FEDERAL RESERVE BANK
OF DALLAS

ROBERT D. McTEER, JR.
PRESIDENT
AND CHIEF EXECUTIVE OFFICER

DALLAS, TEXAS
75265-5906

May 14, 1996

Notice 96-46

TO: The Chief Executive Officer of each member bank and others concerned in the Eleventh Federal Reserve District

SUBJECT

Final Rule Amending the Definition of "Capital Stock and Surplus"

DETAILS

The Board of Governors of the Federal Reserve System announced a final rule to reduce the regulatory burden for member banks and other insured depository institutions monitoring lending to their affiliates.

The rule adopts a definition of "capital stock and surplus" for purposes of section 23A that conforms to the definition of unimpaired capital and unimpaired surplus used by the Board in calculating the limits in Regulation O for insider lending and by the Office of the Comptroller of the Currency in calculating the limit on loans by a national bank to a single borrower.

ATTACHMENT

A copy of the Board's notice (Federal Reserve System Docket No. R-0902) is attached.

MORE INFORMATION

For more information, please contact Jane Anne Schmoker at (214) 922-5101. For additional copies of this Bank's notice, please contact the Public Affairs Department at (214) 922-5254.

Sincerely yours,

Robert D. McTeer, Jr.

For additional copies, bankers and others are encouraged to use one of the following toll-free numbers in contacting the Federal Reserve Bank of Dallas: Dallas Office (800) 333-4460; El Paso Branch *Intrastate* (800) 592-1631, *Interstate* (800) 351-1012; Houston Branch *Intrastate* (800) 392-4162, *Interstate* (800) 221-0363; San Antonio Branch *Intrastate* (800) 292-5810.

FEDERAL RESERVE SYSTEM

12 CFR Part 250

[Docket No. R-0902]

Transactions with Affiliates

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is adopting a definition of capital stock and surplus for purposes of section 23A of the Federal Reserve Act that conforms to the definition of unimpaired capital and unimpaired surplus used by the Board in calculating the limits in Regulation O for insider lending and by the Office of the Comptroller of the Currency (OCC) in calculating the limit on loans by a national bank to a single borrower. The final rule will reduce the burden for member banks and other insured depository institutions monitoring lending to their affiliates.

EFFECTIVE DATE: July 1, 1996.

FOR FURTHER INFORMATION CONTACT: Pamela G. Nardolilli, Senior Attorney (202/452-3289) Legal Division, or Barbara Bouchard, Supervisory Financial Analyst (202/452-3072), Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System. For users of

the Telecommunications Device for the Deaf (TDD) only, please contact Dorothea Thompson (202/452-3544).

SUPPLEMENTARY INFORMATION: Section 23A of the Federal Reserve Act, 12 U.S.C. 371c, regulates lending and asset purchase transactions between insured depository institutions and their affiliates. In general, section 23A prohibits an insured depository institution from engaging in covered transactions (which include extensions of credit and purchases of assets) with any single affiliate in excess of 10 percent of the institution's capital stock and surplus. A 20 percent aggregate limit is imposed on the total amount of covered transactions by a bank with all affiliates. Under section 23A, all extensions of credit between an insured depository institution and its affiliate must meet certain collateral requirements. Section 23A also prohibits an insured depository institution from purchasing any low-quality assets from an affiliate and requires that all transactions with an affiliate must be conducted on terms that are consistent with safe and sound banking practices. Although section 23A, by its terms, applies only to member banks, the Federal Deposit Insurance Act applies section 23A to all nonmember insured banks (12 U.S.C. 1828 (j)), and the Home Owners' Loan Act applies section 23A to savings associations (12 U.S.C. 1468).

Section 23A does not include an explicit definition of "capital stock and surplus." A 1964 Board interpretation refers to the definition of capital as "the amount of unimpaired common stock plus the amount of preferred stock outstanding and unimpaired" but explicitly excludes debt-like instruments from the definition of capital and surplus. 12 CFR 250.161. In the interpretation, the Board recognized that certain notes and debentures could be considered as capital or capital stock for purposes of membership in the Federal Reserve System, but concluded that for purposes of certain Federal Reserve Act limitations and requirements, such instruments could not be regarded as part of either capital or capital stock. A subsequent Board interpretation issued in 1971 states that capital stock and surplus, as used in provisions of the Federal Reserve Act, includes undivided profits, which are defined to include reserves for loan losses and valuation reserves for securities. 12 CFR 250.162. As a practical matter, this definition of capital and surplus has been implemented as total equity capital and the allowance for loan and lease losses (ALLL) as set forth in the bank's Report of Condition and Income (Call Report).

Revisions to the Definition of Capital Stock and Surplus

In February 1995, the OCC amended its regulation governing the amount a national bank may lend to a single counterparty, and revised the

definition of unimpaired capital and unimpaired surplus upon which this lending limit was based. 60 FR 8526 (February 15, 1995) (to be codified at 12 CFR 32.2(b)). In June 1995, the Board amended its Regulation O, 60 FR 31053 (June 13, 1995) (to be codified at 12 CFR 215.2), to revise the definition of capital used to limit loans to insiders, to a definition that is consistent with that used for purposes of the OCC's single borrower lending limits. The Board took this action to eliminate discrepancies in the definitions of capital used for different lending limit purposes and to reduce regulatory burden for banks monitoring lending to their insiders. Under the revised OCC regulation, unimpaired capital and unimpaired surplus is defined as Tier 1 and Tier 2 capital, as calculated under the risk-based capital guidelines, plus the balance of the allowance for loan and lease losses (ALLL) excluded from Tier 2 capital.[1/]

On December 4, 1995, the Board proposed adopting a definition of "capital stock and surplus" for purposes of section 23A that is the same as the capital definitions used for Regulation O and the national bank lending limits.

[1/] Under the banking agencies' risk-based capital guidelines, Tier 1 capital includes common equity, some noncumulative perpetual preferred stock and related surplus, and minority interest in equity accounts of consolidated subsidiaries. Tier 2 capital includes the ALLL up to 1.25 percent of the bank's weighted risk assets, perpetual preferred stock and related surplus, hybrid capital instruments, and certain types of subordinated debt.

(60 FR 62050 (1995)). Unlike the current capital definition for section 23A, the revised definition will permit banks to include in capital the bank's subordinated debt that qualifies for inclusion in Tier 2 capital. On the other hand, unlike equity capital, Tier 1 capital does not include securities revaluation reserves, in particular, gains and losses on available-for-sale securities, which under Statement of Financial Accounting Standards Number 115 (FAS 115) are considered a component of equity capital. Tier 1 capital also excludes certain intangible assets, most notably goodwill. Based on June 1995 Call Report data, the revised definition will decrease the limits for transactions with affiliates for a majority of banks. Overall, it is estimated that the revised definition of capital and surplus will result in a change for most banks of 5 percent or less from their current limit, although a few community and mid-sized banks may experience substantial changes principally due to large gains or losses on available-for-sale securities.

Notwithstanding the decrease for many banks in the amount of capital that will be used to calculate their section 23A limit under the revised definition, the Board believes that, over all, revising the definition will be beneficial for all insured depository institutions for two reasons. First, the revised definition will provide consistency in the capital definition used for

section 23A, Regulation O, and the national bank lending limits. Second, the revised definition will result in a more stable limit over time than the current definition because the revised definition excludes revaluation gains and losses on available-for-sale securities, a component of equity capital that tends to be volatile.

PUBLIC COMMENT: The Board received seventeen comments regarding its proposed definition of capital stock and surplus. The Board received eight comments from Reserve Banks, six comments from commercial banking organizations and three comments from trade associations. All the commenters supported the Board's efforts to reduce regulatory burden and provide greater uniformity in defining capital for regulatory purposes. Seven commenters also noted that the proposed definition will provide greater stability over time because the proposed definition excludes the gains and losses on available-for-sale securities.

Several commenters questioned whether an institution will be in violation of section 23A if, as a result of the change in the definition of capital stock and surplus, the institution's amount of outstanding covered transactions exceeded the quantitative limits of section 23A. In general, the Board believes that a change in circumstances, such as a change in the capital definition,

should not adversely affect existing transactions that were entered into in good faith by an insured depository institution and its affiliate. In the past, when an institution exceeded its quantitative limit because of a change in circumstances, the Board has allowed the insured depository institution to retain the nonconforming transaction, but has not allowed the institution to engage in additional covered transactions until the institution was in compliance with section 23A. Accordingly, based on this precedent, the Board has determined that any institution whose outstanding covered transactions with its affiliates exceed its quantitative limits as a result of this rule will be allowed to retain those transactions. However, these institutions are not allowed to engage in any additional covered transactions with any affiliate, including any renewal transactions, until the institution's outstanding amount of covered transactions is in compliance with the institution's new quantitative limit.

The Board also amends 12 CFR 250.161 and 12 CFR 250.162 to delete the reference to section 23A to reflect the change.

Determination of Effective Date

Because the final rule adjusts a requirement on insured depository institutions, the final rule will become effective July 1, 1996, the first day of

the calendar quarter after the date of the final rule's publication.

See 12 U.S.C. 4802(b).

Final Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (the "Act") requires an agency to publish a final regulatory flexibility analysis with any final rulemaking. The Act requires that the regulatory flexibility analysis of a final rule provide a description of the reasons why the action by the agency is being considered and a statement of the objectives of, and legal basis for, the rule and a summary of the issues raised by the public comments received, the agency assessment thereof, and any change made in response thereto. This information is contained in the supplementary information above. No significant alternatives to the final rule were considered by the agency.

Another requirement for the regulatory flexibility analysis is a description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply. The final rule will apply to all insured depository institutions, regardless of size. The Board has determined that its final rule will impose no additional reporting or recordkeeping requirements, and that there are no relevant federal rules that duplicate, overlap, or conflict with the proposed rule. In addition, the final rule is not expected to have a

significant economic impact on small institutions. Instead, the final rule is expected to relieve the regulatory burden on the majority of insured depository institutions.

Paperwork Reduction Act

In accordance with section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.; 5 CFR 1320 Appendix A.1.), the Board reviewed the final rule under authority delegated to the Board by the Office of Management and Budget. No collections of information pursuant to the Paperwork Reduction Act are contained in the final rule.

List of Subjects in 12 CFR Part 250

Credit, Federal Reserve System.

For the reasons set forth in the preamble, the Board amends 12 CFR part 250 as set forth below:

PART 250--MISCELLANEOUS INTERPRETATIONS

1. The authority citation for part 250 will continue to read as follows:

Authority: 12 U.S.C. 248(i) and 371c(e).

§ 250.161 [Amended]

2. In § 250.161 paragraph (d) is amended by removing the words "loans to affiliates (12 U.S.C. 371c)," in the first sentence.

§ 250.162 [Amended]

3. In § 250.162, paragraph (a) is amended by removing the words "Loans to affiliates (12 U.S.C. 371c), purchases" in the first sentence and adding "Purchases" in their place.

4. A new § 250.242 to read as follows:

§ 250.242 Section 23A of the Federal Reserve Act -- definition of capital stock and surplus.

(a) An insured depository institution's capital stock and surplus for purposes of section 23A of the Federal Reserve Act (12 U.S.C. 371c) is:

(1) Tier 1 and Tier 2 capital included in an institution's risk-based capital under the capital guidelines of the appropriate Federal banking agency, based on the institution's most recent consolidated Report of Condition and Income filed under 12 U.S.C. 1817(a)(3); and

(2) The balance of an institution's allowance for loan and lease losses not included in its Tier 2 capital for purposes of the calculation of risk-based capital by the appropriate Federal banking agency, based on the institution's most recent consolidated Report of Condition and Income filed under 12 U.S.C. 1817(a)(3).

(b) For purposes of this section, the terms appropriate Federal banking agency and insured depository institution are defined as those terms are defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813.

By order of the Board of Governors of the Federal Reserve System, April 26, 1996.

(signed) Jennifer J. Johnson

Jennifer J. Johnson,
Deputy Secretary of the Board.