transaction value at the agreed settlement price and the current market price of the transaction, if the difference results in a credit exposure of the FDIC-supervised institution to the counterparty.

(b) *Scope.* This section applies to all transactions involving securities, foreign exchange instruments, and commodities that have a risk of delayed settlement or delivery. This section does not apply to:

(1) Cleared transactions that are subject to daily marking-to-market and daily receipt and payment of variation margin;

(2) Repo-style transactions, including unsettled repo-style transactions (which are addressed in §§ 324.131 and 324.132);

(3) One-way cash payments on OTC derivative contracts (which are addressed in §§ 324.131 and 324.132); or

(4) Transactions with a contractual settlement period that is longer than

the normal settlement period (which are treated as OTC derivative contracts and addressed in §§ 324.131 and 324.132).

(c) *System-wide failures.* In the case of a system-wide failure of a settlement or clearing system, or a central counterparty, the FDIC may waive risk-based capital requirements for unsettled and failed transactions until the situation is rectified.

(d) *Delivery-versus-payment (DvP) and payment-versus-payment (PvP) transactions.* An FDIC-supervised institution must hold risk-based capital against any DvP or PvP transaction with a normal settlement period if the FDIC-supervised institution's counterparty has not made delivery or payment within five business days after the settlement date. The FDIC-supervised institution must determine its risk-weighted asset amount for such a transaction by multiplying the positive current exposure of the transaction for the FDIC-supervised institution by the appropriate risk weight in Table 1 to § 324.136.

TABLE 1 TO § 324.136—RISK WEIGHTS FOR UNSETTLED DVP AND PVP TRANSACTIONS

Number of business days after contractual settlement date	Risk weight to be applied to positive current exposure (in percent)
From 5 to 15	100
From 16 to 30	625
From 31 to 45	937.5
46 or more	1,250

(e) *Non-DvP/non-PvP (non-delivery-versus-payment/non-payment-versus-payment) transactions.* (1) An FDIC-supervised institution must hold risk-based capital against any non-DvP/non-PvP transaction with a normal settlement period if the FDIC-supervised institution has delivered cash, securities, commodities, or currencies to its counterparty but has not received its corresponding deliverables by the end of the same business day. The FDIC-supervised institution must continue to hold risk-based capital against the transaction until the FDIC-supervised institution has received its corresponding deliverables.

(2) From the business day after the FDIC-supervised institution has made its delivery until five business days after the counterparty delivery is due, the FDIC-supervised institution must calculate its risk-based capital requirement for the transaction by treating the current fair value of the deliverables owed to the FDIC-supervised institution as a wholesale exposure.

(i) An FDIC-supervised institution may use a 45 percent LGD for the transaction rather than estimating LGD for the transaction provided the FDIC-supervised institution uses the 45 percent LGD for all transactions described in paragraphs (e)(1) and (e)(2) of this section.

(ii) An FDIC-supervised institution may use a 100 percent risk weight for the transaction provided the FDIC-supervised institution uses this risk weight for all transactions described in paragraphs (e)(1) and (e)(2) of this section.

(3) If the FDIC-supervised institution has not received its deliverables by the fifth business day after the counterparty delivery was due, the FDIC-supervised institution must apply a 1,250 percent risk weight to the current fair value of the deliverables owed to the FDIC-supervised institution.

(f) *Total risk-weighted assets for unsettled transactions.* Total risk-weighted assets for unsettled transactions is the sum of the risk-weighted asset amounts of all DvP, PvP, and non-DvP/non-PvP transactions.

[78 FR 55471, Sept. 10, 2013, as amended at 80 FR 41425, July 15, 2015]

§§ 324.137–324.140 [Reserved]

RISK-WEIGHTED ASSETS FOR SECURITIZATION EXPOSURES

§ 324.141 Operational criteria for recognizing the transfer of risk.

(a) *Operational criteria for traditional securitizations.* An FDIC-supervised institution that transfers exposures it has originated or purchased to a securitization SPE or other third party in connection with a traditional securitization may exclude the exposures from the calculation of its risk-weighted assets only if each of the conditions in this paragraph (a) is satisfied. An FDIC-supervised institution that meets these conditions must hold

risk-based capital against any securitization exposures it retains in connection with the securitization. An FDIC-supervised institution that fails to meet these conditions must hold risk-based capital against the transferred exposures as if they had not been securitized and must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from the transaction. The conditions are:

(1) The exposures are not reported on the FDIC-supervised institution's consolidated balance sheet under GAAP;

(2) The FDIC-supervised institution has transferred to one or more third parties credit risk associated with the underlying exposures;

(3) Any clean-up calls relating to the securitization are eligible clean-up calls; and

(4) The securitization does not:

(i) Include one or more underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit; and

(ii) Contain an early amortization provision.

(b) *Operational criteria for synthetic securitizations.* For synthetic securitizations, an FDIC-supervised institution may recognize for risk-based capital purposes under this subpart the use of a credit risk mitigant to hedge underlying exposures only if each of the conditions in this paragraph (b) is satisfied. An FDIC-supervised institution that meets these conditions must hold risk-based capital against any credit risk of the exposures it retains in connection with the synthetic securitization. An FDIC-supervised institution that fails to meet these conditions or chooses not to recognize the credit risk mitigant for purposes of this section must hold risk-based capital under this subpart against the underlying exposures as if they had not been synthetically securitized. The conditions are:

(1) The credit risk mitigant is:

(i) Financial collateral; or

(ii) A guarantee that meets all of the requirements of an eligible guarantee in § 324.2 except for paragraph (3) of the definition; or

(iii) A credit derivative that meets all of the requirements of an eligible credit derivative except for paragraph (3) of the definition of eligible guarantee in § 324.2.

(2) The FDIC-supervised institution transfers credit risk associated with the underlying exposures to third parties, and the terms and conditions in the credit risk mitigants employed do not include provisions that:

(i) Allow for the termination of the credit protection due to deterioration in the credit quality of the underlying exposures;

(ii) Require the FDIC-supervised institution to alter or replace the underlying exposures to improve the credit quality of the underlying exposures;

(iii) Increase the FDIC-supervised institution's cost of credit protection in response to deterioration in the credit quality of the underlying exposures;

(iv) Increase the yield payable to parties other than the FDIC-supervised institution in response to a deterioration in the credit quality of the underlying exposures; or

(v) Provide for increases in a retained first loss position or credit enhancement provided by the FDIC-supervised institution after the inception of the securitization;

(3) The FDIC-supervised institution obtains a well-reasoned opinion from legal counsel that confirms the enforceability of the credit risk mitigant in all relevant jurisdictions; and

(4) Any clean-up calls relating to the securitization are eligible clean-up calls.

(c) *Due diligence requirements for securitization exposures.* (1) Except for exposures that are deducted from common equity tier 1 capital and exposures subject to § 324.142(k), if an FDIC-supervised institution is unable to demonstrate to the satisfaction of the FDIC a comprehensive understanding of the features of a securitization exposure that would materially affect the performance of the exposure, the FDIC-supervised institution must assign a 1,250 percent risk weight to the securitization exposure. The FDIC-supervised institution's analysis must be commensurate with the complexity of the securitization exposure and the materiality of the position in relation to regulatory capital according to this part.

(2) An FDIC-supervised institution must demonstrate its comprehensive understanding of a securitization exposure under paragraph (c)(1) of this section, for each securitization exposure by:

(i) Conducting an analysis of the risk characteristics of a securitization exposure prior to acquiring the exposure and document such analysis within three business days after acquiring the exposure, considering:

(A) Structural features of the securitization that would materially impact the performance of the exposure, for example, the contractual cash flow waterfall, waterfall-related triggers, credit enhancements, liquidity enhancements, fair value triggers, the performance of organizations that service the position, and deal-specific definitions of default;

(B) Relevant information regarding the performance of the underlying credit exposure(s), for example, the percentage of loans 30, 60, and 90 days past due; default rates; prepayment rates; loans in foreclosure; property types; occupancy; average credit score or other measures of creditworthiness; average loan-to-value ratio; and industry and geographic diversification data on the underlying exposure(s);

(C) Relevant market data of the securitization, for example, bid-ask spreads, most recent sales price and historical price volatility, trading volume, implied market rating, and size, depth and concentration level of the market for the securitization; and

(D) For resecuritization exposures, performance information on the underlying securitization exposures, for example, the issuer name and credit quality, and the characteristics and performance of the exposures underlying the securitization exposures; and

(ii) On an on-going basis (no less frequently than quarterly), evaluating, reviewing, and updating as appropriate the analysis required under this section for each securitization exposure.

§ 324.142 Risk-weighted assets for securitization exposures.

(a) *Hierarchy of approaches.* Except as provided elsewhere in this section and in § 324.141:

(1) An FDIC-supervised institution must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from a securitization and must apply a 1,250 percent risk weight to the portion of any CEIO that does not constitute after tax gain-on-sale;

(2) If a securitization exposure does not require deduction or a 1,250 percent risk weight under paragraph (a)(1) of this section, the FDIC-supervised institution must apply the supervisory formula approach in § 324.143 to the exposure if the FDIC-supervised institution and the exposure qualify for the supervisory formula approach according to § 324.143(a);

(3) If a securitization exposure does not require deduction or a 1,250 percent risk weight under paragraph (a)(1) of this section and does not qualify for the supervisory formula approach, the FDIC-supervised institution may apply the simplified supervisory formula approach under § 324.144;

(4) If a securitization exposure does not require deduction or a 1,250 percent risk weight under paragraph (a)(1) of this section, does not qualify for the supervisory formula approach in § 324.143, and the FDIC-supervised institution does not apply the simplified supervisory formula approach in § 324.144, the FDIC-supervised institution must apply a 1,250 percent risk weight to the exposure; and

(5) If a securitization exposure is a derivative contract (other than protection provided by an FDIC-supervised institution in the form of a credit derivative) that has a first priority claim on the cash flows from the underlying exposures (notwithstanding amounts due under interest rate or currency derivative contracts, fees due, or other similar payments), an FDIC-supervised institution may choose to set the risk-weighted asset amount of the exposure equal to the amount of the exposure as determined in paragraph (e) of this section rather than apply the hierarchy of approaches described in paragraphs (a)(1) through (4) of this section.

(b) *Total risk-weighted assets for securitization exposures.* An FDIC-supervised institution's total risk-weighted assets for securitization exposures is equal to the sum of its risk-weighted

assets calculated using §§ 324.141 through 146.

(c) *Deductions.* An FDIC-supervised institution may calculate any deduction from common equity tier 1 capital for a securitization exposure net of any DTLs associated with the securitization exposure.

(d) *Maximum risk-based capital requirement.* Except as provided in § 324.141(c), unless one or more underlying exposures does not meet the definition of a wholesale, retail, securitization, or equity exposure, the total risk-based capital requirement for all securitization exposures held by a single FDIC-supervised institution associated with a single securitization (excluding any risk-based capital requirements that relate to the FDIC-supervised institution's gain-on-sale or CEIOs associated with the securitization) may not exceed the sum of:

(1) The FDIC-supervised institution's total risk-based capital requirement for the underlying exposures calculated under this subpart as if the FDIC-supervised institution directly held the underlying exposures; and

(2) The total ECL of the underlying exposures calculated under this subpart.

(e) *Exposure amount of a securitization exposure.* (1) The exposure amount of an on-balance sheet securitization exposure that is not a repo-style transaction, eligible margin loan, OTC derivative contract, or cleared transaction is the FDIC-supervised institution's carrying value.

(2) Except as provided in paragraph (m) of this section, the exposure amount of an off-balance sheet securitization exposure that is not an OTC derivative contract (other than a credit derivative), repo-style transaction, eligible margin loan, or cleared transaction (other than a credit derivative) is the notional amount of the exposure. For an off-balance-sheet securitization exposure to an ABCP program, such as an eligible ABCP liquidity facility, the notional amount may be reduced to the maximum potential amount that the FDIC-supervised institution could be required to fund given the ABCP program's current underlying assets (calculated without regard to the current credit quality of those assets).

(3) The exposure amount of a securitization exposure that is a repo-style transaction, eligible margin loan, or OTC derivative contract (other than a credit derivative) or cleared transaction (other than a credit derivative) is the ≤EAD of the exposure as calculated in § 324.132 or § 324.133.

(f) *Overlapping exposures.* If an FDIC-supervised institution has multiple securitization exposures that provide duplicative coverage of the underlying exposures of a securitization (such as when an FDIC-supervised institution provides a program-wide credit enhancement and multiple pool-specific liquidity facilities to an ABCP program), the FDIC-supervised institution is not required to hold duplicative risk-based capital against the overlapping position. Instead, the FDIC-supervised institution may assign to the overlapping securitization exposure the applicable risk-based capital treatment under this subpart that results in the highest risk-based capital requirement.

(g) *Securitizations of non-IRB exposures.* Except as provided in § 324.141(c), if an FDIC-supervised institution has a securitization exposure where any underlying exposure is not a wholesale exposure, retail exposure, securitization exposure, or equity exposure, the FDIC-supervised institution:

(1) Must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from the securitization and apply a 1,250 percent risk weight to the portion of any CEIO that does not constitute gain-on-sale, if the FDIC-supervised institution is an originating FDIC-supervised institution;

(2) May apply the simplified supervisory formula approach in § 324.144 to the exposure, if the securitization exposure does not require deduction or a 1,250 percent risk weight under paragraph (g)(1) of this section;

(3) Must assign a 1,250 percent risk weight to the exposure if the securitization exposure does not require deduction or a 1,250 percent risk weight under paragraph (g)(1) of this section, does not qualify for the supervisory formula approach in § 324.143, and the FDIC-supervised institution

does not apply the simplified supervisory formula approach in § 324.144 to the exposure.

(h) *Implicit support*. If an FDIC-supervised institution provides support to a securitization in excess of the FDIC-supervised institution's contractual obligation to provide credit support to the securitization (implicit support):

(1) The FDIC-supervised institution must calculate a risk-weighted asset amount for underlying exposures associated with the securitization as if the exposures had not been securitized and must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from the securitization; and

(2) The FDIC-supervised institution must disclose publicly:

(i) That it has provided implicit support to the securitization; and

(ii) The regulatory capital impact to the FDIC-supervised institution of providing such implicit support.

(i) *Undrawn portion of a servicer cash advance facility*. (1) Notwithstanding any other provision of this subpart, an FDIC-supervised institution that is a servicer under an eligible servicer cash advance facility is not required to hold risk-based capital against potential future cash advance payments that it may be required to provide under the contract governing the facility.

(2) For an FDIC-supervised institution that acts as a servicer, the exposure amount for a servicer cash advance facility that is not an eligible servicer cash advance facility is equal to the amount of all potential future cash advance payments that the FDIC-supervised institution may be contractually required to provide during the subsequent 12 month period under the contract governing the facility.

(j) *Interest-only mortgage-backed securities*. Regardless of any other provisions in this part, the risk weight for a non-credit-enhancing interest-only mortgage-backed security may not be less than 100 percent.

(k) *Small-business loans and leases on personal property transferred with recourse*. (1) Notwithstanding any other provisions of this subpart E, an FDIC-supervised institution that has transferred small-business loans and leases on personal property (small-business obligations) with recourse must include in risk-weighted assets only the contractual amount of retained recourse if all the following conditions are met:

(i) The transaction is a sale under GAAP.

(ii) The FDIC-supervised institution establishes and maintains, pursuant to GAAP, a non-capital reserve sufficient to meet the FDIC-supervised institution's reasonably estimated liability under the recourse arrangement.

(iii) The loans and leases are to businesses that meet the criteria for a small-business concern established by the Small Business Administration under section 3(a) of the Small Business Act (15 U.S.C. 632 *et seq.*); and

(iv) The FDIC-supervised institution is well-capitalized, as defined in subpart H of this part. For purposes of determining whether an FDIC-supervised institution is well capitalized for purposes of this paragraph (k), the FDIC-supervised institution's capital ratios must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (k)(1) of this section.

(2) The total outstanding amount of recourse retained by an FDIC-supervised institution on transfers of small-business obligations subject to paragraph (k)(1) of this section cannot exceed 15 percent of the FDIC-supervised institution's total capital.

(3) If an FDIC-supervised institution ceases to be well capitalized or exceeds the 15 percent capital limitation in paragraph (k)(2) of this section, the preferential capital treatment specified in paragraph (k)(1) of this section will continue to apply to any transfers of small-business obligations with recourse that occurred during the time that the FDIC-supervised institution was well capitalized and did not exceed the capital limit.

(4) The risk-based capital ratios of an FDIC-supervised institution must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (k)(1) of this section.

(l) *N^{th}-to-default credit derivatives*—(1) *Protection provider*. An FDIC-supervised institution must determine a risk

weight using the supervisory formula approach (SFA) pursuant to § 324.143 or the simplified supervisory formula approach (SSFA) pursuant to § 324.144 for an nth-to-default credit derivative in accordance with this paragraph (l). In the case of credit protection sold, an FDIC-supervised institution must determine its exposure in the nth-to-default credit derivative as the largest notional amount of all the underlying exposures.

(2) For purposes of determining the risk weight for an nth-to-default credit derivative using the SFA or the SSFA, the FDIC-supervised institution must calculate the attachment point and detachment point of its exposure as follows:

(i) The attachment point (parameter A) is the ratio of the sum of the notional amounts of all underlying exposures that are subordinated to the FDIC-supervised institution's exposure to the total notional amount of all underlying exposures. For purposes of the SSFA, parameter A is expressed as a decimal value between zero and one. For purposes of using the SFA to calculate the risk weight for its exposure in an nth-to-default credit derivative, parameter A must be set equal to the credit enhancement level (L) input to the SFA formula. In the case of a first-to-default credit derivative, there are no underlying exposures that are subordinated to the FDIC-supervised institution's exposure. In the case of a second-or-subsequent-to-default credit derivative, the smallest (n-1) risk-weighted asset amounts of the underlying exposure(s) are subordinated to the FDIC-supervised institution's exposure.

(ii) The detachment point (parameter D) equals the sum of parameter A plus the ratio of the notional amount of the FDIC-supervised institution's exposure in the nth-to-default credit derivative to the total notional amount of all underlying exposures. For purposes of the SSFA, parameter W is expressed as a decimal value between zero and one. For purposes of the SFA, parameter D must be set to equal L plus the thickness of tranche T input to the SFA formula.

(3) An FDIC-supervised institution that does not use the SFA or the SSFA to determine a risk weight for its exposure in an nth-to-default credit derivative must assign a risk weight of 1,250 percent to the exposure.

(4) *Protection purchaser*—(i) *First-to-default credit derivatives.* An FDIC-supervised institution that obtains credit protection on a group of underlying exposures through a first-to-default credit derivative that meets the rules of recognition of § 324.134(b) must determine its risk-based capital requirement under this subpart for the underlying exposures as if the FDIC-supervised institution synthetically securitized the underlying exposure with the lowest risk-based capital requirement and had obtained no credit risk mitigant on the other underlying exposures. An FDIC-supervised institution must calculate a risk-based capital requirement for counterparty credit risk according to § 324.132 for a first-to-default credit derivative that does not meet the rules of recognition of § 324.134(b).

(ii) *Second-or-subsequent-to-default credit derivatives.* (A) An FDIC-supervised institution that obtains credit protection on a group of underlying exposures through a nth-to-default credit derivative that meets the rules of recognition of § 324.134(b) (other than a first-to-default credit derivative) may recognize the credit risk mitigation benefits of the derivative only if:

(*1*) The FDIC-supervised institution also has obtained credit protection on the same underlying exposures in the form of first-through-(n-1)-to-default credit derivatives; or

(*2*) If n-1 of the underlying exposures have already defaulted.

(B) If an FDIC-supervised institution satisfies the requirements of paragraph (l)(3)(ii)(A) of this section, the FDIC-supervised institution must determine its risk-based capital requirement for the underlying exposures as if the bank had only synthetically securitized the underlying exposure with the nth smallest risk-based capital requirement and had obtained no credit risk mitigant on the other underlying exposures.

(C) An FDIC-supervised institution must calculate a risk-based capital requirement for counterparty credit risk according to § 324.132 for a nth-to-default

credit derivative that does not meet the rules of recognition of § 324.134(b).

(m) *Guarantees and credit derivatives other than n^{th}-to-default credit derivatives*—(1) *Protection provider*. For a guarantee or credit derivative (other than an nth-to-default credit derivative) provided by an FDIC-supervised institution that covers the full amount or a pro rata share of a securitization exposure's principal and interest, the FDIC-supervised institution must risk weight the guarantee or credit derivative as if it holds the portion of the reference exposure covered by the guarantee or credit derivative.

(2) *Protection purchaser*. (i) An FDIC-supervised institution that purchases an OTC credit derivative (other than an nth-to-default credit derivative) that is recognized under § 324.145 as a credit risk mitigant (including via recognized collateral) is not required to compute a separate counterparty credit risk capital requirement under § 324.131 in accordance with § 324.132(c)(3).

(ii) If an FDIC-supervised institution cannot, or chooses not to, recognize a purchased credit derivative as a credit risk mitigant under § 324.145, the FDIC-supervised institution must determine the exposure amount of the credit derivative under § 324.132(c).

(A) If the FDIC-supervised institution purchases credit protection from a counterparty that is not a securitization SPE, the FDIC-supervised institution must determine the risk weight for the exposure according to § 324.131.

(B) If the FDIC-supervised institution purchases the credit protection from a counterparty that is a securitization SPE, the FDIC-supervised institution must determine the risk weight for the exposure according to this section, including paragraph (a)(5) of this section for a credit derivative that has a first priority claim on the cash flows from the underlying exposures of the securitization SPE (notwithstanding amounts due under interest rate or currency derivative contracts, fees due, or other similar payments).

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20761, Apr. 14, 2014]

§ 324.143 Supervisory formula approach (SFA).

(a) *Eligibility requirements*. An FDIC-supervised institution must use the SFA to determine its risk-weighted asset amount for a securitization exposure if the FDIC-supervised institution can calculate on an ongoing basis each of the SFA parameters in paragraph (e) of this section.

(b) *Mechanics*. The risk-weighted asset amount for a securitization exposure equals its SFA risk-based capital requirement as calculated under paragraph (c) and (d) of this section, multiplied by 12.5.

(c) *The SFA risk-based capital requirement*. (1) If K_{IRB} is greater than or equal to L + T, an exposure's SFA risk-based capital requirement equals the exposure amount.

(2) If K_{IRB} is less than or equal to L, an exposure's SFA risk-based capital requirement is UE multiplied by TP multiplied by the greater of:

(i) $F \cdot T$ (where F is 0.016 for all securitization exposures); or

(ii) $S[L + T] - S[L]$.

(3) If K_{IRB} is greater than L and less than L + T, the FDIC-supervised institution must apply a 1,250 percent risk weight to an amount equal to $UE \cdot TP \cdot (K_{IRB} - L)$, and the exposure's SFA risk-based capital requirement is UE multiplied by TP multiplied by the greater of:

(i) $F \cdot (T - (K_{IRB} - L))$ (where F is 0.016 for all other securitization exposures); or

(ii) $S[L + T] - S[K_{IRB}]$.

(d) *The supervisory formula:*

(1) $$S[Y] = \begin{cases} Y & \text{when } Y \le K_{IRB} \\ K_{IRB} + K[Y] - K[K_{IRB}] + \frac{d \cdot K_{IRB}}{20}\left(1 - e^{\frac{20 \cdot (K_{IRB} - Y)}{K_{IRB}}}\right) & \text{when } Y > K_{IRB} \end{cases}$$

(2) $$K[Y] = (1-h) \cdot \left[\left(1 - \beta[Y; a, b]\right) \cdot Y + \beta[Y; a+1, b] \cdot c\right]$$

(3) $$h = \left(1 - \frac{K_{IRB}}{EWALGD}\right)^N$$

(4) $$a = g \cdot c$$

(5) $$b = g \cdot (1 - c)$$

(6) $$c = \frac{K_{IRB}}{1 - h}$$

(7) $$g = \frac{(1 - c) \cdot c}{f} - 1$$

(8) $$f = \frac{v + K_{IRB}^{\ 2}}{1 - h} - c^2 + \frac{(1 - K_{IRB}) \cdot K_{IRB} - v}{(1 - h) \cdot 1000}$$

(9) $$v = K_{IRB} \cdot \frac{(EWALGD - K_{IRB}) + .25 \cdot (1 - EWALGD)}{N}$$

(10) $$d = 1 - (1 - h) \cdot (1 - \beta[K_{IRB}; a, b]).$$

(11) In these expressions, β [Y; a, b] refers to the cumulative beta distribution with parameters a and b evaluated at Y. In the case where N = 1 and EWALGD = 100 percent, S[Y] in formula (1) must be calculated with K[Y] set equal to the product of K_{IRB} and Y, and d set equal to 1 - K_{IRB}.

(e) *SFA parameters*. For purposes of the calculations in paragraphs (c) and (d) of this section:

(1) *Amount of the underlying exposures (UE)*. UE is the EAD of any underlying exposures that are wholesale and retail exposures (including the amount of any funded spread accounts, cash collateral accounts, and other similar funded credit enhancements) plus the amount of any underlying exposures that are securitization exposures (as defined in § 324.142(e)) plus the adjusted carrying value of any underlying exposures that are equity exposures (as defined in § 324.151(b)).

(2) *Tranche percentage (TP)*. TP is the ratio of the amount of the FDIC-supervised institution's securitization exposure to the amount of the tranche that contains the securitization exposure.

(3) *Capital requirement on underlying exposures (K_{IRB})*. (i) K_{IRB} is the ratio of:

(A) The sum of the risk-based capital requirements for the underlying exposures plus the expected credit losses of the underlying exposures (as determined under this subpart E as if the

underlying exposures were directly held by the FDIC-supervised institution); to

(B) UE.

(ii) The calculation of K_{IRB} must reflect the effects of any credit risk mitigant applied to the underlying exposures (either to an individual underlying exposure, to a group of underlying exposures, or to all of the underlying exposures).

(iii) All assets related to the securitization are treated as underlying exposures, including assets in a reserve account (such as a cash collateral account).

(4) *Credit enhancement level (L).* (i) L is the ratio of:

(A) The amount of all securitization exposures subordinated to the tranche that contains the FDIC-supervised institution's securitization exposure; to

(B) UE.

(ii) An FDIC-supervised institution must determine L before considering the effects of any tranche-specific credit enhancements.

(iii) Any gain-on-sale or CEIO associated with the securitization may not be included in L.

(iv) Any reserve account funded by accumulated cash flows from the underlying exposures that is subordinated to the tranche that contains the FDIC-supervised institution's securitization exposure may be included in the numerator and denominator of L to the extent cash has accumulated in the account. Unfunded reserve accounts (that is, reserve accounts that are to be funded from future cash flows from the underlying exposures) may not be included in the calculation of L.

(v) In some cases, the purchase price of receivables will reflect a discount that provides credit enhancement (for example, first loss protection) for all or certain tranches of the securitization. When this arises, L should be calculated inclusive of this discount if the discount provides credit enhancement for the securitization exposure.

(5) *Thickness of tranche (T).* T is the ratio of:

(i) The amount of the tranche that contains the FDIC-supervised institution's securitization exposure; to

(ii) UE.

(6) *Effective number of exposures (N).* (i) Unless the FDIC-supervised institution elects to use the formula provided in paragraph (f) of this section,

$$N = \frac{(\sum_i EAD_i)^2}{\sum_i EAD_i^2}$$

where EAD_i represents the EAD associated with the ith instrument in the underlying exposures.

(ii) Multiple exposures to one obligor must be treated as a single underlying exposure.

(iii) In the case of a resecuritization, the FDIC-supervised institution must treat each underlying exposure as a single underlying exposure and must not look through to the originally securitized underlying exposures.

(7) *Exposure-weighted average loss given default (EWALGD).* EWALGD is calculated as:

$$EWALGD = \frac{\sum_i LGD_i \cdot EAD_i}{\sum_i EAD_i}$$

where LGD_i represents the average LGD associated with all exposures to the ith obligor. In the case of a resecuritization, an LGD of 100 percent must be assumed for the underlying exposures that are themselves securitization exposures.

(f) *Simplified method for computing N and EWALGD.* (1) If all underlying exposures of a securitization are retail exposures, an FDIC-supervised institution may apply the SFA using the following simplifications:

(i) h = 0; and

(ii) v = 0.

(2) Under the conditions in §§ 324.143(f)(3) and (f)(4), an FDIC-supervised institution may employ a simplified method for calculating N and EWALGD.

(3) If C_1 is no more than 0.03, an FDIC-supervised institution may set EWALGD = 0.50 if none of the underlying exposures is a securitization exposure, or may set EWALGD = 1 if one or more of the underlying exposures is a securitization exposure, and may set N equal to the following amount:

$$N = \frac{1}{C_1 C_m + \left(\frac{C_m - C_1}{m-1}\right)\max(1 - mC_1, 0)}$$

where:

(i) C_m is the ratio of the sum of the amounts of the 'm' largest underlying exposures to UE; and

(ii) The level of m is to be selected by the FDIC-supervised institution.

(4) Alternatively, if only C_1 is available and C_1 is no more than 0.03, the FDIC-supervised institution may set EWALGD = 0.50 if none of the underlying exposures is a securitization exposure, or may set EWALGD = 1 if one or more of the underlying exposures is a securitization exposure and may set $N = 1/C_1$.

§ 324.144 Simplified supervisory formula approach (SSFA).

(a) *General requirements for the SSFA.* To use the SSFA to determine the risk weight for a securitization exposure, an FDIC-supervised institution must have data that enables it to assign accurately the parameters described in paragraph (b) of this section. Data used to assign the parameters described in paragraph (b) of this section must be the most currently available data; if the contracts governing the underlying exposures of the securitization require payments on a monthly or quarterly basis, the data used to assign the parameters described in paragraph (b) of this section must be no more than 91 calendar days old. An FDIC-supervised institution that does not have the appropriate data to assign the parameters described in paragraph (b) of this section must assign a risk weight of 1,250 percent to the exposure.

(b) *SSFA parameters.* To calculate the risk weight for a securitization exposure using the SSFA, an FDIC-supervised institution must have accurate information on the following five inputs to the SSFA calculation:

(1) K_G is the weighted-average (with unpaid principal used as the weight for each exposure) total capital requirement of the underlying exposures calculated using subpart D of this part. K_G is expressed as a decimal value between zero and one (that is, an average risk weight of 100 percent represents a value of K_G equal to 0.08).

(2) Parameter W is expressed as a decimal value between zero and one. Parameter W is the ratio of the sum of the dollar amounts of any underlying exposures of the securitization that meet any of the criteria as set forth in paragraphs (b)(2)(i) through (vi) of this section to the balance, measured in dollars, of underlying exposures:

(i) Ninety days or more past due;

(ii) Subject to a bankruptcy or insolvency proceeding;

(iii) In the process of foreclosure;

(iv) Held as real estate owned;

(v) Has contractually deferred payments for 90 days or more, other than

principal or interest payments deferred on:

(A) Federally-guaranteed student loans, in accordance with the terms of those guarantee programs; or

(B) Consumer loans, including non-federally-guaranteed student loans, provided that such payments are deferred pursuant to provisions included in the contract at the time funds are disbursed that provide for period(s) of deferral that are not initiated based on changes in the creditworthiness of the borrower; or

(vi) Is in default.

(3) Parameter A is the attachment point for the exposure, which represents the threshold at which credit losses will first be allocated to the exposure. Except as provided in § 324.142(l) for n^{th}-to-default credit derivatives, parameter A equals the ratio of the current dollar amount of underlying exposures that are subordinated to the exposure of the FDIC-supervised institution to the current dollar amount of underlying exposures. Any reserve account funded by the accumulated cash flows from the underlying exposures that is subordinated to the FDIC-supervised institution's securitization exposure may be included in the calculation of parameter A to the extent that cash is present in the account. Parameter A is expressed as a decimal value between zero and one.

(4) Parameter D is the detachment point for the exposure, which represents the threshold at which credit losses of principal allocated to the exposure would result in a total loss of principal. Except as provided in § 324.142(l) for n^{th}-to-default credit derivatives, parameter D equals parameter A plus the ratio of the current dollar amount of the securitization exposures that are *pari passu* with the exposure (that is, have equal seniority with respect to credit risk) to the current dollar amount of the underlying exposures. Parameter D is expressed as a decimal value between zero and one.

(5) A supervisory calibration parameter, p, is equal to 0.5 for securitization exposures that are not resecuritization exposures and equal to 1.5 for resecuritization exposures.

(c) *Mechanics of the SSFA.* K_G and W are used to calculate K_A, the augmented value of K_G, which reflects the observed credit quality of the underlying exposures. K_A is defined in paragraph (d) of this section. The values of parameters A and D, relative to K_A determine the risk weight assigned to a securitization exposure as described in paragraph (d) of this section. The risk weight assigned to a securitization exposure, or portion of a securitization exposure, as appropriate, is the larger of the risk weight determined in accordance with this paragraph (c), paragraph (d) of this section, and a risk weight of 20 percent.

(1) When the detachment point, parameter D, for a securitization exposure is less than or equal to K_A, the exposure must be assigned a risk weight of 1,250 percent;

(2) When the attachment point, parameter A, for a securitization exposure is greater than or equal to K_A, the FDIC-supervised institution must calculate the risk weight in accordance with paragraph (d) of this section;

(3) When A is less than K_A and D is greater than K_A, the risk weight is a weighted-average of 1,250 percent and 1,250 percent times K_{SSFA} calculated in accordance with paragraph (d) of this section. For the purpose of this weighted-average calculation:

(i) The weight assigned to 1,250 percent equals $\frac{K_A - A}{D - A}$; and

(ii) The weight assigned to 1,250 percent times K_{SSFA} equals $\frac{D - K_A}{D - A}$. The risk weight will be set equal to:

$$Risk\ Weight = \left[\left(\frac{K_A - A}{D - A}\right) \cdot 1{,}250\ percent\right] + \left[\left(\frac{D - K_A}{D - A}\right) \cdot 1{,}250\ percent \cdot K_{SSFA}\right]$$

(d) SSFA equation. (1) The FDIC-supervised institution must define the following parameters:

$$K_A = (1 - W) \cdot K_G + (0.5 \cdot W)$$

$$a = -\frac{1}{p \cdot K_A}$$

$$u = D - K_A$$

$$l = \max(A - K_A, 0)$$

$e = 2.71828$, the base of the natural logarithms.

(2) Then the FDIC-supervised institution must calculate K_{SSFA} according to the following equation:

$$K_{SSFA} = \frac{e^{a \cdot u} - e^{a \cdot l}}{a(u - l)}$$

(3) The risk weight for the exposure (expressed as a percent) is equal to $K_{SSFA} \times 1{,}250$.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20761, Apr. 14, 2014]

§ 324.145 Recognition of credit risk mitigants for securitization exposures.

(a) *General.* An originating FDIC-supervised institution that has obtained a credit risk mitigant to hedge its securitization exposure to a synthetic or traditional securitization that satisfies the operational criteria in § 324.141 may recognize the credit risk mitigant, but only as provided in this section. An investing FDIC-supervised institution that has obtained a credit risk mitigant to hedge a securitization exposure may recognize the credit risk

mitigant, but only as provided in this section.

(b) *Collateral*—(1) *Rules of recognition*. An FDIC-supervised institution may recognize financial collateral in determining the FDIC-supervised institution's risk-weighted asset amount for a securitization exposure (other than a repo-style transaction, an eligible margin loan, or an OTC derivative contract for which the FDIC-supervised institution has reflected collateral in its determination of exposure amount under § 324.132) as follows. The FDIC-supervised institution's risk-weighted asset amount for the collateralized securitization exposure is equal to the risk-weighted asset amount for the securitization exposure as calculated under the SSFA in § 324.144 or under the SFA in § 324.143 multiplied by the ratio of adjusted exposure amount (SE*) to original exposure amount (SE), where:

(i) SE* equals max {0, [SE − C × (1 − H_s − H_{fx})]};

(ii) SE equals the amount of the securitization exposure calculated under § 324.142(e);

(iii) C equals the current fair value of the collateral;

(iv) H_s equals the haircut appropriate to the collateral type; and

(v) H_{fx} equals the haircut appropriate for any currency mismatch between the collateral and the exposure.

(2) Mixed collateral. Where the collateral is a basket of different asset types or a basket of assets denominated in different currencies, the haircut on the basket will be $H = \sum_i a_i H_i$, where a_i is the current fair value of the asset in the basket divided by the current fair value of all assets in the basket and H_i is the haircut applicable to that asset.

(3) *Standard supervisory haircuts*. Unless an FDIC-supervised institution qualifies for use of and uses own-estimates haircuts in paragraph (b)(4) of this section:

(i) An FDIC-supervised institution must use the collateral type haircuts (H_s) in Table 1 to § 324.132 of this subpart;

(ii) An FDIC-supervised institution must use a currency mismatch haircut (H_{fx}) of 8 percent if the exposure and the collateral are denominated in different currencies;

(iii) An FDIC-supervised institution must multiply the supervisory haircuts obtained in paragraphs (b)(3)(i) and (ii) of this section by the square root of 6.5 (which equals 2.549510); and

(iv) An FDIC-supervised institution must adjust the supervisory haircuts upward on the basis of a holding period longer than 65 business days where and as appropriate to take into account the illiquidity of the collateral.

(4) *Own estimates for haircuts*. With the prior written approval of the FDIC, an FDIC-supervised institution may calculate haircuts using its own internal estimates of market price volatility and foreign exchange volatility, subject to § 324.132(b)(2)(iii). The minimum holding period (T_M) for securitization exposures is 65 business days.

(c) *Guarantees and credit derivatives*—(1) *Limitations on recognition*. An FDIC-supervised institution may only recognize an eligible guarantee or eligible credit derivative provided by an eligible guarantor in determining the FDIC-supervised institution's risk-weighted asset amount for a securitization exposure.

(2) *ECL for securitization exposures*. When an FDIC-supervised institution recognizes an eligible guarantee or eligible credit derivative provided by an eligible guarantor in determining the FDIC-supervised institution's risk-weighted asset amount for a securitization exposure, the FDIC-supervised institution must also:

(i) Calculate ECL for the protected portion of the exposure using the same

risk parameters that it uses for calculating the risk-weighted asset amount of the exposure as described in paragraph (c)(3) of this section; and

(ii) Add the exposure's ECL to the FDIC-supervised institution's total ECL.

(3) *Rules of recognition.* An FDIC-supervised institution may recognize an eligible guarantee or eligible credit derivative provided by an eligible guarantor in determining the FDIC-supervised institution's risk-weighted asset amount for the securitization exposure as follows:

(i) *Full coverage.* If the protection amount of the eligible guarantee or eligible credit derivative equals or exceeds the amount of the securitization exposure, the FDIC-supervised institution may set the risk-weighted asset amount for the securitization exposure equal to the risk-weighted asset amount for a direct exposure to the eligible guarantor (as determined in the wholesale risk weight function described in §324.131), using the FDIC-supervised institution's PD for the guarantor, the FDIC-supervised institution's LGD for the guarantee or credit derivative, and an EAD equal to the amount of the securitization exposure (as determined in §324.142(e)).

(ii) *Partial coverage.* If the protection amount of the eligible guarantee or eligible credit derivative is less than the amount of the securitization exposure, the FDIC-supervised institution may set the risk-weighted asset amount for the securitization exposure equal to the sum of:

(A) *Covered portion.* The risk-weighted asset amount for a direct exposure to the eligible guarantor (as determined in the wholesale risk weight function described in §324.131), using the FDIC-supervised institution's PD for the guarantor, the FDIC-supervised institution's LGD for the guarantee or credit derivative, and an EAD equal to the protection amount of the credit risk mitigant; and

(B) *Uncovered portion.* (*1*) 1.0 minus the ratio of the protection amount of the eligible guarantee or eligible credit derivative to the amount of the securitization exposure); multiplied by

(*2*) The risk-weighted asset amount for the securitization exposure without the credit risk mitigant (as determined in §§ 324.142 through 324.146).

(4) *Mismatches.* The FDIC-supervised institution must make applicable adjustments to the protection amount as required in §324.134(d), (e), and (f) for any hedged securitization exposure and any more senior securitization exposure that benefits from the hedge. In the context of a synthetic securitization, when an eligible guarantee or eligible credit derivative covers multiple hedged exposures that have different residual maturities, the FDIC-supervised institution must use the longest residual maturity of any of the hedged exposures as the residual maturity of all the hedged exposures.

§§ 324.146–324.150 [Reserved]

RISK-WEIGHTED ASSETS FOR EQUITY EXPOSURES

§ 324.151 Introduction and exposure measurement.

(a) *General.* (1) To calculate its risk-weighted asset amounts for equity exposures that are not equity exposures to investment funds, an FDIC-supervised institution may apply either the Simple Risk Weight Approach (SRWA) in §324.152 or, if it qualifies to do so, the Internal Models Approach (IMA) in §324.153. An FDIC-supervised institution must use the look-through approaches provided in §324.154 to calculate its risk-weighted asset amounts for equity exposures to investment funds.

(2) An FDIC-supervised institution must treat an investment in a separate account (as defined in §324.2), as if it were an equity exposure to an investment fund as provided in §324.154.

(3) *Stable value protection.* (i) Stable value protection means a contract where the provider of the contract is obligated to pay:

(A) The policy owner of a separate account an amount equal to the shortfall between the fair value and cost basis of the separate account when the policy owner of the separate account surrenders the policy, or

(B) The beneficiary of the contract an amount equal to the shortfall between the fair value and book value of a specified portfolio of assets.

(ii) An FDIC-supervised institution that purchases stable value protection on its investment in a separate account must treat the portion of the carrying value of its investment in the separate account attributable to the stable value protection as an exposure to the provider of the protection and the remaining portion of the carrying value of its separate account as an equity exposure to an investment fund.

(iii) An FDIC-supervised institution that provides stable value protection must treat the exposure as an equity derivative with an adjusted carrying value determined as the sum of § 324.151(b)(1) and (2).

(b) *Adjusted carrying value.* For purposes of this subpart, the adjusted carrying value of an equity exposure is:

(1) For the on-balance sheet component of an equity exposure, the FDIC-supervised institution's carrying value of the exposure;

(2) For the off-balance sheet component of an equity exposure, the effective notional principal amount of the exposure, the size of which is equivalent to a hypothetical on-balance sheet position in the underlying equity instrument that would evidence the same change in fair value (measured in dollars) for a given small change in the price of the underlying equity instrument, minus the adjusted carrying value of the on-balance sheet component of the exposure as calculated in paragraph (b)(1) of this section.

(3) For unfunded equity commitments that are unconditional, the effective notional principal amount is the notional amount of the commitment. For unfunded equity commitments that are conditional, the effective notional principal amount is the FDIC-supervised institution's best estimate of the amount that would be funded under economic downturn conditions.

§ 324.152 Simple risk weight approach (SRWA).

(a) *General.* Under the SRWA, an FDIC-supervised institution's aggregate risk-weighted asset amount for its equity exposures is equal to the sum of the risk-weighted asset amounts for each of the FDIC-supervised institution's individual equity exposures (other than equity exposures to an investment fund) as determined in this section and the risk-weighted asset amounts for each of the FDIC-supervised institution's individual equity exposures to an investment fund as determined in § 324.154.

(b) *SRWA computation for individual equity exposures.* An FDIC-supervised institution must determine the risk-weighted asset amount for an individual equity exposure (other than an equity exposure to an investment fund) by multiplying the adjusted carrying value of the equity exposure or the effective portion and ineffective portion of a hedge pair (as defined in paragraph (c) of this section) by the lowest applicable risk weight in this section.

(1) *Zero percent risk weight equity exposures.* An equity exposure to an entity whose credit exposures are exempt from the 0.03 percent PD floor in § 324.131(d)(2) is assigned a zero percent risk weight.

(2) *20 percent risk weight equity exposures.* An equity exposure to a Federal Home Loan Bank or the Federal Agricultural Mortgage Corporation (Farmer Mac) is assigned a 20 percent risk weight.

(3) *100 percent risk weight equity exposures.* The following equity exposures are assigned a 100 percent risk weight:

(i) *Community development equity exposures.* An equity exposure that qualifies as a community development investment under section 24 (Eleventh) of the National Bank Act, excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act.

(ii) *Effective portion of hedge pairs.* The effective portion of a hedge pair.

(iii) *Non-significant equity exposures.* Equity exposures, excluding significant investments in the capital of an unconsolidated institution in the form of common stock and exposures to an investment firm that would meet the definition of a traditional securitization were it not for the FDIC's application of paragraph (8) of that definition in § 324.2 and has greater than immaterial

leverage, to the extent that the aggregate adjusted carrying value of the exposures does not exceed 10 percent of the FDIC-supervised institution's total capital.

(A) To compute the aggregate adjusted carrying value of an FDIC-supervised institution's equity exposures for purposes of this section, the FDIC-supervised institution may exclude equity exposures described in paragraphs (b)(1), (b)(2), (b)(3)(i), and (b)(3)(ii) of this section, the equity exposure in a hedge pair with the smaller adjusted carrying value, and a proportion of each equity exposure to an investment fund equal to the proportion of the assets of the investment fund that are not equity exposures or that meet the criterion of paragraph (b)(3)(i) of this section. If an FDIC-supervised institution does not know the actual holdings of the investment fund, the FDIC-supervised institution may calculate the proportion of the assets of the fund that are not equity exposures based on the terms of the prospectus, partnership agreement, or similar contract that defines the fund's permissible investments. If the sum of the investment limits for all exposure classes within the fund exceeds 100 percent, the FDIC-supervised institution must assume for purposes of this section that the investment fund invests to the maximum extent possible in equity exposures.

(B) When determining which of an FDIC-supervised institution's equity exposures qualifies for a 100 percent risk weight under this section, an FDIC-supervised institution first must include equity exposures to unconsolidated small business investment companies or held through consolidated small business investment companies described in section 302 of the Small Business Investment Act, then must include publicly traded equity exposures (including those held indirectly through investment funds), and then must include non-publicly traded equity exposures (including those held indirectly through investment funds).

(4) *250 percent risk weight equity exposures.* Significant investments in the capital of unconsolidated financial institutions in the form of common stock that are not deducted from capital pursuant to § 324.22(b)(4) are assigned a 250 percent risk weight.

(5) *300 percent risk weight equity exposures.* A publicly traded equity exposure (other than an equity exposure described in paragraph (b)(7) of this section and including the ineffective portion of a hedge pair) is assigned a 300 percent risk weight.

(6) *400 percent risk weight equity exposures.* An equity exposure (other than an equity exposure described in paragraph (b)(7) of this section) that is not publicly traded is assigned a 400 percent risk weight.

(7) *600 percent risk weight equity exposures.* An equity exposure to an investment firm that:

(i) Would meet the definition of a traditional securitization were it not for the FDIC's application of paragraph (8) of that definition in § 324.2; and

(ii) Has greater than immaterial leverage is assigned a 600 percent risk weight.

(c) *Hedge transactions*—(1) *Hedge pair.* A hedge pair is two equity exposures that form an effective hedge so long as each equity exposure is publicly traded or has a return that is primarily based on a publicly traded equity exposure.

(2) *Effective hedge.* Two equity exposures form an effective hedge if the exposures either have the same remaining maturity or each has a remaining maturity of at least three months; the hedge relationship is formally documented in a prospective manner (that is, before the FDIC-supervised institution acquires at least one of the equity exposures); the documentation specifies the measure of effectiveness (E) the FDIC-supervised institution will use for the hedge relationship throughout the life of the transaction; and the hedge relationship has an E greater than or equal to 0.8. An FDIC-supervised institution must measure E at least quarterly and must use one of three alternative measures of E:

(i) Under the dollar-offset method of measuring effectiveness, the FDIC-supervised institution must determine the ratio of value change (RVC). The RVC is the ratio of the cumulative sum of the periodic changes in value of one equity exposure to the cumulative sum of the periodic changes in the value of the other equity exposure. If RVC is

positive, the hedge is not effective and E equals zero. If RVC is negative and greater than or equal to −1 (that is, between zero and −1), then E equals the absolute value of RVC. If RVC is negative and less than −1, then E equals 2 plus RVC.

(ii) Under the variability-reduction method of measuring effectiveness:

$$E = 1 - \frac{\sum_{t=1}^{T} \left(X_t - X_{t-1} \right)^2}{\sum_{t=1}^{T} \left(A_t - A_{t-1} \right)^2}, \text{ where}$$

(A) $X_t = A_t - B_t$;

(B) $A_t =$ the value at time t of one exposure in a hedge pair; and

(C) $B_t =$ the value at time t of the other exposure in a hedge pair.

(iii) Under the regression method of measuring effectiveness, E equals the coefficient of determination of a regression in which the change in value of one exposure in a hedge pair is the dependent variable and the change in value of the other exposure in a hedge pair is the independent variable. However, if the estimated regression coefficient is positive, then the value of E is zero.

(3) The effective portion of a hedge pair is E multiplied by the greater of the adjusted carrying values of the equity exposures forming a hedge pair.

(4) The ineffective portion of a hedge pair is (1–E) multiplied by the greater of the adjusted carrying values of the equity exposures forming a hedge pair.

[78 FR 55471, Sept. 10, 2013, as amended at 84 FR 35280, July 22, 2019]

§ 324.153 Internal models approach (IMA).

(a) *General.* An FDIC-supervised institution may calculate its risk-weighted asset amount for equity exposures using the IMA by modeling publicly traded and non-publicly traded equity exposures (in accordance with paragraph (c) of this section) or by modeling only publicly traded equity exposures (in accordance with paragraphs (c) and (d) of this section).

(b) *Qualifying criteria.* To qualify to use the IMA to calculate risk-weighted assets for equity exposures, an FDIC-supervised institution must receive prior written approval from the FDIC. To receive such approval, the FDIC-supervised institution must demonstrate to the FDIC's satisfaction that the FDIC-supervised institution meets the following criteria:

(1) The FDIC-supervised institution must have one or more models that:

(i) Assess the potential decline in value of its modeled equity exposures;

(ii) Are commensurate with the size, complexity, and composition of the FDIC-supervised institution's modeled equity exposures; and

(iii) Adequately capture both general market risk and idiosyncratic risk.

(2) The FDIC-supervised institution's model must produce an estimate of potential losses for its modeled equity exposures that is no less than the estimate of potential losses produced by a VaR methodology employing a 99th percentile one-tailed confidence interval of the distribution of quarterly returns for a benchmark portfolio of equity exposures comparable to the

FDIC-supervised institution's modeled equity exposures using a long-term sample period.

(3) The number of risk factors and exposures in the sample and the data period used for quantification in the FDIC-supervised institution's model and benchmarking exercise must be sufficient to provide confidence in the accuracy and robustness of the FDIC-supervised institution's estimates.

(4) The FDIC-supervised institution's model and benchmarking process must incorporate data that are relevant in representing the risk profile of the FDIC-supervised institution's modeled equity exposures, and must include data from at least one equity market cycle containing adverse market movements relevant to the risk profile of the FDIC-supervised institution's modeled equity exposures. In addition, the FDIC-supervised institution's benchmarking exercise must be based on daily market prices for the benchmark portfolio. If the FDIC-supervised institution's model uses a scenario methodology, the FDIC-supervised institution must demonstrate that the model produces a conservative estimate of potential losses on the FDIC-supervised institution's modeled equity exposures over a relevant long-term market cycle. If the FDIC-supervised institution employs risk factor models, the FDIC-supervised institution must demonstrate through empirical analysis the appropriateness of the risk factors used.

(5) The FDIC-supervised institution must be able to demonstrate, using theoretical arguments and empirical evidence, that any proxies used in the modeling process are comparable to the FDIC-supervised institution's modeled equity exposures and that the FDIC-supervised institution has made appropriate adjustments for differences. The FDIC-supervised institution must derive any proxies for its modeled equity exposures and benchmark portfolio using historical market data that are relevant to the FDIC-supervised institution's modeled equity exposures and benchmark portfolio (or, where not, must use appropriately adjusted data), and such proxies must be robust estimates of the risk of the FDIC-supervised institution's modeled equity exposures.

(c) *Risk-weighted assets calculation for an FDIC-supervised institution using the IMA for publicly traded and non-publicly traded equity exposures.* If an FDIC-supervised institution models publicly traded and non-publicly traded equity exposures, the FDIC-supervised institution's aggregate risk-weighted asset amount for its equity exposures is equal to the sum of:

(1) The risk-weighted asset amount of each equity exposure that qualifies for a 0 percent, 20 percent, or 100 percent risk weight under § 324.152(b)(1) through (b)(3)(i) (as determined under § 324.152) and each equity exposure to an investment fund (as determined under § 324.154); and

(2) The greater of:

(i) The estimate of potential losses on the FDIC-supervised institution's equity exposures (other than equity exposures referenced in paragraph (c)(1) of this section) generated by the FDIC-supervised institution's internal equity exposure model multiplied by 12.5; or

(ii) The sum of:

(A) 200 percent multiplied by the aggregate adjusted carrying value of the FDIC-supervised institution's publicly traded equity exposures that do not belong to a hedge pair, do not qualify for a 0 percent, 20 percent, or 100 percent risk weight under § 324.152(b)(1) through (b)(3)(i), and are not equity exposures to an investment fund;

(B) 200 percent multiplied by the aggregate ineffective portion of all hedge pairs; and

(C) 300 percent multiplied by the aggregate adjusted carrying value of the FDIC-supervised institution's equity exposures that are not publicly traded, do not qualify for a 0 percent, 20 percent, or 100 percent risk weight under § 324.152(b)(1) through (b)(3)(i), and are not equity exposures to an investment fund.

(d) *Risk-weighted assets calculation for an FDIC-supervised institution using the IMA only for publicly traded equity exposures.* If an FDIC-supervised institution models only publicly traded equity exposures, the FDIC-supervised institution's aggregate risk-weighted asset amount for its equity exposures is equal to the sum of:

(1) The risk-weighted asset amount of each equity exposure that qualifies for a 0 percent, 20 percent, or 100 percent risk weight under §§ 324.152(b)(1) through (b)(3)(i) (as determined under § 324.152), each equity exposure that qualifies for a 400 percent risk weight under § 324.152(b)(5) or a 600 percent risk weight under § 324.152(b)(6) (as determined under § 324.152), and each equity exposure to an investment fund (as determined under § 324.154); and

(2) The greater of:

(i) The estimate of potential losses on the FDIC-supervised institution's equity exposures (other than equity exposures referenced in paragraph (d)(1) of this section) generated by the FDIC-supervised institution's internal equity exposure model multiplied by 12.5; or

(ii) The sum of:

(A) 200 percent multiplied by the aggregate adjusted carrying value of the FDIC-supervised institution's publicly traded equity exposures that do not belong to a hedge pair, do not qualify for a 0 percent, 20 percent, or 100 percent risk weight under § 324.152(b)(1) through (b)(3)(i), and are not equity exposures to an investment fund; and

(B) 200 percent multiplied by the aggregate ineffective portion of all hedge pairs.

§ 324.154 Equity exposures to investment funds.

(a) *Available approaches.* (1) Unless the exposure meets the requirements for a community development equity exposure in § 324.152(b)(3)(i), an FDIC-supervised institution must determine the risk-weighted asset amount of an equity exposure to an investment fund under the full look-through approach in paragraph (b) of this section, the simple modified look-through approach in paragraph (c) of this section, or the alternative modified look-through approach in paragraph (d) of this section.

(2) The risk-weighted asset amount of an equity exposure to an investment fund that meets the requirements for a community development equity exposure in § 324.152(b)(3)(i) is its adjusted carrying value.

(3) If an equity exposure to an investment fund is part of a hedge pair and the FDIC-supervised institution does not use the full look-through approach, the FDIC-supervised institution may use the ineffective portion of the hedge pair as determined under § 324.152(c) as the adjusted carrying value for the equity exposure to the investment fund. The risk-weighted asset amount of the effective portion of the hedge pair is equal to its adjusted carrying value.

(b) *Full look-through approach.* An FDIC-supervised institution that is able to calculate a risk-weighted asset amount for its proportional ownership share of each exposure held by the investment fund (as calculated under this subpart E of this part as if the proportional ownership share of each exposure were held directly by the FDIC-supervised institution) may either:

(1) Set the risk-weighted asset amount of the FDIC-supervised institution's exposure to the fund equal to the product of:

(i) The aggregate risk-weighted asset amounts of the exposures held by the fund as if they were held directly by the FDIC-supervised institution; and

(ii) The FDIC-supervised institution's proportional ownership share of the fund; or

(2) Include the FDIC-supervised institution's proportional ownership share of each exposure held by the fund in the FDIC-supervised institution's IMA.

(c) *Simple modified look-through approach.* Under this approach, the risk-weighted asset amount for an FDIC-supervised institution's equity exposure to an investment fund equals the adjusted carrying value of the equity exposure multiplied by the highest risk weight assigned according to subpart D of this part that applies to any exposure the fund is permitted to hold under its prospectus, partnership agreement, or similar contract that defines the fund's permissible investments (excluding derivative contracts that are used for hedging rather than speculative purposes and that do not constitute a material portion of the fund's exposures).

(d) *Alternative modified look-through approach.* Under this approach, an FDIC-supervised institution may assign the adjusted carrying value of an equity exposure to an investment fund on a pro rata basis to different risk weight categories assigned according to subpart D of this part based on the

investment limits in the fund's prospectus, partnership agreement, or similar contract that defines the fund's permissible investments. The risk-weighted asset amount for the FDIC-supervised institution's equity exposure to the investment fund equals the sum of each portion of the adjusted carrying value assigned to an exposure class multiplied by the applicable risk weight. If the sum of the investment limits for all exposure types within the fund exceeds 100 percent, the FDIC-supervised institution must assume that the fund invests to the maximum extent permitted under its investment limits in the exposure type with the highest risk weight under subpart D of this part, and continues to make investments in order of the exposure type with the next highest risk weight under subpart D of this part until the maximum total investment level is reached. If more than one exposure type applies to an exposure, the FDIC-supervised institution must use the highest applicable risk weight. An FDIC-supervised institution may exclude derivative contracts held by the fund that are used for hedging rather than for speculative purposes and do not constitute a material portion of the fund's exposures.

§ 324.155 Equity derivative contracts.

(a) Under the IMA, in addition to holding risk-based capital against an equity derivative contract under this part, an FDIC-supervised institution must hold risk-based capital against the counterparty credit risk in the equity derivative contract by also treating the equity derivative contract as a wholesale exposure and computing a supplemental risk-weighted asset amount for the contract under § 324.132.

(b) Under the SRWA, an FDIC-supervised institution may choose not to hold risk-based capital against the counterparty credit risk of equity derivative contracts, as long as it does so for all such contracts. Where the equity derivative contracts are subject to a qualified master netting agreement, an FDIC-supervised institution using the SRWA must either include all or exclude all of the contracts from any measure used to determine counterparty credit risk exposure.

§§ 324.161–324.160 [Reserved]

RISK-WEIGHTED ASSETS FOR OPERATIONAL RISK

§ 324.161 Qualification requirements for incorporation of operational risk mitigants.

(a) *Qualification to use operational risk mitigants.* An FDIC-supervised institution may adjust its estimate of operational risk exposure to reflect qualifying operational risk mitigants if:

(1) The FDIC-supervised institution's operational risk quantification system is able to generate an estimate of the FDIC-supervised institution's operational risk exposure (which does not incorporate qualifying operational risk mitigants) and an estimate of the FDIC-supervised institution's operational risk exposure adjusted to incorporate qualifying operational risk mitigants; and

(2) The FDIC-supervised institution's methodology for incorporating the effects of insurance, if the FDIC-supervised institution uses insurance as an operational risk mitigant, captures through appropriate discounts to the amount of risk mitigation:

(i) The residual term of the policy, where less than one year;

(ii) The cancellation terms of the policy, where less than one year;

(iii) The policy's timeliness of payment;

(iv) The uncertainty of payment by the provider of the policy; and

(v) Mismatches in coverage between the policy and the hedged operational loss event.

(b) *Qualifying operational risk mitigants.* Qualifying operational risk mitigants are:

(1) Insurance that:

(i) Is provided by an unaffiliated company that the FDIC-supervised institution deems to have strong capacity to meet its claims payment obligations and the obligor rating category to which the FDIC-supervised institution assigns the company is assigned a PD equal to or less than 10 basis points;

(ii) Has an initial term of at least one year and a residual term of more than 90 days;

(iii) Has a minimum notice period for cancellation by the provider of 90 days;

(iv) Has no exclusions or limitations based upon regulatory action or for the receiver or liquidator of a failed depository institution; and

(v) Is explicitly mapped to a potential operational loss event;

(2) Operational risk mitigants other than insurance for which the FDIC has given prior written approval. In evaluating an operational risk mitigant other than insurance, the FDIC will consider whether the operational risk mitigant covers potential operational losses in a manner equivalent to holding total capital.

§ 324.162 Mechanics of risk-weighted asset calculation.

(a) If an FDIC-supervised institution does not qualify to use or does not have qualifying operational risk mitigants, the FDIC-supervised institution's dollar risk-based capital requirement for operational risk is its operational risk exposure minus eligible operational risk offsets (if any).

(b) If an FDIC-supervised institution qualifies to use operational risk mitigants and has qualifying operational risk mitigants, the FDIC-supervised institution's dollar risk-based capital requirement for operational risk is the greater of:

(1) The FDIC-supervised institution's operational risk exposure adjusted for qualifying operational risk mitigants minus eligible operational risk offsets (if any); or

(2) 0.8 multiplied by the difference between:

(i) The FDIC-supervised institution's operational risk exposure; and

(ii) Eligible operational risk offsets (if any).

(c) The FDIC-supervised institution's risk-weighted asset amount for operational risk equals the FDIC-supervised institution's dollar risk-based capital requirement for operational risk determined under sections 162(a) or (b) multiplied by 12.5.

§§ 324.163–324.170 [Reserved]

DISCLOSURES

§ 324.171 Purpose and scope.

§§ 324.171 through 324.173 establish public disclosure requirements related to the capital requirements of an FDIC-supervised institution that is an advanced approaches FDIC-supervised institution.

§ 324.172 Disclosure requirements.

(a) An FDIC-supervised institution that is an advanced approaches FDIC-supervised institution that has completed the parallel run process and that has received notification from the FDIC pursuant to § 324.121(d) must publicly disclose each quarter its total and tier 1 risk-based capital ratios and their components as calculated under this subpart (that is, common equity tier 1 capital, additional tier 1 capital, tier 2 capital, total qualifying capital, and total risk-weighted assets).

(b) An FDIC-supervised institution that is an advanced approaches FDIC-supervised institution that has completed the parallel run process and that has received notification from the FDIC pursuant to section § 324.121(d) must comply with paragraph (c) of this section unless it is a consolidated subsidiary of a bank holding company, savings and loan holding company, or depository institution that is subject to these disclosure requirements or a subsidiary of a non-U.S. banking organization that is subject to comparable public disclosure requirements in its home jurisdiction.

(c)(1) An FDIC-supervised institution described in paragraph (b) of this section must provide timely public disclosures each calendar quarter of the information in the applicable tables in § 324.173. If a significant change occurs, such that the most recent reported amounts are no longer reflective of the FDIC-supervised institution's capital adequacy and risk profile, then a brief discussion of this change and its likely impact must be disclosed as soon as practicable thereafter. Qualitative disclosures that typically do not change each quarter (for example, a general summary of the FDIC-supervised institution's risk management objectives and policies, reporting system, and definitions) may be disclosed annually after the end of the fourth calendar quarter, provided that any significant changes to these are disclosed in the interim. Management may provide all

of the disclosures required by this subpart in one place on the FDIC-supervised institution's public Web site or may provide the disclosures in more than one public financial report or other regulatory reports, provided that the FDIC-supervised institution publicly provides a summary table specifically indicating the location(s) of all such disclosures.

(2) An FDIC-supervised institution described in paragraph (b) of this section must have a formal disclosure policy approved by the board of directors that addresses its approach for determining the disclosures it makes. The policy must address the associated internal controls and disclosure controls and procedures. The board of directors and senior management are responsible for establishing and maintaining an effective internal control structure over financial reporting, including the disclosures required by this subpart, and must ensure that appropriate review of the disclosures takes place. One or more senior officers of the FDIC-supervised institution must attest that the disclosures meet the requirements of this subpart.

(3) If an FDIC-supervised institution described in paragraph (b) of this section believes that disclosure of specific commercial or financial information would prejudice seriously its position by making public information that is either proprietary or confidential in nature, the FDIC-supervised institution is not required to disclose those specific items, but must disclose more general information about the subject matter of the requirement, together with the fact that, and the reason why, the specific items of information have not been disclosed.

(d)(1) An FDIC-supervised institution that meets any of the criteria in § 324.100(b)(1) before January 1, 2015, must publicly disclose each quarter its supplementary leverage ratio and the components thereof (that is, tier 1 capital and total leverage exposure) as calculated under subpart B of this part, beginning with the first quarter in 2015. This disclosure requirement applies without regard to whether the FDIC-supervised institution has completed the parallel run process and received notification from the FDIC pursuant to § 324.121(d).

(2) An FDIC-supervised institution that meets any of the criteria in § 324.100(b)(1) on or after January 1, 2015, or a Category III FDIC-supervised institution must publicly disclose each quarter its supplementary leverage ratio and the components thereof (that is, tier 1 capital and total leverage exposure) as calculated under subpart B of this part beginning with the calendar quarter immediately following the quarter in which the FDIC-supervised institution becomes an advanced approaches FDIC-supervised institution or a Category III FDIC-supervised institution. This disclosure requirement applies without regard to whether the FDIC-supervised institution has completed the parallel run process and has received notification from the FDIC pursuant to § 324.121(d).

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 57750, Sept. 26, 2014; 80 FR 41425, July 15, 2015; 84 FR 59279, Nov. 1, 2019]

§ 324.173 Disclosures by certain advanced approaches FDIC-supervised institutions and Category III FDIC-supervised institutions.

(a)(1) An advanced approaches FDIC-supervised institution described in § 324.172(b) must make the disclosures described in Tables 1 through 12 to § 324.173.

(2) An advanced approaches FDIC-supervised institution and a Category III FDIC-supervised institution that is required to publicly disclose its supplementary leverage ratio pursuant to § 324.172(d) must make the disclosures required under Table 13 to this section unless the FDIC-supervised institution is a consolidated subsidiary of a bank holding company, savings and loan holding company, or depository institution that is subject to these disclosure requirements or a subsidiary of a non-U.S. banking organization that is subject to comparable public disclosure requirements in its home jurisdiction.

(3) The disclosures described in Tables 1 through 12 to § 324.173 must be made publicly available for twelve consecutive quarters beginning on January 1, 2014, or a shorter period, as applicable, for the quarters after the FDIC-supervised institution has completed

the parallel run process and received notification from the FDIC pursuant to § 324.121(d). The disclosures described in Table 13 to § 324.173 must be made publicly available for twelve consecutive quarters beginning on January 1, 2015, or a shorter period, as applicable, for the quarters after the FDIC-supervised institution becomes subject to the disclosure of the supplementary leverage ratio pursuant to § 324.172(d) and § 324.173(a)(2).

TABLE 1 TO § 324.173—SCOPE OF APPLICATION

Qualitative disclosures ...	(a)	The name of the top corporate entity in the group to which subpart E of this part applies.
	(b)	A brief description of the differences in the basis for consolidating entities[1] for accounting and regulatory purposes, with a description of those entities: (1) That are fully consolidated; (2) That are deconsolidated and deducted from total capital; (3) For which the total capital requirement is deducted; and (4) That are neither consolidated nor deducted (for example, where the investment in the entity is assigned a risk weight in accordance with this subpart E).
	(c)	Any restrictions, or other major impediments, on transfer of funds or total capital within the group.
Quantitative disclosures	(d)	The aggregate amount of surplus capital of insurance subsidiaries included in the total capital of the consolidated group.
	(e)	The aggregate amount by which actual total capital is less than the minimum total capital requirement in all subsidiaries, with total capital requirements and the name(s) of the subsidiaries with such deficiencies.

[1] Such entities include securities, insurance and other financial subsidiaries, commercial subsidiaries (where permitted), and significant minority equity investments in insurance, financial and commercial entities.

TABLE 2 TO § 324.173—CAPITAL STRUCTURE

Qualitative disclosures ...	(a)	Summary information on the terms and conditions of the main features of all regulatory capital instruments.
Quantitative disclosures	(b)	The amount of common equity tier 1 capital, with separate disclosure of: (1) Common stock and related surplus; (2) Retained earnings; (3) Common equity minority interest; (4) AOCI (net of tax) and other reserves; and (5) Regulatory adjustments and deductions made to common equity tier 1 capital.
	(c)	The amount of tier 1 capital, with separate disclosure of: (1) Additional tier 1 capital elements, including additional tier 1 capital instruments and tier 1 minority interest not included in common equity tier 1 capital; and (2) Regulatory adjustments and deductions made to tier 1 capital.
	(d)	The amount of total capital, with separate disclosure of: (1) Tier 2 capital elements, including tier 2 capital instruments and total capital minority interest not included in tier 1 capital; and (2) Regulatory adjustments and deductions made to total capital.
	(e)	(1) Whether the FDIC-supervised institution has elected to phase in recognition of the transitional amounts as defined in § 324.300(f) (2) The FDIC-supervised institution's common equity tier 1 capital, tier 1 capital, and total capital without including the transitional amounts as defined in § 324.300(f).

TABLE 3 TO § 324.173—CAPITAL ADEQUACY

Qualitative disclosures ...	(a)	A summary discussion of the FDIC-supervised institution's approach to assessing the adequacy of its capital to support current and future activities.

TABLE 3 TO § 324.173—CAPITAL ADEQUACY—Continued

Quantitative disclosures	(b)	Risk-weighted assets for credit risk from: (1) Wholesale exposures; (2) Residential mortgage exposures; (3) Qualifying revolving exposures; (4) Other retail exposures; (5) Securitization exposures; (6) Equity exposures: (7) Equity exposures subject to the simple risk weight approach; and (8) Equity exposures subject to the internal models approach.
	(c)	Standardized market risk-weighted assets and advanced market risk-weighted assets as calculated under subpart F of this part: (1) Standardized approach for specific risk; and (2) Internal models approach for specific risk.
	(d)	Risk-weighted assets for operational risk.
	(e)	(1) Common equity tier 1, tier 1 and total risk-based capital ratios reflecting the transition provisions described in § 324.300(f): (A) For the top consolidated group; and (2) For each depository institution subsidiary.
	(f)	Common equity tier 1, tier 1 and total risk-based capital ratios reflecting the full adoption of CECL: (1) For the top consolidated group; and (2) For each depository institution subsidiary.
	(g)	Total risk-weighted assets.

TABLE 4 TO § 324.173—CAPITAL CONSERVATION AND COUNTERCYCLICAL CAPITAL BUFFERS

Qualitative disclosures ...	(a)	The FDIC-supervised institution must publicly disclose the geographic breakdown of its private sector credit exposures used in the calculation of the countercyclical capital buffer.
Quantitative disclosures	(b)	At least quarterly, the FDIC-supervised institution must calculate and publicly disclose the capital conservation buffer and the countercyclical capital buffer as described under § 324.11 of subpart B.
	(c)	At least quarterly, the FDIC-supervised institution must calculate and publicly disclose the buffer retained income of the FDIC-supervised institution, as described under § 324.11 of subpart B.
	(d)	At least quarterly, the FDIC-supervised institution must calculate and publicly disclose any limitations it has on distributions and discretionary bonus payments resulting from the capital conservation buffer and the countercyclical capital buffer framework described under § 324.11 of subpart B, including the maximum payout amount for the quarter.

(b) *General qualitative disclosure requirement*. For each separate risk area described in Tables 5 through 12 to § 324.173, the FDIC-supervised institution must describe its risk management objectives and policies, including:

(1) Strategies and processes;

(2) The structure and organization of the relevant risk management function;

(3) The scope and nature of risk reporting and/or measurement systems; and

(4) Policies for hedging and/or mitigating risk and strategies and processes for monitoring the continuing effectiveness of hedges/mitigants.

TABLE 5[1] TO § 324.173—CREDIT RISK: GENERAL DISCLOSURES

Qualitative disclosures ...	(a)	The general qualitative disclosure requirement with respect to credit risk (excluding counterparty credit risk disclosed in accordance with Table 7 to § 324.173), including: (1) Policy for determining past due or delinquency status; (2) Policy for placing loans on nonaccrual; (3) Policy for returning loans to accrual status; (4) Definition of and policy for identifying impaired loans (for financial accounting purposes). (5) Description of the methodology that the entity uses to estimate its allowance for loan and lease losses or adjusted allowance for credit losses, as applicable, including statistical methods used where applicable; (6) Policy for charging-off uncollectible amounts; and (7) Discussion of the FDIC-supervised institution's credit risk management policy
Quantitative disclosures	(b)	Total credit risk exposures and average credit risk exposures, after accounting offsets in accordance with GAAP,[2] without taking into account the effects of credit risk mitigation techniques (for example, collateral and netting not permitted under GAAP), over the period categorized by major types of credit exposure. For example, FDIC-supervised institutions could use categories similar to that used for financial statement purposes. Such categories might include, for instance: (1) Loans, off-balance sheet commitments, and other non-derivative off-balance sheet exposures; (2) Debt securities; and (3) OTC derivatives.
	(c)	Geographic[3] distribution of exposures, categorized in significant areas by major types of credit exposure.
	(d)	Industry or counterparty type distribution of exposures, categorized by major types of credit exposure.
	(e)	By major industry or counterparty type: (1) Amount of impaired loans for which there was a related allowance under GAAP; (2) Amount of impaired loans for which there was no related allowance under GAAP; (3) Amount of loans past due 90 days and on nonaccrual; (4) Amount of loans past due 90 days and still accruing;[4] (5) The balance in the allowance for loan and lease losses or adjusted allowance for credit losses, as applicable, at the end of each period, disaggregated on the basis of the entity's impairment method. To disaggregate the information required on the basis of impairment methodology, an entity shall separately disclose the amounts based on the requirements in GAAP; and (6) Charge-offs during the period.
	(f)	Amount of impaired loans and, if available, the amount of past due loans categorized by significant geographic areas including, if practical, the amounts of allowances related to each geographical area,[5] further categorized as required by GAAP.
	(g)	Reconciliation of changes in ALLL or AACL, as applicable.[6]
	(h)	Remaining contractual maturity breakdown (for example, one year or less) of the whole portfolio, categorized by credit exposure.

[1] Table 5 to § 324.173 does not cover equity exposures, which should be reported in Table 9 to § 324.173.

[2] *See,* for example, ASC Topic 815–10 and 210–20, as they may be amended from time to time.

[3] Geographical areas may comprise individual countries, groups of countries, or regions within countries. An FDIC-supervised institution might choose to define the geographical areas based on the way the company's portfolio is geographically managed. The criteria used to allocate the loans to geographical areas must be specified.

[4] An FDIC-supervised institution is encouraged also to provide an analysis of the aging of past-due loans.

[5] The portion of the general allowance that is not allocated to a geographical area should be disclosed separately.

[6] The reconciliation should include the following: a description of the allowance; the opening balance of the allowance; charge-offs taken against the allowance during the period; amounts provided (or reversed) for estimated probable loan losses during the period; any other adjustments (for example, exchange rate differences, business combinations, acquisitions and disposals of subsidiaries), including transfers between allowances; and the closing balance of the allowance. Charge-offs and recoveries that have been recorded directly to the income statement should be disclosed separately.

TABLE 6 TO § 324.173—CREDIT RISK: DISCLOSURES FOR PORTFOLIOS SUBJECT TO IRB RISK-BASED CAPITAL FORMULAS

Qualitative disclosures ...	(a)	Explanation and review of the: (1) Structure of internal rating systems and if the FDIC-supervised institution considers external ratings, the relation between internal and external ratings; (2) Use of risk parameter estimates other than for regulatory capital purposes; (3) Process for managing and recognizing credit risk mitigation (see Table 8 to § 324.173); and (4) Control mechanisms for the rating system, including discussion of independence, accountability, and rating systems review.
	(b)	(1) Description of the internal ratings process, provided separately for the following: (i) Wholesale category; (ii) Retail subcategories; (iii) Residential mortgage exposures; (iv) Qualifying revolving exposures; and (v) Other retail exposures. (2) For each category and subcategory above the description should include: (i) The types of exposure included in the category/subcategories; and (ii) The definitions, methods and data for estimation and validation of PD, LGD, and EAD, including assumptions employed in the derivation of these variables.[1]
Quantitative disclosures: risk assessment.	(c)	(1) For wholesale exposures, present the following information across a sufficient number of PD grades (including default) to allow for a meaningful differentiation of credit risk:[2] (i) Total EAD;[3] (ii) Exposure-weighted average LGD (percentage); (iii) Exposure-weighted average risk weight; and (iv) Amount of undrawn commitments and exposure-weighted average EAD including average drawdowns prior to default for wholesale exposures. (2) For each retail subcategory, present the disclosures outlined above across a sufficient number of segments to allow for a meaningful differentiation of credit risk.
Quantitative disclosures: historical results.	(d)	Actual losses in the preceding period for each category and subcategory and how this differs from past experience. A discussion of the factors that impacted the loss experience in the preceding period—for example, has the FDIC-supervised institution experienced higher than average default rates, loss rates or EADs.
	(e)	The FDIC-supervised institution's estimates compared against actual outcomes over a longer period.[4] At a minimum, this should include information on estimates of losses against actual losses in the wholesale category and each retail subcategory over a period sufficient to allow for a meaningful assessment of the performance of the internal rating processes for each category/subcategory.[5] Where appropriate, the FDIC-supervised institution should further decompose this to provide analysis of PD, LGD, and EAD outcomes against estimates provided in the quantitative risk assessment disclosures above.[6]

[1] This disclosure item does not require a detailed description of the model in full—it should provide the reader with a broad overview of the model approach, describing definitions of the variables and methods for estimating and validating those variables set out in the quantitative risk disclosures below. This should be done for each of the four category/subcategories. The FDIC-supervised institution must disclose any significant differences in approach to estimating these variables within each category/subcategories.

[2] The PD, LGD and EAD disclosures in Table 6 (c) to § 324.173 should reflect the effects of collateral, qualifying master netting agreements, eligible guarantees and eligible credit derivatives as defined under this part. Disclosure of each PD grade should include the exposure-weighted average PD for each grade. Where an FDIC-supervised institution aggregates PD grades for the purposes of disclosure, this should be a representative breakdown of the distribution of PD grades used for regulatory capital purposes.

[3] Outstanding loans and EAD on undrawn commitments can be presented on a combined basis for these disclosures.

[4] These disclosures are a way of further informing the reader about the reliability of the information provided in the "quantitative disclosures: risk assessment" over the long run. The disclosures are requirements from year-end 2010; in the meantime, early adoption is encouraged. The phased implementation is to allow an FDIC-supervised institution sufficient time to build up a longer run of data that will make these disclosures meaningful.

[5] This disclosure item is not intended to be prescriptive about the period used for this assessment. Upon implementation, it is expected that an FDIC-supervised institution would provide these disclosures for as long a set of data as possible—for example, if an FDIC-supervised institution has 10 years of data, it might choose to disclose the average default rates for each PD grade over that 10-year period. Annual amounts need not be disclosed.

[6] An FDIC-supervised institution must provide this further decomposition where it will allow users greater insight into the reliability of the estimates provided in the "quantitative disclosures: risk assessment." In particular, it must provide this information where there are material differences between its estimates of PD, LGD or EAD compared to actual outcomes over the long run. The FDIC-supervised institution must also provide explanations for such differences.

TABLE 7 TO § 324.173—GENERAL DISCLOSURE FOR COUNTERPARTY CREDIT RISK OF OTC DERIVATIVE CONTRACTS, REPO-STYLE TRANSACTIONS, AND ELIGIBLE MARGIN LOANS

Qualitative Disclosures ...	(a)	The general qualitative disclosure requirement with respect to OTC derivatives, eligible margin loans, and repo-style transactions, including: (1) Discussion of methodology used to assign economic capital and credit limits for counterparty credit exposures; (2) Discussion of policies for securing collateral, valuing and managing collateral, and establishing credit reserves; (3) Discussion of the primary types of collateral taken; (4) Discussion of policies with respect to wrong-way risk exposures; and (5) Discussion of the impact of the amount of collateral the FDIC-supervised institution would have to provide if the FDIC-supervised institution were to receive a credit rating downgrade.
Quantitative Disclosures	(b)	Gross positive fair value of contracts, netting benefits, netted current credit exposure, collateral held (including type, for example, cash, government securities), and net unsecured credit exposure.[1] Also report measures for EAD used for regulatory capital for these transactions, the notional value of credit derivative hedges purchased for counterparty credit risk protection, and, for FDIC-supervised institutions not using the internal models methodology in § 324.132(d), the distribution of current credit exposure by types of credit exposure.[2]
	(c)	Notional amount of purchased and sold credit derivatives, segregated between use for the FDIC-supervised institution's own credit portfolio and for its intermediation activities, including the distribution of the credit derivative products used, categorized further by protection bought and sold within each product group.
	(d)	The estimate of alpha if the FDIC-supervised institution has received supervisory approval to estimate alpha.

[1] Net unsecured credit exposure is the credit exposure after considering the benefits from legally enforceable netting agreements and collateral arrangements, without taking into account haircuts for price volatility, liquidity, etc.

[2] This may include interest rate derivative contracts, foreign exchange derivative contracts, equity derivative contracts, credit derivatives, commodity or other derivative contracts, repo-style transactions, and eligible margin loans.

TABLE 8 TO § 324.173—CREDIT RISK MITIGATION[1] [2]

Qualitative disclosures ...	(a)	The general qualitative disclosure requirement with respect to credit risk mitigation, including: (1) Policies and processes for, and an indication of the extent to which the FDIC-supervised institution uses, on- or off-balance sheet netting; (2) Policies and processes for collateral valuation and management; (3) A description of the main types of collateral taken by the FDIC-supervised institution; (4) The main types of guarantors/credit derivative counterparties and their creditworthiness; and (5) Information about (market or credit) risk concentrations within the mitigation taken.
Quantitative disclosures	(b)	For each separately disclosed portfolio, the total exposure (after, where applicable, on- or off-balance sheet netting) that is covered by guarantees/credit derivatives.

[1] At a minimum, an FDIC-supervised institution must provide the disclosures in Table 8 to § 324.173 in relation to credit risk mitigation that has been recognized for the purposes of reducing capital requirements under this subpart. Where relevant, FDIC-supervised institutions are encouraged to give further information about mitigants that have not been recognized for that purpose.

[2] Credit derivatives and other credit mitigation that are treated for the purposes of this subpart as synthetic securitization exposures should be excluded from the credit risk mitigation disclosures (in Table 8 to § 324.173) and included within those relating to securitization (in Table 9 to § 324.173).

TABLE 9 TO § 324.173—SECURITIZATION

Qualitative disclosures ...	(a)	The general qualitative disclosure requirement with respect to securitization (including synthetic securitizations), including a discussion of: (1) The FDIC-supervised institution's objectives for securitizing assets, including the extent to which these activities transfer credit risk of the underlying exposures away from the FDIC-supervised institution to other entities and including the type of risks assumed and retained with resecuritization activity; [1] (2) The nature of the risks (e.g. liquidity risk) inherent in the securitized assets; (3) The roles played by the FDIC-supervised institution in the securitization process [2] and an indication of the extent of the FDIC-supervised institution's involvement in each of them; (4) The processes in place to monitor changes in the credit and market risk of securitization exposures including how those processes differ for resecuritization exposures; (5) The FDIC-supervised institution's policy for mitigating the credit risk retained through securitization and resecuritization exposures; and (6) The risk-based capital approaches that the FDIC-supervised institution follows for its securitization exposures including the type of securitization exposure to which each approach applies.
	(b)	A list of: (1) The type of securitization SPEs that the FDIC-supervised institution, as sponsor, uses to securitize third-party exposures. The FDIC-supervised institution must indicate whether it has exposure to these SPEs, either on- or off- balance sheet; and (2) Affiliated entities: (i) That the FDIC-supervised institution manages or advises; and (ii) That invest either in the securitization exposures that the FDIC-supervised institution has securitized or in securitization SPEs that the FDIC-supervised institution sponsors.[3]
	(c)	Summary of the FDIC-supervised institution's accounting policies for securitization activities, including: (1) Whether the transactions are treated as sales or financings; (2) Recognition of gain-on-sale; (3) Methods and key assumptions and inputs applied in valuing retained or purchased interests; (4) Changes in methods and key assumptions and inputs from the previous period for valuing retained interests and impact of the changes; (5) Treatment of synthetic securitizations; (6) How exposures intended to be securitized are valued and whether they are recorded under subpart E of this part; and (7) Policies for recognizing liabilities on the balance sheet for arrangements that could require the FDIC-supervised institution to provide financial support for securitized assets.
	(d)	An explanation of significant changes to any of the quantitative information set forth below since the last reporting period.
Quantitative disclosures	(e)	The total outstanding exposures securitized [4] by the FDIC-supervised institution in securitizations that meet the operational criteria in § 324.141 (categorized into traditional/synthetic), by underlying exposure type [5] separately for securitizations of third-party exposures for which the FDIC-supervised institution acts only as sponsor.
	(f)	For exposures securitized by the FDIC-supervised institution in securitizations that meet the operational criteria in § 324.141: (1) Amount of securitized assets that are impaired [6]/past due categorized by exposure type; and (2) Losses recognized by the FDIC-supervised institution during the current period categorized by exposure type.[7]
	(g)	The total amount of outstanding exposures intended to be securitized categorized by exposure type.

TABLE 9 TO § 324.173—SECURITIZATION—Continued

	(h)	Aggregate amount of: (1) On-balance sheet securitization exposures retained or purchased categorized by exposure type; and (2) Off-balance sheet securitization exposures categorized by exposure type.
	(i)	(1) Aggregate amount of securitization exposures retained or purchased and the associated capital requirements for these exposures, categorized between securitization and resecuritization exposures, further categorized into a meaningful number of risk weight bands and by risk-based capital approach (e.g. SA, SFA, or SSFA). (2) Aggregate amount disclosed separately by type of underlying exposure in the pool of any: (i) After-tax gain-on-sale on a securitization that has been deducted from common equity tier 1 capital; and (ii) Credit-enhancing interest-only strip that is assigned a 1,250 percent risk weight.
	(j)	Summary of current year's securitization activity, including the amount of exposures securitized (by exposure type), and recognized gain or loss on sale by asset type.
	(k)	Aggregate amount of resecuritization exposures retained or purchased categorized according to: (1) Exposures to which credit risk mitigation is applied and those not applied; and (2) Exposures to guarantors categorized according to guarantor creditworthiness categories or guarantor name.

[1] The FDIC-supervised institution must describe the structure of resecuritizations in which it participates; this description must be provided for the main categories of resecuritization products in which the FDIC-supervised institution is active.

[2] For example, these roles would include originator, investor, servicer, provider of credit enhancement, sponsor, liquidity provider, or swap provider.

[3] For example, money market mutual funds should be listed individually, and personal and private trusts, should be noted collectively.

[4] ''Exposures securitized'' include underlying exposures originated by the FDIC-supervised institution, whether generated by them or purchased, and recognized in the balance sheet, from third parties, and third-party exposures included in sponsored transactions. Securitization transactions (including underlying exposures originally on the FDIC-supervised institution's balance sheet and underlying exposures acquired by the FDIC-supervised institution from third-party entities) in which the originating bank does not retain any securitization exposure should be shown separately but need only be reported for the year of inception.

[5] An FDIC-supervised institution is required to disclose exposures regardless of whether there is a capital charge under this part.

[6] An FDIC-supervised institution must include credit-related other than temporary impairment (OTTI).

[7] For example, charge-offs/allowances (if the assets remain on the FDIC-supervised institution's balance sheet) or credit-related OTTI of I/O strips and other retained residual interests, as well as recognition of liabilities for probable future financial support required of the FDIC-supervised institution with respect to securitized assets.

TABLE 10 TO § 324.173—OPERATIONAL RISK

Qualitative disclosures ...	(a)	The general qualitative disclosure requirement for operational risk.
	(b)	Description of the AMA, including a discussion of relevant internal and external factors considered in the FDIC-supervised institution's measurement approach.
	(c)	A description of the use of insurance for the purpose of mitigating operational risk.

TABLE 11 TO § 324.173—EQUITIES NOT SUBJECT TO SUBPART F OF THIS PART

Qualitative disclosures ...	(a)	The general qualitative disclosure requirement with respect to the equity risk of equity holdings not subject to subpart F of this part, including: (1) Differentiation between holdings on which capital gains are expected and those held for other objectives, including for relationship and strategic reasons; and (2) Discussion of important policies covering the valuation of and accounting for equity holdings not subject to subpart F of this part. This includes the accounting methodology and valuation methodologies used, including key assumptions and practices affecting valuation as well as significant changes in these practices.
Quantitative disclosures	(b)	Carrying value on the balance sheet of equity investments, as well as the fair value of those investments.

TABLE 11 TO § 324.173—EQUITIES NOT SUBJECT TO SUBPART F OF THIS PART—Continued

	(c)	The types and nature of investments, including the amount that is: (1) Publicly traded; and (2) Non-publicly traded.
	(d)	The cumulative realized gains (losses) arising from sales and liquidations in the reporting period.
	(e)	(1) Total unrealized gains (losses) [1] (2) Total latent revaluation gains (losses) [2] (3) Any amounts of the above included in tier 1 and/or tier 2 capital.
	(f)	Capital requirements categorized by appropriate equity groupings, consistent with the FDIC-supervised institution's methodology, as well as the aggregate amounts and the type of equity investments subject to any supervisory transition regarding total capital requirements.[3]

[1] Unrealized gains (losses) recognized in the balance sheet but not through earnings.
[2] Unrealized gains (losses) not recognized either in the balance sheet or through earnings.
[3] This disclosure must include a breakdown of equities that are subject to the 0 percent, 20 percent, 100 percent, 300 percent, 400 percent, and 600 percent risk weights, as applicable.

TABLE 12 TO § 324.173—INTEREST RATE RISK FOR NON-TRADING ACTIVITIES

Qualitative disclosures ...	(a)	The general qualitative disclosure requirement, including the nature of interest rate risk for non-trading activities and key assumptions, including assumptions regarding loan prepayments and behavior of non-maturity deposits, and frequency of measurement of interest rate risk for non-trading activities.
Quantitative disclosures	(b)	The increase (decline) in earnings or economic value (or relevant measure used by management) for upward and downward rate shocks according to management's method for measuring interest rate risk for non-trading activities, categorized by currency (as appropriate).

(c) Except as provided in § 324.172(b), an FDIC-supervised institution described in § 324.172(d) must make the disclosures described in Table 13 to § 324.173; provided, however, the disclosures required under this paragraph are required without regard to whether the FDIC-supervised institution has completed the parallel run process and has received notification from the FDIC pursuant to § 324.121(d). The FDIC-supervised institution must make these disclosures publicly available beginning on January 1, 2015.

TABLE 13 TO § 324.173—SUPPLEMENTARY LEVERAGE RATIO

	Dollar amounts in thousands			
	Tril	Bil	Mil	Thou
Part 1: Summary comparison of accounting assets and total leverage exposure				
1 Total consolidated assets as reported in published financial statements.				
2 Adjustment for investments in banking, financial, insurance or commercial entities that are consolidated for accounting purposes but outside the scope of regulatory consolidation.				
3 Adjustment for fiduciary assets recognized on balance sheet but excluded from total leverage exposure.				
4 Adjustment for derivative exposures.				
5 Adjustment for repo-style transactions.				
6 Adjustment for off-balance sheet exposures (that is, conversion to credit equivalent amounts of off-balance sheet exposures).				
7 Other adjustments.				
8 Total leverage exposure.				
Part 2: Supplementary leverage ratio				
On-balance sheet exposures				
1 On-balance sheet assets (excluding on-balance sheet assets for repo-style transactions and derivative exposures, but including cash collateral received in derivative transactions).				
2 LESS: Amounts deducted from tier 1 capital.				

TABLE 13 TO § 324.173—SUPPLEMENTARY LEVERAGE RATIO—Continued

	Dollar amounts in thousands			
	Tril	Bil	Mil	Thou
3 Total on-balance sheet exposures (excluding on-balance sheet assets for repo-style transactions and derivative exposures, but including cash collateral received in derivative transactions) (sum of lines 1 and 2).				
Derivative exposures				
4 Current exposure for derivative exposures (that is, net of cash variation margin).				
5 Add-on amounts for potential future exposure (PFE) for derivative exposures.				
6 Gross-up for cash collateral posted if deducted from the on-balance sheet assets, except for cash variation margin.				
7 LESS: Deductions of receivable assets for cash variation margin posted in derivative transactions, if included in on-balance sheet assets.				
8 LESS: Exempted CCP leg of client-cleared transactions.				
9 Effective notional principal amount of sold credit protection.				
10 LESS: Effective notional principal amount offsets and PFE adjustments for sold credit protection.				
11 Total derivative exposures (sum of lines 4 to 10).				
Repo-style transactions				
12 On-balance sheet assets for repo-style transactions, except include the gross value of receivables for reverse repurchase transactions. Exclude from this item the value of securities received in a security-for-security repo-style transaction where the securities lender has not sold or re-hypothecated the securities received. Include in this item the value of securities that qualified for sales treatment that must be reversed.				
13 LESS: Reduction of the gross value of receivables in reverse repurchase transactions by cash payables in repurchase transactions under netting agreements.				
14 Counterparty credit risk for all repo-style transactions.				
15 Exposure for repo-style transactions where a banking organization acts as an agent.				
16 Total exposures for repo-style transactions (sum of lines 12 to 15).				
Other off-balance sheet exposures				
17 Off-balance sheet exposures at gross notional amounts.				
18 LESS: Adjustments for conversion to credit equivalent amounts.				
19 Off-balance sheet exposures (sum of lines 17 and 18).				
Capital and total leverage exposure				
20 Tier 1 capital.				
21 Total leverage exposure (sum of lines 3, 11, 16 and 19).				
Supplementary leverage ratio				
22 Supplementary leverage ratio	(in percent)			

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 57750, Sept. 26, 2014; 80 FR 41425, July 15, 2015; 84 FR 4247, Feb. 14, 2019; 84 FR 59279, Nov. 1, 2019; 85 FR 4442, Jan. 24, 2020]

§§ 324.174–324.200 [Reserved]

Subpart F—Risk-Weighted Assets—Market Risk

§ 324.201 Purpose, applicability, and reservation of authority.

(a) *Purpose*. This subpart F establishes risk-based capital requirements for FDIC-supervised institutions with significant exposure to market risk, provides methods for these FDIC-supervised institutions to calculate their standardized measure for market risk and, if applicable, advanced measure for market risk, and establishes public disclosure requirements.

(b) *Applicability*. (1) This subpart F applies to any FDIC-supervised institution with aggregate trading assets and trading liabilities (as reported in the

FDIC-supervised institution's most recent quarterly Call Report), equal to:

(i) 10 percent or more of quarter-end total assets as reported on the most recent quarterly Call Report; or

(ii) $1 billion or more.

(2) The FDIC may apply this subpart to any FDIC-supervised institution if the FDIC deems it necessary or appropriate because of the level of market risk of the FDIC-supervised institution or to ensure safe and sound banking practices.

(3) The FDIC may exclude an FDIC-supervised institution that meets the criteria of paragraph (b)(1) of this section from application of this subpart if the FDIC determines that the exclusion is appropriate based on the level of market risk of the FDIC-supervised institution and is consistent with safe and sound banking practices.

(c) *Reservation of authority* (1) The FDIC may require an FDIC-supervised institution to hold an amount of capital greater than otherwise required under this subpart if the FDIC determines that the FDIC-supervised institution's capital requirement for market risk as calculated under this subpart is not commensurate with the market risk of the FDIC-supervised institution's covered positions. In making determinations under paragraphs (c)(1) through (c)(3) of this section, the FDIC will apply notice and response procedures generally in the same manner as the notice and response procedures set forth in § 324.5(c).

(2) If the FDIC determines that the risk-based capital requirement calculated under this subpart by the FDIC-supervised institution for one or more covered positions or portfolios of covered positions is not commensurate with the risks associated with those positions or portfolios, the FDIC may require the FDIC-supervised institution to assign a different risk-based capital requirement to the positions or portfolios that more accurately reflects the risk of the positions or portfolios.

(3) The FDIC may also require an FDIC-supervised institution to calculate risk-based capital requirements for specific positions or portfolios under this subpart, or under subpart D or subpart E of this part, as appropriate, to more accurately reflect the risks of the positions.

(4) Nothing in this subpart limits the authority of the FDIC under any other provision of law or regulation to take supervisory or enforcement action, including action to address unsafe or unsound practices or conditions, deficient capital levels, or violations of law.

§ 324.202 Definitions.

(a) Terms set forth in § 324.2 and used in this subpart have the definitions assigned thereto in § 324.2.

(b) For the purposes of this subpart, the following terms are defined as follows:

Backtesting means the comparison of an FDIC-supervised institution's internal estimates with actual outcomes during a sample period not used in model development. For purposes of this subpart, backtesting is one form of out-of-sample testing.

Commodity position means a position for which price risk arises from changes in the price of a commodity.

Corporate debt position means a debt position that is an exposure to a company that is not a sovereign entity, the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, the European Stability Mechanism, the European Financial Stability Facility, a multilateral development bank, a depository institution, a foreign bank, a credit union, a public sector entity, a GSE, or a securitization.

Correlation trading position means:

(1) A securitization position for which all or substantially all of the value of the underlying exposures is based on the credit quality of a single company for which a two-way market exists, or on commonly traded indices based on such exposures for which a two-way market exists on the indices; or

(2) A position that is not a securitization position and that hedges a position described in paragraph (1) of this definition; and

(3) A correlation trading position does not include:

(i) A resecuritization position;

(ii) A derivative of a securitization position that does not provide a pro

rata share in the proceeds of a securitization tranche; or

(iii) A securitization position for which the underlying assets or reference exposures are retail exposures, residential mortgage exposures, or commercial mortgage exposures.

Covered position means the following positions:

(1) A trading asset or trading liability (whether on- or off-balance sheet),[32] as reported on Call Report, that meets the following conditions:

(i) The position is a trading position or hedges another covered position;[33] and

(ii) The position is free of any restrictive covenants on its tradability or the FDIC-supervised institution is able to hedge the material risk elements of the position in a two-way market;

(2) A foreign exchange or commodity position, regardless of whether the position is a trading asset or trading liability (excluding any structural foreign currency positions that the FDIC-supervised institution chooses to exclude with prior supervisory approval); and

(3) Notwithstanding paragraphs (1) and (2) of this definition, a covered position does not include:

(i) An intangible asset, including any servicing asset;

(ii) Any hedge of a trading position that the FDIC determines to be outside the scope of the FDIC-supervised institution's hedging strategy required in paragraph (a)(2) of § 324.203;

(iii) Any position that, in form or substance, acts as a liquidity facility that provides support to asset-backed commercial paper;

(iv) A credit derivative the FDIC-supervised institution recognizes as a guarantee for risk-weighted asset amount calculation purposes under subpart D or subpart E of this part;

(v) Any position that is recognized as a credit valuation adjustment hedge under § 324.132(e)(5) or § 324.132(e)(6), except as provided in § 324.132(e)(6)(vii);

(vi) Any equity position that is not publicly traded, other than a derivative that references a publicly traded equity and other than a position in an investment company as defined in and registered with the SEC under the Investment Company Act, provided that all the underlying equities held by the investment company are publicly traded;

(vii) Any equity position that is not publicly traded, other than a derivative that references a publicly traded equity and other than a position in an entity not domiciled in the United States (or a political subdivision thereof) that is supervised and regulated in a manner similar to entities described in paragraph (3)(vi) of this definition;

(viii) Any position an FDIC-supervised institution holds with the intent to securitize; or

(ix) Any direct real estate holding.

Debt position means a covered position that is not a securitization position or a correlation trading position and that has a value that reacts primarily to changes in interest rates or credit spreads.

Default by a sovereign entity has the same meaning as the term sovereign default under § 324.2.

Equity position means a covered position that is not a securitization position or a correlation trading position and that has a value that reacts primarily to changes in equity prices.

Event risk means the risk of loss on equity or hybrid equity positions as a result of a financial event, such as the announcement or occurrence of a company merger, acquisition, spin-off, or dissolution.

Foreign exchange position means a position for which price risk arises from changes in foreign exchange rates.

General market risk means the risk of loss that could result from broad market movements, such as changes in the general level of interest rates, credit spreads, equity prices, foreign exchange rates, or commodity prices.

Hedge means a position or positions that offset all, or substantially all, of one or more material risk factors of another position.

Idiosyncratic risk means the risk of loss in the value of a position that

[32] Securities subject to repurchase and lending agreements are included as if they are still owned by the lender.

[33] A position that hedges a trading position must be within the scope of the bank's hedging strategy as described in paragraph (a)(2) of § 324.203.

arises from changes in risk factors unique to that position.

Incremental risk means the default risk and credit migration risk of a position. Default risk means the risk of loss on a position that could result from the failure of an obligor to make timely payments of principal or interest on its debt obligation, and the risk of loss that could result from bankruptcy, insolvency, or similar proceeding. Credit migration risk means the price risk that arises from significant changes in the underlying credit quality of the position.

Market risk means the risk of loss on a position that could result from movements in market prices.

Resecuritization position means a covered position that is:

(1) An on- or off-balance sheet exposure to a resecuritization; or

(2) An exposure that directly or indirectly references a resecuritization exposure in paragraph (1) of this definition.

Securitization means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties;

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches that reflect different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures;

(4) All or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities);

(5) For non-synthetic securitizations, the underlying exposures are not owned by an operating company;

(6) The underlying exposures are not owned by a small business investment company described in section 302 of the Small Business Investment Act;

(7) The underlying exposures are not owned by a firm an investment in which qualifies as a community development investment under section 24(Eleventh) of the National Bank Act;

(8) The FDIC may determine that a transaction in which the underlying exposures are owned by an investment firm that exercises substantially unfettered control over the size and composition of its assets, liabilities, and off-balance sheet exposures is not a securitization based on the transaction's leverage, risk profile, or economic substance;

(9) The FDIC may deem an exposure to a transaction that meets the definition of a securitization, notwithstanding paragraph (5), (6), or (7) of this definition, to be a securitization based on the transaction's leverage, risk profile, or economic substance; and

(10) The transaction is not:

(i) An investment fund;

(ii) A collective investment fund (as defined in 12 CFR 344.3 (state nonmember bank) and 12 CFR 390.203 (state savings association));

(iii) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of ERISA, a ''governmental plan'' (as defined in 29 USC 1002(32)) that complies with the tax deferral qualification requirements provided in the Internal Revenue Code, or any similar employee benefit plan established under the laws of a foreign jurisdiction; or

(iv) Registered with the SEC under the Investment Company Act or foreign equivalents thereof.

Securitization position means a covered position that is:

(1) An on-balance sheet or off-balance sheet credit exposure (including credit-enhancing representations and warranties) that arises from a securitization (including a resecuritization); or

(2) An exposure that directly or indirectly references a securitization exposure described in paragraph (1) of this definition.

Sovereign debt position means a direct exposure to a sovereign entity.

Specific risk means the risk of loss on a position that could result from factors other than broad market movements and includes event risk, default risk, and idiosyncratic risk.

Structural position in a foreign currency means a position that is not a trading position and that is:

(1) Subordinated debt, equity, or minority interest in a consolidated subsidiary that is denominated in a foreign currency;

(2) Capital assigned to foreign branches that is denominated in a foreign currency;

(3) A position related to an unconsolidated subsidiary or another item that is denominated in a foreign currency and that is deducted from the FDIC-supervised institution's tier 1 or tier 2 capital; or

(4) A position designed to hedge an FDIC-supervised institution's capital ratios or earnings against the effect on paragraphs (1), (2), or (3) of this definition of adverse exchange rate movements.

Term repo-style transaction means a repo-style transaction that has an original maturity in excess of one business day.

Trading position means a position that is held by the FDIC-supervised institution for the purpose of short-term resale or with the intent of benefiting from actual or expected short-term price movements, or to lock in arbitrage profits.

Two-way market means a market where there are independent bona fide offers to buy and sell so that a price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined within one day and settled at that price within a relatively short time frame conforming to trade custom.

Value-at-Risk (VaR) means the estimate of the maximum amount that the value of one or more positions could decline due to market price or rate movements during a fixed holding period within a stated confidence interval.

[78 FR 55471, Sept. 10, 2013, as amended at 81 FR 71354, Oct. 17, 2016; 84 FR 35280, July 22, 2019; 85 FR 4434, Jan. 24, 2020]

§ 324.203 Requirements for application of this subpart F.

(a) *Trading positions*—(1) *Identification of trading positions*. An FDIC-supervised institution must have clearly defined policies and procedures for determining which of its trading assets and trading liabilities are trading positions and which of its trading positions are correlation trading positions. These policies and procedures must take into account:

(i) The extent to which a position, or a hedge of its material risks, can be marked-to-market daily by reference to a two-way market; and

(ii) Possible impairments to the liquidity of a position or its hedge.

(2) *Trading and hedging strategies*. An FDIC-supervised institution must have clearly defined trading and hedging strategies for its trading positions that are approved by senior management of the FDIC-supervised institution.

(i) The trading strategy must articulate the expected holding period of, and the market risk associated with, each portfolio of trading positions.

(ii) The hedging strategy must articulate for each portfolio of trading positions the level of market risk the FDIC-supervised institution is willing to accept and must detail the instruments, techniques, and strategies the FDIC-supervised institution will use to hedge the risk of the portfolio.

(b) *Management of covered positions*—(1) *Active management*. An FDIC-supervised institution must have clearly defined policies and procedures for actively managing all covered positions. At a minimum, these policies and procedures must require:

(i) Marking positions to market or to model on a daily basis;

(ii) Daily assessment of the FDIC-supervised institution's ability to hedge position and portfolio risks, and of the extent of market liquidity;

(iii) Establishment and daily monitoring of limits on positions by a risk control unit independent of the trading business unit;

(iv) Daily monitoring by senior management of information described in paragraphs (b)(1)(i) through (b)(1)(iii) of this section;

(v) At least annual reassessment of established limits on positions by senior management; and

(vi) At least annual assessments by qualified personnel of the quality of market inputs to the valuation process, the soundness of key assumptions, the reliability of parameter estimation in pricing models, and the stability and

accuracy of model calibration under alternative market scenarios.

(2) *Valuation of covered positions.* The FDIC-supervised institution must have a process for prudent valuation of its covered positions that includes policies and procedures on the valuation of positions, marking positions to market or to model, independent price verification, and valuation adjustments or reserves. The valuation process must consider, as appropriate, unearned credit spreads, close-out costs, early termination costs, investing and funding costs, liquidity, and model risk.

(c) *Requirements for internal models.* (1) An FDIC-supervised institution must obtain the prior written approval of the FDIC before using any internal model to calculate its risk-based capital requirement under this subpart.

(2) An FDIC-supervised institution must meet all of the requirements of this section on an ongoing basis. The FDIC-supervised institution must promptly notify the FDIC when:

(i) The FDIC-supervised institution plans to extend the use of a model that the FDIC has approved under this subpart to an additional business line or product type;

(ii) The FDIC-supervised institution makes any change to an internal model approved by the FDIC under this subpart that would result in a material change in the FDIC-supervised institution's risk-weighted asset amount for a portfolio of covered positions; or

(iii) The FDIC-supervised institution makes any material change to its modeling assumptions.

(3) The FDIC may rescind its approval of the use of any internal model (in whole or in part) or of the determination of the approach under § 324.209(a)(2)(ii) for an FDIC-supervised institution's modeled correlation trading positions and determine an appropriate capital requirement for the covered positions to which the model would apply, if the FDIC determines that the model no longer complies with this subpart or fails to reflect accurately the risks of the FDIC-supervised institution's covered positions.

(4) The FDIC-supervised institution must periodically, but no less frequently than annually, review its internal models in light of developments in financial markets and modeling technologies, and enhance those models as appropriate to ensure that they continue to meet the FDIC's standards for model approval and employ risk measurement methodologies that are most appropriate for the FDIC-supervised institution's covered positions.

(5) The FDIC-supervised institution must incorporate its internal models into its risk management process and integrate the internal models used for calculating its VaR-based measure into its daily risk management process.

(6) The level of sophistication of an FDIC-supervised institution's internal models must be commensurate with the complexity and amount of its covered positions. An FDIC-supervised institution's internal models may use any of the generally accepted approaches, including but not limited to variance-covariance models, historical simulations, or Monte Carlo simulations, to measure market risk.

(7) The FDIC-supervised institution's internal models must properly measure all the material risks in the covered positions to which they are applied.

(8) The FDIC-supervised institution's internal models must conservatively assess the risks arising from less liquid positions and positions with limited price transparency under realistic market scenarios.

(9) The FDIC-supervised institution must have a rigorous and well-defined process for re-estimating, re-evaluating, and updating its internal models to ensure continued applicability and relevance.

(10) If an FDIC-supervised institution uses internal models to measure specific risk, the internal models must also satisfy the requirements in paragraph (b)(1) of § 324.207.

(d) *Control, oversight, and validation mechanisms.* (1) The FDIC-supervised institution must have a risk control unit that reports directly to senior management and is independent from the business trading units.

(2) The FDIC-supervised institution must validate its internal models initially and on an ongoing basis. The FDIC-supervised institution's validation process must be independent of

the internal models' development, implementation, and operation, or the validation process must be subjected to an independent review of its adequacy and effectiveness. Validation must include:

(i) An evaluation of the conceptual soundness of (including developmental evidence supporting) the internal models;

(ii) An ongoing monitoring process that includes verification of processes and the comparison of the FDIC-supervised institution's model outputs with relevant internal and external data sources or estimation techniques; and

(iii) An outcomes analysis process that includes backtesting. For internal models used to calculate the VaR-based measure, this process must include a comparison of the changes in the FDIC-supervised institution's portfolio value that would have occurred were end-of-day positions to remain unchanged (therefore, excluding fees, commissions, reserves, net interest income, and intraday trading) with VaR-based measures during a sample period not used in model development.

(3) The FDIC-supervised institution must stress test the market risk of its covered positions at a frequency appropriate to each portfolio, and in no case less frequently than quarterly. The stress tests must take into account concentration risk (including but not limited to concentrations in single issuers, industries, sectors, or markets), illiquidity under stressed market conditions, and risks arising from the FDIC-supervised institution's trading activities that may not be adequately captured in its internal models.

(4) The FDIC-supervised institution must have an internal audit function independent of business-line management that at least annually assesses the effectiveness of the controls supporting the FDIC-supervised institution's market risk measurement systems, including the activities of the business trading units and independent risk control unit, compliance with policies and procedures, and calculation of the FDIC-supervised institution's measures for market risk under this subpart. At least annually, the internal audit function must report its findings to the FDIC-supervised institution's board of directors (or a committee thereof).

(e) *Internal assessment of capital adequacy*. The FDIC-supervised institution must have a rigorous process for assessing its overall capital adequacy in relation to its market risk. The assessment must take into account risks that may not be captured fully in the VaR-based measure, including concentration and liquidity risk under stressed market conditions.

(f) *Documentation*. The FDIC-supervised institution must adequately document all material aspects of its internal models, management and valuation of covered positions, control, oversight, validation and review processes and results, and internal assessment of capital adequacy.

§ 324.204 Measure for market risk.

(a) *General requirement*. (1) An FDIC-supervised institution must calculate its standardized measure for market risk by following the steps described in paragraph (a)(2) of this section. An advanced approaches FDIC-supervised institution also must calculate an advanced measure for market risk by following the steps in paragraph (a)(2) of this section.

(2) *Measure for market risk*. An FDIC-supervised institution must calculate the standardized measure for market risk, which equals the sum of the VaR-based capital requirement, stressed VaR-based capital requirement, specific risk add-ons, incremental risk capital requirement, comprehensive risk capital requirement, and capital requirement for *de minimis* exposures all as defined under this paragraph (a)(2), (except, that the FDIC-supervised institution may not use the SFA in § 324.210(b)(2)(vii)(B) for purposes of this calculation), plus any additional capital requirement established by the FDIC. An advanced approaches FDIC-supervised institution that has completed the parallel run process and that has received notifications from the FDIC pursuant to § 324.121(d) also must calculate the advanced measure for market risk, which equals the sum of the VaR-based capital requirement,

stressed VaR-based capital requirement, specific risk add-ons, incremental risk capital requirement, comprehensive risk capital requirement, and capital requirement for *de minimis* exposures as defined under this paragraph (a)(2), plus any additional capital requirement established by the FDIC.

(i) *VaR-based capital requirement.* An FDIC-supervised institution's VaR-based capital requirement equals the greater of:

(A) The previous day's VaR-based measure as calculated under § 324.205; or

(B) The average of the daily VaR-based measures as calculated under § 324.205 for each of the preceding 60 business days multiplied by three, except as provided in paragraph (b) of this section.

(ii) *Stressed VaR-based capital requirement.* An FDIC-supervised institution's stressed VaR-based capital requirement equals the greater of:

(A) The most recent stressed VaR-based measure as calculated under § 324.206; or

(B) The average of the stressed VaR-based measures as calculated under § 324.206 for each of the preceding 12 weeks multiplied by three, except as provided in paragraph (b) of this section.

(iii) *Specific risk add-ons.* An FDIC-supervised institution's specific risk add-ons equal any specific risk add-ons that are required under § 324.207 and are calculated in accordance with § 324.210.

(iv) *Incremental risk capital requirement.* An FDIC-supervised institution's incremental risk capital requirement equals any incremental risk capital requirement as calculated under § 324.208.

(v) *Comprehensive risk capital requirement.* An FDIC-supervised institution's comprehensive risk capital requirement equals any comprehensive risk capital requirement as calculated under § 324.209.

(vi) *Capital requirement for de minimis exposures.* An FDIC-supervised institution's capital requirement for *de minimis* exposures equals:

(A) The absolute value of the fair value of those *de minimis* exposures that are not captured in the FDIC-supervised institution's VaR-based measure or under paragraph (a)(2)(vi)(B) of this section; and

(B) With the prior written approval of the FDIC, the capital requirement for any *de minimis* exposures using alternative techniques that appropriately measure the market risk associated with those exposures.

(b) *Backtesting.* An FDIC-supervised institution must compare each of its most recent 250 business days' trading losses (excluding fees, commissions, reserves, net interest income, and intraday trading) with the corresponding daily VaR-based measures calibrated to a one-day holding period and at a one-tail, 99.0 percent confidence level. An FDIC-supervised institution must begin backtesting as required by this paragraph (b) no later than one year after the later of January 1, 2014, and the date on which the FDIC-supervised institution becomes subject to this subpart. In the interim, consistent with safety and soundness principles, an FDIC-supervised institution subject to this subpart as of January 1, 2014 should continue to follow backtesting procedures in accordance with the FDIC's supervisory expectations.

(1) Once each quarter, the FDIC-supervised institution must identify the number of exceptions (that is, the number of business days for which the actual daily net trading loss, if any, exceeds the corresponding daily VaR-based measure) that have occurred over the preceding 250 business days.

(2) An FDIC-supervised institution must use the multiplication factor in Table 1 to § 324.204 that corresponds to the number of exceptions identified in paragraph (b)(1) of this section to determine its VaR-based capital requirement for market risk under paragraph (a)(2)(i) of this section and to determine its stressed VaR-based capital requirement for market risk under paragraph (a)(2)(ii) of this section until it obtains the next quarter's backtesting results, unless the FDIC notifies the FDIC-supervised institution in writing that a different adjustment or other action is appropriate.

TABLE 1 TO § 324.204—MULTIPLICATION FACTORS BASED ON RESULTS OF BACKTESTING

Number of exceptions	Multiplication factor
4 or fewer	3.00
5	3.40
6	3.50
7	3.65
8	3.75
9	3.85
10 or more	4.00

§ 324.205 VaR-based measure.

(a) *General requirement.* An FDIC-supervised institution must use one or more internal models to calculate daily a VaR-based measure of the general market risk of all covered positions. The daily VaR-based measure also may reflect the FDIC-supervised institution's specific risk for one or more portfolios of debt and equity positions, if the internal models meet the requirements of § 324.207(b)(1). The daily VaR-based measure must also reflect the FDIC-supervised institution's specific risk for any portfolio of correlation trading positions that is modeled under § 324.209. An FDIC-supervised institution may elect to include term repo-style transactions in its VaR-based measure, provided that the FDIC-supervised institution includes all such term repo-style transactions consistently over time.

(1) The FDIC-supervised institution's internal models for calculating its VaR-based measure must use risk factors sufficient to measure the market risk inherent in all covered positions. The market risk categories must include, as appropriate, interest rate risk, credit spread risk, equity price risk, foreign exchange risk, and commodity price risk. For material positions in the major currencies and markets, modeling techniques must incorporate enough segments of the yield curve—in no case less than six—to capture differences in volatility and less than perfect correlation of rates along the yield curve.

(2) The VaR-based measure may incorporate empirical correlations within and across risk categories, provided the FDIC-supervised institution validates and demonstrates the reasonableness of its process for measuring correlations. If the VaR-based measure does not incorporate empirical correlations across risk categories, the FDIC-supervised institution must add the separate measures from its internal models used to calculate the VaR-based measure for the appropriate market risk categories (interest rate risk, credit spread risk, equity price risk, foreign exchange rate risk, and/or commodity price risk) to determine its aggregate VaR-based measure.

(3) The VaR-based measure must include the risks arising from the nonlinear price characteristics of options positions or positions with embedded optionality and the sensitivity of the fair value of the positions to changes in the volatility of the underlying rates, prices, or other material risk factors. An FDIC-supervised institution with a large or complex options portfolio must measure the volatility of options positions or positions with embedded optionality by different maturities and/or strike prices, where material.

(4) The FDIC-supervised institution must be able to justify to the satisfaction of the FDIC the omission of any risk factors from the calculation of its VaR-based measure that the FDIC-supervised institution uses in its pricing models.

(5) The FDIC-supervised institution must demonstrate to the satisfaction of the FDIC the appropriateness of any proxies used to capture the risks of the FDIC-supervised institution's actual positions for which such proxies are used.

(b) *Quantitative requirements for VaR-based measure.* (1) The VaR-based measure must be calculated on a daily basis using a one-tail, 99.0 percent confidence level, and a holding period equivalent to a 10-business-day movement in underlying risk factors, such as rates, spreads, and prices. To calculate VaR-based measures using a 10-business-day holding period, the FDIC-supervised institution may calculate 10-business-day measures directly or may convert VaR-based measures using holding periods other than 10 business days to the equivalent of a 10-business-day holding period. An FDIC-supervised institution that converts its VaR-based measure in such a manner must be able to justify the reasonableness of its approach to the satisfaction of the FDIC.

(2) The VaR-based measure must be based on a historical observation period of at least one year. Data used to determine the VaR-based measure must be relevant to the FDIC-supervised institution's actual exposures and of sufficient quality to support the calculation of risk-based capital requirements. The FDIC-supervised institution must update data sets at least monthly or more frequently as changes in market conditions or portfolio composition warrant. For an FDIC-supervised institution that uses a weighting scheme or other method for the historical observation period, the FDIC-supervised institution must either:

(i) Use an effective observation period of at least one year in which the average time lag of the observations is at least six months; or

(ii) Demonstrate to the FDIC that its weighting scheme is more effective than a weighting scheme with an average time lag of at least six months representing the volatility of the FDIC-supervised institution's trading portfolio over a full business cycle. An FDIC-supervised institution using this option must update its data more frequently than monthly and in a manner appropriate for the type of weighting scheme.

(c) An FDIC-supervised institution must divide its portfolio into a number of significant subportfolios approved by the FDIC for subportfolio backtesting purposes. These subportfolios must be sufficient to allow the FDIC-supervised institution and the FDIC to assess the adequacy of the VaR model at the risk factor level; the FDIC will evaluate the appropriateness of these subportfolios relative to the value and composition of the FDIC-supervised institution's covered positions. The FDIC-supervised institution must retain and make available to the FDIC the following information for each subportfolio for each business day over the previous two years (500 business days), with no more than a 60-day lag:

(1) A daily VaR-based measure for the subportfolio calibrated to a one-tail, 99.0 percent confidence level;

(2) The daily profit or loss for the subportfolio (that is, the net change in price of the positions held in the portfolio at the end of the previous business day); and

(3) The p-value of the profit or loss on each day (that is, the probability of observing a profit that is less than, or a loss that is greater than, the amount reported for purposes of paragraph (c)(2) of this section based on the model used to calculate the VaR-based measure described in paragraph (c)(1) of this section).

§ 324.206 Stressed VaR-based measure.

(a) *General requirement.* At least weekly, an FDIC-supervised institution must use the same internal model(s) used to calculate its VaR-based measure to calculate a stressed VaR-based measure.

(b) *Quantitative requirements for stressed VaR-based measure.* (1) An FDIC-supervised institution must calculate a stressed VaR-based measure for its covered positions using the same model(s) used to calculate the VaR-based measure, subject to the same confidence level and holding period applicable to the VaR-based measure under § 324.205, but with model inputs calibrated to historical data from a continuous 12-month period that reflects a period of significant financial stress appropriate to the FDIC-supervised institution's current portfolio.

(2) The stressed VaR-based measure must be calculated at least weekly and be no less than the FDIC-supervised institution's VaR-based measure.

(3) An FDIC-supervised institution must have policies and procedures that describe how it determines the period of significant financial stress used to calculate the FDIC-supervised institution's stressed VaR-based measure under this section and must be able to provide empirical support for the period used. The FDIC-supervised institution must obtain the prior approval of the FDIC for, and notify the FDIC if the FDIC-supervised institution makes any material changes to, these policies and procedures. The policies and procedures must address:

(i) How the FDIC-supervised institution links the period of significant financial stress used to calculate the stressed VaR-based measure to the composition and directional bias of its current portfolio; and

(ii) The FDIC-supervised institution's process for selecting, reviewing, and updating the period of significant financial stress used to calculate the stressed VaR-based measure and for monitoring the appropriateness of the period to the FDIC-supervised institution's current portfolio.

(4) Nothing in this section prevents the FDIC from requiring an FDIC-supervised institution to use a different period of significant financial stress in the calculation of the stressed VaR-based measure.

§ 324.207 Specific risk.

(a) *General requirement.* An FDIC-supervised institution must use one of the methods in this section to measure the specific risk for each of its debt, equity, and securitization positions with specific risk.

(b) *Modeled specific risk.* An FDIC-supervised institution may use models to measure the specific risk of covered positions as provided in § 324.205(a) (therefore, excluding securitization positions that are not modeled under § 324.209). An FDIC-supervised institution must use models to measure the specific risk of correlation trading positions that are modeled under § 324.209.

(1) *Requirements for specific risk modeling.* (i) If an FDIC-supervised institution uses internal models to measure the specific risk of a portfolio, the internal models must:

(A) Explain the historical price variation in the portfolio;

(B) Be responsive to changes in market conditions;

(C) Be robust to an adverse environment, including signaling rising risk in an adverse environment; and

(D) Capture all material components of specific risk for the debt and equity positions in the portfolio. Specifically, the internal models must:

(*1*) Capture event risk and idiosyncratic risk; and

(*2*) Capture and demonstrate sensitivity to material differences between positions that are similar but not identical and to changes in portfolio composition and concentrations.

(ii) If an FDIC-supervised institution calculates an incremental risk measure for a portfolio of debt or equity positions under § 324.208, the FDIC-supervised institution is not required to capture default and credit migration risks in its internal models used to measure the specific risk of those portfolios.

(2) *Specific risk fully modeled for one or more portfolios.* If the FDIC-supervised institution's VaR-based measure captures all material aspects of specific risk for one or more of its portfolios of debt, equity, or correlation trading positions, the FDIC-supervised institution has no specific risk add-on for those portfolios for purposes of § 324.204(a)(2)(iii).

(c) *Specific risk not modeled.* (1) If the FDIC-supervised institution's VaR-based measure does not capture all material aspects of specific risk for a portfolio of debt, equity, or correlation trading positions, the FDIC-supervised institution must calculate a specific-risk add-on for the portfolio under the standardized measurement method as described in § 324.210.

(2) An FDIC-supervised institution must calculate a specific risk add-on under the standardized measurement method as described in § 324.210 for all of its securitization positions that are not modeled under § 324.209.

§ 324.208 Incremental risk.

(a) *General requirement.* An FDIC-supervised institution that measures the specific risk of a portfolio of debt positions under § 324.207(b) using internal models must calculate at least weekly an incremental risk measure for that portfolio according to the requirements in this section. The incremental risk measure is the FDIC-supervised institution's measure of potential losses due to incremental risk over a one-year time horizon at a one-tail, 99.9 percent confidence level, either under the assumption of a constant level of risk, or under the assumption of constant positions. With the prior approval of the FDIC, an FDIC-supervised institution may choose to include portfolios of equity positions in its incremental risk model, provided that it consistently includes such equity positions in a manner that is consistent with how the FDIC-supervised institution internally measures and manages the incremental risk of such positions at the portfolio level. If equity positions are included

in the model, for modeling purposes default is considered to have occurred upon the default of any debt of the issuer of the equity position. An FDIC-supervised institution may not include correlation trading positions or securitization positions in its incremental risk measure.

(b) *Requirements for incremental risk modeling*. For purposes of calculating the incremental risk measure, the incremental risk model must:

(1) Measure incremental risk over a one-year time horizon and at a one-tail, 99.9 percent confidence level, either under the assumption of a constant level of risk, or under the assumption of constant positions.

(i) A constant level of risk assumption means that the FDIC-supervised institution rebalances, or rolls over, its trading positions at the beginning of each liquidity horizon over the one-year horizon in a manner that maintains the FDIC-supervised institution's initial risk level. The FDIC-supervised institution must determine the frequency of rebalancing in a manner consistent with the liquidity horizons of the positions in the portfolio. The liquidity horizon of a position or set of positions is the time required for an FDIC-supervised institution to reduce its exposure to, or hedge all of its material risks of, the position(s) in a stressed market. The liquidity horizon for a position or set of positions may not be less than the shorter of three months or the contractual maturity of the position.

(ii) A constant position assumption means that the FDIC-supervised institution maintains the same set of positions throughout the one-year horizon. If an FDIC-supervised institution uses this assumption, it must do so consistently across all portfolios.

(iii) An FDIC-supervised institution's selection of a constant position or a constant risk assumption must be consistent between the FDIC-supervised institution's incremental risk model and its comprehensive risk model described in § 324.209, if applicable.

(iv) An FDIC-supervised institution's treatment of liquidity horizons must be consistent between the FDIC-supervised institution's incremental risk model and its comprehensive risk model described in § 324.209, if applicable.

(2) Recognize the impact of correlations between default and migration events among obligors.

(3) Reflect the effect of issuer and market concentrations, as well as concentrations that can arise within and across product classes during stressed conditions.

(4) Reflect netting only of long and short positions that reference the same financial instrument.

(5) Reflect any material mismatch between a position and its hedge.

(6) Recognize the effect that liquidity horizons have on dynamic hedging strategies. In such cases, an FDIC-supervised institution must:

(i) Choose to model the rebalancing of the hedge consistently over the relevant set of trading positions;

(ii) Demonstrate that the inclusion of rebalancing results in a more appropriate risk measurement;

(iii) Demonstrate that the market for the hedge is sufficiently liquid to permit rebalancing during periods of stress; and

(iv) Capture in the incremental risk model any residual risks arising from such hedging strategies.

(7) Reflect the nonlinear impact of options and other positions with material nonlinear behavior with respect to default and migration changes.

(8) Maintain consistency with the FDIC-supervised institution's internal risk management methodologies for identifying, measuring, and managing risk.

(c) *Calculation of incremental risk capital requirement*. The incremental risk capital requirement is the greater of:

(1) The average of the incremental risk measures over the previous 12 weeks; or

(2) The most recent incremental risk measure.

§ 324.209 Comprehensive risk.

(a) *General requirement*. (1) Subject to the prior approval of the FDIC, an FDIC-supervised institution may use the method in this section to measure comprehensive risk, that is, all price risk, for one or more portfolios of correlation trading positions.

(2) An FDIC-supervised institution that measures the price risk of a portfolio of correlation trading positions using internal models must calculate at least weekly a comprehensive risk measure that captures all price risk according to the requirements of this section. The comprehensive risk measure is either:

(i) The sum of:

(A) The FDIC-supervised institution's modeled measure of all price risk determined according to the requirements in paragraph (b) of this section; and

(B) A surcharge for the FDIC-supervised institution's modeled correlation trading positions equal to the total specific risk add-on for such positions as calculated under § 324.210 multiplied by 8.0 percent; or

(ii) With approval of the FDIC and provided the FDIC-supervised institution has met the requirements of this section for a period of at least one year and can demonstrate the effectiveness of the model through the results of ongoing model validation efforts including robust benchmarking, the greater of:

(A) The FDIC-supervised institution's modeled measure of all price risk determined according to the requirements in paragraph (b) of this section; or

(B) The total specific risk add-on that would apply to the bank's modeled correlation trading positions as calculated under § 324.210 multiplied by 8.0 percent.

(b) *Requirements for modeling all price risk*. If an FDIC-supervised institution uses an internal model to measure the price risk of a portfolio of correlation trading positions:

(1) The internal model must measure comprehensive risk over a one-year time horizon at a one-tail, 99.9 percent confidence level, either under the assumption of a constant level of risk, or under the assumption of constant positions.

(2) The model must capture all material price risk, including but not limited to the following:

(i) The risks associated with the contractual structure of cash flows of the position, its issuer, and its underlying exposures;

(ii) Credit spread risk, including nonlinear price risks;

(iii) The volatility of implied correlations, including nonlinear price risks such as the cross-effect between spreads and correlations;

(iv) Basis risk;

(v) Recovery rate volatility as it relates to the propensity for recovery rates to affect tranche prices; and

(vi) To the extent the comprehensive risk measure incorporates the benefits of dynamic hedging, the static nature of the hedge over the liquidity horizon must be recognized. In such cases, an FDIC-supervised institution must:

(A) Choose to model the rebalancing of the hedge consistently over the relevant set of trading positions;

(B) Demonstrate that the inclusion of rebalancing results in a more appropriate risk measurement;

(C) Demonstrate that the market for the hedge is sufficiently liquid to permit rebalancing during periods of stress; and

(D) Capture in the comprehensive risk model any residual risks arising from such hedging strategies;

(3) The FDIC-supervised institution must use market data that are relevant in representing the risk profile of the FDIC-supervised institution's correlation trading positions in order to ensure that the FDIC-supervised institution fully captures the material risks of the correlation trading positions in its comprehensive risk measure in accordance with this section; and

(4) The FDIC-supervised institution must be able to demonstrate that its model is an appropriate representation of comprehensive risk in light of the historical price variation of its correlation trading positions.

(c) *Requirements for stress testing*. (1) An FDIC-supervised institution must at least weekly apply specific, supervisory stress scenarios to its portfolio of correlation trading positions that capture changes in:

(i) Default rates;

(ii) Recovery rates;

(iii) Credit spreads;

(iv) Correlations of underlying exposures; and

(v) Correlations of a correlation trading position and its hedge.

(2) *Other requirements.* (i) An FDIC-supervised institution must retain and make available to the FDIC the results of the supervisory stress testing, including comparisons with the capital requirements generated by the FDIC-supervised institution's comprehensive risk model.

(ii) An FDIC-supervised institution must report to the FDIC promptly any instances where the stress tests indicate any material deficiencies in the comprehensive risk model.

(d) *Calculation of comprehensive risk capital requirement.* The comprehensive risk capital requirement is the greater of:

(1) The average of the comprehensive risk measures over the previous 12 weeks; or

(2) The most recent comprehensive risk measure.

§ 324.210 Standardized measurement method for specific risk.

(a) *General requirement.* An FDIC-supervised institution must calculate a total specific risk add-on for each portfolio of debt and equity positions for which the FDIC-supervised institution's VaR-based measure does not capture all material aspects of specific risk and for all securitization positions that are not modeled under § 324.209. An FDIC-supervised institution must calculate each specific risk add-on in accordance with the requirements of this section. Notwithstanding any other definition or requirement in this subpart, a position that would have qualified as a debt position or an equity position but for the fact that it qualifies as a correlation trading position under paragraph (2) of the definition of correlation trading position in § 324.2, shall be considered a debt position or an equity position, respectively, for purposes of this § 324.210.

(1) The specific risk add-on for an individual debt or securitization position that represents sold credit protection is capped at the notional amount of the credit derivative contract. The specific risk add-on for an individual debt or securitization position that represents purchased credit protection is capped at the current fair value of the transaction plus the absolute value of the present value of all remaining payments to the protection seller under the transaction. This sum is equal to the value of the protection leg of the transaction.

(2) For debt, equity, or securitization positions that are derivatives with linear payoffs, an FDIC-supervised institution must assign a specific risk-weighting factor to the fair value of the effective notional amount of the underlying instrument or index portfolio, except for a securitization position for which the FDIC-supervised institution directly calculates a specific risk add-on using the SFA in paragraph (b)(2)(vii)(B) of this section. A swap must be included as an effective notional position in the underlying instrument or portfolio, with the receiving side treated as a long position and the paying side treated as a short position. For debt, equity, or securitization positions that are derivatives with nonlinear payoffs, an FDIC-supervised institution must risk weight the fair value of the effective notional amount of the underlying instrument or portfolio multiplied by the derivative's delta.

(3) For debt, equity, or securitization positions, an FDIC-supervised institution may net long and short positions (including derivatives) in identical issues or identical indices. An FDIC-supervised institution may also net positions in depositary receipts against an opposite position in an identical equity in different markets, provided that the FDIC-supervised institution includes the costs of conversion.

(4) A set of transactions consisting of either a debt position and its credit derivative hedge or a securitization position and its credit derivative hedge has a specific risk add-on of zero if:

(i) The debt or securitization position is fully hedged by a total return swap (or similar instrument where there is a matching of swap payments and changes in fair value of the debt or securitization position);

(ii) There is an exact match between the reference obligation of the swap and the debt or securitization position;

(iii) There is an exact match between the currency of the swap and the debt or securitization position; and

(iv) There is either an exact match between the maturity date of the swap

and the maturity date of the debt or securitization position; or, in cases where a total return swap references a portfolio of positions with different maturity dates, the total return swap maturity date must match the maturity date of the underlying asset in that portfolio that has the latest maturity date.

(5) The specific risk add-on for a set of transactions consisting of either a debt position and its credit derivative hedge or a securitization position and its credit derivative hedge that does not meet the criteria of paragraph (a)(4) of this section is equal to 20.0 percent of the capital requirement for the side of the transaction with the higher specific risk add-on when:

(i) The credit risk of the position is fully hedged by a credit default swap or similar instrument;

(ii) There is an exact match between the reference obligation of the credit derivative hedge and the debt or securitization position;

(iii) There is an exact match between the currency of the credit derivative hedge and the debt or securitization position; and

(iv) There is either an exact match between the maturity date of the credit derivative hedge and the maturity date of the debt or securitization position; or, in the case where the credit derivative hedge has a standard maturity date:

(A) The maturity date of the credit derivative hedge is within 30 business days of the maturity date of the debt or securitization position; or

(B) For purchased credit protection, the maturity date of the credit derivative hedge is later than the maturity date of the debt or securitization position, but is no later than the standard maturity date for that instrument that immediately follows the maturity date of the debt or securitization position. The maturity date of the credit derivative hedge may not exceed the maturity date of the debt or securitization position by more than 90 calendar days.

(6) The specific risk add-on for a set of transactions consisting of either a debt position and its credit derivative hedge or a securitization position and its credit derivative hedge that does not meet the criteria of either paragraph (a)(4) or (a)(5) of this section, but in which all or substantially all of the price risk has been hedged, is equal to the specific risk add-on for the side of the transaction with the higher specific risk add-on.

(b) *Debt and securitization positions.* (1) The total specific risk add-on for a portfolio of debt or securitization positions is the sum of the specific risk add-ons for individual debt or securitization positions, as computed under this section. To determine the specific risk add-on for individual debt or securitization positions, an FDIC-supervised institution must multiply the absolute value of the current fair value of each net long or net short debt or securitization position in the portfolio by the appropriate specific risk-weighting factor as set forth in paragraphs (b)(2)(i) through (b)(2)(vii) of this section.

(2) For the purpose of this section, the appropriate specific risk-weighting factors include:

(i) *Sovereign debt positions.* (A) In accordance with Table 1 to § 324.210, an FDIC-supervised institution must assign a specific risk-weighting factor to a sovereign debt position based on the CRC applicable to the sovereign, and, as applicable, the remaining contractual maturity of the position, or if there is no CRC applicable to the sovereign, based on whether the sovereign entity is a member of the OECD. Notwithstanding any other provision in this subpart, sovereign debt positions that are backed by the full faith and credit of the United States are treated as having a CRC of 0.

TABLE 1 TO § 324.210—SPECIFIC RISK-WEIGHTING FACTORS FOR SOVEREIGN DEBT POSITIONS

		Specific risk-weighting factor (in percent)
CRC	0–1	0.0

TABLE 1 TO § 324.210—SPECIFIC RISK-WEIGHTING FACTORS FOR SOVEREIGN DEBT POSITIONS—Continued

	2–3	Remaining contractual maturity of 6 months or less.	0.25
		Remaining contractual maturity of greater than 6 and up to and including 24 months.	1.0
		Remaining contractual maturity exceeds 24 months.	1.6
	4–6	8.0	
	7	12.0	
OECD Member with No CRC		0.0	
Non-OECD Member with No CRC		8.0	
Sovereign Default		12.0	

(B) Notwithstanding paragraph (b)(2)(i)(A) of this section, an FDIC-supervised institution may assign to a sovereign debt position a specific risk-weighting factor that is lower than the applicable specific risk-weighting factor in Table 1 to § 324.210 if:

(*1*) The position is denominated in the sovereign entity's currency;

(*2*) The FDIC-supervised institution has at least an equivalent amount of liabilities in that currency; and

(*3*) The sovereign entity allows banks under its jurisdiction to assign the lower specific risk-weighting factor to the same exposures to the sovereign entity.

(C) An FDIC-supervised institution must assign a 12.0 percent specific risk-weighting factor to a sovereign debt position immediately upon determination a default has occurred; or if a default has occurred within the previous five years.

(D) An FDIC-supervised institution must assign a 0.0 percent specific risk-weighting factor to a sovereign debt position if the sovereign entity is a member of the OECD and does not have a CRC assigned to it, except as provided in paragraph (b)(2)(i)(C) of this section.

(E) An FDIC-supervised institution must assign an 8.0 percent specific risk-weighting factor to a sovereign debt position if the sovereign is not a member of the OECD and does not have a CRC assigned to it, except as provided in paragraph (b)(2)(i)(C) of this section.

(ii) *Certain supranational entity and multilateral development bank debt positions.* An FDIC-supervised institution may assign a 0.0 percent specific risk-weighting factor to a debt position that is an exposure to the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, the European Stability Mechanism, the European Financial Stability Facility, or an MDB.

(iii) *GSE debt positions.* An FDIC-supervised institution must assign a 1.6 percent specific risk-weighting factor to a debt position that is an exposure to a GSE. Notwithstanding the foregoing, an FDIC-supervised institution must assign an 8.0 percent specific risk-weighting factor to preferred stock issued by a GSE.

(iv) *Depository institution, foreign bank, and credit union debt positions.* (A) Except as provided in paragraph (b)(2)(iv)(B) of this section, an FDIC-supervised institution must assign a specific risk-weighting factor to a debt position that is an exposure to a depository institution, a foreign bank, or a credit union, in accordance with Table

2 to § 324.210 of this section, based on the CRC that corresponds to that entity's home country or the OECD membership status of that entity's home country if there is no CRC applicable to the entity's home country, and, as applicable, the remaining contractual maturity of the position.

TABLE 2 TO § 324.210—SPECIFIC RISK-WEIGHTING FACTORS FOR DEPOSITORY INSTITUTION, FOREIGN BANK, AND CREDIT UNION DEBT POSITIONS

	Specific risk-weighting factor	Percent
CRC 0–2 or OECD Member with No CRC.	Remaining contractual maturity of 6 months or less.	0.25
	Remaining contractual maturity of greater than 6 and up to and including 24 months.	1.0
	Remaining contractual maturity exceeds 24 months.	1.6
CRC 3		8.0
CRC 4–7		12.0
Non-OECD Member with No CRC		8.0
Sovereign Default		12.0

(B) An FDIC-supervised institution must assign a specific risk-weighting factor of 8.0 percent to a debt position that is an exposure to a depository institution or a foreign bank that is includable in the depository institution's or foreign bank's regulatory capital and that is not subject to deduction as a reciprocal holding under § 324.22.

(C) An FDIC-supervised institution must assign a 12.0 percent specific risk-weighting factor to a debt position that is an exposure to a foreign bank immediately upon determination that a default by the foreign bank's home country has occurred or if a default by the foreign bank's home country has occurred within the previous five years.

(v) *PSE debt positions.* (A) Except as provided in paragraph (b)(2)(v)(B) of this section, an FDIC-supervised institution must assign a specific risk-weighting factor to a debt position that is an exposure to a PSE in accordance with Tables 3 and 4 to § 324.210 depending on the position's categorization as a general obligation or revenue obligation based on the CRC that corresponds to the PSE's home country or the OECD membership status of the PSE's home country if there is no CRC applicable to the PSE's home country, and, as applicable, the remaining contractual maturity of the position, as set forth in Tables 3 and 4 to § 324.210.

(B) An FDIC-supervised institution may assign a lower specific risk-weighting factor than would otherwise apply under Tables 3 and 4 to § 324.210 to a debt position that is an exposure to a foreign PSE if:

(*1*) The PSE's home country allows banks under its jurisdiction to assign a lower specific risk-weighting factor to such position; and

(*2*) The specific risk-weighting factor is not lower than the risk weight that corresponds to the PSE's home country in Table 1 to § 324.210.

(C) An FDIC-supervised institution must assign a 12.0 percent specific risk-weighting factor to a PSE debt position immediately upon determination that a default by the PSE's home country has occurred or if a default by the PSE's home country has occurred within the previous five years.

TABLE 3 TO § 324.210—SPECIFIC RISK-WEIGHTING FACTORS FOR PSE GENERAL OBLIGATION DEBT POSITIONS

	General obligation specific risk-weighting factor	Percent
CRC 0–2 or OECD Member with No CRC.	Remaining contractual maturity of 6 months or less.	0.25
	Remaining contractual maturity of greater than 6 and up to and including 24 months.	1.0
	Remaining contractual maturity exceeds 24 months.	1.6
CRC 3		8.0
CRC 4–7		12.0
Non-OECD Member with No CRC		8.0
Sovereign Default		12.0

TABLE 4 TO § 324.210—SPECIFIC RISK-WEIGHTING FACTORS FOR PSE REVENUE OBLIGATION DEBT POSITIONS

	Revenue obligation specific risk-weighting factor	Percent
CRC 0–1 or OECD Member with No CRC.	Remaining contractual maturity of 6 months or less.	0.25
	Remaining contractual maturity of greater than 6 and up to and including 24 months.	1.0
	Remaining contractual maturity exceeds 24 months.	1.6
CRC 2–3		8.0
CRC 4–7		12.0
Non-OECD Member with No CRC		8.0
Sovereign Default		12.0

(vi) *Corporate debt positions.* Except as otherwise provided in paragraph (b)(2)(vi)(B) of this section, an FDIC-supervised institution must assign a specific risk-weighting factor to a corporate debt position in accordance with the investment grade methodology in paragraph (b)(2)(vi)(A) of this section.

(A) *Investment grade methodology.* (*1*) For corporate debt positions that are exposures to entities that have issued and outstanding publicly traded instruments, an FDIC-supervised institution must assign a specific risk-weighting factor based on the category and remaining contractual maturity of the position, in accordance with Table 5 to § 324.210. For purposes of this paragraph (b)(2)(vi)(A)(*1*), the FDIC-supervised institution must determine whether the position is in the investment grade or not investment grade category.

TABLE 5 TO § 324.210—SPECIFIC RISK-WEIGHTING FACTORS FOR CORPORATE DEBT POSITIONS UNDER THE INVESTMENT GRADE METHODOLOGY

Category	Remaining contractual maturity	Specific risk-weighting factor (in percent)
Investment Grade	6 months or less	0.50
	Greater than 6 and up to and including 24 months.	2.00
	Greater than 24 months	4.00

TABLE 5 TO § 324.210—SPECIFIC RISK-WEIGHTING FACTORS FOR CORPORATE DEBT POSITIONS UNDER THE INVESTMENT GRADE METHODOLOGY—Continued

Category	Remaining contractual maturity	Specific risk-weighting factor (in percent)
Non-investment Grade		12.00

(*2*) An FDIC-supervised institution must assign an 8.0 percent specific risk-weighting factor for corporate debt positions that are exposures to entities that do not have publicly traded instruments outstanding.

(B) *Limitations.* (*1*) An FDIC-supervised institution must assign a specific risk-weighting factor of at least 8.0 percent to an interest-only mortgage-backed security that is not a securitization position.

(*2*) An FDIC-supervised institution shall not assign a corporate debt position a specific risk-weighting factor that is lower than the specific risk-weighting factor that corresponds to the CRC of the issuer's home country, if applicable, in Table 1 to § 324.210.

(vii) *Securitization positions.* (A) General requirements. (*1*) An FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution must assign a specific risk-weighting factor to a securitization position using either the simplified supervisory formula approach (SSFA) in paragraph (b)(2)(vii)(C) of this section (and § 324.211) or assign a specific risk-weighting factor of 100 percent to the position.

(*2*) An FDIC-supervised institution that is an advanced approaches FDIC-supervised institution must calculate a specific risk add-on for a securitization position in accordance with paragraph (b)(2)(vii)(B) of this section if the FDIC-supervised institution and the securitization position each qualifies to use the SFA in § 324.143. An FDIC-supervised institution that is an advanced approaches FDIC-supervised institution with a securitization position that does not qualify for the SFA under paragraph (b)(2)(vii)(B) of this section may assign a specific risk-weighting factor to the securitization position using the SSFA in accordance with paragraph (b)(2)(vii)(C) of this section or assign a specific risk-weighting factor of 100 percent to the position.

(*3*) An FDIC-supervised institution must treat a short securitization position as if it is a long securitization position solely for calculation purposes when using the SFA in paragraph (b)(2)(vii)(B) of this section or the SSFA in paragraph (b)(2)(vii)(C) of this section.

(B) *SFA.* To calculate the specific risk add-on for a securitization position using the SFA, an FDIC-supervised institution that is an advanced approaches FDIC-supervised institution must set the specific risk add-on for the position equal to the risk-based capital requirement as calculated under § 324.143.

(C) *SSFA.* To use the SSFA to determine the specific risk-weighting factor for a securitization position, an FDIC-supervised institution must calculate the specific risk-weighting factor in accordance with § 324.211.

(D) *N^{th}-to-default credit derivatives.* An FDIC-supervised institution must determine a specific risk add-on using the SFA in paragraph (b)(2)(vii)(B) of this section, or assign a specific risk-weighting factor using the SSFA in paragraph (b)(2)(vii)(C) of this section to an nth-to-default credit derivative in accordance with this paragraph (b)(2)(vii)(D), regardless of whether the FDIC-supervised institution is a net protection buyer or net protection seller. An FDIC-supervised institution must determine its position in the nth-to-default credit derivative as the largest notional amount of all the underlying exposures.

(*1*) For purposes of determining the specific risk add-on using the SFA in paragraph (b)(2)(vii)(B) of this section or the specific risk-weighting factor for an nth-to-default credit derivative using the SSFA in paragraph (b)(2)(vii)(C) of this section the FDIC-supervised institution must calculate

the attachment point and detachment point of its position as follows:

(*i*) The attachment point (parameter A) is the ratio of the sum of the notional amounts of all underlying exposures that are subordinated to the FDIC-supervised institution's position to the total notional amount of all underlying exposures. For purposes of the SSFA, parameter A is expressed as a decimal value between zero and one. For purposes of using the SFA in paragraph (b)(2)(vii)(B) of this section to calculate the specific add-on for its position in an nth-to-default credit derivative, parameter A must be set equal to the *credit enhancement level* (L) input to the SFA formula in § 324.143. In the case of a first-to-default credit derivative, there are no underlying exposures that are subordinated to the FDIC-supervised institution's position. In the case of a second-or-subsequent-to-default credit derivative, the smallest (n-1) notional amounts of the underlying exposure(s) are subordinated to the FDIC-supervised institution's position.

(*ii*) The detachment point (parameter D) equals the sum of parameter A plus the ratio of the notional amount of the FDIC-supervised institution's position in the nth-to-default credit derivative to the total notional amount of all underlying exposures. For purposes of the SSFA, parameter A is expressed as a decimal value between zero and one. For purposes of using the SFA in paragraph (b)(2)(vii)(B) of this section to calculate the specific risk add-on for its position in an nth-to-default credit derivative, parameter D must be set to equal the L input plus the *thickness of tranche* (T) input to the SFA formula in § 324.143.

(*2*) An FDIC-supervised institution that does not use the SFA in paragraph (b)(2)(vii)(B) of this section to determine a specific risk-add on, or the SSFA in paragraph (b)(2)(vii)(C) of this section to determine a specific risk-weighting factor for its position in an nth-to-default credit derivative must assign a specific risk-weighting factor of 100 percent to the position.

(c) *Modeled correlation trading positions*. For purposes of calculating the comprehensive risk measure for modeled correlation trading positions under either paragraph (a)(2)(i) or (a)(2)(ii) of § 324.209, the total specific risk add-on is the greater of:

(1) The sum of the FDIC-supervised institution's specific risk add-ons for each net long correlation trading position calculated under this section; or

(2) The sum of the FDIC-supervised institution's specific risk add-ons for each net short correlation trading position calculated under this section.

(d) *Non-modeled securitization positions*. For securitization positions that are not correlation trading positions and for securitizations that are correlation trading positions not modeled under § 324.209, the total specific risk add-on is the greater of:

(1) The sum of the FDIC-supervised institution's specific risk add-ons for each net long securitization position calculated under this section; or

(2) The sum of the FDIC-supervised institution's specific risk add-ons for each net short securitization position calculated under this section.

(e) *Equity positions*. The total specific risk add-on for a portfolio of equity positions is the sum of the specific risk add-ons of the individual equity positions, as computed under this section. To determine the specific risk add-on of individual equity positions, an FDIC-supervised institution must multiply the absolute value of the current fair value of each net long or net short equity position by the appropriate specific risk-weighting factor as determined under this paragraph (e):

(1) The FDIC-supervised institution must multiply the absolute value of the current fair value of each net long or net short equity position by a specific risk-weighting factor of 8.0 percent. For equity positions that are index contracts comprising a well-diversified portfolio of equity instruments, the absolute value of the current fair value of each net long or net short position is multiplied by a specific risk-weighting factor of 2.0 percent.[34]

(2) For equity positions arising from the following futures-related arbitrage

[34] A portfolio is well-diversified if it contains a large number of individual equity positions, with no single position representing a substantial portion of the portfolio's total fair value.

strategies, an FDIC-supervised institution may apply a 2.0 percent specific risk-weighting factor to one side (long or short) of each position with the opposite side exempt from an additional capital requirement:

(i) Long and short positions in exactly the same index at different dates or in different market centers; or

(ii) Long and short positions in index contracts at the same date in different, but similar indices.

(3) For futures contracts on main indices that are matched by offsetting positions in a basket of stocks comprising the index, an FDIC-supervised institution may apply a 2.0 percent specific risk-weighting factor to the futures and stock basket positions (long and short), provided that such trades are deliberately entered into and separately controlled, and that the basket of stocks is comprised of stocks representing at least 90.0 percent of the capitalization of the index.

(f) *Due diligence requirements for securitization positions.* (1) An FDIC-supervised institution must demonstrate to the satisfaction of the FDIC a comprehensive understanding of the features of a securitization position that would materially affect the performance of the position by conducting and documenting the analysis set forth in paragraph (f)(2) of this section. The FDIC-supervised institution's analysis must be commensurate with the complexity of the securitization position and the materiality of the position in relation to capital.

(2) An FDIC-supervised institution must demonstrate its comprehensive understanding for each securitization position by:

(i) Conducting an analysis of the risk characteristics of a securitization position prior to acquiring the position and document such analysis within three business days after acquiring position, considering:

(A) Structural features of the securitization that would materially impact the performance of the position, for example, the contractual cash flow waterfall, waterfall-related triggers, credit enhancements, liquidity enhancements, fair value triggers, the performance of organizations that service the position, and deal-specific definitions of default;

(B) Relevant information regarding the performance of the underlying credit exposure(s), for example, the percentage of loans 30, 60, and 90 days past due; default rates; prepayment rates; loans in foreclosure; property types; occupancy; average credit score or other measures of creditworthiness; average loan-to-value ratio; and industry and geographic diversification data on the underlying exposure(s);

(C) Relevant market data of the securitization, for example, bid-ask spreads, most recent sales price and historical price volatility, trading volume, implied market rating, and size, depth and concentration level of the market for the securitization; and

(D) For resecuritization positions, performance information on the underlying securitization exposures, for example, the issuer name and credit quality, and the characteristics and performance of the exposures underlying the securitization exposures.

(ii) On an on-going basis (no less frequently than quarterly), evaluating, reviewing, and updating as appropriate the analysis required under paragraph (f)(1) of this section for each securitization position.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20761, Apr. 14, 2014; 81 FR 71354, Oct. 17, 2016; 84 FR 35280, July 22, 2019; 85 FR 4434, Jan. 24, 2020]

§ 324.211 Simplified supervisory formula approach (SSFA).

(a) *General requirements.* To use the SSFA to determine the specific risk-weighting factor for a securitization position, an FDIC-supervised institution must have data that enables it to assign accurately the parameters described in paragraph (b) of this section. Data used to assign the parameters described in paragraph (b) of this section must be the most currently available data; if the contracts governing the underlying exposures of the securitization require payments on a monthly or quarterly basis, the data used to assign the parameters described in paragraph (b) of this section must be no more than 91 calendar days old. An FDIC-supervised institution that does not have

the appropriate data to assign the parameters described in paragraph (b) of this section must assign a specific risk-weighting factor of 100 percent to the position.

(b) *SSFA parameters.* To calculate the specific risk-weighting factor for a securitization position using the SSFA, an FDIC-supervised institution must have accurate information on the five inputs to the SSFA calculation described in paragraphs (b)(1) through (b)(5) of this section.

(1) K_G is the weighted-average (with unpaid principal used as the weight for each exposure) total capital requirement of the underlying exposures calculated using subpart D. K_G is expressed as a decimal value between zero and one (that is, an average risk weight of 100 percent represents a value of K_G equal to 0.08).

(2) Parameter W is expressed as a decimal value between zero and one. Parameter W is the ratio of the sum of the dollar amounts of any underlying exposures of the securitization that meet any of the criteria as set forth in paragraphs (b)(2)(i) through (vi) of this section to the balance, measured in dollars, of underlying exposures:

(i) Ninety days or more past due;

(ii) Subject to a bankruptcy or insolvency proceeding;

(iii) In the process of foreclosure;

(iv) Held as real estate owned;

(v) Has contractually deferred payments for 90 days or more, other than principal or interest payments deferred on:

(A) Federally-guaranteed student loans, in accordance with the terms of those guarantee programs; or

(B) Consumer loans, including non-federally-guaranteed student loans, provided that such payments are deferred pursuant to provisions included in the contract at the time funds are disbursed that provide for period(s) of deferral that are not initiated based on changes in the creditworthiness of the borrower; or

(vi) Is in default.

(3) Parameter A is the attachment point for the position, which represents the threshold at which credit losses will first be allocated to the position. Except as provided in § 324.210(b)(2)(vii)(D) for n^{th}-to-default credit derivatives, parameter A equals the ratio of the current dollar amount of underlying exposures that are subordinated to the position of the FDIC-supervised institution to the current dollar amount of underlying exposures. Any reserve account funded by the accumulated cash flows from the underlying exposures that is subordinated to the position that contains the FDIC-supervised institution's securitization exposure may be included in the calculation of parameter A to the extent that cash is present in the account. Parameter A is expressed as a decimal value between zero and one.

(4) Parameter D is the detachment point for the position, which represents the threshold at which credit losses of principal allocated to the position would result in a total loss of principal. Except as provided in § 324.210(b)(2)(vii)(D) for n^{th}-to-default credit derivatives, parameter D equals parameter A plus the ratio of the current dollar amount of the securitization positions that are *pari passu* with the position (that is, have equal seniority with respect to credit risk) to the current dollar amount of the underlying exposures. Parameter D is expressed as a decimal value between zero and one.

(5) A supervisory calibration parameter, p, is equal to 0.5 for securitization positions that are not resecuritization positions and equal to 1.5 for resecuritization positions.

(c) *Mechanics of the SSFA.* K_G and W are used to calculate K_A, the augmented value of K_G, which reflects the observed credit quality of the underlying exposures. K_A is defined in paragraph (d) of this section. The values of parameters A and D, relative to K_A determine the specific risk-weighting factor assigned to a position as described in this paragraph (c) and paragraph (d) of this section. The specific risk-weighting factor assigned to a securitization position, or portion of a position, as appropriate, is the larger of the specific risk-weighting factor determined in accordance with this paragraph (c), paragraph (d) of this section, and a specific risk-weighting factor of 1.6 percent.

(1) When the detachment point, parameter D, for a securitization position

is less than or equal to K_A, the position must be assigned a specific risk-weighting factor of 100 percent.

(2) When the attachment point, parameter A, for a securitization position is greater than or equal to K_A, the FDIC-supervised institution must calculate the specific risk-weighting factor in accordance with paragraph (d) of this section.

(3) When A is less than K_A and D is greater than K_A, the specific risk-weighting factor is a weighted-average of 1.00 and K_{SSFA} calculated under paragraphs (c)(3)(i) and (c)(3)(ii) of this section. For the purpose of this calculation:

(i) The weight assigned to 1.00 equals $\frac{K_A - A}{D - A}$.

(ii) The weight assigned to K_{SSFA} equals $\frac{D - K_A}{D - A}$. The specific risk-weighting factor is equal to:

$$SRWF = 100 \cdot \left[\left(\frac{K_A - A}{D - A}\right) \cdot 1.00\right] + \left[\left(\frac{D - K_A}{D - A}\right) \cdot K_{SSFA}\right]$$

(d) SSFA equation. (1) The FDIC-supervised institution must define the following parameters:

$$K_A = (1 - W) \cdot K_G + (0.5 \cdot W)$$

$$a = -\frac{1}{p \cdot K_A}$$

$$u = D - K_A$$

$$l = \max(A - K_A, 0)$$

$e = 2.71828$, the base of the natural logarithms.

(2) Then the FDIC-supervised institution must calculate K_{SSFA} according to the following formula:

$$K_{SSFA} = \frac{e^{a \cdot u} - e^{a \cdot l}}{a(u - l)}$$

(3) The specific risk-weighting factor for the position (expressed as a percent) is equal to $K_{SSFA} \times 100$.

[78 FR 55471, Sept. 10, 2013, as amended at 79 FR 20761, Apr. 14, 2014]

§ 324.212 Market risk disclosures.

(a) *Scope*. An FDIC-supervised institution must comply with this section unless it is a consolidated subsidiary of a bank holding company or a depository institution that is subject to these requirements or of a non-U.S. banking organization that is subject to comparable public disclosure requirements in its home jurisdiction. An FDIC-supervised institution must make timely public disclosures each calendar quarter. If a significant change occurs, such that the most recent reporting amounts are no longer reflective of the FDIC-supervised institution's capital adequacy and risk profile, then a brief discussion of this change and its likely impact must be provided as soon as practicable thereafter. Qualitative disclosures that typically do not change each quarter may be disclosed annually, provided any significant changes are disclosed in the interim. If an FDIC-supervised institution believes that disclosure of specific commercial or financial information would prejudice seriously its position by making public certain information that is either proprietary or confidential in nature, the FDIC-supervised institution is not required to disclose these specific items, but must disclose more general information about the subject matter of the requirement, together with the fact that, and the reason why, the specific items of information have not been disclosed. The FDIC-supervised institution's management may provide all of the disclosures required by this section in one place on the FDIC-supervised institution's public Web site or may provide the disclosures in more than one public financial report or other regulatory reports, provided that the FDIC-supervised institution publicly provides a summary table specifically indicating the location(s) of all such disclosures.

(b) *Disclosure policy*. The FDIC-supervised institution must have a formal disclosure policy approved by the board of directors that addresses the FDIC-supervised institution's approach for determining its market risk disclosures. The policy must address the associated internal controls and disclosure controls and procedures. The board of directors and senior management must ensure that appropriate verification of the disclosures takes place and that effective internal controls and disclosure controls and procedures are maintained. One or more senior officers of the FDIC-supervised institution must attest that the disclosures meet the requirements of this subpart, and the board of directors and senior management are responsible for establishing and maintaining an effective internal control structure over financial reporting, including the disclosures required by this section.

(c) *Quantitative disclosures*. (1) For each material portfolio of covered positions, the FDIC-supervised institution must provide timely public disclosures of the following information at least quarterly:

(i) The high, low, and mean VaR-based measures over the reporting period and the VaR-based measure at period-end;

(ii) The high, low, and mean stressed VaR-based measures over the reporting period and the stressed VaR-based measure at period-end;

(iii) The high, low, and mean incremental risk capital requirements over the reporting period and the incremental risk capital requirement at period-end;

(iv) The high, low, and mean comprehensive risk capital requirements over the reporting period and the comprehensive risk capital requirement at period-end, with the period-end requirement broken down into appropriate risk classifications (for example, default risk, migration risk, correlation risk);

(v) Separate measures for interest rate risk, credit spread risk, equity price risk, foreign exchange risk, and commodity price risk used to calculate the VaR-based measure; and

(vi) A comparison of VaR-based estimates with actual gains or losses experienced by the FDIC-supervised institution, with an analysis of important outliers.

(2) In addition, the FDIC-supervised institution must disclose publicly the following information at least quarterly:

(i) The aggregate amount of on-balance sheet and off-balance sheet securitization positions by exposure type; and

(ii) The aggregate amount of correlation trading positions.

(d) *Qualitative disclosures*. For each material portfolio of covered positions, the FDIC-supervised institution must provide timely public disclosures of the following information at least annually after the end of the fourth calendar quarter, or more frequently in the event of material changes for each portfolio:

(1) The composition of material portfolios of covered positions;

(2) The FDIC-supervised institution's valuation policies, procedures, and methodologies for covered positions including, for securitization positions, the methods and key assumptions used for valuing such positions, any significant changes since the last reporting period, and the impact of such change;

(3) The characteristics of the internal models used for purposes of this subpart. For the incremental risk capital requirement and the comprehensive risk capital requirement, this must include:

(i) The approach used by the FDIC-supervised institution to determine liquidity horizons;

(ii) The methodologies used to achieve a capital assessment that is consistent with the required soundness standard; and

(iii) The specific approaches used in the validation of these models;

(4) A description of the approaches used for validating and evaluating the accuracy of internal models and modeling processes for purposes of this subpart;

(5) For each market risk category (that is, interest rate risk, credit spread risk, equity price risk, foreign exchange risk, and commodity price risk), a description of the stress tests applied to the positions subject to the factor;

(6) The results of the comparison of the FDIC-supervised institution's internal estimates for purposes of this subpart with actual outcomes during a sample period not used in model development;

(7) The soundness standard on which the FDIC-supervised institution's internal capital adequacy assessment under this subpart is based, including a description of the methodologies used to achieve a capital adequacy assessment that is consistent with the soundness standard;

(8) A description of the FDIC-supervised institution's processes for monitoring changes in the credit and market risk of securitization positions, including how those processes differ for resecuritization positions; and

(9) A description of the FDIC-supervised institution's policy governing the use of credit risk mitigation to mitigate the risks of securitization and resecuritization positions.

§§ 324.213–324.299 [Reserved]

Subpart G—Transition Provisions

§ 324.300 Transitions.

(a) *Capital conservation and countercyclical capital buffer*. (1) From January 1, 2014, through December 31, 2015, an FDIC-supervised institution is not subject to limits on distributions and discretionary bonus payments under § 324.11 notwithstanding the amount of its capital conservation buffer or any applicable countercyclical capital buffer amount.

(2) Beginning January 1, 2016, through December 31, 2018, an FDIC-supervised institution's maximum payout ratio shall be determined as set forth in Table 1 to § 324.300.

TABLE 1 TO § 324.300

Transition period	Capital conservation buffer	Maximum payout ratio (as a percentage of eligible retained income)
Calendar year 2016	Greater than 0.625 percent (plus 25 percent of any applicable countercyclical capital buffer amount).	No payout ratio limitation applies under this section.
	Less than or equal to 0.625 percent (plus 25 percent of any applicable countercyclical capital buffer amount), and greater than 0.469 percent (plus 17.25 percent of any applicable countercyclical capital buffer amount).	60 percent.

TABLE 1 TO § 324.300—Continued

Transition period	Capital conservation buffer	Maximum payout ratio (as a percentage of eligible retained income)
	Less than or equal to 0.469 percent (plus 17.25 percent of any applicable countercyclical capital buffer amount), and greater than 0.313 percent (plus 12.5 percent of any applicable countercyclical capital buffer amount).	40 percent.
	Less than or equal to 0.313 percent (plus 12.5 percent of any applicable countercyclical capital buffer amount), and greater than 0.156 percent (plus 6.25 percent of any applicable countercyclical capital buffer amount).	20 percent.
	Less than or equal to 0.156 percent (plus 6.25 percent of any applicable countercyclical capital buffer amount).	0 percent.
Calendar year 2017	Greater than 1.25 percent (plus 50 percent of any applicable countercyclical capital buffer amount).	No payout ratio limitation applies under this section.
	Less than or equal to 1.25 percent (plus 50 percent of any applicable countercyclical capital buffer amount), and greater than 0.938 percent (plus 37.5 percent of any applicable countercyclical capital buffer amount).	60 percent.
	Less than or equal to 0.938 percent (plus 37.5 percent of any applicable countercyclical capital buffer amount), and greater than 0.625 percent (plus 25 percent of any applicable countercyclical capital buffer amount).	40 percent.
	Less than or equal to 0.625 percent (plus 25 percent of any applicable countercyclical capital buffer amount), and greater than 0.313 percent (plus 12.5 percent of any applicable countercyclical capital buffer amount).	20 percent.
	Less than or equal to 0.313 percent (plus 12.5 percent of any applicable countercyclical capital buffer amount).	0 percent.
Calendar year 2018	Greater than 1.875 percent (plus 75 percent of any applicable countercyclical capital buffer amount).	No payout ratio limitation applies under this section.
	Less than or equal to 1.875 percent (plus 75 percent of any applicable countercyclical capital buffer amount), and greater than 1.406 percent (plus 56.25 percent of any applicable countercyclical capital buffer amount).	60 percent.
	Less than or equal to 1.406 percent (plus 56.25 percent of any applicable countercyclical capital buffer amount), and greater than 0.938 percent (plus 37.5 percent of any applicable countercyclical capital buffer amount).	40 percent.
	Less than or equal to 0.938 percent (plus 37.5 percent of any applicable countercyclical capital buffer amount), and greater than 0.469 percent (plus 18.75 percent of any applicable countercyclical capital buffer amount).	20 percent.
	Less than or equal to 0.469 percent (plus 18.75 percent of any applicable countercyclical capital buffer amount).	0 percent.

(b) [Reserved]

(c) *Non-qualifying capital instruments. Depository institutions.* (1) Beginning on January 1, 2014, a depository institution that is an advanced approaches FDIC-supervised institution, and beginning on January 1, 2015, all other depository institutions may include in regulatory capital debt or equity instruments issued prior to September 12, 2010, that do not meet the criteria for additional tier 1 or tier 2 capital instruments in § 324.20 but that were included in tier 1 or tier 2 capital respectively as of September 12, 2010 (non-qualifying capital instruments issued prior to September 12, 2010) up to the percentage of the outstanding principal amount of such non-qualifying capital instruments as of January 1, 2014 in accordance with Table 8 to § 324.300.

(2) Table 8 to § 324.300 applies separately to tier 1 and tier 2 non-qualifying capital instruments.

(3) The amount of non-qualifying capital instruments that cannot be included in additional tier 1 capital under this section may be included in tier 2 capital without limitation, provided that the instruments meet the criteria for tier 2 capital instruments under § 324.20(d).

TABLE 8 TO § 324.300

Transition period (calendar year)	Percentage of non-qualifying capital instruments includable in additional tier 1 or tier 2 capital
Calendar year 2014	80
Calendar year 2015	70
Calendar year 2016	60
Calendar year 2017	50
Calendar year 2018	40
Calendar year 2019	30
Calendar year 2020	20
Calendar year 2021	10
Calendar year 2022 and thereafter	0

(d) [Reserved]

(e) *Prompt corrective action*. For purposes of subpart H of this part, an FDIC-supervised institution must calculate its capital measures and tangible equity ratio in accordance with the transition provisions in this section.

(f) An FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution may apply the treatment under §§ 324.21 and 324.22(c)(2), (5), (6), and (d)(2) applicable to an advanced approaches FDIC-supervised institution during the calendar quarter beginning January 1, 2020. During the quarter beginning January 1, 2020, an FDIC-supervised institution that makes such an election must deduct 80 percent of the amount otherwise required to be deducted under § 324.22(d)(2) and must apply a 100 percent risk weight to assets not deducted under § 324.22(d)(2). In addition, during the quarter beginning January 1, 2020, an FDIC-supervised institution that makes such an election must include in its regulatory capital 20 percent of any minority interest that exceeds the amount of minority interest includable in regulatory capital under § 324.21 as it applies to an advanced approaches FDIC-supervised institution. An FDIC-supervised institution that is not an advanced approaches institution must apply the treatment under §§ 324.21 and 324.22 applicable to an FDIC-supervised institution that is a non-advanced approaches institution beginning April 1, 2020, and thereafter.

(g) *SA–CCR*. An advanced approaches FDIC-supervised institution may use CEM rather than SA–CCR for purposes of §§ 324.34(a) and 324.132(c) until January 1, 2022. A FDIC-supervised institution must provide prior notice to the FDIC if it decides to begin using SA–CCR before January 1, 2022. On January 1, 2022, and thereafter, an advanced approaches FDIC-supervised institution must use SA–CCR for purposes of §§ 324.34(a), 324.132(c), and 324.133(d). Once an advanced approaches FDIC-supervised institution has begun to use SA–CCR, the advanced approaches FDIC-supervised institution may not change to use CEM.

(h) *Default fund contributions*. Prior to January 1, 2022, a FDIC-supervised institution that calculates the exposure amounts of its derivative contracts under the standardized approach for counterparty credit risk in § 324.132(c) may calculate the risk-weighted asset amount for a default fund contribution to a QCCP under either method 1 under § 324.35(d)(3)(i) or method 2 under § 324.35(d)(3)(ii), rather than under § 324.133(d).

[78 FR 55471, Sept. 10, 2013, as amended at 82 FR 55317, Nov. 21, 2017; 84 FR 35280, July 22, 2019; 84 FR 61808, Nov. 13, 2019; 85 FR 4443, Jan. 24, 2020]

§ 324.301 Current expected credit losses (CECL) transition.

(a) *CECL transition provision*. (1) Except as provided in paragraph (d) of this section, an FDIC-supervised institution may elect to use a CECL transition provision pursuant to this section only if the FDIC-supervised institution records a reduction in retained earnings due to the adoption of CECL as of the beginning of the fiscal year in which the FDIC-supervised institution adopts CECL.

(2) Except as provided in paragraph (d) of this section, an FDIC-supervised institution that elects to use the CECL

transition provision must elect to use the CECL transition provision in the first Call Report that includes CECL filed by the FDIC-supervised institution after it adopts CECL.

(3) An FDIC-supervised institution that does not elect to use the CECL transition provision as of the first Call Report that includes CECL filed as described in paragraph (a)(2) of this section may not elect to use the CECL transition provision in subsequent reporting periods.

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

(1) *Transition period* means the three-year period, beginning the first day of the fiscal year in which an FDIC-supervised institution adopts CECL and reflects CECL in its first Call Report filed after that date; or, for the 2020 CECL transition provision under paragraph (d) of this section, the five-year period beginning on the earlier of the date an FDIC-supervised institution was required to adopt CECL for accounting purposes under GAAP (as in effect January 1, 2020), or the first day of the fiscal year that begins during the 2020 calendar year in which the FDIC-supervised institution files regulatory reports that include CECL.

(2) *CECL transitional amount* means the difference, net of any DTAs, in the amount of an FDIC-supervised institution's retained earnings as of the beginning of the fiscal year in which the FDIC-supervised institution adopts CECL from the amount of the FDIC-supervised institution's retained earnings as of the closing of the fiscal year-end immediately prior to the FDIC-supervised institution's adoption of CECL.

(3) *DTA transitional amount* means the difference in the amount of an FDIC-supervised institution's DTAs arising from temporary differences as of the beginning of the fiscal year in which the FDIC-supervised institution adopts CECL from the amount of the FDIC-supervised institution's DTAs arising from temporary differences as of the closing of the fiscal year-end immediately prior to the FDIC-supervised institution's adoption of CECL.

(4) *AACL transitional amount* means the difference in the amount of an FDIC-supervised institution's AACL as of the beginning of the fiscal year in which the FDIC-supervised institution adopts CECL and the amount of the FDIC-supervised institution's ALLL as of the closing of the fiscal year-end immediately prior to the FDIC-supervised institution's adoption of CECL.

(5) *Eligible credit reserves transitional amount* means the difference in the amount of an FDIC-supervised institution's eligible credit reserves as of the beginning of the fiscal year in which the FDIC-supervised institution adopts CECL from the amount of the FDIC-supervised institution's eligible credit reserves as of the closing of the fiscal year-end immediately prior to the FDIC-supervised institution's adoption of CECL.

(c) *Calculation of the three-year CECL transition provision.* (1) For purposes of the election described in paragraph (a)(1) of this section and except as provided in paragraph (d) of this section, an FDIC-supervised institution must make the following adjustments in its calculation of regulatory capital ratios:

(i) Increase retained earnings by seventy-five percent of its CECL transitional amount during the first year of the transition period, increase retained earnings by fifty percent of its CECL transitional amount during the second year of the transition period, and increase retained earnings by twenty-five percent of its CECL transitional amount during the third year of the transition period;

(ii) Decrease amounts of DTAs arising from temporary differences by seventy-five percent of its DTA transitional amount during the first year of the transition period, decrease amounts of DTAs arising from temporary differences by fifty percent of its DTA transitional amount during the second year of the transition period, and decrease amounts of DTAs arising from temporary differences by twenty-five percent of its DTA transitional amount during the third year of the transition period;

(iii) Decrease amounts of AACL by seventy-five percent of its AACL transitional amount during the first year of the transition period, decrease amounts of AACL by fifty percent of its AACL transitional amount during

the second year of the transition period, and decrease amounts of AACL by twenty-five percent of its AACL transitional amount during the third year of the transition period; and

(iv) Increase average total consolidated assets as reported on the Call Report for purposes of the leverage ratio by seventy-five percent of its CECL transitional amount during the first year of the transition period, increase average total consolidated assets as reported on the Call Report for purposes of the leverage ratio by fifty percent of its CECL transitional amount during the second year of the transition period, and increase average total consolidated assets as reported on the Call Report for purposes of the leverage ratio by twenty-five percent of its CECL transitional amount during the third year of the transition period.

(2) For purposes of the election described in paragraph (a)(1) of this section, an advanced approaches or Category III FDIC-supervised institution must make the following additional adjustments to its calculation of its applicable regulatory capital ratios:

(i) Increase total leverage exposure for purposes of the supplementary leverage ratio by seventy-five percent of its CECL transitional amount during the first year of the transition period, increase total leverage exposure for purposes of the supplementary leverage ratio by fifty percent of its CECL transitional amount during the second year of the transition period, and increase total leverage exposure for purposes of the supplementary leverage ratio by twenty-five percent of its CECL transitional amount during the third year of the transition period; and

(ii) An advanced approaches FDIC-supervised institution that has completed the parallel run process and that has received notification from the FDIC pursuant to § 324.121(d) must decrease amounts of eligible credit reserves by seventy-five percent of its eligible credit reserves transitional amount during the first year of the transition period, decrease amounts of eligible credit reserves by fifty percent of its eligible credit reserves transitional amount during the second year of the transition provision, and decrease amounts of eligible credit reserves by twenty-five percent of its eligible credit reserves transitional amount during the third year of the transition period.

(d) *2020 CECL transition provision*. Notwithstanding paragraph (a) of this section, an FDIC-supervised institution that adopts CECL for accounting purposes under GAAP as of the first day of a fiscal year that begins during the 2020 calendar year may elect to use the transitional amounts and modified transitional amounts in paragraph (d)(1) of this section with the 2020 CECL transition provision calculation in paragraph (d)(2) of this section to adjust its calculation of regulatory capital ratios during each quarter of the transition period in which an FDIC-supervised institution uses CECL for purposes of its Call Report. An FDIC supervised-institution may use the transition provision in this paragraph (d) if it has a positive modified CECL transitional amount during any quarter ending in 2020 and makes the election in the Call Report filed for the same quarter. An FDIC-supervised institution that does not calculate a positive modified CECL transitional amount in any quarter is not required to apply the adjustments in its calculation of regulatory capital ratios in paragraph (d)(2) of this section in that quarter.

(1) *Definitions*. For purposes of the 2020 CECL transition provision calculation in paragraph (d)(2) of this section, the following definitions apply:

(i) *Modified CECL transitional amount* means:

(A) During the first two years of the transition period, the difference between AACL as reported in the most recent Call Report and the AACL as of the beginning of the fiscal year in which the FDIC-supervised institution adopts CECL, multiplied by 0.25, plus the CECL transitional amount; and

(B) During the last three years of the transition period, the difference between AACL as reported in the Call Report at the end of the second year of the transition period and the AACL as of the beginning of the fiscal year in which the FDIC-supervised institution adopts CECL, multiplied by 0.25, plus the CECL transitional amount.

(ii) *Modified AACL transitional amount* means:

(A) During the first two years of the transition period, the difference between AACL as reported in the most recent Call Report, and the AACL as of the beginning of the fiscal year in which the FDIC-supervised institution adopts CECL, multiplied by 0.25, plus the AACL transitional amount; and

(B) During the last three years of the transition period, the difference between AACL as reported in the Call Report at the end of the second year of the transition period and the AACL as of the beginning of the fiscal year in which the FDIC-supervised institution adopts CECL, multiplied by 0.25, plus the AACL transitional amount.

(2) *Calculation of 2020 CECL transition provision.* (i) An FDIC-supervised institution that has elected the 2020 CECL transition provision described in this paragraph (d) may make the following adjustments in its calculation of regulatory capital ratios:

(A) Increase retained earnings by one-hundred percent of its modified CECL transitional amount during the first year of the transition period, increase retained earnings by one hundred percent of its modified CECL transitional amount during the second year of the transition period, increase retained earnings by seventy-five percent of its modified CECL transitional amount during the third year of the transition period, increase retained earnings by fifty percent of its modified CECL transitional amount during the fourth year of the transition period, and increase retained earnings by twenty-five percent of its modified CECL transitional amount during the fifth year of the transition period;

(B) Decrease amounts of DTAs arising from temporary differences by one-hundred percent of its DTA transitional amount during the first year of the transition period, decrease amounts of DTAs arising from temporary differences by one hundred percent of its DTA transitional amount during the second year of the transition period, decrease amounts of DTAs arising from temporary differences by seventy-five percent of its DTA transitional amount during the third year of the transition period, decrease amounts of DTAs arising from temporary differences by fifty percent of its DTA transitional amount during the fourth year of the transition period, and decrease amounts of DTAs arising from temporary differences by twenty-five percent of its DTA transitional amount during the fifth year of the transition period;

(C) Decrease amounts of AACL by one-hundred percent of its modified AACL transitional amount during the first year of the transition period, decrease amounts of AACL by one hundred percent of its modified AACL transitional amount during the second year of the transition period, decrease amounts of AACL by seventy-five percent of its modified AACL transitional amount during the third year of the transition period, decrease amounts of AACL by fifty percent of its modified AACL transitional amount during the fourth year of the transition period, and decrease amounts of AACL by twenty-five percent of its modified AACL transitional amount during the fifth year of the transition period; and

(D) Increase average total consolidated assets as reported on the Call Report for purposes of the leverage ratio by one-hundred percent of its modified CECL transitional amount during the first year of the transition period, increase average total consolidated assets as reported on the Call Report for purposes of the leverage ratio by one hundred percent of its modified CECL transitional amount during the second year of the transition period, increase average total consolidated assets as reported on the Call Report for purposes of the leverage ratio by seventy-five percent of its modified CECL transitional amount during the third year of the transition period, increase average total consolidated assets as reported on the Call Report for purposes of the leverage ratio by fifty percent of its modified CECL transitional amount during the fourth year of the transition period, and increase average total consolidated assets as reported on the Call Report for purposes of the leverage ratio by twenty-five percent of its modified CECL transitional amount during the fifth year of the transition period.

(ii) An advanced approaches or Category III FDIC-supervised institution

that has elected the 2020 CECL transition provision described in this paragraph (d) may make the following additional adjustments to its calculation of its applicable regulatory capital ratios:

(A) Increase total leverage exposure for purposes of the supplementary leverage ratio by one-hundred percent of its modified CECL transitional amount during the first year of the transition period, increase total leverage exposure for purposes of the supplementary leverage ratio by one hundred percent of its modified CECL transitional amount during the second year of the transition period, increase total leverage exposure for purposes of the supplementary leverage ratio by seventy-five percent of its modified CECL transitional amount during the third year of the transition period, increase total leverage exposure for purposes of the supplementary leverage ratio by fifty percent of its modified CECL transitional amount during the fourth year of the transition period, and increase total leverage exposure for purposes of the supplementary leverage ratio by twenty-five percent of its modified CECL transitional amount during the fifth year of the transition period; and

(B) An advanced approaches FDIC-supervised institution that has completed the parallel run process and that has received notification from the FDIC pursuant to § 324.121(d) must decrease amounts of eligible credit reserves by one-hundred percent of its eligible credit reserves transitional amount during the first year of the transition period, decrease amounts of eligible credit reserves by one hundred percent of its eligible credit reserves transitional amount during the second year of the transition period, decrease amounts of eligible credit reserves by seventy-five percent of its eligible credit reserves transitional amount during the third year of the transition period, decrease amounts of eligible credit reserves by fifty percent of its eligible credit reserves transitional amount during the fourth year of the transition period, and decrease amounts of eligible credit reserves by twenty-five percent of its eligible credit reserves transitional amount during the fifth year of the transition period.

(e) *Eligible credit reserves shortfall.* An advanced approaches FDIC-supervised institution that has completed the parallel run process and that has received notification from the FDIC pursuant to § 324.121(d), whose amount of expected credit loss exceeded its eligible credit reserves immediately prior to the adoption of CECL, and that has an increase in common equity tier 1 capital as of the beginning of the fiscal year in which it adopts CECL after including the first year portion of the CECL transitional amount (or modified CECL transitional amount) must decrease its CECL transitional amount used in paragraph (c) of this section (or modified CECL transitional amount used in paragraph (d) of this section) by the full amount of its DTA transitional amount.

(f) *Business combinations.* Notwithstanding any other requirement in this section, for purposes of this paragraph (f), in the event of a business combination involving an FDIC-supervised institution where one or both FDIC-supervised institutions have elected the treatment described in this section:

(1) If the acquirer FDIC-supervised institution (as determined under GAAP) elected the treatment described in this section, the acquirer FDIC-supervised institution must continue to use the transitional amounts (unaffected by the business combination) that it calculated as of the date that it adopted CECL through the end of its transition period.

(2) If the acquired insured depository institution (as determined under GAAP) elected the treatment described in this section, any transitional amount of the acquired insured depository institution does not transfer to the resulting FDIC-supervised institution.

[85 FR 61591, Sept. 30, 2020]

§ 324.302 Exposures Related the Money Market Mutual Fund Liquidity Facility.

Notwithstanding any other section of this part, an FDIC-supervised institution may exclude exposures acquired pursuant to a non-recourse loan that is provided as part of the Money Market Mutual Fund Liquidity Facility, announced by the Federal Reserve on

March 18, 2020, from total leverage exposure, average total consolidated assets, advanced approaches total risk-weighted assets, and standardized total risk-weighted assets, as applicable.

For the purpose of this provision, an FDIC-supervised institution's liability under the facility must be reduced by the purchase price of the assets acquired with funds advanced from the facility.

[85 FR 16237, Mar. 23, 2020]

§ 324.303 Temporary changes to the community bank leverage ratio framework.

(a)(1) An FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution and that meets all the criteria to be a qualifying community banking organization under § 324.12(a)(2) but for § 324.12(a)(2)(i) is a qualifying community banking organization if it has a leverage ratio equal to or greater than 8 percent.

(2) Notwithstanding § 324.12(a)(1), a qualifying community banking organization that has made an election to use the community bank leverage ratio framework under § 324.12(a)(3) shall be considered to have met the minimum capital requirements under § 324.10, the capital ratio requirements for the well capitalized capital category under § 324.403(b)(1) of this part, and any other capital or leverage requirements to which the qualifying community banking organization is subject, if it has a leverage ratio equal to or greater than 8 percent.

(b) Notwithstanding § 324.12(c)(6) and subject to § 324.12(c)(5), a qualifying community banking organization that has a leverage ratio of 7 percent or greater has the grace period described in § 324.12(c)(1) through (4). An FDIC-supervised institution that has a leverage ratio of less than 7 percent does not have a grace period and must comply with the minimum capital requirements under § 324.10(a)(1) and must report the required capital measures under § 324.10(a)(1) for the quarter in which it reports a leverage ratio of less than 7 percent.

(c) Pursuant to section 4012 of the Coronavirus Aid, Relief, and Economic Security Act, the requirements provided under paragraphs (a) and (b) of this section are effective during the period beginning on April 23, 2020 and ending on the sooner of:

(1) The termination date of the national emergency concerning the novel coronavirus disease outbreak declared by the President on March 13, 2020, under the National Emergencies Act (50 U.S.C. 1601 *et seq.*); or

(2) December 31, 2020.

(d) Upon the termination of the requirements in paragraphs (a) and (b) of this section as provided in paragraph (c) of this section, a qualifying community banking organization, as defined in § 324.12(a)(2), is subject to the following:

(1) Through December 31, 2020:

(i) An FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution and that meets all the criteria to be a qualifying community banking organization under § 324.12(a)(2) but for § 324.12(a)(2)(i) is a qualifying banking organization if it has a leverage ratio greater than 8 percent.

(ii) Notwithstanding § 324.12(a)(1), a qualifying community banking organization that has made an election to use the community bank leverage ratio framework under § 324.12(a)(3) shall be considered to have met the minimum capital requirements under § 324.10, the capital ratio requirements for the well capitalized capital category under § 324.403(b)(1) of this part, and any other capital or leverage requirements to which the qualifying community banking organization is subject, if it has a leverage ratio greater than 8 percent.

(iii) Notwithstanding § 324.12(c)(6) and subject to § 324.12(c)(5), a qualifying community banking organization that has a leverage ratio of greater than 7 percent has the grace period described in § 324.12(c)(1) through (4). An FDIC-supervised institution that has a leverage ratio of 7 percent or less does not have a grace period and must comply with the minimum capital requirements under § 324.10(a)(1) and must report the required capital measures under § 324.10(a)(1) for the quarter in which it reports a leverage ratio of 7 percent or less.

(2) From January 1, 2021, through December 31, 2021:

(i) An FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution and that meets all the criteria to be a qualifying community banking organization under § 324.12(a)(2) but for § 324.12(a)(2)(i) is a qualifying banking organization if it has a leverage ratio greater than 8.5 percent.

(ii) Notwithstanding § 324.12(a)(1), a qualifying community banking organization that has made an election to use the community bank leverage ratio framework under § 324.12(a)(3) shall be considered to have met the minimum capital requirements under § 324.10, the capital ratio requirements for the well capitalized capital category under § 324.403(b)(1) of this part, and any other capital or leverage requirements to which the qualifying community banking organization is subject, if it has a leverage ratio greater than 8.5 percent.

(iii) Notwithstanding § 324.12(c)(6) and subject to § 3247.12(c)(5), a qualifying community banking organization that has a leverage ratio of greater than 7.5 percent has the grace period described in § 324.12(c)(1) through (4). An FDIC-supervised institution that has a leverage ratio of 7.5 percent or less does not have a grace period and must comply with the minimum capital requirements under § 324.10(a)(1) and must report the required capital measures under § 324.10(a)(1) for the quarter in which it reports a leverage ratio of 7.5 percent or less.

[85 FR 22929, Apr. 23, 2020, as amended at 85 FR 22938, Apr. 23, 2020]

§ 324.304 Temporary exclusions from total leverage exposure.

(a) *In general*. Subject to paragraphs (b) through (g) of this section, and notwithstanding any other requirement in this part, an FDIC-supervised institution, when calculating on-balance sheet assets as of each day of a reporting quarter for purposes of determining the FDIC-supervised institution's total leverage exposure under § 324.10(c), may exclude the balance sheet carrying value of the following items:

(1) U.S. Treasury securities; and

(2) Funds on deposit at a Federal Reserve Bank.

(b) *Opt-in period*. Before applying the relief provided in paragraph (a) of this section, an FDIC-supervised institution must first notify the appropriate regional director of the FDIC Division of Risk Management Supervision before July 1, 2020.

(c) *Calculation of relief*. When calculating on-balance sheet assets as of each day of a reporting quarter, the relief provided in paragraph (a) of this section applies from the beginning of the reporting quarter in which the FDIC-supervised institution filed an opt-in notice through the termination date specified in paragraph (d) of this section.

(d) *Termination of exclusions*. This section shall cease to be effective after the reporting period that ends March 31, 2021.

(e) *Custody bank*. A custody bank must reduce the amount in § 324.10(c)(2)(x)(A) (to no less than zero) by any amount excluded under paragraph (a)(2) of this section.

(f) *Disclosure*. Notwithstanding Table 13 to § 324.173, an FDIC-supervised institution that is required to make the disclosures pursuant to § 324.173 must exclude the items excluded pursuant to paragraph (a) of this section from Table 13 to § 324.173.

(g) *FDIC approval for distributions*. During the calendar quarter beginning on July 1, 2020, and until March 31, 2021, no FDIC-supervised institution that has opted in to the relief provided under paragraph (a) of this section may make a distribution, or create an obligation to make such a distribution, without prior FDIC approval. When reviewing a request under this paragraph (g), the FDIC will consider all relevant factors, including whether the distribution would be contrary to the safety and soundness of the FDIC-supervised institution; the nature, purpose, and extent of the request; and the particular circumstances giving rise to the request.

[85 FR 32990, June 1, 2020, as amended at 86 FR 745, Jan. 6, 2021]

§ 324.305 Exposures related to the Paycheck Protection Program Lending Facility.

Notwithstanding any other section of this part, an FDIC-supervised institution may exclude exposures pledged as collateral for a non-recourse loan that

is provided as part of the Paycheck Protection Program Lending Facility, announced by the Federal Reserve on April 7, 2020, from total leverage exposure, average total consolidated assets, advanced approaches total risk-weighted assets, and standardized total risk-weighted assets, as applicable. For the purpose of this section, an FDIC-supervised institution's liability under the facility must be reduced by the principal amount of the loans pledged as collateral for funds advanced under the facility.

[85 FR 20394, Apr. 13, 2020. Redesignated at 85 FR 32990, June 1, 2020]

§§ 324.306–324.399 [Reserved]

Subpart H—Prompt Corrective Action

§ 324.401 Authority, purpose, scope, other supervisory authority, disclosure of capital categories, and transition procedures.

(a) *Authority*. This subpart H is issued by the FDIC pursuant to section 38 of the Federal Deposit Insurance Act (FDI Act), as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102–242, 105 Stat. 2236 (1991)) (12 U.S.C. 1831o).

(b) *Purpose*. Section 38 of the FDI Act establishes a framework of supervisory actions for insured depository institutions that are not adequately capitalized. The principal purpose of this subpart is to define, for FDIC-supervised institutions, the capital measures and capital levels, and for insured branches of foreign banks, comparable asset-based measures and levels, that are used for determining the supervisory actions authorized under section 38 of the FDI Act. This subpart also establishes procedures for submission and review of capital restoration plans and for issuance and review of directives and orders pursuant to section 38 of the FDI Act.

(c) *Scope*. Until January 1, 2015, subpart B of part 325 of this chapter will continue to apply to banks and insured branches of foreign banks for which the FDIC is the appropriate Federal banking agency. Until January 1, 2015, subpart Y of part 390 of this chapter will continue to apply to state savings associations. Beginning on, and thereafter, January 1, 2015, this subpart H implements the provisions of section 38 of the FDI Act as they apply to FDIC-supervised institutions and insured branches of foreign banks for which the FDIC is the appropriate Federal banking agency. Certain of these provisions also apply to officers, directors and employees of those insured institutions. In addition, certain provisions of this subpart apply to all insured depository institutions that are deemed critically undercapitalized.

(d) *Other supervisory authority*. Neither section 38 of the FDI Act nor this subpart H in any way limits the authority of the FDIC under any other provision of law to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. Action under section 38 of the FDI Act and this subpart H may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the FDIC, including issuance of cease and desist orders, capital directives, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(e) *Disclosure of capital categories*. The assignment of an FDIC-supervised institution or an insured branch of a foreign bank for which the FDIC is the appropriate Federal banking agency under this subpart H within a particular capital category is for purposes of implementing and applying the provisions of section 38 of the FDI Act. Unless permitted by the FDIC or otherwise required by law, no FDIC-supervised institution or insured branch of a foreign bank for which the FDIC is the appropriate Federal banking agency may state in any advertisement or promotional material its capital category under this subpart H or that the FDIC or any other Federal banking agency has assigned it to a particular capital category.

(f) *Transition procedures*—(1) *Definitions applicable before January 1, 2015, for certain FDIC-supervised institutions*. Before January 1, 2015, notwithstanding any other requirement in this

subpart H and with respect to any FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution:

(i) The definitions of leverage ratio, tangible equity, tier 1 capital, tier 1 risk-based capital, and total risk-based capital as calculated or defined under Appendix A to part 325 or Appendix B to part 325, as applicable, remain in effect for purposes of this subpart H; and

(ii) The term total assets shall have the meaning provided in 12 CFR 325.2(x).

(2) *Timing*. The calculation of the definitions of common equity tier 1 capital, the common equity tier 1 risk-based capital ratio, the leverage ratio, the supplementary leverage ratio, tangible equity, tier 1 capital, the tier 1 risk-based capital ratio, total assets, total leverage exposure, the total risk-based capital ratio, and total risk-weighted assets under this subpart H is subject to the timing provisions at 12 CFR 324.1(f) and the transitions at 12 CFR part 324, subpart G.

(g) For purposes of subpart H, as of January 1, 2015, total assets means quarterly average total assets as reported in an FDIC-supervised institution's Call Report, minus amounts deducted from tier 1 capital under § 324.22(a), (c), and (d). At its discretion, the FDIC may calculate total assets using an FDIC-supervised institution's period-end assets rather than quarterly average assets.

§ 324.402 Notice of capital category.

(a) *Effective date of determination of capital category*. An FDIC-supervised institution shall be deemed to be within a given capital category for purposes of section 38 of the FDI Act and this subpart H as of the date the FDIC-supervised institution is notified of, or is deemed to have notice of, its capital category, pursuant to paragraph (b) of this section.

(b) *Notice of capital category*. An FDIC-supervised institution shall be deemed to have been notified of its capital levels and its capital category as of the most recent date:

(1) A Call Report is required to be filed with the FDIC;

(2) A final report of examination is delivered to the FDIC-supervised institution; or

(3) Written notice is provided by the FDIC to the FDIC-supervised institution of its capital category for purposes of section 38 of the FDI Act and this subpart or that the FDIC-supervised institution's capital category has changed as provided in § 324.403(d).

(c) *Adjustments to reported capital levels and capital category*—(1) *Notice of adjustment by bank or state savings association*. An FDIC-supervised institution shall provide the appropriate FDIC regional director with written notice that an adjustment to the FDIC-supervised institution's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the FDIC-supervised institution to be placed in a lower capital category from the category assigned to the FDIC-supervised institution for purposes of section 38 of the FDI Act and this subpart H on the basis of the FDIC-supervised institution's most recent Call Report or report of examination.

(2) *Determination by the FDIC to change capital category*. After receiving notice pursuant to paragraph (c)(1) of this section, the FDIC shall determine whether to change the capital category of the FDIC-supervised institution and shall notify the bank or state savings association of the FDIC's determination.

§ 324.403 Capital measures and capital category definitions.

(a) *Capital measures*. (1) For purposes of section 38 of the FDI Act and this subpart H, the relevant capital measures are:

(i) Total Risk-Based Capital Measure: The total risk-based capital ratio;

(ii) Tier 1 Risk-Based Capital Measure: The tier 1 risk-based capital ratio;

(iii) Common Equity Tier 1 Capital Measure: The common equity tier 1 risk-based capital ratio; and

(iv) Leverage Measure:

(A) The leverage ratio; and

(B) With respect to an advanced approaches FDIC-supervised institutions, on January 1, 2018, and thereafter, the supplementary leverage ratio.

(2) For a qualifying community banking organization (as defined under § 324.12), that has elected to use the community bank leverage ratio framework (as defined under § 324.12), the leverage ratio calculated in accordance with § 324.12(b) is used to determine the well capitalized capital category under paragraph (b)(1)(i)(A) through (D) of this section.

(b) *Capital categories*. For purposes of section 38 of the FDI Act and this subpart, an FDIC-supervised institution shall be deemed to be:

(1)(i) ''Well capitalized'' if:

(A) Total Risk-Based Capital Measure: The FDIC-supervised institution has a total risk-based capital ratio of 10.0 percent or greater; and

(B) Tier 1 Risk-Based Capital Measure: The FDIC-supervised institution has a tier 1 risk-based capital ratio of 8.0 percent or greater; and

(C) Common Equity Tier 1 Capital Measure: The FDIC-supervised institution has a common equity tier 1 risk-based capital ratio of 6.5 percent or greater; and

(D) The FDIC-supervised institution has a leverage ratio of 5.0 percent or greater; and

(E) The FDIC-supervised institution is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the FDIC pursuant to section 8 of the FDI Act (12 U.S.C. 1818), the International Lending Supervision Act of 1983 (12 U.S.C. 3907), or the Home Owners' Loan Act (12 U.S.C. 1464(t)(6)(A)(ii)), or section 38 of the FDI Act (12 U.S.C. 1831o), or any regulation thereunder, to meet and maintain a specific capital level for any capital measure.

(ii) An FDIC-supervised institution that is a subsidiary of a global systemically important bank holding company will be deemed to be well capitalized if the FDIC-supervised institution satisfies paragraphs (b)(1)(i)(A) through (E) of this section and has a supplementary leverage ratio of 6.0 percent or greater. For purposes of this paragraph (b)(1)(ii), global systemically important bank holding company has the same meaning as in 12 CFR 217.402.

(iii) A qualifying community banking organization, as defined under § 324.12, that has elected to use the community bank leverage ratio framework under § 324.12 shall be considered to have met the capital ratio requirements for the well capitalized capital category in paragraph (b)(1)(i)(A) through (D) of this section.

(2) ''Adequately capitalized'' if it:

(i) Has a total risk-based capital ratio of 8.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and

(iii) Has a common equity tier 1 capital ratio of 4.5 percent or greater; and

(iv) Has a leverage ratio of 4.0 percent or greater; and

(v) Does not meet the definition of ''well capitalized'' in this section.

(vi) Beginning January 1, 2018, an advanced approaches or Category III FDIC–supervised institution will be deemed to be ''adequately capitalized'' if it satisfies paragraphs (b)(2)(i) through (v) of this section and has a supplementary leverage ratio of 3.0 percent or greater, as calculated in accordance with § 324.10.

(3) ''Undercapitalized'' if it:

(i) Has a total risk-based capital ratio that is less than 8.0 percent; or

(ii) Has a Tier 1 risk-based capital ratio that is less than 6.0 percent; or

(iii) Has a common equity tier 1 capital ratio that is less than 4.5 percent; or

(iv) Has a leverage ratio that is less than 4.0 percent.

(v) Beginning January 1, 2018, an advanced approaches or Category III FDIC–supervised institution will be deemed to be ''undercapitalized'' if it has a supplementary leverage ratio of less than 3.0 percent, as calculated in accordance with § 324.10.

(4) ''Significantly undercapitalized'' if it has:

(i) A total risk-based capital ratio that is less than 6.0 percent; or

(ii) A Tier 1 risk-based capital ratio that is less than 4.0 percent; or

(iii) A common equity tier 1 capital ratio that is less than 3.0 percent; or

(iv) A leverage ratio that is less than 3.0 percent.

(5) ''Critically undercapitalized'' if the insured depository institution has a ratio of tangible equity to total assets that is equal to or less than 2.0 percent.

(c) *Capital categories for insured branches of foreign banks.* For purposes of the provisions of section 38 of the FDI Act and this subpart H, an insured branch of a foreign bank shall be deemed to be:

(1) ''Well capitalized'' if the insured branch:

(i) Maintains the pledge of assets required under § 347.209 of this chapter; and

(ii) Maintains the eligible assets prescribed under § 347.210 of this chapter at 108 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

(iii) Has not received written notification from:

(A) The OCC to increase its capital equivalency deposit pursuant to 12 CFR 28.15, or to comply with asset maintenance requirements pursuant to 12 CFR 28.20; or

(B) The FDIC to pledge additional assets pursuant to § 347.209 of this chapter or to maintain a higher ratio of eligible assets pursuant to § 347.210 of this chapter.

(2) ''Adequately capitalized'' if the insured branch:

(i) Maintains the pledge of assets required under § 347.209 of this chapter; and

(ii) Maintains the eligible assets prescribed under § 347.210 of this chapter at 106 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

(iii) Does not meet the definition of a well capitalized insured branch.

(3) ''Undercapitalized'' if the insured branch:

(i) Fails to maintain the pledge of assets required under § 347.209 of this chapter; or

(ii) Fails to maintain the eligible assets prescribed under § 347.210 of this chapter at 106 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

(4) ''Significantly undercapitalized'' if it fails to maintain the eligible assets prescribed under § 347.210 of this chapter at 104 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

(5) ''Critically undercapitalized'' if it fails to maintain the eligible assets prescribed under § 347.210 of this chapter at 102 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

(d) *Reclassifications based on supervisory criteria other than capital.* The FDIC may reclassify a well capitalized FDIC-supervised institution as adequately capitalized and may require an adequately capitalized FDIC-supervised institution or an undercapitalized FDIC-supervised institution to comply with certain mandatory or discretionary supervisory actions as if the FDIC-supervised institution were in the next lower capital category (except that the FDIC may not reclassify a significantly undercapitalized FDIC-supervised institution as critically undercapitalized) (each of these actions are hereinafter referred to generally as ''reclassifications'') in the following circumstances:

(1) *Unsafe or unsound condition.* The FDIC has determined, after notice and opportunity for hearing pursuant to § 308.202(a) of this chapter, that the FDIC-supervised institution is in unsafe or unsound condition; or

(2) *Unsafe or unsound practice.* The FDIC has determined, after notice and opportunity for hearing pursuant to § 308.202(a) of this chapter, that, in the most recent examination of the FDIC-supervised institution, the FDIC-supervised institution received and has not corrected a less-than-satisfactory rating for any of the categories of asset quality, management, earnings, or liquidity.

[81 FR 22173, Apr. 15, 2016, as amended at 79 FR 24541, May 1, 2014; 83 FR 17617, Apr. 23, 2018; 84 FR 61803, Nov. 13, 2019; 85 FR 5303, Jan. 30, 2020; 85 FR 32990, June 1, 2020; 85 FR 74259, Nov. 20, 2020]

§ 324.404 Capital restoration plans.

(a) *Schedule for filing plan*—(1) *In general.* An FDIC-supervised institution shall file a written capital restoration plan with the appropriate FDIC regional director within 45 days of the date that the FDIC-supervised institution receives notice or is deemed to

have notice that the FDIC-supervised institution is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the FDIC notifies the FDIC-supervised institution in writing that the plan is to be filed within a different period. An adequately capitalized FDIC-supervised institution that has been required pursuant to § 324.403(d) to comply with supervisory actions as if the FDIC-supervised institution were undercapitalized is not required to submit a capital restoration plan solely by virtue of the reclassification.

(2) *Additional capital restoration plans.* Notwithstanding paragraph (a)(1) of this section, an FDIC-supervised institution that has already submitted and is operating under a capital restoration plan approved under section 38 and this subpart H is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification of the institution under § 324.403 unless the FDIC notifies the FDIC-supervised institution that it must submit a new or revised capital plan. An FDIC-supervised institution that is notified that it must submit a new or revised capital restoration plan shall file the plan in writing with the appropriate FDIC regional director within 45 days of receiving such notice, unless the FDIC notifies it in writing that the plan must be filed within a different period.

(b) *Contents of plan.* All financial data submitted in connection with a capital restoration plan shall be prepared in accordance with the instructions provided on the Call Report, unless the FDIC instructs otherwise. The capital restoration plan shall include all of the information required to be filed under section 38(e)(2) of the FDI Act. An FDIC-supervised institution that is required to submit a capital restoration plan as a result of its reclassification pursuant to § 324.403(d) shall include a description of the steps the FDIC-supervised institution will take to correct the unsafe or unsound condition or practice. No plan shall be accepted unless it includes any performance guarantee described in section 38(e)(2)(C) of the FDI Act by each company that controls the FDIC-supervised institution.

(c) *Review of capital restoration plans.* Within 60 days after receiving a capital restoration plan under this subpart, the FDIC shall provide written notice to the FDIC-supervised institution of whether the plan has been approved. The FDIC may extend the time within which notice regarding approval of a plan shall be provided.

(d) *Disapproval of capital plan.* If a capital restoration plan is not approved by the FDIC, the FDIC-supervised institution shall submit a revised capital restoration plan within the time specified by the FDIC. Upon receiving notice that its capital restoration plan has not been approved, any undercapitalized FDIC-supervised institution (as defined in § 324.403(b)) shall be subject to all of the provisions of section 38 of the FDI Act and this subpart H applicable to significantly undercapitalized institutions. These provisions shall be applicable until such time as a new or revised capital restoration plan submitted by the FDIC-supervised institution has been approved by the FDIC.

(e) *Failure to submit capital restoration plan.* An FDIC-supervised institution that is undercapitalized (as defined in § 324.403(b)) and that fails to submit a written capital restoration plan within the period provided in this section shall, upon the expiration of that period, be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions.

(f) *Failure to implement capital restoration plan.* Any undercapitalized FDIC-supervised institution that fails in any material respect to implement a capital restoration plan shall be subject to all of the provisions of section 38 of the FDI Act and this subpart H applicable to significantly undercapitalized institutions.

(g) *Amendment of capital restoration plan.* An FDIC-supervised institution that has filed an approved capital restoration plan may, after prior written notice to and approval by the FDIC, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the FDIC-supervised institution shall implement the capital restoration plan

as approved prior to the proposed amendment.

(h) *Performance guarantee by companies that control an FDIC-supervised institution*—(1) *Limitation on liability*—(i) *Amount limitation*. The aggregate liability under the guarantee provided under section 38 and this subpart H for all companies that control a specific FDIC-supervised institution that is required to submit a capital restoration plan under this subpart H shall be limited to the lesser of:

(A) An amount equal to 5.0 percent of the FDIC-supervised institution's total assets at the time the FDIC-supervised institution was notified or deemed to have notice that the FDIC-supervised institution was undercapitalized; or

(B) The amount necessary to restore the relevant capital measures of the FDIC-supervised institution to the levels required for the FDIC-supervised institution to be classified as adequately capitalized, as those capital measures and levels are defined at the time that the FDIC-supervised institution initially fails to comply with a capital restoration plan under this subpart H.

(ii) *Limit on duration*. The guarantee and limit of liability under section 38 of the FDI Act and this subpart H shall expire after the FDIC notifies the FDIC-supervised institution that it has remained adequately capitalized for each of four consecutive calendar quarters. The expiration or fulfillment by a company of a guarantee of a capital restoration plan shall not limit the liability of the company under any guarantee required or provided in connection with any capital restoration plan filed by the same FDIC-supervised institution after expiration of the first guarantee.

(iii) *Collection on guarantee*. Each company that controls a given FDIC-supervised institution shall be jointly and severally liable for the guarantee for such FDIC-supervised institution as required under section 38 and this subpart H, and the FDIC may require and collect payment of the full amount of that guarantee from any or all of the companies issuing the guarantee.

(2) *Failure to provide guarantee*. In the event that an FDIC-supervised institution that is controlled by any company submits a capital restoration plan that does not contain the guarantee required under section 38(e)(2) of the FDI Act, the FDIC-supervised institution shall, upon submission of the plan, be subject to the provisions of section 38 and this subpart H that are applicable to FDIC-supervised institutions that have not submitted an acceptable capital restoration plan.

(3) *Failure to perform guarantee*. Failure by any company that controls an FDIC-supervised institution to perform fully its guarantee of any capital plan shall constitute a material failure to implement the plan for purposes of section 38(f) of the FDI Act. Upon such failure, the FDIC-supervised institution shall be subject to the provisions of section 38 and this subpart H that are applicable to FDIC-supervised institutions that have failed in a material respect to implement a capital restoration plan.

§ 324.405 Mandatory and discretionary supervisory actions.

(a) *Mandatory supervisory actions*—(1) *Provisions applicable to all FDIC-supervised institutions*. All FDIC-supervised institutions are subject to the restrictions contained in section 38(d) of the FDI Act on payment of capital distributions and management fees.

(2) *Provisions applicable to undercapitalized, significantly undercapitalized, and critically undercapitalized FDIC-supervised institution*. Immediately upon receiving notice or being deemed to have notice, as provided in § 324.402, that the FDIC-supervised institution is undercapitalized, significantly undercapitalized, or critically undercapitalized, it shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting payment of capital distributions and management fees (section 38(d) of the FDI Act);

(ii) Requiring that the FDIC monitor the condition of the FDIC-supervised institution (section 38(e)(1) of the FDI Act);

(iii) Requiring submission of a capital restoration plan within the schedule established in this subpart (section 38(e)(2) of the FDI Act);

(iv) Restricting the growth of the FDIC-supervised institution's assets (section 38(e)(3) of the FDI Act); and

(v) Requiring prior approval of certain expansion proposals (section 38(e)(4) of the FDI Act).

(3) *Additional provisions applicable to significantly undercapitalized, and critically undercapitalized FDIC-supervised institutions.* In addition to the provisions of section 38 of the FDI Act described in paragraph (a)(2) of this section, immediately upon receiving notice or being deemed to have notice, as provided in §324.402, that the FDIC-supervised institution is significantly undercapitalized, or critically undercapitalized, or that the FDIC-supervised institution is subject to the provisions applicable to institutions that are significantly undercapitalized because the FDIC-supervised institution failed to submit or implement in any material respect an acceptable capital restoration plan, the FDIC-supervised institution shall become subject to the provisions of section 38 of the FDI Act that restrict compensation paid to senior executive officers of the institution (section 38(f)(4) of the FDI Act).

(4) *Additional provisions applicable to critically undercapitalized institutions.* (i) In addition to the provisions of section 38 of the FDI Act described in paragraphs (a)(2) and (a)(3) of this section, immediately upon receiving notice or being deemed to have notice, as provided in §324.402, that the insured depository institution is critically undercapitalized, the institution is prohibited from doing any of the following without the FDIC's prior written approval:

(A) Entering into any material transaction other than in the usual course of business, including any investment, expansion, acquisition, sale of assets, or other similar action with respect to which the depository institution is required to provide notice to the appropriate Federal banking agency;

(B) Extending credit for any highly leveraged transaction;

(C) Amending the institution's charter or bylaws, except to the extent necessary to carry out any other requirement of any law, regulation, or order;

(D) Making any material change in accounting methods;

(E) Engaging in any covered transaction (as defined in section 23A(b) of the Federal Reserve Act (12 U.S.C. 371c(b)));

(F) Paying excessive compensation or bonuses;

(G) Paying interest on new or renewed liabilities at a rate that would increase the institution's weighted average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in the institution's normal market areas; and

(H) Making any principal or interest payment on subordinated debt beginning 60 days after becoming critically undercapitalized except that this restriction shall not apply, until July 15, 1996, with respect to any subordinated debt outstanding on July 15, 1991, and not extended or otherwise renegotiated after July 15, 1991.

(ii) In addition, the FDIC may further restrict the activities of any critically undercapitalized institution to carry out the purposes of section 38 of the FDI Act.

(iii) The FDIC-supervised institution must remain in compliance with the plan or is operating under a written agreement with the appropriate Federal banking agency.

(b) Discretionary supervisory actions. In taking any action under section 38 of the FDI Act that is within the FDIC's discretion to take in connection with:

(1) An insured depository institution that is deemed to be undercapitalized, significantly undercapitalized, or critically undercapitalized, or has been reclassified as undercapitalized, or significantly undercapitalized; or

(2) An officer or director of such institution, the FDIC shall follow the procedures for issuing directives under §§308.201 and 308.203 of this chapter, unless otherwise provided in section 38 of the FDI Act or this subpart H.

PART 325—STRESS TESTING

Sec.

325.1 Authority, purpose, and reservation of authority.
325.2 Definitions.
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325.4 Periodic stress tests required.
325.5 Methodologies and practices.
325.6 Required reports of stress test results to the FDIC and the Board of Governors of the Federal Reserve System.

325.7 Publication of stress test results.

AUTHORITY: 12 U.S.C. 5365(i)(2); 12 U.S.C. 5412(b)(2)(C); 12 U.S.C. 1818, 12 U.S.C. 1819(a)(Tenth), 12 U.S.C. 1831o, and 12 U.S.C. 1831p–1.

SOURCE: 77 FR 62424, Oct. 15, 2012, unless otherwise noted.

§ 325.1 Authority, purpose, and reservation of authority.

(a) *Authority*. This part is issued by the Federal Deposit Insurance Corporation (the ''Corporation'' or ''FDIC'') under 12 U.S.C. 5365(i)(2), 12 U.S.C. 5412(b)(2)(B), 12 U.S.C. 1818, 12 U.S.C. 1819(a)(Tenth), 12 U.S.C. 1831o, and 12 U.S.C. 1831p-1.

(b) *Purpose*. This part implements 12 U.S.C. 5365(i)(2), which requires the Corporation (in coordination with the Board of Governors of the Federal Reserve System (Board) and the Federal Insurance Office) to issue regulations that require each covered bank to conduct periodic stress tests, and establishes a definition of stress test, methodologies for conducting stress tests, and reporting and disclosure requirements.

(c) *Reservation of authority*. Notwithstanding any other provisions of this part, the Corporation may modify some or all of the requirements of this part.

(1) The Corporation may accelerate or extend any deadline for stress testing, reporting, or publication of the stress test results.

(2) The Corporation may require different or additional tests not otherwise required by this part or may require or permit different or additional analytical techniques and methodologies, different or additional scenarios (including components for the scenarios), or different assumptions for the covered bank to use in meeting the requirements of this part. In addition, the FDIC may specify a different as-of date for any or all categories of financial data used by the stress test.

(3) The Corporation may modify the reporting requirements of a report under this part or may require additional reports. The Corporation may modify the publication requirements of this part and or may require different or additional publication disclosures.

(4) The Corporation may also exempt a covered bank from the requirement to conduct a stress test in a particular reporting year.

(5) Factors considered: Any exercise of authority under this section by the Corporation will be in writing and will consider the activities, level of complexity, risk profile, scope of operations, and the regulatory capital of the covered bank, in addition to any other relevant factors.

(6) Notice and comment procedures: In exercising its authority to require different or additional stress tests and different or additional scenarios (including components for the scenarios) under paragraph (c)(2) of this section, the Corporation will apply notice and response procedures in the same manner and to the same extent as the notice and response procedures in 12 CFR 324.5, as appropriate.

(7) Nothing in this part limits the authority of the Corporation under any other provision of law or regulation to take supervisory or enforcement action, including action to address unsafe and unsound practices or conditions, or violations of law or regulation.

[77 FR 62424, Oct. 15, 2012. Redesignated and amended at 83 FR 17740, Apr. 24, 2018; 84 FR 56933, Oct. 24, 2019; 84 FR 64985, Nov. 26, 2019]

§ 325.2 Definitions.

For purposes of this part—

(a) *Average total consolidated assets* means the average of the covered bank's total consolidated assets, as reported on the covered bank's Consolidated Report of Condition and Income (Call Report) for the four most recent consecutive quarters. If the covered bank has not filed a Call Report for each of the four most recent consecutive quarters, the covered bank's average total consolidated assets means the average of the covered bank's total consolidated assets, as reported on the covered bank's Call Reports, for the most recent one or more consecutive quarters. The date on which the state nonmember bank or the state savings association becomes a covered bank will be the as-of date of the most recent Call Report used in the calculation of the average.

(b) *Baseline scenario* means a set of conditions that affect the U.S. economy or the financial condition of a covered bank, and that reflect the consensus views of the economic and financial outlook.

(c) *Covered bank* means any state nonmember bank or state savings association with average total consolidated assets calculated as required under this part that are greater than $250 billion.

(d) *Planning horizon* means the period of at least nine quarters over which the relevant projections extend.

(e) *Pre-provision net revenue* means the sum of net interest income and non-interest income, less expenses, before adjusting for loss provisions.

(f) *Provision for credit losses* means:

(1) Until December 31, 2019:

(i) With respect to a state nonmember bank or state savings association that has not adopted the current expected credit losses methodology under U.S. generally accepted accounting principles (GAAP), the provision for loan and lease losses as reported on the Call Report in the current stress test cycle; and,

(ii) With respect to a state nonmember bank or state savings association that has adopted the current expected credit losses methodology under GAAP, the provision for loan and lease losses, as would be calculated and reported on the Call Report by a state nonmember bank or state savings association that has not adopted the current expected credit losses methodology under GAAP; and

(2) Beginning January 1, 2020:

(i) With respect to a state nonmember bank or state savings association that has adopted the current expected credit losses methodology under GAAP, the provision for credit losses, as reported in the Call Report in the current stress test cycle; and

(ii) With respect to a state nonmember bank or state savings association that has not adopted the current expected credit losses methodology under GAAP, the provision for loan and lease losses as would be reported in the Call Report in the current stress test cycle.

(g) *Regulatory capital ratio* means a capital ratio for which the Corporation established minimum requirements by regulation or order, including the leverage ratio and tier 1 and total risk-based capital ratios applicable to that covered bank as calculated under the Corporation's regulations.

(h) *Reporting year* means the calendar year in which a covered institution must conduct, report, and publish its stress test, as required under 12 CFR 325.4(d).

(i) *Scenarios* are those sets of conditions that affect the U.S. economy or the financial condition of a covered bank that the Corporation determines are appropriate for use in the company-run stress tests, including, but not limited to, baseline and severely adverse scenarios.

(j) *Severely adverse scenario* means a set of conditions that affect the U.S. economy or the financial condition of a covered bank and that overall are significantly more severe than those associated with the baseline scenario and may include trading or other additional components.

(k) *State nonmember bank* and *state savings association* have the same meanings as those terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(l) *Stress test* means the process to assess the potential impact of scenarios on the consolidated earnings, losses, and capital of a covered bank over the planning horizon, taking into account the current condition of the covered bank and the covered bank's risks, exposures, strategies, and activities.

(m) *Stress test cycle* means the period beginning January 1 of a reporting year and ending on December 31 of that reporting year.

[77 FR 62424, Oct. 15, 2012, as amended at 79 FR 69368, Nov. 21, 2014. Redesignated at 83 FR 17740, Apr. 24, 2018, as amended at 84 FR 4249, Feb. 14, 2019; 84 FR 56933, Oct. 24, 2019]

§ 325.3 Applicability.

(a) *Covered banks subject to stress testing.* (1) A state nonmember bank or state savings association that is a covered bank as of December 31, 2019, is subject to the requirements of this part for the 2020 reporting year.

(2) A state nonmember bank or state savings association that becomes a covered bank after December 31, 2019, shall conduct its first stress test under

this part in the first reporting year that begins more than three calendar quarters after the date the state nonmember bank or state savings association becomes a covered bank, unless otherwise determined by the Corporation in writing.

(b) *Ceasing to be a covered bank.* A covered bank shall remain subject to the stress test requirements of this part unless and until total consolidated assets of the covered bank falls to $250 billion or less for each of four consecutive quarters as reported on the covered bank's most recent Call Reports. The calculation will be effective on the as-of date of the fourth consecutive Call Report.

(c) *Covered bank subsidiaries of a bank holding company or savings and loan holding company subject to periodic stress test requirements.* (1) Notwithstanding the requirements applicable to covered banks under this section, a covered bank that is a consolidated subsidiary of a bank holding company or savings and loan holding company that is required to conduct a periodic company-run stress test under applicable regulations of the Board of Governors of the Federal Reserve System may elect to conduct its stress test and report to the FDIC on the same timeline as its parent bank holding company or savings and loan holding company.

(2) A covered bank that elects to conduct its stress test under paragraph (c)(1) of this section will remain subject to the same timeline requirements of its parent company until otherwise approved by the FDIC.

[84 FR 56933, Oct. 24, 2019; 84 FR 64985, Nov. 26, 2019]

§ 325.4 Periodic stress tests required.

Each covered bank must conduct the periodic stress test under this part subject to the following requirements:

(a) *Financial data.* A covered bank must use financial data as of December 31 of the calendar year prior to the reporting year.

(b) *Scenarios provided by the Corporation.* In conducting the stress test under this part, each covered bank must use the scenarios provided by the Corporation. The scenarios provided by the Corporation will reflect a minimum of two sets of economic and financial conditions, including baseline and severely adverse scenarios. The Corporation will provide a description of the scenarios required to be used by each covered bank no later than February 15 of the reporting year.

(c) *Significant trading activities.* The Corporation may require a covered bank with significant trading activities, as determined by the Corporation, to include trading and counterparty components in its severely adverse scenarios. The trading and counterparty position data used in this component will be as of a date between October 1 of the year preceding the reporting year and March 1 of the reporting year, and the Corporation will communicate a description of the component to the covered bank no later than March 1 of the reporting year.

(d) *Frequency.* A covered bank that is consolidated under a holding company that is required, pursuant to applicable regulations of the Board of Governors of the Federal Reserve System, to conduct a stress test at least once every calendar year must treat every calendar year as a reporting year, unless otherwise determined by the Corporation. All other covered banks must treat every even-numbered calendar year beginning January 1, 2020 (*i.e.*, 2022, 2024, 2026, etc.), as a reporting year, unless otherwise determined by the Corporation.

[84 FR 56934, Oct. 24, 2019]

§ 325.5 Methodologies and practices.

(a) *Potential impact on capital.* In conducting a stress test under this part, during each quarter of the planning horizon, each covered bank must estimate the following for each scenario required to be used:

(1) Pre-provision net revenues, losses, provision for credit losses, and net income; and

(2) The potential impact on the regulatory capital levels and ratios applicable to the covered bank, and any other capital ratios specified by the Corporation, incorporating the effects of any capital action over the planning horizon and maintenance of an allowance for loan losses or adjusted allowance for credit losses, as appropriate, for credit exposures throughout the planning horizon.

(b) *Controls and oversight of stress testing processes.* (1) The senior management of a covered bank must establish and maintain a system of controls, oversight, and documentation, including policies and procedures, that are designed to ensure that its stress test processes satisfy the requirements in this part. These policies and procedures must, at a minimum, describe the covered bank's stress test practices and methodologies, and processes for validating and updating the covered bank's stress test practices and methodologies consistent with applicable laws and regulations.

(2) The board of directors, or a committee thereof, of a covered bank must approve and review the policies and procedures of the stress testing processes as frequently as economic conditions or the condition of the covered bank may warrant, but no less than once every reporting year. The board of directors and senior management of the covered bank must receive a summary of the results of the stress test.

(3) The board of directors and senior management of each covered bank must consider the results of the stress tests in the normal course of business, including but not limited to, the covered bank's capital planning, assessment of capital adequacy, and risk management practices.

[77 FR 62424, Oct. 15, 2012. Redesignated and amended at 83 FR 17740, Apr. 24, 2018; 84 FR 4249, Feb. 14, 2019; 84 FR 56933, 56934, Oct. 24, 2019]

§ 325.6 Required reports of stress test results to the FDIC and the Board of Governors of the Federal Reserve System.

(a) *Report required for periodic stress test results.* A covered bank must report to the FDIC and to the Board of Governors of the Federal Reserve System, on or before April 5 of the reporting year, the results of the stress test in the manner and form specified by the FDIC.

(b) *Content of reports.* (1) The reports required under paragraph (a) of this section must include under the baseline scenario, severely adverse scenario, and any other scenario required by the Corporation under this part, a description of the types of risks being included in the stress test, a summary description of the methodologies used in the stress test, and, for each quarter of the planning horizon, estimates of aggregate losses, pre-provision net revenue, provision for loan and lease losses, net income, and pro forma capital ratios (including regulatory and any other capital ratios specified by the FDIC). In addition, the report must include an explanation of the most significant causes for the changes in regulatory capital ratios and any other information required by the Corporation.

(2) The description of aggregate losses and net income must include the cumulative losses and cumulative net income over the planning horizon, and the description of each regulatory capital ratio must include the beginning value, ending value, and minimum value of each ratio over the planning horizon.

(c) *Confidential treatment of information submitted.* The confidentiality of information submitted to the Corporation under this part and related materials will be determined in accordance with applicable law including any available exemptions under the Freedom of Information Act (5 U.S.C. 552(b)) and the FDIC's Rules and Regulations regarding the Disclosure of Information (12 CFR part 309).

[84 FR 56934, Oct. 24, 2019]

§ 325.7 Publication of stress test results.

(a) *Publication date.* A covered bank must publish a summary of the results of its stress tests in the period starting June 15 and ending July 15 of the reporting year, provided:

(1) Unless the Corporation determines otherwise, if the covered bank is a consolidated subsidiary of a bank holding company or savings and loan holding company subject to supervisory stress tests conducted by the Board of Governors of the Federal Reserve System under 12 CFR part 252, then, within the June 15 to July 15 period, such covered bank may not publish the required summary of its periodic stress test earlier than the date that the Board of Governors of the Federal Reserve System publishes the supervisory stress test results of the covered bank's parent holding company.

(2) If the Board of Governors of the Federal Reserve System publishes the supervisory stress test results of the covered bank's parent holding company prior to June 15, then such covered bank may publish its stress test results prior to June 15, but no later than July 15, through actual publication by the covered bank or through publication by the parent holding company under paragraph (b) of this section.

(b) *Publication method.* The summary required under this section may be published on the covered bank's website or in any other forum that is reasonably accessible to the public. A covered bank that is a consolidated subsidiary of a bank holding company or savings and loan holding company that is required to conduct a company-run stress test under applicable regulations of the Board of Governors of the Federal Reserve System will be deemed to have satisfied the public disclosure requirements under this part if it publishes a summary of its stress test results with its parent bank holding company's or savings and loan holding company's summary of stress test results. Subsidiary covered banks electing to satisfy their public disclosure requirement in this manner must include a summary of changes in regulatory capital ratios of such covered bank over the planning horizon, and an explanation of the most significant causes for the changes in regulatory capital ratios.

(c) *Information to be disclosed in the summary.* A covered bank must disclose the following information regarding the severely adverse scenario if it is not a consolidated subsidiary of a parent bank holding company or savings and loan holding company that has elected to make its disclosure under 12 CFR 325.3(d):

(1) A description of the types of risks included in the stress test;

(2) A summary description of the methodologies used in the stress test;

(3) Estimates of aggregate losses, pre-provision net revenue, provision for credit losses, net income, and pro forma capital ratios (including regulatory and any other capital ratios specified by the FDIC); and

(4) An explanation of the most significant causes for the changes in the regulatory capital ratios.

(d) *Content of results.* (1) The disclosure of aggregate losses, pre-provision net revenue, provisions for credit losses, and net income under this section must be on a cumulative basis over the planning horizon.

(2) The disclosure of regulatory capital ratios and any other capital ratios specified by the Corporation under this section must include the beginning value, ending value, and minimum value of each ratio over the planning horizon.

[77 FR 62424, Oct. 15, 2012, as amended at 79 FR 69369, Nov. 21, 2014. Redesignated at 83 FR 17740, Apr. 24, 2018, as amended at 84 FR 4249, Feb. 14, 2019; 84 FR 56934, Oct. 24, 2019; 84 FR 64985, Nov. 26, 2019]

PART 326—MINIMUM SECURITY DEVICES AND PROCEDURES AND BANK SECRECY ACT[1] COMPLIANCE

Subpart A—Minimum Security Procedures

Sec.
326.0 Authority, purpose, and scope.
326.1 Definitions.
326.2 Designation of security officer.
326.3 Security program.
326.4 Reports.

Subpart B—Procedures for Monitoring Bank Secrecy Act Complianace

326.8 Bank Secrecy Act compliance.

AUTHORITY: 12 U.S.C. 1813, 1815, 1817, 1818, 1819 (Tenth), 1881–1883, 5412; 31 U.S.C. 5311–5314, 5316–5332.2.

Subpart A—Minimum Security Procedures

SOURCE: 83 FR 13842, Apr. 2, 2018, unless otherwise noted.

§ 326.0 Authority, purpose, and scope.

(a) This part is issued by the Federal Deposit Insurance Corporation

[1] In its original form, subchapter II of chapter 53 of title 31 U.S.C., was part of Pub. L. 91–508 which requires recordkeeping for and reporting of currency transactions by banks and others and is commonly known as the *Bank Secrecy Act*.

(''FDIC'') pursuant to section 3 of the Bank Protection Act of 1968 (12 U.S.C. 1882). It applies to FDIC-supervised insured depository institutions. It requires each institution to adopt appropriate security procedures to discourage robberies, burglaries, and larcenies and to assist in identifying and apprehending persons who commit such acts.

(b) It is the responsibility of the institution's board of directors to comply with this part and ensure that a written security program for the institution's main office and branches is developed and implemented.

§ 326.1 Definitions.

For the purposes of this part—

(a) The term *FDIC-supervised institution* or *institution* means any entity for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

(b) The term *banking office* includes any branch of an institution and, in the case of an FDIC-supervised insured depository institution; it includes the main office of that institution.

(c) The term *branch* for an institution chartered under the laws of any state of the United States includes any branch institution, branch office, branch agency, additional office, or any branch place of business located in any state or territory of the United States, District of Columbia, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Northern Mariana Islands or the Virgin Islands at which deposits are received or checks paid or money lent. In the case of a foreign bank defined in § 347.202 of this chapter, the term branch has the meaning given in § 347.202 of this chapter.

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

[83 FR 13842, Apr. 2, 2018, as amended at 85 FR 3246, Jan. 21, 2020]

§ 326.2 Designation of security officer.

Upon the issuance of Federal deposit insurance, the board of directors of each institution shall designate a security officer who shall have the authority, subject to the approval of the board of directors, to develop, within a reasonable time, but no later than 180 days, and to administer a written security program for each banking office.

§ 326.3 Security program.

(a) *Contents of security program.* The security program shall:

(1) Establish procedures for opening and closing for business and for the safekeeping of all currency, negotiable securities, and similar valuables at all times;

(2) Establish procedures that will assist in identifying persons committing crimes against the institution and that will preserve evidence that may aid in their identification and prosecution; such procedures may include, but are not limited to:

(i) Retaining a record of any robbery, burglary, or larceny committed against the institution;

(ii) Maintaining a camera that records activity in the banking office; and

(iii) Using identification devices, such as prerecorded serial-numbered bills, or chemical and electronic devices;

(3) Provide for initial and periodic training of officers and employees in their responsibilities under the security program and in proper employee conduct during and after a robbery, burglar or larceny; and

(4) Provide for selecting, testing, operating and maintaining appropriate security devices, as specified in paragraph (b) of this section.

(b) *Security devices.* Each institution shall have, at a minimum, the following security devices:

(1) A means of protecting cash or other liquid assets, such as a vault, safe, or other secure space;

(2) A lighting system for illuminating, during the hours of darkness, the area around the vault, if the vault is visible from outside the banking office;

(3) An alarm system or other appropriate device for promptly notifying the nearest responsible law enforcement officers of an attempted or perpetrated robbery or burglary;

(4) Tamper-resistant locks on exterior doors and exterior windows that may be opened; and

(5) Such other devices as the security officer determines to be appropriate, taking into consideration:

(i) The incidence of crimes against financial institutions in the area;

(ii) The amount of currency or other valuables exposed to robbery, burglary, and larceny;

(iii) The distance of the banking office from the nearest responsible law enforcement officers;

(iv) The cost of the security devices;

(v) Other security measures in effect at the banking office; and

(vi) The physical characteristics of the structure of the banking office and its surroundings.

§ 326.4 Reports.

The security officer for each institution shall report at least annually to the institution's board of directors on the implementation, administration, and effectiveness of the security program.

Subpart B—Procedures for Monitoring Bank Secrecy Act Compliance

§ 326.8 Bank Secrecy Act compliance.

(a) *Purpose*. This subpart is issued to assure that all FDIC-supervised institutions as defined in 12 CFR 326.1 establish and maintain procedures reasonably designed to assure and monitor their compliance with the requirements of subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations promulgated thereunder by the Department of Treasury at 31 CFR Chapter X.

(b) *Compliance procedures*—(1) *Program requirement*. Each institution shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations issued by the Department of Treasury at 31 CFR Chapter X. The compliance program shall be written, approved by the institution's board of directors, and noted in the minutes.

(2) *Customer identification program*. Each institution is subject to the requirements of 31 U.S.C. 5318(l) and the implementing regulation jointly promulgated by the FDIC and the Department of the Treasury at 31 CFR 1020.220.

(c) *Contents of compliance program*. The compliance program shall, at a minimum:

(1) Provide for a system of internal controls to assure ongoing compliance;

(2) Provide for independent testing for compliance to be conducted by institution personnel or by an outside party;

(3) Designate an individual or individuals responsible for coordinating and monitoring day-to-day compliance; and

(4) Provide training for appropriate personnel.

[85 FR 3246, Jan. 21, 2020]

PART 327—ASSESSMENTS

Subpart A—In General

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Subpart C—Implementation of Dividend Requirements

327.50 Dividends.

AUTHORITY: 12 U.S.C. 1813, 1815, 1817–19, 1821.

SOURCE: 54 FR 51374, Dec. 15, 1989, unless otherwise noted.

Subpart A—In General

SOURCE: Sections 327.1 through 327.8 appear at 71 FR 69277, Nov. 30, 2006, unless otherwise noted.

§ 327.1 Purpose and scope.

(a) *Scope.* This part 327 applies to any insured depository institution, including any insured branch of a foreign bank.

(b) *Purpose.* (1) Except as specified in paragraph (b)(2) of this section, this part 327 sets forth the rules for:

(i) The time and manner of filing certified statements by insured depository institutions;

(ii) The time and manner of payment of assessments by such institutions;

(iii) The payment of assessments by depository institutions whose insured status has terminated;

(iv) The classification of depository institutions for risk; and

(v) The processes for review of assessments.

(2) Deductions from the assessment base of an insured branch of a foreign bank are stated in subpart B part 347 of this chapter.

§ 327.2 Certified statements.

(a) *Required.* (1) The certified statement shall also be known as the quarterly certified statement invoice. Each insured depository institution shall file and certify its quarterly certified statement invoice in the manner and form set forth in this section.

(2) The quarterly certified statement invoice shall reflect the institution's risk assignment, assessment base, assessment computation, and assessment amount, for each quarterly assessment period.

(b) *Availability and access.* (1) The Corporation shall make available to each insured depository institution via the FDIC's e-business Web site FDIC*connect* a quarterly certified statement invoice each assessment period.

(2) Insured depository institutions shall access their quarterly certified statement invoices via FDIC*connect*, unless the FDIC provides notice to insured depository institutions of a successor system. In the event of a contingency, the FDIC may employ an alternative means of delivering the quarterly certified statement invoices. A quarterly certified statement invoice delivered by any alternative means will be treated as if it had been downloaded from FDIC*connect*.

(3) Institutions that do not have Internet access may request a renewable one-year exemption from the requirement that quarterly certified statement invoices be accessed through FDIC*connect*. Any exemption request must be submitted in writing to the Manager of the Assessments Section.

(4) Each assessment period, the FDIC will provide courtesy e-mail notification to insured depository institutions indicating that new quarterly certified statement invoices are available and may be accessed on FDIC*connect*. E-mail notification will be sent to all individuals with FDIC*connect* access to quarterly certified statement invoices.

(5) E-mail notification may be used by the FDIC to communicate with insured depository institutions regarding quarterly certified statement invoices and other assessment-related matters.

(c) *Review by institution.* The president of each insured depository institution, or such other officer as the institution's president or board of directors or trustees may designate, shall review the information shown on each quarterly certified statement invoice.

(d) *Retention by institution.* If the appropriate officer of the insured depository institution agrees that, to the best of his or her knowledge and belief, the information shown on the quarterly certified statement invoice is true, correct, and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued under it, the institution shall pay the amount specified on the quarterly certified statement invoice and shall retain it in the institution's files for three years as specified in section 7(b)(4) of the Federal Deposit Insurance Act.

(e) *Amendment by institution.* If the appropriate officer of the insured depository institution determines that, to the best of his or her knowledge and belief, the information shown on the quarterly certified statement invoice is not true, correct, and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued under it, the institution shall pay the amount specified on the quarterly certified statement invoice, and may:

(1) Amend its report of condition, or other similar report, to correct any data believed to be inaccurate on the quarterly certified statement invoice; amendments to such reports timely filed under section 7(g) of the Federal Deposit Insurance Act but not permitted to be made by an institution's primary federal regulator may be filed with the FDIC for consideration in determining deposit insurance assessments; or

(2) Amend and sign its quarterly certified statement invoice to correct a calculation believed to be inaccurate and return it to the FDIC by the applicable payment date specified in § 327.3(b)(2).

(f) *Certification.* Data used by the Corporation to complete the quarterly certified statement invoice has been previously attested to by the institution in its reports of condition, or other similar reports, filed with the institution's primary federal regulator. When an insured institution pays the amount shown on the quarterly certified statement invoice and does not correct that invoice as provided in paragraph (e) of this section, the information on that invoice shall be deemed true, correct, complete, and certified for purposes of paragraph (a) of this section and section 7(c) of the Federal Deposit Insurance Act.

(g) *Requests for revision of assessment computation.* (1) The timely filing of an amended report of condition or other similar report under paragraph (e)(1) of this section, or the timely filing of an amended quarterly certified statement invoice under paragraph (e)(2), that will result in a change to deposit insurance assessments owed or paid by an insured depository institution, shall be treated as a timely filed request for revision of computation of quarterly assessment payment under § 327.3(f).

(2) The assessment rate on the quarterly certified statement invoice shall be amended only if it is inconsistent with the assessment risk assignment(s) provided to the institution by the Corporation for the assessment period in question pursuant to § 327.4(a). Agreement with the assessment rate shall not be deemed to constitute agreement with the assessment risk assignment. An institution may request review of an assessment risk assignment it believes to be incorrect pursuant to § 327.4(c).

§ 327.3 Payment of assessments.

(a) *Required*—(1) *In general.* Each insured depository institution shall pay to the Corporation for each assessment period an assessment determined in accordance with this part 327.

(2) *Notice of designated deposit account.* For the purpose of making such payments, each insured depository institution shall designate a deposit account for direct debit by the Corporation. No later than 30 days prior to the next payment date specified in paragraph (b)(2) of this section, each institution

shall provide notice to the Corporation via FDIC*connect* of the account designated, including all information and authorizations needed by the Corporation for direct debit of the account. After the initial notice of the designated account, no further notice is required unless the institution designates a different account for assessment debit by the Corporation, in which case the requirements of the preceding sentence apply.

(3) *Transition Rule for Financing Corporation (FICO) Payments.* Quarterly FICO payments shall be collected by the FDIC without interruption during the assessment system transitional period in 2007. All insured depository institutions shall make scheduled quarterly FICO payments on January 2, 2007 (unless prepaid on December 30, 2006), and March 30, 2007, based upon, respectively, their September 30, 2006, and December 31, 2006 reported assessment bases, which shall be the final assessment bases calculated pursuant to 12 CFR 327.5(a) and (b) (2006). Simultaneous collection of deposit insurance assessments and FICO assessments will resume in June of 2007, based on the March 31, 2007 reported assessment base.

(b) *Assessment payment*—(1) *Quarterly certified statement invoice.* Starting with the first assessment period of 2007, no later than 15 days prior to the payment date specified in paragraph (b)(2) of this section, the Corporation will provide to each insured depository institution a quarterly certified statement invoice showing the amount of the assessment payment due from the institution for the prior quarter (net of credits or dividends, if any), and the computation of that amount. Subject to paragraph (e) of this section and § 327.17, the invoiced amount on the quarterly certified statement invoice shall be the product of the following: The assessment base of the institution for the prior quarter computed in accordance with § 327.5 multiplied by the institution's rate for that prior quarter as assigned to the institution pursuant to §§ 327.4(a) and 327.16.

(2) *Quarterly payment date and manner.* The Corporation will cause the amount stated in the applicable quarterly certified statement invoice to be directly debited on the appropriate payment date from the deposit account designated by the insured depository institution for that purpose, as follows:

(i) In the case of the assessment payment for the quarter that begins on January 1, the payment date is the following June 30;

(ii) In the case of the assessment payment for the quarter that begins on April 1, the payment date is the following September 30;

(iii) In the case of the assessment payment for the quarter that begins on July 1, the payment date is the following December 30; and

(iv) In the case of the assessment payment for the quarter that begins on October 1, the payment date is the following March 30.

(c) *Necessary action, sufficient funding by institution.* Each insured depository institution shall take all actions necessary to allow the Corporation to debit assessments from the insured depository institution's designated deposit account. Each insured depository institution shall, prior to each payment date indicated in paragraph (b)(2) of this section, ensure that funds in an amount at least equal to the amount on the quarterly certified statement invoice are available in the designated account for direct debit by the Corporation. Failure to take any such action or to provide such funding of the account shall be deemed to constitute nonpayment of the assessment. Penalties for failure to timely pay assessments will be calculated and published in accordance with 12 CFR 308.132(d).

(d) *Business days.* If a payment date specified in paragraph (b)(2) falls on a date that is not a business day, the applicable date shall be the previous business day.

(e) *Payment adjustments in succeeding quarters.* Quarterly certified statement invoices provided by the Corporation may reflect adjustments, initiated by the Corporation or an institution, resulting from such factors as amendments to prior quarterly reports of condition, retroactive revision of the institution's assessment risk assignment, and revision of the Corporation's assessment computations for prior quarters.

(f) *Request for revision of computation of quarterly assessment payment*—(1) *In general*. An institution may submit a written request for revision of the computation of the institution's quarterly assessment payment as shown on the quarterly certified statement invoice in the following circumstances:

(i) The institution disagrees with the computation of the assessment base as stated on the quarterly certified statement invoice;

(ii) The institution determines that the rate applied by the Corporation is inconsistent with the assessment risk assignment(s) provided to the institution in writing by the Corporation for the assessment period for which the payment is due; or

(iii) The institution believes that the quarterly certified statement invoice does not fully or accurately reflect adjustments provided for in paragraph (e) of this section.

(2) *Inapplicability*. This paragraph (f) is not applicable to requests for review of an institution's assessment risk assignment, which are covered by § 327.4(c) of this part.

(3) *Requirements*. Any such request for revision must be submitted within 90 days from the date the computation being challenged appears on the institution's quarterly certified statement invoice. The request for revision shall be submitted to the Manager of the Assessments Section and shall provide documentation sufficient to support the change sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the request for additional information. Any institution submitting a timely request for revision will receive written notice from the Corporation regarding the outcome of its request. Upon completion of a review, the DOF Director (or designee) shall promptly notify the institution in writing of his or her determination of whether revision is warranted. If the institution requesting revision disagrees with that determination, it may appeal to the FDIC's Assessment Appeals Committee. Notice of the procedures applicable to appeals will be included with the written determination.

(g) *Quarterly certified statement invoice unavailable*. Any institution whose quarterly certified statement invoice is unavailable on FDIC*connect* by the fifteenth day of the month in which the payment is due shall promptly notify the Corporation. Failure to provide prompt notice to the Corporation shall not affect the institution's obligation to make full and timely assessment payment. Unless otherwise directed by the Corporation, the institution shall preliminarily pay the amount shown on its quarterly certified statement invoice for the preceding assessment period, subject to subsequent correction.

[54 FR 51374, Dec. 15, 1989, as amended at 74 FR 9550, Mar. 4, 2009; 81 FR 32201, May 20, 2016; 81 FR 42243, June 29, 2016; 83 FR 61115, Nov. 28, 2018; 85 FR 38292, June 26, 2020]

§ 327.4 Assessment rates.

(a) *Assessment risk assignment*. For the purpose of determining the annual assessment rate for insured depository institutions under § 327.9 or § 327.16 , each insured depository institution will be provided an assessment risk assignment. Notice of an institution's current assessment risk assignment will be provided to the institution with each quarterly certified statement invoice. Adjusted assessment risk assignments for prior periods may also be provided by the Corporation. Notice of the procedures applicable to reviews will be included with the notice of assessment risk assignment provided pursuant to paragraph (a) of this section.

(b) *Payment of assessment at rate assigned*. Institutions shall make timely payment of assessments based on the assessment risk assignment in the notice provided to the institution pursuant to paragraph (a) of this section. Timely payment is required notwithstanding any request for review filed pursuant to paragraph (c) of this section. Assessment risk assignments remain in effect for future assessment periods until changed. If the risk assignment in the notice is subsequently changed, any excess assessment paid by the institution will be credited by the Corporation, with interest, and any additional assessment owed shall be paid by the institution, with interest, in the next assessment payment after such

subsequent assignment or change. Interest payable under this paragraph shall be determined in accordance with § 327.7.

(c) *Requests for review*. An institution that believes any assessment risk assignment provided by the Corporation pursuant to paragraph (a) of this section is incorrect and seeks to change it must submit a written request for review of that risk assignment. An institution cannot request review through this process of the CAMELS ratings assigned by its primary federal regulator or challenge the appropriateness of any such rating; each federal regulator has established procedures for that purpose. An institution may also request review of a determination by the FDIC to assess the institution as a large, highly complex, or a small institution (§§ 327.9(e)(3) and 327.16(f)(3)) or a determination by the FDIC that the institution is a new institution (§§ 327.9(f)(5) and 327.16(g)(5)). Any request for review must be submitted within 90 days from the date the assessment risk assignment being challenged pursuant to paragraph (a) of this section appears on the institution's quarterly certified statement invoice. The request shall be submitted to the Corporation's Director of the Division of Insurance and Research in Washington, DC, and shall include documentation sufficient to support the change sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the request for additional information. Any institution submitting a timely request for review will receive written notice from the Corporation regarding the outcome of its request. Upon completion of a review, the Director of the Division of Insurance and Research (or designee) or the Director of the Division of Supervision and Consumer Protection (or designee) or any successor divisions, as appropriate, shall promptly notify the institution in writing of his or her determination of whether a change is warranted. If the institution requesting review disagrees with that determination, it may appeal to the FDIC's Assessment Appeals Committee. Notice of the procedures applicable to appeals will be included with the written determination.

(d) *Disclosure restrictions*. The portion of an assessment risk assignment provided to an institution by the Corporation pursuant to paragraph (a) of this section that reflects any supervisory evaluation or confidential information is deemed to be exempt information within the scope of § 309.5(g)(8) of this chapter and, accordingly, is governed by the disclosure restrictions set out at § 309.6 of this chapter.

(e) *Limited use of assessment risk assignment*. Any assessment risk assignment provided to a depository institution under this part 327 is for purposes of implementing and operating the FDIC's risk-based assessment system. Unless permitted by the Corporation or otherwise required by law, no institution may state in any advertisement or promotional material, or in any other public place or manner, the assessment risk assignment provided to it pursuant to this part.

(f) *Effective date for changes to risk assignment*. Changes to an insured institution's risk assignment resulting from a supervisory ratings change become effective as of the date of written notification to the institution by its primary federal regulator or state authority of its supervisory rating (even when the CAMELS component ratings have not been disclosed to the institution), if the FDIC, after taking into account other information that could affect the rating, agrees with the rating. If the FDIC does not agree, the FDIC will notify the institution of the FDIC's supervisory rating; resulting changes to an insured institution's risk assignment become effective as of the date of written notification to the institution by the FDIC.

(g) *Designated Reserve Ratio*. The designated reserve ratio for the Deposit Insurance Fund is 2 percent.

[71 FR 69277, 69326, Nov. 30, 2006, as amended at 75 FR 79293, Dec. 20, 2010; 76 FR 10704, Feb. 25, 2011; 81 FR 32201, May 20, 2016]

§ 327.5 Assessment base.

(a) *Assessment base for all insured depository institutions*. Except as provided in paragraphs (b), (c), and (d) of this section, the assessment base for an insured depository institution shall equal

the average consolidated total assets of the insured depository institution during the assessment period minus the average tangible equity of the insured depository institution during the assessment period.

(1) *Average consolidated total assets defined and calculated.* Average consolidated total assets are defined in the schedule of quarterly averages in the Consolidated Reports of Condition and Income, using either a daily averaging method or a weekly averaging method as described in paragraphs (a)(1)(i) or (ii) of this section. The amounts to be reported as daily averages are the sum of the gross amounts of consolidated total assets for each calendar day during the quarter divided by the number of calendar days in the quarter. The amounts to be reported as weekly averages are the sum of the gross amounts of consolidated total assets for each Wednesday during the quarter divided by the number of Wednesdays in the quarter. For days that an office of the reporting institution (or any of its subsidiaries or branches) is closed (e.g., Saturdays, Sundays, or holidays), the amounts outstanding from the previous business day will be used. An office is considered closed if there are no transactions posted to the general ledger as of that date. For institutions that begin operating during the calendar quarter, the amounts to be reported as daily averages are the sum of the gross amounts of consolidated total assets for each calendar day the institution was operating during the quarter divided by the number of calendar days the institution was operating during the quarter.

(i) *Institutions that must report average consolidated total assets using a daily averaging method.* All insured depository institutions that report $1 billion or more in quarter-end consolidated total assets on their March 31, 2011 Consolidated Report of Condition and Income or Thrift Financial Report (or successor report), and all institutions that become insured after March 31, 2011, shall report average consolidated total assets as of the close of business for each day of the calendar quarter.

(ii) *Institutions that may report average consolidated total assets using a weekly averaging method.* All insured depository institutions that report less than $1 billion in quarter-end consolidated total assets on their March 31, 2011, Consolidated Report of Condition and Income or Thrift Financial Report may report average consolidated total assets as an average of the balances as of the close of business on each Wednesday during the calendar quarter, or may at any time opt permanently to report average consolidated total assets on a daily basis as set forth in paragraph (a)(1)(i) of this section. Once an institution that reports average consolidated total assets using a weekly average reports average consolidated total assets equal to or greater than $1 billion for two consecutive quarters, it shall permanently report average consolidated total assets using daily averaging starting in the next quarter.

(iii) *Mergers and consolidations.* The average calculation of the assets of the surviving or resulting institution in a merger or consolidation shall include the assets of all the merged or consolidated institutions for the days in the quarter prior to the merger or consolidation, whether reported by the daily or weekly method.

(2) *Average tangible equity defined and calculated.* Tangible equity is defined as Tier 1 capital.

(i) *Calculation of average tangible equity.* Except as provided in paragraph (a)(2)(ii) of this section, average tangible equity shall be calculated using monthly averaging. Monthly averaging means the average of the three month-end balances within the quarter.

(ii) *Alternate calculation of average tangible equity.* Institutions that report less than $1 billion in quarter-end consolidated total assets on their March 31, 2011 Consolidated Reports of Condition and Income or Thrift Financial Reports may report average tangible equity using an end-of-quarter balance or may at any time opt permanently to report average tangible equity using a monthly average balance. An institution that reports average tangible equity using an end-of-quarter balance and reports average daily or weekly consolidated assets of $1 billion or more for two consecutive quarters shall permanently report average tangible equity using monthly averaging

starting in the next quarter. Newly insured institutions shall report using monthly averaging.

(iii) *Calculation of average tangible equity for the surviving institution in a merger or consolidation.* For the surviving institution in a merger or consolidation, Tier 1 capital shall be calculated as if the merger occurred on the first day of the quarter in which the merger or consolidation occurred.

(3) *Consolidated subsidiaries*—(i) *Reporting for insured depository institutions with consolidated subsidiaries that are not insured depository institutions.* For insured institutions with consolidated subsidiaries that are not insured depository institutions, assets, including assets eliminated in consolidation, shall be calculated using a daily or weekly averaging method, corresponding to the daily or weekly averaging requirement of the parent institution. The Consolidated Reports of Condition and Income instructions in effect for the quarter for which data is being reported shall govern calculation of the average amount of subsidiaries' assets, including those assets eliminated in consolidation. An insured depository institution that reports average tangible equity using a monthly averaging method and that has subsidiaries that are not insured depository institutions shall use monthly average reporting for the subsidiaries. The monthly average data for these subsidiaries, however, may be calculated for the current quarter or for the prior quarter consistent with the method used to report average consolidated total assets and in conformity with Consolidated Reports of Condition and Income requirements. Once the method of reporting the subsidiaries' assets and tangible equity is chosen, however (current quarter or prior quarter), insured depository institutions cannot change the reporting method from quarter to quarter. An institution that reports consolidated assets and tangible equity using data for the prior quarter may switch to concurrent reporting on a permanent basis.

(ii) *Reporting for insured depository institutions with consolidated insured depository subsidiaries.* Insured depository institutions that consolidate with other insured depository institutions for financial reporting purposes shall report for the parent and for each subsidiary individually, daily average consolidated total assets or weekly average consolidated total assets, as appropriate under paragraph (a)(1)(i) or (ii) above, and tangible equity, without consolidating their insured depository institution subsidiaries into the calculations. Investments in insured depository institution subsidiaries should be included in total assets using the equity method of accounting.

(b) *Assessment base for banker's banks*—(1) *Bankers bank defined.* A banker's bank for purposes of calculating deposit insurance assessments shall meet the definition of banker's bank as that term is used in 12 U.S.C. 24. Banker's banks that have funds from government capital infusion programs (such as TARP and the Small Business Lending Fund), and stock owned by the FDIC resulting from banks failures, as well as non-bank-owned stock resulting from equity compensation programs, are not thereby excluded from the definition of banker's banks.

(2) *Self-certification.* Institutions that meet the requirements of paragraph (b)(1) of this section shall so certify to that effect each quarter on the Consolidated Reports of Condition and Income or Thrift Financial Report or successor report.

(3) *Assessment base calculation for banker's banks.* A banker's bank shall pay deposit insurance assessments on its assessment base as calculated in paragraph (a) of this section provided that it conducts 50 percent or more of its business with entities other than its parent holding company or entities other than those controlled (control has the same meaning as in section 3(w)(5) of the FDI Act) either directly or indirectly by its parent holding company. The assessment base will exclude the average (daily or weekly depending on how the institution calculates its average consolidated total assets) amount of reserve balances passed through to the Federal Reserve, the average amount of reserve balances held at the Federal Reserve for its own account (including all balances due from the Federal Reserve as described in the instructions to line 4 of Schedule

RC–A of the Consolidated Report of Condition and Income as of December 31, 2010), and the average amount of the institution's federal funds sold, but in no case shall the amount excluded exceed the sum of the bank's average amount of total deposits of commercial banks and other depository institutions in the United States and the average amount of its federal funds purchased.

(c) *Assessment base for custodial banks*—(1) *Custodial bank defined.* A custodial bank for purposes of calculating deposit insurance assessments shall be an insured depository institution with previous calendar-year trust assets (fiduciary and custody and safekeeping assets, as described in the instructions to Schedule RC–T of the Consolidated Report of Condition and Income) of at least $50 billion or an insured depository institution that derived more than 50 percent of its total revenue (interest income plus non-interest income) from trust activity over the previous calendar year.

(2) *Assessment base calculation for custodial banks.* A custodial bank shall pay deposit insurance assessments on its assessment base as calculated in paragraph (a) of this section, but the FDIC will exclude from that assessment base the daily or weekly average (depending on how the bank reports its average consolidated total assets) of all asset types described in the instructions to lines 1, 2, and 3 of Schedule RC of the Consolidated Report of Condition and Income with a standardized approach risk weight of 0 percent, regardless of maturity, plus 50 percent of those asset types described in the instructions to lines 1, 2, and 3 of Schedule RC of the Consolidated Report of Condition and Income, with a standardized approach risk-weight greater than 0 and up to and including 20 percent, regardless of maturity, subject to the limitation that the daily or weekly average (depending on how the bank reports its average consolidated total assets) value of all assets that serve as the basis for a deduction under this section cannot exceed the daily or weekly average value of those deposits that are classified as transaction accounts in the instructions to Schedule RC–E of the Consolidated Report of Condition and Income and that are identified by the institution as being directly linked to a fiduciary or custodial and safekeeping account asset.

(d) *Assessment base for insured branches of foreign banks.* Average consolidated total assets for an insured branch of a foreign bank are defined as total assets of the branch (including net due from related depository institutions) in accordance with the schedule of assets and liabilities in the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks as of the assessment period for which the assessment is being calculated, but measured using the definition for reporting total assets in the schedule of quarterly averages in the Consolidated Reports of Condition and Income, and calculated using the appropriate daily or weekly averaging method under paragraph (a)(1)(i) or (ii) of this section. Tangible equity for an insured branch of a foreign bank is eligible assets (determined in accordance with § 347.210 of the FDIC's regulations) less the book value of liabilities (exclusive of liabilities due to the foreign bank's head office, other branches, agencies, offices, or wholly owned subsidiaries) calculated on a monthly or end-of-quarter basis, according to the branch's size.

(e) *Newly insured institutions.* A newly insured institution shall pay an assessment for the assessment period during which it became insured. The FDIC will prorate the newly insured institution's assessment amount to reflect the number of days it was insured during the period.

[76 FR 10704, Feb. 25, 2011, as amended at 79 FR 70437, Nov. 26, 2014]

§ 327.6 Mergers and consolidations; other terminations of insurance.

(a) *Final quarterly certified invoice for acquired institution.* An institution that is not the resulting or surviving institution in a merger or consolidation must file a report of condition for every assessment period prior to the assessment period in which the merger or consolidation occurs. The surviving or resulting institution shall be responsible for ensuring that these reports of condition are filed and shall be liable for any unpaid assessments on the part

of the institution that is not the resulting or surviving institution.

(b) *Assessment for quarter in which the merger or consolidation occurs.* For an assessment period in which a merger or consolidation occurs, consolidated total assets for the surviving or resulting institution shall include the consolidated total assets of all insured depository institutions that are parties to the merger or consolidation as if the merger or consolidation occurred on the first day of the assessment period. Tier 1 capital shall be reported in the same manner.

(c) *Other termination.* When the insured status of an institution is terminated, and the deposit liabilities of such institution are not assumed by another insured depository institution—

(1) *Payment of assessments; quarterly certified statement invoices.* The depository institution whose insured status is terminating shall continue to file and certify its quarterly certified statement invoice and pay assessments for the assessment period its deposits are insured. Such institution shall not be required to certify its quarterly certified statement invoice and pay further assessments after it has paid in full its deposit liabilities and the assessment to the Corporation required to be paid for the assessment period in which its deposit liabilities are paid in full, and after it, under applicable law, goes out of business or transfers all or substantially all of its assets and liabilities to other institutions or otherwise ceases to be obliged to pay subsequent assessments.

(2) *Payment of deposits; certification to Corporation.* When the deposit liabilities of the depository institution have been paid in full, the depository institution shall certify to the Corporation that the deposit liabilities have been paid in full and give the date of the final payment. When the depository institution has unclaimed deposits, the certification shall further state the amount of the unclaimed deposits and the disposition made of the funds to be held to meet the claims. For assessment purposes, the following will be considered as payment of the unclaimed deposits:

(i) The transfer of cash funds in an amount sufficient to pay the unclaimed and unpaid deposits to the public official authorized by law to receive the same; or

(ii) If no law provides for the transfer of funds to a public official, the transfer of cash funds or compensatory assets to an insured depository institution in an amount sufficient to pay the unclaimed and unpaid deposits in consideration for the assumption of the deposit obligations by the insured depository institution.

(3) *Notice to depositors.* (i) The depository institution whose insured status is terminating shall give sufficient advance notice of the intended transfer to the owners of the unclaimed deposits to enable the depositors to obtain their deposits prior to the transfer. The notice shall be mailed to each depositor and shall be published in a local newspaper of general circulation. The notice shall advise the depositors of the liquidation of the depository institution, request them to call for and accept payment of their deposits, and state the disposition to be made of their deposits if they fail to promptly claim the deposits.

(ii) If the unclaimed and unpaid deposits are disposed of as provided in paragraph (c)(2)(i) of this section, a certified copy of the public official's receipt issued for the funds shall be furnished to the Corporation.

(iii) If the unclaimed and unpaid deposits are disposed of as provided in paragraph (c)(2)(ii) of this section, an affidavit of the publication and of the mailing of the notice to the depositors, together with a copy of the notice and a certified copy of the contract of assumption, shall be furnished to the Corporation.

(4) *Notice to Corporation.* The depository institution whose insured status is terminating shall advise the Corporation of the date on which it goes out of business or transfers all or substantially all of its assets and liabilities to other institutions or otherwise ceases to be obligated to pay subsequent assessments and the method whereby the termination has been effected.

(d) *Resumption of insured status before insurance of deposits ceases.* If a depository institution whose insured status

has been terminated is permitted by the Corporation to continue or resume its status as an insured depository institution before the insurance of its deposits has ceased, the institution will be deemed, for assessment purposes, to continue as an insured depository institution and must thereafter file and certify its quarterly certified statement invoices and pay assessments as though its insured status had not been terminated. The procedure for applying for the continuance or resumption of insured status is set forth in § 303.248 of this chapter.

[76 FR 10706, Feb. 25, 2011]

§ 327.7 Payment of interest on assessment underpayments and overpayments.

(a) *Payment of interest*—(1) *Payment by institutions*. Each insured depository institution shall pay interest to the Corporation on any underpayment of the institution's assessment.

(2) *Payment by Corporation*. The Corporation will pay interest on any overpayment by the institution of its assessment.

(3) *Accrual of interest*. (i) Interest on an amount owed to or by the Corporation for the underpayment or overpayment of an assessment shall accrue interest at the relevant interest rate.

(ii) Interest on an amount specified in paragraph (a)(3)(i) of this section shall begin to accrue on the day following the regular payment date, as provided for in § 327.3(b)(2), for the amount so overpaid or underpaid, provided, however, that interest shall not begin to accrue on any overpayment until the day following the date such overpayment was received by the Corporation. Interest shall continue to accrue through the date on which the overpayment or underpayment (together with any interest thereon) is discharged.

(iii) The relevant interest rate shall be redetermined for each quarterly assessment interval. A quarterly assessment interval begins on the day following a regular payment date, as specified in § 327.3(b)(2), and ends on the immediately following regular payment date.

(b) *Interest rates*. (1) The relevant interest rate for a quarterly assessment interval that includes the month of January, April, July, and October, respectively, is the coupon equivalent yield of the average discount rate set on the 3-month Treasury bill at the last auction held by the United States Treasury Department during the preceding December, March, June, and September, respectively.

(2) The relevant interest rate for a quarterly assessment interval will apply to any amounts overpaid or underpaid on the payment date immediately prior to the beginning of the quarterly assessment interval. The relevant interest rate will also apply to any amounts owed for previous overpayments or underpayments (including any interest thereon) that remain outstanding, after any adjustments to such overpayments or underpayments have been made thereon, at the end of the regular payment date immediately prior to the beginning of the quarterly assessment interval. Interest will be compounded daily.

§ 327.8 Definitions.

For the purpose of this part 327:

(a) *Deposits*. The term *deposit* has the meaning specified in section 3(*l*) of the Federal Deposit Insurance Act.

(b) *Quarterly report of condition*. The term *quarterly report of condition* means a report required to be filed pursuant to section 7(a)(3) of the Federal Deposit Insurance Act.

(c) *Assessment period—In general*. The term *assessment period* means a period beginning on January 1 of any calendar year and ending on March 31 of the same year, or a period beginning on April 1 of any calendar year and ending on June 30 of the same year; or a period beginning on July 1 of any calendar year and ending on September 30 of the same year; or a period beginning on October 1 of any calendar year and ending on December 31 of the same year.

(d) *Acquiring institution*. The term *acquiring institution* means an insured depository institution that assumes some or all of the deposits of another insured depository institution in a terminating transfer.

(e) *Small institution*. (1) An insured depository institution with assets of less than $10 billion, excluding assets as described in § 327.17(e), as of December 31,

2006, and an insured branch of a foreign institution shall be classified as a small institution.

(2) Except as provided in paragraph (e)(3) of this section and § 327.17(e), if, after December 31, 2006, an institution classified as large under paragraph (f) of this section (other than an institution classified as large for purposes of §§ 327.9(e) and 327.16(f)) reports assets of less than $10 billion in its quarterly reports of condition for four consecutive quarters, excluding assets as described in § 327.17(e), the FDIC will reclassify the institution as small beginning the following quarter.

(3) An insured depository institution that elects to use the community bank leverage ratio framework under 12 CFR 3.12(a)(3), 12 CFR 217.12(a)(3), or 12 CFR 324.12(a)(3), shall be classified as a small institution, even if that institution otherwise would be classified as a large institution under paragraph (f) of this section.

(f) *Large institution.* An institution classified as large for purposes of §§ 327.9(e) and 327.16(f) or an insured depository institution with assets of $10 billion or more, excluding assets as described in § 327.17(e), as of December 31, 2006 (other than an insured branch of a foreign bank or a highly complex institution) shall be classified as a large institution. If, after December 31, 2006, an institution classified as small under paragraph (e) of this section reports assets of $10 billion or more in its quarterly reports of condition for four consecutive quarters, excluding assets as described in § 327.17(e), the FDIC will reclassify the institution as large beginning the following quarter.

(g) *Highly complex institution.* (1) A highly complex institution is:

(i) An insured depository institution (excluding a credit card bank) that has had $50 billion or more in total assets for at least four consecutive quarters, excluding assets as described in § 327.17(e), that is controlled by a U.S. parent holding company that has had $500 billion or more in total assets for four consecutive quarters, or controlled by one or more intermediate U.S. parent holding companies that are controlled by a U.S. holding company that has had $500 billion or more in assets for four consecutive quarters; or

(ii) A processing bank or trust company.

(2) Control has the same meaning as in section 3(w)(5) of the FDI Act. A U.S. parent holding company is a parent holding company incorporated or organized under the laws of the United States or any State, as the term ''State'' is defined in section 3(a)(3) of the FDI Act. If, after December 31, 2010, an institution classified as highly complex under paragraph (g)(1)(i) of this section falls below $50 billion in total assets in its quarterly reports of condition for four consecutive quarters, or its parent holding company or companies fall below $500 billion in total assets for four consecutive quarters, the FDIC will reclassify the institution beginning the following quarter. If, after December 31, 2010, an institution classified as highly complex under paragraph (a)(1)(ii) of this section falls below $10 billion in total assets for four consecutive quarters, the FDIC will reclassify the institution beginning the following quarter.

(h) *CAMELS composite and CAMELS component ratings.* The terms *CAMELS composite ratings* and *CAMELS component ratings* shall have the same meaning as in the Uniform Financial Institutions Rating System as published by the Federal Financial Institutions Examination Council.

(i) *ROCA supervisory ratings.* ROCA supervisory ratings rate risk management, operational controls, compliance, and asset quality.

(j) *New depository institution.* A new insured depository institution is a bank or savings association that has been federally insured for less than five years as of the last day of any quarter for which it is being assessed.

(k) *Established depository institution.* An established insured depository institution is a bank or savings association that has been federally insured for at least five years as of the last day of any quarter for which it is being assessed.

(1) *Merger or consolidation involving new and established institution(s).* Subject to paragraphs (k)(2), (3), (4), and (5) of this section and §§ 327.9(f)(3) and (4) and 327.16 (g)(3) and (4), when an established institution merges into or consolidates with a new institution, the

resulting institution is a new institution unless:

(i) The assets of the established institution, as reported in its report of condition for the quarter ending immediately before the merger, exceeded the assets of the new institution, as reported in its report of condition for the quarter ending immediately before the merger; and

(ii) Substantially all of the management of the established institution continued as management of the resulting or surviving institution.

(2) *Consolidation involving established institutions.* When established institutions consolidate, the resulting institution is an established institution.

(3) *Grandfather exception.* If a new institution merges into an established institution, and the merger agreement was entered into on or before July 11, 2006, the resulting institution shall be deemed to be an established institution for purposes of this part.

(4) *Subsidiary exception.* Subject to paragraph (k)(5) of this section, a new institution will be considered established if it is a wholly owned subsidiary of:

(i) A company that is a bank holding company under the Bank Holding Company Act of 1956 or a savings and loan holding company under the Home Owners' Loan Act, and:

(A) At least one eligible depository institution (as defined in 12 CFR 303.2(r)) that is owned by the holding company has been chartered as a bank or savings association for at least five years as of the date that the otherwise new institution was established; and

(B) The holding company has a composite rating of at least ''2'' for bank holding companies or an above average or ''A'' rating for savings and loan holding companies and at least 75 percent of its insured depository institution assets are assets of eligible depository institutions, as defined in 12 CFR 303.2(r); or

(ii) An eligible depository institution, as defined in 12 CFR 303.2(r), that has been chartered as a bank or savings association for at least five years as of the date that the otherwise new institution was established.

(5) *Effect of credit union conversion.* In determining whether an insured depository institution is new or established, the FDIC will include any period of time that the institution was a federally insured credit union.

(l) *Risk assignment.* Under § 327.9, for all small institutions and insured branches of foreign banks, risk assignment includes assignment to Risk Category I, II, III, or IV and, within Risk Category I, assignment to an assessment rate. Under § 327.16, for all new small institutions and insured branches of foreign banks, risk assignment includes assignment to Risk Category I, II, III, or IV, and for insured branches of foreign banks within Risk Category I, assignment to an assessment rate or rates. For all established small institutions, and all large institutions and all highly complex institutions, risk assignment includes assignment to an assessment rate.

(m) *Unsecured debt.* For purposes of the unsecured debt adjustment as set forth in §§ 327.9(d)(1) and 327.16(e)(1) and the depository institution debt adjustment as set forth in §§ 327.9(d)(2) and 327.16(e)(2), unsecured debt shall include senior unsecured liabilities and subordinated debt.

(n) *Senior unsecured liability.* For purposes of the unsecured debt adjustment as set forth in §§ 327.9(d)(1) and 327.16(e)(1) and the depository institution debt adjustment as set forth in §§ 327.9(d)(2) and 327.16(e)(2), senior unsecured liabilities shall be the unsecured portion of other borrowed money as defined in the quarterly report of condition for the reporting period as defined in paragraph (b) of this section, but shall not include any senior unsecured debt that the FDIC has guaranteed under the Temporary Liquidity Guarantee Program, 12 CFR part 370.

(o) *Subordinated debt.* For purposes of the unsecured debt adjustment as set forth in §§ 327.9(d)(1) and 327.16(e)(1) and the depository institution debt adjustment as set forth in §§ 327.9(d)(2) and 327.16(e)(2), subordinated debt shall be as defined in the quarterly report of condition for the reporting period; however, subordinated debt shall also include limited-life preferred stock as defined in the quarterly report of condition for the reporting period.

(p) *Long-term unsecured debt.* For purposes of the unsecured debt adjustment

as set forth in §§ 327.9(d)(1) and 327.16(e)(1)and the depository institution debt adjustment as set forth in §§ 327.9(d)(2) and 327.16(e)(2), long-term unsecured debt shall be unsecured debt with at least one year remaining until maturity; however, any such debt where the holder of the debt has a redemption option that is exercisable within one year of the reporting date shall not be deemed long-term unsecured debt.

(q) *Brokered reciprocal deposits.* Reciprocal deposits as defined in § 337.6(e)(2)(v) that are not excepted from the institution's brokered deposits pursuant to § 337.6(e).

(r) *Parent holding company*—A parent holding company has the same meaning as ''depository institution holding company,'' as defined in § 3(w) of the FDI Act.

(s) *Processing bank or trust company.* A processing bank or trust company is an institution whose last three years' nonlending interest income, fiduciary revenues, and investment banking fees, combined, exceed 50 percent of total revenues (and its last three years fiduciary revenues are non-zero), and whose total fiduciary assets total $500 billion or more, and whose total assets for at least four consecutive quarters have been $10 billion or more.

(t) *Credit card bank.* A credit card bank is a bank for which credit card receivables plus securitized receivables exceed 50 percent of assets plus securitized receivables.

(u) *Control.* Control has the same meaning as in section 2 of the Bank Holding Company Act of 1956, 12 U.S.C. 1841(a)(2).

(v) *Established small institution.* An established small institution is a ''small institution'' as defined under paragraph (e) of this section that meets the definition of ''established depository institution'' under paragraph (k) of this section.

(w) *New small institution.* A new small institution is a ''small institution'' as defined under paragraph (e) of this section that meets the definition of ''new depository institution'' under paragraph (j) of this section.

(x) *Deposit Insurance Fund and DIF.* The Deposit Insurance Fund as defined in 12 U.S.C. 1813(y)(1).

(y) *Reserve ratio of the DIF.* The reserve ratio as defined in 12 U.S.C. 1813(y)(3).

(z) *Well capitalized, adequately capitalized, and undercapitalized.* For any insured depository institution other than an insured branch of a foreign bank, Well Capitalized, Adequately Capitalized, and Undercapitalized have the same meaning as in: 12 CFR 6.4 (for national banks and Federal savings associations), as either may be amended from time to time, except that 12 CFR 6.4(b)(1)(i)(E) and (e), as they may be amended from time to time, shall not apply; 12 CFR 208.43 (for state member institutions), as either may be amended from time to time, except that 12 CFR 208.43(b)(1)(i)(E) and (c), as they may be amended from time to time, shall not apply; and 12 CFR 324.403 (for state nonmember institutions and state savings associations), as either may be amended from time to time, except that 12 CFR 324.403(b)(1)(i)(E) and (d), as they may be amended from time to time, shall not apply.

[54 FR 51374, Dec. 15, 1989, as amended at 74 FR 9551, Mar. 4, 2009; 76 FR 10707, Feb. 25, 2011; 81 FR 32201, May 20, 2016; 83 FR 14568, Apr. 5, 2018; 84 FR 1353, Feb. 4, 2019; 84 FR 66838, Dec. 6, 2019; 85 FR 38292, June 26, 2020]

§ 327.9 Assessment pricing methods.

The following pricing methods shall apply through the later of June 30, 2016, or the subsequent calendar quarter in which the reserve ratio of the DIF reaches 1.15 percent.

(a) *Small institutions*—(1) *Risk Categories.* Each small insured depository institution shall be assigned to one of the following four Risk Categories based upon the institution's capital evaluation and supervisory evaluation as defined in this section.

(i) *Risk Category I.* Small institutions in Supervisory Group A that are Well Capitalized will be assigned to Risk Category I.

(ii) *Risk Category II.* Small institutions in Supervisory Group A that are Adequately Capitalized, and small institutions in Supervisory Group B that are either Well Capitalized or Adequately Capitalized will be assigned to Risk Category II.

(iii) *Risk Category III.* Small institutions in Supervisory Groups A and B

that are Undercapitalized, and small institutions in Supervisory Group C that are Well Capitalized or Adequately Capitalized will be assigned to Risk Category III.

(iv) *Risk Category IV*. Small institutions in Supervisory Group C that are Undercapitalized will be assigned to Risk Category IV.

(2) *Capital evaluations*. Each small institution will receive one of the following three capital evaluations on the basis of data reported in the institution's Consolidated Reports of Condition and Income or Thrift Financial Report (or successor report, as appropriate) dated as of March 31 for the assessment period beginning the preceding January 1; dated as of June 30 for the assessment period beginning the preceding April 1; dated as of September 30 for the assessment period beginning the preceding July 1; and dated as of December 31 for the assessment period beginning the preceding October 1.

(i) *Well Capitalized*. A Well Capitalized institution is one that satisfies each of the following capital ratio standards: Total risk-based capital ratio, 10.0 percent or greater; tier 1 risk-based capital ratio, 8.0 percent or greater; leverage ratio, 5.0 percent or greater; common equity tier 1 capital ratio, 6.5 percent or greater; and, if the institution is an insured depository institution subject to the enhanced supplementary leverage ratio standards under 12 CFR 6.4(c)(1)(iv)(B), 12 CFR 208.43(c)(2)(iv)(B), or 12 CFR 324.403(b)(1)(v), as each may be amended from time to time, a supplementary leverage ratio of 6.0 percent or greater.

(ii) *Adequately Capitalized*. An Adequately Capitalized institution is one that does not satisfy the standards of Well Capitalized in paragraph (a)(2)(i) of this section but satisfies each of the following capital ratio standards: Total risk-based capital ratio, 8.0 percent or greater; tier 1 risk-based capital ratio, 6.0 percent or greater; leverage ratio, 4.0 percent or greater; common equity tier 1 capital ratio, 4.5 percent or greater; and, if the institution is subject to the advanced approaches risk-based capital rules under 12 CFR 6.4(c)(2)(iv)(B), 12 CFR 208.43(c)(2)(iv)(B), or 12 CFR 324.403(b)(2)(vi), as each may be amended from time to time, a supplementary leverage ratio of 3.0 percent or greater.

(iii) *Undercapitalized*. An undercapitalized institution is one that does not qualify as either Well Capitalized or Adequately Capitalized under paragraphs (a)(2)(i) and (ii) of this section.

(3) *Supervisory evaluations*. Each small institution will be assigned to one of three Supervisory Groups based on the Corporation's consideration of supervisory evaluations provided by the institution's primary federal regulator. The supervisory evaluations include the results of examination findings by the primary federal regulator, as well as other information that the primary federal regulator determines to be relevant. In addition, the Corporation will take into consideration such other information (such as state examination findings, as appropriate) as it determines to be relevant to the institution's financial condition and the risk posed to the Deposit Insurance Fund. The three Supervisory Groups are:

(i) *Supervisory Group ''A.''* This Supervisory Group consists of financially sound institutions with only a few minor weaknesses;

(ii) *Supervisory Group ''B.''* This Supervisory Group consists of institutions that demonstrate weaknesses which, if not corrected, could result in significant deterioration of the institution and increased risk of loss to the Deposit Insurance Fund; and

(iii) *Supervisory Group ''C.''* This Supervisory Group consists of institutions that pose a substantial probability of loss to the Deposit Insurance Fund unless effective corrective action is taken.

(4) *Financial ratios method*. A small insured depository institution in Risk Category I shall have its initial base assessment rate determined using the financial ratios method.

(i) Under the financial ratios method, each of six financial ratios and a weighted average of CAMELS component ratings will be multiplied by a corresponding pricing multiplier. The sum of these products will be added to a uniform amount. The resulting sum shall equal the institution's initial base assessment rate; provided, however, that no institution's initial base

assessment rate shall be less than the minimum initial base assessment rate in effect for Risk Category I institutions for that quarter nor greater than the maximum initial base assessment rate in effect for Risk Category I institutions for that quarter. An institution's initial base assessment rate, subject to adjustment pursuant to paragraphs (d)(1), (2), and (3) of this section, as appropriate (resulting in the institution's total base assessment rate, which in no case can be lower than 50 percent of the institution's initial base assessment rate), and adjusted for the actual assessment rates set by the Board under § 327.10(f), will equal an institution's assessment rate. The six financial ratios are: Leverage ratio; Loans past due 30–89 days/gross assets; Nonperforming assets/gross assets; Net loan charge-offs/gross assets; Net income before taxes/risk-weighted assets; and the Adjusted brokered deposit ratio. The ratios are defined in Table A.1 of Appendix A to this subpart. The ratios will be determined for an assessment period based upon information contained in an institution's report of condition filed as of the last day of the assessment period as set out in paragraph (a)(2) of this section. The weighted average of CAMELS component ratings is created by multiplying each component by the following percentages and adding the products: Capital adequacy—25%, Asset quality—20%, Management—25%, Earnings—10%, Liquidity—10%, and Sensitivity to market risk—10%. The following table sets forth the initial values of the pricing multipliers:

Risk measures *	Pricing multipliers **
Leverage ratio	(0.056)
Loans Past Due 30–89 Days/Gross Assets	0.575
Nonperforming Assets/Gross Assets	1.074
Net Loan Charge-Offs/Gross Assets	1.210
Net Income before Taxes/Risk-Weighted Assets	(0.764)
Adjusted brokered deposit ratio	0.065
Weighted Average CAMELS Component Rating	1.095

* Ratios are expressed as percentages.
** Multipliers are rounded to three decimal places.

(ii) The six financial ratios and the weighted average CAMELS component rating will be multiplied by the respective pricing multiplier, and the products will be summed. To this result will be added the uniform amount. The resulting sum shall equal the institution's initial base assessment rate; provided, however, that no institution's initial base assessment rate shall be less than the minimum initial base assessment rate in effect for Risk Category I institutions for that quarter nor greater than the maximum initial base assessment rate in effect for Risk Category I institutions for that quarter.

(iii) *Uniform amount and pricing multipliers*. Except as adjusted for the actual assessment rates set by the Board under § 327.10(f), the uniform amount shall be:

(A) 4.861 whenever the assessment rate schedule set forth in § 327.10(a) is in effect;

(B) 2.861 whenever the assessment rate schedule set forth in § 327.10(b) is in effect;

(C) 1.861 whenever the assessment rate schedule set forth in § 327.10(c) is in effect; or

(D) 0.861 whenever the assessment rate schedule set forth in § 327.10(d) is in effect.

(iv) *Implementation of CAMELS rating changes*—(A) *Changes between risk categories*. If, during a quarter, a CAMELS composite rating change occurs that results in a Risk Category I institution moving from Risk Category I to Risk Category II, III or IV, the institution's initial base assessment rate for the portion of the quarter that it was in Risk Category I shall be determined using the supervisory ratings in effect before the change and the financial ratios as of the end of the quarter, subject to adjustment pursuant to paragraphs (d)(1), (2), and (3) of this section, as appropriate, and adjusted for the actual assessment rates set by the Board under § 327.10(f). For the portion of the quarter that the institution was not in Risk Category I, the institution's initial base assessment rate, which shall be subject to adjustment pursuant to paragraphs (d)(1), (2), and (3), shall be determined under the assessment schedule for the appropriate Risk Category. If, during a quarter, a CAMELS composite rating change occurs that results in an institution moving from Risk Category II, III or IV to Risk Category I, then the financial ratios method shall apply for the portion of the

quarter that it was in Risk Category I, subject to adjustment pursuant to paragraphs (d)(1), (2) and (3) of this section, as appropriate, and adjusted for the actual assessment rates set by the Board under § 327.10(f). For the portion of the quarter that the institution was not in Risk Category I, the institution's initial base assessment rate, which shall be subject to adjustment pursuant to paragraphs (d)(1), (2), and (3) of this section shall be determined under the assessment schedule for the appropriate Risk Category.

(B) *Changes within Risk Category I.* If, during a quarter, an institution's CAMELS component ratings change in a way that will change the institution's initial base assessment rate within Risk Category I, the initial base assessment rate for the period before the change shall be determined under the financial ratios method using the CAMELS component ratings in effect before the change, subject to adjustment pursuant to paragraphs (d)(1), (2), and (3) of this section, as appropriate. Beginning on the date of the CAMELS component ratings change, the initial base assessment rate for the remainder of the quarter shall be determined using the CAMELS component ratings in effect after the change, again subject to adjustment pursuant to paragraphs (d)(1), (2), and (3) of this section, as appropriate.

(b) *Large and Highly Complex institutions*—(1) *Assessment scorecard for large institutions (other than highly complex institutions).* (i) A large institution other than a highly complex institution shall have its initial base assessment rate determined using the scorecard for large institutions.

SCORECARD FOR LARGE INSTITUTIONS

	Scorecard measures and components	Measure weights (percent)	Component weights (percent)
P	Performance Score		
P.1 ...	Weighted Average CAMELS Rating.	100	30
P.2 ...	Ability to Withstand Asset-Related Stress.		50
	Leverage ratio	10	
	Concentration Measure	35	
	Core Earnings/Average Quarter-End Total Assets*.	20	
	Credit Quality Measure	35	
P.3 ...	Ability to Withstand Funding-Related Stress.		20
	Core Deposits/Total Liabilities	60	
	Balance Sheet Liquidity Ratio	40	
L	Loss Severity Score.		
L.1 ...	Loss Severity Measure		100

*Average of five quarter-end total assets (most recent and four prior quarters)

(ii) The scorecard for large institutions produces two scores: performance score and loss severity score.

(A) *Performance score for large institutions.* The performance score for large institutions is a weighted average of the scores for three measures: the weighted average CAMELS rating score, weighted at 30 percent; the ability to withstand asset-related stress score, weighted at 50 percent; and the ability to withstand funding-related stress score, weighted at 20 percent.

(*1*) *Weighted average CAMELS rating score.* (*i*) To compute the weighted average CAMELS rating score, a weighted average of an institution's CAMELS component ratings is calculated using the following weights:

CAMELS Component	Weight
C	25%
A	20%
M	25%
E	10%
L	10%
S	10%

(*ii*) A weighted average CAMELS rating converts to a score that ranges from 25 to 100. A weighted average rating of 1 equals a score of 25 and a weighted average of 3.5 or greater equals a score of 100. Weighted average CAMELS ratings between 1 and 3.5 are assigned a score between 25 and 100. The score increases at an increasing rate as the weighted average CAMELS rating increases. Appendix B of this subpart describes the conversion of a weighted average CAMELS rating to a score.

(*2*) *Ability to withstand asset-related stress score.* (*i*) The ability to withstand asset-related stress score is a weighted average of the scores for four measures: Leverage ratio; concentration measure; the ratio of core earnings to average quarter-end total assets; and the credit quality measure. Appendices A and C of this subpart define these measures.

(*ii*) The Leverage ratio and the ratio of core earnings to average quarter-end total assets are described in appendix A and the method of calculating the scores is described in appendix C of this subpart.

(*iii*) The score for the concentration measure is the greater of the higher-risk assets to Tier 1 capital and reserves score or the growth-adjusted portfolio concentrations score. Both ratios are described in appendix C.

(*iv*) The score for the credit quality measure is the greater of the criticized and classified items to Tier 1 capital and reserves score or the underperforming assets to Tier 1 capital and reserves score.

(*v*) The following table shows the cutoff values and weights for the measures used to calculate the ability to withstand asset-related stress score. Appendix B of this subpart describes how each measure is converted to a score between 0 and 100 based upon the minimum and maximum cutoff values, where a score of 0 reflects the lowest risk and a score of 100 reflects the highest risk.

CUTOFF VALUES AND WEIGHTS FOR MEASURES TO CALCULATE ABILITY TO WITHSTAND ASSET-RELATED STRESS SCORE

Measures of the ability to withstand asset-related stress	Cutoff values		Weights (percent)
	Minimum (percent)	Maximum (percent)	
Leverage ratio	6	13	10
Concentration Measure			35
Higher–Risk Assets to Tier 1 Capital and Reserves; or	0	135	
Growth-Adjusted Portfolio Concentrations	4	56	
Core Earnings/Average Quarter-End Total Assets*	0	2	20
Credit Quality Measure			35
Criticized and Classified Items/Tier 1 Capital and Reserves; or	7	100	
Underperforming Assets/Tier 1 Capital and Reserves	2	35	

*Average of five quarter-end total assets (most recent and four prior quarters).

(*vi*) The score for each measure in the table in paragraph (b)(1)(ii)(A)(2)(v) is multiplied by its respective weight and the resulting weighted score is summed to arrive at the score for an ability to withstand asset-related stress, which can range from 0 to 100, where a score of 0 reflects the lowest risk and a score of 100 reflects the highest risk.

(*3*) *Ability to withstand funding-related stress score.* Two measures are used to compute the ability to withstand funding-related stress score: a core deposits to total liabilities ratio, and a balance sheet liquidity ratio. Appendix A of this subpart describes these measures. Appendix B of this subpart describes how these measures are converted to a score between 0 and 100, where a score of 0 reflects the lowest risk and a score of 100 reflects the highest risk. The ability to withstand funding-related stress score is the weighted average of the scores for the two measures. In the following table, cutoff values and weights are used to derive an institution's ability to withstand funding-related stress score:

CUTOFF VALUES AND WEIGHTS TO CALCULATE ABILITY TO WITHSTAND FUNDING-RELATED STRESS SCORE

Measures of the ability to withstand funding-related stress	Cutoff values		Weights (percent)
	Minimum (percent)	Maximum (percent)	
Core Deposits/Total Liabilities	5	87	60
Balance Sheet Liquidity Ratio	7	243	40

(*4*) *Calculation of Performance Score.* In paragraph (b)(1)(ii)(A)(3), the scores for the weighted average CAMELS rating, the ability to withstand asset-related stress, and the ability to withstand funding-related stress are multiplied by their respective weights (30 percent, 50 percent and 20 percent, respectively) and the results are summed to arrive at the performance score. The performance score cannot be less than 0 or more than 100, where a score of 0 reflects the lowest risk and a score of 100 reflects the highest risk.

(B) *Loss severity score.* The loss severity score is based on a loss severity measure that is described in appendix D of this subpart. Appendix B also describes how the loss severity measure is converted to a score between 0 and 100. The loss severity score cannot be less than 0 or more than 100, where a score of 0 reflects the lowest risk and a score of 100 reflects the highest risk. Cutoff values for the loss severity measure are:

CUTOFF VALUES TO CALCULATE LOSS SEVERITY SCORE

Measure of loss severity	Cutoff values	
	Minimum (percent)	Maximum (percent)
Loss Severity	0	28

(C) *Total Score.* The performance and loss severity scores are combined to produce a total score. The loss severity score is converted into a loss severity factor that ranges from 0.8 (score of 5 or lower) to 1.2 (score of 85 or higher). Scores at or below the minimum cutoff of 5 receive a loss severity factor of 0.8, and scores at or above the maximum cutoff of 85 receive a loss severity factor of 1.2. The following linear interpolation converts loss severity scores between the cutoffs into a loss severity factor:

(*Loss Severity Factor* = 0.8 + [0.005 * (*Loss Severity Score* − 5)].

The performance score is multiplied by the loss severity factor to produce a total score (total score = performance score * loss severity factor). The total score can be up to 20 percent higher or lower than the performance score but cannot be less than 30 or more than 90. The total score is subject to adjustment, up or down, by a maximum of 15 points, as set forth in paragraph (b)(3) of this section. The resulting total score after adjustment cannot be less than 30 or more than 90.

(D) *Initial base assessment rate.* A large institution with a total score of 30 pays the minimum initial base assessment rate and an institution with a total

score of 90 pays the maximum initial base assessment rate. For total scores between 30 and 90, initial base assessment rates rise at an increasing rate as the total score increases, calculated according to the following formula:

$$Rate = Minimum\ Rate + \left[\left(\left(1.4245 \times \left(\frac{Score}{100}\right)^3\right) - 0.0385\right) \times (Maximum\ Rate - Minimum\ Rate)\right]$$

where Rate is the initial base assessment rate (expressed in basis points), Maximum Rate is the maximum initial base assessment rate then in effect (expressed in basis points), and Minimum Rate is the minimum initial base assessment rate then in effect (expressed in basis points). Initial base assessment rates are subject to adjustment pursuant to paragraphs (b)(3), (d)(1), (d)(2), of this section; large institutions that are not well capitalized or have a CAMELS composite rating of 3, 4 or 5 shall be subject to the adjustment at paragraph (d)(3); these adjustments shall result in the institution's total base assessment rate, which in no case can be lower than 50 percent of the institution's initial base assessment rate.

(2) *Assessment scorecard for highly complex institutions.* (i) A highly complex institution shall have its initial base assessment rate determined using the scorecard for highly complex institutions.

SCORECARD FOR HIGHLY COMPLEX INSTITUTIONS

	Measures and components	Measure weights (percent)	Component weights (percent)
P	Performance Score		
P.1 ...	Weighted Average CAMELS Rating.	100	30
P.2 ...	Ability To Withstand Asset-Related Stress.	.....	50
	Leverage ratio	10	
	Concentration Measure	35	
	Core Earnings/Average Quarter-End Total Assets.	20	
	Credit Quality Measure and Market Risk Measure.	35	
P.3 ...	Ability To Withstand Funding-Related Stress.	.....	20
	Core Deposits/Total Liabilities	50	
	Balance Sheet Liquidity Ratio	30	
	Average Short-Term Funding/Average Total Assets.	20	
L	Loss Severity Score	.....	
L.1 ...	Loss Severity	.....	100

(ii) The scorecard for highly complex institutions produces two scores: performance and loss severity.

(A) *Performance score for highly complex institutions.* The performance score for highly complex institutions is the weighted average of the scores for three components: weighted average CAMELS rating, weighted at 30 percent; ability to withstand asset-related stress score, weighted at 50 percent; and ability to withstand funding-related stress score, weighted at 20 percent.

(*1*) *Weighted average CAMELS rating score.* (*i*) To compute the score for the weighted average CAMELS rating, a weighted average of an institution's CAMELS component ratings is calculated using the following weights:

CAMELS Component	Weight
C	25%
A	20%
M	25%
E	10%
L	10%
S	10%

(*ii*) A weighted average CAMELS rating converts to a score that ranges from 25 to 100. A weighted average rating of 1 equals a score of 25 and a weighted average of 3.5 or greater equals a score of 100. Weighted average CAMELS ratings between 1 and 3.5 are assigned a score between 25 and 100. The score increases at an increasing rate as the weighted average CAMELS rating increases. Appendix B of this subpart describes the conversion of a weighted average CAMELS rating to a score.

(*2*) *Ability to withstand asset-related stress score.* (*i*) The ability to withstand asset-related stress score is a weighted average of the scores for four measures: Leverage ratio; concentration measure; ratio of core earnings to average quarter-end total assets; credit quality measure and market risk measure. Appendix A of this subpart describes these measures.

(*ii*) The Leverage ratio and the ratio of core earnings to average quarter-end total assets are described in appendix A and the method of calculating the scores is described in appendix B of this subpart.

(*iii*) The score for the concentration measure for highly complex institutions is the greatest of the higher-risk assets to the sum of Tier 1 capital and reserves score, the top 20 counterparty exposure to the sum of Tier 1 capital and reserves score, or the largest counterparty exposure to the sum of Tier 1 capital and reserves score. Each ratio is described in appendix A of this subpart. The method used to convert the concentration measure into a score is described in appendix C of this subpart.

(*iv*) The credit quality score is the greater of the criticized and classified items to Tier 1 capital and reserves score or the underperforming assets to Tier 1 capital and reserves score. The market risk score is the weighted average of three scores—the trading revenue volatility to Tier 1 capital score, the market risk capital to Tier 1 capital score, and the level 3 trading assets to Tier 1 capital score. All of these ratios are described in appendix A of this subpart and the method of calculating the scores is described in appendix B. Each score is multiplied by its respective weight, and the resulting weighted score is summed to compute the score for the market risk measure. An overall weight of 35 percent is allocated between the scores for the credit quality measure and market risk measure. The allocation depends on the ratio of average trading assets to the sum of average securities, loans and trading assets (trading asset ratio) as follows:

(*v*) Weight for credit quality score = 35 percent * (1—trading asset ratio); and,

(*vi*) Weight for market risk score = 35 percent * trading asset ratio.

(*vii*) Each of the measures used to calculate the ability to withstand asset-related stress score is assigned the following cutoff values and weights:

CUTOFF VALUES AND WEIGHTS FOR MEASURES TO CALCULATE THE ABILITY TO WITHSTAND ASSET-RELATED STRESS SCORE

Measures of the ability to withstand asset-related stress	Cutoff values		Market risk measure (percent)	Weights (percent)
	Minimum (percent)	Maximum (percent)		
Leverage ratio	6	13		10.
Concentration Measure				35.
Higher Risk Assets/Tier 1 Capital and Reserves;	0	135		
Top 20 Counterparty Exposure/Tier 1 Capital and Reserves; or.	0	125		
Largest Counterparty Exposure/Tier 1 Capital and Reserves.	0	20		
Core Earnings/Average Quarter-end Total Assets	0	2		20.
Credit Quality Measure*				35* (1 − Trading Asset Ratio).
Criticized and Classified Items to Tier 1 Capital and Reserves; or.	7	100		
Underperforming Assets/Tier 1 Capital and Reserves.	2	35		
Market Risk Measure*				35* Trading Asset Ratio.
Trading Revenue Volatility/Tier 1 Capital	0	2	60	
Market Risk Capital/Tier 1 Capital	0	10	20	
Level 3 Trading Assets/Tier 1 Capital	0	35	20	

*Combined, the credit quality measure and the market risk measure are assigned a 35 percent weight. The relative weight of each of the two scores depends on the ratio of average trading assets to the sum of average securities, loans and trading assets (trading asset ratio).

(*viii*) [Reserved]

(*ix*) The score of each measure is multiplied by its respective weight and the resulting weighted score is summed to compute the ability to withstand asset-related stress score, which can range from 0 to 100, where a score of 0 reflects the lowest risk and a score of 100 reflects the highest risk.

(*3*) *Ability to withstand funding related stress score*. Three measures are used to calculate the score for the ability to withstand funding-related stress: a core deposits to total liabilities ratio, a balance sheet liquidity ratio, and average short-term funding to average total assets ratio. Appendix A of this subpart describes these ratios. Appendix B of this subpart describes how each measure is converted to a score. The ability to withstand funding-related stress score is the weighted average of the scores for the three measures. In the following table, cutoff values and weights are used to derive an institution's ability to withstand funding-related stress score:

CUTOFF VALUES AND WEIGHTS TO CALCULATE ABILITY TO WITHSTAND FUNDING-RELATED STRESS MEASURES

Measures of the ability to withstand funding-related stress	Cutoff values		Weights (percent)
	Minimum (percent)	Maximum (percent)	
Core Deposits/Total Liabilities	5	87	50
Balance Sheet Liquidity Ratio	7	243	30
Average Short-term Funding/Average Total Assets	2	19	20

(*4*) *Calculation of Performance Score*. The weighted average CAMELS score, the ability to withstand asset-related stress score, and the ability to withstand funding-related stress score are multiplied by their respective weights (30 percent, 50 percent and 20 percent, respectively) and the results are summed to arrive at the performance score, which cannot be less than 0 or more than 100.

(B) *Loss severity score*. The loss severity score is based on a loss severity measure described in appendix D of this subpart. Appendix B of this subpart also describes how the loss severity measure is converted to a score between 0 and 100. Cutoff values for the loss severity measure are:

CUTOFF VALUES FOR LOSS SEVERITY MEASURE

Measure of loss severity	Cutoff values	
	Minimum (percent)	Maximum (percent)
Loss Severity	0	28

(C) *Total Score*. The performance and loss severity scores are combined to produce a total score. The loss severity score is converted into a loss severity factor that ranges from 0.8 (score of 5 or lower) to 1.2 (score of 85 or higher). Scores at or below the minimum cutoff of 5 receive a loss severity factor of 0.8, and scores at or above the maximum cutoff of 85 receive a loss severity factor of 1.2. The following linear interpolation converts loss severity scores between the cutoffs into a loss severity factor: (Loss Severity Factor = 0.8 + [0.005 * (Loss Severity Score − 5)]. The performance score is multiplied by the loss severity factor to produce a total score (total score = performance score * loss severity factor). The total score can be up to 20 percent higher or lower than the performance score but cannot be less than 30 or more than 90. The total score is subject to adjustment, up or down, by a maximum of 15 points, as set forth in paragraph (b)(3) of this section. The resulting total score after adjustment cannot be less than 30 or more than 90.

(D) *Initial base assessment rate*. A highly complex institution with a total score of 30 pays the minimum initial base assessment rate and an institution with a total score of 90 pays the maximum initial base assessment rate. For total scores between 30 and 90, initial base assessment rates rise at an increasing rate as the total score increases, calculated according to the following formula:

$$Rate = Minimum\ Rate + \left[\left(\left(1.4245 \times \left(\frac{Score}{100}\right)^3\right) - 0.0385\right) \times \left(Maximum\ Rate - Minimum\ Rate\right)\right]$$

where Rate is the initial base assessment rate (expressed in basis points), Maximum Rate is the maximum initial base assessment rate then in effect (expressed in basis points), and Minimum Rate is the minimum initial base assessment rate then in effect (expressed in basis points). Initial base assessment rates are subject to adjustment pursuant to paragraphs (b)(3), (d)(1), and (d)(2) of this section; highly complex institutions that are not well capitalized or have a CAMELS composite rating of 3, 4 or 5 shall be subject to the adjustment at paragraph (d)(3); these adjustments shall result in the institution's total base assessment rate, which in no case can be lower than 50 percent of the institution's initial base assessment rate.

(3) *Adjustment to total score for large institutions and highly complex institutions*. The total score for large institutions and highly complex institutions is subject to adjustment, up or down, by a maximum of 15 points, based upon significant risk factors that are not adequately captured in the appropriate scorecard. In making such adjustments, the FDIC may consider such information as financial performance and condition information and other market or supervisory information. The FDIC will also consult with an institution's primary federal regulator and, for state chartered institutions, state banking supervisor.

(i) *Prior notice of adjustments*—(A) *Prior notice of upward adjustment*. Prior to making any upward adjustment to an institution's total score because of considerations of additional risk information, the FDIC will formally notify the institution and its primary federal regulator and provide an opportunity to respond. This notification will include the reasons for the adjustment and when the adjustment will take effect.

(B) *Prior notice of downward adjustment*. Prior to making any downward adjustment to an institution's total score because of considerations of additional risk information, the FDIC will

formally notify the institution's primary federal regulator and provide an opportunity to respond.

(ii) *Determination whether to adjust upward; effective period of adjustment.* After considering an institution's and the primary federal regulator's responses to the notice, the FDIC will determine whether the adjustment to an institution's total score is warranted, taking into account any revisions to scorecard measures, as well as any actions taken by the institution to address the FDIC's concerns described in the notice. The FDIC will evaluate the need for the adjustment each subsequent assessment period. Except as provided in paragraph (b)(3)(iv) of this section, the amount of adjustment cannot exceed the proposed adjustment amount contained in the initial notice unless additional notice is provided so that the primary federal regulator and the institution may respond.

(iii) *Determination whether to adjust downward; effective period of adjustment.* After considering the primary federal regulator's responses to the notice, the FDIC will determine whether the adjustment to total score is warranted, taking into account any revisions to scorecard measures. Any downward adjustment in an institution's total score will remain in effect for subsequent assessment periods until the FDIC determines that an adjustment is no longer warranted. Downward adjustments will be made without notification to the institution. However, the FDIC will provide advance notice to an institution and its primary federal regulator and give them an opportunity to respond before removing a downward adjustment.

(iv) *Adjustment without notice.* Notwithstanding the notice provisions set forth above, the FDIC may change an institution's total score without advance notice under this paragraph, if the institution's supervisory ratings or the scorecard measures deteriorate.

(c) *Insured branches of foreign banks*—(1) *Risk categories for insured branches of foreign banks.* Insured branches of foreign banks shall be assigned to risk categories as set forth in paragraph (a)(1) of this section.

(2) *Capital evaluations for insured branches of foreign banks.* Each insured branch of a foreign bank will receive one of the following three capital evaluations on the basis of data reported in the institution's Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks dated as of March 31 for the assessment period beginning the preceding January 1; dated as of June 30 for the assessment period beginning the preceding April 1; dated as of September 30 for the assessment period beginning the preceding July 1; and dated as of December 31 for the assessment period beginning the preceding October 1.

(i) *Well Capitalized.* An insured branch of a foreign bank is Well Capitalized if the insured branch:

(A) Maintains the pledge of assets required under § 347.209 of this chapter; and

(B) Maintains the eligible assets prescribed under § 347.210 of this chapter at 108 percent or more of the average book value of the insured branch's third-party liabilities for the quarter ending on the report date specified in paragraph (c)(2) of this section.

(ii) *Adequately Capitalized.* An insured branch of a foreign bank is Adequately Capitalized if the insured branch:

(A) Maintains the pledge of assets required under § 347.209 of this chapter; and

(B) Maintains the eligible assets prescribed under § 347.210 of this chapter at 106 percent or more of the average book value of the insured branch's third-party liabilities for the quarter ending on the report date specified in paragraph (c)(2) of this section; and

(C) Does not meet the definition of a Well Capitalized insured branch of a foreign bank.

(iii) *Undercapitalized.* An insured branch of a foreign bank is undercapitalized institution if it does not qualify as either Well Capitalized or Adequately Capitalized under paragraphs (c)(2)(i) and (ii) of this section.

(3) *Supervisory evaluations for insured branches of foreign banks.* Each insured branch of a foreign bank will be assigned to one of three supervisory groups as set forth in paragraph (a)(3) of this section.

(4) *Assessment method for insured branches of foreign banks in Risk Category I.* Insured branches of foreign

banks in Risk Category I shall be assessed using the weighted average ROCA component rating.

(i) *Weighted average ROCA component rating.* The weighted average ROCA component rating shall equal the sum of the products that result from multiplying ROCA component ratings by the following percentages: Risk Management—35%, Operational Controls—25%, Compliance—25%, and Asset Quality—15%. The weighted average ROCA rating will be multiplied by 5.076 (which shall be the pricing multiplier). To this result will be added a uniform amount. The resulting sum—the initial base assessment rate—will equal an institution's total base assessment rate; provided, however, that no institution's total base assessment rate will be less than the minimum total base assessment rate in effect for Risk Category I institutions for that quarter nor greater than the maximum total base assessment rate in effect for Risk Category I institutions for that quarter.

(ii) *Uniform amount.* Except as adjusted for the actual assessment rates set by the Board under § 327.10(f), the uniform amount for all insured branches of foreign banks shall be:

(A) −3.127 whenever the assessment rate schedule set forth in § 327.10(a) is in effect;

(B) −5.127 whenever the assessment rate schedule set forth in § 327.10(b) is in effect;

(C) −-6.127 whenever the assessment rate schedule set forth in § 327.10(c) is in effect; or

(D) −7.127 whenever the assessment rate schedule set forth in § 327.10(d) is in effect.

(iii) *Insured branches of foreign banks not subject to certain adjustments.* No insured branch of a foreign bank in any risk category shall be subject to the adjustments in paragraphs (b)(3), (d)(1), or (d)(3) of this section.

(iv) *Implementation of changes between Risk Categories for insured branches of foreign banks.* If, during a quarter, a ROCA rating change occurs that results in an insured branch of a foreign bank moving from Risk Category I to Risk Category II, III or IV, the institution's initial base assessment rate for the portion of the quarter that it was in Risk Category I shall be determined using the weighted average ROCA component rating. For the portion of the quarter that the institution was not in Risk Category I, the institution's initial base assessment rate shall be determined under the assessment schedule for the appropriate Risk Category. If, during a quarter, a ROCA rating change occurs that results in an insured branch of a foreign bank moving from Risk Category II, III or IV to Risk Category I, the institution's assessment rate for the portion of the quarter that it was in Risk Category I shall equal the rate determined as provided using the weighted average ROCA component rating. For the portion of the quarter that the institution was not in Risk Category I, the institution's initial base assessment rate shall be determined under the assessment schedule for the appropriate Risk Category.

(v) *Implementation of changes within Risk Category I for insured branches of foreign banks.* If, during a quarter, an insured branch of a foreign bank remains in Risk Category I, but a ROCA component rating changes that will affect the institution's initial base assessment rate, separate assessment rates for the portion(s) of the quarter before and after the change(s) shall be determined under this paragraph (c)(4) of this section.

(d) *Adjustments*—(1) *Unsecured debt adjustment to initial base assessment rate for all institutions.* All institutions, except new institutions as provided under paragraphs (f)(1) and (2) of this section and insured branches of foreign banks as provided under paragraph (c)(4)(iii) of this section, shall be subject to an adjustment of assessment rates for unsecured debt. Any unsecured debt adjustment shall be made after any adjustment under paragraph (b)(3) of this section.

(i) *Application of unsecured debt adjustment.* The unsecured debt adjustment shall be determined as the sum of the initial base assessment rate plus 40 basis points; that sum shall be multiplied by the ratio of an insured depository institution's long-term unsecured debt to its assessment base. The amount of the reduction in the assessment rate due to the adjustment is

equal to the dollar amount of the adjustment divided by the amount of the assessment base.

(ii) *Limitation*—No unsecured debt adjustment for any institution shall exceed the lesser of 5 basis points or 50 percent of the institution's initial base assessment rate.

(iii) *Applicable quarterly reports of condition*—Unsecured debt adjustment ratios for any given quarter shall be calculated from quarterly reports of condition (Consolidated Reports of Condition and Income and Thrift Financial Reports, or any successor reports to either, as appropriate) filed by each institution as of the last day of the quarter.

(2) *Depository institution debt adjustment to initial base assessment rate for all institutions.* All institutions shall be subject to an adjustment of assessment rates for unsecured debt held that is issued by another depository institution. Any such depository institution debt adjustment shall be made after any adjustment under paragraphs (b)(3) and (d)(1) of this section.

(i) *Application of depository institution debt adjustment.* An insured depository institution shall pay a 50 basis point adjustment on the amount of unsecured debt it holds that was issued by another insured depository institution to the extent that such debt exceeds 3 percent of the institution's Tier 1 capital. The amount of long-term unsecured debt issued by another insured depository institution shall be calculated using the same valuation methodology used to calculate the amount of such debt for reporting on the asset side of the balance sheets.

(ii) *Applicable quarterly reports of condition.* Depository institution debt adjustment ratios for any given quarter shall be calculated from quarterly reports of condition (Consolidated Reports of Condition and Income and Thrift Financial Reports, or any successor reports to either, as appropriate) filed by each institution as of the last day of the quarter.

(3) *Brokered Deposit Adjustment.* All small institutions in Risk Categories II, III, and IV, all large institutions and all highly complex institutions, except large and highly complex institutions (including new large and new highly complex institutions) that are well capitalized and have a CAMELS composite rating of 1 or 2, shall be subject to an assessment rate adjustment for brokered deposits. Any such brokered deposit adjustment shall be made after any adjustment under paragraphs (b)(3), (d)(1), and (d)(2) of this section. The brokered deposit adjustment includes all brokered deposits as defined in Section 29 of the Federal Deposit Insurance Act (12 U.S.C. 1831f), and 12 CFR 337.6, including reciprocal deposits as defined in § 327.8(p), and brokered deposits that consist of balances swept into an insured institution from another institution. The adjustment under this paragraph is limited to those institutions whose ratio of brokered deposits to domestic deposits is greater than 10 percent; asset growth rates do not affect the adjustment. Insured branches of foreign banks are not subject to the brokered deposit adjustment as provided in paragraph (c)(4)(iii) of this section.

(i) *Application of brokered deposit adjustment.* The brokered deposit adjustment shall be determined by multiplying 25 basis points by the ratio of the difference between an insured depository institution's brokered deposits and 10 percent of its domestic deposits to its assessment base.

(ii) *Limitation.* The maximum brokered deposit adjustment will be 10 basis points; the minimum brokered deposit adjustment will be 0.

(iii) *Applicable quarterly reports of condition.* Brokered deposit ratios for any given quarter shall be calculated from the quarterly reports of condition (Call Reports and Thrift Financial Reports, or any successor reports to either, as appropriate) filed by each institution as of the last day of the quarter.

(e) *Request to be treated as a large institution*—(1) *Procedure.* Any institution with assets of between $5 billion and $10 billion may request that the FDIC determine its assessment rate as a large institution. The FDIC will consider such a request provided that it has sufficient information to do so. Any such request must be made to the FDIC's Division of Insurance and Research. Any approved change will become effective within one year from

the date of the request. If an institution whose request has been granted subsequently reports assets of less than $5 billion in its report of condition for four consecutive quarters, the institution shall be deemed a small institution for assessment purposes.

(2) *Time limit on subsequent request for alternate method.* An institution whose request to be assessed as a large institution is granted by the FDIC shall not be eligible to request that it be assessed as a small institution for a period of three years from the first quarter in which its approved request to be assessed as a large institution became effective. Any request to be assessed as a small institution must be made to the FDIC's Division of Insurance and Research.

(3) An institution that disagrees with the FDIC's determination that it is a large, highly complex, or small institution may request review of that determination pursuant to § 327.4(c).

(f) *New and established institutions and exceptions*—(1) *New small institutions.* A new small Risk Category I institution shall be assessed the Risk Category I maximum initial base assessment rate for the relevant assessment period. No new small institution in any risk category shall be subject to the unsecured debt adjustment as determined under paragraph (d)(1) of this section. All new small institutions in any Risk Category shall be subject to the depository institution debt adjustment as determined under paragraph (d)(2) of this section. All new small institutions in Risk Categories II, III, and IV shall be subject to the brokered deposit adjustment as determined under paragraph (d)(3) of this section.

(2) *New large institutions and new highly complex institutions.* All new large institutions and all new highly complex institutions shall be assessed under the appropriate method provided at paragraph (b)(1) or (2) of this section and subject to the adjustments provided at paragraphs (b)(3), (d)(2), and (d)(3) of this section. No new highly complex or large institutions are entitled to adjustment under paragraph (d)(1) of this section. If a large or highly complex institution has not yet received CAMELS ratings, it will be given a weighted CAMELS rating of 2 for assessment purposes until actual CAMELS ratings are assigned.

(3) *CAMELS ratings for the surviving institution in a merger or consolidation.* When an established institution merges with or consolidates into a new institution, if the FDIC determines the resulting institution to be an established institution under § 327.8(k)(1), its CAMELS ratings for assessment purposes will be based upon the established institution's ratings prior to the merger or consolidation until new ratings become available.

(4) *Rate applicable to institutions subject to subsidiary or credit union exception.* A small Risk Category I institution that is established under § 327.8(k)(4) or (5), but does not have CAMELS component ratings, shall be assessed at 2 basis points above the minimum initial base assessment rate applicable to Risk Category I institutions until it receives CAMELS component ratings. Thereafter, the assessment rate will be determined by annualizing, where appropriate, financial ratios obtained from all quarterly reports of condition that have been filed, until the institution files four quarterly reports of condition. If a large or highly complex institution is considered established under § 327.8(k)(4) or (5), but does not have CAMELS component ratings, it will be given a weighted CAMELS rating of 2 for assessment purposes until actual CAMELS ratings are assigned.

(5) *Request for review.* An institution that disagrees with the FDIC's determination that it is a new institution may request review of that determination pursuant to § 327.4(c).

(g) *Assessment rates for bridge depository institutions and conservatorships.* Institutions that are bridge depository institutions under 12 U.S.C. 1821(n) and institutions for which the Corporation has been appointed or serves as conservator shall, in all cases, be assessed at the Risk Category I minimum initial base assessment rate, which shall not be subject to adjustment under paragraphs (b)(3), (d)(1), (2) or (3) of this section.

[76 FR 10708, Feb. 25, 2011, as amended at 79 FR 70437, Nov. 26, 2014; 81 FR 32201, May 20, 2016]

§ 327.10 Assessment rate schedules.

(a) *Assessment rate schedules before the reserve ratio of the DIF reaches 1.15 percent*—(1) *Applicability*. The assessment rate schedules in paragraph (a) of this section will cease to be applicable when the reserve ratio of the DIF first reaches 1.15 percent.

(2) *Initial Base Assessment Rate Schedule*. Before the reserve ratio of the DIF reaches 1.15 percent, the initial base assessment rate for an insured depository institution shall be the rate prescribed in the following schedule:

INITIAL BASE ASSESSMENT RATE SCHEDULE BEFORE THE RESERVE RATIO OF THE DIF REACHES 1.15 PERCENT

	Risk category I	Risk category II	Risk category III	Risk category IV	Large and highly complex institutions
Initial base assessment rate	5–9	14	23	35	5–35

*All amounts for all risk categories are in basis points annually. Initial base rates that are not the minimum or maximum rate will vary between these rates.

(i) *Risk Category I Initial Base Assessment Rate Schedule*. The annual initial base assessment rates for all institutions in Risk Category I shall range from 5 to 9 basis points.

(ii) *Risk Category II, III, and IV Initial Base Assessment Rate Schedule*. The annual initial base assessment rates for Risk Categories II, III, and IV shall be 14, 23, and 35 basis points, respectively.

(iii) All institutions in any one risk category, other than Risk Category I, will be charged the same initial base assessment rate, subject to adjustment as appropriate.

(iv) *Large and Highly Complex Institutions Initial Base Assessment Rate Schedule*. The annual initial base assessment rates for all large and highly complex institutions shall range from 5 to 35 basis points.

(3) *Total Base Assessment Rate Schedule after Adjustments*. Before the reserve ratio of the DIF reaches 1.15 percent, the total base assessment rates after adjustments for an insured depository institution shall be as prescribed in the following schedule.

TOTAL BASE ASSESSMENT RATE SCHEDULE (AFTER ADJUSTMENTS)* BEFORE THE RESERVE RATIO OF THE DIF REACHES 1.15 PERCENT**

	Risk category I	Risk category II	Risk category III	Risk category IV	Large and highly complex institutions
Initial base assessment rate	5–9	14	23	35	5–35
Unsecured debt adjustment	(4.5)–0	(5)–0	(5)–0	(5)–0	(5)–0
Brokered deposit adjustment	.....	0–10	0–10	0–10	0–10
Total base assessment rate	2.5–9	9–24	18–33	30–45	2.5–45

*All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

**Total base assessment rates do not include the depository institution debt adjustment.

(i) *Risk Category I Total Base Assessment Rate Schedule*. The annual total base assessment rates for all institutions in Risk Category I shall range from 2.5 to 9 basis points.

(ii) *Risk Category II Total Base Assessment Rate Schedule*. The annual total base assessment rates for Risk Category II shall range from 9 to 24 basis points.

(iii) *Risk Category III Total Base Assessment Rate Schedule*. The annual total base assessment rates for Risk Category III shall range from 18 to 33 basis points.

(iv) *Risk Category IV Total Base Assessment Rate Schedule*. The annual total base assessment rates for Risk Category IV shall range from 30 to 45 basis points.

(v) *Large and Highly Complex Institutions Total Base Assessment Rate Schedule*. The annual total base assessment rates for all large and highly complex institutions shall range from 2.5 to 45 basis points.

(b) Assessment rate schedules for established small institutions and large and highly complex institutions applicable in the first assessment period after June 30, 2016, where the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent, and in all subsequent assessment periods where the reserve ratio of the DIF as of the end of the prior assessment period is less than 2 percent.

(1) *Initial base assessment rate schedule for established small institutions and large and highly complex institutions*. In the first assessment period after June 30, 2016, where the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent, and for all subsequent assessment periods where the reserve ratio as of the end of the prior assessment period is less than 2 percent, the initial base assessment rate for established small institutions and large and highly complex institutions, except as provided in paragraph (f) of this section, shall be the rate prescribed in the following schedule:

INITIAL BASE ASSESSMENT RATE SCHEDULE BEGINNING THE FIRST ASSESSMENT PERIOD AFTER JUNE 30, 2016, WHERE THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD HAS REACHED 1.15 PERCENT, AND FOR ALL SUBSEQUENT ASSESSMENT PERIODS WHERE THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD IS LESS THAN 2 PERCENT [1]

	Established small institutions			Large & highly complex institutions
	CAMELS composite			
	1 or 2	3	4 or 5	
Initial Base Assessment Rate	3 to 16	6 to 30	16 to 30	3 to 30.

[1] All amounts for all risk categories are in basis points annually. Initial base rates that are not the minimum or maximum rate will vary between these rates.

(i) *CAMELS composite 1- and 2-rated established small institutions initial base assessment rate schedule*. The annual initial base assessment rates for all established small institutions with a CAMELS composite rating of 1 or 2 shall range from 3 to 16 basis points.

(ii) *CAMELS composite 3-rated established small institutions initial base assessment rate schedule*. The annual initial base assessment rates for all established small institutions with a CAMELS composite rating of 3 shall range from 6 to 30 basis points.

(iii) *CAMELS composite 4- and 5-rated established small institutions initial base assessment rate schedule*. The annual initial base assessment rates for all established small institutions with a CAMELS composite rating of 4 or 5 shall range from 16 to 30 basis points.

(iv) *Large and highly complex institutions initial base assessment rate schedule*. The annual initial base assessment rates for all large and highly complex institutions shall range from 3 to 30 basis points.

(2) *Total base assessment rate schedule after adjustments*. In the first assessment period after June 30, 2016, that the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent, and for all subsequent assessment periods where the reserve ratio for the prior assessment period is less than 2 percent, the total base assessment rates after adjustments for established small institutions and large and highly complex institutions, except as provided in paragraph (f) of this section, shall be as prescribed in the following schedule:

TOTAL BASE ASSESSMENT RATE SCHEDULE (AFTER ADJUSTMENTS)[1] BEGINNING THE FIRST ASSESSMENT PERIOD AFTER JUNE 30, 2016, WHERE THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD HAS REACHED 1.15 PERCENT, AND FOR ALL SUBSEQUENT ASSESSMENT PERIODS WHERE THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD IS LESS THAN 2 PERCENT[2]

	Established small institutions			Large & highly complex institutions
	CAMELS composite			
	1 or 2	3	4 or 5	
Initial Base Assessment Rate	3 to 16	6 to 30	16 to 30	3 to 30.
Unsecured Debt Adjustment	−5 to 0	−5 to 0	−5 to 0	−5 to 0.
Brokered Deposit Adjustment	N/A	N/A	N/A	0 to 10.
Total Base Assessment Rate	1.5 to 16	3 to 30	11 to 30	1.5 to 40.

[1] The depository institution debt adjustment, which is not included in the table, can increase total base assessment rates above the maximum assessment rates shown in the table.
[2] All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

(i) *CAMELS composite 1- and 2-rated established small institutions total base assessment rate schedule.* The annual total base assessment rates for all established small institutions with a CAMELS composite rating of 1 or 2 shall range from 1.5 to 16 basis points.

(ii) *CAMELS composite 3-rated established small institutions total base assessment rate schedule.* The annual total base assessment rates for all established small institutions with a CAMELS composite rating of 3 shall range from 3 to 30 basis points.

(iii) *CAMELS composite 4- and 5-rated established small institutions total base assessment rate schedule.* The annual total base assessment rates for all established small institutions with a CAMELS composite rating of 4 or 5 shall range from 11 to 30 basis points.

(iv) *Large and highly complex institutions total base assessment rate schedule.* The annual total base assessment rates for all large and highly complex institutions shall range from 1.5 to 40 basis points.

(c) *Assessment rate schedules if the reserve ratio of the DIF as of the end of the prior assessment period is equal to or greater than 2 percent and less than 2.5 percent*—(1) *Initial base assessment rate schedule for established small institutions and large and highly complex institutions.* If the reserve ratio of the DIF as of the end of the prior assessment period is equal to or greater than 2 percent and less than 2.5 percent, the initial base assessment rate for established small institutions and large and highly complex institutions, except as provided in paragraph (f) of this section, shall be the rate prescribed in the following schedule:

INITIAL BASE ASSESSMENT RATE SCHEDULE IF THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD IS EQUAL TO OR GREATER THAN 2 PERCENT BUT LESS THAN 2.5 PERCENT[1]

	Established small institutions			Large & highly complex institutions
	CAMELS composite			
	1 or 2	3	4 or 5	
Initial Base Assessment Rate	2 to 14	5 to 28	14 to 28	2 to 28.

[1] All amounts for all risk categories are in basis points annually. Initial base rates that are not the minimum or maximum rate will vary between these rates.

(i) *CAMELS composite 1- and 2-rated established small institutions initial base assessment rate schedule.* The annual initial base assessment rates for all established small institutions with a CAMELS composite rating of 1 or 2 shall range from 2 to 14 basis points.

(ii) *CAMELS composite 3-rated established small institutions initial base assessment rate schedule.* The annual initial base assessment rates for all established small institutions with a CAMELS composite rating of 3 shall range from 5 to 28 basis points.

(iii) *CAMELS composite 4- and 5-rated established small institutions initial base assessment rate schedule.* The annual initial base assessment rates for all established small institutions with a CAMELS composite rating of 4 or 5 shall range from 14 to 28 basis points.

(iv) *Large and highly complex institutions initial base assessment rate schedule.* The annual initial base assessment rates for all large and highly complex institutions shall range from 2 to 28 basis points.

(2) *Total base assessment rate schedule after adjustments for established small institutions and large and highly complex institutions.* If the reserve ratio of the DIF as of the end of the prior assessment period is equal to or greater than 2 percent and less than 2.5 percent, the total base assessment rates after adjustments for established small institutions and large and highly complex institutions, except as provided in paragraph (f) of this section, shall be as prescribed in the following schedule:

TOTAL BASE ASSESSMENT RATE SCHEDULE (AFTER ADJUSTMENTS)[1] IF THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD IS EQUAL TO OR GREATER THAN 2 PERCENT BUT LESS THAN 2.5 PERCENT[2]

	Established small institutions			Large & highly complex institutions
	CAMELS composite			
	1 or 2	3	4 or 5	
Initial Base Assessment Rate	2 to 14	5 to 28	14 to 28	2 to 28.
Unsecured Debt Adjustment	−5 to 0	−5 to 0	−5 to 0	−5 to 0.
Brokered Deposit Adjustment	N/A	N/A	N/A	0 to 10.
Total Base Assessment Rate	1 to 14	2.5 to 28	9 to 28	1 to 38.

[1] The depository institution debt adjustment, which is not included in the table, can increase total base assessment rates above the maximum assessment rates shown in the table.

[2] All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

(i) *CAMELS composite 1- and 2-rated established small institutions total base assessment rate schedule.* The annual total base assessment rates for all established small institutions with a CAMELS composite rating of 1 or 2 shall range from 1 to 14 basis points.

(ii) *CAMELS composite 3-rated established small institutions total base assessment rate schedule.* The annual total base assessment rates for all established small institutions with a CAMELS composite rating of 3 shall range from 2.5 to 28 basis points.

(iii) *CAMELS composite 4- and 5-rated established small institutions total base assessment rate schedule.* The annual total base assessment rates for all established small institutions with a CAMELS composite rating of 4 or 5 shall range from 9 to 28 basis points.

(iv) *Large and highly complex institutions total base assessment rate schedule.* The annual total base assessment rates for all large and highly complex institutions shall range from 1 to 38 basis points.

(d) *Assessment rate schedules if the reserve ratio of the DIF as of the end of the prior assessment period is greater than 2.5 percent*—(1) *Initial base assessment rate schedule.* If the reserve ratio of the DIF as of the end of the prior assessment period is greater than 2.5 percent, the initial base assessment rate for established small institutions and large and highly complex institutions, except as provided in paragraph (f) of this section, shall be the rate prescribed in the following schedule:

INITIAL BASE ASSESSMENT RATE SCHEDULE IF THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD IS GREATER THAN OR EQUAL TO 2.5 PERCENT [1]

	Established small institutions			Large & highly complex institutions
	CAMELS composite			
	1 or 2	3	4 or 5	
Initial Base Assessment Rate	1 to 13	4 to 25	13 to 25	1 to 25.

[1] All amounts for all risk categories are in basis points annually. Initial base rates that are not the minimum or maximum rate will vary between these rates.

(i) *CAMELS composite 1- and 2-rated established small institutions initial base assessment rate schedule*. The annual initial base assessment rates for all established small institutions with a CAMELS composite rating of 1 or 2 shall range from 1 to 13 basis points.

(ii) *CAMELS composite 3-rated established small institutions initial base assessment rate schedule*. The annual initial base assessment rates for all established small institutions with a CAMELS composite rating of 3 shall range from 4 to 25 basis points.

(iii) *CAMELS composite 4- and 5-rated established small institutions initial base assessment rate schedule*. The annual initial base assessment rates for all established small institutions with a CAMELS composite rating of 4 or 5 shall range from 13 to 25 basis points.

(iv) *Large and highly complex institutions initial base assessment rate schedule*. The annual initial base assessment rates for all large and highly complex institutions shall range from 1 to 25 basis points.

(2) *Total base assessment rate schedule after adjustments*. If the reserve ratio of the DIF as of the end of the prior assessment period is greater than 2.5 percent, the total base assessment rates after adjustments for established small institutions and large and highly complex institutions, except as provided in paragraph (f) of this section, shall be the rate prescribed in the following schedule:

TOTAL BASE ASSESSMENT RATE SCHEDULE (AFTER ADJUSTMENTS) [1] IF THE RESERVE RATIO AS OFTHE END OF THE PRIOR ASSESSMENT PERIOD IS GREATER THAN OR EQUAL TO 2.5 PERCENT [2]

	Established small institutions			Large & highly complex institutions
	CAMELS composite			
	1 or 2	3	4 or 5	
Initial Base Assessment Rate	1 to 13	4 to 25	13 to 25	1 to 25.
Unsecured Debt Adjustment	−5 to 0	−5 to 0	−5 to 0	−5 to 0.
Brokered Deposit Adjustment	N/A	N/A	N/A	0 to 10.
Total Base Assessment Rate	0.5 to 13	2 to 25	8 to 25	0.5 to 35.

[1] The depository institution debt adjustment, which is not included in the table, can increase total base assessment rates above the maximum assessment rates shown in the table.

[2] All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

(i) *CAMELS composite 1- and 2-rated established small institutions total base assessment rate schedule*. The annual total base assessment rates for all established small institutions with a CAMELS composite rating of 1 or 2 shall range from 0.5 to 13 basis points.

(ii) *CAMELS composite 3-rated established small institutions total base assessment rate schedule*. The annual total base assessment rates for all established small institutions with a CAMELS composite rating of 3 shall range from 2 to 25 basis points.

(iii) *CAMELS composite 4- and 5-rated established small institutions total base assessment rate schedule*. The annual total base assessment rates for all established small institutions with a CAMELS composite rating of 4 or 5 shall range from 8 to 25 basis points.

(iv) *Large and highly complex institutions total base assessment rate schedule*. The annual total base assessment rates

for all large and highly complex institutions shall range from 0.5 to 35 basis points.

(e) *Assessment rate schedules for new institutions and insured branches of foreign banks.* (1) New depository institutions, as defined in § 327.8(j), shall be subject to the assessment rate schedules as follows:

(i) *Prior to the reserve ratio of the DIF first reaching 1.15 percent on or after June 30, 2016.* Prior to the reserve ratio of the DIF reaching 1.15 percent for the first time on or after June 30, 2016, all new institutions shall be subject to the initial and total base assessment rate schedules provided for in paragraph (a) of this section.

(ii) *Assessment rate schedules for new large and highly complex institutions once the DIF reserve ratio first reaches 1.15 percent on or after June 30, 2016.* In the first assessment period after June 30, 2016, where the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent, and for all subsequent assessment periods, even if the reserve ratio equals or exceeds 2 percent or 2.5 percent, new large and new highly complex institutions shall be subject to the initial and total base assessment rate schedules provided for in paragraph (b) of this section.

(iii) *Assessment rate schedules for new small institutions beginning the first assessment period after June 30, 2016, where the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent, and for all subsequent assessment periods*—(A) *Initial base assessment rate schedule for new small institutions.* In the first assessment period after June 30, 2016, where the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent, and for all subsequent assessment periods, the initial base assessment rate for a new small institution shall be the rate prescribed in the following schedule, even if the reserve ratio equals or exceeds 2 percent or 2.5 percent:

INITIAL BASE ASSESSMENT RATE SCHEDULE BEGINNING THE FIRST ASSESSMENT PERIOD AFTER JUNE 30, 2016,WHERE THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD HAS REACHED 1.15 PERCENT,AND FOR ALL SUBSEQUENT ASSESSMENT PERIODS [1]

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial Assessment Rate	7	12	19	30

[1] All amounts for all risk categories are in basis points annually.

(*1*) *Risk category I initial base assessment rate schedule.* The annual initial base assessment rates for all new small institutions in Risk Category I shall be 7 basis points.

(*2*) *Risk category II, III, and IV initial base assessment rate schedule.* The annual initial base assessment rates for all new small institutions in Risk Categories II, III, and IV shall be 12, 19, and 30 basis points, respectively.

(B) *Total base assessment rate schedule for new small institutions.* In the first assessment period after June 30, 2016, that the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent, and for all subsequent assessment periods, the total base assessment rates after adjustments for a new small institution shall be the rate prescribed in the following schedule, even if the reserve ratio equals or exceeds 2 percent or 2.5 percent:

TOTAL BASE ASSESSMENT RATE SCHEDULE (AFTER ADJUSTMENTS) [1] BEGINNINGTHE FIRST ASSESSMENT PERIOD AFTER JUNE 30, 2016, WHERE THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD HAS REACHED 1.15 PERCENT, AND FOR ALL SUBSEQUENT ASSESSMENT PERIODS WHERE THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD IS LESS THAN 2 PERCENT [2]

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial Assessment Rate	7	12	19	30.
Brokered Deposit Adjustment (added)	N/A	0 to 10	0 to 10	0 to 10.
Total Assessment Rate	7	12 to 22	19 to 29	30 to 40.

[1] The depository institution debt adjustment, which is not included in the table, can increase total base assessment rates above the maximum assessment rates shown in the table.
[2] All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

(*1*) *Risk category I total assessment rate schedule*. The annual total base assessment rates for all new small institutions in Risk Category I shall be 7 basis points.

(*2*) *Risk category II total assessment rate schedule*. The annual total base assessment rates for all new small institutions in Risk Category II shall range from 12 to 22 basis points.

(*3*) *Risk category III total assessment rate schedule*. The annual total base assessment rates for all new small institutions in Risk Category III shall range from 19 to 29 basis points.

(*4*) *Risk category IV total assessment rate schedule*. The annual total base assessment rates for all new small institutions in Risk Category IV shall range from 30 to 40 basis points.

(2) *Insured branches of foreign banks*—(i) *Beginning the first assessment period after June 30, 2016, where the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent, and for all subsequent assessment periods where the reserve ratio as of the end of the prior assessment period is less than 2 percent*. In the first assessment period after June 30, 2016, where the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent, and for all subsequent assessment periods where the reserve ratio as of the end of the prior assessment period is less than 2 percent, the initial and total base assessment rates for an insured branch of a foreign bank, except as provided in paragraph (f) of this section, shall be the rate prescribed in the following schedule:

INITIAL AND TOTAL BASE ASSESSMENT RATE SCHEDULE [1] BEGINNING THE FIRST ASSESSMENT PERIOD AFTER JUNE 30, 2016, WHERE THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD HAS REACHED 1.15 PERCENT, AND FOR ALL SUBSEQUENT ASSESSMENT PERIODS WHERE THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD IS LESS THAN 2 PERCENT [2]

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial and Total Assessment Rate	3 to 7	12	19	30

[1] The depository institution debt adjustment, which is not included in the table, can increase total base assessment rates above the maximum assessment rates shown in the table.
[2] All amounts for all risk categories are in basis points annually. Initial and total base rates that are not the minimum or maximum rate will vary between these rates.

(A) *Risk category I initial and total base assessment rate schedule*. The annual initial and total base assessment rates for an insured branch of a foreign bank in Risk Category I shall range from 3 to 7 basis points.

(B) *Risk category II, III, and IV initial and total base assessment rate schedule*. The annual initial and total base assessment rates for Risk Categories II, III, and IV shall be 12, 19, and 30 basis points, respectively.

(C) All insured branches of foreign banks in any one risk category, other than Risk Category I, will be charged the same initial base assessment rate, subject to adjustment as appropriate.

(ii) *Assessment rate schedule for insured branches of foreign banks if the reserve ratio of the DIF as of the end of the prior assessment period is equal to or greater than 2 percent and less than 2.5 percent.* If the reserve ratio of the DIF as of the end of the prior assessment period is equal to or greater than 2 percent and less than 2.5 percent, the initial and total base assessment rates for an insured branch of a foreign bank, except as provided in paragraph (f) of this section, shall be the rate prescribed in the following schedule:

INITIAL AND TOTAL BASE ASSESSMENT RATE SCHEDULE [1] IF THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD IS EQUAL TO OR GREATER THAN 2 PERCENT BUT LESS THAN 2.5 PERCENT [2]

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial and Total Assessment Rate	2 to 6	10	17	28

[1] The depository institution debt adjustment, which is not included in the table, can increase total base assessment rates above the maximum assessment rates shown in the table.
[2] All amounts for all risk categories are in basis points annually. Initial and total base rates that are not the minimum or maximum rate will vary between these rates.

(A) *Risk category I initial and total base assessment rate schedule.* The annual initial and total base assessment rates for an insured branch of a foreign bank in Risk Category I shall range from 2 to 6 basis points.

(B) *Risk category II, III, and IV initial and total base assessment rate schedule.* The annual initial and total base assessment rates for Risk Categories II, III, and IV shall be 10, 17, and 28 basis points, respectively.

(C) All insured branches of foreign banks in any one risk category, other than Risk Category I, will be charged the same initial base assessment rate, subject to adjustment as appropriate.

(iii) *Assessment rate schedule for insured branches of foreign banks if the reserve ratio of the DIF as of the end of the prior assessment period is greater than 2.5 percent.* If the reserve ratio of the DIF as of the end of the prior assessment period is greater than 2.5 percent, the initial and total base assessment rate for an insured branch of foreign bank, except as provided in paragraph (f) of this section, shall be the rate prescribed in the following schedule:

INITIAL AND TOTAL BASE ASSESSMENT RATE SCHEDULE [1] IF THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD IS GREATER THAN OR EQUAL TO 2.5 PERCENT [2]

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial Assessment Rate	1 to 5	9	15	25

[1] The depository institution debt adjustment, which is not included in the table, can increase total base assessment rates above the maximum assessment rates shown in the table.
[2] All amounts for all risk categories are in basis points annually. Initial and total base rates that are not the minimum or maximum rate will vary between these rates.

(A) *Risk category I initial and total base assessment rate schedule.* The annual initial and total base assessment rates for an insured branch of a foreign bank in Risk Category I shall range from 1 to 5 basis points.

(B) *Risk category II, III, and IV initial and total base assessment rate schedule.* The annual initial and total base assessment rates for Risk Categories II, III, and IV shall be 9, 15, and 25 basis points, respectively.

(C) All insured branches of foreign banks in any one risk category, other than Risk Category I, will be charged the same initial base assessment rate, subject to adjustment as appropriate.

(f) *Total base assessment rate schedule adjustments and procedures*—(1) *Board*

rate adjustments. The Board may increase or decrease the total base assessment rate schedule in paragraphs (a) through (e) of this section up to a maximum increase of 2 basis points or a fraction thereof or a maximum decrease of 2 basis points or a fraction thereof (after aggregating increases and decreases), as the Board deems necessary. Any such adjustment shall apply uniformly to each rate in the total base assessment rate schedule. In no case may such rate adjustments result in a total base assessment rate that is mathematically less than zero or in a total base assessment rate schedule that, at any time, is more than 2 basis points above or below the total base assessment schedule for the Deposit Insurance Fund in effect pursuant to paragraph (b) of this section, nor may any one such adjustment constitute an increase or decrease of more than 2 basis points.

(2) *Amount of revenue*. In setting assessment rates, the Board shall take into consideration the following:

(i) Estimated operating expenses of the Deposit Insurance Fund;

(ii) Case resolution expenditures and income of the Deposit Insurance Fund;

(iii) The projected effects of assessments on the capital and earnings of the institutions paying assessments to the Deposit Insurance Fund;

(iv) The risk factors and other factors taken into account pursuant to 12 U.S.C. 1817(b)(1); and

(v) Any other factors the Board may deem appropriate.

(3) *Adjustment procedure*. Any adjustment adopted by the Board pursuant to this paragraph (f) will be adopted by rulemaking, except that the Corporation may set assessment rates as necessary to manage the reserve ratio, within set parameters not exceeding cumulatively 2 basis points, pursuant to paragraph (f)(1) of this section, without further rulemaking.

(4) *Announcement*. The Board shall announce the assessment schedules and the amount and basis for any adjustment thereto not later than 30 days before the quarterly certified statement invoice date specified in § 327.3(b) for the first assessment period for which the adjustment shall be effective. Once set, rates will remain in effect until changed by the Board.

[76 FR 10717, Feb. 25, 2011, as amended at 81 FR 32201, May 20, 2016]

§ 327.11 Surcharges and assessments required to raise the reserve ratio of the DIF to 1.35 percent.

(a) *Surcharge*—(1) *Institutions subject to surcharge*. The following insured depository institutions are subject to the surcharge described in this paragraph:

(i) Large institutions, as defined in § 327.8(f);

(ii) Highly complex institutions, as defined in § 327.8(g); and

(iii) Insured branches of foreign banks whose assets are equal to or exceed $10 billion, as reported in Schedule RAL of the branch's most recent quarterly Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks.

(2) *Surcharge period*. The surcharge period shall begin the later of the first day of the assessment period following the assessment period in which the reserve ratio of the DIF first reaches or exceeds 1.15 percent, or the assessment period beginning on July 1, 2016. The surcharge period shall continue through the earlier of the assessment period ending December 31, 2018, or the end of the assessment period in which the reserve ratio of the DIF first reaches or exceeds 1.35 percent.

(3) *Notification of surcharge*. The FDIC shall notify each insured depository institution subject to the surcharge of the amount of such surcharge no later than 15 days before such surcharge is due, as described in paragraph (a)(4) of this section.

(4) *Payment of any surcharge*. Each insured depository institution subject to the surcharge shall pay to the Corporation any surcharge imposed under paragraph (a) of this section in compliance with and subject to the provisions of §§ 327.3, 327.6 and 327.7. The payment date for any surcharge shall be the date provided in § 327.3(b)(2) for the institution's quarterly certified statement invoice for the assessment period in which the surcharge was imposed.

(5) *Calculation of surcharge.* An insured depository institution's surcharge for each assessment period during the surcharge period shall be determined by multiplying 1.125 basis points times the institution's surcharge base for the assessment period.

(i) *Surcharge base—Insured depository institution that has no affiliated insured depository institution subject to the surcharge.* The surcharge base for an assessment period for an insured depository institution subject to the surcharge that has no affiliated insured depository institution subject to the surcharge shall equal:

(A) The institution's deposit insurance assessment base for the assessment period, determined according to § 327.5; plus

(B) The greater of the increase amount determined according to paragraph (a)(5)(iii) of this section or zero; minus

(C) $10 billion; provided, however, that an institution's surcharge base for an assessment period cannot be negative.

(ii) *Surcharge base—insured depository institution that has one or more affiliated insured depository institutions subject to the surcharge.* The surcharge base for an assessment period for an insured depository institution subject to the surcharge that has one or more affiliated insured depository institutions subject to the surcharge shall equal:

(A) The institution's deposit insurance assessment base for the assessment period, determined according to § 327.5; plus

(B) The greater of the institution's portion, determined according to paragraph (a)(5)(v) of this section, of the increase amount determined according to paragraph (a)(5)(iii) of this section or zero; minus

(C) The institution's portion, determined according to paragraph (a)(5)(v) of this section, of $10 billion; provided, however, that an institution's surcharge base for an assessment period cannot be negative.

(iii) *Surcharge base—determination of increase amount.* The increase amount for an assessment period shall equal:

(A) The amount of the aggregate deposit insurance assessment bases for the assessment period, determined according to § 327.5, of all of the institution's affiliated insured depository institutions that are not subject to the surcharge, minus

(B) The product of the increase multiplier set out in paragraph (a)(5)(iv) of this section and the aggregate deposit insurance assessment bases, determined according to § 327.5, as of December 31, 2015, of all of the small institutions, as defined in § 327.8(e), that were the institution's affiliated insured depository institutions for the assessment period ending December 31, 2015.

(iv) *Increase multiplier for the assessment periods during the surcharge period.* During the surcharge period, the increase multiplier shall be the amount prescribed in the following schedule:

INCREASE MULTIPLIERS FOR THE ASSESSMENT PERIODS DURING THE SURCHARGE PERIOD

For the assessment period ending—	
September 30, 2016	1.0740995
December 31, 2016	1.1000000
March 31, 2017	1.1265251
June 30, 2017	1.1536897
September 30, 2017	1.1815094
December 31, 2017	1.2100000
March 31, 2018	1.2391776
June 30, 2018	1.2690587
September 30, 2018	1.2996604
December 31, 2018	1.3310000

(A) For the assessment period ending September 30, 2016, the increase multiplier shall be 1.0740995.

(B) For the assessment period ending December 31, 2016, the increase multiplier shall be 1.1000000.

(C) For the assessment period ending March 31, 2017, the increase multiplier shall be 1.1265251.

(D) For the assessment period ending June 30, 2017, the increase multiplier shall be 1.1536897.

(E) For the assessment period ending September 30, 2017, the increase multiplier shall be 1.1815094.

(F) For the assessment period ending December 31, 2017, the increase multiplier shall be 1.2100000.

(G) For the assessment period ending March 31, 2018, the increase multiplier shall be 1.2391776.

(H) For the assessment period ending June 30, 2018, the increase multiplier shall be 1.2690587.

(I) For the assessment period ending September 30, 2018, the increase multiplier shall be 1.2996604.

(J) For the assessment period ending December 31, 2018, the increase multiplier shall be 1.33100000.

(v) *Surcharge base—institution's portion.* For purposes of paragraphs (a)(5)(ii)(B) and (C) of this section, an institution's portion shall equal the ratio of the institution's deposit insurance assessment base for the assessment period, determined according to § 327.5, to the sum of the institution's deposit insurance assessment base for the assessment period, determined according to § 327.5, and the deposit insurance assessment bases for the assessment period, determined according to § 327.5, of all of the institution's affiliated insured depository institutions subject to the surcharge.

(vi) For the purposes of this section, an affiliated insured depository institution is an insured depository institution that meets the definition of ''affiliate'' in section 3 of the FDI Act, 12 U.S.C. 1813(w)(6).

(6) *Effect of mergers and consolidations on surcharge base.* (i) If an insured depository institution acquires another insured depository institution through merger or consolidation during the surcharge period, the acquirer's surcharge base will be calculated consistent with § 327.6 and § 327.11(a)(5). For the purposes of the surcharge, a merger or consolidation means any transaction in which an insured depository institution merges or consolidates with any other insured depository institution, and includes transactions in which an insured depository institution either directly or indirectly acquires all or substantially all of the assets, or assumes all or substantially all of the deposit liabilities of any other insured depository institution where there is not a legal merger or consolidation of the two insured depository institutions.

(ii) If an insured depository institution not subject to the surcharge is the surviving or resulting institution in a merger or consolidation with an insured depository institution that is subject to the surcharge or acquires all or substantially all of the assets, or assumes all or substantially all of the deposit liabilities, of an insured depository institution subject to the surcharge, then the surviving or resulting insured deposit institution or the insured depository institution that acquires such assets or assumes such deposit liabilities is subject to the surcharge.

(b) *Shortfall assessment.*—(1) *Institutions subject to shortfall assessment.* Any insured depository institution that was subject to a surcharge under paragraph (a)(1) of this section, in any assessment period during the surcharge period described in paragraph (a)(2) of this section, shall be subject to the shortfall assessment described in this paragraph (b). If surcharges under paragraph (a) of this section have not been in effect, the insured depository institutions subject to the shortfall assessment described in this paragraph (b) will be the insured depository institutions described in paragraph (a)(1) of this section as of the assessment period in which the reserve ratio of the DIF reaches or exceeds 1.15 percent.

(2) *Notification of shortfall.* The FDIC shall notify each insured depository institution subject to the shortfall assessment of the amount of such institution's share of the shortfall assessment described in paragraph (b)(5) of this section no later than 15 days before such shortfall assessment is due, as described in paragraph (b)(3) of this section.

(3) *Payment of any shortfall assessment.* Each insured depository institution subject to the shortfall assessment shall pay to the Corporation such institution's share of any shortfall assessment as described in paragraph (b)(5) of this section in compliance with and subject to the provisions of §§ 327.3, 327.6 and 327.7. The payment date for any shortfall assessment shall be the date provided in § 327.3(b)(2) for the institution's quarterly certified statement invoice for the assessment period in which the shortfall assessment is imposed.

(4) *Amount of aggregate shortfall assessment.* (i) If the reserve ratio of the DIF is at least 1.15 percent but has not reached or exceeded 1.35 percent as of December 31, 2018, the shortfall assessment shall be imposed on March 31, 2019, and shall equal 1.35 percent of estimated insured deposits as of December 31, 2018, minus the actual DIF balance as of that date.

(ii) If the reserve ratio of the DIF is less than 1.15 percent and has not reached or exceeded 1.35 percent by December 31, 2018, the shortfall assessment shall be imposed at the end of the assessment period immediately following the assessment period that occurs after December 31, 2018, during which the reserve ratio first reaches or exceeds 1.15 percent and shall equal 0.2 percent of estimated insured deposits as of the end of the calendar quarter in which the reserve ratio first reaches or exceeds 1.15 percent.

(5) *Institutions' shares of aggregate shortfall assessment.* Each insured depository institution's share of the aggregate shortfall assessment shall be determined by apportioning the aggregate amount of the shortfall assessment among all institutions subject to the shortfall assessment in proportion to each institution's shortfall assessment base as described in this paragraph.

(i) *Shortfall assessment base if surcharges have been in effect.* If surcharges have been in effect, an institution's shortfall assessment base shall equal the average of the institution's surcharge bases during the surcharge period. For purposes of determining the average surcharge base, if an institution was not subject to the surcharge during any assessment period of the surcharge period, its surcharge base shall equal zero for that assessment period.

(ii) *Shortfall assessment base if surcharges have not been in effect.* If surcharges have not been in effect, an institution's shortfall assessment base shall equal the average of what its surcharge bases would have been over the four assessment periods ending with the assessment period in which the reserve ratio first reaches or exceeds 1.15 percent. If an institution would not have been subject to a surcharge during one of those assessment periods, its surcharge base shall equal zero for that assessment period.

(6) *Effect of mergers and consolidations on shortfall assessment.* (i) If an insured depository institution, through merger or consolidation, acquires another insured depository institution that paid surcharges for one or more assessment periods, the acquirer will be subject to a shortfall assessment and its average surcharge base will be increased by the average surcharge base of the acquired institution, consistent with paragraph (b)(5) of this section.

(ii) For the purposes of the shortfall assessment, a merger or consolidation means any transaction in which an insured depository institution merges or consolidates with any other insured depository institution, and includes transactions in which an insured depository institution either directly or indirectly acquires all or substantially all of the assets, or assumes all or substantially all of the deposit liabilities of any other insured depository institution where there is not a legal merger or consolidation of the two insured depository institutions.

(c) *Assessment credits.* (1)(i) *Eligible Institutions.* For the purposes of this paragraph (c) an insured depository institution will be considered an eligible institution, if, for at least one assessment period during the credit calculation period, the institution was a credit accruing institution.

(ii) *Credit accruing institutions.* A credit accruing institution is an institution that, for a particular assessment period, is not:

(A) A large institution, as defined in § 327.8(f);

(B) A highly complex institution, as defined in § 327.8(g); or

(C) An insured branch of a foreign bank whose assets are equal to or exceed $10 billion, as reported in Schedule RAL of the branch's most recent quarterly Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks.

(2) *Credit calculation period.* The credit calculation period shall begin the first day of the assessment period after the reserve ratio of the DIF reaches or exceeds 1.15 percent, and shall continue through the earlier of the assessment period that the reserve ratio of the DIF reaches or exceeds 1.35 percent or the assessment period that ends December 31, 2018.

(3) *Determination of aggregate assessment credit awards to all eligible institutions.* The FDIC shall award an aggregate amount of assessment credits equal to the product of the *fraction of*

quarterly regular deposit insurance assessments paid by credit accruing institutions during the credit calculation period and the amount by which the *DIF increase*, as determined under paragraph (c)(3)(ii) or (iii) of this section, exceeds total surcharges imposed under paragraph (b) of this section; provided, however, that the aggregate amount of assessment credits cannot exceed the aggregate amount of quarterly deposit insurance assessments paid by credit accruing institutions during the credit calculation period.

(i) *Fraction of quarterly regular deposit insurance assessments paid by credit accruing institutions*. The fraction of assessments paid by credit accruing institutions shall equal quarterly deposit insurance assessments, as determined under §§ 327.9 and 327.16, paid by such institutions for each assessment period during the credit calculation period, divided by the total amount of quarterly deposit insurance assessments paid by all insured depository institutions during the credit calculation period, excluding the aggregate amount of surcharges imposed under paragraph (b) of this section.

(ii) *DIF increase if the DIF reserve ratio has reached 1.35 percent by December 31, 2018*. If the DIF reserve ratio has reached 1.35 percent by December 31, 2018, the DIF increase shall equal 0.2 percent of estimated insured deposits as of the date that the DIF reserve ratio first reaches or exceeds 1.35 percent.

(iii) *DIF Increase if the DIF reserve ratio has not reached 1.35 percent by December 31, 2018*. If the DIF reserve ratio has not reached 1.35 percent by December 31, 2018, the DIF increase shall equal the DIF balance on December 31, 2018, minus 1.15 percent of estimated insured deposits on that date.

(4) *Determination of individual eligible institutions' shares of aggregate assessment Credit*—(i) *Assessment credit share*. To determine an eligible institution's assessment credit share, the aggregate assessment credits awarded by the FDIC shall be apportioned among all eligible institutions in proportion to their respective assessment credit bases, as described in paragraph (c)(4)(ii) of this section.

(ii) *Assessment credit base*. An eligible institution's assessment credit base shall equal the average of its quarterly deposit insurance assessment bases, as determined under § 327.5, during the credit calculation period, as defined in paragraph (c)(2) of this section. An eligible institution's credit base shall be deemed to equal zero for any assessment period during which the institution was not a credit accruing institution.

(iii) *Limitation*. The assessment credits awarded to an eligible institution shall not exceed the total amount of quarterly deposit insurance assessments paid by that institution for assessment periods during the credit calculation period in which it was a credit accruing institution.

(5) *Effect of merger or consolidation on assessment credit base*. If an eligible institution acquires another eligible institution through merger or consolidation before the reserve ratio of the DIF reaches 1.35 percent, the acquirer's quarterly deposit insurance assessment base (for purposes of calculating the acquirer's assessment credit base) shall be deemed to include the acquired institution's deposit insurance assessment base for the assessment periods during the credit calculation period that were prior to the merger or consolidation and in which the acquired institution was a credit accruing institution.

(6) *Effect of call report amendments*. Amendments to the quarterly Reports of Condition and Income or the quarterly Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks that occur subsequent to the payment date for the final assessment period of the credit calculation period shall not affect an eligible institution's credit share.

(7) *Award and notice of assessment credits*—(i) *Award of assessment credits*. As soon as practicable after the earlier of either December 31, 2018, or the date on which the reserve ratio of the DIF reaches 1.35 percent, the FDIC shall notify an eligible institution of the FDIC's preliminary estimate of such institution's assessment credits and the manner in which the FDIC calculated such credits.

(ii) *Notice of assessment credits.* The FDIC shall provide eligible institutions with periodic updated notices reflecting adjustments to the institution's assessment credits resulting from requests for review or appeals, mergers or consolidations, or the FDIC's application of credits to an institution's quarterly deposit insurance assessments.

(8) *Requests for review and appeal of assessment credits.* Any institution that disagrees with the FDIC's computation of or basis for its assessment credits, as determined under this paragraph (c), may request review of the FDIC's determination or appeal that determination. Such requests for review or appeal shall be filed pursuant to the procedures set forth in paragraph (d) of this section.

(9) *Successors.* If an insured depository institution acquires an eligible institution through merger or consolidation after the reserve ratio of the DIF reaches 1.35 percent, the acquirer is successor to any assessment credits of the acquired institution.

(10) *Mergers and consolidation include only legal mergers and consolidation.* For the purposes of this paragraph (c), a merger or consolidation does not include transactions in which an insured depository institution either directly or indirectly acquires the assets of, or assumes liability to pay any deposits made in, any other insured depository institution, but there is not a legal merger or consolidation of the two insured depository institutions.

(11) *Use of credits.* (i) Effective as of July 1, 2019, the FDIC will apply assessment credits awarded under this paragraph (c) to an institution's deposit insurance assessments, as calculated under this part 327, beginning in the first assessment period in which the reserve ratio of the DIF is at least 1.38 percent, and in each assessment period thereafter in which the reserve ratio of the DIF is at least 1.35 percent, for no more than three additional assessment periods.

(ii) The FDIC shall apply assessment credits to reduce an institution's quarterly deposit insurance assessments by each institution's remaining credits. The assessment credit applied to each institution's deposit insurance assessment for any assessment period shall not exceed the institution's total deposit insurance assessment for that assessment period.

(12) *Transfer or sale of credits.* Other than through merger or consolidation, credits may not be sold or transferred.

(13) *Remittance of credits.* After assessment credits awarded under this paragraph (c) have been applied for four assessment periods, the FDIC will remit the full nominal value of an institution's remaining assessment credits in a single lump-sum payment to such institution in the next assessment period in which the reserve ratio is at least 1.35 percent.

(d) *Request for review and appeals of assessment credits.* (1) An institution that disagrees with the basis for its assessment credits, or the Corporation's computation of its assessments credits under paragraph (c) of this section and seeks to change it must submit a written request for review and any supporting documentation to the FDIC's Director of the Division of Finance.

(2) *Timing.* (i) Any request for review under this paragraph must be submitted within 30 days from

(A) The initial notice provided by the FDIC to the insured depository institution under paragraph (c)(7) of this section stating the FDIC's preliminary estimate of an eligible institution's assessment credit and the manner in which the assessment credit was calculated; or

(B) Any updated notice provided by the FDIC to the insured depository institution under paragraph (c)(7) of this section.

(ii) Any requests submitted after the deadline in paragraph (d)(2)(i) of this section will be considered untimely filed and the institution will be subsequently barred from submitting a request for review of its assessment credit.

(3) *Process of review.* (i) Upon receipt of a request for review, the FDIC shall temporarily freeze the amount of the assessment credit being reviewed until a final determination is made by the Corporation.

(ii) The FDIC may request, as part of its review, additional information from

the insured depository institution involved in the request and any such information must be submitted to the FDIC within 21 days of the FDIC's request;

(iii) The FDIC's Director of the Division of Finance, or his or her designee, will notify the requesting institution of his or her determination of whether a change is warranted within 60 days of receipt by the FDIC of the request for review, or if additional information had been requested from the FDIC, within 60 days of receipt of any such additional information.

(4) *Appeal*. If the requesting institution disagrees with the final determination from the Director of the Division of Finance, that institution may appeal its assessment credit determination to the FDIC's Assessment Appeals Committee within 30 days from the date of the Director's written determination. Notice of the procedures applicable to an appeal before the Assessment Appeals Committee will be included in the Director's written determination.

(5) *Adjustments to assessment credits*. Once the Director of the Division of Finance, or the Assessment Appeals Committee, as appropriate, has notified the requesting bank of its final determination, the FDIC will make appropriate adjustments to assessment credit amounts consistent with that determination. Adjustments to an insured depository institution's assessment credit amounts will not be applied retroactively to reduce or increase the quarterly deposit insurance assessment for a prior assessment period.

[81 FR 16069, Mar. 25, 2016, as amended at 83 FR 14568, Apr. 5, 2018; 84 FR 65275, Nov. 27, 2019]

§ 327.12 Prepayment of quarterly risk-based assessments.

(a) *Requirement to prepay assessment*. On December 30, 2009, each insured depository institution shall pay to the FDIC a prepaid assessment, which shall equal its estimated quarterly risk-based assessments aggregated for the fourth quarter of 2009, and all of 2010, 2011, and 2012 (the ''prepayment period'').

(b) *Calculation of prepaid assessment*—(1) *Prepaid assessment*—(i) *Fourth quarter 2009 and all of 2010*. An institution's prepaid assessment for the fourth quarter of 2009 and for all of 2010 shall be determined by multiplying its prepaid assessment rate as defined in paragraph (b)(2) of this section times the corresponding prepaid assessment base for each quarter as determined pursuant to paragraph (b)(3) of this section.

(ii) *All of 2011 and 2012*. An institution's prepaid assessment for each quarter of 2011 and 2012 shall be determined by multiplying the sum of its prepaid assessment rate as defined in paragraph (b)(2) of this section, plus .75 basis points (which implements the 3 basis point increase in annual assessment rates adopted by the Board on September 29, 2009), times the corresponding prepaid assessment base for each quarter determined pursuant to paragraph (b)(3) of this section.

(2) *Prepaid assessment rate*. For each quarter of the prepayment period, an institution's prepaid assessment rate shall equal the total base assessment rate that the institution would have paid for the third quarter of 2009 had the institution's CAMELS ratings in effect on September 30, 2009, and, where applicable, long-term debt issuer ratings in effect on September 30, 2009, been in effect for the entire third quarter of 2009.

(3) *Prepaid assessment base*. For each quarter of the prepayment period, an institution's prepaid assessment base shall be calculated by increasing its third quarter 2009 assessment base at an annual rate of 5 percent.

(4) *Finality of prepaid assessment*. The prepaid assessment rate and prepaid assessment base defined in paragraphs (b)(2) and (3) of this section shall be determined based upon data in the FDIC's computer systems as of December 24, 2009. Changes to data underlying an institution's adjusted total base assessment rate or assessment base, whether by amendment to a report of condition or otherwise, received by the FDIC after December 24, 2009, shall not affect an institution's prepaid assessment.

(5) *Prepaid assessment rates for mergers and consolidations*. For mergers and consolidations recorded in the FDIC's

computer systems no later than December 24, 2009, the acquired institution's prepaid assessment rate under paragraph (b)(2) of this section shall be the prepaid assessment rate of the acquiring institution.

(c) *Invoicing of prepaid assessment.* The FDIC shall advise each insured depository institution of the amount and calculation of its prepaid assessment at the same time the FDIC provides the institution's quarterly certified statement invoice for the third quarter of 2009. The FDIC will re-invoice through FDICconnect based upon any data changes as provided in paragraph (b)(4) of this section.

(d) *Payment of prepaid assessment.* Each insured depository institution shall pay to the Corporation the amount of its prepaid assessment as required under paragraph (a) of this section in compliance with and subject to the provisions of §§ 327.3 and 327.7 of subpart A.

(1) *Exception to ACH payment.* If an institution's prepaid assessment is greater than $99 million, the institution shall make payment by wire transfer to the FDIC, rather than by funding its designated deposit account for payment via ACH as provided in § 327.3 of subpart A.

(2) *One-time assessment credits.* The FDIC will not apply an institution's one-time assessment credit under subpart B of this part 327 to reduce an institution's prepaid assessment. The FDIC will apply an institution's remaining one-time assessment credits under Part 327 subpart B to its quarterly deposit insurance assessments before applying its prepaid assessments.

(e) *Use of prepaid assessments.* Prepaid assessments shall only be used to offset regular quarterly risk-based deposit insurance assessments payable under this subpart A. The FDIC will begin offsetting regular quarterly risk-based deposit insurance assessments against prepaid assessments on March 30, 2010. The FDIC will continue to make such offsets until the earlier of the exhaustion of the institution's prepaid assessment or June 30, 2013. Any prepaid assessment remaining after collection of the amount due on June 30, 2013, shall be returned to the institution. If the FDIC, in its discretion, determines that its liquidity needs allow, it may return any remaining prepaid assessment to the institution prior to June 30, 2013.

(f) *Transfers.* An insured depository institution may enter into an agreement to transfer, but not pledge, any portion of that institution's prepaid assessment to another insured depository institution, provided that the parties to the agreement notify the FDIC's Division of Finance and submit a written agreement, signed by legal representatives of both institutions. The parties must include documentation stating that each representative has the legal authority to bind the institution. The institution transferring its prepaid assessment shall submit the required notice and documentation through FDIC*connect*. That information will be presented by the FDIC through FDIC*connect* to the institution acquiring the prepaid assessments for its acceptance. The adjustment to the amount of the prepaid assessment for each institution involved in the transfer will be made in the next assessment invoice that is sent at least 10 days after the FDIC's receipt of acceptance by the institution acquiring the prepaid assessments.

(g) *Prepaid assessments following a merger.* In the event that an insured depository institution merges with, or consolidates into, another insured depository institution, the surviving or resulting institution will be entitled to use any unused portion of the acquired institution's prepaid assessment not otherwise transferred pursuant to paragraph (f) of this section.

(h) *Disposition in the event of failure or termination of insured status.* In the event of failure of an insured depository institution, any amount of its prepaid assessment remaining (other than any amounts needed to satisfy its assessment obligations not yet offset against the prepaid amount) will be refunded to the institution's receiver. In the event that an insured depository institution's insured status terminates, any amount of its prepaid assessment remaining (other than any amounts needed to satisfy its assessment obligations not yet offset against the prepaid

amount) will be refunded to the institution, subject to the provisions of § 327.6 of subpart A.

(i) *Exemptions*—(1) *Exemption without application*. The FDIC, after consultation with an institution's primary federal regulator, will exercise its discretion as supervisor and insurer to exempt an institution from the prepayment requirement under paragraph (a) of this section if the FDIC determines that the prepayment would adversely affect the safety and soundness of that institution. No application is required for this review and the FDIC will notify any affected institution of its exemption by November 23, 2009.

(2) *Application for exemption*. An institution may also apply to the FDIC for an exemption from the prepayment requirement under paragraph (a) of this section if the prepayment would significantly impair the institution's liquidity, or would otherwise create extraordinary hardship. Written applications for exemption from the prepayment obligation must be submitted to the Director of the Division of Supervision and Consumer Protection on or before December 1, 2009, by electronic mail (*prepaidassessment@fdic.gov*) or fax (202–898–6676). The application must contain a full explanation of the need for the exemption and provide supporting documentation, including current financial statements, cash flow projections, and any other relevant information, including any information the FDIC may request. The FDIC will exercise its discretion in deciding whether to exempt an institution that files an application for exemption. An application shall be deemed denied unless the FDIC notifies an applying institution by December 15, 2009, either that the institution is exempt from the prepaid assessment or the FDIC has postponed determination under paragraph (i)(4) of this section. The FDIC's denial of applications for exemption will be final and not subject to further agency review.

(3) *Application for withdrawal of exemption*. An institution that has received an exemption under paragraph (i)(1) of this section may request that the FDIC withdraw the exemption. Written applications for withdrawal of exemption must be submitted to the Director of the Division of Supervision and Consumer Protection on or before December 1, 2009, by electronic mail (*prepaidassessment@fdic.gov*) or fax (202–898–6676). The application must contain a full explanation of the reasons the exemption is not needed and provide supporting documentation, including current financial statements, cash flow projections, and any other relevant information, including any information the FDIC may request. The FDIC, after consultation with the institution's primary Federal regulator, will exercise its discretion in deciding whether to withdraw the exemption. The FDIC will notify an institution of its decision to withdraw the exemption by December 15, 2009; that determination will be final and not subject to further agency review. An application shall be deemed denied unless the FDIC notifies an applying institution by December 15, 2009, that the exemption is withdrawn.

(4) *Postponement of determination*. The FDIC may postpone making a determination on any application for exemption filed under paragraph (i)(2) of this section until no later than January 14, 2010. An institution notified by the FDIC of such postponement will not have to pay the prepaid assessment calculated under paragraph (b) of this section on December 30, 2009. If the FDIC denies the application for exemption, the FDIC will notify the institution of the denial and of the date by which the institution must pay the prepaid assessment. The due date for payment of the prepaid assessment after such a denial will be no less than 15 days after the date of the notice of denial.

(5) *Obligation to pay third quarter 2009 assessment*. Any institution exempted from the prepayment requirement or any institution whose application for exemption has been postponed under this section shall pay to the Corporation on December 30, 2009, any amount due for the third quarter of 2009 as shown on the certified statement invoice for that quarter.

[74 FR 59065, Nov. 17, 2009]

§ 327.15 Emergency special assessments.

(a) *Emergency special assessment imposed on June 30, 2009.* On June 30, 2009, the FDIC shall impose an emergency special assessment of 20 basis points on each insured depository institution based on the institution's assessment base calculated pursuant to § 327.5 for the second assessment period of 2009.

(b) *Emergency special assessments after June 30, 2009.* After June 30, 2009, if the reserve ratio of the Deposit Insurance Fund is estimated to fall to a level that that the Board believes would adversely affect public confidence or to a level which shall be close to zero or negative at the end of a calendar quarter, an emergency special assessment of up to 10 basis points may be imposed by a vote of the Board on all insured depository institutions based on each institution's assessment base calculated pursuant to § 327.5 for the corresponding assessment period.

(1) *Estimation process.* For purposes of any emergency special assessment under this paragraph (b), the FDIC shall estimate the reserve ratio of the Deposit Insurance Fund for the applicable calendar quarter end from available data on, or estimates of, insurance fund assessment income, investment income, operating expenses, other revenue and expenses, and loss provisions, including provisions for anticipated failures. The FDIC will assume that estimated insured deposits will increase during the quarter at the average quarterly rate over the previous four quarters.

(2) *Imposition and announcement of emergency special assessments.* Any emergency special assessment under this paragraph (b) shall be on the last day of a calendar quarter and shall be announced by the end of such quarter. As soon as practicable after announcement, the FDIC will have a notice published in the FEDERAL REGISTER of the emergency special assessment.

(c) *Invoicing of any emergency special assessments.* The FDIC shall advise each insured depository institution of the amount and calculation of any emergency special assessment imposed under paragraph (a) or (b) of this section. This information shall be provided at the same time as the institution's quarterly certified statement invoice for the assessment period in which the emergency special assessment was imposed.

(d) *Payment of any emergency special assessment.* Each insured depository institution shall pay to the Corporation any emergency special assessment imposed under paragraph (a) or (b) of this section in compliance with and subject to the provisions of §§ 327.3, 327.6 and 327.7 of subpart A, and the provisions of subpart B. The payment date for any emergency special assessment shall be the date provided in § 327.3(b)(2) for the institution's quarterly certified statement invoice for the calendar quarter in which the emergency special assessment was imposed.

[74 FR 9341, Mar. 3, 2009]

§ 327.16 Assessment pricing methods—beginning the first assessment period after June 30, 2016, where the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent.

Subject to the modifications described in § 327.17, the following pricing methods shall apply beginning in the first assessment period after June 30, 2016, where the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent, and for all subsequent assessment periods.

(a) *Established small institutions.* Beginning the first assessment period after June 30, 2016, where the reserve ratio of the DIF as of the end of the prior assessment period has reached or exceeded 1.15 percent, and for all subsequent assessment periods, an established small institution shall have its initial base assessment rate determined by using the financial ratios methods set forth in paragraph (a)(1) of this section.

(1) Under the financial ratios method, each of seven financial ratios and a weighted average of CAMELS component ratings will be multiplied by a corresponding pricing multiplier. The sum of these products will be added to a uniform amount. The resulting sum shall equal the institution's initial base assessment rate; provided, however, that no institution's initial base

assessment rate shall be less than the minimum initial base assessment rate in effect for established small institutions with a particular CAMELS composite rating for that assessment period nor greater than the maximum initial base assessment rate in effect for established small institutions with a particular CAMELS composite rating for that assessment period. An institution's initial base assessment rate, subject to adjustment pursuant to paragraphs (e)(1) and (2) of this section, as appropriate (resulting in the institution's total base assessment rate, which in no case can be lower than 50 percent of the institution's initial base assessment rate), and adjusted for the actual assessment rates set by the Board under § 327.10(f), will equal an institution's assessment rate. The seven financial ratios are: Leverage Ratio (%); Net Income before Taxes/Total Assets (%); Nonperforming Loans and Leases/Gross Assets (%); Other Real Estate Owned/Gross Assets (%); Brokered Deposit Ratio (%); One Year Asset Growth (%); and Loan Mix Index. The ratios and the weighted average of CAMELS component ratings are defined in paragraph (a)(1)(ii) of this section. The ratios will be determined for an assessment period based upon information contained in an institution's report of condition filed as of the last day of the assessment period as set out in paragraph (a)(2) of this section. The weighted average of CAMELS component ratings is created by multiplying each component by the following percentages and adding the products: Capital adequacy—25%, Asset quality—20%, Management—25%, Earnings—10%, Liquidity—10%, and Sensitivity to market risk—10%. The following tables set forth the values of the pricing multipliers:

PRICING MULTIPLIERS APPLICABLE BEGINNING THE FIRST ASSESSMENT PERIOD AFTER JUNE 30, 2016, WHERE THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD HAS REACHED 1.15 PERCENT, AND FOR ALL SUBSEQUENT ASSESSMENT PERIODS WHERE THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD IS LESS THAN 2 PERCENT

Risk measures [1]	Pricing multipliers [2]
Leverage ratio	−1.264
Net Income before Taxes/Total Assets	−0.720
Nonperforming Loans and Leases/Gross Assets	0.942
Other Real Estate Owned/Gross Assets	0.533
Brokered Deposit Ratio	0.264
One Year Asset Growth	0.061
Loan Mix Index	0.081
Weighted Average CAMELS Component Rating	1.519

[1] Ratios are expressed as percentages.
[2] Multipliers are rounded to three decimal places.

PRICING MULTIPLIERS APPLICABLE WHEN THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD IS EQUAL TO OR GREATER THAN 2 PERCENT BUT LESS THAN 2.5 PERCENT

Risk measures [1]	Pricing multipliers [2]
Leverage Ratio	−1.217
Net Income before Taxes/Total Assets	−0.694
Nonperforming Loans and Leases/Gross Assets	0.907
Other Real Estate Owned/Gross Assets	0.513
Brokered Deposit Ratio	0.254
One Year Asset Growth	0.059
Loan Mix Index	0.078
Weighted Average CAMELS Component Rating	1.463

[1] Ratios are expressed as percentages.
[2] Multipliers are rounded to three decimal places.

PRICING MULTIPLIERS APPLICABLE WHEN THE RESERVE RATIO AS OF THE END OF THE PRIOR ASSESSMENT PERIOD IS GREATER THAN OR EQUAL TO 2.5 PERCENT

Risk measures [1]	Pricing multipliers [2]
Leverage Ratio	−1.123
Net Income before Taxes/Total Assets	−0.640
Nonperforming Loans and Leases/Gross Assets	0.837
Other Real Estate Owned/Gross Assets	0.474
Brokered Deposit Ratio	0.235
One Year Asset Growth	0.054
Loan Mix Index	0.072
Weighted Average CAMELS Component Rating	1.350

[1] Ratios are expressed as percentages.
[2] Multipliers are rounded to three decimal places.

(i) *Uniform amount*. Except as adjusted for the actual assessment rates set by the Board under § 327.10(f), the uniform amount shall be:

(A) 7.352 whenever the assessment rate schedule set forth in § 327.10(b) is in effect;

(B) 6.188 whenever the assessment rate schedule set forth in § 327.10(c) is in effect; or

(C) 4.870 whenever the assessment rate schedule set forth in § 327.10(d) is in effect.

(ii) *Definitions of measures used in the financial ratios method*—(A) *Definitions*. The following table lists and defines the measures used in the financial ratios method:

DEFINITIONS OF MEASURES USED IN THE FINANCIAL RATIOS METHOD

Variables	Description
Leverage Ratio (%)	Tier 1 capital divided by adjusted average assets. (Numerator and denominator are both based on the definition for prompt corrective action.)
Net Income before Taxes/Total Assets (%).	Income (before applicable income taxes and discontinued operations) for the most recent twelve months divided by total assets.[1]
Nonperforming Loans and Leases/Gross Assets (%).	Sum of total loans and lease financing receivables past due 90 or more days and still accruing interest and total nonaccrual loans and lease financing receivables (excluding, in both cases, the maximum amount recoverable from the U.S. Government, its agencies or government-sponsored enterprises, under guarantee or insurance provisions) divided by gross assets.[2]
Other Real Estate Owned/ Gross Assets (%).	Other real estate owned divided by gross assets.[2]
Brokered Deposit Ratio	The ratio of the difference between brokered deposits and 10 percent of total assets to total assets. For institutions that are well capitalized and have a CAMELS composite rating of 1 or 2, brokered reciprocal deposits as defined in § 327.8(q) are deducted from brokered deposits. If the ratio is less than zero, the value is set to zero.
Weighted Average of C, A, M, E, L, and S Component Ratings.	The weighted sum of the "C," "A," "M," "E", "L", and "S" CAMELS components, with weights of 25 percent each for the "C" and "M" components, 20 percent for the "A" component, and 10 percent each for the "E", "L", and "S" components.
Loan Mix Index	A measure of credit risk described paragraph (a)(1)(ii)(B) of this section.
One-Year Asset Growth (%)	Growth in assets (adjusted for mergers[3]) over the previous year in excess of 10 percent.[4] If growth is less than 10 percent, the value is set to zero.

[1] The ratio of Net Income before Taxes to Total Assets is bounded below by (and cannot be less than) −25 percent and is bounded above by (and cannot exceed) 3 percent.

[2] Gross assets are total assets plus the allowance for loan and lease financing receivable losses (ALLL) or allowance for credit losses, as applicable.

[3] Growth in assets is also adjusted for acquisitions of failed banks.

[4] The maximum value of the Asset Growth measure is 230 percent; that is, asset growth (merger adjusted) over the previous year in excess of 240 percent (230 percentage points in excess of the 10 percent threshold) will not further increase a bank's assessment rate.

(B) *Definition of loan mix index*. The Loan Mix Index assigns loans in an institution's loan portfolio to the categories of loans described in the following table. The Loan Mix Index is calculated by multiplying the ratio of an institution's amount of loans in a particular loan category to its total assets by the associated weighted average charge-off rate for that loan category, and summing the products for all loan categories. The table gives the weighted average charge-off rate for each category of loan. The Loan Mix Index excludes credit card loans.

LOAN MIX INDEX CATEGORIES AND WEIGHTED CHARGE-OFF RATE PERCENTAGES

	Weighted charge-off rate (percent)
Construction & Development	4.4965840
Commercial & Industrial	1.5984506
Leases	1.4974551
Other Consumer	1.4559717
Real Estate Loans Residual	1.0169338
Multifamily Residential	0.8847597
Nonfarm Nonresidential	0.7286274
1–4 Family Residential	0.6973778
Loans to Depository Banks	0.5760532
Agricultural Real Estate	0.2376712
Agriculture	0.2432737

(iii) *Implementation of CAMELS rating changes*—(A) *Composite rating change*. If, during an assessment period, a CAMELS composite rating change occurs in a way that changes the institution's

initial base assessment rate, then the institution's initial base assessment rate for the portion of the assessment period prior to the change shall be determined using the assessment schedule for the appropriate CAMELS composite rating in effect before the change, including any minimum or maximum initial base assessment rates, and subject to adjustment pursuant to paragraphs (e)(1) and (2) of this section, as appropriate, and adjusted for actual assessment rates set by the Board under § 327.10(f). For the portion of the assessment period after the CAMELS composite rating change, the institution's initial base assessment rate shall be determined using the assessment schedule for the applicable CAMELS composite rating in effect, including any minimum or maximum initial base assessment rates, and subject to adjustment pursuant to paragraphs (e)(1) and (2) of this section, as appropriate, and adjusted for actual assessment rates set by the Board under § 327.10(f).

(B) *Component ratings changes*. If, during an assessment period, a CAMELS component rating change occurs in a way that changes the institution's initial base assessment rate, the initial base assessment rate for the period before the change shall be determined under the financial ratios method using the CAMELS component ratings in effect before the change, subject to adjustment under paragraphs (e)(1) and (2) of this section, as appropriate. Beginning on the date of the CAMELS component rating change, the initial base assessment rate for the remainder of the assessment period shall be determined under the financial ratios method using the CAMELS component ratings in effect after the change, again subject to adjustment under paragraphs (e)(1) and (2) of this section, as appropriate.

(iv) *No CAMELS composite rating or no CAMELS component ratings*—(A) *No CAMELS composite rating*. If, during an assessment period, an institution has no CAMELS composite rating, its initial assessment rate will be 2 basis points above the minimum initial assessment rate for established small institutions until it receives a CAMELS composite rating.

(B) *No CAMELS component ratings*. If, during an assessment period, an institution has a CAMELS composite rating but no CAMELS component ratings, the initial base assessment rate for that institution shall be determined under the financial ratios method using the CAMELS composite rating for its weighted average CAMELS component rating and, if the institution has not yet filed four quarterly reports of condition, by annualizing, where appropriate, financial ratios obtained from all quarterly reports of condition that have been filed.

(2) *Applicable quarterly reports of condition*. The financial ratios used to determine the assessment rate for an established small institution shall be based upon information contained in an institution's Consolidated Reports of Condition and Income (or successor report, as appropriate) dated as of March 31 for the assessment period beginning the preceding January 1; dated as of June 30 for the assessment period beginning the preceding April 1; dated as of September 30 for the assessment period beginning the preceding July 1; and dated as of December 31 for the assessment period beginning the preceding October 1.

(b) *Large and highly complex institutions*—(1) *Assessment scorecard for large institutions (other than highly complex institutions)*. (i) A large institution other than a highly complex institution shall have its initial base assessment rate determined using the scorecard for large institutions.

SCORECARD FOR LARGE INSTITUTIONS

	Scorecard measures and components	Measure weights (percent)	Component weights (percent)
P	Performance Score.		
P.1	Weighted Average CAMELS Rating	100	30
P.2	Ability to Withstand Asset-Related Stress		50
	Leverage ratio	10	

SCORECARD FOR LARGE INSTITUTIONS—Continued

	Scorecard measures and components	Measure weights (percent)	Component weights (percent)
	Concentration Measure	35	
	Core Earnings/Average Quarter-End Total Assets [1]	20	
	Credit Quality Measure	35	
P.3	Ability to Withstand Funding-Related Stress		20
	Core Deposits/Total Liabilities	60	
	Balance Sheet Liquidity Ratio	40	
L	Loss Severity Score.		
L.1	Loss Severity Measure		100

[1] Average of five quarter-end total assets (most recent and four prior quarters).

(ii) The scorecard for large institutions produces two scores: Performance score and loss severity score.

(A) *Performance score for large institutions*. The performance score for large institutions is a weighted average of the scores for three measures: The weighted average CAMELS rating score, weighted at 30 percent; the ability to withstand asset-related stress score, weighted at 50 percent; and the ability to withstand funding-related stress score, weighted at 20 percent.

(*1*) *Weighted average CAMELS rating score*. (*i*) To compute the weighted average CAMELS rating score, a weighted average of an institution's CAMELS component ratings is calculated using the following weights:

CAMELS component	Weight (%)
C	25
A	20
M	25
E	10
L	10
S	10

(*ii*) A weighted average CAMELS rating converts to a score that ranges from 25 to 100. A weighted average rating of 1 equals a score of 25 and a weighted average of 3.5 or greater equals a score of 100. Weighted average CAMELS ratings between 1 and 3.5 are assigned a score between 25 and 100. The score increases at an increasing rate as the weighted average CAMELS rating increases. Appendix B of this subpart describes the conversion of a weighted average CAMELS rating to a score.

(*2*) *Ability to withstand asset-related stress score*. (*i*) The ability to withstand asset-related stress score is a weighted average of the scores for four measures: Leverage ratio; concentration measure; the ratio of core earnings to average quarter-end total assets; and the credit quality measure. Appendices A and C of this subpart define these measures.

(*ii*) The Leverage ratio and the ratio of core earnings to average quarter-end total assets are described in appendix A and the method of calculating the scores is described in appendix C of this subpart.

(*iii*) The score for the concentration measure is the greater of the higher-risk assets to Tier 1 capital and reserves score or the growth-adjusted portfolio concentrations score. Both ratios are described in appendix C of this subpart.

(*iv*) The score for the credit quality measure is the greater of the criticized and classified items to Tier 1 capital and reserves score or the underperforming assets to Tier 1 capital and reserves score.

(*v*) The following table shows the cutoff values and weights for the measures used to calculate the ability to withstand asset-related stress score. Appendix B of this subpart describes how each measure is converted to a score between 0 and 100 based upon the minimum and maximum cutoff values, where a score of 0 reflects the lowest risk and a score of 100 reflects the highest risk.

CUTOFF VALUES AND WEIGHTS FOR MEASURES TO CALCULATE ABILITY TO WITHSTAND ASSET-RELATED STRESS SCORE

Measures of the ability to withstand asset-related stress	Cutoff values		Weights (percent)
	Minimum (percent)	Maximum (percent)	
Leverage ratio	6	13	10
Concentration Measure			35
Higher-Risk Assets to Tier 1 Capital and Reserves; or	0	135	
Growth-Adjusted Portfolio Concentrations	4	56	
Core Earnings/Average Quarter-End Total Assets [1]	0	2	20
Credit Quality Measure			35
Criticized and Classified Items/Tier 1 Capital and Reserves; or	7	100	
Underperforming Assets/Tier 1 Capital and Reserves	2	35	

[1] Average of five quarter-end total assets (most recent and four prior quarters).

(*vi*) The score for each measure in the table in paragraph (b)(1)(ii)(A)(*2*)(*v*) of this section is multiplied by its respective weight and the resulting weighted score is summed to arrive at the score for an ability to withstand asset-related stress, which can range from 0 to 100, where a score of 0 reflects the lowest risk and a score of 100 reflects the highest risk.

(*3*) *Ability to withstand funding-related stress score*. Two measures are used to compute the ability to withstand funding-related stress score: A core deposits to total liabilities ratio, and a balance sheet liquidity ratio. Appendix A of this subpart describes these measures. Appendix B of this subpart describes how these measures are converted to a score between 0 and 100, where a score of 0 reflects the lowest risk and a score of 100 reflects the highest risk. The ability to withstand funding-related stress score is the weighted average of the scores for the two measures. In the following table, cutoff values and weights are used to derive an institution's ability to withstand funding-related stress score:

CUTOFF VALUES AND WEIGHTS TO CALCULATE ABILITY TO WITHSTAND FUNDING-RELATED STRESS SCORE

Measures of the ability to withstand funding-related stress	Cutoff values		Weights (percent)
	Minimum (percent)	Maximum (percent)	
Core Deposits/Total Liabilities	5	87	60
Balance Sheet Liquidity Ratio	7	243	40

(*4*) *Calculation of performance score*. In paragraph (b)(1)(ii)(A)(*3*) of this section, the scores for the weighted average CAMELS rating, the ability to withstand asset-related stress, and the ability to withstand funding-related stress are multiplied by their respective weights (30 percent, 50 percent and 20 percent, respectively) and the results are summed to arrive at the performance score. The performance score cannot be less than 0 or more than 100, where a score of 0 reflects the lowest risk and a score of 100 reflects the highest risk.

(B) *Loss severity score*. The loss severity score is based on a loss severity measure that is described in appendix D of this subpart. Appendix B of this subpart also describes how the loss severity measure is converted to a score between 0 and 100. The loss severity score cannot be less than 0 or more than 100, where a score of 0 reflects the lowest risk and a score of 100 reflects the highest risk. Cutoff values for the loss severity measure are:

CUTOFF VALUES TO CALCULATE LOSS SEVERITY SCORE

Measure of loss severity	Cutoff values	
	Minimum (percent)	Maximum (percent)
Loss Severity	0	28

(C) *Total score.* (*1*) The performance and loss severity scores are combined to produce a total score. The loss severity score is converted into a loss severity factor that ranges from 0.8 (score of 5 or lower) to 1.2 (score of 85 or higher). Scores at or below the minimum cutoff of 5 receive a loss severity factor of 0.8, and scores at or above the maximum cutoff of 85 receive a loss severity factor of 1.2. The following linear interpolation converts loss severity scores between the cutoffs into a loss severity factor:

(Loss Severity Factor = 0.8 + [0.005 * (Loss Severity Score − 5)]

(*2*) The performance score is multiplied by the loss severity factor to produce a total score (total score = performance score * loss severity factor). The total score can be up to 20 percent higher or lower than the performance score but cannot be less than 30 or more than 90. The total score is subject to adjustment, up or down, by a maximum of 15 points, as set forth in paragraph (b)(3) of this section. The resulting total score after adjustment cannot be less than 30 or more than 90.

(D) *Initial base assessment rate.* A large institution with a total score of 30 pays the minimum initial base assessment rate and an institution with a total score of 90 pays the maximum initial base assessment rate. For total scores between 30 and 90, initial base assessment rates rise at an increasing rate as the total score increases, calculated according to the following formula:

$$Rate = Minimum\ Rate + \left[\left(\left(1.4245 \times \left(\frac{Score}{100}\right)^3\right) - 0.0385\right) \times (Maximum\ Rate - Minimum\ Rate)\right]$$

Where:

Rate is the initial base assessment rate (expressed in basis points);

Maximum Rate is the maximum initial base assessment rate then in effect (expressed in basis points); and

Minimum Rate is the minimum initial base assessment rate then in effect (expressed in basis points). Initial base assessment rates are subject to adjustment pursuant to paragraphs (b)(3) and (e)(1) and (2) of this section; large institutions that are not well capitalized or have a CAMELS composite rating of 3, 4 or 5 shall be subject to the adjustment at paragraph (e)(3) of this section; these adjustments shall result in the institution's total base assessment rate, which in no case can be lower than 50 percent of the institution's initial base assessment rate.

(2) *Assessment scorecard for highly complex institutions.* (i) A highly complex institution shall have its initial base assessment rate determined using the scorecard for highly complex institutions.

SCORECARD FOR HIGHLY COMPLEX INSTITUTIONS

	Measures and components	Measure weights (percent)	Component weights (percent)
P	Performance Score.		
P.1	Weighted Average CAMELS Rating	100	30
P.2	Ability To Withstand Asset-Related Stress		50
	Leverage ratio	10	
	Concentration Measure	35	
	Core Earnings/Average Quarter-End Total Assets	20	

SCORECARD FOR HIGHLY COMPLEX INSTITUTIONS—Continued

	Measures and components	Measure weights (percent)	Component weights (percent)
	Credit Quality Measure and Market Risk Measure	35	
P.3	Ability To Withstand Funding-Related Stress		20
	Core Deposits/Total Liabilities	50	
	Balance Sheet Liquidity Ratio	30	
	Average Short-Term Funding/Average Total Assets	20	
L	Loss Severity Score.		
L.1	Loss Severity		100

(ii) The scorecard for highly complex institutions produces two scores: Performance and loss severity.

(A) Performance score for highly complex institutions. The performance score for highly complex institutions is the weighted average of the scores for three components: Weighted average CAMELS rating, weighted at 30 percent; ability to withstand asset-related stress score, weighted at 50 percent; and ability to withstand funding-related stress score, weighted at 20 percent.

(*1*) *Weighted average CAMELS rating score*. (*i*) To compute the score for the weighted average CAMELS rating, a weighted average of an institution's CAMELS component ratings is calculated using the following weights:

CAMELS component	Weight (%)
C	25
A	20
M	25
E	10
L	10
S	10

(*ii*) A weighted average CAMELS rating converts to a score that ranges from 25 to 100. A weighted average rating of 1 equals a score of 25 and a weighted average of 3.5 or greater equals a score of 100. Weighted average CAMELS ratings between 1 and 3.5 are assigned a score between 25 and 100. The score increases at an increasing rate as the weighted average CAMELS rating increases. Appendix B of this subpart describes the conversion of a weighted average CAMELS rating to a score.

(*2*) *Ability to withstand asset-related stress score*. (*i*) The ability to withstand asset-related stress score is a weighted average of the scores for four measures: Leverage ratio; concentration measure; ratio of core earnings to average quarter-end total assets; credit quality measure and market risk measure. Appendix A of this subpart describes these measures.

(*ii*) The Leverage ratio and the ratio of core earnings to average quarter-end total assets are described in appendix A of this subpart and the method of calculating the scores is described in appendix B of this subpart.

(*iii*) The score for the concentration measure for highly complex institutions is the greatest of the higher-risk assets to the sum of Tier 1 capital and reserves score, the top 20 counterparty exposure to the sum of Tier 1 capital and reserves score, or the largest counterparty exposure to the sum of Tier 1 capital and reserves score. Each ratio is described in appendix A of this subpart. The method used to convert the concentration measure into a score is described in appendix C of this subpart.

(*iv*) The credit quality score is the greater of the criticized and classified items to Tier 1 capital and reserves score or the underperforming assets to Tier 1 capital and reserves score. The market risk score is the weighted average of three scores—the trading revenue volatility to Tier 1 capital score, the market risk capital to Tier 1 capital score, and the level 3 trading assets to Tier 1 capital score. All of these ratios are described in appendix A of this subpart and the method of calculating the scores is described in appendix B of this subpart. Each score is multiplied by its respective weight, and the resulting weighted score is summed to compute the score for the market risk measure. An overall

weight of 35 percent is allocated between the scores for the credit quality measure and market risk measure. The allocation depends on the ratio of average trading assets to the sum of average securities, loans and trading assets (trading asset ratio) as follows:

(*v*) Weight for credit quality score = 35 percent * (1 − trading asset ratio); and,

(*vi*) Weight for market risk score = 35 percent * trading asset ratio.

(*vii*) Each of the measures used to calculate the ability to withstand asset-related stress score is assigned the following cutoff values and weights:

CUTOFF VALUES AND WEIGHTS FOR MEASURES TO CALCULATE THE ABILITY TO WITHSTAND ASSET-RELATED STRESS SCORE

Measures of the ability to withstand asset-related stress	Cutoff values		Market risk measure (percent)	Weights (percent)
	Minimum (percent)	Maximum (percent)		
Leverage ratio	6	13		10.
Concentration Measure				35.
Higher Risk Assets/Tier 1 Capital and Reserves;	0	135		
Top 20 Counterparty Exposure/Tier 1 Capital and Reserves; or.	0	125		
Largest Counterparty Exposure/Tier 1 Capital and Reserves.	0	20		
Core Earnings/Average Quarter-end Total Assets	0	2		20.
Credit Quality Measure [1]				35* (1 − Trading Asset Ratio).
Criticized and Classified Items to Tier 1 Capital and Reserves; or.	7	100		
Underperforming Assets/Tier 1 Capital and Reserves	2	35		
Market Risk Measure [1]				35* Trading Asset Ratio.
Trading Revenue Volatility/Tier 1 Capital	0	2	60	
Market Risk Capital/Tier 1 Capital	0	10	20	
Level 3 Trading Assets/Tier 1 Capital	0	35	20	

[1] Combined, the credit quality measure and the market risk measure are assigned a 35 percent weight. The relative weight of each of the two scores depends on the ratio of average trading assets to the sum of average securities, loans and trading assets (trading asset ratio).

(*viii*) [Reserved]

(*ix*) The score of each measure is multiplied by its respective weight and the resulting weighted score is summed to compute the ability to withstand asset-related stress score, which can range from 0 to 100, where a score of 0 reflects the lowest risk and a score of 100 reflects the highest risk.

(*3*) *Ability to withstand funding related stress score*. Three measures are used to calculate the score for the ability to withstand funding-related stress: A core deposits to total liabilities ratio, a balance sheet liquidity ratio, and average short-term funding to average total assets ratio. Appendix A of this subpart describes these ratios. Appendix B of this subpart describes how each measure is converted to a score. The ability to withstand funding-related stress score is the weighted average of the scores for the three measures. In the following table, cutoff values and weights are used to derive an institution's ability to withstand funding-related stress score:

CUTOFF VALUES AND WEIGHTS TO CALCULATE ABILITY TO WITHSTAND FUNDING-RELATED STRESS MEASURES

Measures of the ability to withstand funding-related stress	Cutoff values		Weights (percent)
	Minimum (percent)	Maximum (percent)	
Core Deposits/Total Liabilities	5	87	50
Balance Sheet Liquidity Ratio	7	243	30
Average Short-term Funding/Average Total Assets	2	19	20

(*4*) *Calculation of performance score.* The weighted average CAMELS score, the ability to withstand asset-related stress score, and the ability to withstand funding-related stress score are multiplied by their respective weights (30 percent, 50 percent and 20 percent, respectively) and the results are summed to arrive at the performance score, which cannot be less than 0 or more than 100.

(B) *Loss severity score.* The loss severity score is based on a loss severity measure described in appendix D of this subpart. Appendix B of this subpart also describes how the loss severity measure is converted to a score between 0 and 100. Cutoff values for the loss severity measure are:

CUTOFF VALUES FOR LOSS SEVERITY MEASURE

Measure of loss severity	Cutoff values	
	Minimum (percent)	Maximum (percent)
Loss Severity	0	28

(C) *Total score.* The performance and loss severity scores are combined to produce a total score. The loss severity score is converted into a loss severity factor that ranges from 0.8 (score of 5 or lower) to 1.2 (score of 85 or higher). Scores at or below the minimum cutoff of 5 receive a loss severity factor of 0.8, and scores at or above the maximum cutoff of 85 receive a loss severity factor of 1.2. The following linear interpolation converts loss severity scores between the cutoffs into a loss severity factor: (Loss Severity Factor = 0.8 + [0.005 * (Loss Severity Score − 5)]. The performance score is multiplied by the loss severity factor to produce a total score (total score = performance score * loss severity factor). The total score can be up to 20 percent higher or lower than the performance score but cannot be less than 30 or more than 90. The total score is subject to adjustment, up or down, by a maximum of 15 points, as set forth in paragraph (b)(3) of this section. The resulting total score after adjustment cannot be less than 30 or more than 90.

(D) *Initial base assessment rate.* A highly complex institution with a total score of 30 pays the minimum initial base assessment rate and an institution with a total score of 90 pays the maximum initial base assessment rate. For total scores between 30 and 90, initial base assessment rates rise at an increasing rate as the total score increases, calculated according to the following formula:

$$Rate = Minimum\ Rate + \left[\left(\left(1.4245 \times \left(\frac{Score}{100}\right)^3\right) - 0.0385\right) \times \left(Maximum\ Rate - Minimum\ Rate\right)\right]$$

Where:

Rate is the initial base assessment rate (expressed in basis points);

Maximum Rate is the maximum initial base assessment rate then in effect (expressed in basis points); and

Minimum Rate is the minimum initial base assessment rate then in effect (expressed in basis points). Initial base assessment rates are subject to adjustment pursuant to paragraphs (b)(3) and (e)(1) and (2) of this section; highly complex institutions that are not well capitalized or have a CAMELS composite rating of 3, 4 or 5 shall be subject to the adjustment at paragraph (e)(3) of this section; these adjustments shall result in the institution's total base assessment rate, which in no case can be lower than 50 percent of the institution's initial base assessment rate.

(3) *Adjustment to total score for large institutions and highly complex institutions.* The total score for large institutions and highly complex institutions is subject to adjustment, up or down, by a maximum of 15 points, based upon

significant risk factors that are not adequately captured in the appropriate scorecard. In making such adjustments, the FDIC may consider such information as financial performance and condition information and other market or supervisory information. The FDIC will also consult with an institution's primary federal regulator and, for state chartered institutions, state banking supervisor.

(i) *Prior notice of adjustments*—(A) *Prior notice of upward adjustment.* Prior to making any upward adjustment to an institution's total score because of considerations of additional risk information, the FDIC will formally notify the institution and its primary federal regulator and provide an opportunity to respond. This notification will include the reasons for the adjustment and when the adjustment will take effect.

(B) *Prior notice of downward adjustment.* Prior to making any downward adjustment to an institution's total score because of considerations of additional risk information, the FDIC will formally notify the institution's primary federal regulator and provide an opportunity to respond.

(ii) *Determination whether to adjust upward; effective period of adjustment.* After considering an institution's and the primary federal regulator's responses to the notice, the FDIC will determine whether the adjustment to an institution's total score is warranted, taking into account any revisions to scorecard measures, as well as any actions taken by the institution to address the FDIC's concerns described in the notice. The FDIC will evaluate the need for the adjustment each subsequent assessment period. Except as provided in paragraph (b)(3)(iv) of this section, the amount of adjustment cannot exceed the proposed adjustment amount contained in the initial notice unless additional notice is provided so that the primary federal regulator and the institution may respond.

(iii) *Determination whether to adjust downward; effective period of adjustment.* After considering the primary federal regulator's responses to the notice, the FDIC will determine whether the adjustment to total score is warranted, taking into account any revisions to scorecard measures. Any downward adjustment in an institution's total score will remain in effect for subsequent assessment periods until the FDIC determines that an adjustment is no longer warranted. Downward adjustments will be made without notification to the institution. However, the FDIC will provide advance notice to an institution and its primary federal regulator and give them an opportunity to respond before removing a downward adjustment.

(iv) *Adjustment without notice.* Notwithstanding the notice provisions set forth in paragraph (b)(3) of this section, the FDIC may change an institution's total score without advance notice, if the institution's supervisory ratings or the scorecard measures deteriorate.

(c) *New small institutions*—(1) *Risk categories.* Each new small institution shall be assigned to one of the following four Risk Categories based upon the institution's capital evaluation and supervisory evaluation as defined in this section.

(i) *Risk category I.* New small institutions in Supervisory Group A that are Well Capitalized will be assigned to Risk Category I.

(ii) *Risk category II.* New small institutions in Supervisory Group A that are Adequately Capitalized, and new small institutions in Supervisory Group B that are either Well Capitalized or Adequately Capitalized will be assigned to Risk Category II.

(iii) *Risk category III.* New small institutions in Supervisory Groups A and B that are Undercapitalized, and new small institutions in Supervisory Group C that are Well Capitalized or Adequately Capitalized will be assigned to Risk Category III.

(iv) *Risk category IV.* New small institutions in Supervisory Group C that are Undercapitalized will be assigned to Risk Category IV.

(2) *Capital evaluations.* Each new small institution will receive one of the following three capital evaluations on the basis of data reported in the institution's Consolidated Reports of Condition and Income or Thrift Financial Report (or successor report, as appropriate) dated as of the last day of

each assessment period: Well Capitalized, Adequately Capitalized, or Undercapitalized as defined in § 327.8(z) of this chapter.

(3) *Supervisory evaluations.* Each new small institution will be assigned to one of three Supervisory Groups based on the Corporation's consideration of supervisory evaluations provided by the institution's primary federal regulator. The supervisory evaluations include the results of examination findings by the primary federal regulator, as well as other information that the primary federal regulator determines to be relevant. In addition, the Corporation will take into consideration such other information (such as state examination findings, as appropriate) as it determines to be relevant to the institution's financial condition and the risk posed to the Deposit Insurance Fund. The three Supervisory Groups are:

(i) *Supervisory group ''A.''* This Supervisory Group consists of financially sound institutions with only a few minor weaknesses;

(ii) *Supervisory group ''B.''* This Supervisory Group consists of institutions that demonstrate weaknesses which, if not corrected, could result in significant deterioration of the institution and increased risk of loss to the Deposit Insurance Fund; and

(iii) *Supervisory group ''C.''* This Supervisory Group consists of institutions that pose a substantial probability of loss to the Deposit Insurance Fund unless effective corrective action is taken.

(4) *Assessment method for new small institutions in risk category I*—(i) *Maximum initial base assessment rate for risk category I new small institutions.* A new small institution in Risk Category I shall be assessed the maximum initial base assessment rate for Risk Category I small institutions in the relevant assessment period.

(ii) *New small institutions not subject to certain adjustments.* No new small institution in any risk category shall be subject to the adjustment in paragraph (e)(1) of this section.

(iii) *Implementation of CAMELS rating changes*—(A) *Changes between risk categories.* If, during an assessment period, a CAMELS composite rating change occurs that results in a Risk Category I institution moving from Risk Category I to Risk Category II, III or IV, the institution's initial base assessment rate for the portion of the assessment period that it was in Risk Category I shall be the maximum initial base assessment rate for the relevant assessment period, subject to adjustment pursuant to paragraph (e)(2) of this section, as appropriate, and adjusted for the actual assessment rates set by the Board under § 327.10(f). For the portion of the assessment period that the institution was not in Risk Category I, the institution's initial base assessment rate, which shall be subject to adjustment pursuant to paragraphs (e)(2) and (3) of this section, as appropriate, shall be determined under the assessment schedule for the appropriate Risk Category. If, during an assessment period, a CAMELS composite rating change occurs that results in an institution moving from Risk Category II, III or IV to Risk Category I, then the maximum initial base assessment rate for new small institutions in Risk Category I shall apply for the portion of the assessment period that it was in Risk Category I, subject to adjustment pursuant to paragraph (e)(2) of this section, as appropriate, and adjusted for the actual assessment rates set by the Board under § 327.10(f). For the portion of the assessment period that the institution was not in Risk Category I, the institution's initial base assessment rate, which shall be subject to adjustment pursuant to paragraphs (e)(2) and (3) of this section shall be determined under the assessment schedule for the appropriate Risk Category.

(B) [Reserved]

(d) *Insured branches of foreign banks*—(1) *Risk categories for insured branches of foreign banks.* Insured branches of foreign banks shall be assigned to risk categories as set forth in paragraph (c)(1) of this section.

(2) *Capital evaluations for insured branches of foreign banks.* Each insured branch of a foreign bank will receive one of the following three capital evaluations on the basis of data reported in the institution's Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks dated as of

March 31 for the assessment period beginning the preceding January 1; dated as of June 30 for the assessment period beginning the preceding April 1; dated as of September 30 for the assessment period beginning the preceding July 1; and dated as of December 31 for the assessment period beginning the preceding October 1.

(i) *Well Capitalized.* An insured branch of a foreign bank is Well Capitalized if the insured branch:

(A) Maintains the pledge of assets required under § 347.209 of this chapter; and

(B) Maintains the eligible assets prescribed under § 347.210 of this chapter at 108 percent or more of the average book value of the insured branch's third-party liabilities for the quarter ending on the report date specified in paragraph (d)(2) of this section.

(ii) *Adequately Capitalized.* An insured branch of a foreign bank is Adequately Capitalized if the insured branch:

(A) Maintains the pledge of assets required under § 347.209 of this chapter; and

(B) Maintains the eligible assets prescribed under § 347.210 of this chapter at 106 percent or more of the average book value of the insured branch's third-party liabilities for the quarter ending on the report date specified in paragraph (d)(2) of this section; and

(C) Does not meet the definition of a Well Capitalized insured branch of a foreign bank.

(iii) *Undercapitalized.* An insured branch of a foreign bank is undercapitalized institution if it does not qualify as either Well Capitalized or Adequately Capitalized under paragraphs (d)(2)(i) and (ii) of this section.

(3) *Supervisory evaluations for insured branches of foreign banks.* Each insured branch of a foreign bank will be assigned to one of three supervisory groups as set forth in paragraph (c)(3) of this section.

(4) *Assessment method for insured branches of foreign banks in risk category I.* Insured branches of foreign banks in Risk Category I shall be assessed using the weighted average ROCA component rating.

(i) *Weighted average ROCA component rating.* The weighted average ROCA component rating shall equal the sum of the products that result from multiplying ROCA component ratings by the following percentages: Risk Management—35%, Operational Controls—25%, Compliance—25%, and Asset Quality—15%. The weighted average ROCA rating will be multiplied by 5.076 (which shall be the pricing multiplier). To this result will be added a uniform amount. The resulting sum—the initial base assessment rate—will equal an institution's total base assessment rate; provided, however, that no institution's total base assessment rate will be less than the minimum total base assessment rate in effect for Risk Category I institutions for that assessment period nor greater than the maximum total base assessment rate in effect for Risk Category I institutions for that assessment period.

(ii) *Uniform amount.* Except as adjusted for the actual assessment rates set by the Board under § 327.10(f), the uniform amount for all insured branches of foreign banks shall be:

(A) −5.127 whenever the assessment rate schedule set forth in § 327.10(b) is in effect;

(B) −6.127 whenever the assessment rate schedule set forth in § 327.10(c) is in effect; or

(C) −7.127 whenever the assessment rate schedule set forth in § 327.10(d) is in effect.

(iii) *Insured branches of foreign banks not subject to certain adjustments.* No insured branch of a foreign bank in any risk category shall be subject to the adjustments in paragraph (b)(3) or (e)(1) or (3) of this section.

(iv) *Implementation of changes between risk categories for insured branches of foreign banks.* If, during an assessment period, a ROCA rating change occurs that results in an insured branch of a foreign bank moving from Risk Category I to Risk Category II, III or IV, the institution's initial base assessment rate for the portion of the assessment period that it was in Risk Category I shall be determined using the weighted average ROCA component rating. For the portion of the assessment period that the institution was not in Risk Category I, the institution's initial base assessment rate shall be determined under the assessment schedule for the appropriate Risk Category. If,

during an assessment period, a ROCA rating change occurs that results in an insured branch of a foreign bank moving from Risk Category II, III or IV to Risk Category I, the institution's assessment rate for the portion of the assessment period that it was in Risk Category I shall equal the rate determined as provided using the weighted average ROCA component rating. For the portion of the assessment period that the institution was not in Risk Category I, the institution's initial base assessment rate shall be determined under the assessment schedule for the appropriate Risk Category.

(v) *Implementation of changes within risk category I for insured branches of foreign banks.* If, during an assessment period, an insured branch of a foreign bank remains in Risk Category I, but a ROCA component rating changes that will affect the institution's initial base assessment rate, separate assessment rates for the portion(s) of the assessment period before and after the change(s) shall be determined under this paragraph (d)(4).

(e) *Adjustments*—(1) *Unsecured debt adjustment to initial base assessment rate for all institutions.* All institutions, except new institutions as provided under paragraphs (g)(1) and (2) of this section and insured branches of foreign banks as provided under paragraph (d)(4)(iii) of this section, shall be subject to an adjustment of assessment rates for unsecured debt. Any unsecured debt adjustment shall be made after any adjustment under paragraph (b)(3) of this section.

(i) *Application of unsecured debt adjustment.* The unsecured debt adjustment shall be determined as the sum of the initial base assessment rate plus 40 basis points; that sum shall be multiplied by the ratio of an insured depository institution's long-term unsecured debt to its assessment base. The amount of the reduction in the assessment rate due to the adjustment is equal to the dollar amount of the adjustment divided by the amount of the assessment base.

(ii) *Limitation.* No unsecured debt adjustment for any institution shall exceed the lesser of 5 basis points or 50 percent of the institution's initial base assessment rate.

(iii) *Applicable quarterly reports of condition.* Unsecured debt adjustment ratios for any given quarter shall be calculated from quarterly reports of condition (Consolidated Reports of Condition and Income and Thrift Financial Reports, or any successor reports to either, as appropriate) filed by each institution as of the last day of the quarter.

(2) *Depository institution debt adjustment to initial base assessment rate for all institutions.* All institutions shall be subject to an adjustment of assessment rates for unsecured debt held that is issued by another depository institution. Any such depository institution debt adjustment shall be made after any adjustment under paragraphs (b)(3) and (e)(1) of this section.

(i) *Application of depository institution debt adjustment.* An insured depository institution shall pay a 50 basis point adjustment on the amount of unsecured debt it holds that was issued by another insured depository institution to the extent that such debt exceeds 3 percent of the institution's Tier 1 capital. The amount of long-term unsecured debt issued by another insured depository institution shall be calculated using the same valuation methodology used to calculate the amount of such debt for reporting on the asset side of the balance sheets.

(ii) *Applicable quarterly reports of condition.* Depository institution debt adjustment ratios for any given quarter shall be calculated from quarterly reports of condition (Consolidated Reports of Condition and Income and Thrift Financial Reports, or any successor reports to either, as appropriate) filed by each institution as of the last day of the quarter.

(3) *Brokered deposit adjustment.* All new small institutions in Risk Categories II, III, and IV, all large institutions and all highly complex institutions, except large and highly complex institutions (including new large and new highly complex institutions) that are well capitalized and have a CAMELS composite rating of 1 or 2, shall be subject to an assessment rate adjustment for brokered deposits. Any such brokered deposit adjustment shall be made after any adjustment under paragraphs (b)(3) and (e)(1) and (2) of this

section. The brokered deposit adjustment includes all brokered deposits as defined in Section 29 of the Federal Deposit Insurance Act (12 U.S.C. 1831f), and 12 CFR 337.6, including brokered reciprocal deposits as defined in § 327.8(q), and brokered deposits that consist of balances swept into an insured institution from another institution. The adjustment under this paragraph is limited to those institutions whose ratio of brokered deposits to domestic deposits is greater than 10 percent; asset growth rates do not affect the adjustment. Insured branches of foreign banks are not subject to the brokered deposit adjustment as provided in paragraph (d)(4)(iii) of this section.

(i) *Application of brokered deposit adjustment.* The brokered deposit adjustment shall be determined by multiplying 25 basis points by the ratio of the difference between an insured depository institution's brokered deposits and 10 percent of its domestic deposits to its assessment base.

(ii) *Limitation.* The maximum brokered deposit adjustment will be 10 basis points; the minimum brokered deposit adjustment will be 0.

(iii) *Applicable quarterly reports of condition.* The brokered deposit adjustment for any given quarter shall be calculated from the quarterly reports of condition (Call Reports and Thrift Financial Reports, or any successor reports to either, as appropriate) filed by each institution as of the last day of the quarter.

(f) *Request to be treated as a large institution*—(1) *Procedure.* Any small institution with assets of between $5 billion and $10 billion, excluding assets as described in § 327.17(e), may request that the FDIC determine its assessment rate as a large institution. The FDIC will consider such a request provided that it has sufficient information to do so. Any such request must be made to the FDIC's Division of Insurance and Research. Any approved change will become effective within one year from the date of the request. If an institution whose request has been granted subsequently reports assets of less than $5 billion in its report of condition for four consecutive quarters, excluding assets as described in § 327.17(e), the institution shall be deemed a small institution for assessment purposes.

(2) *Time limit on subsequent request for alternate method.* An institution whose request to be assessed as a large institution is granted by the FDIC shall not be eligible to request that it be assessed as a small institution for a period of three years from the first quarter in which its approved request to be assessed as a large institution became effective. Any request to be assessed as a small institution must be made to the FDIC's Division of Insurance and Research.

(3) *Request for review.* An institution that disagrees with the FDIC's determination that it is a large, highly complex, or small institution may request review of that determination pursuant to § 327.4(c).

(g) *New and established institutions and exceptions*—(1) *New small institutions.* A new small Risk Category I institution shall be assessed the Risk Category I maximum initial base assessment rate for the relevant assessment period. No new small institution in any risk category shall be subject to the unsecured debt adjustment as determined under paragraph (e)(1) of this section. All new small institutions in any Risk Category shall be subject to the depository institution debt adjustment as determined under paragraph (e)(2) of this section. All new small institutions in Risk Categories II, III, and IV shall be subject to the brokered deposit adjustment as determined under paragraph (e)(3) of this section.

(2) *New large institutions and new highly complex institutions.* All new large institutions and all new highly complex institutions shall be assessed under the appropriate method provided at paragraph (b)(1) or (2) of this section and subject to the adjustments provided at paragraphs (b)(3) and (e)(2) and (3) of this section. No new highly complex or large institutions are entitled to adjustment under paragraph (e)(1) of this section. If a large or highly complex institution has not yet received CAMELS ratings, it will be given a weighted CAMELS rating of 2 for assessment purposes until actual CAMELS ratings are assigned.

(3) *CAMELS ratings for the surviving institution in a merger or consolidation.*

When an established institution merges with or consolidates into a new institution, if the FDIC determines the resulting institution to be an established institution under § 327.8(k)(1), its CAMELS ratings for assessment purposes will be based upon the established institution's ratings prior to the merger or consolidation until new ratings become available.

(4) *Rate applicable to institutions subject to subsidiary or credit union exception*—(i) *Established small institutions.* A small institution that is established under § 327.8(k)(4) or (5) shall be assessed as follows:

(A) If the institution does not have a CAMELS composite rating, its initial base assessment rate shall be 2 basis points above the minimum initial base assessment rate applicable to established small institutions until it receives a CAMELS composite rating.

(B) If the institution has a CAMELS composite rating but no CAMELS component ratings, its initial assessment rate shall be determined using the financial ratios method, as set forth in paragraph (a)(1) of this section, but its CAMELS composite rating will be substituted for its weighted average CAMELS component rating and, if the institution has not filed four quarterly reports of condition, then the assessment rate will be determined by annualizing, where appropriate, financial ratios from all quarterly reports of condition that have been filed.

(ii) *Large or highly complex institutions.* If a large or highly complex institution is considered established under § 327.8(k)(4) or (5), but does not have CAMELS component ratings, it will be given a weighted CAMELS rating of 2 for assessment purposes until actual CAMELS ratings are assigned.

(5) *Request for review.* An institution that disagrees with the FDIC's determination that it is a new institution may request review of that determination pursuant to § 327.4(c).

(h) *Assessment rates for bridge depository institutions and conservatorships.* Institutions that are bridge depository institutions under 12 U.S.C. 1821(n) and institutions for which the Corporation has been appointed or serves as conservator shall, in all cases, be assessed at the minimum initial base assessment rate applicable to established small institutions, which shall not be subject to adjustment under paragraph (b)(3) or (e)(1), (2), or (3) of this section.

[81 FR 32207, May 20, 2016, as amended at 83 FR 14568, Apr. 5, 2018; 84 FR 1353, Feb. 4, 2019; 84 FR 4249, Feb. 14, 2019; 85 FR 38292, June 26, 2020; 85 FR 71228, Nov. 9, 2020]

§ 327.17 Mitigating the Deposit Insurance Assessment Effect of Participation in the Money Market Mutual Fund Liquidity Facility, the Paycheck Protection Program Liquidity Facility, and the Paycheck Protection Program.

(a) *Mitigating the assessment effects of loans provided under the Paycheck Protection Program for established small institutions.* Applicable beginning April 1, 2020, the FDIC will take the following actions when calculating the assessment rate for established small institutions under § 327.16:

(1) *Exclusion of loans provided under the Paycheck Protection Program from net income before taxes ratio, nonperforming loans and leases ratio, other real estate owned ratio, brokered deposit ratio, and one-year asset growth measure.* As described in appendix E to this subpart, the FDIC will exclude the outstanding balance of loans provided under the Paycheck Protection Program, as reported on the Consolidated Report of Condition and Income, from the total assets in the calculation of the following risk measures: Net income before taxes ratio, the nonperforming loans and leases ratio, the other real estate owned ratio, the brokered deposit ratio, and the one-year asset growth measure, which are described in § 327.16(a)(1)(ii)(A).

(2) *Exclusion of loans provided under the Paycheck Protection Program from Loan Mix Index.* As described in appendix E to this subpart A, when calculating the loan mix index described in § 327.16(a)(1)(ii)(B), the FDIC will exclude:

(i) The outstanding balance of loans provided under the Paycheck Protection Program, as reported on the Consolidated Report of Condition and Income, from the total assets; and

(ii) The outstanding balance loans provided under the Paycheck Protection Program, as reported on the Consolidated Report of Condition and Income, from an established small institution's balance of commercial and industrial loans. To the extent that the outstanding balance of loans provided under the Paycheck Protection Program exceeds an established small institution's balance of commercial and industrial loans, as reported on the Consolidated Report of Condition and Income, the FDIC will exclude any remaining balance of these loans from the balance of agricultural loans, up to the amount of agricultural loans, in the calculation of the loan mix index.

(b) *Mitigating the assessment effects of loans provided under the Paycheck Protection Program for large or highly complex institutions.* Applicable beginning April 1, 2020, the FDIC will take the following actions when calculating the assessment rate for large institutions and highly complex institutions under § 327.16:

(1) *Exclusion of Paycheck Protection Program loans from average short-term funding ratio, core earnings ratio, growth-adjusted portfolio concentration measure, and trading asset ratio.* As described in appendix E of this subpart, the FDIC will exclude the outstanding balance of loans provided under the Paycheck Protection Program, as reported on the Consolidated Report of Condition and Income, from the calculation of the average short-term funding ratio, the core earnings ratio, the growth-adjusted portfolio concentration measure, and the trading asset ratio.

(2) *Exclusion of Paycheck Protection Program Liquidity Facility borrowings from core deposit ratio.* As described in appendix E of this subpart, the FDIC will exclude the total outstanding balance of borrowings from the Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility, as reported on the Consolidated Report of Condition and Income, from the calculation of the core deposit ratio.

(3) *Exclusion of Paycheck Protection Program Liquidity Facility borrowings from balance sheet liquidity ratio.* As described in appendix E to this subpart, when calculating the balance sheet liquidity measure described under appendix A to this subpart, the FDIC will:

(i) Include the outstanding balance of loans provided under the Paycheck Protection Program that exceed total borrowings from the Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility, as reported on the Consolidated Report of Condition and Income, in the amount of highly liquid assets until September 30, 2020, or, if the Board of Governors of the Federal Reserve System and the Secretary of the Treasury determine to extend the Paycheck Protection Program Liquidity Facility, until such date of extension; and

(ii) Exclude the outstanding balance of borrowings from the Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility with a remaining maturity of one year or less from other borrowings with a remaining maturity of one year or less, both as reported on the Consolidated Report of Condition and Income.

(4) *Exclusion of loans provided under the Paycheck Protection Program and Paycheck Protection Program Liquidity Facility borrowings from loss severity measure.* As described in appendix E to this subpart, when calculating the loss severity measure described under appendix A to this subpart, the FDIC will exclude:

(i) The total outstanding balance of borrowings from the Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility, as reported on the Consolidated Report of Condition and Income, from short- and long-term secured borrowings, as appropriate; and

(ii) The outstanding balance of loans provided under the Paycheck Protection Program, as reported on the Consolidated Report of Condition and Income, from an institution's balance of commercial and industrial loans. To the extent that the outstanding balance of loans provided under the Paycheck Protection Program exceeds an institution's balance of commercial and industrial loans, the FDIC will exclude any remaining balance from all other loans, up to the total amount of

all other loans, followed by agricultural loans, up to the total amount of agricultural loans, as reported on the Consolidated Report of Condition and Income. To the extent that an institution's outstanding balance of loans provided under the Paycheck Protection Program exceeds its borrowings from the Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility, the FDIC will add the amount of outstanding loans provided under the Paycheck Protection Program in excess of borrowings under the Paycheck Protection Program Liquidity Facility to cash.

(c) *Mitigating the effects of loans provided under the Paycheck Protection Program and assets purchased under the Money Market Mutual Fund Liquidity Facility on the unsecured adjustment, depository institution debt adjustment, and the brokered deposit adjustment to an insured depository institution's assessment rate.* As described in appendix E to this subpart, when calculating an insured depository institution's unsecured debt adjustment, depository institution debt adjustment, or the brokered deposit adjustment described in § 327.16(e), as applicable, the FDIC will exclude the outstanding balance of loans provided under the Paycheck Protection Program and the quarterly average amount of assets purchased under the Money Market Mutual Fund Liquidity Facility, both as reported on the Consolidated Report of Condition and Income.

(d) *Mitigating the effects on the assessment base attributable to loans provided under the Paycheck Protection Program and participation in the Money Market Mutual Fund Liquidity Facility.* As described in appendix E to this subpart, when calculating an insured depository institution's quarterly deposit insurance assessment payment due under this part, the FDIC will provide an offset to an institution's assessment for the increase to its assessment base attributable to participation in the Money Market Mutual Fund Liquidity Facility and loans provided under the Paycheck Protection Program.

(1) *Calculation of offset amount.* (i) To determine the offset amount, the FDIC will take the sum of the outstanding balance of loans provided under the Paycheck Protection Program and the quarterly average amount of assets purchased under the Money Market Mutual Fund Liquidity Facility, both as reported on the Consolidated Report of Condition and Income, and multiply the sum by an institution's total base assessment rate, as calculated under § 327.16, including any adjustments under § 327.16(e).

(ii) To the extent that an institution does not report the outstanding balance of loans provided under the Paycheck Protection Program, such as in an insured branch's Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, the FDIC will take the sum of either the quarterly average amount of loans pledged to the Paycheck Protection Program Liquidity Facility as reported in the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, or the outstanding balance of loans provided under the Paycheck Protection Program, as such certified data is provided to the FDIC, and the quarterly average amount of assets purchased under the Money Market Mutual Fund Liquidity Facility, as reported in the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, and multiply the sum by an institution's total base assessment rate, as calculated under § 327.16.

(2) *Calculation of assessment amount due.* The FDIC will subtract the offset amount described in § 327.17(d)(1) from an insured depository institution's total assessment amount, consistent with § 327.3(b)(1).

(e) *Mitigating the effects of loans provided under the Paycheck Protection Program and assets purchased under the Money Market Mutual Fund Liquidity Facility on the classification of insured depository institutions as small, large, or highly complex for deposit insurance purposes.* When classifying an insured depository institution as small, large, or complex for assessment purposes under § 327.8, the FDIC will exclude from an institution's total assets the outstanding balance of loans provided

under the Paycheck Protection Program and the balance of assets purchased under the Money Market Mutual Fund Liquidity Facility outstanding, both as reported on the Consolidated Report of Condition and Income. Any institution with assets of between $5 billion and $10 billion, excluding the outstanding balance of loans provided under the Paycheck Protection Program and the balance of assets purchased under the MMLF, both as reported on the Consolidated Report of Condition and Income, may request that the FDIC determine its assessment rate as a large institution under § 327.16(f).

(f) *Definitions*. For the purposes of this section:

(1) *Paycheck Protection Program*. The term ''Paycheck Protection Program'' means the program of that name that was created in section 1102 of the Coronavirus Aid, Relief, and Economic Security Act.

(2) *Paycheck Protection Program Liquidity Facility*. The term ''Paycheck Protection Program Liquidity Facility'' means the program of that name that was announced by the Board of Governors of the Federal Reserve System on April 9, 2020, and renamed as such on April 30, 2020.

(3) *Money Market Mutual Fund Liquidity Facility*. The term ''Money Market Mutual Fund Liquidity Facility'' means the program of that name announced by the Board of Governors of the Federal Reserve System on March 18, 2020.

[85 FR 38293, June 26, 2020]

APPENDIX A TO SUBPART A OF PART 327—METHOD TO DERIVE PRICING MULTIPLIERS AND UNIFORM AMOUNT

I. INTRODUCTION

The uniform amount and pricing multipliers are derived from:

- A model (the Statistical Model) that estimates the probability that a Risk Category I institution will be downgraded to a composite CAMELS rating of 3 or worse within one year;
- Minimum and maximum downgrade probability cutoff values, based on data from June 30, 2008, that will determine which small institutions will be charged the minimum and maximum initial base assessment rates applicable to Risk Category I;
- The minimum initial base assessment rate for Risk Category I, equal to 12 basis points, and
- The maximum initial base assessment rate for Risk Category I, which is four basis points higher than the minimum rate.

II. THE STATISTICAL MODEL

The Statistical Model is defined in equations 1 and 3 below.

Equation 1

$\text{Downgrade}(0,1)_{i,t} = \beta_0 + \beta_1$ (Leverage ratio_T) + β_2 (Loans past due 30 to 89 days $\text{ratio}_{i,t}$) + β_3 (Nonperforming asset $\text{ratio}_{i,t}$) + β_4 (Net loan charge-off $\text{ratio}_{i,t}$) + β_5 (Net income before taxes $\text{ratio}_{i,t}$) + β_6 (Adjusted brokered deposit $\text{ratio}_{i,t}$) + β_7 (Weighted average CAMELS component $\text{rating}_{i,t}$) where $\text{Downgrade}(01)_{i,t}$ (the dependent variable—the event being explained) is the incidence of downgrade from a composite rating of 1 or 2 to a rating of 3 or worse during an on-site examination for an institution i between 3 and 12 months after time t. Time t is the end of a year within the multi-year period over which the model was estimated (as explained below). The dependent variable takes a value of 1 if a downgrade occurs and 0 if it does not.

The explanatory variables (regressors) in the model are six financial ratios and a weighted average of the ''C,'' ''A,'' ''M,'' ''E'' and ''L'' component ratings. The six financial ratios included in the model are:

- Leverage ratio
- Loans past due 30–89 days/Gross assets
- Nonperforming assets/Gross assets
- Net loan charge-offs/Gross assets
- Net income before taxes/Risk-weighted assets
- Brokered deposits/domestic deposits above the 10 percent threshold, adjusted for the asset growth rate factor

Table A.1 defines these six ratios along with the weighted average of CAMELS component ratings. The adjusted brokered deposit ratio ($B_{i,T}$) is calculated by multiplying the ratio of brokered deposits to domestic deposits above the 10 percent threshold by an asset growth rate factor that ranges from 0 to 1 as shown in Equation 2 below. The asset growth rate factor ($A_{i,T}$) is calculated by subtracting 0.4 from the four-year cumulative gross asset growth rate (expressed as a number rather than as a percentage), adjusted for mergers and acquisitions, and multiplying the remainder by 3⅓. The factor cannot be less than 0 or greater than 1.

Equation 2

$$B_{i,T} = \left(\frac{Brokered\ Deposits_{i,T}}{Domestic\ Deposits_{i,T}} - 0.10 \right) * A_{i,T}$$

$$\text{where } A_{i,T} = \left[\left(\frac{GrossAssets_{i,T} - GrossAssets_{i,T-4}}{GrossAssets_{i,T-4}} - 0.4 \right) * \frac{10}{3} \right], \text{ subject to } 0 \le A_{i,T} \le 1 \text{ and } B_{i,T} \ge 0.$$

The component rating for sensitivity to market risk (the ''S'' rating) is not available for years prior to 1997. As a result, and as described in Table A.1, the Statistical Model is estimated using a weighted average of five component ratings excluding the ''S'' component. Delinquency and non-accrual data on government guaranteed loans are not available before 1993 for Call Report filers and before the third quarter of 2005 for TFR filers. As a result, and as also described in Table A.1, the Statistical Model is estimated without deducting delinquent or past-due government guaranteed loans from either the loans past due 30–89 days to gross assets ratio or the nonperforming assets to gross assets ratio. Reciprocal deposits are not presently reported in the Call Report or TFR. As a result, and as also described in Table A.1, the Statistical Model is estimated without deducting reciprocal deposits from brokered deposits in determining the adjusted brokered deposit ratio.

TABLE A.1—DEFINITIONS OF REGRESSORS

Regressor	Description
Leverage ratio (%)	Tier 1 capital for Prompt Corrective Action (PCA) divided by adjusted average assets based on the definition for prompt corrective action.
Loans Past Due 30–89 Days/Gross Assets (%)	Total loans and lease financing receivables past due 30 through 89 days and still accruing interest divided by gross assets (gross assets equal total assets plus allowance for loan and lease financing receivable losses and allocated transfer risk).
Nonperforming Assets/Gross Assets (%)	Sum of total loans and lease financing receivables past due 90 or more days and still accruing interest, total nonaccrual loans and lease financing receivables, and other real estate owned divided by gross assets.
Net Loan Charge-Offs/Gross Assets (%)	Total charged-off loans and lease financing receivables debited to the allowance for loan and lease losses less total recoveries credited to the allowance to loan and lease losses for the most recent twelve months divided by gross assets.
Net Income before Taxes/Risk-Weighted Assets (%).	Income before income taxes and extraordinary items and other adjustments for the most recent twelve months divided by risk-weighted assets.
Adjusted brokered deposit ratio (%)	Brokered deposits divided by domestic deposits less 0.10 multiplied by the asset growth rate factor (which is the term $A_{i,T}$ as defined in equation 2 above) that ranges between 0 and 1.
Weighted Average of C, A, M, E and L Component Ratings.	The weighted sum of the ''C,'' ''A,'' ''M,'' ''E'' and ''L'' CAMELS components, with weights of 28 percent each for the ''C'' and ''M'' components, 22 percent for the ''A'' component, and 11 percent each for the ''E'' and ''L'' components. (For the regression, the ''S'' component is omitted.)

The financial variable regressors used to estimate the downgrade probabilities are obtained from quarterly reports of condition (Reports of Condition and Income and Thrift Financial Reports). The weighted average of the ''C,'' ''A,'' ''M,'' ''E'' and ''L'' component ratings regressor is based on component ratings obtained from the most recent bank examination conducted within 24 months before the date of the report of condition.

The Statistical Model uses ordinary least squares (OLS) regression to estimate downgrade probabilities. The model is estimated with data from a multi-year period (as explained below) for all institutions in Risk Category I, except for institutions established within five years before the date of the report of condition.

The OLS regression estimates coefficients, β_j for a given regressor j and a constant amount, β_0, as specified in equation 1. As shown in equation 3 below, these coefficients are multiplied by values of risk measures at time T, which is the date of the report of condition corresponding to the end of the quarter for which the assessment rate is computed. The sum of the products is then added to the constant amount to produce an estimated probability, d_{iT}, that an institution will be downgraded to 3 or worse within 3 to 12 months from time T.

The risk measures are financial ratios as defined in Table A.1, except that: (1) The loans past due 30 to 89 days ratio and the nonperforming asset ratio are adjusted to exclude the maximum amount recoverable

from the U.S. Government, its agencies or government-sponsored agencies, under guarantee or insurance provisions; (2) the weighted sum of six CAMELS component ratings is used, with weights of 25 percent each for the ''C'' and ''M'' components, 20 percent for the ''A'' component, and 10 percent each for the ''E,'' ''L,'' and ''S'' components; and (3) reciprocal deposits are deducted from brokered deposits in determining the adjusted brokered deposit ratio.

Equation 3

$d_{iT} = \beta_0 + \beta_1$ (Leverage ratio_{iT}) + β_2 (Loans past due 30 to 89 days ratio_{iT}) + β_3 (Nonperforming asset ratio_{iT}) + β_4 (Net loan charge-off ratio_{iT}) + β_5 (Net income before taxes ratio_{iT}) + β_6 (Adjusted brokered deposit ratio_{iT}) + β_7 (Weighted average CAMELS component rating_{iT})

III. Minimum and Maximum Downgrade Probability Cutoff Values

The pricing multipliers are also determined by minimum and maximum downgrade probability cutoff values, which will be computed as follows:

- The minimum downgrade probability cutoff value will be the maximum downgrade probability among the twenty-five percent of all small insured institutions in Risk Category I (excluding new institutions) with the lowest estimated downgrade probabilities, computed using values of the risk measures as of June 30, 2008.[1][2] The minimum downgrade probability cutoff value is 0.0182.
- The maximum downgrade probability cutoff value will be the minimum downgrade probability among the fifteen percent of all small insured institutions in Risk Category I (excluding new institutions) with the highest estimated downgrade probabilities, computed using values of the risk measures as of June 30, 2008. The maximum downgrade probability cutoff value is 0.1506.

IV. Derivation of Uniform Amount and Pricing Multipliers

The uniform amount and pricing multipliers used to compute the annual base assessment rate in basis points, P_{iT}, for any such institution i at a given time T will be determined from the Statistical Model, the minimum and maximum downgrade probability cutoff values, and minimum and maximum initial base assessment rates in Risk Category I as follows:

Equation 4

$P_{iT} = \alpha_0 + \alpha_1 * d_{iT}$ subject to $Min \leq P_{iT} \leq Min + 4$

where α_0 and α_1 are a constant term and a scale factor used to convert d_{iT} (the estimated downgrade probability for institution i at a given time T from the Statistical Model) to an assessment rate, respectively, and *Min* is the minimum initial base assessment rate expressed in basis points. (P_{iT} is expressed as an annual rate, but the actual rate applied in any quarter will be $P_{iT}/4$.) The maximum initial base assessment rate is 4 basis points above the minimum (*Min* + 4)

Solving equation 4 for minimum and maximum initial base assessment rates simultaneously,

$Min = \alpha_0 + \alpha_1 * 0.0182$ and $Min + 4 = \alpha_0 + \alpha_1 * 0.1506$

where 0.0182 is the minimum downgrade probability cutoff value and 0.1506 is the maximum downgrade probability cutoff value, results in values for the constant amount, α_0 and the scale factor, α_1:

Equation 5

$$\alpha_0 = Min - \frac{4 * 0.0182}{(0.1506 - 0.0182)} = Min - 0.550$$

and *Equation 6*

$$\alpha_1 = \frac{4}{(0.1506 - 0.0182)} = 30.211$$

Substituting equations 3, 5 and 6 into equation 4 produces an annual initial base assessment rate for institution i at time T, P_{iT}, in terms of the uniform amount, the pricing multipliers and the ratios and weighted average CAMELS component rating referred to in 12 CFR 327.9(d)(2)(i):

Equation 7

$P_{iT} = [(\text{Min} - 0.550) + 30.211 * \beta_0] + 30.211 * [\beta_1$ (Leverage ratio_T)] + $30.211 * [\beta_2$ (Loans past due 30 to 89 days ratio_T)] + $30.211 * [\beta_3$ (Nonperforming asset ratio_T)] + $30.211 * [\beta_4$ (Net loan charge-off ratio_T)] + $30.211 * [\beta_5$ (Net income before taxes ratio_T)] + $30.211 * [\beta_6$ (Adjusted brokered deposit ratio_T)] + $30.211 * [\beta_7$ (Weighted average CAMELS component rating_T)]

again subject to $\text{Min} \leq P_{iT} \leq \text{Min} + 4$

where $(\text{Min} - 0.550) + 30.211 * \beta_0$ equals the uniform amount, $30.211 * \beta_j$ is a pricing multiplier for the associated risk measure j, and T is the date of the report of condition corresponding to the end of the quarter for which the assessment rate is computed.

[1] As used in this context, a ''new institution'' means an institution that has been chartered as a bank or thrift for less than five years.

[2] For purposes of calculating the minimum and maximum downgrade probability cutoff values, institutions that have less than $100,000 in domestic deposits are assumed to have no brokered deposits.

V. Updating the Statistical Model, Uniform Amount, and Pricing Multipliers

The initial Statistical Model is estimated using year-end financial ratios and the weighted average of the ''C,'' ''A,'' ''M,'' ''E'' and ''L'' component ratings over the 1988 to 2006 period and downgrade data from the 1989 to 2007 period. The FDIC may, from time to time, but no more frequently than annually, re-estimate the Statistical Model with updated data and publish a new formula for determining initial base assessment rates—equation 7—based on updated uniform amounts and pricing multipliers. However, the minimum and maximum downgrade probability cutoff values will not change without additional notice-and-comment rulemaking. The period covered by the analysis will be lengthened by one year each year; however, from time to time, the FDIC may drop some earlier years from its analysis.

VI. Description of Scorecard Measures

Scorecard measures [1]	Description
Leverage Ratio	Tier 1 capital for Prompt Corrective Action (PCA) divided by adjusted average assets based on the definition for prompt corrective action.
Concentration Measure for Large Insured depository institutions (excluding Highly Complex Institutions).	The concentration score for large institutions is the higher of the following two scores:
(1) Higher-Risk Assets/Tier 1 Capital and Reserves [2].	Sum of construction and land development (C&D) loans (funded and unfunded), higher-risk C&I loans (funded and unfunded), nontraditional mortgages, higher-risk consumer loans, and higher-risk securitizations divided by Tier 1 capital and reserves. See Appendix C for the detailed description of the ratio.
(2) Growth-Adjusted Portfolio Concentrations [2].	The measure is calculated in the following steps: (1) Concentration levels (as a ratio to Tier 1 capital and reserves) are calculated for each broad portfolio category: • C&D, • Other commercial real estate loans, • First lien residential mortgages (including non-agency residential mortgage-backed securities), • Closed-end junior liens and home equity lines of credit (HELOCs), • Commercial and industrial loans, • Credit card loans, and • Other consumer loans. (2) Risk weights are assigned to each loan category based on historical loss rates. (3) Concentration levels are multiplied by risk weights and squared to produce a risk-adjusted concentration ratio for each portfolio. (4) Three-year merger-adjusted portfolio growth rates are then scaled to a growth factor of 1 to 1.2 where a 3-year cumulative growth rate of 20 percent or less equals a factor of 1 and a growth rate of 80 percent or greater equals a factor of 1.2. If three years of data are not available, a growth factor of 1 will be assigned. (5) The risk-adjusted concentration ratio for each portfolio is multiplied by the growth factor and resulting values are summed. See Appendix C for the detailed description of the measure.
Concentration Measure for Highly Complex Institutions.	Concentration score for highly complex institutions is the highest of the following three scores:
(1) Higher-Risk Assets/Tier 1 Capital and Reserves [2].	Sum of C&D loans (funded and unfunded), higher-risk C&I loans (funded and unfunded), nontraditional mortgages, higher-risk consumer loans, and higher-risk securitizations divided by Tier 1 capital and reserves. See Appendix C for the detailed description of the measure.
(2) Top 20 Counterparty Exposure/Tier 1 Capital and Reserves [2].	Sum of the 20 largest total exposure amounts to counterparties divided by Tier 1 capital and reserves. The total exposure amount is equal to the sum of the institution's exposure amounts to one counterparty (or borrower) for derivatives, securities financing transactions (SFTs), and cleared transactions, and its gross lending exposure (including all unfunded commitments) to that counterparty (or borrower). A counterparty includes an entity's own affiliates. Exposures to entities that are affiliates of each other are treated as exposures to one counterparty (or borrower). Counterparty exposure excludes all counterparty exposure to the U.S. Government and departments or agencies of the U.S. Government that is unconditionally guaranteed by the full faith and credit of the United States. The exposure amount for derivatives, including OTC derivatives, cleared transactions that are derivative contracts, and netting sets of derivative contracts, must be calculated using the methodology set forth in 12 CFR 324.34(b), but without any reduction for collateral other than cash collateral that is all or part of variation margin and that satisfies the requirements of 12 CFR 324.10(c)(4)(ii)(C)(*1*)(*ii*) and (*iii*) and 324.10(c)(4)(ii)(C)(*3*) through (*7*). The exposure amount associated with SFTs, including cleared transactions that are SFTs, must be calculated using the standardized approach set forth in 12 CFR 324.37(b) or (c). For both derivatives and SFT exposures, the exposure amount to central counterparties must also include the default fund contribution.[3]

Scorecard measures [1]	Description
(3) Largest Counterparty Exposure/Tier 1 Capital and Reserves [2].	The largest total exposure amount to one counterparty divided by Tier 1 capital and reserves. The total exposure amount is equal to the sum of the institution's exposure amounts to one counterparty (or borrower) for derivatives, SFTs, and cleared transactions, and its gross lending exposure (including all unfunded commitments) to that counterparty (or borrower). A counterparty includes an entity's own affiliates. Exposures to entities that are affiliates of each other are treated as exposures to one counterparty (or borrower). Counterparty exposure excludes all counterparty exposure to the U.S. Government and departments or agencies of the U.S. Government that is unconditionally guaranteed by the full faith and credit of the United States. The exposure amount for derivatives, including OTC derivatives, cleared transactions that are derivative contracts, and netting sets of derivative contracts, must be calculated using the methodology set forth in 12 CFR 324.34(b), but without any reduction for collateral other than cash collateral that is all or part of variation margin and that satisfies the requirements of 12 CFR 324.10(c)(4)(ii)(C)(*1*)(*ii*) and (*iii*) and 324.10(c)(4)(ii)(C)(*3*) through (*7*). The exposure amount associated with SFTs, including cleared transactions that are SFTs, must be calculated using the standardized approach set forth in 12 CFR 324.37(b) or (c). For both derivatives and SFT exposures, the exposure amount to central counterparties must also include the default fund contribution.[3]
Core Earnings/Average Quarter-End Total Assets.	Core earnings are defined as net income less extraordinary items and tax-adjusted realized gains and losses on available-for-sale (AFS) and held-to-maturity (HTM) securities, adjusted for mergers. The ratio takes a four-quarter sum of merger-adjusted core earnings and divides it by an average of five quarter-end total assets (most recent and four prior quarters). If four quarters of data on core earnings are not available, data for quarters that are available will be added and annualized. If five quarters of data on total assets are not available, data for quarters that are available will be averaged.
Credit Quality Measure ..	The credit quality score is the higher of the following two scores:
(1) Criticized and Classified Items/Tier 1 Capital and Reserves [2].	Sum of criticized and classified items divided by the sum of Tier 1 capital and reserves. Criticized and classified items include items an institution or its primary federal regulator have graded "Special Mention" or worse and include retail items under Uniform Retail Classification Guidelines, securities, funded and unfunded loans, other real estate owned (ORE), other assets, and marked-to-market counterparty positions, less credit valuation adjustments.[4] Criticized and classified items exclude loans and securities in trading books, and the amount recoverable from the U.S. government, its agencies, or government-sponsored enterprises, under guarantee or insurance provisions.
(2) Underperforming Assets/Tier 1 Capital and Reserves [2].	Sum of loans that are 30 days or more past due and still accruing interest, nonaccrual loans, restructured loans (including restructured 1–4 family loans), and ORE, excluding the maximum amount recoverable from the U.S. government, its agencies, or government-sponsored enterprises, under guarantee or insurance provisions, divided by a sum of Tier 1 capital and reserves.
Core Deposits/Total Liabilities.	Total domestic deposits excluding brokered deposits and uninsured non-brokered time deposits divided by total liabilities.
Balance Sheet Liquidity Ratio.	Sum of cash and balances due from depository institutions, federal funds sold and securities purchased under agreements to resell, and the market value of available for sale and held to maturity agency securities (excludes agency mortgage-backed securities but includes all other agency securities issued by the U.S. Treasury, U.S. government agencies, and U.S. government-sponsored enterprises) divided by the sum of federal funds purchased and repurchase agreements, other borrowings (including FHLB) with a remaining maturity of one year or less, 5 percent of insured domestic deposits, and 10 percent of uninsured domestic and foreign deposits.[5]
Potential Losses/Total Domestic Deposits (Loss Severity Measure) [6].	Potential losses to the DIF in the event of failure divided by total domestic deposits. Appendix D describes the calculation of the loss severity measure in detail.
Market Risk Measure for Highly Complex Institutions.	The market risk score is a weighted average of the following three scores:
(1) Trading Revenue Volatility/Tier 1 Capital.	Trailing 4-quarter standard deviation of quarterly trading revenue (merger-adjusted) divided by Tier 1 capital.
(2) Market Risk Capital/Tier 1 Capital.	Market risk capital divided by Tier 1 capital.[7]
(3) Level 3 Trading Assets/Tier 1 Capital.	Level 3 trading assets divided by Tier 1 capital.
Average Short-term Funding/Average Total Assets.	Quarterly average of federal funds purchased and repurchase agreements divided by the quarterly average of total assets as reported on Schedule RC–K of the Call Reports.

[1] The FDIC retains the flexibility, as part of the risk-based assessment system, without the necessity of additional notice-and-comment rulemaking, to update the minimum and maximum cutoff values for all measures used in the scorecard. The FDIC may update the minimum and maximum cutoff values for the higher-risk assets to Tier 1 capital and reserves ratio in order to maintain an approximately similar distribution of higher-risk assets to Tier 1 capital and reserves ratio scores as reported prior to April 1, 2013, or to avoid changing the overall amount of assessment revenue collected. 76 FR 10672, 10700 (February 25, 2011). The FDIC will review changes in the distribution of the higher-risk assets to Tier 1 capital and reserves ratio scores and the resulting effect on total assessments and risk differentiation between banks when determining changes to the cutoffs. The FDIC may update the cutoff values for the higher-risk assets to Tier 1 capital and reserves ratio more frequently than annually. The FDIC will provide banks with a minimum one quarter advance notice of changes in the cutoff values for the higher-risk assets to Tier 1 capital and reserves ratio with their quarterly deposit insurance invoice.

[2] The applicable portions of the current expected credit loss methodology (CECL) transitional amounts attributable to the allowance for credit losses on loans and leases held for investment and added to retained earnings for regulatory capital purposes pursuant to the regulatory capital regulations, as they may be amended from time to time (12 CFR part 3, 12 CFR part 217, 12 CFR part 324, 85 FR 61577 (Sept. 30, 2020), and 84 FR 4222 (Feb. 14, 2019)), will be removed from the sum of Tier 1 capital and reserves.

[3] SFTs include repurchase agreements, reverse repurchase agreements, security lending and borrowing, and margin lending transactions, where the value of the transactions depends on market valuations and the transactions are often subject to margin agreements. The default fund contribution is the funds contributed or commitments made by a clearing member to a central counterparty's mutualized loss sharing arrangement. The other terms used in this description are as defined in 12 CFR part 324, subparts A and D, unless defined otherwise in 12 CFR part 327.

[4] A marked-to-market counterparty position is equal to the sum of the net marked-to-market derivative exposures for each counterparty. The net marked-to-market derivative exposure equals the sum of all positive marked-to-market exposures net of legally enforceable netting provisions and net of all collateral held under a legally enforceable CSA plus any exposure where excess collateral has been posted to the counterparty. For purposes of the Criticized and Classified Items/Tier 1 Capital and Reserves definition a marked-to-market counterparty position less any credit valuation adjustment can never be less than zero.

[5] Deposit runoff rates for the balance sheet liquidity ratio reflect changes issued by the Basel Committee on Banking Supervision in its December 2010 document, ''Basel III: International Framework for liquidity risk measurement, standards, and monitoring,'' *http://www.bis.org/publ/bcbs188.pdf.*

[6] The applicable portions of the CECL transitional amounts attributable to the allowance for credit losses on loans and leases held for investment and added to retained earnings for regulatory capital purposes will be removed from the calculation of the loss severity measure.

[7] *Market risk* is defined in 12 CFR 324.202.

[74 FR 9557, Mar. 4, 2009, as amended at 76 FR 10720, Feb. 25, 2011; 76 FR 17521, Mar. 30, 2011; 77 FR 66015, Oct. 31, 2012; 78 FR 55904, Sept. 10, 2013; 79 FR 70437, Nov. 26, 2014; 83 FR 17740, Apr. 24, 2018; 85 FR 4443, Jan. 24, 2020; 85 FR 71228, Nov. 9, 2020; 86 FR 11399, Feb. 25, 2021]

APPENDIX B TO SUBPART A OF PART 327—CONVERSION OF SCORECARD MEASURES INTO SCORE

1. Weighted Average CAMELS Rating

Weighted average CAMELS ratings between 1 and 3.5 are assigned a score between 25 and 100 according to the following equation:

$S = 25 + [(20/3) * (C^2 - 1)]$,

where:

S = the weighted average CAMELS score; and

C = the weighted average CAMELS rating.

2. Other Scorecard Measures

For certain scorecard measures, a lower ratio implies lower risk and a higher ratio implies higher risk. These measures include:

- Concentration measure;
- Credit quality measure;
- Market risk measure;
- Average short-term funding to average total assets ratio; and
- Potential losses to total domestic deposits ratio (loss severity measure).

For those measures, a value between the minimum and maximum cutoff values is converted linearly to a score between 0 and 100, according to the following formula:

$S = (V - \text{Min}) * 100/(\text{Max} - \text{Min})$,

where S is score (rounded to three decimal points), V is the value of the measure, Min is the minimum cutoff value and Max is the maximum cutoff value.

For other scorecard measures, a lower value represents higher risk and a higher value represents lower risk. These measures include:

- Leverage ratio;
- Core earnings to average quarter-end total assets ratio;
- Core deposits to total liabilities ratio; and
- Balance sheet liquidity ratio.

For those measures, a value between the minimum and maximum cutoff values is converted linearly to a score between 0 and 100, according to the following formula:

$S = (\text{Max} - V) * 100/(\text{Max} - \text{Min})$,

where S is score (rounded to three decimal points), V is the value of the measure, Max is the maximum cutoff value and Min is the minimum cutoff value.

[76 FR 10720, Feb. 25, 2011]

APPENDIX C TO SUBPART A OF PART 327—DESCRIPTION OF CONCENTRATION MEASURES

I. CONCENTRATION MEASURES

The concentration score for large banks is the higher of the higher-risk assets to Tier 1 capital and reserves score or the growth-adjusted portfolio concentrations score.[1] The concentration score for highly complex institutions is the highest of the higher-risk assets to Tier 1 capital and reserves score, the Top 20 counterparty exposure to Tier 1 capital and reserves score, or the largest counterparty to Tier 1 capital and reserves score.[2] The higher-risk assets to Tier 1 capital and reserves ratio and the growth-adjusted portfolio concentration measure are described herein.

[1] For the purposes of this Appendix, the term ''bank'' means insured depository institution.

[2] As described in Appendix A to this subpart, the applicable portions of the current expected credit loss methodology (CECL) transitional amounts attributable to the allowance for credit losses on loans and leases

A. Higher-Risk Assets/Tier 1 Capital and Reserves

The higher-risk assets to Tier 1 capital and reserves ratio is the sum of the concentrations in each of five risk areas described below and is calculated as:

$$H_i = \sum_{k=1}^{5} \left(\frac{\text{Amount of Exposure}_{i,k}}{\text{Tier 1 Capital} + \text{Reserves}_i} \right)$$

Where:

H_i is bank i's higher-risk concentration measure and k is a risk area.[3] The five risk areas (k) are: construction and land development (C&D) loans; higher-risk commercial and industrial (C&I) loans and securities; higher-risk consumer loans; nontraditional mortgage loans; and higher-risk securitizations.

1. Construction and Land Development Loans

Construction and land development loans include construction and land development loans outstanding and unfunded commitments to fund construction and land development loans, whether irrevocable or unconditionally cancellable.[4]

2. Higher-Risk Commercial and Industrial (C&I) Loans and Securities

Definitions

Higher-Risk C&I Loans and Securities

Higher-risk C&I loans and securities are:

(a) All commercial and industrial (C&I) loans (including funded amounts and the amount of unfunded commitments, whether irrevocable or unconditionally cancellable) owed to the reporting bank (*i.e.*, the bank filing its report of condition and income, or Call Report) by a higher-risk C&I borrower, as that term is defined herein, regardless when the loans were made;[5] [6] and

(b) All securities, except securities classified as trading book, issued by a higher-risk C&I borrower, as that term is defined herein, that are owned by the reporting bank, without regard to when the securities were purchased; however, higher-risk C&I loans and securities exclude:

held for investment and added to retained earnings for regulatory capital purposes pursuant to the regulatory capital regulations, as they may be amended from time to time (12 CFR part 3, 12 CFR part 217, 12 CFR part 324, 85 FR 61577 (Sept. 30, 2020), and 84 FR 4222 (Feb. 14, 2019)), will be removed from the sum of Tier 1 capital and reserves throughout the large bank and highly complex bank scorecards, including in the ratio of Higher-Risk Assets to Tier 1 Capital and Reserves, the Growth-Adjusted Portfolio Concentrations Measure, the ratio of Top 20 Counterparty Exposure to Tier 1 Capital and Reserves, and the Ratio of Largest Counterparty Exposure to Tier 1 Capital and Reserves.

[3] The higher-risk concentration ratio is rounded to two decimal points.

[4] Construction and land development loans are as defined in the instructions to Call Report Schedule RC–C Part I—Loans and Leases, as they may be amended from time to time, and include items reported on line items RC–C 1.a.1 (1–4 family residential construction loans), RC–C 1.a.2. (Other construction loans and all land development and other land loans), and RC–O M.10.a (Total unfunded commitments to fund construction, land development, and other land loans secured by real estate), and exclude RC–O M.10.b (Portion of unfunded commitments to fund construction, land development and other loans that are guaranteed or insured by the U.S. government, including the FDIC), RC–O M.13.a (Portion of funded construction, land development, and other land loans guaranteed or insured by the U.S. government, excluding FDIC loss sharing agreements), RC–M 13a.1.a.1 (1–4 family construction and land development loans covered by loss sharing agreements with the FDIC), and RC–M 13a.1.a.2 (Other construction loans and all land development loans covered by loss sharing agreements with the FDIC).

[5] Commercial and industrial loans are as defined as commercial and industrial loans in the instructions to Call Report Schedule RC–C Part I—Loans and Leases, as they may be amended from time to time. This definition includes purchased credit impaired loans and overdrafts.

[6] Unfunded commitments are defined as unused commitments, as this term is defined in the instructions to Call Report Schedule RC–L, Derivatives and Off-Balance Sheet Items, as they may be amended from time to time.

(a) The maximum amount that is recoverable from the U.S. government under guarantee or insurance provisions;

(b) Loans (including syndicated or participated loans) that are fully secured by cash collateral as provided herein;

(c) Loans that are eligible for the asset-based lending exclusion, described herein, provided the bank's primary federal regulator (PFR) has not cited a criticism (included in the Matters Requiring Attention, or MRA) of the bank's controls or administration of its asset-based loan portfolio; and

(d) Loans that are eligible for the floor plan lending exclusion, described herein, provided the bank's PFR has not cited a criticism (included in the MRA) of the bank's controls or administration of its floor plan loan portfolio.

Higher-Risk C&I Borrower

A ''higher-risk C&I borrower'' is a borrower that:

(a) Owes the reporting bank on a C&I loan originally made on or after April 1, 2013, if:

(i) The C&I loan has an original amount (including funded amounts and the amount of unfunded commitments, whether irrevocable or unconditionally cancellable) of at least $5 million;

(ii) The loan meets the purpose and materiality tests described herein; and

(iii) When the loan is made, the borrower meets the leverage test described herein; or

(b) Obtains a refinance, as that term is defined herein, of an existing C&I loan, where the refinance occurs on or after April 1, 2013, and the refinanced loan is owed to the reporting bank, if:

(i) The refinanced loan is in an amount (including funded amounts and the amount of unfunded commitments, whether irrevocable or unconditionally cancellable) of at least $5 million;

(ii) The C&I loan being refinanced met the purpose and materiality tests (described herein) when it was originally made;

(iii) The original loan was made no more than 5 years before the refinanced loan; and

(iv) When the loan is refinanced, the borrower meets the leverage test.

When a bank acquires a C&I loan originally made on or after April 1, 2013, by another lender, it must determine whether the borrower is a higher-risk borrower as a result of the loan as soon as reasonably practicable, but not later than one year after acquisition. When a bank acquires loans from another entity on a recurring or programmatic basis, however, the bank must determine whether the borrower is a higher-risk borrower as a result of the loan as soon as is practicable, but not later than three months after the date of acquisition.

A borrower ceases to be a ''higher-risk C&I borrower'' only if:

(a) The borrower no longer has any C&I loans owed to the reporting bank that, when originally made, met the purpose and materiality tests described herein;

(b) The borrower has such loans outstanding owed to the reporting bank, but they have all been refinanced more than 5 years after originally being made; or

(c) The reporting bank makes a new C&I loan or refinances an existing C&I loan and the borrower no longer meets the leverage test described herein.

Original Amount

The original amount of a loan, including the amounts to aggregate for purposes of arriving at the original amount, as described herein, is:

(a) For C&I loans drawn down under lines of credit or loan commitments, the amount of the line of credit or loan commitment on the date of its most recent approval, extension or renewal prior to the date of the most recent Call Report; if, however, the amount currently outstanding on the loan as of the date of the bank's most recent Call Report exceeds this amount, then the original amount of the loan is the amount outstanding as of the date of the bank's most recent Call Report.

(b) For syndicated or participated C&I loans, the total amount of the loan, rather than just the syndicated or participated portion held by the individual reporting bank.

(c) For all other C&I loans (whether term or non-revolver loans), the total amount of the loan as of origination or the amount outstanding as of the date of the bank's most recent Call Report, whichever is larger.

For purposes of defining original amount and a higher-risk C&I borrower:

(a) All C&I loans that a borrower owes to the reporting bank that meet the purpose test when made, and that are made within six months of each other, must be aggregated to determine the original amount of the loan; however, only loans in the original amount of $1 million or more must be aggregated; and further provided, that loans made before the April 1, 2013, need not be aggregated.

(b) When a C&I loan is refinanced through more than one loan, and the loans are made within six months of each other, they must be aggregated to determine the original amount.

Refinance

For purposes of a C&I loan, a refinance includes:

(a) Replacing an original obligation by a new or modified obligation or loan agreement;

(b) Increasing the master commitment of the line of credit (but not adjusting sub-limits under the master commitment);

(c) Disbursing additional money other than amounts already committed to the borrower;

(d) Extending the legal maturity date;

(e) Rescheduling principal or interest payments to create or increase a balloon payment;

(f) Releasing a substantial amount of collateral;

(g) Consolidating multiple existing obligations; or

(h) Increasing or decreasing the interest rate.

A refinance of a C&I loan does not include a modification or series of modifications to a commercial loan other than as described above or modifications to a commercial loan that would otherwise meet this definition of refinance, but that result in the classification of a loan as a troubled debt restructuring (TDR), as this term is defined in the glossary of the Call Report instructions, as they may be amended from time to time.

Purpose Test

A loan or refinance meets the purpose test if it is to finance:

(a) A buyout, defined as the purchase or repurchase by the borrower of the borrower's outstanding equity, including, but not limited to, an equity buyout or funding an Employee Stock Ownership Plan (ESOP);

(b) An acquisition, defined as the purchase by the borrower of any equity interest in another company, or the purchase of all or a substantial portion of the assets of another company; or

(c) A capital distribution, defined as a dividend payment or other transaction designed to enhance shareholder value, including, but not limited to, a repurchase of stock.

At the time of refinance, whether the original loan met the purpose test may not be easily determined by a new lender. In such a case, the new lender must use its best efforts and reasonable due diligence to determine whether the original loan met the test.

Materiality Test

A loan or refinance meets the materiality test if:

(a) The original amount of the loan (including funded amounts and the amount of unfunded commitments, whether irrevocable or unconditionally cancellable) equals or exceeds 20 percent of the total funded debt of the borrower; total funded debt of the borrower is to be determined as of the date of the original loan and does not include the loan to which the materiality test is being applied; or

(b) Before the loan was made, the borrower had no funded debt.

When multiple loans must be aggregated to determine the original amount, the materiality test is applied as of the date of the most recent loan.

At the time of refinance, whether the original loan met the materiality test may not be easily determined by a new lender. In such a case, the new lender must use its best efforts and reasonable due diligence to determine whether the original loan met the test.

Leverage Test

A borrower meets the leverage test if:

(a) The ratio of the borrower's total debt to trailing twelve-month EBITDA (commonly known as the operating leverage ratio) is greater than 4; or

(b) The ratio of the borrower's senior debt to trailing twelve-month EBITDA (also commonly known as the operating leverage ratio) is greater than 3.

EBITDA is defined as earnings before interest, taxes, depreciation, and amortization.

Total debt is defined as all interest-bearing financial obligations and includes, but is not limited to, overdrafts, borrowings, repurchase agreements (repos), trust receipts, bankers acceptances, debentures, bonds, loans (including those secured by mortgages), sinking funds, capital (finance) lease obligations (including those obligations that are convertible, redeemable or retractable), mandatory redeemable preferred and trust preferred securities accounted for as liabilities in accordance with ASC Subtopic 480–10, Distinguishing Liabilities from Equity—Overall (formerly FASB Statement No. 150, ''Accounting for Certain Financial Instruments with Characteristics of both Liabilities and Equity''), and subordinated capital notes. Total debt excludes pension obligations, deferred tax liabilities and preferred equity.

Senior debt includes any portion of total debt that has a priority claim on any of the borrower's assets. A priority claim is a claim that entitles the holder to priority of payment over other debt holders in bankruptcy.

When calculating either of the borrower's operating leverage ratios, the only permitted EBITDA adjustments are those specifically permitted for that borrower in the loan agreement (at the time of underwriting) and only funded amounts of lines of credit must be considered debt.

The debt-to-EBITDA ratio must be calculated using the consolidated financial statements of the borrower. If the loan is made to a subsidiary of a larger organization, the debt-to-EBITDA ratio may be calculated using the financial statements of the subsidiary or, if the parent company has unconditionally and irrevocably guaranteed the borrower's debt, using the consolidated financial statements of the parent company.

In the case of a merger of two companies or the acquisition of one or more companies or parts of companies, pro-forma debt is to be used as well as the trailing twelve-month pro-forma EBITDA for the combined companies. When calculating the trailing pro-

forma EBITDA for the combined company, no adjustments are allowed for economies of scale or projected cost savings that may be realized subsequent to the acquisition unless specifically permitted for that borrower under the loan agreement.

Exclusions

Cash Collateral Exclusion

To exclude a loan based on cash collateral, the cash must be in the form of a savings or time deposit held by a bank. The bank (or lead bank or agent bank in the case of a participation or syndication) must have a perfected first priority security interest, a security agreement, and a collateral assignment of the deposit account that is irrevocable for the remaining term of the loan or commitment. In addition, the bank must place a hold on the deposit account that alerts the bank's employees to an attempted withdrawal. If the cash collateral is held at another bank or at multiple banks, a security agreement must be in place and each bank must have an account control agreement in place.[7] For the exclusion to apply to a revolving line of credit, the cash collateral must be equal to or greater than the amount of the total loan commitment (the aggregate funded and unfunded balance of the loan).

Asset-Based and Floor Plan Lending Exclusions

The FDIC retains the authority to verify that banks have sound internal controls and administration practices for asset-based and floor plan loans that are excluded from a bank's reported higher-risk C&I loans and securities totals. If the bank's PFR has cited a criticism of the bank's controls or administration of its asset-based or floor plan loan portfolios in an MRA, the bank is not eligible for the asset-based or floor plan lending exclusions.

Asset-Based Lending Conditions

Asset-based loans (loans secured by accounts receivable and inventory) that meet all the following conditions are excluded from a bank's higher-risk C&I loan totals:

(a) The loan is managed by a loan officer or group of loan officers at the reporting bank who have experience in asset-based lending and collateral monitoring, including, but not limited to, experience in reviewing the following: Collateral reports, borrowing base certificates (which are discussed herein), collateral audit reports, loan-to-collateral values (LTV), and loan limits, using procedures common to the industry.

(b) The bank has taken, or has the legally enforceable ability to take, dominion over the borrower's deposit accounts such that proceeds of collateral are applied to the loan balance as collected. Security agreements must be in place in all cases; in addition, if a borrower's deposit account is held at a bank other than the lending bank, an account control agreement must also be in place.

(c) The bank has a perfected first priority security interest in all assets included in the borrowing base certificate.

(d) If the loan is a credit facility (revolving or term loan), it must be fully secured by self-liquidating assets such as accounts receivable and inventory.[8] Other non-self-liquidating assets may be part of the borrowing base, but the outstanding balance of the loan must be fully secured by the portion of the borrowing base that is composed of self-liquidating assets. Fully secured is defined as a 100 percent or lower LTV ratio after applying the appropriate discounts (determined by the loan agreement) to the collateral. If an over advance (including a seasonal over advance) causes the LTV to exceed 100 percent, the loan may not be excluded from higher-risk C&I loans owed by a higher-risk C&I borrower. Additionally, the bank must have the ability to withhold funding of a draw or advance if the loan amount exceeds the amount allowed by the collateral formula.

(e) A bank's lending policy or procedures must address the maintenance of an accounts receivable loan agreement with the borrower. This loan agreement must establish a maximum percentage advance, which cannot exceed 85 percent, against eligible accounts receivable, include a maximum dollar amount due from any one account debtor, address the financial strength of debtor accounts, and define eligible receivables. The definition of eligible receivables must consider the receivable quality, the turnover and dilution rates of receivables pledged, the

[7] An account control agreement, for purposes of this Appendix, means a written agreement between the lending bank (the secured party), the borrower, and the bank that holds the deposit account serving as collateral (the depository bank), that the depository bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the borrower (or any other party).

[8] An asset is self-liquidating if, in the event the borrower defaults, the asset can be easily liquidated and the proceeds of the sale of the assets would be used to pay down the loan. These assets can include machinery, heavy equipment or rental equipment if the machinery or equipment is inventory for the borrower's primary business and the machinery or equipment is included in the borrowing base.

aging of accounts receivable, the concentrations of debtor accounts, and the performance of the receivables related to their terms of sale.

Concentration of debtor accounts is the percentage value of receivables associated with one or a few customers relative to the total value of receivables. Turnover of receivables is the velocity at which receivables are collected. The dilution rate is the uncollectible accounts receivable as a percentage of sales.

Ineligibles must be established for any debtor account where there is concern that the debtor may not pay according to terms. Monthly accounts receivable agings must be received in sufficient detail to allow the bank to compute the required ineligibles. At a minimum, the following items must be deemed ineligible accounts receivable:

(i) Accounts receivable balances over 90 days beyond invoice date or 60 days past due, depending upon custom with respect to a particular industry with appropriate adjustments made for dated billings;

(ii) Entire account balances where over 50 percent of the account is over 60 days past due or 90 days past invoice date;

(iii) Accounts arising from sources other than trade (*e.g.*, royalties, rebates);

(iv) Consignment or guaranteed sales;

(v) Notes receivable;

(vi) Progress billings;

(vii) Account balances in excess of limits appropriate to account debtor's credit worthiness or unduly concentrated by industry, location or customer;

(viii) Affiliate and intercompany accounts; and

(ix) Foreign accounts receivable.

(f) Loans against inventory must be made with advance rates no more than 65 percent of eligible inventory (at the lower of cost valued on a first-in, first-out (FIFO) basis or market) based on an analysis of realizable value. When an appraisal is obtained, or there is a readily determinable market price for the inventory, however, up to 85 percent of the net orderly liquidation value (NOLV) or the market price of the inventory may be financed. Inventory must be valued or appraised by an independent third-party appraiser using NOLV, fair value, or forced sale value (versus a ''going concern'' value), whichever is appropriate, to arrive at a net realizable value. Appraisals are to be prepared in accordance with industry standards, unless there is a readily available and determinable market price for the inventory (*e.g.*, in the case of various commodities), from a recognized exchange or third-party industry source, and a readily available market (*e.g.*, for aluminum, crude oil, steel, and other traded commodities); in that case, inventory may be valued using current market value. When relying upon current market value rather than an independent appraisal, the reporting bank's management must update the value of inventory as market prices for the product change. Valuation updates must be as frequent as needed to ensure compliance with margin requirements. In addition, appropriate mark-to-market reserves must be established to protect against excessive inventory price fluctuations. An asset has a readily identifiable and publicly available market price if the asset's price is quoted routinely in a widely disseminated publication that is readily available to the general public.

(g) A bank's lending policy or procedures must address the maintenance of an inventory loan agreement with the borrower. This loan agreement must establish a maximum percentage advance rate against acceptable inventory, address acceptable appraisal and valuation requirements, and define acceptable and ineligible inventory. Ineligibles must be established for inventory that exhibit characteristics that make it difficult to achieve a realizable value or to obtain possession of the inventory. Monthly inventory agings must be received in sufficient detail to allow the bank to compute the required ineligibles. At a minimum, ineligible inventory must include:

(i) Slow moving, obsolete inventory and items turning materially slower than industry average;

(ii) Inventory with value to the client only, which is generally work in process, but may include raw materials used solely in the client's manufacturing process;

(iii) Consigned inventory or other inventory where a perfected security interest cannot be obtained;

(iv) Off-premise inventory subject to a mechanic's or other lien; and

(v) Specialized, high technology or other inventory subject to rapid obsolescence or valuation problems.

(h) The bank must maintain documentation of borrowing base certificate reviews and collateral trend analyses to demonstrate that collateral values are actively, routinely and consistently monitored. A borrowing base certificate is a form prepared by the borrower that reflects the current status of the collateral. A new borrowing base certificate must be obtained within 30 days before or after each draw or advance on a loan. A bank is required to validate the borrowing base through asset-based tracking reports. The borrowing base validation process must include the bank requesting from the borrower a list of accounts receivable by creditor and a list of individual items of inventory and the bank certifying that the outstanding balance of the loan remains within the collateral formula prescribed by the loan agreement. Any discrepancies between the list of accounts receivable and inventory and the borrowing base certificate must be reconciled with the borrower. Periodic, but no

less than annual, field examinations (audits) must also be performed by individuals who are independent of the credit origination or administration process. There must be a process in place to ensure that the bank is correcting audit exceptions.

Floor Plan Lending Conditions

Floor plan loans may include, but are not limited to, loans to finance the purchase of various vehicles or equipment including automobiles, boat or marine equipment, recreational vehicles (RV), motorized watersports vehicles such as jet skis, or motorized lawn and garden equipment such as tractor lawnmowers. Floor plan loans that meet all the following conditions are excluded from a bank's higher-risk C&I loan totals:

(a) The loan is managed by a loan officer or a group of loan officers at the reporting bank who are experienced in floor plan lending and monitoring collateral to ensure the borrower remains in compliance with floor plan limits and repayment requirements. Loan officers must have experience in reviewing certain items, including but not limited to: Collateral reports, floor plan limits, floor plan aging reports, vehicle inventory audits or inspections, and LTV ratios. The bank must obtain and review financial statements of the borrower (*e.g.*, tax returns, company-prepared financial statements, or dealer statements) on at least a quarterly basis to ensure that adequate controls are in place. (A ''dealer statement'' is the standard format financial statement issued by Original Equipment Manufacturers (OEMs) and used by nationally recognized automobile dealer floor plan lenders.)

(b) For automobile floor plans, each loan advance must be made against a specific automobile under a borrowing base certificate held as collateral at no more than 100 percent of (i) dealer invoice plus freight charges (for new vehicles) or (ii) the cost of a used automobile at auction or the wholesale value using the prevailing market guide (*e.g.*, NADA, Black Book, Blue Book). The advance rate of 100 percent of dealer invoice plus freight charges on new automobiles, and the advance rate of the cost of a used automobile at auction or the wholesale value, may only be used where there is a manufacturer repurchase agreement or an aggressive curtailment program in place that is tracked by the bank over time and subject to strong controls. Otherwise, permissible advance rates must be lower than 100 percent.

(c) Advance rates on vehicles other than automobiles must conform to industry standards for advance rates on such inventory, but may never exceed 100 percent of dealer invoice plus freight charges on new vehicles or 100 percent of the cost of a used vehicle at auction or its wholesale value.

(d) Each loan is self-liquidating (*i.e.*, if the borrower defaulted on the loan, the collateral could be easily liquidated and the proceeds of the sale of the collateral would be used to pay down the loan advance).

(e) Vehicle inventories and collateral values are closely monitored, including the completion of regular (at least quarterly) dealership automotive or other vehicle dealer inventory audits or inspections to ensure accurate accounting for all vehicles held as collateral. The lending bank or a third party must prepare inventory audit reports and inspection reports for loans to automotive dealerships, or loans to other vehicle dealers, and the lending bank must review the reports at least quarterly. The reports must list all vehicles held as collateral and verify that the collateral is in the dealer's possession.

(f) Floor plan aging reports must be reviewed by the bank as frequently as required under the loan agreement, but no less frequently than quarterly. Floor plan aging reports must reflect specific information about each automobile or vehicle being financed (*e.g.*, the make, model, and color of the automobile or other vehicle, and origination date of the loan to finance the automobile or vehicle). Curtailment programs should be instituted where necessary and banks must ensure that curtailment payments are made on stale automotive or other vehicle inventory financed under the floor plan loan.

Detailed Reports

Examples of detailed reports that must be provided to the asset-based and floor plan lending bank include:

(a) Borrowing Base Certificates: Borrowing base certificates, along with supporting information, must include:

(i) The accounts receivable balance (rolled forward from the previous certificate);

(ii) Sales (reported as gross billings) with detailed adjustments for returns and allowances to allow for proper tracking of dilution and other reductions in collateral;

(iii) Detailed inventory information (*e.g.*, raw materials, work-in-process, finished goods); and

(iv) Detail of loan activity.

(b) Accounts Receivable and Inventory Detail: A listing of accounts receivable and inventory that is included on the borrowing base certificate. Monthly accounts receivable and inventory agings must be received in sufficient detail to allow the lender to compute the required ineligibles.

(c) Accounts Payable Detail: A listing of each accounts payable owed to the borrower. Monthly accounts payable agings must be received to monitor payable performance and anticipated working capital needs.

(d) Covenant Compliance Certificates: A listing of each loan covenant and the borrower's compliance with each one. Borrowers

must submit Covenant Compliance Certificates, generally on a monthly or quarterly basis (depending on the terms of the loan agreement) to monitor compliance with the covenants outlined in the loan agreement. Non-compliance with any covenants must be promptly addressed.

(e) Dealership Automotive Inventory or Other Vehicle Inventory Audits or Inspections: The bank or a third party must prepare inventory audit reports or inspection reports for loans to automotive dealerships and other vehicle dealerships. The bank must review the reports at least quarterly. The reports must list all vehicles held as collateral and verify that the collateral is in the dealer's possession.

(f) Floor Plan Aging Reports: Borrowers must submit floor plan aging reports on a monthly or quarterly basis (depending on the terms of the loan agreement). These reports must reflect specific information about each automobile or other type of vehicle being financed (*e.g.*, the make, model, and color of the automobile or other type of vehicle, and origination date of the loan to finance the automobile or other type of vehicle).

3. Higher-Risk Consumer Loans

Definitions

Higher-risk consumer loans are defined as all consumer loans where, as of origination, or, if the loan has been refinanced, as of refinance, the probability of default (PD) within two years (the two-year PD) is greater than 20 percent, excluding those consumer loans that meet the definition of a nontraditional mortgage loan.[9] [10]

Higher-risk consumer loans exclude:

(a) The maximum amounts recoverable from the U.S. government under guarantee or insurance provisions; and

(b) Loans fully secured by cash collateral. To exclude a loan based on cash collateral, the cash must be in the form of a savings or time deposit held by a bank. The lending bank (or lead or agent bank in the case of a participation or syndication) must, in all cases, (including instances in which cash collateral is held at another bank or banks) have a perfected first priority security interest under applicable state law, a security agreement in place, and all necessary documents executed and measures taken as required to result in such perfection and priority. In addition, the lending bank must place a hold on the deposit account that alerts the bank's employees to an attempted withdrawal. For the exclusion to apply to a revolving line of credit, the cash collateral must be equal to, or greater than, the amount of the total loan commitment (the aggregate funded and unfunded balance of the loan).

Banks must determine the PD of a consumer loan as of the date the loan was originated, or, if the loan has been refinanced, as of the date it was refinanced. The two-year PD must be estimated using an approach that conforms to the requirements detailed herein.

Loans Originated or Refinanced Before April 1, 2013, and all Acquired Loans

For loans originated or refinanced by a bank before April 1, 2013, and all acquired loans regardless of the date of acquisition, if information as of the date the loan was originated or refinanced is not available, then the bank must use the oldest available information to determine the PD. If no information is available, then the bank must obtain recent, refreshed data from the borrower or other appropriate third party to determine the PD. Refreshed data is defined as the most recent data available, and must be as of a date that is no earlier than three months before the acquisition of the loan. In addition, for loans acquired on or after April 1, 2013, the acquiring bank shall have six months from the date of acquisition to determine the PD.

When a bank acquires loans from another entity on a recurring or programmatic basis, the acquiring bank may determine whether the loan meets the definition of a higher-risk consumer loan using the origination criteria and analysis performed by the original lender only if the acquiring bank verifies the information provided. Loans acquired from another entity are acquired on a recurring

[9] For the purposes of this rule, consumer loans consist of all loans secured by 1–4 family residential properties as well as loans and leases made to individuals for household, family, and other personal expenditures, as defined in the instructions to the Call Report, Schedule RC–C, as the instructions may be amended from time to time. Higher-risk consumer loans include purchased credit-impaired loans that meet the definition of higher-risk consumer loans.

[10] The FDIC has the flexibility, as part of its risk-based assessment system, to change the 20 percent threshold for identifying higher-risk consumer loans without further notice-and-comment rulemaking as a result of reviewing data for up to the first two reporting periods after the effective date of this rule. Before making any such change, the FDIC will analyze the potential effect of changing the PD threshold on the distribution of higher-risk consumer loans among banks and the resulting effect on assessments collected from the industry. The FDIC will provide banks with at least one quarter advance notice of any such change to the PD threshold through a Financial Institution Letter.

basis if a bank has acquired other loans from that entity at least once within the calendar year of the acquisition of the loans in question or in the previous calendar year. If the acquiring bank cannot or does not verify the information provided by the original lender, the acquiring bank must obtain the necessary information from the borrower or other appropriate third party to make its own determination of whether the purchased assets should be classified as a higher-risk consumer loan.

Loans That Meet Both Higher-Risk Consumer Loans and Nontraditional Mortgage Loans Definitions

A loan that meets both the nontraditional mortgage loan and higher-risk consumer loan definitions at the time of origination, or, if the loan has been refinanced, as of refinance, must be reported only as a nontraditional mortgage loan. If, however, the loan ceases to meet the nontraditional mortgage loan definition but continues to meet the definition of a higher-risk consumer loan, the loan is to be reported as a higher-risk consumer loan.

General Requirements for PD Estimation

Scorable Consumer Loans

Estimates of the two-year PD for a loan must be based on the observed, stress period default rate (defined herein) for loans of a similar product type made to consumers with credit risk comparable to the borrower being evaluated. While a bank may consider additional risk factors beyond the product type and credit score (*e.g.*, geography) in estimating the PD of a loan, it must at a minimum account for these two factors. The credit risk assessment must be determined using third party or internal scores derived using a scoring system that qualifies as *empirically derived, demonstrably and statistically sound* as defined in 12 CFR 202.2(p), as it may be amended from time to time, and has been approved by the bank's model risk oversight and governance process and internal audit mechanism. In the case of a consumer loan with a co-signer or co-borrower, the PD may be determined using the most favorable individual credit score.

In estimating the PD based on such scores, banks must adhere to the following requirements:

(a) The PD must be estimated as the average of the two, 24-month default rates observed from July 2007 to June 2009, and July 2009 to June 2011, where the average is calculated according to the following formula and DR_t is the observed default rate over the 24-month period beginning in July of year t:

$$PD = 1 - \sqrt{(1 - DR_{2007})(1 - DR_{2009})}$$

(b) The default rate for each 24-month period must be calculated as the number of active loans that experienced at least one default event during the period divided by the total number of active loans as of the observation date (*i.e.*, the beginning of the 24-month period). An ''active'' loan is defined as any loan that was open and not in default as of the observation date, and on which a payment was made within the 12 months prior to the observation date.

(c) The default rate for each 24-month period must be calculated using a stratified random sample of loans that is sufficient in size to derive statistically meaningful results for the product type and credit score (and any additional risk factors) being evaluated. The product strata must be as homogenous as possible with respect to the factors that influence default, such that products with distinct risk characteristics are evaluated separately. The loans should be sampled based on the credit score as of the observation date, and each 24-month default rate must be calculated using a random sample of at least 1,200 active loans.

(d) Credit score strata must be determined by partitioning the entire credit score range generated by a given scoring system into a minimum of 15 bands. While the width of the credit score bands may vary, the scores within each band must reflect a comparable level of credit risk. Because performance data for scores at the upper and lower extremes of the population distribution is likely to be limited, however, the top and bottom bands may include a range of scores that suggest some variance in credit quality.

(e) Each credit score will need to have a unique PD associated with it. Therefore, when the number of score bands is less than the number of unique credit scores (as will almost always be the case), banks must use a linear interpolation between adjacent default rates to determine the PD for a particular score. The observed default rate for each band must be assumed to correspond to the midpoint of the range for the band. For example, if one score band ranges from 621 to

625 and has an observed default rate of 4 percent, while the next lowest band ranges from 616 to 620 and has an observed default rate of 6 percent, a 620 score must be assigned a default rate of 5.2 percent, calculated as

$$\left(\frac{.04 - .06}{623 - 618}\right) \cdot (620 - 618) + .06 = .052$$

When evaluating scores that fall below the midpoint of the lowest score band or above the midpoint of the highest score band, the interpolation must be based on an assumed adjacent default rate of 1 or 0, respectively.

(f) The credit scores represented in the historical sample must have been produced by the same entity, using the same or substantially similar methodology as the methodology used to derive the credit scores to which the default rates will be applied. For example, the default rate for a particular vendor score cannot be evaluated based on the score-to-default rate relationship for a different vendor, even if the range of scores under both systems is the same. On the other hand, if the current and historical scores were produced by the same vendor using slightly different versions of the same scoring system and equivalent scores represent a similar likelihood of default, then the historical experience could be applied.

(g) A loan is to be considered in default when it is 90 + days past due, charged-off, or the borrower enters bankruptcy.

Unscorable Consumer Loans

For unscorable consumer loans—where the available information about a borrower is insufficient to determine a credit score—the bank will be unable to assign a PD to the loan according to the requirements described above. If the total outstanding balance of the unscorable consumer loans of a particular product type (including, but not limited to, student loans) exceeds 5 percent of the total outstanding balance for that product type, including both foreign and domestic loans, the excess amount shall be treated as higher risk (the de minimis approach). Otherwise, the total outstanding balance of unscorable consumer loans of a particular product type will not be considered higher risk. The consumer product types used to determine whether the 5 percent test is satisfied shall correspond to the product types listed in the table used for reporting PD estimates.

A bank may not develop PD estimates for unscorable loans based on internal data.

If, after the origination or refinance of the loan, an unscorable consumer loan becomes scorable, a bank must reclassify the loan using a PD estimated according to the general requirements above. Based upon that PD, the loan will be determined to be either higher risk or not, and that determination will remain in effect until a refinancing occurs, at which time the loan must be re-evaluated. An unscorable loan must be reviewed at least annually to determine if a credit score has become available.

Alternative Methodologies

A bank may use internally derived default rates that were calculated using fewer observations or score bands than those specified above under certain conditions. The bank must submit a written request to the FDIC either in advance of, or concurrent with, reporting under the requested approach. The request must explain in detail how the proposed approach differs from the rule specifications and the bank must provide support for the statistical appropriateness of the proposed methodology. The request must include, at a minimum, a table with the default rates and number of observations used in each score and product segment. The FDIC will evaluate the proposed methodology and may request additional information from the bank, which the bank must provide. The bank may report using its proposed approach while the FDIC evaluates the methodology. If, after reviewing the request, the FDIC determines that the bank's methodology is unacceptable, the bank will be required to amend its Call Reports and report according to the generally applicable specifications for PD estimation. The bank will be required to submit amended information for no more than the two most recently dated and filed Call Reports preceding the FDIC's determination.

Foreign Consumer Loans

A bank must estimate the PD of a foreign consumer loan according to the general requirements described above unless doing so would be unduly complex or burdensome (*e.g.*, if a bank had to develop separate PD mappings for many different countries). A bank may request to use default rates calculated using fewer observations or score bands than the specified minimums, either in advance of, or concurrent with, reporting under that methodology, but must comply with the requirements detailed above for using an alternative methodology.

When estimating a PD according to the general requirements described above would

be unduly complex or burdensome, a bank that is required to calculate PDs for foreign consumer loans under the requirements of the Basel II capital framework may: (1) Use the Basel II approach discussed herein, subject to the terms discussed herein; (2) submit a written request to the FDIC to use its own methodology, but may not use the methodology until approved by the FDIC; or (3) treat the loan as an unscorable consumer loan subject to the de minimis approach described above.

When estimating a PD according to the general requirements described above would be unduly complex or burdensome, a bank that is not required to calculate PDs for foreign consumer loans under the requirements of the Basel II capital framework may: (1) Treat the loan as an unscorable consumer loan subject to the de minimis approach described above; or (2) submit a written request to the FDIC to use its own methodology, but may not use the methodology until approved by the FDIC.

When a bank submits a written request to the FDIC to use its own methodology, the FDIC may request additional information from the bank regarding the proposed methodology and the bank must provide the information. The FDIC may grant a bank tentative approval to use the methodology while the FDIC considers it in more detail. If the FDIC ultimately disapproves the methodology, the bank may be required to amend its Call Reports; however, the bank will be required to amend no more than the two most recently dated and filed Call Reports preceding the FDIC's determination. In the amended Call Reports, the bank must treat any loan whose PD had been estimated using the disapproved methodology as an unscorable domestic consumer loan subject to the de minimis approach described above.

Basel II Approach

A bank that is required to calculate PDs for foreign consumer loans under the requirements of the Basel II capital framework may estimate the two-year PD of a foreign consumer loan based on the one-year PD used for Basel II capital purposes.[11] The bank must submit a written request to the FDIC in advance of, or concurrent with, reporting under that methodology. The request must explain in detail how one-year PDs calculated under the Basel II framework are translated to two-year PDs that meet the requirements above. While the range of acceptable approaches is potentially broad, any proposed methodology must meet the following requirements:

(a) The bank must use data on a sample of loans for which both the one-year Basel II PDs and two-year final rule PDs can be calculated. The sample may contain both foreign and domestic loans.

(b) The bank must use the sample data to demonstrate that a meaningful relationship exists between the two types of PD estimates, and the significance and nature of the relationship must be determined using accepted statistical principles and methodologies. For example, to the extent that a linear relationship exists in the sample data, the bank may use an ordinary least-squares regression to determine the best linear translation of Basel II PDs to final rule PDs. The estimated equation should fit the data reasonably well based on standard statistics such as the coefficient of determination; and

(c) The method must account for any significant variation in the relationship between the two types of PD estimates that exists across consumer products based on the empirical analysis of the data. For example, if the bank is using a linear regression to determine the relationship between PD estimates, it should test whether the parameter estimates are significantly different by product type.

The bank may report using this approach (if it first notifies the FDIC of its intention to do so), while the FDIC evaluates the methodology. If, after reviewing the methodology, the FDIC determines that the methodology is unacceptable, the bank will be required to amend its Call Reports. The bank will be required to submit amended information for no more than the two most recently dated and filed Call Reports preceding the FDIC's determination.

Refinance

For purposes of higher-risk consumer loans, a refinance includes:

(a) Extending new credit or additional funds on an existing loan;

(b) Replacing an existing loan with a new or modified obligation;

(c) Consolidating multiple existing obligations;

(d) Disbursing additional funds to the borrower. Additional funds include a material disbursement of additional funds or, with respect to a line of credit, a material increase in the amount of the line of credit, but not a disbursement, draw, or the writing of convenience checks within the original limits of the line of credit. A material increase in the amount of a line of credit is defined as a 10 percent or greater increase in the quarter-end line of credit limit; however, a temporary increase in a credit card line of credit is not a material increase;

[11] Using these Basel II PDs for this purpose does not imply that a bank's PFR has approved use of these PDs for the Basel II capital framework. If a bank's PFR requires it to revise its Basel II PD methodology, the bank must use revised Basel II PDs to calculate (or recalculate if necessary) corresponding PDs under this Basel II approach.

(e) Increasing or decreasing the interest rate (except as noted herein for credit card loans); or

(f) Rescheduling principal or interest payments to create or increase a balloon payment or extend the legal maturity date of the loan by more than six months.

A refinance for this purpose does not include:

(a) A re-aging, defined as returning a delinquent, open-end account to current status without collecting the total amount of principal, interest, and fees that are contractually due, provided:

(i) The re-aging is part of a program that, at a minimum, adheres to the re-aging guidelines recommended in the interagency approved Uniform Retail Credit Classification and Account Management Policy;[12]

(ii) The program has clearly defined policy guidelines and parameters for re-aging, as well as internal methods of ensuring the reasonableness of those guidelines and monitoring their effectiveness; and

(iii) The bank monitors both the number and dollar amount of re-aged accounts, collects and analyzes data to assess the performance of re-aged accounts, and determines the effect of re-aging practices on past due ratios;

(b) Modifications to a loan that would otherwise meet this definition of refinance, but result in the classification of a loan as a TDR;

(c) Any modification made to a consumer loan pursuant to a government program, such as the Home Affordable Modification Program or the Home Affordable Refinance Program;

(d) Deferrals under the Servicemembers Civil Relief Act;

(e) A contractual deferral of payments or change in interest rate that is consistent with the terms of the original loan agreement (*e.g.*, as allowed in some student loans);

(f) Except as provided above, a modification or series of modifications to a closed-end consumer loan;

(g) An advance of funds, an increase in the line of credit, or a change in the interest rate that is consistent with the terms of the loan agreement for an open-end or revolving line of credit (*e.g.*, credit cards or home equity lines of credit);

(h) For credit card loans:

(i) Replacing an existing card because the original is expiring, for security reasons, or because of a new technology or a new system;

(ii) Reissuing a credit card that has been temporarily suspended (as opposed to closed);

(iii) Temporarily increasing the line of credit;

(iv) Providing access to additional credit when a bank has internally approved a higher credit line than it has made available to the customer; or

(v) Changing the interest rate of a credit card line when mandated by law (such as in the case of the Credit CARD Act).

4. Nontraditional mortgage loans

Nontraditional mortgage loans include all residential loan products that allow the borrower to defer repayment of principal or interest and include all interest-only products, teaser rate mortgages, and negative amortizing mortgages, with the exception of home equity lines of credit (HELOCs) or reverse mortgages. A teaser-rate mortgage loan is defined as a mortgage with a discounted initial rate where the lender offers a lower rate and lower payments for part of the mortgage term. A mortgage loan is no longer considered a nontraditional mortgage loan once the teaser rate has expired. An interest-only loan is no longer considered a nontraditional mortgage loan once the loan begins to amortize.

Banks must determine whether residential loans meet the definition of a nontraditional mortgage loan as of origination, or, if the loan has been refinanced, as of refinance, as refinance is defined in this Appendix for purposes of higher-risk consumer loans. When a bank acquires a residential loan, it must determine whether the loan meets the definition of a nontraditional mortgage loan using the origination criteria and analysis performed by the original lender. If this information is unavailable, the bank must obtain refreshed data from the borrower or other appropriate third party. Refreshed data for residential loans is defined as the most recent data available. The data, however, must be as of a date that is no earlier than three months before the acquisition of the residential loan. The acquiring bank must also determine whether an acquired loan is higher risk not later than three months after acquisition.

When a bank acquires loans from another entity on a recurring or programmatic basis, however, the acquiring bank may determine whether the loan meets the definition of a nontraditional mortgage loan using the origination criteria and analysis performed by the original lender only if the acquiring bank verifies the information provided. Loans acquired from another entity are acquired on a recurring basis if a bank has acquired other loans from that entity at least

[12] Among other things, for a loan to be considered for re-aging, the following must be true: (1) The borrower must have demonstrated a renewed willingness and ability to repay the loan; (2) the loan must have existed for at least nine months; and (3) the borrower must have made at least three consecutive minimum monthly payments or the equivalent cumulative amount.

once within the calendar year or the previous calendar year of the acquisition of the loans in question.

5. Higher-Risk Securitizations

Higher-risk securitizations are defined as securitization exposures (except securitizations classified as trading book), where, in aggregate, more than 50 percent of the assets backing the securitization meet either the criteria for higher-risk C & I loans or securities, higher-risk consumer loans, or nontraditional mortgage loans, except those classified as trading book. A securitization exposure is as defined in 12 CFR 324.2, as it may be amended from time to time. A higher-risk securitization excludes the maximum amount that is recoverable from the U.S. government under guarantee or insurance provisions.

A bank must determine whether a securitization is higher risk based upon information as of the date of issuance (*i.e.,* the date the securitization is sold on a market to the public for the first time). The bank must make this determination within the time limit that would apply under this Appendix if the bank were directly acquiring loans or securities of the type underlying the securitization. In making the determination, a bank must use one of the following methods:

(a) For a securitization collateralized by a static pool of loans, whose underlying collateral changes due to the sale or amortization of these loans, the 50 percent threshold is to be determined based upon the amount of higher-risk assets, as defined in this Appendix, owned by the securitization on the date of issuance of the securitization.

(b) For a securitization collateralized by a dynamic pool of loans, whose underlying collateral may change by the purchase of additional assets, including purchases made during a ramp-up period, the 50 percent threshold is to be determined based upon the highest amount of higher-risk assets, as defined in this Appendix, allowable under the portfolio guidelines of the securitization.

A bank is not required to evaluate a securitization on a continuous basis when the securitization is collateralized by a dynamic pool of loans; rather, the bank is only required to evaluate the securitization once.

A bank is required to use the information that is reasonably available to a sophisticated investor in reasonably determining whether a securitization meets the 50 percent threshold. Information reasonably available to a sophisticated investor includes, but is not limited to, offering memoranda, indentures, trustee reports, and requests for information from servicers, collateral managers, issuers, trustees, or similar third parties. When determining whether a revolving trust or similar securitization meets the threshold, a bank may use established criteria, model portfolios, or limitations published in the offering memorandum, indenture, trustee report, or similar documents.

Sufficient information necessary for a bank to make a definitive determination may not, in every case, be reasonably available to the bank as a sophisticated investor. In such a case, the bank may exercise its judgment in making the determination. In some cases, the bank need not rely upon all of the aforementioned pieces of information to make a higher-risk determination if fewer documents provide sufficient data to make the determination.

In cases in which a securitization is required to be consolidated on the balance sheet as a result of SFAS 166 and SFAS 167, and a bank has access to the necessary information, a bank may opt for an alternative method of evaluating the securitization to determine whether it is higher risk. The bank may evaluate individual loans in the securitization on a loan-by-loan basis and only report as higher risk those loans that meet the definition of a higher-risk asset; any loan within the securitization that does not meet the definition of a higher-risk asset need not be reported as such. When making this evaluation, the bank must follow the provisions of section I.B herein. Once a bank evaluates a securitization for higher-risk asset designation using this alternative evaluation method, it must continue to evaluate all securitizations that it has consolidated on the balance sheet as a result of SFAS 166 and SFAS 167, and for which it has the required information, using the alternative evaluation method. For securitizations for which the bank does not have access to information on a loan-by-loan basis, the bank must determine whether the securitization meets the 50 percent threshold in the manner previously described for other securitizations.

B. Application of Definitions

Section I of this Appendix applies to:

(1) All construction and land development loans, whenever originated or purchased;

(2) C&I loans (as that term is defined in this Appendix) owed to a reporting bank by a higher-risk C&I borrower (as that term is defined in this Appendix) and all securities issued by a higher-risk C&I borrower, except securitizations of C&I loans, that are owned by the reporting bank;

(3) Consumer loans (as defined in this Appendix), except securitizations of consumer loans, whenever originated or purchased;

(4) Securitizations of C&I and consumer loans (as defined in this Appendix) issued on or after April 1, 2013, including those securitizations issued on or after April 1, 2013, that are partially or fully collateralized by loans originated before April 1, 2013.

For C&I loans that are either originated or refinanced by a reporting bank before April 1, 2013, or purchased by a reporting bank before April 1, 2013, where the loans are owed to the reporting bank by a borrower that does not meet the definition of a higher-risk C&I borrower as that term is defined in this Appendix (which requires, among other things, that the borrower have obtained a C&I loan or refinanced an existing C&I loan on or after April 1, 2013) and securities purchased before April 1, 2013, that are issued by an entity that does not meet the definition of a higher-risk C&I borrower, as that term is defined in this Appendix, banks must continue to use the transition guidance in the September 2012 Call Report instructions to determine whether to report the loan or security as a higher-risk asset for purposes of the higher-risk assets to Tier 1 capital and reserves ratio. A bank may opt to apply the definition of higher-risk C&I loans and securities in this Appendix to all of its C&I loans and securities, but, if it does so, it must also apply the definition of a higher-risk C&I borrower in this Appendix without regard to when the loan is originally made or refinanced (*i.e.*, whether made or refinanced before or after April 1, 2013).

For consumer loans (other than securitizations of consumer loans) originated or purchased prior to April 1, 2013, a bank must determine whether the loan met the definition of a higher-risk consumer loan no later than June 30, 2013.

For all securitizations issued before April 1, 2013, banks must either (1) continue to use the transition guidance or (2) apply the definitions in this Appendix to all of its securitizations. If a bank applies the definition of higher-risk C&I loans and securities in this Appendix to its securitizations, it must also apply the definition of a higher-risk C&I borrower in this Appendix to all C&I borrowers without regard to when the loans to those borrowers were originally made or refinanced (*i.e.*, whether made or refinanced before or after April 1, 2013).

II. Growth-Adjusted Portfolio Concentration Measure

The *growth-adjusted concentration measure* is the sum of the values of concentrations in each of the seven portfolios, each of the values being first adjusted for risk weights and growth. The product of the risk weight and the concentration ratio is first squared and then multiplied by the growth factor. The measure is calculated as:

$$\mathrm{N}_i = \sum_{k=1}^{7}\left[w_k * \left(\frac{\text{Amount of exposure}_{\mathrm{i,k}}}{\text{Tier 1 Capital} + \text{Reserves}_i}\right)\right]^2 * g_k$$

Where:

N is bank *i*'s growth-adjusted portfolio concentration measure;[13]

k is a portfolio;

g is a growth factor for bank *i*'s portfolio *k;* and,

w is a risk weight for portfolio *k*.

The seven portfolios (k) are defined based on the Call Report/TFR data and they are:

- Construction and land development loans;
- Other commercial real estate loans;
- First-lien residential mortgages and non-agency residential mortgage-backed securities (excludes CMOs, REMICS, CMO and REMIC residuals, and stripped MBS issued by non-U.S. government issuers for which the collateral consists of MBS issued or guaranteed by U.S. government agencies);
- Closed-end junior liens and home equity lines of credit (HELOCs);
- Commercial and industrial loans;
- Credit card loans; and
- Other consumer loans.[14] [15]

The growth factor, *g*, is based on a three-year merger-adjusted growth rate for a given portfolio; *g* ranges from 1 to 1.2 where a 20 percent growth rate equals a factor of 1 and an 80 percent growth rate equals a factor of 1.2.[16] For growth rates less than 20 percent, *g* is 1; for growth rates greater than 80 percent, *g* is 1.2. For growth rates between 20 percent and 80 percent, the growth factor is calculated as:

[13] The growth-adjusted portfolio concentration measure is rounded to two decimal points.

[14] All loan concentrations should include the fair value of purchased credit impaired loans.

[15] Each loan concentration category should exclude the amount of loans recoverable from the U.S. government under guarantee or insurance provisions.

[16] The growth factor is rounded to two decimal points.

$$g_{i,k} = 1 + \left[\frac{1}{3} \left(G_{i,k} - 0.20 \right) \right]$$

Where:

$$G_{i,k} = \frac{V_{i,k,t}}{V_{i,k,t-12}} - 1,$$

V is the portfolio amount as reported on the Call Report/TFR and t is the quarter for which the assessment is being determined.

The risk weight for each portfolio reflects relative peak loss rates for banks at the 90th percentile during the 1990–2009 period.[17] These loss rates were converted into equivalent risk weights as shown in Table C.1.

TABLE C.1—90TH PERCENTILE ANNUAL LOSS RATES FOR 1990–2009 PERIOD AND CORRESPONDING RISK WEIGHTS

Portfolio	Loss rates (90th percentile)	Risk weights
First-Lien Mortgages	2.3%	0.5
Second/Junior Lien Mortgages	4.6%	0.9
Commercial and Industrial (C&I) Loans	5.0%	1.0
Construction and Development (C&D) Loans	15.0%	3.0
Commercial Real Estate Loans, excluding C&D	4.3%	0.9
Credit Card Loans	11.8%	2.4
Other Consumer Loans	5.9%	1.2

[77 FR 66017, Oct. 31, 2013, as amended at 78 FR 55594, Sept. 10, 2013; 83 FR 17740, Apr. 24, 2018; 86 FR 11401, Feb. 25, 2021]

[17] The risk weights are based on loss rates for each portfolio relative to the loss rate for C&I loans, which is given a risk weight of 1. The peak loss rates were derived as follows. The loss rate for each loan category for each bank with over $5 billion in total assets was calculated for each of the last twenty calendar years (1990–2009). The highest value of the 90th percentile of each loan category over the twenty year period was selected as the peak loss rate.

APPENDIX D TO SUBPART A OF PART 327—DESCRIPTION OF THE LOSS SEVERITY MEASURE

The loss severity measure applies a standardized set of assumptions to an institution's balance sheet to measure possible losses to the FDIC in the event of an institution's failure. To determine an institution's loss severity rate, the FDIC first applies assumptions about uninsured deposit and other unsecured liability runoff, and growth in insured deposits, to adjust the size and composition of the institution's liabilities. Assets are then reduced to match any reduction in liabilities.[1] The institution's asset values are then further reduced so that the Leverage ratio reaches 2 percent.[2] [3] In both cases, assets are adjusted pro rata to preserve the institution's asset composition. Assumptions regarding loss rates at failure for a given asset category and the extent of secured liabilities are then applied to estimated assets and liabilities at failure to determine whether the institution has enough unencumbered assets to cover domestic deposits. Any projected

[1] In most cases, the model would yield reductions in liabilities and assets prior to failure. Exceptions may occur for institutions primarily funded through insured deposits which the model assumes to grow prior to failure.

[2] Of course, in reality, runoff and capital declines occur more or less simultaneously as an institution approaches failure. The loss severity measure assumptions simplify this process for ease of modeling.

[3] The applicable portions of the current expected credit loss methodology (CECL) transitional amounts attributable to the allowance for credit losses on loans and leases held for investment and added to retained earnings for regulatory capital purposes pursuant to the regulatory capital regulations, as they may be amended from time to time (12 CFR part 3, 12 CFR part 217, 12 CFR part 324, 85 FR 61577 (Sept. 30, 2020), and 84 FR 4222 (Feb. 14, 2019)), will be removed from the calculation of the loss severity measure.

shortfall is divided by current domestic deposits to obtain an end-of-period loss severity ratio. The loss severity measure is an average loss severity ratio for the three most recent quarters of data available.

Runoff and Capital Adjustment Assumptions

Table D.1 contains run-off assumptions.

TABLE D.1—RUNOFF RATE ASSUMPTIONS

Liability type	Runoff rate * (percent)
Insured Deposits	(10)
Uninsured Deposits	58
Foreign Deposits	80
Federal Funds Purchased	100
Repurchase Agreements	75
Trading Liabilities	50
Unsecured Borrowings ≤ 1 Year	75
Secured Borrowings ≤ 1 Year	25
Subordinated Debt and Limited Liability Preferred Stock	15

* A negative rate implies growth.

Given the resulting total liabilities after runoff, assets are then reduced pro rata to preserve the relative amount of assets in each of the following asset categories and to achieve a Leverage ratio of 2 percent:

- Cash and Interest Bearing Balances;
- Trading Account Assets;
- Federal Funds Sold and Repurchase Agreements;
- Treasury and Agency Securities;
- Municipal Securities;
- Other Securities;
- Construction and Development Loans;
- Nonresidential Real Estate Loans;
- Multifamily Real Estate Loans;
- 1–4 Family Closed-End First Liens;
- 1–4 Family Closed-End Junior Liens;
- Revolving Home Equity Loans; and
- Agricultural Real Estate Loans.

Recovery Value of Assets at Failure

Table D.2 shows loss rates applied to each of the asset categories as adjusted above.

TABLE D.2—ASSET LOSS RATE ASSUMPTIONS

Asset category	Loss rate (percent)
Cash and Interest Bearing Balances	0.0
Trading Account Assets	0.0
Federal Funds Sold and Repurchase Agreements	0.0
Treasury and Agency Securities	0.0
Municipal Securities	10.0
Other Securities	15.0
Construction and Development Loans	38.2
Nonresidential Real Estate Loans	17.6
Multifamily Real Estate Loans	10.8
1–4 Family Closed-End First Liens	19.4
1–4 Family Closed-End Junior Liens	41.0
Revolving Home Equity Loans	41.0
Agricultural Real Estate Loans	19.7
Agricultural Loans	11.8
Commercial and Industrial Loans	21.5
Credit Card Loans	18.3
Other Consumer Loans	18.3
All Other Loans	51.0
Other Assets	75.0

Secured Liabilities at Failure

Federal home loan bank advances, secured federal funds purchased and repurchase agreements are assumed to be fully secured. Foreign deposits are treated as fully secured because of the potential for ring fencing.

Loss Severity Ratio Calculation

The FDIC's loss given failure (LGD) is calculated as:

$$LGD = \frac{InsuredDeposits_{Failure}}{DomesticDeposits_{Failure}} \times \left(\text{DomesticDeposits}_{\text{Failure}} - \text{RecoveryValueofAssets}_{\text{Failure}} + \text{SecuredLiabilities}_{\text{Failure}}\right)$$

An end-of-quarter loss severity ratio is LGD divided by total domestic deposits at quarter-end and the loss severity measure for the scorecard is an average of end-of-period loss severity ratios for three most recent quarters.

[76 FR 10724, Feb. 25, 2011, as amended at 86 FR 11401, Feb. 25, 2021]

APPENDIX E TO SUBPART A OF PART 327—MITIGATING THE DEPOSIT INSURANCE ASSESSMENT EFFECT OF PARTICIPATION IN THE MONEY MARKET MUTUAL FUND LIQUIDITY FACILITY, THE PAYCHECK PROTECTION PROGRAM LIQUIDITY FACILITY, AND THE PAYCHECK PROTECTION PROGRAM

I. MITIGATING THE ASSESSMENT EFFECTS OF PAYCHECK PROTECTION PROGRAM LOANS FOR ESTABLISHED SMALL INSTITUTIONS

TABLE E.1—EXCLUSIONS FROM CERTAIN RISK MEASURES USED TO CALCULATE THE ASSESSMENT RATE FOR ESTABLISHED SMALL INSTITUTIONS

Variables	Description	Exclusions
Leverage Ratio (%)	Tier 1 capital divided by adjusted average assets. (Numerator and denominator are both based on the definition for prompt corrective action.)	No Exclusion.
Net Income before Taxes/Total Assets (%).	Income (before applicable income taxes and discontinued operations) for the most recent twelve months divided by total assets [1].	Exclude from total assets the outstanding balance of loans provided under the Paycheck Protection Program.
Nonperforming Loans and Leases/Gross Assets (%).	Sum of total loans and lease financing receivables past due 90 or more days and still accruing interest and total nonaccrual loans and lease financing receivables (excluding, in both cases, the maximum amount recoverable from the U.S. Government, its agencies or government-sponsored enterprises, under guarantee or insurance provisions) divided by gross assets [2].	Exclude from gross assets the outstanding balance of loans provided under the Paycheck Protection Program.
Other Real Estate Owned/Gross Assets (%).	Other real estate owned divided by gross assets [2].	Exclude from gross assets the outstanding balance of loans provided under the Paycheck Protection Program.
Brokered Deposit Ratio	The ratio of the difference between brokered deposits and 10 percent of total assets to total assets. For institutions that are well capitalized and have a CAMELS composite rating of 1 or 2, brokered reciprocal deposits as defined in § 327.8(q) are deducted from brokered deposits. If the ratio is less than zero, the value is set to zero.	Exclude from total assets (in both numerator and denominator) the outstanding balance of loans provided under the Paycheck Protection Program.
Weighted Average of C, A, M, E, L, and S Component Ratings.	The weighted sum of the "C," "A," "M," "E", "L", and "S" CAMELS components, with weights of 25 percent each for the "C" and "M" components, 20 percent for the "A" component, and 10 percent each for the "E", "L" and "S" components.	No Exclusion.
Loan Mix Index	A measure of credit risk described paragraph (A) of this section.	Exclusions are described in paragraph (A) of this section.

TABLE E.1—EXCLUSIONS FROM CERTAIN RISK MEASURES USED TO CALCULATE THE ASSESSMENT RATE FOR ESTABLISHED SMALL INSTITUTIONS—Continued

Variables	Description	Exclusions
One-Year Asset Growth (%).	Growth in assets (adjusted for mergers[3]) over the previous year in excess of 10 percent.[4] If growth is less than 10 percent, the value is set to zero.	Exclude from total assets (in both numerator and denominator) the outstanding balance of loans provided under the Paycheck Protection Program.

[1] The ratio of Net Income before Taxes to Total Assets is bounded below by (and cannot be less than) -25 percent and is bounded above by (and cannot exceed) 3 percent.
[2] Gross assets are total assets plus the allowance for loan and lease financing receivable losses (ALLL) or allowance for credit losses, as applicable.
[3] Growth in assets is also adjusted for acquisitions of failed banks.
[4] The maximum value of the Asset Growth measure is 230 percent; that is, asset growth (merger adjusted) over the previous year in excess of 240 percent (230 percentage points in excess of the 10 percent threshold) will not further increase a bank's assessment rate.

(a) *Definition of Loan Mix Index*. The Loan Mix Index assigns loans in an institution's loan portfolio to the categories of loans described in the following table. Exclude from the balance of commercial and industrial loans the outstanding balance of loans provided under the Paycheck Protection Program. In the event that the outstanding balance of loans provided under the Paycheck Protection Program exceeds the balance of commercial and industrial loans, exclude the remaining balance from the balance of agricultural loans, up to the total amount of agricultural loans. The Loan Mix Index is calculated by multiplying the ratio of an institution's amount of loans in a particular loan category to its total assets, excluding the outstanding balance of loans provided under the Paycheck Protection Program by the associated weighted average charge-off rate for that loan category, and summing the products for all loan categories. The table gives the weighted average charge-off rate for each category of loan. The Loan Mix Index excludes credit card loans.

(b) [Reserved]

LOAN MIX INDEX CATEGORIES AND WEIGHTED CHARGE-OFF RATE PERCENTAGES

	Weighted charge-off rate percent
Construction & Development	4.4965840
Commercial & Industrial	1.5984506
Leases	1.4974551
Other Consumer	1.4559717
Real Estate Loans Residual	1.0169338
Multifamily Residential	0.8847597
Nonfarm Nonresidential	0.7286274
1–4 Family Residential	0.6973778
Loans to Depository banks	0.5760532
Agricultural Real Estate	0.2376712
Agriculture	0.2432737

II. MITIGATING THE ASSESSMENT EFFECTS OF PAYCHECK PROTECTION PROGRAM LOANS FOR LARGE OR HIGHLY COMPLEX INSTITUTIONS

TABLE E.2—EXCLUSIONS FROM CERTAIN RISK MEASURES USED TO CALCULATE THE ASSESSMENT RATE FOR LARGE OR HIGHLY COMPLEX INSTITUTIONS

Scorecard measures[1]	Description	Exclusions
Leverage Ratio	Tier 1 capital for Prompt Corrective Action (PCA) divided by adjusted average assets based on the definition for prompt corrective action.	No Exclusion.
Concentration Measure for Large Insured depository institutions (excluding Highly Complex Institutions).	The concentration score for large institutions is the higher of the following two scores:	
(1) Higher-Risk Assets/Tier 1 Capital and Reserves.	Sum of construction and land development (C&D) loans (funded and unfunded), higher-risk commercial and industrial (C&I) loans (funded and unfunded), nontraditional mortgages, higher-risk consumer loans, and higher-risk securitizations divided by Tier 1 capital and reserves. See Appendix C for the detailed description of the ratio.	No Exclusion.
(2) Growth-Adjusted Portfolio Concentrations.	The measure is calculated in the following steps:	
	(1) Concentration levels (as a ratio to Tier 1 capital and reserves) are calculated for each broad portfolio category:. • Constructions and land development (C&D),.	

TABLE E.2—EXCLUSIONS FROM CERTAIN RISK MEASURES USED TO CALCULATE THE ASSESSMENT RATE FOR LARGE OR HIGHLY COMPLEX INSTITUTIONS—Continued

Scorecard measures [1]	Description	Exclusions
	• Other commercial real estate loans,. • First lien residential mortgages (including non-agency residential mortgage-backed securities),. • Closed-end junior liens and home equity lines of credit (HELOCs),. • Commercial and industrial loans (C&I),. • Credit card loans, and. • Other consumer loans.. (2) Risk weights are assigned to each loan category based on historical loss rates.. (3) Concentration levels are multiplied by risk weights and squared to produce a risk-adjusted concentration ratio for each portfolio..	
	(4) Three-year merger-adjusted portfolio growth rates are then scaled to a growth factor of 1 to 1.2 where a 3-year cumulative growth rate of 20 percent or less equals a factor of 1 and a growth rate of 80 percent or greater equals a factor of 1.2. If three years of data are not available, a growth factor of 1 will be assigned.	Exclude from C&I loan growth rate the outstanding amount of loans provided under the Paycheck Protection Program.
	(5) The risk-adjusted concentration ratio for each portfolio is multiplied by the growth factor and resulting values are summed. See Appendix C for the detailed description of the measure.	
Concentration Measure for Highly Complex Institutions.	Concentration score for highly complex institutions is the highest of the following three scores:	
(1) Higher-Risk Assets/Tier 1 Capital and Reserves.	Sum of C&D loans (funded and unfunded), higher-risk C&I loans (funded and unfunded), nontraditional mortgages, higher-risk consumer loans, and higher-risk securitizations divided by Tier 1 capital and reserves. See Appendix C for the detailed description of the measure.	No Exclusion.
(2) Top 20 Counterparty Exposure/Tier 1 Capital and Reserves.	Sum of the 20 largest total exposure amounts to counterparties divided by Tier 1 capital and reserves. The total exposure amount is equal to the sum of the institution's exposure amounts to one counterparty (or borrower) for derivatives, securities financing transactions (SFTs), and cleared transactions, and its gross lending exposure (including all unfunded commitments) to that counterparty (or borrower). A counterparty includes an entity's own affiliates. Exposures to entities that are affiliates of each other are treated as exposures to one counterparty (or borrower). Counterparty exposure excludes all counterparty exposure to the U.S. Government and departments or agencies of the U.S. Government that is unconditionally guaranteed by the full faith and credit of the United States. The exposure amount for derivatives, including OTC derivatives, cleared transactions that are derivative contracts, and netting sets of derivative contracts, must be calculated using the methodology set forth in 12 CFR 324.34(b), but without any reduction for collateral other than cash collateral that is all or part of variation margin and that satisfies the requirements of 12 CFR 324.10(c)(4)(ii)(C)(1)(ii) and (iii) and 324.10(c)(4)(ii)(C)(3) through (7). The exposure amount associated with SFTs, including cleared transactions that are SFTs, must be calculated using the standardized approach set forth in 12 CFR 324.37(b) or (c). For both derivatives and SFT exposures, the exposure amount to central counterparties must also include the default fund contribution.	No Exclusion.

TABLE E.2—EXCLUSIONS FROM CERTAIN RISK MEASURES USED TO CALCULATE THE ASSESSMENT RATE FOR LARGE OR HIGHLY COMPLEX INSTITUTIONS—Continued

Scorecard measures [1]	Description	Exclusions
(3) Largest Counterparty Exposure/Tier 1 Capital and Reserves.	The largest total exposure amount to one counterparty divided by Tier 1 capital and reserves. The total exposure amount is equal to the sum of the institution's exposure amounts to one counterparty (or borrower) for derivatives, SFTs, and cleared transactions, and its gross lending exposure (including all unfunded commitments) to that counterparty (or borrower). A counterparty includes an entity's own affiliates. Exposures to entities that are affiliates of each other are treated as exposures to one counterparty (or borrower). Counterparty exposure excludes all counterparty exposure to the U.S. Government and departments or agencies of the U.S. Government that is unconditionally guaranteed by the full faith and credit of the United States. The exposure amount for derivatives, including OTC derivatives, cleared transactions that are derivative contracts, and netting sets of derivative contracts, must be calculated using the methodology set forth in 12 CFR 324.34(b), but without any reduction for collateral other than cash collateral that is all or part of variation margin and that satisfies the requirements of 12 CFR 324.10(c)(4)(ii)(C)(1)(ii) and (iii) and 324.10(c)(4)(ii)(C)(3) through (7). The exposure amount associated with SFTs, including cleared transactions that are SFTs, must be calculated using the standardized approach set forth in 12 CFR 324.37(b) or (c). For both derivatives and SFT exposures, the exposure amount to central counterparties must also include the default fund contribution.	No Exclusion.
Core Earnings/Average Quarter-End Total Assets.	Core earnings are defined as net income less extraordinary items and tax-adjusted realized gains and losses on available-for-sale (AFS) and held-to-maturity (HTM) securities, adjusted for mergers. The ratio takes a four-quarter sum of merger-adjusted core earnings and divides it by an average of five quarter-end total assets (most recent and four prior quarters). If four quarters of data on core earnings are not available, data for quarters that are available will be added and annualized. If five quarters of data on total assets are not available, data for quarters that are available will be averaged.	Prior to averaging, exclude from total assets for the applicable quarter-end periods the outstanding balance of loans provided under the Paycheck Protection Program.
Credit Quality Measure. [2]	The credit quality score is the higher of the following two scores:	
(1) Criticized and Classified Items/Tier 1 Capital and Reserves.	Sum of criticized and classified items divided by the sum of Tier 1 capital and reserves. Criticized and classified items include items an institution or its primary federal regulator have graded ''Special Mention'' or worse and include retail items under Uniform Retail Classification Guidelines, securities, funded and unfunded loans, other real estate owned (ORE), other assets, and marked-to-market counterparty positions, less credit valuation adjustments. Criticized and classified items exclude loans and securities in trading books, and the amount recoverable from the U.S. government, its agencies, or government-sponsored enterprises, under guarantee or insurance provisions.	No Exclusion.
(2) Underperforming Assets/Tier 1 Capital and Reserves.	Sum of loans that are 30 days or more past due and still accruing interest, nonaccrual loans, restructured loans (including restructured 1–4 family loans), and ORE, excluding the maximum amount recoverable from the U.S. government, its agencies, or government-sponsored enterprises, under guarantee or insurance provisions, divided by a sum of Tier 1 capital and reserves.	No Exclusion.
Core Deposits/Total Liabilities.	Total domestic deposits excluding brokered deposits and uninsured nonbrokered time deposits divided by total liabilities.	Exclude from total liabilities outstanding borrowings from Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility with a maturity of one year or less and outstanding borrowings from the Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility with a maturity of greater than one year.

TABLE E.2—EXCLUSIONS FROM CERTAIN RISK MEASURES USED TO CALCULATE THE ASSESSMENT RATE FOR LARGE OR HIGHLY COMPLEX INSTITUTIONS—Continued

Scorecard measures [1]	Description	Exclusions
Balance Sheet Liquidity Ratio.	Sum of cash and balances due from depository institutions, federal funds sold and securities purchased under agreements to resell, and the market value of available for sale and held to maturity agency securities (excludes agency mortgage-backed securities but includes all other agency securities issued by the U.S. Treasury, U.S. government agencies, and U.S. government sponsored enterprises) divided by the sum of federal funds purchased and repurchase agreements, other borrowings (including FHLB) with a remaining maturity of one year or less, 5 percent of insured domestic deposits, and 10 percent of uninsured domestic and foreign deposits.	Include in highly liquid assets the outstanding balance of PPP loans that exceed borrowings from the Federal Reserve Banks under the PPPLF, until September 30, 2020, or if extended by the Board of Governors of the Federal Reserve System and the Secretary of the Treasury, until such date of extension. Exclude from other borrowings with a remaining maturity of one year or less the balance of outstanding borrowings from the Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility with a remaining maturity of one year or less.
Potential Losses/Total Domestic Deposits (Loss Severity Measure).	Potential losses to the DIF in the event of failure divided by total domestic deposits. Paragraph (a) of this section describes the calculation of the loss severity measure in detail.	Exclusions are described in paragraph (a) of this section.
Market Risk Measure for Highly Complex Institutions [2].	The market risk score is a weighted average of the following three scores:	
(1) Trading Revenue Volatility/Tier 1 Capital.	Trailing 4-quarter standard deviation of quarterly trading revenue (merger-adjusted) divided by Tier 1 capital.	No Exclusion.
(2) Market Risk Capital/Tier 1 Capital.	Market risk capital divided by Tier 1 capital	No Exclusion.
(3) Level 3 Trading Assets/Tier 1 Capital.	Level 3 trading assets divided by Tier 1 capital	No Exclusion.
Average Short-term Funding/Average Total Assets.	Quarterly average of federal funds purchased and repurchase agreements divided by the quarterly average of total assets as reported on Schedule RC–K of the Call Reports.	Exclude from the quarterly average of total assets the outstanding balance of loans provided under the Paycheck Protection Program.

[1] The applicable portions of the current expected credit loss methodology (CECL) transitional amounts attributable to the allowance for credit losses on loans and leases held for investment and added to retained earnings for regulatory capital purposes pursuant to the regulatory capital regulations, as they may be amended from time to time (12 CFR part 3, 12 CFR part 217, 12 CFR part 324, 85 FR 61577 (Sept. 30, 2020), and 84 FR 4222 (Feb. 14, 2019)), will be removed from the sum of Tier 1 capital and reserves throughout the large bank and highly complex bank scorecards, including in the ratio of Higher-Risk Assets to Tier 1 Capital and Reserves, the Growth-Adjusted Portfolio Concentrations Measure, the ratio of Top 20 Counterparty Exposure to Tier 1 Capital and Reserves, the Ratio of Largest Counterparty Exposure to Tier 1 Capital and Reserves, the ratio of Criticized and Classified Items to Tier 1 Capital and Reserves, and the ratio of Underperforming Assets to Tier 1 Capital and Reserves. All of these ratios are described in appendix A of this subpart.

[2] The credit quality score is the greater of the criticized and classified items to Tier 1 capital and reserves score or the underperforming assets to Tier 1 capital and reserves score. The market risk score is the weighted average of three scores—the trading revenue volatility to Tier 1 capital score, the market risk capital to Tier 1 capital score, and the level 3 trading assets to Tier 1 capital score. All of these ratios are described in appendix A of this subpart and the method of calculating the scores is described in appendix B of this subpart. Each score is multiplied by its respective weight, and the resulting weighted score is summed to compute the score for the market risk measure. An overall weight of 35 percent is allocated between the scores for the credit quality measure and market risk measure. The allocation depends on the ratio of average trading assets to the sum of average securities, loans and trading assets (trading asset ratio) as follows: (1) Weight for credit quality score = 35 percent * (1—trading asset ratio); and, (2) Weight for market risk score = 35 percent * trading asset ratio. In calculating the trading asset ratio, exclude from the balance of loans the outstanding balance of loans provided under the Paycheck Protection Program.

(a) *Description of the loss severity measure.* The loss severity measure applies a standardized set of assumptions to an institution's balance sheet to measure possible losses to the FDIC in the event of an institution's failure. To determine an institution's loss severity rate, the FDIC first applies assumptions about uninsured deposit and other liability runoff, and growth in insured deposits, to adjust the size and composition of the institution's liabilities. Exclude total outstanding borrowings from Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility from short-and long-term secured borrowings, as appropriate. Assets are then reduced to match any reduction in liabilities. Exclude from an institution's balance of commercial and industrial loans the outstanding balance of loans provided under the Paycheck Protection Program. In the event that the outstanding balance of loans provided under the Paycheck Protection Program exceeds the balance of commercial and industrial loans, exclude any remaining balance of loans provided under the Paycheck Protection Program first from the balance of all other loans, up to the total amount of all other loans, followed by the balance of agricultural loans, up to the total amount of agricultural loans. Increase cash balances by outstanding loans provided under the Paycheck Protection Program that exceed total outstanding borrowings from Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility, if any. The institution's asset values are then further reduced so that the Leverage Ratio reaches 2 percent. In both cases, assets are adjusted pro rata to preserve the institution's asset composition. Assumptions regarding loss rates at failure for a given asset category and the extent of secured liabilities are then applied to estimated assets and liabilities at failure to determine whether the institution has enough unencumbered assets to cover domestic deposits. Any projected shortfall is divided by current domestic deposits to obtain an end-of-period loss severity ratio. The loss severity measure is an average loss severity ratio for the three most recent quarters of data available. The applicable portions of the current expected credit loss methodology (CECL) transitional amounts attributable to the allowance for credit losses on loans and leases held for investment and added to retained earnings for regulatory capital purposes pursuant to the regulatory capital regulations, as they may be amended from time to time (12 CFR part 3, 12 CFR part 217, 12 CFR part 324, 85 FR 61577 (Sept. 30, 2020), and 84 FR 4222 (Feb. 14, 2019)), will be removed from the calculation of the loss severity measure.

Runoff and Capital Adjustment Assumptions

Table E.3 contains run-off assumptions.

TABLE E.3—RUNOFF RATE ASSUMPTIONS

Liability type	Runoff rate * (percent)
Insured Deposits	(10)
Uninsured Deposits	58
Foreign Deposits	80
Federal Funds Purchased	100
Repurchase Agreements	75
Trading Liabilities	50
Unsecured Borrowings < = 1 Year	75
Secured Borrowings < = 1 Year, excluding outstanding borrowings from the Federal Reserve Banks under the PPPLF < = 1 Year	25
Subordinated Debt and Limited Liability Preferred Stock	15

* A negative rate implies growth.

Given the resulting total liabilities after runoff, assets are then reduced pro rata to preserve the relative amount of assets in each of the following asset categories and to achieve a Leverage Ratio of 2 percent:

- Cash and Interest Bearing Balances, including outstanding loans provided under the Paycheck Protection Program in excess of borrowings from Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility;
- Trading Account Assets;
- Federal Funds Sold and Repurchase Agreements;
- Treasury and Agency Securities;
- Municipal Securities;
- Other Securities;
- Construction and Development Loans
- Nonresidential Real Estate Loans;
- Multifamily Real Estate Loans;
- 1—4 Family Closed-End First Liens;
- 1—4 Family Closed-End Junior Liens;
- Revolving Home Equity Loans; and
- Agricultural Real Estate Loans

Recovery Value of Assets at Failure

Table E.4—shows loss rates applied to each of the asset categories as adjusted above.

TABLE E.4—ASSET LOSS RATE ASSUMPTIONS

Asset category	Loss rate (percent)
Cash and Interest Bearing Balances, including outstanding loans provided under the Paycheck Protection Program in excess of borrowings from Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility	0.0
Trading Account Assets	0.0
Federal Funds Sold and Repurchase Agreements	0.0
Treasury and Agency Securities	0.0
Municipal Securities	10.0
Other Securities	15.0
Construction and Development Loans	38.2
Nonresidential Real Estate Loans	17.6
Multifamily Real Estate Loans	10.8
1–4 Family Closed-End First Liens	19.4
1–4 Family Closed-End Junior Liens	41.0
Revolving Home Equity Loans	41.0
Agricultural Real Estate Loans	19.7
Agricultural Loans, excluding outstanding loans under the Paycheck Protection Program, as described in § 327.17 and this appendix	11.8
Commercial and Industrial Loans, excluding outstanding loans under the Paycheck Protection Program, described in § 327.17 and this appendix	21.5
Credit Card Loans	18.3
Other Consumer Loans	18.3
All Other Loans, excluding outstanding loans under the Paycheck Protection Program, described in § 327.17 and this appendix	51.0
Other Assets	75.0

Secured Liabilities at Failure

Federal Home Loan Bank advances, secured federal funds purchased and repurchase agreements are assumed to be fully secured. Foreign deposits are treated as fully secured because of the potential for ring fencing.

Exclude total outstanding borrowings from the Federal Reserve Banks under the Paycheck Protection Program Liquidity Facility.

Loss Severity Ratio Calculation

The FDIC's loss given failure (LGD) is calculated as:

$$LGD = \frac{InsuredDeposits_{Failure}}{DomesticDeposits_{Failure}} \times \left(\text{DomesticDeposits}_{\text{Failure}} - \text{RecoveryValueofAssets}_{\text{Failure}} + \text{SecuredLiabilities}_{\text{Failure}}\right)$$

An end-of-quarter loss severity ratio is LGD divided by total domestic deposits at quarter-end and the loss severity measure for the scorecard is an average of end-of-period loss severity ratios for three most recent quarters.

(b) [Reserved]

III. MITIGATING THE EFFECTS OF LOANS PROVIDED UNDER THE PAYCHECK PROTECTION PROGRAM AND ASSETS PURCHASED UNDER THE MONEY MARKET MUTUAL FUND LIQUIDITY FACILITY ON THE UNSECURED ADJUSTMENT, DEPOSITORY INSTITUTION DEBT ADJUSTMENT, AND THE BROKERED DEPOSIT ADJUSTMENT TO AN IDI'S ASSESSMENT RATE

TABLE E.5—EXCLUSIONS FROM ADJUSTMENTS TO THE INITIAL BASE ASSESSMENT RATE

Adjustment	Calculation	Exclusion
Unsecured debt adjustment.	The unsecured debt adjustment shall be determined as the sum of the initial base assessment rate plus 40 basis points; that sum shall be multiplied by the ratio of an insured depository institution's long-term unsecured debt to its assessment base. The amount of the reduction in the assessment rate due to the adjustment is equal to the dollar amount of the adjustment divided by the amount of the assessment base.	Exclude from the assessment base the outstanding balance of loans provided under the Paycheck Protection Program and the quarterly average amount of assets purchased under the Money Market Mutual Fund Liquidity Facility.

TABLE E.5—EXCLUSIONS FROM ADJUSTMENTS TO THE INITIAL BASE ASSESSMENT RATE—Continued

Adjustment	Calculation	Exclusion
Depository institution debt adjustment.	An insured depository institution shall pay a 50 basis point adjustment on the amount of unsecured debt it holds that was issued by another insured depository institution to the extent that such debt exceeds 3 percent of the institution's Tier 1 capital. This amount is divided by the institution's assessment base. The amount of long-term unsecured debt issued by another insured depository institution shall be calculated using the same valuation methodology used to calculate the amount of such debt for reporting on the asset side of the balance sheets.	Exclude from the assessment base the outstanding balance of loans provided under the Paycheck Protection Program and the quarterly average amount of assets purchased under the Money Market Mutual Fund Liquidity Facility.
Brokered deposit adjustment.	The brokered deposit adjustment shall be determined by multiplying 25 basis points by the ratio of the difference between an insured depository institution's brokered deposits and 10 percent of its domestic deposits to its assessment base.	Exclude from the assessment base the outstanding balance of loans provided under the Paycheck Protection Program and the quarterly average amount of assets purchased under the Money Market Mutual Fund Liquidity Facility.

IV. MITIGATING THE EFFECTS ON THE ASSESSMENT BASE ATTRIBUTABLE TO LOANS PROVIDED UNDER THE PAYCHECK PROTECTION PROGRAM AND PARTICIPATION IN THE MONEY MARKET MUTUAL FUND LIQUIDITY FACILITY

Total Assessment Amount Due = Total Assessment Amount LESS: (SUM (Outstanding balance of loans provided under the Paycheck Protection Program and quarterly average amount of assets purchased under the Money Market Mutual Fund Liquidity Facility) * Total Base Assessment Rate)

[85 FR 38294, June 26, 2020, as amended at 85 FR 71228, Nov. 9, 2020; 86 FR 11401, Feb. 25, 2021]

Subpart B—Implementation of One-Time Assessment Credit

AUTHORITY: 12 U.S.C. 1817(e)(3).

SOURCE: 71 FR 61383, Oct. 18, 2006, unless otherwise noted.

§ 327.30 Purpose and scope.

(a) *Scope*. This subpart B of part 327 implements the one-time assessment credit required by section 7(e)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(e)(3) and applies to insured depository institutions.

(b) *Purpose*. This subpart B of part 327 sets forth the rules for:

(1) Determination of the aggregate amount of the one-time credit;

(2) Identification of eligible insured depository institutions;

(3) Determination of the amount of each eligible institution's December 31, 1996 assessment base ratio and one-time credit;

(4) Transferability of credit amounts among insured depository institutions;

(5) Application of such credit amounts against assessments; and

(6) An institution's request for review of the FDIC's determination of a credit amount.

§ 327.31 Definitions.

For purposes of this subpart and subpart C:

(a) The *average assessment rate* for any assessment period means the aggregate assessment charged all insured depository institutions for that period divided by the aggregate assessment base for that period.

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

(c) *De facto rule* means any transaction in which an insured depository institution assumes substantially all of the deposit liabilities and acquires substantially all of the assets of any other insured depository institution at the time of the transaction.

(d) An *eligible insured depository institution:*

(1) Means an insured depository institution that:

(i) Was in existence on December 31, 1996, and paid a deposit insurance assessment before December 31, 1996; or

(ii) Is a successor to an insured depository institution referred to in paragraph (d)(1)(i) of this section; and

(2) does not include an institution if its insured status has terminated as of or after the effective date of this regulation.

(e) *Merger* means any transaction in which an insured depository institution merges or consolidates with any other insured depository institution. Notwithstanding part 303, subpart D, for purposes of this subpart B and subpart C of this part, *merger* does not include transactions in which an insured depository institution either directly or indirectly acquires the assets of, or assumes liability to pay any deposits made in, any other insured depository institution, but there is not a legal merger or consolidation of the two insured depository institutions.

(f) *Resulting institution* refers to the acquiring, assuming, or resulting institution in a merger.

(g) *Successor* means a resulting institution or an insured depository institution that acquired part of another insured depository institution's 1996 assessment base ratio under paragraph 327.33(c) of this subpart under the *de facto* rule.

§ 327.32 Determination of aggregate credit amount.

The aggregate amount of the one-time credit shall equal $4,707,580,238.19.

§ 327.33 Determination of eligible institution's credit amount.

(a) Subject to paragraph (c) of this section, allocation of the one-time credit shall be based on each eligible insured depository institution's 1996 assessment base ratio.

(b) Subject to paragraph (c) of this section, an eligible insured depository institution's 1996 assessment base ratio shall consist of:

(1) Its assessment base as of December 31, 1996 (adjusted as appropriate to reflect the assessment base of December 31, 1996, of all institutions for which it is the successor), as the numerator; and

(2) The combined aggregate assessment bases of all eligible insured depository institutions, including any successor institutions, as of December 31, 1996, as the denominator.

(c) If an insured depository institution is a successor to an eligible insured depository institution under the *de facto* rule, as defined in paragraph 327.31(c) of this subpart, the successor and the eligible insured depository institution will divide the eligible insured depository institution's 1996 assessment base ratio pro rata, based on the deposit liabilities assumed in the transaction. In any subsequent transaction involving an insured depository institution that previously engaged in a transaction to which the *de facto* rule applied, the insured depository institution may not be deemed to have transferred more than its remaining 1996 assessment base ratio. If the transferring institution is no longer an insured depository institution after the transfer, the last successor will acquire the transferring institution's remaining 1996 assessment base ratio.

§ 327.34 Transferability of credits.

(a) Any remaining amount of the one-time assessment credit and the associated 1996 assessment base ratio shall transfer to a successor of an eligible insured depository institution.

(b) Prior to the final determination of its 1996 assessment base and one-time assessment credit amount by the FDIC, an eligible insured depository institution may enter into an agreement to transfer any portion of such institution's one-time credit amount and 1996 assessment base ratio to another insured depository institution. The parties to the agreement shall notify the FDIC's Division of Finance and submit a written agreement, signed by legal representatives of both institutions. The parties must include documentation stating that each representative has the legal authority to bind the institution. The adjustment to credit amount and the associated 1996 assessment base ratio shall be made in the next assessment invoice that is sent at least 10 days after the FDIC's receipt of the written agreement.

(c) An eligible insured depository institution may enter into an agreement after the final determination of its 1996 assessment base ratio and one-time credit amount by the FDIC to transfer any portion of such institution's one-time credit amount to another insured depository institution. The parties to the agreement shall notify the FDIC's Division of Finance and submit a written agreement, signed by legal representatives of both institutions. The parties must include documentation stating that each representative has the legal authority to bind the institution. The adjustment to the credit amount shall be made in the next assessment invoice that is sent at least 10 days after the FDIC's receipt of the written agreement.

§ 327.35 Application of credits.

(a) Subject to the limitations in paragraph (b) of this section, the amount of an eligible insured depository institution's one-time credit shall be applied to the maximum extent allowable by law against that institution's quarterly assessment payment under subpart A of this part, after applying assessment credits awarded under § 327.11(c), until the institution's credit is exhausted.

(b) The following limitations shall apply to the application of the credit against assessment payments.

(1) For assessments that become due for assessment periods beginning in calendar years 2008, 2009, and 2010, the credit may not be applied to more than 90 percent of the quarterly assessment.

(2) For an insured depository institution that exhibits financial, operational, or compliance weaknesses ranging from moderately severe to unsatisfactory, or is not at least adequately capitalized (as defined pursuant to section 38 of the Federal Deposit Insurance Act) at the beginning of an assessment period, the amount of the credit that may be applied against the institution's quarterly assessment for that period shall not exceed the amount that the institution would have been assessed if it had been assessed at the average assessment rate for all insured institutions for that period. The FDIC shall determine the average assessment rate for an assessment period based upon its best estimate of the average rate for the period. The estimate shall be made using the best information available, but shall be made no earlier than 30 days and no later than 20 days prior to the payment due date for the period.

(3) If the FDIC has established a restoration plan pursuant to section 7(b)(3)(E) of the Federal Deposit Insurance Act, the FDIC may elect to restrict the application of credit amounts, in any assessment period, up to the lesser of:

(i) The amount of an insured depository institution's assessment for that period; or

(ii) The amount equal to 3 basis points of the institution's assessment base.

(c) *Remittance of credits.* Subject to the limitations in paragraph (b) of this section, in the same assessment period that the FDIC remits the full nominal value of small bank assessment credits pursuant to § 327.11(c)(13), the FDIC shall remit the full nominal value of an institution's remaining one-time assessment credits provided under this subpart B in a single lump-sum payment to such institution.

[71 FR 61383, Oct. 18, 2006, as amended at 81 FR 16073, Mar. 25, 2016; 84 FR 65276, Nov. 27, 2019]

§ 327.36 Requests for review of credit amount.

(a)(1) As soon as practicable after the publication date of this rule, the FDIC shall notify each insured depository institution by FDIC*connect* or mail of its 1996 assessment base ratio and credit amount in a Statement of One-Time Credit (''Statement''), if any. An insured depository institution may submit a request for review of the FDIC's determination of the institution's 1996 assessment base ratio or credit amount as shown on the Statement within 30 days after the effective date of this rule. Such review may be requested if:

(i) The institution disagrees with a determination as to eligibility for the credit that relates to that institution's credit amount;

(ii) The institution disagrees with the calculation of the credit as stated on the Statement; or

(iii) The institution believes that the 1996 assessment base ratio attributed to the institution on the Statement does not fully or accurately reflect its own 1996 assessment base or appropriate adjustments for successors.

(2) If an institution does not submit a timely request for review, that institution is barred from subsequently requesting review of its credit amount, subject to paragraph (e) of this section.

(b)(1) An insured depository institution may submit a request for review of the FDIC's adjustment to the credit amount in a quarterly invoice within 30 days of the date on which the FDIC provides the invoice. Such review may be requested if:

(i) The institution disagrees with the calculation of the credit as stated on the invoice; or

(ii) The institution believes that the 1996 assessment base ratio attributed to the institution due to the adjustment to the invoice does not fully or accurately reflect appropriate adjustments for successors since the last quarterly invoice.

(2) If an institution does not submit a timely request for review, that institution is barred from subsequently requesting review of its credit amount, subject to paragraph (e) of this section.

(c) The request for review shall be submitted to the Division of Finance and shall provide documentation sufficient to support the change sought by the institution. At the time of filing with the FDIC, the requesting institution shall notify, to the extent practicable, any other insured depository institution that would be directly and materially affected by granting the request for review and provide such institution with copies of the request for review, the supporting documentation, and the FDIC's procedures for requests under this subpart. In addition, the FDIC also shall make reasonable efforts, based on its official systems of records, to determine that such institutions have been identified and notified.

(d) During the FDIC's consideration of the request for review, the amount of credit in dispute shall not be available for use by any institution.

(e) Within 30 days of being notified of the filing of the request for review, those institutions identified as potentially affected by the request for review may submit a response to such request, along with any supporting documentation, to the Division of Finance, and shall provide copies to the requesting institution. If an institution that was notified under paragraph (c) does not submit a response to the request for review, that institution may not:

(1) Subsequently dispute the information submitted by other institutions on the transaction(s) at issue in the review process; or

(2) Appeal the decision by the Director of the Division of Finance.

(f) If additional information is requested of the requesting or affected institutions by the FDIC, such information shall be provided by the institution within 21 days of the date of the FDIC's request for additional information.

(g) Any institution submitting a timely request for review will receive a written response from the FDIC's Director of the Division of Finance, (or his or her designee), notifying the requesting and affected institutions of the determination of the Director as to whether the requested change is warranted. Notice of the procedures applicable to appeals under paragraph (h) of this section will be included with the Director's written determination. Whenever feasible, the FDIC will provide the institution with the aforesaid written response the later of:

(1) Within 60 days of receipt by the FDIC of the request for revision;

(2) If additional institutions have been notified by the requesting institution or the FDIC, within 60 days of the date of the last response to the notification; or

(3) If additional information has been requested by the FDIC, within 60 days of receipt of the additional information.

(h) Subject to paragraph (e) of this section, the insured depository institution that requested review under this section, or an insured depository institution materially affected by the Director's determination, that disagrees with that determination may appeal to the FDIC's Assessment Appeals Committee on the same grounds as set

forth under paragraph (a) of this section. Any such appeal must be submitted within 30 calendar days from the date of the Director's written determination. Notice of the procedures applicable to appeals under this section will be included with the Director's written determination. The decision of the Assessment Appeals Committee shall be the final determination of the FDIC.

(i) Any adjustment to an institution's credits resulting from a determination by the Director of the FDIC's Assessment Appeals Committee shall be reflected in the institution's next assessment invoice. The adjustment to credits shall affect future assessments only and shall not result in a retroactive adjustment of assessment amounts owed for prior periods.

Subpart C—Implementation of Dividend Requirements

AUTHORITY: 12 U.S.C. 1817(e)(2), (4).

SOURCE: 73 FR 73162, Dec. 2, 2008, unless otherwise noted.

§ 327.50 Dividends.

(a) *Suspension of dividends*. The Board will suspend dividends indefinitely whenever the DIF reserve ratio exceeds 1.50 percent at the end of any year.

(b) *Assessment rate schedule if DIF reserve ratio exceeds 1.50 Percent*. In lieu of dividends, when the DIF reserve ratio exceeds 1.50 percent, assessment rates shall be determined as set forth in section 327.10, as appropriate.

[76 FR 10725, Feb. 25, 2011]

PART 328—ADVERTISEMENT OF MEMBERSHIP

Sec.

328.0 Scope.
328.1 Official sign.
328.2 Display and procurement of official sign.
328.3 Official advertising statement requirements.
328.4 Prohibition against receiving deposits at same teller station or window as non-insured institution.

AUTHORITY: 12 U.S.C. 1818(a), 1819 (Tenth), 1828(a).

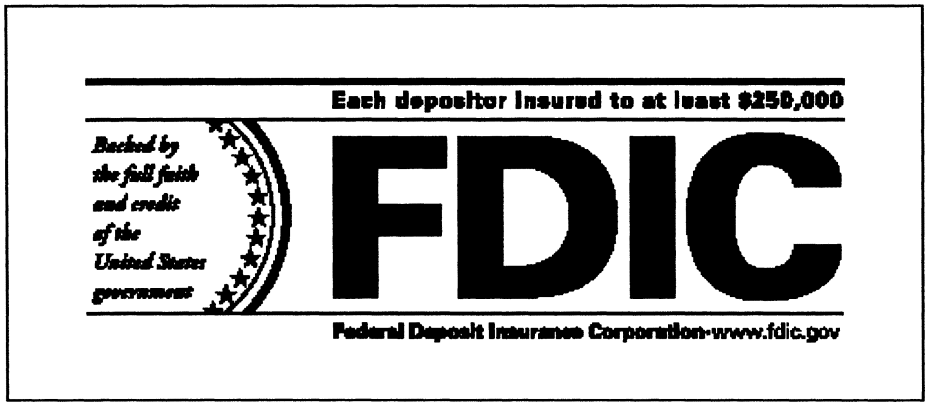
SOURCE: 72 FR 66102, Nov. 13, 2006, unless otherwise noted.

§ 328.0 Scope.

Part 328 describes the official sign of the FDIC and prescribes its use by insured depository institutions. It also prescribes the official advertising statement insured depository institutions must include in their advertisements. For purposes of part 328, the term ''insured depository institution'' includes insured branches of a foreign depository institution. Part 328 does not apply to non-insured offices or branches of insured depository institutions located in foreign countries.

§ 328.1 Official sign.

(a) The official sign referred to in this part shall be 7″ by 3″ in size, with black lettering and gold background, and of the following design:



(b) The ''symbol'' of the Corporation, as used in this part, shall be that portion of the official sign consisting of ''FDIC'' and the two lines of smaller type above and below ''FDIC.''

[72 FR 66102, Nov. 13, 2006, as amended at 75 FR 49365, Aug. 13, 2010]

§ 328.2 Display and procurement of official sign.

(a) *Display of official sign.* Each insured depository institution shall continuously display the official sign at each station or window where insured deposits are usually and normally received in the depository institution's principal place of business and in all its branches.

(1) *Other locations*—(i) *Within the institution.* In addition to locations where display of the official sign is required under this § 328.2(a), an insured depository institution may display the official sign in other locations at the institution.

(ii) *Other facilities.* An insured depository institution may display the official sign on or at Remote Service Facilities. If an insured depository institution displays the official sign at a Remote Service Facility, and if there are any noninsured institutions that share in the Remote Service Facility, any insured depository institution that displays the official sign must clearly show that the sign refers only to a designated insured depository institution(s). As used in this part, the term ''Remote Service Facility'' includes any automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility where deposits are received.

(2) *Varied signs.* Instead of displaying the official sign, an insured depository institution may display signs that vary from the official sign in size, color, or material at any location where display of the official sign is required or permitted under this § 328.2(a). However, any such varied sign that is displayed in locations where display of the official sign is required under this § 328.2(a) must not be smaller in size than the official sign and must have the same color for the text and symbols.

(3) *Newly insured institutions.* A depository institution shall display the official sign no later than its twenty-first day of operation as an insured depository institution, unless the institution promptly requested the official sign from the Corporation, but did not receive it before that date.

(b) *Procuring official sign.* An insured depository institution may procure the official sign from the Corporation for official use at no charge. Information on obtaining the official sign is posted on the FDIC's internet Web site, *http://www.fdic.gov.* Alternatively, insured depository institutions may, at their expense, procure from commercial suppliers signs that vary from the official sign in size, color, or material. Any insured depository institution which has promptly submitted a written request for an official sign to the Corporation shall not be deemed to have violated

this § 328.2 by failing to display the official sign, unless the insured depository institution fails to display the official sign after receipt thereof.

(c) *Required changes in sign*. The Corporation may require any insured depository institution, upon at least thirty (30) days' written notice, to change the wording of the official sign in a manner deemed necessary for the protection of depositors or others.

§ 328.3 Official advertising statement requirements.

(a) *Advertisement defined*. The term ''advertisement,'' as used in this part, shall mean a commercial message, in any medium, that is designed to attract public attention or patronage to a product or business.

(b) *Official advertising statement*. The official advertising statement shall be in substance as follows: ''Member of the Federal Deposit Insurance Corporation.''

(1) *Optional short title and symbol*. The short title ''Member of FDIC'' or ''Member FDIC,'' or a reproduction of the symbol of the Corporation (as described in § 328.1(b)), may be used by insured depository institutions at their option as the official advertising statement.

(2) *Size and print*. The official advertising statement shall be of such size and print to be clearly legible. If the symbol of the Corporation is used as the official advertising statement, and the symbol must be reduced to such proportions that the two lines of smaller type above and below ''FDIC'' are indistinct and illegible, those lines of smaller type may be blocked out or dropped.

(c) *Use of official advertising statement in advertisements*—(1) *General requirement*. Except as provided in § 328.3(d), each insured depository institution shall include the official advertising statement prescribed in § 328.3(b) in all advertisements that either promote deposit products and services or promote non-specific banking products and services offered by the institution. For purposes of this § 328.3, an advertisement promotes non-specific banking products and services if it includes the name of the insured depository institution but does not list or describe particular products or services offered by the institution. An example of such an advertisement would be, ''Anytown Bank, offering a full range of banking services.''

(2) *Foreign depository institutions*. When a foreign depository institution has both insured and noninsured U.S. branches, the depository institution must also identify which branches are insured and which branches are not insured in all of its advertisements requiring use of the official advertising statement.

(3) *Newly insured institutions*. A depository institution shall include the official advertising statement in its advertisements no later than its twenty-first day of operation as an insured depository institution.

(d) *Types of advertisements which do not require the official advertising statement*. The following types of advertisements do not require use of the official advertising statement:

(1) Statements of condition and reports of condition of an insured depository institution which are required to be published by State or Federal law;

(2) Insured depository institution supplies such as stationery (except when used for circular letters), envelopes, deposit slips, checks, drafts, signature cards, deposit passbooks, certificates of deposit, etc.;

(3) Signs or plates in the insured depository institution offices or attached to the building or buildings in which such offices are located;

(4) Listings in directories;

(5) Advertisements not setting forth the name of the insured depository institution;

(6) Entries in a depository institution directory, provided the name of the insured depository institution is listed on any page in the directory with a symbol or other descriptive matter indicating it is a member of the Federal Deposit Insurance Corporation;

(7) Joint or group advertisements of depository institution services where the names of insured depository institutions and noninsured institutions are listed and form a part of such advertisements;

(8) Advertisements by radio or television, other than display advertisements, which do not exceed thirty (30) seconds in time;

(9) Advertisements which are of the type or character that make it impractical to include the official advertising statement, including, but not limited to, promotional items such as calendars, matchbooks, pens, pencils, and key chains; and

(10) Advertisements which contain a statement to the effect that the depository institution is a member of the Federal Deposit Insurance Corporation, or that the depository institution is insured by the Federal Deposit Insurance Corporation, or that its deposits or depositors are insured by the Federal Deposit Insurance Corporation to at least $100,000 for each depositor.

(e) *Restrictions on using the official advertising statement when advertising non-deposit products*—(1) *Definitions*—

(i) *Non-deposit product.* As used in this part, the term ''non-deposit product'' shall include, but is not limited to, insurance products, annuities, mutual funds, and securities. For purposes of this definition, a credit product is not a non-deposit product.

(ii) *Hybrid product.* As used in this part, the term ''hybrid product'' shall mean a product or service that has both deposit product features and non-deposit product features. A sweep account is an example of a hybrid product.

(2) *Non-deposit product advertisements.* Except as provided in § 328.3(e)(4), an insured depository institution shall not include the official advertising statement, or any other statement or symbol which implies or suggests the existence of Federal deposit insurance, in any advertisement relating solely to non-deposit products.

(3) *Hybrid product advertisements.* Except as provided in § 328.3(e)(4), an insured depository institution shall not include the official advertising statement, or any other statement or symbol which implies or suggests the existence of federal deposit insurance, in any advertisement relating solely to hybrid products.

(4) *Mixed advertisements.* In advertisements containing information about both insured deposit products and non-deposit products or hybrid products, an insured depository institution shall clearly segregate the official advertising statement or any similar statement from that portion of the advertisement that relates to the non-deposit products.

(f) *Official advertising statement in non-English language.* The non-English equivalent of the official advertising statement may be used in any advertisement, provided that the translation has had the prior written approval of the Corporation.

§ 328.4 Prohibition against receiving deposits at same teller station or window as noninsured institution.

(a) *Prohibition.* An insured depository institution may not receive deposits at any teller station or window where any noninsured institution receives deposits or similar liabilities.

(b) *Exception.* This § 328.4 does not apply to deposits received at a Remote Service Facility.

PART 329—LIQUIDITY RISK MEASUREMENT STANDARDS

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AUTHORITY: 12 U.S.C. 1815, 1816, 1818, 1819, 1828, 1831p–1, 5412.

SOURCE: 79 FR 61523, Oct. 10, 2014, unless otherwise noted.

Subpart A—General Provisions

§ 329.1 Purpose and applicability.

(a) *Purpose*. This part establishes a minimum liquidity standard and a minimum stable funding standard for certain FDIC-supervised institutions on a consolidated basis, as set forth herein.

(b) *Applicability*. (1) An FDIC-supervised institution is subject to the minimum liquidity standard, minimum stable funding standard, and other requirements of this part if:

(i) It is a:

(A) GSIB depository institution supervised by the FDIC;

(B) Category II FDIC-supervised institution; or

(C) Category III FDIC-supervised institution; or

(ii) The FDIC has determined that application of this part is appropriate in light of the FDIC-supervised institution's asset size, level of complexity, risk profile, scope of operations, affiliation with foreign or domestic covered entities, or risk to the financial system.

(2) This part does not apply to:

(i) A bridge financial company as defined in 12 U.S.C. 5381(a)(3), or a subsidiary of a bridge financial company;

(ii) A new depository institution or a bridge depository institution, as defined in 12 U.S.C. 1813(i); or

(iii) An insured branch.

(3) In making a determination under paragraph (b)(1)(ii) of this section, the FDIC will apply, as appropriate, notice and response procedures in the same manner and to the same extent as the notice and response procedures set forth in 12 CFR 324.5.

[84 FR 59279, Nov. 1, 2019, as amended at 86 FR 9218, Feb. 11, 2021]

§ 329.2 Reservation of authority.

(a) The FDIC may require an FDIC-supervised institution to hold an amount of high-quality liquid assets (HQLA) greater than otherwise required under this part, or to take any other measure to improve the FDIC-supervised institution's liquidity risk profile, if the FDIC determines that the FDIC-supervised institution's liquidity requirements as calculated under this part are not commensurate with the FDIC-supervised institution's liquidity risks. In making determinations under this section, the FDIC will apply notice and response procedures as set forth in 12 CFR 324.5.

(b) The FDIC may require an FDIC-supervised institution to maintain an amount of available stable funding greater than otherwise required under this part, or to take any other measure to improve the FDIC-supervised institution's stable funding, if the FDIC determines that the FDIC-supervised institution's stable funding requirements as calculated under this part are not commensurate with the FDIC-supervised institution's funding risks. In making determinations under this section, the FDIC will apply notice and response procedures as set forth in 12 CFR 324.5.

(c) Nothing in this part limits the authority of the FDIC under any other provision of law or regulation to take supervisory or enforcement action, including action to address unsafe or unsound practices or conditions, deficient

liquidity levels, deficient stable funding levels, or violations of law.

[79 FR 61523, Oct. 10, 2014, as amended at 86 FR 9219, Feb. 11, 2021]

§ 329.3 Definitions.

For the purposes of this part:

Affiliated depository institution means with respect to an FDIC-supervised institution that is a depository institution, another depository institution that is a consolidated subsidiary of a bank holding company or savings and loan holding company of which the FDIC-supervised institution is also a consolidated subsidiary.

Asset exchange means a transaction in which, as of the calculation date, the counterparties have previously exchanged non-cash assets, and have each agreed to return such assets to each other at a future date. Asset exchanges do not include secured funding and secured lending transactions.

Average weighted short-term wholesale funding means the average of the FDIC-supervised institution's weighted short-term wholesale funding for each of the four most recent calendar quarters as reported quarterly on the FR Y–15 or, if the FDIC-supervised institution has not filed the FR Y–15 for each of the four most recent calendar quarters, for the most recent quarter or averaged over the most recent quarters, as applicable.

Bank holding company is defined in section 2 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*).

Brokered deposit means any deposit held at the FDIC-supervised institution that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker as that term is defined in section 29 of the Federal Deposit Insurance Act (12 U.S.C. 1831f(g)) and the Federal Deposit Insurance Corporation's regulations.

Brokered reciprocal deposit means a brokered deposit that an FDIC-supervised institution receives through a deposit placement network on a reciprocal basis, such that:

(1) For any deposit received, the FDIC-supervised institution (as agent for the depositors) places the same amount with other depository institutions through the network; and

(2) Each member of the network sets the interest rate to be paid on the entire amount of funds it places with other network members.

Calculation date means, for subparts B through J of this part, any date on which an FDIC-supervised institution calculates its liquidity coverage ratio under § 329.10, and for subparts K through M of this part, any date on which an FDIC-supervised institution calculates its net stable funding ratio under § 329.100.

Call Report means the Consolidated Reports of Condition and Income.

Carrying value means, with respect to an asset, NSFR regulatory capital element, or NSFR liability, the value on the balance sheet of the FDIC-supervised institution, each as determined in accordance with GAAP.

Category II FDIC-supervised institution means:

(1)(i) An FDIC-supervised institution that:

(A) Is a consolidated subsidiary of:

(*1*) A company that is identified as a Category II banking organization pursuant to 12 CFR 252.5 or 12 CFR 238.10, as applicable; or

(*2*) A U.S. intermediate holding company that is identified as a Category II banking organization pursuant to 12 CFR 252.5; or

(*3*) A depository institution that meets the criteria in paragraph (2)(ii)(A) or (B) of this definition; and

(B) Has total consolidated assets, calculated based on the average of the FDIC-supervised institution's total consolidated assets for the four most recent calendar quarters as reported on the Call Report, equal to $10 billion or more.

(ii) If the FDIC-supervised institution has not filed the Call Report for each of the four most recent calendar quarters, total consolidated assets is calculated based on its total consolidated assets, as reported on the Call Report, for the most recent quarter or the average of the most recent quarters, as applicable. After meeting the criteria under this paragraph (1), an FDIC-supervised institution continues to be a Category II FDIC-supervised institution until the FDIC-supervised institution has less than $10 billion in total consolidated assets, as reported on the Call Report,

for each of the four most recent calendar quarters, or the FDIC-supervised institution is no longer a consolidated subsidiary of an entity described in paragraph (1)(i)(A)(*1*), (*2*), or (*3*) of this definition; or

(2) An FDIC-supervised institution that:

(i) Is not a subsidiary of a depository institution holding company; and

(ii)(A) Has total consolidated assets, calculated based on the average of the depository institution's total consolidated assets for the four most recent calendar quarters as reported on the Call Report, equal to $700 billion or more. If the depository institution has not filed the Call Report for each of the four most recent calendar quarters, total consolidated assets is calculated based on its total consolidated assets, as reported on the Call Report, for the most recent quarter or the average of the most recent quarters, as applicable; or

(B) Has:

(*1*) Total consolidated assets, calculated based on the average of the depository institution's total consolidated assets for the four most recent calendar quarters as reported on the Call Report, of $100 billion or more but less than $700 billion. If the depository institution has not filed the Call Report for each of the four most recent calendar quarters, total consolidated assets means its total consolidated assets, as reported on the Call Report, for the most recent quarter or the average of the most recent quarters, as applicable; and

(*2*) Cross-jurisdictional activity, calculated based on the average of its cross-jurisdictional activity for the four most recent calendar quarters, of $75 billion or more. Cross-jurisdictional activity is the sum of cross-jurisdictional claims and cross-jurisdictional liabilities, calculated in accordance with the instructions to the FR Y–15 or equivalent reporting form.

(iii) After meeting the criteria in paragraphs (2)(i) and (ii) of this definition, an FDIC-supervised institution continues to be a Category II FDIC-supervised institution until the FDIC-supervised institution:

(A)(*1*) Has less than $700 billion in total consolidated assets, as reported on the Call Report, for each of the four most recent calendar quarters; and

(*2*) Has less than $75 billion in cross-jurisdictional activity for each of the four most recent calendar quarters. Cross-jurisdictional activity is the sum of cross-jurisdictional claims and cross-jurisdictional liabilities, calculated in accordance with the instructions to the FR Y–15 or equivalent reporting form; or

(B) Has less than $100 billion in total consolidated assets, as reported on the Call Report, for each of the four most recent calendar quarters; or

(C) Is a GSIB depository institution.

Category III FDIC-supervised institution means:

(1)(i) An FDIC-supervised institution that:

(A) Is a consolidated subsidiary of:

(*1*) A company that is identified as a Category III banking organization pursuant to 12 CFR 252.5 or 12 CFR 238.10, as applicable; or

(*2*) A U.S. intermediate holding company that is identified as a Category III banking organization pursuant to 12 CFR 252.5; or

(*3*) A depository institution that meets the criteria in paragraph (2)(ii)(A) or (B) of this definition; and

(B) Has total consolidated assets, calculated based on the average of the FDIC-supervised institution's total consolidated assets for the four most recent calendar quarters as reported on the Call Report, equal to $10 billion or more.

(ii) If the FDIC-supervised institution has not filed the Call Report for each of the four most recent calendar quarters, total consolidated assets means its total consolidated assets, as reported on the Call Report, for the most recent quarter or the average of the most recent quarters, as applicable. After meeting the criteria under this paragraph (1), an FDIC-supervised institution continues to be a Category III FDIC-supervised institution until the FDIC-supervised institution has less than $10 billion in total consolidated assets, as reported on the Call Report, for each of the four most recent calendar quarters, or the FDIC-supervised institution is no longer a consolidated subsidiary of an entity described in

paragraph (1)(i)(A)(*1*), (*2*), or (3) of this definition; or

(2) An FDIC-supervised institution that:

(i) Is not a subsidiary of a depository institution holding company; and

(ii)(A) Has total consolidated assets, calculated based on the average of the depository institution's total consolidated assets for the four most recent quarters as reported on the Call Report, equal to $250 billion or more. If the depository institution has not filed the Call Report for each of the four most recent calendar quarters, total consolidated assets means its total consolidated assets, as reported on the Call Report, for the most recent quarter or the average of the most recent quarters, as applicable; or

(B) Has:

(*1*) Total consolidated assets, calculated based on the average of the depository institution's total consolidated assets for the four most recent calendar quarters as reported on the Call Report, of $100 billion or more but less than $250 billion. If the depository institution has not filed the Call Report for each of the four most recent calendar quarters, total consolidated assets means its total consolidated assets, as reported on the Call Report, for the most recent quarter or the average of the most recent quarters, as applicable; and

(*2*) One or more of the following in paragraphs (2)(ii)(B)(*2*)(*i*) through (*iii*) of this definition, each measured as the average of the four most recent calendar quarters, or if the depository institution has not filed the FR Y–9LP or equivalent reporting form, Call Report, or FR Y–15 or equivalent reporting form, as applicable for each of the four most recent calendar quarters, for the most recent quarter or the average of the most quarters, as applicable:

(*i*) Total nonbank assets, calculated in accordance with instructions to the FR Y–9LP or equivalent reporting form, equal to $75 billion or more;

(*ii*) Off-balance sheet exposure, calculated in accordance with the instructions to the FR Y–15 or equivalent reporting form, minus the total consolidated assets of the depository institution, as reported on the Call Report, equal to $75 billion or more; or

(*iii*) Weighted short-term wholesale funding, calculated in accordance with the instructions to the FR Y–15 or equivalent reporting form, equal to $75 billion or more.

(iii) After meeting the criteria in paragraphs (2)(i) and (ii) of this definition, an FDIC-supervised institution continues to be a Category III FDIC-supervised institution until the FDIC-supervised institution:

(A)(*1*) Has less than $250 billion in total consolidated assets, as reported on the Call Report, for each of the four most recent calendar quarters; and

(*2*) Has less than $75 billion in total nonbank assets, calculated in accordance with the instructions to the FR Y–9LP or equivalent reporting form, for each of the four most recent calendar quarters;

(*3*) Has less than $75 billion in off-balance sheet exposure for each of the four most recent calendar quarters. Off-balance sheet exposure is calculated in accordance with the instructions to the FR Y–15 or equivalent reporting form, minus the total consolidated assets of the depository institution, as reported on the Call Report; and

(*4*) Has less than $75 billion in weighted short-term wholesale funding, calculated in accordance with the instructions to the FR Y–15 or equivalent reporting form, for each of the four most recent calendar quarters; or

(B) Has less than $100 billion in total consolidated assets, as reported on the Call Report, for each of the four most recent calendar quarters;

(C) Is a Category II FDIC-supervised institution; or

(D) Is a GSIB depository institution.

Client pool security means a security that is owned by a customer of the FDIC-supervised institution that is not an asset of the FDIC-supervised institution, regardless of a FDIC-supervised institution's hypothecation rights with respect to the security.

Collateralized deposit means:

(1) A deposit of a public sector entity held at the FDIC-supervised institution that is required to be secured under applicable law by a lien on assets owned by the FDIC-supervised institution and that gives the depositor, as holder of the lien, priority over the assets in the event the FDIC-supervised institution

enters into receivership, bankruptcy, insolvency, liquidation, resolution, or similar proceeding;

(2) A deposit of a fiduciary account awaiting investment or distribution held at the FDIC-supervised institution for which the FDIC-supervised institution is a fiduciary and is required under applicable state law to set aside assets owned by the FDIC-supervised institution as security, which gives the depositor priority over the assets in the event the FDIC-supervised institution enters into receivership, bankruptcy, insolvency, liquidation, resolution, or similar proceeding; or

(3) A deposit of a fiduciary account awaiting investment or distribution held at the FDIC-supervised institution for which the FDIC-supervised institution's affiliated insured depository institution is a fiduciary and where the FDIC-supervised institution under 12 CFR 9.10(c) (national banks), 12 CFR 150.310 (Federal savings associations), or applicable state law (state member and nonmember banks, and state savings associations) has set aside assets owned by the FDIC-supervised institution as security, which gives the depositor priority over the assets in the event the FDIC-supervised institution enters into receivership, bankruptcy, insolvency, liquidation, resolution, or similar proceeding.

Committed means, with respect to a credit or liquidity facility, that under the terms of the facility, it is not unconditionally cancelable.

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

Consolidated subsidiary means a company that is consolidated on the balance sheet of an FDIC-supervised institution or other company under GAAP.

Controlled subsidiary means, with respect to a company or an FDIC-supervised institution a consolidated subsidiary or a company that otherwise meets the definition of ''subsidiary'' in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

Covered depository institution holding company means a top-tier bank holding company or savings and loan holding company domiciled in the United States other than:

(1) A top-tier savings and loan holding company that is:

(i) A grandfathered unitary savings and loan holding company as defined in section 10(c)(9)(A) of the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*); and

(ii) As of June 30 of the previous calendar year, derived 50 percent or more of its total consolidated assets or 50 percent of its total revenues on an enterprise-wide basis (as calculated under GAAP) from activities that are not financial in nature under section 4(k) of the Bank Holding Company Act (12 U.S.C. 1843(k));

(2) A top-tier depository institution holding company that is an insurance underwriting company;

(3)(i) A top-tier depository institution holding company that, as of June 30 of the previous calendar year, held 25 percent or more of its total consolidated assets in subsidiaries that are insurance underwriting companies (other than assets associated with insurance for credit risk); and

(ii) For purposes of paragraph (3)(i) of this definition, the company must calculate its total consolidated assets in accordance with GAAP, or if the company does not calculate its total consolidated assets under GAAP for any regulatory purpose (including compliance with applicable securities laws), the company may estimate its total consolidated assets, subject to review and adjustment by the Board of Governors of the Federal Reserve System; or

(4) A U.S. intermediate holding company.

Covered Federal Reserve Facility Funding means a non-recourse loan that is extended as part of the Money Market Mutual Fund Liquidity Facility or Paycheck Protection Program Liquidity Facility authorized by the Board of Governors of the Federal Reserve System pursuant to section 13(3) of the Federal Reserve Act.[1]

Credit facility means a legally binding agreement to extend funds if requested

[1] The Money Market Mutual Fund Liquidity Facility was authorized on March 18, 2020, and the Paycheck Protection Program Liquidity Facility was authorized on April 6, 2020.

at a future date, including a general working capital facility such as a revolving credit facility for general corporate or working capital purposes. A credit facility does not include a legally binding written agreement to extend funds at a future date to a counterparty that is made for the purpose of refinancing the debt of the counterparty when it is unable to obtain a primary or anticipated source of funding. *See liquidity facility*.

Customer short position means a legally binding written agreement pursuant to which the customer must deliver to the FDIC-supervised institution a non-cash asset that the customer has already sold.

Deposit means ''deposit'' as defined in section 3(*l*) of the Federal Deposit Insurance Act (12 U.S.C. 1813(*l*)) or an equivalent liability of the FDIC-supervised institution in a jurisdiction outside of the United States.

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

Depository institution holding company means a bank holding company or savings and loan holding company.

Deposit insurance means deposit insurance provided by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

Derivative transaction means a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivative contracts, forward contracts, and any other instrument that poses similar counterparty credit risks. Derivative contracts also include unsettled securities, commodities, and foreign currency exchange transactions with a contractual settlement or delivery lag that is longer than the lesser of the market standard for the particular instrument or five business days. A derivative does not include any identified banking product, as that term is defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

Designated company means a company that the Financial Stability Oversight Council has determined under section 113 of the Dodd-Frank Act (12 U.S.C. 5323) shall be supervised by the Board of Governors of the Federal Reserve System and for which such determination is still in effect.

Dodd-Frank Act means the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

Eligible HQLA means a high-quality liquid asset that meets the requirements set forth in § 329.22.

Encumbered means, with respect to an asset, that the asset:

(1) Is subject to legal, regulatory, contractual, or other restriction on the ability of the FDIC-supervised institution to monetize the asset; or

(2) Is pledged, explicitly or implicitly, to secure or to provide credit enhancement to any transaction, not including when the asset is pledged to a central bank or a U.S. government-sponsored enterprise where:

(i) Potential credit secured by the asset is not currently extended to the FDIC-supervised institution or its consolidated subsidiaries; and

(ii) The pledged asset is not required to support access to the payment services of a central bank.

Fair value means fair value as determined under GAAP.

FDIC means the Federal Deposit Insurance Corporation.

FDIC-supervised institution means any state nonmember bank or state savings association.

Financial sector entity means an investment adviser, investment company, pension fund, non-regulated fund, regulated financial company, or identified company.

Foreign withdrawable reserves means a FDIC-supervised institution's balances held by or on behalf of the FDIC-supervised institution at a foreign central bank that are not subject to restrictions on the FDIC-supervised institution's ability to use the reserves.

FR Y–9LP means the Parent Company Only Financial Statements for Large Holding Companies.

FR Y–15 means the Systemic Risk Report.

GAAP means generally accepted accounting principles as used in the United States.

Global systemically important BHC means a bank holding company identified as a global systemically important BHC pursuant to 12 CFR 217.402.

GSIB depository institution means a depository institution that is a consolidated subsidiary of a global systemically important BHC and has total consolidated assets equal to $10 billion or more, calculated based on the average of the depository institution's total consolidated assets for the four most recent calendar quarters as reported on the Call Report. If the depository institution has not filed the Call Report for each of the four most recent calendar quarters, total consolidated assets means its total consolidated assets, as reported on the Call Report, for the most recent calendar quarter or the average of the most recent calendar quarters, as applicable. After meeting the criteria under this definition, a depository institution continues to be a GSIB depository institution until the depository institution has less than $10 billion in total consolidated assets, as reported on the Call Report, for each of the four most recent calendar quarters, or the depository institution is no longer a consolidated subsidiary of a global systemically important BHC.

High-quality liquid asset (HQLA) means an asset that is a level 1 liquid asset, level 2A liquid asset, or level 2B liquid asset, in accordance with the criteria set forth in § 329.20.

HQLA amount means the HQLA amount as calculated under § 329.21.

Identified company means any company that the FDIC has determined should be treated for the purposes of this part the same as a regulated financial company, investment company, non-regulated fund, pension fund, or investment adviser, based on activities similar in scope, nature, or operations to those entities.

Individual means a natural person, and does not include a sole proprietorship.

Investment adviser means a company registered with the SEC as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) or foreign equivalents of such company.

Investment company means a person or company registered with the SEC under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or foreign equivalents of such persons or companies.

Liquid and readily-marketable has the meaning given the term in 12 CFR 249.3.

Liquidity facility means a legally binding written agreement to extend funds at a future date to a counterparty that is made for the purpose of refinancing the debt of the counterparty when it is unable to obtain a primary or anticipated source of funding. A liquidity facility includes an agreement to provide liquidity support to asset-backed commercial paper by lending to, or purchasing assets from, any structure, program or conduit in the event that funds are required to repay maturing asset-backed commercial paper. Liquidity facilities exclude facilities that are established solely for the purpose of general working capital, such as revolving credit facilities for general corporate or working capital purposes. If a facility has characteristics of both credit and liquidity facilities, the facility must be classified as a liquidity facility. *See credit facility*.

Multilateral development bank means the International Bank for Reconstruction and Development, the Multilateral Investment Guarantee Agency, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, and any other entity that provides financing for national or regional development in which the U.S. government is a shareholder or contributing member or which the FDIC determines poses comparable risk.

Municipal obligation means an obligation of:

(1) A state or any political subdivision thereof; or

(2) Any agency or instrumentality of a state or any political subdivision thereof.

Non-regulated fund means any hedge fund or private equity fund whose investment adviser is required to file SEC Form PF (Reporting Form for Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors), other than a small business investment company as defined in section 102 of the Small Business Investment Act of 1958 (15 U.S.C. 661 *et seq.*).

Nonperforming exposure means an exposure that is past due by more than 90 days or nonaccrual.

NSFR liability means any liability or equity reported on an FDIC-supervised institution's balance sheet that is not an NSFR regulatory capital element.

NSFR regulatory capital element means any capital element included in an FDIC-supervised institution's common equity tier 1 capital, additional tier 1 capital, and tier 2 capital, in each case as defined in 12 CFR 324.20, prior to application of capital adjustments or deductions as set forth in 12 CFR 324.22, excluding any debt or equity instrument that does not meet the criteria for additional tier 1 or tier 2 capital instruments in 12 CFR 324.22 and is being phased out of tier 1 capital or tier 2 capital pursuant to subpart G of 12 CFR part 324.

Operational deposit means short-term unsecured wholesale funding that is a deposit, unsecured wholesale lending that is a deposit, or a collateralized deposit, in each case that meets the requirements of § 329.4(b) with respect to that deposit and is necessary for the provision of operational services as an independent third-party intermediary, agent, or administrator to the wholesale customer or counterparty providing the deposit.

Operational services means the following services, provided they are performed as part of cash management, clearing, or custody services:

(1) Payment remittance;

(2) Administration of payments and cash flows related to the safekeeping of investment assets, not including the purchase or sale of assets;

(3) Payroll administration and control over the disbursement of funds;

(4) Transmission, reconciliation, and confirmation of payment orders;

(5) Daylight overdraft;

(6) Determination of intra-day and final settlement positions;

(7) Settlement of securities transactions;

(8) Transfer of capital distributions and recurring contractual payments;

(9) Customer subscriptions and redemptions;

(10) Scheduled distribution of customer funds;

(11) Escrow, funds transfer, stock transfer, and agency services, including payment and settlement services, payment of fees, taxes, and other expenses; and

(12) Collection and aggregation of funds.

Pension fund means an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1001 *et seq.*), a ''governmental plan'' (as defined in 29 U.S.C. 1002(32)) that complies with the tax deferral qualification requirements provided in the Internal Revenue Code, or any similar employee benefit plan established under the laws of a foreign jurisdiction.

Public sector entity means a state, local authority, or other governmental subdivision below the U.S. sovereign entity level.

Publicly traded means, with respect to an equity security, that the equity security is traded on:

(1) Any exchange registered with the SEC as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f); or

(2) Any non-U.S.-based securities exchange that:

(i) Is registered with, or approved by, a national securities regulatory authority; and

(ii) Provides a liquid, two-way market for the security in question.

QMNA netting set means a group of derivative transactions with a single counterparty that is subject to a qualifying master netting agreement and is

netted under the qualifying master netting agreement.

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

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

(2) The agreement provides the FDIC-supervised institution the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case,

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

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar[2] to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

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

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 382 of this title, subpart I of part 252 of this title or part 47 of this title, as applicable;

(3) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it otherwise would make under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement); and

(4) In order to recognize an agreement as a qualifying master netting agreement for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 329.4(a) with respect to that agreement.

Regulated financial company means:

(1) A depository institution holding company or designated company;

(2) A company included in the organization chart of a depository institution holding company on the Form FR Y–6, as listed in the hierarchy report of the depository institution holding company produced by the National Information Center (NIC) website,[3] provided that the top-tier depository institution holding company is subject to a minimum liquidity standard under 12 CFR part 249;

(3) A depository institution; foreign bank; credit union; industrial loan company, industrial bank, or other similar institution described in section 2 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*); national bank, state member bank, or state non-member bank that is not a depository institution;

(4) An insurance company;

(5) A securities holding company as defined in section 618 of the Dodd-Frank Act (12 U.S.C. 1850a); broker or dealer registered with the SEC under section 15 of the Securities Exchange Act (15 U.S.C. 78o); futures commission merchant as defined in section 1a of the Commodity Exchange Act of 1936 (7 U.S.C. 1a); swap dealer as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a); or security-based swap dealer as defined in section 3 of the Securities Exchange Act (15 U.S.C. 78c);

[2] The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

[3] *http://www.ffiec.gov/nicpubweb/nicweb/NicHome.aspx*.

(6) A designated financial market utility, as defined in section 803 of the Dodd-Frank Act (12 U.S.C. 5462);

(7) A U.S. intermediate holding company; and

(8) Any company not domiciled in the United States (or a political subdivision thereof) that is supervised and regulated in a manner similar to entities described in paragraphs (1) through (7) of this definition (*e.g.*, a foreign banking organization, foreign insurance company, foreign securities broker or dealer or foreign financial market utility).

(9) A regulated financial company does not include:

(i) U.S. government-sponsored enterprises;

(ii) Small business investment companies, as defined in section 102 of the Small Business Investment Act of 1958 (15 U.S.C. 661 *et seq.*);

(iii) Entities designated as Community Development Financial Institutions (CDFIs) under 12 U.S.C. 4701 *et seq.* and 12 CFR part 1805; or

(iv) Central banks, the Bank for International Settlements, the International Monetary Fund, or multilateral development banks.

Reserve Bank balances means:

(1) Balances held in a master account of the FDIC-supervised institution at a Federal Reserve Bank, less any balances that are attributable to any respondent of the FDIC-supervised institution if the FDIC-supervised institution is a correspondent for a pass-through account as defined in section 204.2(l) of Regulation D (12 CFR 204.2(l));

(2) Balances held in a master account of a correspondent of the FDIC-supervised institution that are attributable to the FDIC-supervised institution if the FDIC-supervised institution is a respondent for a pass-through account as defined in section 204.2(l) of Regulation D;

(3) ''Excess balances'' of the FDIC-supervised institution as defined in section 204.2(z) of Regulation D (12 CFR 204.2(z)) that are maintained in an ''excess balance account'' as defined in section 204.2(aa) of Regulation D (12 CFR 204.2(aa)) if the FDIC-supervised institution is an excess balance account participant; or

(4) ''Term deposits'' of the FDIC-supervised institution as defined in section 204.2(dd) of Regulation D (12 CFR 204.2(dd)) if such term deposits are offered and maintained pursuant to terms and conditions that:

(i) Explicitly and contractually permit such term deposits to be withdrawn upon demand prior to the expiration of the term, or that

(ii) Permit such term deposits to be pledged as collateral for term or automatically-renewing overnight advances from the Federal Reserve Bank.

Retail customer or counterparty means a customer or counterparty that is:

(1) An individual;

(2) A business customer, but solely if and to the extent that:

(i) The FDIC-supervised institution manages its transactions with the business customer, including deposits, unsecured funding, and credit facility and liquidity facility transactions, in the same way it manages its transactions with individuals;

(ii) Transactions with the business customer have liquidity risk characteristics that are similar to comparable transactions with individuals; and

(iii) The total aggregate funding raised from the business customer is less than $1.5 million; or

(3) A living or testamentary trust that:

(i) Is solely for the benefit of natural persons;

(ii) Does not have a corporate trustee; and

(iii) Terminates within 21 years and 10 months after the death of grantors or beneficiaries of the trust living on the effective date of the trust or within 25 years, if applicable under state law.

Retail deposit means a demand or term deposit that is placed with the FDIC-supervised institution by a retail customer or counterparty, other than a brokered deposit.

Retail mortgage means a mortgage that is primarily secured by a first or subsequent lien on one-to-four family residential property.

Savings and loan holding company means a savings and loan holding company as defined in section 10 of the Home Owners' Loan Act (12 U.S.C. 1467a).

SEC means the Securities and Exchange Commission.

Secured funding transaction means any funding transaction that is subject to a legally binding agreement that gives rise to a cash obligation of the FDIC-supervised institution to a wholesale customer or counterparty that is secured under applicable law by a lien on securities or loans provided by the FDIC-supervised institution, which gives the wholesale customer or counterparty, as holder of the lien, priority over the securities or loans in the event the FDIC-supervised institution enters into receivership, bankruptcy, insolvency, liquidation, resolution, or similar proceeding. Secured funding transactions include repurchase transactions, securities lending transactions, other secured loans, and borrowings from a Federal Reserve Bank. Secured funding transactions do not include securities.

Secured lending transaction means any lending transaction that is subject to a legally binding agreement that gives rise to a cash obligation of a wholesale customer or counterparty to the FDIC-supervised institution that is secured under applicable law by a lien on securities or loans provided by the wholesale customer or counterparty, which gives the FDIC-supervised institution, as holder of the lien, priority over the securities or loans in the event the counterparty enters into receivership, bankruptcy, insolvency, liquidation, resolution, or similar proceeding. Secured lending transactions include reverse repurchase transactions and securities borrowing transactions. Secured lending transactions do not include securities.

Securities Exchange Act means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

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

Special purpose entity means a company organized for a specific purpose, the activities of which are significantly limited to those appropriate to accomplish a specific purpose, and the structure of which is intended to isolate the credit risk of the special purpose entity.

Stable retail deposit means a retail deposit that is entirely covered by deposit insurance and:

(1) Is held by the depositor in a transactional account; or

(2) The depositor that holds the account has another established relationship with the FDIC-supervised institution such as another deposit account, a loan, bill payment services, or any similar service or product provided to the depositor that the FDIC-supervised institution demonstrates to the satisfaction of the FDIC would make deposit withdrawal highly unlikely during a liquidity stress event.

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

Structured security means a security whose cash flow characteristics depend upon one or more indices or that has embedded forwards, options, or other derivatives or a security where an investor's investment return and the issuer's payment obligations are contingent on, or highly sensitive to, changes in the value of underlying assets, indices, interest rates, or cash flows.

Structured transaction means a secured transaction in which repayment of obligations and other exposures to the transaction is largely derived, directly or indirectly, from the cash flow generated by the pool of assets that secures the obligations and other exposures to the transaction.

Sweep deposit means a deposit held at the FDIC-supervised institution by a customer or counterparty through a contractual feature that automatically transfers to the FDIC-supervised institution from another regulated financial company at the close of each business day amounts identified under the agreement governing the account from which the amount is being transferred.

Two-way market means a market where there are independent bona fide offers to buy and sell so that a price reasonably related to the last sales

price or current bona fide competitive bid and offer quotations can be determined within one day and settled at that price within a relatively short time frame conforming to trade custom.

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

U.S. intermediate holding company means a top-tier company that is required to be established pursuant to 12 CFR 252.153.

Unconditionally cancelable means, with respect to a credit or liquidity facility, that an FDIC-supervised institution may, at any time, with or without cause, refuse to extend credit under the facility (to the extent permitted under applicable law).

Unsecured wholesale funding means a liability or general obligation of the FDIC-supervised institution to a wholesale customer or counterparty that is not a secured funding transaction. Unsecured wholesale funding includes wholesale deposits. Unsecured wholesale funding does not include asset exchanges.

Unsecured wholesale lending means a liability or general obligation of a wholesale customer or counterparty to the FDIC-supervised institution that is not a secured lending transaction or a security. Unsecured wholesale lending does not include asset exchanges.

Wholesale customer or counterparty means a customer or counterparty that is not a retail customer or counterparty.

Wholesale deposit means a demand or term deposit that is provided by a wholesale customer or counterparty.

[79 FR 61523, Oct. 10, 2014, as amended at 81 FR 71354, Oct. 17, 2016; 82 FR 50261, Oct. 30, 2017; 82 FR 61443, Dec. 28, 2017; 83 FR 44455, Aug. 31, 2018; 84 FR 59279, Nov. 1, 2019; 85 FR 26841, May 6, 2020; 86 FR 9219, Feb. 11, 2021]

§ 329.4 Certain operational requirements.

(a) *Qualifying master netting agreements*. In order to recognize an agreement as a qualifying master netting agreement as defined in § 329.3, an FDIC-supervised institution must:

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

(i) The agreement meets the requirements of the definition of qualifying master netting agreement in § 329.3; and

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

(2) Establish and maintain written procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of the definition of qualifying master netting agreement in § 329.3.

(b) *Operational deposits*. In order to recognize a deposit as an operational deposit as defined in § 329.3:

(1) The related operational services must be performed pursuant to a legally binding written agreement, and:

(i) The termination of the agreement must be subject to a minimum 30 calendar-day notice period; or

(ii) As a result of termination of the agreement or transfer of services to a third-party provider, the customer providing the deposit would incur significant contractual termination costs or switching costs (switching costs include significant technology, administrative, and legal service costs incurred in connection with the transfer of the operational services to a third-party provider);

(2) The deposit must be held in an account designated as an operational account;

(3) The customer must hold the deposit at the FDIC-supervised institution for the primary purpose of obtaining the operational services provided by the FDIC-supervised institution;

(4) The deposit account must not be designed to create an economic incentive for the customer to maintain excess funds therein through increased

revenue, reduction in fees, or other offered economic incentives;

(5) The FDIC-supervised institution must demonstrate that the deposit is empirically linked to the operational services and that it has a methodology that takes into account the volatility of the average balance for identifying any excess amount, which must be excluded from the operational deposit amount;

(6) The deposit must not be provided in connection with the FDIC-supervised institution's provision of prime brokerage services, which, for the purposes of this part, are a package of services offered by the FDIC-supervised institution whereby the FDIC-supervised institution, among other services, executes, clears, settles, and finances transactions entered into by the customer or a third-party entity on behalf of the customer (such as an executing broker), and where the FDIC-supervised institution has a right to use or rehypothecate assets provided by the customer, including in connection with the extension of margin and other similar financing of the customer, subject to applicable law, and includes operational services provided to a nonregulated fund; and

(7) The deposits must not be for arrangements in which the FDIC-supervised institution (as correspondent) holds deposits owned by another depository institution bank (as respondent) and the respondent temporarily places excess funds in an overnight deposit with the FDIC-supervised institution.

Subpart B—Liquidity Coverage Ratio

§ 329.10 Liquidity coverage ratio.

(a) *Minimum liquidity coverage ratio requirement*. Subject to the transition provisions in subpart F of this part, an FDIC-supervised institution must calculate and maintain a liquidity coverage ratio that is equal to or greater than 1.0 on each business day in accordance with this part. An FDIC-supervised institution must calculate its liquidity coverage ratio as of the same time on each calculation date (the elected calculation time). The FDIC-supervised institution must select this time by written notice to the FDIC prior to December 31, 2019. The FDIC-supervised institution may not thereafter change its elected calculation time without prior written approval from the FDIC.

(b) *Calculation of the liquidity coverage ratio*. A FDIC-supervised institution's liquidity coverage ratio equals:

(1) The FDIC-supervised institution's HQLA amount as of the calculation date, calculated under subpart C of this part; *divided by*

(2) The FDIC-supervised institution's total net cash outflow amount as of the calculation date, calculated under subpart D of this part.

[79 FR 61523, Oct. 10, 2014, as amended at 84 FR 59282, Nov. 1, 2019]

Subpart C—High-Quality Liquid Assets

§ 329.20 High-quality liquid asset criteria.

(a) *Level 1 liquid assets*. An asset is a level 1 liquid asset if it is one of the following types of assets:

(1) Reserve Bank balances;

(2) Foreign withdrawable reserves;

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

(4) A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, a U.S. government agency (other than the U.S. Department of the Treasury) whose obligations are fully and explicitly guaranteed by the full faith and credit of the U.S. government, provided that the security is liquid and readily-marketable;

(5) A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, a sovereign entity, the Bank for International Settlements, the International Monetary Fund, the European Central Bank, European Community, or a multilateral development bank, that is:

(i) Assigned a zero percent risk weight under subpart D of 12 CFR part 324 as of the calculation date;

(ii) Liquid and readily-marketable;

(iii) Issued or guaranteed by an entity whose obligations have a proven

record as a reliable source of liquidity in repurchase or sales markets during stressed market conditions; and

(iv) Not an obligation of a financial sector entity and not an obligation of a consolidated subsidiary of a financial sector entity; or

(6) A security issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, a sovereign entity that is not assigned a zero percent risk weight under subpart D of 12 CFR part 324, where the sovereign entity issues the security in its own currency, the security is liquid and readily-marketable, and the FDIC-supervised institution holds the security in order to meet its net cash outflows in the jurisdiction of the sovereign entity, as calculated under subpart D of this part.

(b) *Level 2A liquid assets.* An asset is a level 2A liquid asset if the asset is liquid and readily-marketable and is one of the following types of assets:

(1) A security issued by, or guaranteed as to the timely payment of principal and interest by, a U.S. government-sponsored enterprise, that is investment grade under 12 CFR part 1 as of the calculation date, provided that the claim is senior to preferred stock; or

(2) A security that is issued by, or guaranteed as to the timely payment of principal and interest by, a sovereign entity or multilateral development bank that is:

(i) Not included in level 1 liquid assets;

(ii) Assigned no higher than a 20 percent risk weight under subpart D of 12 CFR part 324 as of the calculation date;

(iii) Issued or guaranteed by an entity whose obligations have a proven record as a reliable source of liquidity in repurchase or sales markets during stressed market conditions, as demonstrated by:

(A) The market price of the security or equivalent securities of the issuer declining by no more than 10 percent during a 30 calendar-day period of significant stress, or

(B) The market haircut demanded by counterparties to secured lending and secured funding transactions that are collateralized by the security or equivalent securities of the issuer increasing by no more than 10 percentage points during a 30 calendar-day period of significant stress; and

(iv) Not an obligation of a financial sector entity, and not an obligation of a consolidated subsidiary of a financial sector entity.

(c) *Level 2B liquid assets.* An asset is a level 2B liquid asset if the asset is liquid and readily-marketable and is one of the following types of assets:

(1) A corporate debt security that is:

(i) Investment grade under 12 CFR part 1 as of the calculation date;

(ii) Issued or guaranteed by an entity whose obligations have a proven record as a reliable source of liquidity in repurchase or sales markets during stressed market conditions, as demonstrated by:

(A) The market price of the corporate debt security or equivalent securities of the issuer declining by no more than 20 percent during a 30 calendar-day period of significant stress, or

(B) The market haircut demanded by counterparties to secured lending and secured funding transactions that are collateralized by the corporate debt security or equivalent securities of the issuer increasing by no more than 20 percentage points during a 30 calendar-day period of significant stress; and

(iii) Not an obligation of a financial sector entity and not an obligation of a consolidated subsidiary of a financial sector entity;

(2) A publicly traded common equity share that is:

(i) Included in:

(A) The Russell 1000 Index; or

(B) An index that an FDIC-supervised institution's supervisor in a foreign jurisdiction recognizes for purposes of including equity shares in level 2B liquid assets under applicable regulatory policy, if the share is held in that foreign jurisdiction;

(ii) Issued in:

(A) U.S. dollars; or

(B) The currency of a jurisdiction where the FDIC-supervised institution operates and the FDIC-supervised institution holds the common equity share in order to cover its net cash outflows in that jurisdiction, as calculated under subpart D of this part;

(iii) Issued by an entity whose publicly traded common equity shares

have a proven record as a reliable source of liquidity in repurchase or sales markets during stressed market conditions, as demonstrated by:

(A) The market price of the security or equivalent securities of the issuer declining by no more than 40 percent during a 30 calendar-day period of significant stress, or

(B) The market haircut demanded by counterparties to securities borrowing and lending transactions that are collateralized by the publicly traded common equity shares or equivalent securities of the issuer increasing by no more than 40 percentage points, during a 30 calendar day period of significant stress;

(iv) Not issued by a financial sector entity and not issued by a consolidated subsidiary of a financial sector entity;

(v) If held by a depository institution, is not acquired in satisfaction of a debt previously contracted (DPC); and

(vi) If held by a consolidated subsidiary of a depository institution, the depository institution can include the publicly traded common equity share in its level 2B liquid assets only if the share is held to cover net cash outflows of the depository institution's consolidated subsidiary in which the publicly traded common equity share is held, as calculated by the FDIC-supervised institution under subpart D of this part; or

(3) A municipal obligation that is investment grade under 12 CFR part 1 as of the calculation date.

[79 FR 61523, Oct. 10, 2014, as amended at 83 FR 44455, Aug. 31, 2018]

§ 329.21 High-quality liquid asset amount.

(a) *Calculation of the HQLA amount.* As of the calculation date, a FDIC-supervised institution's HQLA amount equals:

(1) The level 1 liquid asset amount; plus

(2) The level 2A liquid asset amount; plus

(3) The level 2B liquid asset amount; minus

(4) The greater of:

(i) The unadjusted excess HQLA amount; and

(ii) The adjusted excess HQLA amount.

(b) *Calculation of liquid asset amounts*—(1) *Level 1 liquid asset amount.* The level 1 liquid asset amount equals the fair value of all level 1 liquid assets held by the FDIC-supervised institution as of the calculation date that are eligible HQLA, less the amount of the reserve balance requirement under section 204.5 of Regulation D (12 CFR 204.5).

(2) *Level 2A liquid asset amount.* The level 2A liquid asset amount equals 85 percent of the fair value of all level 2A liquid assets held by the FDIC-supervised institution as of the calculation date that are eligible HQLA.

(3) *Level 2B liquid asset amount.* The level 2B liquid asset amount equals 50 percent of the fair value of all level 2B liquid assets held by the FDIC-supervised institution as of the calculation date that are eligible HQLA.

(c) *Calculation of the unadjusted excess HQLA amount.* As of the calculation date, the unadjusted excess HQLA amount equals:

(1) The level 2 cap excess amount; *plus*

(2) The level 2B cap excess amount.

(d) *Calculation of the level 2 cap excess amount.* As of the calculation date, the level 2 cap excess amount equals the greater of:

(1) The level 2A liquid asset amount plus the level 2B liquid asset amount minus 0.6667 times the level 1 liquid asset amount; and

(2) 0.

(e) *Calculation of the level 2B cap excess amount.* As of the calculation date, the level 2B excess amount equals the greater of:

(1) The level 2B liquid asset amount minus the level 2 cap excess amount minus 0.1765 times the sum of the level 1 liquid asset amount and the level 2A liquid asset amount; and

(2) 0.

(f) *Calculation of adjusted liquid asset amounts*—(1) *Adjusted level 1 liquid asset amount.* A FDIC-supervised institution's adjusted level 1 liquid asset amount equals the fair value of all level 1 liquid assets that would be eligible HQLA and would be held by the FDIC-supervised institution upon the

unwind of any secured funding transaction (other than a collateralized deposit), secured lending transaction, asset exchange, or collateralized derivatives transaction that matures within 30 calendar days of the calculation date where the FDIC-supervised institution will provide an asset that is eligible HQLA and the counterparty will provide an asset that will be eligible HQLA; less the amount of the reserve balance requirement under section 204.5 of Regulation D (12 CFR 204.5).

(2) *Adjusted level 2A liquid asset amount.* A FDIC-supervised institution's adjusted level 2A liquid asset amount equals 85 percent of the fair value of all level 2A liquid assets that would be eligible HQLA and would be held by the FDIC-supervised institution upon the unwind of any secured funding transaction (other than a collateralized deposit), secured lending transaction, asset exchange, or collateralized derivatives transaction that matures within 30 calendar days of the calculation date where the FDIC-supervised institution will provide an asset that is eligible HQLA and the counterparty will provide an asset that will be eligible HQLA.

(3) *Adjusted level 2B liquid asset amount.* A FDIC-supervised institution's adjusted level 2B liquid asset amount equals 50 percent of the fair value of all level 2B liquid assets that would be eligible HQLA and would be held by the FDIC-supervised institution upon the unwind of any secured funding transaction (other than a collateralized deposit), secured lending transaction, asset exchange, or collateralized derivatives transaction that matures within 30 calendar days of the calculation date where the FDIC-supervised institution will provide an asset that is eligible HQLA and the counterparty will provide an asset that will be eligible HQLA.

(g) *Calculation of the adjusted excess HQLA amount.* As of the calculation date, the adjusted excess HQLA amount equals:

(1) The adjusted level 2 cap excess amount; *plus*

(2) The adjusted level 2B cap excess amount.

(h) *Calculation of the adjusted level 2 cap excess amount.* As of the calculation date, the adjusted level 2 cap excess amount equals the greater of:

(1) The adjusted level 2A liquid asset amount plus the adjusted level 2B liquid asset amount minus 0.6667 times the adjusted level 1 liquid asset amount; and

(2) 0.

(i) *Calculation of the adjusted level 2B excess amount.* As of the calculation date, the adjusted level 2B excess liquid asset amount equals the greater of:

(1) The adjusted level 2B liquid asset amount minus the adjusted level 2 cap excess amount minus 0.1765 times the sum of the adjusted level 1 liquid asset amount and the adjusted level 2A liquid asset amount; and

(2) 0.

§ 329.22 Requirements for eligible high-quality liquid assets.

(a) *Operational requirements for eligible HQLA.* With respect to each asset that is eligible for inclusion in a FDIC-supervised institution's HQLA amount, an FDIC-supervised institution must meet all of the following operational requirements:

(1) The FDIC-supervised institution must demonstrate the operational capability to monetize the HQLA by:

(i) Implementing and maintaining appropriate procedures and systems to monetize any HQLA at any time in accordance with relevant standard settlement periods and procedures; and

(ii) Periodically monetizing a sample of HQLA that reasonably reflects the composition of the FDIC-supervised institution's eligible HQLA, including with respect to asset type, maturity, and counterparty characteristics;

(2) The FDIC-supervised institution'' in its place wherever it appears. must implement policies that require eligible HQLA to be under the control of the management function in the FDIC-supervised institution'' in its place wherever it appears. that is charged with managing liquidity risk, and this management function must evidence its control over the HQLA by either:

(i) Segregating the HQLA from other assets, with the sole intent to use the HQLA as a source of liquidity; or

(ii) Demonstrating the ability to monetize the assets and making the proceeds available to the liquidity management function without conflicting with a business or risk management strategy of the FDIC-supervised institution'' in its place wherever it appears.;

(3) The fair value of the eligible HQLA must be reduced by the outflow amount that would result from the termination of any specific transaction hedging eligible HQLA;

(4) The FDIC-supervised institution'' in its place wherever it appears. must implement and maintain policies and procedures that determine the composition of its eligible HQLA on each calculation date, by:

(i) Identifying its eligible HQLA by legal entity, geographical location, currency, account, or other relevant identifying factors as of the calculation date;

(ii) Determining that eligible HQLA meet the criteria set forth in this section; and

(iii) Ensuring the appropriate diversification of the eligible HQLA by asset type, counterparty, issuer, currency, borrowing capacity, or other factors associated with the liquidity risk of the assets; and

(5) The FDIC-supervised institution'' in its place wherever it appears.must have a documented methodology that results in a consistent treatment for determining that the FDIC-supervised institution's eligible HQLA meet the requirements set forth in this section.

(b) *Generally applicable criteria for eligible HQLA.* A FDIC-supervised institution's eligible HQLA must meet all of the following criteria:

(1) The assets are not encumbered.

(2) The asset is not:

(i) A client pool security held in a segregated account; or

(ii) An asset received from a secured funding transaction involving client pool securities that were held in a segregated account;

(3) For eligible HQLA held in a legal entity that is a U.S. consolidated subsidiary of an FDIC-supervised institution:

(i) If the U.S. consolidated subsidiary is subject to a minimum liquidity standard under this part, the FDIC-supervised institution may include the eligible HQLA of the U.S. consolidated subsidiary in its HQLA amount up to:

(A) The amount of net cash outflows of the U.S. consolidated subsidiary calculated by the U.S. consolidated subsidiary for its own minimum liquidity standard under this part; *plus*

(B) Any additional amount of assets, including proceeds from the monetization of assets, that would be available for transfer to the top-tier FDIC-supervised institution during times of stress without statutory, regulatory, contractual, or supervisory restrictions, including sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 12 U.S.C. 371c–1) and Regulation W (12 CFR part 223); and

(ii) If the U.S. consolidated subsidiary is not subject to a minimum liquidity standard under this part, the FDIC-supervised institution may include the eligible HQLA of the U.S. consolidated subsidiary in its HQLA amount up to:

(A) The amount of the net cash outflows of the U.S. consolidated subsidiary as of the 30th calendar day after the calculation date, as calculated by the FDIC-supervised institution for the FDIC-supervised institution's minimum liquidity standard under this part; *plus*

(B) Any additional amount of assets, including proceeds from the monetization of assets, that would be available for transfer to the top-tier FDIC-supervised institution during times of stress without statutory, regulatory, contractual, or supervisory restrictions, including sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 12 U.S.C. 371c–1) and Regulation W (12 CFR part 223);

(4) For HQLA held by a consolidated subsidiary of the FDIC-supervised institution that is organized under the laws of a foreign jurisdiction, the FDIC-supervised institution may include the eligible HQLA of the consolidated subsidiary organized under the laws of a foreign jurisdiction in its HQLA amount up to:

(i) The amount of net cash outflows of the consolidated subsidiary as of the 30th calendar day after the calculation

date, as calculated by the FDIC-supervised institution for the FDIC-supervised institution's minimum liquidity standard under this part; *plus*

(ii) Any additional amount of assets that are available for transfer to the top-tier FDIC-supervised institution during times of stress without statutory, regulatory, contractual, or supervisory restrictions;

(5) The FDIC-supervised institution must not include as eligible HQLA any assets, or HQLA resulting from transactions involving an asset that the FDIC-supervised institution received with rehypothecation rights, if the counterparty that provided the asset or the beneficial owner of the asset has a contractual right to withdraw the assets without an obligation to pay more than de minimis remuneration at any time during the 30 calendar days following the calculation date; and

(6) The FDIC-supervised institution has not designated the assets to cover operational costs.

(c) *Maintenance of U.S. eligible HQLA.* An FDIC-supervised institution is generally expected to maintain as eligible HQLA an amount and type of eligible HQLA in the United States that is sufficient to meet its total net cash outflow amount in the United States under subpart D of this part.

[79 FR 61523, Oct. 10, 2014, as amended at 86 FR 9220, Feb. 11, 2021]

Subpart D—Total Net Cash Outflow

§ 329.30 Total net cash outflow amount.

(a) *Calculation of total net cash outflow amount.* As of the calculation date, an FDIC-supervised institution's total net cash outflow amount equals the FDIC-supervised institution's outflow adjustment percentage as determined under paragraph (c) of this section multiplied by:

(1) The sum of the outflow amounts calculated under § 329.32(a) through (l); *minus*

(2) The lesser of:

(i) The sum of the inflow amounts calculated under § 329.33(b) through (g); and

(ii) 75 percent of the amount calculated under paragraph (a)(1) of this section; *plus*

(3) The maturity mismatch add-on as calculated under paragraph (b) of this section.

(b) *Calculation of maturity mismatch add-on.* (1) For purposes of this section:

(i) The net cumulative maturity outflow amount for any of the 30 calendar days following the calculation date is equal to the sum of the outflow amounts for instruments or transactions identified in § 329.32(g), (h)(1), (h)(2), (h)(5), (j), (k), and (l) that have a maturity date prior to or on that calendar day *minus* the sum of the inflow amounts for instruments or transactions identified in § 329.33(c), (d), (e), and (f) that have a maturity date prior to or on that calendar day.

(ii) The net day 30 cumulative maturity outflow amount is equal to, as of the 30th day following the calculation date, the sum of the outflow amounts for instruments or transactions identified in § 329.32(g), (h)(1), (h)(2), (h)(5), (j), (k), and (l) that have a maturity date 30 calendar days or less from the calculation date *minus* the sum of the inflow amounts for instruments or transactions identified in § 329.33(c), (d), (e), and (f) that have a maturity date 30 calendar days or less from the calculation date.

(2) As of the calculation date, a FDIC-supervised institution's maturity mismatch add-on is equal to:

(i) The greater of:

(A) 0; and

(B) The largest net cumulative maturity outflow amount as calculated under paragraph (b)(1)(i) of this section for any of the 30 calendar days following the calculation date; *minus*

(ii) The greater of:

(A) 0; and

(B) The net day 30 cumulative maturity outflow amount as calculated under paragraph (b)(1)(ii) of this section.

(3) Other than the transactions identified in § 329.32(h)(2), (h)(5), or (j) or § 329.33(d) or (f), the maturity of which is determined under § 329.31(a), transactions that have an open maturity are not included in the calculation of the maturity mismatch add-on.

(c) *Outflow adjustment percentage.* An FDIC-supervised institution's outflow adjustment percentage is determined pursuant to Table 1 to this paragraph (c).

TABLE 1 TO § 329.30(c)—OUTFLOW ADJUSTMENT PERCENTAGES

Outflow adjustment percentage	Percent
GSIB depository institution supervised by the FDIC	100
Category II FDIC-supervised institution	100
Category III FDIC-supervised institution that:	100
(1) Is a consolidated subsidiary of (a) a covered depository institution holding company or U.S. intermediate holding company identified as a Category III banking organization pursuant to 12 CFR 252.5 or 12 CFR 238.10 or (b) a depository institution that meets the criteria set forth in paragraphs (2)(ii)(A) and (B) of the definition of Category III FDIC-supervised institution in this part, in each case with $75 billion or more in average weighted short-term wholesale funding; or	
(2) Has $75 billion or more in average weighted short-term wholesale funding and is not a consolidated subsidiary of (a) a covered depository institution holding company or U.S. intermediate holding company identified as a Category III banking organization pursuant to 12 CFR 252.5 or 12 CFR 238.10 or (b) a depository institution that meets the criteria set forth in paragraphs (2)(ii)(A) and (B) of the definition of Category III FDIC-supervised institution in this part.	
Category III FDIC-supervised institution that:	85
Is a consolidated subsidiary of (a) a covered depository institution holding company or U.S. intermediate holding company identified as a Category III banking organization pursuant to 12 CFR 252.5 or 12 CFR 238.10 or (b) a depository institution that meets the criteria set forth in paragraphs (2)(ii)(A) and (B) of the definition of Category III FDIC-supervised institution in this part, in each case with less than $75 billion in average weighted short-term wholesale funding; or	
(2) Has less than $75 billion in average weighted short-term wholesale funding and is not a consolidated subsidiary of (a) a covered depository institution holding company or U.S. intermediate holding company identified as a Category III banking organization pursuant to 12 CFR 252.5 or 12 CFR 238.10 or (b) a depository institution that meets the criteria set forth in paragraphs (2)(ii)(A) and (B) of the definition of Category III FDIC-supervised institution in this part.	

(d) *Transition into a different outflow adjustment percentage.* (1) An FDIC-supervised institution whose outflow adjustment percentage increases from a lower to a higher outflow adjustment percentage may continue to use its previous lower outflow adjustment percentage until the first day of the third calendar quarter after the outflow adjustment percentage increases.

(2) An FDIC-supervised institution whose outflow adjustment percentage decreases from a higher to a lower outflow adjustment percentage must continue to use its previous higher outflow adjustment percentage until the first day of the first calendar quarter after the outflow adjustment percentage decreases.

[79 FR 61523, Oct. 10, 2014, as amended at 84 FR 59282, Nov. 1, 2019; 86 FR 9220, Feb. 11, 2021]

§ 329.31 Determining maturity.

(a) For purposes of calculating its liquidity coverage ratio and the components thereof under this subpart, an FDIC-supervised institution shall assume an asset or transaction matures:

(1) With respect to an instrument or transaction subject to § 329.32, on the earliest possible contractual maturity date or the earliest possible date the transaction could occur, taking into account any option that could accelerate the maturity date or the date of the transaction, except that when considering the earliest possible contractual maturity date or the earliest possible date the transaction could occur, the FDIC-supervised institution should exclude any contingent options that are triggered only by regulatory actions or changes in law or regulation, as follows:

(i) If an investor or funds provider has an option that would reduce the maturity, the FDIC-supervised institution must assume that the investor or funds provider will exercise the option at the earliest possible date;

(ii) If an investor or funds provider has an option that would extend the maturity, the FDIC-supervised institution must assume that the investor or funds provider will not exercise the option to extend the maturity;

(iii) If the FDIC-supervised institution has an option that would reduce the maturity of an obligation, the FDIC-supervised institution must assume that the FDIC-supervised institution will exercise the option at the earliest possible date, except if either of the following criteria are satisfied, in which case the maturity of the obligation for purposes of this part will be the original maturity date at issuance:

(A) The original maturity of the obligation is greater than one year and the option does not go into effect for a period of 180 days following the issuance of the instrument; or

(B) The counterparty is a sovereign entity, a U.S. government-sponsored enterprise, or a public sector entity.

(iv) If the FDIC-supervised institution has an option that would extend the maturity of an obligation it issued, the FDIC-supervised institution must assume the FDIC-supervised institution will not exercise that option to extend the maturity; and

(v) If an option is subject to a contractually defined notice period, the FDIC-supervised institution must determine the earliest possible contractual maturity date regardless of the notice period.

(2) With respect to an instrument or transaction subject to § 329.33, on the latest possible contractual maturity date or the latest possible date the transaction could occur, taking into account any option that could extend the maturity date or the date of the transaction, except that when considering the latest possible contractual maturity date or the latest possible date the transaction could occur, the FDIC-supervised institution may exclude any contingent options that are triggered only by regulatory actions or changes in law or regulation, as follows:

(i) If the borrower has an option that would extend the maturity, the FDIC-supervised institution must assume that the borrower will exercise the option to extend the maturity to the latest possible date;

(ii) If the borrower has an option that would reduce the maturity, the FDIC-supervised institution must assume that the borrower will not exercise the option to reduce the maturity;

(iii) If the FDIC-supervised institution has an option that would reduce the maturity of an instrument or transaction, the FDIC-supervised institution must assume the FDIC-supervised institution will not exercise the option to reduce the maturity;

(iv) If the FDIC-supervised institution has an option that would extend the maturity of an instrument or transaction, the FDIC-supervised institution must assume the FDIC-supervised institution will exercise the option to extend the maturity to the latest possible date; and

(v) If an option is subject to a contractually defined notice period, the FDIC-supervised institution must determine the latest possible contractual maturity date based on the borrower using the entire notice period.

(3) With respect to a transaction subject to § 329.33(f)(1)(iii) through (vii) (secured lending transactions) or § 329.33(f)(2)(ii) through (x) (asset exchanges), to the extent the transaction is secured by collateral that has been pledged in connection with either a secured funding transaction or asset exchange that has a remaining maturity of 30 calendar days or less as of the calculation date, the maturity date is the later of the maturity date determined under paragraph (a)(2) of this section for the secured lending transaction or asset exchange or the maturity date determined under paragraph (a)(1) of this section for the secured funding transaction or asset exchange for which the collateral has been pledged.

(4) With respect to a transaction that has an open maturity, is not an operational deposit, and is subject to the provisions of § 329.32(h)(2), (h)(5), (j), or (k) or § 329.33(d) or (f), the maturity date is the first calendar day after the calculation date. Any other transaction that has an open maturity and is subject to the provisions of § 329.32 shall be considered to mature within 30 calendar days of the calculation date.

(5) With respect to a transaction subject to the provisions of § 329.33(g), on the date of the next scheduled calculation of the amount required under applicable legal requirements for the protection of customer assets with respect

to each broker-dealer segregated account, in accordance with the FDIC-supervised institution's normal frequency of recalculating such requirements.

(b) [Reserved]

[79 FR 61523, Oct. 10, 2014, as amended at 86 FR 9220, Feb. 11, 2021]

§ 329.32 Outflow amounts.

(a) *Retail funding outflow amount.* A FDIC-supervised institution's retail funding outflow amount as of the calculation date includes (regardless of maturity or collateralization):

(1) 3 percent of all stable retail deposits held at the FDIC-supervised institution;

(2) 10 percent of all other retail deposits held at the FDIC-supervised institution;

(3) 20 percent of all deposits placed at the FDIC-supervised institution by a third party on behalf of a retail customer or counterparty that are not brokered deposits, where the retail customer or counterparty owns the account and the entire amount is covered by deposit insurance;

(4) 40 percent of all deposits placed at the FDIC-supervised institution by a third party on behalf of a retail customer or counterparty that are not brokered deposits, where the retail customer or counterparty owns the account and where less than the entire amount is covered by deposit insurance; and

(5) 40 percent of all funding from a retail customer or counterparty that is not:

(i) A retail deposit;

(ii) A brokered deposit provided by a retail customer or counterparty; or

(iii) A debt instrument issued by the FDIC-supervised institution that is owned by a retail customer or counterparty (see paragraph (h)(2)(ii) of this section).

(b) *Structured transaction outflow amount.* If the FDIC-supervised institution is a sponsor of a structured transaction where the issuing entity is not consolidated on the FDIC-supervised institution's balance sheet under GAAP, the structured transaction outflow amount for each such structured transaction as of the calculation date is the greater of:

(1) 100 percent of the amount of all debt obligations of the issuing entity that mature 30 calendar days or less from such calculation date and all commitments made by the issuing entity to purchase assets within 30 calendar days or less from such calculation date; and

(2) The maximum contractual amount of funding the FDIC-supervised institution may be required to provide to the issuing entity 30 calendar days or less from such calculation date through a liquidity facility, a return or repurchase of assets from the issuing entity, or other funding agreement.

(c) *Net derivative cash outflow amount.* The net derivative cash outflow amount as of the calculation date is the sum of the net derivative cash outflow amount for each counterparty. The net derivative cash outflow amount does not include forward sales of mortgage loans and any derivatives that are mortgage commitments subject to paragraph (d) of this section. The net derivative cash outflow amount for a counterparty is the sum of:

(1) The amount, if greater than zero, of contractual payments and collateral that the FDIC-supervised institution will make or deliver to the counterparty 30 calendar days or less from the calculation date under derivative transactions other than transactions described in paragraph (c)(2) of this section, less the contractual payments and collateral that the FDIC-supervised institution will receive from the counterparty 30 calendar days or less from the calculation date under derivative transactions other than transactions described in paragraph (c)(2) of this section, provided that the derivative transactions are subject to a qualifying master netting agreement; and

(2) The amount, if greater than zero, of contractual principal payments that the FDIC-supervised institution will make to the counterparty 30 calendar days or less from the calculation date under foreign currency exchange derivative transactions that result in the full exchange of contractual cash principal payments in different currencies within the same business day, less the contractual principal payments that

the FDIC-supervised institution will receive from the counterparty 30 calendar days or less from the calculation date under foreign currency exchange derivative transactions that result in the full exchange of contractual cash principal payments in different currencies within the same business day.

(d) *Mortgage commitment outflow amount.* The mortgage commitment outflow amount as of a calculation date is 10 percent of the amount of funds the FDIC-supervised institution has contractually committed for its own origination of retail mortgages that can be drawn upon 30 calendar days or less from such calculation date.

(e) *Commitment outflow amount.* (1) A FDIC-supervised institution's commitment outflow amount as of the calculation date includes:

(i) Zero percent of the undrawn amount of all committed credit and liquidity facilities extended by an FDIC-supervised institution that is a depository institution to an affiliated depository institution that is subject to a minimum liquidity standard under this part;

(ii) 5 percent of the undrawn amount of all committed credit and liquidity facilities extended by the FDIC-supervised institution to retail customers or counterparties;

(iii) 10 percent of the undrawn amount of all committed credit facilities extended by the FDIC-supervised institution to a wholesale customer or counterparty that is not a financial sector entity or a consolidated subsidiary thereof, including a special purpose entity (other than those described in paragraph (e)(1)(viii) of this section) that is a consolidated subsidiary of such wholesale customer or counterparty;

(iv) 30 percent of the undrawn amount of all committed liquidity facilities extended by the FDIC-supervised institution to a wholesale customer or counterparty that is not a financial sector entity or a consolidated subsidiary thereof, including a special purpose entity (other than those described in paragraph (e)(1)(viii) of this section) that is a consolidated subsidiary of such wholesale customer or counterparty;

(v) 50 percent of the undrawn amount of all committed credit and liquidity facilities extended by the FDIC-supervised institution to depository institutions, depository institution holding companies, and foreign banks, but excluding commitments described in paragraph (e)(1)(i) of this section;

(vi) 40 percent of the undrawn amount of all committed credit facilities extended by the FDIC-supervised institution to a financial sector entity or a consolidated subsidiary thereof, including a special purpose entity (other than those described in paragraph (e)(1)(viii) of this section) that is a consolidated subsidiary of a financial sector entity, but excluding other commitments described in paragraph (e)(1)(i) or (v) of this section;

(vii) 100 percent of the undrawn amount of all committed liquidity facilities extended by the FDIC-supervised institution to a financial sector entity or a consolidated subsidiary thereof, including a special purpose entity (other than those described in paragraph (e)(1)(viii) of this section) that is a consolidated subsidiary of a financial sector entity, but excluding other commitments described in paragraph (e)(1)(i) or (v) of this section and liquidity facilities included in paragraph (b)(2) of this section;

(viii) 100 percent of the undrawn amount of all committed credit and liquidity facilities extended to a special purpose entity that issues or has issued commercial paper or securities (other than equity securities issued to a company of which the special purpose entity is a consolidated subsidiary) to finance its purchases or operations, and excluding liquidity facilities included in paragraph (b)(2) of this section; and

(ix) 100 percent of the undrawn amount of all other committed credit or liquidity facilities extended by the FDIC-supervised institution.

(2) For the purposes of this paragraph (e), the undrawn amount of a committed credit facility or committed liquidity facility is the entire unused amount of the facility that could be drawn upon within 30 calendar days of the calculation date under the governing agreement, less the amount of level 1 liquid assets and the amount of

level 2A liquid assets securing the facility.

(3) For the purposes of this paragraph (e), the amount of level 1 liquid assets and level 2A liquid assets securing a committed credit or liquidity facility is the fair value of level 1 liquid assets and 85 percent of the fair value of level 2A liquid assets that are required to be pledged as collateral by the counterparty to secure the facility, provided that:

(i) The assets pledged upon a draw on the facility would be eligible HQLA; and

(ii) The FDIC-supervised institution has not included the assets as eligible HQLA under subpart C of this part as of the calculation date.

(f) *Collateral outflow amount*. The collateral outflow amount as of the calculation date includes:

(1) *Changes in financial condition*. 100 percent of all additional amounts of collateral the FDIC-supervised institution could be contractually required to pledge or to fund under the terms of any transaction as a result of a change in the FDIC-supervised institution's financial condition;

(2) *Derivative collateral potential valuation changes*. 20 percent of the fair value of any collateral securing a derivative transaction pledged to a counterparty by the FDIC-supervised institution that is not a level 1 liquid asset;

(3) *Potential derivative valuation changes*. The absolute value of the largest 30-consecutive calendar day cumulative net mark-to-market collateral outflow or inflow realized during the preceding 24 months resulting from derivative transaction valuation changes;

(4) *Excess collateral*. 100 percent of the fair value of collateral that:

(i) The FDIC-supervised institution could be required by contract to return to a counterparty because the collateral pledged to the FDIC-supervised institution exceeds the current collateral requirement of the counterparty under the governing contract;

(ii) Is not segregated from the FDIC-supervised institution's other assets such that it cannot be rehypothecated; and

(iii) Is not already excluded as eligible HQLA by the FDIC-supervised institution under § 329.22(b)(5);

(5) *Contractually required collateral*. 100 percent of the fair value of collateral that the FDIC-supervised institution is contractually required to pledge to a counterparty and, as of such calculation date, the FDIC-supervised institution has not yet pledged;

(6) *Collateral substitution*. (i) Zero percent of the fair value of collateral pledged to the FDIC-supervised institution by a counterparty where the collateral qualifies as level 1 liquid assets and eligible HQLA and where, under the contract governing the transaction, the counterparty may replace the pledged collateral with other assets that qualify as level 1 liquid assets, without the consent of the FDIC-supervised institution;

(ii) 15 percent of the fair value of collateral pledged to the FDIC-supervised institution by a counterparty, where the collateral qualifies as level 1 liquid assets and eligible HQLA and where, under the contract governing the transaction, the counterparty may replace the pledged collateral with assets that qualify as level 2A liquid assets, without the consent of the FDIC-supervised institution;

(iii) 50 percent of the fair value of collateral pledged to the FDIC-supervised institution by a counterparty where the collateral qualifies as level 1 liquid assets and eligible HQLA and where under, the contract governing the transaction, the counterparty may replace the pledged collateral with assets that qualify as level 2B liquid assets, without the consent of the FDIC-supervised institution;

(iv) 100 percent of the fair value of collateral pledged to the FDIC-supervised institution by a counterparty where the collateral qualifies as level 1 liquid assets and eligible HQLA and where, under the contract governing the transaction, the counterparty may replace the pledged collateral with assets that do not qualify as HQLA, without the consent of the FDIC-supervised institution;

(v) Zero percent of the fair value of collateral pledged to the FDIC-supervised institution by a counterparty where the collateral qualifies as level

2A liquid assets and eligible HQLA and where, under the contract governing the transaction, the counterparty may replace the pledged collateral with assets that qualify as level 1 or level 2A liquid assets, without the consent of the FDIC-supervised institution;

(vi) 35 percent of the fair value of collateral pledged to the FDIC-supervised institution by a counterparty where the collateral qualifies as level 2A liquid assets and eligible HQLA and where, under the contract governing the transaction, the counterparty may replace the pledged collateral with assets that qualify as level 2B liquid assets, without the consent of the FDIC-supervised institution;

(vii) 85 percent of the fair value of collateral pledged to the FDIC-supervised institution by a counterparty where the collateral qualifies as level 2A liquid assets and eligible HQLA and where, under the contract governing the transaction, the counterparty may replace the pledged collateral with assets that do not qualify as HQLA, without the consent of the FDIC-supervised institution;

(viii) Zero percent of the fair value of collateral pledged to the FDIC-supervised institution by a counterparty where the collateral qualifies as level 2B liquid assets and eligible HQLA and where, under the contract governing the transaction, the counterparty may replace the pledged collateral with other assets that qualify as HQLA, without the consent of the FDIC-supervised institution; and

(ix) 50 percent of the fair value of collateral pledged to the FDIC-supervised institution by a counterparty where the collateral qualifies as level 2B liquid assets and eligible HQLA and where, under the contract governing the transaction, the counterparty may replace the pledged collateral with assets that do not qualify as HQLA, without the consent of the FDIC-supervised institution.

(g) *Brokered deposit outflow amount for retail customers or counterparties.* The brokered deposit outflow amount for retail customers or counterparties as of the calculation date includes:

(1) 100 percent of all brokered deposits at the FDIC-supervised institution provided by a retail customer or counterparty that are not described in paragraphs (g)(5) through (9) of this section and which mature 30 calendar days or less from the calculation date;

(2) 10 percent of all brokered deposits at the FDIC-supervised institution provided by a retail customer or counterparty that are not described in paragraphs (g)(5) through (9) of this section and which mature later than 30 calendar days from the calculation date;

(3) 20 percent of all brokered deposits at the FDIC-supervised institution provided by a retail customer or counterparty that are not described in paragraphs (g)(5) through (9) of this section and which are held in a transactional account with no contractual maturity date, where the entire amount is covered by deposit insurance;

(4) 40 percent of all brokered deposits at the FDIC-supervised institution provided by a retail customer or counterparty that are not described in paragraphs (g)(5) through (9) of this section and which are held in a transactional account with no contractual maturity date, where less than the entire amount is covered by deposit insurance;

(5) 10 percent of all brokered reciprocal deposits at the FDIC-supervised institution provided by a retail customer or counterparty, where the entire amount is covered by deposit insurance;

(6) 25 percent of all brokered reciprocal deposits at the FDIC-supervised institution provided by a retail customer or counterparty, where less than the entire amount is covered by deposit insurance;

(7) 10 percent of all sweep deposits at the FDIC-supervised institution provided by a retail customer or counterparty:

(i) That are deposited in accordance with a contract between the retail customer or counterparty and the FDIC-supervised institution, a controlled subsidiary of the FDIC-supervised institution, or a company that is a controlled subsidiary of the same top-tier company of which the FDIC-supervised institution is a controlled subsidiary; and

(ii) Where the entire amount of the deposits is covered by deposit insurance;

(8) 25 percent of all sweep deposits at the FDIC-supervised institution provided by a retail customer or counterparty:

(i) That are not deposited in accordance with a contract between the retail customer or counterparty and the FDIC-supervised institution, a controlled subsidiary of the FDIC-supervised institution, or a company that is a controlled subsidiary of the same top-tier company of which the FDIC-supervised institution is a controlled subsidiary; and

(ii) Where the entire amount of the deposits is covered by deposit insurance; and

(9) 40 percent of all sweep deposits at the FDIC-supervised institution provided by a retail customer or counterparty where less than the entire amount of the deposit balance is covered by deposit insurance.

(h) *Unsecured wholesale funding outflow amount.* A FDIC-supervised institution's unsecured wholesale funding outflow amount, for all transactions that mature within 30 calendar days or less of the calculation date, as of the calculation date includes:

(1) For unsecured wholesale funding that is not an operational deposit and is not provided by a financial sector entity or consolidated subsidiary of a financial sector entity:

(i) 20 percent of all such funding, where the entire amount is covered by deposit insurance and the funding is not a brokered deposit;

(ii) 40 percent of all such funding, where:

(A) Less than the entire amount is covered by deposit insurance; or

(B) The funding is a brokered deposit;

(2) 100 percent of all unsecured wholesale funding that is not an operational deposit and is not included in paragraph (h)(1) of this section, including:

(i) Funding provided by a company that is a consolidated subsidiary of the same top-tier company of which the FDIC-supervised institution is a consolidated subsidiary; and

(ii) Debt instruments issued by the FDIC-supervised institution, including such instruments owned by retail customers or counterparties;

(3) 5 percent of all operational deposits, other than operational deposits that are held in escrow accounts, where the entire deposit amount is covered by deposit insurance;

(4) 25 percent of all operational deposits not included in paragraph (h)(3) of this section; and

(5) 100 percent of all unsecured wholesale funding that is not otherwise described in this paragraph (h).

(i) *Debt security buyback outflow amount.* A FDIC-supervised institution's debt security buyback outflow amount for debt securities issued by the FDIC-supervised institution that mature more than 30 calendar days after the calculation date and for which the FDIC-supervised institution or a consolidated subsidiary of the FDIC-supervised institution is the primary market maker in such debt securities includes:

(1) 3 percent of all such debt securities that are not structured securities; and

(2) 5 percent of all such debt securities that are structured securities.

(j) *Secured funding and asset exchange outflow amount.* (1) A FDIC-supervised institution's secured funding outflow amount, for all transactions that mature within 30 calendar days or less of the calculation date, as of the calculation date includes:

(i) Zero percent of all funds the FDIC-supervised institution must pay pursuant to secured funding transactions, to the extent that the funds are secured by level 1 liquid assets;

(ii) 15 percent of all funds the FDIC-supervised institution must pay pursuant to secured funding transactions, to the extent that the funds are secured by level 2A liquid assets;

(iii) 25 percent of all funds the FDIC-supervised institution must pay pursuant to secured funding transactions with sovereign entities, multilateral development banks, or U.S. government-sponsored enterprises that are assigned a risk weight of 20 percent under subpart D of 12 CFR part 324, to the extent that the funds are not secured by level 1 or level 2A liquid assets;

(iv) 50 percent of all funds the FDIC-supervised institution must pay pursuant to secured funding transactions, to the extent that the funds are secured by level 2B liquid assets;

(v) 50 percent of all funds received from secured funding transactions that are customer short positions where the customer short positions are covered by other customers' collateral and the collateral does not consist of HQLA; and

(vi) 100 percent of all other funds the FDIC-supervised institution must pay pursuant to secured funding transactions, to the extent that the funds are secured by assets that are not HQLA.

(2) If an outflow rate specified in paragraph (j)(1) of this section for a secured funding transaction is greater than the outflow rate that the FDIC-supervised institution is required to apply under paragraph (h) of this section to an unsecured wholesale funding transaction that is not an operational deposit with the same counterparty, the FDIC-supervised institution may apply to the secured funding transaction the outflow rate that applies to an unsecured wholesale funding transaction that is not an operational deposit with that counterparty, except in the case of:

(i) Secured funding transactions that are secured by collateral that was received by the FDIC-supervised institution under a secured lending transaction or asset exchange, in which case the FDIC-supervised institution must apply the outflow rate specified in paragraph (j)(1) of this section for the secured funding transaction; and

(ii) Collateralized deposits that are operational deposits, in which case the FDIC-supervised institution may apply to the operational deposit amount, as calculated in accordance with § 329.4(b), the operational deposit outflow rate specified in paragraph (h)(3) or (4) of this section, as applicable, if such outflow rate is lower than the outflow rate specified in paragraph (j)(1) of this section.

(3) A FDIC-supervised institution's asset exchange outflow amount, for all transactions that mature within 30 calendar days or less of the calculation date, as of the calculation date includes:

(i) Zero percent of the fair value of the level 1 liquid assets the FDIC-supervised institution must post to a counterparty pursuant to asset exchanges, not described in paragraphs (j)(3)(x) through (xiii) of this section, where the FDIC-supervised institution will receive level 1 liquid assets from the asset exchange counterparty;

(ii) 15 percent of the fair value of the level 1 liquid assets the FDIC-supervised institution must post to a counterparty pursuant to asset exchanges, not described in paragraphs (j)(3)(x) through (xiii) of this section, where the FDIC-supervised institution will receive level 2A liquid assets from the asset exchange counterparty;

(iii) 50 percent of the fair value of the level 1 liquid assets the FDIC-supervised institution must post to a counterparty pursuant to asset exchanges, not described in paragraphs (j)(3)(x) through (xiii) of this section, where the FDIC-supervised institution will receive level 2B liquid assets from the asset exchange counterparty;

(iv) 100 percent of the fair value of the level 1 liquid assets the FDIC-supervised institution must post to a counterparty pursuant to asset exchanges, not described in paragraphs (j)(3)(x) through (xiii) of this section, where the FDIC-supervised institution will receive assets that are not HQLA from the asset exchange counterparty;

(v) Zero percent of the fair value of the level 2A liquid assets that FDIC-supervised institution must post to a counterparty pursuant to asset exchanges, not described in paragraphs (j)(3)(x) through (xiii) of this section, where FDIC-supervised institution will receive level 1 or level 2A liquid assets from the asset exchange counterparty;

(vi) 35 percent of the fair value of the level 2A liquid assets the FDIC-supervised institution must post to a counterparty pursuant to asset exchanges, not described in paragraphs (j)(3)(x) through (xiii) of this section, where the FDIC-supervised institution will receive level 2B liquid assets from the asset exchange counterparty;

(vii) 85 percent of the fair value of the level 2A liquid assets the FDIC-supervised institution must post to a

counterparty pursuant to asset exchanges, not described in paragraphs (j)(3)(x) through (xiii) of this section, where the FDIC-supervised institution will receive assets that are not HQLA from the asset exchange counterparty;

(viii) Zero percent of the fair value of the level 2B liquid assets the FDIC-supervised institution must post to a counterparty pursuant to asset exchanges, not described in paragraphs (j)(3)(x) through (xiii) of this section, where the FDIC-supervised institution will receive HQLA from the asset exchange counterparty; and

(ix) 50 percent of the fair value of the level 2B liquid assets the FDIC-supervised institution must post to a counterparty pursuant to asset exchanges, not described in paragraphs (j)(3)(x) through (xiii) of this section, where the FDIC-supervised institution will receive assets that are not HQLA from the asset exchange counterparty;

(x) Zero percent of the fair value of the level 1 liquid assets the FDIC-supervised institution will receive from a counterparty pursuant to an asset exchange where the FDIC-supervised institution has rehypothecated the assets posted by the asset exchange counterparty, and, as of the calculation date, the assets will not be returned to the FDIC-supervised institution within 30 calendar days;

(xi) 15 percent of the fair value of the level 2A liquid assets the FDIC-supervised institution will receive from a counterparty pursuant to an asset exchange where the FDIC-supervised institution has rehypothecated the assets posted by the asset exchange counterparty, and, as of the calculation date, the assets will not be returned to the FDIC-supervised institution within 30 calendar days;

(xii) 50 percent of the fair value of the level 2B liquid assets the FDIC-supervised institution will receive from a counterparty pursuant to an asset exchange where the FDIC-supervised institution has rehypothecated the assets posted by the asset exchange counterparty, and, as of the calculation date, the assets will not be returned to the FDIC-supervised institution within 30 calendar days; and

(xiii) 100 percent of the fair value of the non-HQLA the FDIC-supervised institution will receive from a counterparty pursuant to an asset exchange where the FDIC-supervised institution has rehypothecated the assets posted by the asset exchange counterparty, and, as of the calculation date, the assets will not be returned to the FDIC-supervised institution within 30 calendar days.

(k) *Foreign central bank borrowing outflow amount.* A FDIC-supervised institution's foreign central bank borrowing outflow amount is, in a foreign jurisdiction where the FDIC-supervised institution has borrowed from the jurisdiction's central bank, the outflow amount assigned to borrowings from central banks in a minimum liquidity standard established in that jurisdiction. If the foreign jurisdiction has not specified a central bank borrowing outflow amount in a minimum liquidity standard, the foreign central bank borrowing outflow amount must be calculated in accordance with paragraph (j) of this section.

(l) *Other contractual outflow amount.* A FDIC-supervised institution's other contractual outflow amount is 100 percent of funding or amounts, with the exception of operating expenses of the FDIC-supervised institution (such as rents, salaries, utilities, and other similar payments), payable by the FDIC-supervised institution to counterparties under legally binding agreements that are not otherwise specified in this section.

(m) *Excluded amounts for intragroup transactions.* The outflow amounts set forth in this section do not include amounts arising out of transactions between:

(1) The FDIC-supervised institution and a consolidated subsidiary of the FDIC-supervised institution; or

(2) A consolidated subsidiary of the FDIC-supervised institution and another consolidated subsidiary of the FDIC-supervised institution.

[79 FR 61523, Oct. 10, 2014, as amended at 86 FR 9220, Feb. 11, 2021]

§ 329.33 Inflow amounts.

(a) The inflows in paragraphs (b) through (g) of this section do not include:

(1) Amounts the FDIC-supervised institution holds in operational deposits at other regulated financial companies;

(2) Amounts the FDIC-supervised institution expects, or is contractually entitled to receive, 30 calendar days or less from the calculation date due to forward sales of mortgage loans and any derivatives that are mortgage commitments subject to § 329.32(d);

(3) The amount of any credit or liquidity facilities extended to the FDIC-supervised institution;

(4) The amount of any asset that is eligible HQLA and any amounts payable to the FDIC-supervised institution with respect to that asset;

(5) Any amounts payable to the FDIC-supervised institution from an obligation of a customer or counterparty that is a nonperforming asset as of the calculation date or that the FDIC-supervised institution has reason to expect will become a nonperforming exposure 30 calendar days or less from the calculation date; and

(6) Amounts payable to the FDIC-supervised institution with respect to any transaction that has no contractual maturity date or that matures after 30 calendar days of the calculation date (as determined by § 329.31).

(b) *Net derivative cash inflow amount.* The net derivative cash inflow amount as of the calculation date is the sum of the net derivative cash inflow amount for each counterparty. The net derivative cash inflow amount does not include amounts excluded from inflows under paragraph (a)(2) of this section. The net derivative cash inflow amount for a counterparty is the sum of:

(1) The amount, if greater than zero, of contractual payments and collateral that the FDIC-supervised institution will receive from the counterparty 30 calendar days or less from the calculation date under derivative transactions other than transactions described in paragraph (b)(2) of this section, less the contractual payments and collateral that the FDIC-supervised institution will make or deliver to the counterparty 30 calendar days or less from the calculation date under derivative transactions other than transactions described in paragraph (b)(2) of this section, provided that the derivative transactions are subject to a qualifying master netting agreement; and

(2) The amount, if greater than zero, of contractual principal payments that the FDIC-supervised institution will receive from the counterparty 30 calendar days or less from the calculation date under foreign currency exchange derivative transactions that result in the full exchange of contractual cash principal payments in different currencies within the same business day, less the contractual principal payments that the FDIC-supervised institution will make to the counterparty 30 calendar days or less from the calculation date under foreign currency exchange derivative transactions that result in the full exchange of contractual cash principal payments in different currencies within the same business day.

(c) *Retail cash inflow amount.* The retail cash inflow amount as of the calculation date includes 50 percent of all payments contractually payable to the FDIC-supervised institution from retail customers or counterparties.

(d) *Unsecured wholesale cash inflow amount.* The unsecured wholesale cash inflow amount as of the calculation date includes:

(1) 100 percent of all payments contractually payable to the FDIC-supervised institution from financial sector entities, or from a consolidated subsidiary thereof, or central banks; and

(2) 50 percent of all payments contractually payable to the FDIC-supervised institution from wholesale customers or counterparties that are not financial sector entities or consolidated subsidiaries thereof, provided that, with respect to revolving credit facilities, the amount of the existing loan is not included in the unsecured wholesale cash inflow amount and the remaining undrawn balance is included in the outflow amount under § 329.32(e)(1).

(e) *Securities cash inflow amount.* The securities cash inflow amount as of the calculation date includes 100 percent of all contractual payments due to the FDIC-supervised institution on securities it owns that are not eligible HQLA.

(f) *Secured lending and asset exchange cash inflow amount.* (1) A FDIC-supervised institution's secured lending cash inflow amount as of the calculation date includes:

(i) Zero percent of all contractual payments due to the FDIC-supervised institution pursuant to secured lending transactions, including margin loans extended to customers, to the extent that the payments are secured by collateral that has been rehypothecated in a transaction and, as of the calculation date, will not be returned to the FDIC-supervised institution within 30 calendar days;

(ii) 100 percent of all contractual payments due to the FDIC-supervised institution pursuant to secured lending transactions not described in paragraph (f)(1)(vii) of this section, to the extent that the payments are secured by assets that are not eligible HQLA, but are still held by the FDIC-supervised institution and are available for immediate return to the counterparty at any time;

(iii) Zero percent of all contractual payments due to the FDIC-supervised institution pursuant to secured lending transactions not described in paragraphs (f)(1)(i) or (ii) of this section, to the extent that the payments are secured by level 1 liquid assets;

(iv) 15 percent of all contractual payments due to the FDIC-supervised institution pursuant to secured lending transactions not described in paragraphs (f)(1)(i) or (ii) of this section, to the extent that the payments are secured by level 2A liquid assets;

(v) 50 percent of all contractual payments due to the FDIC-supervised institution pursuant to secured lending transactions not described in paragraphs (f)(1)(i) or (ii) of this section, to the extent that the payments are secured by level 2B liquid assets;

(vi) 100 percent of all contractual payments due to the FDIC-supervised institution pursuant to secured lending transactions not described in paragraphs (f)(1)(i), (ii), or (vii) of this section, to the extent that the payments are secured by assets that are not HQLA; and

(vii) 50 percent of all contractual payments due to the FDIC-supervised institution pursuant to collateralized margin loans extended to customers, not described in paragraph (f)(1)(i) of this section, provided that the loans are secured by assets that are not HQLA.

(2) A FDIC-supervised institution's asset exchange inflow amount as of the calculation date includes:

(i) Zero percent of the fair value of assets the FDIC-supervised institution will receive from a counterparty pursuant to asset exchanges, to the extent that the asset received by the FDIC-supervised institution from the counterparty has been rehypothecated in a transaction and, as of the calculation date, will not be returned to the FDIC-supervised institution within 30 calendar days;

(ii) Zero percent of the fair value of level 1 liquid assets the FDIC-supervised institution will receive from a counterparty pursuant to asset exchanges, not described in paragraph (f)(2)(i) of this section, where the FDIC-supervised institution must post level 1 liquid assets to the asset exchange counterparty;

(iii) 15 percent of the fair value of level 1 liquid assets the FDIC-supervised institution will receive from a counterparty pursuant to asset exchanges, not described in paragraph (f)(2)(i) of this section, where the FDIC-supervised institution must post level 2A liquid assets to the asset exchange counterparty;

(iv) 50 percent of the fair value of level 1 liquid assets the FDIC-supervised institution will receive from counterparty pursuant to asset exchanges, not described in paragraph (f)(2)(i) of this section, where the FDIC-supervised institution must post level 2B liquid assets to the asset exchange counterparty;

(v) 100 percent of the fair value of level 1 liquid assets the FDIC-supervised institution will receive from a counterparty pursuant to asset exchanges, not described in paragraph (f)(2)(i) of this section, where the FDIC-supervised institution must post assets that are not HQLA to the asset exchange counterparty;

(vi) Zero percent of the fair value of level 2A liquid assets the FDIC-supervised institution will receive from a

counterparty pursuant to asset exchanges, not described in paragraph (f)(2)(i) of this section, where the FDIC-supervised institution must post level 1 or level 2A liquid assets to the asset exchange counterparty;

(vii) 35 percent of the fair value of level 2A liquid assets the FDIC-supervised institution will receive from a counterparty pursuant to asset exchanges, not described in paragraph (f)(2)(i) of this section, where the FDIC-supervised institution must post level 2B liquid assets to the asset exchange counterparty;

(viii) 85 percent of the fair value of level 2A liquid assets the FDIC-supervised institution will receive from a counterparty pursuant to asset exchanges, not described in paragraph (f)(2)(i) of this section, where the FDIC-supervised institution must post assets that are not HQLA to the asset exchange counterparty;

(ix) Zero percent of the fair value of level 2B liquid assets the FDIC-supervised institution will receive from a counterparty pursuant to asset exchanges, not described in paragraph (f)(2)(i) of this section, where the FDIC-supervised institution must post assets that are HQLA to the asset exchange counterparty; and

(x) 50 percent of the fair value of level 2B liquid assets the FDIC-supervised institution will receive from a counterparty pursuant to asset exchanges, not described in paragraph (f)(2)(i) of this section, where the FDIC-supervised institution must post assets that are not HQLA to the asset exchange counterparty.

(g) *Broker-dealer segregated account inflow amount.* A FDIC-supervised institution's broker-dealer segregated account inflow amount is the fair value of all assets released from broker-dealer segregated accounts maintained in accordance with statutory or regulatory requirements for the protection of customer trading assets, provided that the calculation of the broker-dealer segregated account inflow amount, for any transaction affecting the calculation of the segregated balance (as required by applicable law), shall be consistent with the following:

(1) In calculating the broker-dealer segregated account inflow amount, the FDIC-supervised institution must calculate the fair value of the required balance of the customer reserve account as of 30 calendar days from the calculation date by assuming that customer cash and collateral positions have changed consistent with the outflow and inflow calculations required under §§ 329.32 and 329.33.

(2) If the fair value of the required balance of the customer reserve account as of 30 calendar days from the calculation date, as calculated consistent with the outflow and inflow calculations required under §§ 329.32 and 329.33, is less than the fair value of the required balance as of the calculation date, the difference is the segregated account inflow amount.

(3) If the fair value of the required balance of the customer reserve account as of 30 calendar days from the calculation date, as calculated consistent with the outflow and inflow calculations required under §§ 329.32 and 329.33, is more than the fair value of the required balance as of the calculation date, the segregated account inflow amount is zero.

(h) *Other cash inflow amounts.* A FDIC-supervised institution's inflow amount as of the calculation date includes zero percent of other cash inflow amounts not included in paragraphs (b) through (g) of this section.

(i) *Excluded amounts for intragroup transactions.* The inflow amounts set forth in this section do not include amounts arising out of transactions between:

(1) The FDIC-supervised institution and a consolidated subsidiary of the FDIC-supervised institution; or

(2) A consolidated subsidiary of the FDIC-supervised institution and another consolidated subsidiary of the FDIC-supervised institution.

§ 329.34 Cash flows related to Covered Federal Reserve Facility Funding.

(a) *Treatment of Covered Federal Reserve Facility Funding.* Notwithstanding any other section of this part and except as provided in paragraph (b) of this section, outflow amounts and inflow amounts related to Covered Federal Reserve Facility Funding and the assets securing Covered Federal Reserve Facility Funding are excluded

from the calculation of a FDIC-supervised institution's total net cash outflow amount calculated under § 329.30.

(b) *Exception*. To the extent the Covered Federal Reserve Facility Funding is secured by securities, debt obligations, or other instruments issued by the FDIC-supervised institution or one of its consolidated subsidiaries, the Covered Federal Reserve Facility Funding is not subject to paragraph (a) of this section and this outflow amount must be included in the FDIC-supervised institution's total net cash outflow amount calculated under § 329.30.

[85 FR 26841, May 6, 2020]

Subpart E—Liquidity Coverage Shortfall

§ 329.40 Liquidity coverage shortfall: Supervisory framework.

(a) *Notification requirements*. must notify the FDIC on any business day when its liquidity coverage ratio is calculated to be less than the minimum requirement in § 329.10.

(b) *Liquidity plan*. (1) For the period during which an FDIC-supervised institution must calculate a liquidity coverage ratio on the last business day of each applicable calendar month under subpart F of this part, if the FDIC-supervised institution's liquidity coverage ratio is below the minimum requirement in § 329.10 for any calculation date that is the last business day of the applicable calendar month, or if the FDIC has determined that the FDIC-supervised institution is otherwise materially noncompliant with the requirements of this part, the FDIC-supervised institution must promptly consult with the FDIC to determine whether the FDIC-supervised institution must provide to the FDIC a plan for achieving compliance with the minimum liquidity requirement in § 329.10 and all other requirements of this part.

(2) For the period during which an FDIC-supervised institution must calculate a liquidity coverage ratio each business day under subpart F of this part, if a FDIC-supervised institution's liquidity coverage ratio is below the minimum requirement in § 329.10 for three consecutive business days, or if the FDIC has determined that the FDIC-supervised institution is otherwise materially noncompliant with the requirements of this part, the FDIC-supervised institution must promptly provide to the FDIC a plan for achieving compliance with the minimum liquidity requirement in § 329.10 and all other requirements of this part.

(3) The plan must include, as applicable:

(i) An assessment of the FDIC-supervised institution's liquidity position;

(ii) The actions the FDIC-supervised institution has taken and will take to achieve full compliance with this part, including:

(A) A plan for adjusting the FDIC-supervised institution's risk profile, risk management, and funding sources in order to achieve full compliance with this part; and

(B) A plan for remediating any operational or management issues that contributed to noncompliance with this part;

(iii) An estimated time frame for achieving full compliance with this part; and

(iv) A commitment to report to the FDIC no less than weekly on progress to achieve compliance in accordance with the plan until full compliance with this part is achieved.

(c) *Supervisory and enforcement actions*. The FDIC may, at its discretion, take additional supervisory or enforcement actions to address noncompliance with the minimum liquidity standard and other requirements of this part.

Subpart F—Transitions

§ 329.50 Transitions.

(a) *No transition for certain FDIC-supervised institutions*. An FDIC-supervised institution that is subject to the minimum liquidity standard and other requirements of this part prior to December 31, 2019 must comply with the minimum liquidity standard and other requirements of this part as of December 31, 2019.

(b) [Reserved]

(c) *Initial application*. (1) An FDIC-supervised institution that initially becomes subject to the minimum liquidity standard and other requirements of this part under § 329.1(b)(1)(i) must comply with the requirements of this

part beginning on the first day of the third calendar quarter after which the FDIC-supervised institution becomes subject to this part, except that an FDIC-supervised institution must:

(i) For the first two calendar quarters after the FDIC-supervised institution begins complying with the minimum liquidity standard and other requirements of this part, calculate and maintain a liquidity coverage ratio monthly, on each calculation date that is the last business day of the applicable calendar month; and

(ii) Beginning the first day of the fifth calendar quarter after the FDIC-supervised institution becomes subject to the minimum liquidity standard and other requirements of this part and continuing thereafter, calculate and maintain a liquidity coverage ratio on each calculation date.

(2) An FDIC-supervised institution that becomes subject to the minimum liquidity standard and other requirements of this part under § 329.1(b)(1)(ii), must comply with the requirements of this part subject to a transition period specified by the FDIC.

(d) *Transition into a different outflow adjustment percentage.* (1) An FDIC-supervised institution whose outflow adjustment percentage changes is subject to transition periods as set forth in § 329.30(d).

(2) An FDIC-supervised institution that is no longer subject to the minimum liquidity standard and other requirements of this part pursuant to § 329.1(b)(1)(i) based on the size of total consolidated assets, cross-jurisdictional activity, total nonbank assets, weighted short-term wholesale funding, or off-balance sheet exposure calculated in accordance with the Call Report, the instructions to the FR Y–9LP or the FR Y–15 or equivalent reporting form, as applicable, for each of the four most recent calendar quarters may cease compliance with this part as of the first day of the first quarter after it is no longer subject to § 329.1(b)(1).

(e) *Reservation of authority.* The FDIC may extend or accelerate any compliance date of this part if the FDIC determines that such extension or acceleration is appropriate. In determining whether an extension or acceleration is appropriate, the FDIC will consider the effect of the modification on financial stability, the period of time for which the modification would be necessary to facilitate compliance with this part, and the actions the FDIC-supervised supervised institution is taking to come into compliance with this part.

[84 FR 59283, Nov. 1, 2019]

Subparts G–J [Reserved]

Subpart K—Net Stable Funding Ratio

SOURCE: 86 FR 9220, Feb. 11, 2021, unless otherwise noted.

§ 329.100 Net stable funding ratio.

(a) *Minimum net stable funding ratio requirement.* An FDIC-supervised institution must maintain a net stable funding ratio that is equal to or greater than 1.0 on an ongoing basis in accordance with this subpart.

(b) *Calculation of the net stable funding ratio.* For purposes of this part, an FDIC-supervised institution's net stable funding ratio equals:

(1) The FDIC-supervised institution's available stable funding (ASF) amount, calculated pursuant to § 329.103, as of the calculation date; divided by

(2) The FDIC-supervised institution's required stable funding (RSF) amount, calculated pursuant to § 329.105, as of the calculation date.

§ 329.101 Determining maturity.

For purposes of calculating its net stable funding ratio, including its ASF amount and RSF amount, under subparts K through N, an FDIC-supervised institution shall assume each of the following:

(a) With respect to any NSFR liability, the NSFR liability matures according to § 329.31(a)(1) of this part without regard to whether the NSFR liability is subject to § 329.32;

(b) With respect to an asset, the asset matures according to § 329.31(a)(2) of this part without regard to whether the asset is subject to § 329.33 of this part;

(c) With respect to an NSFR liability or asset that is perpetual, the NSFR liability or asset matures one year or more after the calculation date;

(d) With respect to an NSFR liability or asset that has an open maturity, the NSFR liability or asset matures on the first calendar day after the calculation date, except that in the case of a deferred tax liability, the NSFR liability matures on the first calendar day after the calculation date on which the deferred tax liability could be realized; and

(e) With respect to any principal payment of an NSFR liability or asset, such as an amortizing loan, that is due prior to the maturity of the NSFR liability or asset, the payment matures on the date on which it is contractually due.

§ 329.102 Rules of construction.

(a) *Balance-sheet metric.* Unless otherwise provided in this subpart, an NSFR regulatory capital element, NSFR liability, or asset that is not included on an FDIC-supervised institution's balance sheet is not assigned an RSF factor or ASF factor, as applicable; and an NSFR regulatory capital element, NSFR liability, or asset that is included on an FDIC-supervised institution's balance sheet is assigned an RSF factor or ASF factor, as applicable.

(b) *Netting of certain transactions.* Where an FDIC-supervised institution has secured lending transactions, secured funding transactions, or asset exchanges with the same counterparty and has offset the gross value of receivables due from the counterparty under the transactions by the gross value of payables under the transactions due to the counterparty, the receivables or payables associated with the offsetting transactions that are not included on the FDIC-supervised institution's balance sheet are treated as if they were included on the FDIC-supervised institution's balance sheet with carrying values, unless the criteria in 12 CFR 324.10(c)(2)(v)(A) through (C) are met.

(c) *Treatment of Securities Received in an Asset Exchange by a Securities Lender.* Where an FDIC-supervised institution receives a security in an asset exchange, acts as a securities lender, includes the carrying value of the received security on its balance sheet, and has not rehypothecated the security received:

(1) The security received by the FDIC-supervised institution is not assigned an RSF factor; and

(2) The obligation to return the security received by the FDIC-supervised institution is not assigned an ASF factor.

§ 329.103 Calculation of available stable funding amount.

An FDIC-supervised institution's ASF amount equals the sum of the carrying values of the FDIC-supervised institution's NSFR regulatory capital elements and NSFR liabilities, in each case multiplied by the ASF factor applicable in § 329.104 or § 329.107(c) and consolidated in accordance with § 329.109.

§ 329.104 ASF factors.

(a) *NSFR regulatory capital elements and NSFR liabilities assigned a 100 percent ASF factor.* An NSFR regulatory capital element or NSFR liability of an FDIC-supervised institution is assigned a 100 percent ASF factor if it is one of the following:

(1) An NSFR regulatory capital element; or

(2) An NSFR liability that has a maturity of one year or more from the calculation date, is not described in paragraph (d)(9) of this section, and is not a retail deposit or brokered deposit provided by a retail customer or counterparty.

(b) *NSFR liabilities assigned a 95 percent ASF factor.* An NSFR liability of an FDIC-supervised institution is assigned a 95 percent ASF factor if it is one of the following:

(1) A stable retail deposit (regardless of maturity or collateralization) held at the FDIC-supervised institution; or

(2) A sweep deposit that:

(i) Is deposited in accordance with a contract between the retail customer or counterparty and the FDIC-supervised institution, a controlled subsidiary of the FDIC-supervised institution, or a company that is a controlled subsidiary of the same top-tier company of which the FDIC-supervised institution is a controlled subsidiary;

(ii) Is entirely covered by deposit insurance; and

(iii) The FDIC-supervised institution demonstrates to the satisfaction of the

FDIC that a withdrawal of such deposit is highly unlikely to occur during a liquidity stress event.

(c) *NSFR liabilities assigned a 90 percent ASF factor*. An NSFR liability of an FDIC-supervised institution is assigned a 90 percent ASF factor if it is funding provided by a retail customer or counterparty that is:

(1) A retail deposit (regardless of maturity or collateralization) other than a stable retail deposit or brokered deposit;

(2) A brokered reciprocal deposit where the entire amount is covered by deposit insurance;

(3) A sweep deposit that is deposited in accordance with a contract between the retail customer or counterparty and the FDIC-supervised institution, a controlled subsidiary of the FDIC-supervised institution, or a company that is a controlled subsidiary of the same top-tier company of which the FDIC-supervised institution is a controlled subsidiary, where the sweep deposit does not meet the requirements of paragraph (b)(2) of this section; or

(4) A brokered deposit that is not a brokered reciprocal deposit or a sweep deposit, that is not held in a transactional account, and that matures one year or more from the calculation date.

(d) *NSFR liabilities assigned a 50 percent ASF factor*. An NSFR liability of an FDIC-supervised institution is assigned a 50 percent ASF factor if it is one of the following:

(1) Unsecured wholesale funding that:

(i) Is not provided by a financial sector entity, a consolidated subsidiary of a financial sector entity, or a central bank;

(ii) Matures less than one year from the calculation date; and

(iii) Is not a security issued by the FDIC-supervised institution or an operational deposit placed at the FDIC-supervised institution;

(2) A secured funding transaction with the following characteristics:

(i) The counterparty is not a financial sector entity, a consolidated subsidiary of a financial sector entity, or a central bank;

(ii) The secured funding transaction matures less than one year from the calculation date; and

(iii) The secured funding transaction is not a collateralized deposit that is an operational deposit placed at the FDIC-supervised institution;

(3) Unsecured wholesale funding that:

(i) Is provided by a financial sector entity, a consolidated subsidiary of a financial sector entity, or a central bank;

(ii) Matures six months or more, but less than one year, from the calculation date; and

(iii) Is not a security issued by the FDIC-supervised institution or an operational deposit;

(4) A secured funding transaction with the following characteristics:

(i) The counterparty is a financial sector entity, a consolidated subsidiary of a financial sector entity, or a central bank;

(ii) The secured funding transaction matures six months or more, but less than one year, from the calculation date; and

(iii) The secured funding transaction is not a collateralized deposit that is an operational deposit;

(5) A security issued by the FDIC-supervised institution that matures six months or more, but less than one year, from the calculation date;

(6) An operational deposit placed at the FDIC-supervised institution;

(7) A brokered deposit provided by a retail customer or counterparty that is not described in paragraphs (c) or (e)(2) of this section;

(8) A sweep deposit provided by a retail customer or counterparty that is not described in paragraphs (b) or (c) of this section;

(9) An NSFR liability owed to a retail customer or counterparty that is not a deposit and is not a security issued by the FDIC-supervised institution; or

(10) Any other NSFR liability that matures six months or more, but less than one year, from the calculation date and is not described in paragraphs (a) through (c) or (d)(1) through (d)(9) of this section.

(e) *NSFR liabilities assigned a zero percent ASF factor*. An NSFR liability of an FDIC-supervised institution is assigned a zero percent ASF factor if it is one of the following:

(1) A trade date payable that results from a purchase by the FDIC-supervised institution of a financial instrument, foreign currency, or commodity that is contractually required to settle within the lesser of the market standard settlement period for the particular transaction and five business days from the date of the sale;

(2) A brokered deposit provided by a retail customer or counterparty that is not a brokered reciprocal deposit or sweep deposit, is not held in a transactional account, and matures less than six months from the calculation date;

(3) A security issued by the FDIC-supervised institution that matures less than six months from the calculation date;

(4) An NSFR liability with the following characteristics:

(i) The counterparty is a financial sector entity, a consolidated subsidiary of a financial sector entity, or a central bank;

(ii) The NSFR liability matures less than six months from the calculation date or has an open maturity; and

(iii) The NSFR liability is not a security issued by the FDIC-supervised institution or an operational deposit placed at the FDIC-supervised institution; or

(5) Any other NSFR liability that matures less than six months from the calculation date and is not described in paragraphs (a) through (d) or (e)(1) through (4) of this section.

§ 329.105 Calculation of required stable funding amount.

(a) *Required stable funding amount.* An FDIC-supervised institution's RSF amount equals the FDIC-supervised institution's required stable funding adjustment percentage as determined under paragraph (b) of this section multiplied by the sum of:

(1) The carrying values of an FDIC-supervised institution's assets (other than amounts included in the calculation of the derivatives RSF amount pursuant to § 329.107(b)) and the undrawn amounts of an FDIC-supervised institution's credit and liquidity facilities, in each case multiplied by the RSF factors applicable in § 329.106; and

(2) The FDIC-supervised institution's derivatives RSF amount calculated pursuant to § 329.107(b).

(b) *Required stable funding adjustment percentage.* An FDIC-supervised institution's required stable funding adjustment percentage is determined pursuant to Table 1 to this paragraph (b).

TABLE 1 TO PARAGRAPH (b)—REQUIRED STABLE FUNDING ADJUSTMENT PERCENTAGES

GSIB depository institution supervised by the FDIC	100
Category II FDIC-supervised institution	100
Category III FDIC-supervised institution that:	100
(1) Is a consolidated subsidiary of (a) a covered depository institution holding company or U.S. intermediate holding company identified as a Category III banking organization pursuant to 12 CFR 252.5 or 12 CFR 238.10 or (b) a depository institution that meets the criteria set forth in paragraphs (2)(ii)(A) and (B) of the definition of Category III FDIC-supervised institution in this part, in each case with $75 billion or more in average weighted short-term wholesale funding; or	
(2) Has $75 billion or more in average weighted short-term wholesale funding and is not a consolidated subsidiary of (a) a covered depository institution holding company or U.S. intermediate holding company identified as a Category III banking organization pursuant to 12 CFR 252.5 or 12 CFR 238.10 or (b) a depository institution that meets the criteria set forth in paragraphs (2)(ii)(A) and (B) of the definition of Category III FDIC-supervised institution in this part.	
Category III FDIC-supervised institution that:	85

TABLE 1 TO PARAGRAPH (b)—REQUIRED STABLE FUNDING ADJUSTMENT PERCENTAGES—Continued

(1) Is a consolidated subsidiary of (a) a covered depository institution holding company or U.S. intermediate holding company identified as a Category III banking organization pursuant to 12 CFR 252.5 or 12 CFR 238.10 or (b) a depository institution that meets the criteria set forth in paragraphs (2)(ii)(A) and (B) of the definition of Category III FDIC-supervised institution in this part, in each case with less than $75 billion in average weighted short-term wholesale funding; or (2) Has less than $75 billion in average weighted short-term wholesale funding and is not a consolidated subsidiary of (a) a covered depository institution holding company or U.S. intermediate holding company identified as a Category III banking organization pursuant to 12 CFR 252.5 or 12 CFR 238.10 or (b) a depository institution that meets the criteria set forth in paragraphs (2)(ii)(A) and (B) of the definition of Category III FDIC-supervised institution in this part.	

(c) *Transition into a different required stable funding adjustment percentage.* (1) An FDIC-supervised institution whose required stable funding adjustment percentage increases from a lower to a higher required stable funding adjustment percentage may continue to use its previous lower required stable funding adjustment percentage until the first day of the third calendar quarter after the required stable funding adjustment percentage increases.

(2) An FDIC-supervised institution whose required stable funding adjustment percentage decreases from a higher to a lower required stable funding adjustment percentage must continue to use its previous higher required stable funding adjustment percentage until the first day of the first calendar quarter after the required stable funding adjustment percentage decreases.

[86 FR 9220, 9221, Feb. 11, 2021]

§ 329.106 RSF factors.

(a) *Unencumbered assets and commitments.* All assets and undrawn amounts under credit and liquidity facilities, unless otherwise provided in § 329.107(b) relating to derivative transactions or paragraphs (b) through (d) of this section, are assigned RSF factors as follows:

(1) *Unencumbered assets assigned a zero percent RSF factor.* An asset of an FDIC-supervised institution is assigned a zero percent RSF factor if it is one of the following:

(i) Currency and coin;

(ii) A cash item in the process of collection;

(iii) A Reserve Bank balance or other claim on a Reserve Bank that matures less than six months from the calculation date;

(iv) A claim on a foreign central bank that matures less than six months from the calculation date;

(v) A trade date receivable due to the FDIC-supervised institution resulting from the FDIC-supervised institution's sale of a financial instrument, foreign currency, or commodity that is required to settle no later than the market standard, without extension, for the particular transaction, and that has yet to settle but is not more than five business days past the scheduled settlement date;

(vi) Any other level 1 liquid asset not described in paragraphs (a)(1)(i) through (a)(1)(v) of this section; or

(vii) A secured lending transaction with the following characteristics:

(A) The secured lending transaction matures less than six months from the calculation date;

(B) The secured lending transaction is secured by level 1 liquid assets;

(C) The borrower is a financial sector entity or a consolidated subsidiary thereof; and

(D) The FDIC-supervised institution retains the right to rehypothecate the collateral provided by the counterparty for the duration of the secured lending transaction.

(2) *Unencumbered assets and commitments assigned a 5 percent RSF factor.* An undrawn amount of a committed credit

facility or committed liquidity facility extended by an FDIC-supervised institution is assigned a 5 percent RSF factor. For the purposes of this paragraph (a)(2), the undrawn amount of a committed credit facility or committed liquidity facility is the entire unused amount of the facility that could be drawn upon within one year of the calculation date under the governing agreement.

(3) *Unencumbered assets assigned a 15 percent RSF factor*. An asset of an FDIC-supervised institution is assigned a 15 percent RSF factor if it is one of the following:

(i) A level 2A liquid asset; or

(ii) A secured lending transaction or unsecured wholesale lending with the following characteristics:

(A) The asset matures less than six months from the calculation date;

(B) The borrower is a financial sector entity or a consolidated subsidiary thereof; and

(C) The asset is not described in paragraph (a)(1)(vii) of this section and is not an operational deposit described in paragraph (a)(4)(iii) of this section.

(4) *Unencumbered assets assigned a 50 percent RSF factor*. An asset of an FDIC-supervised institution is assigned a 50 percent RSF factor if it is one of the following:

(i) A level 2B liquid asset;

(ii) A secured lending transaction or unsecured wholesale lending with the following characteristics:

(A) The asset matures six months or more, but less than one year, from the calculation date;

(B) The borrower is a financial sector entity, a consolidated subsidiary thereof, or a central bank; and

(C) The asset is not an operational deposit described in paragraph (a)(4)(iii) of this section;

(iii) An operational deposit placed by the FDIC-supervised institution at a financial sector entity or a consolidated subsidiary thereof; or

(iv) An asset that is not described in paragraphs (a)(1) through (a)(3) or (a)(4)(i) through (a)(4)(iii) of this section that matures less than one year from the calculation date, including:

(A) A secured lending transaction or unsecured wholesale lending where the borrower is a wholesale customer or counterparty that is not a financial sector entity, a consolidated subsidiary thereof, or a central bank; or

(B) Lending to a retail customer or counterparty.

(5) *Unencumbered assets assigned a 65 percent RSF factor*. An asset of an FDIC-supervised institution is assigned a 65 percent RSF factor if it is one of the following:

(i) A retail mortgage that matures one year or more from the calculation date and is assigned a risk weight of no greater than 50 percent under subpart D of 12 CFR part 324; or

(ii) A secured lending transaction, unsecured wholesale lending, or lending to a retail customer or counterparty with the following characteristics:

(A) The asset is not described in paragraphs (a)(1) through (a)(5)(i) of this section;

(B) The borrower is not a financial sector entity or a consolidated subsidiary thereof;

(C) The asset matures one year or more from the calculation date; and

(D) The asset is assigned a risk weight of no greater than 20 percent under subpart D of 12 CFR part 324.

(6) *Unencumbered assets assigned an 85 percent RSF factor*. An asset of an FDIC-supervised institution is assigned an 85 percent RSF factor if it is one of the following:

(i) A retail mortgage that matures one year or more from the calculation date and is assigned a risk weight of greater than 50 percent under subpart D of 12 CFR part 324;

(ii) A secured lending transaction, unsecured wholesale lending, or lending to a retail customer or counterparty with the following characteristics:

(A) The asset is not described in paragraphs (a)(1) through (a)(6)(i) of this section;

(B) The borrower is not a financial sector entity or a consolidated subsidiary thereof;

(C) The asset matures one year or more from the calculation date; and

(D) The asset is assigned a risk weight of greater than 20 percent under subpart D of 12 CFR part 324;

(iii) A publicly traded common equity share that is not HQLA;

(iv) A security, other than a publicly traded common equity share, that matures one year or more from the calculation date and is not HQLA; or

(v) A commodity for which derivative transactions are traded on a U.S. board of trade or trading facility designated as a contract market under sections 5 and 6 of the Commodity Exchange Act (7 U.S.C. 7 and 8) or on a U.S. swap execution facility registered under section 5h of the Commodity Exchange Act (7 U.S.C. 7b–3) or on another exchange, whether located in the United States or in a jurisdiction outside of the United States.

(7) *Unencumbered assets assigned a 100 percent RSF factor*. An asset of an FDIC-supervised institution is assigned a 100 percent RSF factor if it is not described in paragraphs (a)(1) through (a)(6) of this section, including a secured lending transaction or unsecured wholesale lending where the borrower is a financial sector entity or a consolidated subsidiary thereof and that matures one year or more from the calculation date.

(b) *Nonperforming assets*. An RSF factor of 100 percent is assigned to any asset that is past due by more than 90 days or nonaccrual.

(c) *Encumbered assets*. An encumbered asset, unless otherwise provided in § 329.107(b) relating to derivative transactions, is assigned an RSF factor as follows:

(1)(i) *Encumbered assets with less than six months remaining in the encumbrance period*. For an encumbered asset with less than six months remaining in the encumbrance period, the same RSF factor is assigned to the asset as would be assigned if the asset were not encumbered.

(ii) *Encumbered assets with six months or more, but less than one year, remaining in the encumbrance period*. For an encumbered asset with six months or more, but less than one year, remaining in the encumbrance period:

(A) If the asset would be assigned an RSF factor of 50 percent or less under paragraphs (a)(1) through (a)(4) of this section if the asset were not encumbered, an RSF factor of 50 percent is assigned to the asset.

(B) If the asset would be assigned an RSF factor of greater than 50 percent under paragraphs (a)(5) through (a)(7) of this section if the asset were not encumbered, the same RSF factor is assigned to the asset as would be assigned if it were not encumbered.

(iii) *Encumbered assets with one year or more remaining in the encumbrance period*. For an encumbered asset with one year or more remaining in the encumbrance period, an RSF factor of 100 percent is assigned to the asset.

(2) *Assets encumbered for period longer than remaining maturity*. If an asset is encumbered for an encumbrance period longer than the asset's maturity, the asset is assigned an RSF factor under paragraph (c)(1) of this section based on the length of the encumbrance period.

(3) *Segregated account assets*. An asset held in a segregated account maintained pursuant to statutory or regulatory requirements for the protection of customer assets is not considered encumbered for purposes of this paragraph solely because such asset is held in the segregated account.

(d) *Off-balance sheet rehypothecated assets*. When an NSFR liability of an FDIC-supervised institution is secured by an off-balance sheet asset or results from the FDIC-supervised institution selling an off-balance sheet asset (for instance, in the case of a short sale), other than an off-balance sheet asset received by the FDIC-supervised institution as variation margin under a derivative transaction:

(1) If the FDIC-supervised institution received the off-balance sheet asset under a lending transaction, an RSF factor is assigned to the lending transaction as if it were encumbered for the longer of:

(i) The remaining maturity of the NSFR liability; and

(ii) Any other encumbrance period applicable to the lending transaction;

(2) If the FDIC-supervised institution received the off-balance sheet asset under an asset exchange, an RSF factor is assigned to the asset provided by the FDIC-supervised institution in the asset exchange as if the provided asset were encumbered for the longer of:

(i) The remaining maturity of the NSFR liability; and

(ii) Any other encumbrance period applicable to the provided asset; or

(3) If the FDIC-supervised institution did not receive the off-balance sheet asset under a lending transaction or asset exchange, an RSF factor is assigned to the on-balance sheet asset resulting from the rehypothecation of the off-balance sheet asset as if the on-balance sheet asset were encumbered for the longer of:

(i) The remaining maturity of the NSFR liability; and

(ii) Any other encumbrance period applicable to the transaction through which the off-balance sheet asset was received.

§ 329.107 Calculation of NSFR derivatives amounts.

(a) *General requirement.* An FDIC-supervised institution must calculate its derivatives RSF amount and certain components of its ASF amount relating to the FDIC-supervised institution's derivative transactions (which includes cleared derivative transactions of a customer with respect to which the FDIC-supervised institution is acting as agent for the customer that are included on the FDIC-supervised institution's balance sheet under GAAP) in accordance with this section.

(b) *Calculation of required stable funding amount relating to derivative transactions.* An FDIC-supervised institution's derivatives RSF amount equals the sum of:

(1) *Current derivative transaction values.* The FDIC-supervised institution's NSFR derivatives asset amount, as calculated under paragraph (d)(1) of this section, multiplied by an RSF factor of 100 percent;

(2) *Variation margin provided.* The carrying value of variation margin provided by the FDIC-supervised institution under each derivative transaction not subject to a qualifying master netting agreement and each QMNA netting set, to the extent the variation margin reduces the FDIC-supervised institution's derivatives liability value under the derivative transaction or QMNA netting set, as calculated under paragraph (f)(2) of this section, multiplied by an RSF factor of zero percent;

(3) *Excess variation margin provided.* The carrying value of variation margin provided by the FDIC-supervised institution under each derivative transaction not subject to a qualifying master netting agreement and each QMNA netting set in excess of the amount described in paragraph (b)(2) of this section for each derivative transaction or QMNA netting set, multiplied by the RSF factor assigned to each asset comprising the variation margin pursuant to § 329.106;

(4) *Variation margin received.* The carrying value of variation margin received by the FDIC-supervised institution, multiplied by the RSF factor assigned to each asset comprising the variation margin pursuant to § 329.106;

(5) *Potential valuation changes.* (i) An amount equal to 5 percent of the sum of the gross derivative values of the FDIC-supervised institution that are liabilities, as calculated under paragraph (b)(5)(ii) of this section, for each of the FDIC-supervised institution's derivative transactions not subject to a qualifying master netting agreement and each of its QMNA netting sets, multiplied by an RSF factor of 100 percent;

(ii) For purposes of paragraph (5)(i) of this section, the gross derivative value of a derivative transaction not subject to a qualifying master netting agreement or of a QMNA netting set is equal to the value to the FDIC-supervised institution, calculated as if no variation margin had been exchanged and no settlement payments had been made based on changes in the value of the derivative transaction or QMNA netting set.

(6) *Contributions to central counterparty mutualized loss sharing arrangements.* The fair value of an FDIC-supervised institution's contribution to a central counterparty's mutualized loss sharing arrangement (regardless of whether the contribution is included on the FDIC-supervised institution's balance sheet), multiplied by an RSF factor of 85 percent; and

(7) *Initial margin provided.* The fair value of initial margin provided by the FDIC-supervised institution for derivative transactions (regardless of whether the initial margin is included on the FDIC-supervised institution's balance sheet), which does not include initial margin provided by the FDIC-supervised institution for cleared derivative transactions with respect to which the FDIC-supervised institution is acting

as agent for a customer and the FDIC-supervised institution does not guarantee the obligations of the customer's counterparty to the customer under the derivative transaction (such initial margin would be assigned an RSF factor pursuant to § 329.106 to the extent the initial margin is included on the FDIC-supervised institution's balance sheet), multiplied by an RSF factor equal to the higher of 85 percent or the RSF factor assigned to each asset comprising the initial margin pursuant to § 329.106.

(c) *Calculation of available stable funding amount relating to derivative transactions.* The following amounts of an FDIC-supervised institution are assigned a zero percent ASF factor:

(1) The FDIC-supervised institution's NSFR derivatives liability amount, as calculated under paragraph (d)(2) of this section; and

(2) The carrying value of NSFR liabilities in the form of an obligation to return initial margin or variation margin received by the FDIC-supervised institution.

(d) *Calculation of NSFR derivatives asset or liability amount.*

(1) An FDIC-supervised institution's NSFR derivatives asset amount is the greater of:

(i) Zero; and

(ii) The FDIC-supervised institution's total derivatives asset amount, as calculated under paragraph (e)(1) of this section, less the FDIC-supervised institution's total derivatives liability amount, as calculated under paragraph (e)(2) of this section.

(2) An FDIC-supervised institution's NSFR derivatives liability amount is the greater of:

(i) Zero; and

(ii) The FDIC-supervised institution's total derivatives liability amount, as calculated under paragraph (e)(2) of this section, less the FDIC-supervised institution's total derivatives asset amount, as calculated under paragraph (e)(1) of this section.

(e) *Calculation of total derivatives asset and liability amounts.*

(1) An FDIC-supervised institution's total derivatives asset amount is the sum of the FDIC-supervised institution's derivatives asset values, as calculated under paragraph (f)(1) of this section, for each derivative transaction not subject to a qualifying master netting agreement and each QMNA netting set.

(2) An FDIC-supervised institution's total derivatives liability amount is the sum of the FDIC-supervised institution's derivatives liability values, as calculated under paragraph (f)(2) of this section, for each derivative transaction not subject to a qualifying master netting agreement and each QMNA netting set.

(f) *Calculation of derivatives asset and liability values.* For each derivative transaction not subject to a qualifying master netting agreement and each QMNA netting set:

(1) The derivatives asset value is equal to the asset value to the FDIC-supervised institution, after taking into account:

(i) Any variation margin received by the FDIC-supervised institution that is in the form of cash and meets the following conditions:

(A) The variation margin is not segregated;

(B) The variation margin is received in connection with a derivative transaction that is governed by a QMNA or other contract between the counterparties to the derivative transaction, which stipulates that the counterparties agree to settle any payment obligations on a net basis, taking into account any variation margin received or provided;

(C) The variation margin is calculated and transferred on a daily basis based on mark-to-fair value of the derivative contract; and

(D) The variation margin is in a currency specified as an acceptable currency to settle obligations in the relevant governing contract; and

(ii) Any variation margin received by the FDIC-supervised institution that is in the form of level 1 liquid assets and meets the conditions of paragraph (f)(1)(i) of this section provided the FDIC-supervised institution retains the right to rehypothecate the asset for the duration of time that the asset is posted as variation margin to the FDIC-supervised institution; or

(2) The derivatives liability value is equal to the liability value of the

FDIC-supervised institution, after taking into account any variation margin provided by the FDIC-supervised institution.

§ 329.108 Funding related to Covered Federal Reserve Facility Funding.

(a) *Treatment of Covered Federal Reserve Facility Funding*. Notwithstanding any other section of this part and except as provided in paragraph (b) of this section, available stable funding amounts and required stable funding amounts related to Covered Federal Reserve Facility Funding and the assets securing Covered Federal Reserve Facility Funding are excluded from the calculation of an FDIC-supervised institution's net stable funding ratio calculated under § 329.100(b).

(b) *Exception*. To the extent the Covered Federal Reserve Facility Funding is secured by securities, debt obligations, or other instruments issued by the FDIC-supervised institution or one of its consolidated subsidiaries, the Covered Federal Reserve Facility Funding and assets securing the Covered Federal Reserve Facility Funding are not subject to paragraph (a) of this section and the available stable funding amount and required stable funding amount must be included in the FDIC-supervised institution's net stable funding ratio calculated under § 329.100(b).

§ 329.109 Rules for consolidation.

(a) *Consolidated subsidiary available stable funding amount*. For available stable funding of a legal entity that is a consolidated subsidiary of an FDIC-supervised institution, including a consolidated subsidiary organized under the laws of a foreign jurisdiction, the FDIC-supervised institution may include the available stable funding of the consolidated subsidiary in its ASF amount up to:

(1) The RSF amount of the consolidated subsidiary, as calculated by the FDIC-supervised institution for the FDIC-supervised institution's net stable funding ratio under this part; plus

(2) Any amount in excess of the RSF amount of the consolidated subsidiary, as calculated by the FDIC-supervised institution for the FDIC-supervised institution's net stable funding ratio under this part, to the extent the consolidated subsidiary may transfer assets to the top-tier FDIC-supervised institution, taking into account statutory, regulatory, contractual, or supervisory restrictions, such as sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 12 U.S.C. 371c–1) and Regulation W (12 CFR part 223).

(b) *Required consolidation procedures*. To the extent an FDIC-supervised institution includes an ASF amount in excess of the RSF amount of the consolidated subsidiary, the FDIC-supervised institution must implement and maintain written procedures to identify and monitor applicable statutory, regulatory, contractual, supervisory, or other restrictions on transferring assets from any of its consolidated subsidiaries. These procedures must document which types of transactions the FDIC-supervised institution could use to transfer assets from a consolidated subsidiary to the FDIC-supervised institution and how these types of transactions comply with applicable statutory, regulatory, contractual, supervisory, or other restrictions.

Subpart L—Net Stable Funding Shortfall

SOURCE: 86 FR 9220, Feb. 11, 2021, unless otherwise noted.

§ 329.110 NSFR shortfall: supervisory framework.

(a) *Notification requirements*. An FDIC-supervised institution must notify the FDIC no later than 10 business days, or such other period as the FDIC may otherwise require by written notice, following the date that any event has occurred that would cause or has caused the FDIC-supervised institution's net stable funding ratio to be less than 1.0 as required under § 329.100.

(b) *Liquidity Plan*. (1) An FDIC-supervised institution must within 10 business days, or such other period as the FDIC may otherwise require by written notice, provide to the FDIC a plan for achieving a net stable funding ratio equal to or greater than 1.0 as required under § 329.100 if:

(i) The FDIC-supervised institution has or should have provided notice, pursuant to §329.110(a), that the FDIC-

supervised institution's net stable funding ratio is, or will become, less than 1.0 as required under § 329.100;

(ii) The FDIC-supervised institution's reports or disclosures to the FDIC indicate that the FDIC-supervised institution's net stable funding ratio is less than 1.0 as required under § 329.100; or

(iii) The FDIC notifies the FDIC-supervised institution in writing that a plan is required and provides a reason for requiring such a plan.

(2) The plan must include, as applicable:

(i) An assessment of the FDIC-supervised institution's liquidity profile;

(ii) The actions the FDIC-supervised institution has taken and will take to achieve a net stable funding ratio equal to or greater than 1.0 as required under § 329.100, including:

(A) A plan for adjusting the FDIC-supervised institution's liquidity profile;

(B) A plan for remediating any operational or management issues that contributed to noncompliance with subpart K of this part; and

(iii) An estimated time frame for achieving full compliance with § 329.100.

(3) The FDIC-supervised institution must report to the FDIC at least monthly, or such other frequency as required by the FDIC, on progress to achieve full compliance with § 329.100.

(c) *Supervisory and enforcement actions*. The FDIC may, at its discretion, take additional supervisory or enforcement actions to address noncompliance with the minimum net stable funding ratio and other requirements of subparts K through N of this part (see also § 329.2(c)).

Subpart M—Transitions

SOURCE: 86 FR 9221, Feb. 11, 2021, unless otherwise noted.

§ 329.120 Transitions.

(a) *Initial application*. (1) An FDIC-supervised institution that initially becomes subject to the minimum net stable funding requirement under § 329.1(b)(1)(i) after July 1, 2021, must comply with the requirements of subparts K through M of this part beginning on the first day of the third calendar quarter after which the FDIC-supervised institution becomes subject to this part.

(2) An FDIC-supervised institution that becomes subject to the minimum net stable funding requirement under § 329.1(b)(1)(ii) must comply with the requirements of subparts K through M of this part subject to a transition period specified by the FDIC.

(b) *Transition to a different required stable funding adjustment percentage*.

(1) An FDIC-supervised institution whose required stable funding adjustment percentage changes is subject to the transition periods as set forth in § 329.105(c).

(2) An FDIC-supervised institution that is no longer subject to the minimum stable funding requirement of this part pursuant to § 329.1(b)(1)(i) based on the size of total consolidated assets, cross-jurisdictional activity, total nonbank assets, weighted short-term wholesale funding, or off-balance sheet exposure calculated in accordance with the Call Report, or instructions to the FR Y–9LP, the FR Y–15, or equivalent reporting form, as applicable, for each of the four most recent calendar quarters may cease compliance with the requirements of subparts K through M of this part as of the first day of the first calendar quarter after it is no longer subject to § 329.1(b).

(c) *Reservation of authority*. The FDIC may extend or accelerate any compliance date of this part if the FDIC determines such extension or acceleration is appropriate. In determining whether an extension or acceleration is appropriate, the FDIC will consider the effect of the modification on financial stability, the period of time for which the modification would be necessary to facilitate compliance with the requirements of subparts K through M of this part, and the actions the FDIC-supervised institution is taking to come into compliance with the requirements of subparts K through M of this part.

PART 330—DEPOSIT INSURANCE COVERAGE

Sec.
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AUTHORITY: 12 U.S.C. 1813(*l*), 1813(m), 1817(i), 1818(q), 1819(a)(Tenth), 1820(f), 1820(g), 1821(a), 1821(d), 1822(c).

SOURCE: 63 FR 25756, May 11, 1998, unless otherwise noted.

§ 330.1 Definitions.

For the purposes of this part:

(a) *Act* means the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

(b) *Corporation* means the Federal Deposit Insurance Corporation.

(c) *Default* has the same meaning as provided under section 3(x) of the Act (12 U.S.C. 1813(x)).

(d) *Deposit* has the same meaning as provided under section 3(l) of the Act (12 U.S.C. 1813(l)).

(e) *Deposit account records* means account ledgers, signature cards, certificates of deposit, passbooks, corporate resolutions authorizing accounts in the possession of the insured depository institution and other books and records of the insured depository institution, including records maintained by computer, which relate to the insured depository institution's deposit taking function, but does not mean account statements, deposit slips, items deposited or cancelled checks.

(f) *FDIC* means the Federal Deposit Insurance Corporation.

(g) *Independent activity*. A corporation, partnership or unincorporated association shall be deemed to be engaged in an ''independent activity'' if the entity is operated primarily for some purpose other than to increase deposit insurance.

(h) *Insured branch* means a branch of a foreign bank any deposits in which are insured in accordance with the provisions of the Act.

(i) *Insured deposit* has the same meaning as that provided under section 3(m)(1) of the Act (12 U.S.C. 1813(m)(1)) and this part.

(j) *Insured depository institution* is any depository institution whose deposits are insured pursuant to the Act, including a foreign bank having an insured branch.

(k) *Interest*, with respect to a deposit, means any payment to or for the account of any depositor as compensation for the use of funds constituting a deposit. A bank's absorption of expenses incident to providing a normal banking function or its forbearance from charging a fee in connection with such a service is not considered a payment of interest.

(l) *Natural person* means a human being.

(m) *Non-contingent trust interest* means a trust interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031–7 of the Federal Estate Tax Regulations (26 CFR 20.2031–7) or any similar present worth or life expectancy tables which may be adopted by the Internal Revenue Service.

(n) *Sole proprietorship* means a form of business in which one person owns all the assets of the business, in contrast to a partnership or corporation.

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

(p) *Trust estate* means the determinable and beneficial interest of a beneficiary or principal in trust funds but does not include the beneficial interest of an heir or devisee in a decedent's estate.

(q) *Trust funds* means funds held by an insured depository institution as trustee pursuant to any irrevocable trust established pursuant to any statute or written trust agreement.

(r) *Trust interest* means the interest of a beneficiary in an irrevocable express trust (other than an employee benefit plan) created either by written trust instrument or by statute, but does not include any interest retained by the settlor.

(s) [Reserved]

[63 FR 25756, May 11, 1998, as amended at 71 FR 14631, Mar. 23, 2006; 73 FR 61660, Oct. 17, 2008; 74 FR 47716, Sept. 17, 2009; 75 FR 49365, Aug. 13, 2010; 75 FR 69583, Nov. 15, 2010; 76 FR 4816, Jan. 27, 2011; 76 FR 41395, July 14, 2011; 78 FR 56588, Sept. 13, 2013; 80 FR 65921, Oct. 28, 2015]

§ 330.2 Purpose.

The purpose of this part is to clarify the rules and define the terms necessary to afford deposit insurance coverage under the Act and provide rules for the recognition of deposit ownership in various circumstances.

§ 330.3 General principles.

(a) *Ownership rights and capacities.* The insurance coverage provided by the Act and this part is based upon the ownership rights and capacities in which deposit accounts are maintained at insured depository institutions. All deposits in an insured depository institution which are maintained in the same right and capacity (by or for the benefit of a particular depositor or depositors) shall be added together and insured in accordance with this part. Deposits maintained in different rights and capacities, as recognized under this part, shall be insured separately from each other. (Example: Single ownership accounts and joint ownership accounts are insured separately from each other.)

(b) *Deposits maintained in separate insured depository institutions or in separate branches of the same insured depository institution.* Any deposit accounts maintained by a depositor at one insured depository institution are insured separately from, and without regard to, any deposit accounts that the same depositor maintains at any other separately chartered and insured depository institution, even if two or more separately chartered and insured depository institutions are affiliated through common ownership. (Example: Deposits held by the same individual at two different banks owned by the same bank holding company would be insured separately, per bank.)

The deposit accounts of a depositor maintained in the same right and capacity at different branches or offices of the same insured depository institution are not separately insured; rather they shall be added together and insured in accordance with this part.

(c) *Deposits maintained by foreigners and deposits denominated in foreign currency.* The availability of deposit insurance is not limited to citizens and residents of the United States. Any person or entity that maintains deposits in an insured depository institution is entitled to the deposit insurance provided by the Act and this part. In addition, deposits denominated in a foreign currency shall be insured in accordance with this part. Deposit insurance for such deposits shall be determined and paid in the amount of United States dollars that is equivalent in value to the amount of the deposit denominated in the foreign currency as of close of business on the date of default of the insured depository institution. The exchange rates to be used for such conversions are the 12 PM rates (the ''noon buying rates for cable transfers'') quoted for major currencies by the Federal Reserve Bank of New York on the date of default of the insured depository institution, unless the deposit agreement specifies that some other widely recognized exchange rates are to be used for all purposes under that agreement, in which case, the rates so specified shall be used for such conversions.

(d) *Deposits in insured branches of foreign banks.* Deposits in an insured branch of a foreign bank which are payable by contract in the United States shall be insured in accordance with this part, except that any deposits to the credit of the foreign bank, or any office, branch, agency or any wholly owned subsidiary of the foreign bank, shall not be insured. All deposits held by a depositor in the same right and capacity in more than one insured branch of the same foreign bank shall be added together for the purpose of determining the amount of deposit insurance.

(e) *Deposits payable outside of the United States and certain other locations.* (1) Any obligation of an insured depository institution which is payable solely at an office of that institution located outside any State, as the term ''State'' is defined in section 3(a)(3) of the Act (12 U.S.C. 1813(a)(3)), is not a deposit for the purposes of this part.

(2) Except as provided in paragraph (e)(3) of this section, any obligation of an insured depository institution which is carried on the books and records of an office of that institution located outside any State, as referred to in paragraph (e)(1) of this section, shall not be an insured deposit for purposes of this part, or any other provision of this part, notwithstanding that the obligation may also be payable at an office of that institution located within any State.

(3) *Rule of construction.* For purposes of this paragraph (e), Overseas Military Banking Facilities operated under Department of Defense regulations, 32 CFR Parts 230 and 231, are not considered to be offices located outside any State, as referred to in paragraph (e)(1) of this section.

(f) *International banking facility deposits.* An ''international banking facility time deposit,'' as defined by the Board of Governors of the Federal Reserve System in Regulation D (12 CFR 204.8(a)(2)), or in any successor regulation, is not a deposit for the purposes of this part.

(g) *Bank investment contracts.* As required by section 11(a)(8) of the Act (12 U.S.C. 1821(a)(8)), any liability arising under any investment contract between any insured depository institution and any employee benefit plan which expressly permits ''benefit responsive withdrawals or transfers'' (as defined in section 11(a)(8) of the Act) are not insured deposits for purposes of this part. The term ''substantial penalty or adjustment'' used in section 11(a)(8) of the Act means, in the case of a deposit having an original term which exceeds one year, all interest earned on the amount withdrawn from the date of deposit or for six months, whichever is less; or, in the case of a deposit having an original term of one year or less, all interest earned on the amount withdrawn from the date of deposit or three months, whichever is less.

(h) *Application of state or local law to deposit insurance determinations.* In general, deposit insurance is for the benefit of the owner or owners of funds on deposit. However, while ownership under state law of deposited funds is a necessary condition for deposit insurance, ownership under state law is not sufficient for, or decisive in, determining deposit insurance coverage. Deposit insurance coverage is also a function of the deposit account records of the insured depository institution and of the provisions of this part, which, in the interest of uniform national rules for deposit insurance coverage, are controlling for purposes of determining deposit insurance coverage.

(i) *Determination of the amount of a deposit*—(1) *General rule.* The amount of a deposit is the balance of principal and interest unconditionally credited to the deposit account as of the date of default of the insured depository institution, plus the ascertainable amount of interest to that date, accrued at the contract rate (or the anticipated or announced interest or dividend rate), which the insured depository institution in default would have paid if the deposit had matured on that date and the insured depository institution had not failed. In the absence of any such announced or anticipated interest or dividend rate, the rate for this purpose shall be whatever rate was paid in the immediately preceding payment period.

(2) *Discounted certificates of deposit.* The amount of a certificate of deposit sold by an insured depository institution at a discount from its face value is its original purchase price plus the amount of accrued earnings calculated by compounding interest annually at the rate necessary to increase the original purchase price to the maturity value over the life of the certificate.

(3) *Waiver of minimum requirements.* In the case of a deposit with a fixed payment date, fixed or minimum term, or a qualifying or notice period that has not expired as of such date, interest thereon to the date of closing shall be computed according to the terms of the deposit contract as if interest had been credited and as if the deposit could

have been withdrawn on such date without any penalty or reduction in the rate of earnings.

(j) *Continuation of insurance coverage following the death of a deposit owner.* The death of a deposit owner shall not affect the insurance coverage of the deposit for a period of six months following the owner's death unless the deposit account is restructured. The operation of this grace period, however, shall not result in a reduction of coverage. If an account is not restructured within six months after the owner's death, the insurance shall be provided on the basis of actual ownership in accordance with the provisions of § 330.5(a)(1).

[63 FR 25756, May 11, 1998, as amended at 64 FR 15656, Apr. 1, 1999; 78 FR 56589, Sept. 13, 2013]

§ 330.4 Continuation of separate deposit insurance after merger of insured depository institutions.

Whenever the liabilities of one or more insured depository institutions for deposits are assumed by another insured depository institution, whether by merger, consolidation, other statutory assumption or contract:

(a) The insured status of the institutions whose liabilities have been assumed terminates on the date of receipt by the FDIC of satisfactory evidence of the assumption; and

(b) The separate insurance of deposits assumed continues for six months from the date the assumption takes effect or, in the case of a time deposit, the earliest maturity date after the six-month period. In the case of time deposits which mature within six months of the date the deposits are assumed and which are renewed at the same dollar amount (either with or without accrued interest having been added to the principal amount) and for the same term as the original deposit, the separate insurance applies to the renewed deposits until the first maturity date after the six-month period. Time deposits that mature within six months of the deposit assumption and that are renewed on any other basis, or that are not renewed and thereby become demand deposits, are separately insured only until the end of the six-month period.

§ 330.5 Recognition of deposit ownership and fiduciary relationships.

(a) *Recognition of deposit ownership*—(1) *Evidence of deposit ownership.* Except as indicated in this paragraph (a)(1) or as provided in § 330.3(j), in determining the amount of insurance available to each depositor, the FDIC shall presume that deposited funds are actually owned in the manner indicated on the deposit account records of the insured depository institution. If the FDIC, in its sole discretion, determines that the deposit account records of the insured depository institution are clear and unambiguous, those records shall be considered binding on the depositor, and the FDIC shall consider no other records on the manner in which the funds are owned. If the deposit account records are ambiguous or unclear on the manner in which the funds are owned, then the FDIC may, in its sole discretion, consider evidence other than the deposit account records of the insured depository institution for the purpose of establishing the manner in which the funds are owned. Despite the general requirements of this paragraph (a)(1), if the FDIC has reason to believe that the insured depository institution's deposit account records misrepresent the actual ownership of deposited funds and such misrepresentation would increase deposit insurance coverage, the FDIC may consider all available evidence and pay claims for insured deposits on the basis of the actual rather than the misrepresented ownership.

(2) *Recognition of deposit ownership in custodial accounts.* In the case of custodial deposits, the interest of each beneficial owner may be determined on a fractional or percentage basis. This may be accomplished in any manner which indicates that where the funds of an owner are commingled with other funds held in a custodial capacity and a portion thereof is placed on deposit in one or more insured depository institutions without allocation, the owner's insured interest in the deposit in any one insured depository institution would represent, at any given time, the same fractional share as his or her share of the total commingled funds.

(b) *Fiduciary relationships*—(1) *Recognition.* The FDIC will recognize a

claim for insurance coverage based on a fiduciary relationship only if the relationship is expressly disclosed, by way of specific references, in the ''deposit account records'' (as defined in § 330.1(e)) of the insured depository institution. Such relationships include, but are not limited to, relationships involving a trustee, agent, nominee, guardian, executor or custodian pursuant to which funds are deposited. The express indication that the account is held in a fiduciary capacity will not be necessary, however, in instances where the FDIC determines, in its sole discretion, that the titling of the deposit account and the underlying deposit account records sufficiently indicate the existence of a fiduciary relationship. This exception may apply, for example, where the deposit account title or records indicate that the account is held by an escrow agent, title company or a company whose business is to hold deposits and securities for others.

(2) *Details of fiduciary relationships.* If the deposit account records of an insured depository institution disclose the existence of a relationship which might provide a basis for additional insurance (including the exception provided for in paragraph (b)(1) of this section), the details of the relationship and the interests of other parties in the account must be ascertainable either from the deposit account records of the insured depository institution or from records maintained, in good faith and in the regular course of business, by the depositor or by some person or entity that has undertaken to maintain such records for the depositor.

(3) *Multi-tiered fiduciary relationships.* In deposit accounts where there are multiple levels of fiduciary relationships, there are two methods of satisfying paragraphs (b)(1) and (b)(2) of this section to obtain insurance coverage for the interests of the true beneficial owners of a deposit account.

(i) One method is to:

(A) Expressly indicate, on the deposit account records of the insured depository institution, the existence of each and every level of fiduciary relationships; and

(B) Disclose, at each level, the name(s) and interest(s) of the person(s) on whose behalf the party at that level is acting.

(ii) An alternative method is to:

(A) Expressly indicate, on the deposit account records of the insured depository institution, that there are multiple levels of fiduciary relationships;

(B) Disclose the existence of additional levels of fiduciary relationships in records, maintained in good faith and in the regular course of business, by parties at subsequent levels; and

(C) Disclose, at each of the levels, the name(s) and interest(s) of the person(s) on whose behalf the party at that level is acting. No person or entity in the chain of parties will be permitted to claim that they are acting in a fiduciary capacity for others unless the possible existence of such a relationship is revealed at some previous level in the chain.

(4) *Exceptions*—(i) *Deposits evidenced by negotiable instruments.* If any deposit obligation of an insured depository institution is evidenced by a negotiable certificate of deposit, negotiable draft, negotiable cashier's or officer's check, negotiable certified check, negotiable traveler's check, letter of credit or other negotiable instrument, the FDIC will recognize the owner of such deposit obligation for all purposes of claim for insured deposits to the same extent as if his or her name and interest were disclosed on the records of the insured depository institution; provided, that the instrument was in fact negotiated to such owner prior to the date of default of the insured depository institution. The owner must provide affirmative proof of such negotiation, in a form satisfactory to the FDIC, to substantiate his or her claim. Receipt of a negotiable instrument directly from the insured depository institution in default shall, in no event, be considered a negotiation of said instrument for purposes of this provision.

(ii) *Deposit obligations for payment of items forwarded for collection by depository institution acting as agent.* Where an insured depository institution in default has become obligated for the payment of items forwarded for collection by a depository institution acting solely as agent, the FDIC will recognize the holders of such items for all purposes of claim for insured deposits to

the same extent as if their name(s) and interest(s) were disclosed as depositors on the deposit account records of the insured depository institution, when such claim for insured deposits, if otherwise payable, has been established by the execution and delivery of prescribed forms. The FDIC will recognize such depository institution forwarding such items for the holders thereof as agent for such holders for the purpose of making an assignment to the FDIC of their rights against the insured depository institution in default and for the purpose of receiving payment on their behalf.

[63 FR 25756, May 11, 1998, as amended at 64 FR 15656, Apr. 1, 1999]

§ 330.6 Single ownership accounts.

(a) *Individual accounts.* Funds owned by a natural person and deposited in one or more deposit accounts in his or her own name shall be added together and insured up to the SMDIA in the aggregate. Exception: Despite the general requirement in this paragraph (a), if more than one natural person has the right to withdraw funds from an individual account (excluding persons who have the right to withdraw by virtue of a Power of Attorney), the account shall be treated as a joint ownership account (although not necessarily a qualifying joint account) and shall be insured in accordance with the provisions of § 330.9, unless the deposit account records clearly indicate, to the satisfaction of the FDIC, that the funds are owned by one individual and that other signatories on the account are merely authorized to withdraw funds on behalf of the owner.

(b) *Sole proprietorship accounts.* Funds owned by a business which is a ''sole proprietorship'' (as defined in § 330.1(n)) and deposited in one or more deposit accounts in the name of the business shall be treated as the individual account(s) of the person who is the sole proprietor, added to any other individual accounts of that person, and insured up to the SMDIA in the aggregate.

(c) *Single-name accounts containing community property funds.* Community property funds deposited into one or more deposit accounts in the name of one member of a husband-wife community shall be treated as the individual account(s) of the named member, added to any other individual accounts of that person, and insured up to the SMDIA in the aggregate.

(d) *Accounts of a decedent and accounts held by executors or administrators of a decedent's estate.* Funds held in the name of a decedent or in the name of the executor, administrator, or other personal representative of his or her estate and deposited into one or more deposit accounts shall be added together and insured up to the SMDIA in the aggregate; provided, however, that nothing in this paragraph (d) shall affect the operation of § 330.3(j). The deposit insurance provided by this paragraph (d) shall be separate from any insurance coverage provided for the individual deposit accounts of the executor, administrator, other personal representative or the beneficiaries of the estate.

[63 FR 25756, May 11, 1998, as amended at 71 FR 14631, Mar. 23, 2006; 76 FR 41395, July 14, 2011]

§ 330.7 Accounts held by an agent, nominee, guardian, custodian or conservator.

(a) *Agency or nominee accounts.* Funds owned by a principal or principals and deposited into one or more deposit accounts in the name of an agent, custodian or nominee, shall be insured to the same extent as if deposited in the name of the principal(s). When such funds are deposited by an insured depository institution acting as a trustee of an irrevocable trust, the insurance coverage shall be governed by the provisions of § 330.13.

(b) *Guardian, custodian or conservator accounts.* Funds held by a guardian, custodian, or conservator for the benefit of his or her ward, or for the benefit of a minor under the Uniform Gifts to Minors Act, and deposited into one or more accounts in the name of the guardian, custodian or conservator shall, for purposes of this part, be deemed to be agency or nominee accounts and shall be insured in accordance with paragraph (a) of this section.

(c) *Accounts held by fiduciaries on behalf of two or more persons.* Funds held by an agent, nominee, guardian, custodian, conservator or loan servicer, on

behalf of two or more persons jointly, shall be treated as a joint ownership account and shall be insured in accordance with the provisions of § 330.9.

(d) *Mortgage servicing accounts*. Accounts maintained by a mortgage servicer, in a custodial or other fiduciary capacity, which are comprised of payments by mortgagors of principal and interest, shall be insured for the cumulative balance paid into the account by the mortgagors, up to the limit of the SMDIA per mortgagor. Accounts maintained by a mortgage servicer, in a custodial or other fiduciary capacity, which are comprised of payments by mortgagors of taxes and insurance premiums shall be added together and insured in accordance with paragraph (a) of this section for the ownership interest of each mortgagor in such accounts. This provision is effective as of October 10, 2008, for all existing and future mortgage servicing accounts.

(e) *Custodian accounts for American Indians*. Paragraph (a) of this section shall not apply to any interest an individual American Indian may have in funds deposited by the Bureau of Indian Affairs of the United States Department of the Interior (the ''BIA'') on behalf of that person pursuant to 25 U.S.C. 162(a), or by any other disbursing agent of the United States on behalf of that person pursuant to similar authority, in an insured depository institution. The interest of each American Indian in all such accounts maintained at the same insured depository institution shall be added together and insured, up to the SMDIA, separately from any other accounts maintained by that person in the same insured depository institution.

[63 FR 25756, May 11, 1998, as amended at 71 FR 14631, Mar. 23, 2006; 73 FR 61660, Oct. 17, 2008; 74 FR 47716, Sept. 17, 2009]

§ 330.8 Annuity contract accounts.

(a) Funds held by an insurance company or other corporation in a deposit account for the sole purpose of funding life insurance or annuity contracts and any benefits incidental to such contracts, shall be insured separately in the amount of up to the SMDIA per annuitant, provided that, pursuant to a state statute:

(1) The corporation establishes a separate account for such funds;

(2) The account cannot be charged with the liabilities arising out of any other business of the corporation; and

(3) The account cannot be invaded by other creditors of the corporation in the event that the corporation becomes insolvent and its assets are liquidated.

(b) Such insurance coverage shall be separate from the insurance provided for any other accounts maintained by the corporation or the annuitants at the same insured depository institution.

[63 FR 25756, May 11, 1998, as amended at 71 FR 14631, Mar. 23, 2006]

§ 330.9 Joint ownership accounts.

(a) *Separate insurance coverage*. Qualifying joint accounts, whether owned as joint tenants with the right of survivorship, as tenants in common or as tenants by the entirety, shall be insured separately from any individually owned (single ownership) deposit accounts maintained by the co-owners. (Example: If A has a single ownership account and also is a joint owner of a qualifying joint account, A's interest in the joint account would be insured separately from his or her interest in the individual account.) Qualifying joint accounts in the names of both husband and wife which are comprised of community property funds shall be added together and insured up to twice the SMDIA, separately from any funds deposited into accounts bearing their individual names.

(b) *Determination of insurance coverage*. The interests of each co-owner in all qualifying joint accounts shall be added together and the total shall be insured up to the SMDIA. (Example: ''A&B'' have a qualifying joint account with a balance of $150,000; ''A&C'' have a qualifying joint account with a balance of $200,000; and ''A&B&C'' have a qualifying joint account with a balance of $375,000. A's combined ownership interest in all qualifying joint accounts would be $300,000 ($75,000 plus $100,000 plus $125,000); therefore, A's interest would be insured in the amount of $250,000 and uninsured in the amount of $50,000. B's combined ownership interest in all qualifying joint accounts would be $200,000 ($75,000 plus $125,000);

therefore, B's interest would be fully insured. C's combined ownership interest in all qualifying joint accounts would be $225,000 ($100,000 plus $125,000); therefore, C's interest would be fully insured.

(c) *Qualifying joint accounts*—(1) *Qualification requirements.* A joint deposit account shall be deemed to be a qualifying joint account, for purposes of this section, only if:

(i) All co-owners of the funds in the account are ''natural persons'' (as defined in § 330.1(l));

(ii) Each co-owner has personally signed, which may include signing electronically, a deposit account signature card, or the alternative method provided in paragraph (c)(4) of this section is satisfied; and

(iii) Each co-owner possesses withdrawal rights on the same basis.

(2) *Limited exceptions.* The signature-card requirement of paragraph (c)(1)(ii) of this section shall not apply to certificates of deposit, to any deposit obligation evidenced by a negotiable instrument, or to any account maintained by an agent, nominee, guardian, custodian or conservator on behalf of two or more persons.

(3) *Evidence of deposit ownership.* All deposit accounts that satisfy the criteria in paragraph (c)(1) of this section, and those accounts that come within the exception provided for in paragraph (c)(2) of this section, shall be deemed to be jointly owned provided that, in accordance with the provisions of § 330.5(a), the FDIC determines that the deposit account records of the insured depository institution are clear and unambiguous as to the ownership of the accounts. If the deposit account records are ambiguous or unclear as to the manner in which the deposit accounts are owned, then the FDIC may, in its sole discretion, consider evidence other than the deposit account records of the insured depository institution for the purpose of establishing the manner in which the funds are owned. The signatures of two or more persons on the deposit account signature card or the names of two or more persons on a certificate of deposit or other deposit instrument shall be conclusive evidence that the account is a joint account (although not necessarily a qualifying joint account) unless the deposit records as a whole are ambiguous and some other evidence indicates, to the satisfaction of the FDIC, that there is a contrary ownership capacity.

(4) *Alternative method to satisfy signature-card requirement.* The signature-card requirement of paragraph (c)(1)(ii) of this section also may be satisfied by information contained in the deposit account records of the insured depository institution establishing co-ownership of the deposit account, such as evidence that the institution has issued a mechanism for accessing the account to each co-owner or evidence of usage of the deposit account by each co-owner.

(d) *Nonqualifying joint accounts.* A deposit account held in two or more names which is not a qualifying joint account, for purposes of this section, shall be treated as being owned by each named owner, as an individual, corporation, partnership, or unincorporated association, as the case may be, and the actual ownership interest of each individual or entity in such account shall be added to any other single ownership accounts of such individual or other accounts of such entity, and shall be insured in accordance with the provisions of this part governing the insurance of such accounts.

(e) *Determination of interests.* The interests of the co-owners of qualifying joint accounts, held as tenants in common, shall be deemed equal, unless otherwise stated in the depository institution's deposit account records. This section applies regardless of whether the conjunction ''and'' or ''or'' is used in the title of a joint deposit account, even when both terms are used, such as in the case of a joint deposit account with three or more co-owners.

[63 FR 25756, May 11, 1998, as amended at 64 FR 15656, Apr. 1, 1999; 64 FR 62102, Nov. 16, 1999; 71 FR 14631, Mar. 23, 2006; 74 FR 47716, Sept. 17, 2009; 76 FR 41395, July 14, 2011; 84 FR 35027, July 22, 2019]

§ 330.10 Revocable trust accounts.

(a) *General rule.* Except as provided in paragraph (e) of this section, the funds owned by an individual and deposited into one or more accounts with respect to which the owner evidences an intention that upon his or her death the

funds shall belong to one or more beneficiaries shall be separately insured (from other types of accounts the owner has at the same insured depository institution) in an amount equal to the total number of different beneficiaries named in the account(s) multiplied by the SMDIA. This section applies to all accounts held in connection with informal and formal testamentary revocable trusts. Such informal trusts are commonly referred to as payable-on-death accounts, in-trust-for accounts or Totten Trust accounts, and such formal trusts are commonly referred to as living trusts or family trusts. (*Example 1:* Account Owner ''A'' has a living trust account with four different beneficiaries named in the trust. A has no other revocable trust accounts at the same FDIC-insured institution. The maximum insurance coverage would be $1,000,000, determined by multiplying 4 times $250,000 (the number of beneficiaries times the SMDIA). (*Example 2:* Account Owner ''A'' has a payable-on-death account naming his niece and cousin as beneficiaries, and A also has, at the same FDIC-insured institution, another payable-on-death account naming the same niece and a friend as beneficiaries. The maximum coverage available to the account owner would be $750,000. This is because the account owner has named only three *different* beneficiaries in the revocable trust accounts—his niece and cousin in the first, and the same niece and a friend in the second. The naming of the same beneficiary in more than one revocable trust account, whether it be a payable-on-death account or living trust account, does not increase the total coverage amount.) (*Example 3:* Account Owner ''A'' establishes a living trust account, with a balance of $300,000, naming his two children ''B'' and ''C'' as beneficiaries. A also establishes, at the same FDIC-insured institution, a payable-on-death account, with a balance of $300,000, also naming his children B and C as beneficiaries. The maximum coverage available to A is $500,000, determined by multiplying 2 times $250,000 (the number of different beneficiaries times the SMDIA). A is uninsured in the amount of $100,000. This is because all funds that a depositor holds in both living trust accounts and payable-on-death accounts, at the same FDIC-insured institution and naming the same beneficiaries, are aggregated for insurance purposes and insured to the applicable coverage limits.)

(b) *Required intention and naming of beneficiaries.* (1) The required intention in paragraph (a) of this section that upon the owner's death the funds shall belong to one or more beneficiaries must be manifested in the ''title'' of the account using commonly accepted terms such as, but not limited to, ''in trust for,'' ''as trustee for,'' ''payable-on-death to,'' or any acronym therefor. For purposes of this requirement, ''title'' includes the electronic deposit account records of the institution. (For example, the FDIC would recognize an account as a revocable trust account even if the title of the account signature card does not designate the account as a revocable trust account as long as the institution's electronic deposit account records identify (through a code or otherwise) the account as a revocable trust account.) The settlor of a revocable trust shall be presumed to own the funds deposited into the account.

(2) For informal revocable trust accounts, the beneficiaries must be specifically named in the deposit account records of the insured depository institution.

(c) *Definition of beneficiary.* For purposes of this section, a beneficiary includes a natural person as well as a charitable organization and other nonprofit entity recognized as such under the Internal Revenue Code of 1986, as amended.

(d) *Interests of beneficiaries outside the definition of beneficiary in this section.* If a beneficiary named in a trust covered by this section does not meet the definition of beneficiary in paragraph (c) of this section, the funds corresponding to that beneficiary shall be treated as the individually owned (single ownership) funds of the owner(s). As such, they shall be aggregated with any other single ownership accounts of such owner(s) and insured up to the SMDIA per owner. (*Example:* Account Owner ''A'' establishes a payable-on-death account naming a pet as beneficiary with

a balance of $100,000. A also has an individual account at the same FDIC-insured institution with a balance of $175,000. Because the pet is not a ''beneficiary,'' the two accounts are aggregated and treated as a single ownership account. As a result, A is insured in the amount of $250,000, but is uninsured for the remaining $25,000.)

(e) *Revocable trust accounts with aggregate balances exceeding five times the SMDIA and naming more than five different beneficiaries.* Notwithstanding the general coverage provisions in paragraph (a) of this section, for funds owned by an individual in one or more revocable trust accounts naming more than five different beneficiaries and whose aggregate balance is more than five times the SMDIA, the maximum revocable trust account coverage for the account owner shall be the greater of either: five times the SMDIA or the aggregate amount of the interests of each different beneficiary named in the trusts, to a limit of the SMDIA per different beneficiary. (*Example 1:* Account Owner ''A'' has a living trust with a balance of $1 million and names two friends, ''B'' and ''C'' as beneficiaries. At the same FDIC-insured institution, A establishes a payable-on-death account, with a balance of $1 million naming his two cousins, ''D'' and ''E'' as beneficiaries. Coverage is determined under the general coverage provisions in paragraph (a) of this section, and not this paragraph (e). This is because all funds that A holds in both living trust accounts and payable-on-death accounts, at the same FDIC-insured institution, are aggregated for insurance purposes. Although A's aggregated balance of $2 million is more than five times the SMDIA, A names only four different beneficiaries, and coverage under this paragraph (e) applies only if there are more than five different beneficiaries. A is insured in the amount of $1 million (4 beneficiaries times the SMDIA), and uninsured for the remaining $1 million.) (*Example 2:* Account Owner ''A'' has a living trust account with a balance of $1,500,000. Under the terms of the trust, upon A's death, A's three children are each entitled to $125,000, A's friend is entitled to $15,000, and a designated charity is entitled to $175,000. The trust also provides that the remainder of the trust assets shall belong to A's spouse. In this case, because the balance of the account exceeds $1,250,000 (5 times the SMDIA) and there are more than five different beneficiaries named in the trust, the maximum coverage available to A would be the greater of: $1,250,000 or the aggregate of each different beneficiary's interest to a limit of $250,000 per beneficiary. The beneficial interests in the trust for purposes of determining coverage are: $125,000 for each of the children (totaling $375,000), $15,000 for the friend, $175,000 for the charity, and $250,000 for the spouse (because the spouse's $935,000 is subject to the $250,000 per-beneficiary limitation). The aggregate beneficial interests total $815,000. Thus, the maximum coverage afforded to the account owner would be $1,250,000, the greater of $1,250,000 or $815,000.)

(f) *Co-owned revocable trust accounts.* (1) Where an account described in paragraph (a) of this section is established by more than one owner, the respective interest of each account owner (which shall be deemed equal) shall be insured separately, per different beneficiary, up to the SMDIA, subject to the limitation imposed in paragraph (e) of this section. (*Example 1:* A and B, two individuals, establish a payable-on-death account naming their three nieces as beneficiaries. Neither A nor B has any other revocable trust accounts at the same FDIC-insured institution. The maximum coverage afforded to A and B would be $1,500,000, determined by multiplying the number of owners (2) times the SMDIA ($250,000) times the number of different beneficiaries (3). In this example, A would be entitled to revocable trust coverage of $750,000 and B would be entitled to revocable trust coverage of $750,000.) (*Example 2:* A and B, two individuals, establish a payable-on-death account naming their two children, two cousins, and a charity as beneficiaries. The balance in the account is $1,750,000. Neither A nor B has any other revocable trust accounts at the same FDIC-insured institution. The maximum coverage would be determined (under paragraph (a) of this section) by multiplying the number of account owners (2) times the number of different beneficiaries (5) times

$250,000, totaling $2,500,000. Because the account balance ($1,750,000) is less than the maximum coverage amount ($2,500,000), the account would be fully insured.) (*Example 3:* A and B, two individuals, establish a living trust account with a balance of $3.75 million. Under the terms of the trust, upon the death of both A and B, each of their three children is entitled to $600,000, B's cousin is entitled to $380,000, A's friend is entitled to $70,000, and the remaining amount ($1,500,000) goes to a charity. Under paragraph (e) of this section, the maximum coverage, as to each co-owned account owner, would be the greater of $1,250,000 or the aggregate amount (as to each co-owner) of the interest of each different beneficiary named in the trust, to a limit of $250,000 per account owner per beneficiary. The beneficial interests in the trust considered for purposes of determining coverage for account owner *A* are: $750,000 for the children (each child's interest attributable to A, $300,000, is subject to the $250,000-per-beneficiary limitation), $190,000 for the cousin, $35,000 for the friend, and $250,000 for the charity (the charity's interest attributable to A, $750,000, is subject to the $250,000 per-beneficiary limitation). As to A, the aggregate amount of the beneficial interests eligible for deposit insurance coverage totals $1,225,000. Thus, the maximum coverage afforded to account co-owner A would be $1,250,000, which is the greater of $1,250,000 or the aggregate of all the beneficial interests attributable to A (limited to $250,000 per beneficiary), which totaled slightly less at $1,225,000. Because B has equal ownership interest in the trust, the same analysis and coverage determination also would apply to B. Thus, of the total account balance of $3.75 million, $2.5 million would be insured and $1.25 million would be uninsured.)

(2) Notwithstanding paragraph (f)(1) of this section, where the owners of a co-owned revocable trust account are themselves the sole beneficiaries of the corresponding trust, the account shall be insured as a joint account under § 330.9 and shall not be insured under the provisions of this section. (*Example:* If A and B establish a payable-on-death account naming themselves as the sole beneficiaries of the account, the account will be insured as a joint account because the account does not satisfy the intent requirement (under paragraph (a) of this section) that the funds in the account belong to the named beneficiaries upon the owners' death. The beneficiaries are in fact the actual owners of the funds during the account owners' lifetimes.)

(g) For deposit accounts held in connection with a living trust that provides for a life-estate interest for designated beneficiaries, the FDIC shall value each such life estate interest as the SMDIA for purposes of determining the insurance coverage available to the account owner under paragraph (e) of this section. (*Example:* Account Owner ''A'' has a living trust account with a balance of $1,500,000. Under the terms of the trust, A provides a life estate interest for his spouse. Moreover, A's three children are each entitled to $275,000, A's friend is entitled to $15,000, and a designated charity is entitled to $175,000. The trust also provides that the remainder of the trust assets shall belong to A's granddaughter. In this case, because the balance of the account exceeds $1,250,000 (5) five times the SMDIA) and there are more than five different beneficiaries named in the trust, the maximum coverage available to A would be the greater of: $1,250,000 or the aggregate of each different beneficiary's interest to a limit of $250,000 per beneficiary. The beneficial interests in the trust considered for purposes of determining coverage are: $250,000 for the spouse's life estate, $750,000 for the children (because each child's $275,000 is subject to the $250,000 per-beneficiary limitation), $15,000 for the friend, $175,000 for the charity, and $250,000 for the granddaughter (because the granddaughter's $310,000 remainder is limited by the $250,000 per-beneficiary limitation). The aggregate beneficial interests total $1,440,000. Thus, the maximum coverage afforded to the account owner would be $1,440,000, the greater of $1,250,000 or $1,440,000.)

(h) *Revocable trusts that become irrevocable trusts.* Notwithstanding the provisions in section 330.13 on the insurance coverage of irrevocable trust accounts, if a revocable trust account

converts in part or entirely to an irrevocable trust upon the death of one or more of the trust's owners, the trust account shall continue to be insured under the provisions of this section. (*Example:* Assume A and B have a trust account in connection with a living trust, of which they are joint grantors. If upon the death of either A or B the trust transforms into an irrevocable trust as to the deceased grantor's ownership in the trust, the account will continue to be insured under the provisions of this section.)

(i) This section shall apply to all existing and future revocable trust accounts and all existing and future irrevocable trust accounts resulting from formal revocable trust accounts.

[74 FR 47716, Sept. 17, 2009]

§ 330.11 Accounts of a corporation, partnership or unincorporated association.

(a) *Corporate accounts.* (1) The deposit accounts of a corporation engaged in any ''independent activity'' (as defined in § 330.1(g)) shall be added together and insured up to the SMDIA in the aggregate. If a corporation has divisions or units which are not separately incorporated, the deposit accounts of those divisions or units shall be added to any other deposit accounts of the corporation. If a corporation maintains deposit accounts in a representative or fiduciary capacity, such accounts shall not be treated as the deposit accounts of the corporation but shall be treated as fiduciary accounts and insured in accordance with the provisions of § 330.7.

(2) Notwithstanding any other provision of this part, any trust or other business arrangement which has filed or is required to file a registration statement with the Securities and Exchange Commission pursuant to section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8) or that would be required so to register but for the fact it is not created under the laws of the United States or a state or but for sections 2(b), 3(c)(1), or 6(a)(1) of that act shall be deemed to be a corporation for purposes of determining deposit insurance coverage. An exception to this paragraph (a)(2) shall exist for any trust or other business arrangement established by a state or that is a state agency or state public instrumentality as part of a qualified tuition savings program under section 529 of the Internal Revenue Code (26 U.S.C. 529). A deposit account of such a trust or business arrangement shall not be deemed to be the deposit of a corporation provided that: The funds in the account may be traced to one or more particular investors or participants; and the existence of the trust relationships is disclosed in accordance with the requirements of § 330.5. If these conditions are satisfied, each participant's funds shall be insured as a deposit account of the participant.

(b) *Partnership accounts.* The deposit accounts of a partnership engaged in any ''independent activity'' (as defined in § 330.1(g)) shall be added together and insured up to the SMDIA in the aggregate. Such insurance coverage shall be separate from any insurance provided for individually owned (single ownership) accounts maintained by the individual partners. A partnership shall be deemed to exist, for purposes of this paragraph, any time there is an association of two or more persons or entities formed to carry on, as co-owners, an unincorporated business for profit.

(c) *Unincorporated association accounts.* The deposit accounts of an unincorporated association engaged in any independent activity shall be added together and insured up to the SMDIA in the aggregate, separately from the accounts of the person(s) or entity(ies) comprising the unincorporated association. An unincorporated association shall be deemed to exist, for purposes of this paragraph, whenever there is an association of two or more persons formed for some religious, educational, charitable, social or other noncommercial purpose.

(d) *Non-qualifying entities.* The deposit accounts of an entity which is not engaged in an ''independent activity'' (as defined in § 330.1(g)) shall be deemed to be owned by the person or persons owning the corporation or comprising the partnership or unincorporated association, and, for deposit insurance purposes, the interest of each person in such a deposit account shall be added

to any other deposit accounts individually owned by that person and insured up to the SMDIA in the aggregate.

[63 FR 25756, May 11, 1998, as amended at 70 FR 33692, June 9, 2005; 70 FR 62059, Oct. 28, 2005; 71 FR 14631, Mar. 23, 2006]

§ 330.12 Accounts held by a depository institution as the trustee of an irrevocable trust.

(a) *Separate insurance coverage.* ''Trust funds'' (as defined in § 330.1(q)) held by an insured depository institution in its capacity as trustee of an irrevocable trust, whether held in its trust department, held or deposited in any other department of the fiduciary institution, or deposited by the fiduciary institution in another insured depository institution, shall be insured up to the SMDIA for each owner or beneficiary represented. This insurance shall be separate from, and in addition to, the insurance provided for any other deposits of the owners or the beneficiaries.

(b) *Determination of interests.* The insurance for funds held by an insured depository institution in its capacity as trustee of an irrevocable trust shall be determined in accordance with the following provisions:

(1) *Allocated funds of a trust estate.* If trust funds of a particular ''trust estate'' (as defined in § 330.1(p)) are allocated by the fiduciary and deposited, the insurance with respect to such trust estate shall be determined by ascertaining the amount of its funds allocated, deposited and remaining to the credit of the claimant as fiduciary at the insured depository institution in default.

(2) *Interest of a trust estate in unallocated trust funds.* If funds of a particular trust estate are commingled with funds of other trust estates and deposited by the fiduciary institution in one or more insured depository institutions to the credit of the depository institution as fiduciary, without allocation of specific amounts from a particular trust estate to an account in such institution(s), the percentage interest of that trust estate in the unallocated deposits in any institution in default is the same as that trust estate's percentage interest in the entire commingled investment pool.

(c) *Limitation on applicability.* This section shall not apply to deposits of trust funds belonging to a trust which is classified as a corporation under § 330.11(a)(2).

[63 FR 25756, May 11, 1998, as amended at 71 FR 14631, Mar. 23, 2006; 76 FR 41395, July 14, 2011]

§ 330.13 Irrevocable trust accounts.

(a) *General rule.* Funds representing the ''non-contingent trust interest(s)'' (as defined in § 330.1(m)) of a beneficiary deposited into one or more deposit accounts established pursuant to one or more irrevocable trust agreements created by the same settlor(s) (grantor(s)) shall be added together and insured up to the SMDIA in the aggregate. Such insurance coverage shall be separate from the coverage provided for other accounts maintained by the settlor(s), trustee(s) or beneficiary(ies) of the irrevocable trust(s) at the same insured depository institution. Each ''trust interest'' (as defined in § 330.1(r)) in any irrevocable trust established by two or more settlors shall be deemed to be derived from each settlor pro rata to his or her contribution to the trust.

(b) *Treatment of contingent trust interests.* In the case of any trust in which certain trust interests do not qualify as non-contingent trust interests, the funds representing those interests shall be added together and insured up to the SMDIA in the aggregate. Such insurance coverage shall be in addition to the coverage provided for the funds representing non-contingent trust interests which are insured pursuant to paragraph (a) of this section.

(c) *Commingled accounts of bankruptcy trustees.* Whenever a bankruptcy trustee appointed under title 11 of the United States Code commingles the funds of various bankruptcy estates in the same account at an insured depository institution, the funds of each title 11 bankruptcy estate will be added together and insured up to the SMDIA, separately from the funds of any other such estate.

[63 FR 25756, May 11, 1998, as amended at 71 FR 14631, Mar. 23, 2006; 76 FR 41395, July 14, 2011]

§ 330.14 Retirement and other employee benefit plan accounts.

(a) ''Pass-through'' insurance. Any deposits of an employee benefit plan in an insured depository institution shall be insured on a ''pass-through'' basis, in the amount of up to the SMDIA for the non-contingent interest of each plan participant, provided the rules in § 330.5 are satisfied. Deposits eligible for coverage under paragraph (b)(2) of this section that also are deposits of a employee benefit plan or deposits of an deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457) in an insured depository institution shall be insured on a ''pass-through'' basis in the amount of $250,000 for the non-contingent interest of each plan participant, provided the rules in § 330.5 are satisfied.

(b) *Aggregation*—(1) *Multiple plans.* Funds representing the non-contingent interests of a beneficiary in an employee benefit plan, or eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457), which are deposited in one or more deposit accounts shall be aggregated with any other deposited funds representing such interests of the same beneficiary in other employee benefit plans, or eligible deferred compensation plans described in section 457 of the Internal Revenue Code of 1986, established by the same employer or employee organization.

(2) Certain retirement accounts. Deposits in an insured depository institution made in connection with the following types of retirement plans shall be aggregated and insured in the amount of up to $250,000 per participant:

(i) Any individual retirement account described in section 408(a) of the Internal Revenue Code of 1986 (26 U.S.C. 408(a)):

(ii) Any eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457); and

(iii) Any individual account plan defined in section 3(34) of the Employee Retirement Income Security Act (ERISA) (29 U.S.C. 1002) and any plan described in section 401(d) of the Internal Revenue Code of 1986 (26 U.S.C. 401(d)), to the extent that participants and beneficiaries under such plans have the right to direct the investment of assets held in individual accounts maintained on their behalf by the plans.

(c) *Determination of interests*—(1) *Defined contribution plans.* The value of an employee's non-contingent interest in a defined contribution plan shall be deemed to be the employee's account balance as of the date of default of the insured depository institution, regardless of whether said amount was derived, in whole or in part, from contributions of the employee and/or the employer to the account.

(2) *Defined benefit plans.* The value of an employee's non-contingent interest in a defined benefit plan shall be deemed to be the present value of the employee's interest in the plan, evaluated in accordance with the method of calculation ordinarily used under such plan, as of the date of default of the insured depository institution.

(3) *Amounts taken into account.* For the purposes of applying the rule under paragraph (b)(2) of this section, only the present vested and ascertainable interests of each participant in an employee benefit plan or ''457 Plan,'' excluding any remainder interest created by, or as a result of, the plan, shall be taken into account in determining the amount of deposit insurance accorded to the deposits of the plan.

(d) *Treatment of contingent interests.* In the event that employees' interests in an employee benefit plan are not capable of evaluation in accordance with the provisions of this section, or an account established for any such plan includes amounts for future participants in the plan, payment by the FDIC with respect to all such interests shall not exceed the SMDIA in the aggregate.

(e) *Overfunded pension plan deposits.* Any portion of an employee benefit plan's deposits which is not attributable to the interests of the beneficiaries under the plan shall be deemed attributable to the overfunded portion of the plan's assets and shall be aggregated and insured up to the SMDIA, separately from any other deposits.

(f) *Definitions of ''depositor'', ''employee benefit plan'', ''employee organization'' and ''non-contingent interest''.* Except as otherwise indicated in this section, for purposes of this section:

(1) The term *depositor* means the person(s) administering or managing an employee benefit plan.

(2) The term *employee benefit plan* has the same meaning given to such term in section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. 1002) and includes any plan described in section 401(d) of the Internal Revenue Code of 1986.

(3) The term *employee organization* means any labor union, organization, employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose, in whole or in part, of establishing such a plan.

(4) The term *non-contingent interest* means an interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031–7 of the Federal Estate Tax Regulations (26 CFR 20.2031–7) or any similar present worth or life expectancy tables as may be published by the Internal Revenue Service.

[63 FR 25756, May 11, 1998, as amended at 64 FR 15657, Apr. 1, 1999; 71 FR 14631, Mar. 23, 2006; 71 FR 53550, Sept. 12, 2006]

§ 330.15 Accounts held by government depositors.

(a) *Extent of insurance coverage*—(1) *Accounts of the United States.* Each official custodian of funds of the United States lawfully depositing such funds in an insured depository institution shall be separately insured in the amount of:

(i) Up to the SMDIA in the aggregate for all time and savings deposits; and

(ii) Up to the SMDIA in the aggregate for all demand deposits.

(2) *Accounts of a state, county, municipality or political subdivision.* (i) Each official custodian of funds of any state of the United States, or any county, municipality, or political subdivision thereof, lawfully depositing such funds in an insured depository institution in the state comprising the public unit or wherein the public unit is located (including any insured depository institution having a branch in said state) shall be separately insured in the amount of:

(A) Up to the SMDIA in the aggregate for all time and savings deposits; and

(B) Up to the SMDIA in the aggregate for all demand deposits.

(ii) In addition, each such official custodian depositing such funds in an insured depository institution outside of the state comprising the public unit or wherein the public unit is located, shall be insured in the amount of up to the SMDIA in the aggregate for all deposits, regardless of whether they are time, savings or demand deposits.

(3) *Accounts of the District of Columbia.* (i) Each official custodian of funds of the District of Columbia lawfully depositing such funds in an insured depository institution in the District of Columbia (including an insured depository institution having a branch in the District of Columbia) shall be separately insured in the amount of:

(A) Up to the SMDIA in the aggregate for all time and savings deposits; and

(B) Up to the SMDIA in the aggregate for all demand deposits.

(ii) In addition, each such official custodian depositing such funds in an insured depository institution outside of the District of Columbia shall be insured in the amount of up to the SMDIA in the aggregate for all deposits, regardless of whether they are time, savings or demand deposits.

(4) *Accounts of the Commonwealth of Puerto Rico and other government possessions and territories.* (i) Each official custodian of funds of the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, Guam, or The Commonwealth of the Northern Mariana Islands, or of any county, municipality, or political subdivision thereof lawfully depositing such funds in an insured depository institution in

Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, Guam, or The Commonwealth of the Northern Mariana Islands, respectively, shall be separately insured in the amount of:

(A) Up to the SMDIA in the aggregate for all time and savings deposits; and

(B) Up to the SMDIA in the aggregate for all demand deposits.

(ii) In addition, each such official custodian depositing such funds in an insured depository institution outside of the commonwealth, possession or territory comprising the public unit or wherein the public unit is located, shall be insured in the amount of up to the SMDIA in the aggregate for all deposits, regardless of whether they are time, savings or demand deposits.

(5) *Accounts of an Indian tribe.* Each official custodian of funds of an Indian tribe (as defined in 25 U.S.C. 1452(c)), including an agency thereof having official custody of tribal funds, lawfully depositing the same in an insured depository institution shall be separately insured in the amount of:

(i) Up to the SMDIA in the aggregate for all time and savings deposits; and

(ii) Up to the SMDIA in the aggregate for all demand deposits.

(b) *Rules relating to the ''official custodian''*—(1) *Qualifications for an ''official custodian''.* In order to qualify as an ''official custodian'' for the purposes of paragraph (a) of this section, such custodian must have plenary authority, including control, over funds owned by the public unit which the custodian is appointed or elected to serve. Control of public funds includes possession, as well as the authority to establish accounts for such funds in insured depository institutions and to make deposits, withdrawals, and disbursements of such funds.

(2) *Official custodian of the funds of more than one public unit.* For the purposes of paragraph (a) of this section, if the same person is an official custodian of the funds of more than one public unit, he or she shall be separately insured with respect to the funds held by him or her for each such public unit, but shall not be separately insured by virtue of holding different offices in such public unit or, except as provided in paragraph (c) of this section, holding such funds for different purposes.

(3) *Split of authority or control over public unit funds.* If the exercise of authority or control over the funds of a public unit requires action by, or the consent of, two or more officers, employees, or agents of such public unit, then they will be treated as one ''official custodian'' for the purposes of this section.

(c) *Public bond issues.* Where an officer, agent or employee of a public unit has custody of certain funds which by law or under a bond indenture are required to be set aside to discharge a debt owed to the holders of notes or bonds issued by the public unit, any deposit of such funds in an insured depository institution shall be deemed to be a deposit by a trustee of trust funds of which the noteholders or bondholders are pro rata beneficiaries, and the beneficial interest of each noteholder or bondholder in the deposit shall be separately insured up to the SMDIA.

(d) *Definition of ''political subdivision''.* The term ''political subdivision'' includes drainage, irrigation, navigation, improvement, levee, sanitary, school or power districts, and bridge or port authorities and other special districts created by state statute or compacts between the states. It also includes any subdivision of a public unit mentioned in paragraphs (a)(2), (a)(3) and (a)(4) of this section or any principal department of such public unit:

(1) The creation of which subdivision or department has been expressly authorized by the law of such public unit;

(2) To which some functions of government have been delegated by such law; and

(3) Which is empowered to exercise exclusive control over funds for its exclusive use.

[63 FR 25756, May 11, 1998, as amended at 71 FR 14631, Mar. 23, 2006]

§ 330.16 [Reserved]

§ 330.101 Premiums.

This interpretive rule describes certain payments that are not deemed to be ''interest'' as defined in § 330.1(k).

(a) Premiums, whether in the form of merchandise, credit, or cash, given by a bank to the holder of a deposit will not

be regarded as ''interest'' as defined in § 330.1(k) if:

(1) The premium is given to the depositor only at the time of the opening of a new account or an addition to an existing account;

(2) No more than two premiums per deposit are given in any twelve-month interval; and

(3) The value of the premium (in the case of merchandise, the total cost to the bank, including shipping, warehousing, packaging, and handling costs) does not exceed $10 for a deposit of less than $5,000 or $20 for a deposit of $5,000 or more.

(b) The costs of premiums may not be averaged.

(c) A bank may not solicit funds for deposit on the basis that the bank will divide the funds into several accounts for the purpose of enabling the bank to pay the depositor more than two premiums within a twelve-month interval on the solicited funds.

(d) The bank must retain sufficient information for examiners to determine that the requirements of this section have been satisfied.

(e) Notwithstanding paragraph (a) of this section, any premium that is not, directly or indirectly, related to or dependent on the balance in a demand deposit account and the duration of the account balance shall not be considered the payment of interest on a demand deposit account and shall not be subject to the limitations in paragraph (a) of this section.

[76 FR 41395, July 14, 2011]

PART 331—FEDERAL INTEREST RATE AUTHORITY

Sec.
331.1 Authority, purpose, and scope.
331.2 Definitions.
331.3 Application of host State law.
331.4 Interest rate authority.

AUTHORITY: 12 U.S.C. 1819(a)(Tenth), 1820(g), 1831d.

SOURCE: 85 FR 44157, July 22, 2020, unless otherwise noted.

§ 331.1 Authority, purpose, and scope.

(a) *Authority*. The regulations in this part are issued by the Federal Deposit Insurance Corporation (FDIC) under sections 9(a)(Tenth) and 10(g) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1819(a)(Tenth), 1820(g), to implement sections 24(j) and 27 of the FDI Act, 12 U.S.C. 1831a(j), 1831d, and related provisions of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96–221, 94 Stat. 132 (1980).

(b) *Purpose*. Section 24(j) of the FDI Act, as amended by the Riegle-Neal Amendments Act of 1997, Public Law 105–24, 111 Stat. 238 (1997), was enacted to maintain parity between State banks and national banks regarding the application of a host State's laws to branches of out-of-State banks. Section 27 of the FDI Act was enacted to provide State banks with interest rate authority similar to that provided to national banks under the National Bank Act, 12 U.S.C. 85. The regulations in this part clarify that State-chartered banks and insured branches of foreign banks have regulatory authority in these areas parallel to the authority of national banks under regulations issued by the Office of the Comptroller of the Currency, and address other issues the FDIC considers appropriate to implement these statutes.

(c) *Scope*. The regulations in this part apply to State-chartered banks and insured branches of foreign banks.

§ 331.2 Definitions.

For purposes of this part—

Home State means, with respect to a State bank, the State by which the bank is chartered.

Host State means a State, other than the home State of a State bank, in which the State bank maintains a branch.

Insured branch has the same meaning as that term in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813.

Interest means any payment compensating a creditor or prospective creditor for an extension of credit, making available a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. Interest includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates; late fees; creditor-imposed not sufficient funds (NSF) fees

charged when a borrower tenders payment on a debt with a check drawn on insufficient funds; overlimit fees; annual fees; cash advance fees; and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

Out-of-State State bank means, with respect to any State, a State bank whose home State is another State.

Rate on 90-day commercial paper means the rate quoted by the Federal Reserve Board of Governors for 90-day A2/P2 nonfinancial commercial paper.

State bank has the same meaning as that term in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813.

§ 331.3 Application of host State law.

The laws of a host State shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank. To the extent host State law is inapplicable to a branch of an out-of-State State bank in such host State pursuant to the preceding sentence, home State law shall apply to such branch.

§ 331.4 Interest rate authority.

(a) *Interest rates.* In order to prevent discrimination against State-chartered depository institutions, including insured savings banks, or insured branches of foreign banks, if the applicable rate prescribed in this section exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this paragraph (a), such State bank or insured branch of a foreign bank may, notwithstanding any State constitution or statute which is preempted by section 27 of the Federal Deposit Insurance Act, 12 U.S.C. 1831d, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 percent in excess of the rate on 90-day commercial paper or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

(b) *Classes of institutions and loans.* A State bank or insured branch of a foreign bank located in a State may charge interest at the maximum rate permitted to any State-chartered or licensed lending institution by the law of that State. If State law permits different interest charges on specified classes of loans, a State bank or insured branch of a foreign bank making such loans is subject only to the provisions of State law relating to that class of loans that are material to the determination of the permitted interest. For example, a State bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company, without being so licensed, but subject to State law limitations on the size of loans made by small loan companies.

(c) *Effect on State law definitions of interest.* The definition of the term *interest* in this part does not change how interest is defined by the individual States or how the State definition of interest is used solely for purposes of State law. For example, if late fees are not *interest* under the State law of the State where a State bank is located but State law permits its most favored lender to charge late fees, then a State bank located in that State may charge late fees to its intrastate customers. The State bank also may charge late fees to its interstate customers because the fees are interest under the Federal definition of interest and an allowable charge under the State law of the State where the bank is located. However, the late fees would not be treated as interest for purposes of evaluating compliance with State usury limitations because State law excludes late fees when calculating the maximum interest that lending institutions may charge under those limitations.

(d) *Corporate borrowers.* A State bank or insured branch of a foreign bank located in a State whose State law denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by the corporate borrower.

(e) *Determination of interest permissible under section 27.* Whether interest on a loan is permissible under section 27 of

the Federal Deposit Insurance Act is determined as of the date the loan was made. Interest on a loan that is permissible under section 27 of the Federal Deposit Insurance Act shall not be affected by a change in State law, a change in the relevant commercial paper rate after the loan was made, or the sale, assignment, or other transfer of the loan, in whole or in part.

PART 332—PRIVACY OF CONSUMER FINANCIAL INFORMATION

Sec.

332.1 Purpose and scope.
332.2 Model privacy form and examples.
332.3 Definitions.

Subpart A—Privacy and Opt Out Notices

332.4 Initial privacy notice to consumers required.
332.5 Annual privacy notice to customers required.
332.6 Information to be included in privacy notices.
332.7 Form of opt out notice to consumers; opt out methods.
332.8 Revised privacy notices.
332.9 Delivering privacy and opt out notices.

Subpart B—Limits on Disclosures

332.10 Limits on disclosure of nonpublic personal information to nonaffiliated third parties.
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Subpart C—Exceptions

332.13 Exception to opt out requirements for service providers and joint marketing.
332.14 Exceptions to notice and opt out requirements for processing and servicing transactions.
332.15 Other exceptions to notice and opt out requirements.

Subpart D—Relation to Other Laws; Effective Date

332.16 Protection of Fair Credit Reporting Act.
332.17 Relation to State laws.
332.18 Effective date; transition rule.
APPENDIX A TO PART 332—MODEL PRIVACY FORM

AUTHORITY: 12 U.S.C. 1819 (Seventh and Tenth); 15 U.S.C. 6801 *et seq.*

SOURCE: 65 FR 35216, June 1, 2000, unless otherwise noted.

§ 332.1 Purpose and scope.

(a) *Purpose.* This part governs the treatment of nonpublic personal information about consumers by the financial institutions listed in paragraph (b) of this section. This part:

(1) Requires a financial institution to provide notice to customers about its privacy policies and practices;

(2) Describes the conditions under which a financial institution may disclose nonpublic personal information about consumers to nonaffiliated third parties; and

(3) Provides a method for consumers to prevent a financial institution from disclosing that information to most nonaffiliated third parties by ''opting out'' of that disclosure, subject to the exceptions in §§ 332.13, 332.14, and 332.15.

(b) *Scope.* (1) This part applies only to nonpublic personal information about individuals who obtain financial products or services primarily for personal, family, or household purposes from the institutions listed below. This part does not apply to information about companies or about individuals who obtain financial products or services for business, commercial, or agricultural purposes. This part applies to the United States offices of entities for which the Federal Deposit Insurance Corporation (FDIC) has primary federal supervisory authority. They are referred to in this part as ''you.'' These are: banks insured by the FDIC (other than members of the Federal Reserve System), insured state branches of foreign banks, and certain subsidiaries of such entities.

(2) Nothing in this part modifies, limits, or supersedes the standards governing individually identifiable health information promulgated by the Secretary of Health and Human Services under the authority of sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d–1320d–8).

§ 332.2 Model privacy form and examples.

(a) *Model privacy form.* Use of the model privacy form in appendix A of this part, consistent with the instructions in appendix A, constitutes compliance with the notice content requirements of §§ 332.6 and 332.7 of this part, although use of the model privacy form is not required.

(b) *Examples.* The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part.

[74 FR 62935, Dec. 1, 2009]

§ 332.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(b)(1) *Clear and conspicuous* means that a notice is reasonably understandable and designed to call attention to the nature and significance of the information in the notice.

(2) *Examples*—(i) *Reasonably understandable.* You make your notice reasonably understandable if you:

(A) Present the information in the notice in clear, concise sentences, paragraphs, and sections;

(B) Use short explanatory sentences or bullet lists whenever possible;

(C) Use definite, concrete, everyday words and active voice whenever possible;

(D) Avoid multiple negatives;

(E) Avoid legal and highly technical business terminology whenever possible; and

(F) Avoid explanations that are imprecise and readily subject to different interpretations.

(ii) *Designed to call attention.* You design your notice to call attention to the nature and significance of the information in it if you:

(A) Use a plain-language heading to call attention to the notice;

(B) Use a typeface and type size that are easy to read;

(C) Provide wide margins and ample line spacing;

(D) Use boldface or italics for key words; and

(E) In a form that combines your notice with other information, use distinctive type size, style, and graphic devices, such as shading or sidebars, when you combine your notice with other information.

(iii) *Notices on web sites.* If you provide a notice on a web page, you design your notice to call attention to the nature and significance of the information in it if you use text or visual cues to encourage scrolling down the page if necessary to view the entire notice and ensure that other elements on the web site (such as text, graphics, hyperlinks, or sound) do not distract attention from the notice, and you either:

(A) Place the notice on a screen that consumers frequently access, such as a page on which transactions are conducted; or

(B) Place a link on a screen that consumers frequently access, such as a page on which transactions are conducted, that connects directly to the notice and is labeled appropriately to convey the importance, nature, and relevance of the notice.

(c) *Collect* means to obtain information that you organize or can retrieve by the name of an individual or by identifying number, symbol, or other identifying particular assigned to the individual, irrespective of the source of the underlying information.

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e)(1) *Consumer* means an individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family, or household purposes, or that individual's legal representative.

(2) *Examples*—(i) An individual who applies to you for credit for personal, family, or household purposes is a consumer of a financial service, regardless of whether the credit is extended.

(ii) An individual who provides nonpublic personal information to you in order to obtain a determination about whether he or she may qualify for a loan to be used primarily for personal,

family, or household purposes is a consumer of a financial service, regardless of whether the loan is extended.

(iii) An individual who provides nonpublic personal information to you in connection with obtaining or seeking to obtain financial, investment, or economic advisory services is a consumer regardless of whether you establish a continuing advisory relationship.

(iv) If you hold ownership or servicing rights to an individual's loan that is used primarily for personal, family, or household purposes, the individual is your consumer, even if you hold those rights in conjunction with one or more other institutions. (The individual is also a consumer with respect to the other financial institutions involved.) An individual who has a loan in which you have ownership or servicing rights is your consumer, even if you, or another institution with those rights, hire an agent to collect on the loan.

(v) An individual who is a consumer of another financial institution is not your consumer solely because you act as agent for, or provide processing or other services to, that financial institution.

(vi) An individual is not your consumer solely because he or she has designated you as trustee for a trust.

(vii) An individual is not your consumer solely because he or she is a beneficiary of a trust for which you are a trustee.

(viii) An individual is not your consumer solely because he or she is a participant or a beneficiary of an employee benefit plan that you sponsor or for which you act as a trustee or fiduciary.

(f) *Consumer reporting agency* has the same meaning as in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)).

(g) *Control* of a company means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the FDIC determines.

(h) *Customer* means a consumer who has a customer relationship with you.

(i)(1) *Customer relationship* means a continuing relationship between a consumer and you under which you provide one or more financial products or services to the consumer that are to be used primarily for personal, family, or household purposes.

(2) *Examples*—(i) *Continuing relationship.* A consumer has a continuing relationship with you if the consumer:

(A) Has a deposit or investment account with you;

(B) Obtains a loan from you;

(C) Has a loan for which you own the servicing rights;

(D) Purchases an insurance product from you;

(E) Holds an investment product through you, such as when you act as a custodian for securities or for assets in an Individual Retirement Arrangement;

(F) Enters into an agreement or understanding with you whereby you undertake to arrange or broker a home mortgage loan for the consumer;

(G) Enters into a lease of personal property with you; or

(H) Obtains financial, investment, or economic advisory services from you for a fee.

(ii) *No continuing relationship.* A consumer does not, however, have a continuing relationship with you if:

(A) The consumer obtains a financial product or service only in isolated transactions, such as using your ATM to withdraw cash from an account at another financial institution or purchasing a cashier's check or money order;

(B) You sell the consumer's loan and do not retain the rights to service that loan; or

(C) You sell the consumer airline tickets, travel insurance, or traveler's checks in isolated transactions.

(j) *Federal functional regulator* means:

(1) The Board of Governors of the Federal Reserve System;

(2) The Office of the Comptroller of the Currency;

(3) The Board of Directors of the Federal Deposit Insurance Corporation;

(4) The Director of the Office of Thrift Supervision;

(5) The National Credit Union Administration Board; and

(6) The Securities and Exchange Commission.

(k)(1) *Financial institution* means any institution the business of which is engaging in activities that are financial in nature or incidental to such financial activities as described in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

(2) *Financial institution* does not include:

(i) Any person or entity with respect to any financial activity that is subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*);

(ii) The Federal Agricultural Mortgage Corporation or any entity chartered and operating under the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*); or

(iii) Institutions chartered by Congress specifically to engage in securitizations, secondary market sales (including sales of servicing rights), or similar transactions related to a transaction of a consumer, as long as such institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party.

(l)(1) *Financial product or service* means any product or service that a financial holding company could offer by engaging in an activity that is financial in nature or incidental to such a financial activity under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

(2) *Financial service* includes your evaluation or brokerage of information that you collect in connection with a request or an application from a consumer for a financial product or service.

(m)(1) *Nonaffiliated third party* means any person except:

(i) Your affiliate; or

(ii) A person employed jointly by you and any company that is not your affiliate (but *nonaffiliated third party* includes the other company that jointly employs the person).

(2) *Nonaffiliated third party* includes any company that is an affiliate solely by virtue of your or your affiliate's direct or indirect ownership or control of the company in conducting merchant banking or investment banking activities of the type described in section 4(k)(4)(H) or insurance company investment activities of the type described in section 4(k)(4)(I) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)(4)(H) and (I)).

(n)(1) *Nonpublic personal information* means:

(i) Personally identifiable financial information; and

(ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.

(2) *Nonpublic personal information* does not include:

(i) Publicly available information, except as included on a list described in paragraph (n)(1)(ii) of this section; or

(ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any personally identifiable financial information that is not publicly available.

(3) *Examples of lists*—(i) Nonpublic personal information includes any list of individuals' names and street addresses that is derived in whole or in part using personally identifiable financial information that is not publicly available, such as account numbers.

(ii) Nonpublic personal information does not include any list of individuals' names and addresses that contains only publicly available information, is not derived in whole or in part using personally identifiable financial information that is not publicly available, and is not disclosed in a manner that indicates that any of the individuals on the list is a consumer of a financial institution.

(o)(1) *Personally identifiable financial information* means any information:

(i) A consumer provides to you to obtain a financial product or service from you;

(ii) About a consumer resulting from any transaction involving a financial product or service between you and a consumer; or

(iii) You otherwise obtain about a consumer in connection with providing a financial product or service to that consumer.

(2) *Examples*—(i) *Information included.* Personally identifiable financial information includes:

(A) Information a consumer provides to you on an application to obtain a loan, credit card, or other financial product or service;

(B) Account balance information, payment history, overdraft history, and credit or debit card purchase information;

(C) The fact that an individual is or has been one of your customers or has obtained a financial product or service from you;

(D) Any information about your consumer if it is disclosed in a manner that indicates that the individual is or has been your consumer;

(E) Any information that a consumer provides to you or that you or your agent otherwise obtain in connection with collecting on a loan or servicing a loan;

(F) Any information you collect through an Internet ''cookie'' (an information collecting device from a web server); and

(G) Information from a consumer report.

(ii) *Information not included.* Personally identifiable financial information does not include:

(A) A list of names and addresses of customers of an entity that is not a financial institution; and

(B) Information that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(p)(1) *Publicly available information* means any information that you have a reasonable basis to believe is lawfully made available to the general public from:

(i) Federal, State, or local government records;

(ii) Widely distributed media; or

(iii) Disclosures to the general public that are required to be made by Federal, State, or local law.

(2) *Reasonable basis.* You have a reasonable basis to believe that information is lawfully made available to the general public if you have taken steps to determine:

(i) That the information is of the type that is available to the general public; and

(ii) Whether an individual can direct that the information not be made available to the general public and, if so, that your consumer has not done so.

(3) *Examples*—(i) *Government records.* Publicly available information in government records includes information in government real estate records and security interest filings.

(ii) *Widely distributed media.* Publicly available information from widely distributed media includes information from a telephone book, a television or radio program, a newspaper, or a web site that is available to the general public on an unrestricted basis. A web site is not restricted merely because an Internet service provider or a site operator requires a fee or a password, so long as access is available to the general public.

(iii) *Reasonable basis.* (A) You have a reasonable basis to believe that mortgage information is lawfully made available to the general public if you have determined that the information is of the type included on the public record in the jurisdiction where the mortgage would be recorded.

(B) You have a reasonable basis to believe that an individual's telephone number is lawfully made available to the general public if you have located the telephone number in the telephone book or the consumer has informed you that the telephone number is not unlisted.

(q) *You* means:

(1) A bank insured by the FDIC (other than a member of the Federal Reserve System);

(2) An insured state branch of a foreign bank; and

(3) A subsidiary of either such entity except:

(i) A broker or dealer that is registered under the Securities and Exchange Act of 1934 (15 U.S.C. 78a *et seq.*);

(ii) A registered investment adviser, properly registered by or on behalf of either the Securities Exchange Commission or any State, with respect to its investment advisory activities and its activities incidental to those investment advisory activities;

(iii) An investment company that is registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); or

(iv) An insurance company, with respect to its insurance activities and its activities incidental to those insurance activities, that is subject to supervision by a State insurance regulator.

Subpart A—Privacy and Opt Out Notices

§ 332.4 Initial privacy notice to consumers required.

(a) *Initial notice requirement.* You must provide a clear and conspicuous notice that accurately reflects your privacy policies and practices to:

(1) *Customer.* An individual who becomes your customer, not later than when you establish a customer relationship, except as provided in paragraph (e) of this section; and

(2) *Consumer.* A consumer, before you disclose any nonpublic personal information about the consumer to any nonaffiliated third party, if you make such a disclosure other than as authorized by §§ 332.14 and 332.15.

(b) *When initial notice to a consumer is not required.* You are not required to provide an initial notice to a consumer under paragraph (a) of this section if:

(1) You do not disclose any nonpublic personal information about the consumer to any nonaffiliated third party, other than as authorized by §§ 332.14 and 332.15; and

(2) You do not have a customer relationship with the consumer.

(c) *When you establish a customer relationship*—(1) *General rule.* You establish a customer relationship when you and the consumer enter into a continuing relationship.

(2) *Special rule for loans.* You establish a customer relationship with a consumer when you originate a loan to the consumer for personal, family, or household purposes. If you subsequently transfer the servicing rights to that loan to another financial institution, the customer relationship transfers with the servicing rights.

(3)(i) *Examples of establishing customer relationship.* You establish a customer relationship when the consumer:

(A) Opens a credit card account with you;

(B) Executes the contract to open a deposit account with you, obtains credit from you, or purchases insurance from you;

(C) Agrees to obtain financial, economic, or investment advisory services from you for a fee; or

(D) Becomes your client for the purpose of your providing credit counseling or tax preparation services.

(ii) *Examples of loan rule.* You establish a customer relationship with a consumer who obtains a loan for personal, family, or household purposes when you:

(A) Originate the loan to the consumer; or

(B) Purchase the servicing rights to the consumer's loan.

(d) *Existing customers.* When an existing customer obtains a new financial product or service from you that is to be used primarily for personal, family, or household purposes, you satisfy the initial notice requirements of paragraph (a) of this section as follows:

(1) You may provide a revised privacy notice, under § 332.8, that covers the customer's new financial product or service; or

(2) If the initial, revised, or annual notice that you most recently provided to that customer was accurate with respect to the new financial product or service, you do not need to provide a new privacy notice under paragraph (a) of this section.

(e) *Exceptions to allow subsequent delivery of notice.* (1) You may provide the initial notice required by paragraph (a)(1) of this section within a reasonable time after you establish a customer relationship if:

(i) Establishing the customer relationship is not at the customer's election; or

(ii) Providing notice not later than when you establish a customer relationship would substantially delay the customer's transaction and the customer agrees to receive the notice at a later time.

(2) *Examples of exceptions*—(i) *Not at customer's election*. Establishing a customer relationship is not at the customer's election if you acquire a customer's deposit liability or the servicing rights to a customer's loan from another financial institution and the customer does not have a choice about your acquisition.

(ii) *Substantial delay of customer's transaction*. Providing notice not later than when you establish a customer relationship would substantially delay the customer's transaction when:

(A) You and the individual agree over the telephone to enter into a customer relationship involving prompt delivery of the financial product or service; or

(B) You establish a customer relationship with an individual under a program authorized by title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*) or similar student loan programs where loan proceeds are disbursed promptly without prior communication between you and the customer.

(iii) *No substantial delay of customer's transaction*. Providing notice not later than when you establish a customer relationship would not substantially delay the customer's transaction when the relationship is initiated in person at your office or through other means by which the customer may view the notice, such as on a web site.

(f) *Delivery*. When you are required to deliver an initial privacy notice by this section, you must deliver it according to § 332.9. If you use a short-form initial notice for non-customers according to § 332.6(d), you may deliver your privacy notice according to § 332.6(d)(3).

§ 332.5 Annual privacy notice to customers required.

(a)(1) *General rule*. You must provide a clear and conspicuous notice to customers that accurately reflects your privacy policies and practices not less than annually during the continuation of the customer relationship. *Annually* means at least once in any period of 12 consecutive months during which that relationship exists. You may define the 12-consecutive-month period, but you must apply it to the customer on a consistent basis.

(2) *Example*. You provide a notice annually if you define the 12-consecutive-month period as a calendar year and provide the annual notice to the customer once in each calendar year following the calendar year in which you provided the initial notice. For example, if a customer opens an account on any day of year 1, you must provide an annual notice to that customer by December 31 of year 2.

(b)(1) *Termination of customer relationship*. You are not required to provide an annual notice to a former customer.

(2) *Examples*. Your customer becomes a former customer when:

(i) In the case of a deposit account, the account is inactive under your policies;

(ii) In the case of a closed-end loan, the customer pays the loan in full, you charge off the loan, or you sell the loan without retaining servicing rights;

(iii) In the case of a credit card relationship or other open-end credit relationship, you no longer provide any statements or notices to the customer concerning that relationship or you sell the credit card receivables without retaining servicing rights; or

(iv) You have not communicated with the customer about the relationship for a period of 12 consecutive months, other than to provide annual privacy notices or promotional material.

(c) *Special rule for loans*. If you do not have a customer relationship with a consumer under the special rule for loans in § 332.4(c)(2), then you need not provide an annual notice to that consumer under this section.

(d) *Delivery*. When you are required to deliver an annual privacy notice by this section, you must deliver it according to § 332.9.

§ 332.6 Information to be included in privacy notices.

(a) *General rule*. The initial, annual and revised privacy notices that you provide under §§ 332.4, 332.5, and 332.8 must include each of the following items of information, in addition to

any other information you wish to provide, that applies to you and to the consumers to whom you send your privacy notice:

(1) The categories of nonpublic personal information that you collect;

(2) The categories of nonpublic personal information that you disclose;

(3) The categories of affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information, other than those parties to whom you disclose information under §§ 332.14 and 332.15;

(4) The categories of nonpublic personal information about your former customers that you disclose and the categories of affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information about your former customers, other than those parties to whom you disclose information under §§ 332.14 and 332.15;

(5) If you disclose nonpublic personal information to a nonaffiliated third party under § 332.13 (and no other exception in § 332.14 or 332.15 applies to that disclosure), a separate statement of the categories of information you disclose and the categories of third parties with whom you have contracted;

(6) An explanation of the consumer's right under § 332.10(a) to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, including the method(s) by which the consumer may exercise that right at that time;

(7) Any disclosures that you make under section 603(d)(2)(A)(iii) of the Fair Credit Reporting Act (15 U.S.C. 1681a(d)(2)(A)(iii)) (that is, notices regarding the ability to opt out of disclosures of information among affiliates);

(8) Your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information; and

(9) Any disclosure that you make under paragraph (b) of this section.

(b) *Description of nonaffiliated third parties subject to exceptions.* If you disclose nonpublic personal information to third parties as authorized under §§ 332.14 and 332.15, you are not required to list those exceptions in the initial or annual privacy notices required by §§ 332.4 and 332.5. When describing the categories with respect to those parties, it is sufficient to state that you make disclosures to other nonaffiliated companies:

(1) For your everyday business purposes, such as [*include all that apply*] to process transactions, maintain account(s), respond to court orders and legal investigations, or report to credit bureaus; or

(2) As permitted by law.

(c) *Examples*—(1) *Categories of nonpublic personal information that you collect.* You satisfy the requirement to categorize the nonpublic personal information that you collect if you list the following categories, as applicable:

(i) Information from the consumer;

(ii) Information about the consumer's transactions with you or your affiliates;

(iii) Information about the consumer's transactions with nonaffiliated third parties; and

(iv) Information from a consumer reporting agency.

(2) *Categories of nonpublic personal information you disclose*—(i) You satisfy the requirement to categorize the nonpublic personal information that you disclose if you list the categories described in paragraph (c)(1) of this section, as applicable, and a few examples to illustrate the types of information in each category.

(ii) If you reserve the right to disclose all of the nonpublic personal information about consumers that you collect, you may simply state that fact without describing the categories or examples of the nonpublic personal information you disclose.

(3) *Categories of affiliates and nonaffiliated third parties to whom you disclose.* You satisfy the requirement to categorize the affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information if you list the following categories, as applicable, and a few examples to illustrate the types of third parties in each category.

(i) Financial service providers;

(ii) Non-financial companies; and

(iii) Others.

(4) *Disclosures under exception for service providers and joint marketers.* If you disclose nonpublic personal information under the exception in § 332.13 to a

nonaffiliated third party to market products or services that you offer alone or jointly with another financial institution, you satisfy the disclosure requirement of paragraph (a)(5) of this section if you:

(i) List the categories of nonpublic personal information you disclose, using the same categories and examples you used to meet the requirements of paragraph (a)(2) of this section, as applicable; and

(ii) State whether the third party is:

(A) A service provider that performs marketing services on your behalf or on behalf of you and another financial institution; or

(B) A financial institution with whom you have a joint marketing agreement.

(5) *Simplified notices.* If you do not disclose, and do not wish to reserve the right to disclose, nonpublic personal information about customers or former customers to affiliates or nonaffiliated third parties except as authorized under §§ 332.14 and 332.15, you may simply state that fact, in addition to the information you must provide under paragraphs (a)(1), (a)(8), (a)(9), and (b) of this section.

(6) *Confidentiality and security.* You describe your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information if you do both of the following:

(i) Describe in general terms who is authorized to have access to the information; and

(ii) State whether you have security practices and procedures in place to ensure the confidentiality of the information in accordance with your policy. You are not required to describe technical information about the safeguards you use.

(d) *Short-form initial notice with opt out notice for non-customers*—(1) You may satisfy the initial notice requirements in §§ 332.4(a)(2), 332.7(b), and 332.7(c) for a consumer who is not a customer by providing a short-form initial notice at the same time as you deliver an opt out notice as required in § 332.7.

(2) A short-form initial notice must:

(i) Be clear and conspicuous;

(ii) State that your privacy notice is available upon request; and

(iii) Explain a reasonable means by which the consumer may obtain that notice.

(3) You must deliver your short-form initial notice according to § 332.9. You are not required to deliver your privacy notice with your short-form initial notice. You instead may simply provide the consumer a reasonable means to obtain your privacy notice. If a consumer who receives your short-form notice requests your privacy notice, you must deliver your privacy notice according to § 332.9.

(4) *Examples of obtaining privacy notice.* You provide a reasonable means by which a consumer may obtain a copy of your privacy notice if you:

(i) Provide a toll-free telephone number that the consumer may call to request the notice; or

(ii) For a consumer who conducts business in person at your office, maintain copies of the notice on hand that you provide to the consumer immediately upon request.

(e) *Future disclosures.* Your notice may include:

(1) Categories of nonpublic personal information that you reserve the right to disclose in the future, but do not currently disclose; and

(2) Categories of affiliates or nonaffiliated third parties to whom you reserve the right in the future to disclose, but to whom you do not currently disclose, nonpublic personal information.

(f) *Model privacy form.* Pursuant to § 332.2(a) of this part, a model privacy form that meets the notice content requirements of this section is included in appendix A of this part.

[65 FR 35216, June 1, 2000, as amended at 74 FR 62935, Dec. 1, 2009]

§ 332.7 Form of opt out notice to consumers; opt out methods.

(a)(1) *Form of opt out notice.* If you are required to provide an opt out notice under § 332.10(a), you must provide a clear and conspicuous notice to each of your consumers that accurately explains the right to opt out under that section. The notice must state:

(i) That you disclose or reserve the right to disclose nonpublic personal information about your consumer to a nonaffiliated third party;

(ii) That the consumer has the right to opt out of that disclosure; and

(iii) A reasonable means by which the consumer may exercise the opt out right.

(2) *Examples*—(i) *Adequate opt out notice.* You provide adequate notice that the consumer can opt out of the disclosure of nonpublic personal information to a nonaffiliated third party if you:

(A) Identify all of the categories of nonpublic personal information that you disclose or reserve the right to disclose, and all of the categories of nonaffiliated third parties to which you disclose the information, as described in § 332.6(a)(2) and (3), and state that the consumer can opt out of the disclosure of that information; and

(B) Identify the financial products or services that the consumer obtains from you, either singly or jointly, to which the opt out direction would apply.

(ii) *Reasonable opt out means.* You provide a reasonable means to exercise an opt out right if you:

(A) Designate check-off boxes in a prominent position on the relevant forms with the opt out notice;

(B) Include a reply form together with the opt out notice;

(C) Provide an electronic means to opt out, such as a form that can be sent via electronic mail or a process at your web site, if the consumer agrees to the electronic delivery of information; or

(D) Provide a toll-free telephone number that consumers may call to opt out.

(iii) *Unreasonable opt out means.* You *do not* provide a reasonable means of opting out if:

(A) The only means of opting out is for the consumer to write his or her own letter to exercise that opt out right; or

(B) The only means of opting out as described in any notice subsequent to the initial notice is to use a check-off box that you provide with the initial notice but did not include with the subsequent notice.

(iv) *Specific opt out means.* You may require each consumer to opt out through a specific means, as long as that means is reasonable for that consumer.

(b) *Same form as initial notice permitted.* You may provide the opt out notice together with or on the same written or electronic form as the initial notice you provide in accordance with § 332.4.

(c) *Initial notice required when opt out notice delivered subsequent to initial notice.* If you provide the opt out notice later than required for the initial notice in accordance with § 332.4, you must also include a copy of the initial notice with the opt out notice in writing or, if the consumer agrees, electronically.

(d) *Joint relationships.* (1) If two or more consumers jointly obtain a financial product or service from you, you may provide a single opt out notice. Your opt out notice must explain how you will treat an opt out direction by a joint consumer (as explained in paragraph (d)(5) of this section).

(2) Any of the joint consumers may exercise the right to opt out. You may either:

(i) Treat an opt out direction by a joint consumer as applying to all of the associated joint consumers; or

(ii) Permit each joint consumer to opt out separately.

(3) If you permit each joint consumer to opt out separately, you must permit one of the joint consumers to opt out on behalf of all of the joint consumers.

(4) You may not require *all* joint consumers to opt out before you implement *any* opt out direction.

(5) *Example.* If John and Mary have a joint checking account with you and arrange for you to send statements to John's address, you may do any of the following, but you must explain in your opt out notice which opt out policy you will follow:

(i) Send a single opt out notice to John's address, but you must accept an opt out direction from either John or Mary.

(ii) Treat an opt out direction by either John or Mary as applying to the entire account. If you do so, and John opts out, you may not require Mary to opt out as well before implementing John's opt out direction.

(iii) Permit John and Mary to make different opt out directions. If you do so:

(A) You must permit John and Mary to opt out for each other;

(B) If both opt out, you must permit both to notify you in a single response (such as on a form or through a telephone call); and

(C) If John opts out and Mary does not, you may only disclose nonpublic personal information about Mary, but not about John and not about John and Mary jointly.

(e) *Time to comply with opt out.* You must comply with a consumer's opt out direction as soon as reasonably practicable after you receive it.

(f) *Continuing right to opt out.* A consumer may exercise the right to opt out at any time.

(g) *Duration of consumer's opt out direction.* (1) A consumer's direction to opt out under this section is effective until the consumer revokes it in writing or, if the consumer agrees, electronically.

(2) When a customer relationship terminates, the customer's opt out direction continues to apply to the nonpublic personal information that you collected during or related to that relationship. If the individual subsequently establishes a new customer relationship with you, the opt out direction that applied to the former relationship does not apply to the new relationship.

(h) *Delivery.* When you are required to deliver an opt out notice by this section, you must deliver it according to § 332.9.

(i) *Model privacy form.* Pursuant to § 332.2(a) of this part, a model privacy form that meets the notice content requirements of this section is included in Appendix A of this part.

[65 FR 35216, June 1, 2000, as amended at 74 FR 62936, Dec. 1, 2009]

§ 332.8 Revised privacy notices.

(a) *General rule.* Except as otherwise authorized in this part, you must not, directly or through any affiliate, disclose any nonpublic personal information about a consumer to a nonaffiliated third party other than as described in the initial notice that you provided to that consumer under § 332.4, unless:

(1) You have provided to the consumer a clear and conspicuous revised notice that accurately describes your policies and practices;

(2) You have provided to the consumer a new opt out notice;

(3) You have given the consumer a reasonable opportunity, before you disclose the information to the nonaffiliated third party, to opt out of the disclosure; and

(4) The consumer does not opt out.

(b) *Examples*—(1) Except as otherwise permitted by §§ 332.13, 332.14, and 332.15, you must provide a revised notice before you:

(i) Disclose a new category of nonpublic personal information to any nonaffiliated third party;

(ii) Disclose nonpublic personal information to a new category of nonaffiliated third party; or

(iii) Disclose nonpublic personal information about a former customer to a nonaffiliated third party, if that former customer has not had the opportunity to exercise an opt out right regarding that disclosure.

(2) A revised notice is not required if you disclose nonpublic personal information to a new nonaffiliated third party that you adequately described in your prior notice.

(c) *Delivery.* When you are required to deliver a revised privacy notice by this section, you must deliver it according to § 332.9.

§ 332.9 Delivering privacy and opt out notices.

(a) *How to provide notices.* You must provide any privacy notices and opt out notices, including short-form initial notices, that this part requires so that each consumer can reasonably be expected to receive actual notice in writing or, if the consumer agrees, electronically.

(b)(1) *Examples of reasonable expectation of actual notice.* You may reasonably expect that a consumer will receive actual notice if you:

(i) Hand-deliver a printed copy of the notice to the consumer;

(ii) Mail a printed copy of the notice to the last known address of the consumer;

(iii) For the consumer who conducts transactions electronically, post the

notice on the electronic site and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular financial product or service; or

(iv) For an isolated transaction with the consumer, such as an ATM transaction, post the notice on the ATM screen and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining the particular financial product or service.

(2) *Examples of unreasonable expectation of actual notice.* You may *not*, however, reasonably expect that a consumer will receive actual notice of your privacy policies and practices if you:

(i) Only post a sign in your branch or office or generally publish advertisements of your privacy policies and practices; or

(ii) Send the notice via electronic mail to a consumer who does not obtain a financial product or service from you electronically.

(c) *Annual notices only.* You may reasonably expect that a customer will receive actual notice of your annual privacy notice if:

(1) The customer uses your web site to access financial products and services electronically and agrees to receive notices at the web site, and you post your current privacy notice continuously in a clear and conspicuous manner on the web site; or

(2) The customer has requested that you refrain from sending any information regarding the customer relationship, and your current privacy notice remains available to the customer upon request.

(d) *Oral description of notice insufficient.* You may not provide any notice required by this part solely by orally explaining the notice, either in person or over the telephone.

(e) *Retention or accessibility of notices for customers.* (1) For customers only, you must provide the initial notice required by § 332.4(a)(1), the annual notice required by § 332.5(a), and the revised notice required by § 332.8 so that the customer can retain them or obtain them later in writing or, if the customer agrees, electronically.

(2) *Examples of retention or accessibility.* You provide a privacy notice to the customer so that the customer can retain it or obtain it later if you:

(i) Hand-deliver a printed copy of the notice to the customer;

(ii) Mail a printed copy of the notice to the last known address of the customer; or

(iii) Make your current privacy notice available on a web site (or a link to another web site) for the customer who obtains a financial product or service electronically and agrees to receive the notice at the web site.

(f) *Joint notice with other financial institutions.* You may provide a joint notice from you and one or more of your affiliates or other financial institutions, as identified in the notice, as long as the notice is accurate with respect to you and the other institutions.

(g) *Joint relationships.* If two or more consumers jointly obtain a financial product or service from you, you may satisfy the initial, annual, and revised notice requirements of §§ 332.4(a), 332.5(a), and 332.8(a), respectively, by providing one notice to those consumers jointly.

Subpart B—Limits on Disclosures

§ 332.10 Limits on disclosure of nonpublic personal information to nonaffiliated third parties.

(a)(1) *Conditions for disclosure.* Except as otherwise authorized in this part, you may not, directly or through any affiliate, disclose any nonpublic personal information about a consumer to a nonaffiliated third party unless:

(i) You have provided to the consumer an initial notice as required under § 332.4;

(ii) You have provided to the consumer an opt out notice as required in § 332.7;

(iii) You have given the consumer a reasonable opportunity, before you disclose the information to the nonaffiliated third party, to opt out of the disclosure; and

(iv) The consumer does not opt out.

(2) *Opt out definition.* Opt out means a direction by the consumer that you not disclose nonpublic personal information about that consumer to a nonaffiliated third party, other than as permitted by §§ 332.13, 332.14, and 332.15.

(3) *Examples of reasonable opportunity to opt out.* You provide a consumer with a reasonable opportunity to opt out if:

(i) *By mail.* You mail the notices required in paragraph (a)(1) of this section to the consumer and allow the consumer to opt out by mailing a form, calling a toll-free telephone number, or any other reasonable means within 30 days from the date you mailed the notices.

(ii) *By electronic means.* A customer opens an on-line account with you and agrees to receive the notices required in paragraph (a)(1) of this section electronically, and you allow the customer to opt out by any reasonable means within 30 days after the date that the customer acknowledges receipt of the notices in conjunction with opening the account.

(iii) *Isolated transaction with consumer.* For an isolated transaction, such as the purchase of a cashier's check by a consumer, you provide the consumer with a reasonable opportunity to opt out if you provide the notices required in paragraph (a)(1) of this section at the time of the transaction and request that the consumer decide, as a necessary part of the transaction, whether to opt out before completing the transaction.

(b) *Application of opt out to all consumers and all nonpublic personal information.* (1) You must comply with this section, regardless of whether you and the consumer have established a customer relationship.

(2) Unless you comply with this section, you may not, directly or through any affiliate, disclose any nonpublic personal information about a consumer that you have collected, regardless of whether you collected it before or after receiving the direction to opt out from the consumer.

(c) *Partial opt out.* You may allow a consumer to select certain nonpublic personal information or certain nonaffiliated third parties with respect to which the consumer wishes to opt out.

§ 332.11 Limits on redisclosure and reuse of information.

(a)(1) *Information you receive under an exception.* If you receive nonpublic personal information from a nonaffiliated financial institution under an exception in § 332.14 or 332.15 of this part, your disclosure and use of that information is limited as follows:

(i) You may disclose the information to the affiliates of the financial institution from which you received the information;

(ii) You may disclose the information to your affiliates, but your affiliates may, in turn, disclose and use the information only to the extent that you may disclose and use the information; and

(iii) You may disclose and use the information pursuant to an exception in § 332.14 or 332.15 in the ordinary course of business to carry out the activity covered by the exception under which you received the information.

(2) *Example.* If you receive a customer list from a nonaffiliated financial institution in order to provide account processing services under the exception in § 332.14(a), you may disclose that information under any exception in § 332.14 or 332.15 in the ordinary course of business in order to provide those services. For example, you could disclose the information in response to a properly authorized subpoena or to your attorneys, accountants, and auditors. You could not disclose that information to a third party for marketing purposes or use that information for your own marketing purposes.

(b)(1) *Information you receive outside of an exception.* If you receive nonpublic personal information from a nonaffiliated financial institution other than under an exception in § 332.14 or 332.15 of this part, you may disclose the information only:

(i) To the affiliates of the financial institution from which you received the information;

(ii) To your affiliates, but your affiliates may, in turn, disclose the information only to the extent that you can disclose the information; and

(iii) To any other person, if the disclosure would be lawful if made directly to that person by the financial institution from which you received the information.

(2) *Example.* If you obtain a customer list from a nonaffiliated financial institution outside of the exceptions in § 332.14 and 332.15:

(i) You may use that list for your own purposes; and

(ii) You may disclose that list to another nonaffiliated third party only if the financial institution from which you purchased the list could have lawfully disclosed the list to that third party. That is, you may disclose the list in accordance with the privacy policy of the financial institution from which you received the list, as limited by the opt out direction of each consumer whose nonpublic personal information you intend to disclose, and you may disclose the list in accordance with an exception in § 332.14 or 332.15, such as to your attorneys or accountants.

(c) *Information you disclose under an exception.* If you disclose nonpublic personal information to a nonaffiliated third party under an exception in § 332.14 or 332.15 of this part, the third party may disclose and use that information only as follows:

(1) The third party may disclose the information to your affiliates;

(2) The third party may disclose the information to its affiliates, but its affiliates may, in turn, disclose and use the information only to the extent that the third party may disclose and use the information; and

(3) The third party may disclose and use the information pursuant to an exception in § 332.14 or 332.15 in the ordinary course of business to carry out the activity covered by the exception under which it received the information.

(d) *Information you disclose outside of an exception.* If you disclose nonpublic personal information to a nonaffiliated third party other than under an exception in § 332.14 or 332.15 of this part, the third party may disclose the information only:

(1) To your affiliates;

(2) To its affiliates, but its affiliates, in turn, may disclose the information only to the extent the third party can disclose the information; and

(3) To any other person, if the disclosure would be lawful if you made it directly to that person.

§ 332.12 Limits on sharing account number information for marketing purposes.

(a) *General prohibition on disclosure of account numbers.* You must not, directly or through an affiliate, disclose, other than to a consumer reporting agency, an account number or similar form of access number or access code for a consumer's credit card account, deposit account, or transaction account to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer.

(b) *Exceptions.* Paragraph (a) of this section does not apply if you disclose an account number or similar form of access number or access code:

(1) To your agent or service provider solely in order to perform marketing for your own products or services, as long as the agent or service provider is not authorized to directly initiate charges to the account; or

(2) To a participant in a private label credit card program or an affinity or similar program where the participants in the program are identified to the customer when the customer enters into the program.

(c) *Examples*—(1) *Account number.* An account number, or similar form of access number or access code, does not include a number or code in an encrypted form, as long as you do not provide the recipient with a means to decode the number or code.

(2) *Transaction account.* A transaction account is an account other than a deposit account or a credit card account. A transaction account does not include an account to which third parties cannot initiate charges.

Subpart C—Exceptions

§ 332.13 Exception to opt out requirements for service providers and joint marketing.

(a) *General rule.* (1) The opt out requirements in §§ 332.7 and 332.10 do not apply when you provide nonpublic personal information to a nonaffiliated third party to perform services for you or functions on your behalf, if you:

(i) Provide the initial notice in accordance with § 332.4; and

(ii) Enter into a contractual agreement with the third party that prohibits the third party from disclosing or using the information other than to carry out the purposes for which you disclosed the information, including use under an exception in § 332.14 or 332.15 in the ordinary course of business to carry out those purposes.

(2) *Example*. If you disclose nonpublic personal information under this section to a financial institution with which you perform joint marketing, your contractual agreement with that institution meets the requirements of paragraph (a)(1)(ii) of this section if it prohibits the institution from disclosing or using the nonpublic personal information except as necessary to carry out the joint marketing or under an exception in § 332.14 or 332.15 in the ordinary course of business to carry out that joint marketing.

(b) *Service may include joint marketing*. The services a nonaffiliated third party performs for you under paragraph (a) of this section may include marketing of your own products or services or marketing of financial products or services offered pursuant to joint agreements between you and one or more financial institutions.

(c) *Definition of joint agreement*. For purposes of this section, joint agreement means a written contract pursuant to which you and one or more financial institutions jointly offer, endorse, or sponsor a financial product or service.

§ 332.14 Exceptions to notice and opt out requirements for processing and servicing transactions.

(a) *Exceptions for processing transactions at consumer's request*. The requirements for initial notice in § 332.4(a)(2), for the opt out in §§ 332.7 and 332.10 and for service providers and joint marketing in § 332.13 do not apply if you disclose nonpublic personal information as necessary to effect, administer, or enforce a transaction that a consumer requests or authorizes, or in connection with:

(1) Servicing or processing a financial product or service that a consumer requests or authorizes;

(2) Maintaining or servicing the consumer's account with you, or with another entity as part of a private label credit card program or other extension of credit on behalf of such entity; or

(3) A proposed or actual securitization, secondary market sale (including sales of servicing rights), or similar transaction related to a transaction of the consumer.

(b) *Necessary to effect, administer, or enforce a transaction* means that the disclosure is:

(1) Required, or is one of the lawful or appropriate methods, to enforce your rights or the rights of other persons engaged in carrying out the financial transaction or providing the product or service; or

(2) Required, or is a usual, appropriate or acceptable method:

(i) To carry out the transaction or the product or service business of which the transaction is a part, and record, service, or maintain the consumer's account in the ordinary course of providing the financial service or financial product;

(ii) To administer or service benefits or claims relating to the transaction or the product or service business of which it is a part;

(iii) To provide a confirmation, statement, or other record of the transaction, or information on the status or value of the financial service or financial product to the consumer or the consumer's agent or broker;

(iv) To accrue or recognize incentives or bonuses associated with the transaction that are provided by you or any other party;

(v) To underwrite insurance at the consumer's request or for reinsurance purposes, or for any of the following purposes as they relate to a consumer's insurance: account administration, reporting, investigating, or preventing fraud or material misrepresentation, processing premium payments, processing insurance claims, administering insurance benefits (including utilization review activities), participating in research projects, or as otherwise required or specifically permitted by Federal or State law; or

(vi) In connection with:

(A) The authorization, settlement, billing, processing, clearing, transferring, reconciling or collection of amounts charged, debited, or otherwise

paid using a debit, credit, or other payment card, check, or account number, or by other payment means;

(B) The transfer of receivables, accounts, or interests therein; or

(C) The audit of debit, credit, or other payment information.

§ 332.15 Other exceptions to notice and opt out requirements.

(a) *Exceptions to opt out requirements.* The requirements for initial notice in § 332.4(a)(2), for the opt out in §§ 332.7 and 332.10, and for service providers and joint marketing in § 332.13 do not apply when you disclose nonpublic personal information:

(1) With the consent or at the direction of the consumer, provided that the consumer has not revoked the consent or direction;

(2)(i) To protect the confidentiality or security of your records pertaining to the consumer, service, product, or transaction;

(ii) To protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability;

(iii) For required institutional risk control or for resolving consumer disputes or inquiries;

(iv) To persons holding a legal or beneficial interest relating to the consumer; or

(v) To persons acting in a fiduciary or representative capacity on behalf of the consumer;

(3) To provide information to insurance rate advisory organizations, guaranty funds or agencies, agencies that are rating you, persons that are assessing your compliance with industry standards, and your attorneys, accountants, and auditors;

(4) To the extent specifically permitted or required under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 *et seq.*), to law enforcement agencies (including a federal functional regulator, the Secretary of the Treasury, with respect to 31 U.S.C. Chapter 53, Subchapter II (Records and Reports on Monetary Instruments and Transactions) and 12 U.S.C. Chapter 21 (Financial Recordkeeping), a State insurance authority, with respect to any person domiciled in that insurance authority's State that is engaged in providing insurance, and the Federal Trade Commission), self-regulatory organizations, or for an investigation on a matter related to public safety;

(5)(i) To a consumer reporting agency in accordance with the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*), or

(ii) From a consumer report reported by a consumer reporting agency;

(6) In connection with a proposed or actual sale, merger, transfer, or exchange of all or a portion of a business or operating unit if the disclosure of nonpublic personal information concerns solely consumers of such business or unit; or

(7)(i) To comply with Federal, State, or local laws, rules and other applicable legal requirements;

(ii) To comply with a properly authorized civil, criminal, or regulatory investigation, or subpoena or summons by Federal, State, or local authorities; or

(iii) To respond to judicial process or government regulatory authorities having jurisdiction over you for examination, compliance, or other purposes as authorized by law.

(b) *Examples of consent and revocation of consent.* (1) A consumer may specifically consent to your disclosure to a nonaffiliated insurance company of the fact that the consumer has applied to you for a mortgage so that the insurance company can offer homeowner's insurance to the consumer.

(2) A consumer may revoke consent by subsequently exercising the right to opt out of future disclosures of nonpublic personal information as permitted under § 332.7(f).

Subpart D—Relation to Other Laws; Effective Date

§ 332.16 Protection of Fair Credit Reporting Act.

Nothing in this part shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*), and no inference shall be drawn on the basis of the provisions of this part regarding whether information is transaction or experience information under section 603 of that Act.

§ 332.17 Relation to State laws.

(a) *In general.* This part shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such State statute, regulation, order, or interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.

(b) *Greater protection under State law.* For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part, as determined by the Federal Trade Commission, after consultation with the FDIC, on the Federal Trade Commission's own motion, or upon the petition of any interested party.

§ 332.18 Effective date; transition rule.

(a) *Effective date.* This part is effective November 13, 2000. In order to provide sufficient time for you to establish policies and systems to comply with the requirements of this part, the FDIC has extended the time for compliance with this part until July 1, 2001.

(b)(1) *Notice requirement for consumers who are your customers on the compliance date.* By July 1, 2001, you must have provided an initial notice, as required by § 332.4, to consumers who are your customers on July 1, 2001.

(2) *Example.* You provide an initial notice to consumers who are your customers on July 1, 2001, if, by that date, you have established a system for providing an initial notice to all new customers and have mailed the initial notice to all your existing customers.

(c) *Two-year grandfathering of service agreements.* Until July 1, 2002, a contract that you have entered into with a nonaffiliated third party to perform services for you or functions on your behalf satisfies the provisions of § 332.13(a)(1)(ii) of this part, even if the contract does not include a requirement that the third party maintain the confidentiality of nonpublic personal information, as long as you entered into the contract on or before July 1, 2000.

APPENDIX A TO PART 332—MODEL PRIVACY FORM

A. The Model Privacy Form

Version 1: Model Form With No Opt-Out.

Rev. [insert date]

FACTS	WHAT DOES [NAME OF FINANCIAL INSTITUTION] DO WITH YOUR PERSONAL INFORMATION?
Why?	Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.
What?	The types of personal information we collect and share depend on the product or service you have with us. This information can include: ■ Social Security number and [income] ■ [account balances] and [payment history] ■ [credit history] and [credit scores] When you are *no longer* our customer, we continue to share your information as described in this notice.
How?	All financial companies need to share customers' personal information to run their everyday business. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons [name of financial institution] chooses to share; and whether you can limit this sharing.

Reasons we can share your personal information	Does [name of financial institution] share?	Can you limit this sharing?
For our everyday business purposes— such as to process your transactions, maintain your account(s), respond to court orders and legal investigations, or report to credit bureaus		
For our marketing purposes— to offer our products and services to you		
For joint marketing with other financial companies		
For our affiliates' everyday business purposes— information about your transactions and experiences		
For our affiliates' everyday business purposes— information about your creditworthiness		
For our affiliates to market to you		
For nonaffiliates to market to you		

Questions?	Call [phone number] or go to [website]

Page 2

Who we are	
Who is providing this notice?	[insert]

What we do	
How does [name of financial institution] protect my personal information?	To protect your personal information from unauthorized access and use, we use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings. [insert]
How does [name of financial institution] collect my personal information?	We collect your personal information, for example, when you ■ [open an account] or [deposit money] ■ [pay your bills] or [apply for a loan] ■ [use your credit or debit card] [We also collect your personal information from other companies.] **OR** [We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.]
Why can't I limit all sharing?	Federal law gives you the right to limit only ■ sharing for affiliates' everyday business purposes—information about your creditworthiness ■ affiliates from using your information to market to you ■ sharing for nonaffiliates to market to you State laws and individual companies may give you additional rights to limit sharing. [See below for more on your rights under state law.]

Definitions	
Affiliates	Companies related by common ownership or control. They can be financial and nonfinancial companies. ■ *[affiliate information]*
Nonaffiliates	Companies not related by common ownership or control. They can be financial and nonfinancial companies. ■ *[nonaffiliate information]*
Joint marketing	A formal agreement between nonaffiliated financial companies that together market financial products or services to you. ■ *[joint marketing information]*

Other important information
[insert other important information]

Version 2: Model Form with Opt-Out by Telephone and/or Online.

Rev. [insert date]

FACTS	WHAT DOES [NAME OF FINANCIAL INSTITUTION] DO WITH YOUR PERSONAL INFORMATION?
Why?	Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.
What?	The types of personal information we collect and share depend on the product or service you have with us. This information can include: ■ Social Security number and [income] ■ [account balances] and [payment history] ■ [credit history] and [credit scores]
How?	All financial companies need to share customers' personal information to run their everyday business. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons [name of financial institution] chooses to share; and whether you can limit this sharing.

Reasons we can share your personal information	Does [name of financial institution] share?	Can you limit this sharing?
For our everyday business purposes— such as to process your transactions, maintain your account(s), respond to court orders and legal investigations, or report to credit bureaus		
For our marketing purposes— to offer our products and services to you		
For joint marketing with other financial companies		
For our affiliates' everyday business purposes— information about your transactions and experiences		
For our affiliates' everyday business purposes— information about your creditworthiness		
For our affiliates to market to you		
For nonaffiliates to market to you		

To limit our sharing	■ Call **[phone number]**—our menu will prompt you through your choice(s) **or** ■ Visit us online: **[website]** **Please note:** If you are a *new* customer, we can begin sharing your information [30] days from the date we sent this notice. When you are *no longer* our customer, we continue to share your information as described in this notice. However, you can contact us at any time to limit our sharing.
Questions?	Call [phone number] or go to [website]

Page 2

Who we are	
Who is providing this notice?	[insert]

What we do	
How does [name of financial institution] protect my personal information?	To protect your personal information from unauthorized access and use, we use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings. [insert]
How does [name of financial institution] collect my personal information?	We collect your personal information, for example, when you ■ [open an account] or [deposit money] ■ [pay your bills] or [apply for a loan] ■ [use your credit or debit card] [We also collect your personal information from other companies.] **OR** [We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.]
Why can't I limit all sharing?	Federal law gives you the right to limit only ■ sharing for affiliates' everyday business purposes—information about your creditworthiness ■ affiliates from using your information to market to you ■ sharing for nonaffiliates to market to you State laws and individual companies may give you additional rights to limit sharing. [See below for more on your rights under state law.]
What happens when I limit sharing for an account I hold jointly with someone else?	[Your choices will apply to everyone on your account.] **OR** [Your choices will apply to everyone on your account—unless you tell us otherwise.]

Definitions	
Affiliates	Companies related by common ownership or control. They can be financial and nonfinancial companies. ■ *[affiliate information]*
Nonaffiliates	Companies not related by common ownership or control. They can be financial and nonfinancial companies. ■ *[nonaffiliate information]*
Joint marketing	A formal agreement between nonaffiliated financial companies that together market financial products or services to you. ■ *[joint marketing information]*

Other important information
[insert other important information]

Version 3: Model Form with Mail-In Opt-Out Form.

Rev. [insert date]

FACTS	WHAT DOES [NAME OF FINANCIAL INSTITUTION] DO WITH YOUR PERSONAL INFORMATION?
Why?	Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.
What?	The types of personal information we collect and share depend on the product or service you have with us. This information can include: ■ Social Security number and [income] ■ [account balances] and [payment history] ■ [credit history] and [credit scores]
How?	All financial companies need to share customers' personal information to run their everyday business. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons [name of financial institution] chooses to share; and whether you can limit this sharing.

Reasons we can share your personal information	Does [name of financial institution] share?	Can you limit this sharing?
For our everyday business purposes— such as to process your transactions, maintain your account(s), respond to court orders and legal investigations, or report to credit bureaus		
For our marketing purposes— to offer our products and services to you		
For joint marketing with other financial companies		
For our affiliates' everyday business purposes— information about your transactions and experiences		
For our affiliates' everyday business purposes— information about your creditworthiness		
For our affiliates to market to you		
For nonaffiliates to market to you		

To limit our sharing	■ Call **[phone number]**—our menu will prompt you through your choice(s) ■ Visit us online: **[website]** or ■ Mail the form below **Please note:** If you are a *new* customer, we can begin sharing your information [30] days from the date we sent this notice. When you are *no longer* our customer, we continue to share your information as described in this notice. However, you can contact us at any time to limit our sharing.
Questions?	Call [phone number] or go to [website]

✂

Mail-in Form

Leave Blank OR
[If you have a joint account, your choice(s) will apply to everyone on your account unless you mark below.
❑ Apply my choices only to me]

Mark any/all you want to limit:

❑ Do not share information about my creditworthiness with your affiliates for their everyday business purposes.

❑ Do not allow your affiliates to use my personal information to market to me.

❑ Do not share my personal information with nonaffiliates to market their products and services to me.

Name	
Address	
City, State, Zip	
[Account #]	

Mail to:
[Name of Financial Institution]
[Address1]
[Address2]
[City], [ST] [ZIP]

Page 2

Who we are	
Who is providing this notice?	[insert]

What we do	
How does [name of financial institution] protect my personal information?	To protect your personal information from unauthorized access and use, we use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings. [insert]
How does [name of financial institution] collect my personal information?	We collect your personal information, for example, when you ■ [open an account] or [deposit money] ■ [pay your bills] or [apply for a loan] ■ [use your credit or debit card] [We also collect your personal information from other companies.] **OR** [We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.]
Why can't I limit all sharing?	Federal law gives you the right to limit only ■ sharing for affiliates' everyday business purposes—information about your creditworthiness ■ affiliates from using your information to market to you ■ sharing for nonaffiliates to market to you State laws and individual companies may give you additional rights to limit sharing. [See below for more on your rights under state law.]
What happens when I limit sharing for an account I hold jointly with someone else?	[Your choices will apply to everyone on your account.] **OR** [Your choices will apply to everyone on your account—unless you tell us otherwise.]

Definitions	
Affiliates	Companies related by common ownership or control. They can be financial and nonfinancial companies. ■ *[affiliate information]*
Nonaffiliates	Companies not related by common ownership or control. They can be financial and nonfinancial companies. ■ *[nonaffiliate information]*
Joint marketing	A formal agreement between nonaffiliated financial companies that together market financial products or services to you. ■ *[joint marketing information]*

Other important information
[insert other important information]

Version 4. Optional Mail-in Form.

Mail-in Form

Leave Blank OR [If you have a joint account, your choice(s) will apply to everyone on your account unless you mark below. ❑ Apply my choices only to me]	Mark any/all you want to limit: ❑ Do not share information about my creditworthiness with your affiliates for their everyday business purposes. ❑ Do not allow your affiliates to use my personal information to market to me. ❑ Do not share my personal information with nonaffiliates to market their products and services to me.
	Name
	Address
	City, State, Zip
	[Account #]

Mail To: [Name of Financial Institution], [Address1] [Address2], [City], [ST] [ZIP]

B. General Instructions

1. How the Model Privacy Form Is Used

(a) The model form may be used, at the option of a financial institution, including a group of financial institutions that use a common privacy notice, to meet the content requirements of the privacy notice and opt-out notice set forth in §§332.6 and 332.7 of this part.

(b) The model form is a standardized form, including page layout, content, format, style, pagination, and shading. Institutions seeking to obtain the safe harbor through use of the model form may modify it only as described in these Instructions.

(c) Note that disclosure of certain information, such as assets, income, and information from a consumer reporting agency, may give rise to obligations under the Fair Credit Reporting Act [15 U.S.C. 1681–1681x] (FCRA), such as a requirement to permit a consumer to opt out of disclosures to affiliates or designation as a consumer reporting agency if disclosures are made to nonaffiliated third parties.

(d) The word ''customer'' may be replaced by the word ''member'' whenever it appears in the model form, as appropriate.

2. The Contents of the Model Privacy Form

The model form consists of two pages, which may be printed on both sides of a single sheet of paper, or may appear on two separate pages. Where an institution provides a long list of institutions at the end of the model form in accordance with Instruction C.3(a)(1), or provides additional information in accordance with Instruction C.3(c), and such list or additional information exceeds the space available on page two of the model form, such list or additional information may extend to a third page.

(a) *Page One*. The first page consists of the following components:

(1) Date last revised (upper right-hand corner).

(2) Title.

(3) Key frame (Why?, What?, How?).

(4) Disclosure table (''Reasons we can share your personal information'').

(5) ''To limit our sharing'' box, as needed, for the financial institution's opt-out information.

(6) ''Questions'' box, for customer service contact information.

(7) Mail-in opt-out form, as needed.

(b) *Page Two*. The second page consists of the following components:

(1) Heading (Page 2).

(2) Frequently Asked Questions (''Who we are'' and ''What we do'').

(3) Definitions.

(4) ''Other important information'' box, as needed.

3. The Format of the Model Privacy Form

The format of the model form may be modified only as described below.

(a) *Easily readable type font*. Financial institutions that use the model form must use an easily readable type font. While a number of factors together produce easily readable type font, institutions are required to use a minimum of 10-point font (unless otherwise expressly permitted in these Instructions) and sufficient spacing between the lines of type.

(b) *Logo*. A financial institution may include a corporate logo on any page of the notice, so long as it does not interfere with the

readability of the model form or the space constraints of each page.

(c) *Page size and orientation*. Each page of the model form must be printed on paper in portrait orientation, the size of which must be sufficient to meet the layout and minimum font size requirements, with sufficient white space on the top, bottom, and sides of the content.

(d) *Color*. The model form must be printed on white or light color paper (such as cream) with black or other contrasting ink color. Spot color may be used to achieve visual interest, so long as the color contrast is distinctive and the color does not detract from the readability of the model form. Logos may also be printed in color.

(e) *Languages*. The model form may be translated into languages other than English.

C. Information Required in the Model Privacy Form

The information in the model form may be modified only as described below:

1. Name of the Institution or Group of Affiliated Institutions Providing the Notice

Insert the name of the financial institution providing the notice or a common identity of affiliated institutions jointly providing the notice on the form wherever [name of financial institution] appears.

2. Page One

(a) *Last revised date*. The financial institution must insert in the upper right-hand corner the date on which the notice was last revised. The information shall appear in minimum 8-point font as ''rev. [month/year]'' using either the name or number of the month, such as ''rev. July 2009'' or ''rev. 7/09''.

(b) *General instructions for the ''What?'' box*. (1) The bulleted list identifies the types of personal information that the institution collects and shares. All institutions must use the term ''Social Security number'' in the first bullet.

(2) Institutions must use five (5) of the following terms to complete the bulleted list: income; account balances; payment history; transaction history; transaction or loss history; credit history; credit scores; assets; investment experience; credit-based insurance scores; insurance claim history; medical information; overdraft history; purchase history; account transactions; risk tolerance; medical-related debts; credit card or other debt; mortgage rates and payments; retirement assets; checking account information; employment information; wire transfer instructions.

(c) *General instructions for the disclosure table*. The left column lists reasons for sharing or using personal information. Each reason correlates to a specific legal provision described in paragraph C.2(d) of this Instruction. In the middle column, each institution must provide a ''Yes'' or ''No'' response that accurately reflects its information sharing policies and practices with respect to the reason listed on the left. In the right column, each institution must provide in each box one of the following three (3) responses, as applicable, that reflects whether a consumer can limit such sharing: ''Yes'' if it is required to or voluntarily provides an opt-out; ''No'' if it does not provide an opt-out; or ''We don't share'' if it answers ''No'' in the middle column. Only the sixth row (''For our affiliates to market to you'') may be omitted at the option of the institution. *See* paragraph C.2(d)(6) of this Instruction.

(d) *Specific disclosures and corresponding legal provisions*—(1) *For our everyday business purposes*. This reason incorporates sharing information under §§332.14 and 332.15 and with service providers pursuant to §332.13 of this part other than the purposes specified in paragraphs C.2(d)(2) or C.2(d)(3) of these Instructions.

(2) *For our marketing purposes*. This reason incorporates sharing information with service providers by an institution for its own marketing pursuant to §332.13 of this part. An institution that shares for this reason may choose to provide an opt-out.

(3) *For joint marketing with other financial companies*. This reason incorporates sharing information under joint marketing agreements between two or more financial institutions and with any service provider used in connection with such agreements pursuant to §332.13 of this part. An institution that shares for this reason may choose to provide an opt-out.

(4) *For our affiliates' everyday business purposes—information about transactions and experiences*. This reason incorporates sharing information specified in sections 603(d)(2)(A)(i) and (ii) of the FCRA. An institution that shares for this reason may choose to provide an opt-out.

(5) *For our affiliates' everyday business purposes—information about creditworthiness*. This reason incorporates sharing information pursuant to section 603(d)(2)(A)(iii) of the FCRA. An institution that shares for this reason must provide an opt-out.

(6) *For our affiliates to market to you*. This reason incorporates sharing information specified in section 624 of the FCRA. This reason may be omitted from the disclosure table when: The institution does not have affiliates (or does not disclose personal information to its affiliates); the institution's affiliates do not use personal information in a manner that requires an opt-out; or the institution provides the affiliate marketing notice separately. Institutions that include

this reason must provide an opt-out of indefinite duration. An institution that is required to provide an affiliate marketing opt-out, but does not include that opt-out in the model form under this part, must comply with section 624 of the FCRA and 12 CFR part 334, subpart C, with respect to the initial notice and opt-out and any subsequent renewal notice and opt-out. An institution not required to provide an opt-out under this subparagraph may elect to include this reason in the model form.

(7) *For nonaffiliates to market to you.* This reason incorporates sharing described in §§332.7 and 332.10(a) of this part. An institution that shares personal information for this reason must provide an opt-out.

(e) *To limit our sharing:* A financial institution must include this section of the model form *only* if it provides an opt-out. The word ''choice'' may be written in either the singular or plural, as appropriate. Institutions must select one or more of the applicable opt-out methods described: Telephone, such as by a toll-free number; a Web site; or use of a mail-in opt-out form. Institutions may include the words ''toll-free'' before telephone, as appropriate. An institution that allows consumers to opt out online must provide either a specific Web address that takes consumers directly to the opt-out page or a general Web address that provides a clear and conspicuous direct link to the opt-out page. The opt-out choices made available to the consumer who contacts the institution through these methods must correspond accurately to the ''Yes'' responses in the third column of the disclosure table. In the part titled ''Please note'' institutions may insert a number that is 30 or greater in the space marked ''[30].'' Instructions on voluntary or state privacy law opt-out information are in paragraph C.2(g)(5) of these Instructions.

(f) *Questions box.* Customer service contact information must be inserted as appropriate, where [phone number] or [Web site] appear. Institutions may elect to provide either a phone number, such as a toll-free number, or a Web address, or both. Institutions may include the words ''toll-free'' before the telephone number, as appropriate.

(g) *Mail-in opt-out form.* Financial institutions must include this mail-in form *only* if they state in the ''To limit our sharing'' box that consumers can opt out by mail. The mail-in form must provide opt-out options that correspond accurately to the ''Yes'' responses in the third column in the disclosure table. Institutions that require customers to provide only name and address may omit the section identified as ''[account #].'' Institutions that require additional or different information, such as a random opt-out number or a truncated account number, to implement an opt-out election should modify the ''[account #]'' reference accordingly. This includes institutions that require customers with multiple accounts to identify each account to which the opt-out should apply. An institution must enter its opt-out mailing address: In the far right of this form (*see* version 3); or below the form (*see* version 4). The reverse side of the mail-in opt-out form must not include any content of the model form.

(1) *Joint accountholder.* Only institutions that provide their joint accountholders the choice to opt out for only one accountholder, in accordance with paragraph C.3(a)(5) of these Instructions, must include in the far left column of the mail-in form the following statement: ''If you have a joint account, your choice(s) will apply to everyone on your account unless you mark below. □ Apply my choice(s) only to me.'' The word ''choice'' may be written in either the singular or plural, as appropriate. Financial institutions that provide insurance products or services, provide this option, and elect to use the model form may substitute the word ''policy'' for ''account'' in this statement. Institutions that do not provide this option may eliminate this left column from the mail-in form.

(2) *FCRA Section 603(d)(2)(A)(iii) opt-out.* If the institution shares personal information pursuant to section 603(d)(2)(A)(iii) of the FCRA, it must include in the mail-in opt-out form the following statement: ''□ Do not share information about my creditworthiness with your affiliates for their everyday business purposes.''

(3) *FCRA Section 624 opt-out.* If the institution incorporates section 624 of the FCRA in accord with paragraph C.2(d)(6) of these Instructions, it must include in the mail-in opt-out form the following statement: ''□ Do not allow your affiliates to use my personal information to market to me.''

(4) *Nonaffiliate opt-out.* If the financial institution shares personal information pursuant to §332.10(a) of this part, it must include in the mail-in opt-out form the following statement: ''□ Do not share my personal information with nonaffiliates to market their products and services to me.''

(5) *Additional opt-outs.* Financial institutions that use the disclosure table to provide opt-out options beyond those required by Federal law must provide those opt-outs in this section of the model form. A financial institution that chooses to offer an opt-out for its own marketing in the mail-in opt-out form must include one of the two following statements: ''□ Do not share my personal information to market to me.'' *or* ''□ Do not use my personal information to market to me.'' A financial institution that chooses to offer an opt-out for joint marketing must include the following statement: ''□ Do not share my personal information with other financial institutions to jointly market to me.''

(h) *Barcodes*. A financial institution may elect to include a barcode and/or ''tagline'' (an internal identifier) in 6-point font at the bottom of page one, as needed for information internal to the institution, so long as these do not interfere with the clarity or text of the form.

3. Page Two

(a) *General Instructions for the Questions*. Certain of the Questions may be customized as follows:

(1) ''*Who is providing this notice?*'' This question may be omitted where only one financial institution provides the model form and that institution is clearly identified in the title on page one. Two or more financial institutions that jointly provide the model form must use this question to identify themselves as required by §332.9(f) of this part. Where the list of institutions exceeds four (4) lines, the institution must describe in the response to this question the general types of institutions jointly providing the notice and must separately identify those institutions, in minimum 8-point font, directly following the ''Other important information'' box, or, if that box is not included in the institution's form, directly following the ''Definitions.'' The list may appear in a multi-column format.

(2) ''*How does [name of financial institution] protect my personal information?*'' The financial institution may only provide additional information pertaining to its safeguards practices following the designated response to this question. Such information may include information about the institution's use of cookies or other measures it uses to safeguard personal information. Institutions are limited to a maximum of 30 additional words.

(3) ''*How does [name of financial institution] collect my personal information?*'' Institutions must use five (5) of the following terms to complete the bulleted list for this question: Open an account; deposit money; pay your bills; apply for a loan; use your credit or debit card; seek financial or tax advice; apply for insurance; pay insurance premiums; file an insurance claim; seek advice about your investments; buy securities from us; sell securities to us; direct us to buy securities; direct us to sell your securities; make deposits or withdrawals from your account; enter into an investment advisory contract; give us your income information; provide employment information; give us your employment history; tell us about your investment or retirement portfolio; tell us about your investment or retirement earnings; apply for financing; apply for a lease; provide account information; give us your contact information; pay us by check; give us your wage statements; provide your mortgage information; make a wire transfer; tell us who receives the money; tell us where to send the money; show your government-issued ID; show your driver's license; order a commodity futures or option trade. Institutions that collect personal information from their affiliates and/or credit bureaus must include after the bulleted list the following statement: ''We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.'' Institutions that do not collect personal information from their affiliates or credit bureaus but do collect information from other companies must include the following statement instead: ''We also collect your personal information from other companies.'' Only institutions that do not collect any personal information from affiliates, credit bureaus, or other companies can omit both statements.

(4) ''*Why can't I limit all sharing?*'' Institutions that describe state privacy law provisions in the ''*Other important information*'' box must use the bracketed sentence: ''See below for more on your rights under state law.'' Other institutions must omit this sentence.

(5) ''*What happens when I limit sharing for an account I hold jointly with someone else?*'' Only financial institutions that provide opt-out options must use this question. Other institutions must omit this question. Institutions must choose one of the following two statements to respond to this question: ''Your choices will apply to everyone on your account.'' or ''Your choices will apply to everyone on your account—unless you tell us otherwise.'' Financial institutions that provide insurance products or services and elect to use the model form may substitute the word ''policy'' for ''account'' in these statements.

(b) *General Instructions for the Definitions*. The financial institution must customize the space below the responses to the three definitions in this section. This specific information must be in italicized lettering to set off the information from the standardized definitions.

(1) *Affiliates*. As required by §332.6(a)(3) of this part, where [*affiliate information*] appears, the financial institution must:

(i) If it has no affiliates, state: ''[*name of financial institution*] *has no affiliates*'';

(ii) If it has affiliates but does not share personal information, state: ''*[name of financial institution] does not share with our affiliates*''; or

(iii) If it shares with its affiliates, state, as applicable: ''*Our affiliates include companies with a [common corporate identity of financial institution] name; financial companies such as [insert illustrative list of companies]; nonfinancial companies, such as [insert illustrative list of companies]; and others, such as [insert illustrative list].*''

(2) *Nonaffiliates*. As required by §332.6(c)(3) of this part, where [*nonaffiliate information*] appears, the financial institution must:

(i) If it does not share with nonaffiliated third parties, state: *''[name of financial institution] does not share with nonaffiliates so they can market to you''*; or

(ii) If it shares with nonaffiliated third parties, state, as applicable: *''Nonaffiliates we share with can include [list categories of companies such as mortgage companies, insurance companies, direct marketing companies, and nonprofit organizations].''*

(3) *Joint Marketing.* As required by §332.13 of this part, where [*joint marketing*] appears, the financial institution must:

(i) If it does not engage in joint marketing, state: *''[name of financial institution] doesn't jointly market''*; or

(ii) If it shares personal information for joint marketing, state, as applicable: *''Our joint marketing partners include [list categories of companies such as credit card companies].''*

(c) *General instructions for the ''Other important information'' box.* This box is optional. The space provided for information in this box is not limited. Only the following types of information can appear in this box.

(1) State and/or international privacy law information; and/or

(2) Acknowledgment of receipt form.

[74 FR 69236, Dec. 1, 2009]

PART 333—EXTENSION OF CORPORATE POWERS

REGULATIONS

Sec.
333.1 Classification of general character of business.
333.2 Change in general character of business.
333.3 Consent required for exercise of trust powers.
333.4 Conversions from mutual to stock form.

INTERPRETATIONS

333.101 Prior consent not required.

AUTHORITY: 12 U.S.C. 1816; 1817(i); 1818; 1819(a) (''Seventh'', ''Eighth'', and ''Tenth''), 1828, 1828(m), 1831p–1(c), 5414 and 5415.

REGULATIONS

§333.1 Classification of general character of business.

State nonmember insured banks are divided into five categories for the purpose of classifying their general character or type of business,[2] viz: commercial banks, banks and trust companies, savings banks (including mutual and stock), industrial banks, and cash depositories.

[15 FR 8644, Dec. 6, 1950]

§333.2 Change in general character of business.

No State nonmember insured bank (except a District bank) or branch thereof shall hereafter cause or permit any change to be made in the general character or type of business exercised by it after the effective date of this part without the prior written consent of the Corporation.

[15 FR 8644, Dec. 6, 1950]

§333.3 Consent required for exercise of trust powers.

Except as provided in 12 CFR 303.242(a), a State nonmember bank or State savings association seeking to exercise trust powers must obtain prior written consent from the FDIC. Procedures for obtaining the FDIC's prior written consent are set forth in 12 CFR 303.242.

[83 FR 60337, Nov. 26, 2018]

§333.4 Conversions from mutual to stock form.

(a) *Scope.* This section applies to the conversion of insured mutual state savings banks to the stock form of ownership. It supplements the procedural and other requirements for such conversions in subpart I of part 303 of this chapter. This section also applies, to the extent appropriate, to the reorganization of insured mutual state savings banks to the mutual holding company form of ownership. As determined by the Board of Directors of the FDIC on a case-by-case basis, the requirements of paragraphs (d), (e), and (f) of this section do not apply to mutual-to-stock conversions of insured mutual state savings banks whose capital category under §325.103 of this chapter or §324.403, as applicable, is ''undercapitalized'', ''significantly undercapitalized'' or ''critically undercapitalized''. As determined by the Board of Directors of the FDIC on a case-by-case basis, the requirements of paragraphs (d), (e), and (f) of this section do not apply to mutual-to-stock conversions of insured mutual state savings banks whose capital category

[2] A bank's business may include two or more of the general classifications.

under § 324.403 of this chapter is ''undercapitalized'', ''significantly undercapitalized'' or ''critically undercapitalized''.

(b) *Definition of Eligible Depositor*. For purposes of this section, *eligible depositors* are depositors holding qualifying deposits at the bank as of a date designated in the bank's plan of conversion that is not less than one year prior to the date of adoption of the plan of conversion by the converting bank's board of directors/trustees.

(c) *Requirements*. In addition to other requirements that may be imposed by the applicable state statutes and regulations and other federal statutes and regulations, including subpart I of part 303 of this chapter, an insured mutual state savings bank shall not convert to the stock form of ownership unless the following requirements are satisfied:

(1) Eligible depositors shall have higher subscription rights than employee stock ownership plans;

(2) The proposed conversion shall be approved by a vote of at least a majority of the bank's depositors and, as reasonably determined by the bank's directors or trustees, other stakeholders of the bank who are entitled to vote on the conversion, unless the applicable state law requires a higher percentage, in which case the higher percentage shall be used. Voting may be in person or by proxy; and

(3) Management shall not use proxies executed outside the context of the proposed conversion to satisfy the voting requirement imposed in the previous paragraph.

(d) *Restriction on repurchase of stock*. An insured mutual state savings bank that has converted from the mutual to stock form of ownership may not repurchase its capital stock within one year following the date of its conversion to stock form, except that stock repurchases of no greater than 5% of the bank's outstanding capital stock may be repurchased during this one-year period where compelling and valid business reasons are established, to the satisfaction of the FDIC. Any stock repurchases shall be subject to the requirements of section 18(i)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1828(i)(1)).

(e) *Stock benefit plan limitations*. The FDIC will presume that a stock option plan or management or employee stock benefit plan that does not conform with the applicable percentage limitations of the regulations issued by the Office of Thrift Supervision constitutes excessive insider benefits and thereby evidences a breach of the board of directors' or trustees' fiduciary responsibility. In addition, no converted insured mutual state savings bank shall, for one year from the date of the conversion, implement a stock option plan or management or employee stock benefit plan, other than a tax-qualified employee stock ownership plan, unless each of the following requirements is met:

(1) Each of the plans was fully disclosed in the proxy solicitation and conversion stock offering materials;

(2) All such plans are approved by a majority of the bank's stockholders, or in the case of a recently formed holding company, its stockholders, prior to implementation at a duly called meeting of shareholders, either annual or special, to be held no sooner than six months after the completion of the conversion;

(3) In the case of a savings bank subsidiary of a mutual holding company, all such plans are approved by a majority of stockholders other than its parent mutual holding company prior to implementation at a duly called meeting of shareholders, either annual or special, to be held no sooner than six months following the stock issuance;

(4) For stock option plans, stock options are granted at no lower than the market price at which the stock is trading at the time of grant; and

(5) For management or employee stock benefit plans, no conversion stock is used to fund the plans.

[59 FR 61246, Nov. 30, 1994, as amended at 63 FR 44750, Aug. 20, 1998; 68 FR 50461, Aug. 21, 2003; 78 FR 55595, Sept. 10, 2013; 83 FR 17740, Apr. 24, 2018]

INTERPRETATIONS

§ 333.101 Prior consent not required.

(a) The extension by any State nonmember insured bank of its business to

include personal, character or installment loans, or the extension by an industrial bank of its business to include the business of a commercial bank, is not a change in the general character or type of business requiring the prior written consent of the Corporation.

(b) An insured State nonmember bank or State savings association, not exercising trust powers, may act as trustee or custodian of Individual Retirement Accounts established pursuant to the Employee Retirement Income Security Act of 1974 (26 U.S.C. 408), Self-Employed Retirement Plans established pursuant to the Self-Employed Individuals Retirement Act of 1962 (26 U.S.C. 401), Roth Individual Retirement Accounts and Coverdell Education Savings Accounts established pursuant to the Taxpayer Relief Act of 1997 (26 U.S.C. 408A and 530 respectively), Health Savings Accounts established pursuant to the Medicare Prescription Drug Improvement and Modernization Act of 2003 (26 U.S.C. 223), and other similar accounts without the prior written consent of the Corporation provided:

(1) The bank's or savings association's duties as trustee or custodian are essentially custodial or ministerial in nature,

(2) The bank or savings association is required to invest the funds from such plans only

(i) In its own time or savings deposits, or

(ii) In any other assets at the direction of the customer, provided the bank or savings association does not exercise any investment discretion or provide any investment advice with respect to such account assets, and

(3) The bank's or savings association's acceptance of such accounts without trust powers is not contrary to applicable State law.

[41 FR 2375, Jan. 16, 1976, as amended at 50 FR 10754, Mar. 18, 1985; 70 FR 60422, Oct. 18, 2005; 83 FR 60337, Nov. 26, 2018]

PART 334—FAIR CREDIT REPORTING

Subpart A—General Provisions

Sec.
334.1 Purpose and scope.
334.2 Examples.
334.3 Definitions.

Subparts B–H [Reserved]

Subpart I—Records Disposal

334.80–334.82 [Reserved]
334.83 Disposal of consumer information.

Subpart J—Identity Theft Red Flags

334.90 Duties regarding the detection, prevention, and mitigation of identity theft.
334.91 Duties of card issuers regarding changes of address.

APPENDIXES A–I TO PART 334 [RESERVED]
APPENDIX J TO PART 334—INTERAGENCY GUIDELINES ON IDENTITY THEFT DETECTION, PREVENTION, AND MITIGATION

AUTHORITY: 12 U.S.C. 1818, 1819 (Tenth), and 1831p–1; 15 U.S.C. 1681a, 1681b, 1681c, 1681m, 1681s, 1681s–2, 1681s–3, 1681t, 1681w, 6801 *et seq.*, Pub. L. 108–159, 117 Stat. 1952.

SOURCE: 69 FR 77618, Dec. 28, 2004, unless otherwise noted.

Subpart A—General Provisions

SOURCE: 70 FR 70685, Nov. 22, 2005, unless otherwise noted.

§ 334.1 Purpose and scope.

(a) *Purpose* The purpose of this part is to implement the Fair Credit Reporting Act.

(b) *Scope* Except as otherwise provided in this part, the regulations in this part apply to insured state nonmember banks, state savings associations whose deposits are insured by the Federal Deposit Insurance Corporation, insured state licensed branches of foreign banks, and subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

[80 FR 65918, Oct. 28, 2015]

§ 334.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 334.3 Definitions.

For purposes of this part, unless explicitly stated otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that is related by common ownership or common corporate control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f)–(h) [Reserved]

(i) *Common ownership or common corporate control* means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, directly or indirectly, or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the FDIC determines; or

(2) Any other person has, with respect to both companies, a relationship described in paragraphs (i)(1)(i) through (i)(1)(iii) of this section.

(j) [Reserved]

(k) *Medical information* means:

(1) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to:

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(iv) Information that does not identify a specific consumer.

(l) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

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

[70 FR 70685, Nov. 22, 2005, as amended at 72 FR 63760, Nov. 9, 2007; 80 FR 65919, Oct. 28, 2015]

Subparts B–H [Reserved]

Subpart I—Records Disposal

§§ 334.80–334.82 [Reserved]

§ 334.83 Disposal of consumer information.

(a) *In general.* You must properly dispose of any consumer information that you maintain or otherwise possess in accordance with the Interagency Guidelines Establishing Information Security Standards, as set forth in appendix B to part 364 of this chapter, prescribed pursuant to section 216 of the Fair and Accurate Credit Transactions Act of 2003 (15 U.S.C. 1681w) and section 501(b) of the Gramm-Leach-Bliley Act (15 U.S.C. 6801(b)), to the extent the Guidelines are applicable to you.

(b) *Rule of construction.* Nothing in this section shall be construed to:

(1) Require you to maintain or destroy any record pertaining to a consumer that is not imposed under any other law; or

(2) Alter or affect any requirement imposed under any other provision of law to maintain or destroy such a record.

Subpart J—Identity Theft Red Flags

SOURCE: 72 FR 63761, Nov. 9, 2007, unless otherwise noted.

§ 334.90 Duties regarding the detection, prevention, and mitigation of identity theft.

(a) *Scope* This section applies to a financial institution or creditor that is an insured state nonmember bank, State savings association whose deposits are insured by the Federal Deposit Insurance Corporation, insured state licensed branch of a foreign bank, or a subsidiary of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

(b) *Definitions.* For purposes of this section and Appendix J, the following definitions apply:

(1) *Account* means a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes. Account includes:

(i) An extension of credit, such as the purchase of property or services involving a deferred payment; and

(ii) A deposit account.

(2) The term *board of directors* includes:

(i) In the case of a branch or agency of a foreign bank, the managing official in charge of the branch or agency; and

(ii) In the case of any other creditor that does not have a board of directors, a designated employee at the level of senior management.

(3) *Covered account* means:

(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account; and

(ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.

(4) *Credit* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(5) *Creditor* has the same meaning as in 15 U.S.C. 1681m(e)(4).

(6) *Customer* means a person that has a covered account with a financial institution or creditor.

(7) *Financial institution* has the same meaning as in 15 U.S.C. 1681a(t).

(8) *Identity theft* has the same meaning as in 16 CFR 603.2(a).

(9) *Red Flag* means a pattern, practice, or specific activity that indicates the possible existence of identity theft.

(10) *Service provider* means a person that provides a service directly to the financial institution or creditor.

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

(c) *Periodic identification of covered accounts.* Each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As a part of this determination, a financial institution or creditor must conduct a risk assessment to determine whether it offers or maintains covered accounts described in paragraph (b)(3)(ii) of this section, taking into consideration:

(1) The methods it provides to open its accounts;

(2) The methods it provides to access its accounts; and

(3) Its previous experiences with identity theft.

(d) *Establishment of an Identity Theft Prevention Program*—(1) *Program requirement.* Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program (Program) that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

(2) *Elements of the Program.* The Program must include reasonable policies and procedures to:

(i) Identify relevant Red Flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those Red Flags into its Program;

(ii) Detect Red Flags that have been incorporated into the Program of the financial institution or creditor;

(iii) Respond appropriately to any Red Flags that are detected pursuant to paragraph (d)(2)(ii) of this section to prevent and mitigate identity theft; and

(iv) Ensure the Program (including the Red Flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.

(e) *Administration of the Program.* Each financial institution or creditor that is required to implement a Program must provide for the continued administration of the Program and must:

(1) Obtain approval of the initial written Program from either its board of directors or an appropriate committee of the board of directors;

(2) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the Program;

(3) Train staff, as necessary, to effectively implement the Program; and

(4) Exercise appropriate and effective oversight of service provider arrangements.

(f) *Guidelines.* Each financial institution or creditor that is required to implement a Program must consider the guidelines in Appendix J of this part and include in its Program those guidelines that are appropriate.

[72 FR 63761, Nov. 9, 2007, as amended at 80 FR 65919, Oct. 28, 2015]

§ 334.91 Duties of card issuers regarding changes of address.

(a) *Scope* This section applies to an issuer of a debit or credit card (card issuer) that is an insured state nonmember bank, state savings association whose deposits are insured by the Federal Deposit Insurance Corporation, insured state licensed branch of a foreign bank, or a subsidiary of such entities (except brokers, dealers, persons providing insurance, investment companies, or investment advisers).

(b) *Definitions.* For purposes of this section:

(1) *Cardholder* means a consumer who has been issued a credit or debit card.

(2) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

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

(c) *Address validation requirements.* A card issuer must establish and implement reasonable policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a consumer's debit or credit card account and, within a short period of time afterwards (during at least the first 30 days after it receives such notification), the card issuer receives a request for an additional or replacement card for the same account. Under these circumstances, the card issuer may not issue an additional or replacement card, until, in accordance with its reasonable policies and procedures and for the purpose of assessing the validity of the change of address, the card issuer:

(1)(i) Notifies the cardholder of the request:

(A) At the cardholder's former address; or

(B) By any other means of communication that the card issuer and the cardholder have previously agreed to use; and

(ii) Provides to the cardholder a reasonable means of promptly reporting incorrect address changes; or

(2) Otherwise assesses the validity of the change of address in accordance with the policies and procedures the card issuer has established pursuant to § 334.90 of this part.

(d) *Alternative timing of address validation.* A card issuer may satisfy the requirements of paragraph (c) of this section if it validates an address pursuant to the methods in paragraph (c)(1) or (c)(2) of this section when it receives an address change notification, before it receives a request for an additional or replacement card.

(e) *Form of notice.* Any written or electronic notice that the card issuer provides under this paragraph must be

clear and conspicuous and provided separately from its regular correspondence with the cardholder.

[72 FR 63761, Nov. 9, 2007, as amended at 80 FR 65919, Oct. 28, 2015]

APPENDIXES A–I TO PART 334 [RESERVED]

APPENDIX J TO PART 334—INTERAGENCY GUIDELINES ON IDENTITY THEFT DETECTION, PREVENTION, AND MITIGATION

Section 334.90 of this part requires each financial institution and creditor that offers or maintains one or more covered accounts, as defined in §334.90(b)(3) of this part, to develop and provide for the continued administration of a written Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. These guidelines are intended to assist financial institutions and creditors in the formulation and maintenance of a Program that satisfies the requirements of §334.90 of this part.

I. The Program

In designing its Program, a financial institution or creditor may incorporate, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

II. Identifying Relevant Red Flags

(a) *Risk Factors.* A financial institution or creditor should consider the following factors in identifying relevant Red Flags for covered accounts, as appropriate:

(1) The types of covered accounts it offers or maintains;

(2) The methods it provides to open its covered accounts;

(3) The methods it provides to access its covered accounts; and

(4) Its previous experiences with identity theft.

(b) *Sources of Red Flags.* Financial institutions and creditors should incorporate relevant Red Flags from sources such as:

(1) Incidents of identity theft that the financial institution or creditor has experienced;

(2) Methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and

(3) Applicable supervisory guidance.

(c) *Categories of Red Flags.* The Program should include relevant Red Flags from the following categories, as appropriate. Examples of Red Flags from each of these categories are appended as Supplement A to this Appendix J.

(1) Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;

(2) The presentation of suspicious documents;

(3) The presentation of suspicious personal identifying information, such as a suspicious address change;

(4) The unusual use of, or other suspicious activity related to, a covered account; and

(5) Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

III. *Detecting Red Flags.*

The Program's policies and procedures should address the detection of Red Flags in connection with the opening of covered accounts and existing covered accounts, such as by:

(a) Obtaining identifying information about, and verifying the identity of, a person opening a covered account, for example, using the policies and procedures regarding identification and verification set forth in the Customer Identification Program rules implementing 31 U.S.C. 5318(l) (31 CFR 1020.220); and

(b) Authenticating customers, monitoring transactions, and verifying the validity of change of address requests, in the case of existing covered accounts.

IV. *Preventing and Mitigating Identity Theft.*

The Program's policies and procedures should provide for appropriate responses to the Red Flags the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution, creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent Web site. Appropriate responses may include the following:

(a) Monitoring a covered account for evidence of identity theft;

(b) Contacting the customer;

(c) Changing any passwords, security codes, or other security devices that permit access to a covered account;

(d) Reopening a covered account with a new account number;

(e) Not opening a new covered account;
(f) Closing an existing covered account;
(g) Not attempting to collect on a covered account or not selling a covered account to a debt collector;
(h) Notifying law enforcement; or
(i) Determining that no response is warranted under the particular circumstances.

V. *Updating the Program.*

Financial institutions and creditors should update the Program (including the Red Flags determined to be relevant) periodically, to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft, based on factors such as:
(a) The experiences of the financial institution or creditor with identity theft;
(b) Changes in methods of identity theft;
(c) Changes in methods to detect, prevent, and mitigate identity theft;
(d) Changes in the types of accounts that the financial institution or creditor offers or maintains; and
(e) Changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures, and service provider arrangements.

VI. Methods for Administering the Program

(a) *Oversight of Program.* Oversight by the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management should include:
(1) Assigning specific responsibility for the Program's implementation;
(2) Reviewing reports prepared by staff regarding compliance by the financial institution or creditor with §334.90 of this part; and
(3) Approving material changes to the Program as necessary to address changing identity theft risks.
(b) *Reports*—(1) *In general.* Staff of the financial institution or creditor responsible for development, implementation, and administration of its Program should report to the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management, at least annually, on compliance by the financial institution or creditor with §334.90 of this part.
(2) *Contents of report.* The report should address material matters related to the Program and evaluate issues such as: the effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; service provider arrangements; significant incidents involving identity theft and management's response; and recommendations for material changes to the Program.
(c) *Oversight of service provider arrangements.* Whenever a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. For example, a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant Red Flags that may arise in the performance of the service provider's activities, and either report the Red Flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft.

VII. Other Applicable Legal Requirements

Financial institutions and creditors should be mindful of other related legal requirements that may be applicable, such as:
(a) For financial institutions and creditors that are subject to 31 U.S.C. 5318(g), filing a Suspicious Activity Report in accordance with applicable law and regulation;
(b) Implementing any requirements under 15 U.S.C. 1681c–1(h) regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert;
(c) Implementing any requirements for furnishers of information to consumer reporting agencies under 15 U.S.C. 1681s–2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and
(d) Complying with the prohibitions in 15 U.S.C. 1681m on the sale, transfer, and placement for collection of certain debts resulting from identity theft.

Supplement A to Appendix J

In addition to incorporating Red Flags from the sources recommended in section II.b. of the Guidelines in Appendix J of this part, each financial institution or creditor may consider incorporating into its Program, whether singly or in combination, Red Flags from the following illustrative examples in connection with covered accounts:

Alerts, Notifications or Warnings from a Consumer Reporting Agency

1. A fraud or active duty alert is included with a consumer report.
2. A consumer reporting agency provides a notice of credit freeze in response to a request for a consumer report.
3. A consumer reporting agency provides a notice of address discrepancy, as defined in 12 CFR 1022.82(b).

4. A consumer report indicates a pattern of activity that is inconsistent with the history and usual pattern of activity of an applicant or customer, such as:

a. A recent and significant increase in the volume of inquiries;

b. An unusual number of recently established credit relationships;

c. A material change in the use of credit, especially with respect to recently established credit relationships; or

d. An account that was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

Suspicious Documents

5. Documents provided for identification appear to have been altered or forged.

6. The photograph or physical description on the identification is not consistent with the appearance of the applicant or customer presenting the identification.

7. Other information on the identification is not consistent with information provided by the person opening a new covered account or customer presenting the identification.

8. Other information on the identification is not consistent with readily accessible information that is on file with the financial institution or creditor, such as a signature card or a recent check.

9. An application appears to have been altered or forged, or gives the appearance of having been destroyed and reassembled.

Suspicious Personal Identifying Information

10. Personal identifying information provided is inconsistent when compared against external information sources used by the financial institution or creditor. For example:

a. The address does not match any address in the consumer report; or

b. The Social Security Number (SSN) has not been issued, or is listed on the Social Security Administration's Death Master File.

11. Personal identifying information provided by the customer is not consistent with other personal identifying information provided by the customer. For example, there is a lack of correlation between the SSN range and date of birth.

12. Personal identifying information provided is associated with known fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is the same as the address provided on a fraudulent application; or

b. The phone number on an application is the same as the number provided on a fraudulent application.

13. Personal identifying information provided is of a type commonly associated with fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is fictitious, a mail drop, or a prison; or

b. The phone number is invalid, or is associated with a pager or answering service.

14. The SSN provided is the same as that submitted by other persons opening an account or other customers.

15. The address or telephone number provided is the same as or similar to the address or telephone number submitted by an unusually large number of other persons opening accounts or by other customers.

16. The person opening the covered account or the customer fails to provide all required personal identifying information on an application or in response to notification that the application is incomplete.

17. Personal identifying information provided is not consistent with personal identifying information that is on file with the financial institution or creditor.

18. For financial institutions and creditors that use challenge questions, the person opening the covered account or the customer cannot provide authenticating information beyond that which generally would be available from a wallet or consumer report.

Unusual Use of, or Suspicious Activity Related to, the Covered Account

19. Shortly following the notice of a change of address for a covered account, the institution or creditor receives a request for a new, additional, or replacement card or a cell phone, or for the addition of authorized users on the account.

20. A new revolving credit account is used in a manner commonly associated with known patterns of fraud. For example:

a. The majority of available credit is used for cash advances or merchandise that is easily convertible to cash (e.g., electronics equipment or jewelry); or

b. The customer fails to make the first payment or makes an initial payment but no subsequent payments.

21. A covered account is used in a manner that is not consistent with established patterns of activity on the account. There is, for example:

a. Nonpayment when there is no history of late or missed payments;

b. A material increase in the use of available credit;

c. A material change in purchasing or spending patterns;

d. A material change in electronic fund transfer patterns in connection with a deposit account; or

e. A material change in telephone call patterns in connection with a cellular phone account.

22. A covered account that has been inactive for a reasonably lengthy period of time is used (taking into consideration the type of

account, the expected pattern of usage and other relevant factors).

23. Mail sent to the customer is returned repeatedly as undeliverable although transactions continue to be conducted in connection with the customer's covered account.

24. The financial institution or creditor is notified that the customer is not receiving paper account statements.

25. The financial institution or creditor is notified of unauthorized charges or transactions in connection with a customer's covered account.

Notice From Customers, Victims of Identity Theft, Law Enforcement Authorities, or Other Persons Regarding Possible Identity Theft in Connection With Covered Accounts Held by the Financial Institution or Creditor

26. The financial institution or creditor is notified by a customer, a victim of identity theft, a law enforcement authority, or any other person that it has opened a fraudulent account for a person engaged in identity theft.

[72 FR 63762, Nov. 9, 2007, as amended at 74 FR 22643, May 14, 2009; 76 FR 14794, Mar. 18, 2011; 80 FR 65919, Oct. 28, 2015]

PART 335—SECURITIES OF STATE NONMEMBER BANKS AND STATE SAVINGS ASSOCIATIONS

Sec.

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AUTHORITY: 12 U.S.C. 1819; 15 U.S.C. 78j–1, 78l(i), 78m, 78n, 78p, 78w, 5412, 5414, 5415, 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265.

SOURCE: 62 FR 6856, Feb. 14, 1997, unless otherwise noted.

§ 335.101 Scope of part, authority and OMB control number.

(a) This part is issued by the Federal Deposit Insurance Corporation (the FDIC) under section 12(i) of the Securities Exchange Act of 1934, 15 U.S.C. 78 *et seq.* (the Exchange Act), and applies to all securities of FDIC–insured State nonmember banks (including foreign banks having an insured branch) and State savings associations that are subject to the registration requirements of section 12(b) or section 12(g) of the Exchange Act). The FDIC is vested with the powers, functions, and duties of the Securities and Exchange Commission (SEC) to administer and enforce sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act) (15 U.S.C. 78j–1, 78*l*, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p), and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265) regarding State nonmember banks and State savings associations with one or more classes of securities subject to the registration provisions of sections 12(b) or 12(g) of the Exchange Act.

(b) Part 335 generally incorporates through cross reference the regulations of the SEC as these regulations are issued, revised, or updated from time to time under sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), except as provided at § 335.801 of this part. References to the

Commission in the regulations of the SEC are deemed to refer to the FDIC unless the context otherwise requires.

[62 FR 6856, Feb. 14, 1997, as amended at 69 FR 19088, Apr. 12, 2004; 69 FR 59783, Oct. 6, 2004; 70 FR 16400, Mar. 31, 2005; 70 FR 44272, Aug. 2, 2005; 79 FR 63501, Oct. 24, 2014]

§ 335.111 Forms and schedules.

The Exchange Act regulations of the SEC, which are cross referenced under this part, require the filing of forms and schedules as applicable. Reference is made to SEC Exchange Act regulation 17 CFR part 249 regarding the availability of all applicable SEC Exchange Act forms. Required schedules are codified and are found within the context of the SEC's regulations. All forms and schedules shall be titled with the name of the FDIC in substitution for the name of the SEC. The filing of forms and schedules shall be made with the FDIC at the address in § 335.701 or may be filed electronically at FDIC*connect* at *https://www2.fdicconnect.gov/index.asp*. However, electronic filing of Beneficial Ownership Forms 3, 4 and 5 is required. Copies of Forms 3 (§ 335.611), 4 (§ 335.612) and 5 (§ 335.613) and the instructions thereto may be printed and downloaded from *https://www.fdic.gov/regulations/laws/forms*.

[75 FR 73949, Nov. 30, 2010]

§ 335.121 Listing standards related to audit committees.

The provisions of the applicable SEC regulation under section 10(A)(m) of the Exchange Act shall be followed as codified at 17 CFR part 240.

[75 FR 73949, Nov. 30, 2010]

§ 335.201 Securities exempted from registration.

Persons subject to registration requirements under Exchange Act section 12 and subject to this part shall follow the applicable and currently effective SEC regulations relative to exemptions from registration issued under sections 3 and 12 of the Exchange Act as codified at 17 CFR part 240.

[75 FR 73949, Nov. 30, 2010]

§ 335.211 Registration and reporting.

Persons with securities subject to registration under Exchange Act sections 12(b) and 12(g), required to report under Exchange Act section 13, and subject to this part shall follow the applicable and currently effective SEC regulations issued under section 12(b) of the Exchange Act as codified at 17 CFR part 240.

[75 FR 73949, Nov. 30, 2010]

§ 335.221 Forms for registration of securities and cross reference to Regulation FD (Fair Disclosure).

(a) The applicable forms for registration of securities and similar matters are codified in 17 CFR part 249. All forms shall be filed with the FDIC as appropriate and shall be titled with the name of the FDIC instead of the SEC.

(b) The requirements for Financial Statements can generally be found in Regulation S–X (17 CFR part 210). Banks and State savings associations may also refer to the instructions for Federal Financial Institutions Examination Council (FFIEC) Consolidated Reports of Condition and Income when preparing unaudited interim statements. The requirements for Management's Discussion and Analysis of Financial Condition and Results of Operations can be found at 17 CFR part 229. Additional requirements are provided at Industry Guide 3, Statistical Disclosure by Bank Holding Companies, which is found at 17 CFR part 229.

(c) The provisions of the applicable and currently effective SEC regulation FD shall be followed as codified at 17 CFR part 243.

[75 FR 73949, Nov. 30, 2010; 79 FR 63501, Oct. 24, 2014]

§ 335.231 Certification, suspension of trading, and removal from listing by exchanges.

The provisions of the applicable and currently effective SEC regulations under section 12(d) of the Exchange Act shall be followed as codified at 17 part CFR 240.

[75 FR 73949, Nov. 30, 2010]

§ 335.241 Unlisted trading.

The provisions of the applicable and currently effective SEC regulations

under section 12(f) of the Exchange Act shall be followed as codified at 17 CFR part 240.

[75 FR 73949, Nov. 30, 2010]

§ 335.251 Forms for notification of action taken by national securities exchanges.

The applicable forms for notification of action taken by national securities exchanges are codified in 17 CFR part 249. All forms shall be filed with the FDIC as appropriate and shall be titled with the name of the FDIC instead of the SEC.

[75 FR 73949, Nov. 30, 2010]

§ 335.261 Exemptions, terminations, and definitions.

The provisions of the applicable and currently effective SEC regulations under sections 12(g) and 12(h) of the Exchange Act shall be followed as codified in 17 CFR part 240.

[75 FR 73949, Nov. 30, 2010]

§ 335.301 Reports of issuers of securities registered pursuant to section 12.

The provisions of the applicable and currently effective SEC regulations under section 13(a) of the Exchange Act shall be followed as codified at 17 CFR part 240.

[75 FR 73949, Nov. 30, 2010]

§ 335.311 Forms for annual, quarterly, current, and other reports of issuers.

(a) The applicable forms for annual, quarterly, current, and other reports are codified in 17 CFR part 249. All forms shall be filed with the FDIC as appropriate and shall be titled with the name of the FDIC instead of the SEC.

(b) The requirements for Financial Statements can generally be found in Regulation S–X (17 CFR part 210). Banks and State savings associations may also refer to the instructions for FFIEC Consolidated Reports of Condition and Income when preparing unaudited interim reports. The requirements for Management's Discussion and Analysis of Financial Condition and Results of Operations can be found at 17 CFR part 229. Additional requirements are included in Industry Guide 3, Statistical Disclosure by Bank Holding Companies, which is found at 17 CFR part 229.

[75 FR 73949, Nov. 30, 2010, as amended at 79 FR 63501, Oct. 24, 2014]

§ 335.321 Maintenance of records and issuer's representations in connection with required reports.

The provisions of the applicable and currently effective SEC regulations under 13(b) of the Exchange Act shall be followed as codified at 17 CFR part 240.

[75 FR 73949, Nov. 30, 2010]

§ 335.331 Acquisition statements, acquisition of securities by issuers, and other matters.

The provisions of the applicable and currently effective SEC regulations under sections 13(d) and 13(e) of the Exchange Act shall be followed as codified at 17 CFR part 240.

[75 FR 73949, Nov. 30, 2010]

§ 335.401 Solicitations of proxies.

The provisions of the applicable and currently effective SEC regulations under sections 14(a) and 14(c) of the Exchange Act shall be followed as codified at 17 CFR part 240.

[75 FR 73950, Nov. 30, 2010]

§ 335.501 Tender offers.

The provisions of the applicable and currently effective SEC regulations under sections 14(d), 14(e), and 14(f) of the Exchange Act shall be followed as codified at 17 CFR part 240.

[75 FR 73950, Nov. 30, 2010]

§ 335.601 Requirements of section 16 of the Securities Exchange Act of 1934.

Persons subject to section 16 of the Exchange Act with respect to securities registered under this part shall follow the applicable and currently effective SEC regulations issued under section 16 of the Exchange Act (17 CFR part 240), except that the forms described in § 335.611 (FDIC Form 3), § 335.612 (FDIC Form 4), and § 335.613 (FDIC Form 5) shall be used in lieu of SEC Form 3, Form 4, and Form 5, respectively. FDIC Forms 3, 4, and 5 shall be filed electronically on FDIC*connect*

at *https://www2.fdicconnect.gov/index.asp*. Copies of FDIC Forms 3, 4, and 5 and the instructions thereto can be printed and downloaded at *https://www.fdic.gov/regulations/laws/forms*.

[75 FR 73950, Nov. 30, 2010]

§ 335.611 Initial statement of beneficial ownership of securities (Form 3).

This form shall be filed in lieu of SEC Form 3 pursuant to SEC rules for initial statements of beneficial ownership of securities. The FDIC is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Exchange Act (15 U.S.C. 78p and 78w) and the rules and regulations thereunder. SEC regulations referenced in this form are codified at 17 CFR part 240.

[75 FR 73950, Nov. 30, 2010]

§ 335.612 Statement of changes in beneficial ownership of securities (Form 4).

This form shall be filed in lieu of SEC Form 4 pursuant to SEC Rules for statements of changes in beneficial ownership of securities. The FDIC is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Exchange Act (15 U.S.C. 78p and 78w) and the rules and regulations thereunder. SEC regulations referenced in this form are codified at 17 CFR part 240.

[75 FR 73950, Nov. 30, 2010]

§ 335.613 Annual statement of beneficial ownership of securities (Form 5).

This form shall be filed in lieu of SEC Form 5 pursuant to SEC Rules for annual statements of beneficial ownership of securities. The FDIC is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Exchange Act (15 U.S.C. 78p and 78w) and the rules and regulations thereunder. SEC regulations referenced in this form are codified at 17 CFR part 240.

[75 FR 73950, Nov. 30, 2010]

§ 335.701 Filing requirements, public reference, and confidentiality.

(a) *Filing requirements*. Unless otherwise indicated in this part, one original and four conformed copies of all papers required to be filed with the FDIC under the Exchange Act or regulations thereunder shall be filed at its office in Washington, DC. Official filings may be filed electronically at *https://www2.fdicconnect.gov/index.asp*, except for FDIC Beneficial Ownership Forms 3, 4, and 5 for which electronic filing is mandatory as described in § 335.801(b). Paper filings should be submitted to the FDIC's office in Washington, DC, and should be addressed as follows: Accounting and Securities Disclosure Section, Division of Risk Management Supervision, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429. Material may be filed by delivery to the FDIC through the mails or otherwise. The date on which paper filings are actually received by the designated FDIC office shall be the date of filing.

(b) *Inspection*. Except as provided in paragraph (c) of this section, all information filed regarding a security registered with the FDIC will be available for inspection at the Federal Deposit Insurance Corporation, Accounting and Securities Disclosure Section, Division of Risk Management Supervision, 550 17th Street NW., Washington, DC. Beneficial ownership report forms and other official filings that are electronically submitted to the FDIC are available for inspection on the FDIC's Web site at *http://www2.fdic.gov/efr/*

(c) *Nondisclosure of certain information filed*. Any person filing any statement, report, or document with the FDIC under the Exchange Act may make a written objection to the public disclosure of any information contained therein in accordance with the procedure set forth in this paragraph (c) or the instructions provided for electronic filing available on the FDIC's Web site *https://www2.fdicconnect.gov/index.asp*.

(1) The person shall omit from the statement, report, or document, when it is filed, the portion thereof that it desires to keep undisclosed (hereinafter called the confidential portion). In lieu thereof, it shall indicate at the appropriate place in the statement, report, or document that the confidential portion has been so omitted and filed separately with the FDIC.

(2) The person shall file with the copies of the statement, report, or document filed with the FDIC:

(i) As many copies of the confidential portion, each clearly marked ''Confidential Treatment,'' as there are copies of the statement, report, or document filed with the FDIC and with each exchange, if any. Each copy shall contain the complete text of the item and, notwithstanding that the confidential portion does not constitute the whole of the answer, the entire answer thereto; except that in the case where the confidential portion is part of a financial statement or schedule, only the particular financial statement or schedule need be included. All copies of the confidential portion shall be in the same form as the remainder of the statement, report, or document;

(ii) An application making objection to the disclosure of the confidential portion. Such application shall be on a sheet or sheets separate from the confidential portion and shall contain:

(A) An identification of the portion of the statement, report, or document that has been omitted;

(B) A statement of the grounds of the objection;

(C) Consent that the FDIC may determine the question of public disclosure upon the basis of the application, subject to proper judicial reviews;

(D) The name of each exchange, if any, with which the statement, report, or document is filed;

(iii) The copies of the confidential portion and the application filed in accordance with this paragraph shall be enclosed in a separate envelope marked ''Confidential Treatment'' and addressed to Executive Secretary, Federal Deposit Insurance Corporation, Washington, DC 20429.

(3) Pending the determination by the FDIC as to the objection filed in accordance with paragraph (c)(2)(ii) of this section, the confidential portion will not be disclosed by the FDIC.

(4) If the FDIC determines that the objection shall be sustained, a notation to that effect will be made at the appropriate place in the statement, report, or document.

(5) If the FDIC determines that disclosure of the confidential portion is in the public interest, a finding and determination to that effect will be entered and notice of the finding and determination will be sent by registered or certified mail to the person.

(6) The confidential portion shall be made available to the public:

(i) Upon the lapse of 15 days after the dispatch of notice by registered or certified mail of the finding and determination of the FDIC described in paragraph (c)(5) of this section, or the date of the electronic filing, if prior to the lapse of such 15 days the person shall not have filed a written statement that he intends in good faith to seek judicial review of the finding and determination;

(ii) Upon the lapse of 60 days after the dispatch of notice by registered or certified mail, or the date of the electronic filing, of the finding and determination of the FDIC, if the statement described in paragraph (c)(6)(i) of this section shall have been filed and if a petition for judicial review shall not have been filed within such 60 days; or

(iii) If such petition for judicial review shall have been filed within such 60 days upon final disposition, adverse to the person, of the judicial proceedings.

(7) If the confidential portion is made available to the public, a copy thereof shall be attached to each copy of the statement, report, or document filed with the FDIC and with each exchange concerned.

[75 FR 73950, Nov. 30, 2010, as amended at 79 FR 63501, Oct. 24, 2014]

§ 335.801 Inapplicable SEC regulations; FDIC substituted regulations; additional information.

(a) *Filing fees.* Filing fees will not be charged relative to any filings or submissions of materials made with the FDIC pursuant to the cross reference to regulations of the SEC issued under sections 10A(m), 12, 13, 14, and 16 of the Securities Exchange Act of 1934 (15 U.S.C. 78), sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265), and this part.

(b) *Electronic filings.* (1) The FDIC does not participate in the SEC's EDGAR (Electronic Data Gathering

Analysis and Retrieval) electronic filing program (17 CFR part 232). The FDIC permits voluntary electronically transmitted filings and submissions of correspondence and other materials in electronic format to the FDIC, with the exception of Beneficial Ownership Reports (Forms 3, 4, and 5) for which electronic filing is mandatory. Beneficial Ownership Report filing requirements are provided in paragraph (b)(2) of this section.

(2) All reporting persons must electronically file Beneficial Ownership Reports (FDIC Forms 3, 4, and 5), including amendments and exhibits thereto, using the Internet-based interagency Beneficial Ownership Filings System, except that a reporting person that has obtained a continuing hardship exemption under these rules may file the forms with the FDIC in paper format. For electronic filing purposes, FDIC Forms 3, 4, and 5 are accessible at the Internet-based interagency Web site for Beneficial Ownership Filings at FDIC*connect* at *https://www2.fdicconnect.gov/index.asp*. These forms and the instructions thereto are available for printing and downloading at *http://www.fdic.gov/regulations/laws/forms*. A reporting person that has obtained a continuing hardship exemption under these rules may file the appropriate forms with the FDIC in paper format. Instructions for continuing hardship exemptions are provided in paragraph (b)(6) of this section.

(3) Electronic filings of FDIC beneficial ownership report Forms 3, 4, and 5 must be submitted to the FDIC through the interagency Beneficial Ownership Filings system. Beneficial ownership reports and any amendments are deemed filed with the FDIC upon electronic receipt on business days from 8 a.m. through 10 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect (Eastern Time). Business days include each day, except Saturdays, Sundays and Federal holidays. All filings submitted electronically to the FDIC commencing after 10 p.m. Eastern Time on business days shall be deemed filed as of 8 a.m. on the following business day. All filings submitted electronically to the FDIC on non-business days shall be deemed filed as of 8 a.m. on the following business day.

(4) *Adjustment of the filing date.* If an electronic filer in good faith attempts to file a beneficial ownership report with the FDIC in a timely manner but the filing is delayed due to technical difficulties beyond the electronic filer's control, the electronic filer may request an adjustment of the filing date of such submission. The FDIC may grant the request if it appears that such adjustment is appropriate and consistent with the public interest and the protection of investors.

(5) *Exhibits.* (i) Exhibits to an electronic filing that have not previously been filed with the FDIC shall be filed in electronic format, absent a hardship exemption.

(ii) Previously filed exhibits, whether in paper or electronic format, may be incorporated by reference into an electronic filing to the extent permitted by applicable SEC rules under the Exchange Act. An electronic filer may, at its option, restate in electronic format an exhibit incorporated by reference that originally was filed in paper format.

(iii) Any document filed in paper format in violation of mandated electronic filing requirements shall not be incorporated by reference into an electronic filing.

(6) *Continuing Hardship Exemption.* The FDIC will not accept in paper format any beneficial ownership report filing required to be submitted electronically under this part unless the filer satisfies the requirements for a continuing hardship exemption:

(i) A filer may apply in writing for a continuing hardship exemption if all or part of a filing or group of filings otherwise required to be filed in electronic format cannot be so filed without undue burden or expense. Such written application shall be made at least ten business days prior to the required due date of the filing(s) or the proposed filing date, as appropriate, or within such shorter period as may be permitted. The written application shall be sent to the Accounting and Securities Disclosure Section, Division of Risk Management Supervision, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429, and shall

contain the information set forth in paragraph (b)(6)(ii) of this section.

(A) The application shall not be deemed granted until the applicant is notified by the FDIC.

(B) If the FDIC denies the application for a continuing hardship exemption, the filer shall file the required document in electronic format on the required due date or the proposed filing date or such other date as may be permitted.

(C) If the FDIC determines that the grant of the exemption is appropriate and consistent with the public interest and the protection of investors and so notifies the applicant, the filer shall follow the procedures set forth in paragraph (b)(6)(iii) of this section.

(ii) The request for the continuing hardship exemption shall include, but not be limited to, the following:

(A) The reason(s) that the necessary hardware and software are not available without unreasonable burden and expense;

(B) The burden and expense involved to employ alternative means to make the electronic submission; and/or

(C) The reasons for not submitting electronically the document or group of documents, as well as justification for the requested time period for the exemption.

(iii) If the request for a continuing hardship exemption is granted, the electronic filer shall submit the document or group of documents for which the exemption is granted in paper format on the required due date specified in the applicable form, rule or regulation, or the proposed filing date, as appropriate. The paper format document(s) shall have placed at the top of page 1, or at the top of an attached cover page, a legend in capital letters:

IN ACCORDANCE WITH 12 CFR 335.801(b), THIS (SPECIFY DOCUMENT) IS BEING FILED IN PAPER PURSUANT TO A CONTINUING HARDSHIP EXEMPTION.

(iv) Where a continuing hardship exemption is granted with respect to an exhibit only, the paper format exhibit shall be filed with the FDIC under Form SE (17 CFR part 249). The name of the FDIC shall be substituted for the name of the SEC on the form. Form SE shall be filed as a paper cover sheet to all exhibits to Beneficial Ownership Reports submitted to the FDIC in paper form pursuant to a hardship exemption.

(v) Form SE may be filed with the FDIC up to six business days prior to, or on the date of filing of, the electronic form to which it relates but shall not be filed after such filing date. If a paper exhibit is submitted in this manner, requirements that the exhibit be filed with, provided with, or accompany the electronic filing shall be satisfied. Any requirements as to delivery or furnishing the information to persons other than the FDIC shall not be affected by this section.

(7) *Signatures.* (i) Required signatures to, or within, any electronic submission must be in typed form. When used in connection with an electronic filing, the term ''signature'' means an electronic entry or other form of computer data compilation of any letters or series of letters or characters comprising a name, executed, adopted or authorized as a signature.

(ii) Each signatory to an electronic filing shall manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing. Such document shall be executed before or at the time the electronic filing is made and shall be retained by the filer for a period of five years. Upon request, an electronic filer shall furnish to the FDIC a copy of any or all documents retained pursuant to this section.

(iii) Where the FDIC's rules require a filer to furnish a national securities exchange, a national securities association, a bank, or State savings association, paper copies of a document filed with the FDIC in electronic format, signatures to such paper copies may be in typed form.

(c) *Legal proceedings.* Whenever this part or cross referenced provisions of the SEC regulations require disclosure of legal proceedings, administrative or judicial proceedings arising under section 8 of the Federal Deposit Insurance Act shall be deemed material and shall be described.

(d) *Indebtedness of management.* Whenever this part of cross referenced provisions of the SEC regulations require

disclosure of indebtedness of management, extensions of credit to specified persons in excess of ten (10) percent of the equity capital accounts of the bank or State savings association or $5 million, whichever is less, shall be deemed material and shall be disclosed in addition to any other required disclosure. The disclosure of this material indebtedness shall include the largest aggregate amount of indebtedness (in dollar amounts, and as a percentage of total equity capital accounts at the time), including extensions of credit or overdrafts, endorsements and guarantees outstanding at any time since the beginning of the bank or State savings association's last fiscal year, and as of the latest practicable date.

(1) If aggregate extensions of credit to all specified persons as a group exceeded 20 percent of the equity capital accounts of the bank or State savings association at any time since the beginning of the last fiscal year, the aggregate amount of such extensions of credit shall also be disclosed.

(2) Other loans are deemed material and shall be disclosed where:

(i) The extension(s) of credit was not made on substantially the same terms, including interest rates, collateral and repayment terms as those prevailing at the time for comparable transactions with other than the specified persons;

(ii) The extension(s) of credit was not made in the ordinary course of business; or

(iii) The extension(s) of credit has involved or presently involves more than a normal risk of collectibility or other unfavorable features including the restructuring of an extension of credit, or a delinquency as to payment of interest or principal.

(e) *Proxy material required to be filed.* (1) Three preliminary copies of each information statement, proxy statement, form of proxy, and other item of soliciting material to be furnished to security holders concurrently therewith, shall be filed with the FDIC by the bank, State savings association, or any other person making a solicitation subject to 12 CFR 335.401 at least ten calendar days (or 15 calendar days in the case of other than routine meetings, as defined in paragraph (e)(2) of this section) prior to the date such item is first sent or given to any security holders, or such shorter date as may be authorized.

(2) For the purposes of this paragraph (e), a routine meeting means:

(i) A meeting with respect to which no one is soliciting proxies subject to 12 CFR 335.401 other than on behalf of the bank or State savings association and at which the bank or State savings association intends to present no matters other than:

(A) The election of directors;

(B) The election, approval or ratification of accountants;

(C) A Security holder proposal included pursuant to SEC Rule 14(a)-8 (17 CFR 240.14a-8); and

(D) The approval or ratification of a plan as defined in paragraph (a)(7)(ii) of Item 402 of SEC Regulation S-K (17 CFR 229.402(a)(7)(ii)) or amendments to such a plan; and

(ii) The bank or State savings association does not comment upon or refer to a solicitation in opposition (as defined in 17 CFR 240.14a–6) in connection with the meeting in its proxy material.

(3) Where preliminary copies of material are filed with the FDIC under this section, the printing of definitive copies for distribution to security holders should be deferred until the comments of the FDIC's staff have been received and considered.

(f) *Additional information; filing of other statements in certain cases.* (1) In addition to the information expressly required to be included in a statement, form, schedule or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

(2) The FDIC may, upon the written request of the bank or State savings association, and where consistent with the protection of investors, permit the omission of one or more of the statements or disclosures herein required, or the filing in substitution therefor of appropriate statements or disclosures of comparable character.

(3) The FDIC may also require the filing of other statements or disclosures in addition to, or in substitution for those herein required in any case where

such statements are necessary or appropriate for an adequate presentation of the financial condition of any person whose financial statements are required, or disclosure about which is otherwise necessary for the protection of investors.

[62 FR 6856, Feb. 14, 1997, as amended at 69 FR 19088, Apr. 12, 2004; 69 FR 59783, Oct. 6, 2004; 70 FR 16400, Mar. 31, 2005; 70 FR 44273, Aug. 2, 2005; 75 FR 73951, Nov. 30, 2010; 79 FR 63501, Oct. 24, 2014]

PART 336—FDIC EMPLOYEES

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SOURCE: 61 FR 28728, June 6, 1996, unless otherwise noted.

Subpart A—Employee Responsibilities and Conduct

AUTHORITY: 5 U.S.C. 7301; 12 U.S.C. 1819(a).

§ 336.1 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

Employees of the Federal Deposit Insurance Corporation (Corporation) are subject to the Executive Branch-wide Standards of Ethical Conduct at 5 CFR part 2635, the Corporation regulation at 5 CFR part 3201 which supplements the Executive Branch-wide Standards, the Executive Branch-wide financial disclosure regulations at 5 CFR part 2634, and the Corporation regulation at 5 CFR part 3202, which supplements the Executive Branch-wide financial disclosure regulations.

Subpart B—Minimum Standards of Fitness for Employment With the Federal Deposit Insurance Corporation

AUTHORITY: 12 U.S.C. 1819 (Tenth), 1822(f).

§ 336.2 Authority, purpose and scope.

(a) *Authority*. This part is adopted pursuant to section 12(f) of the Federal Deposit Insurance Act, 12 U.S.C. 1822, and the rulemaking authority of the Federal Deposit Insurance Corporation (FDIC) found at 12 U.S.C. 1819. This part is in addition to, and not in lieu of, any other statutes or regulations which may apply to standards for ethical conduct or fitness for employment with the FDIC and is consistent with the goals and purposes of 18 U.S.C. 201, 203, 205, 208, and 209.

(b) *Purpose*. The purpose of this part is to state the minimum standards of fitness and integrity required of individuals who provide service to or on behalf of the FDIC and provide procedures for implementing these requirements.

(c) *Scope*. (1) This part applies to applicants for employment with the FDIC under title 5 of the U.S. Code appointing authority in either the excepted or competitive service, including Special Government Employees. This part applies to all appointments, regardless of tenure, including intermittent, temporary, time-limited and permanent appointments.

(2) In addition, this part applies to all employees of the FDIC who serve under an appointing authority under chapter 21 of title 5 of the U.S. Code.

(3) Further, this part applies to any individual who, pursuant to a contract or any other arrangement, performs functions or activities of the Corporation, under the direct supervision of an officer or employee of the Corporation.

§ 336.3 Definitions.

For the purposes of this part:

(a) *Company* means any corporation, firm, partnership, society, joint venture, business trust, association or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, or any other organization or institution, but shall not include any corporation the majority of the shares of which are owned by the United States, any state, or the District of Columbia.

(b) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company, the ability to direct in any manner the election of a majority of a company's directors or trustees, or the ability to exercise a controlling influence over the company's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership. For purposes of this part, an entity or individual shall be presumed to have control of a company if the entity or individual directly or indirectly, or acting in concert with one or more entities or individuals, or through one or more subsidiaries, owns or controls 25 percent or more of its equity, or otherwise controls or has power to control its management or policies.

(c) *Default on a material obligation* means a loan or advance from an insured depository institution which is or was delinquent for 90 or more days as to payment of principal or interest, or any combination thereof.

(d) *Employee* means any officer or employee, including a liquidation graded or temporary employee, providing service to or on behalf of the FDIC who has been appointed to a position under an authority contained in title 5 of the U.S. Code. This definition excludes those individuals designated by title 5 of the U.S. Code as officials in the Federal Executive Schedule.

(e) *Federal banking agency* means the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation, or their predecessors or successors.

(f) *Federal deposit insurance fund* means the Deposit Insurance Fund, the former Bank Insurance Fund, the former Savings Association Insurance Fund, the Federal Savings and Loan Insurance Corporation (FSLIC) Resolution Trust, or the funds formerly maintained by the Resolution Trust Corporation (RTC), or their successors, for the benefit of insured depositors.

(g) *FDIC* means the Federal Deposit Insurance Corporation, in its receivership and corporate capacities.

(h) *Insured depository institution* means any bank or savings association the deposits of which are insured by the FDIC.

(i) *Pattern or practice of defalcation regarding obligations* means:

(1) A history of financial irresponsibility with regard to debts owed to insured depository institutions which are in default in excess of $50,000 in the aggregate. Examples of such financial irresponsibility include, without limitation:

(i) Failure to pay a debt or debts totalling more than $50,000 secured by an uninsured property which is destroyed; or

(ii) Abuse of credit cards or incurring excessive debt well beyond the individual's ability to repay resulting in default(s) in excess of $50,000 in the aggregate.

(2) Wrongful refusal to fulfill duties and obligations to insured depository institutions. Examples of such wrongful refusal to fulfill duties and obligations include, without limitation:

(i) Any use of false financial statements;

(ii) Misrepresentation as to the individual's ability to repay debts;

(iii) Concealing assets from the insured depository institution;

(iv) Any instance of fraud, embezzlement or similar misconduct in connection with an obligation to the insured depository institution; and

(v) Any conduct described in any civil or criminal judgment against an individual for breach of any obligation, contractual or otherwise, or any duty of loyalty or care that the individual owed to an insured depository institution.

(3) Defaults shall not be considered a pattern or practice of defalcation where the defaults are caused by catastrophic events beyond the control of the employee such as death, disability, illness or loss of financial support.

(j) *Substantial loss to federal deposit insurance funds*—(1) *Substantial loss to federal deposit insurance funds* means:

(i) A loan or advance from an insured depository institution, which is now owed to the FDIC, RTC, FSLIC or their successors, or any federal deposit insurance fund, that is delinquent for ninety (90) or more days as to payment of principal, interest, or a combination thereof and on which there remains a legal obligation to pay an amount in excess of $50,000; or

(ii) A final judgment in excess of $50,000 in favor of any federal deposit insurance fund, the FDIC, RTC, FSLIC, or their successors regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding.

(2) For purposes of computing the $50,000 ceiling in paragraphs (j)(1)(i) and (ii) of this section, all delinquent judgments, loans, or advances currently owed to the FDIC, RTC, FSLIC or their successors, or any federal deposit insurance fund, shall be aggregated. In no event shall delinquent loans or advances from different insured depository institutions be separately considered.

[61 FR 28728, June 6, 1996, as amended at 71 FR 20526, Apr. 21, 2006; 79 FR 42183, July 21, 2014]

§ 336.4 Minimum standards for appointment to a position with the FDIC.

(a) No person shall become employed on or after June 18, 1994, by the FDIC or otherwise perform any service for or on behalf of the FDIC who has:

(1) Been convicted of any felony;

(2) Been removed from, or prohibited from participating in the affairs of, any insured depository institution pursuant to any final enforcement action by any appropriate federal banking agency;

(3) Demonstrated a pattern or practice of defalcation regarding obligations to insured depository institutions; or

(4) Caused a substantial loss to federal deposit insurance funds.

(b) Prior to an offer of employment, any person applying for employment with the FDIC shall sign a certification of compliance with the minimum standards listed in paragraphs (a)(1) through (4) of this section. In addition, any person applying for employment with the FDIC shall provide as an attachment to the certification any instance in which the applicant, or a company under the applicant's control, defaulted on a material obligation to an insured depository institution within the preceding five years.

(c) Incumbent employees who separate from the FDIC and are subsequently reappointed after a break in service of more than three days are subject to the minimum standards listed in paragraphs (a)(1) though (4) of this section. The former employee is required to submit a new certification statement including attachments, as provided in paragraph (b) of this section, prior to appointment to the new position.

§ 336.5 Minimum standards for employment with the FDIC.

(a) No person who is employed by the FDIC shall continue in employment in any manner whatsoever or perform any service for or on behalf of the FDIC who, beginning June 18, 1994 and thereafter:

(1) Is convicted of any felony;

(2) Is prohibited from participating in the affairs of any insured depository institution pursuant to any final enforcement action by any appropriate federal banking agency;

(3) Demonstrates a pattern or practice of defalcation regarding obligations to insured depository institution(s); or

(4) Causes a substantial loss to federal deposit insurance funds.

(b) Any noncompliance with the standards listed in paragraphs (a)(1) through (4) of this section is a basis for removal from employment with the FDIC.

§ 336.6 Verification of compliance.

The FDIC's Division of Administration shall order appropriate investigations as authorized by 12 U.S.C. 1819

and 1822 on newly appointed employees, either prior to or following appointment, to verify compliance with the minimum standards listed under § 336.4(a)(1) through (4).

§ 336.7 Employee responsibility, counseling and distribution of regulation.

(a) Each employee is responsible for being familiar with and complying with the provisions of this part.

(b) The Ethics Counselor shall provide a copy of this part to each new employee within 30 days of initial appointment.

(c) An employee who believes that he or she may not be in compliance with the minimum standards provided under § 336.5(a)(1) through (4), or who receives a demand letter from the FDIC for any reason, shall make a written report of all relevant facts to the Ethics Counselor within ten (10) business days after the employee discovers the possible noncompliance, or after the receipt of a demand letter from the FDIC.

(d) The Ethics Counselor shall provide guidance to employees regarding the appropriate statutes, regulations and corporate policies affecting employee's ethical responsibilities and conduct under this part.

(e) The Ethics Counselor shall provide the Personnel Services Branch with notice of an employee's noncompliance.

§ 336.8 Sanctions and remedial actions.

(a) Any employee found not in compliance with the minimum standards except as provided in paragraph (b) of this section below shall be terminated and prohibited from providing further service for or on behalf of the FDIC in any capacity. No other remedial action is authorized for sanctions for noncompliance.

(b) Any employee found not in compliance with the minimum standards under § 336.5(a)(3) based on financial irresponsibility as defined in § 336.3(i)(1) shall be terminated consistent with applicable procedures and prohibited from providing future services for or on behalf of the FDIC in any capacity, unless the employee brings him or herself into compliance with the minimum standards as provided in paragraphs (b)(1) and (2) of this section.

(1) Upon written notification by the Corporation of financial irresponsibility, the employee will be allowed a reasonable period of time to establish an agreement that satisfies the creditor and the FDIC as to resolution of outstanding indebtedness or otherwise resolves the matter to the satisfaction of the FDIC prior to the initiation of a termination action.

(2) As part of the agreement described in paragraph (b)(1) of this section, the employee shall provide authority to the creditor to report any violation by the employee of the terms of the agreement directly to the FDIC Ethics Counselor.

§ 336.9 Finality of determination.

Any determination made by the FDIC pursuant to this part shall be at the FDIC's sole discretion and shall not be subject to further review.

Subpart C—One-Year Restriction on Post-Employment Activities of Senior Examiners

SOURCE: 70 FR 69639, Nov. 17, 2005, unless otherwise noted.

AUTHORITY: 12 U.S.C. 1819 and 1820(k).

§ 336.10 Purpose and scope.

This subpart applies to officers or employees of the FDIC who are subject to the post-employment restrictions set forth in section 10(k) of the Federal Deposit Insurance Act, 12 U.S.C. 1820(k), and implements those restrictions as they apply to officers and employees of the FDIC.

§ 336.11 Definitions.

For purposes of this subpart:

(a) *Bank holding company* has the meaning given to such term in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)).

(b) A *consultant* for an insured depository institution or other company shall include only individuals who work directly on matters for, or on behalf of, such institution or other company.

(c) *Control* has the meaning given to such term in section 336.3(b), and a foreign bank shall be deemed to control any insured branch of the foreign bank.

(d) *Depository institution* means any bank or savings association, including a branch of a foreign bank, if such branch is located in the United States.

(e) *Foreign bank* means any bank or company described in section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)).

(f) *Savings and loan holding company* has the meaning given to such term in section 10(a)(1)(D) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(D)).

(g) A *senior examiner* for an insured depository institution means an officer or employee of the FDIC—

(1) who has been authorized by the FDIC to conduct examinations or inspections of insured depository institutions on behalf of the FDIC;

(2) who has been assigned continuing, broad, and lead responsibility for the examination or inspection of the institution;

(3) who routinely interacts with officers or employees of the institution or its affiliates; and

(4) whose responsibilities with respect to the institution represent a substantial portion of the FDIC officer or employee's overall responsibilities.

§ 336.12 One-year post-employment restriction.

(a) *Prohibition*. An officer or employee of the FDIC who serves as a senior examiner of an insured depository institution for at least 2 months during the last 12 months of that individual's employment with the FDIC may not, within 1 year after the termination date of his or her employment with the FDIC, knowingly accept compensation as an employee, officer, director, or consultant from—

(1) The insured depository institution; or

(2) Any company (including a bank holding company or savings and loan holding company) that controls such institution.

(b) *Waivers*. The post-employment restrictions in paragraph (a) of this section will not apply to a senior examiner if the FDIC Chairperson certifies in writing and on a case-by case basis that a waiver of the restrictions will not affect the integrity of the FDIC's supervisory program.

(c) *Effective Date*. The post-employment restrictions in paragraph (a) of this section will not apply to any officer or employee of the FDIC, or any former officer or employee of the FDIC, who ceased to be an officer or employee of the FDIC before December 17, 2005.

§ 336.13 Penalties.

(a) *Penalties under section 10(k) of the FDI Act*. A senior examiner of the FDIC who violates the post-employment restrictions set forth in § 336.12 shall be subject to the following penalties—

(1) An order—

(i) Removing such person from office or prohibiting such person from further participation in the affairs of the relevant insured depository institution or company (including a bank holding company or savings and loan holding company) that controls such institution for a period of up to five years, and

(ii) Prohibiting any further participation by such person, in any manner, in the affairs of any insured depository institution for a period of up to five years; or

(2) A civil monetary penalty of not more than $250,000; or

(3) Both.

(b) *Enforcement by appropriate Federal banking agency of hiring entity*. Violations of § 336.12 shall be enforced by the appropriate Federal banking agency of the depository institution, depository institution holding company, or other company at which the violation occurred, as determined under section 10(k)(6), which may be an agency other than the FDIC.

(c) *Scope of prohibition orders*. Any senior examiner who is subject to an order issued under paragraph (a)(1) of this section shall, as required by 12 U.S.C. 1820(k)(6)(B), be subject to paragraphs (6) and (7) of section 8(e) in the same manner and to the same extent as a person subject to an order issued under section 8(e).

(d) *Other penalties*. The penalties set forth in paragraph (a) of this section are not exclusive, and a senior examiner who violates the restrictions in

§ 336.12 may also be subject to other administrative, civil, or criminal remedies or penalties as provided by law.

PART 337—UNSAFE AND UNSOUND BANKING PRACTICES

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AUTHORITY: 12 U.S.C. 375a(4), 375b, 1463, 1464, 1468, 1816, 1818(a), 1818(b), 1819, 1820(d), 1821(f), 1828(j)(2), 1831, 1831f, 1831g, 5412.

SOURCE: 39 FR 29179, Aug. 14, 1974, unless otherwise noted.

§ 337.1 Scope.

The provisions of this part apply to certain banking practices which are likely to have adverse effects on the safety and soundness of insured State nonmember banks or which are likely to result in violations of law, rule, or regulation.

§ 337.2 Standby letters of credit.

(a) *Definition.* As used in this section, the term *standby letter of credit* means any letter of credit, or similar arrangement however named or described, which represents an obligation to the beneficiary on the part of the issuer: (1) To repay money borrowed by or advanced to or for the account of the account party, or (2) to make payment on account of any indebtedness undertaken by the account party, or (3) to make payment on account of any default (including any statement of default) by the account party in the performance of an obligation.[1] The term *similar arrangement* includes the creation of an acceptance or similar undertaking.

(b) *Restriction.* A standby letter of credit issued by an insured State nonmember bank shall be combined with all other standby letters of credit and all loans for purposes of applying any legal limitation on loans of the bank (including limitations on loans to any one borrower, on loans to affiliates of the bank, or on aggregate loans); *Provided, however,* That if such standby letter of credit is subject to separate limitation under applicable State or federal law, then the separate limitation shall apply in lieu of the loan limitation.[2]

(c) *Exceptions.* All standby letters of credit shall be subject to the provisions of paragraph (b) of this section except where:

(1) Prior to or at the time of issuance, the issuing bank is paid an amount equal to the bank's maximum liability under the standby letter of credit; or,

(2) Prior to or at the time of issuance, the issuing bank has set aside sufficient funds in a segregated deposit account, clearly earmarked for that purpose, to cover the bank's maximum liability under the standby letter of credit.

(d) *Disclosure.* Each insured State nonmember bank must maintain adequate control and subsidiary records of its standby letters of credit comparable to the records maintained in connection with the bank's direct loans so that at all times the bank's potential liability thereunder and the bank's compliance with this section may be readily determined. In addition, all such standby letters of credit must be adequately reflected on the bank's published financial statements.

[1] As defined in this paragraph (a), the term *standby letter of credit* would not include commercial letters of credit and similar instruments where the issuing bank expects the beneficiary to draw upon the issuer, which do not ''guaranty'' payment of a money obligation of the account party and which do not provide that payment is occasioned by default on the part of the account party.

[2] Where the standby letter of credit is subject to a non-recourse participation agreement with another bank or other banks, this section shall apply to the issuer and each participant in the same manner as in the case of a participated loan.

§ 337.3 Limits on extensions of credit to executive officers, directors, and principal shareholders of FDIC-supervised institutions.

(a) With the exception of 12 CFR 215.5(b) and (c)(3) and (4), FDIC-supervised institutions are subject to the restrictions contained in Federal Reserve Board Regulation O (12 CFR part 215) to the same extent and to the same manner as though they were member banks.

(b) For the purposes of compliance with § 215.4(b) of Federal Reserve Board Regulation O, no FDIC-supervised institution may extend credit or grant a line of credit to any of its executive officers, directors, or principal shareholders or to any related interest of any such person in an amount that, when aggregated with the amount of all other extensions of credit and lines of credit by the FDIC-supervised institution to that person and to all related interests of that person, exceeds the greater of $25,000 or five percent of the FDIC-supervised institution's unimpaired capital and unimpaired surplus,[1] or $500,000 unless:

(1) The extension of credit or line of credit has been approved in advance by a majority of the entire board of directors of that FDIC-supervised institution and

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

(c)(1) No FDIC-supervised institution may extend credit in an aggregate amount greater than the amount permitted in paragraph (c)(2) of this section to a partnership in which one or more of the FDIC-supervised institution's executive officers are partners and, either individually or together, hold a majority interest. For the purposes of paragraph (c)(2) of this section, the total amount of credit extended by an FDIC-supervised institution to such partnership is considered to be extended to each executive officer of the FDIC-supervised institution who is a member of the partnership.

(2) An FDIC-supervised institution is authorized to extend credit to any executive officer of the bank for any other purpose not specified in § 215.5(c)(1) and (2) of Federal Reserve Board Regulation O (12 CFR 215.5(c)(1) and (2)) if the aggregate amount of such other extensions of credit does not exceed at any one time the higher of 2.5 percent of the FDIC-supervised institution's unimpaired capital and unimpaired surplus or $25,000 but in no event more than $100,000, provided, however, that no such extension of credit shall be subject to this limit if the extension of credit is secured by:

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

(ii) Unconditional takeout commitments or guarantees of any department, agency, bureau, board, commission or establishment of the United States or any corporation wholly owned directly or indirectly by the United States; or

(iii) A perfected security interest in a segregated deposit account in the lending FDIC-supervised institution.

(3) For the purposes of this paragraph (c), the definitions of the terms used in Federal Reserve Board Regulation O shall apply including the exclusion of executive officers of an FDIC-supervised institution's parent bank or savings and loan holding company and executive officers of any other subsidiary of that bank or savings and loan holding company from the definition of executive officer for the purposes of complying with the loan restrictions contained in section 22(g) of the Federal Reserve Act. For the purposes of complying with § 215.5(d) of Federal Reserve Board Regulation O, the reference to ''the amount specified for a category of credit in paragraph (c) of this section'' shall be understood to refer to the amount specified in paragraph (c)(2) of this § 337.3.

(d) *Definition*. For purposes of this section, *FDIC-supervised institution* means an entity for which the FDIC is

[1] For the purposes of section 337.3, an FDIC-supervised institution's unimpaired capital and unimpaired surplus shall have the same meaning as found in section 215.2(i) of Federal Reserve Board Regulation O (12 CFR 215.2(i)).

the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q).

[85 FR 3246, Jan. 21, 2020]

§ 337.4 [Reserved]

§ 337.5 Exemption.

Check guaranty card programs, customer-sponsored credit card programs, and similar arrangements in which a bank undertakes to guarantee the obligations of individuals who are its retail banking deposit customers are exempted from § 337.2: *Provided, however,* That the bank establishes the creditworthiness of the individual before undertaking to guarantee his/her obligations and that any such arrangement to which a bank's principal shareholders, directors, or executive officers are a party be in compliance with applicable provisions of Federal Reserve Regulation O (12 CFR part 215).

[50 FR 10495, Mar. 15, 1985]

§ 337.6 Brokered deposits.

(a) *Definitions.* For the purposes of §§ 337.6 and 337.7, the following definitions apply:

(1) *Appropriate Federal banking agency* has the same meaning as provided under section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

(2) *Brokered deposit* means any deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker.

(3) *Capital categories.* (i) For purposes of section 29 of the Federal Deposit Insurance Act, this section and § 337.7, the terms well capitalized, adequately capitalized, and undercapitalized,[11] shall have the same meaning as to each insured depository institution as provided under regulations implementing section 38 of the Federal Deposit Insurance Act issued by the appropriate federal banking agency for that institution.[12]

EDITORIAL NOTE: At 86 FR 6789, Jan. 22, 2021, § 337.6 was amended in part by revising paragraph (a)(3)(i). Language to the referenced footnotes 11 and 12 was not provided.

(ii) If the appropriate federal banking agency reclassifies a well-capitalized insured depository institution as adequately capitalized pursuant to section 38 of the Federal Deposit Insurance Act, the institution so reclassified shall be subject to the provisions applicable to such lower capital category under this section and § 337.7.

(iii) An insured depository institution shall be deemed to be within a given capital category for purposes of this section and § 337.7 as of the date the institution is notified of, or is deemed to have notice of, its capital category, under regulations implementing section 38 of the Federal Deposit Insurance Act issued by the appropriate federal banking agency for that institution.

(4) *Deposit* has the same meaning as provided under section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(l)).

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

(A) Any person engaged in the business of placing deposits of third parties with insured depository institutions;

(B) Any person engaged in the business of facilitating the placement of deposits of third parties with insured depository institutions;

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

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

(ii) *Engaged in the business of placing deposits.* A person is engaged in the business of placing deposits of third parties if that person receives third party funds and deposits those funds at more than one insured depository institution.

(iii) *Engaged in the business of facilitating the placement of deposits.* A person is engaged in the business of facilitating the placement of deposits of third parties with insured depository institutions, by, while engaged in business, with respect to deposits placed at more than one insured depository institution, engaging in one or more of the following activities:

(A) The person has legal authority, contractual or otherwise, to close the

account or move the third party's funds to another insured depository institution;

(B) The person is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account; or

(C) The person engages in matchmaking activities.

(*1*) A person is engaged in matchmaking activities if the person proposes deposit allocations at, or between, more than one bank based upon both the particular deposit objectives of a specific depositor or depositor's agent, and the particular deposit objectives of specific banks, except in the case of deposits placed by a depositor's agent with a bank affiliated with the depositor's agent. A proposed deposit allocation is based on the particular objectives of:

(*i*) A depositor or depositor's agent when the person has access to specific financial information of the depositor or depositor's agent and the proposed deposit allocation is based upon such information; and

(*ii*) A bank when the person has access to the target deposit-balance objectives of specific banks and the proposed deposit allocation is based upon such information.

(*2*) *Anti-evasion.* Any attempt by a person to structure a deposit placement arrangement in a way that evades meeting the matchmaking definition in this section, while still playing an ongoing role in providing any function related to matchmaking may, upon a finding by and with written notice from the FDIC, result in the person meeting the matchmaking definition.

(iv) *Engaged in the business*—A person is engaged in the business of placing, or facilitating the placement of, deposits as described in paragraph (a)(5)(ii) or (iii) of this section, respectively, when that person has a business relationship with third parties, and as part of that relationship, places, or facilitates the placement of, deposits with insured depository institutions on behalf of the third parties.

(v) The term *deposit broker* does not include:

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

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

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

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

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

(F) The trustee of a testamentary account;

(G) The trustee of an irrevocable trust (other than one described in paragraph (a)(5)(i)(B) of this section), as long as the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

(H) A trustee or custodian of a pension or profit-sharing plan qualified under section 401(d) or 403(a) of the Internal Revenue Code of 1986 (26 U.S.C. 401(d) or 403(a));

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

(*1*) *Designated business exceptions that meet the primary purpose exception.* Business relationships are designated as meeting the primary purpose exception, subject to § 303.243(b)(3) of this chapter, where, with respect to a particular business line:

(*i*) Less than 25 percent of the total assets that the agent or nominee has under administration for its customers is placed at depository institutions;

(*ii*) 100 percent of depositors' funds that the agent or nominee places, or assists in placing, at depository institutions are placed into transactional accounts that do not pay any fees, interest, or other remuneration to the depositor;

(*iii*) A property management firm places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing property management services;

(*iv*) The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing cross-border clearing services to its customers;

(*v*) The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing mortgage servicing;

(*vi*) A title company places, or assists in placing, customer funds into deposit accounts for the primary purpose of facilitating real estate transactions;

(*vii*) A qualified intermediary places, or assists in placing, customer funds into deposit accounts for the primary purpose of facilitating exchanges of properties under section 1031 of the Internal Revenue Code;

(*viii*) A broker dealer or futures commission merchant places, or assists in placing, customer funds into deposit accounts in compliance with 17 CFR 240.15c3–3(e) or 17 CFR 1.20(a);

(*ix*) The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of posting collateral for customers to secure credit-card loans;

(*x*) The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of paying for or reimbursing qualified medical expenses under section 223 of the Internal Revenue Code;

(*xi*) The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of investing in qualified tuition programs under section 529 of the Internal Revenue Code;

(*xii*) The agent or nominee places, or assists in placing, customer funds into deposit accounts to enable participation in the following tax-advantaged programs: Individual retirement accounts under section 408(a) of the Internal Revenue Code, Simple individual retirement accounts under section 408(p) of the Internal Revenue Code, or Roth individual retirement accounts under section 408A of the Internal Revenue Code;

(*xiii*) A Federal, State, or local agency places, or assists in placing, customer funds into deposit accounts to deliver funds to the beneficiaries of government programs; and

(*xiv*) The agent or nominee places, or assists in placing, customer funds into deposit accounts pursuant to such other relationships as the FDIC specifically identifies as a designated business relationship that meets the primary purpose exception.

(*2*) *Approval required for business relationships not designated in paragraph* (a)(5)(v)(I)(*1*). An agent or nominee that does not rely on a designated business exception described in this section must receive an approval under the application process in § 303.243(b) of this chapter in order to qualify for the primary purpose exception.

(*3*) *Brokered CD placements not eligible for primary purpose exception.* An agent's or nominee's placement of brokered certificates of deposit as described in 12 U.S.C. 1831f(g)(1)(A) shall be considered a discrete and independent business line from other deposit placement businesses in which the agent or nominee may be engaged.

(*4*) *Brokered CD* means a deposit placement arrangement in which a master certificate of deposit is issued by an insured depository institution in the name of the third party that has organized the funding of the certificate of deposit, or in the name of a custodian or a sub-custodian of the third party, and the certificate is funded by individual investors through the third party, with each individual investor receiving an ownership interest in the certificate of deposit, or a similar deposit placement arrangement that the FDIC determines is arranged for a similar purpose.

(J) An insured depository institution acting as an intermediary or agent of a U.S. government department or agency for a government sponsored minority or women-owned depository institution deposit program.

(vi) Notwithstanding paragraph (a)(5)(v) of this section, the term *deposit broker* includes any insured depository institution that is not well-capitalized, and any employee of any such insured depository institution, which engages, directly or indirectly, in the solicitation of deposits by offering rates of interest (with respect to such deposits) which are significantly higher than the prevailing rates of interest

on deposits offered by other insured depository institutions in such depository institution's normal market area.

(6) *Employee* means any employee: (i) Who is employed exclusively by the insured depository institution;

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

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

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

(7) *FDIC* means the Federal Deposit Insurance Corporation.

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

(b) *Solicitation and acceptance of brokered deposits by insured depository institutions.* (1) A well capitalized insured depository institution may solicit and accept, renew or roll over any brokered deposit without restriction by this section.

(2) An adequately capitalized insured depository institution may not accept, renew or roll over any brokered deposit unless it has applied for and been granted a waiver of this prohibition by the FDIC in accordance with the provisions of this section.

(3) An undercapitalized insured depository institution may not accept, renew or roll over any brokered deposit.

(4) *Acceptance of nonmaturity brokered deposits.* (i) A nonmaturity brokered deposit is accepted by an institution that is less than well capitalized—

(A) At the time a new nonmaturity account is opened by or through any deposit broker; or

(B) In the case of an existing nonmaturity brokered account, or accounts, that had been opened by or through a particular deposit broker:

(*1*) When the aggregate account balance increases above the amount(s) in the account(s) at the time the institution falls to adequately capitalized; or,

(*2*) For agency or nominee accounts, when funds for a new depositor are credited to the nonmaturity account or accounts.

(c) *Waiver.* The FDIC may, on a case-by-case basis and upon application by an adequately capitalized insured depository institution, waive the prohibition on the acceptance, renewal or rollover of brokered deposits upon a finding that such acceptance, renewal or rollover does not constitute an unsafe or unsound practice with respect to such institution. The FDIC may conclude that it is not unsafe or unsound and may grant a waiver when the acceptance, renewal or rollover of brokered deposits is determined to pose no undue risk to the institution. Any waiver granted may be revoked at any time by written notice to the institution. For filing requirements, consult 12 CFR 303.243.

(d) *Exclusion for institutions in FDIC conservatorship.* No insured depository institution for which the FDIC has been appointed conservator shall be subject to the prohibition on the acceptance, renewal or rollover of brokered deposits contained in this § 337.6 or section 29 of the Federal Deposit Insurance Act for 90 days after the date on which the institution was placed in conservatorship. During this 90-day period, the institution shall, nevertheless, be subject to the restriction on the payment of interest contained in paragraph (b)(2)(ii) of the section. After such 90-day period, the institution may not accept, renew or roll over any brokered deposit.

(e) *Limited exception for reciprocal deposits*—(1) *Limited exception.* Reciprocal deposits of an agent institution shall not be considered to be funds obtained, directly or indirectly, by or through a deposit broker to the extent that the total amount of such reciprocal deposits does not exceed the lesser of:

(i) $5,000,000,000; or

(ii) An amount equal to 20 percent of the total liabilities of the agent institution.

(2) *Additional definitions that apply to the limited exception for reciprocal deposits*—(i) *Agent institution* means an insured depository institution that places a covered deposit through a deposit placement network at other insured depository institutions in amounts that are less than or equal to

the standard maximum deposit insurance amount, specifying the interest rate to be paid for such amounts, if the insured depository institution:

(A)(*1*) When most recently examined under section 10(d) of the Federal Deposit Insurance Act (12 U.S.C. 1820(d)) was found to have a composite condition of outstanding or good; and

(*2*) Is well capitalized;

(B) Has obtained a waiver pursuant to paragraph (c) of this section; or

(C) Does not receive an amount of reciprocal deposits that causes the total amount of reciprocal deposits held by the agent institution to be greater than the average of the total amount of reciprocal deposits held by the agent institution on the last day of each of the four calendar quarters preceding the calendar quarter in which the agent institution was found not to have a composite condition of outstanding or good or was determined to be not well capitalized.

(ii) *Covered deposit* means a deposit that:

(A) Is submitted for placement through a deposit placement network by an agent institution; and

(B) Does not consist of funds that were obtained for the agent institution, directly or indirectly, by or through a deposit broker before submission for placement through a deposit placement network.

(iii) *Deposit placement network* means a network in which an insured depository institution participates, together with other insured depository institutions, for the processing and receipt of reciprocal deposits.

(iv) *Network member bank* means an insured depository institution that is a member of a deposit placement network.

(v) *Reciprocal deposits* means deposits received by an agent institution through a deposit placement network with the same maturity (if any) and in the same aggregate amount as covered deposits placed by the agent institution in other network member banks.

[57 FR 23941, June 5, 1992, as amended at 58 FR 54935, Oct. 25, 1993; 60 FR 31384, June 15, 1995; 63 FR 44750, Aug. 20, 1998; 66 FR 17622, Apr. 3, 2001; 74 FR 27683, June 11, 2009; 78 FR 55595, Sept. 10, 2013; 83 FR 17740, Apr. 24, 2018; 84 FR 1353, Feb. 4, 2019; 86 FR 6789, Jan. 22, 2021]

§ 337.7 Interest rate restrictions.

(a) *Definitions*—(1) *National rate*. The weighted average of rates paid by all insured depository institutions and credit unions on a given deposit product, for which data are available, where the weights are each institution's market share of domestic deposits.

(2) *National rate cap*. The higher of:

(i) National rate plus 75 basis points, or

(ii) 120 percent of the current yield on similar maturity U.S. Treasury obligations plus 75 basis points or, in the case of any nonmaturity deposit, the federal funds rate plus 75 basis points.

(3) *Local market rate cap*. Ninety (90) percent of the highest interest rate paid on a particular deposit product in the institution's local market area. An institution's local market rate cap shall be based upon the rate offered on a particular product type and maturity period by an insured depository institution or credit union that is accepting deposits at a physical location within the institution's local market area.

(4) *Local market area*. An institution's local market area is any readily defined geographical market area in which the insured depository institution accepts or solicits deposits, which may include the State, county or metropolitan statistical area, in which the insured depository institution accepts or solicits deposits.

(5) *On-tenor and off-tenor maturities*. On-tenor maturities include the following term periods: 1-month, 3-months, 6-months, 12-months, 24-months, 36-months, 48-months, and 60-months. All other term periods are considered off-tenor maturities for purposes of this section.

(b) *Computation and publication of national rate cap*—(1) *Computation*. The Corporation will compute the national rate cap for different deposit products and maturities, as determined by the Corporation based on available and reported data.

(2) *Publication*. The Corporation will publish the national rate cap monthly, but reserves the discretion to publish more or less frequently, if needed, on the Corporation's website. Except as provided in paragraph (f) of this section, for institutions that are less than

well capitalized at the time of publication, a national rate cap that is lower than the previously published national rate cap will take effect 3 days after publication. The previously published national rate cap will remain in effect during this 3-day period.

(c) *Application*—(1) *Well-capitalized institutions*. A well-capitalized institution may pay interest without restriction by this section.

(2) *Institutions that are not well capitalized*. An institution that is not well capitalized may not: Solicit deposits by offering a rate of interest that exceeds the applicable rate cap; or, where an institution has accepted brokered deposits pursuant to a waiver described in § 337.6(c), pay a rate of interest that, at the time such deposit is accepted, exceeds the applicable rate cap. For purposes of this section, the applicable rate cap is the national rate cap or, if the institution has provided the notice and evidence described in subsection (d) of this section, the local market rate cap for deposits gathered in the institution's local market area. If an institution gathers deposits from more than one local area, it may seek to pay a rate of interest up to its local market rate cap for deposits gathered in each respective local market area.

(d) *Notice related to local market rate cap applicability*. An insured depository institution that seeks to pay a rate of interest up to its local market rate cap shall provide notice and evidence of the highest rate paid on a particular deposit product in the institution's local market area to the appropriate FDIC regional director. The institution shall update its evidence and calculations for existing and new accounts monthly unless otherwise instructed by the appropriate FDIC regional director, and retain such information available for at least the two most recent examination cycles and, upon the FDIC's request, provide the documentation to the appropriate FDIC regional office and to examination staff during any subsequent examinations.

(e) *Offering products with off-tenor maturities*. If an institution seeks to offer a product with an off-tenor maturity for which the FDIC does not publish the national rate cap or that is not offered by another institution within its local market area, then the institution will be required to use the rate offered on the next lower on-tenor maturity for that product when determining its applicable national or local rate cap, respectively. For example, an institution seeking to offer a 26-month certificate of deposit must use the rate offered for a 24-month certificate of deposit to determine the institution's applicable national or local rate cap. There is no off-tenor maturity for nonmaturity products such as an interest checking account, savings account, or money market deposit account.

(f) *Discretion to delay effect of published national rate cap*. In the event of a substantial decrease in the published national rate cap from one month to the next, the Corporation may, in its discretion, delay the date on which the published national rate cap takes effect. The previously published national rate cap will remain in effect until the effective date, as determined by the Corporation, of the subsequent published national rate cap.

(g) *Treatment of nonmaturity deposits for purposes of this section*. For purposes of this section, the following definitions apply.

(1) *Solicitation of nonmaturity deposits*. (i) An institution solicits a nonmaturity deposit when—

(A) A nonmaturity account is opened;

(B) The institution raises the rate being paid on a nonmaturity account existing at the time when the institution was last well capitalized; or,

(C) Funds for a new depositor are credited to a nonmaturity account existing at the time when the institution was last well capitalized.

(2) *Acceptance of nonmaturity brokered deposits subject to a waiver*. A less than well capitalized institution that accepts nonmaturity brokered deposits subject to waiver, with respect to a particular deposit broker, may not pay interest in excess of the applicable rate cap on:

(i) Any new nonmaturity accounts opened by or through that particular deposit broker;

(ii) An amount of funds that exceeds the amount(s) in the account(s) that, at the time the institution fell to less than well capitalized, had been opened

by or through the particular deposit broker; or

(iii) For agency or nominee accounts, any funds for a new depositor credited to a nonmaturity account or accounts.

[86 FR 6791, Jan. 22, 2021]

§§ 337.8–337.9 [Reserved]

§ 337.10 Waiver.

An insured State nonmember bank has the right to petition the Board of Directors of the Corporation for a waiver of this part or any subpart thereof with respect to any particular transaction or series of similar transactions. A waiver may be granted at the discretion of the Board upon a showing of good cause. All such petitions should be filed with the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

[39 FR 29179, Aug. 14, 1974, as amended at 67 FR 71071, Nov. 29, 2002]

§ 337.11 Effect on other banking practices.

(a) Nothing in this part shall be construed as restricting in any manner the Corporation's authority to deal with any banking practice which is deemed to be unsafe or unsound or otherwise not in accordance with law, rule, or regulation; or which violates any condition imposed in writing by the Corporation in connection with the granting of any application or other request by an FDIC-Supervised institution, or any written agreement entered into by such institution with the Corporation. Compliance with the provisions of this part shall not relieve an FDIC-supervised institution from its duty to conduct its operations in a safe and sound manner nor prevent the Corporation from taking whatever action it deems necessary and desirable to deal with specific acts or practices which, although they do not violate the provisions of this part, are considered detrimental to the safety and sound operation of the institution engaged therein.

(b) *Definition. FDIC-supervised institution* means an entity for which the FDIC is the appropriate Federal banking agency pursuant to section 3(q) of the FDI Act, 12 U.S.C. 1813(q).

[85 FR 3247, Jan. 21, 2020]

§ 337.12 Frequency of examination.

(a) *General.* The Federal Deposit Insurance Corporation examines insured state nonmember banks pursuant to authority conferred by section 10 of the Federal Deposit Insurance Act (12 U.S.C. 1820) and examines insured State savings associations pursuant to authority conferred by section 10 of the Federal Deposit Insurance Act (12 U.S.C. 1820) and section 4 of the Home Owners' Loan Act (12 U.S.C. 1463). The FDIC is required to conduct a full-scope, on-site examination of every insured state nonmember bank and insured State savings association at least once during each 12-month period.

(b) *18-month rule for certain small institutions.* The FDIC may conduct a full-scope, on-site examination of an insured state nonmember bank or insured State savings association at least once during each 18-month period, rather than each 12-month period as provided in paragraph (a) of this section, if the following conditions are satisfied:

(1) The institution has total assets of less than $3 billion;

(2) The institution is well capitalized as defined in § 324.403(b)(1) of this chapter;

(3) At the most recent FDIC or applicable State agency examination, the FDIC:

(i) Assigned the institution a rating of 1 or 2 for management as part of the institution's composite rating under the Uniform Financial Institutions Rating System (commonly referred to as CAMELS); and

(ii) Assigned the institution a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (copies of which are available at the addresses specified in § 309.4 of this chapter);

(4) The institution currently is not subject to a formal enforcement proceeding or order by the FDIC, OCC, or the Board of Governors of the Federal Reserve System; and

(5) No person acquired control of the institution during the preceding 12-month period in which a full-scope, on-

site examination would have been required but for this section.

(c) *Authority to conduct more frequent examinations.* This section does not limit the authority of the FDIC to examine any insured state nonmember bank or insured State savings association as frequently as the agency deems necessary.

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

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

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

[81 FR 10069, Feb. 29, 2016, as amended at 83 FR 43965, Aug. 29, 2018; 85 FR 77364, Dec. 2, 2020]

PART 338—FAIR HOUSING

Subpart A—Advertising

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338.2 Definitions applicable to this subpart.
338.3 Nondiscriminatory advertising.
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338.5 Purpose.
338.6 Definitions applicable to this subpart.
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338.8 Compilation of loan data in register format.
338.9 Mortgage lending of a controlled entity.

AUTHORITY: 12 U.S.C. 1817, 1818, 1819, 1820(b), 2801 *et seq.;* 15 U.S.C. 1691 *et seq.;* 42 U.S.C. 3605, 3608; 12 CFR parts 1002, 1003; 24 CFR part 110.

SOURCE: 86 FR 8088, Feb. 3, 2021, unless otherwise noted.

Subpart A—Advertising

§ 338.1 Purpose.

The purpose of this subpart is to prohibit FDIC-supervised institutions from engaging in discriminatory advertising with regard to residential real estate-related transactions. This subpart also requires FDIC-supervised institutions to publicly display either the Equal Housing Lender poster set forth in § 338.4(b) or the Equal Housing Opportunity poster prescribed by 24 CFR part 110 of the United States Department of Housing and Urban Development's regulations. This subpart enforces section 805 of title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601–3619 (Fair Housing Act), as amended by the Fair Housing Amendments Act of 1988.

§ 338.2 Definitions applicable to this subpart.

For purposes of this subpart:

(a) *Bank* means an insured state nonmember bank as defined in section 3 of the Federal Deposit Insurance Act.

(b) *Dwelling* means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) *FDIC-supervised institution* means either a bank or a State savings association.

(d) *Handicap* means, with respect to a person:

(1) A physical or mental impairment which substantially limits one or more of such person's major life activities;

(2) A record of having such an impairment; or

(3) Being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

(e) *Familial status* means one or more individuals (who have not attained the age of 18 years) being domiciled with:

(1) A parent or another person having legal custody of such individual or individuals; or

(2) The designee of such parent or other person having such custody, with the written permission of such parent or other person; and

(3) The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

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

§ 338.3 Nondiscriminatory advertising.

(a) Any FDIC-supervised institution which directly or through third parties engages in any form of advertising of any loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall prominently indicate in such advertisement, in a manner appropriate to the advertising medium and format utilized, that the FDIC-supervised institutions makes such loans without regard to race, color, religion, national origin, sex, handicap, or familial status.

(1) With respect to written and visual advertisements, this paragraph (a) may be satisfied by including in the advertisement a copy of the logotype with the Equal Housing Lender legend contained in the Equal Housing Lender poster prescribed in § 338.4(b) or a copy of the logotype with the Equal Housing Opportunity legend contained in the Equal Housing Opportunity poster prescribed in 24 CFR 110.25(a) of the United States Department of Housing and Urban Development's regulations.

(2) With respect to oral advertisements, this paragraph (a) may be satisfied by a statement, in the spoken text of the advertisement, that the FDIC-supervised institution is an ''Equal Housing Lender'' or an ''Equal Opportunity Lender.''

(3) When an oral advertisement is used in conjunction with a written or visual advertisement, the use of either of the methods specified in paragraphs (a)(1) and (2) of this section will satisfy the requirements of this paragraph (a).

(b) No advertisement shall contain any words, symbols, models, or other forms of communication which express, imply, or suggest a discriminatory preference or policy of exclusion in violation of the provisions of the Fair Housing Act or the Equal Credit Opportunity Act.

§ 338.4 Fair housing poster.

(a) Each FDIC-supervised institution engaged in extending loans for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall conspicuously display either the Equal Housing Lender poster set forth in paragraph (b) of this section or the Equal Housing Opportunity poster prescribed by 24 CFR 110.25(a) of the United States Department of Housing and Urban Development's regulations, in a central location within the FDIC-supervised institution where deposits are received or where such loans are made, in a manner clearly visible to the general public entering the area, where the poster is displayed.

(b) The Equal Housing Lender Poster shall be at least 11 by 14 inches in size and have the following text:

We Do Business in Accordance with Federal Fair Lending Laws.

UNDER THE FEDERAL FAIR HOUSING ACT, IT IS ILLEGAL, ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, RELIGION, SEX, HANDICAP, OR FAMILIAL STATUS (HAVING CHILDREN UNDER THE AGE OF 18) TO:

• Deny a loan for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling or to deny any loan secured by a dwelling; or

• Discriminate in fixing the amount, interest rate, duration, application procedures, or other terms or conditions of such a loan or in appraising property.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Washington, DC 20410.

For processing under the Federal Fair Housing Act

AND TO:

Federal Deposit Insurance Corporation, Consumer Response Center, [Insert address for the Consumer Response Center stated on the FDIC's website at *www.fdic.gov*]

For processing under the FDIC Regulations.

UNDER THE EQUAL CREDIT OPPORTUNITY ACT, IT IS ILLEGAL TO DISCRIMINATE IN ANY CREDIT TRANSACTION:

• On the basis of race, color, national origin, religion, sex, marital status, or age;

• Because income is from public assistance; or

• Because a right has been exercised under the Consumer Credit Protection Act.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Federal Deposit Insurance Corporation, Consumer Response Center, [Insert address for the Consumer Response Center stated on the FDIC's website at *www.fdic.gov*]

(c) The Equal Housing Lender Poster specified in this section was adopted under 24 CFR 110.25(b) of the United States Department of Housing and Urban Development's rules and regulations as an authorized substitution for the poster required in §110.25(a) of those rules and regulations.

Subpart B—Recordkeeping

§ 338.5 Purpose.

The purpose of this subpart is twofold. First, this subpart notifies all FDIC-supervised institutions of their duty to collect and retain certain information about a home loan applicant's personal characteristics in accordance with 12 CFR part 1002 (Regulation B of the Bureau of Consumer Financial Protection) in order to monitor an institution's compliance with the Equal Credit Opportunity Act of 1974 (15 U.S.C. 1691 *et seq.*). Second, this subpart notifies certain FDIC-supervised institutions of their duty to maintain, update, and report a register of home loan applications in accordance with 12 CFR part 1003 (Regulation C of the Bureau of Consumer Financial Protection), which implements the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*).

§ 338.6 Definitions applicable to this subpart.

For purposes of this subpart—

(a) *Bank* means an insured State nonmember bank as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813.

(b) *Controlled entity* means a corporation, partnership, association, or other business entity with respect to which a bank possesses, directly or indirectly, the power to direct or cause the direction of management and policies, whether through the ownership of voting securities, by contract, or otherwise.

(c) *FDIC-supervised institution* means either a bank or a State savings association.

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

§ 338.7 Recordkeeping requirements.

All FDIC-supervised institutions that receive an application for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence where the extension of credit will be secured by the dwelling shall request and retain the monitoring information required by Regulation B of the Bureau of Consumer Financial Protection (12 CFR part 1002).

§ 338.8 Compilation of loan data in register format.

FDIC-supervised institutions and other lenders required to file a Home Mortgage Disclosure Act loan/application register (LAR) with the Federal Deposit Insurance Corporation shall collect, record and report such LAR in accordance with Regulation C of the Bureau of Consumer Financial Protection (12 CFR part 1003).

§ 338.9 Mortgage lending of a controlled entity.

Any bank which refers any applicants to a controlled entity and which purchases any covered loan as defined in Regulation C of the Bureau of Consumer Financial Protection (12 CFR part 1003) originated by the controlled entity, as a condition to transacting any business with the controlled entity, shall require the controlled entity to enter into a written agreement with the bank. The written agreement shall provide that the entity shall:

(a) Comply with the requirements of §§338.3, 338.4, and 338.7, and, if otherwise subject to Regulation C of the Bureau of Consumer Financial Protection (12 CFR part 1003), §338.8;

(b) Open its books and records to examination by the Federal Deposit Insurance Corporation; and

(c) Comply with all instructions and orders issued by the Federal Deposit Insurance Corporation with respect to its home loan practices.

PART 339—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS

Sec.
339.1 Authority, purpose, and scope.
339.2 Definitions.
339.3 Requirement to purchase flood insurance where available.
339.4 Exemptions.
339.5 Escrow requirement.
339.6 Required use of standard flood hazard determination form.
339.7 Force placement of flood insurance.
339.8 Determination fees.
339.9 Notice of special flood hazards and availability of Federal disaster relief assistance.
339.10 Notice of servicer's identity.
APPENDIX A TO PART 339—SAMPLE FORM OF NOTICE OF SPECIAL FLOOD HAZARDS AND AVAILABILITY OF FEDERAL DISASTER RELIEF ASSISTANCE
APPENDIX B TO PART 339—SAMPLE CLAUSE FOR OPTION TO ESCROW FOR OUTSTANDING LOANS

AUTHORITY: 12 U.S.C. 1462a, 1463, 1464, 1819 (Tenth), 5412(b)(2)(C) and 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

SOURCE: 80 FR 43249, July 21, 2015, unless otherwise noted.

§ 339.1 Authority, purpose, and scope.

(a) *Authority*. This part is issued pursuant to 12 U.S.C. 1462a, 1463, 1464, 1819 (Tenth), 5412(b)(2)(C) and 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

(b) *Purpose*. The purpose of this part is to implement the requirements of the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129).

(c) *Scope*. This part, except for §§ 339.6 and 339.8, applies to loans secured by buildings or mobile homes located or to be located in areas determined by the Administrator of the Federal Emergency Management Agency to have special flood hazards. Sections 339.6 and 339.8 apply to loans secured by buildings or mobile homes, regardless of location.

§ 339.2 Definitions.

As used in this part:

Act means the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001–4129).

Administrator of FEMA means the Administrator of the Federal Emergency Management Agency.

Building means a walled and roofed structure, other than a gas or liquid storage tank, that is principally above ground and affixed to a permanent site, and a walled and roofed structure while in the course of construction, alteration, or repair.

Community means a State or a political subdivision of a State that has zoning and building code jurisdiction over a particular area having special flood hazards.

Designated loan means a loan secured by a building or mobile home that is located or to be located in a special flood hazard area in which flood insurance is available under the Act.

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

Mobile home means a structure, transportable in one or more sections, that is built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities. The term *mobile home* does not include a recreational vehicle. For purposes of this part, the term *mobile home* means a mobile home on a permanent foundation. The term *mobile home* includes a manufactured home as that term is used in the NFIP.

Mutual aid society means an organization—

(1) Whose members share a common religious, charitable, educational, or fraternal bond;

(2) That covers losses caused by damage to members' property pursuant to an agreement, including damage caused by flooding, in accordance with this common bond; and

(3) That has a demonstrated history of fulfilling the terms of agreements to cover losses to members' property caused by flooding.

NFIP means the National Flood Insurance Program authorized under the Act.

Private flood insurance means an insurance policy that:

(1) Is issued by an insurance company that is:

(i) Licensed, admitted, or otherwise approved to engage in the business of insurance by the insurance regulator of the State or jurisdiction in which the property to be insured is located; or

(ii) Recognized, or not disapproved, as a surplus lines insurer by the insurance regulator of the State or jurisdiction in which the property to be insured is located in the case of a policy of difference in conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property;

(2) Provides flood insurance coverage that is at least as broad as the coverage provided under an SFIP for the same type of property, including when considering deductibles, exclusions, and conditions offered by the insurer. To be at least as broad as the coverage provided under an SFIP, the policy must, at a minimum:

(i) Define the term ''flood'' to include the events defined as a ''flood'' in an SFIP;

(ii) Contain the coverage specified in an SFIP, including that relating to building property coverage; personal property coverage, if purchased by the insured mortgagor(s); other coverages; and increased cost of compliance coverage;

(iii) Contain deductibles no higher than the specified maximum, and include similar non-applicability provisions, as under an SFIP, for any total policy coverage amount up to the maximum available under the NFIP at the time the policy is provided to the lender;

(iv) Provide coverage for direct physical loss caused by a flood and may only exclude other causes of loss that are excluded in an SFIP. Any exclusions other than those in an SFIP may pertain only to coverage that is in addition to the amount and type of coverage that could be provided by an SFIP or have the effect of providing broader coverage to the policyholder; and

(v) Not contain conditions that narrow the coverage provided in an SFIP;

(3) Includes all of the following:

(i) A requirement for the insurer to give written notice 45 days before cancellation or non-renewal of flood insurance coverage to:

(A) The insured; and

(B) The FDIC-supervised institution that made the designated loan secured by the property covered by the flood insurance, or the servicer acting on its behalf;

(ii) Information about the availability of flood insurance coverage under the NFIP;

(iii) A mortgage interest clause similar to the clause contained in an SFIP; and

(iv) A provision requiring an insured to file suit not later than one year after the date of a written denial of all or part of a claim under the policy; and

(4) Contains cancellation provisions that are as restrictive as the provisions contained in an SFIP.

Residential improved real estate means real estate upon which a home or other residential building is located or to be located.

Servicer means the person responsible for:

(1) Receiving any scheduled, periodic payments from a borrower under the terms of a loan, including amounts for taxes, insurance premiums, and other charges with respect to the property securing the loan; and

(2) Making payments of principal and interest and any other payments from the amounts received from the borrower as may be required under the terms of the loan.

SFIP means, for purposes of §§ 339.2, a standard flood insurance policy issued under the NFIP in effect as of the date private flood insurance is provided to an FDIC-supervised institution.

Special flood hazard area means the land in the flood plain within a community having at least a one percent chance of flooding in any given year, as designated by the Administrator of FEMA.

Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an

assignment of the loan to the person advancing the funds.

[80 FR 43249, July 21, 2015, as amended at 81 FR 6170, Feb. 5, 2016; 84 FR 4972, Feb. 20, 2019]

§ 339.3 Requirement to purchase flood insurance where available.

(a) *In general.* An FDIC-supervised institution shall not make, increase, extend, or renew any designated loan unless the building or mobile home and any personal property securing the loan is covered by flood insurance for the term of the loan. The amount of insurance must be at least equal to the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the Act. Flood insurance coverage under the Act is limited to the building or mobile home and any personal property that secures a loan and not the land itself.

(b) *Table funded loans.* An FDIC-supervised institution that acquires a loan from a mortgage broker or other entity through table funding shall be considered to be making a loan for the purpose of this part.

(c) *Private flood insurance*—(1) *Mandatory acceptance.* An FDIC-supervised institution must accept private flood insurance, as defined in § 339.2, in satisfaction of the flood insurance purchase requirement in paragraph (a) of this section if the policy meets the requirements for coverage in paragraph (a) of this section.

(2) *Compliance aid for mandatory acceptance.* An FDIC-supervised institution may determine that a policy meets the definition of private flood insurance in § 339.2, without further review of the policy, if the following statement is included within the policy or as an endorsement to the policy: ''This policy meets the definition of private flood insurance contained in 42 U.S.C. 4012a(b)(7) and the corresponding regulation.''

(3) *Discretionary acceptance.* An FDIC-supervised institution may accept a flood insurance policy issued by a private insurer that is not issued under the NFIP and that does not meet the definition of private flood insurance in § 339.2 in satisfaction of the flood insurance purchase requirement in paragraph (a) of this section if the policy:

(i) Provides coverage in the amount required by paragraph (a) of this section;

(ii) Is issued by an insurer that is licensed, admitted, or otherwise approved to engage in the business of insurance by the insurance regulator of the State or jurisdiction in which the property to be insured is located; or in the case of a policy of difference in conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property, is issued by a surplus lines insurer recognized, or not disapproved, by the insurance regulator of the State or jurisdiction where the property to be insured is located;

(iii) Covers both the mortgagor(s) and the mortgagee(s) as loss payees, except in the case of a policy that is provided by a condominium association, cooperative, homeowners association, or other applicable group and for which the premium is paid by the condominium association, cooperative, homeowners association, or other applicable group as a common expense; and

(iv) Provides sufficient protection of the designated loan, consistent with general safety and soundness principles, and the FDIC-supervised institution documents its conclusion regarding sufficiency of the protection of the loan in writing.

(4) *Mutual aid societies.* Notwithstanding the requirements of paragraph (c)(3) of this section, an FDIC-supervised institution may accept a plan issued by a mutual aid society, as defined in § 339.2, in satisfaction of the flood insurance purchase requirement in paragraph (a) of this section if:

(i) The FDIC has determined that such plans qualify as flood insurance for purposes of the Act;

(ii) The plan provides coverage in the amount required by paragraph (a) of this section;

(iii) The plan covers both the mortgagor(s) and the mortgagee(s) as loss payees; and

(iv) The plan provides sufficient protection of the designated loan, consistent with general safety and soundness principles, and the FDIC-supervised institution documents its conclusion regarding sufficiency of the protection of the loan in writing.

[80 FR 43249, July 21, 2015, as amended at 84 FR 4972, Feb. 20, 2019]

§ 339.4 Exemptions.

The flood insurance requirement prescribed by § 339.3 does not apply with respect to:

(a) Any state-owned property covered under a policy of self-insurance satisfactory to the Administrator of FEMA, who publishes and periodically revises the list of states falling within this exemption;

(b) Property securing any loan with an original principal balance of $5,000 or less and a repayment term of one year or less; or

(c) Any structure that is a part of any residential property but is detached from the primary residential structure of such property and does not serve as a residence. For purposes of this paragraph (c):

(1) ''A structure that is a part of a residential property'' is a structure used primarily for personal, family, or household purposes, and not used primarily for agricultural, commercial, industrial, or other business purposes;

(2) A structure is ''detached'' from the primary residential structure if it is not joined by any structural connection to that structure; and

(3) ''Serve as a residence'' shall be based upon the good faith determination of the FDIC-supervised institution that the structure is intended for use or actually used as a residence, which generally includes sleeping, bathroom, or kitchen facilities.

§ 339.5 Escrow requirement.

(a) *In general*—(1) *Applicability*. Except as provided in paragraphs (a)(2) or (c) of this section, an FDIC-supervised institution, or a servicer acting on its behalf, shall require the escrow of all premiums and fees for any flood insurance required under § 339.3(a) for any designated loan secured by residential improved real estate or a mobile home that is made, increased, extended, or renewed on or after January 1, 2016, payable with the same frequency as payments on the designated loan are required to be made for the duration of the loan.

(2) *Exceptions*. Paragraph (a)(1) of this section does not apply if:

(i) The loan is an extension of credit primarily for business, commercial, or agricultural purposes;

(ii) The loan is in a subordinate position to a senior lien secured by the same residential improved real estate or mobile home for which the borrower has obtained flood insurance coverage that meets the requirements of § 339.3(a);

(iii) Flood insurance coverage for the residential improved real estate or mobile home is provided by a policy that:

(A) Meets the requirements of § 339.3(a);

(B) Is provided by a condominium association, cooperative, homeowners association, or other applicable group; and

(C) The premium for which is paid by the condominium association, cooperative, homeowners association, or other applicable group as a common expense;

(iv) The loan is a home equity line of credit;

(v) The loan is a nonperforming loan, which is a loan that is 90 or more days past due and remains nonperforming until it is permanently modified or until the entire amount past due, including principal, accrued interest, and penalty interest incurred as the result of past due status, is collected or otherwise discharged in full; or

(vi) The loan has a term of not longer than 12 months.

(3) *Duration of exception*. If an FDIC-supervised institution, or a servicer acting on its behalf, determines at any time during the term of a designated loan secured by residential improved real estate or a mobile home that is made, increased, extended, or renewed on or after January 1, 2016, that an exception under paragraph (a)(2) of this section does not apply, then the FDIC-supervised institution or its servicer shall require the escrow of all premiums and fees for any flood insurance required under § 339.3(a) as soon as reasonably practicable and, if applicable, shall provide any disclosure required

under section 10 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2609) (RESPA).

(4) *Escrow account.* The FDIC-supervised institution, or a servicer acting on its behalf, shall deposit the flood insurance premiums and fees on behalf of the borrower in an escrow account. This escrow account will be subject to escrow requirements adopted pursuant to section 10 of RESPA, which generally limits the amount that may be maintained in escrow accounts for certain types of loans and requires escrow account statements for those accounts, only if the loan is otherwise subject to RESPA. Following receipt of a notice from the Administrator of FEMA or other provider of flood insurance that premiums are due, the FDIC-supervised institution, or a servicer acting on its behalf, shall pay the amount owed to the insurance provider from the escrow account by the date when such premiums are due.

(b) *Notice.* For any loan for which an FDIC-supervised institution is required to escrow under paragraph (a) or paragraph (c)(2) of this section or may be required to escrow under paragraph (a)(3) of this section during the term of the loan, the FDIC-supervised institution, or a servicer acting on its behalf, shall mail or deliver a written notice with the notice provided under § 339.9 informing the borrower that the FDIC-supervised institution is required to escrow all premiums and fees for required flood insurance, using language that is substantially similar to model clauses on the escrow requirement in appendix A.

(c) *Small lender exception*—(1) *Qualification.* Except as may be required under applicable State law, paragraphs (a), (b) and (d) of this section do not apply to an FDIC-supervised institution:

(i) That has total assets of less than $1 billion as of December 31 of either of the two prior calendar years; and

(ii) On or before July 6, 2012:

(A) Was not required under Federal or State law to deposit taxes, insurance premiums, fees, or any other charges in an escrow account for the entire term of any loan secured by residential improved real estate or a mobile home; and

(B) Did not have a policy of consistently and uniformly requiring the deposit of taxes, insurance premiums, fees, or any other charges in an escrow account for any loans secured by residential improved real estate or a mobile home.

(2) *Change in status.* If an FDIC-supervised institution previously qualified for the exception in paragraph (c)(1) of this section, but no longer qualifies for the exception because it had assets of $1 billion or more for two consecutive calendar year ends, the FDIC-supervised institution must escrow premiums and fees for flood insurance pursuant to paragraph (a) for any designated loan made, increased, extended, or renewed on or after July 1 of the first calendar year of changed status.

(d) *Option to escrow*—(1) *In general.* An FDIC-supervised institution, or a servicer acting on its behalf, shall offer and make available to the borrower the option to escrow all premiums and fees for any flood insurance required under § 339.3 for any loan secured by residential improved real estate or a mobile home that is outstanding on January 1, 2016, or July 1 of the first calendar year in which the FDIC-supervised institution has had a change in status pursuant to paragraph (c)(2) of this section, unless:

(i) The loan or the FDIC-supervised institution qualifies for an exception from the escrow requirement under paragraphs (a)(2) or (c) of this section, respectively;

(ii) The borrower is already escrowing all premiums and fees for flood insurance for the loan; or

(iii) The FDIC-supervised institution is required to escrow flood insurance premiums and fees pursuant to paragraph (a) of this section.

(2) *Notice.* For any loan subject to paragraph (d) of this section, the FDIC-supervised institution, or a servicer acting on its behalf, shall mail or deliver to the borrower no later than June 30, 2016, or September 30 of the first calendar year in which the FDIC-supervised institution has had a change in status pursuant to paragraph (c)(2) of this section, a notice in writing, or if the borrower agrees, electronically, informing the borrower of the option to

escrow all premiums and fees for any required flood insurance and the method(s) by which the borrower may request the escrow, using language similar to the model clause in appendix B to this part.

(3) *Timing*. The FDIC-supervised institution or servicer must begin escrowing premiums and fees for flood insurance as soon as reasonably practicable after the FDIC-supervised institution or servicer receives the borrower's request to escrow.

[80 FR 43252, July 21, 2015]

§ 339.6 Required use of standard flood hazard determination form.

(a) *Use of form*. An FDIC-supervised institution shall use the standard flood hazard determination form developed by the Administrator of FEMA when determining whether the building or mobile home offered as collateral security for a loan is or will be located in a special flood hazard area in which flood insurance is available under the Act. The standard flood hazard determination form may be used in a printed, computerized, or electronic manner. An FDIC-supervised institution may obtain the standard flood hazard determination form from FEMA's Web site at *www.fema.gov*.

(b) *Retention of form*. An FDIC-supervised institution shall retain a copy of the completed standard flood hazard determination form, in either hard copy or electronic form, for the period of time the FDIC-supervised institution owns the loan.

§ 339.7 Force placement of flood insurance.

(a) *Notice and purchase of coverage*. If an FDIC-supervised institution, or a servicer acting on its behalf, determines at any time during the term of a designated loan, that the building or mobile home and any personal property securing the designated loan is not covered by flood insurance or is covered by flood insurance in an amount less than the amount required under § 339.3, then the FDIC-supervised institution or its servicer shall notify the borrower that the borrower should obtain flood insurance, at the borrower's expense, in an amount at least equal to the amount required under § 339.3, for the remaining term of the loan. If the borrower fails to obtain flood insurance within 45 days after notification, then the FDIC-supervised institution or its servicer shall purchase insurance on the borrower's behalf. The FDIC-supervised institution or its servicer may charge the borrower for the cost of premiums and fees incurred in purchasing the insurance, including premiums or fees incurred for coverage beginning on the date on which flood insurance coverage lapsed or did not provide a sufficient coverage amount.

(b) *Termination of force-placed insurance*—(1) *Termination and refund*. Within 30 days of receipt by an FDIC-supervised institution, or a servicer acting on its behalf, of a confirmation of a borrower's existing flood insurance coverage, the FDIC-supervised institution or its servicer shall:

(i) Notify the insurance provider to terminate any insurance purchased by the FDIC-supervised institution or its servicer under paragraph (a) of this section; and

(ii) Refund to the borrower all premiums paid by the borrower for any insurance purchased by the FDIC-supervised institution or its servicer under paragraph (a) of this section during any period during which the borrower's flood insurance coverage and the insurance coverage purchased by the FDIC-supervised institution or its servicer were each in effect, and any related fees charged to the borrower with respect to the insurance purchased by the FDIC-supervised institution or its servicer during such period.

(2) *Sufficiency of demonstration*. For purposes of confirming a borrower's existing flood insurance coverage under paragraph (b) of this section, an FDIC-supervised institution or its servicer shall accept from the borrower an insurance policy declarations page that includes the existing flood insurance policy number and the identity of, and contact information for, the insurance company or agent.

§ 339.8 Determination fees.

(a) *General*. Notwithstanding any Federal or State law other than the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129), any FDIC-supervised institution, or a

servicer acting on its behalf, may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard area. A determination fee may also include, but is not limited to, a fee for life-of-loan monitoring.

(b) *Borrower fee.* The determination fee authorized by paragraph (a) of this section may be charged to the borrower if the determination:

(1) Is made in connection with a making, increasing, extending, or renewing of the loan that is initiated by the borrower;

(2) Reflects the Administrator of FEMA's revision or updating of floodplain areas or flood-risk zones;

(3) Reflects the Administrator of FEMA's publication of a notice or compendium that:

(i) Affects the area in which the building or mobile home securing the loan is located; or

(ii) By determination of the Administrator of FEMA, may reasonably require a determination whether the building or mobile home securing the loan is located in a special flood hazard area; or

(4) Results in the purchase of flood insurance coverage by the lender or its servicer on behalf of the borrower under § 339.7.

(c) *Purchaser or transferee fee.* The determination fee authorized by paragraph (a) of this section may be charged to the purchaser or transferee of a loan in the case of the sale or transfer of the loan.

§ 339.9 Notice of special flood hazards and availability of Federal disaster relief assistance.

(a) *Notice requirement.* When an FDIC-supervised institution makes, increases, extends, or renews a loan secured by a building or a mobile home located or to be located in a special flood hazard area, the FDIC-supervised institution shall mail or deliver a written notice to the borrower and to the servicer in all cases whether or not flood insurance is available under the Act for the collateral securing the loan.

(b) *Contents of notice.* The written notice must include the following information:

(1) A warning, in a form approved by the Administrator of FEMA, that the building or the mobile home is or will be located in a special flood hazard area;

(2) A description of the flood insurance purchase requirements set forth in section 102(b) of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012a(b));

(3) A statement, where applicable, that flood insurance coverage is available from private insurance companies that issue standard flood insurance policies on behalf of the NFIP or directly from the NFIP;

(4) A statement that flood insurance that provides the same level of coverage as a standard flood insurance policy under the NFIP may also be available from a private insurance company that issues policies on behalf of the company.

(5) A statement that the borrower is encouraged to compare the flood insurance coverage, deductibles, exclusions, conditions, and premiums associated with flood insurance policies issued on behalf of the NFIP and policies issued on behalf of private insurance companies and that the borrower should direct inquiries regarding the availability, cost, and comparisons of flood insurance coverage to an insurance agent; and

(6) A statement whether Federal disaster relief assistance may be available in the event of damage to the building or mobile home caused by flooding in a Federally declared disaster.

(c) *Timing of notice.* The FDIC-supervised institution shall provide the notice required by paragraph (a) of this section to the borrower within a reasonable time before the completion of the transaction, and to the servicer as promptly as practicable after the FDIC-supervised institution provides notice to the borrower and in any event no later than the time the FDIC-supervised institution provides other similar notices to the servicer concerning hazard insurance and taxes. Notice to the servicer may be made electronically or may take the form of a copy of the notice to the borrower.

(d) *Record of receipt*. The FDIC-supervised institution shall retain a record of the receipt of the notices by the borrower and the servicer for the period of time the FDIC-supervised institution owns the loan.

(e) *Alternate method of notice*. Instead of providing the notice to the borrower required by paragraph (a) of this section, an FDIC-supervised institution may obtain satisfactory written assurance from a seller or lessor that, within a reasonable time before the completion of the sale or lease transaction, the seller or lessor has provided such notice to the purchaser or lessee. The FDIC-supervised institution shall retain a record of the written assurance from the seller or lessor for the period of time the FDIC-supervised institution owns the loan.

(f) *Use of sample form of notice*. An FDIC-supervised institution will be considered to be in compliance with the requirement for notice to the borrower of this section by providing written notice to the borrower containing the language presented in appendix A to this part within a reasonable time before the completion of the transaction. The notice presented in appendix A to this part satisfies the borrower notice requirements of the Act.

[80 FR 43249, July 21, 2015, as amended at 80 FR 43253, July 21, 2015]

§ 339.10 Notice of servicer's identity.

(a) *Notice requirement*. When an FDIC-supervised institution makes, increases, extends, renews, sells, or transfers a loan secured by a building or mobile home located or to be located in a special flood hazard area, the FDIC-supervised institution shall notify the Administrator of FEMA (or the Administrator of FEMA's designee) in writing of the identity of the servicer of the loan. The Administrator of FEMA has designated the insurance provider to receive the FDIC-supervised institution's notice of the servicer's identity. This notice may be provided electronically if electronic transmission is satisfactory to the Administrator of FEMA's designee.

(b) *Transfer of servicing rights*. The FDIC-supervised institution shall notify the Administrator of FEMA (or the Administrator of FEMA's designee) of any change in the servicer of a loan described in paragraph (a) of this section within 60 days after the effective date of the change. This notice may be provided electronically if electronic transmission is satisfactory to the Administrator or his or her designee. Upon any change in the servicing of a loan described in paragraph (a) of this section, the duty to provide notice under this paragraph (b) shall transfer to the transferee servicer.

APPENDIX A TO PART 339—SAMPLE FORM OF NOTICE OF SPECIAL FLOOD HAZARDS AND AVAILABILITY OF FEDERAL DISASTER RELIEF ASSISTANCE

We are giving you this notice to inform you that:

The building or mobile home securing the loan for which you have applied is or will be located in an area with special flood hazards.

The area has been identified by the Administrator of the Federal Emergency Management Agency (FEMA) as a special flood hazard area using FEMA's *Flood Insurance Rate Map* or the *Flood Hazard Boundary Map* for the following community: _____. This area has a one percent (1%) chance of a flood equal to or exceeding the base flood elevation (a 100-year flood) in any given year. During the life of a 30-year mortgage loan, the risk of a 100-year flood in a special flood hazard area is 26 percent (26%).

Federal law allows a lender and borrower jointly to request the Administrator of FEMA to review the determination of whether the property securing the loan is located in a special flood hazard area. If you would like to make such a request, please contact us for further information.

____The community in which the property securing the loan is located participates in the National Flood Insurance Program (NFIP). Federal law will not allow us to make you the loan that you have applied for if you do not purchase flood insurance. The flood insurance must be maintained for the life of the loan. If you fail to purchase or renew flood insurance on the property, Federal law authorizes and requires us to purchase the flood insurance for you at your expense.

• At a minimum, flood insurance purchased must cover *the lesser of:*

(1) the outstanding principal balance of the loan; *or*

(2) the maximum amount of coverage allowed for the type of property under the NFIP.

Flood insurance coverage under the NFIP is limited to the building or mobile home and any personal property that secures your loan and not the land itself.

• Federal disaster relief assistance (usually in the form of a low-interest loan) may be available for damages incurred in excess of your flood insurance if your community's participation in the NFIP is in accordance with NFIP requirements.

• Although you may not be required to maintain flood insurance on all structures, you may still wish to do so, and your mortgage lender may still require you to do so to protect the collateral securing the mortgage. If you choose not to maintain flood insurance on a structure and it floods, you are responsible for all flood losses relating to that structure.

Availability of Private Flood Insurance Coverage

Flood insurance coverage under the NFIP may be purchased through an insurance agent who will obtain the policy either directly through the NFIP or through an insurance company that participates in the NFIP. Flood insurance that provides the same level of coverage as a standard flood insurance policy under the NFIP may be available from private insurers that do not participate in the NFIP. You should compare the flood insurance coverage, deductibles, exclusions, conditions, and premiums associated with flood insurance policies issued on behalf of the NFIP and policies issued on behalf of private insurance companies and contact an insurance agent as to the availability, cost, and comparisons of flood insurance coverage.

[Escrow Requirement for Residential Loans

Federal law may require a lender or its servicer to escrow all premiums and fees for flood insurance that covers any residential building or mobile home securing a loan that is located in an area with special flood hazards. If your lender notifies you that an escrow account is required for your loan, then you must pay your flood insurance premiums and fees to the lender or its servicer with the same frequency as you make loan payments for the duration of your loan. These premiums and fees will be deposited in the escrow account, which will be used to pay the flood insurance provider.]

___Flood insurance coverage under the NFIP is not available for the property securing the loan because the community in which the property is located does not participate in the NFIP. In addition, if the nonparticipating community has been identified for at least one year as containing a special flood hazard area, properties located in the community will not be eligible for Federal disaster relief assistance in the event of a Federally declared flood disaster.

[80 FR 43253, July 21, 2015]

APPENDIX B TO PART 339—SAMPLE CLAUSE FOR OPTION TO ESCROW FOR OUTSTANDING LOANS

Escrow Option Clause

You have the option to escrow all premiums and fees for the payment on your flood insurance policy that covers any residential building or mobile home that is located in an area with special flood hazards and that secures your loan. If you choose this option:

• Your payments will be deposited in an escrow account to be paid to the flood insurance provider.

• The escrow amount for flood insurance will be added to the regular mortgage payment that you make to your lender or its servicer.

• The payments you make into the escrow account will accumulate over time and the funds will be used to pay your flood insurance policy when your lender or servicer receives a notice from your flood insurance provider that the flood insurance premium is due.

To choose this option, follow the instructions below. If you have any questions about the option, contact [Insert Name of Lender or Servicer] at [Insert Contact Information].

[Insert Instructions for Selecting to Escrow]

[80 FR 43254, July 21, 2015]

PART 340—RESTRICTIONS ON SALE OF ASSETS OF A FAILED INSTITUTION BY THE FEDERAL DEPOSIT INSURANCE CORPORATION

Sec.

340.1 What is the statutory authority for the regulation, what are its purpose and scope, and can the FDIC have other policies on related topics?
340.2 Definitions.
340.3 What are the restrictions on the sale of assets by the FDIC if the buyer wants to finance the purchase with a loan from the FDIC?
340.4 What are the restrictions on the sale of assets by the FDIC regardless of the method of financing?
340.5 Can the FDIC deny a loan to a buyer who is not disqualified from purchasing assets using seller-financing under this regulation?
340.6 What is the effect of this part on transactions that were entered into before its effective date?
340.7 When is a certification required, and who does not have to provide a certification?

340.8 Does this part apply in the case of a workout, resolution, or settlement of obligations?

AUTHORITY: 12 U.S.C. 1819 (Tenth), 1821(p).

SOURCE: 80 FR 22889, Apr. 24, 2015, unless otherwise noted.

§ 340.1 What is the statutory authority for the regulation, what are its purpose and scope, and can the FDIC have other policies on related topics?

(a) *Authority*. The statutory authority for adopting this part is section 11(p) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1821(p). Section 11(p) was added to the FDI Act by section 20 of the Resolution Trust Corporation Completion Act (Pub. L. 103–204, 107 Stat. 2369 (1993)).

(b) *Purpose*. The purpose of this part is to prohibit individuals or entities that improperly profited or engaged in wrongdoing at the expense of a failed institution or covered financial company, or seriously mismanaged a failed institution, from buying assets of a failed institution from the Federal Deposit Insurance Corporation (FDIC).

(c) *Scope*. (1) The restrictions of this part generally apply to sales of assets of failed institutions owned or controlled by the FDIC in any capacity.

(2) The restrictions in this section apply to the sale of assets of a subsidiary of a failed institution or a bridge depository institution if the FDIC controls the terms of the sale by agreement or in its role as shareholder.

(3) Unless we determine otherwise, this part does not apply to the sale of securities in connection with the investment of corporate and receivership funds pursuant to the Investment Policy for Liquidation Funds managed by the FDIC as it is in effect from time to time.

(4) In the case of a sale of securities backed by a pool of assets that may include assets of failed institutions by a trust or other entity, this part applies only to the sale of assets by the FDIC to an underwriter in an initial offering, and not to any other purchaser of the securities.

(5) The restrictions of this part do not apply to a sale of a security or a group or index of securities, a commodity, or any qualified financial contract that, in each case, customarily is traded through a financial intermediary, as defined in § 340.2, where the seller cannot control selection of the purchaser and the sale is consummated through that customary practice.

(6) The restrictions of this part do not apply to a judicial sale or a trustee's sale of property that secures an obligation to the FDIC where the sale is not conducted or controlled by the FDIC.

(d) The FDIC retains the authority to establish other policies restricting asset sales. Neither 12 U.S.C. 1821(p) nor this part in any way limits the authority of the FDIC to establish policies prohibiting the sale of assets to prospective purchasers who have injured any failed institution, or to other prospective purchasers, such as certain employees or contractors of the FDIC, or individuals who are not in compliance with the terms of any debt or duty owed to the FDIC. Any such policies may be independent of, in conjunction with, or in addition to the restrictions set forth in this part.

§ 340.2 Definitions.

Many of the terms used in this part are defined in the Federal Deposit Insurance Act, 12 U.S.C. 1811, *et seq*. Additionally, for the purposes of this part, the following terms are defined:

(a) *Associated person of an individual or entity* means:

(1) With respect to an individual:

(i) The individual's spouse or dependent child or any member of his or her immediate household;

(ii) A partnership of which the individual is or was a general or limited partner;

(iii) A limited liability company of which the individual is or was a member; or

(iv) A corporation of which the individual is or was an officer or director.

(2) With respect to a partnership, a managing or general partner of the partnership or with respect to a limited liability company, a manager; or

(3) With respect to any entity, an individual or entity who, acting individually or in concert with one or more individuals or entities, owns or controls 25 percent or more of the entity.

(b) *Default* means any failure to comply with the terms of an obligation to such an extent that:

(1) A judgment has been rendered in favor of the FDIC or a failed institution; or

(2) In the case of a secured obligation, the property securing such obligation is foreclosed on.

(c) *FDIC* means the Federal Deposit Insurance Corporation.

(d) *Failed institution* means any insured depository institution (as defined in 12 U.S.C. 1813(c)) that has been under the conservatorship or receivership of the FDIC or any of its predecessors.

(e) *Financial intermediary* means any broker, dealer, bank, underwriter, exchange, clearing agency registered with the Securities and Exchange Commission (SEC) under section 17A of the Securities Exchange Act of 1934, transfer agent (as defined in section 3(a)(25) of the Securities Exchange Act of 1934), central counterparty or any other entity whose role is to facilitate a transaction by, as a riskless intermediary, purchasing a security or qualified financial contract from one counterparty and then selling it to another.

(f) *Obligation* means any debt or duty to pay money owed to the FDIC or a failed institution, including any guarantee of any such debt or duty.

(g) *Person* means an individual, or an entity with a legally independent existence, including: A trustee; the beneficiary of at least a 25 percent share of the proceeds of a trust; a partnership; a corporation; an association; or other organization or society.

(h) *Substantial loss* means:

(1) An obligation that is delinquent for ninety (90) or more days and on which there remains an outstanding balance of more than $50,000;

(2) An unpaid final judgment in excess of $50,000 regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding;

(3) A deficiency balance following a foreclosure of collateral in excess of $50,000, regardless of whether it becomes discharged in whole or in part in a bankruptcy proceeding;

(4) Any loss in excess of $50,000 evidenced by an IRS Form 1099–C (Information Reporting for Cancellation of Debt).

§ 340.3 What are the restrictions on the sale of assets by the FDIC if the buyer wants to finance the purchase with a loan from the FDIC?

A person may not borrow money or accept credit from the FDIC in connection with the purchase of any assets of a failed institution from the FDIC if:

(a) There has been a default with respect to one or more obligations totaling in excess of $1,000,000 owed by that person or its associated person; and

(b) The person or its associated person made any fraudulent misrepresentations in connection with any such obligation(s).

§ 340.4 What are the restrictions on the sale of assets by the FDIC regardless of the method of financing?

(a) A person may not acquire any assets of a failed institution from the FDIC if the person or its associated person:

(1) Has participated, as an officer or director of a failed institution or of an affiliate of a failed institution, in a material way in one or more transaction(s) that caused a substantial loss to that failed institution;

(2) Has been removed from, or prohibited from participating in the affairs of, a failed institution pursuant to any final enforcement action by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the FDIC, or any of their predecessors or successors;

(3) Has demonstrated a pattern or practice of defalcation regarding obligations to any failed institution;

(4) Has been convicted of committing or conspiring to commit any offense under 18 U.S.C. 215, 656, 657, 1005, 1006, 1007, 1008, 1014, 1032, 1341, 1343 or 1344 affecting any failed institution and there has been a default with respect to one or more obligations owed by that person or its associated person; or

(5) Would be prohibited from purchasing the assets of a covered financial company from the FDIC under 12 U.S.C. 5390(r) or its implementing regulation at 12 CFR part 380.13.

(b) For purposes of paragraph (a) of this section, a person has participated

''in a material way in a transaction that caused a substantial loss to a failed institution'' if, in connection with a substantial loss to a failed institution, the person has been found in a final determination by a court or administrative tribunal, or is alleged in a judicial or administrative action brought by the FDIC or by any component of the government of the United States or of any state:

(1) To have violated any law, regulation, or order issued by a federal or state banking agency, or breached or defaulted on a written agreement with a federal or state banking agency, or breached a written agreement with a failed institution;

(2) To have engaged in an unsafe or unsound practice in conducting the affairs of a failed institution; or

(3) To have breached a fiduciary duty owed to a failed institution.

(c) For purposes of paragraph (a) of this section, a person or its associated person has demonstrated a ''pattern or practice of defalcation'' regarding obligations to a failed institution if the person or associated person has:

(1) Engaged in more than one transaction that created an obligation on the part of such person or its associated person with intent to cause a loss to any insured depository institution or with reckless disregard for whether such transactions would cause a loss to any such insured depository institution; and

(2) The transactions, in the aggregate, caused a substantial loss to one or more failed institution(s).

§ 340.5 Can the FDIC deny a loan to a buyer who is not disqualified from purchasing assets using seller-financing under this regulation?

The FDIC still has the right to make an independent determination, based upon all relevant facts of a person's financial condition and history, of that person's eligibility to receive any loan or extension of credit from the FDIC, even if the person is not in any way disqualified from purchasing assets from the FDIC under the restrictions set forth in this part.

§ 340.6 What is the effect of this part on transactions that were entered into before its effective date?

This part does not affect the enforceability of a contract of sale and/or agreement for seller financing in effect prior to July 1, 2000.

§ 340.7 When is a certification required, and who does not have to provide a certification?

(a) Before any person may purchase any asset from the FDIC that person must certify, under penalty of perjury, that none of the restrictions contained in this part applies to the purchase. The person must also certify that neither the identity nor form of the person, nor any aspect of the contemplated transaction, has been created or altered with the intent, in whole or in part, to allow an individual or entity who otherwise would be ineligible to purchase assets from the FDIC to benefit directly or indirectly from the proposed transaction. The FDIC may establish the form of the certification and may change the form from time to time.

(b) Notwithstanding paragraph (a) of this section, and unless the Director of the FDIC's Division of Resolutions and Receiverships or designee in his or her discretion so requires, a certification need not be provided by:

(1) A state or political subdivision of a state;

(2) A federal agency or instrumentality such as the Government National Mortgage Association;

(3) A federally-regulated, government-sponsored enterprise such as the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation; or

(4) A bridge depository institution.

§ 340.8 Does this part apply in the case of a workout, resolution, or settlement of obligations?

The restrictions of §§ 340.3 and 340.4 do not apply if the sale or transfer of an asset resolves or settles, or is part of the resolution or settlement of, one or more obligations or claims that have been, or could have been, asserted by the FDIC against the person with whom the FDIC is settling regardless

of the amount of such obligations or claims.

PART 341—REGISTRATION OF SECURITIES TRANSFER AGENTS

Sec.
341.1 Scope.
341.2 Definitions.
341.3 Registration as securities transfer agent.
341.4 Amendments to registration.
341.5 Withdrawal from registration.
341.6 Reports.

AUTHORITY: Secs. 2, 3, 17, 17A and 23(a), Securities Exchange Act of 1934, as amended (15 U.S.C. 78b, 78c, 78q, 78q–1 and 78w(a)).

SOURCE: 47 FR 38106, Aug. 30, 1982, unless otherwise noted.

§ 341.1 Scope.

This part is issued by the Federal Deposit Insurance Corporation (the FDIC) under sections 2, 3(a)(34)(B), 17, 17A and 23(a) of the Securities Exchange Act of 1934 (the Act), as amended (15 U.S.C. 78b, 78c(a)(34)(B), 78q, 78q–1 and 78w(a)) and applies to all insured State nonmember banks, insured State savings associations, or subsidiaries of such institutions, that act as transfer agents for securities registered under section 12 of the Act (15 U.S.C. 78*l*), or for securities exempt from registration under subsections (g)(2)(B) or (g)(2)(G) of section 12 (15 U.S.C. 78*l*(g)(2)(B) and (G)) (securities of investment companies, including mutual funds, and certain insurance companies). Such securities are qualifying securities for purposes of this part.

[81 FR 27297, May 6, 2016]

§ 341.2 Definitions.

For the purpose of this part, including all forms and instructions promulgated for use in connection herewith, unless the context otherwise requires:

(a) The term *transfer agent* means any person who engages on behalf of an issuer of qualifying securities or on behalf of itself as an issuer of qualifying securities in: (1) Countersigning such securities upon issuance;

(2) Monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar;

(3) Registering the transfer of such securities;

(4) Exchanging or converting such securities; or

(5) Transferring record ownership of securities by bookkeeping entry without physical issuance of such securities certificates. The term *transfer agent* includes any person who performs these functions as a co-transfer agent with respect to equity or debt issues, and any person who performs these functions as registrar or co-registrar with respect to debt issued by corporations.

NOTE: The following examples are illustrative of the kinds of activities engaged in by transfer agents under this part.

1. A transfer agent of stock or shares in a mutual fund maintains the records of shareholders and transfers stock from one shareholder to another by cancellation of the surrendered certificates and issuance of new certificates in the name of the new shareholder. A co-transfer agent also performs these functions.

2. A registrar of stock or shares in a mutual fund monitors the issuance of such securities to prevent over-issuance of shares, affixing its signature of each stock certificate issued to signify its authorized issuance. A co-registrar also performs these functions.

3. A registrar of corporate debt securities maintains the records of ownership of registered bonds; makes changes in such records; issues, transfers, and exchanges such certificates; and monitors the securities to prevent over-issuance of certificates. A co-registrar also performs these functions.

(b) The term *Act* means the Securities Exchange Act of 1934.

(c) The acronym *ARA* means the appropriate regulatory agency, as defined in section 3(a)(34)(B) of the Act.

(d) The phrase *Federal bank regulators* means the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation.

(e) The term *Form TA–1* means the form and any attachments to that form, whether filed as a registration or an amendment to a registration.

(f) The term *registrant* means the entity on whose behalf Form TA–1 is filed.

(g) The acronym *SEC* means the Securities and Exchange Commission.

(h) The term *covered institution* means an insured State nonmember bank, an insured State savings association, and any subsidiary of such institutions.

(i) The term *qualifying securities* means:

(1) Securities registered on a national securities exchange (15 U.S.C. 78*l*(b)); or

(2) Securities required to be registered under section 12(g)(1) of the Act (15 U.S.C. 78*l*(g)(1)), except for securities exempted from registration with the SEC by section 12(g)(2) (C, D, E, F, and H) of the Act.

[47 FR 38106, Aug. 30, 1982, as amended at 81 FR 27297, May 6, 2016]

§ 341.3 Registration as securities transfer agent.

(a) *Requirement for registration.* Any covered institution that performs any of the functions of a transfer agent as described in § 341.2(a) with respect to qualifying securities shall register with the FDIC in the manner indicated in this section.

(b) *Application to register as transfer agent.* An application for registration under section 17A(c) of the Act, of a transfer agent for which the FDIC is the appropriate regulatory agency, as defined in section 3(a)(34)(B)(iii) of the Act, shall be filed with the FDIC at its Washington, DC headquarters on Form TA–1, in accordance with the instructions contained therein.

(c) *Effective date of registration.* Registration shall become effective 30 days after the date an application on Form TA–1 is filed unless the FDIC accelerates, denies, or postpones such registration in accordance with section 17A(c) of the Act. The effective date of such registration may be postponed by order for a period not to exceed 15 days. Postponement of registration for more than 15 days shall be after notice and opportunity for hearing. Form TA–1 may be completed electronically and is available from the FDIC at *www.fdic.gov* or the Federal Financial Institutions Examination Council at *www.ffiec.gov*, or upon request, from the Director, Division of Risk Management Supervision (RMS), FDIC, Washington, DC 20429.

[47 FR 38106, Aug. 30, 1982, as amended at 60 FR 31384, June 15, 1995; 81 FR 27297, May 6, 2016]

§ 341.4 Amendments to registration.

(a) Within 60 calendar days following the date which any information reported on Form TA–1 becomes inaccurate, misleading, or incomplete, the registrant shall file an amendment on Form TA–1 correcting the inaccurate, misleading, or incomplete information.

(b) The filing of an amendment to an application for registration as a transfer agent under § 341.3, which registration has not become effective, shall postpone the effective date of the registration for 30 days following the date on which the amendment is filed unless the FDIC accelerates, denies, or postpones the registration in accordance with section 17A(c) of the Act.

[47 FR 38106, Aug. 30, 1982, as amended at 52 FR 1182, Jan. 12, 1987]

§ 341.5 Withdrawal from registration.

(a) *Notice of withdrawal from registration.* Any transfer agent registered under this part that ceases to engage in the functions of a transfer agent as defined in § 341.2(a) shall file a written notice of withdrawal from registration with the FDIC. A registered transfer agent that ceases to engage in one or more of the functions of transfer agent as defined in § 341.2(a), but continues to engage in another such function, shall not withdraw from registration.

(b) A notice of withdrawal shall be filed with the FDIC at its Washington, DC headquarters. Deregistration shall be effective upon receipt of notice of withdrawal by the FDIC. A Request for Deregistration form is available electronically from *www.fdic.gov* or by request from the Director, Division of Risk Management Supervision (RMS), FDIC, Washington, DC 20429.

(c) If the FDIC finds that any registered transfer agent for which it is the ARA, is no longer in existence or has ceased to do business as a transfer agent, FDIC shall cancel or deny the registration by order of the Board of Directors.

(d) Registration of a transfer agent with another ARA shall cancel registration of the transfer agent with FDIC.

[47 FR 38106, Aug. 30, 1982, as amended at 60 FR 31384, June 15, 1995; 81 FR 27297, May 6, 2016]

§ 341.6 Reports.

Every registration or amendment filed under this section shall constitute a *report* or *application* within the meaning or sections 17, 17A(c), and 32(a) of the Act.

PART 342 [RESERVED]

PART 343—CONSUMER PROTECTION IN SALES OF INSURANCE

Sec.
343.10 Purpose and scope.
343.20 Definitions.
343.30 Prohibited practices.
343.40 What you must disclose.
343.50 Where insurance activities may take place.
343.60 Qualification and licensing requirements for insurance sales personnel.
APPENDIX A TO PART 343—CONSUMER GRIEVANCE PROCESS

AUTHORITY: 12 U.S.C. 1819 (Seventh and Tenth); 12 U.S.C. 1831x.

SOURCE: 83 FR 13847, Apr. 2, 2018, unless otherwise noted.

§ 343.10 Purpose and scope.

This part establishes consumer protections in connection with retail sales practices, solicitations, advertising, or offers of any insurance product or annuity to a consumer by:

(a) Any institution; or

(b) Any other person that is engaged in such activities at an office of the institution or on behalf of the institution.

§ 343.20 Definitions.

As used in this part:

Affiliate means a company that controls, is controlled by, or is under common control with another company.

Company means any corporation, partnership, business trust, association or similar organization, or any other trust (unless by its terms the trust must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust). It does not include any corporation the majority of the shares of which are owned by the United States or by any State, or a qualified family partnership, as defined in section 2(o)(10) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841(o)(10)).

Consumer means an individual who purchases, applies to purchase, or is solicited to purchase from you insurance products or annuities primarily for personal, family, or household purposes.

Control of a company has the same meaning as in section 3(w)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(5)).

Domestic violence means the occurrence of one or more of the following acts by a current or former family member, household member, intimate partner, or caretaker:

(1) Attempting to cause or causing or threatening another person physical harm, severe emotional distress, psychological trauma, rape, or sexual assault;

(2) Engaging in a course of conduct or repeatedly committing acts toward another person, including following the person without proper authority, under circumstances that place the person in reasonable fear of bodily injury or physical harm;

(3) Subjecting another person to false imprisonment; or

(4) Attempting to cause or causing damage to property so as to intimidate or attempt to control the behavior of another person.

Electronic media includes any means for transmitting messages electronically between you and a consumer in a format that allows visual text to be displayed on equipment, for example, a personal computer monitor.

FDIC-supervised insured depository institution or institution means any State nonmember insured bank or State savings association for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

Office means the premises of an institution where retail deposits are accepted from the public.

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

Subsidiary has the same meaning as in section 3(w)(4) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(4)).

You—(1) Means:

(i) An institution; or

(ii) Any other person only when the person sells, solicits, advertises, or offers an insurance product or annuity to a consumer at an office of the institution or on behalf of an institution.

(2) For purposes of this definition, activities on behalf of an institution include activities where a person, whether at an office of the institution or at another location sells, solicits, advertises, or offers an insurance product or annuity and at least one of the following applies:

(i) The person represents to a consumer that the sale, solicitation, advertisement, or offer of any insurance product or annuity is by or on behalf of the institution;

(ii) The institution refers a consumer to a seller of insurance products or annuities and the institution has a contractual arrangement to receive commissions or fees derived from a sale of an insurance product or annuity resulting from that referral; or

(iii) Documents evidencing the sale, solicitation, advertising, or offer of an insurance product or annuity identify or refer to the institution.

§ 343.30 Prohibited practices.

(a) *Anticoercion and antitying rules.* You may not engage in any practice that would lead a consumer to believe that an extension of credit, in violation of section 106(b) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972) in the case of a State nonmember insured bank and a foreign bank having an insured branch, or in violation of section 5(q) of the Home Owners' Loan Act (12 U.S.C. 1464(q)) in the case of a State savings association, is conditional upon either:

(1) The purchase of an insurance product or annuity from the institution or any of its affiliates; or

(2) An agreement by the consumer not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

(b) *Prohibition on misrepresentations generally.* You may not engage in any practice or use any advertisement at any office of, or on behalf of, the institution or a subsidiary of the institution that could mislead any person or otherwise cause a reasonable person to reach an erroneous belief with respect to:

(1) The fact that an insurance product or annuity sold or offered for sale by you or any subsidiary of the institution is not backed by the Federal government or the institution, or the fact that the insurance product or annuity is not insured by the Federal Deposit Insurance Corporation;

(2) In the case of an insurance product or annuity that involves investment risk, the fact that there is an investment risk, including the potential that principal may be lost and that the product may decline in value; or

(3) In the case of an institution or subsidiary of the institution at which insurance products or annuities are sold or offered for sale, the fact that:

(i) The approval of an extension of credit to a consumer by the institution or subsidiary may not be conditioned on the purchase of an insurance product or annuity by the consumer from the institution or a subsidiary of the institution; and

(ii) The consumer is free to purchase the insurance product or annuity from another source.

(c) *Prohibition on domestic violence discrimination.* You may not sell or offer for sale, as principal, agent, or broker, any life or health insurance product if the status of the applicant or insured as a victim of domestic violence or as a provider of services to victims of domestic violence is considered as a criterion in any decision with regard to insurance underwriting, pricing, renewal, or scope of coverage of such product, or with regard to the payment of insurance claims on such product,

except as required or expressly permitted under State law.

§ 343.40 What you must disclose.

(a) *Insurance disclosures.* In connection with the initial purchase of an insurance product or annuity by a consumer from you, you must disclose to the consumer, except to the extent the disclosure would not be accurate, that:

(1) The insurance product or annuity is not a deposit or other obligation of, or guaranteed by, the institution or an affiliate of the institution;

(2) The insurance product or annuity is not insured by the Federal Deposit Insurance Corporation (FDIC) or any other agency of the United States, the institution, or (if applicable) an affiliate of the institution; and

(3) In the case of an insurance product or annuity that involves an investment risk, there is investment risk associated with the product, including the possible loss of value.

(b) *Credit disclosure.* In the case of an application for credit in connection with which an insurance product or annuity is solicited, offered, or sold, you must disclose that the institution may not condition an extension of credit on either:

(1) The consumer's purchase of an insurance product or annuity from the institution or any of its affiliates; or

(2) The consumer's agreement not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

(c) *Timing and method of disclosures*—(1) *In general.* The disclosures required by paragraph (a) of this section must be provided orally and in writing before the completion of the initial sale of an insurance product or annuity to a consumer. The disclosure required by paragraph (b) of this section must be made orally and in writing at the time the consumer applies for an extension of credit in connection with which an insurance product or annuity is solicited, offered, or sold.

(2) *Exception for transactions by mail.* If a sale of an insurance product or annuity is conducted by mail, you are not required to make the oral disclosures required by paragraph (a) of this section. If you take an application for credit by mail, you are not required to make the oral disclosure required by paragraph (b) of this section.

(3) *Exception for transactions by telephone.* If a sale of an insurance product or annuity is conducted by telephone, you may provide the written disclosures required by paragraph (a) of this section by mail within 3 business days beginning on the first business day after the sale, excluding Sundays and the legal public holidays specified in 5 U.S.C. 6103(a). If you take an application for credit by telephone, you may provide the written disclosure required by paragraph (b) of this section by mail, provided you mail it to the consumer within three days beginning the first business day after the application is taken, excluding Sundays and the legal public holidays specified in 5 U.S.C. 6103(a).

(4) *Electronic form of disclosures.* (i) Subject to the requirements of section 101(c) of the Electronic Signatures in Global and National Commerce Act (12 U.S.C. 7001(c)), you may provide the written disclosures required by paragraph (a) and (b) of this section through electronic media instead of on paper, if the consumer affirmatively consents to receiving the disclosures electronically and if the disclosures are provided in a format that the consumer may retain or obtain later, for example, by printing or storing electronically (such as by downloading).

(ii) Any disclosure required by paragraph (a) or (b) of this section that is provided by electronic media is not required to be provided orally.

(5) *Disclosures must be readily understandable.* The disclosures provided shall be conspicuous, simple, direct, readily understandable, and designed to call attention to the nature and significance of the information provided. For instance, you may use the following disclosures in visual media, such as television broadcasting, ATM screens, billboards, signs, posters and written advertisements and promotional materials, as appropriate and consistent with paragraphs (a) and (b) of this section:

(i) ''NOT A DEPOSIT''

(ii) ''NOT FDIC-INSURED''

(iii) ''NOT INSURED BY ANY FEDERAL GOVERNMENT AGENCY''

(iv) ''NOT GUARANTEED BY THE INSTITUTION''

(v) ''MAY GO DOWN IN VALUE''

(6) *Disclosures must be meaningful.* (i) You must provide the disclosures required by paragraphs (a) and (b) of this section in a meaningful form. Examples of the types of methods that could call attention to the nature and significance of the information provided include:

(A) A plain-language heading to call attention to the disclosures;

(B) A typeface and type size that are easy to read;

(C) Wide margins and ample line spacing;

(D) Boldface or italics for key words; and

(E) Distinctive type size, style, and graphic devices, such as shading or sidebars, when the disclosures are combined with other information.

(ii) You have not provided the disclosures in a meaningful form if you merely state to the consumer that the required disclosures are available in printed material, but do not provide the printed material when required and do not orally disclose the information to the consumer when required.

(iii) With respect to those disclosures made through electronic media for which paper or oral disclosures are not required, the disclosures are not meaningfully provided if the consumer may bypass the visual text of the disclosures before purchasing an insurance product or annuity.

(7) *Consumer acknowledgment.* You must obtain from the consumer, at the time a consumer receives the disclosures required under paragraph (a) or (b) of this section, or at the time of the initial purchase by the consumer of an insurance product or annuity, a written acknowledgment by the consumer that the consumer received the disclosures. You may permit a consumer to acknowledge receipt of the disclosures electronically or in paper form. If the disclosures required under paragraph (a) or (b) of this section are provided in connection with a transaction that is conducted by telephone, you must:

(i) Obtain an oral acknowledgment of receipt of the disclosures and maintain sufficient documentation to show that the acknowledgment was given; and

(ii) Make reasonable efforts to obtain a written acknowledgment from the consumer.

(d) *Advertisements and other promotional material for insurance products or annuities.* The disclosures described in paragraph (a) of this section are required in advertisements and promotional material for insurance products or annuities unless the advertisements and promotional materials are of a general nature describing or listing the services or products offered by the institution.

§ 343.50 Where insurance activities may take place.

(a) *General rule.* An institution must, to the extent practicable, keep the area where the institution conducts transactions involving insurance products or annuities physically segregated from areas where retail deposits are routinely accepted from the general public, identify the areas where insurance product or annuity sales activities occur, and clearly delineate and distinguish those areas from the areas where the institution's retail deposit-taking activities occur.

(b) *Referrals.* Any person who accepts deposits from the public in an area where such transactions are routinely conducted in the institution may refer a consumer who seeks to purchase an insurance product or annuity to a qualified person who sells that product only if the person making the referral receives no more than a one-time, nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a transaction.

§ 343.60 Qualification and licensing requirements for insurance sales personnel.

An institution may not permit any person to sell or offer for sale any insurance product or annuity in any part of its office or on its behalf, unless the person is at all times appropriately qualified and licensed under applicable State insurance licensing standards with regard to the specific products being sold or recommended.

APPENDIX A TO PART 343—CONSUMER GRIEVANCE PROCESS

Any consumer who believes that any institution or any other person selling, soliciting, advertising, or offering insurance products or annuities to the consumer at an office of the institution or on behalf of the institution has violated the requirements of this part should contact the Division of Depositor and Consumer Protection, Consumer Response Center, Federal Deposit Insurance Corporation, at the following address: 1100 Walnut Street, Box #11, Kansas City, MO 64106, or telephone 1–877–275–3342, or FDIC Electronic Customer Assistance Form at *http://www5.fdic.gov/starsmail/index.asp*.

PART 344—RECORDKEEPING AND CONFIRMATION REQUIREMENTS FOR SECURITIES TRANSACTIONS

Sec.
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AUTHORITY: 12 U.S.C. 1817, 1818, 1819, and 5412.

SOURCE: 78 FR 76723, Dec. 19, 2013, unless otherwise noted.

§ 344.1 Purpose and scope.

(a) *Purpose*. The purpose of this part is to ensure that purchasers of securities in transactions effected by FDIC-supervised institutions are provided adequate information regarding transactions. This part is also designed to ensure that FDIC-supervised institutions subject to this part maintain adequate records and controls with respect to the securities transactions they effect.

(b) *Scope; general*. Any security transaction effected for a customer by an FDIC-supervised institution is subject to this part unless excepted by § 344.2. An FDIC-supervised institution effecting transactions in government securities is subject to the notification, recordkeeping, and policies and procedures requirements of this part. This part also applies to municipal securities transactions by an FDIC-supervised institution that is not registered as a ''municipal securities dealer'' with the Securities and Exchange Commission. See 15 U.S.C. 78c(a)(30) and 78o–4.

§ 344.2 Exceptions.

(a) An FDIC-supervised institution effecting securities transactions for customers is not subject to all or part of this part 344 to the extent that they qualify for one or more of the following exceptions:

(1) *Small number of transactions*. The requirements of §§ 344.4(a)(2) through (4) and 344.8(a)(1) through (3) do not apply to an FDIC-supervised institution effecting an average of fewer than 500 securities transactions per year for customers over the prior three calendar year period. The calculation of this average does not include transactions in government securities.

(2) *Government securities*. The recordkeeping requirements of § 344.4 do not apply to FDIC-supervised institutions effecting fewer than 500 government securities brokerage transactions per year. This exemption does not apply to government securities dealer transactions by FDIC-supervised institutions.

(3) *Municipal securities*. This part does not apply to transactions in municipal securities effected by an FDIC-supervised institution registered with the Securities and Exchange Commission as a ''municipal securities dealer'' as defined in title 15 U.S.C. 78c(a)(30). *See* 15 U.S.C. 78o–4.

(4) *Foreign branches*. Activities of foreign branches of FDIC-supervised institutions shall not be subject to the requirements of this part.

(5) *Transactions effected by registered broker/dealers*. (i) This part does not apply to securities transactions effected for an FDIC-supervised institution's customer by a registered broker/dealer if:

(A) The broker/dealer is fully disclosed to the customer; and

(B) The customer has a direct contractual agreement with the broker/dealer.

(ii) This exemption extends to arrangements with broker/dealers which involve FDIC-supervised institution

employees when acting as employees of, and subject to the supervision of, the registered broker/dealer when soliciting, recommending, or effecting securities transactions.

(b) *Safe and sound operations.* Notwithstanding this section, every FDIC-supervised institution effecting securities transactions for customers shall maintain, directly or indirectly, effective systems of records and controls regarding their customer securities transactions to ensure safe and sound operations. The records and systems maintained must clearly and accurately reflect the information required under this part and provide an adequate basis for an audit.

§ 344.3 Definitions.

(a) *Asset-backed security* means a security that is serviced primarily by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders.

(b) *Cash management sweep account* means a prearranged, automatic transfer of funds above a certain dollar level from a deposit account to purchase a security or securities, or any prearranged, automatic redemption or sale of a security or securities when a deposit account drops below a certain level with the proceeds being transferred into a deposit account.

(c) *Collective investment fund* means funds held by an FDIC-supervised institution as fiduciary and, consistent with local law, invested collectively:

(1) In a common trust fund maintained by such FDIC-supervised institution exclusively for the collective investment and reinvestment of monies contributed thereto by the FDIC-supervised institution in its capacity as trustee, executor, administrator, guardian, or custodian under the Uniform Gifts to Minors Act; or

(2) In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or similar trusts which are exempt from Federal income taxation under the Internal Revenue Code (26 U.S.C.).

(d) *Completion of the transaction* means:

(1) For purchase transactions, the time when the customer pays the FDIC-supervised institution any part of the purchase price (or the time when the FDIC-supervised institution makes the book-entry for any part of the purchase price, if applicable), however, if the customer pays for the security prior to the time payment is requested or becomes due, then the transaction shall be completed when the FDIC-supervised institution transfers the security into the account of the customer; and

(2) For sale transactions, the time when the FDIC-supervised institution transfers the security out of the account of the customer or, if the security is not in its custody, then the time when the security is delivered to it, however, if the customer delivers the security to the FDIC-supervised institution prior to the time delivery is requested or becomes due then the transaction shall be completed when the FDIC-supervised institution makes payment into the account of the customer.

(e) *Crossing of buy and sell orders* means a security transaction in which the same FDIC-supervised institution acts as agent for both the buyer and the seller.

(f) *Customer* means any person or account, including any agency, trust, estate, guardianship, or other fiduciary account for which an FDIC-supervised institution effects or participates in effecting the purchase or sale of securities, but does not include a broker, dealer, insured depository institution acting as a broker or a dealer, issuer of the securities that are the subject of the transaction or a person or account having a direct, contractual agreement with a fully disclosed broker/dealer.

(g) *Debt security* means any security, such as a bond, debenture, note, or any other similar instrument that evidences a liability of the issuer (including any security of this type that is convertible into stock or a similar security) and fractional or participation interests in one or more of any of the foregoing; provided, however, that securities issued by an investment company registered under the Investment

Company Act of 1940, 15 U.S.C. 80a—1 et seq., shall not be included in this definition.

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

(i) *Government security* means:

(1) A security that is a direct obligation of, or obligation guaranteed as to principal and interest by, the United States;

(2) A security that is issued or guaranteed by a corporation in which the United States has a direct or indirect interest and which is designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors;

(3) A security issued or guaranteed as to principal and interest by any corporation whose securities are designated, by statute specifically naming the corporation, to constitute exempt securities within the meaning of the laws administered by the Securities and Exchange Commission; or

(4) Any put, call, straddle, option, or privilege on a security described in paragraph (i)(1), (2), or (3) of this section other than a put, call, straddle, option, or privilege that is traded on one or more national securities exchanges, or for which quotations are disseminated through an automated quotation system operated by a registered securities association.

(j) *Investment discretion* means that, with respect to an account, an FDIC-supervised institution directly or indirectly:

(1) Is authorized to determine what securities or other property shall be purchased or sold by or for the account; or

(2) Makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for these investment decisions.

(k) *Municipal security* means a security which is a direct obligation of, or an obligation guaranteed as to principal or interest by, a State or any political subdivision, or any agency or instrumentality of a State or any political subdivision, or any municipal corporate instrumentality of one or more States or any security which is an industrial development bond (as defined in 26 U.S.C. 103(c)(2)) the interest on which is excludable from gross income under 26 U.S.C. 103(a)(1) if, by reason of the application of paragraph (4) or (6) of 26 U.S.C. 103(c) (determined as if paragraphs (4)(A), (5) and (7) were not included in 26 U.S.C. 103(c), paragraph (1) of 26 U.S.C. 103(c) does not apply to such security. *See* 15. U.S.C. 78c(a)(29).

(l) *Periodic plan* means any written authorization for an FDIC-supervised institution to act as agent to purchase or sell for a customer a specific security or securities, in a specific amount (calculated in security units or dollars) or to the extent of dividends and funds available, at specific time intervals, and setting forth the commission or charges to be paid by the customer or the manner of calculating them. Periodic plans include dividend reinvestment plans, automatic investment plans, and employee stock purchase plans.

(m) *Security* means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, and any put, call, straddle, option, or privilege on any security or group or index of securities (including any interest therein or based on the value thereof), or, in general, any instrument commonly known as a ''security''; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing. The term security does not include:

(1) A deposit or share account in a federally or state insured depository institution;

(2) A loan participation;

(3) A letter of credit or other form of insured depository institution indebtedness incurred in the ordinary course of business;

(4) Currency;

(5) Any note, draft, bill of exchange, or bankers acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(6) Units of a collective investment fund;

(7) Interests in a variable amount (master) note of a borrower of prime credit; or

(8) U.S. Savings Bonds.

§ 344.4 Recordkeeping.

(a) *General rule.* An FDIC-supervised institution effecting securities transactions for customers shall maintain the following records for at least three years:

(1) *Chronological records.* An itemized daily record of each purchase and sale of securities maintained in chronological order, and including:

(i) Account or customer name for which each transaction was effected;

(ii) Description of the securities;

(iii) Unit and aggregate purchase or sale price;

(iv) Trade date; and

(v) Name or other designation of the broker/dealer or other person from whom the securities were purchased or to whom the securities were sold;

(2) *Account records.* Account records for each customer, reflecting:

(i) Purchases and sales of securities;

(ii) Receipts and deliveries of securities;

(iii) Receipts and disbursements of cash; and

(iv) Other debits and credits pertaining to transactions in securities;

(3) *A separate memorandum (order ticket)* of each order to purchase or sell securities (whether executed or canceled), which shall include:

(i) The accounts for which the transaction was effected;

(ii) Whether the transaction was a market order, limit order, or subject to special instructions;

(iii) The time the order was received by the trader or other FDIC-supervised institution employee responsible for effecting the transaction;

(iv) The time the order was placed with the broker/dealer, or if there was no broker/dealer, time the order was executed or canceled;

(v) The price at which the order was executed; and

(vi) The broker/dealer utilized;

(4) *Record of broker/dealers.* A record of all broker/dealers selected by the FDIC-supervised institution to effect securities transactions and the amount of commissions paid or allocated to each broker during the calendar year; and

(5) *Notifications.* A copy of the written notification required by §§ 344.5 and 344.6.

(b) *Manner of maintenance.* Records may be maintained in whatever manner, form or format an FDIC-supervised institution deems appropriate, provided however, the records required by this section must clearly and accurately reflect the information required and provide an adequate basis for the audit of the information. Records may be maintained in hard copy, automated or electronic form provided the records are easily retrievable, readily available for inspection, and capable of being reproduced in a hard copy. An FDIC-supervised institution may contract with third party service providers, including broker/dealers, to maintain records required under this part.

§ 344.5 Content and time of notification.

Every FDIC-supervised institution effecting a securities transaction for a customer shall give or send, by mail, facsimile or other means of electronic transmission, to the customer at or before completion of the transaction one of the types of written notification identified below:

(a) *Broker/dealer's confirmations.* (1) A copy of the confirmation of a broker/dealer relating to the securities transaction. An FDIC-supervised institution may either have the broker/dealer send the confirmation directly to the FDIC-supervised institution's customer or send a copy of the broker/dealer's confirmation to the customer upon receipt of the confirmation by the FDIC-supervised institution. If an FDIC-supervised institution chooses to send a copy of the broker/dealer's confirmation, it must be sent within one business day

from the institution's receipt of the broker/dealer's confirmation; and

(2) If the FDIC-supervised institution is to receive remuneration from the customer or any other source in connection with the transaction, a statement of the source and amount of any remuneration to be received if such would be required under paragraph (b)(6) of this section; or

(b) *Written notification.* A written notification disclosing:

(1) Name of the FDIC-supervised institution;

(2) Name of the customer;

(3) Whether the FDIC-supervised institution is acting as agent for such customer, as agent for both such customer and some other person, as principal for its own account, or in any other capacity;

(4) The date and time of execution, or the fact that the time of execution will be furnished within a reasonable time upon written request of the customer, and the identity, price, and number of shares or units (or principal amount in the case of debt securities) of the security purchased or sold by the customer;

(5) The amount of any remuneration received or to be received, directly or indirectly, by any broker/dealer from such customer in connection with the transaction;

(6)(i) The amount of any remuneration received or to be received by the FDIC-supervised institution from the customer, and the source and amount of any other remuneration received or to be received by the FDIC-supervised institution in connection with the transaction, unless:

(A) Remuneration is determined pursuant to a prior written agreement between the FDIC-supervised institution and the customer; or

(B) In the case of government securities and municipal securities, the FDIC-supervised institution received the remuneration in other than an agency transaction; or

(C) In the case of open end investment company securities, the FDIC-supervised institution has provided the customer with a current prospectus which discloses all current fees, loads and expenses at or before completion of the transaction;

(ii) If the FDIC-supervised institution elects not to disclose the source and amount of remuneration it has received or will receive from a party other than the customer pursuant to paragraph (b)(6)(i)(A), (B), or (C) of this section, the written notification must disclose whether the FDIC-supervised institution has received or will receive remuneration from a party other than the customer, and that the FDIC-supervised institution will furnish within a reasonable time the source and amount of this remuneration upon written request of the customer. This election is not available, however, if, with respect to a purchase, the FDIC-supervised institution was participating in a distribution of that security; or, with respect to a sale, the FDIC-supervised institution was participating in a tender offer for that security;

(7) Name of the broker/dealer utilized; or where there is no broker/dealer, the name of the person from whom the security was purchased or to whom the security was sold, or a statement that the FDIC-supervised institution will furnish this information within a reasonable time upon written request;

(8) In the case of a transaction in a debt security subject to redemption before maturity, a statement to the effect that the debt security may be redeemed in whole or in part before maturity, that the redemption could affect the yield represented and that additional information is available upon request;

(9) In the case of a transaction in a debt security effected exclusively on the basis of a dollar price:

(i) The dollar price at which the transaction was effected; and

(ii) The yield to maturity calculated from the dollar price, provided however, that this shall not apply to a transaction in a debt security that either has a maturity date that may be extended by the issuer thereof, with a variable interest payable thereon, or is an asset-backed security that represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment;

(10) In the case of a transaction in a debt security effected on the basis of yield:

(i) The yield at which the transaction was effected, including the percentage amount and its characterization (e.g., current yield, yield to maturity, or yield to call) and if effected at yield to call, the type of call, the call date and call price;

(ii) The dollar price calculated from the yield at which the transaction was effected; and

(iii) If effected on a basis other than yield to maturity and the yield to maturity is lower than the represented yield, the yield to maturity as well as the represented yield; provided however, that this paragraph (b)(10) shall not apply to a transaction in a debt security that either has a maturity date that may be extended by the issuer with a variable interest rate payable thereon, or is an asset-backed security that represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment;

(11) In the case of a transaction in a debt security that is an asset-backed security, which represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment, a statement indicating that the actual yield of the asset-backed security may vary according to the rate at which the underlying receivables or other financial assets are prepaid and a statement of the fact that information concerning the factors that affect yield (including at a minimum estimated yield, weighted average life, and the prepayment assumptions underlying yield) will be furnished upon written request of the customer; and

(12) In the case of a transaction in a debt security, other than a government security, that the security is unrated by a nationally recognized statistical rating organization, if that is the case.

§ 344.6 Notification by agreement; alternative forms and times of notification.

An FDIC-supervised institution may elect to use the following alternative notification procedures if the transaction is effected for:

(a) *Notification by agreement.* Accounts (except periodic plans) where the FDIC-supervised institution does not exercise investment discretion and the FDIC-supervised institution and the customer agree in writing to a different arrangement as to the time and content of the written notification; provided however, that such agreement makes clear the customer's right to receive the written notification pursuant to § 344.5(a) or (b) at no additional cost to the customer.

(b) *Trust accounts.* Accounts (except collective investment funds) where the FDIC-supervised institution exercises investment discretion in other than in an agency capacity, in which instance it shall, upon request of the person having the power to terminate the account or, if there is no such person, upon the request of any person holding a vested beneficial interest in such account, give or send to such person the written notification within a reasonable time. The FDIC-supervised institution may charge such person a reasonable fee for providing this information.

(c) *Agency accounts.* Accounts where the FDIC-supervised institution exercises investment discretion in an agency capacity, in which instance:

(1) The FDIC-supervised institution shall give or send to each customer not less frequently than once every three months an itemized statement which shall specify the funds and securities in the custody or possession of the FDIC-supervised institution at the end of such period and all debits, credits and transactions in the customer's accounts during such period; and

(2) If requested by the customer, the FDIC-supervised institution shall give or send to each customer within a reasonable time the written notification described in § 344.5. The FDIC-supervised institution may charge a reasonable fee for providing the information described in § 344.5.

(d) *Cash management sweep accounts.* An FDIC-supervised institution effecting a securities transaction for a cash management sweep account shall give or send its customer a written statement, in the same form as required under paragraph (f) of this section, for each month in which a purchase or sale of a security takes place in the account and not less than once every three

months if there are no securities transactions in the account. Notwithstanding the provisions of this paragraph (d), FDIC-supervised institutions that retain custody of government securities that are the subject of a hold-in-custody repurchase agreement are subject to the requirements of 17 CFR 403.5(d).

(e) *Collective investment fund accounts.* The FDIC-supervised institution shall at least annually give or send to the customer a copy of a financial report of the fund, or provide notice that a copy of such report is available and will be furnished upon request to each person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account. This report shall be based upon an audit made by independent public accountants or internal auditors responsible only to the board of directors of the FDIC-supervised institution.

(f) *Periodic plan accounts.* The FDIC-supervised institution shall give or send to the customer not less than once every three months a written statement showing:

(1) The funds and securities in the custody or possession of the FDIC-supervised institution;

(2) All service charges and commissions paid by the customer in connection with the transaction; and

(3) All other debits and credits of the customer's account involved in the transaction; provided that upon written request of the customer, the FDIC-supervised institution shall give or send the information described in § 344.5, except that any such information relating to remuneration paid in connection with the transaction need not be provided to the customer when the remuneration is paid by a source other than the customer. The FDIC-supervised institution may charge a reasonable fee for providing information described in § 344.5.

§ 344.7 Settlement of securities transactions.

(a) All contracts effected or entered into by an FDIC-supervised institution that provide for the purchase or sale of a security (other than an exempted security as defined in 15 U.S.C. 78c(a)(12), government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) shall provide for completion of the transaction within the number of business days in the standard settlement cycle followed by registered broker dealers in the United States, unless otherwise agreed to by the parties at the time of the transaction. The number of business days in the standard settlement cycle shall be determined by reference to paragraph (a) of SEC Rule 15c6–1, 17 CFR 240.15c6–1(a).

(b) Paragraphs (a) and (c) of this section shall not apply to contracts:

(1) For the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association; or

(2) For the purchase or sale of securities that the Securities and Exchange Commission (SEC) may from time to time, taking into account then existing market practices, exempt by order from the requirements of paragraph (a) of SEC Rule 15c6–1, 17 CFR 240.15c6–1(a), either unconditionally or on specified terms and conditions, if the SEC determines that an exemption is consistent with the public interest and the protection of investors.

(c) Paragraph (a) of this section shall not apply to contracts for the sale for cash of securities that are priced after 4:30 p.m. Eastern time on the date the securities are priced and that are sold by an issuer to an underwriter pursuant to a firm commitment underwritten offering registered under the Securities Act of 1933, 15 U.S.C. 77a et seq., or sold to an initial purchaser by an FDIC-supervised institution participating in the offering. An FDIC-supervised institution shall not effect or enter into a contract for the purchase or sale of the securities that provides for payment of funds and delivery of securities later than the fourth business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

(d) For the purposes of paragraphs (a) and (c) of this section, the parties to a contract shall be deemed to have expressly agreed to an alternate date for

payment of funds and delivery of securities at the time of the transaction for a contract for the sale for cash of securities pursuant to a firm commitment offering if the managing underwriter and the issuer have agreed to the date for all securities sold pursuant to the offering and the parties to the contract have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.

[78 FR 76723, Dec. 19, 2013, as amended at 83 FR 26349, June 7, 2018]

§ 344.8 Securities trading policies and procedures.

(a) *Policies and procedures.* Every FDIC-supervised institution effecting securities transactions for customers shall establish written policies and procedures providing:

(1) Assignment of responsibility for supervision of all officers or employees who:

(i) Transmit orders to or place orders with broker/dealers; or

(ii) Execute transactions in securities for customers;

(2) Assignment of responsibility for supervision and reporting, separate from those in paragraph (a)(1) of this section, with respect to all officers or employees who process orders for notification or settlement purposes, or perform other back office functions with respect to securities transactions effected for customers;

(3) For the fair and equitable allocation of securities and prices to accounts when orders for the same security are received at approximately the same time and are placed for execution either individually or in combination; and

(4) Where applicable, and where permissible under local law, for the crossing of buy and sell orders on a fair and equitable basis to the parties to the transaction.

§ 344.9 Personal securities trading reporting by officers and employees of FDIC-supervised institutions.

(a) *Officers and employees subject to reporting.* FDIC-supervised institution officers and employees who:

(1) Make investment recommendations or decisions for the accounts of customers;

(2) Participate in the determination of such recommendations or decisions; or

(3) In connection with their duties, obtain information concerning which securities are being purchased or sold or recommend such action, must report to the FDIC-supervised institution, within 30-calendar days after the end of the calendar quarter, all transactions in securities made by them or on their behalf, either at the FDIC-supervised institution or elsewhere in which they have a beneficial interest. The report shall identify the securities purchased or sold and indicate the dates of the transactions and whether the transactions were purchases or sales.

(b) *Exempt transactions.* Excluded from this reporting requirement are:

(1) Transactions for the benefit of the officer or employee over which the officer or employee has no direct or indirect influence or control;

(2) Transactions in registered investment company shares;

(3) Transactions in government securities; and

(4) All transactions involving in the aggregate $10,000 or less during the calendar quarter.

(c) *Alternative report.* Where an FDIC-supervised institution acts as an investment adviser to an investment company registered under the Investment Company Act of 1940, the FDIC-supervised institution's officers and employees may fulfill their reporting requirement under paragraph (a) of this section by filing with the FDIC-supervised institution the ''access persons'' personal securities trading report required by SEC Rule 17j–1, 17 CFR 270.17j–1.

§ 344.10 Waivers.

The Board of Directors of the FDIC, in its discretion, may waive for good cause all or any part of this part 344.

PART 345—COMMUNITY REINVESTMENT

Subpart A—General

Sec.
345.11 Authority, purposes, and scope.
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Subpart B—Standards for Assessing Performance

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345.41 Assessment area delineation.
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APPENDIX A TO PART 345—RATINGS
APPENDIX B TO PART 345—CRA NOTICE

AUTHORITY: 12 U.S.C. 1814–1817, 1819–1820, 1828, 1831u and 2901–2908, 3103–3104, and 3108(a).

SOURCE: 43 FR 47151, Oct. 12, 1978, unless otherwise noted.

Subpart A—General

SOURCE: 60 FR 22201, May 4, 1995, unless otherwise noted.

§ 345.11 Authority, purposes, and scope.

(a) *Authority and OMB control number*—(1) *Authority*. The authority for this part is 12 U.S.C. 1814–1817, 1819–1820, 1828, 1831u and 2901–2907, 3103–3104, and 3108(a).

(2) *OMB control number*. The information collection requirements contained in this part were approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501 *et seq*. and have been assigned OMB control number 3064–0092.

(b) *Purposes*. In enacting the Community Reinvestment Act (CRA), the Congress required each appropriate Federal financial supervisory agency to assess an institution's record of helping to meet the credit needs of the local communities in which the institution is chartered, consistent with the safe and sound operation of the institution, and to take this record into account in the agency's evaluation of an application for a deposit facility by the institution. This part is intended to carry out the purposes of the CRA by:

(1) Establishing the framework and criteria by which the Federal Deposit Insurance Corporation (FDIC) assesses a bank's record of helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of the bank; and

(2) Providing that the FDIC takes that record into account in considering certain applications.

(c) *Scope*—(1) *General*. Except for certain special purpose banks described in paragraph (c)(3) of this section, this part applies to all insured State nonmember banks, including insured State branches as described in paragraph (c)(2) and any uninsured State branch that results from an acquisition described in section 5(a)(8) of the International Banking Act of 1978 (12 U.S.C. 3103(a)(8)).

(2) *Insured State branches*. Insured State branches are branches of a foreign bank established and operating under the laws of any State, the deposits of which are insured in accordance with the provisions of the Federal Deposit Insurance Act. In the case of insured State branches, references in this part to *main office* mean the principal branch within the United States and the term *branch* or *branches* refers to any insured State branch or branches located within the United States. The *assessment area* of an insured State branch is the community or communities located within the United States served by the branch as described in § 345.41.

(3) *Certain special purpose banks*. This part does not apply to special purpose banks that do not perform commercial

or retail banking services by granting credit to the public in the ordinary course of business, other than as incident to their specialized operations. These banks include banker's banks, as defined in 12 U.S.C. 24 (Seventh), and banks that engage only in one or more of the following activities: providing cash management controlled disbursement services or serving as correspondent banks, trust companies, or clearing agents.

§ 345.12 Definitions.

For purposes of this part, the following definitions apply:

(a) *Affiliate* means any company that controls, is controlled by, or is under common control with another company. The term *control* has the meaning given to that term in 12 U.S.C. 1841(a)(2), and a company is under common control with another company if both companies are directly or indirectly controlled by the same company.

(b) *Area median income* means:

(1) The median family income for the MSA, if a person or geography is located in an MSA, or for the metropolitan division, if a person or geography is located in an MSA that has been subdivided into metropolitan divisions; or

(2) The statewide nonmetropolitan median family income, if a person or geography is located outside an MSA.

(c) *Assessment area* means a geographic area delineated in accordance with § 345.41.

(d) *Remote Service Facility (RSF)* means an automated, unstaffed banking facility owned or operated by, or operated exclusively for, the bank, such as an automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility, at which deposits are received, cash dispersed, or money lent.

(e) *Bank* means a State nonmember bank, as that term is defined in section 3(e)(2) of the Federal Deposit Insurance Act, as amended (FDIA) (12 U.S.C. 1813(e)(2)), with Federally insured deposits, except as provided in § 345.11(c). The term bank also includes an insured State branch as defined in § 345.11(c).

(f) *Branch* means a staffed banking facility authorized as a branch, whether shared or unshared, including, for example, a mini-branch in a grocery store or a branch operated in conjunction with any other local business or nonprofit organization. The term ''branch'' only includes a ''domestic branch'' as that term is defined in section 3(o) of the FDIA (12 U.S.C. 1813(o)).

(g) *Community development* means:

(1) Affordable housing (including multifamily rental housing) for low- or moderate-income individuals;

(2) Community services targeted to low- or moderate-income individuals;

(3) Activities that promote economic development by financing businesses or farms that meet the size eligibility standards of the Small Business Administration's Development Company or Small Business Investment Company programs (13 CFR 121.301) or have gross annual revenues of $1 million or less; or

(4) Activities that revitalize or stabilize—

(i) Low-or moderate-income geographies;

(ii) Designated disaster areas; or

(iii) Distressed or underserved nonmetropolitan middle-income geographies designated by the Board of Governors of the Federal Reserve System, FDIC, and Office of the Comptroller of the Currency, based on—

(A) Rates of poverty, unemployment, and population loss; or

(B) Population size, density, and dispersion. Activities revitalize and stabilize geographies designated based on population size, density, and dispersion if they help to meet essential community needs, including needs of low- and moderate-income individuals.

(h) *Community development loan* means a loan that:

(1) Has as its primary purpose community development; and

(2) Except in the case of a wholesale or limited purpose bank:

(i) Has not been reported or collected by the bank or an affiliate for consideration in the bank's assessment as a home mortgage, small business, small farm, or consumer loan, unless the loan is for a multifamily dwelling (as defined in § 1003.2(n) of this title); and

(ii) Benefits the bank's assessment area(s) or a broader statewide or regional area that includes the bank's assessment area(s).

(i) *Community development service* means a service that:

(1) Has as its primary purpose community development;

(2) Is related to the provision of financial services; and

(3) Has not been considered in the evaluation of the bank's retail banking services under § 345.24(d).

(j) *Consumer loan* means a loan to one or more individuals for household, family, or other personal expenditures. A consumer loan does not include a home mortgage, small business, or small farm loan. Consumer loans include the following categories of loans:

(1) *Motor vehicle loan,* which is a consumer loan extended for the purchase of and secured by a motor vehicle;

(2) *Credit card loan,* which is a line of credit for household, family, or other personal expenditures that is accessed by a borrower's use of a ''credit card,'' as this term is defined in § 1026.2 of this title;

(3) *Other secured consumer loan,* which is a secured consumer loan that is not included in one of the other categories of consumer loans; and

(4) *Other unsecured consumer loan,* which is an unsecured consumer loan that is not included in one of the other categories of consumer loans.

(k) *Geography* means a census tract delineated by the United States Bureau of the Census in the most recent decennial census.

(l) *Home mortgage loan* means a closed-end mortgage loan or an open-end line of credit as these terms are defined under § 1003.2 of this title and that is not an excluded transaction under § 1003.3(c)(1) through (10) and (13) of this title.

(m) *Income level* includes:

(1) *Low-income,* which means an individual income that is less than 50 percent of the area median income or a median family income that is less than 50 percent in the case of a geography.

(2) *Moderate-income,* which means an individual income that is at least 50 percent and less than 80 percent of the area median income or a median family income that is at least 50 and less than 80 percent in the case of a geography.

(3) *Middle-income,* which means an individual income that is at least 80 percent and less than 120 percent of the area median income or a median family income that is at least 80 and less than 120 percent in the case of a geography.

(4) *Upper-income,* which means an individual income that is 120 percent or more of the area median income or a median family income that is 120 percent or more in the case of a geography.

(n) *Limited purpose bank* means a bank that offers only a narrow product line (such as credit card or motor vehicle loans) to a regional or broader market and for which a designation as a limited purpose bank is in effect, in accordance with § 345.25(b).

(o) *Loan location.* A loan is located as follows:

(1) A consumer loan is located in the geography where the borrower resides;

(2) A home mortgage loan is located in the geography where the property to which the loan relates is located; and

(3) A small business or small farm loan is located in the geography where the main business facility or farm is located or where the loan proceeds otherwise will be applied, as indicated by the borrower.

(p) *Loan production office* means a staffed facility, other than a branch, that is open to the public and that provides lending-related services, such as loan information and applications.

(q) *Metropolitan division* means a metropolitan division as defined by the Director of the Office of Management and Budget.

(r) *MSA* means a metropolitan statistical area as defined by the Director of the Office of Management and Budget.

(s) *Nonmetropolitan area* means any area that is not located in an MSA.

(t) *Qualified investment* means a lawful investment, deposit, membership share, or grant that has as its primary purpose community development.

(u) *Small bank*—(1) *Definition. Small bank* means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than $1.384 billion. *Intermediate small bank* means a small bank with assets of at least $346 million as of December 31 of both of the prior two calendar years

and less than $1.384 billion as of December 31 of either of the prior two calendar years.

(2) *Adjustment*. The dollar figures in paragraph (u)(1) of this section shall be adjusted annually and published by the FDIC, based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each twelve-month period ending in November, with rounding to the nearest million.

(v) *Small business loan* means a loan included in ''loans to small businesses'' as defined in the instructions for preparation of the Consolidated Report of Condition and Income.

(w) *Small farm loan* means a loan included in ''loans to small farms'' as defined in the instructions for preparation of the Consolidated Report of Condition and Income.

(x) *Wholesale bank* means a bank that is not in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers, and for which a designation as a wholesale bank is in effect, in accordance with § 345.25(b).

[60 FR 22201, May 4, 1995]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 345.12, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

Subpart B—Standards for Assessing Performance

SOURCE: 60 FR 22201, May 4, 1995, unless otherwise noted.

§ 345.21 Performance tests, standards, and ratings, in general.

(a) *Performance tests and standards*. The FDIC assesses the CRA performance of a bank in an examination as follows:

(1) *Lending, investment, and service tests*. The FDIC applies the lending, investment, and service tests, as provided in §§ 345.22 through 345.24, in evaluating the performance of a bank, except as provided in paragraphs (a)(2), (a)(3), and (a)(4) of this section.

(2) *Community development test for wholesale or limited purpose banks*. The FDIC applies the community development test for a wholesale or limited purpose bank, as provided in § 345.25, except as provided in paragraph (a)(4) of this section.

(3) *Small bank performance standards*. The FDIC applies the small bank performance standards as provided in § 345.26 in evaluating the performance of a small bank or a bank that was a small bank during the prior calendar year, unless the bank elects to be assessed as provided in paragraphs (a)(1), (a)(2), or (a)(4) of this section. The bank may elect to be assessed as provided in paragraph (a)(1) of this section only if it collects and reports the data required for other banks under § 345.42.

(4) *Strategic plan*. The FDIC evaluates the performance of a bank under a strategic plan if the bank submits, and the FDIC approves, a strategic plan as provided in § 345.27.

(b) *Performance context*. The FDIC applies the tests and standards in paragraph (a) of this section and also considers whether to approve a proposed strategic plan in the context of:

(1) Demographic data on median income levels, distribution of household income, nature of housing stock, housing costs, and other relevant data pertaining to a bank's assessment area(s);

(2) Any information about lending, investment, and service opportunities in the bank's assessment area(s) maintained by the bank or obtained from community organizations, state, local, and tribal governments, economic development agencies, or other sources;

(3) The bank's product offerings and business strategy as determined from data provided by the bank;

(4) Institutional capacity and constraints, including the size and financial condition of the bank, the economic climate (national, regional, and local), safety and soundness limitations, and any other factors that significantly affect the bank's ability to provide lending, investments, or services in its assessment area(s);

(5) The bank's past performance and the performance of similarly situated lenders;

(6) The bank's public file, as described in § 345.43, and any written comments about the bank's CRA performance submitted to the bank or the FDIC; and

(7) Any other information deemed relevant by the FDIC.

(c) *Assigned ratings.* The FDIC assigns to a bank one of the following four ratings pursuant to § 345.28 and Appendix A of this part: ''outstanding''; ''satisfactory''; ''needs to improve''; or ''substantial noncompliance'' as provided in 12 U.S.C. 2906(b)(2). The rating assigned by the FDIC reflects the bank's record of helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of the bank.

(d) *Safe and sound operations.* This part and the CRA do not require a bank to make loans or investments or to provide services that are inconsistent with safe and sound operations. To the contrary, the FDIC anticipates banks can meet the standards of this part with safe and sound loans, investments, and services on which the banks expect to make a profit. Banks are permitted and encouraged to develop and apply flexible underwriting standards for loans that benefit low- or moderate-income geographies or individuals, only if consistent with safe and sound operations.

(e) *Low-cost education loans provided to low-income borrowers.* In assessing and taking into account the record of a bank under this part, the FDIC considers, as a factor, low-cost education loans originated by the bank to borrowers, particularly in its assessment area(s), who have an individual income that is less than 50 percent of the area median income. For purposes of this paragraph, ''low-cost education loans'' means any education loan, as defined in section 140(a)(7) of the Truth in Lending Act (15 U.S.C. 1650(a)(7)) (including a loan under a state or local education loan program), originated by the bank for a student at an ''institution of higher education,'' as that term is generally defined in sections 101 and 102 of the Higher Education Act of 1965 (20 U.S.C. 1001 and 1002) and the implementing regulations published by the U.S. Department of Education, with interest rates and fees no greater than those of comparable education loans offered directly by the U.S. Department of Education. Such rates and fees are specified in section 455 of the Higher Education Act of 1965 (20 U.S.C. 1087e).

(f) *Activities in cooperation with minority- or women-owned financial institutions and low-income credit unions.* In assessing and taking into account the record of a nonminority-owned and nonwomen-owned bank under this part, the FDIC considers as a factor capital investment, loan participation, and other ventures undertaken by the bank in cooperation with minority- and women-owned financial institutions and low-income credit unions. Such activities must help meet the credit needs of local communities in which the minority- and women-owned financial institutions and low-income credit unions are chartered. To be considered, such activities need not also benefit the bank's assessment area(s) or the broader statewide or regional area that includes the bank's assessment area(s).

[60 FR 22201, May 4, 1995, as amended at 75 FR 61045, Oct. 4, 2010]

§ 345.22 Lending test.

(a) *Scope of test.* (1) The lending test evaluates a bank's record of helping to meet the credit needs of its assessment area(s) through its lending activities by considering a bank's home mortgage, small business, small farm, and community development lending. If consumer lending constitutes a substantial majority of a bank's business, the FDIC will evaluate the bank's consumer lending in one or more of the following categories: motor vehicle, credit card, other secured, and other unsecured loans. In addition, at a bank's option, the FDIC will evaluate one or more categories of consumer lending, if the bank has collected and maintained, as required in § 345.42(c)(1), the data for each category that the bank elects to have the FDIC evaluate.

(2) The FDIC considers originations and purchases of loans. The FDIC will also consider any other loan data the bank may choose to provide, including data on loans outstanding, commitments and letters of credit.

(3) A bank may ask the FDIC to consider loans originated or purchased by consortia in which the bank participates or by third parties in which the bank has invested only if the loans meet the definition of community development loans and only in accordance with paragraph (d) of this section. The FDIC will not consider these loans under any criterion of the lending test except the community development lending criterion.

(b) *Performance criteria*. The FDIC evaluates a bank's lending performance pursuant to the following criteria:

(1) *Lending activity*. The number and amount of the bank's home mortgage, small business, small farm, and consumer loans, if applicable, in the bank's assessment area(s);

(2) *Geographic distribution*. The geographic distribution of the bank's home mortgage, small business, small farm, and consumer loans, if applicable, based on the loan location, including:

(i) The proportion of the bank's lending in the bank's assessment area(s);

(ii) The dispersion of lending in the bank's assessment area(s); and

(iii) The number and amount of loans in low-, moderate-, middle-, and upper-income geographies in the bank's assessment area(s);

(3) *Borrower characteristics*. The distribution, particularly in the bank's assessment area(s), of the bank's home mortgage, small business, small farm, and consumer loans, if applicable, based on borrower characteristics, including the number and amount of:

(i) Home mortgage loans to low-, moderate-, middle-, and upper-income individuals;

(ii) Small business and small farm loans to businesses and farms with gross annual revenues of $1 million or less;

(iii) Small business and small farm loans by loan amount at origination; and

(iv) Consumer loans, if applicable, to low-, moderate-, middle-, and upper-income individuals;

(4) *Community development lending*. The bank's community development lending, including the number and amount of community development loans, and their complexity and innovativeness; and

(5) *Innovative or flexible lending practices*. The bank's use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies.

(c) *Affiliate lending*. (1) At a bank's option, the FDIC will consider loans by an affiliate of the bank, if the bank provides data on the affiliate's loans pursuant to § 345.42.

(2) The FDIC considers affiliate lending subject to the following constraints:

(i) No affiliate may claim a loan origination or loan purchase if another institution claims the same loan origination or purchase; and

(ii) If a bank elects to have the FDIC consider loans within a particular lending category made by one or more of the bank's affiliates in a particular assessment area, the bank shall elect to have the FDIC consider, in accordance with paragraph (c)(1) of this section, all the loans within that lending category in that particular assessment area made by all of the bank's affiliates.

(3) The FDIC does not consider affiliate lending in assessing a bank's performance under paragraph (b)(2)(i) of this section.

(d) *Lending by a consortium or a third party*. Community development loans originated or purchased by a consortium in which the bank participates or by a third party in which the bank has invested:

(1) Will be considered, at the bank's option, if the bank reports the data pertaining to these loans under § 345.42(b)(2); and

(2) May be allocated among participants or investors, as they choose, for purposes of the lending test, except that no participant or investor:

(i) May claim a loan origination or loan purchase if another participant or investor claims the same loan origination or purchase; or

(ii) May claim loans accounting for more than its percentage share (based on the level of its participation or investment) of the total loans originated by the consortium or third party.

(e) *Lending performance rating*. The FDIC rates a bank's lending performance as provided in Appendix A of this part.

[60 FR 22201, May 4, 1995, as amended at 82 FR 55743, Nov. 24, 2017]

§ 345.23 Investment test.

(a) *Scope of test*. The investment test evaluates a bank's record of helping to meet the credit needs of its assessment area(s) through qualified investments that benefit its assessment area(s) or a broader statewide or regional area that includes the bank's assessment area(s).

(b) *Exclusion*. Activities considered under the lending or service tests may not be considered under the investment test.

(c) *Affiliate investment*. At a bank's option, the FDIC will consider, in its assessment of a bank's investment performance, a qualified investment made by an affiliate of the bank, if the qualified investment is not claimed by any other institution.

(d) *Disposition of branch premises*. Donating, selling on favorable terms, or making available on a rent-free basis a branch of the bank that is located in a predominantly minority neighborhood to a minority depository institution or women's depository institution (as these terms are defined in 12 U.S.C. 2907(b)) will be considered as a qualified investment.

(e) *Performance criteria*. The FDIC evaluates the investment performance of a bank pursuant to the following criteria:

(1) The dollar amount of qualified investments;

(2) The innovativeness or complexity of qualified investments;

(3) The responsiveness of qualified investments to credit and community development needs; and

(4) The degree to which the qualified investments are not routinely provided by private investors.

(f) *Investment performance rating*. The FDIC rates a bank's investment performance as provided in Appendix A of this part.

§ 345.24 Service test.

(a) *Scope of test*. The service test evaluates a bank's record of helping to meet the credit needs of its assessment area(s) by analyzing both the availability and effectiveness of a bank's systems for delivering retail banking services and the extent and innovativeness of its community development services.

(b) *Area(s) benefited*. Community development services must benefit a bank's assessment area(s) or a broader statewide or regional area that includes the bank's assessment area(s).

(c) *Affiliate service*. At a bank's option, the FDIC will consider, in its assessment of a bank's service performance, a community development service provided by an affiliate of the bank, if the community development service is not claimed by any other institution.

(d) *Performance criteria—retail banking services*. The FDIC evaluates the availability and effectiveness of a bank's systems for delivering retail banking services, pursuant to the following criteria:

(1) The current distribution of the bank's branches among low-, moderate-, middle-, and upper-income geographies;

(2) In the context of its current distribution of the bank's branches, the bank's record of opening and closing branches, particularly branches located in low- or moderate-income geographies or primarily serving low- or moderate-income individuals;

(3) The availability and effectiveness of alternative systems for delivering retail banking services (*e.g.*, RSFs, RSFs not owned or operated by or exclusively for the bank, banking by telephone or computer, loan production offices, and bank-at-work or bank-by-mail programs) in low- and moderate-income geographies and to low- and moderate-income individuals; and

(4) The range of services provided in low-, moderate-, middle-, and upper-income geographies and the degree to which the services are tailored to meet the needs of those geographies.

(e) *Performance criteria—community development services*. The FDIC evaluates community development services pursuant to the following criteria:

(1) The extent to which the bank provides community development services; and

(2) The innovativeness and responsiveness of community development services.

(f) *Service performance rating.* The FDIC rates a bank's service performance as provided in Appendix A of this part.

§ 345.25 Community development test for wholesale or limited purpose banks.

(a) *Scope of test.* The FDIC assesses a wholesale or limited purpose bank's record of helping to meet the credit needs of its assessment area(s) under the community development test through its community development lending, qualified investments, or community development services.

(b) *Designation as a wholesale or limited purpose bank.* In order to receive a designation as a wholesale or limited purpose bank, a bank shall file a request, in writing, with the FDIC, at least three months prior to the proposed effective date of the designation. If the FDIC approves the designation, it remains in effect until the bank requests revocation of the designation or until one year after the FDIC notifies the bank that the FDIC has revoked the designation on its own initiative.

(c) *Performance criteria.* The FDIC evaluates the community development performance of a wholesale or limited purpose bank pursuant to the following criteria:

(1) The number and amount of community development loans (including originations and purchases of loans and other community development loan data provided by the bank, such as data on loans outstanding, commitments, and letters of credit), qualified investments, or community development services;

(2) The use of innovative or complex qualified investments, community development loans, or community development services and the extent to which the investments are not routinely provided by private investors; and

(3) The bank's responsiveness to credit and community development needs.

(d) *Indirect activities.* At a bank's option, the FDIC will consider in its community development performance assessment:

(1) Qualified investments or community development services provided by an affiliate of the bank, if the investments or services are not claimed by any other institution; and

(2) Community development lending by affiliates, consortia and third parties, subject to the requirements and limitations in § 345.22 (c) and (d).

(e) *Benefit to assessment area(s)*—(1) *Benefit inside assessment area(s).* The FDIC considers all qualified investments, community development loans, and community development services that benefit areas within the bank's assessment area(s) or a broader statewide or regional area that includes the bank's assessment area(s).

(2) *Benefit outside assessment area(s).* The FDIC considers the qualified investments, community development loans, and community development services that benefit areas outside the bank's assessment area(s), if the bank has adequately addressed the needs of its assessment area(s).

(f) *Community development performance rating.* The FDIC rates a bank's community development performance as provided in Appendix A of this part.

§ 345.26 Small bank performance standards.

(a) *Performance criteria*—(1) *Small banks that are not intermediate small banks.* The FDIC evaluates the record of a small bank that is not, or that was not during the prior calendar year, an intermediate small bank, of helping to meet the credit needs of its assessment area(s) pursuant to the criteria set forth in paragraph (b) of this section.

(2) *Intermediate small banks.* The FDIC evaluates the record of a small bank that is, or that was during the prior calendar year, an intermediate small bank, of helping to meet the credit needs of its assessment area(s) pursuant to the criteria set forth in paragraphs (b) and (c) of this section.

(b) *Lending test.* A small bank's lending performance is evaluated pursuant to the following criteria:

(1) The bank's loan-to-deposit ratio, adjusted for seasonal variation, and, as appropriate, other lending-related activities, such as loan originations for

sale to the secondary markets, community development loans, or qualified investments;

(2) The percentage of loans and, as appropriate, other lending-related activities located in the bank's assessment area(s);

(3) The bank's record of lending to and, as appropriate, engaging in other lending-related activities for borrowers of different income levels and businesses and farms of different sizes;

(4) The geographic distribution of the bank's loans; and

(5) The bank's record of taking action, if warranted, in response to written complaints about its performance in helping to meet credit needs in its assessment area(s).

(c) *Community development test.* An intermediate small bank's community development performance also is evaluated pursuant to the following criteria:

(1) The number and amount of community development loans;

(2) The number and amount of qualified investments;

(3) The extent to which the bank provides community development services; and

(4) The bank's responsiveness through such activities to community development lending, investment, and services needs.

(d) *Small bank performance rating.* The FDIC rates the performance of a bank evaluated under this section as provided in appendix A of this part.

[70 FR 44269, Aug. 2, 2005, as amended at 71 FR 78337, Dec. 29, 2006; 72 FR 72573, Dec. 21, 2007]

§ 345.27 Strategic plan.

(a) *Alternative election.* The FDIC will assess a bank's record of helping to meet the credit needs of its assessment area(s) under a strategic plan if:

(1) The bank has submitted the plan to the FDIC as provided for in this section;

(2) The FDIC has approved the plan;

(3) The plan is in effect; and

(4) The bank has been operating under an approved plan for at least one year.

(b) *Data reporting.* The FDIC's approval of a plan does not affect the bank's obligation, if any, to report data as required by § 345.42.

(c) *Plans in general*—(1) *Term.* A plan may have a term of no more than five years, and any multi-year plan must include annual interim measurable goals under which the FDIC will evaluate the bank's performance.

(2) *Multiple assessment areas.* A bank with more than one assessment area may prepare a single plan for all of its assessment areas or one or more plans for one or more of its assessment areas.

(3) *Treatment of affiliates.* Affiliated institutions may prepare a joint plan if the plan provides measurable goals for each institution. Activities may be allocated among institutions at the institutions' option, provided that the same activities are not considered for more than one institution.

(d) *Public participation in plan development.* Before submitting a plan to the FDIC for approval, a bank shall:

(1) Informally seek suggestions from members of the public in its assessment area(s) covered by the plan while developing the plan;

(2) Once the bank has developed a plan, formally solicit public comment on the plan for at least 30 days by publishing notice in at least one newspaper of general circulation in each assessment area covered by the plan; and

(3) During the period of formal public comment, make copies of the plan available for review by the public at no cost at all offices of the bank in any assessment area covered by the plan and provide copies of the plan upon request for a reasonable fee to cover copying and mailing, if applicable.

(e) *Submission of plan.* The bank shall submit its plan to the FDIC at least three months prior to the proposed effective date of the plan. The bank shall also submit with its plan a description of its informal efforts to seek suggestions from members of the public, any written public comment received, and, if the plan was revised in light of the comment received, the initial plan as released for public comment.

(f) *Plan content*—(1) *Measurable goals.* (i) A bank shall specify in its plan measurable goals for helping to meet the credit needs of each assessment area covered by the plan, particularly the needs of low- and moderate-income

geographies and low- and moderate-income individuals, through lending, investment, and services, as appropriate.

(ii) A bank shall address in its plan all three performance categories and, unless the bank has been designated as a wholesale or limited purpose bank, shall emphasize lending and lending-related activities. Nevertheless, a different emphasis, including a focus on one or more performance categories, may be appropriate if responsive to the characteristics and credit needs of its assessment area(s), considering public comment and the bank's capacity and constraints, product offerings, and business strategy.

(2) *Confidential information.* A bank may submit additional information to the FDIC on a confidential basis, but the goals stated in the plan must be sufficiently specific to enable the public and the FDIC to judge the merits of the plan.

(3) *Satisfactory and outstanding goals.* A bank shall specify in its plan measurable goals that constitute ''satisfactory'' performance. A plan may specify measurable goals that constitute ''outstanding'' performance. If a bank submits, and the FDIC approves, both ''satisfactory'' and ''outstanding'' performance goals, the FDIC will consider the bank eligible for an ''outstanding'' performance rating.

(4) *Election if satisfactory goals not substantially met.* A bank may elect in its plan that, if the bank fails to meet substantially its plan goals for a satisfactory rating, the FDIC will evaluate the bank's performance under the lending, investment, and service tests, the community development test, or the small bank performance standards, as appropriate.

(g) *Plan approval*—(1) *Timing.* The FDIC will act upon a plan within 60 calendar days after the FDIC receives the complete plan and other material required under paragraph (e) of this section. If the FDIC fails to act within this time period, the plan shall be deemed approved unless the FDIC extends the review period for good cause.

(2) *Public participation.* In evaluating the plan's goals, the FDIC considers the public's involvement in formulating the plan, written public comment on the plan, and any response by the bank to public comment on the plan.

(3) *Criteria for evaluating plan.* The FDIC evaluates a plan's measurable goals using the following criteria, as appropriate:

(i) The extent and breadth of lending or lending-related activities, including, as appropriate, the distribution of loans among different geographies, businesses and farms of different sizes, and individuals of different income levels, the extent of community development lending, and the use of innovative or flexible lending practices to address credit needs;

(ii) The amount and innovativeness, complexity, and responsiveness of the bank's qualified investments; and

(iii) The availability and effectiveness of the bank's systems for delivering retail banking services and the extent and innovativeness of the bank's community development services.

(h) *Plan amendment.* During the term of a plan, a bank may request the FDIC to approve an amendment to the plan on grounds that there has been a material change in circumstances. The bank shall develop an amendment to a previously approved plan in accordance with the public participation requirements of paragraph (d) of this section.

(i) *Plan assessment.* The FDIC approves the goals and assesses performance under a plan as provided for in Appendix A of this part.

[60 FR 22201, May 4, 1995, as amended at 60 FR 66050, Dec. 20, 1995; 69 FR 41188, July 8, 2004]

§ 345.28 Assigned ratings.

(a) *Ratings in general.* Subject to paragraphs (b) and (c) of this section, the FDIC assigns to a bank a rating of ''outstanding,'' ''satisfactory,'' ''needs to improve,'' or ''substantial noncompliance'' based on the bank's performance under the lending, investment and service tests, the community development test, the small bank performance standards, or an approved strategic plan, as applicable.

(b) *Lending, investment, and service tests.* The FDIC assigns a rating for a bank assessed under the lending, investment, and service tests in accordance with the following principles:

(1) A bank that receives an ''outstanding'' rating on the lending test receives an assigned rating of at least ''satisfactory'';

(2) A bank that receives an ''outstanding'' rating on both the service test and the investment test and a rating of at least ''high satisfactory'' on the lending test receives an assigned rating of ''outstanding''; and

(3) No bank may receive an assigned rating of ''satisfactory'' or higher unless it receives a rating of at least ''low satisfactory'' on the lending test.

(c) *Effect of evidence of discriminatory or other illegal credit practices.* (1) The FDIC's evaluation of a bank's CRA performance is adversely affected by evidence of discriminatory or other illegal credit practices in any geography by the bank or in any assessment area by any affiliate whose loans have been considered as part of the bank's lending performance. In connection with any type of lending activity described in § 345.22(a), evidence of discriminatory or other credit practices that violate an applicable law, rule, or regulation includes, but is not limited to:

(i) Discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act;

(ii) Violations of the Home Ownership and Equity Protection Act;

(iii) Violations of section 5 of the Federal Trade Commission Act;

(iv) Violations of section 8 of the Real Estate Settlement Procedures Act; and

(v) Violations of the Truth in Lending Act provisions regarding a consumer's right of rescission.

(2) In determining the effect of evidence of practices described in paragraph (c)(1) of this section on the bank's assigned rating, the FDIC considers the nature, extent, and strength of the evidence of the practices; the policies and procedures that the bank (or affiliate, as applicable) has in place to prevent the practices; any corrective action that the bank (or affiliate, as applicable) has taken or has committed to take, including voluntary corrective action resulting from self-assessment; and any other relevant information.

[60 FR 22201, May 4, 1995, as amended at 70 FR 44269, Aug. 2, 2005]

§ 345.29 Effect of CRA performance on applications.

(a) *CRA performance.* Among other factors, the FDIC takes into account the record of performance under the CRA of each applicant bank in considering an application for approval of:

(1) The establishment of a domestic branch or other facility with the ability to accept deposits;

(2) The relocation of the bank's main office or a branch;

(3) The merger, consolidation, acquisition of assets, or assumption of liabilities; and

(4) Deposit insurance for a newly chartered financial institution.

(b) *New financial institutions.* A newly chartered financial institution shall submit with its application for deposit insurance a description of how it will meet its CRA objectives. The FDIC takes the description into account in considering the application and may deny or condition approval on that basis.

(c) *Interested parties.* The FDIC takes into account any views expressed by interested parties that are submitted in accordance with the FDIC's procedures set forth in part 303 of this chapter in considering CRA performance in an application listed in paragraphs (a) and (b) of this section.

(d) *Denial or conditional approval of application.* A bank's record of performance may be the basis for denying or conditioning approval of an application listed in paragraph (a) of this section.

Subpart C—Records, Reporting, and Disclosure Requirements

SOURCE: 60 FR 22201, May 4, 1995, unless otherwise noted.

§ 345.41 Assessment area delineation.

(a) *In general.* A bank shall delineate one or more assessment areas within which the FDIC evaluates the bank's record of helping to meet the credit needs of its community. The FDIC does not evaluate the bank's delineation of its assessment area(s) as a separate performance criterion, but the FDIC reviews the delineation for compliance with the requirements of this section.

(b) *Geographic area(s) for wholesale or limited purpose banks.* The assessment area(s) for a wholesale or limited purpose bank must consist generally of one or more MSAs or metropolitan divisions (using the MSA or metropolitan division boundaries that were in effect as of January 1 of the calendar year in which the delineation is made) or one or more contiguous political subdivisions, such as counties, cities, or towns, in which the bank has its main office, branches, and deposit-taking ATMs.

(c) *Geographic area(s) for other banks.* The assessment area(s) for a bank other than a wholesale or limited purpose bank must:

(1) Consist generally of one or more MSAs or metropolitan divisions (using the MSA or metropolitan division boundaries that were in effect as of January 1 of the calendar year in which the delineation is made) or one or more contiguous political subdivisions, such as counties, cities, or towns; and

(2) Include the geographies in which the bank has its main office, its branches, and its deposit-taking RSFs, as well as the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans (including home mortgage loans, small business and small farm loans, and any other loans the bank chooses, such as those consumer loans on which the bank elects to have its performance assessed).

(d) *Adjustments to geographic area(s).* A bank may adjust the boundaries of its assessment area(s) to include only the portion of a political subdivision that it reasonably can be expected to serve. An adjustment is particularly appropriate in the case of an assessment area that otherwise would be extremely large, of unusual configuration, or divided by significant geographic barriers.

(e) *Limitations on the delineation of an assessment area.* Each bank's assessment area(s):

(1) Must consist only of whole geographies;

(2) May not reflect illegal discrimination;

(3) May not arbitrarily exclude low- or moderate-income geographies, taking into account the bank's size and financial condition; and

(4) May not extend substantially beyond an MSA boundary or beyond a state boundary unless the assessment area is located in a multistate MSA. If a bank serves a geographic area that extends substantially beyond a state boundary, the bank shall delineate separate assessment areas for the areas in each state. If a bank serves a geographic area that extends substantially beyond an MSA boundary, the bank shall delineate separate assessment areas for the areas inside and outside the MSA.

(f) *Banks serving military personnel.* Notwithstanding the requirements of this section, a bank whose business predominantly consists of serving the needs of military personnel or their dependents who are not located within a defined geographic area may delineate its entire deposit customer base as its assessment area.

(g) *Use of assessment area(s).* The FDIC uses the assessment area(s) delineated by a bank in its evaluation of the bank's CRA performance unless the FDIC determines that the assessment area(s) do not comply with the requirements of this section.

[60 FR 22201, May 4, 1995, as amended at 69 FR 41188, July 8, 2004]

§ 345.42 Data collection, reporting, and disclosure.

(a) *Loan information required to be collected and maintained.* A bank, except a small bank, shall collect, and maintain in machine readable form (as prescribed by the FDIC) until the completion of its next CRA examination, the following data for each small business or small farm loan originated or purchased by the bank:

(1) A unique number or alpha-numeric symbol that can be used to identify the relevant loan file;

(2) The loan amount at origination;

(3) The loan location; and

(4) An indicator whether the loan was to a business or farm with gross annual revenues of $1 million or less.

(b) *Loan information required to be reported.* A bank, except a small bank or a bank that was a small bank during the prior calendar year, shall report annually by March 1 to the FDIC in

machine readable form (as prescribed by the FDIC) the following data for the prior calendar year:

(1) *Small business and small farm loan data.* For each geography in which the bank originated or purchased a small business or small farm loan, the aggregate number and amount of loans:

(i) With an amount at origination of $100,000 or less;

(ii) With an amount at origination of more than $100,000 but less than or equal to $250,000;

(iii) With an amount at origination of more than $250,000; and

(iv) To businesses and farms with gross annual revenues of $1 million or less (using the revenues that the bank considered in making its credit decision);

(2) *Community development loan data.* The aggregate number and aggregate amount of community development loans originated or purchased; and

(3) *Home mortgage loans.* If the bank is subject to reporting under part 1003 of this title, the location of each home mortgage loan application, origination, or purchase outside the MSAs in which the bank has a home or branch office (or outside any MSA) in accordance with the requirements of part 1003 of this title.

(c) *Optional data collection and maintenance*—(1) *Consumer loans.* A bank may collect and maintain in machine readable form (as prescribed by the FDIC) data for consumer loans originated or purchased by the bank for consideration under the lending test. A bank may maintain data for one or more of the following categories of consumer loans: motor vehicle, credit card, other secured, and other unsecured. If the bank maintains data for loans in a certain category, it shall maintain data for all loans originated or purchased within that category. The bank shall maintain data separately for each category, including for each loan:

(i) A unique number or alpha-numeric symbol that can be used to identify the relevant loan file;

(ii) The loan amount at origination or purchase;

(iii) The loan location; and

(iv) The gross annual income of the borrower that the bank considered in making its credit decision.

(2) *Other loan data.* At its option, a bank may provide other information concerning its lending performance, including additional loan distribution data.

(d) *Data on affiliate lending.* A bank that elects to have the FDIC consider loans by an affiliate, for purposes of the lending or community development test or an approved strategic plan, shall collect, maintain, and report for those loans the data that the bank would have collected, maintained, and reported pursuant to paragraphs (a), (b), and (c) of this section had the loans been originated or purchased by the bank. For home mortgage loans, the bank shall also be prepared to identify the home mortgage loans reported under part 1003 of this title by the affiliate.

(e) *Data on lending by a consortium or a third party.* A bank that elects to have the FDIC consider community development loans by a consortium or third party, for purposes of the lending or community development tests or an approved strategic plan, shall report for those loans the data that the bank would have reported under paragraph (b)(2) of this section had the loans been originated or purchased by the bank.

(f) *Small banks electing evaluation under the lending, investment, and service tests.* A bank that qualifies for evaluation under the small bank performance standards but elects evaluation under the lending, investment, and service tests shall collect, maintain, and report the data required for other banks pursuant to paragraphs (a) and (b) of this section.

(g) *Assessment area data.* A bank, except a small bank or a bank that was a small bank during the prior calendar year, shall collect and report to the FDIC by March 1 of each year a list for each assessment area showing the geographies within the area.

(h) *CRA Disclosure Statement.* The FDIC prepares annually for each bank that reports data pursuant to this section a CRA Disclosure Statement that contains, on a state-by-state basis:

(1) For each county (and for each assessment area smaller than a county) with a population of 500,000 persons or fewer in which the bank reported a small business or small farm loan:

(i) The number and amount of small business and small farm loans reported as originated or purchased located in low-, moderate-, middle-, and upper-income geographies;

(ii) A list grouping each geography according to whether the geography is low-, moderate-, middle-, or upper-income;

(iii) A list showing each geography in which the bank reported a small business or small farm loan; and

(iv) The number and amount of small business and small farm loans to businesses and farms with gross annual revenues of $1 million or less;

(2) For each county (and for each assessment area smaller than a county) with a population in excess of 500,000 persons in which the bank reported a small business or small farm loan:

(i) The number and amount of small business and small farm loans reported as originated or purchased located in geographies with median income relative to the area median income of less than 10 percent, 10 or more but less than 20 percent, 20 or more but less than 30 percent, 30 or more but less than 40 percent, 40 or more but less than 50 percent, 50 or more but less than 60 percent, 60 or more but less than 70 percent, 70 or more but less than 80 percent, 80 or more but less than 90 percent, 90 or more but less than 100 percent, 100 or more but less than 110 percent, 110 or more but less than 120 percent, and 120 percent or more;

(ii) A list grouping each geography in the county or assessment area according to whether the median income in the geography relative to the area median income is less than 10 percent, 10 or more but less than 20 percent, 20 or more but less than 30 percent, 30 or more but less than 40 percent, 40 or more but less than 50 percent, 50 or more but less than 60 percent, 60 or more but less than 70 percent, 70 or more but less than 80 percent, 80 or more but less than 90 percent, 90 or more but less than 100 percent, 100 or more but less than 110 percent, 110 or more but less than 120 percent, and 120 percent or more;

(iii) A list showing each geography in which the bank reported a small business or small farm loan; and

(iv) The number and amount of small business and small farm loans to businesses and farms with gross annual revenues of $1 million or less;

(3) The number and amount of small business and small farm loans located inside each assessment area reported by the bank and the number and amount of small business and small farm loans located outside the assessment area(s) reported by the bank; and

(4) The number and amount of community development loans reported as originated or purchased.

(i) *Aggregate disclosure statements.* The FDIC, in conjunction with the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency, prepares annually, for each MSA or metropolitan division (including an MSA or metropolitan division that crosses a state boundary) and the nonmetropolitan portion of each state, an aggregate disclosure statement of small business and small farm lending by all institutions subject to reporting under this part or parts 25, 195, or 228 of this title. These disclosure statements indicate, for each geography, the number and amount of all small business and small farm loans originated or purchased by reporting institutions, except that the FDIC may adjust the form of the disclosure if necessary, because of special circumstances, to protect the privacy of a borrower or the competitive position of an institution.

(j) *Central data depositories.* The FDIC makes the aggregate disclosure statements, described in paragraph (i) of this section, and the individual bank CRA Disclosure Statements, described in paragraph (h) of this section, available to the public at central data depositories. The FDIC publishes a list of the depositories at which the statements are available.

[60 FR 22201, May 4, 1995, as amended at 69 FR 41188, July 8, 2004; 80 FR 81165, Dec. 29, 2015; 82 FR 55743, Nov. 24, 2017]

§ 345.43 Content and availability of public file.

(a) *Information available to the public.* A bank shall maintain a public file that includes the following information:

(1) All written comments received from the public for the current year and each of the prior two calendar years that specifically relate to the bank's performance in helping to meet community credit needs, and any response to the comments by the bank, if neither the comments nor the responses contain statements that reflect adversely on the good name or reputation of any persons other than the bank or publication of which would violate specific provisions of law;

(2) A copy of the public section of the bank's most recent CRA Performance Evaluation prepared by the FDIC. The bank shall place this copy in the public file within 30 business days after its receipt from the FDIC;

(3) A list of the bank's branches, their street addresses, and geographies;

(4) A list of branches opened or closed by the bank during the current year and each of the prior two calendar years, their street addresses, and geographies;

(5) A list of services (including hours of operation, available loan and deposit products, and transaction fees) generally offered at the bank's branches and descriptions of material differences in the availability or cost of services at particular branches, if any. At its option, a bank may include information regarding the availability of alternative systems for delivering retail banking services (*e.g.*, RSFs, RSFs not owned or operated by or exclusively for the bank, banking by telephone or computer, loan production offices, and bank-at-work or bank-by-mail programs);

(6) A map of each assessment area showing the boundaries of the area and identifying the geographies contained within the area, either on the map or in a separate list; and

(7) Any other information the bank chooses.

(b) *Additional information available to the public*—(1) *Banks other than small banks*. A bank, except a small bank or a bank that was a small bank during the prior calendar year, shall include in its public file the following information pertaining to the bank and its affiliates, if applicable, for each of the prior two calendar years:

(i) If the bank has elected to have one or more categories of its consumer loans considered under the lending test, for each of these categories, the number and amount of loans:

(A) To low-, moderate-, middle-, and upper-income individuals;

(B) Located in low-, moderate-, middle-, and upper-income census tracts; and

(C) Located inside the bank's assessment area(s) and outside the bank's assessment area(s); and

(ii) The bank's CRA Disclosure Statement. The bank shall place the statement in the public file within three business days of its receipt from the FDIC.

(2) *Banks required to report Home Mortgage Disclosure Act (HMDA) data*. A bank required to report home mortgage loan data pursuant part 1003 of this title shall include in its public file a written notice that the institution's HMDA Disclosure Statement may be obtained on the Consumer Financial Protection Bureau's (Bureau's) Web site at *www.consumerfinance.gov/hmda*. In addition, a bank that elected to have the FDIC consider the mortgage lending of an affiliate shall include in its public file the name of the affiliate and a written notice that the affiliate's HMDA Disclosure Statement may be obtained at the Bureau's Web site. The bank shall place the written notice(s) in the public file within three business days after receiving notification from the Federal Financial Institutions Examination Council of the availability of the disclosure statement(s).

(3) *Small banks*. A small bank or a bank that was a small bank during the prior calendar year shall include in its public file:

(i) The bank's loan-to-deposit ratio for each quarter of the prior calendar year and, at its option, additional data on its loan-to-deposit ratio; and

(ii) The information required for other banks by paragraph (b)(1) of this section, if the bank has elected to be evaluated under the lending, investment, and service tests.

(4) *Banks with strategic plans*. A bank that has been approved to be assessed under a strategic plan shall include in its public file a copy of that plan. A

bank need not include information submitted to the FDIC on a confidential basis in conjunction with the plan.

(5) *Banks with less than satisfactory ratings.* A bank that received a less than satisfactory rating during its most recent examination shall include in its public file a description of its current efforts to improve its performance in helping to meet the credit needs of its entire community. The bank shall update the description quarterly.

(c) *Location of public information.* A bank shall make available to the public for inspection upon request and at no cost the information required in this section as follows:

(1) At the main office and, if an interstate bank, at one branch office in each state, all information in the public file; and

(2) At each branch:

(i) A copy of the public section of the bank's most recent CRA Performance Evaluation and a list of services provided by the branch; and

(ii) Within five calendar days of the request, all the information in the public file relating to the assessment area in which the branch is located.

(d) *Copies.* Upon request, a bank shall provide copies, either on paper or in another form acceptable to the person making the request, of the information in its public file. The bank may charge a reasonable fee not to exceed the cost of copying and mailing (if applicable).

(e) *Updating.* Except as otherwise provided in this section, a bank shall ensure that the information required by this section is current as of April 1 of each year.

[60 FR 22201, May 4, 1995, as amended at 80 FR 81165, Dec. 29, 2015; 82 FR 55743, Nov. 24, 2017]

§ 345.44 Public notice by banks.

A bank shall provide in the public lobby of its main office and each of its branches the appropriate public notice set forth in Appendix B of this part. Only a branch of a bank having more than one assessment area shall include the bracketed material in the notice for branch offices. Only a bank that is an affiliate of a holding company shall include the next to the last sentence of the notices. A bank shall include the last sentence of the notices only if it is an affiliate of a holding company that is not prevented by statute from acquiring additional banks.

§ 345.45 Publication of planned examination schedule.

The FDIC publishes at least 30 days in advance of the beginning of each calendar quarter a list of banks scheduled for CRA examinations in that quarter.

APPENDIX A TO PART 345—RATINGS

(a) *Ratings in general.* (1) In assigning a rating, the FDIC evaluates a bank's performance under the applicable performance criteria in this part, in accordance with §§ 345.21 and 345.28. This includes consideration of low-cost education loans provided to low-income borrowers and activities in cooperation with minority- or women-owned financial institutions and low-income credit unions, as well as adjustments on the basis of evidence of discriminatory or other illegal credit practices.

(2) A bank's performance need not fit each aspect of a particular rating profile in order to receive that rating, and exceptionally strong performance with respect to some aspects may compensate for weak performance in others. The bank's overall performance, however, must be consistent with safe and sound banking practices and generally with the appropriate rating profile as follows.

(b) *Banks evaluated under the lending, investment, and service tests*—(1) *Lending performance rating.* The FDIC assigns each bank's lending performance one of the five following ratings.

(i) *Outstanding.* The FDIC rates a bank's lending performance ''outstanding'' if, in general, it demonstrates:

(A) Excellent responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) A substantial majority of its loans are made in its assessment area(s);

(C) An excellent geographic distribution of loans in its assessment area(s);

(D) An excellent distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the bank;

(E) An excellent record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including

farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) Extensive use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It is a leader in making community development loans.

(ii) *High satisfactory*. The FDIC rates a bank's lending performance ''high satisfactory'' if, in general, it demonstrates:

(A) Good responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) A high percentage of its loans are made in its assessment area(s);

(C) A good geographic distribution of loans in its assessment area(s);

(D) A good distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the bank;

(E) A good record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) Use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It has made a relatively high level of community development loans.

(iii) *Low satisfactory*. The FDIC rates a bank's lending performance ''low satisfactory'' if, in general, it demonstrates:

(A) Adequate responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) An adequate percentage of its loans are made in its assessment area(s);

(C) An adequate geographic distribution of loans in its assessment area(s);

(D) An adequate distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the bank;

(E) An adequate record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) Limited use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It has made an adequate level of community development loans.

(iv) *Needs to improve*. The FDIC rates a bank's lending performance ''needs to improve'' if, in general, it demonstrates:

(A) Poor responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) A small percentage of its loans are made in its assessment area(s);

(C) A poor geographic distribution of loans, particularly to low- or moderate-income geographies, in its assessment area(s);

(D) A poor distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the bank;

(E) A poor record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) Little use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It has made a low level of community development loans.

(v) *Substantial noncompliance*. The FDIC rates a bank's lending performance as being in ''substantial noncompliance'' if, in general, it demonstrates:

(A) A very poor responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) A very small percentage of its loans are made in its assessment area(s);

(C) A very poor geographic distribution of loans, particularly to low- or moderate-income geographies, in its assessment area(s);

(D) A very poor distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the bank;

(E) A very poor record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) No use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It has made few, if any, community development loans.

(2) *Investment performance rating*. The FDIC assigns each bank's investment performance one of the five following ratings.

(i) *Outstanding*. The FDIC rates a bank's investment performance ''outstanding'' if, in general, it demonstrates:

(A) An excellent level of qualified investments, particularly those that are not routinely provided by private investors, often in a leadership position;

(B) Extensive use of innovative or complex qualified investments; and

(C) Excellent responsiveness to credit and community development needs.

(ii) *High satisfactory*. The FDIC rates a bank's investment performance ''high satisfactory'' if, in general, it demonstrates:

(A) A significant level of qualified investments, particularly those that are not routinely provided by private investors, occasionally in a leadership position;

(B) Significant use of innovative or complex qualified investments; and

(C) Good responsiveness to credit and community development needs.

(iii) *Low satisfactory*. The FDIC rates a bank's investment performance ''low satisfactory'' if, in general, it demonstrates:

(A) An adequate level of qualified investments, particularly those that are not routinely provided by private investors, although rarely in a leadership position;

(B) Occasional use of innovative or complex qualified investments; and

(C) Adequate responsiveness to credit and community development needs.

(iv) *Needs to improve*. The FDIC rates a bank's investment performance ''needs to improve'' if, in general, it demonstrates:

(A) A poor level of qualified investments, particularly those that are not routinely provided by private investors;

(B) Rare use of innovative or complex qualified investments; and

(C) Poor responsiveness to credit and community development needs.

(v) *Substantial noncompliance*. The FDIC rates a bank's investment performance as being in ''substantial noncompliance'' if, in general, it demonstrates:

(A) Few, if any, qualified investments, particularly those that are not routinely provided by private investors;

(B) No use of innovative or complex qualified investments; and

(C) Very poor responsiveness to credit and community development needs.

(3) *Service performance rating*. The FDIC assigns each bank's service performance one of the five following ratings.

(i) *Outstanding*. The FDIC rates a bank's service performance ''outstanding'' if, in general, the bank demonstrates:

(A) Its service delivery systems are readily accessible to geographies and individuals of different income levels in its assessment area(s);

(B) To the extent changes have been made, its record of opening and closing branches has improved the accessibility of its delivery systems, particularly in low- or moderate-income geographies or to low- or moderate-income individuals;

(C) Its services (including, where appropriate, business hours) are tailored to the convenience and needs of its assessment area(s), particularly low- or moderate-income geographies or low- or moderate-income individuals; and

(D) It is a leader in providing community development services.

(ii) *High satisfactory*. The FDIC rates a bank's service performance ''high satisfactory'' if, in general, the bank demonstrates:

(A) Its service delivery systems are accessible to geographies and individuals of different income levels in its assessment area(s);

(B) To the extent changes have been made, its record of opening and closing branches has not adversely affected the accessibility of its delivery systems, particularly in low- and moderate-income geographies and to low- and moderate-income individuals;

(C) Its services (including, where appropriate, business hours) do not vary in a way that inconveniences its assessment area(s), particularly low- and moderate-income geographies and low- and moderate-income individuals; and

(D) It provides a relatively high level of community development services.

(iii) *Low satisfactory*. The FDIC rates a bank's service performance ''low satisfactory'' if, in general, the bank demonstrates:

(A) Its service delivery systems are reasonably accessible to geographies and individuals of different income levels in its assessment area(s);

(B) To the extent changes have been made, its record of opening and closing branches has generally not adversely affected the accessibility of its delivery systems, particularly in low- and moderate-income geographies and to low- and moderate-income individuals;

(C) Its services (including, where appropriate, business hours) do not vary in a way that inconveniences its assessment area(s), particularly low- and moderate-income geographies and low- and moderate-income individuals; and

(D) It provides an adequate level of community development services.

(iv) *Needs to improve*. The FDIC rates a bank's service performance ''needs to improve'' if, in general, the bank demonstrates:

(A) Its service delivery systems are unreasonably inaccessible to portions of its assessment area(s), particularly to low- or moderate-income geographies or to low- or moderate-income individuals;

(B) To the extent changes have been made, its record of opening and closing branches has adversely affected the accessibility its delivery systems, particularly in low- or moderate-income geographies or to low- or moderate-income individuals;

(C) Its services (including, where appropriate, business hours) vary in a way that inconveniences its assessment area(s), particularly low- or moderate-income geographies or low- or moderate-income individuals; and

(D) It provides a limited level of community development services.

(v) *Substantial noncompliance*. The FDIC rates a bank's service performance as being in ''substantial noncompliance'' if, in general, the bank demonstrates:

(A) Its service delivery systems are unreasonably inaccessible to significant portions of its assessment area(s), particularly to low- or moderate-income geographies or to low- or moderate-income individuals;

(B) To the extent changes have been made, its record of opening and closing branches has significantly adversely affected the accessibility of its delivery systems, particularly in low- or moderate-income geographies or to low- or moderate-income individuals;

(C) Its services (including, where appropriate, business hours) vary in a way that significantly inconveniences its assessment area(s), particularly low- or moderate-income geographies or low- or moderate-income individuals; and

(D) It provides few, if any, community development services.

(c) *Wholesale or limited purpose banks*. The FDIC assigns each wholesale or limited purpose bank's community development performance one of the four following ratings.

(1) *Outstanding*. The FDIC rates a wholesale or limited purpose bank's community development performance ''outstanding'' if, in general, it demonstrates:

(i) A high level of community development loans, community development services, or qualified investments, particularly investments that are not routinely provided by private investors;

(ii) Extensive use of innovative or complex qualified investments, community development loans, or community development services; and

(iii) Excellent responsiveness to credit and community development needs in its assessment area(s).

(2) *Satisfactory*. The FDIC rates a wholesale or limited purpose bank's community development performance ''satisfactory'' if, in general, it demonstrates:

(i) An adequate level of community development loans, community development services, or qualified investments, particularly investments that are not routinely provided by private investors;

(ii) Occasional use of innovative or complex qualified investments, community development loans, or community development services; and

(iii) Adequate responsiveness to credit and community development needs in its assessment area(s).

(3) *Needs to improve*. The FDIC rates a wholesale or limited purpose bank's community development performance as ''needs to improve'' if, in general, it demonstrates:

(i) A poor level of community development loans, community development services, or qualified investments, particularly investments that are not routinely provided by private investors;

(ii) Rare use of innovative or complex qualified investments, community development loans, or community development services; and

(iii) Poor responsiveness to credit and community development needs in its assessment area(s).

(4) *Substantial noncompliance*. The FDIC rates a wholesale or limited purpose bank's community development performance in ''substantial noncompliance'' if, in general, it demonstrates:

(i) Few, if any, community development loans, community development services, or qualified investments, particularly investments that are not routinely provided by private investors;

(ii) No use of innovative or complex qualified investments, community development loans, or community development services; and

(iii) Very poor responsiveness to credit and community development needs in its assessment area(s).

(d) *Banks evaluated under the small bank performance standards*—(1) *Lending test ratings*—(i) *Eligibility for a satisfactory lending test rating*. The FDIC rates a small bank's lending performance ''satisfactory'' if, in general, the bank demonstrates:

(A) A reasonable loan-to-deposit ratio (considering seasonal variations) given the bank's size, financial condition, the credit needs of its assessment area(s), and taking into account, as appropriate, other lending-related activities such as loan originations for sale to the secondary markets and community development loans and qualified investments;

(B) A majority of its loans and, as appropriate, other lending-related activities, are in its assessment area;

(C) A distribution of loans to and, as appropriate, other lending-related activities for individuals of different income levels (including low- and moderate-income individuals) and businesses and farms of different sizes that is reasonable given the demographics of the bank's assessment area(s);

(D) A record of taking appropriate action, when warranted, in response to written complaints, if any, about the bank's performance in helping to meet the credit needs of its assessment area(s); and

(E) A reasonable geographic distribution of loans given the bank's assessment area(s).

(ii) *Eligibility for an ''outstanding'' lending test rating.* A small bank that meets each of the standards for a ''satisfactory'' rating under this paragraph and exceeds some or all of those standards may warrant consideration for a lending test rating of ''outstanding.''

(iii) *Needs to improve or substantial noncompliance ratings.* A small bank may also receive a lending test rating of ''needs to improve'' or ''substantial noncompliance'' depending on the degree to which its performance has failed to meet the standard for a ''satisfactory'' rating.

(2) *Community development test ratings for intermediate small banks*—(i) *Eligibility for a satisfactory community development test rating.* The FDIC rates an intermediate small bank's community development performance ''satisfactory'' if the bank demonstrates adequate responsiveness to the community development needs of its assessment area(s) through community development loans, qualified investments, and community development services. The adequacy of the bank's response will depend on its capacity for such community development activities, its assessment area's need for such community development activities, and the availability of such opportunities for community development in the bank's assessment area(s).

(ii) *Eligibility for an outstanding community development test rating.* The FDIC rates an intermediate small bank's community development performance ''outstanding'' if the bank demonstrates excellent responsiveness to community development needs in its assessment area(s) through community development loans, qualified investments, and community development services, as appropriate, considering the bank's capacity and the need and availability of such opportunities for community development in the bank's assessment area(s).

(iii) *Needs to improve or substantial noncompliance ratings.* An intermediate small bank may also receive a community development test rating of ''needs to improve'' or ''substantial noncompliance'' depending on the degree to which its performance has failed to meet the standards for a ''satisfactory'' rating.

(3) *Overall rating*—(i) *Eligibility for a satisfactory overall rating.* No intermediate small bank may receive an assigned overall rating of ''satisfactory'' unless it receives a rating of at least ''satisfactory'' on both the lending test and the community development test.

(ii) *Eligibility for an outstanding overall rating.* (A) An intermediate small bank that receives an ''outstanding'' rating on one test and at least ''satisfactory'' on the other test may receive an assigned overall rating of ''outstanding.''

(B) A small bank that is not an intermediate small bank that meets each of the standards for a ''satisfactory'' rating under the lending test and exceeds some or all of those standards may warrant consideration for an overall rating of ''outstanding.'' In assessing whether a bank's performance is ''outstanding,'' the FDIC considers the extent to which the bank exceeds each of the performance standards for a ''satisfactory'' rating and its performance in making qualified investments and its performance in providing branches and other services and delivery systems that enhance credit availability in its assessment area(s).

(iii) *Needs to improve or substantial noncompliance overall ratings.* A small bank may also receive a rating of ''needs to improve'' or ''substantial noncompliance'' depending on the degree to which its performance has failed to meet the standards for a ''satisfactory'' rating.

(e) *Strategic plan assessment and rating*—(1) *Satisfactory goals.* The FDIC approves as ''satisfactory'' measurable goals that adequately help to meet the credit needs of the bank's assessment area(s).

(2) *Outstanding goals.* If the plan identifies a separate group of measurable goals that substantially exceed the levels approved as ''satisfactory,'' the FDIC will approve those goals as ''outstanding.''

(3) *Rating.* The FDIC assesses the performance of a bank operating under an approved plan to determine if the bank has met its plan goals:

(i) If the bank substantially achieves its plan goals for a satisfactory rating, the FDIC will rate the bank's performance under the plan as ''satisfactory.''

(ii) If the bank exceeds its plan goals for a satisfactory rating and substantially achieves its plan goals for an outstanding rating, the FDIC will rate the bank's performance under the plan as ''outstanding.''

(iii) If the bank fails to meet substantially its plan goals for a satisfactory rating, the FDIC will rate the bank as either ''needs to improve'' or ''substantial noncompliance,'' depending on the extent to which it falls short of its plan goals, unless the bank elected in its plan to be rated otherwise, as provided in §345.27(f)(4).

[60 FR 22201, May 4, 1995, as amended at 70 FR 44270, Aug. 2, 2005; 75 FR 61045, Oct. 4, 2010]

APPENDIX B TO PART 345—CRA NOTICE

(a) *Notice for main offices and, if an interstate bank, one branch office in each state.*

COMMUNITY REINVESTMENT ACT NOTICE

Under the Federal Community Reinvestment Act (CRA), the Federal Deposit Insurance Corporation (FDIC) evaluates our record of helping to meet the credit needs of this community consistent with safe and sound operations. The FDIC also takes this record into account when deciding on certain applications submitted by us.

Your involvement is encouraged.

You are entitled to certain information about our operations and our performance under the CRA, including, for example, information about our branches, such as their location and services provided at them; the public section of our most recent CRA Performance Evaluation, prepared by the FDIC; and comments received from the public relating to our performance in helping to meet community credit needs, as well as our responses to those comments. You may review this information today.

At least 30 days before the beginning of each quarter, the FDIC publishes a nationwide list of the banks that are scheduled for CRA examination in that quarter. This list is available from the Regional Director, FDIC (address). You may send written comments about our performance in helping to meet community credit needs to (name and address of official at bank) and FDIC Regional Director. You may also submit comments electronically through the FDIC's Web site at *www.fdic.gov/regulations/cra*. Your letter, together with any response by us, will be considered by the FDIC in evaluating our CRA performance and may be made public.

You may ask to look at any comments received by the FDIC Regional Director. You may also request from the FDIC Regional Director an announcement of our applications covered by the CRA filed with the FDIC. We are an affiliate of (name of holding company), a bank holding company. You may request from the (title of responsible official), Federal Reserve Bank of _____(address) an announcement of applications covered by the CRA filed by bank holding companies.

(b) *Notice for branch offices.*

COMMUNITY REINVESTMENT ACT NOTICE

Under the Federal Community Reinvestment Act (CRA), the Federal Deposit Insurance Corporation (FDIC) evaluates our record of helping to meet the credit needs of this community consistent with safe and sound operations. The FDIC also takes this record into account when deciding on certain applications submitted by us.

Your involvement is encouraged.

You are entitled to certain information about our operations and our performance under the CRA. You may review today the public section of our most recent CRA evaluation, prepared by the FDIC, and a list of services provided at this branch. You may also have access to the following additional information, which we will make available to you at this branch within five calendar days after you make a request to us: (1) a map showing the assessment area containing this branch, which is the area in which the FDIC evaluates our CRA performance in this community; (2) information about our branches in this assessment area; (3) a list of services we provide at those locations; (4) data on our lending performance in this assessment area; and (5) copies of all written comments received by us that specifically relate to our CRA performance in this assessment area, and any responses we have made to those comments. If we are operating under an approved strategic plan, you may also have access to a copy of the plan.

[If you would like to review information about our CRA performance in other communities served by us, the public file for our entire bank is available at (name of office located in state), located at (address).]

At least 30 days before the beginning of each quarter, the FDIC publishes a nationwide list of the banks that are scheduled for CRA examination in that quarter. This list is available from the Regional Director, FDIC (address). You may send written comments about our performance in helping to meet community credit needs to (name and address of official at bank) and the FDIC Regional Director. You may also submit comments electronically through the FDIC's Web site at *www.fdic.gov/regulations/cra*. Your letter, together with any response by us, will be considered by the FDIC in evaluating our CRA performance and may be made public.

You may ask to look at any comments received by the FDIC Regional Director. You may also request from the FDIC Regional Director an announcement of our applications covered by the CRA filed with the FDIC. We are an affiliate of (name of holding company), a bank holding company. You may request from the (title of responsible official), Federal Reserve Bank of _____(address) an announcement of applications covered by the CRA filed by bank holding companies.

[43 FR 47151, Oct. 12, 1978, as amended at 82 FR 5356, Jan. 18, 2017]

PART 346—DISCLOSURE AND REPORTING OF CRA-RELATED AGREEMENTS

Sec.

346.1 Purpose and scope of this part.
346.2 Definition of covered agreement.
346.3 CRA communications.
346.4 Fulfillment of the CRA.
346.5 Related agreements considered a single agreement.

346.6 Disclosure of covered agreements.
346.7 Annual reports.
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346.10 Transition provisions.
346.11 Other definitions and rules of construction used in this part.

AUTHORITY: 12 U.S.C. 1831y.

SOURCE: 80 FR 23692, Apr. 29, 2015, unless otherwise noted.

§ 346.1 Purpose and scope of this part.

(a) *General*. This part implements section 711 of the Gramm-Leach-Bliley Act (12 U.S.C. 1831y). That section requires any nongovernmental entity or person, insured depository institution, or affiliate of an insured depository institution that enters into a covered agreement to—

(1) Make the covered agreement available to the public and the appropriate Federal banking agency; and

(2) File an annual report with the appropriate Federal banking agency concerning the covered agreement.

(b) *Scope of this part*. The provisions of this part apply to—

(1) State nonmember insured banks;

(2) Subsidiaries of state nonmember insured banks;

(3) Nongovernmental entities or persons that enter into covered agreements with any company listed in paragraphs (b)(1), (2), (4) and (5) of this section.

(4) State savings associations; and

(5) Subsidiaries of State savings associations.

(c) *Relation to Community Reinvestment Act*. This part does not affect in any way the Community Reinvestment Act of 1977 (12 U.S.C. 2901 *et seq.*) or the FDIC's Community Reinvestment regulation found at 12 CFR part 345, or the FDIC's interpretations or administration of that Act or regulation.

(d) *Examples*. (1) The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part.

(2) Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issues that may arise in this part.

§ 346.2 Definition of covered agreement.

(a) *General definition of covered agreement*. A covered agreement is any contract, arrangement, or understanding that meets all of the following criteria—

(1) The agreement is in writing.

(2) The parties to the agreement include—

(i) One or more insured depository institutions or affiliates of an insured depository institution; and

(ii) One or more nongovernmental entities or persons (referred to hereafter as NGEPs).

(3) The agreement provides for the insured depository institution or any affiliate to—

(i) Provide to one or more individuals or entities (whether or not parties to the agreement) cash payments, grants, or other consideration (except loans) that have an aggregate value of more than $10,000 in any calendar year; or

(ii) Make to one or more individuals or entities (whether or not parties to the agreement) loans that have an aggregate principal amount of more than $50,000 in any calendar year.

(4) The agreement is made pursuant to, or in connection with, the fulfillment of the Community Reinvestment Act of 1977 (12 U.S.C. 2901 *et seq.*) (CRA), as defined in § 346.4.

(5) The agreement is with a NGEP that has had a CRA communication as described in § 346.3 prior to entering into the agreement.

(b) *Examples concerning written arrangements or understandings*—

(1) *Example 1*. A NGEP meets with an insured depository institution and states that the institution needs to make more community development investments in the NGEP's community. The NGEP and insured depository institution do not reach an agreement concerning the community development investments the institution should make in the community, and the parties do not reach any mutual arrangement or understanding. Two weeks later, the institution unilaterally issues a press release announcing that it has established a general goal of making $100 million of community development grants in low- and moderate-income neighborhoods served by

the insured depository institution over the next 5 years. The NGEP is not identified in the press release. The press release is not a written arrangement or understanding.

(2) *Example 2.* A NGEP meets with an insured depository institution and states that the institution needs to offer new loan programs in the NGEP's community. The NGEP and the insured depository institution reach a mutual arrangement or understanding that the institution will provide additional loans in the NGEP's community. The institution tells the NGEP that it will issue a press release announcing the program. Later, the insured depository institution issues a press release announcing the loan program. The press release incorporates the key terms of the understanding reached between the NGEP and the insured depository institution. The written press release reflects the mutual arrangement or understanding of the NGEP and the insured depository institution and is, therefore, a written arrangement or understanding.

(3) *Example 3.* An NGEP sends a letter to an insured depository institution requesting that the institution provide a $15,000 grant to the NGEP. The insured depository institution responds in writing and agrees to provide the grant in connection with its annual grant program. The exchange of letters constitutes a written arrangement or understanding.

(c) *Loan agreements that are not covered agreements.* A covered agreement does not include—

(1) Any individual loan that is secured by real estate; or

(2) Any specific contract or commitment for a loan or extension of credit to an individual, business, farm, or other entity, or group of such individuals or entities if—

(i) The funds are loaned at rates that are not substantially below market rates; and

(ii) The loan application or other loan documentation does not indicate that the borrower intends or is authorized to use the borrowed funds to make a loan or extension of credit to one or more third parties.

(d) *Examples concerning loan agreements—*

(1) *Example 1.* An insured depository institution provides an organization with a $1 million loan that is documented in writing and is secured by real estate owned or to-be-acquired by the organization. The agreement is an individual mortgage loan and is exempt from coverage under paragraph (c)(1) of this section, regardless of the interest rate on the loan or whether the organization intends or is authorized to re-loan the funds to a third party.

(2) *Example 2.* An insured depository institution commits to provide a $500,000 line of credit to a small business that is documented by a written agreement. The loan is made at rates that are within the range of rates offered by the institution to similarly situated small businesses in the market and the loan documentation does not indicate that the small business intends or is authorized to re-lend the borrowed funds. The agreement is exempt from coverage under paragraph (c)(2) of this section.

(3) *Example 3.* An insured depository institution offers small business loans that are guaranteed by the Small Business Administration (SBA). A small business obtains a $75,000 loan, documented in writing, from the institution under the institution's SBA loan program. The loan documentation does not indicate that the borrower intends or is authorized to re-lend the funds. Although the rate charged on the loan is well below that charged by the institution on commercial loans, the rate is within the range of rates that the institution would charge a similarly situated small business for a similar loan under the SBA loan program. Accordingly, the loan is not made at substantially below market rates and is exempt from coverage under paragraph (c)(2) of this section.

(4) *Example 4.* A bank holding company enters into a written agreement with a community development organization that provides that insured depository institutions owned by the bank holding company will make $250 million in small business loans in the community over the next 5 years. The written agreement is not a specific contract or commitment for a loan or an extension of credit and, thus, is not

exempt from coverage under paragraph (c)(2) of this section: Each small business loan made by the insured depository institution pursuant to this general commitment would, however, be exempt from coverage if the loan is made at rates that are not substantially below market rates and the loan documentation does not indicate that the borrower intended or was authorized to re-lend the funds.

(e) *Agreements that include exempt loan agreements*. If an agreement includes a loan, extension of credit or loan commitment that, if documented separately, would be exempt under paragraph (c) of this section, the exempt loan, extension of credit or loan commitment may be excluded for purposes of determining whether the agreement is a covered agreement.

(f) *Determining annual value of agreements that lack schedule of disbursements*. For purposes of paragraph (a)(3) of this section, a multi-year agreement that does not include a schedule for the disbursement of payments, grants, loans or other consideration by the insured depository institution or affiliate, is considered to have a value in the first year of the agreement equal to all payments, grants, loans and other consideration to be provided at any time under the agreement.

§ 346.3 CRA communications.

(a) *Definition of CRA communication*. A CRA communication is any of the following—

(1) Any written or oral comment or testimony provided to a Federal banking agency concerning the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate.

(2) Any written comment submitted to the insured depository institution that discusses the adequacy of the performance under the CRA of the institution and must be included in the institution's CRA public file.

(3) Any discussion or other contact with the insured depository institution or any affiliate about—

(i) Providing (or refraining from providing) written or oral comments or testimony to any Federal banking agency concerning the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate;

(ii) Providing (or refraining from providing) written comments to the insured depository institution that concern the adequacy of the institution's performance under the CRA and must be included in the institution's CRA public file; or

(iii) The adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate.

(b) *Discussions or contacts that are not CRA communications*—(1) *Timing of contacts with a Federal banking agency*. An oral or written communication with a Federal banking agency is not a CRA communication if it occurred more than 3 years before the parties entered into the agreement.

(2) *Timing of contacts with insured depository institutions and affiliates*. A communication with an insured depository institution or affiliate is not a CRA communication if the communication occurred—

(i) More than 3 years before the parties entered into the agreement, in the case of any written communication;

(ii) More than 3 years before the parties entered into the agreement, in the case of any oral communication in which the NGEP discusses providing (or refraining from providing) comments or testimony to a Federal banking agency or written comments that must be included in the institution's CRA public file in connection with a request to, or agreement by, the institution or affiliate to take (or refrain from taking) any action that is in fulfillment of the CRA; or

(iii) More than 1 year before the parties entered into the agreement, in the case of any other oral communication not described in paragraph (b)(2)(ii) of this section.

(3) *Knowledge of communication by insured depository institution or affiliate*. (i) A communication is only a CRA communication under paragraph (a) of this section if the insured depository institution or its affiliate has knowledge of the communication under this

paragraph (b)(3)(ii) or (iii) of this section.

(ii) *Communication with insured depository institution or affiliate.* An insured depository institution or affiliate has knowledge of a communication by the NGEP to the institution or its affiliate under this paragraph only if one of the following representatives of the insured depository institution or any affiliate has knowledge of the communication—

(A) An employee who approves, directs, authorizes, or negotiates the agreement with the NGEP; or

(B) An employee designated with responsibility for compliance with the CRA or executive officer if the employee or executive officer knows that the institution or affiliate is negotiating, intends to negotiate, or has been informed by the NGEP that it expects to request that the institution or affiliate negotiate an agreement with the NGEP.

(iii) *Other communications.* An insured depository institution or affiliate is deemed to have knowledge of—

(A) Any testimony provided to a Federal banking agency at a public meeting or hearing;

(B) Any comment submitted to a Federal banking agency that is conveyed in writing by the agency to the insured depository institution or affiliate; and

(C) Any written comment submitted to the insured depository institution that must be and is included in the institution's CRA public file.

(4) *Communication where NGEP has knowledge.* A NGEP has a CRA communication with an insured depository institution or affiliate only if any of the following individuals has knowledge of the communication—

(i) A director, employee, or member of the NGEP who approves, directs, authorizes, or negotiates the agreement with the insured depository institution or affiliate;

(ii) A person who functions as an executive officer of the NGEP and who knows that the NGEP is negotiating or intends to negotiate an agreement with the insured depository institution or affiliate; or

(iii) Where the NGEP is an individual, the NGEP.

(c) *Examples of CRA communications*—(1) *Examples of actions that are CRA communications.* The following are examples of CRA communications. These examples are not exclusive and assume that the communication occurs within the relevant time period as described in paragraph (b)(1) or (2) of this section and the appropriate representatives have knowledge of the communication as specified in paragraphs (b)(3) and (4) of this section.

(i) *Example 1.* A NGEP files a written comment with a Federal banking agency that states than an insured depository institution successfully addresses the credit needs of its community. The written comment is in response to a general request from the agency for comments on an application of the insured depository institution to open a new branch and a copy of the comment is provided to the institution.

(ii) *Examples 2.* A NGEP meets with an executive officer of an insured depository institution and states that the institution must improve its CRA performance.

(iii) *Example 3.* A NGEP meets with an executive officer of an insured depository institution and states that the institution needs to make more mortgage loans in low- and moderate-income neighborhoods in its community.

(iv) *Example 4.* A bank holding company files an application with a Federal banking agency to acquire an insured depository institution. Two weeks later, the NGEP meets with an executive officer of the bank holding company to discuss the adequacy of the performance under the CRA of the target insured depository institution. The insured depository institution was an affiliate of the bank holding company at the time the NGEP met with the target institution. (See § 346.11(a).) Accordingly, the NGEP had a CRA communication with an affiliate of the bank holding company.

(2) *Examples of actions that are not CRA communications.* The following are examples of actions that are not by themselves CRA communications. These examples are not exclusive.

(i) *Example 1.* A NGEP provides to a Federal banking agency comments or

testimony concerning an insured depository institution or affiliate in response to a direct request by the agency for comments or testimony from that NGEP. Direct requests for comments or testimony do not include a general invitation by a Federal banking agency for comments or testimony from the public in connection with a CRA performance evaluation of, or application for a deposit facility (as defined in section 803 of the CRA (12 U.S.C. 2902(3)) by, an insured depository institution or an application by a company to acquire an insured depository institution.

(ii) *Example 2.* A NGEP makes a statement concerning an insured depository institution or affiliate at a widely attended conference or seminar regarding a general topic. A public or private meeting, public hearing, or other meeting regarding one or more specific institutions, affiliates or transactions involving an application for a deposit facility is not considered a widely attended conference or seminar.

(iii) *Example 3.* A NGEP, such as a civil rights group, community group providing housing and other services in low- and moderate-income neighborhoods, veterans organization, community theater group, or youth organization, sends a fundraising letter to insured depository institutions and to other businesses in its community. The letter encourages all businesses in the community to meet their obligation to assist in making the local community a better place to live and work by supporting the fundraising efforts of the NGEP.

(iv) *Example 4.* A NGEP discusses with an insured depository institution or affiliate whether particular loans, services, investments, community development activities, or other activities are generally eligible for consideration by a Federal banking agency under the CRA. The NGEP and insured depository institution or affiliate do not discuss the adequacy of the CRA performance of the insured depository institution or affiliate.

(v) *Example 5.* A NGEP engaged in the sale or purchase of loans in the secondary market sends a general offering circular to financial institutions offering to sell or purchase a portfolio of loans. An insured depository institution that receives the offering circular discusses with the NGEP the types of loans included in the loan pool, whether such loans are generally eligible for consideration under the CRA, and which loans are made to borrowers in the institution's local community. The NGEP and insured depository institution do not discuss the adequacy of the institution's CRA performance.

(d) *Multiparty covered agreements.* (1) A NGEP that is a party to a covered agreement that involves multiple NGEPs is not required to comply with the requirements of this part if—

(i) The NGEP has not had a CRA communication; and

(ii) No representative of the NGEP identified in paragraph (b)(4) of this section has knowledge at the time of the agreement that another NGEP that is a party to the agreement has had a CRA communication.

(2) An insured depository institution or affiliate that is a party to a covered agreement that involves multiple insured depository institutions or affiliates is not required to comply with the disclosure and annual reporting requirements in §§ 346.6 and 346.7 if—

(i) No NGEP that is a party to the agreement has had a CRA communication concerning the insured depository institution or any affiliate; and

(ii) No representative of the insured depository institution or any affiliate identified in paragraph (b)(3) of this section has knowledge at the time of the agreement that an NGEP that is a party to the agreement has had a CRA communication concerning any other insured depository institution or affiliate that is a party to the agreement.

§ 346.4 Fulfillment of the CRA.

(a) *List of factors that are in fulfillment of the CRA.* Fulfillment of the CRA, for purposes of this part, means the following list of factors—

(1) *Comments to a Federal banking agency or included in CRA public file.* Providing or refraining from providing written or oral comments or testimony to any Federal banking agency concerning the performance under the CRA of an insured depository institution or CRA affiliate that is a party to

the agreement or an affiliate of a party to the agreement or written comments that are required to be included in the CRA public file of any such insured depository institution; or

(2) *Activities given favorable CRA consideration.* Performing any of the following activities if the activity is of the type that is likely to receive favorable consideration by a Federal banking agency in evaluating the performance under the CRA of the insured depository institution that is a party to the agreement or an affiliate of a party to the agreement—

(i) Home-purchase, home-improvement, small business, small farm, community development, and consumer lending, as described in 12 CFR 345.22, including loan purchases, loan commitments, and letters of credit;

(ii) Making investments, deposits, or grants, or acquiring membership shares, that have as their primary purpose community development, as described in 12 CFR 345.23;

(iii) Delivering retail banking services as described in 12 CFR 345.24(d);

(iv) Providing community development services, as described in 12 CFR 345.24(e);

(v) In the case of a wholesale or limited-purpose insured depository institution, community development lending, including originating and purchasing loans and making loan commitments and letters of credit, making qualified investments, or providing community development services, as described in 12 CFR 345.25(c);

(vi) In the case of a small insured depository institution, any lending or other activity described in 12 CFR 345.26(a); or

(vii) In the case of an insured depository institution that is evaluated on the basis of a strategic plan, any element of the strategic plan, as described in 12 CFR 345.27(f).

(b) *Agreements relating to activities of CRA affiliates.* An insured depository institution or affiliate that is a party to a covered agreement that concerns any activity described in paragraph (a) of this section of a CRA affiliate must, prior to the time the agreement is entered into, notify each NGEP that is a party to the agreement that the agreement concerns a CRA affiliate.

§ 346.5 Related agreements considered a single agreement.

The following rules must be applied in determining whether an agreement is a covered agreement under § 346.2.

(a) *Agreements entered into by same parties.* All written agreements to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement if the agreements—

(1) Are entered into with the same NGEP;

(2) Were entered into within the same 12-month period; and

(3) Are each in fulfillment of the CRA.

(b) *Substantively related contracts.* All written contracts to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement, without regard to whether the other parties to the contracts are the same or whether each such contract is in fulfillment of the CRA, if the contracts were negotiated in a coordinated fashion and a NGEP is a party to each contract.

§ 346.6 Disclosure of covered agreements.

(a) *Applicability date.* This section applies only to covered agreements entered into after November 12, 1999.

(b) *Disclosure of covered agreements to the public*—(1) *Disclosure required.* Each NGEP and each insured depository institution or affiliate that enters into a covered agreement must promptly make a copy of the covered agreement available to any individual or entity upon request.

(2) *Nondisclosure of confidential and proprietary information permitted.* In responding to a request for a covered agreement from any individual or entity under paragraph (b)(1) of this section, a NGEP, insured depository institution, or affiliate may withhold from public disclosure confidential or proprietary information that the party believes the relevant supervisory agency could withhold from disclosure under the Freedom of Information Act (5 U.S.C. 552 *et seq.*) (FOIA).

(3) *Information that must be disclosed.* Notwithstanding paragraph (b)(2) of

this section, a party must disclose any of the following information that is contained in a covered agreement—

(i) The names and addresses of the parties to the agreement;

(ii) The amount of any payments, fees, loans, or other consideration to be made or provided by any party to the agreement;

(iii) Any description of how the funds or other resources provided under the agreement are to be used;

(iv) The term of the agreement (if the agreement establishes a term); and

(v) Any other information that the relevant supervisory agency determines is not properly exempt from public disclosure.

(4) *Request for review of withheld information*. Any individual or entity may request that the relevant supervisory agency review whether any information in a covered agreement withheld by a party must be disclosed. Any requests for agency review of withheld information must be filed, and will be processed in accordance with, the relevant supervisory agency's rules concerning the availability of information (*see* the FDIC's rules regarding Disclosure of Information (12 CFR part 309)).

(5) *Duration of obligation*. The obligation to disclose a covered agreement to the public terminates 12 months after the end of the term of the agreement.

(6) *Reasonable copy and mailing fees*. Each NGEP and each insured depository institution or affiliate may charge an individual or entity that requests a copy of a covered agreement a reasonable fee not to exceed the cost of copying and mailing the agreement.

(7) *Use of CRA public file by insured depository institution or affiliate*. An insured depository institution and any affiliate of an insured depository institution may fulfill its obligation under this paragraph (b) by placing a copy of the covered agreement in the insured depository institution's CRA public file if the institution makes the agreement available in accordance with the procedures set forth in 12 CFR 345.43.

(c) *Disclosure by NGEPs of covered agreements to the relevant supervisory agency*. (1) Each NGEP that is a party to a covered agreement must provide the following within 30 days of receiving a request from the relevant supervisory agency—

(i) A complete copy of the agreement; and

(ii) In the event the NGEP proposes the withholding of any information contained in the agreement in accordance with paragraph (b)(2) of this section, a public version of the agreement that excludes such information and an explanation justifying the exclusions. Any public version must include the information described in paragraph (b)(3) of this section.

(2) The obligation of a NGEP to provide a covered agreement to the relevant supervisory agency terminates 12 months after the end of the term of the covered agreement.

(d) *Disclosure by insured depository institution or affiliate of covered agreements to the relevant supervisory agency*—(1) *In general*. Within 60 days of the end of each calendar quarter, each insured depository institution and affiliate must provide each relevant supervisory agency with—

(i)(A) A complete copy of each covered agreement entered into by the insured depository institution or affiliate during the calendar quarter; and

(B) In the event the institution or affiliate proposes the withholding of any information contained in the agreement in accordance with paragraph (b)(2) of this section, a public version of the agreement that excludes such information (other than any information described in paragraph (b)(3) of this section) and an explanation justifying the exclusions; or

(ii) A list of all covered agreements entered into by the insured depository institution or affiliate during the calendar quarter that contains—

(A) The name and address of each insured depository institution or affiliate that is a party to the agreement;

(B) The name and address of each NGEP that is a party to the agreement;

(C) The date the agreement was entered into;

(D) The estimated total value of all payments, fees, loans, and other consideration to be provided by the institution or any affiliate of the institution under the agreement; and

(E) The date the agreement terminates.

(2) *Prompt filing of covered agreements contained in list required.* (i) If an insured depository institution or affiliate files a list of the covered agreements entered into by the institution or affiliate pursuant to paragraph (d)(1)(ii) of this section, the institution or affiliate must provide any relevant supervisory agency a complete copy and public version of any covered agreement referenced in the list within 7 calendar days of receiving a request from the agency for a copy of the agreement.

(ii) The obligation of an insured depository institution or affiliate to provide a covered agreement to the relevant supervisory agency under this paragraph (d)(2) terminates 36 months after the end of the term of the agreement.

(3) *Joint filings.* In the event that 2 or more insured depository institutions or affiliates are parties to a covered agreement, the insured depository institution(s) and affiliate(s) may jointly file the documents required by this paragraph (d). Any joint filing must identify the insured depository institution(s) and affiliate(s) for whom the filings are being made.

§ 346.7 Annual reports.

(a) *Applicability date.* This section applies only to covered agreements entered into on or after May 12, 2000.

(b) *Annual report required.* Each NGEP and each insured depository institution or affiliate that is a party to a covered agreement must file an annual report with each relevant supervisory agency concerning the disbursement, receipt, and uses of funds or other resources under the covered agreement.

(c) *Duration of reporting requirement*—(1) *NGEPs.* A NGEP must file an annual report for a covered agreement for any fiscal year in which the NGEP receives or uses funds or other resources under the agreement.

(2) *Insured depository institutions and affiliates.* An insured depository institution or affiliate must file an annual report for a covered agreement for any fiscal year in which the institution or affiliate—

(i) Provides or receives any payments, fees, or loans under the covered agreement that must be reported under paragraphs (e)(1)(iii) and (iv) of this section; or

(ii) Has data to report on loans, investments, and services provided by a party to the covered agreement under the covered agreement under paragraph (e)(1)(vi) of this section.

(d) *Annual reports filed by NGEP*—(1) *Contents of report.* The annual report filed by a NGEP under this section must include the following—

(i) The name and mailing address of the NGEP filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The amount of funds or resources received under the covered agreement during the fiscal year; and

(iv) A detailed, itemized list of how any funds or resources received by the NGEP under the covered agreement were used during the fiscal year, including the total amount used for—

(A) Compensation of officers, directors, and employees;

(B) Administrative expenses;

(C) Travel expenses;

(D) Entertainment expenses;

(E) Payment of consulting and professional fees; and

(F) Other expenses and uses (specify expense or use).

(2) *More detailed reporting of uses of funds or resources permitted*—(i) *In general.* If a NGEP allocated and used funds received under a covered agreement for a specific purpose, the NGEP may fulfill the requirements of paragraph (d)(1)(iv) of this section with respect to such funds by providing—

(A) A brief description of each specific purpose for which the funds or other resources were used; and

(B) The amount of funds or resources used during the fiscal year for each specific purpose.

(ii) *Specific purpose defined.* A NGEP allocates and uses funds for a specific purpose if the NGEP receives and uses the funds for a purpose that is more specific and limited than the categories listed in paragraph (d)(1)(iv) of this section.

(3) *Use of other reports*. The annual report filed by a NGEP may consist of or incorporate a report prepared for any other purpose, such as the Internal Revenue Service Return of Organization Exempt From Income Tax on Form 990, or any other Internal Revenue Service form, state tax form, report to members or shareholders, audited or unaudited financial statements, audit report, or other report, so long as the annual report filed by the NGEP contains all of the information required by this paragraph (d).

(4) *Consolidated reports permitted*. A NGEP that is a party to 2 or more covered agreements may file with each relevant supervisory agency a single consolidated annual report covering all the covered agreements. Any consolidated report must contain all the information required by this paragraph (d). The information reported under paragraphs (d)(1)(iv) and (d)(2) of this section may be reported on an aggregate basis for all covered agreements.

(5) *Examples of annual report requirements for NGEPs*—

(i) *Example 1*. A NGEP receives an unrestricted grant of $15,000 under a covered agreement, includes the funds in its general operating budget, and uses the funds during its fiscal year. The NGEP's annual report for the fiscal year must provide the name and mailing address of the NGEP, information sufficient to identify the covered agreement, and state that the NGEP received $15,000 during the fiscal year. The report must also indicate the total expenditures made by the NGEP during the fiscal year for compensation, administrative expenses, travel expenses, entertainment expenses, consulting and professional fees, and other expenses and uses. The NGEP's annual report may provide this information by submitting an Internal Revenue Service Form 990 that includes the required information. If the Internal Revenue Service Form does not include information for all of the required categories listed in this part, the NGEP must report the total expenditures in the remaining categories either by providing that information directly or by providing another form or report that includes the required information.

(ii) *Examples 2*. An organization receives $15,000 from an insured depository institution under a covered agreement and allocates and uses the $15,000 during the fiscal year to purchase computer equipment to support its functions. The organization's annual report must include the name and address of the organization, information sufficient to identify the agreement, and a statement that the organization received $15,000 during the year. In addition, since the organization allocated and used the funds for a specific purpose that is more narrow and limited than the categories of expenses included in the detailed, itemized list of expenses, the organization would have the option of providing either the total amount it used during the year for each category of expenses included in paragraph (d)(1)(iv) of this section, or a statement that it used the $15,000 to purchase computer equipment and a brief description of the equipment purchased.

(iii) *Examples 3*. A community group receives $50,000 from an insured depository institution under a covered agreement. During its fiscal year, the community group specifically allocates and uses $5,000 of the funds to pay for a particular business trip and uses the remaining $45,000 for general operating expenses. The group's annual report for the fiscal year must include the name and address of the group, information sufficient to identify the agreement, and a statement that the group received $50,000. Because the group did not allocate and use all of the funds for a specific purpose, the group's annual report must provide the total amount of funds it used during the year for each category of expenses included in paragraph (d)(1)(iv) of this section. The group's annual report also could state that it used $5,000 for a particular business trip and include a brief description of the trip.

(iv) *Example 4*. A community development organization is a party to two separate covered agreements with two unaffiliated insured depository institutions. Under each agreement, the organization receives $15,000 during its fiscal year and uses the funds to support its activities during that year. If the

organization elects to file a consolidated annual report, the consolidated report must identify the organization and the two covered agreements, state that the organization received $15,000 during the fiscal year under each agreement, and provide the total amount that the organization used during the year for each category of expenses included in paragraph (d)(1)(iv) of this section.

(e) *Annual report filed by insured depository institution or affiliate*—(1) *General.* The annual report filed by an insured depository institution or affiliate must include the following—

(i) The name and principal place of business of the insured depository institution or affiliate filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans provided by the insured depository institution or affiliate under the covered agreement to any other party to the agreement during the fiscal year;

(iv) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans received by the insured depository institution or affiliate under the covered agreement from any other party to the agreement during the fiscal year;

(v) A general description of the terms and conditions of any payments, fees, or loans reported under paragraphs (e)(1)(iii) and (iv) of this section, or, in the event such terms and conditions are set forth—

(A) In the covered agreement, a statement identifying the covered agreement and the date the agreement (or a list identifying the agreement) was filed with the relevant supervisory agency; or

(B) In a previous annual report filed by the insured depository institution or affiliate, a statement identifying the date the report was filed with the relevant supervisory agency; and

(vi) The aggregate amount and number of loans, aggregate amount and number of investments, and aggregate amount of services provided under the covered agreement to any individual or entity not a party to the agreement—

(A) By the insured depository institution or affiliate during its fiscal year; and

(B) By any other party to the agreement, unless such information is not known to the insured depository institution or affiliate filing the report or such information is or will be contained in the annual report filed by another party under this section.

(2) *Consolidated reports permitted*—(i) *Party to multiple agreements.* An insured depository institution or affiliate that is a party to 2 or more covered agreements may file a single consolidated annual report with each relevant supervisory agency concerning all the covered agreements.

(ii) *Affiliated entities party to the same agreement.* An insured depository institution and its affiliates that are parties to the same covered agreement may file a single consolidated annual report relating to the agreement with each relevant supervisory agency for the covered agreement.

(iii) *Content of report.* Any consolidated annual report must contain all the information required by this paragraph (e). The amounts and data required to be reported under paragraphs (e)(1)(iv) and (vi) of this section may be reported on an aggregate basis for all covered agreements.

(f) *Time and place of filing*—(1) *General.* Each party must file its annual report with each relevant supervisory agency for the covered agreement no later than six months following the end of the fiscal year covered by the report.

(2) *Alternative method of fulfilling annual reporting requirement for a NGEP.* (i) A NGEP may fulfill the filing requirements of this section by providing the following materials to an insured depository institution or affiliate that is a party to the agreement no later than six months following the end of the NGEP's fiscal year—

(A) A copy of the NGEP's annual report required under paragraph (d) of this section for the fiscal year; and

(B) Written instructions that the insured depository institution or affiliate promptly forward the annual report to

the relevant supervisory agency or agencies on behalf of the NGEP.

(ii) An insured depository institution or affiliate that receives an annual report from a NGEP pursuant to paragraph (f)(2)(i) of this section must file the report with the relevant supervisory agency or agencies on behalf of the NGEP within 30 days.

§ 346.8 Release of information under FOIA.

The FDIC will make covered agreements and annual reports available to the public in accordance with the Freedom of Information Act (5 U.S.C. 552 *et seq.*) and the FDIC's rules regarding Disclosure of Information (12 CFR part 309). A party to a covered agreement may request confidential treatment of proprietary and confidential information in a covered agreement or an annual report under those procedures.

§ 346.9 Compliance provisions.

(a) *Willful failure to comply with disclosure and reporting obligations.* (1) If the FDIC determines that a NGEP has willfully failed to comply in a material way with §§ 346.6 or 346.7, the FDIC will notify the NGEP in writing of that determination and provide the NGEP a period of 90 days (or such longer period as the FDIC finds to be reasonable under the circumstances) to comply.

(2) If the NGEP does not comply within the time period established by the FDIC, the agreement shall thereafter be unenforceable by that NGEP by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y).

(3) The FDIC may assist any insured depository institution or affiliate that is a party to a covered agreement that is unenforceable by a NGEP by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y) in identifying a successor to assume the NGEP's responsibilities under the agreement.

(b) *Diversion of funds.* If a court or other body of competent jurisdiction determines that funds or resources received under a covered agreement have been diverted contrary to the purposes of the covered agreement for an individual's personal financial gain, the FDIC may take either or both of the following actions—

(1) Order the individual to disgorge the diverted funds or resources received under the agreement.

(2) Prohibit the individual from being a party to any covered agreement for a period not to exceed 10 years.

(c) *Notice and opportunity to respond.* Before making a determination under paragraph (a)(1) of this section, or taking any action under paragraph (b) of this section, the FDIC will provide written notice and an opportunity to present information to the FDIC concerning any relevant facts or circumstances relating to the matter.

(d) *Inadvertent or de minimis errors.* Inadvertent or de minimis errors in annual reports or other documents filed with the FDIC under §§ 346.6 or 346.7 will not subject the reporting party to any penalty.

(e) *Enforcement of provisions in covered agreements.* No provision of this part shall be construed as authorizing the FDIC to enforce the provisions of any covered agreement.

§ 346.10 Transition provisions.

(a) *Disclosure of covered agreements entered into before the effective date of this part*—(1) *Disclosure to the public.* Each NGEP and each insured depository institution or affiliate that was a party to the agreement must make the agreement available to the public under § 346.6 until at least April 1, 2002.

(2) *Disclosure to the relevant supervisory agency.* (i) Each NGEP that was a party to the agreement must make the agreement available to the relevant supervisory agency under § 346.6 until at least April 1, 2002.

(ii) Each insured depository institution or affiliate that was a party to the agreement must, by June 30, 2001, provide each relevant supervisory agency either—

(A) A copy of the agreement under § 346.6(d)(1)(i); or

(B) The information described in § 346.6(d)(1)(ii) for each agreement.

(b) *Filing of annual reports that relate to fiscal years ending on or before December 31, 2000.* In the event that a NGEP, insured depository institution or affiliate has any information to report under § 346.7 for a fiscal year that ends

on or before December 31, 2000, and that concerns a covered agreement entered into between May 12, 2000, and December 31, 2000, the annual report for that fiscal year must be provided no later than June 30, 2001, to—

(1) Each relevant supervisory agency; or

(2) In the case of a NGEP, to an insured depository institution or affiliate that is a party to the agreement in accordance with § 346.7(f)(2).

§ 346.11 Other definitions and rules of construction used in this part.

(a) *Affiliate.* ''Affiliate'' means—

(1) Any company that controls, is controlled by, or is under common control with another company; and

(2) For the purpose of determining whether an agreement is a covered agreement under § 346.2, an ''affiliate'' includes any company that would be under common control or merged with another company on consummation of any transaction pending before a Federal banking agency at the time—

(i) The parties enter into the agreement; and

(ii) The NGEP that is a party to the agreement makes a CRA communication, as described in § 346.3.

(b) *Control.* ''Control'' is defined in section 2(a) of the Bank Holding Company Act (12 U.S.C. 1841(a)).

(c) *CRA affiliate.* A ''CRA affiliate'' of an insured depository institution is any company that is an affiliate of an insured depository institution to the extent, and only to the extent, that the activities of the affiliate were considered by the appropriate Federal banking agency when evaluating the CRA performance of the institution at its most recent CRA examination prior to the agreement. An insured depository institution or affiliate also may designate any company as a CRA affiliate at any time prior to the time a covered agreement is entered into by informing the NGEP that is a party to the agreement of such designation.

(d) *CRA public file.* ''CRA public file'' means the public file maintained by an insured depository institution and described in 12 CFR 345.43.

(e) *Executive officer.* The term ''executive officer'' has the same meaning as in § 215.2(e)(1) of the Board of Governors of the Federal Reserve System's Regulation O (12 CFR 215.2(e)(1)).

(f) *Federal banking agency; appropriate Federal banking agency.* The terms ''Federal banking agency'' and ''appropriate Federal banking agency'' have the same meanings as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(g) *Fiscal year.* (1) The fiscal year for a NGEP that does not have a fiscal year shall be the calendar year.

(2) Any NGEP, insured depository institution, or affiliate that has a fiscal year may elect to have the calendar year be its fiscal year for purposes of this part.

(h) *Insured depository institution.* ''Insured depository institution'' has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(i) *NGEP.* ''NGEP'' means a nongovernmental entity or person.

(j) *Nongovernmental entity or person*—(1) *General.* A ''nongovernmental entity or person'' is any partnership, association, trust, joint venture, joint stock company, corporation, limited liability corporation, company, firm, society, other organization, or individual.

(2) *Exclusions.* A nongovernmental entity or person does not include—

(i) The United States government, a state government, a unit of local government (including a county, city, town, township, parish, village, or other general-purpose subdivision of a state) or an Indian tribe or tribal organization established under Federal, state or Indian tribal law (including the Department of Hawaiian Home Lands), or a department, agency, or instrumentality of any such entity;

(ii) A federally-chartered public corporation that receives Federal funds appropriated specifically for that corporation;

(iii) An insured depository institution or affiliate of an insured depository institution; or

(iv) An officer, director, employee, or representative (acting in his or her capacity as an officer, director, employee, or representative) of an entity listed in paragraphs (j)(2)(i) through (iii) of this section.

(k) *Party.* The term ''party''. The authority citation for part 405 continues

to read as follows: with respect to a covered agreement means each NGEP and each insured depository institution or affiliate that entered into the agreement.

(l) *Relevant supervisory agency*. The ''relevant supervisory agency'' for a covered agreement means the appropriate Federal banking agency for—

(1) Each insured depository institution (or subsidiary thereof) that is a party to the covered agreement;

(2) Each insured depository institution (or subsidiary thereof) or CRA affiliate that makes payments or loans or provides services that are subject to the covered agreement; and

(3) Any company (other than an insured depository institution or subsidiary thereof) that is a party to the covered agreement.

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

(n) *Term of agreement*. An agreement that does not have a fixed termination date is considered to terminate on the last date on which any party to the agreement makes any payment or provides any loan or other resources under the agreement, unless the relevant supervisory agency for the agreement otherwise notifies each party in writing.

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327.1—327.17 (Subpart A) Appendix C amended 11401
327.1—327.17 (Subpart A) Appendix D amended 11401
327.1—327.17 (Subpart A) Appendix E amended 11401
329.1 (a) and (b)(1) introductory text revised 9219
329.2 (b) revised; (c) added 9219
329.3 Amended 9219
329.22 (b)(1) revised 9220
329.30 (b)(3) revised 9220
329.31 (a)(1) introductory text, (2) introductory text, and (4) revised 9220

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329.32 Amended 9220
329.100—329.109 (Subpart K) Added; nomenclature change 9220
329.110 (Subpart L) Added; nomenclature change 9220
329.120 (Subpart M) Added 9221
337.6 (a)(5)(ii), (iii), (b)(2)(i), and (3)(i) redesignated as (a)(5)(v), (vi), (b)(2), and (3); new (a)(5)(ii), new (iii), (iv), and (b)(4) added; (a) introductory text, (3)(i) through (iii), (5)(i), new (v)(I), and new (vi) revised; (b)(2)(ii), (3)(ii), and (f) removed 6789
337.7 Added 6791
338 Revised 8088
345.12 (u)(1) revised 71815