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- 32.6 Nonconforming loans and extensions of credit.
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APPENDIX A TO PART 32—INTERPRETATIONS

AUTHORITY: 12 U.S.C. 1 *et seq.*, 12 U.S.C. 84, 93a, 1462a, 1463, 1464(u), 5412(b)(2)(B), and 15 U.S.C. 1639h.

SOURCE: 60 FR 8532, Feb. 15, 1995, unless otherwise noted.

§ 32.1 Authority, purpose and scope.

(a) *Authority.* This part is issued pursuant to 12 U.S.C. 1 *et seq.*, 12 U.S.C. 84, 93a, 1462a, 1463, 1464(u), and 5412(b)(2)(B).

(b) *Purpose.* The purpose of this part is to protect the safety and soundness of national banks and savings associations by preventing excessive loans to one person, or to related persons that are financially dependent, and to promote diversification of loans and equitable access to banking services.

(c) *Scope.* (1) Except as provided by paragraphs (c) and (d) of this section, this part applies to all loans and extensions of credit made by national banks and their domestic operating subsidiaries and to all loans and extensions of credit made by savings associations, their operating subsidiaries, and their service corporations that are consolidated under Generally Accepted Accounting Principles (GAAP). For purposes of this part, the term “savings association” includes Federal savings associations and state savings associations, as those terms are defined in 12 U.S.C. 1813(b).

(2) This part does not apply to loans or extensions of credit made to the bank’s or savings association’s:

- (i) Affiliates, as that term is defined in 12 U.S.C. 371c(b)(1) and (e), as implemented by 12 CFR 223.2(a) (Regulation W);
- (ii) Operating subsidiaries;
- (iii) Edge Act or Agreement Corporation subsidiaries; or
- (iv) Any other subsidiary consolidated with the bank or savings association under GAAP.

(3) The lending limits in this part are separate and independent from the investment limits prescribed by 12 U.S.C. 24 (Seventh) or 12 U.S.C. 1464(c), as applicable, and 12 CFR Part 1 and 12 CFR 160.30, and a national bank or savings association may make loans or extensions of credit to one borrower up to the full amount permitted by this part and also hold eligible securities of the same obligor up to the full amount permitted under 12 U.S.C. 24 (Seventh) or 12 U.S.C. 1464(c), as applicable, and 12 CFR part 1 and 12 CFR 160.30.

(4) Loans and extensions of credit to executive officers, directors and principal shareholders of national banks, savings associations, and their related interests are subject to limits prescribed by 12 U.S.C. 375a and 375b in addition to the lending limits established by 12 U.S.C. 84 or 12 U.S.C. 1464(u) as applicable, and this part.

(5) In addition to the foregoing, loans and extensions of credit must be consistent with safe and sound banking practices.

(d) *Temporary exception.* The requirements of this part shall not apply to the credit exposure arising from a derivative transaction or securities financing transaction until October 1, 2013.

[60 FR 8532, Feb. 15, 1995, as amended at 73 FR 22251, Apr. 24, 2008; 77 FR 37275, June 21, 2012; 77 FR 76842, Dec. 31, 2012; 78 FR 37943, June 25, 2013]

§ 32.2 Definitions.

(a) *Appropriate Federal banking agency* has the same meaning as in 12 U.S.C. 1813(q).

(b) *Borrower* means a person who is named as a borrower or debtor in a loan or extension of credit; a person to whom a national bank or savings association has credit exposure arising from a derivative transaction or a securities financing transaction, entered by the bank or savings association; or any other person, including a drawer, endorser, or guarantor, who is deemed to be a borrower under the “direct benefit” or the “common enterprise” tests set forth in § 32.5.

(c) *Capital and surplus* means—

(1) For qualifying community banking organizations that have elected to use the community bank leverage ratio

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framework, as set forth under the OCC's Capital Adequacy Standards at part 3 of this chapter:

(i) A qualifying community banking organization's tier 1 capital, as used under § 3.12 of this chapter; plus

(ii) A qualifying community banking organization's allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, as reported in the Consolidated Reports of Condition and Income (Call Report); or

(2) For all other national banks and Federal savings associations:

(i) A national bank's or savings association's tier 1 and tier 2 capital calculated under the risk-based capital standards applicable to the institution as reported in the Call Report; plus

(ii) The balance of a national bank's or Federal savings association's allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, not included in the bank's or savings association's tier 2 capital, for purposes of the calculation of risk-based capital described in paragraph (c)(2)(i) of this section, as reported in the national bank's or savings association's Call Report.

(d) *Close of business* means the time at which a national bank or savings association closes its accounting records for the business day.

(e) *Consumer* means the user of any products, commodities, goods, or services, whether leased or purchased, but does not include any person who purchases products or commodities for resale or fabrication into goods for sale.

(f) *Consumer paper* means paper relating to automobiles, mobile homes, residences, office equipment, household items, tuition fees, insurance premium fees, and similar consumer items. Consumer paper also includes paper covering the lease (where the national bank or savings association is not the owner or lessor) or purchase of equipment for use in manufacturing, farming, construction, or excavation.

(g) *Contractual commitment to advance funds.* (1) The term includes a national bank's or savings association's obligation to—

(i) Make payment (directly or indirectly) to a third person contingent upon default by a customer of the bank or savings association in performing an

obligation and to make such payment in keeping with the agreed upon terms of the customer's contract with the third person, or to make payments upon some other stated condition;

(ii) Guarantee or act as surety for the benefit of a person;

(iii) Advance funds under a qualifying commitment to lend, as defined in paragraph (t) of this section, and

(iv) Advance funds under a standby letter of credit as defined in paragraph (ee) of this section, a put, or other similar arrangement.

(2) The term does not include commercial letters of credit and similar instruments where the issuing bank or savings association expects the beneficiary to draw on the issuer, that do not guarantee payment, and that do not provide for payment in the event of a default by a third party.

(h) *Control* is presumed to exist when a person directly or indirectly, or acting through or together with one or more persons—

(1) Owns, controls, or has the power to vote 25 percent or more of any class of voting securities of another person;

(2) Controls, in any manner, the election of a majority of the directors, trustees, or other persons exercising similar functions of another person; or

(3) Has the power to exercise a controlling influence over the management or policies of another person.

(i) *Credit derivative* has the same meaning as this term has in 12 CFR 3.2.

(j) *Current market value* means the bid or closing price listed for an item in a regularly published listing or an electronic reporting service.

(k) *Derivative transaction* includes any transaction that is a contract, agreement, swap, warrant, note, or option that is based, in whole or in part, on the value of, any interest in, or any quantitative measure or the occurrence of any event relating to, one or more commodities, securities, currencies, interest or other rates, indices, or other assets.

(l) *Effective margining arrangement* means a master legal agreement governing derivative transactions between a bank or savings association and a counterparty that requires the counterparty to post, on a daily basis, variation margin to fully collateralize

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that amount of the bank's or savings association's net credit exposure to the counterparty that exceeds \$25 million created by the derivative transactions covered by the agreement.

(m) *Eligible credit derivative* means a single-name credit derivative or a standard, non-tranched index credit derivative provided that:

(1) The derivative contract meets the requirements of an eligible guarantee, as defined in 12 CFR 3.2, and has been confirmed by the protection purchaser and the protection provider;

(2) Any assignment of the derivative contract has been confirmed by all relevant parties;

(3) If the credit derivative is a credit default swap, the derivative 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) Bankruptcy, insolvency, restructuring (for obligors not subject to bankruptcy or insolvency), or inability of the obligor on the reference exposure 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 derivative contract is to be settled are incorporated into the contract;

(5) If the derivative contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss with respect to the derivative reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(6) If the derivative 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 provides that any required consent to transfer may not be unreasonably withheld; and

(7) If the credit derivative is a credit default swap, the derivative contract clearly identifies the parties respon-

sible 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.

(n) *Eligible national bank or eligible savings association* means a national bank or saving association that:

(1) Is well capitalized as defined in the prompt corrective action rules applicable to the institution; and

(2) Has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System in connection with the national bank's or savings association's most recent examination or subsequent review, with at least a rating of 2 for asset quality and for management.

(o) *Eligible protection provider* means:

(1) A sovereign entity (a central government, including the U.S. government; an agency; department; ministry; or central bank);

(2) The Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, or a multilateral development bank;

(3) A Federal Home Loan Bank;

(4) The Federal Agricultural Mortgage Corporation;

(5) A depository institution, as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c);

(6) A bank holding company, as defined in section 2 of the Bank Holding Company Act, as amended, 12 U.S.C. 1841;

(7) A savings and loan holding company, as defined in section 10 of the Home Owners' Loan Act, 12 U.S.C. 1467a;

(8) A securities broker or dealer registered with the SEC under the Securities Exchange Act of 1934, 15 U.S.C. 78o et seq;

(9) An insurance company that is subject to the supervision of a State insurance regulator;

(10) A foreign banking organization;

(11) A non-U.S.-based securities firm or a non-U.S.-based insurance company that is subject to consolidated supervision and regulation comparable to

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that imposed on U.S. depository institutions, securities broker-dealers, or insurance companies; and

(12) A qualifying central counterparty;

(p) *Financial instrument* means stocks, notes, bonds, and debentures traded on a national securities exchange, OTC margin stocks as defined in Regulation U, 12 CFR part 221, commercial paper, negotiable certificates of deposit, bankers' acceptances, and shares in money market and mutual funds of the type that issue shares in which national banks or savings associations may perfect a security interest. Financial instruments may be denominated in foreign currencies that are freely convertible to U.S. dollars. The term "financial instrument" does not include mortgages.

(q) *Loans and extensions of credit* means a national bank's or savings association's direct or indirect advance of funds to or on behalf of a borrower based on an obligation of the borrower to repay the funds or repayable from specific property pledged by or on behalf of the borrower; and any credit exposure, as determined pursuant to § 32.9, arising from a derivative transaction or a securities financing transaction.

(1) Loans or extensions of credit for purposes of 12 U.S.C. 84 or 12 U.S.C. 1464(u), as applicable, and this part include—

(i) A contractual commitment to advance funds, as defined in paragraph (g) of this section;

(ii) A maker or endorser's obligation arising from a national bank's or savings association's discount of commercial paper;

(iii) A national bank's or savings association's purchase of third-party paper subject to an agreement that the seller will repurchase the paper upon default or at the end of a stated period. The amount of the bank's or savings association's loan is the total unpaid balance of the paper owned by the bank or savings association less any applicable dealer reserves retained by the bank or savings association and held by the bank or savings association as collateral security. Where the seller's obligation to repurchase is limited, the bank's or savings association's loan is

measured by the total amount of the paper the seller may ultimately be obligated to repurchase. A national bank's or savings association's purchase of third party paper without direct or indirect recourse to the seller is not a loan or extension of credit to the seller;

(iv) An overdraft, whether or not pre-arranged, but not an intra-day overdraft for which payment is received before the close of business of the national bank or savings association that makes the funds available;

(v) The sale of Federal funds with a maturity of more than one business day, but not Federal funds with a maturity of one day or less or Federal funds sold under a continuing contract; and

(vi) Loans or extensions of credit that have been charged off on the books of the national bank or savings association in whole or in part, unless the loan or extension of credit—

(A) Is unenforceable by reason of discharge in bankruptcy;

(B) Is no longer legally enforceable because of expiration of the statute of limitations or a judicial decision;

(C) Is no longer legally enforceable for other reasons, provided that the bank or savings association maintains sufficient records to demonstrate that the loan is unenforceable.

(2) The following items do not constitute loans or extensions of credit for purposes of 12 U.S.C. 84 or 12 U.S.C. 1464(u), as applicable, and this part—

(i) Additional funds advanced for the benefit of a borrower by a national bank or savings association for payment of taxes, insurance, utilities, security, and maintenance and operating expenses necessary to preserve the value of real property securing the loan, consistent with safe and sound banking practices, but only if the advance is for the protection of the bank's or savings association's interest in the collateral, and provided that such amounts must be treated as an extension of credit if a new loan or extension of credit is made to the borrower;

(ii) Accrued and discounted interest on an existing loan or extension of credit, including interest that has been

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capitalized from prior notes and interest that has been advanced under terms and conditions of a loan agreement;

(iii) Financed sales of a national bank's or savings association's own assets, including Other Real Estate Owned, if the financing does not put the bank or savings association in a worse position than when the bank or savings association held title to the assets;

(iv) A renewal or restructuring of a loan as a new "loan or extension of credit," following the exercise by a national bank or savings association of reasonable efforts, consistent with safe and sound banking practices, to bring the loan into conformance with the lending limit, unless new funds are advanced by the national bank or savings association to the borrower (except as permitted by § 32.3(b)(5)), or a new borrower replaces the original borrower, or unless the appropriate Federal banking agency determines that a renewal or restructuring was undertaken as a means to evade the bank's or savings association's lending limit;

(v) Amounts paid against uncollected funds in the normal process of collection;

(vi)(A) That portion of a loan or extension of credit sold as a participation by a national bank or savings association on a nonrecourse basis, provided that the participation results in a pro rata sharing of credit risk proportionate to the respective interests of the originating and participating lenders. Where a participation agreement provides that repayment must be applied first to the portions sold, a pro rata sharing will be deemed to exist only if the agreement also provides that, in the event of a default or comparable event defined in the agreement, participants must share in all subsequent repayments and collections in proportion to their percentage participation at the time of the occurrence of the event.

(B) When an originating national bank or savings association funds the entire loan, it must receive funding from the participants before the close of business of its next business day. If the participating portions are not received within that period, then the portions funded will be treated as a loan

by the originating bank or savings association to the borrower. If the portions so attributed to the borrower exceed the originating bank's or savings association's lending limit, the loan may be treated as nonconforming subject to § 32.6, rather than a violation, if:

(1) The originating national bank or savings association had a valid and unconditional participation agreement with a participant or participants that was sufficient to reduce the loan to within the originating bank's or savings association's lending limit;

(2) The participant reconfirmed its participation and the originating national bank or savings association had no knowledge of any information that would permit the participant to withhold its participation; and

(3) The participation was to be funded by close of business of the originating national bank's or savings association's next business day; and

(vii) That portion of one or more loans or extensions of credit, not to exceed 10 percent of capital and surplus, with respect to which the national bank or savings association has purchased protection in the form of a single-name credit derivative that meets the requirements of § 32.2(m)(1) through (7) from an eligible protection provider if the reference obligor is the same legal entity as the borrower in the loan or extension of credit and the maturity of the protection purchased equals or exceeds the maturity of the loan or extension of credit.

(r) *Person* means an individual; sole proprietorship; partnership; joint venture; association; trust; estate; business trust; corporation; limited liability company; not-for-profit corporation; sovereign government or agency, instrumentality, or political subdivision thereof; or any similar entity or organization; and

(s) *Qualifying central counterparty* has the same meaning as this term has in 12 CFR 3.2.

(t) *Qualifying commitment to lend* means a legally binding written commitment to lend that, when combined with all other outstanding loans and qualifying commitments to a borrower, was within the national bank's or savings association's lending limit when

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entered into, and has not been disqualified.

(1) In determining whether a commitment is within the national bank's or savings association's lending limit when made, the bank or savings association may deduct from the amount of the commitment the amount of any legally binding loan participation commitments that are issued concurrent with the bank's or savings association's commitment and that would be excluded from the definition of "loan or extension of credit" under paragraph (q)(2)(vi) of this section.

(2) If the national bank or savings association subsequently chooses to make an additional loan and that subsequent loan, together with all outstanding loans and qualifying commitments to a borrower, exceeds the bank's or savings association's applicable lending limit at that time, the bank's or savings association's qualifying commitments to the borrower that exceed the bank's or savings association's lending limit at that time are deemed to be permanently disqualified, beginning with the most recent qualifying commitment and proceeding in reverse chronological order. When a commitment is disqualified, the entire commitment is disqualified and the disqualified commitment is no longer considered a "loan or extension of credit." Advances of funds under a disqualified or non-qualifying commitment may only be made to the extent that the advance, together with all other outstanding loans to the borrower, do not exceed the bank's or savings association's lending limit at the time of the advance, calculated pursuant to §32.4.

(u) *Qualifying master netting agreement* has the same meaning as this term has in 12 CFR 3.2.

(v) *Readily marketable collateral* means financial instruments and bullion that are salable under ordinary market conditions with reasonable promptness at a fair market value determined by quotations based upon actual transactions on an auction or similarly available daily bid and ask price market.

(w) *Readily marketable staple* means an article of commerce, agriculture, or industry, such as wheat and other

grains, cotton, wool, and basic metals such as tin, copper and lead, in the form of standardized interchangeable units, that is easy to sell in a market with sufficiently frequent price quotations.

(1) An article comes within this definition if—

(i) The exact price is easy to determine; and

(ii) The staple itself is easy to sell at any time at a price that would not be considerably less than the amount at which it is valued as collateral.

(2) Whether an article qualifies as a readily marketable staple is determined on the basis of the conditions existing at the time the loan or extension of credit that is secured by the staples is made.

(x) *Residential housing units* mean:

(1) Homes (including a dwelling unit in a multi-family residential property such as a condominium or a cooperative);

(2) Combinations of homes and business property (*i.e.*, a home used in part for business);

(3) Other real estate used for primarily residential purposes other than a home (but which may include homes);

(4) Combinations of such real estate and business property involving only minor business use (*i.e.*, where no more than 20 percent of the total appraised value of the real estate is attributable to the business use);

(5) Farm residences and combinations of farm residences and commercial farm real estate;

(6) Property to be improved by the construction of such structures; or

(7) Leasehold interests in the above real estate.

(y) *Residential real estate loan* means a loan or extension of credit that is secured by 1-4 family residential real estate.

(z) *Sale of Federal funds* means any transaction between depository institutions involving the transfer of immediately available funds resulting from credits to deposit balances at Federal Reserve Banks, or from credits to new or existing deposit balances due from a correspondent depository institution.

(aa) *Securities financing transaction* means a repurchase agreement, reverse

repurchase agreement, securities lending transaction, or securities borrowing transaction.

(bb) *Security* has the same meaning as in section 3(a)(10) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(10)).

(cc) *Loans to small businesses* means loans or extensions of credit “secured by nonfarm nonresidential properties” or “commercial and industrial loans” as defined in the instructions for preparation of the Consolidated Report of Condition and Income.

(dd) *Loans or extensions of credit to small farms* means “loans secured by farmland” or “loans to finance agricultural production and other loans to farmers” as defined in the instructions for preparation of the Consolidated Report of Condition and Income.

(ee) *Standby letter of credit* means any letter of credit, or similar arrangement, that 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;

(2) To make payment on account of any indebtedness undertaken by the account party; or

(3) To make payment on account of any default by the account party in the performance of an obligation.

[60 FR 8532, Feb. 15, 1995, as amended at 63 FR 15746, Apr. 1, 1998; 66 FR 31120, June 11, 2001; 66 FR 55072, Nov. 1, 2001; 69 FR 51357, Aug. 19, 2004; 77 FR 37275, June 21, 2012; 77 FR 37277, June 21, 2012; 78 FR 37944, June 25, 2013; 79 FR 11312, Feb. 28, 2014; 80 FR 28479, May 18, 2015; 84 FR 4240, Feb. 14, 2019; 84 FR 61795, Nov. 13, 2019; 84 FR 69298, Dec. 18, 2019; 85 FR 42642, July 14, 2020]

§ 32.3 Lending limits.

(a) *Combined general limit.* A national bank’s or savings association’s total outstanding loans and extensions of credit to one borrower may not exceed 15 percent of the bank’s or savings association’s capital and surplus, plus an additional 10 percent of the bank’s or savings association’s capital and surplus, if the amount that exceeds the bank’s or savings association’s 15 percent general limit is fully secured by readily marketable collateral, as defined in § 32.2(v). To qualify for the additional 10 percent limit, the bank or savings association must perfect a se-

curity interest in the collateral under applicable law and the collateral must have a current market value at all times of at least 100 percent of the amount of the loan or extension of credit that exceeds the bank’s or savings association’s 15 percent general limit.

(b) *Loans subject to special lending limits.* The following loans or extensions of credit are subject to the lending limits set forth below. When loans and extensions of credit qualify for more than one special lending limit, the special limits are cumulative.

(1) *Loans secured by bills of lading or warehouse receipts covering readily marketable staples.* (i) A national bank’s or savings association’s loans or extensions of credit to one borrower secured by bills of lading, warehouse receipts, or similar documents transferring or securing title to readily marketable staples, as defined in § 32.2(w), may not exceed 35 percent of the bank’s or savings association’s capital and surplus in addition to the amount allowed under the bank’s or savings association’s combined general limit. The market value of the staples securing the loan must at all times equal at least 115 percent of the amount of the outstanding loan that exceeds the bank’s or savings association’s combined general limit.

(ii) Staples that qualify for this special limit must be nonperishable, may be refrigerated or frozen, and must be fully covered by insurance if such insurance is customary. Whether a staple is non-perishable must be determined on a case-by-case basis because of differences in handling and storing commodities.

(iii) This special limit applies to a loan or extension of credit arising from a single transaction or secured by the same staples, provided that the duration of the loan or extension of credit is:

(A) Not more than ten months if secured by nonperishable staples; or

(B) Not more than six months if secured by refrigerated or frozen staples.

(iv) The holder of the warehouse receipts, order bills of lading, documents qualifying as documents of title under the Uniform Commercial Code, or other similar documents, must have