that this final rule will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 966

Marketing agreements, Reporting and recordkeeping requirements, Tomatoes.

For the reasons set forth in the preamble, 7 CFR part 966 is amended as follows:

## PART 966—TOMATOES GROWN IN FLORIDA

Accordingly, the interim final rule amending 7 CFR Part 966 which was published at 60 FR 57906 on November 24, 1995, is adopted as a final rule without change.

Dated: February 8, 1996.

Sharon Bomer Lauritsen,

*Deputy Director, Fruit and Vegetable Division.*

[FR Doc. 96–3349 Filed 2–14–96; 8:45 am]

BILLING CODE 3410–02–P

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 201

**[Regulation A]**

### Extensions of Credit by Federal Reserve Banks; Change in Discount Rate

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule.

**SUMMARY:** The Board of Governors has amended its Regulation A on Extensions of Credit by Federal Reserve Banks to reflect its approval of a decrease in the basic discount rate at each Federal Reserve Bank. The Board acted on requests submitted by the Boards of Directors of the twelve Federal Reserve Banks.

**EFFECTIVE DATE:** The amendments to part 201 (Regulation A) were effective February 5, 1996. The rate changes for adjustment credit were effective on the dates specified in 12 CFR 201.51.

**FOR FURTHER INFORMATION CONTACT:** William W. Wiles, Secretary of the Board (202/452–3257); for users of Telecommunications Device for the Deaf (TDD), please contact Dorothea Thompson, (202/452–3544), Board of Governors of the Federal Reserve System, 20th and C Streets NW., Washington, DC 20551.

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority of sections 10(b), 13, 14, 19, et.al., of the Federal Reserve Act, the Board has amended its Regulation A (12 CFR part 201) to incorporate changes in discount rates on Federal Reserve Bank extensions of credit. The discount rates are the interest rates charged to depository institutions when they borrow from their district Reserve Banks.

The ''basic discount rate'' is a fixed rate charged by Reserve Banks for adjustment credit and, at the Reserve Banks' discretion, for extended credit. In decreasing the basic discount rate, the Board acted on requests submitted by the Boards of Directors of the twelve Federal Reserve Banks. The new rates were effective on the dates specified below. Moderating economic expansion in recent months has reduced potential inflationary pressures going forward. In this environment, the decrease in rates is consistent with continued inflation and sustainable growth.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Board certifies that the change in the basic discount rate will not have a significant adverse economic impact on a substantial number of small entities. The rule does not impose any additional requirements on entities affected by the regulation.

Paperwork Reduction Act

In accordance with section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 35; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget. No collections of information pursuant to the Paperwork Reduction Act are contained in the rule.

Administrative Procedure Act

The provisions of 5 U.S.C. 553(b) relating to notice and public participation were not followed in connection with the adoption of the amendment because the Board for ''good cause'' finds that delaying the change in the basic discount rate in order to allow notice and public comment on the change is impracticable, unnecessary, and contrary to the public interest in fostering sustainable economic growth.

The provisions of 5 U.S.C. 553(d) that prescribe 30 days prior notice of the effective date of a rule have not been followed because section 553(d) provides that such prior notice is not necessary whenever there is good cause for finding that such notice is contrary to the public interest. As previously stated, the Board determined that delaying the changes in the basic discount rate is contrary to the public interest.

List of Subjects in 12 CFR Part 201

Banks, banking, Credit, Federal Reserve System.

For the reasons set out in the preamble, 12 CFR Part 201 is amended as set forth below:

## PART 201—EXTENSIONS OF CREDIT BY FEDERAL RESERVE BANKS (REGULATION A)

1. The authority citation for 12 CFR part 201 continues to read as follows:

Authority: 12 U.S.C. 343 *et. seq.*, 347a, 347b, 347c, 347d, 348 *et. seq.*, 357, 374, 374a and 461.

2. Section 201.51 is revised to read as follows:

**§ 201.51 Adjustment credit for depository institutions.**

The rates for adjustment credit provided to depository institutions under § 201.3(a) are:

| Federal Reserve Bank | Rate | Effective |
|---|---|---|
| Boston ..... | 5.00 | February 1, 1996. |
| New York ..... | 5.00 | January 31, 1996. |
| Philadelphia . | 5.00 | January 31, 1996. |
| Cleveland ..... | 5.00 | January 31, 1996. |
| Richmond ..... | 5.00 | February 1, 1996. |
| Atlanta ..... | 5.00 | January 31, 1996. |
| Chicago ..... | 5.00 | February 1, 1996. |
| St. Louis ..... | 5.00 | February 5, 1996. |
| Minneapolis .. | 5.00 | January 31, 1996. |
| Kansas City .. | 5.00 | February 1, 1996. |
| Dallas ..... | 5.00 | January 31, 1996. |
| San Francisco. | 5.00 | January 31, 1996. |

By order of the Board of Governors of the Federal Reserve System, February 9, 1996.

William W. Wiles,

*Secretary of the Board.*

[FR Doc. 96–3389 Filed 2–14–96; 8:45 a.m.]

BILLING CODE 6210–01–P

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Parts 303 and 359

**RIN 3064–AB11**

### Regulation of Golden Parachutes and Other Benefits Which May Be Subject to Misuse

**AGENCY:** Federal Deposit Insurance Corporation (FDIC or Corporation).

**ACTION:** Final rule.

**SUMMARY:** The FDIC is adopting a rule limiting golden parachute and indemnification payments to institution-affiliated parties by insured depository institutions and depository institution holding companies. The

purpose of this rule is to prevent the improper disposition of institution assets and to protect the financial soundness of insured depository institutions, depository institution holding companies, and the federal deposit insurance funds.

**EFFECTIVE DATE:** April 1, 1996.

**FOR FURTHER INFORMATION CONTACT:** Robert F. Miailovich, Associate Director, Division of Supervision, (202) 898–6918, 550 17th Street, N.W., Washington, D.C.; Michael D. Jenkins, Examination Specialist, Division of Supervision, (202) 898–6896, 1776 F Street, N.W., Washington, D.C. 20429; Jeffrey M. Kopchik, Counsel, Legal Division, (202) 898–3872; Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429.

**SUPPLEMENTARY INFORMATION:**

Paperwork Reduction Act

No collection of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is contained in this rule. Consequently, no information was submitted to the Office of Management and Budget for review.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601 *et seq.*), it is certified that this rule will not have a significant impact on a substantial number of small entities.

Background

On March 29, 1995, the FDIC published for public comment a notice of proposed rulemaking entitled ''Regulation of Golden Parachutes and Other Benefits Which May Be Subject to Misuse''. 60 FR 16069 (1995). This proposal (the Second Proposal) followed an earlier notice of proposed rulemaking concerning the same topic (the First Proposal), which was published in the Federal Register on October 7, 1991. 56 FR 50529 (1991). Both the First and Second Proposals were efforts to implement section 18(k) of the Federal Deposit Insurance Act (12 U.S.C. 1828(k)) (FDI Act). Section 18(k) provides that the FDIC may prohibit or limit, by regulation or order, any golden parachute or indemnification payment.

The FDIC received 23 comment letters in response to the Second Proposal. The comment letters were submitted by major financial institution trade associations, insured depository institutions, insured depository institution holding companies, a law firm and a trade association representing life insurance underwriters. Virtually all of the commenters expressed the view that the Second Proposal represented a significant improvement over the First Proposal in terms of the burden that the proposed regulation would place on the industry. In fact, the majority of commenters expressed support for the Second Proposal, while submitting well thought-out suggestions. These suggestions encompassed technical revisions to the regulation as well as broader proposals aimed at making it easier for insured depository institutions and holding companies to make golden parachute and indemnification payments in certain limited circumstances.

Issues Raised by the Commenters—Golden Parachute Payments

The FDIC has carefully reviewed and analyzed the comment letters it received in response to the Second Proposal. With respect to the golden parachute portion of the Second Proposal, the most significant issues raised by the comment letters and the FDIC's responses are discussed below.

*1. Bona Fide Deferred Compensation Plans*

The Second Proposal includes a definition of ''bona fide deferred compensation plan or arrangement'' that was created specifically for this regulation. This definition, which appears in § 359.1(d) of the Second Proposal, includes a provision that allows plans to provide for the crediting of a reasonable investment return on elective deferrals of compensation, wages or fees. Several commenters suggested that the definition of ''bona fide deferred compensation plan or arrangement'' should be expanded to further define the term ''reasonable investment return''. One comment letter included suggested language to be incorporated into the regulation. The FDIC is of the opinion that including an additional definition of ''reasonable investment return'' would not provide any advantage to the industry and would only serve to make the regulation more complicated. This provision is provided in the definition to permit financial institutions to follow normal business practices. It is not intended to have the regulators make close distinctions of what is a reasonable investment return. It is intended merely to prevent the inclusion of exorbitant returns that would result in a circumvention of the primary purpose of this regulation. The suggested definitions provided by the commenters are considered to clearly fit the requirements of this term; however, the FDIC also recognizes that there are several other definitions of ''reasonable investment return'' that also fit these requirements.

Several commenters asked whether a finding by the FDIC that a bona fide deferred compensation plan provided for an unreasonable investment return on elective deferrals would invalidate the entire plan. The FDIC is of the view that such a finding would not invalidate such a plan which otherwise conforms to § 359.1(d). However, that portion of the investment return which is found to be unreasonable would be a prohibited golden parachute payment.

*2. Nondiscriminatory Severance Pay Plans*

Section 359.1(f)(2) of the Second Proposal contains certain exceptions to the definition of ''golden parachute payment''. One of those exceptions is for nondiscriminatory severance pay plans. Second Proposal § 359.1(f)(2)(v). Several commenters suggested that the FDIC delete the requirement that the exception apply only in cases of a reduction in force (RIF). This section of the Second Proposal also would require 30 days prior written notice to the appropriate federal banking agency and the FDIC prior to making such a severance payment to a senior executive officer. Several commenters also urged the deletion of the prior notice requirement. After careful consideration, the FDIC agrees with these suggestions. If a nondiscriminatory severance pay plan conforms to the other requirements set forth in § 359.1(f)(2)(v), it should not be necessary that an employee's involuntary termination be part of a RIF in order for that employee to collect severance pay. This section's other requirements are more than adequate protection that the exception will not be used to circumvent the regulation's primary purpose, *i.e.*, the prohibition of golden parachute payments. Also, the advantages of the prior notice provision for severance payments to senior executive officers do not outweigh the burden such a requirement would place on the industry, so this requirement has been deleted.

*3. Definition of Nondiscriminatory*

Section 359.1(j) of the Second Proposal contains the definition of ''nondiscriminatory'' as it relates to severance pay plans or arrangements. These are the only type of severance pay plans or arrangements that may qualify as an exception to the regulation's prohibition. In order to be considered nondiscriminatory, a severance pay plan must apply to all employees of an

insured depository institution or depository institution holding company who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of service requirements. The Second Proposal provides that a nondiscriminatory severance pay plan may provide different benefits to IAPs based only upon length of service and/or position. In the event that an employee's position is used as a basis for providing a different level of benefits, employees who are not senior executive officers shall be treated more favorably than senior executive officers.

The reason for this approach was the FDIC's concern that severance pay plans could be designed in such a way that they would circumvent the basic purpose of the regulation. In other words, as an example, to permit severance payments of one year's salary to the top five senior executive officers of an insured depository institution in contrast to one week's salary to all tellers on the basis that such payments are made pursuant to a *bona fide* severance pay plan, a recognized exception to the golden parachute prohibition, would undermine the purpose of FDI Act section 18(k). However, several commenters noted that many existing severance plans do pay somewhat more generous benefits to higher ranking IAPs. These commenters suggested that a modest disparity in severance benefits linked to objective criteria like job title or length of service should be permitted by the regulation since such plans are common in the financial services industry and do not violate the basic premise of FDI Act section 18(k). The FDIC has been persuaded that this position represents a good compromise between preventing the payment of prohibited golden parachutes and permitting insured depository institutions and holding companies to offer severance benefits that conform to well-established industry norms.

Based upon suggestions made in the comment letters, the definition of ''nondiscriminatory'' contained in § 359.1(j) of the Second Proposal has been amended to provide that a nondiscriminatory severance plan may provide for different levels of benefits based only on objective criteria such as salary, total compensation, length of service, job grade or classification. In addition, any group of employees which is designated for a different level of benefits based upon such acceptable objective criteria must consist of the lesser of not less than 33 percent of all employees or 1,000 employees. Furthermore, the differential in benefits between the groups shall not be more than plus or minus 10 percent.

*4. White Knight Exception*

Both the First and Second Proposals contained a provision which would permit a troubled depository institution or holding company to hire an individual and agree to pay him/her a golden parachute payment upon termination of employment, provided that the amount and terms of the payment receive the prior written consent of the appropriate federal banking agency and the FDIC. Second Proposal § 359.4(a)(2). All commenters that discussed the issue were supportive of the FDIC's ''white knight'' exception to the golden parachute prohibition. They were particularly supportive of the revisions to the exception that were made in response to comment letters concerning the First Proposal. However, a number of commenters reiterated the suggestion that the FDIC broaden the exception to include current officers and employees who are promoted to executive positions at a time when the institution is troubled.[1] The FDIC has carefully considered this suggestion once again and remains unconvinced that the regulation should be amended in this way. White knight severance payments will be approved in limited circumstances as a way to entice competent management to sever established ties with their current employer and take a calculated risk that they can assist in bringing a troubled institution back to financial health. This rationale does not apply to the case of a current employee of a troubled institution since he/she does not need to be enticed to give up an established, stable career with another employer.

*5. Change In Control Exception*

Section 359.4(a)(3) of the Second Proposal contains the change in control exception to the golden parachute prohibition. This exception permits an insured depository institution or holding company to make a reasonable severance payment, not to exceed twelve months salary, to an IAP in the event of a change in control with the prior consent of the appropriate federal banking agency. Once again, every commenter who discussed this exception expressed their support. However, a substantial number of those recommended that the FDIC delete the one year's salary cap.

This exception was added to the Second Proposal in response to comment letters received concerning the First Proposal. While the FDIC considers this to be an important exception, we believe that certain limits need to be placed on such payments. One year's salary appears to be a reasonable compromise between a prohibition on any payment and more generous payments. The FDIC is of the opinion that one year's salary will provide ample incentive for an IAP (usually a senior executive officer) to objectively consider a takeover bid which may result in the loss of that IAP's job. It must be remembered that this exception is relevant only in the event of the takeover of a troubled depository institution or holding company.

*6. Condition of the Institution at Time of Termination*

The FDIC specified in the preamble to the Second Proposal that a golden parachute payment which is prohibited from being paid at the time of an IAP's termination due to the troubled condition of the insured depository institution or holding company cannot be paid to that IAP at some later point in time once the institution or holding company is no longer troubled. See Second Proposal § 359.1(f)(1)(iii). Several commenters requested that the FDIC reconsider its position on this point.

The FDIC believes the position taken in the Second Proposal is consistent with the language and spirit of the statute. The language of section 18(k)(4)(A)(ii) of the FDI Act provides that any payment which is contingent on the termination of an IAP's employment and is received on or after an institution or holding company becomes troubled is a prohibited golden parachute. If this payment is prohibited under the prescribed circumstances, it is prohibited forever. However, the regulation contains several exceptions and procedures for affected individuals to avoid an undeserved prohibition on a potential golden parachute payment. Thus, the final regulation is consistent with the Second Proposal in this regard.

Issues Raised by the Commenters—Indemnification Payments

The vast majority of commenters were very supportive of the changes which the FDIC made to the indemnification payments portion of the First Proposal in response to the first set of comment letters. While most commenters indicated they thought the Second Proposal set forth a rational and fair scheme for determining indemnification, many commenters urged the FDIC to further amend the

[1] In the course of this preamble, the term ''troubled'' shall be used to refer to any of the criteria listed in § 359.1(f)(ii) of this final regulation.

regulation to make it somewhat easier for IAPs to be indemnified. The FDIC has decided to adopt some, but not all, of the suggestions it received as discussed below.

*1. Partial Indemnification*

The most prevalent comment with regard to the indemnification portion of the Second Proposal noted that the proposed regulation would not permit partial indemnification in instances where it has been determined that an IAP has not violated certain banking laws or regulations or has not engaged in certain unsafe or unsound banking practices or breaches of fiduciary duty for which the individual has been charged. The FDIC has carefully considered this point and agrees with the commenters that indemnification should not be an ''all or nothing'' proposition. Therefore, the final regulation has been revised to permit partial indemnification for legal or professional expenses specifically attributable to particular charges for which there has been a formal and final adjudication or finding in connection with a settlement that the IAP has not violated certain banking laws or regulations or engaged in certain unsafe or unsound banking practices or breaches of fiduciary duty. Thus, in any administrative proceeding or civil action instituted by any federal banking agency which results in a final order or settlement pursuant to which the IAP is assessed a civil money penalty or is subject to a cease and desist order, indemnification will be permitted only for that portion of the liability or legal expenses incurred which relate to the particular charges for which an adjudication or finding in connection with a settlement in favor of the IAP has been made. Partial indemnification will not be permitted in cases where an IAP is removed from office and/or prohibited from participating in the affairs of an institution. Under no circumstances shall an IAP be indemnified for the amount of a civil money penalty or judgement assessed against him/her. See Final Regulation §§ 359.1(*l*) and 359.5(a). The FDIC recognizes that in many cases the appropriate amount of any partial indemnification will be difficult to ascertain with certainty.

*2. Prior Notification of Indemnification Payments*

Several commenters suggested that the FDIC delete the § 359.5(a)(5) requirement that the institution or holding company give the FDIC and the primary federal regulator prior written notification of the granting of any indemnification. The commenters pointed out that, in view of the limitations which the Second Proposal would place on the granting of indemnification payments and the various safeguards incorporated into the proposed regulation, prior notification would be unnecessary and burdensome. The FDIC agrees and this requirement has been deleted.

*3. Prevention of Double Payments*

Several commenters pointed out that § 359.5(a)(4) of the Second Proposal is worded in such a way that it could result in double payments to the institution in the event that a liability or legal expense incurred by the institution is reimbursed by insurance or a fidelity bond. The commenters are correct that the FDIC did not intend this result and the final regulation has been amended to make it clear that an IAP will not be obligated to reimburse the depository institution or holding company for indemnification payments made for his/her benefit to the extent that the institution or holding company is reimbursed by an insurance policy or fidelity bond.

*4. Definition of Independent Counsel*

A few comment letters noted that the Second Proposal does not contain a definition of the term ''independent legal counsel'', utilized in §§ 359.5 (c) and (d). The FDIC considered including such a definition when the Second Proposal was being written, but decided against it in an effort to shorten and simplify the regulation. The Corporation was of the opinion that the term ''independent legal counsel'' was not overly technical and could be determined on a case-by-case basis. Also, the preamble to the Second Proposal provided that:

> The FDIC would regard legal counsel as being ''independent'' (for purposes of this regulation) if the attorney(s) is not a member of the depository institution's or holding company's in-house legal staff, does not have an ongoing relationship with the depository institution or holding company and no other conflict of interest is present.

60 FR 16076 (1995). Thus, the FDIC has elected not to define this term in the final regulation.

*5. Standard for Indemnification*

In response to comments received with regard to the First Proposal, the FDIC made significant modifications to the indemnification portion of the proposed regulation in an effort to make it easier for an institution's or holding company's board of directors to approve IAPs to be indemnified for expenses incurred in administrative or civil actions commenced by a federal banking agency. Those modifications were discussed in great detail in the preamble to the Second Proposal. See 60 FR 16075–16076 (1995).

While all the commenters who raised the issue were supportive of these revisions, some commenters urged the FDIC to further revise the Second Proposal to make it even easier for IAPs to be indemnified. Several of these commenters referred to the Model Business Corporation Act (MBCA) and recommended that the FDIC adopt the indemnification standard set forth in section 8.51 thereof.

The Office of the Comptroller of the Currency (OCC) published a Notice of Proposed Rulemaking on March 3, 1995 concerning proposed modifications to 12 CFR part 7. See 60 FR 11924 (1995). This OCC proposal contained suggested revisions to OCC interpretive rulings concerning, among other topics, the indemnification of directors, officers and employees of national banks. Several of those who commented on the Second Proposal urged the FDIC and the OCC to adopt consistent regulations. In an effort to achieve inter-agency conformity, the FDIC and OCC have consulted with each other and have agreed to adopt consistent regulations.

While the Corporation understands the commenters' desires to make indemnification as easy as would be reasonable and to utilize the standard set forth in the MBCA, the FDIC Board has concluded that it is not required to follow the MBCA and that a slightly more stringent standard for insured depository institutions and their holding companies makes sense in view of the fact that this indemnification prohibition only applies to actions brought by the federal banking agencies. Such actions are only brought after substantial investigation and as part of a strict regulatory scheme. Such actions are intended to protect and maintain the solvency and integrity of the federal deposit insurance funds. Moreover, the FDIC Board is of the opinion that the indemnification standard set forth in the Second Proposal, with the revisions described above, appropriately balances the need to indemnify IAPs for actions taken in their official capacities with the necessity of making sure that they are held accountable for substantive violations of law or regulation. The standard also serves the purpose of protecting the financial viability of the insured depository institution or holding company which may make the indemnification payment. Thus, no further modifications to the standards are considered warranted.

*6. Commencement of an Administrative Action*

Several commenters suggested that the FDIC clarify when an administrative action is commenced by a federal banking agency. This time frame is important in view of the FDIC's position that expenses incurred prior to the commencement of a formal action are not subject to the regulation. See 60 FR 16077. The FDIC considers a formal administrative action to be commenced by the issuance of a ''Notice of Charges''. See *e.g.*, 12 CFR 308.18.

List of Subjects

*12 CFR Part 303*

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Reporting and recordkeeping requirements, Savings associations.

*12 CFR Part 359*

Banks, banking, Golden parachute payments, Indemnity payments.

For the reasons set out in the preamble, the FDIC Board of Directors hereby amends part 303 and adds part 359 of title 12, chapter III, of the Code of Federal Regulations as follows:

## PART 303—APPLICATIONS, REQUESTS, SUBMITTALS, DELEGATIONS OF AUTHORITY, AND NOTICES REQUIRED TO BE FILED BY STATUTE OR REGULATION

1. The authority citation for part 303 continues to read as follows:

Authority: 12 U.S.C. 378, 1813, 1815, 1816, 1817(j), 1818, 1819(''Seventh'' and ''Tenth''), 1828, 1831e, 1831o, 1831p-1; 15 U.S.C. 1607.

2. In § 303.7, a new paragraph (g) is added to read as follows:

### § 303.7 Delegation of authority to the Director (DOS) and to the associate directors, regional directors and deputy regional directors to act on certain applications, requests, and notices of acquisition of control.

* * * * *

(g) *Requests pursuant to section 18(k) of the Act.* Authority is delegated to the Director, and where confirmed in writing by the Director, to an associate director, or to the appropriate regional director or deputy regional director, to approve or deny requests pursuant to section 18(k) of the Act to make:

(1) Excess nondiscriminatory severance plan payments as provided by 12 CFR 359.1(f)(2)(v); and

(2) Golden parachute payments permitted by 12 CFR 359.4.

3. New part 359 is added to read as follows:

## PART 359—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

Sec.



Authority: 12 U.S.C. 1828(k).

### § 359.0 Scope.

(a) This part limits and/or prohibits, in certain circumstances, the ability of insured depository institutions, their subsidiaries and affiliated depository institution holding companies to enter into contracts to pay and to make golden parachute and indemnification payments to institution-affiliated parties (IAPs).

(b) The limitations on golden parachute payments apply to troubled insured depository institutions which seek to enter into contracts to pay or to make golden parachute payments to their IAPs. The limitations also apply to depository institution holding companies which are troubled and seek to enter into contracts to pay or to make golden parachute payments to their IAPs as well as healthy holding companies which seek to enter into contracts to pay or to make golden parachute payments to IAPs of a troubled insured depository institution subsidiary. A ''golden parachute payment'' is generally considered to be any payment to an IAP which is contingent on the termination of that person's employment and is received when the insured depository institution making the payment is troubled or, if the payment is being made by an affiliated holding company, either the holding company itself or the insured depository institution employing the IAP, is troubled. The definition of golden parachute payment does not include payments pursuant to qualified retirement plans, nonqualified *bona fide* deferred compensation plans, nondiscriminatory severance pay plans, other types of common benefit plans, state statutes and death benefits. Certain limited exceptions to the golden parachute payment prohibition are provided for in cases involving the hiring of a white knight and unassisted changes in control. A procedure is also set forth whereby an institution or IAP can request permission to make what would otherwise be a prohibited golden parachute payment.

(c) The limitations on indemnification payments apply to all insured depository institutions, their subsidiaries and affiliated depository institution holding companies regardless of their financial health. Generally, this part prohibits insured depository institutions, their subsidiaries and affiliated holding companies from indemnifying an IAP for that portion of the costs sustained with regard to an administrative or civil enforcement action commenced by any federal banking agency which results in a final order or settlement pursuant to which the IAP is assessed a civil money penalty, removed from office, prohibited from participating in the affairs of an insured depository institution or required to cease and desist from or take an affirmative action described in section 8(b) (12 U.S.C. 1818(b)) of the Federal Deposit Insurance Act (FDI Act). However, there are exceptions to this general prohibition. First, an institution or holding company may purchase commercial insurance to cover such expenses, except judgments and penalties. Second, the institution or holding company may advance legal and other professional expenses to an IAP directly (except for judgments and penalties) if its board of directors makes certain specific findings and the IAP agrees in writing to reimburse the institution if it is ultimately determined that the IAP violated a law, regulation or other fiduciary duty.

### § 359.1 Definitions.

(a) *Act* means the Federal Deposit Insurance Act, as amended (12 U.S.C. 1811, *et seq.*).

(b) *Appropriate federal banking agency, bank holding company, depository institution holding company* and *savings and loan holding company* have the meanings given to such terms in section 3 of the Act.

(c) *Benefit plan* means any plan, contract, agreement or other arrangement which is an ''employee welfare benefit plan'' as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services or cafeteria plans; provided however, that such term shall not include any plan intended to be subject to paragraphs (f)(2) (iii) and (v) of this section.

(d) *Bona fide deferred compensation plan or arrangement* means any plan, contract, agreement or other arrangement whereby:

(1) An IAP voluntarily elects to defer all or a portion of the reasonable compensation, wages or fees paid for services rendered which otherwise would have been paid to such party at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals) and the insured depository institution or depository institution holding company either:

(i) Recognizes compensation expense and accrues a liability for the benefit payments according to generally accepted accounting principles (GAAP); or

(ii) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; or

(2) An insured depository institution or depository institution holding company establishes a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (e)(1) of this section:

(i) Primarily for the purpose of providing benefits for certain IAPs in excess of the limitations on contributions and benefits imposed by sections 415, 401(a)(17), 402(g) or any other applicable provision of the Internal Revenue Code of 1986 (26 U.S.C. 415, 401(a)(17), 402(g)); or

(ii) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees (excluding severance payments described in paragraph (f)(2)(v) of this section and permissible golden parachute payments described in § 359.4); and

(3) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in paragraphs (d) (1) and (2) of this section, the following requirements shall apply:

(i) The plan was in effect at least one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(ii) Any payment made pursuant to such plan is made in accordance with the terms of the plan as in effect no later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section and in accordance with any amendments to such plan during such one year period that do not increase the benefits payable thereunder;

(iii) The IAP has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(iv) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);

(v) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(vi) The insured depository institution or depository institution holding company has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; and

(vii) Payments pursuant to such plans shall not be in excess of the accrued liability computed in accordance with GAAP.

(e) *Corporation* means the Federal Deposit Insurance Corporation, in its corporate capacity.

(f) *Golden parachute payment.* (1) The term *golden parachute payment* means any payment (or any agreement to make any payment) in the nature of compensation by any insured depository institution or an affiliated depository institution holding company for the benefit of any current or former IAP pursuant to an obligation of such institution or holding company that:

(i) Is contingent on, or by its terms is payable on or after, the termination of such party's primary employment or affiliation with the institution or holding company; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency (or similar event) of the insured depository institution which is making the payment or bankruptcy or insolvency (or similar event) of the depository institution holding company which is making the payment; or

(B) The appointment of any conservator or receiver for such insured depository institution; or

(C) A determination by the insured depository institution's or depository institution holding company's appropriate federal banking agency, respectively, that the insured depository institution or depository institution holding company is in a troubled condition, as defined in the applicable regulations of the appropriate federal banking agency (§ 303.14(a)(4) of this chapter); or

(D) The insured depository institution is assigned a composite rating of 4 or 5 by the appropriate federal banking agency or informed in writing by the Corporation that it is rated a 4 or 5 under the Uniform Financial Institutions Rating System of the Federal Financial Institutions Examination Council, or the depository institution holding company is assigned a composite rating of 4 or 5 or unsatisfactory by its appropriate federal banking agency; or

(E) The insured depository institution is subject to a proceeding to terminate or suspend deposit insurance for such institution; and

(iii)(A) Is payable to an IAP whose employment by or affiliation with an insured depository institution is terminated at a time when the insured depository institution by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii) (A) through (E) of this section, or in contemplation of any of these conditions; or

(B) Is payable to an IAP whose employment by or affiliation with an insured depository institution holding company is terminated at a time when the insured depository institution holding company by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A), (C) or (D) of this section, or in contemplation of any of these conditions.

(2) *Exceptions.* The term *golden parachute payment* shall not include:

(i) Any payment made pursuant to a pension or retirement plan which is qualified (or is intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401) or pursuant to a pension or other retirement plan which is governed by the laws of any foreign country; or

(ii) Any payment made pursuant to a benefit plan as that term is defined in paragraph (c) of this section; or

(iii) Any payment made pursuant to a *bona fide* deferred compensation plan or arrangement as defined in paragraph (d) of this section; or

(iv) Any payment made by reason of death or by reason of termination caused by the disability of an institution-affiliated party; or

(v) Any payment made pursuant to a nondiscriminatory severance pay plan

or arrangement which provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause, voluntary resignation, or early retirement; *provided, however,* that no employee shall receive any such payment which exceeds the base compensation paid to such employee during the twelve months (or such longer period or greater benefit as the Corporation shall consent to) immediately preceding termination of employment, resignation or early retirement, and such severance pay plan or arrangement shall not have been adopted or modified to increase the amount or scope of severance benefits at a time when the insured depository institution or depository institution holding company was in a condition specified in paragraph (f)(1)(ii) of this section or in contemplation of such a condition without the prior written consent of the appropriate federal banking agency; or

(vi) Any severance or similar payment which is required to be made pursuant to a state statute or foreign law which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria); or

(vii) Any other payment which the Corporation determines to be permissible in accordance with § 359.4.

(g) *Insured depository institution* means any bank or savings association the deposits of which are insured by the Corporation pursuant to the Act, or any subsidiary thereof.

(h) *Institution-affiliated party (IAP)* means:

(1) Any director, officer, employee, or controlling stockholder (other than a depository institution holding company) of, or agent for, an insured depository institution or depository institution holding company;

(2) Any other person who has filed or is required to file a change-in-control notice with the appropriate federal banking agency under section 7(j) of the Act (12 U.S.C. 1817(j));

(3) Any shareholder (other than a depository institution holding company), consultant, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution or depository institution holding company; and

(4) Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in: Any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution or depository institution holding company.

(i) *Liability or legal expense* means:

(1) Any legal or other professional fees and expenses incurred in connection with any claim, proceeding, or action;

(2) The amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(3) The amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

(j) *Nondiscriminatory* means that the plan, contract or arrangement in question applies to all employees of an insured depository institution or depository institution holding company who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of service requirements. A nondiscriminatory plan, contract or arrangement may provide different benefits based only on objective criteria such as salary, total compensation, length of service, job grade or classification, which are applied on a proportionate basis (with a variance in severance benefits relating to any criterion of plus or minus ten percent) to groups of employees consisting of not less than the lesser of 33 percent of employees or 1,000 employees.

(k) *Payment* means:

(1) Any direct or indirect transfer of any funds or any asset;

(2) Any forgiveness of any debt or other obligation;

(3) The conferring of any benefit, including but not limited to stock options and stock appreciation rights; and

(4) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(i) The determination, after such date, of the liability for the payment of such amount; or

(ii) The liquidation, after such date, of the amount of such payment.

(l) *Prohibited indemnification payment.* (1) The term *prohibited indemnification payment* means any payment (or any agreement or arrangement to make any payment) by any insured depository institution or an affiliated depository institution holding company for the benefit of any person who is or was an IAP of such insured depository institution or holding company, to pay or reimburse such person for any civil money penalty or judgment resulting from any administrative or civil action instituted by any federal banking agency, or any other liability or legal expense with regard to any administrative proceeding or civil action instituted by any federal banking agency which results in a final order or settlement pursuant to which such person:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution; or

(iii) Is required to cease and desist from or take any affirmative action described in section 8(b) of the Act with respect to such institution.

(2) *Exceptions.* (i) The term *prohibited indemnification payment* shall not include any reasonable payment by an insured depository institution or depository institution holding company which is used to purchase any commercial insurance policy or fidelity bond, provided that such insurance policy or bond shall not be used to pay or reimburse an IAP for the cost of any judgment or civil money penalty assessed against such person in an administrative proceeding or civil action commenced by any federal banking agency, but may pay any legal or professional expenses incurred in connection with such proceeding or action or the amount of any restitution to the insured depository institution, depository institution holding company or receiver.

(ii) The term *prohibited indemnification payment* shall not include any reasonable payment by an insured depository institution or depository institution holding company that represents partial indemnification for legal or professional expenses specifically attributable to particular charges for which there has been a formal and final adjudication or finding in connection with a settlement that the IAP has not violated certain banking laws or regulations or has not engaged in certain unsafe or unsound banking practices or breaches of fiduciary duty, unless the administrative action or civil

proceeding has resulted in a final prohibition order against the IAP.

**§ 359.2 Golden parachute payments prohibited.**

No insured depository institution or depository institution holding company shall make or agree to make any golden parachute payment, except as provided in this part.

**§ 359.3 Prohibited indemnification payments.**

No insured depository institution or depository institution holding company shall make or agree to make any prohibited indemnification payment, except as provided in this part.

**§ 359.4 Permissible golden parachute payments.**

(a) An insured depository institution or depository institution holding company may agree to make or may make a golden parachute payment if and to the extent that:

(1) The appropriate federal banking agency, with the written concurrence of the Corporation, determines that such a payment or agreement is permissible; or

(2) Such an agreement is made in order to hire a person to become an IAP either at a time when the insured depository institution or depository institution holding company satisfies or in an effort to prevent it from imminently satisfying any of the criteria set forth in § 359.1(f)(1)(ii), and the institution's appropriate federal banking agency and the Corporation consent in writing to the amount and terms of the golden parachute payment. Such consent by the FDIC and the institution's appropriate federal banking agency shall not improve the IAP's position in the event of the insolvency of the institution since such consent can neither bind a receiver nor affect the provability of receivership claims. In the event that the institution is placed into receivership or conservatorship, the FDIC and/or the institution's appropriate federal banking agency shall not be obligated to pay the promised golden parachute and the IAP shall not be accorded preferential treatment on the basis of such prior approval; or

(3) Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, not to exceed twelve months salary, to an IAP in the event of a change in control of the insured depository institution; *provided, however,* that an insured depository institution or depository institution holding company shall obtain the consent of the appropriate federal banking agency prior to making such a payment and this paragraph (a)(3) shall not apply to any change in control of an insured depository institution which results from an assisted transaction as described in section 13 of the Act (12 U.S.C. 1823) or the insured depository institution being placed into conservatorship or receivership; and

(4) An insured depository institution, depository institution holding company or IAP making a request pursuant to paragraphs (a)(1) through (3) of this section shall demonstrate that it does not possess and is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:

(i) The IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the depository institution or depository institution holding company that has had or is likely to have a material adverse effect on the institution or holding company;

(ii) The IAP is substantially responsible for the insolvency of, the appointment of a conservator or receiver for, or the troubled condition, as defined by applicable regulations of the appropriate federal banking agency, of the insured depository institution, depository institution holding company or any insured depository institution subsidiary of such holding company;

(iii) The IAP has materially violated any applicable federal or state banking law or regulation that has had or is likely to have a material effect on the insured depository institution or depository institution holding company; and

(iv) The IAP has violated or conspired to violate section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of title 18 of the United States Code, or section 1341 or 1343 of such title affecting a federally insured financial institution as defined in title 18 of the United States Code.

(b) In making a determination under paragraphs (a) (1) through (3) of this section, the appropriate federal banking agency and the Corporation may consider:

(1) Whether, and to what degree, the IAP was in a position of managerial or fiduciary responsibility;

(2) The length of time the IAP was affiliated with the insured depository institution or depository institution holding company, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and

(3) Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of section 18(k) of the Act or this part.

**§ 359.5 Permissible indemnification payments.**

(a) An insured depository institution or depository institution holding company may make or agree to make reasonable indemnification payments to an IAP with respect to an administrative proceeding or civil action initiated by any federal banking agency if:

(1) The insured depository institution's or depository institution holding company's board of directors, in good faith, determines in writing after due investigation and consideration that the institution-affiliated party acted in good faith and in a manner he/she believed to be in the best interests of the institution;

(2) The insured depository institution's or depository institution holding company's board of directors, respectively, in good faith, determines in writing after due investigation and consideration that the payment of such expenses will not materially adversely affect the institution's or holding company's safety and soundness;

(3) The indemnification payments do not constitute prohibited indemnification payments as that term is defined in § 359.1(l); and

(4) The IAP agrees in writing to reimburse the insured depository institution or depository institution holding company, to the extent not covered by payments from insurance or bonds purchased pursuant to § 359.1(l)(2), for that portion of the advanced indemnification payments which subsequently become prohibited indemnification payments, as defined in § 359.1(l)

(b) An IAP requesting indemnification payments shall not participate in any way in the board's discussion and approval of such payments; *provided, however,* that such IAP may present his/her request to the board and respond to any inquiries from the board concerning his/her involvement in the circumstances giving rise to the administrative proceeding or civil action.

(c) In the event that a majority of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the remaining members of the board may authorize independent legal counsel to review the indemnification request and provide the remaining members of the board with a written opinion of counsel as to whether the conditions delineated in paragraph (a) of this section have been met. If independent legal counsel

opines that said conditions have been met, the remaining members of the board of directors may rely on such opinion in authorizing the requested indemnification.

(d) In the event that all of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the board shall authorize independent legal counsel to review the indemnification request and provide the board with a written opinion of counsel as to whether the conditions delineated in paragraph (a) of this section have been met. If independent legal counsel opines that said conditions have been met, the board of directors may rely on such opinion in authorizing the requested indemnification.

**§ 359.6 Filing instructions.**

Requests to make excess nondiscriminatory severance plan payments pursuant to § 359.1(f)(2)(v) and golden parachute payments permitted by § 359.4 shall be submitted in writing to the FDIC regional director (Supervision) for the region in which the institution is located. The request shall be in letter form and shall contain all relevant factual information as well as the reasons why such approval should be granted. In the event that the consent of the institution's primary federal regulator is required in addition to that of the FDIC, the requesting party shall submit a copy of its letter to the FDIC to the institution's primary federal regulator. In the case of national banks, such written requests shall be submitted to the OCC. In the case of state member banks and bank holding companies, such written requests shall be submitted to the Federal Reserve district bank where the institution or holding company, respectively, is located. In the case of savings associations and savings association holding companies, such written requests shall be submitted to the OTS regional office where the institution or holding company, respectively, is located. In cases where the prior consent of only the institution's primary federal regulator is required and that agency is not the FDIC, a written request satisfying the requirements of this section shall be submitted to the primary federal regulator as described in this section.

**§ 359.7 Applicability in the event of receivership.**

The provisions of this part, or any consent or approval granted under the provisions of this part by the FDIC (in its corporate capacity), shall not in any way bind any receiver of a failed insured depository institution. Any consent or approval granted under the provisions of this part by the FDIC or any other federal banking agency shall not in any way obligate such agency or receiver to pay any claim or obligation pursuant to any golden parachute, severance, indemnification or other agreement. Claims for employee welfare benefits or other benefits which are contingent, even if otherwise vested, when the FDIC is appointed as receiver for any depository institution, including any contingency for termination of employment, are not provable claims or actual, direct compensatory damage claims against such receiver. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of any IAP contrary to 12 U.S.C. 1828(k)(3).

By order of the Board of Directors, dated at Washington, DC, this 6th day of February, 1996.

Federal Deposit Insurance Corporation.

Jerry L. Langley,

*Executive Secretary.*

[FR Doc. 96–3273 Filed 2–14–96; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Airspace Docket No. 96–AWA–1]**

## Revision to the Miami Class B Airspace Area; Florida

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; technical amendment.

**SUMMARY:** This action corrects the legal description of the Miami, FL, Class B airspace area. This action is necessary due to the decommissioning of two principal navigational aids (NAVAIDS), Biscayne Bay, FL, Very High Frequency Omnidirectional Range (VOR) and Miami, FL, VOR, used to describe the lateral limits of the present Miami, FL, Class B airspace area. This action does not alter the vertical or lateral limits of the existing Miami, FL, Class B airspace area.

**EFFECTIVE DATE:** February 15, 1996.

**FOR FURTHER INFORMATION CONTACT:** Patricia P. Crawford, Airspace and Obstruction Evaluation Branch (ATP–240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–3075.

**SUPPLEMENTARY INFORMATION:** This action is the last in a series of regulatory and nonregulatory actions that began in 1992 with Hurricane Andrew. In the summer of 1992, the Biscayne Bay (BSY) VOR was rendered inoperative by Hurricane Andrew and was replaced by the Andrew (AEW) Nondirectional Radio Beacon (NDB). The AEW NDB provided navigational guidance for air traffic operations in south Florida until March 30, 1995. At that time, the Virginia Keys (VKZ) Very High Frequency Omnidirectional Range/Distance Measuring Equipment (VOR/DME) was commissioned to replace the AEW NDB.

In anticipation of changes to the airspace in South America and the Caribbean, the FAA initiated action to decommission and relocate another primary NAVAID, the Miami VOR, to support users of the airspace and the air traffic system. A new NAVAID, replacing the Miami VOR, was commissioned as the Dolphin (DHP) VOR on November 9, 1995.

The commissioning or decommissioning of these NAVAIDS prompted rulemaking action to realign Federal airways, jet routes, and revisions to standard instrument departure and arrival routes. Associated publications were updated subsequently to the rulemaking actions. However, the Miami, FL, visual flight rules Terminal Area Chart was not updated and as a result of this oversight, the published chart contained obsolete data.

This action will update the description of the Miami, FL, Class B airspace area and associated navigational charts by removing all notations relating to BSY and MIA VOR's. Since this action involves the removal of obsolete terms from the airspace designation and does not alter the vertical or lateral boundaries or operating requirements of the Miami Class B airspace area, the FAA finds that notice and public procedure under 5 U.S.C. 553(b), are not practicable. Also, because there is an immediate need to remove any reference to obsolete NAVAIDS from the airspace designation to avoid pilot confusion, the FAA finds that, good cause, pursuant to 5 U.S.C.(d), exists for making this amendment effective in less than 30 days.

Further, the FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It,