TB 32 was rescinded 10/21/91. Incorporated into Thrift Activities 211.

Handbook: Thrift Activities
Subject: Loans-To-One-Borrower

Section: 211
TB 32

September 8, 1989

Interim Guidelines for Use in Applying Loans-To-One-Borrower Requirements Adopted in The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA)

RESCINDED

Summary: The FIRREA of 1989 requires thrift institutions to comply with the loans-to-one-borrower limits set forth for national banks effective August 9, 1989. Management should take immediate steps to alert its lending officers of these new restrictions and to set the institution's lending policies and loan approval limits accordingly.

For Further Information Contact:
The Office of Thrift Supervision (OTS) for the District in which you are located, or the Office of Supervision Policy of the OTS.

Thrift Bulletin 32

Lending Limits:

The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) Title III, Section 301, amends the Home Owners' Loan Act of 1933 effective August 9, 1989. Specifically, FIRREA provides that Section 5200 of the Revised Statutes shall apply to savings associations in the same manner and to the same extent as it applies to national banks. Section 5200 of the Revised Statutes is codified as 12 U.S.C. 84. A copy of 12 U.S.C. 84 and the implementing Office of Comptroller (OCC) regulation with interpretations, as well as, a proposed amendment are attached. While no determination has yet been made concerning the status of the Comptroller's regulations and interpretations, copies are attached to assist in understanding their current application to national banks by the OCC.

The basic requirements are as follows:

1. Savings associations can lend up to 15% of their unimpaired capital and unimpaired surplus to one borrower for loans and extensions of credit not fully secured.

2. In addition to this 15%, savings associations can lend up to 10% of their unimpaired capital and unimpaired surplus to a borrower, that has exhausted the initial 15% limit, for loans and extensions of credit fully secured by readily marketable collateral having a market value, as determined by readily and continuously available price quotations, at least equal to the outstanding loan balance.

3. There are ten exceptions to the 15% and 10% limitations listed in one and two above. Some exceptions provide no capital and surplus limit and others provide a different limit. A complete list of these exceptions may be found in the attached Section 5200 of the Revised Statutes (12 U.S.C. Section 84).

4. FIRREA also provides that a savings association may make loans-to-one-borrower under one of the following special exemptions:

   a. A savings association may lend to one borrower for any purpose not to exceed $500,000; or

   b. to develop domestic residential housing units, not to exceed the lesser of $30,000,000 or 30% of the savings association's unimpaired capital and unimpaired surplus, provided:

      i. the purchase price of each single family home in the development being financed does not exceed $500,000;

      ii. the savings association is and continues to be in compliance with the fully phased-in capital standards proscribed under FIRREA;

      iii. loans made under this exemption to all borrowers, in aggregate, do not exceed 150% of the savings association's unimpaired capital and unimpaired surplus;

      iv. the Director of the OTS has authorized the association to avail itself of the higher limit; and

      v. such loans shall comply with all applicable loan-to-value requirements.

5. A savings association's loans-to-one-borrower to finance the sale

of REO may exceed the 15% and 10% limits, provided that it shall not exceed 50% of the savings association's unimpaired capital and unimpaired surplus.

6. The Director of OTS may impose more stringent restrictions on a savings association's loans-to-one-borrower if the Director determines that such action is necessary to protect the safety and soundness of the association.

In addition, FIRREA provides civil money penalty authority for OTS for violations of the law. The three tiered system proscribes penalties in amounts from $5,000 per day up to, but not to exceed, the lesser of $1,000,000 or 1% of the total assets of the institution.

These rules however raise questions regarding applying national bank standards to thrifts since the definition of capital and other differences need to be resolved. These unresolved questions are presently under review in the Office of Thrift Supervision (OTS). In the meantime, institutions should consult with their legal counsel to resolve questions regarding the limits found in 12 U.S.C. 84 in this interim period.

Legally Binding Commitments:

In the case of legally binding loan commitments entered into prior to August 9, 1989, the following guidance is provided:

If a legally binding loan commitment was entered into—but not funded—prior to FIRREA's enactment, and the loan is funded post-enactment, then the loan is subject to the loans-to-one-borrower preexisting regulatory limitation under 12 C.F.R. 563.9-3, not the FIRREA limitation. Several factual items must be emphasized, however.

First, this conclusion assumes that the loan commitment was legally binding prior to FIRREA's enactment. It is incumbent upon the association to demonstrate that the commitment represents a legally binding commitment to fund (e.g., the OCC's transition rules under 12 C.F.R. Section 32.7 require either a written agreement or other file documentation). Where doubts exist as to the legally binding nature of the commitment, supervisory personnel may require a legal opinion of the association's counsel.

In general, loan commitments for which the prospective borrower has paid no fee to the thrift should be reviewed closely to determine if a binding commitment exists. Such agreements typically contain broad provisions permitting the lenders to decline to fund on subjective grounds that effectively render the commitment unenforceable. In absence of payment of such a fee, the association must overcome the strong presumption that the commitment is not legally binding with convincing evidence.

Finally, advances under renewals or extensions of such pre-enactment commitments must conform to the new loans-to-one-borrower limitations set forth under FIRREA if the renewal or extension of the commitment is made on or after FIRREA's date of enactment (August 9, 1989). This position is consistent with the OCC's transition rules (12 C.F.R. Section 32.7), a copy of which is attached.

Attachments

Darrel W. Dochow

— Darrel W. Dochow
Acting Senior Deputy Director, Supervision/Operations

Attachment I to TB 32

Section 5200 of the Revised Statutes
12 U.S.C. Section 84
Lending Limits
(Last Amended in 1983)

Appendix—Section 5200 of the Revised Statutes (12 U.S.C. Sec. 84)

Total loans and extensions of credit.

(a)(1) The total loans and extensions of credit by a national banking association to a person outstanding at one time and not fully secured, as determined in a manner consistent with paragraph (2) of this subsection, by collateral having a market value at least equal to the amount of the loan or extension of credit shall not exceed 15 per centum of the unimpaired capital and unimpaired surplus of the association.

(2) The total loans and extensions of credit by a national banking association to a person outstanding at one time and fully secured by readily marketable collateral having a market value, as determined by reliable and continuously available price quotations, at least equal to the amount of the funds outstanding shall not exceed 10 per centum of the unimpaired capital and unimpaired surplus of the association. This limitation shall be separate from and in addition to the limitations contained in paragraph (1) of this subsection.

Definitions.

(b) For the purposes of this section—

(1) The term "loans and extensions of credit" shall include all direct or indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds or repayable from specific property pledged by or on behalf of the person, and to the extent specified by the Comptroller of the Currency, such term shall also include any liability of a national banking association to advance funds to or on behalf of a person pursuant to a contractual commitment; and

(2) the term "person" shall include an individual, sole proprietorship, partnership, joint venture, association, trust, estate, business trust, corporation, sovereign government, or agency, instrumentality, or political subdivision thereof, or any similar entity or organization.

Exceptions.

(c) The limitations contained in subsection (a) of this section shall be subject to the following exceptions:

(1) Loans or extensions of credit arising from the discount of commercial or business paper evidencing an obligation to the person negotiating it with recourse shall not be subject to any limitation based on capital and surplus.

(2) The purchase of bankers' acceptances of the kind described in section 372 of this title and issued by other banks shall not be subject to any limitation based on capital and surplus.

(3) Loans and extensions of credit secured by bills of lading, warehouse receipts, or similar documents transferring or securing title to readily marketable staples shall be subject to a limitation of 35 per centum of capital and surplus in addition to the general limitations if the market value of the staples securing each additional loan or extension of credit at all times equals or exceeds 115 per centum of the outstanding amount of such loan or extension of credit. The staples shall be fully covered by insurance whenever it is customary to insure such staples.

(4) Loans or extensions of credit secured by bonds, notes, certificates of indebtedness, or Treasury bills of the United States or by other such obligations fully guaranteed as to principal and interest by the United States shall not be subject to any limitation based on capital and surplus.

(5) Loans or extensions of credit to or secured by unconditional takeout commitments or guarantees of any department, agency, bureau, board, commission, or establishment of the United States or any corporation wholly owned directly or indirectly by the United States shall not be subject to any limitation based on capital and surplus.

(6) Loans or extensions of credit secured by a segregated deposit account in the lending bank shall not be subject to any limitation based on capital and surplus.

(7) Loans or extensions of credit to any financial institution or to any receiver, conservator, superintendent of banks, or other agent in charge of the business and property of such financial institution, when such loans or extensions of credit are approved by the Comptroller of the Currency, shall not be subject to any limitation based on capital and surplus.

(8) (A) Loans and extensions of credit arising from the discount of negotiable or nonnegotiable installment consumer paper which carries a full recourse endorsement or unconditional guarantee by the person transferring the paper shall be subject under this section to a maximum limitation equal to 25 per centum of such capital and surplus, notwithstanding the collateral requirements set forth in subsection (a)(2) of this section.

(B) If the bank's files or the knowledge of its officers of the financial condition of each maker of such consumer paper is reasonably adequate, and an officer of the bank designated for that purpose by the board of directors of the bank certifies in writing that the bank is relying primarily upon the responsibility of each maker for payment of such loans or extensions of credit and not upon any full or partial recourse endorsement or guarantee by the transferor, the limitations of this section as to the loans or extensions of credit of each such maker shall be the sole applicable loan limitations.

(9) (A) Loans and extensions of credit secured by shipping documents or instruments transferring or securing title covering livestock or giving a lien on livestock when the market value of the livestock securing the obligation is not at any time less than 115 per centum of the face amount of the note covered, shall be subject under this section notwithstanding the collateral requirements set forth in subsection (a)(2) of this section, to a maximum limitation equal to 25 per centum of such capital and surplus.

(B) Loans and extensions of credit which arise from the discount by dealers in dairy cattle of paper given in payment for dairy cattle, which paper carries a full recourse endorsement or unconditional guarantee of the seller, and which are secured by the cattle being sold, shall be subject under this section, notwithstanding the collateral requirements set forth in subsection (a)(2) of this section, to a limitation of 25 per centum of such capital and surplus.

(10) Loans or extensions of credit to the Student Loan Marketing Association shall not be subject to any limitation based on capital and surplus.

(d) Authority of Comptroller of the Currency.

(1) The Comptroller of the Currency may prescribe rules and regulations to administer and carry out the purposes of this section, including rules or regulations to define or further define terms used in this section and to establish limits or requirements other than those specified in this section for particular classes or categories of loans or extensions of credit.

(2) The Comptroller of the Currency also shall have authority to determine when a loan putatively made to a person shall for purposes of this section be attributed to another person.

Attachment II to TB 32

12 U.S.C. Part 32
National Bank Lending Limits
With Interpretations 32.101 through 32.111

From Code of Federal Regulations as of January 1, 1989

cerning the indebtedness of these executive officers or principal shareholders. The disclosure in paragraph (a)(1) above may be based on information compiled as the basis for reporting in the Commercial Bank Report of Condition and Income. The disclosure in paragraph (a)(2) above may be based on information contained in the reports referred to in § 31.6 of this part.

(c) A national bank shall maintain records of any requests for information under paragraph (a) of this section, and records of the disposition of such requests, for a period of two years.

(d) The definitions of terms set forth in Regulation O, 12 CFR 215, and made applicable thereby to Subpart B of that regulation, 12 CFR 215.20–215.23, apply for purposes of this subpart, except that with respect to disclosures required pursuant to paragraph (a)(1) of § 31.5, the term "bank" shall mean a Federally-chartered "insured bank", as that term is used in 12 U.S.C. 1817.

§ 31.6 Reports by executive officers and principal shareholders.

Pursuant to 12 U.S.C. 1972(2)(G)(i), executive officers and principal shareholders of banks are required annually to report to the bank's board of directors their indebtedness, and the indebtedness of their related interests, from correspondent banks of the insiders' bank. This requirement is restated in Regulation O, 12 CFR 215.22.

[48 FR 57265, Dec. 29, 1983, as amended at 49 FR 11825, Mar. 28, 1984]

PART 32—LENDING LIMITS

Sec.

AUTHORITY: 12 U.S.C. 84 and 12 U.S.C. 93a.

SOURCE: 48 FR 15852, Apr. 12, 1983, unless otherwise noted.

§ 32.1 Authority, purpose and scope.

(a) *Authority.* This part is issued pursuant to authority granted in 12 U.S.C. 1 *et seq.; 12* U.S.C. 84 and 12 U.S.C. 93a.

(b) *Purpose.* R.S. 5200 (12 U.S.C. 84) is intended to prevent one individual, or a relatively small group, from borrowing an unduly large amount of the bank's funds. It is also intended to safeguard the bank's depositors by spreading the loans among a relatively large number of persons engaged in different lines of business.

(c) *Scope.* This part applies to all loans and extensions of credit made by national banks and their domestic operating subsidiaries. This part does not apply to loans made by a national bank to its affiliates (as that term is defined in subsection (b)(1) of section 23A of the Federal Reserve Act (12 U.S.C. 371c(b)(1))), operating subsidiaries, and Edge Act or Agreement Corporation subsidiaries.

[48 FR 15852, Apr. 12, 1983, as amended at 49 FR 11825, Mar. 28, 1984]

§ 32.2 Definitions.

For purposes of this part:

(a) "Loans and extensions of credit" means any direct or indirect advance of funds (including obligations of makers and endorsers arising from the discounting of commercial paper) to a

person made on the basis of any obligation of that person to repay the funds, or repayable from specific property pledged by or on behalf of a person. "Loans and extensions of credit" also includes a "contractual commitment to advance funds" as that term is defined in this section.

(b) "Person" means an individual; sole proprietorship; partnership; joint venture; association; trust; estate; business trust; corporation; not-for-profit corporation; sovereign government or agency, instrumentality, or political subdivision thereof; or any similar entity or organization.

(c) "Unimpaired capital and unimpaired surplus" is equivalent to the term "capital and surplus" and has the meaning set forth in 12 CFR 7.1100.

(d) "Contractual commitment to advance funds" means (1) an obligation to make payments (directly or indirectly) to a third party contingent upon default by the bank's customer in the performance of an obligation under the terms of that customer's contract with the third party or upon some other stated condition, or (2) an obligation to guarantee or stand as surety for the benefit of a third party. The term includes, but is not limited to, standby letters of credit (as defined in paragraph (e) of this section), guarantees, puts or other similar arrangements. A binding, written commitment to lend is a "contractual commitment to advance funds" under this part if it and all other outstanding loans (including other binding commitments) to the borrower are within the bank's lending limit on the date of the commitment. Thus, if such a commitment and all other outstanding loans to a borrower are within the bank's lending limit on the date of the commitment, the bank may fund the commitment without violating the lending limit even if its capital and, hence, its lending limit should decline prior to the actual advance of funds. On the other hand, if a commitment and all other outstanding loans to a borrower are not within a bank's lending limit on the date of the commitment, then the commitment would not be deemed a loan until funded and its legality would be determined at that time. In determining whether the issuance of a commitment would cause a bank to exceed its lending limit on the date of the commitment, a bank may deduct from the amount of the commitment the aggregate amount of legally binding written loan participations in that commitment by other financially responsible persons or institutions. The definition also does not include commercial letters of credit and similar instruments where the issuing bank expects the beneficiary to draw upon the issuer, which do not "guarantee" payment of a money obligation, and which do not provide for payment in the event of default by the account party.

(e) A "standby letter of credit" is any letter of credit, or similar arrangement, however named or described, which represents an obligation to the beneficiary on the part of the issuer (1) to repay money borrowed by or advanced to or for the account of the account party, or (2) to make payment on account of any indebtedness undertaken by the account party, or (3) to make payment on account of any default by the account party in the performance of an obligation.

[48 FR 15852, Apr. 12, 1983, as amended at 53 FR 23753, June 24, 1988; 53 FR 40721, Oct. 18, 1988]

§ 32.3 General limitation.

12 U.S.C. 84(a)(1) provides:

The total loans and extensions of credit by a national banking association to a person outstanding at one time and not fully secured, as determined in a manner consistent with paragraph (2) of this subsection, by collateral having a market value at least equal to the amount of the loan or extension of credit shall not exceed 15 per centum of the unimpaired capital and unimpaired surplus of the association.

§ 32.4 Additional general limitation: loans fully secured by readily marketable collateral.

(a) *Law.* 12 U.S.C. 84(a)(2) provides:

The total loans and extensions of credit by a national banking association to a person outstanding at one time and fully secured by readily marketable collateral having a market value, as determined by reliable and continuously available price quotations, at least equal to the amount of the

funds outstanding shall not exceed 10 per centum of the unimpaired capital and unimpaired surplus of the association. This limitation shall be separate from and in addition to the limitation contained in paragraph (1) of this subsection.

(b) *Compliance with Section 84(a)(2).* Each loan or extension of credit based on the foregoing limitation shall be secured by readily marketable collateral having a current market value of at least 100 percent of the amount of the loan or extension of credit at all times. "Current market value" means the bid or closing price listed for an item in a regularly published listing or an electronic reporting service.

(c) For purposes of this part, "readily marketable collateral" means financial instruments and bullion which are salable under ordinary circumstances with reasonable promptness at a fair market value determined by quotations based on actual transactions on an auction or a similarly available daily bid and ask price market. "Financial instruments" include stocks, notes, bonds, and debentures traded on a national securities exchange, "OTC margin stocks" (as defined in Regulation U of the Federal Reserve Board), commercial paper, negotiable certificates of deposit, bankers' acceptances, and shares in money market and mutual funds of the type which issue shares in which banks may perfect a security interest.

(d) Each bank must institute adequate procedures to ensure that the collateral value fully secures the outstanding loan at all times.

(e) Financial instruments may be denominated in foreign currencies which are freely convertible to U.S. dollars. If collateral is denominated and payable in a currency other than that of the loan or extension of credit which it secures, the bank's procedures must require that the collateral be revalued at least monthly, using appropriate foreign exchange rates, in addition to being repriced at current market value.

(f) If collateral values fall below 100 percent of the outstanding loan, to the extent that the loan is no longer in conformance with this section and exceeds the general 15 percent limitation, the loan must be brought into conformance within five business days, except where judicial proceedings, regulatory actions, or other extraordinary occurrences prevent the bank from taking action.

§ 32.5 Combining loans to separate borrowers.

(a)(1) *General rule.* Loans or extensions of credit to one person will be attributed to other persons, for purposes of this part, when (i) the proceeds of the loans or extensions of credit are to be used for the direct benefit of the other person or persons or (ii) a "common enterprise" is deemed to exist between the persons.

(2) *"Common enterprise."*

(i) Whether two or more persons are engaged in a "common enterprise" will depend upon a realistic evaluation of the facts and circumstances of particular transactions.

(ii) Where the expected source of repayment for each loan or extension of credit is the same for each person, a "common enterprise" will be deemed to exist and the loans or extensions of credit must be combined.

(iii) Where loans or extensions of credit are made to persons who are related through common control, including where one person is controlled by another person, a "common enterprise" will be deemed to exist if the persons are engaged in interdependent businesses or there is substantial financial interdependence among them. A "common enterprise" will be deemed to exist when 50 percent or more of one person's gross receipts or gross expenditures (on an annual basis) are derived from transactions with one or more persons related through common control (as defined in paragraph (a)(2)(v) of this section). Gross receipts and expenditures include gross revenues/expenses, intercompany loans, dividends, capital contributions, and similar receipts or payments.

(iv) A "common enterprise" will also be deemed to exist when separate persons borrow from a bank for the purpose of acquiring a business enterprise of which those persons will own more than 50 percent of the voting securities.

(v) For the purposes of paragraph (a)(2)(iii) of this section, "control" shall be presumed to exist when:

(A) One or more persons acting in concert directly or indirectly own, control, or have power to vote 25 percent or more of any class of voting securities of another person; or

(B) One or more persons acting in concert control, in any manner, the election of a majority of the directors, trustees, or other persons exercising similar functions of another person; or

(C) Any other circumstances exist which indicate that one or more persons acting in concert directly or indirectly exercise a controlling influence over the management or policies of another person.

(b) *Loans to corporations.* (1) For purposes of this paragraph, a corporation is a "subsidiary" of any person which owns or beneficially owns more than 50 percent of the voting stock of the corporation. Such ownership need not be direct. Thus, if A owns more than 50 percent of the voting stock of Corporation X which, in turn, owns more than 50 percent of the voting stock of Corporation Y, Corporation Y would be considered a subsidiary of both A and of Corporation X.

(2) Loans or extensions of credit to a person and its subsidiary or to subsidiaries of one person need not be combined where the bank has determined that the person and subsidiaries involved are not engaged in a "common enterprise" as that term is defined in paragraph (a) of this section.

(3) Notwithstanding paragraph (b)(2) of this section, loans or extensions of credit by a national bank to a "corporate group" may not exceed 50 percent of the bank's unimpaired capital and unimpaired surplus. This aggregate limitation applies only to loans made pursuant to sections 84 (a)(1) and (a)(2). A "corporate group" includes a person and all of its subsidiaries.

(c) *Loans to partnerships, joint ventures, and associations.* (1) Loans or extensions of credit to a partnership, joint venture, or association shall, for purposes of this part, be considered loans or extensions of credit to each member of such partnership, joint venture, or association.

(2) Loans or extensions of credit to members of a partnership, joint venture, or association shall, for purpose of this part, be attributed to the partnership, joint venture, or association where one or more of the tests set forth in paragraph (a) of this section is satisfied with respect to one or more such members. However, loans to members of a partnership, joint venture, or association will not be attributed to other members of the partnership, joint venture, or association under this paragraph unless one or more of the tests set forth in paragraph (a) of this section is satisfied with respect to such other members. The tests set forth in paragraph (a) of this section shall be deemed to be satisfied when loans or extensions of credit are made to members of a partnership, joint venture, or association for the purpose of purchasing an interest in such partnership, joint venture, or association.

(3) The rule set forth in paragraph (c)(1) of this subsection is not applicable to limited partners in limited partnerships or to members of joint ventures or associations if such partners or members, by the terms of the partnership or membership agreement, are not to be held liable for the debts or actions of the partnership, joint venture, or association. However, the rules set forth in paragraph (a) of this section are applicable to such partners or members.

(d) *Loans to foreign governments, their agencies, and instrumentalities.* (1) Notwithstanding paragraphs (a), (b), and (c) of this section, loans or extensions of credit to foreign governments, their agencies, and instrumentalities will be combined with one another under section 84 only if they fail to meet either of the following tests at the time the loan or extension of credit is made:

(i) The borrower has resources or revenue of its own sufficient over time to service its debt obligations ("means" test);

(ii) The purpose of the loan or extension of credit is consistent with the purposes of the borrower's general business ("purpose" test).

(2) In order to show that the "means" and "purpose" tests have

been satisfied, a bank shall, at a minimum, assemble and retain in its files the following items:

(i) A statement (accompanied by supporting documentation) describing the legal status and the degree of financial and operational autonomy of the borrowing entity.

(ii) Financial statements for the borrowing entity for a minimum of three years prior to the date the loan or extension of credit was made or for each year less than three that the borrowing entity has been in existence.

(iii) Financial statements for each year the loan or extension of credit is outstanding.

(iv) The bank's assessments of the borrower's means of servicing the loan or extension of credit, including specific reasons in support of that assessment. The assessment shall include an analysis of the borrower's financial history, its present and projected economic and financial performance, and the significance of any financial support provided to the borrower by third parties, including the borrower's central government. If the government's support exceeds the borrower's annual revenues from other sources, it will be presumed that the "means" test has not been satisfied. No such presumption will be made, however, because of a guarantee by the central government of the borrower's debt.

(v) A loan agreement or other written statement from the borrower which clearly describes the purpose of the loan or extension of credit. The written representation will ordinarily constitute sufficient evidence that the "purpose" test has been satisfied. However, when, at the time the funds are disbursed, the bank knows or has reason to know of other information suggesting that the borrower will use the proceeds in a manner inconsistent with the written representation, it may not, without further inquiry, accept the representation.

(Approved by the Office of Management and Budget under control number 1557-0139)

[48 FR 15552, Apr. 12, 1983, as amended at 48 FR 27228, June 14, 1983; 49 FR 11828, Mar. 28, 1984]

§ 32.6 Exceptions to the lending limits.

(a) *Discount of commercial or business paper.*

(1) *Law.* 12 U.S.C. 84(c)(1) provides:

> Loans or extensions of credit arising from the discount of commercial or business paper evidencing an obligation to the person negotiating it with recourse shall not be subject to any limitation based on capital and surplus.

(2) This exception applies to negotiable paper given in payment of the purchase price of commodities in domestic or export transactions purchased for resale or to be used in connection with the fabrication of a product, or to be used for any other business purpose which may reasonably be expected to provide funds for payment of the paper. Loans or extensions of credit arising from the discount of paper of the kind described in this paragraph must bear the full recourse endorsement of the owner. However, loans or extensions of credit arising from the discount of such paper in export transactions may be endorsed by such owner without recourse or with limited recourse, or may be accompanied by a separate agreement for limited recourse; provided, that if transferred without full recourse, the paper must be supported by an assignment of appropriate insurance covering the political, credit, and transfer risks applicable to the paper. Insurance provided by the Export-Import Bank or the Foreign Credit Insurance Association is considered appropriate for this purpose. Loans or extensions of credit based on this exception are not subject to any limitation.

(3) Since the reason for the unlimited credit under this exception is that the paper arises from the sale of a commodity which may reasonably be expected to provide funds for payment of the paper, failure to pay either principal or interest when due removes the reason for unlimited credit. Therefore, although the line of credit to the maker or endorser should not be classified as excessive by reason of such default, the paper on which the default has occurred must thereafter be taken into consideration in determining whether additional loans or extensions of credit may be made within

the limits of 12 U.S.C. 84. The same principles of disqualification from the exception applies to any renewal or extension of either the entire loan or an installment thereof.

(b) *Bankers' acceptances.* (1) *Law.* 12 U.S.C. 84(c)(2) provides:

The purchase of bankers' acceptances of the kind described in section 13 of the Federal Reserve Act and issued by other banks shall not be subject to any limitation based on capital and surplus.

(2) This exception permits the purchase by a national bank without limitation of bankers' acceptances created by other banks, provided that such acceptances are of the kind described in 12 U.S.C. 372 and 373 (eligible acceptances). Acceptances other than those described in sections 372 and 373 must be included within the purchasing bank's lending limit to each acceptor bank.

(3) The limits under which a national bank may itself accept drafts eligible for rediscount are contained in sections 372 and 373. These limits are distinct from the limits under section 84. Acceptances by a national bank of "ineligible" drafts, i.e., time drafts which do not meet the requirements for discount with a Federal Reserve bank, are subject to the limitations of section 84.

(4) During any period within which a national bank holds its own acceptances, eligible or ineligible, having given value therefor, the amount given is considered, for purposes of this part, to be a loan or extension of credit to the customer for whom the acceptance was made and is subject to the lending limits. To the extent that a loan or extension of credit created by discounting the acceptance is covered by a bona fide participation agreement, the discounting bank need only consider that portion of the discounted acceptance which it retains as being subject to the limitations of section 84.

(c) *Loans secured by bills of lading or warehouse receipts covering readily marketable staples.* (1) *Law.* 12 U.S.C. 84(c)(3) provides:

Loans and extensions of credit secured by bills of lading, warehouse receipts, or similar documents transferring or securing title to readily marketable staples shall be subject to a limitation of 35 per centum of capital and surplus in addition to the general limitations if the market value of the staples securing each additional loan or extension of credit at all times equals or exceeds 115 per centum of the outstanding amount of such loan or extension of credit. The staples shall be fully covered by insurance whenever it is customary to insure such staples.

(2) This exception allows a national bank to make loans or extensions of credit to one person in an amount equal to 35 per cent of its capital and surplus in addition to the general 15 per cent permitted by section 84(a)(1) and in addition to the 10 per cent permitted by section 84(a)(2), provided the collateral requirements of section 84(a)(2) are met.

(3) A readily marketable staple means an article of commerce, agriculture, or industry of such uses as to make it the subject of dealings in a ready market with sufficiently frequent price quotations as to make (i) the price easily and definitely ascertainable, and (ii) the staple itself easy to realize upon sale at any time at a price which would not involve any considerable sacrifice from the amount at which it is valued as collateral. Staples eligible for this exception must be nonperishable, may be refrigerated or frozen, and must be fully covered by insurance when such insurance is customary. This exception is intended to apply primarily to basic commodities, such as wheat and other grains, cotton, wool, and basic metals such as tin, copper, lead, and the like. Whether a commodity is readily marketable depends upon existing conditions and it is possible that a commodity that qualifies at one time may cease to qualify at a later date. Fabricated commodities which do not constitute standardized interchangeable units and do not possess uniformly broad marketability do not qualify as readily marketable collateral.

(4) Commodities sometimes fail to qualify as nonperishable because of the manner in which they are handled or stored during the life of the loan or extension of credit. Accordingly, the question as to whether a staple is nonperishable must be determined on a case-by-case basis.

(5) This exception is applicable to a loan or extension of credit arising from a single transaction or secured by the same staples for (i) not more than 10 months if secured by nonperishable staples; and (ii) not more than six months if secured by refrigerated or frozen staples.

(6) The important characteristic of warehouse receipts, order bills of lading, or other similar documents is that the holder of such documents has control of the commodity and can obtain immediate possession. (However, the existence of brief notice periods, or similar procedural requirements under state law, for the disposal of the collateral will not affect the eligibility of instruments for this exception.) Only documents with these characteristics are eligible security for loans under this exception. In the event of default on a loan secured by such documents, the bank must be in a position to sell the underlying commodity and promptly transfer title and possession to the purchaser, thus being able to protect itself without extended litigation. Generally, documents qualifying as "documents of title" under the Uniform Commercial Code are "similar documents" qualifying for this exception.

(7) Field warehouse receipts are an acceptable form of collateral when they are issued by a duly bonded and licensed grain elevator or warehouse having exclusive possession and control of the commodities even though the grain elevator or warehouse is maintained on the commodity owner's premise.

(8) Warehouse receipts issued by the borrower-owner which is a grain elevator or warehouse company, duly-bonded and licensed and regularly inspected by state or federal authorities, may be considered eligible collateral under this exception only when the receipts are registered with an independent registrar whose consent is required before the commodities can be withdrawn from the warehouse.

(d) *Loans secured by U.S. obligations.* (1) *Law.* 12 U.S.C. 84(c)(4) provides:

> Loans or extensions of credit secured by bonds, notes, certificates of indebtedness, or Treasury bills of the United States or by other such obligations fully guaranteed as to principal and interest by the United States shall not be subject to any limitation based on capital and surplus.

(2) This exception applies only to the extent that loans or extensions of credit are fully secured by the current market value of obligations of the United States or guaranteed by the United States.

(3) If the market value of the collateral declines to the extent that the loan is no longer in conformance with this exception and exceeds the general 15 per cent limitation, the loan must be brought into conformance within five business days.

(e) *Loans to or guaranteed by a federal agency.* (1) *Law.* 12 U.S.C. 84(c)(5) provides:

> Loans or extensions of credit to or secured by unconditional takeout commitments or guarantees of any department, agency, bureau, board, commission, or establishment of the United States or any corporation wholly owned directly or indirectly by the United States shall not be subject to any limitation based on capital and surplus.

(2) This exception may apply to only that portion of a loan or extension of credit that is covered by a federal guarantee or commitment.

(3) For purposes of this exception, the commitment or guarantee must be payable in cash or its equivalent within sixty days after demand for payment is made.

(4) A guarantee or commitment is unconditional if the protection afforded the bank is not substantially diminished or impaired in the case of loss resulting from factors beyond the bank's control. Protection against loss is not materially diminished or impaired by procedural requirements, such as an agreement to take over only in the event of default, including default over a specific period of time, a requirement that notification of default be given within a specific period after its occurrence, or a requirement of good faith on the part of the bank.

(f) *Loans secured by segregated deposit accounts.* (1) *Law.* 12 U.S.C. 84(c)(6) provides:

> Loans or extensions of credit secured by a segregated deposit account in the lending

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bank shall not be subject to any limitation based on capital and surplus.

(2) The bank must ensure that a security interest has been perfected in the deposit, including the assignment of a specifically identified deposit and any other actions required by state law.

(3) Deposit accounts which may qualify for this exception include deposits in any form generally recognized as deposits. In the case of a deposit eligible for withdrawal prior to the maturity of the secured loan, the bank must establish internal procedures which will prevent the release of the security.

(4) A deposit which is denominated and payable in a currency other than that of the loan or extension of credit which it secures may be eligible for this exception if it is freely convertible to U.S. dollars. The deposit must be revalued at least monthly, using appropriate foreign exchange rates, to ensure that the loan or extension of credit remains fully secured. This exception applies to only that portion of the loan or extension of credit that is covered by the U.S. dollar value of the deposit. If the U.S. dollar value of the deposit falls to the extent that the loan is in nonconformance with this exception and exceeds the general 15 per cent limitation, the loan must be brought into conformance within five business days, except where judicial proceedings, regulatory actions, or other extraordinary occurrences prevent the bank from taking such action. This exception is not authority for national banks to take deposits denominated in foreign currencies.

(g) *Loans to financial institutions with the approval of the Comptroller.* (1) *Law.* 12 U.S.C. 84(c)(7) provides:

Loans or extensions of credit to any financial institution or to any receiver, conservator, superintendent of banks, or other agent in charge of the business and property of such financial institution, when such loans or extensions of credit are approved by the Comptroller of the Currency, shall not be subject to any limitation based on capital and surplus.

(2) This exception is intended to apply only in emergency situations where a national bank is called upon to provide assistance to another financial institution.

(3) For purposes of this paragraph (g), "financial institution" means a commercial bank, savings bank, trust company, savings and loan association, or credit union.

(h) *Discount of installment consumer paper.* (1) *Law.* 12 U.S.C. 84(c)(8) provides:

(A) Loans and extensions of credit arising from the discount of negotiable or nonnegotiable installment consumer paper which carries a full recourse endorsement or unconditional guarantee by the person transferring the paper shall be subject under this section to a maximum limitation equal to 25 per centum of such capital and surplus, notwithstanding the collateral requirements set forth in subsection (a)(2).

(B) If the bank's files or the knowledge of its officers of the financial condition of each maker of such consumer paper is reasonably adequate, and an officer of the bank designated for that purpose by the board of directors of the bank certifies in writing that the bank is relying primarily upon the responsibility of each maker for payment of such loans or extensions of credit and not upon any full or partial recourse endorsement or guarantee by the transferor, the limitations of this section as to the loans or extensions of credit of each such maker shall be the sole applicable loan limitations.

(2) This exception allows a national bank to discount negotiable or nonnegotiable installment consumer paper of one person in an amount equal to 10 percent of its capital and surplus (in addition to the 15 percent permitted by section 84(a)(1)) if the paper carries a full recourse endorsement or unconditional guarantee by the seller transferring such paper. The unconditional guarantee may be in the form of a repurchase agreement or a separate guarantee agreement. A condition reasonably within the power of the bank to perform, such as the repossession of collateral, will not be considered to make conditional an otherwise unconditional agreement.

(3) For purposes of this paragraph (h), "consumer" means the user of any products, commodities, goods, or services, whether leased or purchased, and does not include any person who purchases products or commodities for the purpose of resale or for fabrication into goods for sale.

(4) For purposes of this paragraph (h), "consumer paper" includes paper relating to automobiles, mobile homes, residences, office equipment, household items, tuition fees, insurance premium fees, and similar consumer items. Also included is paper covering the lease (where the bank is not the owner or lessor) or purchase of equipment for use in manufacturing, farming, construction, or excavation.

(5) Under certain circumstances, installment consumer paper which otherwise meets the requirements of this exception will be considered a loan or extension of credit to the maker of the paper rather than the seller of the paper. Specifically, where (i) through the bank's files it has been determined that the financial condition of each maker is reasonably adequate to repay the loan or extension of credit, and (ii) an officer designated by the bank's Chairman or Chief Executive Officer pursuant to authorization by the Board of Directors certifies in writing that the bank is relying primarily upon the maker to repay the loan or extension of credit, the loan or extention of credit is subject only to the lending limits of the maker of the paper. Where paper is purchased in substantial quantities, the records, evaluation, and certification may be in such form as is appropriate for the class and quantity of paper involved.

(i) *Loans secured by livestock or dairy cattle.*—(1) *Loans secured by livestock.* (i) *Law.* 12 U.S.C. 84(c)(9)(A) provides:

> Loans and extensions of credit secured by shipping documents or instruments transferring or securing title covering livestock or giving a lien on livestock when the market value of the livestock securing the obligation is not at any time less than 115 per centum of the face amount of the note covered, shall be subject under this section, notwithstanding the collateral requirements set forth in subsection (a)(2), to a maximum limitation equal to 25 per centum of such capital and surplus.

(ii) This exception allows a national bank to make loans or extensions of credit to one person in an amount equal to 10 percent of its capital and surplus (in addition to the 15 percent permitted by section 84(a)(1)), if the loans or extensions of credit are secured by livestock having a market value at least equal to 115 percent of the outstanding loan balance at all times. The loans or extensions of credit may be secured by shipping documents or other instruments which transfer title to, secure title to, or give a first lien on livestock. "Livestock" includes dairy and beef cattle, hogs, sheep, goats, horses, mules, poultry, and fish, whether or not held for resale. To support compliance with this exception, the bank must maintain in its files an inspection and appraisal report on the livestock pledged. The inspection and appraisal report should be performed at least every 12 months, or more frequently as deemed prudent.

(iii) Under the laws of certain states, a persons furnishing pasturage under a grazing contract may have a lien on the livestock for the amount due for pasturage. If the lien which is based on pasturage furnished by the lienor prior to the making of the loan (A) is assigned to the bank by a recordable instrument and (B) is protected against being defeated by some other lien or claim, by payment to a person other than the bank, or otherwise, it would qualify under this exception provided the amount of such perfected lien is at least equal to the amount of the loan and the value of the livestock is at no time less than 115 percent of the loan. Where the amount due under the grazing contract is dependent upon future performance thereunder, the resulting lien has merely prospective value and does not meet the requirements of the exception.

(2) *Loans secured by dairy cattle.* (i) *Law.* 12 U.S.C. 84(c)(9)(B) provides:

> Loans and extensions of credit which arise from the discount by dealers in dairy cattle of paper given in payment for dairy cattle, which paper carries a full recourse endorsement or unconditional guarantee of the seller, and which are secured by the cattle being sold, shall be subject under this section, notwithstanding the collateral requirements set forth in subsection (a)(2), to a limitation of 25 per centum of such capital and surplus.

(ii) This exception allows a national bank to discount paper of one person given in payment for dairy cattle in an amount equal to 10 percent of its capital and surplus (in addition to the 15

percent permitted by section 84(a)(1)). The discounted paper must carry the full recourse endorsement or unconditional guarantee of the seller and the dairy cattle must secure the debt. Liens on the cattle may be in any form which allows the bank to maintain a perfected security interest in the cattle under applicable state law.

(3) The exception for loans and extensions of credit secured by livestock is separate and apart from the exception for loans and extensions of credit created by the discount of paper for the purchase of dairy cattle. Therefore, a national bank may make loans or extensions of credit to one person secured by each type of collateral in an amount equal to 10 percent of its capital and surplus (in addition to the 15 percent permitted under section 84(a)(1)).

(j) *Loans to Student Loan Marketing Association.* 12 U.S.C. 84(c)(10) provides:

> Loans or extensions of credit to the Student Loan Marketing Association shall not be subject to any limitation based on capital and surplus.

§ 32.7 Transitional rules.

(a) Loans or extensions of credit which were in violation of 12 U.S.C. 84 prior to the relevant effective dates of this part will be considered to remain in violation of section 84 and subject to actions under 12 U.S.C. 93 and 1818, and other appropriate laws after those dates until they are paid in full, regardless of whether the loans or extensions of credit conform to the rules established in this part. Renewals or extensions of such loans or extensions of credit will also be considered violations of law.

(b) A national bank which has outstanding loans or extensions of credit to a person in violation of section 84 as of the relevant effective dates of this part may make additional advances to such person after those dates if the additional advances are permitted under this part. The additional advances, however, may not be used directly or indirectly to repay any outstanding illegal loans or extensions of credit.

(c) Loans or extensions of credit which were in conformance with section 84 prior to the relevant effective dates of this part but are not in conformance with the rules established in this part will not be considered to be violations of law during the existing contract terms of such loans or extensions of credit. Renewals or extensions of such loans or extensions of credit which are not in conformance with the rules set forth in this part may be made on or after the effective dates of this part; however, all loans or extensions of credit made under such renewals or extensions must conform with the rules set forth in this part no later than January 1, 1985.

(d) If a national bank, prior to the relevant effective dates of this part, entered into a legally binding commitment to advance funds on or after those dates, and such commitment was in conformance with section 84, advances under such commitment may be made notwithstanding the fact that such advances are not in conformance with this part. The bank must, however, demonstrate that the commitment represents a legal obligation to fund, either by a written agreement or through file documentation. Advances under renewals or extensions of such commitments must conform to this part if the renewal or extension of the commitment is made on or after the relevant effective dates of this part.

§ 32.8 Substitute lending limit for banks with agricultural or oil and gas loans.

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

(1) "Agricultural loans" include loans or extensions of credit secured by farmland, loans to finance agricultural production and other loans to farmers reported in the bank's Report of Condition and Income (Call Report). The following are examples of such types of loans: for growing and storing of crops, breeding and marketing of livestock, financing fisheries, purchases of farm machinery and equipment, maintenance and operations of the farm, and discounted notes of farmers.

(2) "Oil and gas loans" include loans or extensions of credit to oil companies, petroleum refiners, and companies primarily engaged in the oil- and

gas- related business, for example: operating oil and gas field properties, contract drilling, performing exploration services on a contract basis, performing oil and gas field services, manufacturing or leasing of oil field machinery and equipment, pipeline transportation of petroleum, natural gas transmission or distribution, and investing in oil and gas royalties or leases.

(3) "Special category loan charge-offs" mean agricultural or oil and gas loans charged-off during the period from January 1, 1986 through December 31, 1989, which have been or will be reported in a special memorandum item in the bank's Call Report in accordance with the Comptroller of the Currency's capital forbearance policy.

(b) A national bank which has special category loan charge-offs resulting in a reduction in its unimpaired capital and unimpaired surplus since December 31, 1985, may substitute a lending limit calculated under this section for the general limitation provided at 12 U.S.C. 84(a)(1), up to a maximum amount of 20 percent of unimpaired capital and unimpaired surplus, until January 1, 1995.

(c) The substitute lending limit in paragraph (b) of this section is the lesser of the following amounts:

(1) 15 percent of unimpaired capital and unimpaired surplus on December 31, 1985; or

(2) 15 percent of the total of:

(i) The difference between the sum of special category loan charge-offs and the sum of recoveries on those charge-offs; plus

(ii) Unimpaired capital and unimpaired surplus; or

(3) 20 percent of unimpaired capital and unimpaired surplus.

[51 FR 39642, Oct. 30, 1986, as amended at 53 FR 2998, Feb. 3, 1988]

Interpretations

§ 32.101 Obligations of accommodation parties.

The liability of a drawer, endorser, or guarantor who does not receive any of the proceeds, or the benefit of the proceeds, of the loan or extension of credit is not a loan or extension of credit to such person for purposes of this part unless one of the tests set forth in 12 CFR 32.5(a)(1) is satisfied.

§ 32.102 Sale of Federal funds.

(a) *Definition.* "Sale of Federal funds" means, for purposes of this section, any transaction among depository institutions involving the transfer of immediately available funds resulting from credits to deposit balances at Federal Reserve banks or from credits to new or existing deposit balances due from a correspondent depository institution.

(b) Sales of Federal funds with a maturity of one business day or under a continuing contract are not "loans and extensions of credit" for purposes of this part. However, sales of Federal funds with a maturity of more than one business day are subject to the lending limits.

(c) A "continuing contract" refers to an agreement that remains in effect for more than one business day but has no specified maturity and requires no advance notice for termination.

§ 32.103 Purchase of securities subject to repurchase agreement.

(a) The purchase of "Type I securities," as defined in 12 CFR 1.3(c), subject to an agreement that the seller will repurchase at the end of a stated period is not a "loan or extension of credit" for purposes of this part.

(b) The purchase of other types of securities subject to an agreement that the seller will repurchase at the end of a stated period is regarded as a loan from the purchasing bank to the seller and not as an obligation of the underlying obligor of the security.

§ 32.104 Purchase of third-party paper.

Where a bank purchases third-party paper subject to an agreement that the seller will repurchase the paper upon default or at the end of a stated period after default, the seller's obligation to repurchase is subject to 12 U.S.C. 84 and is measured by the total unpaid balance of the paper owned by the bank less any applicable dealer reserves. Where the seller's obligation to repurchase is limited, the seller's total loans or extensions of credit, for the purpose of 12 U.S.C. 84 are measured

by the total amount of paper the seller may ultimately be obligated to repurchase. Where no more than an agreed percentage of the purchase price is retained by the bank and credited to a reserve to be held as a form of collateral security, but the bank has no direct or indirect recourse to the seller, the loans or extensions of credit do not constitute loans or extensions of credit to the seller subject to the limitations of section 84.

§ 32.105 Overdrafts.

Overdrafts, whether or not prearranged, are "loans and extensions of credit" for purposes of this part. This rule does not apply to "intra-day" or "daylight" overdrafts.

§ 32.106 Loans charged off in whole or in part.

The lending limits apply to all existing loans or extensions of credit to a person by the bank, including loans or extensions of credit which have been charged off on the books of the bank in whole or in part. Loans or extensions of credit which have become unenforceable by reason of discharge in bankruptcy or are no longer legally enforceable for other reasons are not "loans and extensions of credit" for purposes of this part.

§ 32.107 Sale of loan participations.

(a) When a bank sells a participation in a loan or extension of credit, including the discount of a bank's own acceptance, that portion of the loan that is sold on a nonrecourse basis will not be applied to the bank's lending limits. In order to remove a loan or extension of credit from a bank's lending limit, a participation must result in a pro rata sharing of credit risk proportionate to the respective interests of the originating and participating lenders. This is so even where the participation agreement provides that repayment must be applied first to the shares sold. In that case, the pro rata sharing may only be accomplished if the agreement also provides that, in case of a default or comparable event defined in the agreement, participants shall share in all subsequent repayments and collections in proportion to the percentage of participation at the time of the occurrence of the event.

(b) The provisions of the above paragraph apply to all "loans and extensions of credit," as defined in § 32.2(a) of this part, including "contractual commitment(s) to advance funds," as defined in § 32.2(d) of this part.

§ 32.108 Interest or discount on loans.

The lending limits do not apply to the portion of a loan or extension of credit that represents accrued or discounted interest.

§ 32.109 Loans to or guaranteed by general obligations of a State or political subdivision.

(a) A loan or extension of credit to a bank customer which is guaranteed or fully secured by a "general obligation" of any State or political subdivision thereof, within the meaning of 12 CFR 1.3(g), is not considered an obligation of the customer for purposes of 12 U.S.C. 84. The lending bank should obtain the opinion of competent counsel that the guarantee or collateral is a valid and enforceable obligation of the public body.

(b) A loan or extension of credit to a State or political subdivision thereof is not subject to any limitation based on capital or surplus if the loan or extension of credit constitutes a "general obligation" of the State or political subdivision within the meaning of 12 CFR 1.3(g). The lending bank should obtain the opinion of competent counsel that the loan or extension of credit is a valid and enforceable obligation of the borrower.

§ 32.110 Loans to industrial development authorities.

A loan or extension of credit to an industrial development authority or similar public entity created for the purpose of constructing and leasing a plant facility, including a health care facility, to an industrial occupant is not a loan or extension of credit to the authority for the purposes of 12 U.S.C. 84 if: (a) The bank relies on the credit of the industrial occupant in making the loan; (b) the authority's liability with respect to the loan is limited solely to whatever interest it has in

the particular facility; (c) the authority's interest is assigned to the bank as security for the loan or a promissory note from the lessee to the bank provides a higher order of security than the assignment of a lease; and (d) the industrial occupant's lease rentals are assigned and paid directly to the bank. A loan or extension of credit meeting the above criteria will be deemed a loan or extension of credit to the lessee and will be combined with other obligations of the lessee for purposes of section 84.

§ 32.111 Separate limitations for 12 U.S.C. 24 and 12 U.S.C. 84.

The lending limits prescribed by 12 U.S.C. 84 are separate and distinct from the investment limits prescribed by 12 U.S.C. 24. Accordingly, a national bank may make loans or extensions of credit to one borrower up to the full amount permitted by 12 U.S.C. 84 and also hold eligible investment securities of the same obligor up to the full amount permitted by 12 U.S.C. 24. In order for a security to be an "investment security" it must be eligible for investment by a national bank in accordance with the standards set forth in 12 CFR Part 1.

PART 33—DISPOSITION OF UNCLAIMED PROPERTY RECOVERED FROM CLOSED NATIONAL BANKS

Sec.

AUTHORITY: 12 U.S.C. 216.

SOURCE: 48 FR 30007, June 29, 1983, unless otherwise noted.

§ 33.1 Authority.

The Office of the Comptroller of the Currency issues this part pursuant to the authority of section 408 of the Garn-St Germain Depository Institutions Act of 1982 (Pub. L. 97-320) ("Act"), 12 U.S.C. 216.

§ 33.2 Purpose.

The purpose of this part is to establish procedures to govern the disposition of unclaimed property in the possession or custody of the Office that was recovered from insolvent national banks and banks in the District of Columbia closed before and during the 1930's. Information regarding the filing and processing of claims and the disposition of property is included.

§ 33.3 Definitions.

For purposes of this part, the term:

"Bank" means a national banking association or a bank located in the District of Columbia subject to the supervision of the Office that was closed before or during the 1930's and from which unclaimed property was recovered by a receiver and delivered into the possession or custody of the Office.

"Bank customer" means the person or entity who appears from the records of the receivers appointed by the Office to be the last known owner of the unclaimed property or in whose name the property was held by the bank.

"Claim" means a written assertion of lawful entitlement to, or custody or possession of, unclaimed property that is filed in accordance with requirements established by the Office.

"Claimant" means any person or entity, including a state under its applicable statutory law, asserting a demonstrable legal interest in title to, or custody or possession of, unclaimed property.

"Office" means the Office of the Comptroller of the Currency.

"Unclaimed property" means any document, article, item, asset, other property, or the proceeds thereof, recovered from a safe deposit box or other safekeeping arrangement with a bank that is in the possession, custody, or control of the Office in its capacity as successor to a receiver of the bank.

§ 33.4 General requirements and procedures for filing claims.

(a) *General requirements.* Any person, including an entity or a state, that may have a legal interest in title

Attachment III to TB 32

July 18, 1989 Notice of Proposed Rulemaking
(Proposed Amendments to Temporary Rule of June 24, 1988)

chapter; and § 70.7 (a) through (f), § 70.9, and §§ 70.32, 70.42, 70.51 to 70.56, inclusive, §§ 70.60 to 70.62, inclusive, and § 70.7 of Part 70 of this chapter; and to the provisions of Parts 19, 20 and 71 and Subpart B of Part 34 of this chapter. In addition, any person engaging in activities in non-Agreement States or in offshore waters under the general licenses provided in this section:

* * * * *

Dated at Rockville, MD, this 12th day of July, 1989.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 89-16792 Filed 7-17-89; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF THE TREASURY

Comptroller of the Currency

12 CFR Part 32

[Docket No. 89-7]

National Bank Lending Limits

AGENCY: Office of the Comptroller of the Currency.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (the "OCC") is proposing to amend a temporary rule (the "Temporary Rule"), which revised the OCC's regulation concerning national bank lending limits with respect to the treatment of loan commitments. In issuing the Temporary Rule, the OCC emphasized in the preamble that it would provide relief for national banks that have experienced a decline in their capital, and hence, in their lending limits, after entering into loan commitments. Nonetheless, the substantive provisions of the Temporary Rule were applicable to *all* national banks.

In response to comments received which objected to the impact of the Temporary Rule on banks that have not experienced a capital decline, the OCC is proposing to amend the Temporary Rule. This amendment is intended to revise and clarify the effect of the rule on the loan commitments of national banks that have not experienced a decline in capital, by restoring some flexibility to banks in managing their loan commitments relative to their lending limits.

Although the Temporary Rule was effective when it was published, on June 24, 1988, this amendment proposes a modified transition period. As part of this transition period, the OCC proposes not to take administrative action to enforce the Temporary Rule against banks until the effective date of a final rule. However, this amendment does not propose any change to the effective date of the Temporary Rule or to the retroactive validation of loan commitments made prior to the effective date of the Temporary Rule, that were within a bank's lending limit when made. During this modified transition period, the OCC expects all national banks to become familiar with the Temporary Rule and its revisions and to amend their lending practices as necessary.

DATE: Comments must be received by September 18, 1989.

ADDRESSES: Comments should be directed to: Docket No. 89-7, Communications Division, Fifth Floor, Office of the Comptroller of the Currency, 490 L'Enfant Plaza East, SW., Washington, DC 20219; Attn: Jackie England. Comments will be available for public inspection and photocopying at the same location.

FOR FURTHER INFORMATION CONTACT: Ellen C. Starr or Deborah Katz, Attorneys, Legal Advisory Services Division, (202) 447-1880; or Jon A. Nagy or William C. Kerr, National Bank Examiners, Supervision Policy/Research Division (202) 447-1164.

SUPPLEMENTARY INFORMATION

Drafting Information

The principal drafters of this document were Ellen C. Starr, Attorney, Legal Advisory Services Division, and William C. Kerr, National Bank Examiner, Supervision Policy/Research Division.

Background

National banks are subject to a statutory limitation on the "total loans and extensions of credit * * * to a person outstanding at one time." 12 U.S.C. section 84. Section 84 defines "loans and extensions of credit" as including "all direct or indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds or repayable from specific property pledged by or on behalf of the person * * *." 12 U.S.C. section 84(b)(1). In addition, the term "loans and extensions of credit" includes, "to the extent specified by the Comptroller of the Currency," * * any liability of a national banking association to advance funds to or on behalf of a person pursuant to a contractual commitment." *Id.*

Exercising the authority of section 84(b)(1), and the more general regulatory authority provided at 12 U.S.C. section 84(d)(1), the OCC issued a regulation on national bank lending limits. *See* 12 CFR Part 32 (1988). At Part 32, the OCC generally restated the statutory definition of "loans and extensions of credit," and included within that definition a "contractual commitment to advance funds." *See* 12 CFR 32.2(a). A "contractual commitment to advance funds" was separately defined, and excluded "undisbursed loan funds and loan commitments not yet drawn upon" which were not otherwise the equivalent of a contractual commitment to advance funds as defined in the regulation. *Id.* at § 32.2(d). Thus, prior to the Temporary Rule, a loan commitment that was not the equivalent of a "contractual commitment to advance funds" was not considered a loan or extension of credit, such that a national bank's lending limit was applicable to it, until funds were actually disbursed under the commitment.

The OCC adopted this definition of a "contractual commitment to advance funds" largely in response to comments which advocated that loan commitments and undisbursed loan funds should not be subject to the lending limit until the funds were disbursed. *See* 52 FR 15844 (April 12, 1983). Nonetheless, the OCC expressed some concern that banks might not monitor commitments to ensure that they were properly managed. 52 FR at 15845. For example, the OCC noted that there was no legal prohibition against a national bank's entering into a loan commitment with a borrower which, alone or in combination with other obligations of that borrower, would exceed the bank's lending limit if funded. *Id.* Further, the OCC noted that the opportunity to generate fee income or the desire to retain a large borrower as a customer may create an incentive for a bank to provide a loan commitment in excess of its lending limit, where the bank speculated that its future capital levels would increase or that it would be able to sell any overline to another bank at the time of funding the commitment. *Id.*

Unfortunately, a number of banks experienced problems under the definition of a "contractual commitment to advance funds" established by Part 32. These problems involved not only the question of *which* loan commitments constituted "contractual commitments to advance funds," and thus "loans and extensions of credit," subject to the limitations of section 84, but also *when*, a bank's lending limit was applied to such a loan commitment, to determine its legality under section 84.

Section 84 does not expressly address when a bank's lending limit is applied to a loan or extension of credit, to

determine its legality. However, the OCC has consistently interpreted an early Supreme Court case as establishing the principle that the lending limit is applied on the day that the loan is made. *See Corsicana National Bank* v. *Johnson*, 51 U.S. 66, 86, (1919). Thereafter, a loan which was within the bank's lending limit on the date it was made would not become a violation of § 84 even if subsequent changes in circumstances, *e.g.*, a reduction in the bank's lending limit, caused the loan to become nonconforming. The OCC also applied this principle to a loan commitment; as a result, a bank's lending limit was applied to a loan commitment only on the day, and then only to the extent, that funds were disbursed under the commitment.

This treatment of loan commitments resulted in a dilemma for a bank which entered into a loan commitment within its lending limit when made, but in excess of its lending limit at the time of funding because of an intervening reduction in the bank's capital. If the bank funded the loan in excess of its lending limit, it would violate section 84, perhaps exposing its directors to personal liability. Alternatively, if the bank did not fund the loan, in compliance with section 84, it could breach a legally binding loan commitment, thereby risking liability to its customer. The bank's dilemma was particularly acute when it was not able to sell a simultaneous participation to another lender at the time of funding the commitment. The OCC issued the Temporary Rule to provide relief for banks facing this dilemma, and to enable banks to avoid this dilemma when considering future loan commitments. *See* 53 FR 23752 (June 24, 1988).

Provisions of the Temporary Rule

In issuing the Temporary Rule, the OCC determined that it was equitable and convenient "to allow the lending limit to be applied on the date a binding, written commitment within the bank's limit is made, *i.e.*, to treat such an 'underline' commitment as a lawful 'loan and extension of credit' even if the bank's capital declines prior to funding that commitment." *Id.* Thus, "if the *total* of the proposed commitment *and* all other loans and commitments to a borrower are within the bank's lending limit at the time the commitment is made, the commitment is deemed a 'loan' and its legality under the lending limit is determined as of that time." *Id.* at 23753. In discussing "underline" commitments, the Preamble to the Temporary Rule concluded that "[o]nce a commitment is treated as a loan, it *must* be included by the bank in computing its lending limit for all subsequent loans to the borrower." *Id.* (Emphasis added.) The effect of the Temporary Rule, then, was to allow a bank to fully fund a loan commitment that was within the bank's lending limit when made, even if the bank's lending limit subsequently declined.

The Temporary Rule also addressed "overline" loan commitments, *i.e.*, those loan commitments which would exceed the bank's lending limit if funded when made. *Id.* The OCC stated that such commitments would still be permitted, because they would not be treated as "loans and extensions of credit" until funded. Thus, "if a bank has made a binding, written loan commitment to one borrower that, in combination with all other outstanding loans and commitments to that borrower, is in excess of its lending limit on the day of the commitment, the commitment is not a loan on that date." * * *" *Id.* In that event, "the lending limit must be calculated and applied on the date funds are advanced, even if capital subsequently is reduced." *Id.* A bank entering into such an "overline" loan commitment would violate section 84 if it subsequently funded the overline commitment in an amount which, alone or in combination with all other loans and extensions of credit outstanding to the borrower at the time of funding, exceeded the bank's lending limit. *Id.*

Even in issuing the Temporary Rule, however, the OCC cautioned that "[w]hen a bank is requested to enter into an outstanding binding commitment which may exceed its lending limit now or in the future, prudent banking practice would dictate that the bank take precautions to permit escape from such a dilemma." *Id.* at 23752. As an example, the OCC suggested including "a protective clause in the commitment which would release the bank from its obligation if funding the commitment would result in an overline." *Id.*

The Temporary Rule achieved its substantive purpose through an amendment to the definition of a "contractual commitment to advance funds." The Temporary Rule deleted that portion of the definition of a "contractual commitment to advance funds" which excluded "undisbursed loan funds and loan commitments not yet drawn upon" which were not otherwise the equivalent of a contractual commitment to advance funds. In its place, the Temporary Rule added in part: "A binding, written commitment to lend is a 'contractual commitment to advance funds' under this part if it and all other outstanding loans (including other binding commitments) to the borrower are within the bank's lending limit on the date of the commitment." *Id.* at 23753–54.

In order to provide the swiftest relief, the Temporary Rule was made effective on publication, *i.e.*, on June 24, 1988. *Id.* at 23752. In addition, the Temporary Rule was made retroactive, to permit "a bank to honor all legally binding commitments which were made in good faith prior to the effective date of the amendment and were within the bank's lending limit when made, even if the *advances* would cause the bank to exceed its present lending limit if they were treated as loans." *Id.* at 23753. The Preamble specifically stated, however, that the Temporary Rule would not "retroactively validate *advances* that were made prior to the effective date of the new rule and that exceeded the lending limit at that time." *Id.*

Summary of Comments Received on the Temporary Rule; Agency Action

Although the Temporary Rule was made effective on publication, the OCC requested comment on it, providing a 90-day comment period which ended on September 22, 1988. *Id.* at 23752. During the comment period, the OCC received only 13 comment letters from national banks and one trade association. Of these letters, only one opposed the intent of the Temporary Rule contending that it encouraged the perpetuation of poor management practices. This commenter suggested that banks make use of protective clauses in loan commitments. As an alternative, if the OCC chose to issue the Temporary Rule as a final rule, this commenter argued that all loan commitments should be treated consistently, *i.e.*, that an "overline" commitment should be treated as an illegal loan on the day it was entered into, rather than on the day it was funded.

The remaining 12 comment letters supported the intent of the Temporary Rule and expressed appreciation to the OCC for responding to the dilemma imposed upon banks which had experienced, or might experience, an unexpected decline in capital. Some commenters offered minor suggestions for amending the Temporary Rule. Most notable however, were four comments that addressed the effect of the Temporary Rule on banks which had not experienced a decline in capital; each of these comments objected to a perceived negative impact of the Temporary Rule on "healthy" banks. These comments are discussed below.

Three commenters suggested that the Temporary Rule be expanded, to apply to binding oral commitments in addition to binding written loan commitments. The OCC has considered this suggestion, but has chosen to retain the present scope of the Temporary Rule, which applies to binding *written* loan commitments only. Although the OCC recognizes that in some states, some oral commitments to lend may in fact be binding, the binding nature of these commitments is often determined only through litigation. With the Temporary Rule, the OCC has for the first time offered a bank a method of protecting itself and its outstanding loan commitments from a subsequent decline in the bank's capital. As a matter of prudent banking practice and for ease of monitoring compliance with section 84's lending limit, the OCC is requiring banks which would take advantage of the protection provided by the Temporary Rule to enter into binding written commitments to lend, rather than oral commitments, even where that oral loan commitment may be supported by bank documentation.

One commenter requested that any final rule be clarified to permit renewals of loan commitments, including unfunded commitments, that were within the bank's legal lending limit when made, even though the commitment may be greater than the lending limit at the time of its renewal. In response to this comment, the OCC has considered the effect of the Temporary Rule on renewals of loan commitments generally, whether funded or unfunded.

The OCC has previously recognized that the renewal of an existing outstanding loan is not an advance of funds for the purposes of section 84. Thus, the OCC has allowed a bank to renew an outstanding loan, even where the bank's lending limit has declined such that a new loan, if made as of the date of the renewal, would have resulted in a violation of the bank's lending limit. The renewal of a loan which is in excess of the bank's presently applicable lending limit, but which was legal when made, does not constitute a violation of section 84; rather, the loan is considered "nonconforming." As an integral part of the renewal of a loan in excess of the bank's presently applicable lending limit, however, the OCC has consistently required that the bank make every effort to bring the loan into conformance with its lending limit through the sale of participations or other loan restructuring prior to renewing the loan.

In that the Temporary Rule deems a loan commitment which is within a bank's lending limit when made to be a loan, a question was raised about the treatment of a renewal of an unfunded or partially funded loan commitment which was within the bank's lending limit when made but which would exceed the bank's lending limit if entered into on the date of renewal. An argument may be made that an underline loan commitment should be treated as a loan in all respects, allowing for a renewal of the commitment even after the bank's capital has declined. However, the OCC views the expiration of an unfunded or partially funded loan commitment, or any restructuring of the commitment, as an opportunity for a bank to bring that loan commitment into conformance with the bank's then-applicable lending limit.

Thus, where a bank has entered into and funded or partially funded a loan commitment which was within the bank's lending limit when made, and the bank's lending limit subsequently declines, the bank may renew that portion of the loan commitment which has been funded, as though the loan commitment were a term loan. Alternatively, the bank may enter into a new loan commitment, which, with all other outstanding obligations of the borrower, is within its new lower lending limit. As a loan commitment within the bank's lending limit when made, this commitment would be construed as a loan, which subsequently may be fully funded, even if the bank's capital and lending limit should again decline. The OCC has determined that an unfunded loan commitment, or the unfunded portion of any loan commitment, which would exceed the bank's lending limit if made on the date of renewal, may not be renewed.

If a bank renews an unfunded loan commitment, which renewal is in excess of its legal lending limit when made, the renewal will be construed as an overline commitment, not subject to the protections of the Temporary Rule. Such a renewal does not of itself constitute a violation of Section 84, however; the bank will violate Section 84 only when funds provided pursuant to an overline commitment exceed the bank's lending limit. If the bank renews the funded portion of a partially funded loan commitment which was within the bank's lending limit when made, but which now exceeds the bank's lending limit, the loan will be considered "nonconforming" to the extent that funds disbursed prior to the date of the renewal exceed the bank's lending limit as of the date of the renewal. If the bank advances additional funds, however, the bank will exceed its lending limit, and hence, violate Section 84.

Another commenter, while agreeing with the intent of the Temporary Rule, suggested that the OCC take action less formally, either through an interpretive ruling or through an internal advisory letter to national bank examiners. However, as the Temporary Rule amended the OCC's definition of a "contractual commitment to advance funds" stated at 12 CFR § 32.2(d), the OCC has determined that a regulation is the appropriate mechanism by which to implement the intention of the Temporary Rule. Further, issuing the Temporary Rule as a regulation is consistent with the OCC's continuing effort to consolidate its existing regulations and interpretive rulings on national bank lending limits into one comprehensive regulation.

As noted above, four comments addressed the effect of the Temporary Rule on a bank which had not experienced a decline in capital. Three of these comments, each from a national bank, specifically objected to the Temporary Rule, generally protesting that it restricted the flexibility of banks in managing their loan commitments relative to their lending limits. One national bank commenter stated that the Temporary Rule imposed "new and burdensome constraints on the ability of all national banks to manage their relationships with substantial borrowers." It is in response to these comments that the OCC is proposing a revision of the Temporary Rule.

Each of the three comment letters which specifically objected to the effect of the Temporary Rule on the lending practices of banks which had not experienced a decline in capital did so for the same reason, which may be described with an example. Thus, assume that a national bank has a lending limit of $10,000,000.00. The bank has one loan, in the amount of $5,000,000.00, outstanding to Borrower. At Borrower's request, the bank enters into a legally binding written commitment with Borrower for an additional $5,000,000.00, to be funded at a later date. After entering into the loan commitment, but before it is funded, Borrower requests a short term loan, of $10,000.00, from the bank. Prior to the Temporary Rule, the bank would have been allowed to extend the short term credit requested without exceeding its lending limit. Under the Temporary Rule, however, the $5,000,000.00 loan commitment must be counted as a loan when made, because as of that date it was within the bank's lending limit. By

er tering into the commitment, the bank has reached its lending limit, and may not extend the additional short term credit Borrower requested without violating Section 84.

The example above demonstrates that, as a result of the Temporary Rule, healthy banks may not make some extensions of credit which they could have made prior to the Temporary Rule. Thus, the Temporary Rule has been seen as placing an additional and unnecessary burden on healthy banks. In response to these objections, the OCC is proposing to amend the Temporary Rule.

The proposed amendment is intended to allow a bank which has entered into a loan commitment with a borrower, which was within the bank's lending limit when made, to extend additional credit to that borrower, which when aggregated with all other funds *actually disbursed* to the borrower, does not exceed the bank's lending limit. In proposing this revision, the OCC has recognized that most banks do carefully and effectively monitor funds actually disbursed to a borrower, thereby avoiding a violation of Section 84, even though the nominal amount of credit available to that borrower, through loans or loan commitments, exceeds the bank's lending limit.

Summary of the Proposed Revision of the Temporary Rule, With Examples

Three of the commenters objecting to the impact of the Temporary Rule on banks which had not experienced a decline in capital proposed an alternative to the Temporary Rule's treatment of loan commitments. These commenters suggested that a bank not be *required* to consider a loan commitment which was within the bank's lending limit when made as a loan, which, when combined with all other outstanding obligations of the borrower *must* be within the bank's lending limit. Rather, these commenters proposed that the bank be allowed to make an election, choosing whether a loan commitment which is within the bank's lending limit when made should be treated as a loan as of the day it is entered into or as of the day it is funded.

Although the OCC considered that alternative, the OCC has rejected it in favor of this proposed revision. In rejecting the suggestion offered by the commenters, the OCC considered that a bank may not be in the best position, at the time of entering into an underline loan commitment, to determine whether that commitment should be treated as a loan or as an overline commitment. Such a decision may better be made after the loan commitment has been entered into, if and when the bank is called upon to make an additional extension of credit which, when aggregated with the total amount to be advanced under the loan commitment, would cause the bank to exceed its lending limit to the borrower. At that point, the bank may more accurately assess its potential increases or decreases in capital, to determine the prudence of extending the later-requested credit.

To achieve the flexibility desired, the OCC is proposing a method by which "underline" loan commitments, *i.e.*, those loan commitments which, with all other outstanding obligations of the borrower, are within the bank's lending limit when made, will qualify for the protection provided by the Temporary Rule. An "overline" loan commitment, *i.e.*, a loan commitment which, with all other outstanding obligations of the borrower, exceeds the bank's lending limit on the date it is entered into, will not qualify for the protection of the Temporary Rule. However, some underline commitments, which qualified for the protection of the Temporary Rule when made, may subsequently be disqualified.

An underline commitment will be disqualified from the protection of the Temporary Rule if, after entering into the underline commitment, the bank makes an additional loan or an extension of credit to the borrower, which exceeds the bank's lending limit when combined with the nominal amount of any underline loan commitments and all other loans outstanding to the borrower. Note that, as an overline commitment is not considered a loan or an extension of credit until it is funded, merely entering into an overline commitment subsequent to a qualifying underline commitment to lend will not, of itself, disqualify an earlier qualifying commitment to lend. Advances of funds under an overline commitment may result in the disqualification of an underline commitment to lend, however.

Once an underline commitment has been disqualified, it will be treated as if it had been an overline commitment. Thus, a disqualified loan commitment may be funded only to the extent that any advance under the commitment, combined with all other obligations outstanding to the borrower, does not exceed the bank's lending limit on the date of funding. Disqualification of a loan commitment may also result in a violation of Section 84, where the funds disbursed under the loan commitment, when combined with all other outstanding obligations of the borrower and the amount of the disqualifying credit, exceed the bank's lending limit on the date of the disqualifying credit.

Although a bank does not violate Section 84 when it fully funds a qualified underline loan commitment in excess of the bank's lending limit on the date of funding, funding the loan commitment may nonetheless result in total obligations outstanding to a borrower in excess of the bank's lending limit. This excess credit is "nonconforming" for the purposes of Section 84, and must be taken into account prior to any subsequent loans which the bank would make to the borrower. In other words, to the extent that a bank has nonconforming loans outstanding to a borrower, the bank may not make additional extensions of credit to that borrower. The requirement that a bank consider its nonconforming loans prior to extending any additional credit to a borrower is not new with this proposed revision of the Temporary Rule, nor was it imposed by the Temporary Rule.

The examples below illustrate (1) the disqualification of an underline commitment, and (2) a nonconforming, but not illegal, loan commitment.

Example I: This example illustrates the disqualification of an underline loan commitment. Assume that a national bank has a lending limit of $10,000,000.00. On June 1, 1988, the bank has one loan, in the amount of $5,000,000.00, outstanding to Borrower. On July 1, 1988, at Borrower's request, the bank enters into a legally binding written loan commitment with Borrower for an additional $5,000,000.00, to be funded at a later date. As this loan commitment, when combined with all other outstanding obligations of Borrower to the bank, is within the bank's lending limit when it is made, it qualifies for the protection of the Temporary Rule. Unless it is disqualified, this loan commitment may be fully funded, notwithstanding a subsequent decline in the bank's lending limit.

On August 1, 1988, after entering into the loan commitment, but before it is funded, Borrower requests an additional loan of $1,000,000.00 from the bank; this loan is not related to the qualifying loan commitment. Once the bank makes this loan, the total outstanding obligations of the Borrower, including the amount of the unfunded loan commitment, exceed the bank's lending limit. Under the Temporary Rule, as published and made effective June 24, 1988, the bank would have violated section 84 on making this $1,000,000.00 loan to Borrower. Under the proposed revision of the Temporary Rule, however, the bank would not violate section 84. Rather, in making the

$1,000,000.00 loan, the bank has effectively elected to disqualify its July 1, 1988, loan commitment. As a disqualified underline commitment, the loan commitment may subsequently be funded only to the extent of the bank's lending limit on the date of funding. Thus, if Borrower later seeks to have the loan commitment funded, the bank may provide only $4,000,000.00 without violating section 84. Of course, the bank may attempt to sell participations for the remaining $1,000,000.00 of the loan commitment.

Note that if Borrower had requested a second loan commitment of $1,000,000.00 on August 1, 1988, rather than a loan, the July 1, 1988, loan commitment would not have been disqualified. The proposed revision provides that a qualifying loan commitment may only be disqualified by a subsequent loan or extension of credit which would cause the bank to exceed its lending limit when combined with any underline commitments to lend and all other outstanding obligations of the borrower. A loan commitment of $1,000,000.00, entered into on August 1, 1988, would have been an overline commitment. Since an overline commitment is not considered a loan or an extension of credit until it is funded, the overline commitment could not have triggered the disqualification of the July 1, 1988, loan commitment.

Example II: This example illustrates the consideration that must be given to a nonconforming loan, in excess of the bank's lending limit as a result of the bank having fully funded a qualifying loan commitment, after the bank has experienced a decline in its capital, and hence, its lending limit. Assume that a national bank has a lending limit of $10,000,000.00. On June 1, 1988, the bank has one loan, in the amount of $5,000,000.00, outstanding to Borrower. On July 1, 1988, at Borrower's request, the bank enters into a legally binding written loan commitment with Borrower for an additional $5,000,000.00, to be funded at a later date. As this loan commitment, when combined with all other outstanding obligations of Borrower to the bank, is within the bank's lending limit when it is made, it qualifies for the protection of the Temporary Rule. Unless it is disqualified, this loan commitment may be fully funded, notwithstanding a subsequent decline in the bank's lending limit.

On October 1, 1988, Borrower requests that the bank fully fund its July 1, 1988, loan commitment. By this time, the bank's lending limit has declined to $7,000,000.00. As the loan commitment was within the bank's lending limit when made, and has not subsequently been disqualified from the protection of the Temporary Rule, the bank may fully fund this loan commitment without violating section 84. However, when the bank fully funds that commitment, it will have total extensions of credit outstanding to Borrower of $10,000,000.00, exceeding its lending limit by $3,000,000.00.

On November 1, 1988, Borrower requests a short term loan of $500,000.00 from the bank. As the bank has exceeded its lending limit to Borrower, and has nonconforming extensions of credit outstanding to Borrower, the bank may not make this loan without violating section 84.

On learning of the bank's inability to extend this credit to Borrower, Borrower notes that on November 15, 1988, it will repay the first of five $1,000,000.00 installments of principal on its $5,000,000.00 loan. Borrower further notes that its present outstanding obligations, at $10,000,000.00, do not result in a violation of section 84. Thus, Borrower asks whether, on receiving that $1,000,000.00 payment, the bank may then make the requested $500,000.00 available to Borrower, for total outstanding credit to Borrower of $9,500,000.00.

Notwithstanding a reduction in Borrower's outstanding obligations, to an amount less than the $10,000,000.00 which the bank has extended to Borrower without violating section 84, the bank may not make the requested $500,000.00 available to Borrower. Even though Borrower will reduce its total outstanding obligations to the bank, the reduction will not bring the total within or below the bank's lending limit on that day. Thus, the bank's total obligations outstanding to Borrower are still nonconforming for the purposes of section 84 and the bank may not make additional extensions of credit to Borrower at this time.

Proposed Revisions to the Temporary Rule

In order to achieve the results intended by this revision, the proposal would amend the definition of a "contractual commitment to advance funds," at 12 CFR 32.2(d), to include a "qualifying commitment to lend." The revision would also add a definition of a "qualifying commitment to lend" to the definitions provided by Part 32. The definition of a "qualifying commitment to lend" notes that all written legally binding loan commitments, which, when combined with all other outstanding obligations of the borrower, are within the bank's lending limit when made, are qualifying commitments to lend. The definition then describes the disqualification of an underline loan commitment. The specific language of the proposed definitional amendments to § 32.2 is fully set forth below.

In addition to the substantive revision of the Temporary Rule, the OCC is proposing a modified transition period, during which the OCC will not take administrative action to enforce the Temporary Rule against national banks. The provision for a transition period will not change the effective date of the Temporary Rule, or its validation, for the purposes of the Temporary Rule, of all legally binding commitments which were made in good faith prior to the effective date of the Temporary Rule, and which were within the bank's lending limit when made.

The OCC proposes that the transition period extend from the date the Temporary Rule became effective, on June 24, 1988, until 60 days after the date the Temporary Rule is made a final rule. This transition period recognizes that many banks may not have fully understood the requirements of the Temporary Rule, and its applicability to all national banks. The OCC intends that national banks use the transition period to become familiar with the provisions of the Temporary Rule, and any revisions of the Temporary Rule, and amend their lending practices as necessary. As the transition rule incorporates a policy of limited administrative forbearance, it is addressed in a new, separate section of Part 32, at § 32.9. The proposed language of this rule is also set forth below.

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, it is certified that this notice of proposed rulemaking, if adopted as a final rule, will not have a significant economic impact on a substantial number of small banks.

Executive Order 12291

The OCC has determined that this proposed rule is not classified as a "major rule," and therefore does not require a regulatory impact analysis.

List of Subjects in 12 CFR Part 32

National banks, Lending limit, Loan commitments.

Authority and Issuance

For the reasons set forth in the preamble, Title 12, Chapter I, Part 32 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 32—LENDING LIMIT

1. The authority citation for Part 32—LENDING LIMIT continues to read as follows:

Authority: 12 U.S.C. 84 and 12 U.S.C. 93a.

2. Section 32.2, paragraph (d), is revised, and a new paragraph (f) is added, to read as follows:

§ 32.2 Definitions.

* * * * *

(d) "Contractual commitment to advance funds" means (1) an obligation to make payments (directly or indirectly) to a third party contingent upon default by the bank's customer in the performance of an obligation under the terms of that customer's contract with the third party or upon some other stated condition, (2) an obligation to guarantee or stand as a surety for the benefit of a third party, or (3) a qualifying commitment to lend (as defined at paragraph (f) of this section). The term includes, but is not limited to, standby letters of credit (as defined in paragraph (e) of this section), guarantees, puts or other similar arrangements. For the purposes of this part, undisbursed loan funds and loan commitments not yet drawn upon which are not "qualifying commitments to lend," or which are not otherwise equivalent to a contractual commitment to advance funds as defined herein are not considered a "contractual commitment to advance funds." This definition also does not include commercial letters of credit and similar instruments where the issuing bank expects the beneficiary to draw upon the issuer, which do not "guarantee" payment of a money obligation, and which do not provide for payment in the event of default of the account party.

* * * * *

(f) "Qualifying commitment to lend" means a binding written commitment to lend which, when combined with all other outstanding loans (including other binding commitments) to the borrower, is within the bank's lending limit on the date of the commitment and which has not been disqualified. A qualifying commitment to lend will be disqualified by any loan or extension of credit made subsequent to the date of the qualifying commitment, which, when combined with all other outstanding loans (including other binding commitments) attributable to the borrower, would cause the total to exceed the bank's lending limit on the date of the loan or extension of credit. In determining whether the issuance of a commitment to lend would be within a bank's lending limit on the date of the commitment, the bank may deduct from the amount of the commitment the aggregate amount of legally binding written loan participations in that commitment by other financially responsible persons or institutions.

3. A new § 32.9, is added to read as follows:

§ 32.9 Modified transition period.

Where it is established to the satisfaction of the Comptroller of the Currency that a bank has exceeded its lending limit as the result of an unintentional misapplication of the definition of a "contractual commitment to advance funds," as amended by the Temporary Rule on National Bank Lending Limits, 53 FR 23752 (June 24, 1988), the Comptroller of the Currency will not take administrative enforcement action against the bank, its officers, directors, or employees for a violation of 12 U.S.C. § 84. This policy will apply to loans and extensions of credit made from the date the Temporary Rule on National Bank Lending Limits became effective, June 24, 1988, until [insert 60 days after the effective date of the final rule].

Date: July 11, 1989.

Robert L. Clarke,

[Comptroller of the Currency.

[Fr Doc. 89-16704 Filed 07-17-89; 8:45 am]

BILLING CODE 4810-33-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 89-NM-101-AD]

Airworthiness Directives; Aerospatiale Model ATR42 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes to revise an existing airworthiness directive (AD), applicable to Aerospatiale Model ATR42 series airplanes, which currently prohibits use of the autopilot when operating in icing conditions. That action was prompted by an incident in which a Model ATR42 airplane operating in icing conditions (believed to have been freezing rain) experienced roll excursions and autopilot disconnect. This condition, if not corrected, could result in loss of control of the airplane. This action would require installation of vortex generators on the upper wing surface as a terminating action to the prohibition of use of the autopilot when operating in icing conditions.

DATE: Comments must be received no later than September 8, 1989.

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 89-NM-101-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Aerospatiale, 216 Route de Bayonne, 31060 Toulouse, Cedex 03, France. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Standardization Branch, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Robert C. McCracken, Standardization Branch, ANM-113; telephone (206) 431-1979. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 89-NM-101-AD." The post card will be date/time stamped and returned to the commenter.