

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Parts 303, 325, 327, and 347

RIN 3064-AC85

### International Banking

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

**ACTION:** Notice of proposed rulemaking with request for comment.

**SUMMARY:** The FDIC is publishing for notice and comment proposed amendments to subpart J of part 303 on international banking and revisions to subpart A of part 347, relating to the international activities and investments of insured state nonmember banks, and subpart B of part 347, relating principally to insured and noninsured U.S. branches of foreign banks. The proposed amendments address the relocation of grandfathered insured branches. They also reorganize, clarify, and revise subparts A and B of part 347, and address various issues raised as part of the FDIC's ongoing effort under the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (12 U.S.C. 3311) to address regulatory burden issues. Included in the revisions affecting grandfathered insured branches are revisions to the FDIC's asset pledge requirement to establish a risk-based system and revision of the FDIC's asset maintenance requirement to calculate the asset maintenance percentage based on the daily third-party liabilities of the branch. In addition, the FDIC is proposing to strengthen FDIC's supervisory processes and make conforming amendments for other FDIC rules as part of the proposal.

The FDIC is also requesting comments, as part of this document, on whether deposits in wholesale U.S. branches of foreign banks should be covered by deposit insurance and on the accounting rules contained in subpart C of part 347.

**DATES:** Written comments must be received on or before September 17, 2004.

**ADDRESSES:** You may submit comments, identified by RIN number 3064-AC85, by any of the following methods:

- *Agency Web site:* <http://www.FDIC.gov/regulations/laws/federal/propose.html>.

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

- *Hand Delivered/Courier:* The guard station at the rear of the 550 17th Street

Building (located on F Street), on business days between 7 a.m. and 5 p.m.

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

Include RIN number 3064-AC85 in the subject line of the message.

- *Public Inspection:* Comments may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW, Washington, DC, between 9 a.m. and 4:30 p.m. on business days.

Instructions: Submissions received must include the agency name and RIN for this rulemaking. 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:** John Di Clemente, Chief, International Section, Division of Supervision and Consumer Protection, (202) 898-3540 or [jdiclemente@fdic.gov](mailto:jdiclemente@fdic.gov) or Rodney D. Ray, Counsel, Legal Division, (202) 898-3556 or [rray@fdic.gov](mailto:rray@fdic.gov), Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

**SUPPLEMENTARY INFORMATION:** The FDIC is proposing to amend and revise its rules concerning international banking activities of insured state nonmember banks operating in foreign countries and insured U.S. branches of foreign banks. This is being done to implement the "plain language" requirement contained in section 722 of the Gramm-Leach-Bliley Act of 1999 (12 U.S.C. 4809). Also, as part of the FDIC's ongoing effort under the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (12 U.S.C. 3311) (EGRPRA), the FDIC is proposing amendments to its existing rules to address certain regulatory burden issues raised in public comments. The FDIC is also proposing revisions to existing rules and new rules to update the FDIC's supervisory processes.

The proposed changes will be made to subpart J of part 303 and to subparts A and B of part 347 of title 12 of the Code of Federal Regulations. As a result of the proposed changes, conforming changes also will be made to subpart B of part 325, relating to the FDIC's Prompt Corrective Action rules, and subpart A of part 327, regarding the FDIC's assessment rules for insured U.S. branches of foreign banks.

Subpart J of part 303 contains the procedural rules that implement part 347. The rules in subpart A of part 347 address issues related to the international activities and investments of insured state nonmember banks. In general, they implement the FDIC's statutory authority under section 18(d)(2) of the Federal Deposit

Insurance Act (FDI Act) (12 U.S.C. 1828(d)(2)), regarding branches of insured state nonmember banks in foreign countries, and section 18(l) of the FDI Act, regarding insured state nonmember bank investments in foreign entities. The rules in subpart B of part 347 principally address issues related to insured and noninsured U.S. branches of foreign banks under section 6 of the International Banking Act (IBA) (12 U.S.C. 3104).

Although subpart C of part 347 also contains rules regarding accounting and reporting rules relating to international lending activities of insured state nonmember banks, the FDIC is not proposing to revise subpart C at this time. The Office of the Comptroller of the Currency ("OCC") and Board of Governors of the Federal Reserve System ("FRB") have similar rules implementing the same statutory provisions for the institutions under their supervision that were originally issued in a joint rulemaking proceeding with the FDIC. Therefore, proposed revisions to the rules in subpart C may require discussion and coordination with the other agencies. Commenters may still comment on the rules contained in subpart C of part 347, however, in order to bring particular issues to the FDIC's attention at this time.

### I. Background

Although the FDIC made significant amendments and consolidated its international banking rules in 1998, various events that have transpired since then have influenced the FDIC's decision to propose further revisions to its international banking rules. First, when the FDIC finalized its international banking rules, the FRB was proposing amendments to Regulation K (12 CFR part 211). The FDIC noted in 63 FR 17056 (April 8, 1998) (1998 Final Rule) that subpart A of part 347 maintained parity with the existing version of Regulation K, governing foreign branching and investments by member banks, and that the FDIC may need to make further revisions to subpart A of part 347 once the FRB finalized its revisions to Regulation K. The revisions of Regulation K that are relevant to this rulemaking proceeding were finalized on October 26, 2001, and the FDIC is proposing certain revisions to the part 347 rules because of changes made to Regulation K. Second, the FDIC has received written comments from the public suggesting that the language in part 347 needs to be simplified and the FDIC believes that some additional reorganization and clarification of the

FDIC's rules may be beneficial. It is also believed that strengthening the existing supervisory structure in a few areas is appropriate. In addition, Congress enacted the "plain language" requirement for all proposed and final rulemakings published in the **Federal Register** after January 1, 2000, in section 722 of the Gramm-Leach-Bliley Act of 1999. Therefore, several revisions to part 347 are included to address this requirement. Finally, the FDIC and the other Federal banking agencies solicited and received public comments in 2003 as part of the EGRPRA regulatory burden reduction process on three categories of agency rules. Part 347 was included in one of those categories, and the comments relating to them have been reviewed and are discussed in greater detail in the section-by-section discussion in this document.

In general, FDIC is proposing to revise subpart J of part 303 to provide new cross-references to the appropriate revised rule(s) in subparts A and B of part 347. Since many of the revisions to the text in subpart J merely provide new cross-references to the appropriate sections in subparts A and B of part 347 or make stylistic changes in the text, they will not be further addressed in the subpart J section-by-section analysis. The existing sections in subpart A of part 347 are being reorganized in the proposal by moving, consolidating, and breaking particularly complex sections, such as existing section 347.104, into multiple sections based on the subject matter addressed. The sections addressing general consent, expedited processing, and specific consent for foreign branches and investments, contained in existing sections 347.103 and 347.108, are also being reorganized and consolidated into separate sections addressing each type of approval. The existing sections in subpart B are being reorganized in the proposal by grouping them with other sections that address the same or similar subject matter. In addition, several existing sections in subpart B are being revised in the proposal to update and clarify the regulatory requirements. Finally, a few additional sections are being added to subparts A and B in the proposal to address issues that are not addressed in the existing rules.

The proposed amendments and revisions are discussed below, by subpart, in the section-by-section description. The FDIC invites public comments on all aspects of the proposal. In addition, public comments are specifically invited on the following items:

- Providing for expedited processing of proposed relocations of insured U.S.

branches of foreign banks (section 303.184);

- Revising existing sections that address authorized activities for foreign investments and foreign branches to more closely track the sections of Regulation K addressing those issues in connection with member banks. The revisions also address approval of activities requiring consideration under parts 347 and 362 (sections 347.105 and 347.115);

- Providing that, except for certain merger and acquisition transactions, the grandfathered status of an insured branch of a foreign bank may not be transferred (section 347.206);

- Revising the FDIC's asset pledge requirement for insured branches of foreign banks to a risk-based approach (section 347.209);

- Revising the FDIC's asset maintenance rule for insured branches of foreign banks to calculate the asset maintenance percentage based on daily third-party liabilities (section 347.210); and

- Providing deposit insurance for wholesale U.S. branches of foreign banks (section V of the preamble).

## II. Section-by-Section Analysis of Proposed Amendments to Part 303, Subpart J

### 1. Moving an Insured Branch of a Foreign Bank (Revised § 303.184)

Section 303.184 contains the filing procedures and approval criteria applicable to the relocation of an insured U.S. branch of a foreign bank. As part of the EGRPRA process, an industry trade association observed that section 303.41(b), which addresses branch relocations in the context of domestic branches of insured state nonmember banks, differentiates between a branch closing or relocation based upon whether the proposed move is within the same immediate neighborhood. The trade association expressed concern that, if the FDIC applied a similar geographic standard to proposed relocations of grandfathered insured branches, relocations of those branches would effectively be precluded because those branches could not close and reopen as insured branches. This is because of the statutory provision contained in section 6(d) of the International Banking Act (IBA) (12 U.S.C. 3104(d)) requiring foreign banks engaging in domestic retail deposit activities after December 19, 1991 that require deposit insurance protection to do so through one or more insured bank subsidiaries. The FDIC does not believe such a construction was intended by the statute or existing rule but recognizes

that the existing rule does not address the geographic proximity of the proposed relocation. Section 303.184(b) is being amended, to address this issue, by making expedited processing available for proposed relocations of grandfathered insured branches within the same state. The FDIC notes that 12 CFR 28.12(e)(1) provides for expeditious processing of intrastate relocations of federal branches regulated by the OCC. Therefore, although the FDIC's processing requirements differ from those utilized by the OCC, the approach of providing expedited processing for proposed relocations of insured branches of foreign banks within the same state is consistent with the OCC's overall approach of expediting proposed relocations of federal branches within the same state.

## III. Section-by-Section Analysis of Proposed Revisions to Part 347, Subpart A

### 1. Authority, Purpose, and Scope (Revised § 347.101)

The proposal amends section 347.101 to provide a more comprehensive list of the major areas addressed by the rules in the subpart. The order of the subjects mentioned in the section is also revised to correspond to the order in which those subjects are addressed in the revised subpart.

### 2. Definitions (Revised § 347.102)

Four additional definitions are added to this section by the proposal. Proposed revisions to the rules in the subpart use the term "domestic" in sections 347.104 and 347.105, and that term is defined in paragraph (c) of this section. Paragraph (m) defining "insured state nonmember bank" or "bank" is added to minimize the repetitive use of the former term that currently exists in the rules. Paragraphs (o) and (r) are new definitions that would adopt the same definition for "investment grade" and "NRSRO" that the FRB adopted in 12 CFR 211.2(n) and (r). The effect of the inclusion of the latter two terms will be discussed in greater detail in the description of proposed section 347.115.

### 3. Effect of State Law on Actions Taken Under This Subpart (Revised § 347.103)

Section 347.103 combines the requirement contained in paragraph (a) of existing sections 347.103 and 347.104 into a single section. The rule specifies that an insured state nonmember bank may acquire or retain equity interests in foreign organizations or establish a foreign branch, if authorized to do so by the law of the state where the bank is

chartered, by complying with the requirements of this subpart.

*4. Insured State Nonmember Bank Investments in Foreign Organizations (Revised § 347.104)*

Section 347.104(a) of the proposal is derived from existing section 347.104(f). The rationale for the requirement was discussed in the preamble to the 1998 Final Rule. That rationale, which is restated below, remains unchanged. Thus, the substance of paragraph (f) of the existing rule is retained. It is placed in a separate section, however, apart from the section addressing authorized activities of foreign organizations, and is reworded and reorganized for clarity.

The FDIC recognizes that direct investments in foreign organizations by member banks (and thus national banks) are only permitted for certain types of investments specified in Regulation K, such as investments in foreign banks, because of language in section 25 of the Federal Reserve Act (12 U.S.C. 601) limiting direct foreign investments by member banks. Other types of foreign investments by member banks are required to be made indirectly through an Edge corporation subsidiary or a foreign bank subsidiary of a member bank. In contrast, section 18(l) of the FDI Act (12 U.S.C. 1828(l)) permits state nonmember banks, to the extent authorized by state law, to invest in foreign "banks and other entities." As a consequence, and because the legislative history of section 18(l) shows that Congress was aware of the FRB's parallel authority over member banks at the time section 18(l) was enacted, the difference in language between the two statutes is significant and deliberate and results in the type of foreign organizations that state nonmember banks may invest in directly not being restricted by section 18(l).

Because national banks are unable to invest directly in nonbank foreign organizations, however, the ability of insured state nonmember banks to invest in other types of foreign organizations raises issues under section 24 of the FDI Act (12 U.S.C. 1831a) and 12 CFR part 362. Section 24 prohibits an insured state nonmember bank from acquiring an equity investment that a national bank is not permitted to acquire. Such an investment may be made under section 24, however, if the investment is made through a majority-owned subsidiary of the bank. It may also be made if a company becomes majority-owned by the bank as a result of the investment and the "as principal" activities of the company are ones in which a subsidiary of a national bank could engage. Ownership of more than

50 percent of the equity in a nonbank foreign organization makes that organization a majority-owned subsidiary and, thus, no section 24 analysis is required because such a subsidiary is authorized only to engage in the same activities that the FRB has authorized for subsidiaries of member banks (and thus national banks) under Regulation K. In addition, while it is not necessary for insured state nonmember bank investments of 50 percent or less of the equity of a nonbank foreign organization to be held through an intermediate foreign bank subsidiary or Edge subsidiary as required under Regulation K, those investments are required to be held through some form of U.S. or foreign majority-owned subsidiary in order to comply with the requirements of section 24 and part 362.

*5. Permissible Financial Activities Outside the United States (Revised § 347.105)*

Section 347.105 (a) and (b) of the proposal are derived from existing section 347.104(b). As amended, the language in existing section 347.104(b) that limits the activities of certain types of investments in foreign organizations to those authorized by the section, is restructured, reworded slightly, and placed in section 347.105(a). Under section 347.105(b) the same financial activities will be authorized that are presently authorized under section 347.104(b) of the existing rule.

The proposed rule also revises the activities list contained in the existing rule. As the FDIC noted in the preamble to the 1998 Final Rule, the activities contained in existing section 347.104(b) were modeled after the FRB's corresponding provision in Regulation K, but the list of authorized activities was reordered. In addition, the FDIC considered certain activities listed in the FRB's corresponding section of Regulation K to be authorized under Regulation Y and incorporated by the cross-reference to Regulation Y activities contained in section 347.104(b)(10) of the existing rule. Therefore, those activities were not separately listed in existing section 347.104(b). Time has shown this approach to have made the interplay between the FDIC and FRB lists of permissible activities difficult in certain circumstances to understand and apply.

The FDIC recognizes that insured state nonmember banks or their subsidiaries may want to engage in activities outside the United States that are not listed by the FDIC as permissible activities but that have been approved for member banks or their subsidiaries under Regulation K. Including those

items in the FDIC list of permissible activities facilitates banks doing so. In addition, as discussed in more detail below, the banks or their subsidiaries may want to engage in activities outside the United States, as principal, that have not been authorized for member banks (and thus national banks) in Regulation K. To do so, banks must comply with section 24 of the FDI Act and the requirements of part 362, as well as part 347.

Considering these issues, the FDIC is proposing to revise the order of the activities listed in section 347.105(b) to more closely track the order of the activities listed as permissible in 12 CFR 211.10, the corresponding provision in Regulation K. The activities listed in the proposal also include activities that the FDIC did not specifically list as being authorized in the 1998 Final Rule because they were considered to overlap with activities authorized by Regulation Y.<sup>1</sup> Including them makes the comparison easier between activities authorized under section 347.105(b) and those authorized for member banks and their subsidiaries.<sup>2</sup>

Paragraphs (c) and (d) of section 347.105 are being added for clarification. Paragraph (c) is based on language contained in the preamble to the 1998 Final Rule but not included in the text of the existing rule. Paragraph (d) addresses an issue that was raised in the preamble to the 1998 Final Rule, but not addressed in the existing rule, concerning the applicability in certain instances of section 24 of the FDI Act and part 362 to issues arising under subpart A of part 347. Briefly stated, in relevant part, section 24(a) of the FDI Act and part 362 prohibit a state bank from engaging, as principal, in any type of activity that is not permissible for a national bank, unless the FDIC determines that the activity would not pose a significant risk of loss to the deposit insurance fund and the bank meets its minimum capital requirements. Likewise, section 24(d) of the FDI Act and part 362 prohibit a subsidiary of a state bank from engaging, as principal, in any type of activity that

<sup>1</sup> The omitted activities were: financing; acting as a fiduciary; providing investment, financial or economic advisory services; leasing real or personal property or acting as agent, broker or advisor in connection with such transactions if the lease serves as the functional equivalent of an extension of credit to the lessee; acting as a futures commission merchant; and acting as principal or agent in swap transactions.

<sup>2</sup> The six activities being added to the list of approved activities are being added, subject to the attendant restrictions contained in section 225.28(b) of Regulation Y, because those activities are considered to be subject to the Regulation Y restrictions by the cross-reference to that authority in existing section 347.104(b)(10).

is not permissible for a subsidiary of a national bank, unless the FDIC first determines that it would not pose a significant risk of loss to the deposit insurance fund and the bank meets its minimum capital requirements. Thus, when a state nonmember bank wants to engage in financial activities, as principal, that are not specifically authorized by part 347, the question becomes whether authorization to engage in those types of activities must be obtained under part 347, part 362, or both parts. The FDIC is proposing to add paragraph (d) which would generally address when authorization to engage in activities through a subsidiary other than those specified in paragraph (b) may be authorized by specific consent under part 347 and when authorization for those activities must be obtained under part 362 as well as subpart A of part 347.<sup>3</sup>

#### 6. *Going Concerns (Revised § 347.106)*

Section 347.106 of the proposal is derived from the “going concern” provision contained in existing section 347.104(c). The text has been made a separate section and reworded slightly for ease of reference.

<sup>3</sup> Proposed paragraph (d) is, of necessity, a rule of general applicability. For example, as the FDIC noted in the preamble to the 1998 Final Rule, an activity authorized under Regulation K concerning a foreign investment entity’s ability to underwrite life, annuity, pension fund-related, and other types of insurance where the associated risks have been previously determined to be actuarially predictable (see, 12 CFR 211.10(a)(17)) was not included in existing section 347.104. Although Regulation K included these activities on its list of permissible activities abroad, the regulation required specific consent before those activities could be conducted by a subsidiary of an insured U.S. bank. Since no general authorization had been given under Regulation K for this activity to be conducted directly or indirectly by a subsidiary of a member bank, there was an issue under section 24 of the FDI Act. Section 24(b) and 24(d)(2) of the FDI Act do not permit the FDIC to give approval for a state bank or its subsidiary to engage in insurance underwriting if such underwriting is not permissible for a national bank or its subsidiary (unless that activity is expressly excepted by other subsections of section 24 covering limited types of insurance underwriting). Therefore, the FDIC observed when adopting the 1998 Final Rule, that it was foreclosed at that time from granting general regulatory authorization for banks to indirectly underwrite life, pension-fund related and other types of insurance abroad. Insurance underwriting represents an example of specific types of activities that are listed in 12 CFR 211.10 that could not be authorized under either part 347 or part 362.

In proposing paragraph (d) the FDIC desires to lend a degree of clarity to this area but also wants to provide banks with more notice that approval to engage in certain foreign activities may require compliance with requirements beyond those contained in part 347. In these situations, for the FDIC to process such applications in a timely manner, the applicants will need to provide sufficiently detailed and relevant information regarding proposed foreign activities for the FDIC to properly evaluate the issues raised by the application.

As under the existing rule, a bank subsidiary (as defined in proposed section 347.102(t)) in a foreign country will be limited to conducting activities authorized under proposed section 347.105(b), unless the bank acquires its subsidiary as a going concern. In this case, under proposed section 347.106, no more than 5 percent of the foreign subsidiary’s assets or revenues may be attributable to activities that are not on the list of authorized activities. In addition, any foreign organization which is controlled (as defined in proposed section 347.102(b)) by a bank and its affiliates (as defined in proposed section 347.102(a)), regardless of the percent of voting stock owned by the bank, is limited to conducting financial activities authorized under proposed section 347.105(b), subject to the same 5 percent exception for going concerns.

#### 7. *Joint Ventures (Revised § 347.107)*

Section 347.107(a) of the proposal is derived from the “joint venture” provision contained in existing section 347.104(d). The text has been made a separate section and reworded slightly for ease of reference. As is the case under the existing rule, if a bank and its affiliates hold 20 to 50 percent of the voting equity securities of a foreign organization and do not control the organization, no more than 10 percent of the foreign organization’s assets or revenues may be attributable to activities that are not on the section 347.105(b) list of authorized activities.

#### 8. *Portfolio Investments (Revised § 347.108)*

Section 347.108(a) of the proposal is derived from the “portfolio investment” provision contained in existing section 347.104(e). The text has been made a separate section and reworded slightly for ease of reference. As is the case under the existing rule, if a bank and its affiliates’ holdings are less than 20 percent of the voting equity securities of a foreign organization and the bank and its affiliates do not control the organization, no more than 10 percent of the foreign organization’s assets or revenues may be attributable to activities that are not on the section 347.105(b) list of authorized activities. In addition, the bank is prohibited from making any loans or extensions of credit to the organization that are not on the same terms as those prevailing at the time for comparable transactions with nonaffiliated organizations.

#### 9. *Limitations on Indirect Investments in Nonfinancial Foreign Organizations (Revised § 347.109)*

Section 347.109 of the proposal is derived from existing section 347.104(g). The text of the paragraph is retained but is reworded for clarification, and the references to other sections of subpart A are revised to conform to the new section numbers contained in the proposal. The paragraph is also being made a separate section for ease of reference.

Like paragraph (g) of the existing rule, this section authorizes a bank to make indirect portfolio investments in nonfinancial foreign organizations through a foreign subsidiary or an Edge corporation subsidiary, to an amount equal to 15 percent of the bank’s Tier 1 capital, without regard to whether the activities of the foreign organization are authorized under section 347.105(b). In addition, the following requirements must be met:

- The aggregate holdings of a particular foreign organization’s equity interests by the bank and its affiliates must be less than 20 percent of the foreign organization’s voting interests and 40 percent of its total voting and nonvoting equity interests;
- The bank and its affiliates are not permitted to control the foreign organization; and
- Any loan or extension of credit to the foreign organization must be on substantially the same terms as those prevailing at the time for comparable transactions with nonaffiliated organizations.

#### 10. *Affiliate Holdings (Revised § 347.110)*

Section 347.110 of the proposal is derived from existing section 347.104(h). The text of the paragraph is retained, and cross-references to subpart A are added for ease of reference due to other proposed revisions to the rules in subpart A. The reference to section 337.4 in the existing rule is also changed to reflect the removal and replacement of section 337.4 with section 362.8 or, for financial subsidiaries, section 362.18. See, 66 FR 1018 (January 5, 2001). The paragraph also is made a separate section for ease of reference.

#### 11. *Underwriting and Dealing Limits Applicable to Foreign Organizations Held by Insured State Nonmember Banks (Revised § 347.111)*

Section 347.111 of the proposal is derived from existing section 347.105. Cross-references are being added, for ease of reference, to other rules in

subpart A that affect this rule because of other revisions being made in this proposal. Appropriate revisions to section citations in Regulation K are also being made.

Under the proposed rule, as with existing section 347.105, a foreign investment entity of a bank is permitted to underwrite, distribute, and deal equity securities outside the United States, subject to the three main limitations described generally below:

- Underwriting commitments for a single issuer may not exceed an amount equal to the lesser of \$60 million or 25 percent of the bank's Tier 1 capital. This underwriting commitment limit may be exceeded, however, to the extent the commitment is covered by binding commitments from sub-underwriters or purchasers.

- Distribution and dealing shares of a single entity may not exceed an amount equal to the lesser of \$30 million or 5 percent of the bank's Tier 1 capital. This limit is subject to two exceptions. First, to facilitate underwritings, any equity securities acquired pursuant to an underwriting commitment extending up to 90 days after the payment date of the underwriting are not included in the limit. Second, up to 75 percent of the position in an equity security may be reduced by netting long and short positions in the identical equity security, or by offsetting cash positions against derivative instruments referenced to the same security.

- The sum of underwriting commitments, distribution and dealing shares, and any portfolio investments in nonfinancial organizations under proposed section 347.109 may not exceed an amount equal to 25 percent of the bank's Tier 1 capital.

**12. Restrictions on Activities Applicable to Foreign Organizations That Act as Futures Commission Merchants (Revised § 347.112)**

Section 347.112 of the proposal is derived from existing section 347.106. As proposed, the title to the section is revised, and the text of the existing rule is reorganized and retained. Cross-references are added, for ease of reference, to subpart A that affect this rule because of other revisions made in this proposal.

As with existing section 347.106, the proposed rule imposes an additional restriction beyond those imposed by section 225.28(b) of Regulation Y on acting as a futures commission merchant. Under section 347.112, a foreign investment entity may not, without the FDIC's prior approval, have potential liability to a mutual exchange or clearing association of which the

foreign investment entity is a member that exceeds 2 percent of the bank's Tier 1 capital.

**13. Restrictions Applicable to Activities by a Foreign Organization in the United States. (Revised § 347.113)**

Section 347.113 of the proposal is derived from existing section 347.107. The title to the section is revised, and the text of the existing rule is reorganized and retained.

As with the existing rule, the proposed rule prohibits a state nonmember bank from investing in any foreign organization that engages in the general business of buying or selling goods, wares, merchandise, or commodities in the U.S. It also prohibits investments totaling over 5 percent of equity interests in any foreign organization if the organization engages in any business activities in the U.S. that are not incidental to its international or foreign business. The rule also provides that a foreign organization will not be considered to be engaged in business or activities in the U.S. unless it maintains an office in the U.S. other than a representative office. Beyond these thresholds, foreign organizations are authorized to conduct activities that are permissible in the U.S. for an Edge corporation, or such other business activities as are approved by the FDIC.

**14. Extensions of Credit to Foreign Organizations Held by Insured State Nonmember Banks; Shares of Foreign Organizations Held in Connection With Debts Previously Contracted (Revised § 347.114)**

Section 347.114 of the proposal is derived from existing section 347.109. The text of the existing rule is reorganized and retained with only minor revisions.

**15. Activities Permissible for a Foreign Branch of an Insured State Nonmember Bank (Revised § 347.115)**

Proposed section 347.115 is largely derived from existing section 347.103(a). Although most of the existing text is not being changed substantively, a few revisions are made to incorporate changes made by the FRB in section 211.4 of Regulation K. For example, the reference to "development bank" in existing section 347.103(a)(2)(i) has been changed to "government sponsored development bank" in section 347.115(c)(1)(i). The authorization for an insured state nonmember bank to underwrite, distribute and deal, invest in or trade specified foreign government obligations that are rated as investment

grade by at least two established international rating agencies under existing section 347.103(a)(3)(ii) is also being changed. As amended, section 347.115(b)(2) would require only that these obligations be rated as "investment grade." As mentioned earlier, because the FDIC is proposing to adopt the same definition of "investment grade" that the FRB adopted in its recent revisions to Regulation K, an obligation would qualify as "investment grade" under the proposed rule if it received a rating in one of the four highest investment categories by two or more NRSROs (nationally recognized statistical rating organization, as designated by the Securities and Exchange Commission). If it had only been rated by one NRSRO and received the appropriate rating, it could be considered "investment grade" with only that one rating.

In addition, as with section 347.105 of this proposal, in the preamble to the 1998 Final Rule, the FDIC determined that certain activities the FRB had specifically listed as being authorized in the corresponding section of Regulation K for foreign branches of national banks were within the general banking powers of a national bank. Therefore, it was considered unnecessary to separately enumerate them for foreign branches of insured state nonmember banks in existing section 347.103(a). Because the same issues that were previously discussed in connection with the revisions to section 347.105 of the proposal would be applicable to this section regarding the applicability of section 24 of the FDI Act and part 362, the FDIC is including the activities that were previously omitted from the text of the FDIC's existing rule but which are included in the corresponding provision of Regulation K.<sup>4</sup> The activities

<sup>4</sup> The omitted activities relevant to this discussion are: engaging in repurchase agreements that are the functional equivalent of extensions of credit and paying branch employees a greater rate of interest on their deposits than the rate paid to other depositors on similar deposits. A third activity, concerning extending credit to an officer of the branch in the foreign country in which the branch is located to finance the officer's living quarters, is not included in the list of activities authorized by the FDIC's existing rule. Considering that this activity was not among the list of permissible activities for foreign branches of member banks in the recent revisions to Regulation K and that the FDIC previously concluded that the activity was within the general banking powers of a foreign branch, the inclusion of this additional activity in the list of activities that are permissible under proposed section 347.115 does not appear to be necessary. It also does not appear to advance the goal of making the comparison of activities authorized under Regulation K and those authorized by the FDIC's corresponding provision easier. Therefore, this particular activity is not being included in the list of permissible activities contained in the proposed rule.

authorized under the proposed rule also are reorganized to correspond more closely to those activities authorized in 12 CFR 211.4 for foreign branches of member banks. Finally, the paragraph addressing "other activities" is revised to indicate that the FDIC may authorize foreign branches of state nonmember banks to engage in activities that are not specifically listed in the proposed rule, and a new paragraph (h) is being added to clarify when other activities may be approved under this subpart or, alternatively, when they also must be authorized under section 24 of the FDI Act and part 362.<sup>5</sup>

**16. Recordkeeping and Supervision of Foreign Activities of Insured State Nonmember Banks Under This Subpart (Revised § 347.116)**

Section 347.116 of the proposal is derived from existing section 347.110. The language in section 347.110(b)(2) of the existing rule is eliminated in the proposed rule because it addresses application processing and the requirement for specific consent in jurisdictions that limit access to financial information. Those issues are addressed in section 347.119 of the proposal.

**17. General Consent (Revised § 347.117)**

Section 347.117 of the proposal consolidates the general consent requirements related to foreign branches that are presently contained in section 347.103(b) with the general consent requirements for investments in foreign organizations that are presently contained in section 347.108(a) into a single rule.

Under proposed section 347.117(a), as in existing section 347.103(b), general consent is provided for an eligible insured state nonmember bank to establish branches within a foreign country in which it has a branch or a foreign bank subsidiary and for relocation of existing foreign branches within a foreign country. As part of the EGRPRA process, it was suggested that U.S. banks that are well-managed, well-capitalized, maintain at least a satisfactory CRA rating, and have experience operating overseas, such as through one or two branches, should be allowed to branch overseas using procedures available to them for domestic branching. After considering this comment, the FDIC is concerned that such broad authority may allow branching into foreign countries without adequate familiarity with the banking

system and regulatory requirements that may exist in the host country. Nonetheless, the proposal introduces some additional flexibility in the branching area, by allowing insured state nonmember banks to branch into a foreign country under general consent in circumstances covered by (a)(1)(ii) or (iii) of the proposed rule. This change will allow an eligible state nonmember bank to establish additional branches in a country in which the bank's holding company operates a foreign bank subsidiary, or in which an affiliated bank or Edge or Agreement corporation operates one or more foreign branches or foreign bank subsidiaries. This will allow for after-the-fact notification to the FDIC in those circumstances, rather than requiring prior approval under expedited processing, as is presently required under section 347.103(c)(1).

Under proposed section 347.117(b), general consent for investments in foreign organizations is provided in the same circumstances covered by existing section 347.108(a). In addition, the proposal would grant general consent to invest in a foreign organization, under proposed section 347.117(b)(2), when at least one insured state nonmember bank operates a foreign branch in the relevant foreign country where the organization will be located because of the FDIC's familiarity with the banking laws and practices of that country. This amendment was suggested in a comment on the 1998 Final Rule, but the FDIC declined to adopt it because of concerns that banks could operate "nameplate" branches in foreign countries and, because they would lack a physical presence in those countries, more extensive analysis and coordination with the host country supervisors may be needed before the FDIC authorized free-standing foreign organizations. Upon further consideration of this issue, however, the FDIC believes most nameplate branches would be operated in jurisdictions where authority to invest in foreign organizations by general consent would be inapplicable under section 347.119(a) of the proposal. Therefore, if that issue arises, specific consent would be required to authorize such an investment, and the previously stated concern could be addressed at that time.

**18. Expedited Processing (Revised § 347.118)**

Section 347.118 of the proposal consolidates the expedited processing provisions for foreign branches in existing section 347.103(c)(2) with the expedited processing provisions for investments in foreign organizations in

existing section 347.108(b) into a single rule for ease of reference.

**19. Specific Consent (Revised § 347.119)**

Section 347.119 of the proposal consolidates the specific consent requirements for foreign branches in existing section 347.103(d)–(e) with the specific consent requirements for investments in foreign organizations in existing section 347.108(c)–(d) into a single rule for ease of reference and because the existing provisions are largely duplicative.

**20. Computation of Investment Amounts (Revised § 347.120)**

Section 347.120 of the proposal is derived from existing section 347.108(e). It is placed in a separate section in the proposal to indicate its applicability to the general consent, expedited processing, and specific consent sections for foreign investments because those subjects are addressed by separate sections of the proposal.

**21. Requirements for Insured State Nonmember Bank to Close a Foreign Branch. (Revised § 347.121)**

Section 347.121 of the proposal is derived from 347.103(f) and is placed in a separate section for ease of reference and because the approval provisions of that section are separated from the authorized activities section for foreign branches in the proposal.

**22. Limitations Applicable to the Authority Provided in This Subpart (New § 347.122)**

The FDIC is proposing to add a new section 347.122. This section recognizes that the FDIC may, under section 18(d)(2) and 18(l) of the FDI Act, condition the authority granted under this subpart A as it considers appropriate. The section also provides for termination of activities or divestiture of investments permitted under the subpart, after giving the bank notice and a reasonable opportunity to be heard, if a bank is unable or fails to comply with the requirements of the subpart or any conditions imposed by the FDIC regarding transactions under the subpart.

**IV. Section-by-Section Analysis of Proposed Revisions to Part 347, Subpart B**

**1. Authority, Purpose and Scope (Revised § 347.201)**

The FDIC is proposing to revise existing section 347.201 to reflect the authority and coverage of subpart B, as amended. In addition, the scope of the subpart is revised to reflect the grouping of the sections therein based primarily

<sup>5</sup> As with proposed section 347.105(d), this paragraph is considered a rule of general applicability to provide guidance and notice to banks with an interest in this area.

upon whether they apply to both insured state and federal branches or only to state branches. The section also recognizes that section 347.204 applies to foreign banks seeking deposit insurance coverage for their state or federal depository institution subsidiaries.

## 2. Definitions (Revised § 347.202)

The definitions contained in existing section 347.202 are revised by amending an existing paragraph, moving an existing paragraph, and adding three new paragraphs. In the proposal, the definition of “domestic retail deposit activity” contained in paragraph (e) is being amended to add “federal” branches because the prohibition contained in section 347.206 of the proposal, concerning taking domestic retail deposits through U.S. bank subsidiaries or certain grandfathered branches, is applicable equally to state or federal branches of foreign banks. The addition of “federal” branches to section 347.202(e) is not intended, however, to create a discrepancy regarding the application of section 347.216 of the proposal, which also uses the term “domestic retail deposit activity,” because section 347.216, by its own terms, applies specifically to state branches. The corresponding rule for federal branches is 12 CFR 28.16. Paragraph (m) of the proposal revises the definition of “initial deposit” that is contained in paragraph (l) of the existing rule to eliminate the need for the separate definition of “first deposit” that is included at the end of the paragraph in the existing rule. In addition, paragraphs (j) and (s) are added to the section and are consistent with the definitions for the same terms that are utilized in subpart A.

## 3. Deposit Insurance Required for All Branches of Foreign Banks Engaged in Domestic Retail Deposit Activity in the Same State (Revised § 347.203)

Existing section 347.203 is retained in the proposal, but the text is revised to clarify the requirements of the section. The title to the section also is revised to make it more descriptive of the contents of the section.

## 4. Commitment To Be Examined and Provide Information (Revised § 347.204)

Section 347.204 of the proposal substantially revises existing section 347.208 to update the rule and enhance the FDIC’s supervisory authority. The existing rule was initially issued in 1979 to implement section 10(b) of the FDI Act (12 U.S.C. 1820(b)) with regard to U.S. branches of foreign banks. Section 10(b) requires a foreign bank, in

connection with obtaining deposit insurance for a branch or depository institution subsidiary, to submit a binding written commitment to the FDIC to permit any examination of the affairs of any affiliate of the branch or depository institution subsidiary to the extent necessary to determine: (1) The relationship between the depository institution and the affiliate and (2) the effect of such relationship on such depository institution.

Like the existing rule, the proposed rule addresses a foreign bank seeking deposit insurance for a U.S. branch. However, the proposed rule, if adopted, will apply whenever a foreign bank seeks deposit insurance for a banking subsidiary.

Accordingly, the rule, as revised, will require a foreign bank applying for deposit insurance for a U.S. branch or depository institution subsidiary to provide the FDIC with a written commitment (including a consent to U.S. court jurisdiction and designation of agent for service of process, acceptable to the FDIC) to:

1. Permit examination, for the reasons specified in section 10(b)(4), of the foreign bank and affiliates located outside the U.S.;<sup>6</sup>
2. Provide information, for the reasons specified in section 10(b)(4), regarding the foreign bank and affiliates located outside the U.S.; and
3. Allow examination and provide information, for the reasons specified in section 10(b)(4), regarding the offices and affiliates of the foreign bank that are located in the U.S.

The proposed rule also will allow the foreign examination provision to be waived in instances where the FRB has already made a comprehensive consolidated supervision determination for the foreign bank at issue.

In addition, under the proposed rule, if an equivalent commitment has been made by a foreign bank to another Federal banking agency that provides the FDIC with the same rights and privileges that the FDIC would have if it obtained such commitment on its own behalf, the FDIC may waive all or part of the commitment requirements imposed by this section in lieu of

<sup>6</sup> Unlike the existing section, which requires the foreign bank to provide information regarding the affairs of the foreign bank and its affiliates outside the U.S. and examination of the affairs of any office, agency, branch or affiliate of the foreign bank located in the United States, the proposed section will require the foreign bank to permit examination of itself and its affiliates for the purposes specified in the statute, without regard to their location. This requirement is based on the relevant underlying statutory provisions in the FDI Act. *See*, sections 3(w)(6) and 10(b)(4) of the FDI Act (12 U.S.C. 1813(w)(6), 1820(b)(4)).

requiring its own separate commitment from the foreign bank. If such waiver is granted, however, the foreign bank will be required to provide the FDIC with the commitments required by the section before the foreign bank terminates any commitments provided to any other Federal banking agency which provide a basis for such waiver.

The FDIC recognizes that there may be situations when a foreign bank has not been determined to be subject to comprehensive consolidated supervision; has not provided a commitment to any other Federal banking agency that the FDIC finds acceptable; and cannot or will not provide the written commitment to permit examination required under section 347.204(a)(1). In this circumstance, it is envisioned that under section 347.204(a)(3) the deposit insurance application for the U.S. branch or depository institution will not be processed because the application will not be considered substantially complete without the required commitment. It is also recognized, however, that the foreign bank may be willing to provide the required commitment, but obstacles to the FDIC’s ability to utilize the commitment may be posed by the laws or regulatory regime governing the foreign bank. In this situation, it is envisioned that the foreign bank would be responsible for addressing and resolving these issues in consultation with the appropriate FDIC staff. To the extent the issues cannot be resolved acceptably, but the foreign bank provides the required commitment, the rule provides for consideration of these issues, in section 347.204(b)(3), in determining whether the deposit insurance application of the foreign bank’s U.S. branch or depository institution should be granted or denied.

## 5. Records Maintenance (Revised § 347.205)

Section 347.205 of the proposal addresses record maintenance requirements for insured U.S. branches of foreign banks. The new section reorders and combines the paragraphs of existing section 347.209, which addresses the same issues.

## 6. Conduct of Domestic Retail Deposit Activity by U.S. Branch of a Foreign Bank (Revised § 347.206)

Section 347.206 of the proposal implements section 6(d) of the IBA (12 U.S.C. 3104(d)). Paragraphs (a)–(c) are derived from existing section 347.204(a)–(c) but have been reworded slightly for clarity. Paragraph (a) requires any foreign bank intending to conduct domestic retail deposit



activities requiring deposit insurance in any state after December 19, 1991, to establish one or more insured U.S. bank subsidiaries to conduct those deposit activities. Paragraph (b) provides an exception to this general rule, based on section 6(d)(3) of the IBA, for any FDIC-insured bank organized under the laws of any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands. This allows insured banks organized under the laws of the specified jurisdictions to conduct any domestic retail deposit activities in the United States through an insured branch, rather than through insured bank subsidiaries. Paragraph (c) is based upon the "grandfathered branch" exception in the statute, which allows any insured branches that were accepting or maintaining domestic retail deposit accounts on December 19, 1991, to continue to operate as insured branches conducting domestic retail deposit activities. Existing section 347.204(d), which authorizes foreign banks to operate noninsured state branches meeting the criteria specified therein, is made into proposed section 347.213 because it only applies to state branches.

Paragraph (d) of the proposed rule is added to address an issue raised with the FDIC through the EGRPRA process. In that process, an industry trade association requested that the FDIC clarify that the grandfathered status of an insured branch survives the sale or transfer of the branch from one foreign bank to another foreign bank. The trade association suggested that the transferability of the grandfathered status of a U.S. branch of a foreign bank to a new owner was supported by applying the "plain meaning" rule of statutory construction to section 6(d) of the IBA. The trade association's view was that because the availability of the grandfather exception appears to be conditioned upon a single exception (that the branch was insured as of December 19, 1991), it was inconsistent with the plain meaning of the statute to read into it an additional condition (that the branch was not transferred after December 19, 1991). The trade association also observed that other grandfather provisions enacted by Congress in the same statute expressly state that those grandfather rights terminate upon a change in control. Therefore, the absence of such a provision in the grandfathered branch exception, it was argued, indicates that Congress did not intend that an insured branch would lose its grandfathered status upon its sale or transfer. Additionally, the trade association

observed that permitting transfers of grandfathered branches would provide an option for other foreign banks that would like to establish FDIC-insured branches but are constrained from doing so by the subsidiary requirement in section 6(d). Finally, it was observed that depositors would not lose the protections of deposit insurance solely as a result of the sale or transfer of an insured branch.

The FDIC has considered these observations and others presented by the trade association. It appreciates the arguments supporting a broad reading of the grandfathered branch exception but the exception has been construed more narrowly in the past<sup>7</sup> and, at this time, the FDIC is not persuaded that a change in position is justified. The broad reading of the grandfather exception requested would be at odds with the distinct preference Congress stated in section 6(d) of the IBA of making foreign banks desiring to engage in new domestic retail deposit activities requiring deposit insurance after December 19, 1991 do so through insured banking subsidiaries. Since it is a well recognized rule of statutory construction that in ascertaining the plain meaning of a statute it is appropriate to look to the particular statutory language at issue, as well as the language and design of the statute as a whole, this construction of paragraph (d) appears to be more appropriate than the alternative construction of the statute advanced by the trade association.<sup>8</sup> It also does not appear to be appropriate, as a matter of policy, to adopt an interpretation that will make the grandfathered status the object of bargain among foreign banks and allow entry to and departure from the insured domestic retail deposit market based on the highest bid for the privilege.

<sup>7</sup> See e.g., FDIC Advisory Opinion 92-12, March 25, 1992, reprinted in [1991-1992 Transfer Binder] Fed. Banking L. Rep. (CCH) P81,482 (The grandfathered branch exception was intended only to permit existing insured branches of foreign banks to continue to operate after the enactment of FDICIA without the requirement of being "rolled up" into a newly chartered subsidiary bank. The provision does not permit a foreign bank with a grandfathered branch to subsequently open additional insured branches which accept and maintain deposit accounts having balances of less than \$100,000.)

<sup>8</sup> Reading the statute as a whole, the proposed broad reading of the exception also is contrary to the direction provided in section 6(a) of the IBA regarding implementation of the section because purchasers of grandfathered branches could avoid forming and capitalizing banking subsidiaries to engage in domestic retail deposit activity in the U.S., rather than following the same process required for domestic banks of establishing and capitalizing a distinct corporate entity and applying for deposit insurance.

The FDIC recognizes that the existing rule does not address this issue. It also recognizes, however, that there may be other situations, such as certain merger and acquisition transactions, that are not designed or motivated by the desire to obtain access to the domestic retail deposit market and avoid compliance with the subsidiary requirement in section 6(d) of the IBA, where the grandfathered status of an insured branch should remain intact. Therefore, the FDIC is addressing the issue in paragraph (d) of the proposed rule and inviting public comments.

#### *7. Disclosure of Supervisory Information to Foreign Supervisors (New § 347.207)*

Section 347.207 is proposed to facilitate cross-border supervision of insured branches of foreign banks and insured bank subsidiaries by providing for the sharing of supervisory information between the FDIC and foreign bank regulatory or supervisory authorities. It is patterned after section 15 of the IBA (12 U.S.C. 3109) and 12 CFR 211.27. The section also addresses the confidentiality of such information, based upon the FDIC's interpretation of section 8(v) of the FDI Act (12 U.S.C. 1818(v)), by providing that the disclosure or transfer of such information to a foreign bank regulatory or supervisory authority does not waive any privilege applicable to such information.

#### *8. Assessment Base Deductions by Insured Branch (Revised § 347.208)*

Section 347.208 is revised text of existing section 347.212.

#### *9. Pledge of Assets (Revised § 347.209)*

The asset pledge requirement contained in existing section 347.210 is revised in proposed section 347.209 by imposing a risk-based asset pledge requirement. The existing 5 percent asset pledge requirement has been in place since 1984. As part of the EGRPRA process, an industry trade association observed that the existing asset pledge requirement fails to take into account the specific circumstances of each insured branch and advances in risk-based bank supervision that have taken place in recent years. The trade association also observed that the asset pledge requirements do not apply to U.S. banks and asserted that the existing asset pledge requirement adversely affects the earnings and liquidity of insured U.S. branches by making them maintain and pledge specific amounts of generally lower yielding assets.

The FDIC recognizes that the asset pledge requirement may have competitive implications for foreign



banks with regard to their insured branches operating in the United States, but does not believe elimination of the asset pledge requirement is appropriate. Unlike their domestic counterparts, the activities, assets, and personnel of foreign banks operating insured branches in the United States are, in large part, outside the jurisdiction of the United States. While the parent bank may, in theory, add financial support to the branch structure, the FDIC is concerned that indications of financial weakness that become apparent in an insured branch may also be indicative of financial weakness at the parent level that may result in less financial support from the parent of the insured branch in times of financial stress. This could result either from voluntary decisions of the parent or regulatory restrictions imposed by the home country regulator, and may precipitate significant deposit outflows from the insured branch. Therefore, to mitigate this risk and the potential risks associated with providing deposit insurance for deposits in an insured branch, the FDIC continues to believe that an asset pledge requirement in some amount is appropriate.

The FDIC recognizes that it may be appropriate, however, to revise the asset pledge requirement to make it more risk-focused and to take into consideration characteristics that may be unique to each insured branch. As revised in the proposal, the asset pledge requirement will be determined in a manner similar to the approach the FDIC has taken with its risk-based deposit insurance assessment system. Under the proposal, any newly insured branch will be subject to a 5 percent asset pledge requirement until the end of the first three years of its operation as an insured branch. This differs from the one-year requirement in paragraph (b)(2) of the existing rule, but the FDIC believes that the standard in the existing rule is outdated and that it is prudent to impose more stringent requirements on newly insured institutions during the first three years of their operations to compensate for potential risks associated with the commencement of insured operations. Three years will also allow a newly insured branch to experience at least one examination cycle, which will result in supervisory information that the FDIC can utilize to adjust the asset pledge requirement for the branch. After the first three years of operation as an insured branch, the rule envisions that the asset pledge amount will be adjusted by taking into consideration the percentage of assets maintained by the insured branch,

pursuant to section 347.210, and the supervisory information relative to the branch at issue. It is envisioned that the most recent ROCA rating<sup>9</sup> for the insured branch will be a focal point of such supervisory information but, as with the risk-based premium system, the FDIC could also consider other supervisory information that it believes is appropriate to fully evaluate the potential risk posed by the insured branch in determining the supervisory subgroup assignment for the branch. The appropriate percentage of assets required to be pledged will then be determined based on the supervisory risk subgroup assigned and the asset maintenance level applicable to the branch. The proposal will generally permit the asset pledge to be lowered to not less than 2 percent of third-party liabilities for insured branches that are perceived to pose a lower potential risk and up to 8 percent of liabilities for insured branches that are perceived to pose a higher potential risk to the deposit insurance fund. In addition the FDIC's ability to require a higher percentage of pledged assets in appropriate circumstances will remain unchanged in the proposed rule. Although the proposed rule could potentially increase the asset pledge requirement above the existing 5 percent requirement for some insured branches, most of the existing insured branches traditionally exceed the minimum asset maintenance requirements imposed by existing section 347.210, and most of their supervisory ratings are also favorable. Therefore, if the rule is adopted as proposed, the FDIC's asset pledge requirement for most of the existing insured branches will be reduced from its current level. Moreover, the risk-based proposal is designed to increase the degree of protection provided to the FDIC deposit insurance fund as the risk profile for the insured branch deteriorates.

The proposed rule also makes amendments and deletions to the existing rule. Paragraph (d)(1) of the existing rule specifies that certificates of deposit may be pledged as collateral. The additional term "negotiable" is being added to the corresponding portion of the proposed rule to clarify this requirement because negotiable certificates of deposit are marketable, while other types of certificates of deposit may exist that could provide less protection to the FDIC in the event

they had to be liquidated quickly. Thus, certificates of deposit that are not negotiable will not qualify as acceptable collateral for purposes of the asset pledge requirement. In addition, the FDIC is proposing to amend paragraph (d)(2) to add U.S. Treasury bills as an additional form of eligible collateral. Finally, paragraph (f) of the existing rule is removed in the proposed rule because it is essentially a delegation of authority. Over the past several years the FDIC has removed its delegations of authority for supervisory matters from its rules and now generally addresses these matters by internal delegations of authority from the FDIC's Board of Directors.

#### *10. Asset Maintenance (Revised § 347.210)*

Proposed section 347.210 contains revisions to existing section 347.211 that are largely related to the asset maintenance calculation for insured branches. As revised, the proposed rule will require insured branches to maintain eligible assets on a daily basis in an amount not less than 106 percent of the insured branch's daily third-party liabilities, rather than based upon the preceding quarter's average book value of the insured branch's liabilities. Although the existing calculation method has been in place for a number of years, there have been some instances where insured branches were winding down their operations and needed to be allowed to calculate their asset maintenance on a daily basis to maintain compliance with the asset maintenance requirement. The FDIC believes that requiring that the calculation be made based on the daily third-party liabilities of the branch will avoid these and other potential anomalies that can be caused by using liability information from the preceding quarter.

In addition, although requiring the asset maintenance ratio to be calculated based on the daily assets and liabilities of a branch may require some adjustment of existing processes, the FDIC does not believe it will require much additional preparation by insured branches. The FDIC also believes this formula's application will be more straightforward and the asset maintenance calculation will be easier for the insured branches to determine. Nevertheless, the FDIC is soliciting public comment regarding this proposal.

Other revisions to paragraph (a) of the existing rule include elimination of the alternative calculation for newly-established branches and the reference to the "Board of Directors." Paragraph (d) of the existing rule is revised to require that the asset maintenance

<sup>9</sup> The ROCA system represents the rating of risk management, operational controls, compliance, and asset quality of a Foreign Banking Organization's U.S. operations.

calculations for the branch be retained until the next Federal examination.

**11. Examination of Branches of Foreign Banks (Revised § 347.211)**

Section 347.211 of the proposal contains the text of existing section 347.214.

**12. FDIC Approval to Conduct Activities That Are Not Permissible for Federal Branches (Revised § 347.212)**

Section 347.212 revises the text of existing section 347.213. In addition, a specific citation is added to the appropriate section in subpart J that applies to this section for ease of reference.

**13. Establishment and Operation of Noninsured Branch (Revised § 347.213)**

Section 347.213 of the proposal contains the revised text of existing section 347.204(d). As in the existing rule, the section authorizes foreign banks to operate noninsured branches if any such branch:

- Is conducting only a wholesale deposit taking operation;
- Is accepting only deposits that are permissible for an Edge Act corporation pursuant to proposed rule 347.214; or
- Meets the requirements for an exemption from the definition of “domestic retail deposit activity” pursuant to proposed rule 347.215.

The paragraph is separated from the other paragraphs in existing section 347.204 because paragraphs (a)–(c) are equally applicable to state and federal branches that are insured. As indicated earlier, paragraphs (a)–(c) of section 347.204 are contained in proposed section 347.206. Because this paragraph addresses only noninsured state branches, it is placed in its own section and grouped with other sections of the subpart that relate only to noninsured state branches.

**14. Branch Established Under Section 5 of the International Banking Act (Revised § 347.214)**

Section 347.214 of the proposal contains the revised text of existing section 347.205.

**15. Exemption From Deposit Insurance Requirement (Revised § 347.215)**

Section 347.215 of the proposal contains revised text of existing section 347.206. Paragraph (c)(2) has been revised to delete the exception for non-time deposits because the timeframe stated in the existing rule has expired. Other revisions to the text are not substantive, and a specific citation has been added to the section of subpart J of part 303 that applies to this section.

**16. Depositor Notification (Revised § 347.216)**

Section 347.216 of the proposal contains the text of existing section 347.207.

**V. Request for Comments on Deposit Insurance for Wholesale U.S. Branches of Foreign Banks**

As part of the EGRPA process, an industry trade association indicated that some foreign banks with U.S. wholesale branches (*i.e.*, branches that are not engaged in domestic retail deposit activities that require FDIC insurance) may be interested in obtaining deposit insurance and recommended that the FDIC should no longer discourage international banks from applying for “optional” deposit insurance.

To place this observation in context, prior to 1998, the FDIC had a rule authorizing “optional insurance” for U.S. branches of foreign banks. In 1998 the optional insurance rule was eliminated as part of the revision and consolidation of various parts of the FDIC rules into part 347. At that time, to summarize the discussion contained in the 1998 Final Rule, the FDIC observed that the subsidiary requirement imposed by section 6(d) of the IBA appeared to reach only domestic retail deposit taking activities of foreign banks. Because section 5(b) of the FDI Act (12 U.S.C. 1815(b)), addressing deposit insurance applications for U.S. branches of foreign banks, had not been repealed, it arguably may be possible for a U.S. branch of a foreign bank that does not engage in domestic retail deposit activity to seek deposit insurance from the FDIC. The FDIC further observed, however, that as a practical matter, it did not foresee many circumstances in which it could be appropriate for the FDIC’s Board of Directors to approve such an application, but that the elimination of the optional insurance rule would not affect a foreign bank’s ability to argue that it may make such an application under section 5(b) of the FDI Act.

Finally, the FDIC observed that the FDIC Board of Directors would have to determine whether to actually accept and approve such an application, based on its review of the facts and circumstances involved, in addition to the pertinent legal and policy considerations.

Among the arguments advanced to support an expanded view of the availability of deposit insurance for wholesale branches was that:

- A “plain meaning” construction of section 5(b) permits “any branch”—

including a wholesale branch—to become insured;

- Congress expressly prohibited foreign banks from obtaining FDIC insurance for branches “engaged in domestic retail deposit activities” but did not remove the statutory provisions authorizing foreign banks to apply for deposit insurance for wholesale branches;

- The FDIC’s approach ignores significant changes in regulatory practices and structures that have occurred since 1991 with regard to foreign banks; broader acceptance of the principle of “investor choice;” and rejection of a broader policy to force foreign banks to operate in the U.S. only through subsidiaries;

- Wholesale depositors often seek the benefits of FDIC insurance—even though the full amount of their deposits may not be insured. The ability to offer these benefits through a U.S. branch would provide a benefit to customers and increase a foreign bank’s funding options;

- Optional FDIC insurance is likely to be attractive primarily to foreign banks already operating FDIC-insured branches and subsidiaries in the U.S. and to a relatively small number of other foreign banks, especially those seeking to serve particular ethnic markets. As a result, a more liberal policy likely would have a minimal effect on the deposit insurance fund; and

- Permitting wholesale branches to obtain deposit insurance is consistent with the business model that has been followed by some major U.S. banks that have retained insurance while focusing on wholesale markets.

While the FDIC recognizes the arguments advanced by the trade association and appreciates that some foreign banks may be reluctant to file deposit insurance applications, the FDIC believes that it is difficult to reconcile the concept that Congress imposed the subsidiary requirement with regard to domestic retail deposit activity requiring deposit insurance for the protection of the FDIC with the implicit assumption that Congress did not believe such protection was needed with regard to wholesale branches of foreign banks.<sup>10</sup> In this respect, it

<sup>10</sup> For example, Senator Donald W. Riegle, who introduced the amendment adding the subsidiary requirement to section 6 of the IBA, explained the rationale for the amendment, at 137 Cong. Rec. S18617, S18623 (daily ed. November 27, 1991), as follows:

“Another section of the conference report foreign bank subtitle ensures that foreign banks, that wish to accept or maintain insured deposit accounts, do

should be noted that even though the deposits of such branches may be characterized as "wholesale," the branch deposits would be insured to the same extent as any other deposits maintained in an insured depository institution and that it is possible to obtain more than \$100,000 in deposit insurance coverage if the customer accounts are structured correctly.

In addition, many of the reasons offered in the past against insuring retail branches apply equally to wholesale branches. For example, various legal issues arise in the branch context that are more difficult to predict and address than those involving banking subsidiaries and, thus, potentially pose additional risks to the deposit insurance fund. As the FDIC noted even prior to the 1991 statutory amendments regarding insured domestic retail deposit activities by U.S. branches of foreign banks, directors of a foreign bank are not usually subject to the U.S. jurisdiction, and domestic branch personnel essential to explaining certain transactions could be transferred beyond the reach of U.S. authorities. Essential records could also be difficult to reach if they are kept at the head office or at branches in other countries. The FDIC also has recognized in the past that a U.S. branch could be subjected to requirements under foreign laws or to political or economic decisions of a foreign government which conflict with domestic bank regulatory policies. In addition, a recognized advantage of operating through a branch, as opposed to subsidiary structure, is the ability to engage in transactions with the home office without significant operational restrictions that might otherwise be applied to transactions with affiliates of insured U.S. banks. Finally, insolvency of a foreign bank with a multinational branch structure may pose complicated and time-consuming issues regarding the resolution of the branch that could more likely be avoided in situations involving banking subsidiaries.

so only in subsidiary banks incorporated in the United States. Although the taking of retail deposits in insured branches is not presently a widespread practice by foreign banks, I pushed for enactment of this provision as a safeguard against any future expansion of this practice in order to better safeguard the bank insurance fund from losses by branches of banks whose full operations we do not oversee or control. In the past the FDIC has expressed concerns that in the event of insolvency of a foreign bank, assets could easily be shifted from the U.S. branch and out of U.S. jurisdiction while deposits could be shifted to the U.S. branch. Such practices, of course, would create new risks for the bank insurance fund and taxpayers who stand behind it. During his September 24, 1991 confirmation hearing William Taylor, Chairman of the FDIC, endorsed this provision."

The proposed expansive approach to deposit insurance for wholesale U.S. branches also appears to raise additional concerns, including the following:

- The size and legal structure of cross-border wholesale branch operations, as opposed to similar operations through domestic banking subsidiaries, may pose additional risks to the deposit insurance fund. Regarding the size of the operations, for example, the trade association indicated that foreign banks hold over \$3 trillion in assets through their U.S. operations, including over \$1 trillion in assets in nearly 300 U.S. branches and agencies of foreign banks. Although it has been represented that only a small number of these branches and U.S. subsidiaries would be interested in obtaining deposit insurance, the potential for a larger number of branches seeking the benefit of FDIC deposit insurance could present a considerable and imprudent expansion of the deposit insurance safety net. Regarding the legal structure of cross-border wholesale branches, while the branch structure theoretically can provide more economic support from the foreign bank than a subsidiary structure, the livelihood of a branch is highly dependent on the continued economic viability of the foreign bank. Unlike a subsidiary bank, which is separately capitalized and can continue to operate independently of the foreign bank, if the foreign bank becomes insolvent, in all likelihood the bank's branches will also be rendered insolvent or require intervention.

- The potential benefit to the wholesale branch depositors of the liberalized approach may not be as significant for the branch's depositors as the potential benefits that may accrue to the foreign bank, through potentially reduced funding costs as a result of obtaining FDIC deposit insurance. This raises concerns, from a policy perspective, about whether this should be considered a proper use of the deposit insurance funds and about the FDIC's reputation as a deposit insurer. It also raises concerns about the potential for foreign citizens being confused or misled by foreign bank marketing of FDIC deposit insurance coverage for wholesale branch deposits.

- It may also be difficult to ensure that deposit insurance for wholesale branches would not be utilized as a mechanism to circumvent or weaken the subsidiary requirement imposed by section 6(d) of the IBA. For example, an argument might be made that an initial deposit for a nominal amount in excess of \$100,000 qualifies as a "wholesale deposit," even though the balance in the account immediately falls below

\$100,000 and, even with subsequent deposits, the balance in the account never again exceeds the \$100,000.

Based on the foregoing discussion, the FDIC continues to believe the statements made in the 1998 Final Rule are appropriate with regard to deposit insurance for wholesale U.S. branches of foreign banks, but welcomes public comments on this issue. The FDIC expects to take appropriate action after consideration of the comments received.

## VI. Regulatory Flexibility Act Analysis

The FDIC is required by section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a)) to 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 purposes of the analysis or certification, financial institutions with assets of \$150 million or less are considered "small entities." For the reasons stated below, the FDIC certifies, pursuant to 5 U.S.C. 605(b), that the amendments and revisions contained in this proposed rule will not, if promulgated through a final rule, have a significant economic impact on a substantial number of small entities.

The proposed rule makes primarily technical revisions to update, reorganize, and clarify the existing rules in subpart A of part 347 and subpart J of part 303. Subpart J of part 303 contains the procedural rules that implement part 347. The rules in subpart A of part 347 address issues related to the international activities and investments of insured state nonmember banks. In general, they implement the FDIC's statutory authority under section 18(d)(2) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1828(d)(2)), regarding branches of insured state nonmember banks in foreign countries, and section 18(l) of the FDI Act, regarding insured state nonmember bank investments in foreign entities. As of December 31, 2003, there were approximately 4,833 state nonmember banks, but fewer than 50 of those institutions had foreign investments or foreign branches. Available information indicates that state nonmember banks with foreign investments or foreign branches are not small entities. For example, none of the state nonmember banks with foreign branches is a small entity, and none of the foreign investment applications processed in 2003 involved small entities.

The proposed rule also makes revisions to update, reorganize, and clarify the existing rules in subpart B of

347, as well as additional revisions and amendments that address supervisory issues. The rules in subpart B of part 347 principally address issues related to insured and noninsured U.S. branches of foreign banks under section 6 of the International Banking Act (IBA) (12 U.S.C. 3104). As of December 31, 2003, there were approximately 237 U.S. branches of foreign banks, including 12 insured branches. Of this number, there were approximately 71 U.S. branches of foreign banks that appear to qualify as small entities, including 6 insured branches. The 12 insured branches are presently subject to the FDIC's asset pledge and asset maintenance requirements, which are revised in sections 347.209 and 347.210 of the proposed rule. Although the revision of the asset pledge requirement to implement a risk-based approach may result in an increase in the amount of assets pledged for insured branches with low supervisory ratings, the FDIC does not believe this will affect the insured branches that qualify as small entities. The FDIC also is simplifying the asset maintenance calculation in section 347.210. The formula will require that third-party liabilities be calculated on a daily basis, rather than based upon the preceding quarter's average book value of the insured branch's liabilities (as required in existing section 347.211). This revision will apply to all insured branches, including the small entities, but the FDIC believes this calculation method will make compliance with the regulatory requirement less difficult for the affected institutions. Although the change may require some modifications to existing computer programs, these should not be significant because there should already be a daily reconciliation of assets and liabilities occurring in the branches. The requirement that the asset maintenance calculations be retained until the next Federal examination also should not result in a significant economic impact on the small entities because retention of each branch's liability calculations until the next Federal examination is already required under the existing asset maintenance rule. Other revisions being proposed to the rules affecting noninsured branches are not substantive and, thus, should have no significant economic impact on noninsured branches that qualify as small entities.

Finally, no amendments are being proposed to the rules in subpart C. The public merely is being given an opportunity, in this rulemaking proceeding, to comment on the accounting and reporting rules related

to international lending that are contained in subpart C of part 347.

## VII. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The FDIC has two OMB-approved information collections (3064-0125, Foreign Branching and Investment by Insured State Nonmember Banks, and 3064-0114, Foreign Banks) which cover the paperwork burden associated with Subparts A and B of Part 347. The information collections in 3064-0125 consist of applications related to establishing and closing a foreign branch; applications related to acquiring stock of a foreign organization; and records and reports which a nonmember bank must maintain once it has established a foreign branch or foreign organization. The information collections in 3064-0114 consist of applications to operate as a noninsured state-licensed branch of a foreign bank; applications from an insured state-licensed branch of a foreign bank to conduct activities which are not permissible for a federally-licensed branch; internal recordkeeping by insured branches of foreign banks; and reporting requirements related to an insured branch's pledge of assets to the FDIC. This proposal to amend Part 347, Subparts A and B will not result in any change in the current estimated paperwork burden associated with the regulation, therefore no submission has been made to OMB under the Paperwork Reduction Act.

## VIII. Plain Language Requirement

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the federal banking agencies to use "plain language" in all proposed and final rules published after January 1, 2000. We invite your comments on how to make this proposal easier to understand. For example:

- (1) Have we organized the material to suit your needs?
- (2) Are the requirements in the rule clearly stated?
- (3) Does the rule contain technical language or jargon that isn't clear?
- (4) What else could we do to make the rule easier to understand?

## IX. Assessment of Impact of Federal Regulation on Families

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

### 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 325

Banks, banking, Reporting and recordkeeping requirements.

#### 12 CFR Part 327

Bank deposit insurance, Banks, banking, Savings associations.

#### 12 CFR Part 347

Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Credit, Foreign banking, Investments, Reporting and recordkeeping requirements, United States investments abroad.

For the reasons set forth above and under the authority of 12 U.S.C. 1819(a)(Tenth), the FDIC Board of Directors hereby proposes to amend 12 CFR chapter III as follows:

## PART 303—FILING PROCEDURES

### Subpart J—International Banking

1. 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.

2. Revise § 303.182 to read as follows:

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

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

not been located on a site on the World Heritage List or on the foreign country's equivalent of the National Register of Historic Places (National Register), in accordance with section 402 of the National Historic Preservation Act Amendments of 1980 (NHPA Amendments Act) (16 U.S.C. 470a-2). The FDIC will provide written acknowledgment of receipt of the notice.

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

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

(i) The exact location of the proposed foreign branch, including the street address, and a statement whether the foreign branch will be located on a site on the World Heritage List or on the foreign country's equivalent of the National Register, in accordance with section 402 of the NHPA Amendments Act;

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

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

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

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

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

the FDIC, or on such earlier date authorized by the FDIC in writing.

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

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

3. In § 303.183, revise the title and paragraphs (a), (b)(1), and (c)(1) to read as follows:

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

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

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

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

4. In § 303.184, revise paragraph (b)(1) to read as follows:

**§ 303.184 Moving an insured branch of a foreign bank.**

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

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

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

5. In § 303.186, revise the title and paragraphs (a)(1) to read as follows:

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

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

6. In § 303.187, revise the title and paragraphs (a)(1), (a)(2)(iv) and (b)(1) to read as follows:

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

(a) *Filing procedures*—(1) *Where to file*. An application by an insured state branch seeking approval to conduct activities not permissible for a federal branch, as required by § 347.212(a) of this chapter, shall be submitted in writing to the appropriate FDIC office.

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

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

**PART 325—CAPITAL MAINTENANCE**

7. The authority citation for part 325 continues to read as follows:

**Authority:** 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819 (Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note).

8. In § 325.103, revise paragraph (c) to read as follows:

**§ 325.103 Capital measures and capital category definitions.**

\* \* \* \* \*

(c) *Capital categories for insured branches of foreign banks.* For purposes of the provisions of section 38 and this subpart, an insured branch of a foreign bank shall be deemed to be:

(1) Well capitalized if the insured branch:

(i) Maintains the pledge of assets required under § 347.209 of this chapter; and

(ii) Maintains the eligible assets prescribed under § 347.210 of this chapter at 108 percent of the insured branch's daily third-party liabilities; and

(iii) Has not received written notification from:

(A) The OCC to increase its capital equivalency deposit pursuant to 12 CFR 28.15(b), or to comply with asset maintenance requirements pursuant to 12 CFR 28.20; or

(B) The FDIC to pledge additional assets pursuant to § 347.209 of this chapter or to maintain a higher ratio of eligible assets pursuant to § 347.210 of this chapter.

(2) Adequately capitalized if the insured branch:

(i) Maintains the pledge of assets required under § 347.209 of this chapter; and

(ii) Maintains the eligible assets prescribed under § 347.210 of this chapter at 106 percent of the insured branch's daily third-party liabilities; and

(iii) Does not meet the definition of a well capitalized insured branch.

(3) Undercapitalized if the insured branch:

(i) Fails to maintain the pledge of assets required under § 347.209 of this chapter; or

(ii) Fails to maintain the eligible assets prescribed under § 347.210 of this chapter at 106 percent or more of the insured branch's daily third-party liabilities.

(4) Significantly undercapitalized if it fails to maintain the eligible assets

prescribed under § 347.210 of this chapter at 104 percent of the insured branch's daily third-party liabilities.

(5) Critically undercapitalized if it fails to maintain the eligible assets prescribed under § 347.210 of this chapter at 102 percent or more of the insured branch's daily third-party liabilities.

\* \* \* \* \*

**PART 327—ASSESSMENTS**

9. The authority citation for part 327 continues to read as follows:

**Authority:** 12 U.S.C. 1441, 1441b, 1813, 1815, 1817–1819; Pub. L. 104–208, 110 Stat. 3009–479 (12 U.S.C. 1821).

10. In § 327.4, revise paragraphs

(a)(1)(i)(B)(1), (a)(1)(i)(B)(2),

(a)(1)(ii)(B)(1), and (a)(1)(ii)(B)(2) to read as follows:

**§ 327.4 Annual assessment rate.**

(a) \* \* \*

(1) \* \* \*

(i) \* \* \*

(B) \* \* \*

(1) Maintains the pledge of assets required under § 347.209 of this chapter; and

(2) Maintains the eligible assets prescribed under § 347.210 of this chapter at 108 percent of the insured branch's daily third-party liabilities.

(ii) \* \* \*

(B) \* \* \*

(1) Maintains the pledge of assets required under § 347.209 of this chapter; and

(2) Maintains the eligible assets prescribed under § 347.210 of this chapter at 106 percent of the insured branch's daily third-party liabilities; and

\* \* \* \* \*

11. Revise part 347 to read as follows:

**PART 347—INTERNATIONAL BANKING****Subpart A—Foreign Banking and Investment by Insured State Nonmember Banks**

Sec.

347.101 Authority, purpose, and scope.

347.102 Definitions.

347.103 Effect of state law on actions taken under this subpart.

347.104 Insured state nonmember bank investment in foreign organizations.

347.105 Permissible financial activities outside the United States.

347.106 Going concerns.

347.107 Joint ventures.

347.108 Portfolio investments.

347.109 Limitations on indirect investments in nonfinancial organizations.

347.110 Affiliate holdings.

347.111 Underwriting and dealing limits applicable to foreign organizations held by insured state nonmember banks.

347.112 Restrictions applicable to foreign organizations that act as futures commission merchants.

347.113 Restrictions applicable to activities by a foreign organization in the United States.

347.114 Extensions of credit to foreign organizations held by insured state nonmember banks; shares of foreign organizations held in connection with debts previously contracted.

347.115 Permissible activities for a foreign branch of an insured state nonmember bank.

347.116 Recordkeeping and supervision of the foreign activities of insured state nonmember banks.

347.117 General consent.

347.118 Expedited processing.

347.119 Specific consent.

347.120 Computation of investment amounts.

347.121 Requirements for insured state nonmember bank to close a foreign branch.

347.122 Limitations applicable to the authority provided in this subpart.

**Subpart B—Foreign Banks**

347.201 Authority, purpose, and scope.

347.202 Definitions.

347.203 Deposit insurance required for all branches of foreign banks engaged in domestic retail deposit activity in the same state.

347.204 Commitment to be examined and provide information.

347.205 Record maintenance.

347.206 Domestic retail deposit activity requiring deposit insurance by U.S. branch of a foreign bank.

347.207 Disclosure of supervisory information to foreign supervisors.

347.208 Assessment base deductions by insured branch.

347.209 Pledge of assets.

347.210 Asset maintenance.

347.211 Examination of branches of foreign banks.

347.212 FDIC approval to conduct activities that are not permissible for federal branches.

347.213 Establishment or operation of noninsured foreign branch.

347.214 Branch established under section 5 of the International Banking Act.

347.215 Exemptions from deposit insurance requirement.

347.216 Depositor notification.

**Subpart C—International Lending**

347.301 Purpose, authority, and scope.

347.302 Definitions.

347.303 Allocated transfer risk reserve.

347.304 Accounting for fees on international loans.

347.305 Reporting and disclosure of international assets.

**Authority:** 12 U.S.C. 1813, 1815, 1817, 1819, 1820, 1828, 3103, 3104, 3105, 3108, 3109; Title IX, Pub. L. 98–181, 97 Stat. 1153.

## Subpart A—Foreign Banking and Investment by Insured State Nonmember Banks

### § 347.101 Authority, purpose, and scope.

(a) This subpart is issued pursuant to section 18(d) and (l) of the Federal Deposit Insurance Act (12 U.S.C. 1828(d), 1828(l)).

(b) The rules in subpart A address the FDIC's requirements for insured state nonmember bank investments in foreign organizations, permissible foreign financial activities, loans or extensions of credit to or for the account of foreign organizations, and the FDIC's recordkeeping, supervision, and approval requirements. The rules also address the permissible activities for foreign branches of insured state nonmember banks, as well as the FDIC's requirements for establishing, operating, relocating and closing of branches in foreign countries.

### § 347.102 Definitions.

For the purposes of this subpart:

(a) An *affiliate* of an insured state nonmember bank means:

(1) Any entity of which the insured state nonmember bank is a direct or indirect subsidiary or which otherwise controls the insured state nonmember bank;

(2) Any organization which is a direct or indirect subsidiary of such entity or which is otherwise controlled by such entity; or

(3) Any other organization that is a direct or indirect subsidiary of the insured state nonmember bank or is otherwise controlled by the insured state nonmember bank.

(b) *Control* means the ability to control in any manner the election of a majority of an organization's directors or trustees; or the ability to exercise a controlling influence over the management and policies of an organization. An insured state nonmember bank is deemed to control an organization of which it is a general partner or its affiliate is a general partner.

(c) *Domestic* means United States.

(d) *Eligible* insured state nonmember bank means an eligible depository institution as defined in § 303.2(r) of this chapter.

(e) *Equity interest* means any ownership interest or rights in an organization, whether through an equity security, contribution to capital, general or limited partnership interest, debt or warrants convertible into ownership interests or rights, loans providing profit participation, binding commitments to acquire any such items, or some other form of business transaction.

(f) *Equity security* means voting or nonvoting shares, stock, investment contracts, or other interests representing ownership or participation in a company or similar enterprise, as well as any instrument convertible to any such interest at the option of the holder without payment of substantial additional consideration.

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

(h) *Foreign bank* means an organization that is organized under the laws of a foreign country, a territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands that:

(1) Is recognized as a bank by the bank supervisory or monetary authority of the country of its organization or the country in which its principal banking operations are located;

(2) Receives deposits to a substantial extent in the regular course of its business; and

(3) Has the power to accept demand deposits.

(i) *Foreign banking organization* means a foreign organization that is formed for the sole purpose of either holding shares of a foreign bank or performing nominee, fiduciary, or other banking services incidental to the activities of a foreign branch or foreign bank affiliate of the insured state nonmember bank.

(j) *Foreign branch* means an office or place of business located outside the United States, its territories, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Virgin Islands, at which banking operations are conducted, but does not include a representative office.

(k) *Foreign country* means any country other than the United States and includes any territory, dependency, or possession of any such country or of the United States.

(l) *Foreign organization* means an organization that is organized under the laws of a foreign country.

(m) *Insured state nonmember bank or bank* means a state bank, as defined by section 3(a)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(a)(2)), whose deposits are insured by the FDIC and that is not a member of the Federal Reserve System.

(n) *Indirectly* means investments held or activities conducted by a subsidiary of an organization.

(o) *Investment grade* means a security that is rated in one of the four highest categories by:

(1) Two or more NRSROs; or

(2) One NRSRO if the security is rated by only one NRSRO.

(p) *Loan or extension of credit* means all direct and indirect advances of funds to a person, government, or entity made on the basis of any obligation of that person, government, or entity to repay funds.

(q) *Organization or entity* means a corporation, partnership, association, bank, or other similar entity.

(r) *NRSRO* means a nationally recognized statistical rating organization as designated by the Securities and Exchange Commission.

(s) *Representative office* means an office that engages solely in representative functions such as soliciting new business for its home office or acting as liaison between the home office and local customers, but which has no authority to make business or contracting decisions other than those relating to the personnel and premises of the representative office.

(t) *Subsidiary* means any organization more than 50 percent of the voting equity interests of which are directly or indirectly held by another organization.

(u) *Tier 1 capital* means Tier 1 capital as defined in section 325.2 of this chapter.

(v) *Well capitalized* means well capitalized as defined in section 325.103 of this chapter.

### § 347.103 Effect of state law on actions taken under this subpart.

A bank may acquire and retain equity interests in a foreign organization or establish a foreign branch, subject to the requirements of this subpart, if it is authorized to do so by the law of the state in which the bank is chartered.

### § 347.104 Insured state nonmember bank investments in foreign organizations.

(a) *Investment in foreign banks or foreign banking organizations.* A bank may directly or indirectly acquire and retain equity interests in a foreign bank or foreign banking organization.

(b) *Investment in other foreign organizations.* A bank may only:

(1) acquire and retain equity interests in foreign organizations, other than foreign banks or foreign banking organizations in amounts of 50 percent or less of the foreign organization's voting equity interests, if the equity interest is held through a domestic or foreign subsidiary; and

(2) the bank meets its minimum capital requirements.

### § 347.105 Permissible financial activities outside the United States.

(a) *Limitation on authorized activities.* A bank may not directly or indirectly acquire or hold equity interests in a foreign organization that will result in the bank and its affiliates:



(1) Holding more than 50 percent, in the aggregate, of the voting equity interest in such foreign organization; or

(2) Controlling such foreign organization, unless the activities of a foreign organization are limited to those authorized under paragraph (b) of this section.

(b) *Authorized activities.* The following financial activities are authorized outside the United States:

(1) Commercial and other banking activities.

(2) Financing, including commercial financing, consumer financing, mortgage banking, and factoring, subject to compliance with any attendant restrictions contained in 12 CFR 225.28(b).

(3) Leasing real or personal property, acting as agent, broker or advisor in leasing real or personal property, subject to compliance with any attendant restrictions in 12 CFR 225.28(b).

(4) Acting as a fiduciary, subject to compliance with any attendant restrictions in 12 CFR 225.28(b).

(5) Underwriting credit life, credit accident and credit health insurance.

(6) Performing services for other direct or indirect operations of a domestic banking organization, including representative functions, sale of long-term debt, name saving, liquidating assets acquired to prevent loss on a debt previously contracted in good faith, and other activities that are permissible for a bank holding company under sections 4(a)(2)(A) and 4(c)(1)(C) of the Bank Holding Company Act.

(7) Holding the premises of a branch of an Edge corporation or insured state nonmember bank or the premises of a direct or indirect subsidiary, or holding or leasing the residence of an officer or employee of a branch or a subsidiary.

(8) Providing investment, financial, or economic services, subject to compliance with any attendant restrictions in 12 CFR 225.28(b).

(9) General insurance agency and brokerage.

(10) Data processing.

(11) Organizing, sponsoring, and managing a mutual fund if the fund's shares are not sold or distributed in the United States or to U.S. residents and the fund does not exercise management control over the firms in which it invests.

(12) Performing management consulting services, provided that such services when rendered with respect to the domestic market must be restricted to the initial entry.

(13) Underwriting, distributing, and dealing in debt securities outside the United States.

(14) With the prior approval of the FDIC under § 347.120(d), underwriting,

distributing, and dealing in equity securities outside the United States.

(15) Operating a travel agency in connection with financial services offered outside the United States by the bank or others.

(16) Providing futures commission merchant services, subject to compliance with any attendant restrictions in 12 CFR 225.28(b).

(17) Engaging in activities that the FRB has determined in Regulation Y (12 CFR 225.28(b)) are closely related to banking under section 4(c)(8) of the Bank Holding Company Act.

(18) Engaging in other activities, with the prior approval of the FDIC.

(c) *Limitation on activities authorized under Regulation Y.* If a bank relies solely on the cross-reference to Regulation Y contained in paragraph (b)(17) of this section as authority to engage in an activity, compliance with any attendant restrictions on the activity that are contained in 12 CFR 225.28(b) is required.

(d) *Approval of other activities.* Activities that are not specifically authorized by this section, but that are authorized by 12 CFR 211.10 or FRB interpretations of activities authorized by that section, may be authorized by specific consent of the FDIC on an individual basis and upon such terms and conditions as the FDIC may consider appropriate. Activities that will be engaged in as principal (defined by reference to § 362.1(b) of this chapter), and that are not authorized by 12 CFR 211.10 or FRB interpretations of activities authorized under that section, must satisfy the requirements of part 362 of this chapter and be approved by the FDIC under this part as well as part 362 of this chapter.

#### § 347.106 Going concerns.

*Going concerns.* If a bank acquires an equity interest in a foreign organization that is a going concern, no more than 5 percent of either the consolidated assets or revenues of the foreign organization may be attributable to activities that are not permissible under § 347.105(b).

#### § 347.107 Joint ventures.

(a) *Joint ventures.* If a bank, directly or indirectly, acquires or holds an equity interest in a foreign organization that is a joint venture, and the bank or its affiliates do not control the foreign organization, no more than 10 percent of either the consolidated assets or revenues of the foreign organization may be attributable to activities that are not permissible under § 347.105(b).

(b) *Joint venture defined.* For purposes of this section, the term "joint venture" means any organization in

which 20 percent or more but not in excess of 50 percent of the voting equity interests, in the aggregate, are directly or indirectly held by a bank or its affiliates.

#### § 347.108 Portfolio investments.

(a) *Portfolio investments.* If a bank, directly or indirectly, acquires or holds an equity interest in a foreign organization as a portfolio investment and the foreign organization is not controlled, directly or indirectly, by the bank or its affiliates:

(1) No more than 10 percent of either the consolidated assets or revenues of the foreign organization may be attributable to activities that are not permissible under § 347.105(b); and

(2) Any loans or extensions of credit made by the bank and its affiliates to the foreign organization must be on substantially the same terms, including interest rates and collateral, as those prevailing at the same time for comparable transactions between the bank or its affiliates and nonaffiliated organizations.

(b) *Portfolio investment defined.* For purposes of this section, the term "portfolio investment" means an investment in an organization in which less than 20 percent of the voting equity interests, in the aggregate, are directly or indirectly held by a bank or its affiliates.

#### § 347.109 Limitations on indirect investments in nonfinancial foreign organizations.

(a) A bank may, through a subsidiary authorized by § 347.105 or 347.106, or an Edge corporation if also authorized by the FRB, acquire and hold equity interests in foreign organizations that are not foreign banks or foreign banking organizations and that engage generally in activities beyond those listed in § 347.105(b), subject to the following:

(1) The amount of the investment does not exceed 15 percent of the bank's Tier 1 capital;

(2) The aggregate holding of voting equity interests of one foreign organization by the bank and its affiliates must be less than:

(i) 20 percent of the foreign organization's voting equity interests; and

(ii) 40 percent of the foreign organization's voting and nonvoting equity interests;

(3) The bank or its affiliates must not otherwise control the foreign organization; and

(4) Loans or extensions of credit made by the bank and its affiliates to the foreign organization must be on substantially the same terms, including interest rates and collateral, as those prevailing at the same time for

comparable transactions between the bank or its affiliates and nonaffiliated organizations.

(b) [Reserved]

#### **§ 347.110 Affiliate holdings.**

References in §§ 347.107, 347.108, and 347.109 to equity interests of foreign organizations held by an affiliate of a bank include equity interests held in connection with an underwriting or for distribution or dealing by an affiliate permitted to do so by § 362.8 or 362.18 of this chapter or section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)).

#### **§ 347.111 Underwriting and dealing limits applicable to foreign organizations held by insured state nonmember banks.**

A bank that holds an equity interest in one or more foreign organizations which underwrite, deal, or distribute equity securities outside the United States as authorized by section 347.105(b)(14) is subject to the following limitations:

(a) *Underwriting commitment limits.*

(1) The aggregate underwriting commitments by the foreign organizations for the equity securities of a single entity, taken together with underwriting commitments by any affiliate of the bank under the authority of 12 CFR 211.10(b), may not exceed the lesser of \$60 million or 25 percent of the bank's Tier 1 capital, except as otherwise provided in this paragraph.

(2) Underwriting commitments in excess of this limit must be either:

(i) Covered by binding commitments from subunderwriters or purchasers; or  
(ii) Deducted from the capital of the bank, with at least 50 percent of the deduction being taken from Tier 1 capital, with the bank remaining well capitalized after this deduction.

(b) *Distribution and dealing limits.* The equity securities of any single entity held for distribution or dealing by the foreign organizations, taken together with equity securities held for distribution or dealing by any affiliate of the bank under the authority of 12 CFR 211.10:

(1) May not exceed the lesser of \$30 million or 5 percent of the bank's Tier 1 capital, subject to the following:

(i) Any equity securities acquired pursuant to any underwriting commitment extending up to 90 days after the payment date for the underwriting may be excluded from this limit;

(ii) Any equity securities of the entity held under the authority of §§ 347.105 through 347.109 or 12 CFR 211.10 for purposes other than distribution or dealing must be included in this limit; and

(iii) Up to 75 percent of the position in an equity security may be reduced by netting long and short positions in the same security, or offsetting cash positions against derivative instruments referenced to the same security so long as the derivatives are part of a prudent hedging strategy; and

(2) Must be included in calculating the general consent limits under § 347.117(b)(3) if the bank relies on the general consent provisions as authority to acquire equity interests of the same foreign entity for investment or trading.

(c) *Additional distribution and dealing limits.* With the exception of equity securities acquired pursuant to any underwriting commitment extending up to 90 days after the payment date for the underwriting, equity securities of a single entity held for distribution or dealing by all affiliates of the bank (this includes shares held in connection with an underwriting or for distribution or dealing by an affiliate permitted to do so by § 362.8 or 362.18 of this chapter or section 4(c)(8) of the Bank Holding Company Act), combined with any equity interests held for investment or trading purposes by all affiliates of the bank, must conform to the limits of § 347.105 through 347.109.

(d) *Combined limits.* The aggregate of the following may not exceed 25 percent of the bank's Tier 1 capital:

(1) All equity interests of foreign organizations held for investment or trading under § 347.109 or by an affiliate of the bank under the corresponding paragraph of 12 CFR 211.10.

(2) All underwriting commitments under paragraph (a) of this section, taken together with all underwriting commitments by any affiliate of the bank under the authority of 12 CFR 211.10, after excluding the amount of any underwriting commitment:

(i) Covered by binding commitments from subunderwriters or purchasers under paragraph (a)(1) of this section or the comparable provision of 12 CFR 211.10; or

(ii) Already deducted from the bank's capital under paragraph (a)(2) of this section, or the appropriate affiliate's capital under the comparable provisions of 12 CFR 211.10; and

(3) All equity securities held for distribution or dealing under paragraph (b) of this section, taken together with all equity securities held for distribution or dealing by any affiliate of the bank under the authority of 12 CFR 211.10, after reducing by up to 75 percent the position in any equity security by netting and offset, as permitted by paragraph (b)(1)(iii) of this section or the comparable provision of 12 CFR 211.10.

#### **§ 347.112 Restrictions applicable to foreign organizations that act as futures commission merchants.**

(a) If a bank acquires or retains an equity interest in a foreign organization that acts as a futures commission merchant pursuant to § 347.105(b)(16), the foreign organization may not be a member of an exchange or clearing association that requires members to guarantee or otherwise contract to cover losses suffered by other members unless the:

(1) foreign organization's liability does not exceed two percent of the bank's Tier 1 capital, or

(2) bank has obtained the prior approval of the FDIC under § 347.120(d).

(b) [Reserved]

#### **§ 347.113 Restrictions applicable to activities by a foreign organization in the United States.**

(a) A bank, acting under the authority provided in this subpart, may not directly or indirectly hold:

(1) equity interests of any foreign organization that engages in the general business of buying or selling goods, wares, merchandise, or commodities in the United States; or

(2) more than 5 percent of the equity interests of any foreign organization that engages in activities in the United States unless any activities in which the foreign organization engages in the United States are incidental to its international or foreign business.

(b) For purposes of this section:

(1) A foreign organization is not engaged in any business or activities in the United States unless it maintains an office in the United States other than a representative office.

(2) The following activities are incidental to international or foreign business:

(i) Activities that are permissible for an Edge corporation in the United States under 12 CFR 211.6; or

(ii) Other activities approved by the FDIC.

#### **§ 347.114 Extensions of credit to foreign organizations held by insured state nonmember banks; shares of foreign organizations held in connection with debts previously contracted.**

(a) *Loans or extensions of credit.* A bank that directly or indirectly holds equity interests in a foreign organization pursuant to the authority of this subpart may make loans or extensions of credit to or for the accounts of the organization without regard to the provisions of section 18(j) of the FDI Act (12 U.S.C. 1828(j)).

(b) *Debts previously contracted.* Equity interests acquired to prevent a

loss upon a debt previously contracted in good faith are not subject to the limitations or procedures of this subpart; however, they must be disposed of promptly but in no event later than two years after their acquisition, unless the FDIC authorizes retention for a longer period.

**§ 347.115 Permissible activities for a foreign branch of an insured state nonmember bank.**

In addition to its general banking powers and if permitted by the law of the state in which the bank is chartered, a foreign branch of a bank may conduct the following activities to the extent that they are consistent with banking practices in a foreign country where the bank maintains a branch:

(a) *Guarantees.* Guarantee debts, or otherwise agree to make payments on the occurrence of readily ascertainable events including, without limitation, nonpayment of taxes, rentals, customs duties, or costs of transport and loss or nonconformance of shipping documents, if:

(1) The guarantee or agreement specifies a maximum monetary liability; and

(2) To the extent the guarantee or agreement is not subject to a separate amount limit under state or federal law, the amount of the guarantee or agreement is combined with loans and other obligations for purposes of applying any legal lending limits.

(b) *Government obligations.* Engage in the following types of transactions with respect to the obligations of foreign countries, so long as aggregate investments, securities held in connection with distribution and dealing, and underwriting commitments do not exceed ten percent of the bank's Tier 1 capital:

(1) Underwrite, distribute and deal, invest in, or trade obligations of:

(i) The national government of the country in which the branch is located or its political subdivisions; and

(ii) An agency or instrumentality of such national government if supported by the taxing authority, guarantee, or full faith and credit of the national government.

(2) Underwrite, distribute and deal, invest in or trade obligations<sup>11</sup> rated as investment grade of:

(i) The national government of any foreign country or its political subdivisions, to the extent permissible under the law of the issuing foreign country; and

(ii) An agency or instrumentality of the national government of any foreign country to the extent permissible under the law of the issuing foreign country, if supported by the taxing authority, guarantee, or full faith and credit of the national government.

(c) *Local investments.*

(1) Acquire and hold local investments in:

(i) Equity securities of the central bank, clearing houses, governmental entities, and government sponsored development banks of the country in which the branch is located;

(ii) Other debt securities eligible to meet local reserve or similar requirements; and

(iii) Shares of automated electronic payment networks, professional societies, schools, and similar entities necessary to the business of the branch.

(2) Aggregate local investments (other than those required by the law of the foreign country or permissible under section 5136 of the Revised Statutes (12 U.S.C. 24 (Seventh)) by all the bank's branches in a single foreign country must not exceed 1 percent of the total deposits in all the bank's branches in that country as reported in the preceding year-end Report of Income and Condition (Call Report).<sup>12</sup>

(d) *Insurance.* Act as an insurance agent or broker.

(e) *Employee benefits program.* Pay to an employee of a branch, as part of an employee benefits program, a greater rate of interest than that paid to other depositors of the branch.

(f) *Repurchase agreements.* Engage in repurchase agreements involving securities and commodities that are the functional equivalents of extensions of credit.

(g) *Other activities.* Engage in other activities, with the prior approval of the FDIC.

(h) *Approval of other activities.* Activities that are not specifically authorized by this section, but that are authorized by 12 CFR 211.4 or FRB interpretations of activities authorized by that section, may be authorized by specific consent of the FDIC on an individual basis and upon such terms and conditions as the FDIC may consider appropriate. Activities that will be engaged in as principal (defined by reference to § 362.1(b) of this chapter), and that are not authorized by 12 CFR 211.4 or FRB interpretations of activities authorized under that section, must satisfy the requirements of part

362 of this chapter and be approved by the FDIC under this part as well as part 362 of this chapter.

**§ 347.116 Recordkeeping and supervision of foreign activities of insured state nonmember banks.**

(a) *Records, controls and reports.* A bank with any foreign branch, any investment in a foreign organization of 20 percent or more of the organization's voting equity interests, or control of a foreign organization must maintain a system of records, controls and reports that, at minimum, provide for the following:

(1) *Risk assets.* To permit assessment of exposure to loss, information furnished or available to the main office should be sufficient to permit periodic and systematic appraisals of the quality of risk assets, including loans and other extensions of credit. Coverage should extend to a substantial proportion of the risk assets in the branch or foreign organization, and include the status of all large credit lines and of credits to customers also borrowing from other offices or affiliates of the bank. Appropriate information on risk assets may include:

(i) A recent financial statement of the borrower or obligee and current information on the borrower's or obligee's financial condition;

(ii) Terms, conditions, and collateral;

(iii) Data on any guarantors;

(iv) Payment history; and

(v) Status of corrective measures employed.

(2) *Liquidity.* To enable assessment of local management's ability to meet its obligations from available resources, reports should identify the general sources and character of the deposits, borrowing, and other funding sources employed in the branch or foreign organization with special reference to their terms and volatility. Information should be available on sources of liquidity—cash, balances with banks, marketable securities, and repayment flows—such as will reveal their accessibility in time and any risk elements involved.

(3) *Contingencies.* Data on the volume and nature of contingent items such as loan commitments and guarantees or their equivalents that permit analysis of potential risk exposure and liquidity requirements.

(4) *Controls.* Reports on the internal and external audits of the branch or foreign organization in sufficient detail to permit determination of conformance to auditing guidelines. Appropriate audit reports may include coverage of:

(i) Verification and identification of entries on financial statements;

<sup>11</sup> If the obligation is an equity interest, it must be held through a subsidiary of the foreign branch and the insured state nonmember bank must meet its minimum capital requirements.

<sup>12</sup> If a branch has recently been acquired by the bank and the branch was not previously required to file a Call Report, branch deposits as of the acquisition date must be used.

(ii) Income and expense accounts, including descriptions of significant chargeoffs and recoveries;  
 (iii) Operations and dual-control procedures and other internal controls;  
 (iv) Conformance to head office guidelines on loans, deposits, foreign exchange activities, accounting procedures in compliance with applicable accounting standards, and discretionary authority of local management;

(v) Compliance with local laws and regulations; and

(vi) Compliance with applicable U.S. laws and regulations.

(b) *Availability of information to examiners; reports.*

(1) Information about foreign branches or foreign organizations must be made available to the FDIC by the bank for examination and other supervisory purposes.

(2) The FDIC may from time to time require a bank to make and submit such reports and information as may be necessary to implement and enforce the provisions of this subpart, and the bank shall submit an annual report of condition for each foreign branch pursuant to instructions provided by the FDIC.

#### **§ 347.117 General consent.**

(a) *General consent to establishment or relocation of foreign branch.* General consent of the FDIC is granted, subject to the written notification requirement contained in section 303.182(a) and consistent with the requirements of this subpart, for an:

(1) Eligible bank to establish a foreign branch conducting activities authorized by section 347.115 of this section in any foreign country in which:

(i) The bank already operates one or more foreign branches or foreign bank subsidiaries;

(ii) The bank's holding company operates a foreign bank subsidiary; or  
 (iii) An affiliated bank or Edge or Agreement corporation operates one or more foreign branches or foreign bank subsidiaries.

(2) Insured state nonmember bank to relocate an existing foreign branch within a foreign country.

(b) *General consent to invest in a foreign organization.* General consent of the FDIC is granted, subject to the written notification requirement contained in section 303.183(a) (unless no notification is required because the investment is acquired for trading purposes) and consistent with the requirements of this subpart, for an eligible bank to make investments in foreign organizations, directly or indirectly, if:

(1) The bank operates at least one foreign bank subsidiary or foreign branch, an affiliated bank or Edge or Agreement corporation operates at least one foreign bank subsidiary or foreign branch, or the bank's holding company operates at least one foreign bank subsidiary;

(2) In any instance where the bank and its affiliates will hold 20 percent or more of the foreign organization's voting equity interests or control the foreign organization, at least one bank has a foreign bank subsidiary or foreign branch in the country where the foreign organization will be located;<sup>13</sup> and

(3) The investment is within one of the following limits:

(i) The investment is acquired at net asset value from an affiliate;

(ii) The investment is a reinvestment of cash dividends received from the same foreign organization during the preceding 12 months; or

(iii) The total investment, directly or indirectly, in a single foreign organization in any transaction or series of transactions during a twelve-month period does not exceed 2 percent of the bank's Tier 1 capital, and such investments in all foreign organizations in the aggregate do not exceed:

(A) 5 percent of the bank's Tier 1 capital during a 12-month period; and

(B) Up to an additional 5 percent of the bank's Tier 1 capital if the investments are acquired for trading purposes.

#### **§ 347.118 Expedited processing.**

(a) *Expedited processing of branch applications.* An eligible bank may establish a foreign branch conducting activities authorized by § 347.115 in an additional foreign country, after complying with the expedited processing requirements contained in § 303.182(b) and (c)(1), if any of the following are located in two or more foreign countries:

(1) Foreign branches or foreign bank subsidiaries of the eligible bank;

(2) Foreign branches or foreign bank subsidiaries of banks and Edge or Agreement corporations affiliated with the eligible bank; and

(3) Foreign bank subsidiaries of the eligible bank's holding company.

(b) *Expedited processing of applications for investment in foreign organizations.* An investment that does not qualify for general consent but is otherwise in conformity with the limits and requirements of this subpart may be made 45 days after an eligible bank files a substantially complete application

with the FDIC in compliance with the expedited processing requirements contained in § 303.183(b) and (c)(1), or within such earlier time as authorized by the FDIC.

#### **§ 347.119 Specific consent.**

General consent and expedited processing under this subpart do not apply in the following circumstances:

(a) *Limitation on access to supervisory information in foreign country.*

(1) Applicable law or practice in the foreign country where the foreign organization or foreign branch would be located would limit the FDIC's access to information for supervisory purposes; and

(i) A bank would hold 20 percent or more of the voting equity interests of a foreign organization or control such organization as a result of a foreign investment; or

(ii) A bank would be establishing a foreign branch.

(b) *World Heritage site.* A foreign branch of a bank would be located on a site on the World Heritage List or on the foreign country's equivalent of the National Register of Historic Places, in accordance with section 403 of the National Historic Preservation Act Amendments of 1980 (16 U.S.C. 470a-2).

(c) *Modification or suspension of general consent or expedited processing.* The FDIC at any time notifies the bank that the FDIC is modifying or suspending its general consent or expedited processing procedure.

(d) *Specific consent.* Direct or indirect investments in or activities of foreign organizations by banks, the establishment of foreign branches or issues regarding the types or amounts of activity that can be engaged in by foreign branches, which are not authorized under §§ 347.117 or 347.118 require prior review and specific consent of the FDIC.

#### **§ 347.120 Computation of investment amounts.**

In computing the amount that may be invested in any foreign organization under §§ 347.117 through 347.119, any investments held by an affiliate of a bank must be included.

#### **§ 347.121 Requirements for insured state nonmember bank to close a foreign branch.**

A bank must comply with the written notification requirement contained in § 303.182(d) when it closes a foreign branch.

#### **§ 347.122 Limitations applicable to the authority provided in this subpart.**

The FDIC may impose such conditions on authority granted in this

<sup>13</sup> A list of these countries can be obtained from the FDIC's Internet Web Site at <http://www.fdic.gov>.

subpart as it considers appropriate. If a bank is unable or fails to comply with the requirements of this subpart or any conditions imposed by the FDIC regarding transactions under this subpart, the FDIC may require termination of any activities or divestiture of investments permitted under this subpart after giving the bank notice and a reasonable opportunity to be heard on the matter.

## Subpart B—Foreign Banks

### § 347.201 Authority, purpose, and scope.

(a) This subpart is issued pursuant to sections 5(c) and 10(b)(4) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1815(c) and 1820(b)(4)) and sections 6, 7, and 15 of the International Banking Act of 1978 (IBA) (12 U.S.C. 3104, 3105, and 3109).

(b) This subpart implements the insured branch asset pledge and examination commitment requirement for foreign banks in the FDI Act. It also implements the deposit insurance, permissible activity, and cross-border cooperation provisions of the IBA regarding the FDIC. Sections 347.203–347.211 apply to state and federal branches whose deposits are insured. Sections 347.204 and 347.207 are applicable to depository institution subsidiaries of a foreign bank. Section 347.212 applies to insured state branches and §§ 347.213 through 347.216 apply to state branches whose deposits are not insured by the FDIC.

### § 347.202 Definitions.

For the purposes of this subpart:

(a) *Affiliate* means any entity that controls, is controlled by, or is under common control with another entity. An entity shall be deemed to “control” another entity if the entity directly or indirectly owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the other entity or controls in any manner the election of a majority of the directors or trustees of the other entity.

(b) *Branch* means any office or place of business of a foreign bank located in any state of the United States at which deposits are received. The term does not include any office or place of business deemed by the state licensing authority or the Comptroller of the Currency to be an agency.

(c) *Deposit* has the same meaning as that term in section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(l)).

(d) *Depository* means any insured state bank, national bank, or insured branch.

(e) *Domestic retail deposit activity* means the acceptance by a federal or

state branch of any initial deposit of less than \$100,000.

(f) *Federal branch* means a branch of a foreign bank established and operating under the provisions of section 4 of the International Banking Act of 1978 (12 U.S.C. 3102).

(g) *Foreign bank* means any company organized under the laws of a foreign country, any territory of the United States, Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, or the Virgin Islands, which engages in the business of banking. The term includes foreign commercial banks, foreign merchant banks and other foreign institutions that engage in banking activities usual in connection with the business of banking in the countries where such foreign institutions are organized and operating. Except as otherwise specifically provided by the Federal Deposit Insurance Corporation, banks organized under the laws of a foreign country, any territory of the United States, Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, or the Virgin Islands which are insured banks other than by reason of having an insured branch are not considered to be foreign banks for purposes of §§ 347.204, 347.205, 347.209, and 347.210.

(h) *Foreign business* means any entity including, but not limited to, a corporation, partnership, sole proprietorship, association, foundation or trust, which is organized under the laws of a foreign country or any United States entity which is owned or controlled by an entity which is organized under the laws of a foreign country or a foreign national.

(i) *Foreign country* means any country other than the United States and includes any colony, dependency or possession of any such country.

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

(k) *Home state* of a foreign bank means the state so determined by the election of the foreign bank, or in default of such election, by the Board of Governors of the Federal Reserve System.

(l) *Immediate family member of a natural person* means the spouse, father, mother, brother, sister, son or daughter of that natural person.

(m) *Initial deposit* means the first deposit transaction between a depositor and the branch where there is no existing deposit relationship. The initial deposit may be placed into different deposit accounts or into different kinds of deposit accounts, such as demand, savings or time. Deposit accounts that are held by a depositor in the same right and capacity may be added together for

the purposes of determining the dollar amount of the initial deposit.

(n) *Insured bank* means any bank, including a foreign bank with an insured branch, the deposits of which are insured in accordance with the provisions of the Federal Deposit Insurance Act.

(o) *Insured branch* means a branch of a foreign bank any deposits of which branch are insured in accordance with the provisions of the Federal Deposit Insurance Act.

(p) *Large United States business* means any entity including, but not limited to, a corporation, partnership, sole proprietorship, association, foundation or trust which is organized under the laws of the United States or any state thereof, and:

(1) Whose securities are registered on a national securities exchange or quoted on the National Association of Securities Dealers Automated Quotation System; or

(2) Has annual gross revenues in excess of \$1,000,000 for the fiscal year immediately preceding the initial deposit.

(q) *A majority owned subsidiary* means a company the voting stock of which is more than 50 percent owned or controlled by another company.

(r) *Noninsured branch* means a branch of a foreign bank deposits of which branch are not insured in accordance with the provisions of the Federal Deposit Insurance Act.

(s) *OCC* means the Office of the Comptroller of the Currency.

(t) *Person* means an individual, bank, corporation, partnership, trust, association, foundation, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity.

(u) *Significant risk to the deposit insurance fund* shall be understood to be present whenever there is a high probability that the Bank Insurance Fund administered by the FDIC may suffer a loss.

(v) *State* means any state of the United States or the District of Columbia.

(w) *State branch* means a branch of a foreign bank established and operating under the laws of any state.

(x) *Wholly owned subsidiary* means a company the voting stock of which is 100 percent owned or controlled by another company except for a nominal number of directors' shares.

### § 347.203 Deposit insurance required for all branches of foreign banks engaged in domestic retail deposit activity in the same state.

The FDIC will not insure deposits in any branch of a foreign bank unless the

foreign bank agrees that every branch established or operated by the foreign bank in the same state that engages in domestic retail deposit activity will be an insured branch.

**§ 347.204 Commitment to be examined and provide information.**

(a) A foreign bank that applies for insurance for a U.S. branch or depository institution subsidiary shall provide a written commitment (including a consent to U.S. court jurisdiction and designation of agent for service of process, acceptable to the FDIC) to the following terms:

(1)(i) The FDIC will be permitted to examine the foreign bank and its affiliates located outside of the United States to determine:

(A) The relationship between the U.S. branch or depository institution subsidiary and its affiliates; and

(B) The effect of such relationship on such U.S. branch or depository institution subsidiary.

(ii) The FDIC will be provided with any information about the foreign bank and its affiliates located outside of the United States that the FDIC requests to determine:

(A) The relationship between the U.S. branch or depository institution subsidiary and its affiliates; and

(B) The effect of such relationship on such U.S. branch or depository institution subsidiary.

(2) The FDIC will be allowed to examine the affairs of any office, agency, branch or affiliate of the foreign bank located in the United States and will be provided any information requested to determine:

(i) The relationship between the U.S. branch or depository institution subsidiary and such offices, agencies, branches or affiliates; and

(ii) The effect of such relationship on such U.S. branch or depository institution subsidiary.

(3) The FDIC will not process a deposit insurance application for any U.S. branch or depository institution subsidiary if the foreign bank fails to provide the written commitment required by paragraph (a) of this section.

(b)(1) The FDIC may waive compliance with the examination requirement contained in paragraph (a)(1)(i) of this section if the FRB has determined that the foreign bank is subject to comprehensive consolidated supervision, as required by section 7 of the International Banking Act (12 U.S.C. 3105).

(2) The FDIC may waive the commitment requirements in paragraph (a) of this section, or any portion thereof, if the foreign bank has made an

equivalent commitment to another Federal banking agency which provides the FDIC the same rights and privileges that the FDIC would have if it obtained such commitment on its own behalf. If such waiver is granted, however, the foreign bank shall provide the FDIC with the commitments required by this section before terminating any commitments provided to any other Federal banking agency that provide a basis for such waiver.

(3) The FDIC will consider the existence and extent of any prohibition or restrictions on its ability to utilize the commitments required by paragraph (a)(1)(i) and (ii) of this section in determining whether to grant or deny a deposit insurance application for the U.S. branch or depository institution subsidiary.

(c) The commitment to permit examination (including a consent to U.S. court jurisdiction and designation of agent for service of process) shall be signed by an officer of the foreign bank who has been so authorized by the foreign bank's board of directors and in all instances will be executed in a manner acceptable to the FDIC and shall be included with the foreign bank's application for insurance. Any of the documents that are not in English shall be accompanied by an English translation.

**§ 347.205 Record maintenance.**

The records of each insured branch shall be kept as though it were a separate entity, with its assets and liabilities separate from the other operations of the head office, other branches or agencies of the foreign bank and its subsidiaries or affiliates. Each insured branch must keep a set of accounts and records in the words and figures of the English language that accurately reflects the business transactions of the insured branch on a daily basis. A foreign bank that has more than one insured branch in a state may treat such insured branches as one entity for record-keeping purposes and may designate one branch to maintain records for all the branches in the state.

**§ 347.206 Domestic retail deposit activity requiring deposit insurance by U.S. branch of a foreign bank.**

(a) *Domestic retail deposit activity.* To initiate or conduct domestic retail deposit activity requiring deposit insurance protection in any state after December 19, 1991, a foreign bank must establish one or more insured U.S. bank subsidiaries for that purpose.

(b) *Exception.* Paragraph (a) of this section does not apply to any bank organized under the laws of any

territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, the deposits of which are insured by the FDIC pursuant to the Federal Deposit Insurance Act.

(c) *Grandfathered insured branches.* Domestic retail deposit accounts with balances of less than \$100,000 that require deposit insurance protection may be accepted or maintained in an insured branch of a foreign bank only if such branch was an insured branch on December 19, 1991.

(d) *Change in ownership of grandfathered insured branch.* The grandfathered status of an insured branch may not be transferred, except in certain merger and acquisition transactions that the FDIC determines are not designed, or motivated by the desire, to avoid compliance with section 6(d)(1) of the International Banking Act (12 U.S.C. 3104(d)(1)).

**§ 347.207 Disclosure of supervisory information to foreign supervisors.**

(a) *Disclosure by the FDIC.* The FDIC may disclose information obtained in the course of exercising its supervisory or examination authority to a foreign bank regulatory or supervisory authority, if the FDIC determines that disclosure is appropriate for bank supervisory or regulatory purposes and will not prejudice the interests of the United States.

(b) *Confidentiality.* Before making any disclosure of information pursuant to paragraph (a) of this section, the FDIC will obtain, to the extent necessary, the agreement of the foreign bank regulatory or supervisory authority to maintain the confidentiality of such information to the extent possible under applicable law. The disclosure or transfer of information to a foreign bank regulatory or supervisory authority under this section will not waive any privilege applicable to the information that is disclosed or transferred.

**§ 347.208 Assessment base deductions by insured branch.**

Deposits in an insured branch to the credit of the foreign bank or any of its offices, branches, agencies, or wholly owned subsidiaries may be deducted from the assessment base of the insured branch.

**§ 347.209 Pledge of assets.**

(a) *Purpose.* A foreign bank that has an insured branch must pledge assets for the benefit of the FDIC or its designee(s). Whenever the FDIC is obligated under section 11(f) of the Federal Deposit Insurance Act (12 U.S.C. 1821(f)) to pay the insured deposits of an insured branch, the assets

pledged under this section must become the property of the FDIC and be used to the extent necessary to protect the deposit insurance fund.

(b) *Amount of assets to be pledged.*

(1) For a newly insured branch, a foreign bank must pledge assets equal to at least 5 percent of the liabilities of the branch, based on the branch's projection

of its liabilities at the end of the first three years of its operation. For all other insured branches, a foreign bank must pledge assets equal to the appropriate percentage applicable to the insured branch, as determined by reference to the risk-based assessment schedule contained in this paragraph, of the

insured branch's average liabilities for the last 30 days of the most recent calendar quarter.<sup>14</sup>

(2) *Risk-based assessment schedule.* The risk-based asset pledge required by paragraph (b)(1) will be determined by utilizing the following risk-based assessment schedule:

Asset maintenance level	Supervisory risk subgroup		
	A*	B*	C*
Equal to or Greater than 108% .....	2	3	4
Equal to or Greater than 106% .....	4	5	6
Less than 106% .....	6	7	8

\*Amount represents percent.

The appropriate asset pledge percentage will be determined based on the supervisory risk subgroup and asset maintenance level applicable to the insured branch.

(3) *Supervisory risk factors.* For purposes of this section, within each asset maintenance group, each institution will be assigned to one of three subgroups based on consideration by the FDIC of supervisory evaluations provided by the primary federal regulator for the insured branch. The supervisory evaluations include the results of examination findings by the primary federal regulator, as well as other information the primary federal regulator determines to be relevant. In addition, the FDIC will take into consideration such other information (such as state examination findings, if appropriate) as it determines to be relevant to the financial condition and the risk posed to the deposit insurance fund. The three supervisory subgroups are:

(i) *Subgroup "A".* This subgroup consists of financially sound institutions with only a few minor weaknesses;

(ii) *Subgroup "B".* This subgroup consists of institutions that demonstrate weaknesses which, if not corrected, could result in significant deterioration of the institution and increased risk of loss to the deposit insurance fund; and

(iii) *Subgroup "C".* This subgroup consists of institutions that pose a substantial probability of loss to the deposit insurance fund.

(4) The FDIC may require a foreign bank to pledge additional assets or to compute its pledge on a daily basis whenever the FDIC determines that the

condition of the foreign bank or the insured branch is such that the assets pledged under this section will not adequately protect the deposit insurance fund. In requiring a foreign bank to pledge additional assets, the FDIC will consult with the primary regulator for the insured branch. Among the factors to be considered in imposing these requirements are the concentration of risk to any one borrower or group of related borrowers, the concentration of transfer risk related to any one country, including the country in which the foreign bank's head office is located or any other factor the FDIC determines is relevant.

(5) Each insured branch must separately comply with the requirements of this section. A foreign bank which has more than one insured branch in a state may, however, treat all of its insured branches in the same state as one entity and will designate one insured branch to be responsible for compliance with this section.

(c) *Depository.* A foreign bank must place pledged assets for safekeeping at any depository which is located in any state. However, a depository may not be an affiliate of the foreign bank whose insured branch is seeking to use the depository. A foreign bank must obtain the FDIC's prior written approval of the depository selected, and such approval may be revoked and dismissal of the depository required whenever the depository does not fulfill any one of its obligations under the pledge agreement. A foreign bank shall appoint and constitute the depository as its attorney in fact for the sole purpose of transferring title to pledged assets to the FDIC as may be required to effectuate

the provisions of paragraph (a) of this section.

(d) *Assets that may be pledged.* Subject to the right of the FDIC to require substitution, a foreign bank may pledge any of the kinds of assets listed in this paragraph (d); such assets must be denominated in United States dollars. A foreign bank shall be deemed to have pledged any such assets for the benefit of the FDIC or its designee at such time as any such asset is placed with the depository, as follows:

(1) Negotiable certificates of deposit that are payable in the United States and that are issued by any state bank, national bank, or branch of a foreign bank which has executed a valid waiver of offset agreement or similar debt instruments that are payable in the United States and that are issued by any agency of a foreign bank which has executed a valid waiver of offset agreement; provided, that the maturity of any certificate or issuance is not greater than one year; and provided further, that the issuing branch or agency of a foreign bank is not an affiliate of the pledging bank or from the same country as the pledging bank's domicile;

(2) Treasury bills, interest bearing bonds, notes, debentures, or other direct obligations of or obligations fully guaranteed as to principal and interest by the United States or any agency or instrumentality thereof;

(3) Commercial paper that is rated P-1 or P-2, or their equivalent by a nationally recognized rating service; provided, that any conflict in a rating shall be resolved in favor of the lower rating;

<sup>14</sup> This average must be computed by using the sum of the close of business figures for the 30 calendar days of the most recent calendar quarter, ending with and including the last day of the calendar quarter, divided by 30. For days on which

the branch is closed, however, balances from the previous business day are to be used in determining its average liabilities. The insured branch may exclude liabilities to other offices, agencies, branches, and wholly owned subsidiaries of the

foreign bank. The value of the pledged assets must be computed based on the lesser of the principal amount (par value) or market value of such assets at the time of the original pledge and thereafter as of the last day of the most recent calendar quarter.



(4) Banker's acceptances that are payable in the United States and that are issued by any state bank, national bank, or branch or agency of a foreign bank; provided, that the maturity of any acceptance is not greater than 180 days; and provided further, that the branch or agency issuing the acceptance is not an affiliate of the pledging bank or from the same country as the pledging bank's domicile;

(5) General obligations of any state of the United States, or any county or municipality of any state of the United States, or any agency, instrumentality, or political subdivision of the foregoing or any obligation guaranteed by a state of the United States or any county or municipality of any state of the United States; provided, that such obligations have a credit rating within the top two rating bands of a nationally recognized rating service (with any conflict in a rating resolved in favor of the lower rating);

(6) Obligations of the African Development Bank, Asian Development Bank, Inter-American Development Bank, and the International Bank for Reconstruction and Development;

(7) Notes issued by bank holding companies or banks organized under the laws of the United States or any state thereof or notes issued by United States branches or agencies of foreign banks, provided, that the notes have a credit rating within the top two rating bands of a nationally recognized rating service (with any conflict in a rating resolved in favor of the lower rating) and that they are payable in the United States, and provided further, that the issuer is not an affiliate of the foreign bank pledging the note; or

(8) Any other asset determined by the FDIC to be acceptable.

(e) *Pledge agreement.* A foreign bank shall not pledge any assets unless a pledge agreement in form and substance satisfactory to the FDIC has been executed by the foreign bank and the depository. The agreement, in addition to other terms not inconsistent with this paragraph (e), shall give effect to the following terms:

(1) *Original pledge.* The foreign bank shall place with the depository assets of the kind described in paragraph (d) of this section, having an aggregate value in the amount as required pursuant to paragraph (b) of this section.

(2) *Additional assets required to be pledged.* Whenever the foreign bank is required to pledge additional assets for the benefit of the FDIC or its designees pursuant to paragraph (b)(4) of this section, it shall place (within two business days after the last day of the most recent calendar quarter, unless

otherwise ordered) additional assets of the kind described in paragraph (d) of this section, having an aggregate value in the amount required by the FDIC.

(3) *Substitution of assets.* The foreign bank, at any time, may substitute any assets for pledged assets, and, upon such substitution, the depository shall promptly release any such assets to the foreign bank; provided, that:

(i) The foreign bank pledges assets of the kind described in paragraph (d) of this section having an aggregate value not less than the value of the pledged assets for which they are substituted and certified as such by the foreign bank; and

(ii) The FDIC has not by written notification to the foreign bank, a copy of which shall be provided to the depository, suspended or terminated the foreign bank's right of substitution.

(4) *Delivery of other documents.* Concurrently with the pledge of any assets, the foreign bank will deliver to the depository all documents and instruments necessary or advisable to effectuate the transfer of title to any such assets and thereafter, from time to time, at the request of the FDIC, deliver to the depository any such additional documents or instruments. The foreign bank shall provide copies of all such documents described in this paragraph (e)(4) to the appropriate regional director concurrently with their delivery to the depository.

(5) *Acceptance and safekeeping responsibilities of the depository.* (i) The depository will accept and hold any assets pledged by the foreign bank pursuant to the pledge agreement for safekeeping free and clear of any lien, charge, right of offset, credit, or preference in connection with any claim the depository may assert against the foreign bank and shall designate any such assets as a special pledge for the benefit of the FDIC or its designee. The depository shall not accept the pledge of any such assets unless, concurrently with such pledge, the foreign bank delivers to the depository the documents and instruments necessary for the transfer of title thereto as provided in this part.

(ii) The depository shall hold any such assets separate from all other assets of the foreign bank or the depository. Such assets may be held in book-entry form but must at all times be segregated on the records of the depository and clearly identified as assets subject to the pledge agreement.

(6) *Reporting requirements of the insured branch and the depository—*(i) *Initial reports.* Upon the original pledge of assets as provided in paragraph (e)(1) of this section:

(A) The depository shall provide to the foreign bank and to the appropriate FDIC regional director a written report in the form of a receipt identifying each asset pledged and specifying in reasonable detail with respect to each such asset the complete title, interest rate, series, serial number (if any), principal amount (par value), maturity date and call date; and

(B) The foreign bank shall provide to the appropriate regional director a written report certified as correct by the foreign bank which sets forth the value of each pledged asset and the aggregate value of all such assets, and which states that the aggregate value of all such assets is at least equal to the amount required pursuant to paragraph (b) of this section and that all such assets are of the kind described in paragraph (d) of this section.

(ii) *Quarterly reports.* Within ten calendar days after the end of the most recent calendar quarter:

(A) The depository shall provide to the appropriate regional director a written report specifying in reasonable detail with respect to each asset currently pledged (including any asset pledged to satisfy the requirements of paragraph (b)(4) of this section and identified as such), as of two business days after the end of the most recent calendar quarter, the complete title, interest rate, series, serial number (if any), principal amount (par value), maturity date, and call date, provided, that if no substitution of any asset has occurred during the reporting period, the reporting need only specify that no substitution of assets has occurred; and

(B) The foreign bank shall provide as of two business days after the end of the most recent calendar quarter to the appropriate regional director a written report certified as correct by the foreign bank which sets forth the value of each pledged asset and the aggregate value of all such assets, which states that the aggregate value of all such assets is at least equal to the amount required pursuant to paragraph (b) of this section and that all such assets are of the kind described in paragraph (d) of this section, and which states the average of the liabilities of each insured branch of the foreign bank computed in the manner and for the period prescribed in paragraph (b) of this section.

(iii) *Additional reports.* The foreign bank shall, from time to time, as may be required, provide to the appropriate regional director a written report in the form specified containing the information requested with respect to any asset then currently pledged.

(7) *Access to assets.* With respect to any asset pledged pursuant to the

pledge agreement, the depository will provide representatives of the FDIC or the foreign bank with access (during regular business hours of the depository and at the location where any such asset is held, without other limitation or qualification) to all original instruments, documents, books, and records evidencing or pertaining to any such asset.

(8) *Release upon the order of the FDIC.* The depository shall release to the foreign bank any pledged assets, as specified in a written notification of the appropriate regional director, upon the terms and conditions provided in such notification, including without limitation the waiver of any requirement that any assets be pledged by the foreign bank in substitution of any released assets.

(9) *Release to the FDIC.* Whenever the FDIC is obligated under section 11(f) of the Federal Deposit Insurance Act to pay insured deposits of an insured branch, the FDIC by written certification shall so inform the depository; and the depository, upon receipt of such certification, shall thereupon promptly release and transfer title to any pledged assets to the FDIC or release such assets to the foreign bank, as specified in the certification. Upon release and transfer of title to all pledged assets specified in the certification, the depository shall be discharged from any further obligation under the pledge agreement.

(10) *Interest earned on assets.* The foreign bank may retain any interest earned with respect to the assets currently pledged unless the FDIC by written notice prohibits retention of interest by the foreign bank, in which case the notice shall specify the disposition of any such interest.

(11) *Expenses of agreement.* The FDIC shall not be required to pay any fees, costs, or expenses for services provided by the depository to the foreign bank pursuant to, or in connection with, the pledge agreement.

(12) *Substitution of depository.* The depository may resign, or the foreign bank may discharge the depository, from its duties and obligations under the pledge agreement by giving at least 60 days written notice thereof to the other party and to the appropriate regional director. The FDIC, upon 30 days written notice to the foreign bank and the depository, may require the foreign bank to dismiss the depository if the FDIC in its discretion determines that the depository is in breach of the pledge agreement. The depository shall continue to function as such until the appointment of a successor depository becomes effective and the depository has released to the successor depository

the pledged assets and documents and instruments to effectuate transfer of title in accordance with the written instructions of the foreign bank as approved by the FDIC. The appointment by the foreign bank of a successor depository shall not be effective until:

- (i) The FDIC has approved in writing the successor depository; and
- (ii) A pledge agreement in form and substance satisfactory to the FDIC has been executed.

(13) *Waiver of terms.* The FDIC may by written order waive compliance by the foreign bank or the depository with any term or condition of the pledge agreement.

#### **§ 347.210 Asset maintenance.**

(a) An insured branch of a foreign bank shall maintain on a daily basis eligible assets at an amount not less than 106 percent of the insured branch's daily liabilities, exclusive of liabilities due to the head office of the foreign bank, other branches, agencies, offices, or wholly owned subsidiaries. The FDIC, after consulting with the primary regulator of the insured branch, may require that a higher ratio of eligible assets be maintained if the financial condition of the insured branch warrants such action. Among the factors which will be considered in requiring a higher ratio of eligible assets are the concentration of risk to any one borrower or group of related borrowers; the concentration of transfer risk to any one country, including the country in which the foreign bank's head office is located; or any other factor the FDIC determines is relevant. Eligible assets must be payable in United States dollars.

(b) In determining eligible assets for the purposes of compliance with paragraph (a) of this section, the insured branch shall exclude the following:

- (1) Any asset due from the foreign bank's head office, or its other branches, agencies, offices or affiliates;
- (2) Any asset classified "Value Impaired," to the extent of the required Allocated Transfer Risk Reserves or equivalent write down, or "Loss" in the most recent state or federal examination report;
- (3) Any deposit of the insured branch in a bank unless the bank has executed a valid waiver of offset agreement;
- (4) Any asset not supported by sufficient credit information to allow a review of the asset's credit quality, as determined at the most recent state or federal examination, as follows:

(i) Whether an asset has sufficient credit information will be a function of the size of the borrower and the location within the foreign bank of the

responsibility for authorizing and monitoring extensions of credit to the borrower. For large, well known companies, when credit responsibility is located in an office of the foreign bank outside the insured branch, the insured branch must have adequate documentation to show that the asset is of good quality and is being supervised adequately by the foreign bank. In such cases, copies of periodic memoranda that include an analysis of the borrower's recent financial statements and a report on recent developments in the borrower's operations and borrowing relationships with the foreign bank generally would constitute sufficient information. For other borrowers, periodic memoranda must be supplemented by information such as copies of recent financial statements, recent correspondence concerning the borrower's financial condition and repayment history, credit terms and collateral, data on any guarantors, and where necessary, the status of any corrective measures being employed;

(ii) Subsequent to the determination that an asset lacks sufficient credit information, an insured branch may not include the amount of that asset among eligible assets until the FDIC determines that sufficient documentation exists. Such a determination may be made either at the next federal examination, or upon request of the insured branch, by the appropriate regional director;

(5) Any asset not in the insured branch's actual possession unless the insured branch holds title to such asset and the insured branch maintains records sufficient to enable independent verification of the insured branch's ownership of the asset, as determined at the most recent state or federal examination;

(6) Any intangible asset;

(7) Any other asset not considered bankable by the FDIC.

(c) A foreign bank which has more than one insured branch in a state may treat all of its insured branches in the same state as one entity for purposes of compliance with paragraph (a) of this section and shall designate one insured branch to be responsible for maintaining the records of the insured branches' compliance with this section.

(d) Asset maintenance calculations required by this rule shall be retained by the insured branch until the next federal examination.

#### **§ 347.211 Examination of branches of foreign banks.**

(a) *Frequency of on-site examination.* Each branch or agency of a foreign bank shall be examined on-site at least once during each 12-month period (beginning

on the date the most recent examination of the office ended) by:

- (1) The FRB;
- (2) The FDIC, if an insured branch;
- (3) The OCC, if the branch or agency of the foreign bank is licensed by the OCC; or

(4) The state supervisor, if the office of the foreign bank is licensed or chartered by the state.

(b) *18-month cycle for certain small institutions*—(1) *Mandatory standards.* The FDIC may conduct a full-scope, on-site examination at least once during each 18-month period, rather than each 12-month period as provided in paragraph (a) of this section, if the insured branch:

- (i) Has total assets of \$250 million or less;
- (ii) Has received a composite ROCA supervisory rating (which rates risk management, operational controls, compliance, and asset quality) of 1 or 2 at its most recent examination;
- (iii) Satisfies the requirement of either the following paragraph (b)(iii)(A) or (B):

(A) The foreign bank's most recently reported capital adequacy position consists of, or is equivalent to, Tier 1 and total risk-based capital ratios of at least 6 percent and 10 percent, respectively, on a consolidated basis; or

(B) The insured branch has maintained on a daily basis, over the past three quarters, eligible assets in an amount not less than 108 percent of the preceding quarter's average third party liabilities (determined consistent with applicable federal and state law) and sufficient liquidity is currently available to meet its obligations to third parties;

(iv) Is not subject to a formal enforcement action or order by the FRB, FDIC, or the OCC; and

(v) Has not experienced a change in control during the preceding 12-month period in which a full-scope, on-site examination would have been required but for this section.

(2) *Discretionary standards.* In determining whether an insured branch that meets the standards of paragraph (b)(1) of this section should not be eligible for an 18-month examination cycle pursuant to this paragraph (b), the FDIC may consider additional factors, including whether:

- (i) Any of the individual components of the ROCA supervisory rating of an insured branch is rated "3" or worse;
- (ii) The results of any off-site monitoring indicate a deterioration in the condition of the insured branch;
- (iii) The size, relative importance, and role of a particular insured branch when reviewed in the context of the foreign bank's entire U.S. operations otherwise necessitate an annual examination; and

(iv) The condition of the parent foreign bank gives rise to such a need.

(c) *Authority to conduct more frequent examinations.* Nothing in paragraphs (a) and (b) of this section limits the authority of the FDIC to examine any insured branch as frequently as it deems necessary.

**§ 347.212 FDIC approval to conduct activities that are not permissible for federal branches.**

(a) *Scope.* A foreign bank operating an insured state branch which desires to engage in or continue to engage in any type of activity that is not permissible for a federal branch, pursuant to the National Bank Act (12 U.S.C. 21 *et seq.*) or any other federal statute, regulation, official bulletin or circular, written order or interpretation, or decision of a court of competent jurisdiction, must file a written application for permission to conduct such activity with the FDIC.

(b) *Exceptions.* If the FDIC has already determined, pursuant to part 362 of this chapter, "Activities and Investment of Insured State Banks," that an activity does not present a significant risk to the affected deposit insurance fund, no application is required under paragraph (a) of this section for a foreign bank operating an insured branch to engage or continue to engage in the same activity.

(c) *Agency activities.* A foreign bank operating an insured state branch is not required to submit an application pursuant to paragraph (a) of this section to engage in or continue engaging in an activity conducted as agent if the activity is:

(1) Permissible agency activity for a state-chartered bank located in the state which the state-licensed insured branch of the foreign bank is located;

(2) Permissible agency activity for a state-licensed branch of a foreign bank located in that state; and

(3) Permissible pursuant to any other applicable federal law or regulation.

(d) *Conditions of approval.* (1) Approval of such an application required by paragraph (a) of this section may be conditioned on the agreement by the foreign bank and its insured state branch to conduct the activity subject to specific limitations, which may include pledging of assets in excess of the asset pledge and asset maintenance requirements contained in §§ 347.209 and 347.210.

(2) In the case of an application to initially engage in an activity, as opposed to an application to continue to conduct an activity, the insured state branch shall not commence the activity until it has been approved in writing by the FDIC pursuant to this part and the

FRB, and any and all conditions imposed in such approvals have been satisfied.

(e) *Divestiture or cessation.* (1) If an application for permission to continue to conduct an activity is not approved by the FDIC or the FRB, the applicant shall submit a plan of divestiture or cessation of the activity to the appropriate regional director.

(2) A foreign bank operating an insured state branch which elects not to apply to the FDIC for permission to continue to conduct an activity which is rendered impermissible by any change in statute, regulation, official bulletin or circular, written order or interpretation, or decision of a court of competent jurisdiction shall submit a plan of divestiture or cessation to the appropriate regional director.

(3) All plans of divestitures or cessation required by this paragraph must be completed within one year from the date of the disapproval, or within such shorter period as the FDIC may direct.

(f) *Procedures.* Procedures for applications under this section are set out in § 303.187.

**§ 347.213 Establishment or operation of noninsured foreign branch.**

(a) A foreign bank may establish or operate a state branch, as provided by state law, without federal deposit insurance whenever:

(1) The branch only accepts initial deposits in an amount of \$100,000 or greater; or

(2) The branch meets the criteria set forth in §§ 347.214 or 347.215.

(b) [Reserved]

**§ 347.214 Branch established under section 5 of the International Banking Act.**

A foreign bank may operate any state branch as a noninsured branch whenever the foreign bank has entered into an agreement with the FRB to accept at that branch only those deposits as would be permissible for a corporation organized under section 25(a) of the Federal Reserve Act (12 U.S.C. 611 *et seq.*) and implementing rules and regulations administered by the FRB (12 CFR part 211).

**§ 347.215 Exemptions from deposit insurance requirement.**

(a) *Deposit activities not requiring insurance.* A state branch will not be considered to be engaged in domestic retail deposit activity that requires the foreign bank parent to establish an insured U.S. bank subsidiary if the state branch accepts initial deposits only in an amount of less than \$100,000 that are derived solely from the following:

(1) Individuals who are not citizens or residents of the United States at the time of the initial deposit;

(2) Individuals who:

(i) Are not citizens of the United States;

(ii) Are residents of the United States; and

(iii) Are employed by a foreign bank, foreign business, foreign government, or recognized international organization;

(3) Persons (including immediate family members of natural persons) to whom the branch or foreign bank (including any affiliate thereof) has extended credit or provided other nondeposit banking services within the past twelve months or has entered into a written agreement to provide such services within the next twelve months;

(4) Foreign businesses, large United States businesses, and persons from whom an Edge or agreement corporation may accept deposits under 12 CFR 211.6(a)(1);

(5) Any governmental unit, including the United States government, any state government, any foreign government and any political subdivision or agency of any of the foregoing, and recognized international organizations;

(6) Persons who are depositing funds in connection with the issuance of a financial instrument by the branch for the transmission of funds or the transmission of such funds by any electronic means; and

(7) Any other depositor, but only if:

(i) The branch's average deposits under this paragraph (a)(7) do not exceed one percent of the branch's average total deposits, as calculated under paragraph (a)(7)(ii) if this section (*de minimis* exception).

(ii) For purposes of calculating this exception:

(A) The branch's average deposits under this paragraph and the average total deposits must be computed by summing the close of business figures for each of the last 30 calendar days, ending with and including the last day of the calendar quarter, and dividing the resulting sum by 30;

(B) For days on which the branch is closed, balances from the last previous business day are to be used;

(C) The branch may exclude deposits in the branch of other offices, branches, agencies or wholly owned subsidiaries of the bank to determine its average deposits;

(D) The branch must not solicit deposits from the general public by advertising, display of signs, or similar activity designed to attract the attention of the general public; and

(E) A foreign bank that has more than one state branch in the same state may

aggregate deposits in such branches (excluding deposits of other branches, agencies or wholly owned subsidiaries of the bank) for the purpose of this paragraph (a)(7).

(b) *Application for an exemption.* (1) Whenever a foreign bank proposes to accept at a state branch initial deposits of less than \$100,000 and such deposits are not otherwise excepted under paragraph (a) of this section, the foreign bank may apply to the FDIC for consent to operate the branch as a noninsured branch. The Board of Directors may exempt the branch from the insurance requirement if the branch is not engaged in domestic retail deposit activities requiring insurance protection. The Board of Directors will consider the size and nature of depositors and deposit accounts, the importance of maintaining and improving the availability of credit to all sectors of the United States economy, including the international trade finance sector of the United States economy, whether the exemption would give the foreign bank an unfair competitive advantage over United States banking organizations, and any other relevant factors in making this determination.

(2) Procedures for applications under this section are set out in § 303.186.

(c) *Transition period.* A noninsured state branch may maintain a retail deposit lawfully accepted prior to April 1, 1996 pursuant to regulations in effect prior to July 1, 1998:

(1) If the deposit qualifies pursuant to paragraph (a) or (b) of this section; or

(2) If the deposit does not qualify pursuant to paragraph (a) or (b) of this section, in the case of a time deposit, no later than the first maturity date of the time deposit after April 1, 1996.

#### § 347.216 Depositor Notification.

Any state branch that is exempt from the insurance requirement pursuant to § 347.215 shall:

(a) Display conspicuously at each window or place where deposits are usually accepted a sign stating that deposits are not insured by the FDIC; and

(b) Include in bold face conspicuous type on each signature card, passbook, and instrument evidencing a deposit the statement "This deposit is not insured by the FDIC"; or require each depositor to execute a statement which acknowledges that the initial deposit and all future deposits at the branch are not insured by the FDIC. This acknowledgment shall be retained by the branch so long as the depositor maintains any deposit with the branch. This provision applies to any negotiable certificates of deposit made in a branch

on or after July 6, 1989, as well as to any renewals of such deposits which become effective on or after July 6, 1989.

### Subpart C—International Lending

#### § 347.301 Purpose, authority, and scope.

Under the International Lending Supervision Act of 1983 (12 U.S.C. 3901 *et seq.*) (ILSA), the Federal Deposit Insurance Corporation prescribes the regulations in this subpart relating to international lending activities of banks.

#### § 347.302 Definitions.

For the purposes of this subpart:

(a) *Administrative cost* means those costs which are specifically identified with negotiating, processing and consummating the loan. These costs include, but are not necessarily limited to: Legal fees; costs of preparing and processing loan documents; and an allocable portion of salaries and related benefits of employees engaged in the international lending function. No portion of supervisory and administrative expenses or other indirect expenses such as occupancy and other similar overhead costs shall be included.

(b) *Banking institution* means an insured state nonmember bank.

(c) *Federal banking agencies* means the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.

(d) *International assets* means those assets required to be included in banking institutions' "Country Exposure Report" form (FFIEC No. 009).

(e) *International loan* means a loan as defined in the instructions to the "Report of Condition and Income" for the respective banking institution (FFIEC Nos. 031, 032, 033 and 034) and made to a foreign government, or to an individual, a corporation, or other entity not a citizen of, resident in, or organized or incorporated in the United States.

(f) *Restructured international loan* means a loan that meets the following criteria:

(1) The borrower is unable to service the existing loan according to its terms and is a resident of a foreign country in which there is a generalized inability of public and private sector obligors to meet their external debt obligations on a timely basis because of a lack of, or restraints on the availability of, needed foreign exchange in the country; and

(2) Either:

(i) The terms of the existing loan are amended to reduce stated interest or extend the schedule of payments; or

(ii) A new loan is made to, or for the benefit of, the borrower, enabling the

borrower to service or refinance the existing debt.

(g) *Transfer risk* means the possibility that an asset cannot be serviced in the currency of payment because of a lack of, or restraints on the availability of, needed foreign exchange in the country of the obligor.

### § 347.303 Allocated transfer risk reserve.

(a) *Establishment of Allocated Transfer Risk Reserve.* A banking institution shall establish an allocated transfer risk reserve (ATRR) for specified international assets when required by the FDIC in accordance with this section.

(b) *Procedures and standards—(1) Joint agency determination.* At least annually, the federal banking agencies shall determine jointly, based on the standards set forth in paragraph (b)(2) of this section, the following:

(i) Which international assets subject to transfer risk warrant establishment of an ATRR;

(ii) The amount of the ATRR for the specified assets; and

(iii) Whether an ATRR established for specified assets may be reduced.

(2) *Standards for requiring ATRR—(i) Evaluation of assets.* The federal banking agencies shall apply the following criteria in determining whether an ATRR is required for particular international assets:

(A) Whether the quality of a banking institution's assets has been impaired by a protracted inability of public or private obligors in a foreign country to make payments on their external indebtedness as indicated by such factors, among others, as whether:

(1) Such obligors have failed to make full interest payments on external indebtedness; or

(2) Such obligors have failed to comply with the terms of any restructured indebtedness; or

(3) A foreign country has failed to comply with any International Monetary Fund or other suitable adjustment program; or

(B) Whether no definite prospects exist for the orderly restoration of debt service.

(ii) *Determination of amount of ATRR.* (A) In determining the amount of the ATRR, the federal banking agencies shall consider:

(1) The length of time the quality of the asset has been impaired;

(2) Recent actions taken to restore debt service capability;

(3) Prospects for restored asset quality; and

(4) Such other factors as the federal banking agencies may consider relevant to the quality of the asset.

(B) The initial year's provision for the ATRR shall be ten percent of the principal amount of each specified international asset, or such greater or lesser percentage determined by the federal banking agencies. Additional provision, if any, for the ATRR in subsequent years shall be fifteen percent of the principal amount of each specified international asset, or such greater or lesser percentage determined by the federal banking agencies.

(3) *FDIC notification.* Based on the joint agency determinations under paragraph (b)(1) of this section, the FDIC shall notify each banking institution holding assets subject to an ATRR:

(i) Of the amount of the ATRR to be established by the institution for specified international assets; and

(ii) That an ATRR established for specified assets may be reduced.

(c) *Accounting treatment of ATRR—*

(1) *Charge to current income.* A banking institution shall establish an ATRR by a charge to current income and the amounts so charged shall not be included in the banking institution's capital or surplus.

(2) *Separate accounting.* A banking institution shall account for an ATRR separately from the Allowance for Loan and Lease Losses, and shall deduct the ATRR from "gross loans and leases" to arrive at "net loans and leases." The ATRR must be established for each asset subject to the ATRR in the percentage amount specified.

(3) *Consolidation.* A banking institution shall establish an ATRR, as required, on a consolidated basis. For banks, consolidation should be in accordance with the procedures and tests of significance set forth in the instructions for preparation of Consolidated Reports of Condition and Income (FFIEC Nos. 031, 032, 033 and 034).

(4) *Alternative accounting treatment.* A banking institution need not establish an ATRR if it writes down in the period in which the ATRR is required, or has written down in prior periods, the value of the specified international assets in the requisite amount for each such asset. For purposes of this paragraph (c)(4), international assets may be written down by a charge to the Allowance for Loan and Lease Losses or a reduction in the principal amount of the asset by application of interest payments or other collections on the asset; provided, that only those international assets that may be charged to the Allowance for Loan and Lease Losses pursuant to generally accepted accounting principles may be written down by a charge to the Allowance for Loan and Lease Losses. However, the Allowance

for Loan and Lease Losses must be replenished in such amount necessary to restore it to a level which adequately provides for the estimated losses inherent in the banking institution's loan and lease portfolio.

(5) *Reduction of ATRR.* A banking institution may reduce an ATRR when notified by the FDIC or, at any time, by writing down such amount of the international asset for which the ATRR was established.

### § 347.304 Accounting for fees on international loans.

(a) *Restrictions on fees for restructured international loans.* No banking institution shall charge, in connection with the restructuring of an international loan, any fee exceeding the administrative cost of the restructuring unless it amortizes the amount of the fee exceeding the administrative cost over the effective life of the loan.

(b) *Accounting treatment.* Subject to paragraph (a) of this section, banking institutions shall account for fees on international loans in accordance with generally accepted accounting principles.

### § 347.305 Reporting and disclosure of international assets.

(a) *Requirements.* (1) Pursuant to section 907(a) of ILSA, a banking institution shall submit to the FDIC, at least quarterly, information regarding the amounts and composition of its holdings of international assets.

(2) Pursuant to section 907(b) of ILSA, a banking institution shall submit to the FDIC information regarding concentrations in its holdings of international assets that are material in relation to total assets and to capital of the institution, such information to be made publicly available by the FDIC on request.

(b) *Procedures.* The format, content and reporting and filing dates of the reports required under paragraph (a) of this section shall be determined jointly by the federal banking agencies. The requirements to be prescribed by the federal banking agencies may include changes to existing forms (such as revisions to the Country Exposure Report, Form FFIEC No. 009) or such other requirements as the federal banking agencies deem appropriate. The federal banking agencies also may determine to exempt from the requirements of paragraph (a) of this section banking institutions that, in the federal banking agencies' judgment, have de minimis holdings of international assets.

(c) *Reservation of Authority.* Nothing contained in this subpart shall preclude

the FDIC from requiring from a banking institution such additional or more frequent information on the institution's holdings of international assets as the agency may consider necessary.

By order of the Board of Directors.  
Dated at Washington, DC, this 28th day of June, 2004.

Federal Deposit Insurance Corporation.  
**Valerie J. Best,**  
*Assistant Executive Secretary.*  
[FR Doc. 04-15757 Filed 7-16-04; 8:45 am]  
**BILLING CODE 6714-01-P**