

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Parts 303 and 324

RIN 3064-AC78

#### Filing Procedures; Transactions With Affiliates

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Insured State nonmember banks are subject to the restrictions and limitations on transactions by member banks with affiliates found in sections 23A and 23B of the Federal Reserve Act "in the same manner and to the same extent" as though they were member banks. The Board of Governors of the Federal Reserve System (FRB) adopted 12 CFR 223 ("Regulation W") governing sections 23A and 23B. The FDIC is proposing to add a new part to title 12 of the CFR that would cross reference Regulation W to make it clear that insured State nonmember banks are subject to the restrictions and limitations, and may take advantage of the exemptions, contained in Regulation W. FDIC's regulation would also make it clear that the FDIC administers the restrictions and limitations contained in Regulation W as to insured State nonmember banks, may grant case-by-case exemptions from those restrictions and limitations, and is the appropriate agency to make other determinations under Regulation W. The proposal would also amend part 303 of FDIC's regulations governing filing and hearing procedures by adding a new section that would govern requests for exemptions from new part 324 and hearings that are held for the purpose determining whether a shareholder or company exercises a controlling influence over another company.

**DATES:** Written comments must be received on or before May 3, 2004.

**ADDRESSES:** You may submit comments, identified by RIN number by any of the following methods:

- Agency Web Site: <http://www.fdic.gov/regulations/laws/federal/propose.html>. Follow instructions for submitting comments on the Agency Web site.

- E-mail: [Comments@FDIC.gov](mailto:Comments@FDIC.gov).

Include the RIN number in the subject line of the message.

- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

- Hand Delivery/Courier: Guard station at rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Instructions: All submissions received must include the agency name and RIN for this rulemaking. All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal/propose.html> including any personal information provided.

#### FOR FURTHER INFORMATION CONTACT:

Curtis Vaughn, Senior Examination Specialist, Division of Supervision and Consumer Protection, (202) 898-6759 or [cvaughn@fdic.gov](mailto:cvaughn@fdic.gov), Kenyon T. Kilber, Senior Examination Specialist, Division of Supervision and Consumer Protection, (202) 898-8935 or [kkilber@fdic.gov](mailto:kkilber@fdic.gov) or Pamela E.F. LeCren, Counsel, Legal Division, (202) 898-3730 or [plecra@fdic.gov](mailto:plecra@fdic.gov), Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 18(j)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1828(j)(1)) ("FDI Act") provides that "Sections 371c and 371c-1 of [title 12] shall apply with respect to every nonmember insured bank in the same manner and to the same extent as if the nonmember insured bank were a member bank." Sections 371c and 371c-1 of title 12 (12 U.S.C. 371c, 371c-1) are respectively sections 23A and 23B of the Federal Reserve Act (FRA). They establish restrictions and limitations with respect to transactions between member banks and their affiliates. The purpose of those restrictions is to protect member banks from suffering losses when entering into transactions with affiliates.

Section 23A (1) establishes limits on the amount of "covered transactions" between a member bank and its affiliates (any one affiliate and in the aggregate as to all affiliates); (2) requires

that all covered transactions between a member bank and its affiliates be on terms and conditions that are consistent with safe and sound banking practices; (3) prohibits the purchase of low quality assets from an affiliate; and (4) requires that extensions of credit by a member bank to an affiliate, and guarantees on behalf of affiliates, be secured by statutorily defined amounts of collateral. Section 23B (1) requires that transactions (covered transactions as well as other identified transactions such as the sale of assets to an affiliate) between a member bank and its affiliates be on market terms (on terms and under circumstances that are substantially the same, or at least as favorable to the bank, as those prevailing at the time for comparable transactions with nonaffiliates); (2) prohibits purchases of assets from an affiliate as fiduciary unless one of several exceptions are met; (3) prohibits purchases of securities during the existence of an underwriting or selling syndicate if the principal underwriter of the securities is an affiliate; and (4) prohibits any advertisements or agreements by a member bank suggesting that the bank is responsible for the obligations of an affiliate.

The FDIC interprets and enforces the restrictions and requirements of sections 23A and 23B of the FRA as to FDIC insured State banks that are not members of the Federal Reserve System (insured State nonmember banks) and has done so for many years. Until recently neither the FRB nor the FDIC had adopted, or proposed, a regulation on the restrictions of sections 23A or 23B as applicable to the depository institutions over which each is given responsibility under the FRA and FDI Act respectively. Both agencies relied, rather, upon the language of the FRA and careful coordination of their interpretations of the statutory restrictions. On May 11, 2001, the FRB published a proposed regulation (Regulation W) designed to implement sections 23A and 23B of the FRA if that proposal were adopted in final. (66 FR 24186). The FDIC filed a formal comment on the proposal. On December 12, 2002, the FRB published Regulation W as a final rule. (67 FR 76560). It became effective on April 1, 2003, and is codified at 12 CFR 223. The preamble accompanying Regulation W as adopted in final form indicated that member

banks would be given certain time periods to bring outstanding transactions into compliance with the new regulation.

Regulation W defines terms; restates the statutory prohibitions found in section 23A and 23B; establishes a number of exemptions to those restrictions; explains how to value credit transactions and asset purchases for purposes of complying with the limits on covered transactions; sets out rules on when covered transactions arise for purposes of Regulation W; sets out rules with respect to derivative transactions and how section 23A and 23B apply to foreign branches; defines the term “financial subsidiary” for purposes of Regulation W; and sets out the standards under which the FRB will grant requests for exemptions on a case-by-case basis.

In keeping with section 18(j)(1) of the FDI Act, the FDIC is proposing to add a new part to title 12 of the CFR. The purpose of this new part is to make clear that insured State nonmember banks must comply with the restrictions and limitations contained in Regulation W in order to comply with sections 23A and 23B of the FRA and section 18(j)(1) of the FDI Act. As previously stated, section 18(j)(1) of the FDI Act provides that sections 23A and 23B shall apply to insured State nonmember banks “in the same manner and to the same extent” as if the nonmember banks are member banks. This requirement in the FDI Act means that the substantive requirements and restrictions set out in Regulation W apply equally to insured State nonmember banks. The FDIC has taken those requirements and restrictions into consideration in interpreting and applying sections 23A and 23B to insured State nonmember banks since the adoption of Regulation W. The FDIC is now proposing to add part 324, which will expressly incorporate through cross reference the substantive provisions of Regulation W. The part also identifies the FDIC as the appropriate agency for State nonmember banks in the administration and interpretation of those requirements and in granting exemption requests.

## Discussion

### *Description of Proposal*

Proposed part 324 is divided into six sections. Section 324.1 sets out the authority under which the FDIC is proposing to act and describes the purpose and scope of the regulation. Section 324.2 provides that the restrictions and limitations of Regulation W apply to insured State nonmember banks and contains an

exemption for certain subsidiary relationships that were entered into prior to the date on which the FDIC’s proposed part was published for public comment. Section 324.3 informs insured State banks that they are to follow the FDIC’s procedures set forth in part 303 of the FDIC’s regulations when requesting a hearing or making any filing under part 324. Section 324.4 makes it clear that “member bank” should be read as “insured State nonmember bank”, “Board” should be read as “FDIC” and “appropriate Federal banking agency” should be understood to mean “FDIC” wherever those terms appear in Regulation W. Section 324.4 also contains a definition of “State nonmember bank”. Section 324.5 provides that insured State nonmember banks may obtain an exemption from the restrictions and limitations of this part concerning section 23A if the FDIC determines that such an exemption is in the public interest and is consistent with the purposes of section 23A. Procedures for filing exemption requests are proposed in this section and would, if adopted, be added to part 303 of FDIC’s regulations (Filing Procedures) as new § 303.251. Finally, § 324.6 provides that determinations that a shareholder or company exercises a controlling influence over another company will only be made after notice and opportunity for hearing. Hearings would be conducted in accordance with the proposed amendments to part 303 that are set out as part of this rulemaking. Proposed part 324, and the accompanying proposed amendments to part 303, are discussed in more detail below.

### *Section 324.1 Authority, Purpose and Scope*

The FDIC derives the authority from section 9 (Tenth) of the FDI Act (12 U.S.C. 1819 (Tenth)) to adopt rules implementing sections 23A and 23B of the FRA as made applicable to insured State nonmember banks. Section 9 (Tenth) of the FDI Act authorizes the FDIC to issue rules and regulations “to carry out the provisions of this chapter or of any other law which it has the responsibility of administering or enforcing”.

The FDIC has the responsibility of administering and enforcing section 18(j)(1) of the FDI Act as to state nonmember banks. The language in section 9 (Tenth) of the FDI Act limits the FDIC’s authority to adopt regulations governing a particular area only if “authority to issue such rules and regulations has been expressly and exclusively granted to any other

regulatory agency”. Nothing in the text of section 23A or section 23B or the legislative history of those sections indicates that the FRB has the “exclusive” rulemaking authority with respect to those sections as they apply to institutions other than member banks.<sup>1</sup>

The text of sections 23A and 23B itself bear out the proposition that the FDIC is free to adopt regulations in this area. Sections 23A and 23B do not parcel out responsibility between the FRB and the appropriate Federal banking agencies as is the case with sections 22(g) and 22(h) of the FRA, both of which are also made applicable to insured State nonmember banks by section 18(j) of the FDI Act “in the same manner and to the same extent” as though they were member banks. Section 23A and 23B’s silence with respect to what role the other Federal banking agencies are to play shows that the FRA does not operate as a constraint on the authority the FDIC derives from its own statute to establish rules implementing section 23A and 23B and the FDIC’s ability to make decisions in applying those sections to insured State nonmember banks. The only restraint placed on the FDIC by the FDI Act is that all of the restrictions and limitations of section 23A and 23B be applied “in the same manner and to the same extent” as those restrictions and limitations are applied to member banks. As discussed below, the FDIC will in fact be applying Regulation W and section 23A and 23B to State nonmember banks in the same way as those provisions apply to member banks.

### *Section 324.2 Affiliate Transactions*

*General Requirements*—Paragraph (a) of § 324.2 of the proposal cross references Regulation W and restates the requirement found in section 18(j)(1) of the FDI Act that sections 23A and 23B of the FRA apply to insured State nonmember banks as though they were member banks. The purpose of paragraph (a) is to clarify that insured State nonmember banks must comply with the substantive provisions of Regulation W in order to comply with section 18(j)(1) of the FDI Act and part

<sup>1</sup> Congress could have amended the FRA to refer to “bank” rather than “member bank” if it wanted to provide the FRB with exclusive rulemaking authority with regard to sections 23A and 23B but it did not do so. Instead Congress amended the FDI Act, not once but twice, by incorporating a cross reference first to section 23A and then to section 23B after that section was added to the FRA. The fact that Congress chose to amend the FDI Act and not the FRA signals an intent to provide the FDIC with a role in the administration and interpretation of sections 23A and 23B.

324. The effect going forward of the cross reference in § 324.2(a) to Regulation W is that State nonmember banks will automatically be subject to any changes made to Regulation W by the FRB without the need for the FDIC to take any action to amend its own regulation.

*Exception to General Requirements*—The FDIC is proposing to adopt a regulatory exemption to the general rule set out in paragraph (a) of § 324.2 of the proposal that insured State nonmember banks are subject to the restrictions and requirements of Regulation W.<sup>2</sup>

Paragraph (b) of § 324.2 would exempt from the restrictions of part 324 certain subsidiary relationships that were established prior to the date on which the FDIC's proposal is published for comment. If a subsidiary relationship predates that date and that subsidiary relationship was not considered by the FDIC to be subject to section 23A and 23B prior to December 12, 2002 (*i.e.*, the subsidiary was not considered to be an affiliate for purposes of section 23A and 23B as it was interpreted and applied by the FDIC) but is subject to section 23A and 23B after that date (is considered an affiliate relationship under Regulation W) the subsidiary will not be treated as an affiliate for purposes of part 324. Under the exemption, the bank's investment in the company, and its other covered transactions, if any, with the company, will not count toward the quantitative amount limitations that would otherwise apply under part 324 and outstanding transactions with the company do not need to be brought into compliance with part 324. It also means that, going forward, the bank is not subject to the restrictions of part 324 whenever it deals with that subsidiary company, *e.g.*, any future extensions of credit to, or investments in, the subsidiary will not count toward the limits on covered transactions with affiliates to which the bank is subject. The exemption only applies, however, for so long as the subsidiary's activities are limited to those that were approved by the FDIC by regulation or order, or which are covered by an exception in section 24 of the FDI Act (12 U.S.C. 1831a) ("section 24"), and were conducted as of the date on which the FDIC's proposal is published for comment. If, for example, the subsidiary changes its line of business in such a way that under Regulation W a newly established subsidiary of the bank doing

<sup>2</sup> The FDIC has the authority to adopt by regulation or order exemptions from the restrictions of section 23A if the FDIC determines that the exemption is in the public interest and is consistent with the purposes of the section 23A of the FRA.

the same thing would be considered an affiliate, the subsidiary will be treated as an affiliate from that point forward. The effect of the loss of the exemption is that, going forward, covered transactions between the bank and the subsidiary will be subject to part 324. Although the exemption would no longer apply, the outstanding investment in the subsidiary, any outstanding extensions of credit to the subsidiary and any other prior transactions with the subsidiary would not be affected by the loss of the exemption.

The exemption provided for under the proposal is intended to cover several categories of subsidiaries. The first category is those subsidiaries that, prior to the date on which the FDIC's proposal was issued for comment, were established after the FDIC issued an approval order under section 24 of the FDI Act and 12 CFR 362 ("section 24 subsidiaries"). Such subsidiaries are by definition engaged in activities that are not permissible for a subsidiary of a national bank. The exemption is not limited, however, to State nonmember banks that applied for and obtained consent to establish a subsidiary under 12 CFR 362. It also covers section 24 subsidiaries that were established prior to the date on which the FDIC's proposal was published for comment that were (1) established after filing a notice under part 362,<sup>3</sup> or (2) established pursuant to a provision of part 362 that permits State nonmember banks to establish certain subsidiaries without filing notice or making application to the FDIC.<sup>4</sup> Finally, the exemption also is intended to cover subsidiaries established prior to the relevant date pursuant to a statutory exception in section 24 of the FDI Act which is restated in 12 CFR 362.

As proposed, the subsidiary relationship exemption may be over inclusive to the extent that some of the section 24 subsidiaries described above fall within an exception to the definition of financial subsidiary found in Regulation W and thus are not

<sup>3</sup> 12 CFR 362 permits state nonmember banks to establish certain subsidiaries after filing a notice with the FDIC provided that certain conditions and requirements are met. In each such instance the conditions include affiliate transaction restrictions.

<sup>4</sup> 12 CFR 362 permits an insured state nonmember bank to establish a subsidiary that invests in bank stock (§ 362.4(b)(4)(ii)); engages in certain leasing activities (§ 362.4(b)(6)); invests in adjustable rate preferred stock, money market preferred stock and similar instruments (§ 362.4(b)(7)); and holds a control interest in a company that engages in insurance agency activities, any national bank permissible activity, real estate leasing, or that invests in adjustable rate and money market preferred stock (§ 362.4(b)(3)(ii)) without filing an application or a notice.

considered to be affiliates. As it may be possible to construe the exceptions to the definition of financial subsidiary found in Regulation W narrowly, the FDIC has opted to draft the proposed exemption broadly so as to avoid any undue confusion or ambiguity as to how insured State nonmember banks with existing section 24 subsidiaries are affected by the adoption of FRB Regulation W.

The FDIC intends to limit the exemption to the types of section 24 subsidiaries described above. Comment is invited on whether the regulatory text is sufficiently clear as to its scope or has broader effect than intended. In addition, comment is requested on whether the FDIC should consider narrowing the scope of the exemption or making it broader.

It has been the FDIC's practice to include in section 24 approval orders conditions on the manner and extent to which an insured State nonmember bank may interact with its subsidiary that engages in activities that are not permissible for a subsidiary of a national bank.<sup>5</sup> Those conditions are very similar but not identical to the restrictions found in section 23A and 23B and Regulation W. In addition, the FDIC's regulations which provide that a bank may simply file a notice before establishing a certain type of subsidiary require in most instances that a bank must abide by certain affiliate transaction restrictions when interacting with the subsidiary if a bank wants to take advantage of the notice procedure. The affiliate transaction restrictions that apply in the case of a notice are the same restrictions which have been imposed by the FDIC by order on a case-by-case basis. Banks that are eligible for the subsidiary relationship exemption but which are subject by order or regulation to conditions placing restrictions on the bank's transactions with its subsidiary would still be subject to those conditions (*i.e.*, the proposed exemption would not supercede or invalidate those conditions).

As indicated above, the FDIC may, by regulation or order, exempt transactions or relationships from the requirements and restrictions of sections 23A and 23B of the FRA if the FDIC finds that the exemption is in the public interest and consistent with the purposes of the

<sup>5</sup> Section 24 of the FDI Act requires the FDIC to determine that the activities to be engaged in by the subsidiary do not present a significant risk to the fund. The FDIC can, and typically has, determined that a particular activity does not present a significant risk to the fund provided that the activity is conditioned in such a way as to make any risk associated with the conduct of that activity by the subsidiary acceptable.

FRA. The proposed subsidiary relationship exemption should not have an adverse impact on the public interest or be inconsistent with the purposes of section 23A and 23B as most banks that have subsidiaries that are eligible for the exemption are already subject to affiliate transaction conditions very similar to those found in Regulation. The exemption would not affect those conditions. The majority of the section 24 subsidiaries which have been approved by the FDIC involved either real estate subsidiaries or subsidiaries that invest in equity securities.<sup>6</sup> The majority of the real estate subsidiaries are subject to affiliate transaction restrictions similar to those found in Regulation W and many of those that are not subject to such restrictions are approvals to hold certain real estate investments pending their liquidation. The FDIC carefully reviewed the requests for consent to engage in equity securities investments through a subsidiary. Although many of the equity securities applications were not made subject to affiliate transaction restrictions, the applications that were approved were made subject to whatever conditions the Board found necessary in its best judgment to protect the deposit insurance funds from risk given the facts and circumstances of each application. (Section 24 requires the FDIC to determine that the conduct of business by subsidiaries such as these does not present a significant risk before the FDIC may give its consent to acquisition or establishment of the subsidiary.) The majority of the equity subsidiaries that were approved involved small investments (less than 10% of tier one capital) and in many cases the equities in which those subsidiaries sought consent to invest were bank holding companies and other similar firms. Most of the approvals were conditioned in such a way as to limit lending to the subsidiaries and to limit the amount of the investments that the subsidiaries may in turn make. Given the Board's initial review and determination and the conditions to which the approvals are subject, the FDIC does not believe that grandfathering these subsidiaries will be contrary to the public interest. What is more, the FDIC notes that these equity investment securities are in many ways similar to private equity funds (the vehicle through which financial holding companies may invest in equity

securities) which are provided special treatment under Regulation W.

Section 324.2(b) of the proposal does not exempt transactions entered into by a State nonmember bank prior to the publication date of the proposal from compliance with Regulation W and part 324. All transactions with affiliates, regardless of when entered into, are governed by Regulation W and the phase-in periods adopted by the FRB in the case of member banks. Transactions entered into after December 12, 2002, but before April 1, 2003, by member banks with their affiliates were required to comply with Regulation W as of April 1, 2003. Transactions entered into prior to December 12, 2002, were required to comply with Regulation W no later than July 1, 2003. State nonmember banks that entered into transactions with affiliates that would have been required to be in compliance with Regulation W by either April 1, 2003, or July 1, 2003, if entered into by a member bank and which are not in compliance at this time will be cited for a violation of section 23A and 23B and section 18(j)(1) of the FDI Act as appropriate. Comment is invited as to whether the FDIC should consider adopting some other treatment in part 324. For example, should the FDIC grant an additional compliance period or perhaps grandfather pre-existing transactions?

#### *Section 324.3 Submissions and Requests for Hearing*

Section 324.3 informs insured State nonmember banks that all filings, submissions, requests for hearings and other requests made under this part are to be made in accordance with the procedures set out in 12 CFR 303. The intent of the provision is to eliminate any confusion that might arise as to the procedures to be followed by insured State nonmember banks (procedures found in Regulation W or elsewhere in FRB regulations or procedures found in the FDIC's regulations which might differ from those used by the FRB). This rulemaking would add a new § 303.251 to 12 CFR 303 that would set out the applicable procedures for submissions, filings, and requests for hearing that are made under §§ 324.5 and 324.6 of the proposal. The proposed procedures are discussed in more detail below.

#### *Section 324.4 Definitions and Usage of Terms*

Section 324.4 of the proposal substitutes appropriate terminology for that found in Regulation W to make it clear that, for the purposes of compliance with section 18(j)(1) of the FDI Act and this part, "member bank" should be understood to mean "insured

State nonmember bank"; "Board" should be understood to mean "FDIC"; and "appropriate Federal banking agency" should be understood to mean "FDIC" wherever those words or phrases are used in Regulation W. The section also defines "State nonmember bank" by cross referencing the definition found in section 3 of the FDI Act (12 U.S.C. 1813(e)).

Sections 324.2(a), 324.3 and 324.4 together accomplish two important things. They make clear that (1) the FDIC, as the Federal supervisor of insured State nonmember banks, is the appropriate party to whom insured State nonmember banks must look for guidance in interpreting the requirements of sections 23A and 23B of the FRA as they apply to insured State nonmember banks through section 18(j) of the FDI Act, and (2) it is the FDIC which exercises discretion in applying the restrictions and limitations found in Regulation W in those instances in which Regulation W provides for relief, calls for determinations, or provides for the exercise of discretion by the FRB. In short, by adopting the cross reference to Regulation W the FDIC is satisfying its obligation to ensure that insured State nonmember banks are subject to sections 23A and 23B as though they were member banks. It is only appropriate, and is in fact necessary to the effective accomplishment of the FDIC's charge to oversee the safety and soundness of insured State nonmember banks, for the FDIC to exercise the authority to make decisions with respect to particular insured State nonmember banks and their transactions with affiliates in the context of the overall facts and circumstances affecting those banks. The FDIC is the supervisor of these particular institutions and the Federal supervisory agency that is in the best position to evaluate the need for relief.

As indicated above, part 324 makes it clear that the reference to the "appropriate Federal banking agency" as found in Regulation W means the FDIC. References to the FDIC in FDIC's regulations will normally be understood to refer to the FDIC's Board of Directors unless the Board of Directors has delegated the matter to some other individual within the agency. Regulation W contains several provisions that permit the "appropriate Federal Banking agency" to make certain decisions. For example, section 223.15(b)(3) of Regulation W provides that the appropriate Federal banking agency may set the amount by which a bank's share of a participation in a loan originated by an affiliate which is now a problem loan and which is being

<sup>6</sup> A summary of requests approved by the FDIC's Board of Directors can be viewed at <http://www.fdic.gov/regulations/resources/approved/index.html>.

renewed (or for which additional funds are extended) may exceed 5% of the bank's original exposure without the renewal constituting a purchase of a low quality asset. Insured State nonmember banks should note that it is the FDIC's present intent that the authority to make determinations under Regulation W that are to be made by the "appropriate Federal banking agency" will be delegated to the Director of the Division of Supervision and Consumer Protection and the Director's designee.

#### *Section 324.5 Exemption Requests*

Section 223.43 of Regulation W (12 CFR 223.43) provides that the FRB may, by regulation or order, at its discretion, exempt transactions or relationships from the requirements of section 23A if the FRB determines that the exemption is in the public interest and is consistent with the purposes of section 23A. FDIC's proposed § 324.5 provides that insured State nonmember banks may request an exemption from the requirements and restrictions of section 23A, as implemented by Regulation W, by filing a written request with the FDIC. The FDIC may, in its discretion, grant an exemption if the FDIC determines that it is in the public interest to do so and the FDIC determines that granting the exemption is consistent with the purposes of section 23A. This provision is similar in purpose to §§ 324.2, 324.3 and 324.4 in that it makes clear that it is the FDIC which is the appropriate agency to grant relief in the case of an insured State nonmember bank.

Exemptions from the restrictions of Regulation W are available for insured State nonmember banks under the same standards that apply to member banks, *i.e.*, if the exemption is in the public interest and it is consistent with the purposes of section 23A. Exemptions are thus available to member and nonmember banks "in the same manner" (after filing a request for an exemption) and "to the same extent" (after the bank's request is evaluated based upon the same standards). The only difference is that it is the FDIC which, based on its unique supervisory perspective and familiarity with the institution in question, evaluates whether those standards are met and whether it is appropriate to grant an exemption.

Past practice has been for insured State nonmember banks to apply to the FRB to obtain exemptions from the restrictions of section 23A. Usually the FRB consults with the FDIC prior to granting exemptions. Absent unusual circumstances, if the FDIC objects to the exemption request, it is not granted.

Rather than continue the practice of allowing insured State nonmember banks to file exemption requests with the FRB, the FDIC is proposing to instruct insured State nonmember banks to file all exemption requests with the FDIC. Since FDIC is the primary Federal banking supervisor of insured State nonmember banks and is more familiar with the condition and overall management of those banks than the FRB, it is more appropriate for the FDIC to review and act on exemption requests from insured State nonmember banks. It is not only more appropriate to do so, but the FDIC expects that following this new procedure will result in more efficiency in the review of the requests which will in turn benefit banks. We anticipate that individual reviews will take less time even though it is the FDIC's intent to continue to coordinate with the FRB to ensure that the standards under which exemption requests are evaluated are consistently applied by the FDIC and the FRB. If adopted, the regulation would not have any effect on exemptions previously granted by the FRB. Those exemptions will continue to be valid and there would be no need for an insured State nonmember bank to seek an order from the FDIC affirming the prior exemption granted by the FRB.

Procedures for filing exemption requests are proposed for comment and are discussed below under the heading "Section 303.251 Affiliate Transactions". If adopted, those procedures would be set out in a new § 303.251.

#### *Section 324.6 Controlling Influence Determinations*

Section 23A of the FRA requires a shareholder or a company to be given notice and opportunity for a hearing before the shareholder or company is determined to directly or indirectly exercise a controlling influence over the management or policies of another company. The impact of a determination that such influence is found to exist is that the shareholder or company is considered to control the other company, thus making the companies affiliates for the purposes of section 23A.

Section 324.6 of the proposed regulation restates the statutory obligation for opportunity for a hearing prior to the control determination being made. It also makes it clear that the FDIC and not the FRB is the agency that affords the opportunity for a hearing and makes the final determination on the control issue when an insured State nonmember bank is involved. (See, *Roque De La Feunte II v. FDIC*, 332 F.3d

1208 (9th Cir. 2003) (FDIC has the authority and obligation to afford opportunity for hearing and to conduct a control hearing). The standard under the proposal for determining if control exists is whether the shareholder or company has a controlling influence over the management or policies of the other company. This standard is identical to that found in section 23A of the FRA and is the same standard in FRB Regulation W.<sup>7</sup>

If a hearing is requested by an insured State nonmember bank, or one of its shareholders, the hearing will be conducted in accordance with the procedures set out in 12 CFR 303. (See discussion below under the heading "Section 303.251 Affiliate transactions" for information regarding the hearing procedures that are proposed for comment.)

#### *Proposed Amendments to 12 CFR 303*

##### *Section 303.251 Affiliate Transactions*

FDIC is proposing to amend part 303 governing filing procedures and certain hearings. Under the proposal, a new section would be added to subpart M—"Other Filings" that would (1) set out the procedures for filing a request for an exemption from section 23A, and (2) set out the procedures governing hearings to determine whether or not a shareholder or company exercises a controlling influence over another company.

*Exemption requests*—As proposed in §303.251(a), the procedures governing requests for an exemption from the restrictions of section 23A would require the requesting bank to file a letter with the appropriate FDIC office that (1) describes in detail the relationship or transaction for which the bank is seeking an exemption, (2) identifies the requirements or restrictions from which the bank is seeking relief, and (3) sets out an explanation of why the exemption is in the public interest and is consistent with the purposes of section 23A. The FDIC may request any additional information that is, in its opinion, necessary to properly evaluate the request. Banks that file exemption requests will receive written notification of the FDIC's decision. The proposed exemption procedures are substantially

<sup>7</sup> The FDIC recognizes that it will be necessary to coordinate with the FRB to assure consistency as between the application of the standard to member banks and state nonmember banks. We note, however, that to date the FRB has never had a control hearing under the relevant provisions of section 23A of the FRA. At this time there is no existing prior FRB precedent resulting from a control hearing for the FDIC to take into consideration.

the same as those adopted by the FRB in Regulation W for member banks with the exception that, unlike member banks, State nonmember banks would file requests with an FDIC regional office rather than with the agency's General Counsel. At the present time it is anticipated that the FDIC's Board of Directors will retain the authority to grant exemptions and will not delegate that responsibility.

*Controlling influence hearing requests*—Procedures governing requests for hearings and the actual conduct of hearings to determine control are set out in proposed § 303.251(b). Under the proposed procedures the FDIC is required to provide a shareholder or company written notice of an opportunity for hearing before the agency makes a determination that there is an affiliation based on the ability to exercise a controlling influence over the management or policies of another company. A company or shareholder that wants a hearing must respond to that effect no later than 10 days after receiving the written notice of opportunity for hearing by filing a request for a hearing with the “appropriate FDIC office” as that term is defined in 12 CFR 303. Which FDIC office is the “appropriate FDIC office” is dependent upon whether the institution that is the subject of a filing is *not* part of a group of related institutions. If that is the case, the appropriate regional office for that institution, and any individual associated with the institution, is the FDIC region in which the institution is located. (See § 303.2(g)(1) of current part 303). If the institution that is the subject of a filing is part of a group of related institutions, the appropriate FDIC regional office for that institution, and any individual associated with that institution, is the FDIC region in which the group's major policy and decision makers are located (or any other region the FDIC designates on a case-by-case basis). (See § 303.2(g)(2) of current part 303).

Requests for a control hearing will be acknowledged in writing. The date and time for hearings will be set by the FDIC solely in its discretion (“such time as FDIC determines to be reasonable”). In setting the date for the hearing the FDIC will take care to consider the convenience of the participants in addition to other factors such as the complexity of the issues and the potential effects of the timing of the hearing on associated matters such as a pending examination. The presiding officer will be the Director of the Division of Supervision and Consumer Protection or the Director's designee.

The presiding officer is responsible for conducting the hearing, determining any procedural question that is not specifically addressed by § 303.251(b), and rendering a final determination within 20 days of the date on which the hearing record is closed. The participants will be notified in writing of the final disposition which will contain an explanation of the reasons for the final decision.

The final determination may be appealed to the Board of Directors of the FDIC. To do so a request for review must be filed the Executive Secretary of the FDIC within 15 days of the date on which notification of the final decision is received.

The proposal indicates that the procedures currently set out in §§ 303.10(f) through 303.10(i), 303.10(k) and 303.10(m) will govern the conduct of the hearing. Section 303.10 is titled “Hearings and other meetings”. Paragraph (f) governs participation in hearings. Paragraph (g) governs transcripts. Paragraph (h) governs presentations and information that may be submitted. It also identifies federal laws that are not applicable to hearings. Paragraph (i) governs the closing of the hearing record. Paragraph (k) governs the computation of time. Paragraph (m) provides that the Board of Directors may delegate by resolution to the presiding officer the authority to adopt different procedures in individual matters.

#### *Request for Comments*

In addition to any other comments on the proposal, the FDIC specifically requests comment on the following.

1. Is it advisable for the FDIC to adopt separate rules implementing section 18(j)(1) of the FDI Act and section 23A and 23B of the FRA as they apply to insured State nonmember banks?

2. If the FDIC does adopt separate regulations, should the regulation set out the full text of Regulation W rather than adopt the proposed cross reference? If the FDIC adopted a full text version it would be identical to Regulation W with the exception that “insured State nonmember bank” would be substituted for “member bank”; “FDIC” would be substituted for “Board”; “FDIC” would be substituted for “appropriate Federal banking agency”; the definition of “member bank” would be replaced with a definition of “State nonmember bank” (definition would be the same as currently proposed) and the authority, purpose and scope paragraph as found in Regulation W would be modified to read as those paragraphs are proposed for comment.

3. Should the FDIC continue its past practice of allowing the FRB to act on exemption requests by insured State nonmember banks or adopt the proposed change in practice which would direct insured State nonmember banks to file such requests with the FDIC, which would then grant or deny the request?

4. If the FDIC adopts the practice of acting on exemption requests, are the proposed procedures for exemption requests sufficiently clear? Is the information that is required to be presented in an exemption request burdensome? Should the regulation require that additional, specifically identified information be included in the request? Should the regulation provide specifics on the time in which the FDIC will act on exemption requests?

5. Are the proposed hearing procedures adequate? What additional procedures if any should be included? Should the regulation specify that the hearing will take place no later than a certain specified period of time after the request for hearing is submitted to the FDIC? Is it appropriate to apply the procedures found in §§ 303.10(f) through 303.10(i), 303.10(k) and 303.10(m) to a controlling influence hearing?

6. Should the Board of Directors delegate the authority to grant exemptions under the regulation or retain the authority to grant exemptions at the Board level?

7. Should the Board of Directors delegate the authority to make a final control determination or should that authority be retained only at the Board level?

8. If decision making authority with respect to control determinations is delegated, is it appropriate to allow an appeal of the decision and if so, to whom?

9. Is the FDIC correct in its initial view that the proposed exemption for section 24 subsidiaries that were established prior to the publication of this proposal from part 324 will not adversely impact the public or be inconsistent with the purposes of section 23A and 23B?

10. Should the FDIC draft the subsidiary exemption more narrowly? If so, why? Should the exemption be broader in scope? If so, why?

11. Should the FDIC consider additional exemptions at this time?

12. Should the FDIC consider granting a phase-in period for transactions that were entered into prior to the publication of the proposal? If so, should the phase-in period mirror the phase-in period the FRB adopted for

member banks (*i.e.*, three months from the effective date of the rule) or would some other period be more appropriate?

13. Should the FDIC consider exempting from part 324 transactions that were entered into prior to the publication of the proposal? If so, why? Would such an exemption pose safety and soundness issues?

14. FDIC's view is that insured State branches, agencies, and commercial lending companies of foreign banks are subject to the substantive provisions of Regulation W and this part. Comment is requested on whether the proposed regulation is sufficiently clear in that regard and whether or not the FDIC is justified in its view.

15. Are the proposed amendments to the FDIC's regulations written clearly and in "plain language"? If not, what changes should be made to the proposed language to make it clearer and easier to understand?

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the FDIC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The collection of information contained in this rule has been submitted to OMB for review.

Written comments on the collection of information should be sent to the Joseph F. Lackey, FDIC desk officer: Office of Management and Budget, Office of Information and Regulatory Affairs, New Executive Office Building, Washington, DC 20503. Copies of comments should also be sent to: Thomas Nixon, Legal Division, FDIC, 550 17th Street, NW., Washington, DC 20429, (202) 898-8766. For further information on the Paperwork Reduction Act aspect of this rule, contact Thomas Nixon at the above address.

Comment is solicited on:

1. Whether the collection of information is necessary for the proper performance of FDIC functions, including whether the information will have practical utility;

2. The accuracy of our estimate of burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. The quality, utility, and clarity of the information to be collected;

4. Ways to minimize the burden of the information collection on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of

information technology, for example, permitting electronic submission of responses; and

5. Estimates of capital or start-up costs and costs of operation, maintenance, and purchases of services to provide information.

*Title of the collection:* Transactions with affiliates.

*Summary of the collection:* As discussed more fully in the preamble, the FDIC's 12 CFR part 324 will make clear that insured State nonmember institutions must conform to the standards of FRB's Regulation W and that the FDIC is responsible for administering Regulation W as it applies to such institutions, including receiving and acting on notices required by Regulation W.

The notices required in this collection are required to evidence compliance with sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c-1) and section 18(j)(1) of the Federal Deposit Insurance Act ("FDI Act"). The respondents for part 324 will be insured State nonmember institutions.

Regulation W established four notices at (12 CFR) sections 223.15(b)(4), 223.31(d)(4), 223.41(d)(2) and 223.43(b). The FDIC will require insured state nonmember institutions to provide the first three of these notices to the FDIC by the part 324's cross-reference to Regulation W. The fourth Regulation W notice (223.43(b)) will not be required through the part 324 cross-reference. Instead, the FDIC equivalent of that notice will be required through 12 CFR 303.251.

The first notice requirement, described in Regulation W's section 223.15(b)(4), is a condition to an exemption for renewals of loan participations involving problem loans. Regulation W requires the participating depository institution to provide its appropriate Federal banking agency with written notice of the renewal or extension of additional credit not later than 20 days after consummation. The FDIC is the appropriate Federal banking agency to which insured State nonmember institutions are to provide this notice. There will be no reporting form associated with this information collection. The FDIC estimates that approximately three insured State nonmember institutions will file this notice annually and that it will take approximately two hours to prepare the notice.

The second notice requirement, described in Regulation W's section 223.31(d)(4), is a condition to an exemption for a depository institution's acquisition of an affiliate that becomes

an operating subsidiary of the institution after the acquisition.

Regulation W requires the institution to provide its appropriate Federal banking agency and the FRB with written notice of its intention to acquire the company at or before the time that the company becomes an affiliate of the institution. Through part 324's cross-reference, insured State nonmember institutions will provide that notice to the FDIC. There will be no reporting form associated with this information collection. The FDIC estimates that approximately three insured State nonmember institutions will file this notice annually and that it will take approximately six hours to prepare the notice.

The third notice requirement, described in Regulation W's section 223.41(d)(2), is a condition to an exemption for internal corporate reorganization transactions. Regulation W requires the depository institution to provide its appropriate Federal banking agency and the FRB with written notice of the transaction before consummation. Insured State nonmember institutions will provide notice to the FDIC. The notice must describe the primary business activities of the affiliate and indicate the proposed date of the reorganization. There will be no reporting form associated with this information collection. The FDIC estimates that approximately seven insured state nonmember institutions will file this notice annually and that it will take approximately six hours to prepare a notice.

Finally, part 324 will not require insured state nonmember institutions to send a notice to the FDIC through a cross-reference to Regulation W's section 223.43(b). Instead, pursuant to § 303.251, they must submit a request to the appropriate FDIC regional office. The request must describe in detail the transaction or relationship for which the institution seeks exemption; explain why the FDIC should exempt the transaction or relationship; and explain how the exemption would be in the public interest and consistent with the purposes of section 23A. There will be no reporting form associated with this information collection. The FDIC estimates that approximately two insured State nonmember institutions will file these requests annually and that it will take approximately 10 hours to prepare a request.

*Burden estimate:* The total estimated annual burden for insured State nonmember institutions that must comply with the above-mentioned requirements is 86 hours. Based on a rate of \$50 per hour, the total annual



cost to the public for these collections of information is estimated to be \$4,300.

### Regulatory Flexibility Act

In accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a)), the FDIC must publish an initial regulatory flexibility analysis with this rulemaking or certify that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities. For the purposes of the required analysis or certification, financial institutions with total assets of \$150 million or less are considered to be "small entities". For the reasons set out below the FDIC hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

Sections 23A and 23B of the FRA limit transactions between a member bank and its affiliates. The FDIC enforces sections 23A and 23B of the FRA as to insured State nonmember banks under section 18(j)(1) of the FDI Act which provides that insured State nonmember banks are subject to sections 23A and 23B of the FRA as though they were member banks. Section 9 (Tenth) of the FDI Act authorizes the FDIC to issue such regulations as may be necessary to administer and carry out the purposes of those sections. The proposed rule would make clear to insured State nonmember banks that in order to comply with section 18(j)(1) of the FDI Act they must comply with the substantive provisions of FRB Regulation W which was adopted in final by the FRB on December 12, 2002 to implement the requirements and restrictions of sections 23A and 23B of the FRA as they apply to member banks. Regulation W is codified at 12 CFR 223. It appeared in volume 67 of the **Federal Register** at page 76560 (67 FR 76560). A full description of the reasons why the FRB considered and adopted Regulation W are set out in the **Federal Register** document which contained Regulation W as originally proposed for comment (66 FR 24186, May 11, 2001) and in Regulation W as adopted in final form. The FRB describes Regulation W as a regulation which, although designed to comprehensively implement sections 23A and 23B of the FRA, is a regulation that in large measure simply codifies the FRB's past practice and interpretations with respect to sections 23A and 23B. The reasons the FDIC is proposing to adopt a cross reference to Regulation W in its regulations and, is further proposing to amend its regulations to make clear that the FDIC is the

appropriate agency to grant exemptions from sections 23A and 23B to insured State nonmember banks as well as to make other determinations under Regulation W, are set out more fully under the supplementary information section of this document. The proposed rule would apply to all insured State nonmember banks regardless of their size.

Regulation W largely codifies the application of section 23A and 23B of the FRA as to member and State nonmember banks as interpreted and applied before that rule's adoption. In most instances the differences between what a bank needed to do to comply with section 23A or 23B previously and what is required to be done in order to comply with section 23A or 23B post Regulation W are minimal. In many instances Regulation W actually grants relief from restrictions contained in the statute. Regulation W does contain some new notice requirements and sets out specifics as to filing requirements if a bank wishes to obtain an exemption from section 23A as to a particular transaction or relationship. Those requirements are discussed above under the heading "Paperwork Reduction Act". Of the requirements discussed under that heading, the requirements necessary to obtain an exemption are the most onerous. Based on FDIC's experience as to the number and size of State nonmember banks that have sought such exemptions in the past, we anticipate very few such requests and the institutions most likely to file an exemption request can be expected to be larger than \$150 million in total assets. In 2003 only three insured State nonmember banks requested exemptions from section 23A. Only one of the three institutions was under \$150 million in total assets. Regulation W also requires a notice in connection with corporate reorganizations that are exempted from some of the restrictions of section 23A and 23B without need of a case-by-case determination. Again based on our past experience we anticipate that banks that will take advantage of this exemption are likely to be larger than \$150 million in total assets. Over the years, exemption requests have typically involved reorganization transactions and as stated above, banks that file exemption requests are more likely to be banks in excess of \$150 million in total assets. Although we cannot come to the same conclusion with respect to the final two categories of notices described under the Paperwork Reduction Act heading, those notice requirements are minimal in terms of the information required to

be filed. Banks will not require the services of attorneys, consultants, appraisers, accountants or other professionals to prepare and submit the notices nor do these notices require the use of sophisticated computer programs, statistical analysis, or other complex tracking or recordkeeping systems. While some aspects of Regulation W may require tracking or other compliance systems in order for a bank to comply with the requirements of the rule or to take advantage of certain exemptions contained in the rule, those systems as well as any burden arising out of FDIC's proposed rule would be present for State nonmember banks regardless of whether the FDIC adopts the proposal or not. The impact of the proposed rule is largely procedural in that its purpose is to clarify for State nonmember banks that it is the FDIC that administers the requirements of Regulation W as to insured state nonmember banks. The rule does not impose any new or different substantive requirement. In short, proposed part 324 does not itself impose any burden on small institutions that is not already imposed under Regulation W.

### Impact on Families

The FDIC has determined that this proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105-277, 112 Stat. 2681 (1998).

### List of Subjects

#### 12 CFR Part 324

Banks, banking, Safety and Soundness, Transactions with affiliates.

#### 12 CFR Part 303

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Bank merger, Branching, Foreign branches, Foreign investments, Gold parachute payments, Insured branches, Interstate branching, Reporting and recordkeeping requirements, Savings associations.

The Board of Directors of the Federal Deposit Insurance Corporation hereby proposes to add a new part 324 to title 12 of the Code of Federal Regulations and amend part 303 of title 12 of the Code of Federal Regulations as follows:

1. The authority citation for part 324 reads as follows:

**Authority:** 12 U.S.C. 1819(tenth), 1828(j)(1).

2. New part 324 is added to read as follows:



**PART 324—TRANSACTIONS WITH AFFILIATES**

Sec.

- 324.1 Authority, purpose and scope.  
 324.2 Affiliate transactions.  
 324.3 Filings, submissions, requests and hearings.  
 324.4 Definitions and usage of terms.  
 324.5 Exemptions.  
 324.6 Controlling influence determinations.

**§ 324.1 Authority, purpose and scope.**

(a) *Authority.* This part is issued under the authority of sections 9 (tenth) and 18(j)(1) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1819 (tenth), 1828(j)(1)).

(b) *Purpose.* This part implements section 18(j)(1) of the FDI Act and sections 23A and 23B of the Federal Reserve Act (FRA) (12 U.S.C. 371c, 371c-1) as to insured State nonmember banks. Section 18(j)(1) of the FDI Act makes insured State nonmember banks subject to the restrictions of sections 23A and 23B of the FRA in the same manner and to the same extent as if insured State nonmember banks are member banks of the Federal Reserve System. Section 23A and 23B of the FRA establish certain quantitative limits and other prudential requirements for loans, purchases of assets, and certain other transactions between a member bank and its affiliates. Federal Reserve Board (FRB) Regulation W (12 CFR 223) implements sections 23A and 23B of the FRA as to member banks by defining terms used in sections 23A and 23B, explaining the requirements of those statutory provisions and exempting certain transactions from the restrictions and limitations of the FRA.

(c) *Scope.* This part applies to insured State nonmember banks.

**§ 324.2 Affiliate transactions.**

(a) *General.* Insured State nonmember banks are subject to the restrictions and limitations contained in section 23A and 23B of the FRA and FRB Regulation W on transactions by member banks with affiliates in the same manner and to the same extent as if they were member banks of the Federal Reserve System.

(b) *Exception.* Any subsidiary relationship that predates March 17, 2004, is exempt from the requirements and restrictions of this part that would otherwise apply if such relationship would not have been subject to section 23A and 23B of the FRA prior to December 12, 2002, because the subsidiary would not have at that time been considered to be an affiliate.

**§ 324.3 Filings, submissions, requests and hearings.**

Filings, submissions, and requests made under section 324.5 and section 324.6 of this part are governed by 12 CFR 303.251. All other filings, submissions or requests under this part are governed by subpart A of 12 CFR 303. Procedures to which member banks are subject under FRB Regulation W for filings, submissions, requests and hearings do not apply in the case of a State nonmember bank.

**§ 324.4 Definitions and usage of terms.**

For purposes of compliance with this part insured state nonmember banks should substitute “insured State nonmember bank” for “member bank” and “FDIC” for “Board” wherever those terms appear in Federal Reserve Board Regulation W. The phrase “appropriate Federal banking agency” as used in Federal Reserve Board Regulation W should in all instances be read to mean “FDIC”. “State nonmember bank” has the same meaning as in 12 U.S.C. 1813(e)(2).

**§ 324.5 Exemptions.**

An insured State nonmember bank may request that the FDIC exempt transactions or relationships from the requirements of section 23A of the FRA as implemented by this part. Exemption requests may be granted by the FDIC in its discretion if it finds such exemption to be in the public interest and to be consistent with the purposes of section 23A.

**§ 324.6 Controlling influence determinations.**

Determinations by the FDIC that a shareholder or company directly or indirectly exercises a controlling influence over the management or policies of another company will only be made after notice and opportunity for hearing. Hearings will be conducted in accordance with 12 CFR 303.251.

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

**Authority:** 12 U.S.C. 378, 1813, 1815, 1817, 1818, 1819 (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831o, 1831p-1, 1831w, 1835a, 1843(l), 3104, 3105, 3108, 3207; 15 U.S.C. 1601-1607.

4. Sections 303.251 and 303.252 of subpart M of part 303 are redesignated as §§ 303.252 and 303.253.

5. Section 303.251 is added to subpart M of part 303 to read as follows:

**Subpart M—Other Filings**

\* \* \* \* \*

**§ 303.251 Affiliate transactions.**

(a) *Exemption requests.* (1) *Scope.*—This paragraph contains the procedures to be followed by an insured state nonmember bank that wants to obtain an order from the FDIC exempting affiliate transactions or relationships from the requirements of part 324 (12 CFR 324) and section 23A of the Federal Reserve Act (12 U.S.C. 371c) as made applicable to insured state nonmember banks by section 18(j)(1) of the FDI Act (12 U.S.C. 1828(j)(1)).

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

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

- (i) A detailed description of the relationship or transaction for which the applicant is seeking an exemption,
- (ii) An identification of the requirements or restrictions from which the applicant is seeking relief, and
- (iii) A statement of why the requested relief is in the public interest and consistent with the purposes of section 18(j)(1) of the FDI Act.

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

(5) *Processing.* The FDIC will provide the applicant with written notification of the final action when the decision is rendered.

(b) *Controlling influence determinations.* (1) *Scope.*—This paragraph contains the procedures the FDIC will follow when determining for the purposes of part 324 whether a company or shareholder controls another company as a result of directly or indirectly exercising a controlling influence over the management or policies of such company.

(2) *Opportunity for hearing.* Prior to determining that a shareholder or a company has a controlling influence over the management or policies of another company, the shareholder or company will be provided written notice of an opportunity for hearing.

(3) *Hearing requests.* Requests for a hearing must be received by the FDIC no later than 10 days after a written notice of opportunity for a hearing is received.

(4) *Where to File.* Requests for a hearing must be submitted by letter to the appropriate FDIC office.

(5) *Timing of hearing.* Upon receipt of a request for hearing, the FDIC will acknowledge the request in writing and set such date for the hearing as is determined by the FDIC to be reasonable.

(6) *Hearing Procedures.* The presiding officer shall be the Director of the Division of Supervision and Consumer

Protection or the Director's designee. Hearings will be conducted in accordance with sections 303.10(f)–section 303.10(i), section 303.10(k) and section 303.10(m). The presiding officer is responsible for conducting the hearing, determining all procedural questions not governed by paragraph (b) of this section and making the final determination within 20 days of the date on which the hearing record is closed. Participants will be notified in writing of the final disposition and provided an explanation of the reasons for the final decision.

(7) *Review of final decision.* Final decisions resulting in a determination that control exists may be appealed to the Board of Directors of the FDIC by filing a request for review with the Executive Secretary of the FDIC no later than 15 days after the date on which written notification of the final decision is received.

Dated at Washington, DC, this 10th day of March, 2004.

By order of the Board of Directors.  
Federal Deposit Insurance Corporation.

**Robert E. Feldman,**  
*Executive Secretary.*

[FR Doc. 04–5928 Filed 3–16–04; 8:45 am]

**BILLING CODE 6714–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 2002–NM–251–AD]

RIN 2120–AA64

#### **Airworthiness Directives; Fokker Model F.28 Mark 0070 Series Airplanes**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Fokker Model F.28 Mark 0070 series airplanes. This proposal would require inspection of cables installed on certain contactors in the electrical power center (EPC) for proper installation of wires, and reinstallation of wires if necessary. These actions are necessary to prevent a short circuit in the EPC, possibly leading to a fire in the main cabin and damage to the airplane, or injury to passengers and flightcrew. These actions are intended to address the identified unsafe condition.

**DATES:** Comments must be received by April 16, 2004.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–251–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain “Docket No. 2002–NM–251–AD” in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Fokker Services B.V., PO Box 231, 2150 AE Nieuw-Vennep, the Netherlands. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

**FOR FURTHER INFORMATION CONTACT:** Tom Rodriguez, Aerospace Engineer; International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1137; fax (425) 227–1149.

#### **SUPPLEMENTARY INFORMATION:**

##### **Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic,

environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: “Comments to Docket Number 2002–NM–251–AD.” The postcard will be date stamped and returned to the commenter.

#### **Availability of NPRMs**

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–251–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

#### **Discussion**

The Civil Aviation Authority—the Netherlands (CAA–NL), which is the airworthiness authority for the Netherlands, notified the FAA that an unsafe condition may exist on certain Fokker Model F.28 Mark 0070 series airplanes. The CAA–NL advises that an operator reported an occurrence of a short circuit between two cables attached to a contactor in the electrical power center (EPC) while an airplane was on the ground and powered by external power only. The short circuit occurred due to incorrect installation of the wires on the contactor, which left minimal clearance between the cable terminals. The operator also discovered the same condition on another airplane. This condition, if not corrected, could result in a short circuit in the EPC, possibly leading to a fire in the main cabin and damage to the airplane or injury to passengers and flightcrew.

#### **Explanation of Relevant Service Information**

Fokker Services B.V. has issued Service Bulletin SBF100–24–035, dated May 27, 2002, which describes procedures for inspection of cables installed on certain contactors in the EPC for proper installation of wires, and reinstallation of wires, if necessary. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition. The CAA–NL classified this service bulletin as mandatory and issued Dutch airworthiness directive 2002–112, dated