FEDERAL RESERVE BANK
OF DALLAS

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

DALLAS, TEXAS
75265-5906

October 22, 1997

Notice 97-94

TO: The Chief Executive Officer of each financial institution in the Eleventh Federal Reserve District

SUBJECT

Revised Pamphlets for Regulation Y (Bank Holding Companies and Change in Bank Control) and the Official Staff Commentary on Regulation Z (Truth in Lending)

DETAILS

The Board of Governors of the Federal Reserve System has published revised pamphlets for Regulation Y, effective April 1997, and the Official Staff Commentary on Regulation Z, effective February 1997.

ENCLOSURES

The revised pamphlets are enclosed. Please insert them in your Regulations binders.

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.

MORE INFORMATION

For more information regarding Regulation Y, please contact Rob Jolley at (214) 922-6071. For more information regarding Regulation Z, please contact Eugene Coy at (214) 922-6201.

For additional copies of this Bank's notice or the revised pamphlets, contact the Public Affairs Department at (214) 922-5254.

Sincerely yours,

Robert D. McTeer, Jr.

Board of Governors of the Federal Reserve System

Regulation Y
Banking Holding Companies and Change in Bank Control

12 CFR 225; as amended effective April 21, 1997

Any inquiry relating to this regulation should be addressed to the Federal Reserve Bank of the Federal Reserve District in which the inquiry arises.

May 1997

Contents

* See the Board pamphlet "Capital Adequacy Guidelines."

Regulation Y
Bank Holding Companies and Change in Bank Control

12 CFR 225; as amended effective April 21, 1997

SUBPART A—GENERAL PROVISIONS

SECTION 225.1—Authority, Purpose, and Scope

(a) *Authority.* This part[1] (Regulation Y) is issued by the Board of Governors of the Federal Reserve System (Board) under section 5(b) of the Bank Holding Company Act of 1956, as amended (12 USC 1844(b)) (BHC Act); sections 8 and 13(a) of the International Banking Act of 1978 (12 USC 3106 and 3108); section 7(j)(13) of the Federal Deposit Insurance Act, as amended by the Change in Bank Control Act of 1978 (12 USC 1817(j)(13)) (Bank Control Act); section 8(b) of the Federal Deposit Insurance Act (12 USC 1818(b)); section 914 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (12 USC 1831i); section 106 of the Bank Holding Company Act Amendments of 1970 (12 USC 1972); and the International Lending Supervision Act of 1983 (Pub. L. 98-181, title IX). The BHC Act is codified at 12 USC 1841, et seq.

(b) *Purpose.* The principal purposes of this part are to—

(1) regulate the acquisition of control of banks by companies and individuals;

(2) define and regulate the nonbanking activities in which bank holding companies and foreign banking organizations with United States operations may engage; and

(3) set forth the procedures for securing approval for such transactions and activities.

(c) *Scope.*

(1) Subpart A contains general provisions and definitions of terms used in this regulation.

(2) Subpart B governs acquisitions of bank or bank holding company securities and assets by bank holding companies or by any company that will become a bank holding company as a result of the acquisition.

(3) Subpart C defines and regulates the nonbanking activities in which bank holding companies and foreign banking organizations may engage directly or through a subsidiary. The Board's Regulation K governs, certain nonbanking activities conducted by foreign banking organizations and certain foreign activities conducted by bank holding companies (12 CFR 211, International Banking Operations).

(4) Subpart D specifies situations in which a company is presumed to control voting securities or to have the power to exercise a controlling influence over the management or policies of a bank or other company, sets forth the procedures for making a control determination, and provides rules governing the effectiveness of divestitures by bank holding companies.

(5) Subpart E governs changes in bank control resulting from the acquisition by individuals or companies (other than bank holding companies) of voting securities of a bank holding company or state member bank of the Federal Reserve System.

(6) Subpart F specifies the limitations that govern companies that control so-called nonbank banks and the activities of nonbank banks.

(7) Subpart G prescribes minimum standards that apply to the performance of real estate appraisals and identifies transactions that require state-certified appraisers.

(8) Subpart H identifies the circumstances when written notice must be provided to the Board prior to the appointment of a director or senior officer of a bank holding company and establishes procedures for obtaining the required Board approval.

(9) Appendix A to the regulation contains

[1] Code of Federal Regulations, title 12, chapter II, part 225.

the Board's risk-based capital adequacy guidelines for bank holding companies.

(10) Appendix B contains the Board's capital adequacy guidelines for measuring leverage for bank holding companies and state member banks.

(11) Appendix C contains the Board's policy statement governing small bank holding companies.

(12) Appendix D contains the Board's capital adequacy guidelines for measuring tier 1 leverage for bank holding companies.

(13) Appendix E contains the Board's capital adequacy guidelines for measuring market risk of bank holding companies.

SECTION 225.2—Definitions

Except as modified in this section or unless the context otherwise requires, the terms used in this regulation have the same meanings as set forth in the relevant statutes.

(a) *Affiliate* means any company that controls, is controlled by, or is under common control with, another company.

(b) (1) *Bank* means—

(i) an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 USC 1813(h)); or

(ii) an institution organized under the laws of the United States which both—

(A) accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and

(B) is engaged in the business of making commercial loans.

(2) "Bank" does not include those institutions qualifying under the exceptions listed in section 2(c)(2) of the BHC Act (12 USC 1841(c)(2)).

(c) (1) *Bank holding company* means any company (including a bank) that has direct or indirect control of a bank, other than control that results from the ownership or control of—

(i) voting securities held in good faith in a fiduciary capacity (other than as provided in paragraphs (e)(2)(ii) and (iii) of this section) without sole discretionary voting authority, or as otherwise exempted under section 2(a)(5)(A) of the BHC Act;

(ii) voting securities acquired and held only for a reasonable period of time in connection with the underwriting of securities, as provided in section 2(a)(5)(B) of the BHC Act;

(iii) voting rights to voting securities acquired for the sole purpose and in the course of participating in a proxy solicitation, as provided in section 2(a)(5)(C) of the BHC Act;

(iv) voting securities acquired in satisfaction of debts previously contracted in good faith, as provided in section 2(a)(5)(D) of the BHC Act, if the securities are divested within two years of acquisition (or such later period as the Board may permit by order); or

(v) voting securities of certain institutions owned by a thrift institution or a trust company, as provided in sections 2(a)(5)(E) and (F) of the BHC Act.

(2) Except for the purposes of section 225.4(b) of this subpart and subpart E of this part, or as otherwise provided in this part, the term "bank holding company" includes a foreign banking organization. For the purposes of subpart B of this part, "bank holding company" includes a foreign banking organization only if it owns or controls a bank in the United States.

(d) (1) *Company* includes any bank, corporation, general or limited partnership, association or similar organization, business trust, or any other trust unless by its terms it must terminate either within 25 years, or within 21 years and 10 months after the death of individuals living on the effective date of the trust.

(2) "Company" does not include any organization, the majority of the voting securities of which are owned by the United States or any state.

(3) *Testamentary trusts exempt.* Unless the Board finds that the trust is being operated as a business trust or company, a trust is presumed not to be a company if the trust—

(i) terminates within 21 years and 10 months after the death of grantors or ben-

eficiaries of the trust living on the effective date of the trustor within 25 years;

(ii) is a testamentary or inter vivos trust established by an individual or individuals for the benefit of natural persons (or trusts for the benefit of natural persons) who are related by blood, marriage, or adoption;

(iii) contains only assets previously owned by the individual or individuals who established the trust;

(iv) is not a Massachusetts business trust; and

(v) does not issue shares, certificates, or any other evidence of ownership.

(4) *Qualified limited partnerships exempt.* "Company" does not include a qualified limited partnership, as defined in section 2(o)(10) of the BHC Act.

(e) (1) *Control* of a bank or other company means (except for the purposes of subpart E of this part)—

(i) ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting securities of the bank or other company, directly or indirectly or acting through one or more other persons;

(ii) control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the bank or other company;

(iii) the power to exercise, directly or indirectly, a controlling influence over the management or policies of the bank or other company, as determined by the Board after notice and opportunity for hearing in accordance with section 225.31 of subpart D of this regulation; or

(iv) conditioning in any manner the transfer of 25 percent or more of the outstanding shares of any class of voting securities of a bank or other company upon the transfer of 25 percent or more of the outstanding shares of any class of voting securities of another bank or other company.

(2) A bank or other company is deemed to control voting securities or assets owned, controlled, or held, directly or indirectly—

(i) by any subsidiary of the bank or other company;

(ii) in a fiduciary capacity (including by pension and profit-sharing trusts) for the benefit of the shareholders, members, or employees (or individuals serving in similar capacities) of the bank or other company or of any of its subsidiaries; or

(iii) in a fiduciary capacity for the benefit of the bank or other company or any of its subsidiaries.

(f) *Foreign banking organization* and *qualifying foreign banking organization* have the same meanings as provided in section 211.21(n) and section 211.23 of the Board's Regulation K (12 CFR 211.21(n) and 211.23).

(g) *Insured depository institution* includes an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 USC 1813(h)) and a savings association.

(h) *Lead insured depository institution* means the largest insured depository institution controlled by the bank holding company as of the quarter ending immediately prior to the proposed filing, based on a comparison of the average total risk-weighted assets controlled during the previous 12-month period by each insured depository institution subsidiary of the holding company.

(i) *Management official* means any officer, director (including honorary or advisory directors), partner, or trustee of a bank or other company, or any employee of the bank or other company with policy-making functions.

(j) *Nonbank bank* means any institution that—

(1) became a bank as a result of enactment of the Competitive Equality Amendments of 1987 (Pub. L. No. 100-86), on the date of enactment (August 10, 1987); and

(2) was not controlled by a bank holding company on the day before the enactment of the Competitive Equality Amendments of 1987 (August 9, 1987).

(k) *Outstanding shares* means any voting securities, but does not include securities owned by the United States or by a company wholly owned by the United States.

(*l*) *Person* includes an individual, bank, cor-

poration, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity.

(m) *Savings association* means—

(1) any federal savings association or federal savings bank;

(2) any building and loan association, savings and loan association, homestead association, or cooperative bank if such association or cooperative bank is a member of the Savings Association Insurance Fund; and

(3) any savings bank or cooperative which is deemed by the director of the Office of Thrift Supervision to be a savings association under section 10(*l*) of the Home Owners' Loan Act.

(n) *Shareholder.*

(1) *Controlling shareholder* means a person that owns or controls, directly or indirectly, 25 percent or more of any class of voting securities of a bank or other company.

(2) *Principal shareholder* means a person that owns or controls, directly or indirectly, 10 percent or more of any class of voting securities of a bank or other company, or any person that the Board determines has the power, directly or indirectly, to exercise a controlling influence over the management or policies of a bank or other company.

(o) *Subsidiary* means a bank or other company that is controlled by another company, and refers to a direct or indirect subsidiary of a bank holding company. An indirect subsidiary is a bank or other company that is controlled by a subsidiary of the bank holding company.

(p) *United States* means the United States and includes any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

(q) (1) *Voting securities* means shares of common or preferred stock, general or limited partnership shares or interests, or similar interests if the shares or interest, by statute, charter, or in any manner, entitle the holder—

(i) to vote for or to select directors, trustees, or partners (or persons exercising similar functions of the issuing company); or

(ii) to vote on or to direct the conduct of the operations or other significant policies of the issuing company.

(2) *Nonvoting shares.* Preferred shares, limited partnership shares or interests, or similar interests are not "voting securities" if—

(i) any voting rights associated with the shares or interest are limited solely to the type customarily provided by statute with regard to matters that would significantly and adversely affect the rights or preference of the security or other interest, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the security or interest, the dissolution of the issuing company, or the payment of dividends by the issuing company when preferred dividends are in arrears;

(ii) the shares or interest represent an essentially passive investment or financing device and do not otherwise provide the holder with control over the issuing company; and

(iii) the shares or interest do not entitle the holder, by statute, charter, or in any manner, to select or to vote for the selection of directors, trustees, or partners (or persons exercising similar functions) of the issuing company.

(3) *Class of voting shares.* Shares of stock issued by a single issuer are deemed to be the same class of voting shares, regardless of differences in dividend rights or liquidation preference, if the shares are voted together as a single class on all matters for which the shares have voting rights other than matters described in paragraph (o)(2)(i) of this section that affect solely the rights or preferences of the shares.

(r) *Well capitalized.*

(1) *Bank holding company.* In the case of a

bank holding company,[2] "well capitalized" means that—

(i) on a consolidated basis, the bank holding company maintains a total risk-based capital ratio of 10.0 percent or greater, as defined in appendix A of this part;

(ii) on a consolidated basis, the bank holding company maintains a tier 1 risk-based capital ratio of 6.0 percent or greater, as defined in appendix A of this part; and

(iii) the bank holding company is not subject to any written agreement, order, capital directive, or prompt-corrective-action directive issued by the Board to meet and maintain a specific capital level for any capital measure.

(2) *Insured depository institution.* In the case of an insured depository institution, "well capitalized" means that the institution maintains at least the capital levels required to be well capitalized under the capital adequacy regulations or guidelines applicable to the institution that have been adopted by the appropriate federal banking agency for the institution under section 38 of the Federal Deposit Insurance Act (12 USC 1831o).

(3) *Foreign banks.*

(i) *Standards applied.* For purposes of determining whether a foreign banking organization qualifies under paragraph (r)(1) of this section—

(A) a foreign banking organization whose home-country supervisor, as defined in section 211.21 of the Board's Regulation K (12 CFR 211.21), has adopted capital standards consistent in all respects with the Capital Accord of the Basle Committee on Banking Supervision (Basle Accord) may calculate its capital ratios under the home-country standard; and

(B) a foreign banking organization whose home-country supervisor has not adopted capital standards consistent in all respects with the Basle Accord shall obtain a determination from the Board that its capital is equivalent to the capital that would be required of a U.S. banking organization under paragraph (r)(1) of this section.

(ii) *Branches and agencies.* For purposes of determining, under paragraph (r)(1) of this section, whether a branch or agency of a foreign banking organization is well capitalized, the branch or agency shall be deemed to have the same capital ratios as the foreign banking organization.

(s) *Well managed.*

(1) *In general.* A company, insured depository institution, or branch or agency of a foreign banking organization is well managed if—

(i) at its most recent inspection or examination or subsequent review by the appropriate federal banking agency for the company or institution, the company or institution received—

(A) at least a satisfactory composite rating; and

(B) at least a satisfactory rating for management and for compliance, if such a rating is given; or

(ii) in the case of a company or insured depository institution that has not received an examination rating, the Board has determined, after a review of the managerial and other resources of the company or depository institution, that the company or institution qualifies for the streamlined procedures in this subpart, and subparts B and C of this part.

(2) *Foreign banking organizations.* A foreign banking organization shall qualify under this paragraph if the combined operations of the foreign banking organization in the United States have received at least a satisfactory composite rating at the most recent annual assessment.

SECTION 225.3—Administration

(a) *Delegation of authority.* Designated Board members and officers and the Federal Reserve Banks are authorized by the Board to exercise various functions prescribed in this regulation

[2] For purposes of this subpart and subparts B and C of this part, a bank holding company with consolidated assets under $150 million that is subject to the small bank holding company policy statement in appendix C of this part will be deemed to be "well capitalized" if the bank holding company meets the requirements for expedited/waived processing in appendix C.

and in the Board's Rules Regarding Delegation of Authority (12 CFR 265) and the Board's Rules of Procedure (12 CFR 262).

(b) *Appropriate Federal Reserve Bank.* In administering this regulation, the appropriate Federal Reserve Bank is as follows:

(1) For a bank holding company (or a company applying to become a bank holding company): the Reserve Bank of the Federal Reserve District in which the company's banking operations are principally conducted, as measured by total domestic deposits in its subsidiary banks on the date it became (or will become) a bank holding company;

(2) For a foreign banking organization that has no subsidiary bank and is not subject to paragraph (b)(1) of this section: the Reserve Bank of the Federal Reserve District in which the total assets of the organization's United States branches, agencies, and commercial lending companies are the largest as of the later of January 1, 1980, or the date it becomes a foreign banking organization;

(3) For an individual or company submitting a notice under subpart E of this part: the Reserve Bank of the Federal Reserve District in which the banking operations of the bank holding company or state member bank to be acquired are principally conducted, as measured by total domestic deposits on the date the notice is filed.

SECTION 225.4—Corporate Practices

(a) *Bank holding company policy and operations.*

(1) A bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks and shall not conduct its operations in an unsafe or unsound manner.

(2) Whenever the Board believes an activity of a bank holding company or control of a nonbank subsidiary (other than a nonbank subsidiary of a bank) constitutes a serious risk to the financial safety, soundness, or stability of a subsidiary bank of the bank holding company and is inconsistent with sound banking principles or the purposes of the BHC Act or the Financial Institutions Supervisory Act of 1966, as amended (12 USC 1818(b) et seq.), the Board may require the bank holding company to terminate the activity or to terminate control of the subsidiary, as provided in section 5(e) of the BHC Act.

(b) *Purchase or redemption by a bank holding company of its own securities.*

(1) *Filing notice.* Except as provided in paragraph (b)(6), a bank holding company shall give the Board prior written notice before purchasing or redeeming its equity securities if the gross consideration for the purchase or redemption, when aggregated with the net consideration paid by the company for all such purchases or redemptions during the preceding 12 months, is equal to 10 percent or more of the company's consolidated net worth. For the purposes of this section, "net consideration" is the gross consideration paid by the company for all of its equity securities purchased or redeemed during the period minus the gross consideration received for all of its equity securities sold during the period.

(2) *Contents of notice.* Any notice under this section shall be filed with the appropriate Reserve Bank and shall contain the following information:

(i) the purpose of the transaction, a description of the securities to be purchased or redeemed, the total number of each class outstanding, the gross consideration to be paid, and the terms and sources of funding for the transaction;

(ii) a description of all equity securities redeemed within the preceding 12 months, the net consideration paid, and the terms of any debt incurred in connection with those transactions; and

(iii) (A) if the bank holding company has consolidated assets of $150 million or more, consolidated pro forma risk-based capital and leverage ratio calculations for the bank holding company as of the most recent quarter, and, if the redemption is to be debt funded, a parent-only pro forma balance sheet as of the most recent quarter; or

(B) if the bank holding company has consolidated assets of less than $150

million, a pro forma parent-only balance sheet as of the most recent quarter, and, if the redemption is to be debt funded, one-year income statement and cash-flow projections.

(3) *Acting on notice.* Within 15 calendar days of receipt of a notice under this section, the appropriate Reserve Bank shall either approve the transaction proposed in the notice or refer the notice to the Board for decision. If the notice is referred to the Board for decision, the Board shall act on the notice within 30 calendar days after the Reserve Bank receives the notice.

(4) *Factors considered in acting on notice.*

(i) The Board may disapprove a proposed purchase or redemption if it finds that the proposal would constitute an unsafe or unsound practice, or would violate any law, regulation, Board order, directive, or any condition imposed by, or written agreement with, the Board.

(ii) In determining whether a proposal constitutes an unsafe or unsound practice, the Board shall consider whether the bank holding company's financial condition, after giving effect to the proposed purchase or redemption, meets the financial standards applied by the Board under section 3 of the BHC Act, including the Board's capital adequacy guidelines (appendix A) and the Board's policy statement for small bank holding companies (appendix C).

(5) *Disapproval and hearing.*

(i) The Board shall notify the bank holding company in writing of the reasons for a decision to disapprove any proposed purchase or redemption. Within 10 calendar days of receipt of a notice of disapproval by the Board, the bank holding company may submit a written request for a hearing.

(ii) The Board shall order a hearing within 10 calendar days of receipt of the request if it finds that material facts are in dispute, or if it otherwise appears appropriate. Any hearing conducted under this paragraph shall be held in accordance with the Board's Rules of Practice for Formal Hearings (12 CFR 263).

(iii) At the conclusion of the hearing, the Board shall by order approve or disapprove the proposed purchase or redemption on the basis of the record of the hearing.

(6) *Exception for well-capitalized bank holding companies.* A bank holding company is not required to obtain prior Board approval for the redemption or purchase of its equity securities under this section provided—

(i) both before and immediately after the redemption, the bank holding company is well capitalized;

(ii) the bank holding company is well managed; and

(iii) the bank holding company is not the subject of any unresolved supervisory issues.

(c) *Deposit insurance.* Every bank that is a bank holding company or a subsidiary of a bank holding company shall obtain Federal Deposit Insurance and shall remain an "insured bank" as defined in section 3(h) of the Federal Deposit Insurance Act (12 USC 1813(h)).

(d) *Acting as transfer agent, municipal securities dealer, or clearing agent.* A bank holding company or any nonbanking subsidiary that is a "bank," as defined in section 3(a)(6) of the Securities Exchange Act of 1934 (15 USC 78c(a)(6)), and that is a transfer agent of securities, a municipal securities dealer, a clearing agency, or a participant in a clearing agency (as those terms are defined in section 3(a) of the Securities Exchange Act (12 USC 78c(a)), shall be subject to section 208.8(f)–(j) of the Board's Regulation H (12 CFR 208.8(f)–(j)) as if it were a state member bank.

(e) *Reporting requirement for credit secured by certain bank holding company stock.* Each executive officer or director of a bank holding company the shares of which are not publicly traded shall report annually to the board of directors of the bank holding company the outstanding amount of any credit that was extended to the executive officer or director and that is secured by shares of the bank holding company. For purposes of this paragraph, the terms "executive officer" and "director" shall

have the meaning given in section 215.2 of Regulation O (12 CFR 215.2).

(f) *Suspicious-activity report.* A bank holding company or any nonbank subsidiary thereof, or a foreign bank that is subject to the BHC Act or any nonbank subsidiary of such foreign bank operating in the United States, shall file a suspicious-activity report in accordance with the provisions of section 208.20 of the Board's Regulation H (12 CFR 208.20).

SECTION 225.5—Registration, Reports, and Inspections

(a) *Registration of bank holding companies.* Each company shall register within 180 days after becoming a bank holding company by furnishing information in the manner and form prescribed by the Board. A company that receives the Board's prior approval under subpart B of this regulation to become a bank holding company may complete this registration requirement through submission of its first annual report to the Board as required by paragraph (b) of this section.

(b) *Reports of bank holding companies.* Each bank holding company shall furnish, in the manner and form prescribed by the Board, an annual report of the company's operations for the fiscal year in which it becomes a bank holding company, and for each fiscal year during which it remains a bank holding company. Additional information and reports shall be furnished as the Board may require.

(c) *Examinations and inspections.* The Board may examine or inspect any bank holding company and each of its subsidiaries and prepare a report of their operations and activities. With respect to a foreign banking organization, the Board may also examine any branch or agency of a foreign bank in any state of the United States and may examine or inspect each of the organization's subsidiaries in the United States and prepare reports of their operations and activities. The Board shall rely, as far as possible, on the reports of examination made by the primary federal or state supervisor of the subsidiary bank of the bank holding company or of the branch or agency of the foreign bank.

SECTION 225.6—Penalties for Violations

(a) *Criminal and civil penalties.*

(1) Section 8 of the BHC Act provides criminal penalties for willful violation, and civil penalties for violation, by any company or individual, of the BHC Act or any regulation or order issued under it, or for making a false entry in any book, report, or statement of a bank holding company.

(2) Civil money penalty assessments for violations of the BHC Act shall be made in accordance with subpart C of the Board's Rules of Practice for Hearings (12 CFR 263, subpart C). For any willful violation of the Bank Control Act or any regulation or order issued under it, the Board may assess a civil penalty as provided in 12 USC 1817(j)(15).

(b) *Cease-and-desist proceedings.* For any violation of the BHC Act, the Bank Control Act, this regulation, or any order or notice issued thereunder, the Board may institute a cease-and-desist proceeding in accordance with the Financial Institutions Supervisory Act of 1966, as amended (12 USC 1818(b) et seq.).

SECTION 225.7—Exceptions to Tying Restrictions

(a) *Purpose.* This section establishes exceptions to the anti-tying restrictions of section 106 of the Bank Holding Company Act Amendments of 1970 (12 USC 1971, 1972(1)). These exceptions are in addition to those in section 106. The section also restricts tying of electronic benefit transfer services by bank holding companies and their nonbank subsidiaries.

(b) *Exceptions to statute.* Subject to the limitations of paragraph (c) of this section, a bank may—

(1) *Extension to affiliates of statutory exceptions preserving traditional banking relationships.* Extend credit, lease or sell

property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement that a customer—

(i) obtain a loan, discount, deposit, or trust service from an affiliate of the bank; or

(ii) provide to an affiliate of the bank some additional credit, property, or service that the bank could require to be provided to itself pursuant to section 106(b)(1)(C) of the Bank Holding Company Act Amendments of 1970 (12 USC 1972(1)(C)).

(2) *Safe harbor for combined-balance discounts.* Vary the consideration for any product or package of products based on a customer's maintaining a combined minimum balance in certain products specified by the bank (eligible products), if—

(i) the bank offers deposits, and all such deposits are eligible products; and

(ii) balances in deposits count at least as much as nondeposit products toward the minimum balance.

(3) *Safe harbor for foreign transactions.* Engage in any transaction with a customer if that customer is—

(i) a corporation, business, or other person (other than an individual) that—

(A) is incorporated, chartered, or otherwise organized outside the United States; and

(B) has its principal place of business outside the United States; or

(ii) an individual who is a citizen of a foreign country and is not resident in the United States.

(c) *Limitations on exceptions.* Any exception granted pursuant to this section shall terminate upon a finding by the Board that the arrangement is resulting in anticompetitive practices. The eligibility of a bank to operate under any exception granted pursuant to this section shall terminate upon a finding by the Board that its exercise of this authority is resulting in anticompetitive practices.

(d) *Extension of statute to electronic benefit transfer services.* A bank holding company or nonbank subsidiary of a bank holding company that provides electronic benefit transfer services shall be subject to the anti-tying restrictions applicable to such services set forth in section 7(i)(11) of the Food Stamp Act of 1977 (7 USC 2016(i)(11)).

(e) For purposes of this section, "bank" has the meaning given that term in section 106(a) of the Bank Holding Company Act Amendments of 1970 (12 USC 1971), but shall also include a United States branch, agency, or commercial lending company subsidiary of a foreign bank that is subject to section 106 pursuant to section 8(d) of the International Banking Act of 1978 (12 USC 3106(d)), and any company made subject to section 106 by section 4(f)(9) or 4(h) of the BHC Act.

SUBPART B—ACQUISITION OF BANK SECURITIES OR ASSETS

SECTION 225.11—Transactions Requiring Board Approval

The following transactions require an application for the Board's prior approval under section 3 of the Bank Holding Company Act except as exempted under section 225.12 or as otherwise covered by section 225.17 of this subpart.

(a) *Formation of bank holding company.* Any action that causes a bank or other company to become a bank holding company.

(b) *Acquisition of subsidiary bank.* Any action that causes a bank to become a subsidiary of a bank holding company.

(c) *Acquisition of control of bank or bank holding company securities.*

(1) The acquisition by a bank holding company of direct or indirect ownership or control of any voting securities of a bank or bank holding company, if the acquisition results in the company's control of more than 5 percent of the outstanding shares of any class of voting securities of the bank or bank holding company.

(2) An acquisition includes the purchase of additional securities through the exercise of preemptive rights, but does not include securities received in a stock dividend or

stock split that does not alter the bank holding company's proportional share of any class of voting securities.

(d) *Acquisition of bank assets.* The acquisition by a bank holding company or by a subsidiary thereof (other than a bank) of all or substantially all of the assets of a bank.

(e) *Merger of bank holding companies.* The merger or consolidation of bank holding companies, including a merger through the purchase of assets and assumption of liabilities.

(f) *Transactions by foreign banking organization.* Any transaction described in paragraphs (a) through (e) of this section by a foreign banking organization that involves the acquisition of an interest in a U.S. bank or in a bank holding company for which application would be required if the foreign banking organization were a bank holding company.

SECTION 225.12—Transactions Not Requiring Board Approval

The following transactions do *not* require the Board's approval under section 225.11 of this subpart:

(a) *Acquisition of securities in fiduciary capacity.* The acquisition by a bank or other company (other than a trust that is a company) of control of voting securities of a bank or bank holding company in good faith in a fiduciary capacity, unless—

(1) the acquiring bank or other company has sole discretionary authority to vote the securities and retains the authority for more than two years; or

(2) the acquisition is for the benefit of the acquiring bank or other company, or its shareholders, employees, or subsidiaries.

(b) *Acquisition of securities in satisfaction of debts previously contracted.* The acquisition by a bank or other company of control of voting securities of a bank or bank holding company in the regular course of securing or collecting a debt previously contracted in good faith, if the acquiring bank or other company divests the securities within two years of acquisition. The Board or Reserve Bank may grant requests for up to three one-year extensions.

(c) *Acquisition of securities by bank holding company with majority control.* The acquisition by a bank holding company of additional voting securities of a bank or bank holding company if more than 50 percent of the outstanding voting securities of the bank or bank holding company is lawfully controlled by the acquiring bank holding company prior to the acquisition.

(d) *Acquisitions involving bank mergers and internal corporate reorganizations.*

(1) *Transactions subject to Bank Merger Act.* The merger or consolidation of a subsidiary bank of a bank holding company with another bank, or the purchase of assets by the subsidiary bank, or a similar transaction involving subsidiary banks of a bank holding company, if the transaction requires the prior approval of a federal supervisory agency under the Bank Merger Act (12 USC 1828(c)) and does not involve the acquisition of shares of a bank. This exception does not include—

(i) the merger of a nonsubsidiary bank and a nonoperating subsidiary bank formed by a company for the purpose of acquiring the nonsubsidiary bank; or

(ii) any transaction requiring the Board's prior approval under section 225.11(e) of this subpart.

The Board may require an application under this subpart if it determines that the merger or consolidation would have a significant adverse impact on the financial condition of the bank holding company, or otherwise requires approval under section 3 of the BHC Act.

(2) *Certain acquisitions subject to the Bank Merger Act.* The acquisition by a bank holding company of shares of a bank or company controlling a bank or the merger of a company controlling a bank with the bank holding company, if the transaction is part of the merger or consolidation of the bank with a subsidiary bank (other than a nonoperating subsidiary bank) of the acquiring bank holding company, or is part of the purchase of substantially all of the assets of the bank by a subsidiary bank (other than a

nonoperating subsidiary bank) of the acquiring bank holding company, and if—

(i) the bank merger, consolidation, or asset purchase occurs simultaneously with the acquisition of the shares of the bank or bank holding company or the merger of holding companies, and the bank is not operated by the acquiring bank holding company as a separate entity other than as the survivor of the merger, consolidation, or asset purchase;

(ii) the transaction requires the prior approval of a federal supervisory agency under the Bank Merger Act (12 USC 1828(c));

(iii) the transaction does not involve the acquisition of any nonbank company that would require prior approval under section 4 of the Bank Holding Company Act (12 USC 1843);

(iv) both before and after the transaction, the acquiring bank holding company meets the Board's capital adequacy guidelines (appendixes A, B, C, D, and E of this part);

(v) at least 10 days prior to the transaction, the acquiring bank holding company has provided to the Reserve Bank written notice of the transaction that contains—

(A) a copy of the filing made to the appropriate federal banking agency under the Bank Merger Act; and

(B) a description of the holding company's involvement in the transaction, the purchase price, and the source of funding for the purchase price; and

(vi) prior to expiration of the period provided in paragraph (d)(2)(v) of this section, the Reserve Bank has not informed the bank holding company that an application under section 225.11 is required.

(3) *Internal corporate reorganizations.*

(i) Subject to paragraph (d)(3)(ii) of this section, any of the following transactions performed in the United States by a bank holding company:

(A) the merger of holding companies that are subsidiaries of the bank holding company;

(B) the formation of a subsidiary holding company;[1]

(C) the transfer of control or ownership of a subsidiary bank or a subsidiary holding company between one subsidiary holding company and another subsidiary holding company or the bank holding company.

(ii) A transaction described in paragraph (d)(3)(i) of this section qualifies for this exception if—

(A) the transaction represents solely a corporate reorganization involving companies and insured depository institutions that, both preceding and following the transaction, are lawfully controlled and operated by the bank holding company;

(B) the transaction does not involve the acquisition of additional voting shares of an insured depository institution that, prior to the transaction, was less than majority-owned by the bank holding company;

(C) the bank holding company is not organized in mutual form; and

(D) both before and after the transaction, the bank holding company meets the Board's capital adequacy guidelines (appendixes A, B, C, D, and E of this part).

(e) *Holding securities in escrow.* The holding of voting securities of a bank or bank holding company in an escrow arrangement for the benefit of an applicant pending the Board's action on an application for approval of the proposed acquisition, if title to the securities and the voting rights remain with the seller and payment for the securities has not been made to the seller.

(f) *Acquisition of foreign banking organization.* The acquisition of a foreign banking organization where the foreign banking organization does not directly or indirectly own or control a bank in the United States, unless the acquisition is also by a foreign banking orga-

[1] In the case of a transaction that results in the formation or designation of a new bank holding company, the new bank holding company must complete the registration requirements described in section 225.5.

nization and otherwise subject to section 225.11(f) of this subpart.

SECTION 225.13—Factors Considered in Acting on Bank Acquisition Proposals

(a) *Factors requiring denial.* As specified in section 3(c) of the BHC Act, the Board may not approve any application under this subpart if—

(1) the transaction would result in a monopoly or would further any combination or conspiracy to monopolize, or to attempt to monopolize, the business of banking in any part of the United States;

(2) the effect of the transaction may be substantially to lessen competition in any section of the country, tend to create a monopoly, or in any other manner be in restraint of trade, unless the Board finds that the transaction's anticompetitive effects are clearly outweighed by its probable effect in meeting the convenience and needs of the community;

(3) the applicant has failed to provide the Board with adequate assurances that it will make available such information on its operations or activities, and the operations or activities of any affiliate of the applicant, that the Board deems appropriate to determine and enforce compliance with the BHC Act and other applicable federal banking statutes, and any regulations thereunder; or

(4) in the case of an application involving a foreign banking organization, the foreign banking organization is not subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in its home country, as provided in section 211.24(c)(1)(ii) of the Board's Regulation K (12 CFR 211.24(c)(1)(ii)).

(b) *Other factors.* In deciding applications under this subpart, the Board also considers the following factors with respect to the applicant, its subsidiaries, any banks related to the applicant through common ownership or management, and the bank or banks to be acquired:

(1) *Financial condition.* Their financial condition and future prospects, including whether current and projected capital positions and levels of indebtedness conform to standards and policies established by the Board.

(2) *Managerial resources.* The competence, experience, and integrity of the officers, directors, and principal shareholders of the applicant, its subsidiaries and the banks and bank holding companies concerned; their record of compliance with laws and regulations; and the record of the applicant and its affiliates of fulfilling any commitments to, and any conditions imposed by, the Board in connection with prior applications.

(3) *Convenience and needs of the community.* The convenience and needs of the communities to be served, including the record of performance under the Community Reinvestment Act of 1977 (12 USC 2901 et seq.) and regulations issued thereunder, including the Board's Regulation BB (12 CFR 228.)

(c) *Interstate transactions.* The Board may approve any application or notice under this subpart by a bank holding company to acquire control of all or substantially all of the assets of a bank located in a state other than the home state of the bank holding company, without regard to whether the transaction is prohibited under the law of any state, if the transaction complies with the requirements of section 3(d) of the BHC Act (12 USC 1842(d)).

(d) *Conditional approvals.* The Board may impose conditions on any approval, including conditions to address competitive, financial, managerial, safety-and-soundness, convenience-and-needs, compliance or other concerns, to ensure that approval is consistent with the relevant statutory factors and other provisions of the BHC Act.

SECTION 225.14—Expedited Action for Certain Bank Acquisitions by Well-Run Bank Holding Companies

(a) *Filing of notice.*

(1) *Information required and public notice.* As an alternative to the procedure provided in section 225.15, a bank holding company that meets the requirements of paragraph (c)

of this section may satisfy the prior-approval requirements of section 225.11 in connection with the acquisition of shares, assets, or control of a bank, or a merger or consolidation between bank holding companies, by providing the appropriate Reserve Bank with a written notice containing the following:

(i) a certification that all of the criteria in paragraph (c) of this section are met;

(ii) a description of the transaction that includes identification of the companies and insured depository institutions involved in the transaction[2] and identification of each banking market affected by the transaction;

(iii) a description of the effect of the transaction on the convenience and needs of the communities to be served and of the actions being taken by the bank holding company to improve the CRA performance of any insured depository institution subsidiary that does not have at least a satisfactory CRA performance rating at the time of the transaction;

(iv) evidence that notice of the proposal has been published in accordance with section 225.16(b)(1);

(v) (A) if the bank holding company has consolidated assets of $150 million or more, an abbreviated consolidated pro forma balance sheet as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction, consolidated pro forma risk-based capital ratios for the acquiring bank holding company as of the most recent quarter, and a description of the purchase price and the terms and sources of funding for the transaction;

(B) if the bank holding company has consolidated assets of less than $150 million, a pro forma parent-only balance sheet as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction, and a description of the purchase price, the terms and sources of funding for the transaction, and the sources and schedule for retiring any debt incurred in the transaction;

(vi) if the bank holding company has consolidated assets of less than $300 million, a list of and biographical information regarding any directors or senior executive officers of the resulting bank holding company that are not directors or senior executive officers of the acquiring bank holding company or of a company or institution to be acquired;

(vii) for each insured depository institution whose tier 1 capital, total capital, total assets or risk-weighted assets change as a result of the transaction, the total risk-weighted assets, total assets, tier 1 capital and total capital of the institution on a pro forma basis; and

(viii) the market indexes for each relevant banking market reflecting the pro forma effect of the transaction.

(2) *Waiver of unnecessary information.* The Reserve Bank may reduce the information requirements in paragraph (a)(1)(v) through (viii) as appropriate.

(b) (1) *Action on proposals under this section.* The Board or the appropriate Reserve Bank shall act on a proposal submitted under this section or notify the bank holding company that the transaction is subject to the procedure in section 225.15 within five business days after the close of the public-comment period. The Board and the Reserve Bank shall not approve any proposal under this section prior to the third business day following the close of the public-comment period, unless an emergency exists that requires expedited or immediate action. The Board may extend the period for action under this section for up to five business days.

(2) *Acceptance of notice in event expedited procedure not available.* In the event that

[2] If, in connection with a transaction under this subpart, any person or group of persons proposes to acquire control of the acquiring bank holding company for purposes of the Bank Control Act or section 225.41, the person or group of persons may fulfill the notice requirements of the Bank Control Act and section 225.43 by providing, as part of the submission by the acquiring bank holding company under this subpart, identifying and biographical information required in paragraph (6)(A) of the Bank Control Act (12 USC 1817(j)(6)(A)), as well as any financial or other information requested by the Reserve Bank under section 225.43.

the Board or the Reserve Bank determines after the filing of a notice under this section that a bank holding company may not use the procedure in this section and must file an application under section 225.15, the application shall be deemed accepted for purposes of section 225.15 as of the date that the notice was filed under this section.

(c) *Criteria for use of expedited procedure.* The procedure in this section is available only if—

(1) *Well-capitalized organization.*

(i) *Bank holding company.* Both at the time of and immediately after the proposed transaction, the acquiring bank holding company is well capitalized;

(ii) *Insured depository institutions.* Both at the time of and immediately after the proposed transaction—

(A) the lead insured depository institution of the acquiring bank holding company is well capitalized;

(B) well-capitalized insured depository institutions control at least 80 percent of the total risk-weighted assets of insured depository institutions controlled by the acquiring bank holding company; and

(C) no insured depository institution controlled by the acquiring bank holding company is undercapitalized;

(2) *Well-managed organization.*

(i) *Satisfactory examination ratings.* At the time of the transaction, the acquiring bank holding company, its lead insured depository institution, and insured depository institutions that control at least 80 percent of the total risk-weighted assets of insured depository institutions controlled by the holding company are well managed;

(ii) *No poorly managed institutions.* No insured depository institution controlled by the acquiring bank holding company has received 1 of the 2 lowest composite ratings at the later of the institution's most recent examination or subsequent review by the appropriate federal banking agency for the institution;

(iii) *Recently acquired institutions excluded.* Any insured depository institution that has been acquired by the bank holding company during the 12-month period preceding the date on which written notice is filed under paragraph (a) of this section may be excluded for purposes of paragraph (c)(2)(ii) if—

(A) the bank holding company has developed a plan acceptable to the appropriate federal banking agency for the institution to restore the capital and management of the institution; and

(B) All insured depository institutions excluded under this paragraph represent, in the aggregate, less than 10 percent of the aggregate total risk-weighted assets of all insured depository institutions controlled by the bank holding company;

(3) *Convenience-and-needs criteria.*

(i) *Effect on the community.* The record indicates that the proposed transaction would meet the convenience and needs of the community standard in the BHC Act; and

(ii) *Established CRA performance record.* At the time of the transaction, the lead insured depository institution of the acquiring bank holding company and insured depository institutions that control at least 80 percent of the total risk-weighted assets of insured institutions controlled by the holding company have received a satisfactory or better composite rating at the most recent examination under the Community Reinvestment Act;

(4) *Public comment.* No comment that is timely and substantive as provided in section 225.16 is received by the Board or the appropriate Reserve Bank other than a comment that supports approval of the proposal;

(5) *Competitive criteria.*

(i) *Competitive screen.* Without regard to any divestitures proposed by the acquiring bank holding company, the acquisition does not cause—

(A) insured depository institutions controlled by the acquiring bank holding company to control in excess of 35 percent of market deposits in any relevant banking market; or

(B) the Herfindahl-Hirschman index to increase by more than 200 points in

any relevant banking market with a post-acquisition index of at least 1800; and

(ii) *Department of Justice.* The Department of Justice has not indicated to the Board that consummation of the transaction is likely to have a significantly adverse effect on competition in any relevant banking market;

(6) *Size of acquisition.*

(i) *In general.*

(A) *Limited growth.* Except as provided in paragraph (c)(6)(ii), the sum of the aggregate risk-weighted assets to be acquired in the proposal and the aggregate risk-weighted assets acquired by the acquiring bank holding company in all other qualifying transactions does not exceed 35 percent of the consolidated risk-weighted assets of the acquiring bank holding company. For purposes of this paragraph "other qualifying transactions" means any transaction approved under this section or section 225.23 during the 12 months prior to filing the notice under this section; and

(B) *Individual size limitation.* The total risk-weighted assets to be acquired do not exceed $7.5 billion;

(ii) *Small bank holding companies.* Paragraph (c)(6)(i)(A) shall not apply if, immediately following consummation of the proposed transaction, the consolidated risk-weighted assets of the acquiring bank holding company are less than $300 million;

(7) *Supervisory actions.* During the 12-month period ending on the date on which the bank holding company proposes to consummate the proposed transaction, no formal administrative order, including a written agreement, cease-and-desist order, capital directive, prompt-corrective-action directive, asset-maintenance agreement, or other formal enforcement action, is or was outstanding against the bank holding company or any insured depository institution subsidiary of the holding company, and no formal administrative enforcement proceeding involving any such enforcement action, order, or directive is or was pending;

(8) *Interstate acquisitions.* Board approval of the transaction is not prohibited under section 3(d) of the BHC Act;

(9) *Other supervisory considerations.* Board approval of the transaction is not prohibited under the informational sufficiency or comprehensive home-country supervision standards set forth in section 3(c)(3) of the BHC Act; and

(10) *Notification.* The acquiring bank holding company has not been notified by the Board, in its discretion, prior to the expiration of the period in paragraph (b)(1) of this section that an application under section 225.15 is required in order to permit closer review of any financial, managerial, competitive, convenience-and-needs, or other matter related to the factors that must be considered under this part.

(d) *Comment by primary banking supervisor.*

(1) *Notice.* Upon receipt of a notice under this section, the appropriate Reserve Bank shall promptly furnish notice of the proposal and a copy of the information filed pursuant to paragraph (a) of this section to the primary banking supervisor of the insured depository institutions to be acquired.

(2) *Comment period.* The primary banking supervisor shall have 30 calendar days (or such shorter time as agreed to by the primary banking supervisor) from the date of the letter giving notice in which to submit its views and recommendations to the Board.

(3) *Action subject to supervisor's comment.* Action by the Board or the Reserve Bank on a proposal under this section is subject to the condition that the primary banking supervisor not recommend in writing to the Board disapproval of the proposal prior to the expiration of the comment period described in paragraph (d)(2) of this section. In such event, any approval given under this section shall be revoked and, if required by section 3(b) of the BHC Act, the Board shall order a hearing on the proposal.

(4) *Emergencies.* Notwithstanding paragraphs (d)(2) and (d)(3) of this section, the Board may provide the primary banking supervisor with 10 calendar days' notice of a proposal under this section if the Board

finds that an emergency exists requiring expeditious action, and may act during the notice period or without providing notice to the primary banking supervisor if the Board finds that it must act immediately to prevent probable failure.

(5) *Primary banking supervisor.* For purposes of this section and section 225.15(b), the primary banking supervisor for an institution is—

(i) the Office of the Comptroller of the Currency, in the case of a national banking association or District bank;

(ii) the appropriate supervisory authority for the state in which the bank is chartered, in the case of a state bank;

(iii) the director of the Office of Thrift Supervision, in the case of a savings association.

(e) *Branches and agencies of foreign banking organizations.* For purposes of this section, a U.S. branch or agency of a foreign banking organization shall be considered to be an insured depository institution. A U.S. branch or agency of a foreign banking organization shall be subject to paragraph (c)(3)(ii) of this section only to the extent it is insured by the Federal Deposit Insurance Corporation in accordance with section 6 of the International Banking Act of 1978 (12 USC 3104).

SECTION 225.15—Procedures for Other Bank Acquisition Proposals

(a) *Filing application.* Except as provided in section 225.14, an application for the Board's prior approval under this subpart shall be governed by the provisions of this section and shall be filed with the appropriate Reserve Bank on the designated form.

(b) *Notice to primary banking supervisor.* Upon receipt of an application under this subpart, the Reserve Bank shall promptly furnish notice and a copy of the application to the primary banking supervisor of the bank to be acquired. The primary supervisor shall have 30 calendar days from the date of the letter giving notice in which to submit its views and recommendations to the Board.

(c) *Accepting application for processing.* Within 7 business days after the Reserve Bank receives an application under this section, the Reserve Bank shall accept it for processing as of the date the application was filed or return the application if it is substantially incomplete. Upon accepting an application, the Reserve Bank shall immediately send copies to the Board. The Reserve Bank or the Board may request additional information necessary to complete the record of an application at any time after accepting the application for processing.

(d) *Action on applications.*

(1) *Action under delegated authority.* The Reserve Bank shall approve an application under this section within 30 calendar days after the acceptance date for the application, unless the Reserve Bank, upon notice to the applicant, refers the application to the Board for decision because action under delegated authority is not appropriate.

(2) *Board action.* The Board shall act on an application under this subpart that is referred to it for decision within 60 calendar days after the acceptance date for the application, unless the Board notifies the applicant that the 60-day period is being extended for a specified period and states the reasons for the extension. In no event may the extension exceed the 91-day period provided in section 225.16(f). The Board may, at any time, request additional information that it believes is necessary for its decision.

SECTION 225.16—Public Notice, Comments, Hearings, and Other Provisions Governing Applications and Notices

(a) *In general.* The provisions of this section apply to all notices and applications filed under section 225.14 and section 225.15.

(b) *Public notice.*

(1) *Newspaper publication.*

(i) *Location of publication.* In the case of each notice or application submitted under section 225.14 or section 225.15, the applicant shall publish a notice in a newspaper of general circulation, in the

form and at the locations specified in section 262.3 of the Rules of Procedure (12 CFR 262.3).

(ii) *Contents of notice.* A newspaper notice under this paragraph shall provide an opportunity for interested persons to comment on the proposal for a period of at least 30 calendar days.

(iii) *Timing of publication.* Each newspaper notice published in connection with a proposal under this paragraph shall be published no more than 15 calendar days before and no later than 7 calendar days following the date that a notice or application is filed with the appropriate Reserve Bank.

(2) *Federal Register notice.*

(i) *Publication by Board.* Upon receipt of a notice or application under section 225.14 or section 225.15, the Board shall promptly publish notice of the proposal in the *Federal Register* and shall provide an opportunity for interested persons to comment on the proposal for a period of no more than 30 days.

(ii) *Request for advance publication.* A bank holding company may request that, during the 15-day period prior to filing a notice or application under section 225.14 or section 225.15, the Board publish notice of a proposal in the *Federal Register*. A request for advance *Federal Register* publication shall be made in writing to the appropriate Reserve Bank and shall contain the identifying information prescribed by the Board for *Federal Register* publication.

(3) *Waiver or shortening of notice.* The Board may waive or shorten the required notice periods under this section if the Board determines that an emergency exists requiring expeditious action on the proposal, or if the Board finds that immediate action is necessary to prevent the probable failure of an insured depository institution.

(c) *Public comment.*

(1) *Timely comments.* Interested persons may submit information and comments regarding a proposal filed under this subpart. A comment shall be considered timely for purposes of this subpart if the comment, together with all supplemental information, is submitted in writing in accordance with the Board's Rules of Procedure and received by the Board or the appropriate Reserve Bank prior to the expiration of the latest public-comment period provided in paragraph (b) of this section.

(2) *Extension of comment period.*

(i) *In general.* The Board may, in its discretion, extend the public comment period regarding any proposal submitted under this subpart.

(ii) *Requests in connection with obtaining application or notice.* In the event that an interested person has requested a copy of a notice or application submitted under this subpart, the Board may, in its discretion and based on the facts and circumstances, grant such person an extension of the comment period for up to 15 calendar days.

(iii) *Joint requests by interested person and acquiring company.* The Board will grant a joint request by an interested person and the acquiring bank holding company for an extension of the comment period for a reasonable period for a purpose related to the statutory factors the Board must consider under this subpart.

(3) *Substantive comment.* A comment will be considered substantive for purposes of this subpart unless it involves individual complaints, or raises frivolous, previously considered, or wholly unsubstantiated claims or irrelevant issues.

(d) *Notice to attorney general.* The Board or Reserve Bank shall immediately notify the attorney general of approval of any notice or application under section 225.14 or section 225.15.

(e) *Hearings.* As provided in section 3(b) of the BHC Act, the Board shall order a hearing on any application or notice under section 225.15 if the Board receives from the primary supervisor of the bank to be acquired, within the 30-day period specified in section 225.15(b), a written recommendation of disapproval of an application. The Board may order a formal or informal hearing or other proceeding on the application or notice, as provided in section 262.3(i)(2) of the Board's Rules of

Procedure. Any request for a hearing (other than from the primary supervisor) shall comply with section 262.3(e) of the Rules of Procedure (12 CFR 262.3(e)).

(f) *Approval through failure to act.*

(1) *Ninety-one-day rule.* An application or notice under section 225.14 or section 225.15 shall be deemed approved if the Board fails to act on the application or notice within 91 calendar days after the date of submission to the Board of the complete record on the application. For this purpose, the Board acts when it issues an order stating that the Board has approved or denied the application or notice, reflecting the votes of the members of the Board, and indicating that a statement of the reasons for the decision will follow promptly.

(2) *Complete record.* For the purpose of computing the commencement of the 91-day period, the record is complete on the latest of—

(i) the date of receipt by the Board of an application that has been accepted by the Reserve Bank;

(ii) the last day provided in any notice for receipt of comments and hearing requests on the application;

(iii) the date of receipt by the Board of the last relevant material regarding the application that is needed for the Board's decision, if the material is received from a source outside of the Federal Reserve System; or

(iv) the date of completion of any hearing or other proceeding.

(g) *Exceptions to notice and hearing requirements.*

(1) *Probable bank failure.* If the Board finds it must act immediately on an application in order to prevent the probable failure of a bank or bank holding company, the Board may modify or dispense with the notice and hearing requirements of this section.

(2) *Emergency.* If the Board finds that, although immediate action on an application or notice is not necessary, an emergency exists requiring expeditious action, the Board shall provide the primary supervisor 10 days to submit its recommendation. The Board may act on such an application or notice without a hearing and may modify or dispense with the other notice and hearing requirements of this section.

(h) *Waiting period.* A transaction approved under section 225.14 or section 225.15 shall not be consummated until 30 days after the date of approval of the application, except that a transaction may be consummated—

(1) immediately upon approval, if the Board has determined under paragraph (g) of this section that the application or notice involves a probable bank failure;

(2) on or after the 5th calendar day following the date of approval, if the Board has determined under paragraph (g) of this section that an emergency exists requiring expeditious action; or

(3) on or after the 15th calendar day following the date of approval, if the Board has not received any adverse comments from the United States attorney general relating to the competitive factors and the attorney general has consented to the shorter waiting period.

SECTION 225.17—Notice Procedure for One-Bank Holding Company Formations

(a) *Transactions that qualify under this section.* An acquisition by a company of control of a bank may be consummated 30 days after providing notice to the appropriate Reserve Bank in accordance with paragraph (b) of this section, provided that all of the following conditions are met:

(1) the shareholder or shareholders who control at least 67 percent of the shares of the bank will control, immediately after the reorganization, at least 67 percent of the shares of the holding company in substantially the same proportion, except for changes in shareholders' interests resulting from the exercise of dissenting shareholders' rights under state or federal law;[3]

[3] A shareholder of a bank in reorganization will be considered to have the same proportional interest in the holding company if the shareholder interest increases, on a pro rata basis, as a result of either the redemption of shares from dissenting shareholders by the bank or bank holding

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(2) no shareholder or group of shareholders acting in concert will, following the reorganization, own or control 10 percent or more of any class of voting shares of the bank holding company unless that shareholder or group of shareholders was authorized, after review under the Change in Bank Control Act of 1978 (12 USC 1817(j)) by the appropriate federal banking agency for the bank, to own or control 10 percent or more of any class of voting shares of the bank;[4]

(3) the bank is adequately capitalized (as defined in section 38 of the Federal Deposit Insurance Act (12 USC 1831o));

(4) the bank has received at least a composite "satisfactory" rating at its most recent examination, in the event that the bank was examined;

(5) at the time of the reorganization, neither the bank nor any of its officers, directors, or shareholders is involved in any unresolved supervisory or enforcement matters with any appropriate federal banking agency;

(6) the company demonstrates that any debt that it incurs at the time of the reorganization, and the proposed means of retiring this debt, will not place undue burden on the holding company or its subsidiary on a pro forma basis;[5]

(7) the holding company would not, as a result of the reorganization, acquire control of any additional bank or engage in any activities other than those of managing and controlling banks; and

(8) during this period, neither the appropriate Reserve Bank nor the Board objected to the proposal or required the filing of an application under section 225.15 of this subpart.

(b) *Contents of notice.* A notice filed under this paragraph shall include—

(1) certification by the notificant's board of directors that the requirements of 12 USC 1842(a)(C) and this section are met by the proposal;

(2) a list identifying the shareholders of the bank prior to the reorganization and of the holding company following the reorganization, and specifying the percentage of shares held by each principal shareholder in the bank and proposed to be held in the new holding company;

(3) a description of the resulting management of the proposed bank holding company and its subsidiary bank, including—

(i) biographical information regarding any senior officers and directors of the resulting bank holding company who were *not* senior officers or directors of the bank prior to the reorganization; and,

(ii) a detailed history of the involvement of any officer, director, or principal shareholder of the resulting bank holding company in any administrative or criminal proceeding;

(4) pro forma financial statements for the holding company, and a description of the amount, source and terms of debt, if any, that the bank holding company proposes to incur, and information regarding the sources and timing for debt service and retirement.

(c) *Acknowledgment of notice.* Within seven calendar days following receipt of a notice under this section, the Reserve Bank shall provide the notificant with a written acknowledgment of receipt of the notice. This written acknowledgment shall indicate that the transaction described in the notice may be consummated on the 30th calendar day after the date of receipt of the notice if the Reserve Bank or the Board has not objected to the proposal during that time.

(d) *Application required upon objection.* The Reserve Bank or the Board may object to a proposal during the notice period by providing the bank holding company with a written explanation of the reasons for the objection. In

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company or the acquisition of shares of dissenting shareholders by the remaining shareholders.

[4] This procedure is not available in cases in which the exercise of dissenting shareholders' rights would cause a company that is not a bank holding company (other than the company in formation) to be required to register as a bank holding company. This procedure also is not available for the formation of a bank holding company organized in mutual form.

[5] For a banking organization with consolidated assets, on a pro forma basis, of less than $150 million (other than a banking organization that will control a de novo bank), this requirement is satisfied if the proposal complies with the Board's policy statement on small bank holding companies appendix C of this part.

such case, the bank holding company may file an application for prior approval of the proposal pursuant to section 225.15 of this subpart.

SUBPART C—NONBANKING ACTIVITIES AND ACQUISITIONS BY BANK HOLDING COMPANIES

SECTION 225.21—Prohibited Nonbanking Activities and Acquisitions; Exempt Bank Holding Companies

(a) *Prohibited nonbanking activities and acquisitions.* Except as provided in section 225.22 of this subpart, a bank holding company or a subsidiary may not engage in, or acquire or control, directly or indirectly, voting securities or assets of a company engaged in, any activity other than—

(1) banking or managing or controlling banks and other subsidiaries authorized under the BHC Act; and

(2) an activity that the Board determines to be so closely related to banking or managing or controlling banks as to be a proper incident thereto, including any incidental activities that are necessary to carry on such an activity, if the bank holding company has obtained the prior approval of the Board for that activity in accordance with and subject to the requirements of this regulation.

(b) *Exempt bank holding companies.* The following bank holding companies are exempt from the provisions of this subpart:

(1) *Family-owned companies.* Any company that is a "company covered in 1970," as defined in section 2(b) of the BHC Act, more than 85 percent of the voting securities of which was collectively owned on June 30, 1968, and continuously thereafter, by members of the same family (or their spouses) who are lineal descendants of common ancestors.

(2) *Labor, agricultural, and horticultural organizations.* Any company that was on January 4, 1977, both a bank holding company and a labor, agricultural, or horticultural organization exempt from taxation under section 501 of the Internal Revenue Code (26 USC 501(c)).

(3) *Companies granted hardship exemption.* Any bank holding company that has controlled only one bank since before July 1, 1968, and that has been granted an exemption by the Board under section 4(d) of the BHC Act, subject to any conditions imposed by the Board.

(4) *Companies granted exemption on other grounds.* Any company that acquired control of a bank before December 10, 1982, without the Board's prior approval under section 3 of the BHC Act, on the basis of a narrow interpretation of the term "demand deposit" or "commercial loan" if the Board has determined that—

(i) coverage of the company as a bank holding company under this subpart would be unfair or represent an unreasonable hardship; and

(ii) exclusion of the company from coverage under this regulation is consistent with the purposes of the BHC Act and section 106 of the Bank Holding Company Act Amendments of 1970 (12 USC 1971, 1972(1)). The provisions of section 225.4 of subpart A of this regulation do not apply to a company exempt under this paragraph.

SECTION 225.22—Exempt Nonbanking Activities and Acquisitions

(a) *Certain de novo activities.* A bank holding company may, either directly or indirectly, engage de novo in any nonbanking activity listed in section 225.28(b) (other than operation of an insured depository institution) without obtaining the Board's prior approval if the bank holding company—

(1) meets the requirements of paragraphs (c)(1), (2), and (6) of section 225.23;

(2) conducts the activity in compliance with all Board orders and regulations governing the activity; and

(3) within 10 business days after commencing the activity, provides written notice to the appropriate Reserve Bank describing the activity, identifying the company or compa-

nies engaged in the activity, and certifying that the activity will be conducted in accordance with the Board's orders and regulations and that the bank holding company meets the requirements of paragraphs (c)(1), (2), and (6) of section 225.23.

(b) *Servicing activities.* A bank holding company may, without the Board's prior approval under this subpart, furnish services to or perform services for, or establish or acquire a company that engages solely in furnishing services to or performing services for—

(1) the bank holding company or its subsidiaries in connection with their activities as authorized by law, including services that are necessary to fulfill commitments entered into by the subsidiaries with third parties, if the bank holding company or servicing company complies with the Board's published interpretations and does not act as principal in dealing with third parties; and

(2) the internal operations of the bank holding company or its subsidiaries. Services for the internal operations of the bank holding company or its subsidiaries include, but are not limited to—

(i) accounting, auditing, and appraising;

(ii) advertising and public relations;

(iii) data processing and data transmission services, data bases, or facilities;

(iv) personnel services;

(v) courier services;

(vi) holding or operating property used wholly or substantially by a subsidiary in its operations or for its future use;

(vii) liquidating property acquired from a subsidiary;

(viii) liquidating property acquired from any sources either prior to May 9, 1956, or the date on which the company became a bank holding company, whichever is later; and

(ix) selling, purchasing, or underwriting insurance, such as blanket bond insurance, group insurance for employees, and property and casualty insurance.

(c) *Safe deposit business.* A bank holding company or nonbank subsidiary may, without the Board's prior approval, conduct a safe deposit business, or acquire voting securities of a company that conducts such a business.

(d) *Nonbanking acquisitions not requiring prior Board approval.* The Board's prior approval is not required under this subpart for the following acquisitions:

(1) *DPC acquisitions.*

(i) Voting securities or assets, acquired by foreclosure or otherwise, in the ordinary course of collecting a debt previously contracted (DPC property) in good faith, if the DPC property is divested within two years of acquisition.

(ii) The Board may, upon request, extend this two-year period for up to three additional years. The Board may permit additional extensions for up to 5 years (for a total of 10 years), for shares, real estate or other assets where the holding company demonstrates that each extension would not be detrimental to the public interest and either the bank holding company has made good faith attempts to dispose of such shares, real estate or other assets or disposal of the shares, real estate or other assets during the initial period would have been detrimental to the company.

(iii) Transfers of DPC property within the bank holding company system do not extend any period for divestiture of the property.

(2) *Securities or assets required to be divested by subsidiary.* Voting securities or assets required to be divested by a subsidiary at the request of an examining federal or state authority (except by the Board under the BHC Act or this regulation), if the bank holding company divests the securities or assets within two years from the date acquired from the subsidiary.

(3) *Fiduciary investments.* Voting securities or assets acquired by a bank or other company (other than a trust that is a company) in good faith in a fiduciary capacity, if the voting securities or assets are—

(i) held in the ordinary course of business; and

(ii) not acquired for the benefit of the company or its shareholders, employees, or subsidiaries.

(4) *Securities eligible for investment by national bank.* Voting securities of the kinds

and amounts explicitly eligible by federal statute (other than section 4 of the Bank Service Corporation Act, 12 USC 1864) for investment by a national bank, and voting securities acquired prior to June 30, 1971, in reliance on section 4(c)(5) of the BHC Act and interpretations of the Comptroller of the Currency under section 5136 of the Revised Statutes (12 USC 24(7)).

(5) *Securities or property representing 5 percent or less of a company.* Voting securities of a company or property that, in the aggregate, represent 5 percent or less of the outstanding shares of any class of voting securities of a company, or that represent a 5 percent interest or less in the property, subject to the provisions of 12 CFR 225.137.

(6) *Securities of investment company.* Voting securities of an investment company that is solely engaged in investing in securities and that does not own or control more than 5 percent of the outstanding shares of any class of voting securities of any company.

(7) *Assets acquired in ordinary course of business.* Assets of a company acquired in the ordinary course of business, subject to the provisions of 12 CFR 225.132, if the assets relate to activities in which the acquiring company has previously received Board approval under this regulation to engage.

(8) *Asset acquisitions by lending company or industrial bank.* Assets of an office(s) of a company, all or substantially all of which relate to making, acquiring, or servicing loans if—

(i) the acquiring company has previously received Board approval under this regulation or is not required to obtain prior Board approval under this regulation to engage in lending activities or industrial banking activities;

(ii) the assets acquired during any 12-month period do not represent more than 50 percent of the risk-weighted assets (on a consolidated basis) of the acquiring lending company or industrial bank, or more than $100 million, whichever amount is less;

(iii) the assets acquired do not represent more than 50 percent of the selling company's consolidated assets that are devoted to lending activities or industrial banking business;

(iv) the acquiring company notifies the Reserve Bank of the acquisition within 30 days after the acquisition; and

(v) the acquiring company, after giving effect to the transaction, meets the Board's capital adequacy guidelines (appendix A of this part) and the Board has not previously notified the acquiring company that it may not acquire assets under the exemption in this paragraph.

(e) *Acquisition of securities by subsidiary banks.*

(1) *National bank.* A national bank or its subsidiary may, without the Board's approval under this subpart, acquire or retain securities on the basis of section 4(c)(5) of the BHC Act in accordance with the regulations of the Comptroller of the Currency.

(2) *State bank.* A state-chartered bank or its subsidiary may, insofar as federal law is concerned, and without the Board's prior approval under this subpart—

(i) acquire or retain securities, on the basis of section 4(c)(5) of the BHC Act, of the kinds and amounts explicitly eligible by federal statute for investment by a national bank; or

(ii) acquire or retain all (but, except for directors' qualifying shares, not less than all) of the securities of a company that engages solely in activities in which the parent bank may engage, at locations at which the bank may engage in the activity, and subject to the same limitations as if the bank were engaging in the activity directly.

(f) *Activities and securities of new bank holding companies.* A company that becomes a bank holding company may, for a period of two years, engage in nonbanking activities and control voting securities or assets of a nonbank subsidiary, if the bank holding company engaged in such activities or controlled such voting securities or assets on the date it became a bank holding company. The Board may grant requests for up to three one-year extensions of the two-year period.

(g) *Grandfathered activities and securities.* Unless the Board orders divestiture or termination under section 4(a)(2) of the BHC Act, a "company covered in 1970," as defined in section 2(b) of the BHC Act, may—

(1) retain voting securities or assets and engage in activities that it has lawfully held or engaged in continuously since June 30, 1968; and

(2) acquire voting securities of any newly formed company to engage in such activities.

(h) *Securities or activities exempt under Regulation K.* A bank holding company may acquire voting securities or assets and engage in activities as authorized in Regulation K (12 CFR 211).

SECTION 225.23—Expedited Action for Certain Nonbanking Proposals by Well-Run Bank Holding Companies

(a) *Filing of notice.*

(1) *Information required.* A bank holding company that meets the requirements of paragraph (c) of this section may satisfy the notice requirement of this subpart in connection with the acquisition of voting securities or assets of a company engaged in nonbanking activities that the Board has permitted by order or regulation (other than an insured depository institution),[1] or a proposal to engage de novo, either directly or indirectly, in a nonbanking activity that the Board has permitted by order or by regulation, by providing the appropriate Reserve Bank with a written notice containing the following:

(i) a certification that all of the criteria in paragraph (c) of this section are met;

(ii) a description of the transaction that includes identification of the companies involved in the transaction, the activities to be conducted, and a commitment to conduct the proposed activities in conformity with the Board's regulations and orders governing the conduct of the proposed activity;

(iii) if the proposal involves an acquisition of a going concern:

(A) if the bank holding company has consolidated assets of $150 million or more, an abbreviated consolidated pro forma balance sheet for the acquiring bank holding company as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction, consolidated pro forma risk-based capital ratios for the acquiring bank holding company as of the most recent quarter, a description of the purchase price and the terms and sources of funding for the transaction, and the total revenue and net income of the company to be acquired;

(B) if the bank holding company has consolidated assets of less than $150 million, a pro forma parent-only balance sheet as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction, a description of the purchase price and the terms and sources of funding for the transaction and the sources and schedule for retiring any debt incurred in the transaction, and the total assets, off-balance-sheet items, revenue, and net income of the company to be acquired;

(C) for each insured depository institution whose tier 1 capital, total capital, total assets or risk-weighted assets change as a result of the transaction, the total risk-weighted assets, total assets, tier 1 capital and total capital of the institution on a pro forma basis;

(iv) identification of the geographic markets in which competition would be affected by the proposal, a description of the effect of the proposal on competition in the relevant markets, a list of the major competitors in that market in the proposed activity if the affected market is local in nature, and, if requested, the market indexes for the relevant market; and

(v) a description of the public benefits

[1] A bank holding company may acquire voting securities or assets of a savings association or other insured depository institution that is not a bank by using the procedures in section 225.14 of subpart B if the bank holding company and the proposal qualify under that section as if the savings association or other institution were a bank for purposes of that section.

that can reasonably be expected to result from the transaction.

(2) *Waiver of unnecessary information.* The Reserve Bank may reduce the information requirements in paragraphs (1)(iii) and (iv) as appropriate.

(b) (1) *Action on proposals under this section.* The Board or the appropriate Reserve Bank shall act on a proposal submitted under this section, or notify the bank holding company that the transaction is subject to the procedure in section 225.24, within 12 business days following the filing of all of the information required in paragraph (a) of this section.

(2) *Acceptance of notice if expedited procedure not available.* If the Board or the Reserve Bank determines, after the filing of a notice under this section, that a bank holding company may not use the procedure in this section and must file a notice under section 225.24, the notice shall be deemed accepted for purposes of section 225.24 as of the date that the notice was filed under this section.

(c) *Criteria for use of expedited procedure.* The procedure in this section is available only if—

(1) *Well-capitalized organization.*

(i) *Bank holding company.* Both at the time of and immediately after the proposed transaction, the acquiring bank holding company is well capitalized;

(ii) *Insured depository institutions.* Both at the time of and immediately after the transaction—

(A) the lead insured depository institution of the acquiring bank holding company is well capitalized;

(B) well-capitalized insured depository institutions control at least 80 percent of the total risk-weighted assets of insured depository institutions controlled by the acquiring bank holding company; and

(C) no insured depository institution controlled by the acquiring bank holding company is undercapitalized;

(2) *Well-managed organization.*

(i) *Satisfactory examination ratings.* At the time of the transaction, the acquiring bank holding company, its lead insured depository institution, and insured depository institutions that control at least 80 percent of the total risk-weighted assets of insured depository institutions controlled by such holding company are well managed;

(ii) *No poorly managed institutions.* No insured depository institution controlled by the acquiring bank holding company has received 1 of the 2 lowest composite ratings at the later of the institution's most recent examination or subsequent review by the appropriate federal banking agency for the institution;

(iii) *Recently acquired institutions excluded.* Any insured depository institution that has been acquired by the bank holding company during the 12-month period preceding the date on which written notice is filed under paragraph (a) of this section may be excluded for purposes of paragraph (c)(2)(ii) of this section if—

(A) the bank holding company has developed a plan acceptable to the appropriate federal banking agency for the institution to restore the capital and management of the institution; and

(B) all insured depository institutions excluded under this paragraph represent, in the aggregate, less than 10 percent of the aggregate total risk-weighted assets of all insured depository institutions controlled by the bank holding company;

(3) *Permissible activity.*

(i) The Board has determined by regulation or order that each activity proposed to be conducted is so closely related to banking, or managing or controlling banks, as to be a proper incident thereto; and

(ii) The Board has not indicated that proposals to engage in the activity are subject to the notice procedure provided in section 225.24;

(4) *Competitive criteria.*

(i) *Competitive screen.* In the case of the acquisition of a going concern, the acquisition, without regard to any divestitures proposed by the acquiring bank holding company, does not cause—

(A) the acquiring bank holding company to control in excess of 35 percent of the market share in any relevant market; or

(B) the Herfindahl-Hirschman index to increase by more than 200 points in any relevant market with a post-acquisition index of at least 1800; and

(ii) *Other competitive factors.* The Board has not indicated that the transaction is subject to close scrutiny on competitive grounds;

(5) *Size of acquisition.*

(i) *In general.*

(A) *Limited growth.* Except as provided in paragraph (c)(5)(ii), the sum of aggregate risk-weighted assets to be acquired in the proposal and the aggregate risk-weighted assets acquired by the acquiring bank holding company in all other qualifying transactions does not exceed 35 percent of the consolidated risk-weighted assets of the acquiring bank holding company. For purposes of this paragraph, "other qualifying transactions" means any transaction approved under this section or section 225.14 during the 12 months prior to filing the notice under this section;

(B) *Consideration paid.* The gross consideration to be paid by the acquiring bank holding company in the proposal does not exceed 15 percent of the consolidated tier 1 capital of the acquiring bank holding company; and

(C) *Individual size limitation.* The total risk-weighted assets to be acquired do not exceed $7.5 billion;

(ii) *Small bank holding companies.* Paragraph (c)(5)(i)(A) shall not apply if, immediately following consummation of the proposed transaction, the consolidated risk-weighted assets of the acquiring bank holding company are less than $300 million;

(6) *Supervisory actions.* During the 12-month period ending on the date on which the bank holding company proposes to consummate the proposed transaction, no formal administrative order, including a written agreement, cease-and-desist order, capital directive, prompt-corrective-action directive, asset-maintenance agreement, or other formal enforcement order is or was outstanding against the bank holding company or any insured depository institution subsidiary of the holding company, and no formal administrative enforcement proceeding involving any such enforcement action, order, or directive is or was pending; and

(7) *Notification.* The bank holding company has not been notified by the Board, in its discretion, prior to the expiration of the period in paragraph (b) that a notice under section 225.24 is required in order to permit closer review of any potential adverse effect or other matter related to the factors that must be considered under this part.

(d) *Branches and agencies of foreign banking organizations.* For purposes of this section, a U.S. branch or agency of a foreign banking organization shall be considered to be an insured depository institution.

SECTION 225.24—Procedures for Other Nonbanking Proposals

(a) *Notice required for nonbanking activities.* Except as provided in section 225.22 and section 225.23, a notice for the Board's prior approval under section 225.21(a) to engage in or acquire a company engaged in a nonbanking activity shall be filed by a bank holding company (including a company seeking to become a bank holding company) with the appropriate Reserve Bank in accordance with this section and the Board's Rules of Procedure (12 CFR 262.3).

(1) *Engaging de novo in listed activities.* A bank holding company seeking to commence or to engage de novo, either directly or through a subsidiary, in a nonbanking activity listed in section 225.28 shall file a notice containing a description of the activities to be conducted and the identity of the company that will conduct the activity.

(2) *Acquiring company engaged in listed activities.* A bank holding company seeking to acquire or control voting securities or

assets of a company engaged in a nonbanking activity listed in section 225.28 shall file a notice containing the following:

(i) a description of the proposal, including a description of each proposed activity, and the effect of the proposal on competition among entities engaging in each proposed activity in each relevant market with relevant market indexes;

(ii) the identity of any entity involved in the proposal, and if the notificant proposes to conduct the activity through an existing subsidiary, a description of the existing activities of the subsidiary;

(iii) a statement of the public benefits that can reasonably be expected to result from the proposal;

(iv) if the bank holding company has consolidated assets of $150 million or more—

(A) parent company and consolidated pro forma balance sheets for the acquiring bank holding company as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction;

(B) consolidated pro forma risk-based capital and leverage ratio calculations for the acquiring bank holding company as of the most recent quarter; and

(C) a description of the purchase price and the terms and sources of funding for the transaction;

(v) if the bank holding company has consolidated assets of less than $150 million—

(A) a pro forma parent-only balance sheet as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction; and

(B) a description of the purchase price and the terms and sources of funding for the transaction and, if the transaction is debt funded, one-year income statement and cash flow projections for the parent company, and the sources and schedule for retiring any debt incurred in the transaction;

(vi) for each insured depository institution whose tier 1 capital, total capital, total assets or risk-weighted assets change as a result of the transaction, the total risk-weighted assets, total assets, tier 1 capital and total capital of the institution on a pro forma basis; and

(vii) a description of the management expertise, internal controls and risk-management systems that will be utilized in the conduct of the proposed activities; and

(viii) a copy of the purchase agreements, and balance-sheet and income statements for the most recent quarter and year-end for any company to be acquired.

(3) *Engaging in or acquiring company to engage in unlisted activities.* A bank holding company seeking to engage de novo in, or to acquire or control voting securities or assets of a company engaged in, any activity not listed in section 225.28 shall file a notice containing the following:

(i) evidence that the proposed activity is so closely related to banking or managing or controlling banks as to be a proper incident thereto, or, if the Board previously determined by order that the activity is permissible for a bank holding company to conduct, a commitment to comply with all conditions and limitations that have been established by the Board governing the activity; and

(ii) the information required in paragraphs (a)(1) or (a)(2), as appropriate.

(b) *Notice provided to Board.* The Reserve Bank shall immediately send to the Board a copy of any notice received under paragraphs (a)(2) or (a)(3) of this section.

(c) *Notice to public.*

(1) *Listed activities and activities approved by order.*

(i) In a case involving an activity listed in section 225.28 or previously approved by the Board by order, the Reserve Bank shall notify the Board for publication in the *Federal Register* immediately upon receipt by the Reserve Bank of—

(A) a notice under this section; or

(B) a written request that notice of a proposal under this section or section 225.23 be published in the *Federal Register*. Such a request may request that *Federal Register* publication occur

up to 15 calendar days prior to submission of a notice under this subpart.

(ii) The *Federal Register* notice published under this paragraph shall invite public comment on the proposal, generally for a period of 15 days.

(2) *New activities.*

(i) *In general.* In the case of a notice under this section involving an activity that is not listed in section 225.28 and that has not been previously approved by the Board by order, the Board shall send notice of the proposal to the *Federal Register* for publication, unless the Board determines that the notificant has not demonstrated that the activity is so closely related to banking or to managing or controlling banks as to be a proper incident thereto. The *Federal Register* notice shall invite public comment on the proposal for a reasonable period of time, generally for 30 days.

(ii) *Time for publication.* The Board shall send the notice required under this paragraph to the *Federal Register* within 10 business days of acceptance by the Reserve Bank. The Board may extend the 10-day period for an additional 30 calendar days upon notice to the notificant. In the event notice of a proposal is not published for comment, the Board shall inform the notificant of the reasons for the decision.

(d) *Action on notices.*

(1) *Reserve Bank action.*

(i) *In general.* Within 30 calendar days after receipt by the Reserve Bank of a notice filed pursuant to paragraphs (a)(1) or (a)(2) of this section, the Reserve Banks shall—

(A) approve the notice; or

(B) refer the notice to the Board for decision because action under delegated authority is not appropriate.

(ii) *Return of incomplete notice.* Within seven calendar days of receipt, the Reserve Bank may return any notice as informationally incomplete that does not contain all of the information required by this subpart. The return of such a notice shall be deemed action on the notice.

(iii) *Notice of action.* The Reserve Bank shall promptly notify the bank holding company of any action or referral under this paragraph.

(iv) *Close of public-comment period.* The Reserve Bank shall not approve any notice under this paragraph (1) prior to the third business day after the close of the public-comment period, unless an emergency exists that requires expedited or immediate action.

(2) *Board action.*

(i) *Internal schedule.* The Board seeks to act on every notice referred to it for decision within 60 days of the date that the notice is filed with the Reserve Bank. If the Board is unable to act within this period, the Board shall notify the notificant and explain the reasons and the date by which the Board expects to act.

(ii) *Extension of required period for action.*

(A) *In general.* The Board may extend the 60-day period required for Board action under paragraph (d)(2)(i) of this section for an additional 30 days upon notice to the notificant.

(B) *Unlisted activities.* If a notice involves a proposal to engage in an activity that is not listed in section 225.28, the Board may extend the period required for Board action under paragraph (d)(2)(i) of this section for an additional 90 days. This 90-day extension is in addition to the 30-day extension period provided in paragraph (d)(2)(ii)(A) of this section. The Board shall notify the notificant that the notice period has been extended and explain the reasons for the extension.

(3) *Requests for additional information.* The Board or the Reserve Bank may modify the information requirements under this section or at any time request any additional information that either believes is needed for a decision on any notice under this section.

(4) *Tolling of period.* The Board or the Reserve Bank may at any time extend or toll the time period for action on a notice for

any period with the consent of the notificant.

SECTION 225.25—Hearings, Alteration of Activities, and Other Matters

(a) *Hearings.*

(1) *Procedure to request hearing.* Any request for a hearing on a notice under this subpart shall comply with the provisions of 12 CFR 262.3(e).

(2) *Determination to hold hearing.* The Board may order a formal or informal hearing or other proceeding on a notice as provided in 12 CFR 262.3(i)(2). The Board shall order a hearing only if there are disputed issues of material fact that cannot be resolved in some other manner.

(3) *Extension of period for hearing.* The Board may extend the time for action on any notice for such time as is reasonably necessary to conduct a hearing and evaluate the hearing record. Such extension shall not exceed 91 calendar days after the date of submission to the Board of the complete record on the notice. The procedures for computation of the 91-day rule as set forth in section 225.16(f) apply to notices under this subpart that involve hearings.

(b) *Approval through failure to act.*

(1) Except as provided in paragraph (a) of this section or section 225.24(d)(4), a notice under this subpart shall be deemed to be approved at the conclusion of the period that begins on the date the complete notice is received by the Reserve Bank or the Board and that ends 60 calendar days plus any applicable extension and tolling period thereafter.

(2) *Complete notice.* For purposes of paragraph (b)(1) of this section, a notice shall be deemed to be complete at such time as it contains all information required by this subpart and all other information requested by the Board or the Reserve Bank.

(c) *Notice to expand or alter nonbanking activities.*

(1) *De novo expansion.* A notice under this subpart is required to open a new office or to form a subsidiary to engage in, or to relocate an existing office engaged in, a nonbanking activity that the Board has previously approved for the bank holding company under this regulation, only if—

(i) the Board's prior approval was limited geographically;

(ii) the activity is to be conducted in a country outside of the United States and the bank holding company has not previously received prior Board approval under this regulation to engage in the activity in that country; or

(iii) the Board or appropriate Reserve Bank has notified the company that a notice under this subpart is required.

(2) *Activities outside United States.* With respect to activities to be engaged in outside the United States that require approval under this subpart, the procedures of this section apply only to activities to be engaged in directly by a bank holding company that is not a qualifying foreign banking organization, or by a nonbank subsidiary of a bank holding company approved under this subpart. Regulation K (12 CFR 211) governs other international operations of bank holding companies.

(3) *Alteration of nonbanking activity.* Unless otherwise permitted by the Board, a notice under this subpart is required to alter a nonbanking activity in any material respect from that considered by the Board in acting on the application or notice to engage in the activity.

(d) *Emergency savings association acquisitions.* In the case of a notice to acquire a savings association, the Board may modify or dispense with the public-notice and hearing requirements of this section if the Board finds that an emergency exists that requires the Board to act immediately and the primary federal regulator of the institution concurs.

SECTION 225.26—Factors Considered in Acting on Nonbanking Proposals

(a) *In general.* In evaluating a notice under section 225.23 or section 225.24, the Board

shall consider whether the notificant's performance of the activities can reasonably be expected to produce benefits to the public (such as greater convenience, increased competition, and gains in efficiency) that outweigh possible adverse effects (such as undue concentration of resources, decreased or unfair competition, conflicts of interest, and unsound banking practices).

(b) *Financial and managerial resources.* Consideration of the factors in paragraph (a) of this section includes an evaluation of the financial and managerial resources of the notificant, including its subsidiaries, and any company to be acquired, and the effect of the proposed transaction on those resources, and the management expertise, internal-control and risk-management systems, and capital of the entity conducting the activity.

(c) *Competitive effect of de novo proposals.* Unless the record demonstrates otherwise, the commencement or expansion of a nonbanking activity de novo is presumed to result in benefits to the public through increased competition.

(d) *Denial for lack of information.* The Board may deny any notice submitted under this subpart if the notificant neglects, fails, or refuses to furnish all information required by the Board.

(e) *Conditional approvals.* The Board may impose conditions on any approval, including conditions to address permissibility, financial, managerial, safety-and-soundness, competitive, compliance, conflicts-of-interest, or other concerns to ensure that approval is consistent with the relevant statutory factors and other provisions of the BHC Act.

SECTION 225.27—Procedures for Determining Scope of Nonbanking Activities

(a) *Advisory opinions regarding scope of previously approved nonbanking activities.*

(1) *Request for advisory opinion.* Any person may submit a request to the Board for an advisory opinion regarding the scope of any permissible nonbanking activity. The request shall be submitted in writing to the Board and shall identify the proposed parameters of the activity, or describe the service or product that will be provided, and contain an explanation supporting an interpretation regarding the scope of the permissible nonbanking activity.

(2) *Response to request.* The Board shall provide an advisory opinion within 45 days of receiving a written request under this paragraph.

(b) *Procedure for consideration of new activities.*

(1) *Initiation of proceeding.* The Board may, at any time, on its own initiative or in response to a written request from a person, initiate a proceeding to determine whether any activity is so closely related to banking or managing or controlling banks as to be a proper incident thereto.

(2) *Requests for determination.* Any request for a Board determination that an activity is so closely related to banking or managing or controlling banks as to be a proper incident thereto, shall be submitted to the Board in writing, and shall contain evidence that the proposed activity is so closely related to banking or managing or controlling banks as to be a proper incident thereto.

(3) *Publication.* The Board shall publish in the *Federal Register* notice that it is considering the permissibility of a new activity and invite public comment for a period of at least 30 calendar days. In the case of a request submitted under paragraph (b) of this section, the Board may determine not to publish notice of the request if the Board determines that the requester has provided no reasonable basis for a determination that the activity is so closely related to banking, or managing or controlling banks, as to be a proper incident thereto, and notifies the requester of the determination.

(4) *Comments and hearing requests.* Any comment and any request for a hearing regarding a proposal under this section shall comply with the provisions of section 262.3(e) of the Board's Rules of Procedure (12 CFR 262.3(e)).

SECTION 225.28—List of Permissible Nonbanking Activities

(a) *Closely related nonbanking activities.* The activities listed in paragraph (b) of this section are so closely related to banking or managing or controlling banks as to be a proper incident thereto, and may be engaged in by a bank holding company or its subsidiary in accordance with requirements of this regulation.

(b) *Activities determined by regulation to be permissible.*

(1) *Extending credit and servicing loans.* Making, acquiring, brokering, or servicing loans or other extensions of credit (including factoring, issuing letters of credit and accepting drafts) for the company's account or for the account of others.

(2) *Activities related to extending credit.* Any activity usual in connection with making, acquiring, brokering, or servicing loans or other extensions of credit, as determined by the Board. The Board has determined that the following activities are usual in connection with making, acquiring, brokering, or servicing loans or other extensions of credit:

(i) *Real estate and personal property appraising.* Performing appraisals of real estate and tangible and intangible personal property, including securities.

(ii) *Arranging commercial real estate equity financing.* Acting as intermediary for the financing of commercial or industrial income-producing real estate by arranging for the transfer of the title, control, and risk of such a real estate project to one or more investors, if the bank holding company and its affiliates do not have an interest in, or participate in managing or developing, a real estate project for which it arranges equity financing, and do not promote or sponsor the development of the property.

(iii) *Check-guaranty services.* Authorizing a subscribing merchant to accept personal checks tendered by the merchant's customers in payment for goods and services, and purchasing from the merchant validly authorized checks that are subsequently dishonored.

(iv) *Collection agency services.* Collecting overdue accounts receivable, either retail or commercial.

(v) *Credit bureau services.* Maintaining information related to the credit history of consumers and providing the information to a credit grantor who is considering a borrower's application for credit or who has extended credit to the borrower.

(vi) *Asset management, servicing, and collection activities.* Engaging under contract with a third party in asset management, servicing, and collection[2] of assets of a type that an insured depository institution may originate and own, if the company does not engage in real property management or real estate brokerage services as part of these services.

(vii) *Acquiring debt in default.* Acquiring debt that is in default at the time of acquisition, if the company—

(A) divests shares or assets securing debt in default that are not permissible investments for bank holding companies, within the time period required for divestiture of property acquired in satisfaction of a debt previously contracted under section 225.12(b);[3]

(B) stands only in the position of a creditor and does not purchase equity of obligors of debt in default (other than equity that may be collateral for such debt); and

(C) does not acquire debt in default secured by shares of a bank or bank holding company.

(viii) *Real estate settlement servicing.* Providing real estate settlement services.[4]

(3) *Leasing personal or real property.* Leasing personal or real property or acting as agent, broker, or adviser in leasing such property if—

[2] Asset management services include acting as agent in the liquidation or sale of loans and collateral for loans, including real estate and other assets acquired through foreclosure or in satisfaction of debts previously contracted.

[3] For this purpose, the divestiture period for property begins on the date that the debt is acquired, regardless of when legal title to the property is acquired.

[4] For purposes of this section, real estate settlement services do not include providing title insurance as principal, agent, or broker.

(i) the lease is on a nonoperating basis;[5]

(ii) the initial term of the lease is at least 90 days;

(iii) in the case of leases involving real property—

(A) at the inception of the initial lease, the effect of the transaction will yield a return that will compensate the lessor for not less than the lessor's full investment in the property plus the estimated total cost of financing the property over the term of the lease from rental payments, estimated tax benefits, and the estimated residual value of the property at the expiration of the initial lease; and

(B) the estimated residual value of property for purposes of paragraph (b)(3)(iii)(A) of this section shall not exceed 25 percent of the acquisition cost of the property to the lessor.

(4) *Operating nonbank depository institutions.*

(i) *Industrial banking.* Owning, controlling, or operating an industrial bank, Morris Plan bank, or industrial loan company, so long as the institution is not a bank.

(ii) *Operating savings association.* Owning, controlling, or operating a savings association, if the savings association engages only in deposit-taking activities, lending, and other activities that are permissible for bank holding companies under this subpart C.

(5) *Trust company functions.* Performing functions or activities that may be performed by a trust company (including activities of a fiduciary, agency, or custodial nature), in the manner authorized by federal or state law, so long as the company is not a bank for purposes of section 2(c) of the Bank Holding Company Act.

(6) *Financial and investment advisory activities.* Acting as investment or financial advisor to any person, including (without, in any way, limiting the foregoing)—

(i) serving as investment adviser (as defined in section 2(a)(20) of the Investment Company Act of 1940, 15 USC 80a-2(a)(20)), to an investment company registered under that act, including sponsoring, organizing, and managing a closed-end investment company;

(ii) furnishing general economic information and advice, general economic statistical forecasting services, and industry studies;

(iii) providing advice in connection with mergers, acquisitions, divestitures, investments, joint ventures, leveraged buyouts, recapitalizations, capital structurings, financing transactions and similar transactions, and conducting financial-feasibility studies;[6]

(iv) providing information, statistical forecasting, and advice with respect to any transaction in foreign exchange, swaps, and similar transactions, commodities, and any forward contract, option, future, option on a future, and similar instruments;

(v) providing educational courses, and instructional materials to consumers on individual financial management matters; and

(vi) providing tax-planning and tax-preparation services to any person.

(7) *Agency transactional services for customer investments.*

(i) *Securities brokerage.* Providing securities brokerage services (including securities clearing and/or securities execution services on an exchange), whether alone or in combination with investment advisory services, and incidental activities (including related securities credit activi-

[5] The requirement that the lease be on a nonoperating basis means that the bank holding company may not, directly or indirectly, engage in operating, servicing, maintaining, or repairing leased property during the lease term. For purposes of the leasing of automobiles, the requirement that the lease be on a nonoperating basis means that the bank holding company may not, directly or indirectly, (1) provide servicing, repair, or maintenance of the leased vehicle during the lease term; (2) purchase parts and accessories in bulk or for an individual vehicle after the lessee has taken delivery of the vehicle; (3) provide the loan of an automobile during servicing of the leased vehicle; (4) purchase insurance for the lessee; or (5) provide for the renewal of the vehicle's license merely as a service to the lessee where the lessee could renew the license without authorization from the lessor. The bank holding company may arrange for a third party to provide these services or products.

[6] Feasibility studies do not include assisting management with the planning or marketing for a given project or providing general operational or management advice.

ties and custodial services), if the securities brokerage services are restricted to buying and selling securities solely as agent for the account of customers and do not include securities underwriting or dealing.

(ii) *Riskless-principal transactions.* Buying and selling in the secondary market all types of securities on the order of customers as a "riskless principal" to the extent of engaging in a transaction in which the company, after receiving an order to buy (or sell) a security from a customer, purchases (or sells) the security for its own account to offset a contemporaneous sale to (or purchase from) the customer. This does not include—

(A) selling bank-ineligible securities[7] at the order of a customer that is the issuer of the securities, or selling bank-ineligible securities in any transaction where the company has a contractual agreement to place the securities as agent of the issuer; or

(B) acting as a riskless principal in any transaction involving a bank-ineligible security for which the company or any of its affiliates acts as underwriter (during the period of the underwriting or for 30 days thereafter) or dealer.[8]

(iii) *Private-placement services.* Acting as agent for the private placement of securities in accordance with the requirements of the Securities Act of 1933 (1933 act) and the rules of the Securities and Exchange Commission, if the company engaged in the activity does not purchase or repurchase for its own account the securities being placed, or hold in inventory unsold portions of issues of these securities.

(iv) *Futures commission merchant.* Acting as a futures commission merchant (FCM) for unaffiliated persons in the execution, clearance, or execution and clearance of any futures contract and option on a futures contract traded on an exchange in the United States or abroad if—

(A) the activity is conducted through a separately incorporated subsidiary of the bank holding company, which may engage in activities other than FCM activities (including, but not limited to, permissible advisory and trading activities); and

(B) the parent bank holding company does not provide a guarantee or otherwise become liable to the exchange or clearing association other than for those trades conducted by the subsidiary for its own account or for the account of any affiliate.

(v) *Other transactional services.* Providing to customers as agent transactional services with respect to swaps and similar transactions, any transaction described in paragraph (b)(8) of this section, any transaction that is permissible for a state member bank, and any other transaction involving a forward contract, option, futures, option on a futures or similar contract (whether traded on an exchange or not) relating to a commodity that is traded on an exchange.

(8) *Investment transactions as principal.*

(i) *Underwriting and dealing in government obligations and money market instruments.* Underwriting and dealing in obligations of the United States, general obligations of states and their political subdivisions, and other obligations that state member banks of the Federal Reserve System may be authorized to underwrite and deal in under 12 USC 24 and 335, including banker's acceptances and certificates of deposit, under the same limitations as would be applicable if the activity were performed by the bank holding company's subsidiary member banks or its subsidiary nonmember banks as if they were member banks.

[7] A bank-ineligible security is any security that a state member bank is not permitted to underwrite or deal in under 12 USC 24 and 335.

[8] A company or its affiliates may not enter quotes for specific bank-ineligible securities in any dealer quotation system in connection with the company's riskless-principal transactions; except that the company or its affiliates may enter "bid" or "ask" quotations, or publish "offering wanted" or "bid wanted" notices on trading systems other than NASDAQ or an exchange, if the company or its affiliate does not enter price quotations on different sides of the market for a particular security during any two-day period.

(ii) *Investing and trading activities.* Engaging as principal in—

(A) foreign exchange;

(B) forward contracts, options, futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on any rate, price, financial asset (including gold, silver, platinum, palladium, copper, or any other metal approved by the Board), nonfinancial asset, or group of assets, other than a bank-ineligible security[9], if—

(*1*) a state member bank is authorized to invest in the asset underlying the contract;

(*2*) the contract requires cash settlement; or

(*3*) the contract allows for assignment, termination, or offset prior to delivery or expiration, and the company makes every reasonable effort to avoid taking or making delivery; and

(C) forward contracts, options,[10] futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on an index of a rate, a price, or the value of any financial asset, nonfinancial asset, or group of assets, if the contract requires cash settlement.

(iii) *Buying and selling bullion, and related activities.* Buying, selling and storing bars, rounds, bullion, and coins of gold, silver, platinum, palladium, copper, and any other metal approved by the Board, for the company's own account and the account of others, and providing incidental services such as arranging for storage, safe custody, assaying, and shipment.

(9) *Management consulting and counseling activities.*

(i) *Management consulting.*

(A) Providing management consulting advice[11]—

(*1*) on any matter to unaffiliated depository institutions, including commercial banks, savings and loan associations, savings banks, credit unions, industrial banks, Morris Plan banks, cooperative banks, industrial loan companies, trust companies, and branches or agencies of foreign banks;

(*2*) on any financial, economic, accounting, or audit matter to any other company.

(B) A company conducting management consulting activities under this subparagraph and any affiliate of such company may not—

(*1*) own or control, directly or indirectly, more than 5 percent of the voting securities of the client institution; and

(*2*) allow a management official, as defined in 12 CFR 212.2(h), of the company or any of its affiliates to serve as a management official of the client institution, except where such interlocking relationship is permitted pursuant to an exemption granted under 12 CFR 212.4(b) or otherwise permitted by the Board,

(C) A company conducting management consulting activities may provide management consulting services to customers not described in paragraph (b)(9)(i)(A)(*1*) of this section or regarding matters not described in paragraph (b)(9)(i)(A)(*2*) of this section, if the total annual revenue derived from those management consulting services does not exceed 30 percent of the company's total annual revenue derived from management consulting activities.

[9] A bank-ineligible security is any security that a state member bank is not permitted to underwrite or deal in under 12 USC 24 and 335.

[10] This reference does not include acting as a dealer in options based on indices of bank-ineligible securities when the options are traded on securities exchanges. These options are securities for purposes of the federal securities laws and bank-ineligible securities for purposes of section 20 of the Glass-Steagall Act, 12 USC 337. Similarly, this reference does not include acting as a dealer in any other instrument that is a bank-ineligible security for purposes of section 20. A bank holding company may deal in these instruments in accordance with the Board's orders on dealing in bank-ineligible securities.

[11] In performing this activity, bank holding companies are not authorized to perform tasks or operations or provide services to client institutions either on a daily or continuing basis, except as necessary to instruct the client institution on how to perform such services for itself. See also the Board's interpretation of bank management consulting advice (12 CFR 225.131.).

(ii) *Employee benefits consulting services.* Providing consulting services to employee benefit, compensation, and insurance plans, including designing plans, assisting in the implementation of plans, providing administrative services to plans, and developing employee communication programs for plans.

(iii) *Career counseling services.* Providing career counseling services to—

(A) a financial organization[12] and individuals currently employed by, or recently displaced from, a financial organization;

(B) individuals who are seeking employment at a financial organization; and

(C) individuals who are currently employed in or who seek positions in the finance, accounting, and audit departments of any company.

(10) Support services.

(i) *Courier services.* Providing courier services for—

(A) checks, commercial papers, documents, and written instruments (excluding currency or bearer-type negotiable instruments) that are exchanged among banks and financial institutions; and

(B) audit and accounting media of a banking or financial nature and other business records and documents used in processing such media.[13]

(ii) *Printing and selling MICR-encoded items.* Printing and selling checks and related documents, including corporate image checks, cash tickets, voucher checks, deposit slips, savings withdrawal packages, and other forms that require magnetic ink character recognition (MICR) encoding.

(11) *Insurance agency and underwriting.*

(i) *Credit insurance.* Acting as principal, agent, or broker for insurance (including home mortgage redemption insurance) that is—

(A) directly related to an extension of credit by the bank holding company or any of its subsidiaries; and

(B) limited to ensuring the repayment of the outstanding balance due on the extension of credit[14] in the event of the death, disability, or involuntary unemployment of the debtor.

(ii) *Finance company subsidiary.* Acting as agent or broker for insurance directly related to an extension of credit by a finance company[15] that is a subsidiary of a bank holding company, if—

(A) the insurance is limited to ensuring repayment of the outstanding balance on such extension of credit in the event of loss or damage to any property used as collateral for the extension of credit; and

(B) the extension of credit is not more than $10,000, or $25,000 if it is to finance the purchase of a residential manufactured home[16] and the credit is secured by the home; and

(C) the applicant commits to notify borrowers in writing that—

(*1*) they are not required to purchase such insurance from the applicant;

(*2*) such insurance does not insure any interest of the borrower in the collateral; and

(*3*) the applicant will accept more comprehensive property insurance in place of such single-interest insurance.

(iii) *Insurance in small towns.* Engaging

[12] "Financial organization" refers to insured depository institution holding companies and their subsidiaries, other than nonbanking affiliates of diversified savings and loan holding companies that engage in activities not permissible under section 4(c)(8) of the Bank Holding Company Act (12 USC 1842(c)(8)).

[13] See also the Board's interpretation on courier activities (12 CFR 225.129), which sets forth conditions for bank holding company entry into the activity.

[14] "Extension of credit" includes direct loans to borrowers, loans purchased from other lenders, and leases of real or personal property so long as the leases are nonoperating and full-payout leases that meet the requirements of paragraph (b)(3) of this section.

[15] "Finance company" includes all non-deposit-taking financial institutions that engage in a significant degree of consumer lending (excluding lending secured by first mortgages) and all financial institutions specifically defined by individual states as finance companies and that engage in a significant degree of consumer lending.

[16] These limitations increase at the end of each calendar year, beginning with 1982, by the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers published by the Bureau of Labor Statistics.

in any insurance agency activity in a place where the bank holding company or a subsidiary of the bank holding company has a lending office and that—

(A) has a population not exceeding 5,000 (as shown in the preceding decennial census); or

(B) has inadequate insurance agency facilities, as determined by the Board, after notice and opportunity for hearing.

(iv) *Insurance agency activities conducted on May 1, 1982.* Engaging in any specific insurance agency activity[17] if the bank holding company, or subsidiary conducting the specific activity, conducted such activity on May 1, 1982, or received Board approval to conduct such activity on or before May 1, 1982.[18] A bank holding company or subsidiary engaging in a specific insurance agency activity under this clause may—

(A) engage in such specific insurance agency activity only at locations—

(*1*) in the state in which the bank holding company has its principal place of business (as defined in 12 USC 1842(d));

(*2*) in any state or states immediately adjacent to such state; and

(*3*) in any state in which the specific insurance agency activity was conducted (or was approved to be conducted) by such bank holding company or subsidiary thereof or by any other subsidiary of such bank holding company on May 1, 1982; and

(B) provide other insurance coverages that may become available after May 1, 1982, so long as those coverages insure against the types of risks as (or are otherwise functionally equivalent to) coverages sold or approved to be sold on May 1, 1982, by such bank holding company or subsidiary.

(v) *Supervision of retail insurance agents.* Supervising on behalf of insurance underwriters the activities of retail insurance agents who sell—

(A) fidelity insurance and property and casualty insurance on the real and personal property used in the operations of the bank holding company or its subsidiaries; and

(B) group insurance that protects the employees of the bank holding company or its subsidiaries.

(vi) *Small bank holding companies.* Engaging in any insurance agency activity if the bank holding company has total consolidated assets of $50 million or less. A bank holding company performing insurance agency activities under this paragraph may not engage in the sale of life insurance or annuities except as provided in paragraphs (b)(11)(i) and (iii) of this section, and it may not continue to engage in insurance agency activities pursuant to this provision more than 90 days after the end of the quarterly reporting period in which total assets of the holding company and its subsidiaries exceed $50 million.

(vii) *Insurance agency activities conducted before 1971.* Engaging in any insurance agency activity performed at any location in the United States directly or indirectly by a bank holding company that was engaged in insurance agency activities prior to January 1, 1971, as a consequence of approval by the Board prior to January 1, 1971.

(12) *Community development activities.*

(i) *Financing and investment activities.* Making equity and debt investments in corporations or projects designed primarily to promote community welfare, such as the economic rehabilitation and development of low-income areas by providing housing, services, or jobs for residents.

(ii) *Advisory activities.* Providing advisory and related services for programs

[17] Nothing contained in this provision shall preclude a bank holding company subsidiary that is authorized to engage in a specific insurance agency activity under this clause from continuing to engage in the particular activity after merger with an affiliate, if the merger is for legitimate business purposes and prior notice has been provided to the Board.

[18] For the purposes of this paragraph, activities engaged in on May 1, 1982, include activities carried on subsequently as the result of an application to engage in such activities pending before the Board on May 1, 1982, and approved subsequently by the Board or as the result of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition.

designed primarily to promote community welfare.

(13) *Money orders, savings bonds, and traveler's checks.* The issuance and sale at retail of money orders and similar consumer-type payment instruments; the sale of U.S. savings bonds; and the issuance and sale of traveler's checks.

(14) *Data processing.*

(i) Providing data processing and data transmission services, facilities (including data processing and data transmission hardware, software, documentation, or operating personnel), data bases, advice, and access to such services, facilities, or data bases by any technological means, if—

(A) the data to be processed or furnished are financial, banking, or economic; and

(B) The hardware provided in connection therewith is offered only in conjunction with software designed and marketed for the processing and transmission of financial, banking, or economic data, and where the general purpose hardware does not constitute more than 30 percent of the cost of any packaged offering.

(ii) A company conducting data processing and data transmission activities may conduct data processing and data transmission activities not described in paragraph (b)(14)(i) of this section if the total annual revenue derived from those activities does not exceed 30 percent of the company's total annual revenues derived from data processing and data transmission activities.

SUBPART D—CONTROL AND DIVESTITURE PROCEEDINGS

SECTION 225.31—Control Proceedings

(a) *Preliminary determination of control.*

(1) The Board may issue a preliminary determination of control under the procedures set forth in this section in any case in which—

(i) any of the presumptions of control set forth in paragraph (d) of this section is present; or

(ii) it otherwise appears that a company has the power to exercise a controlling influence over the management or policies of a bank or other company.

(2) If the Board makes a preliminary determination of control under this section, the Board shall send notice to the controlling company containing a statement of the facts upon which the preliminary determination is based.

(b) *Response to preliminary determination of control.* Within 30 calendar days of issuance by the Board of a preliminary determination of control or such longer period permitted by the Board, the company against whom the determination has been made shall—

(1) submit for the Board's approval a specific plan for the prompt termination of the control relationship;

(2) file an application under subpart B or C of this regulation to retain the control relationship; or

(3) contest the preliminary determination by filing a response, setting forth the facts and circumstances in support of its position that no control exists, and, if desired, requesting a hearing or other proceeding.

(c) *Hearing and final determination.*

(1) The Board shall order a formal hearing or other appropriate proceeding upon the request of a company that contests a preliminary determination that the company has the power to exercise a controlling influence over the management or policies of a bank or other company, if the Board finds that material facts are in dispute. The Board may also in its discretion order a formal hearing or other proceeding with respect to a preliminary determination that the company controls voting securities of the bank or other company under the presumptions in paragraph (d)(1) of this section.

(2) At a hearing or other proceeding, any applicable presumptions established by paragraph (d) of this section shall be considered in accordance with the Federal Rules of Evidence and the Board's Rules of Practice for Formal Hearings (12 CFR 263).

(3) After considering the submissions of the company and other evidence, including the record of any hearing or other proceeding, the Board shall issue a final order determining whether the company controls voting securities, or has the power to exercise a controlling influence over the management or policies, of the bank or other company. If a control relationship is found, the Board may direct the company to terminate the control relationship or to file an application for the Board's approval to retain the control relationship under subpart B or C of this regulation.

(d) *Rebuttable presumptions of control.* The following rebuttable presumptions shall be used in any proceeding under this section:

(1) *Control of voting securities.*

(i) *Securities convertible into voting securities.* A company that owns, controls, or holds securities that are immediately convertible, at the option of the holder or owner, into voting securities of a bank or other company, controls the voting securities.

(ii) *Option or restriction on voting securities.* A company that enters into an agreement or understanding under which the rights of a holder of voting securities of a bank or other company are restricted in any manner controls the securities. This presumption does not apply where the agreement or understanding—

(A) is a mutual agreement among shareholders granting to each other a right of first refusal with respect to their shares;

(B) is incident to a bona fide loan transaction; or

(C) relates to restrictions on transferability and continues only for the time necessary to obtain approval from the appropriate federal supervisory authority with respect to acquisition by the company of the securities.

(2) *Control over company.*

(i) *Management agreement.* A company that enters into any agreement or understanding with a bank or other company (other than an investment advisory agreement), such as a management contract, under which the first company or any of its subsidiaries directs or exercises significant influence over the general management or overall operations of the bank or other company controls the bank or other company.

(ii) *Shares controlled by company and associated individuals.* A company that, together with its management officials or controlling shareholders (including members of the immediate families of either), owns, controls, or holds with power to vote 25 percent or more of the outstanding shares of any class of voting securities of a bank or other company controls the bank or other company, if the first company owns, controls, or holds with power to vote more than 5 percent of the outstanding shares of any class of voting securities of the bank or other company.

(iii) *Common management officials.* A company that has one or more management officials in common with a bank or other company controls the bank or other company, if the first company owns, controls, or holds with power to vote more than 5 percent of the outstanding shares of any class of voting securities of the bank or other company, and no other person controls as much as 5 percent of the outstanding shares of any class of voting securities of the bank or other company.

(iv) *Shares held as fiduciary.* The presumptions in paragraphs (d)(2)(ii) and (iii) of this section do not apply if the securities are held by the company in a fiduciary capacity without sole discretionary authority to exercise the voting rights.

(e) *Presumptions of noncontrol.*

(1) In any proceeding under this section, there is a presumption that any company that directly or indirectly owns, controls, or has power to vote less than 5 percent of the outstanding shares of any class of voting securities of a bank or other company does not have control over that bank or other company.

(2) In any proceeding under this section, or judicial proceeding under the BHC Act, other than a proceeding in which the Board

has made a preliminary determination that a company has the power to exercise a controlling influence over the management or policies of the bank or other company, a company may not be held to have had control over the bank or other company at any given time, unless that company, at the time in question, directly or indirectly owned, controlled, or had power to vote 5 percent or more of the outstanding shares of any class of voting securities of the bank or other company, or had already been found to have control on the basis of the existence of a controlling influence relationship.

SUBPART E—CHANGE IN BANK CONTROL

SECTION 225.41—Transactions Requiring Prior Notice

(a) *Prior-notice requirement.* Any person acting directly or indirectly, or through or in concert with one or more persons, shall give the Board 60 days' written notice, as specified in section 225.43 of this subpart, before acquiring control of a state member bank or bank holding company, unless the acquisition is exempt under section 225.42.

(b) *Definitions.* For purposes of this subpart:

(1) *Acquisition* includes a purchase, assignment, transfer, or pledge of voting securities, or an increase in percentage ownership of a state member bank or a bank holding company resulting from a redemption of voting securities.

(2) *Acting in concert* includes knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a state member bank or bank holding company whether or not pursuant to an express agreement.

(3) *Immediate family* includes a person's father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, the spouse of any of the foregoing, and the person's spouse.

(c) *Acquisitions requiring prior notice.*

(1) *Acquisition of control.* The acquisition of voting securities of a state member bank or bank holding company constitutes the acquisition of control under the Bank Control Act,* requiring prior notice to the Board, if, immediately after the transaction, the acquiring person (or persons acting in concert) will own, control, or hold with power to vote 25 percent or more of any class of voting securities of the institution.

(2) *Rebuttable presumption of control.* The Board presumes that an acquisition of voting securities of a state member bank or bank holding company constitutes the acquisition of control under the Bank Control Act, requiring prior notice to the Board, if, immediately after the transaction, the acquiring person (or persons acting in concert) will own, control, or hold with power to vote 10 percent or more of any class of voting securities of the institution, and if—

(i) the institution has registered securities under section 12 of the Securities Exchange Act of 1934 (15 USC 78*l*); or

(ii) no other person will own, control, or hold the power to vote a greater percentage of that class of voting securities immediately after the transaction.[1]

(d) *Rebuttable presumption of concerted action.* The following persons shall be presumed to be acting in concert for purposes of this subpart:

(1) a company and any controlling shareholder, partner, trustee, or management official of the company, if both the company and the person own voting securities of the state member bank or bank holding company;

(2) an individual and the individual's immediate family;

(3) companies under common control;

(4) persons that are parties to any agreement, contract, understanding, relationship, or other arrangement, whether written or

* The Change in Bank Control Act amended section 7(j) of the Federal Deposit Insurance Act (12 USC 1817(j)).

[1] If two or more persons, not acting in concert, each propose to acquire simultaneously equal percentages of 10 percent or more of a class of voting securities of the state member bank or bank holding company, each person must file prior notice to the Board.

otherwise, regarding the acquisition, voting, or transfer of control of voting securities of a state member bank or bank holding company, other than through a revocable proxy as described in section 225.42(a)(5) of this subpart;

(5) persons that have made, or propose to make, a joint filing under sections 13 or 14 of the Securities Exchange Act of 1934 (15 USC 78m or 78n), and the rules promulgated thereunder by the Securities and Exchange Commission; and

(6) a person and any trust for which the person serves as trustee.

(e) *Acquisitions of loans in default.* The Board presumes an acquisition of a loan in default that is secured by voting securities of a state member bank or bank holding company to be an acquisition of the underlying securities for purposes of this section.

(f) *Other transactions.* Transactions other than those set forth in paragraph (c) of this section resulting in a person's control of less than 25 percent of a class of voting securities of a state member bank or bank holding company are not deemed by the Board to constitute control for purposes of the Bank Control Act.

(g) *Rebuttal of presumptions.* Prior notice to the Board is not required for any acquisition of voting securities under the presumption of control set forth in this section, if the Board finds that the acquisition will not result in control. The Board shall afford any person seeking to rebut a presumption in this section an opportunity to present views in writing or, if appropriate, orally before its designated representatives at an informal conference.

SECTION 225.42—Transactions Not Requiring Prior Notice

(a) *Exempt transactions.* The following transactions do not require notice to the Board under this subpart:

(1) *Existing control relationships.* The acquisition of additional voting securities of a state member bank or bank holding company by a person who—

(i) continuously since March 9, 1979 (or since the institution commenced business, if later), held power to vote 25 percent or more of any class of voting securities of the institution; or

(ii) is presumed, under section 225.41(c)(2) of this subpart, to have controlled the institution continuously since March 9, 1979, if the aggregate amount of voting securities held does not exceed 25 percent or more of any class of voting securities of the institution or, in other cases, where the Board determines that the person has controlled the bank continuously since March 9, 1979;

(2) *Increase of previously authorized acquisitions.* Unless the Board or the Reserve Bank otherwise provides in writing, the acquisition of additional shares of a class of voting securities of a state member bank or bank holding company by any person (or persons acting in concert) who has lawfully acquired and maintained control of the institution (for purposes of section 225.41(c) of this subpart), after complying with the procedures and receiving approval to acquire voting securities of the institution under this subpart, or in connection with an application approved under section 3 of the BHC Act (12 USC 1842; section 225.11 of subpart B of this part) or section 18(c) of the Federal Deposit Insurance Act (Bank Merger Act, 12 USC 1828(c));

(3) *Acquisitions subject to approval under BHC Act or Bank Merger Act.* Any acquisition of voting securities subject to approval under section 3 of the BHC Act (section 225.11 of subpart B), or section 18(c) of the Federal Deposit Insurance Act (Bank Merger Act, 12 USC 1828(c));

(4) *Transactions exempt under BHC Act.* Any transaction described in sections 2(a)(5), 3(a)(A), or 3(a)(B) of the BHC Act (12 USC 1841(a)(5), 1842(a)(A), 1842(a)(B)), by a person described in those provisions;

(5) *Proxy solicitation.* The acquisition of the power to vote securities of a state member or bank holding company through receipt of a revocable proxy in connection with a proxy solicitation for the purposes of conducting business at a regular or special

meeting of the institution, if the proxy terminates within a reasonable period after the meeting;

(6) *Stock dividends.* The receipt of voting securities of a state member bank or bank holding company through a stock dividend or stock split if the proportional interest of the recipient in the institution remains substantially the same; and.

(7) *Acquisition of foreign banking organization.* The acquisition of voting securities of a qualifying foreign banking organization. (This exemption does not extend to the reports and information required under paragraphs 9, 10, and 12 of the Bank Control Act (12 USC 1817(j)(9), (10), and (12)) and section 225.44 of this subpart.

(b) *Prior-notice exemption.*

(1) The following acquisitions of voting securities of a state member bank or bank holding company, which would otherwise require prior notice under this subpart, are not subject to the prior-notice requirements if the acquiring person notifies the appropriate Reserve Bank within 90 calendar days after the acquisition and provides any relevant information requested by the Reserve Bank:

(i) acquisition of voting securities through inheritance;

(ii) acquisition of voting securities as a bona fide gift; and

(iii) acquisition of voting securities in satisfaction of a debt previously contracted (DPC) in good faith.

(2) The following acquisitions of voting securities of a state member bank or bank holding company, which would otherwise require prior notice under this subpart, are not subject to the prior-notice requirements if the acquiring person does not reasonably have advance knowledge of the transaction, and provides the written notice required under section 225.43 to the appropriate Reserve Bank within 90 calendar days after the transaction occurs:

(i) acquisition of voting securities resulting from a redemption of voting securities by the issuing bank or bank holding company; and

(ii) acquisition of voting securities as a result of actions (including the sale of securities) by any third party that is not within the control of the acquiror.

(3) Nothing in paragraphs (b)(1) or (b)(2) of this section limits the authority of the Board to disapprove a notice pursuant to section 225.43(h) of this subpart.

SECTION 225.43—Procedures for Filing, Processing, Publishing, and Acting on Notices

(a) *Filing notice.*

(1) A notice required under this subpart shall be filed with the appropriate Reserve Bank and shall contain all the information required by paragraph 6 of the Bank Control Act (12 USC 1817(j)(6)), or prescribed in the designated Board form.

(2) The Board may waive any of the informational requirements of the notice if the Board determines that it is in the public interest.

(3) A notificant shall notify the appropriate Reserve Bank or the Board immediately of any material changes in a notice submitted to the Reserve Bank, including changes in financial or other conditions.

(4) When the acquiring person is an individual, or group of individuals acting in concert, the requirement to provide personal financial data may be satisfied by a current statement of assets and liabilities and an income summary, as required in the designated Board form, together with a statement of any material changes since the date of the statement or summary. The Reserve Bank or the Board, nevertheless, may request additional information, if appropriate.

(b) *Acceptance of notice.* The 60-day notice period specified in section 225.41 of this subpart begins on the date of receipt of a complete notice. The Reserve Bank shall notify the person or persons submitting a notice under this subpart in writing of the date the notice is or was complete and thereby accepted for processing. The Reserve Bank or the Board may request additional relevant information at any time after the date of acceptance.

(c) *Publication.*

(1) *Newspaper announcement.* Any person(s) filing a notice under this subpart shall publish, in a form prescribed by the Board, an announcement soliciting public comment on the proposed acquisition. The announcement shall be published in a newspaper of general circulation in the community in which the head office of the state member bank to be acquired is located or, in the case of a proposed acquisition of a bank holding company, in the community in which its head office is located and in the community in which the head office of each of its subsidiary banks is located. The announcement shall be published no earlier than 15 calendar days before the filing of the notice with the appropriate Reserve Bank and no later than 10 calendar days after the filing date; and the publisher's affidavit of publication shall be provided to the appropriate Reserve Bank.

(2) *Contents of newspaper announcement.* The newspaper announcement shall state—

(i) the name of each person identified in the notice as a proposed acquiror of the bank or bank holding company;

(ii) the name of the bank or bank holding company to be acquired, including the name of each of the bank holding company's subsidiary banks; and

(iii) a statement that interested persons may submit comments on the notice to the Board or the appropriate Reserve Bank for a period of 20 days, or such shorter period as may be provided, pursuant to paragraph (c)(5) of this section.

(3) *Federal Register announcement.* The Board shall, upon filing of a notice under this subpart, publish announcement in the *Federal Register* of receipt of the notice. The *Federal Register* announcement shall contain the information required under paragraphs (c)(2)(i) and (c)(2)(ii) of this section and a statement that interested persons may submit comments on the proposed acquisition for a period of 15 calendar days, or such shorter period as may be provided, pursuant to paragraph (c)(5) of this section. The Board may waive publication in the *Federal Register*, if the Board determines that such action is appropriate.

(4) *Delay of publication.* The Board may permit delay in the publication required under paragraphs (c)(1) and (c)(3) if the Board determines, for good cause shown, that it is in the public interest to grant such a delay. Requests for delay of publication may be submitted to the appropriate Reserve Bank.

(5) *Shortening or waiving notice.* The Board may shorten or waive the public-comment or newspaper-publication requirements of this paragraph, or act on a notice before the expiration of a public-comment period, if it determines in writing that an emergency exists, or that disclosure of the notice, solicitation of public comment, or delay until expiration of the public-comment period would seriously threaten the safety or soundness of the bank or bank holding company to be acquired.

(6) *Consideration of public comments.* In acting upon a notice filed under this subpart, the Board shall consider all public comments received in writing within the period specified in the newspaper or *Federal Register* announcement, whichever is later. At the Board's option, comments received after this period may, but need not, be considered.

(7) *Standing.* No person (other than the acquiring person) who submits comments or information on a notice filed under this subpart shall thereby become a party to the proceeding or acquire any standing or right to participate in the Board's consideration of the notice or to appeal or otherwise contest the notice or the Board's action regarding the notice.

(d) *Time period for Board action.*

(1) *Consummation of acquisition.*

(i) The notificants may consummate the proposed acquisition 60 days after submission to the Reserve Bank of a complete notice under paragraph (a) of this section, unless within that period the Board disapproves the proposed acquisition or extends the 60-day period, as provided under paragraph (d)(2) of this section.

(ii) The notificant(s) may consummate the proposed transaction before the expiration of the 60-day period if the Board

notifies the notificant(s) in writing of the Board's intention not to disapprove the acquisition.

(2) *Extensions of time period.*

(i) The Board may extend the 60-day period in paragraph (d)(1) of this section for an additional 30 days by notifying the acquiring person(s).

(ii) The Board may further extend the period during which it may disapprove a notice for two additional periods of not more than 45 days each, if the Board determines that—

(A) any acquiring person has not furnished all the information required under paragraph (a) of this section;

(B) any material information submitted is substantially inaccurate;

(C) the Board is unable to complete the investigation of any acquiring person because of inadequate cooperation or delay by that person; or

(D) additional time is needed to investigate and determine that no acquiring person has a record of failing to comply with the requirements of the Bank Secrecy Act, subchapter II of chapter 53 of title 31, United States Code.

(iii) If the Board extends the time period under this paragraph, it shall notify the acquiring person(s) of the reasons therefor and shall include a statement of the information, if any, deemed incomplete or inaccurate.

(e) *Advice to bank supervisory agencies.*

(1) Upon accepting a notice relating to acquisition of securities of a state member bank, the Reserve Bank shall send a copy of the notice to the appropriate state bank supervisor, which shall have 30 calender days from the date the notice is sent in which to submit its views and recommendations to the Board. The Reserve Bank also shall send a copy of any notice to the Comptroller of the Currency, Federal Deposit Insurance Corporation, and the Office of Thrift Supervision.

(2) If the Board finds that it must act immediately in order to prevent the probable failure of the bank or bank holding company involved, the Board may dispense with or modify the requirements for notice to the state supervisor.

(f) *Investigation and report.*

(1) After receiving a notice under this subpart, the Board or the appropriate Reserve Bank shall conduct an investigation of the competence, experience, integrity, and financial ability of each person by and for whom an acquisition is to be made. The Board shall also make an independent determination of the accuracy and completeness of any information required to be contained in a notice under paragraph (a) of this section. In investigating any notice accepted under this subpart, the Board or Reserve Bank may solicit information or views from any person, including any bank or bank holding company involved in the notice, and any appropriate state, federal, or foreign governmental authority.

(2) The Board or the appropriate Reserve Bank shall prepare a written report of its investigation, which shall contain, at a minimum, a summary of the results of the investigation.

(g) *Factors considered in acting on notices.* In reviewing a notice filed under this subpart, the Board shall consider the information in the record, the views and recommendations of the appropriate bank supervisor, and any other relevant information obtained during any investigation of the notice.

(h) *Disapproval and hearing.*

(1) *Disapproval of notice.* The Board may disapprove an acquisition if it finds adverse effects with respect to any of the factors set forth in paragraph 7 of the Bank Control Act (12 USC 1817(j)(7)) (i.e., competitive, financial, managerial, banking, or incompleteness of information).

(2) *Disapproval notification.* Within three days after its decision to issue a notice of intent to disapprove any proposed acquisition, the Board shall notify the acquiring person in writing of the reasons for the action.

(3) *Hearing.* Within 10 calendar days of receipt of the notice of the Board's intent to disapprove, the acquiring person may submit a written request for a hearing. Any

hearing conducted under this paragraph shall be in accordance with the Rules of Practice for Formal Hearings (12 CFR 263). At the conclusion of the hearing, the Board shall, by order, approve or disapprove the proposed acquisition on the basis of the record of the hearing. If the acquiring person does not request a hearing, the notice of intent to disapprove becomes final and unappealable.

SECTION 225.44—Reporting of Stock Loans

(a) *Requirements.*

(1) Any foreign bank or affiliate of a foreign bank that has credit outstanding to any person or group of persons, in the aggregate, which is secured, directly or indirectly, by 25 percent or more of any class of voting securities of a state member bank, shall file a consolidated report with the appropriate Reserve Bank for the state member bank.

(2) The foreign bank or its affiliate also shall file a copy of the report with its appropriate federal banking agency.

(3) Any shares of the state member bank held by the foreign bank or any affiliate of the foreign bank as principal must be included in the calculation of the number of shares in which the foreign bank or its affiliate has a security interest for purposes of paragraph (a) of this section.

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

(1) *Foreign bank* shall have the same meaning as in section 1(b) of the International Banking Act of 1978 (12 USC 3101).

(2) *Credit outstanding* includes any loan or extension of credit; the issuance of a guarantee, acceptance, or letter of credit, including an endorsement or standby letter of credit; and any other type of transaction that extends credit or financing to the person or group of persons.

(3) *Group of persons* includes any number of persons that the foreign bank or any affiliate of a foreign bank has reason to believe—

(i) are acting together, in concert, or with one another to acquire or control shares of the same insured depository institution, including an acquisition of shares of the same depository institution at approximately the same time under substantially the same terms; or

(ii) have made, or propose to make, a joint filing under section 13 or 14 of the Securities Exchange Act of 1934 (15 USC 78m or 78n), and the rules promulgated thereunder by the Securities and Exchange Commission regarding ownership of the shares of the same insured depository institution.

(c) *Exceptions.* Compliance with paragraph (a) of this section is not required if—

(1) the person or group of persons referred to in that paragraph has disclosed the amount borrowed and the security interest therein to the Board or appropriate Reserve Bank in connection with a notice filed under section 225.41 of this subpart, or another application filed with the Board or Reserve Bank as a substitute for a notice under section 225.41 of this subpart, including an application filed under section 3 of the BHC Act (12 USC 1842) or section 18(c) of the Federal Deposit Insurance Act (Bank Merger Act, 12 USC 1828(c)), or an application for membership in the Federal Reserve System; or

(2) the transaction involves a person or group of persons that has been the owner or owners of record of the stock for a period of one year or more; or, if the transaction involves stock issued by a newly chartered bank, before the bank is opened for business.

(d) *Report requirements.*

(1) The consolidated report shall indicate the number and percentage of shares securing each applicable extension of credit, the identity of the borrower, and the number of shares held as principal by the foreign bank and any affiliate thereof.

(2) A foreign bank, or any affiliate of a foreign bank, shall file the consolidated report in writing within 30 days of the date on which the foreign bank or affiliate first believes that the security for any outstanding credit consists of 25 percent or more of any class of voting securities of a state member bank.

(e) *Other reporting requirements.* A foreign bank, or any affiliate thereof, that is supervised by the System and is required to report credit extended that is secured by the shares of an insured depository institution to another federal banking agency also shall file a copy of the report with the appropriate Reserve Bank.

SUBPART F—LIMITATIONS ON NONBANK BANKS

SECTION 225.52—Limitation on Overdrafts

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

(1) "Account" means a reserve account, clearing account, or deposit account as defined in the Board's Regulation D (12 CFR 204.2(a)(1)(i)), that is maintained at a Federal Reserve Bank or nonbank bank.

(2) "Cash item" means (i) a check other than a check classified as a noncash item; or (ii) any other item payable on demand and collectible at par that the Federal Reserve Bank of the District in which the item is payable is willing to accept as a cash item.

(3) "Discount-window loan" means any credit extended by a Federal Reserve Bank to a nonbank bank or industrial bank pursuant to the provisions of the Board's Regulation A (12 CFR 201).

(4) "Industrial bank" means an institution as defined in section 2(c)(2)(H) of the BHC Act (12 USC 1841(c)(2)(H)).

(5) "Noncash item" means an item handled by a Reserve Bank as a noncash item under the Reserve Bank's "Collection of Noncash Items Operating Circular" (e.g., a maturing banker's acceptance or a maturing security, or a demand item, such as a check, with special instructions or an item that has not been preprinted or postencoded).

(6) "Other nonelectronic transactions" include all other transactions not included as funds transfers, book-entry securities transfers, cash items, noncash items, automated clearinghouse transactions, net-settlement entries, and discount-window loans (e.g., original issue of securities or redemption of securities).

(7) An "overdraft" in an account occurs whenever the Federal Reserve Bank, nonbank bank, or industrial bank holding an account posts a transaction to the account of the nonbank bank, industrial bank, or affiliate that exceeds the aggregate balance of the accounts of the nonbank bank, industrial bank, or affiliate, as determined by the posting rules set forth in paragraphs (d) and (e) of this section and continues until the aggregate balance of the account is zero or greater.

(8) "Transfer item" means an item as defined in subpart B of Regualtion J (12 CFR 210.25 et seq.).

(b) *Restriction on overdrafts.*

(1) *Affiliates.* Neither a nonbank bank nor an industrial bank shall permit any affiliate to incur any overdraft in its account with the nonbank bank or industrial bank.

(2) *Nonbank banks or industrial banks.*

(i) No nonbank bank or industrial bank shall incur any overdraft in its account at a Federal Reserve Bank on behalf of an affiliate.

(ii) An overdraft by a nonbank bank or industrial bank in its account at a Federal Reserve Bank shall be deemed to be on behalf of an affiliate whenever—

(A) a nonbank bank or industrial bank holds an account for an affiliate from which third-party payments can be made; and

(B) when the posting of an affiliate's transaction to the nonbank bank's or industrial bank's account at a Reserve Bank creates an overdraft in its account at a Federal Reserve Bank or increases the amount of an existing overdraft in its account at a Federal Reserve Bank.

(c) *Permissible overdrafts.* The following are permissible overdrafts not subject to paragraph (b):

(1) *Inadvertent error.* An overdraft in its account by a nonbank bank or its affiliate, or an industrial bank or its affiliate, that results from an inadvertent computer error or inadvertent accounting error, that was not reasonably foreseeable or could not have

been prevented through the maintenance of procedures reasonably adopted by the nonbank bank or affiliate to avoid such overdraft; and

(2) *Fully secured primary-dealer affiliate overdrafts.*

(i) An overdraft incurred by an affiliate of a nonbank bank, which affiliate is recognized as a primary dealer by the Federal Reserve Bank of New York, in the affiliate's account at the nonbank bank, or an overdraft incurred by a nonbank bank on behalf of its primary-dealer affiliate in the nonbank bank's account at a Federal Reserve Bank; *provided* the overdraft is fully secured by bonds, notes, or other obligations which are direct obligations of the United States or on which the principal and interest are fully guaranteed by the United States or by securities and obligations eligible for settlement on the Federal Reserve book-entry system.

(ii) An overdraft by a nonbank bank in its account at a Federal Reserve Bank that is on behalf of a primary-dealer affiliate is fully secured when that portion of its overdraft at the Federal Reserve Bank that corresponds to the transaction posted for an affiliate that caused or increased the nonbank bank's overdraft is fully secured in accordance with paragraph (c)(2)(iii).

(iii) An overdraft is fully secured under paragraph (c)(2)(i) when the nonbank bank can demonstrate that the overdraft is secured, at all times, by a perfected security interest in specific, identified obligations described in paragraph (c)(2)(i) with a market value that, in the judgment of the Reserve Bank holding the nonbank bank's account, is sufficiently in excess of the amount of the overdraft to provide a margin of protection in a volatile market or in the event the securities need to be liquidated quickly.

(d) *Posting by Federal Reserve Banks.* For purposes of determining the balance of an account under this section, payments and transfers by nonbank banks and industrial banks processed by the Federal Reserve Banks shall be considered posted to their accounts at Federal Reserve Banks as follows:

(1) *Funds transfers.* Transfer items shall be posted—

(i) to the transferor's account at the time the transfer is actually made by the transferor's Federal Reserve Bank; and

(ii) to the transferee's account at the time the transferee's Reserve Bank sends the transfer item or sends or telephones the advice of credit for the item to the transferee, whichever occurs first.

(2) *Book-entry securities transfers against payment.* A book-entry securities transfer against payment shall be posted—

(i) to the transferor's account at the time the entry is made by the transferor's Reserve Bank; and

(ii) to the transferee's account at the time the entry is made by the transferee's Reserve Bank.

(3) *Discount-window loans.* Credit for a discount-window loan shall be posted to the account of a nonbank bank or industrial bank at the close of business on the day that it is made or such earlier time as may be specifically agreed to by the Federal Reserve Bank and the nonbank bank under the terms of the loan. Debit for repayment of a discount-window loan shall be posted to the account of the nonbank bank or industrial bank as of the close of business on the day of maturity of the loan or such earlier time as may be agreed to by the Federal Reserve Bank and the nonbank bank or required by the Federal Reserve Bank under the terms of the loan.

(4) *Other transactions.* Total aggregate credits for automated clearinghouse transfers, cash items, noncash items, net-settlement entries, and other nonelectronic transactions shall be posted to the account of a nonbank bank or industrial bank as of the opening of business on settlement day. Total aggregate debits for these transactions and entries shall be posted to the account of a nonbank or industrial bank as of the close of business on settlement day.

(e) *Posting by nonbank banks and industrial banks.* For purposes of determining the balance of an affiliate's account under this section, payments and transfers through an affili-

ate's account at a nonbank bank or industrial bank shall by posted as follows:

(1) *Funds transfers.*

(i) Fedwire transfer items shall be posted—

(A) to the transferor affiliate's account no later than the time the transfer is actually made by the transferor's Federal Reserve Bank; and

(B) to the transferee affiliate's account no earlier than the time the transferee's Reserve Bank sends the transfer item, or sends or telephones the advice of credit for the item to the transferee, whichever occurs first.

(ii) For funds transfers not sent or received through Federal Reserve Banks, debits shall be posted to the transferor affiliate's account not later than the time the nonbank bank or industrial bank becomes obligated on the transfer. Credits shall not be posted to the transferee affiliate's account before the nonbank bank or industrial bank has received actually and finally collected funds for the transfer.

(2) *Book-entry securities transfers against payment.*

(i) A book-entry securities transfer against payment shall be posted—

(A) to the transferor affiliate's account not earlier than the time the entry is made by the transferor's Reserve Bank; and

(B) to the transferee affiliate's account not later than the time the entry is made by the transferee's Reserve Bank.

(ii) For book-entry securities transfers against payment that are not sent or received through Federal Reserve Banks, enteries shall be posted—

(A) to the buyer-affiliate's account not later than the time the nonbank bank or industrial bank becomes obligated on the transfer; and

(B) to the seller-affiliate's account not before the nonbank bank or industrial bank has received actually and finally collected funds for the transfer.

(3) *Other transactions.*

(i) *Credits.* Except as otherwise provided in this paragraph, credits for cash items, noncash items, ACH transfers, net-settlement entries, and all other nonelectronic transactions shall be posted to an affiliate's account on the day of the transaction (i.e., settlement day for ACH transactions or the day of credit for check transactions), but no earlier than the Federal Reserve Bank's opening of business on that day. Credit for cash items that are required by federal or state statute or regulation to be made available to the depositor for withdrawal prior to the posting time set forth in the preceding paragraph shall be posted as of the required availability time.

(ii) *Debits.* Debits for cash items, noncash items, ACH transfers, net-settlement entries, and all other nonelectronic transactions shall be posted to an affiliate's account on the day of the transaction (e.g., settlement day for ACH transactions or the day of presentment for check transactions), but no later than the Federal Reserve Bank's close of business on that day. If a check drawn on an affiliate's account or an ACH debit transfer received by an affiliate is returned timely by the nonbank bank or industrial bank in accordance with applicable law and agreements, no entry need be posted to the affiliate's account for such item.

SUBPART G—APPRAISAL STANDARDS FOR FEDERALLY RELATED TRANSACTIONS

SECTION 225.61—Authority, Purpose, and Scope

(a) *Authority.* This subpart is issued by the Board of Governors of the Federal Reserve System (the "Board") under title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (Pub. L. No. 101-73, 103 Stat. 183 (1989)), 12 USC 3310, 3331–3351, and section 5(b) of the Bank Holding Company Act, 12 USC 1844(b).

(b) *Purpose and scope.*

(1) Title XI provides protection for federal financial and public-policy interests in real estate–related transactions by requiring real estate appraisals used in connection with federally related transactions to be performed in writing, in accordance with uniform standards, by appraisers whose competency has been demonstrated and whose professional conduct will be subject to effective supervision. This subpart implements the requirements of title XI, and applies to all federally related transactions entered into by the Board or by institutions regulated by the Board ("regulated institutions").

(2) This subpart—

(i) identifies which real estate–related financial transactions require the services of an appraiser;

(ii) prescribes which categories of federally related transactions shall be appraised by a state-certified appraiser and which by a state-licensed appraiser; and

(iii) prescribes minimum standards for the performance of real estate appraisals in connection with federally related transactions under the jurisdiction of the Board.

SECTION 225.62—Definitions

(a) *Appraisal* means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information.

(b) *Appraisal Foundation* means the Appraisal Foundation established on November 30, 1987, as a not-for-profit corporation under the laws of Illinois.

(c) *Appraisal Subcommittee* means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(d) *Business loan* means a loan or extension of credit to any corporation, general or limited partnership, business trust, joint venture, pool, syndicate, sole proprietorship, or other business entity.

(e) *Complex one- to four-family residential property appraisal* means one in which the property to be appraised, the form of ownership, or market conditions are atypical.

(f) *Federally related transaction* means any real estate–related financial transaction entered into on or after August 9, 1990, that—

(1) the Board or any regulated institution engages in or contracts for; and

(2) requires the services of an appraiser.

(g) *Market value* means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby—

(1) buyer and seller are typically motivated;

(2) both parties are well informed or well advised, and acting in what they consider their own best interests;

(3) a reasonable time is allowed for exposure in the open market;

(4) payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and

(5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

(h) *Real estate* or *real property* means an identified parcel or tract of land, with improvements, and includes easements, rights-of-way, undivided or future interests, or similar rights in a tract of land, but does not include mineral rights, timber rights, growing crops, water rights, or similar interests severable from the land when the transaction does not involve the associated parcel or tract of land.

(i) *Real estate–related financial transaction* means any transaction involving—

(1) the sale, lease, purchase, investment in or exchange of real property, including interests in property, or the financing thereof; or

(2) the refinancing of real property or interests in real property; or

(3) the use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.

(j) *State-certified appraiser* means any individual who has satisfied the requirements for certification in a state or territory whose criteria for certification as a real estate appraiser currently meet or exceed the minimum criteria for certification issued by the Appraiser Qualifications Board of the Appraisal Foundation. No individual shall be a state-certified appraiser unless such individual has achieved a passing grade upon a suitable examination administered by a state or territory that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualifications Board of the Appraisal Foundation. In addition, the Appraisal Subcommittee must not have issued a finding that the policies, practices, or procedures of the state or territory are inconsistent with title XI of FIRREA. The Board may, from time to time, impose additional qualification criteria for certified appraisers performing appraisals in connection with federally related transactions within its jurisdiction.

(k) *State-licensed appraiser* means any individual who has satisfied the requirements for licensing in a state or territory where the licensing procedures comply with title XI of FIRREA and where the Appraisal Subcommittee has not issued a finding that the policies, practices, or procedures of the state or territory are inconsistent with title XI. The Board may, from time to time, impose additional qualification criteria for licensed appraisers performing appraisals in connection with federally related transactions within the Board's jurisdiction.

(l) *Tract development* means a project of five units or more that is constructed or is to be constructed as a single development.

(m) *Transaction value* means—

(1) for loans or other extensions of credit, the amount of the loan or extension of credit;

(2) for sales, leases, purchases, and investments in or exchanges of real property, the market value of the real property interest involved; and

(3) for the pooling of loans or interests in real property for resale or purchase, the amount of the loan or the market value of the real property calculated with respect to each such loan or interest in real property.

SECTION 225.63—Appraisals Required; Transactions Requiring a State-Certified or -Licensed Appraiser

(a) *Appraisals required.* An appraisal performed by a state-certified or -licensed appraiser is required for any real estate–related financial transaction except those in which—

(1) the transaction value is $250,000 or less;

(2) a lien on real estate has been taken as collateral in an abundance of caution;

(3) the transaction is not secured by real estate;

(4) a lien on real estate has been taken for purposes other than the real estate's value;

(5) the transaction is a business loan that—

(i) has a transaction value of $1 million or less; and

(ii) is not dependent on the sale of, or rental income derived from, real estate as the primary source of repayment;

(6) a lease of real estate is entered into, unless the lease is the economic equivalent of a purchase or sale of the leased real estate;

(7) the transaction involves an existing extension of credit at the lending institution, provided that—

(i) there has been no obvious and material change in market conditions or physical aspects of the property that threatens the adequacy of the institution's real estate collateral protection after the transaction, even with the advancement of new monies; or

(ii) there is no advancement of new monies, other than funds necessary to cover reasonable closing costs;

(8) the transaction involves the purchase, sale, investment in, exchange of, or extension of credit secured by, a loan or interest in a loan, pooled loans, or interests in real property, including mortgaged-backed securities, and each loan or interest in a loan, pooled loan, or real property interest met

Board regulatory requirements for appraisals at the time of origination;

(9) the transaction is wholly or partially insured or guaranteed by a United States government agency or United States government–sponsored agency;

(10) the transaction either—

(i) qualifies for sale to a United States government agency or United States government–sponsored agency; or

(ii) involves a residential real estate transaction in which the appraisal conforms to the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation appraisal standards applicable to that category of real estate;

(11) the regulated institution is acting in a fiduciary capacity and is not required to obtain an appraisal under other law; or

(12) the Board determines that the services of an appraiser are not necessary in order to protect federal financial and public-policy interests in real estate–related financial transactions or to protect the safety and soundness of the institution.

(b) *Evaluations required.* For a transaction that does not require the services of a state-certified or -licensed appraiser under paragraphs (a)(1), (a)(5), or (a)(7) of this section, the institution shall obtain an appropriate evaluation of real property collateral that is consistent with safe and sound banking practices.

(c) *Appraisals to address safety-and-soundness concerns.* The Board reserves the right to require an appraisal under this subpart whenever the agency believes it is necessary to address safety-and-soundness concerns.

(d) *Transactions requiring a state-certified appraiser.*

(1) *All transactions of $1,000,000 or more.* All federally related transactions having a transaction value of $1,000,000 or more shall require an appraisal prepared by a state-certified appraiser.

(2) *Nonresidential transactions of $250,000 or more.* All federally related transactions having a transaction value of $250,000 or more, other than those involving appraisals of one- to four-family residential properties, shall require an appraisal prepared by a state-certified appraiser.

(3) *Complex residential transactions of $250,000 or more.* All complex one- to four-family residential property appraisals rendered in connection with federally related transactions shall require a state-certified appraiser if the transaction value is $250,000 or more. A regulated institution may presume that appraisals of one- to four-family residential properties are not complex, unless the institution has readily available information that a given appraisal will be complex. The regulated institution shall be responsible for making the final determination of whether the appraisal is complex. If during the course of the appraisal a licensed appraiser identifies factors that would result in the property, form of ownership, or market conditions being considered atypical, then either—

(i) the regulated institution may ask the licensed appraiser to complete the appraisal and have a certified appraiser approve and cosign the appraisal; or

(ii) the institution may engage a certified appraiser to complete the appraisal.

(e) *Transactions requiring either a state-certified or -licensed appraiser.* All appraisals for federally related transactions not requiring the services of a state-certified appraiser shall be prepared by either a state-certified appraiser or a state-licensed appraiser.

SECTION 225.64—Minimum Appraisal Standards

For federally related transactions, all appraisals shall, at a minimum—

(a) conform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice promulgated by the Appraisal Standards Board of the Appraisal Foundation, 1029 Vermont Ave., N.W., Washington, D.C. 20005, unless principles of safe and sound banking require compliance with stricter standards;

(b) be written and contain sufficient information and analysis to support the institution's decision to engage in the transaction;

(c) analyze and report appropriate deductions and discounts for proposed construction or renovation, partially leased buildings, nonmarket lease terms, and tract developments with unsold units;

(d) be based upon the definition of market value as set forth in this subpart; and

(e) be performed by state-licensed or -certified appraisers in accordance with requirements set forth in this subpart.

SECTION 225.65—Appraiser Independence

(a) *Staff appraisers.* If an appraisal is prepared by a staff appraiser, that appraiser must be independent of the lending, investment, and collection functions and not involved, except as an appraiser, in the federally related transaction, and have no direct or indirect interest, financial or otherwise, in the property. If the only qualified persons available to perform an appraisal are involved in the lending, investment, or collection functions of the regulated institution, the regulated institution shall take appropriate steps to ensure that the appraisers exercise independent judgment and that the appraisal is adequate. Such steps include, but are not limited to, prohibiting an individual from performing appraisals in connection with federally related transactions in which the appraiser is otherwise involved and prohibiting directors and officers from participating in any vote or approval involving assets on which they performed an appraisal.

(b) *Fee appraisers.*

(1) If an appraisal is prepared by a fee appraiser, the appraiser shall be engaged directly by the regulated institution or its agent, and have no direct or indirect interest, financial or otherwise, in the property or transaction.

(2) A regulated institution also may accept an appraisal that was prepared by an appraiser engaged directly by another financial-services institution if—

(i) the appraiser has no direct or indirect interest, financial or otherwise, in the property or the transaction; and

(ii) the regulated institution determines that the appraisal conforms to the requirements of this subpart and is otherwise acceptable.

SECTION 225.66—Professional Association Membership; Competency

(a) *Membership in appraisal organizations.* A state-certified appraiser or a state-licensed appraiser may not be excluded from consideration for an assignment for a federally related transaction solely by virtue of membership or lack of membership in any particular appraisal organization.

(b) *Competency.* All staff and fee appraisers performing appraisals in connection with federally related transactions must be state-certified or -licensed, as appropriate. However, a state-certified or -licensed appraiser may not be considered competent solely by virtue of being certified or licensed. Any determination of competency shall be based upon the individual's experience and educational background as they relate to the particular appraisal assignment for which he or she is being considered.

SECTION 225.67—Enforcement

Institutions and institution-affiliated parties, including staff appraisers and fee appraisers, may be subject to removal and/or prohibition orders, cease-and-desist orders, and the imposition of civil money penalties pursuant to the Federal Deposit Insurance Act, 12 USC 1811 et seq., as amended, or other applicable law.

SUBPART H—NOTICE OF ADDITION OR CHANGE OF DIRECTORS AND SENIOR EXECUTIVE OFFICERS

SECTION 225.71—Definitions

(a) *Director* means a person who serves on the board of directors of a regulated institution, except that this term does not include an advisory director who—

(1) is not elected by the shareholders of the regulated institution;

(2) is not authorized to vote on any matters

before the board of directors or any committee thereof;

(3) solely provides general policy advice to the board of directors and any committee thereof; and

(4) has not been identified by the Board or Reserve Bank as a person who performs the functions of a director for purposes of this subpart.

(b) *Regulated institution* means a state member bank or a bank holding company.

(c) *Senior executive officer* means a person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions: president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, or chief investment officer. *Senior executive officer* also includes any other person identified by the Board or Reserve Bank, whether or not hired as an employee, with significant influence over, or who participates in, major policymaking decisions of the regulated institution.

(d) *Troubled condition* for a regulated institution means an institution that—

(1) has a composite rating, as determined in its most recent report of examination or inspection, of 4 or 5 under the Uniform Financial Institutions Rating System or under the Federal Reserve Bank Holding Company Rating System;

(2) is subject to a cease-and-desist order or formal written agreement that requires action to improve the financial condition of the institution, unless otherwise informed in writing by the Board or Reserve Bank; or

(3) is informed in writing by the Board or Reserve Bank that it is in troubled condition for purposes of the requirements of this subpart on the basis of the institution's most recent report of condition or report of examination or inspection, or other information available to the Board or Reserve Bank.

SECTION 225.72—Director and Officer Appointments; Prior-Notice Requirement

(a) *Prior notice by regulated institution.* [redacted] regulated institution shall give the Board 3[redacted] days' written notice, as specified in section 225.73, before adding or replacing any member of its board of directors, employing any person as a senior executive officer of the institution, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive officer position, if—

(1) the regulated institution is not in compliance with all minimum capital requirements applicable to the institution as determined on the basis of the institution's most recent report of condition or report of examination or inspection;

(2) the regulated institution is in troubled condition; or

(3) the Board determines, in connection with its review of a capital-restoration plan required under section 38 of the Federal Deposit Insurance Act or subpart B of the Board's Regulation H, or otherwise, that such notice is appropriate.

(b) *Prior notice by individual.* The prior notice required by paragraph (a) of this section may be provided by an individual seeking [redacted] election to the board of directors of a regu[redacted] lated institution.

SECTION 225.73—Procedures for Filing, Processing, and Acting on Notices; Standards for Disapproval; Waiver of Notice

(a) *Filing notice.*

(1) *Content.* The notice required in section 225.72 shall be filed with the appropriate Reserve Bank and shall contain—

(i) the information required by paragraph 6(A) of the Change in Bank Control Act (12 USC 1817(j)(6)(A)) as may be prescribed in the designated Board form;

(ii) additional information consistent with the Federal Financial Institutions Examination Council's joint statement of guidelines on conducting background checks and

change in control investigations, as set forth in the designated Board form; and

(iii) such other information as may be required by the Board or Reserve Bank.

(2) *Modification.* The Reserve Bank may modify or accept other information in place of the requirements of section 225.73(a)(1) for a notice filed under this subpart.

(3) *Acceptance and processing of notice.* The 30-day notice period specified in section 225.72 shall begin on the date all information required to be submitted by the notificant pursuant to section 225.73(a)(1) is received by the appropriate Reserve Bank. The Reserve Bank shall notify the regulated institution or individual submitting the notice of the date on which all required information is received and the notice is accepted for processing, and of the date on which the 30-day notice period will expire. The Board or Reserve Bank may extend the 30-day notice period for an additional period of not more than 60 days by notifying the regulated institution or individual filing the notice that the period has been extended and stating the reason for not processing the notice within the 30-day notice period.

(b) *Commencement of service.*

(1) *At expiration of period.* A proposed director or senior executive officer may begin service after the end of the 30-day period and any extension as provided under paragraph (a)(3) of this section, unless the Board or Reserve Bank disapproves the notice before the end of the period.

(2) *Prior to expiration of period.* A proposed director or senior executive officer may begin service before the end of the 30-day period and any extension as provided under paragraph (a)(3) of this section, if the Board or the Reserve Bank notifies in writing the regulated institution or individual submitting the notice of the Board's or Reserve Bank's intention not to disapprove the notice.

(c) *Notice of disapproval.* The Board or Reserve Bank shall disapprove a notice under section 225.72 if the Board or Reserve Bank finds that the competence, experience, character, or integrity of the individual with respect to whom the notice is submitted indicates that it would not be in the best interests of the depositors of the regulated institution or in the best interests of the public to permit the individual to be employed by, or associated with, the regulated institution. The notice of disapproval shall contain a statement of the basis for disapproval and shall be sent to the regulated institution and the disapproved individual.

(d) *Appeal of a notice of disapproval.*

(1) A disapproved individual or a regulated institution that has submitted a notice that is disapproved under this section may appeal the disapproval to the Board within 15 days of the effective date of the notice of disapproval. An appeal shall be in writing and explain the reasons for the appeal and include all facts, documents, and arguments that the appealing party wishes to be considered in the appeal, and state whether the appealing party is requesting an informal hearing.

(2) Written notice of the final decision of the Board shall be sent to the appealing party within 60 days of the receipt of an appeal, unless the appealing party's request for an informal hearing is granted.

(3) The disapproved individual may not serve as a director or senior executive officer of the state member bank or bank holding company while the appeal is pending.

(e) *Informal hearing.*

(1) An individual or regulated institution whose notice under this section has been disapproved may request an informal hearing on the notice. A request for an informal hearing shall be in writing and shall be submitted within 15 days of a notice of disapproval. The Board may, in its sole discretion, order an informal hearing if the Board finds that oral argument is appropriate or necessary to resolve disputes regarding material issues of fact.

(2) An informal hearing shall be held within 30 days of a request, if granted, unless the requesting party agrees to a later date.

(3) Written notice of the final decision of the Board shall be given to the individual

and the regulated institution within 60 days of the conclusion of any informal hearing ordered by the Board, unless the requesting party agrees to a later date.

(f) *Waiver of notice.*

(1) *Waiver requests.* The Board or Reserve Bank may permit an individual to serve as a senior executive officer or director before the notice required under this subpart is provided, if the Board or Reserve Bank finds that—

(i) delay would threaten the safety or soundness of the regulated institution or a bank controlled by a bank holding company;

(ii) delay would not be in the public interest; or

(iii) other extraordinary circumstances exist that justify waiver of prior notice.

(2) *Automatic waiver.* An individual may serve as a director upon election to the board of directors of a regulated institution before the notice required under this subpart is provided if the individual—

(i) is not proposed by the management of the regulated institution;

(ii) is elected as a new member of the board of directors at a meeting of the regulated institution; and

(iii) provides to the appropriate Reserve Bank all the information required in section 225.73(a) within two (2) business days after the individual's election.

(3) *Effect on disapproval authority.* A waiver shall not affect the authority of the Board or Reserve Bank to disapprove a notice within 30 days after a waiver is granted under paragraph (f)(1) of this section or the election of an individual who has filed a notice and is serving pursuant to an automatic waiver under paragraph (f)(2) of this section.

APPENDIX A—Capital Adequacy Guidelines for Bank Holding Companies: Risk-Based Measure

See the Board pamphlet "Capital Adequacy Guidelines."

APPENDIX B—Capital Adequacy Guidelines for Bank Holding Companies and State Member Banks: Leverage Measure

See the Board pamphlet "Capital Adequacy Guidelines."

APPENDIX C—Small Bank Holding Company Policy Statement

In acting on applications filed under the Bank Holding Company Act, the Board has adopted, and continues to follow, the principle that bank holding companies should serve as a source of strength for their subsidiary banks. When bank holding companies incur debt and rely upon the earnings of their subsidiary banks as the means of repaying such debt, a question arises as to the probable effect upon the financial condition of the holding company and its subsidiary bank or banks.

The Board believes that a high level of debt at the parent holding company impairs the ability of a bank holding company to provide financial assistance to its subsidiary bank(s) and, in some cases, the servicing requirements on such debt may be a significant drain on the resources of the bank(s). For these reasons the Board has not favored the use of acquisition debt in the formation of bank holding companies or in the acquisition of additional banks. Nevertheless, the Board has recognized that the transfer of ownership of small banks often requires the use of acquisition debt. The Board, therefore, has permitted the formation and expansion of small bank holding companies with debt levels higher than would be permitted for larger holding companies. Approval of these applications has been given on the condition that small bank holding companies demonstrate the ability to service acquisition debt without straining the capital of their subsidiary banks and, further, that such companies restore their ability to serve as a source of strength for their subsidiary banks within a relatively short period of time.

In the interest of continuing its policy of facilitating the transfer of ownership in banks without compromising bank safety and sound-

ness, the Board has, as described below, adopted the following procedures and standards for the formation and expansion of small bank holding companies subject to this policy statement.

Applicability of Policy Statement

This policy statement applies only to bank holding companies with pro forma consolidated assets of less than $150 million that (1) are *not* engaged in any nonbanking activities involving significant leverage[1] and (2) do *not* have a significant amount of outstanding debt that is held by the general public.

While this policy statement primarily applies to the formation of small bank holding companies, it also applies to existing small bank holding companies that wish to acquire an additional bank or company and to transactions involving changes in control, stock redemptions, or other shareholder transactions.[2]

Ongoing Requirements

The following guidelines must be followed on an ongoing basis for all organizations operating under this policy statement.

Reduction in parent-company leverage. Small bank holding companies are to reduce their parent-company debt consistent with the requirement that all debt be retired within 25 years of being incurred. The Board also expects that these bank holding companies reach a debt-to-equity ratio of .30:1 or less within 12 years of the incurrence of the debt.[3] The bank holding company must also comply with debt servicing and other requirements imposed by its creditors.

Capital adequacy. Each insured depository subsidiary of a small bank holding company is expected to be well capitalized. Any institution that is not well capitalized is expected to become well capitalized within a brief period of time.

Dividend restrictions. A small bank holding company whose debt-to-equity ratio is greater than 1.0:1 is not expected to pay corporate dividends until such time as it reduces its debt-to-equity ratio to 1.0:1 or less and otherwise meets the criteria set forth in sections 225.14(c)(1)(ii), 225.14(c)(2), and 225.14(c)(7) of Regulation Y.[4]

Small bank holding companies formed before the effective date of this policy statement may switch to a plan that adheres to the intent of this statement provided they comply with the requirements set forth above.

Core Requirements for All Applicants

In assessing applications or notices by organizations subject to this policy statement, the Board will continue to take into account a full range of financial and other information about the applicant, and its current and proposed subsidiaries, including the recent trend and stability of earnings, past and prospective growth, asset quality, the ability to

[1] A parent company that is engaged in significant off-balance-sheet activities would generally be deemed to be engaged in activities that involve significant leverage.

[2] The appropriate Reserve Bank should be contacted to determine the manner in which a specific situation may qualify for treatment under this policy statement.

[3] The term "debt," as used in the ratio of debt to equity, means any borrowed funds (exclusive of short-term borrowings that arise out of current transactions, the proceeds of which are used for current transactions), and any securities issued by, or obligations of, the holding company that are the functional equivalent of borrowed funds.

The term "equity," as used in the ratio of debt to equity, means the total stockholders' equity of the bank holding company as defined in accordance with generally accepted accounting principles. In determining the total amount of stockholders' equity, the bank holding company should account for its investments in the common stock of subsidiaries by the equity method of accounting.

Ordinarily the Board does not view redeemable preferred stock as a substitute for common stock in a small bank holding company. Nevertheless, to a limited degree and under certain circumstances, the Board will consider redeemable preferred stock as equity in the capital accounts of the holding company if the following conditions are met: (1) the preferred stock is redeemable only at the option of the issuer and (2) the debt-to-equity ratio of the holding company would be at or remain below .30:1 following the redemption or retirement of any preferred stock. Preferred stock that is convertible into common stock of the holding company may be treated as equity.

[4] Dividends may be paid by small bank holding companies with debt to equity at or below 1.0:1 and otherwise meeting the requirements of sections 225.14(c)(1)(ii), 225.14(c)(2), and 225.14(c)(7) if the dividends are reasonable in amount, do not adversely affect the ability of the bank holding company to service its debt in an orderly manner, and do not adversely affect the ability of the subsidiary banks to be well capitalized. It is expected that dividends will be eliminated if the holding company is (1) not reducing its debt consistent with the requirement that the debt-to-equity ratio be reduced to .30:1 within 12 years of consummation of the proposal or (2) not meeting the requirements of its loan agreement(s).

meet debt-servicing requirements without placing an undue strain on the resources of the bank(s), and the record and competency of management. In addition, the Board will require applicants to meet the following requirements:

- *Minimum downpayment.* The amount of acquisition debt should not exceed 75 percent of the purchase price of the bank(s) or company to be acquired. When the owner(s) of the holding company incurs debt to finance the purchase of the bank(s) or company, such debt will be considered acquisition debt even through it does not represent an obligation of the bank holding company, unless the owner(s) can demonstrate that such debt can be serviced without reliance on the resources of the bank(s) or bank holding company.
- *Ability to reduce parent-company leverage.* The bank holding company must clearly be able to reduce its debt-to-equity ratio and comply with its loan agreement(s) as set forth in paragraph 2A above.

Failure to meet the criteria in this section would normally result in denial of an application.

Additional Application Requirements for Expedited/Waived Processing

Expedited notices under sections 225.14 and 225.23 of Regulation Y. A small bank holding company proposal will be eligible for the expedited processing procedures set forth in sections 225.14 and 225.23 of Regulation Y if the bank holding company is in compliance with the ongoing requirements of this policy statement, the bank holding company meets the core requirements for all applicants noted above, and the following requirements are met:

- The parent bank holding company has a pro forma debt-to-equity ratio of 1.0:1 or less.
- The bank holding company meets all of the criteria for expedited action set forth in sections 225.14 or 225.23 of Regulation Y.

Waiver of stock-redemption filing. A small bank holding company will be eligible for the stock-redemption filing exception for well-capitalized bank holding companies contained in section 225.4(b)(6) if the following requirements are met:

- The parent bank holding company has a pro forma debt-to-equity ratio of 1.0:1 or less.
- The bank holding company is in compliance with the ongoing requirements of this policy statement and meets the requirements of sections 225.14(c)(1)(ii), 225.14(c)(2), and 225.14(c)(7) of Regulation Y.

APPENDIX D—Capital Adequacy Guidelines for Bank Holding Companies: Tier 1 Leverage Measure

See the Board pamphlet "Capital Adequacy Guidelines."

APPENDIX E—Capital Adequacy Guidelines for Bank Holding Companies: Market-Risk Measure

See the Board pamphlet "Capital Adequacy Guidelines."

Bank Holding Company Act of 1956

12 USC 1841 et seq.; 70 Stat. 133, Pub. L. 84-511 (May 9, 1956)

Section

To define bank holding companies, control their future expansion, and require divestment of their nonbanking interests.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Bank Holding Company Act of 1956."

* * * * *

SECTION 2—Definitions (12 USC 1841)

(a) (1) Except as provided in paragraph (5) of this subsection, "*bank holding company*" means any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this Act.

(2) Any company has control over a bank or over any company if—

(A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;

(B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or

(C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

(3) For the purposes of any proceeding under paragraph (2)(C) of this subsection, there is a presumption that any company which directly or indirectly owns, controls, or has power to vote less than 5 per centum of any class of voting securities of a given bank or company does not have control over that bank or company.

(4) In any administrative or judicial proceeding under this Act, other than a proceeding under paragraph (2)(C) of this subsection, a company may not be held to have had control over any given bank or company at any given time unless that company, at the time in question, directly or indirectly owned, controlled, or had power to vote 5 per centum or more of any class of voting securities of the bank or company, or had already been found to have control in a proceeding under paragraph (2)(C).

(5) Notwithstanding any other provision of this subsection.

(A) No bank and no company owning or controlling voting shares of a bank is a bank holding company by virtue of its ownership or control of shares in a fiduciary capacity, except as provided in paragraphs (2) and (3) of subsection (g) of this section. For the purpose of the preceding sentence, bank shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring bank or company has sole discretionary authority to exercise voting rights with respect thereto; except that this limitation is applicable in the case of a bank or company acquiring such shares prior to the date of enactment of the Bank Holding Company Act Amendments of 1970 only if the bank or company has the right consistent with its obligations under the instrument, agreement, or other arrangement establishing the fiduciary relationship to divest itself of such voting rights and fails to exercise that right to divest within a reasonable period not to

exceed one year after the date of enactment of the Bank Holding Company Act Amendments of 1970.

(B) No company is a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities if such shares are held only for such period of time as will permit the sale thereof on a reasonable basis.

(C) No company formed for the sole purpose of participating in a proxy solicitation is a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation.

(D) No company is a bank holding company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition. The Board is authorized upon application by a company to extend, from time to time for not more than one year at a time, the two-year period referred to herein for disposing of any shares acquired by a company in the regular course of securing or collecting a debt previously contracted in good faith, if, in the Board's judgment, such an extension would not be detrimental to the public interest, but no such extension shall in the aggregate exceed three years.

(E) No company is a bank holding company by virtue of its ownership or control of any State-chartered bank or trust company which—

(i) is wholly owned by thrift institutions or savings banks; and

(ii) is restricted to accepting—

(I) deposits from thrift institutions or savings banks;

(II) deposits arising out of the corporate business of the thrift institutions or savings banks that own the bank or trust company; or

(III) deposits of public moneys.

(F) No trust company or mutual savings bank which is an insured bank under the Federal Deposit Insurance Act is a bank holding company by virtue of its direct or indirect ownership or control of one bank located in the same State, if (i) such ownership or control existed on the date of enactment of the Bank Holding Company Act Amendments of 1970 and is specifically authorized by applicable State law, and (ii) the trust company or mutual savings bank does not after that date acquire an interest in any company that, together with any other interest it holds in that company, will exceed 5 per centum of any class of the voting shares of that company, except that this limitation shall not be applicable to investments of the trust company or mutual savings bank, direct and indirect, which are otherwise in accordance with the limitations applicable to national banks under section 5136 of the Revised Statutes (12 U.S.C. 24).

(6) For the purposes of this Act, any successor to a bank holding company shall be deemed to be a bank holding company from the date on which the predecessor company became a bank holding company.

(b) *"Company"* means any corporation, partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State, and shall not include a qualified family partnership. "Company covered in 1970" means a company which becomes a bank holding company as a result of the enactment of the Bank Holding Company Act Amendments of 1970 and which would have been a bank holding company on June 30, 1968, if those amendments had been enacted on that date.

(c) *Bank defined.** For purposes of this Act—

(1) Except as provided in paragraph (2), the term "bank" means any of the following:

(A) An insured bank as defined in sec-

* See note at the end of this section.

tion 3(h) of the Federal Deposit Insurance Act.

(B) An institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which both—

(i) accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and

(ii) is engaged in the business of making commercial loans.

(2) The term "bank" does not include any of the following:

(A) A foreign bank which would be a bank within the meaning of paragraph (1) solely because such bank has an insured or uninsured branch in the United States.

(B) An insured institution (as defined in subsection (j)).

(C) An organization that does not do business in the United States except as an incident to its activities outside the United States.

(D) An institution that functions solely in a trust or fiduciary capacity, if—

(i) all or substantially all of the deposits of such institution are in trust funds and are received in a bona fide fiduciary capacity;

(ii) no deposits of such institution which are insured by the Federal Deposit Insurance Corporation are offered or marketed by or through an affiliate of such institution;

(iii) such institution does not accept demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others or make commercial loans; and

(iv) such institution does not—

(I) obtain payment or payment related services from any Federal Reserve bank, including any service referred to in section 11A of the Federal Reserve Act; or

(II) exercise discount or borrowing privileges pursuant to section 19(b)(7) of the Federal Reserve Act.

(E) A credit union (as described in section 19(b)(1)(A)(iv) of the Federal Reserve Act).

(F) an institution, including an institution that accepts collateral for extensions of credit by holding deposits under $100,000, and by other means which—

(i) engages only in credit card operations;

(ii) does not accept demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others;

(iii) does not accept any savings or time deposit of less than $100,000;

(iv) maintains only one office that accepts deposits; and

(v) does not engage in the business of making commerical loans.

(G) An organization operating under section 25 or section 25(a) of the Federal Reserve Act.

(H) an industrial loan company, industrial bank, or other similar institution which is—

(i) an institution organized under the laws of a State which, on March 5, 1987, had in effect or had under consideration in such State's legislature a statute which required or would require such institution to obtain insurance under the Federal Deposit Insurance Act—

(I) which does not accept demand deposits that the depositor may withdraw by check or similar means for payment to third parties;

(II) which has total assets of less than $100,000,000; or

(III) the control of which is not acquired by any company after the date of the enactment of the Competitive Equality Amendments of 1987; or

(ii) an institution which does not, directly, indirectly, or through an affiliate, engage in any activity in which it was not lawfully engaged as of March 5, 1987,

except that this subparagraph shall cease to apply to any institution which permits any overdraft (including any intraday

overdraft), or which incurs any such overdraft in such institution's account at a Federal Reserve bank, on behalf of an affiliate if such overdraft is not the result of an inadvertent computer or accounting error that is beyond the control of both the institution and the affiliate.

(I) The Investors Fiduciary Trust Company, located in Kansas City, Missouri, so long as such institution—

(i) engages only in trust, fiduciary, and agency activities in which it was lawfully engaged on March 5, 1987;

(ii) engages in such activities only at the same number of locations at which such activities were conducted on such date;

(iii) does not accept demand deposits other than demand deposits which are maintained by such institution in—

(I) a trust or fiduciary capacity;

(II) the institution's capacity as a custodian or as a paying, transfer, shareholder servicing, securities clearing, escrow, or dividend disbursing agent; or

(III) any capacity which is incidental to the trust or fiduciary activities of the institution;

(iv) does not engage in the business of making commercial loans;

(v) does not exercise discount or borrowing privileges pursuant to section 19(b)(7) of the Federal Reserve Act; and

(vi) is not directly or indirectly controlled by any company other than a company which directly or indirectly controlled such institution on March 5, 1987.

(J) A savings bank (as defined in section 3(g) of the Federal Deposit Insurance Act) which—

(i) is an insured bank (as defined in section 3(h) of such Act);

(ii) is a subsidiary of the Great Western Financial Corporation as a result of an approval in writing by the State bank supervisor of the State of New York before June 30, 1987;

(iii) meets or exceeds the investment requirements which an insured institution must meet in order to be a qualified thrift lender under section 408(o) of the National Housing Act; and

(iv) does not, directly, or through insurance products such savings bank receives from or provides to the Great Western Financial Corporation, engage in the sale or underwriting of insurance,

except that this subparagraph shall cease to apply with respect to such savings bank or any successor institution if any deposits of any other subsidiary or affiliate of the Great Western Financial Corporation which are subject to an assessment of an insurance premium under subsection (b) or (c) of section 404 of the National Housing Act are, directly or indirectly by any device whatsoever, transferred to or acquired by such savings bank or any successor institution which would have the effect of materially reducing such premium assessments. The exemption provided by this subparagraph shall cease to apply if Great Western Financial Corporation uses such savings bank or any successor institution as a vehicle to move such Corporation from Federal Savings and Loan Insurance Corporation insurance to Federal Deposit Insurance Corporation insurance.

(3) The term "District bank" means any bank operating under the Code of Law for the District of Columbia.

(d) *"Subsidiary"*, with respect to a specified bank holding company, means (1) any company 25 per centum or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is directly or indirectly owned or controlled by such bank holding company, or is held by it with power to vote; (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company; or (3) any company with respect to the management or policies of which such bank holding company has the power, directly or indirectly, to exercise a controlling influence, as determined by the Board, after notice and opportunity for hearing.

(e) The term *"successor"* shall include any company which acquires directly or indirectly from a bank holding company shares of any bank, when and if the relationship between such company and the bank holding company is such that the transaction effects no substantial change in the control of the bank or beneficial ownership of such shares of such bank. The Board may, by regulation, further define the term "successor" to the extent necessary to prevent evasion of the purposes of this Act.

(f) *"Board"* means the Board of Governors of the Federal Reserve System.

(g) For the purposes of this Act—

(1) shares owned or controlled by any subsidiary of a bank holding company shall be deemed to be indirectly owned or controlled by such bank holding company; and

(2) shares held or controlled directly or indirectly by trustees for the benefit of (A) a company, (B) the shareholders or members of a company, or (C) the employees (whether exclusively or not) of a company, shall be deemed to be controlled by such company.

(h) (1) Except as provided by paragraph (2), the application of this Act and of section 23A of the Federal Reserve Act (12 U.S.C. 371), as amended, shall not be affected by the fact that a transaction takes place wholly or partly outside the United States or that a company is organized or operates outside the United States.

(2) Except as provided in paragraph (3), the prohibitions of section 4 of this Act shall not apply to shares of any company organized under the laws of a foreign country (or to shares held by such company in any company engaged in the same general line of business as the investor company or in a business related to the business of the investor company) that is principally engaged in business outside the United States if such shares are held or acquired by a bank holding company organized under the laws of a foreign country that is principally engaged in the banking business outside the United States. For the purpose of this subsection, the term "section 2(h)(2) company" means any company whose shares are held pursuant to this paragraph.

(3) Nothing in paragraph (2) authorizes a section 2(h)(2) company to engage in (or acquire or hold more than 5 percent of the outstanding shares of any class of voting securities of a company engaged in) any banking, securities, insurance, or other financial activities, as defined by the Board, in the United States. This paragraph does not prohibit a section 2(h)(2) company from holding shares that were lawfully acquired before the date of enactment of the Competitive Equality Banking Act of 1987.

(4) No domestic office or subsidiary of a bank holding company or subsidiary thereof holding shares of a section 2(h)(2) company may extend credit to a domestic office or subsidiary of such section 2(h)(2) company on terms more favorable than those afforded similar borrowers in the United States.

(5) No domestic banking office or bank subsidiary of a bank holding company that controls a section 2(h)(2) company may offer or market products or services of such section 2(h)(2) company, or permit its products or services to be offered or marketed by or through such section 2(h)(2) company, unless such products or services were being so offered or marketed as of March 5, 1987, and then only in the same manner in which they were being offered or marketed as of that date.

(i) For purposes of this Act, the term *"thrift institution"* means—

(1) any domestic building and loan or savings and loan association;

(2) any cooperative bank without capital stock organized and operated for mutual purposes and without profit;

(3) any Federal savings bank; and

(4) any State-chartered savings bank the holding company of which is registered pursuant to section 408 of the National Housing Act.

(j) The term *"savings association"* or *"insured institution"* means—

(1) any Federal savings association or Federal savings bank;

(2) any building and loan association, sav-

ings and loan association, homestead association, or cooperative bank if such association or cooperative bank is a member of the Deposit Insurance Fund; and

(3) any savings bank or cooperative bank which is deemed by the Director of the Office of Thrift Supervision to be a savings association under section 10(*l*) of the Home Owners' Loan Act.

(k) For purposes of this Act, the term *"affiliate"* means any company that controls, is controlled by, or is under common control with another company.

(*l*) For purposes of this Act, the term *"savings bank holding company"* means any company which controls one or more qualified savings banks if the aggregate total assets of such savings banks constitute, upon formation of the holding company and at all times thereafter, at least 70 percent of the total assets of such company.

(m) For purposes of this Act, the term *"qualified savings bank"*—

(1) means any savings bank (as defined in section 3(g) of the Federal Deposit Insurance Act) which was organized on or before March 5, 1987; and

(2) includes any cooperative bank that is an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act) and any interim savings bank that is established to facilitate a corporate reorganization, or the formation of a holding company, involving a savings bank described in paragraph (1).

(n) *Incorporated definitions.* For purposes of this Act, the terms "insured depository institution", "appropriate Federal banking agency", "default", "in danger of default", and "State bank supervisor" have the same meanings as in section 3 of the Federal Deposit Insurance Act.

(o) For purposes of this Act, the following definitions shall apply:

(1) (A) With respect to insured depository institutions, the terms "*well capitalized*", "*adequately capitalized*", and "*undercapitalized*" have the same meanings as in section 38(b) of the Federal Deposit Insurance Act.

(B) (i) With respect to a bank holding company, the term "*adequately capitalized*" means a level of capitalization which meets or exceeds all applicable Federal regulatory capital standards.

(ii) A bank holding company is "*well capitalized*" if it meets the required capital levels for well capitalized bank holding companies established by the Board.

(C) The terms "*Tier 1*" and "*risk-weighted assets*" have the meanings given those terms in the capital guidelines or regulations established by the Board for bank holding companies.

(2) Except as provided in section 11, the term "*antitrust laws*"—

(A) has the same meaning as in subsection (a) of the first section of the Clayton Act; and

(B) includes section 5 of the Federal Trade Commission Act to the extent that such section 5 relates to unfair methods of competition.

(3) The term "*branch*" means a domestic branch (as defined in section 3 of the Federal Deposit Insurance Act).

(4) The term "*home State*" means—

(A) with respect to a national bank, the State in which the main office of the bank is located;

(B) with respect to a State bank, the State by which the bank is chartered; and

(C) with respect to a bank holding company, the State in which the total deposits of all banking subsidiaries of such company are the largest on the later of—

(i) July 1, 1966; or

(ii) the date on which the company becomes a bank holding company under this Act.

(5) The term "*host State*" means—

(A) with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch; and

(B) with respect to a bank holding company, a State, other than the home State of the company, in which the company controls, or seeks to control, a bank subsidiary.

(6) The term "*out-of-State bank*" means,

with respect to any State, a bank whose home State is another State.

(7) The term "*out-of-State bank holding company*" means, with respect to any State, a bank holding company whose home State is another State.

(8) (A) The term "*lead insured depository institution*" means the largest insured depository institution controlled by the subject bank holding company at any time, based on a comparison of the average total risk-weighted assets controlled by each insured depository institution during the previous 12-month period.

(B) For purposes of this paragraph and section 4(j)(4), the term "*insured depository institution*" includes any branch or agency operated in the United States by a foreign bank.

(9) The term "*well managed*" means—

(A) in the case of any company or depository institution which receives examinations, the achievement of—

(i) a CAMEL composite rating of 1 or 2 (or an equivalent rating under an equivalent rating system) in connection with the most recent examination or subsequent review of such company or institution; and

(ii) at least a satisfactory rating for management, if such rating is given; or

(B) in the case of a company or depository institution that has not received an examination rating, the existence and use of managerial resources which the Board determines are satisfactory.

(10) The term "*qualified family partnership*" means a general or limited partnership that the Board determines—

(A) does not directly control any bank, except through a registered bank holding company;

(B) does not control more than 1 registered bank holding company;

(C) does not engage in any business activity, except indirectly through ownership of other business entities;

(D) has no investments other than those permitted for a bank holding company pursuant to section 4(c);

(E) is not obligated on any debt, either directly or as a guarantor;

(F) has partners, all of whom are either—

(i) individuals related to each other by blood, marriage (including former marriage), or adoption; or

(ii) trusts for the primary benefit of individuals related as described in clause (i); and

(G) has filed with the Board a statement that includes—

(i) the basis for the eligibility of the partnership under subparagraph (F);

(ii) a list of the existing activities and investments of the partnership;

(iii) a commitment to comply with this paragraph;

(iv) a commitment to comply with section 7 of the Federal Deposit Insurance Act with respect to any acquisition of control of an insured depository institution occurring after date of enactment of this paragraph; and

(v) a commitment to be subject, to the same extent as if the qualified family partnership were a bank holding company—

(I) to examination by the Board to assure compliance with this paragraph; and

(II) to section 8 of the Federal Deposit Insurance Act.

[12 USC 1841. As amended by acts of July 1, 1966 (80 Stat. 236), Dec. 31, 1970 (84 Stat. 1760); Sept. 17, 1978 (92 Stat. 623); Oct. 15, 1982 (96 Stat. 1479, 1504, 1512); Aug. 10, 1987 (101 Stat. 555, 557, 562, 584); Aug. 9, 1989 (103 Stat. 409); Sept. 29, 1994 (108 Stat. 2341); and Sept. 30, 1996 (110 Stat. 3009-406, 408, 425, 475, 495).] The date of enactment of the Bank Holding Company Act Amendments of 1970 referred to in this section is Dec. 31, 1970.

Subsection (h) of section 101 of the Competitive Equality Banking Act of 1987 (101 Stat. 554), which amended this section, reads as follows:

(h) *1987 amendment transition rule.*

(1) *Delay in application of amendment to certain institutions.* If—

(A) on March 5, 1987, an institution was not a bank (as defined in section 2(c) of the Bank Holding Company Act of 1956), as in effect on such date; and

(B) any person which had a controlling interest in such institution on March 5, 1987, made a public announcement before such date that the transfer or other disposition of such person's controlling interest in such institution was being considered,

the institution shall not become a bank (for purposes of the Bank Holding Company Act of 1956) due to the amendment made to such section 2(c) by this section

before the date on which such institution fails to meet any requirement of paragraph (2).

(2) *Requirements for application of subsection.* This subsection shall not apply with respect to any institution described in paragraph (1) unless—

(A) the transfer or other disposition of the controlling interest referred to in such paragraph is completed, or an agreement to make such transfer or other disposition is in effect (or is subject only to final approval by the appropriate Federal and State regulatory agencies), before the end of the 180-day period beginning on the date of the enactment of this title;

(B) a written notice by the person acquiring a controlling interest in such institution (pursuant to the transfer or other disposition described in subparagraph (A)) of such person's intention to operate such institution as an institution described in section 2(c)(2)(F) of the Bank Holding Company Act of 1956, as in effect after the enactment of this title is filed with the Board before the end of the 7-day period beginning on the later of the date of such transfer (or other disposition) or the date of the enactment of this title; and

(C) the operation of such institution as an institution described in such section 2(c)(2)(F) begins before the end of the 180-day period beginning on the date the transfer (or other disposition) described in subparagraph (A) is completed.

(3) *Controlling interest.* For purposes of this subsection, a person has a controlling interest in any institution if such person controls—

(A) such institution; or

(B) any company which controls such institution, as determined in accordance with the provisions of subsections (b) and (g) of section 2 of the Bank Holding Company Act of 1956.]

SECTION 3—Acquisition of Bank Shares or Assets (12 USC 1842)

(a) *Prior approval of Board as necessary; exceptions; subsequent approval or disposition upon disapproval.* It shall be unlawful, except with the prior approval of the Board,

(1) for any action to be taken that causes any company to become a bank holding company;

(2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company;

(3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank;

(4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or

(5) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to

(A) shares acquired by a bank,

(i) in good faith in a fiduciary capacity, except where such shares are held under a trust that constitutes a company as defined in section 2(b) and except as provided in paragraphs (2) and (3) of section 2(g), or

(ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after the date of enactment of this Act in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired;

(B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition; or

(C) the acquisition, by a company, of control of a bank in a reorganization in which a person or group of persons exchanges their shares of the bank for shares of a newly formed bank holding company and receives after the reorganization substantially the same proportional share interest in the holding company as they held in the bank except for changes in shareholders' interests resulting from the exercise of dissenting shareholders' rights under State or Federal law if—

(i) immediately following the acquisition—

(I) the bank holding company meets the capital and other financial standards prescribed by the Board by regulation for such a bank holding company; and

(II) the bank is adequately capitalized (as defined in section 38 of the Federal Deposit Insurance Act);

(ii) the holding company does not engage in any activities other than those

of managing and controlling banks as a result of the reorganization;

(iii) the company provides 30 days prior notice to the Board and the Board does not object to such transaction during such 30-day period; and

(iv) the holding company will not acquire control of any additional bank as a result of the reorganization.

The Board is authorized upon application by a bank to extend, from time to time for not more than one year at a time, the two-year period referred to above for disposing of any shares acquired by a bank in the regular course of securing or collecting a debt previously contracted in good faith, if, in the Board's judgment, such an extension would not be detrimental to the public interest, but no such extension shall in the aggregate exceed three years. For the purpose of the preceding sentence, bank shares acquired after the date of enactment of the Bank Holding Company Act Amendments of 1970 [December 31, 1970] shall not be deemed to have been acquired in good faith in a fiduciary capacity if the acquiring bank or company has sole discretionary authority to exercise voting rights with respect thereto, but in such instances acquisitions may be made without prior approval of the Board if the Board, upon application filed within ninety days after the shares are acquired, approves retention or, if retention is disapproved, the acquiring bank disposes of the shares or its sole discretionary voting rights within two years after issuance of the order of disapproval.

(b) *Notice and hearing requirements.*

(1) Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of the Currency, if the applicant company or any bank the voting shares or assets of which are sought to be required is a national banking association or a District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a State bank, in order to provide for the submission of the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be. The views and recommendations shall be submitted within thirty calendar days of the date on which notice is given, or within ten calendar days of such date if the Board advises the Comptroller of the Currency or the State supervisory authority that an emergency exists requiring expeditious action. If the thirty-day notice period applies and if the Comptroller of the Currency or the State supervisory authority so notified by the Board disapproves the application in writing within this period, the Board shall forthwith give written notice of that fact to the applicant. Within three days after giving such notice to the applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Board shall, by order, grant or deny the application on the basis of the record made at such hearing. In the event of the failure of the Board to act on any application for approval under this section within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted. Notwithstanding any other provision of the subsection, if the Board finds that it must act immediately on any application for approval under this section in order to prevent the probable failure of a bank or bank holding company involved in a proposed acquisition, merger, or consolidation transaction, the Board may dispose with the notice requirements of this subsection, and if notice is given, the Board may request that the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, be submitted immediately in any form or by any means acceptable to the Board. If the

Board has found pursuant to this subsection either that an emergency exists requiring expeditious action or that it must act immediately to prevent probable failure, the Board may grant or deny any such application without a hearing notwithstanding any recommended disapproval by the appropriate supervisory authority.

(2) If the Board receives a certification described in section 13(f)(8)(D) of the Federal Deposit Insurance Act from the appropriate Federal or State chartering authority that a bank is in danger of closing, the Board may dispense with the notice and hearing requirements of paragraph (1) with respect to any application received by the Board relating to the acquisition of such bank, the bank holding company which controls such bank, or any other affiliated bank.

(c) *Factors for consideration by Board.*

(1) The Board shall not approve—

(A) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transactions are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

(2) In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

(3) The Board shall disapprove any application under this section by any company if—

(A) the company fails to provide the Board with adequate assurances that the company will make available to the Board such information on the operations or activities of the company, and any affiliate of the company, as the Board determines to be appropriate to determine and enforce compliance with this Act; or

(B) in the case of an application involving a foreign bank, the foreign bank is not subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in the bank's home country.

(4) Notwithstanding any other provision of law, the Board shall not follow any practice or policy in the consideration of any application for the formation of a one-bank holding company if following such practice or policy would result in the rejection of such application solely because the transaction to form such one-bank holding company involves a bank stock loan which is for a period of not more than twenty-five years. The previous sentence shall not be construed to prohibit the Board from rejecting any application solely because the other financial arrangements are considered unsatisfactory. The Board shall consider transactions involving bank stock loans for the formation of a one-bank holding company having a maturity of twelve years or more on a case by case basis and no such transaction shall be approved if the Board believes the safety or soundness of the bank may be jeopardized.

(5) Consideration of the managerial resources of a company or bank under paragraph (2) shall include consideration of the competence, experience, and integrity of the officers, directors, and principal shareholders of the company or bank.

(d) *Interstate banking.**

(1) (A) The Board may approve an application under this section by a bank holding company that is adequately capitalized and adequately managed to acquire control of, or acquire all or substantially all of the assets of, a bank located in a State other than the home State of such bank

* As amended effective September 23, 1995.

holding company, without regard to whether such transaction is prohibited under the law of any State.

(B) (i) Notwithstanding subparagraph (A), the Board may not approve an application pursuant to such subparagraph that would have the effect of permitting an out-of-State bank holding company to acquire a bank in a host State that has not been in existence for the minimum period of time, if any, specified in the statutory law of the host State.

(ii) Notwithstanding clause (i), the Board may approve, pursuant to subparagraph (A), the acquisition of a bank that has been in existence for at least 5 years without regard to any longer minimum period of time specified in a statutory law of the host State.

(C) For purposes of this subsection, a bank that has been chartered solely for the purpose of, and does not open for business prior to, acquiring control of, or acquiring all or substantially all of the assets of, an existing bank shall be deemed to have been in existence for the same period of time as the bank to be acquired.

(D) No provision of this subsection shall be construed as affecting the applicability of a State law that makes an acquisition of a bank contingent upon a requirement to hold a portion of such bank's assets available for call by a State-sponsored housing entity established pursuant to State law, if—

(i) the State law does not have the effect of discriminating against out-of-State banks, out-of-State bank holding companies, or subsidiaries of such banks or bank holding companies;

(ii) that State law was in effect as of the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994;

(iii) the Federal Deposit Insurance Corporation has not determined that compliance with such State law would result in an unacceptable risk to the appropriate deposit insurance fund; and

(iv) the appropriate Federal banking agency for such bank has not found that compliance with such State law would place the bank in an unsafe or unsound condition.

(2) (A) The Board may not approve an application pursuant to paragraph (1)(A) if the applicant (including all insured depository institutions which are affiliates of the applicant) controls, or upon consummation of the acquisition for which such application is filed would control, more than 10 percent of the total amount of deposits of insured depository institutions in the United States.

(B) The Board may not approve an application pursuant to paragraph (1)(A) if—

(i) immediately before the consummation of the acquisition for which such application is filed, the applicant (including any insured depository institution affiliate of the applicant) controls any insured depository institution or any branch of an insured depository institution in the home State of any bank to be acquired or in any host State in which any such bank maintains a branch; and

(ii) the applicant (including all insured depository institutions which are affiliates of the applicant), upon consummation of the acquisition, would control 30 percent or more of the total amount of deposits of insured depository institutions in any such State.

(C) No provision of this subsection shall be construed as affecting the authority of any State to limit, by statute, regulation, or order, the percentage of the total amount of deposits of insured depository institutions in the State which may be held or controlled by any bank or bank holding company (including all insured depository institutions which are affiliates of the bank or bank holding company) to the extent the application of such limitation does not discriminate against out-of-State banks, out-of-State bank holding companies, or subsidiaries of such banks or holding companies.

(D) The Board may approve an applica-

tion pursuant to paragraph (1)(A) without regard to the applicability of subparagraph (B) with respect to any State if—

(i) there is a limitation described in subparagraph (C) in a State statute, regulation, or order which has the effect of permitting a bank or bank holding company (including all insured depository institutions which are affiliates of the bank or bank holding company) to control a greater percentage of total deposits of all insured depository institutions in the State than the percentage permitted under subparagraph (B); or

(ii) the acquisition is approved by the appropriate State bank supervisor of such State and the standard on which such approval is based does not have the effect of discriminating against out-of-State banks, out-of-State bank holding companies, or subsidiaries of such banks or holding companies.

(E) For purposes of this paragraph, the term "deposit" has the same meaning as in section 3(1) of the Federal Deposit Insurance Act.

(3) In determining whether to approve an application under paragraph (1)(A), the Board shall—

(A) comply with the responsibilities of the Board regarding such application under section 804 of the Community Reinvestment Act of 1977; and

(B) take into account the applicant's record of compliance with applicable State community reinvestment laws.

(4) No provision of this subsection shall be construed as affecting—

(A) the applicability of the antitrust laws; or

(B) the applicability, if any, of any State law which is similar to the antitrust laws.

(5) The Board may approve an application pursuant to paragraph (1)(A) which involves—

(A) an acquisition of 1 or more banks in default or in danger of default; or

(B) an acquisition with respect to which assistance is provided under section 13(c) of the Federal Deposit Insurance Act;

without regard to subparagraph (B) or (D) of paragraph (1) or paragraph (2) or (3).

(e) *Insured bank.* Every bank that is a holding company and every bank that is a subsidiary of such a company shall become and remain an insured depository institution as defined in section 3 of the Federal Deposit Insurance Act.

(f) *Savings bank subsidiaries of bank holding companies.*

(1) Notwithstanding any other provision of this Act (other than paragraphs (2) and (3)), any qualified savings bank which is a subsidiary of a bank holding company may engage, directly or through a subsidiary, in any activity in which such savings bank may engage (as a State chartered savings bank) pursuant to express, incidental, or implied powers under any statute or regulation, or under any judicial interpretation of any law, of the State in which such savings bank is located.

(2) Except as provided in paragraph (3), any insurance activities of any qualified savings bank which is a subsidiary of a bank holding company shall be limited to insurance activities allowed under section 4(c)(8).

(3) Any qualified savings bank permitted, as of March 5, 1987, to engage in the sale or underwriting of savings bank life insurance may sell or underwrite such insurance after such savings bank is a subsidiary of a bank holding company if—

(A) the savings bank is located in the State of Connecticut, Massachusetts, or New York;

(B) such activity is expressly authorized by the law of the State in which such savings bank is located;

(C) the savings bank retains its character as a savings bank;

(D) such activity is carried out by the savings bank directly and not by—

(i) any subsidiary or affiliate of the savings bank; or

(ii) the bank holding company which controls such savings bank;

(E) such activity is carried out by the savings bank in accordance with any resi-

dency or employment limitations set forth in the savings bank life insurance statute in effect on March 5, 1987, in the State in which such bank is located; and

(F) such activity is otherwise carried out in the same manner as savings bank life insurance activity is carried out in the State in which such bank is located by savings banks which are not subsidiaries of any bank holding company registered under this Act.

(4) If any company which is not a savings bank or a savings bank holding company acquires control of a qualified savings bank, such savings bank shall cease to engage in any activity authorized under paragraph (1) or (3) before the end of the 2-year period beginning on the date such company acquires control, unless such activity is otherwise authorized pursuant to this Act.

(5) For the sole purpose of determining whether a qualified savings bank may continue to sell and underwrite savings bank life insurance in accordance with this subsection after control of such savings bank is acquired by a bank holding company, the assets of any other bank affiliated with, or under contract to affiliate with, such savings bank as of March 5, 1987, shall be treated as assets of the savings bank in determining whether such bank holding company is a savings bank holding company.

(g) *Mutual bank holding company.*

(1) Notwithstanding any provision of Federal law other than this Act, a savings bank or cooperative bank operating in mutual form may reorganize so as to form a holding company.

(2) A corporation organized as a holding company under this subsection shall be regulated on the same terms and be subject to the same limitations as any other holding company which controls a savings bank.

[12 USC 1842. As amended by acts of July 1, 1966 (80 Stat. 237); Dec. 31, 1970 (84 Stat. 1763); Nov. 16, 1977 (91 Stat. 1389); March 31, 1980 (94 Stat. 190); Oct. 15, 1982 (96 Stat. 1479, 1488, 1512); Aug. 10, 1987 (101 Stat. 561, 579, 628, 635); Aug. 9, 1989 (103 Stat. 409); Dec. 19, 1991 (105 Stat. 2290, 2298); Sept. 23, 1994 (108 Stat. 2224, 2227); and Sept. 29, 1994 (108 Stat. 2339).]

SECTION 4—Interests in Nonbanking Organizations (12 USC 1843)

(a) *Ownership or control of any company not a bank; engagement in activities other than banking.* Except as otherwise provided in this Act, no bank holding company shall—

(1) after the date of enactment of this Act acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from the date as of which it becomes a bank holding company, or in the case of a company which has been continuously affiliated since May 15, 1955, with a company which was registered under the Investment Company Act of 1940, prior to May 15, 1955, in such a manner as to constitute an affiliated company within the meaning of that Act, after December 31, 1978, or in the case of any company which becomes, as a result of the enactment of the Bank Holding Company Act Amendments of 1970, a bank holding company on the date of such enactment, after December 31, 1980, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company or engage in any activities other than (A) those of banking or of managing or controlling banks and other subsidiaries authorized under this Act or of furnishing services to or performing services for its subsidiaries, and (B) those permitted under paragraph (8) of subsection (c) of this section subject to all the conditions specified in such paragraph or in any order or regulation issued by the Board under such paragraph: *Provided,* That a company covered in 1970 may also engage in those activities in which directly or through a subsidiary (i) it was lawfully engaged on June 30, 1968 (or on a date subsequent to June 30, 1968 in the case of activities carried on as the result of the acquisition by such company or subsidiary, pursuant to a binding written contract entered into on or before June 30, 1968, of another company engaged in such activities at the time of the acquisition), and (ii) it has been continuously engaged since June 30, 1968 (or such subsequent date). The Board by order, after opportunity for

hearing, may terminate the authority conferred by the preceding proviso on any company to engage directly or through a subsidiary in an activity otherwise permitted by that proviso if it determines, having due regard to the purposes of this Act, that such action is necessary to prevent undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices; and in the case of any such company controlling a bank having bank assets in excess of $60,000,000 on or after the date of enactment of the Bank Holding Company Act Amendments of 1970 the Board shall determine, within two years after such date (or, if later, within two years after the date on which the bank assets first exceed $60,000,000), whether the authority conferred by the preceding proviso with respect to such company should be terminated as provided in this sentence. Nothing in this paragraph shall be construed to authorize any bank holding company referred to in the preceding proviso, or any subsidiary thereof, to engage in activities authorized by that proviso through the acquisition, pursuant to a contract entered into after June 30, 1968, of any interest in or the assets of a going concern engaged in such activities. Any company which is authorized to engage in any activity pursuant to the preceding proviso or subsection (d) of this section but, as a result of action of the Board, is required to terminate such activity may (notwithstanding any otherwise applicable time limit prescribed in this paragraph) retain the ownership or control of shares in any company carrying on such activity for a period of ten years from the date on which its authority was so terminated by the Board.

The Board is authorized, upon application by a bank holding company, to extend the two-year period referred to in paragraph (2) above from time to time as to such bank holding company for not more than one year at a time, if, in its judgment, such an extension would not be detrimental to the public interest, but no such extensions shall in the aggregate exceed three years. Notwithstanding any other provision of this Act, the period ending December 31, 1980, referred to in paragraph (2) above, may be extended by the Board of Governors to December 31, 1984, but only for the divestiture by a bank holding company of real estate or interests in real estate lawfully acquired for investment or development. In making its decision whether to grant such extension, the Board shall consider whether the company has made a good faith effort to divest such interests and whether such extension is necessary to avert substantial loss to the company. Notwithstanding any other provision of this paragraph, if any company that became a bank holding company as a result of the enactment of the Competitive Equality Amendments of 1987 acquired, between March 5, 1987, and the date of the enactment of such Amendments, an institution that became a bank as a result of the enactment of such Amendments, that company shall, upon the enactment of such Amendments, immediately come into compliance with the requirements of this Act.

(b) *Statement purporting to represent shares of any company except a bank or bank holding company.* After two years from the date of enactment of this Act, no certificate evidencing shares of any bank holding company shall bear any statement purporting to represent shares of any other company except a bank or a bank holding company, nor shall the ownership, sale, or transfer of shares of any bank holding company be conditioned in any manner whatsoever upon the ownership, sale, or transfer of shares of any other company except a bank or a bank holding company.

(c) *Exemptions.* The prohibitions in this section shall not apply to (i) any company that was on January 4, 1977, both a bank holding company and a labor, agricultural, or horticultural organization exempt from taxation under section 501 of the Internal Revenue Code of 1954, or to any labor, agricultural, or horticultural organization to which all or substantially all of the assets of such company are hereafter transferred, or (ii) a company covered in 1970 more than 85 per centum of the voting stock of which was collectively owned on June 30, 1968, and continuously thereafter, directly or indirectly, by or for members of the same family, or their spouses, who are lineal descendants of common ancestors; and such pro-

hibitions shall not, with respect to any other bank holding company, apply to—

(1) shares of any company engaged or to be engaged solely in one or more of the following activities: (A) holding or operating properties used wholly or substantially by any banking subsidiary of such bank holding company in the operations of such banking subsidiary or acquired for such future use; or (B) conducting a safe deposit business; or (C) furnishing services to or performing services for such bank holding company or its banking subsidiaries; or (D) liquidating assets acquired from such bank holding company or its banking subsidiaries or acquired from any other source prior to May 9, 1956, or the date on which such company became a bank holding company, whichever is later;

(2) shares acquired by a bank holding company or any of its subsidiaries in satisfaction of a debt previously contracted in good faith, but such shares shall be disposed of within a period of two years from the date on which they were acquired, except that the Board is authorized upon application by such bank holding company to extend such period of two years from time to time as to such holding company, in its judgment, such an extension would not be detrimental to the public interest, and, in the case of a bank holding company which has not disposed of such shares within 5 years after the date on which such shares were acquired, the Board may, upon the application of such company, grant additional exemptions if, in the judgment of the Board, such extension would not be detrimental to the public interest and, either the bank holding company has made a good faith attempt to dispose of such shares during such 5-year period, or the disposal of such shares during such 5-year period would have been detrimental to the company, except that the aggregate duration of such extensions shall not extend beyond 10 years after the date on which such shares were acquired;

(3) shares acquired by such bank holding company from any of its subsidiaries which subsidiary has been requested to dispose of such shares by any Federal or State authority having statutory power to examine such subsidiary, but such bank holding company shall dispose of such shares within a period of two years from the date on which they were acquired;

(4) shares held or acquired by a bank in good faith in a fiduciary capacity, except where such shares are held under a trust that constitutes a company as defined in section 2(b) and except as provided in paragraphs (2) and (3) of section 2(g);

(5) shares which are of the kinds and amounts eligible for investment by national banking associations under the provisions of section 5136 of the Revised Statutes;

(6) shares of any company which do not include more than 5 per centum of the outstanding voting shares of such company;

(7) shares of an investment company which is not a bank holding company and which is not engaged in any business other than investing in securities, which securities do not include more than 5 per centum of the outstanding voting shares of any company;

(8) shares of any company the activities of which the Board after due notice (and opportunity for hearing in the case of an acquisition of a savings association) has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto, but for purposes of this subsection it is not closely related to banking or managing or controlling banks for a bank holding company to provide insurance as a principal, agent, or broker except (A) where the insurance is limited to assuring repayment of the outstanding balance due on a specific extension of credit by a bank holding company or its subsidiary in the event of the death, disability, or involuntary unemployment of the debtor; (B) in the case of a finance company which is a subsidiary of a bank holding company, where the insurance is also limited to assuring repayment of the outstanding balance on an extension of credit in the event of loss or damage to any property used as collateral on such extension of credit and, during the period beginning on the date of the enactment of this subparagraph and ending on December 31, 1982, such extension of credit is not more

than $10,000 ($25,000 in the case of an extension of credit which is made to finance the purchase of a residential manufactured home and which is secured by such residential manufactured home) and for any given year after 1982, such extension of credit is not more than an amount equal to $10,000 ($25,000 in the case of an extension of credit which is made to finance the purchase of a residential manufactured home and which is secured by such residential manufactured home) increased by the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers published monthly by the Bureau of Labor Statistics for the period beginning on January 1, 1982, and ending on December 31 of the year preceding the year in which such extension of credit is made; (C) any insurance agency activity in a place that (i) has a population not exceeding five thousand (as shown by the last preceding decennial census), or (ii) the bank holding company, after notice and opportunity for a hearing, demonstrates has inadequate insurance agency facilities; (D) any insurance agency activity which was engaged in by the bank holding company or any of its subsidiaries on May 1, 1982, or which the Board approved for such company or any of its subsidiaries on or before May 1, 1982, including (i) sales of insurance at new locations of the same bank holding company or the same subsidiary or subsidiaries with respect to which insurance was sold on May 1, 1982, or approved to be sold on or before May 1, 1982, if such new locations are confined to the State in which the principal place of business of the bank holding company is located, any State or States immediately adjacent to such State, and any State or States in which insurance activities were conducted by the bank holding company or any of its subsidiaries on May 1, 1982, or were approved to be conducted by the bank holding company or any of its subsidiaries on or before May 1, 1982, and (ii) sales of insurance coverages which may become available after May 1, 1982, so long as those coverages insure against the same types of risks as, or are otherwise functionally equivalent to, coverages sold on May 1, 1982, or approved to be sold on or before May 1, 1982 (for purposes of this subparagraph, activities engaged in or approved by the Board on May 1, 1982, shall include activities carried on subsequent to that date as the result of an application to engage in such activities pending on May 1, 1982, and approved subsequent to that date or of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition); (E) any insurance activity where the activity is limited solely to supervising on behalf of insurance underwriters the activities of retail insurance agents who sell (i) fidelity insurance and property and casualty insurance on the real and personal property used in the operations of the bank holding company or any of its subsidiaries, and (ii) group insurance that protects the employees of the bank holding company or any of its subsidiaries; (F) any insurance agency activity engaged in by a bank holding company, or any of its subsidiaries, which bank holding company has total assets of $50,000,000 or less: *Provided, however,* That such a bank holding company and its subsidiaries may not engage in the sale of life insurance or annuities except as provided in subparagraph (A), (B), or (C) or (G) where the activity is performed, or shares of the company involved are owned, directly or indirectly, by a bank holding company which is registered with the Board of Governors of the Federal Reserve System and which, prior to January 1, 1971, was engaged, directly or indirectly, in insurance agency activities as a consequence of approval by the Board prior to January 1, 1971. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of

interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern. Notwithstanding any other provision of this Act, if the Board finds that an emergency exists which requires the Board to act immediately on any application under this subsection involving a thrift institution, and the primary Federal regulator of such institution concurs in such finding, the Board may dispense with the notice and hearing requirement of this subsection and the Board may approve or deny any such application without notice or hearing. If an application is filed under this paragraph in connection with an application to make an acquisition pursuant to section 13(f) of the Federal Deposit Insurance Act, the Board may dispense with the notice and hearing requirement of this paragraph and the Board may approve or deny the application under this paragraph without notice or hearing. If an application described in the preceding sentence is approved, the Board shall publish in the Federal Register, not later than 7 days after such approval is granted, the order approving the application and a description of the nonbanking activities involved in the acquisition;

(9) shares held or activities conducted by any company organized under the laws of a foreign country the greater part of whose business is conducted outside the United States, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the exemption would not be substantially at variance with the purposes of this Act and would be in the public interest;

(10) shares lawfully acquired and owned prior to May 9, 1956, by a bank which is a bank holding company, or by any of its wholly owned subsidiaries;

(11) shares owned directly or indirectly by a company covered in 1970 in a company which does not engage in any activities other than those in which the bank holding company, or its subsidiaries, may engage by virtue of this section, but nothing in this paragraph authorizes any bank holding company, or subsidiary thereof, to acquire any interest in or the assets of any going concern (except pursuant to a binding written contract entered into before June 30, 1968, or pursuant to another provision of this Act) other than one which was a subsidiary on June 30, 1968;

(12) shares retained or acquired, or activities engaged in, by any company which becomes, as a result of the enactment of the Bank Holding Company Act Amendments of 1970, a bank holding company on the date of such enactment, or by any subsidiary thereof, if such company—

(A) within the applicable time limits prescribed in subsection (a)(2) of this section (i) ceases to be a bank holding company, or (ii) ceases to retain direct or indirect ownership or control of those shares and to engage in those activities not authorized under this section; and

(B) complies with such other conditions as the Board may by regulation or order prescribe;

(13) shares of, or activities conducted by, any company which does no business in the United States except as an incident to its international or foreign business, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the exemption would not be substantially at variance with the purposes of this Act and would be in the public interest; or

(14) shares of any company which is an export trading company whose acquisition (including each acquisition of shares) or formation by a bank holding company has not been disapproved by the Board pursuant to this paragraph, except that such investments, whether direct or indirect, in such shares shall not exceed 5 per centum of the bank holding company's consolidated capital and surplus.

(A) (i) No bank holding company shall invest in an export trading company under this paragraph unless the Board has been given sixty days' prior written notice of such proposed investment and within such period has not issued a notice disapproving the proposed in-

vestment or extending for up to another thirty days the period during which such disapproval may be issued.

(ii) The period for disapproval may be extended for such additional thirty-day period only if the Board determines that a bank holding company proposing to invest in an export trading company has not furnished all the information required to be submitted or that in the Board's judgment any material information submitted is substantially inaccurate.

(iii) The notice required to be filed by a bank holding company shall contain such relevant information as the Board shall require by regulation or by specific request in connection with any particular notice.

(iv) The Board may disapprove any proposed investment only if—

(I) such disapproval is necessary to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition, or conflicts of interest;

(II) the Board finds that such investment would affect the financial or managerial resources of a bank holding company to an extent which is likely to have a materially adverse effect on the safety and soundness of any subsidiary bank of such bank holding company, or

(III) the bank hoding company fails to furnish the information required under clause (iii).

(v) The Board may not disapprove any proposed investment solely on the basis of the anticipated or proposed asset-to-equity ratio of the export trading company with respect to which such investment is proposed, unless the anticipated or proposed annual average asset-to-equity ratio is greater than 20-to-1.

(vi) Within three days after a decision to disapprove an investment, the Board shall notify the bank holding company in writing of the disapproval and shall provide a written statement of the basis for the disapproval.

(vii) A proposed investment may be made prior to the expiration of the disapproval period if the Board issues written notice of its intent not to disapprove the investment.

(B) (i) The total amount of extensions of credit by a bank holding company which invests in an export trading company, when combined with all such extensions of credit by all the subsidiaries of such bank holding company, to an export trading company shall not exceed at any one time 10 per centum of the bank holding company's consolidated capital and surplus. For purposes of the preceding sentence, an extension of credit shall not be deemed to include any amount invested by a bank holding company in the shares of an export trading company.

(ii) No provision of any other Federal law in effect on October 1, 1982, relating specifically to collateral requirements shall apply with respect to any such extension of credit.

(iii) No bank holding company or subsidiary of such company which invests in an export trading company may extend credit to such export trading company or to customers of such export trading company on terms more favorable than those afforded similar borrowers in similar circumstances, and such extension of credit shall not involve more than the normal risk of repayment or present other unfavorable features.

(C) For purposes of this paragraph, an export trading company—

(i) may engage in or hold shares of a company engaged in the business of underwriting, selling, or distributing securities in the United States only to the extent that any bank holding company which invests in such export trading company may do so under applicable Federal and State banking laws and regulations; and

(ii) may not engage in agricultural production activities or in manufacturing, except for such incidental product modification including repackaging, re-

assembling or extracting byproducts, as is necessary to enable United States goods or services to conform with requirements of a foreign country and to facilitate their sale in foreign countries.

(D) A bank holding company which invests in an export trading company may be required, by the Board, to terminate its investment or may be made subject to such limitations or conditions as may be imposed by the Board, if the Board determines that the export trading company has taken positions in commodities or commodity contracts, in securities, or in foreign exchange, other than as may be necessary in the course of the export trading company's business operations.

(E) Notwithstanding any other provision of law, an Edge Act corporation, organized under section 25(a) of the Federal Reserve Act (12 U.S.C. 611– 631), which is a subsidiary of a bank holding company, or an agreement corporation, operating subject to section 25 of the Federal Reserve Act (12 U.S.C. 601–604(a)), which is a subsidiary of a bank holding company, may invest directly and indirectly in the aggregate up to 5 per centum of its consolidated capital and surplus (25 per centum in the case of a corporation not engaged in banking) in the voting stock or other evidences of ownership in one or more export trading companies.

(F) For purposes of this paragraph—

(i) the term "export trading company" means a company which does business under the laws of the United States or any State, which is exclusively engaged in activities related to international trade, and which is organized and operated principally for purposes of exporting goods or services produced in the United States or for purposes of facilitating the exportation of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services;

(ii) the term "export trade services" includes, but is not limited to, consulting, international market research, advertising, marketing, insurance (other than acting as principal, agent or broker in the sale of insurance on risks resident or located, or activities performed, in the United States, except for insurance covering the transportation of cargo from any point of origin in the United States to a point of final destination outside the United States), product research and design, legal assistance, transportation, including trade documentation and freight forwarding, communication and processing of foreign orders to and for exporters and foreign purchasers, warehousing, foreign exchange, financing, and taking title to goods, when provided in order to facilitate the export of goods or services produced in the United States;

(iii) the term "bank holding company" shall include a bank which (I) is organized solely to do business with other banks and their officers, directors, or employees; (II) is owned primarily by the banks with which it does business; and (III) does not do business with the general public. No such other bank, owning stock in a bank described in this clause that invests in an export trading company, shall extend credit to an export trading company in an amount exceeding at any one time 10 per centum of such other bank's capital and surplus; and

(iv) the term "extension of credit" shall have the same meaning given such term in the fourth paragraph of section 23A of the Federal Reserve Act.

(G) (i) For purposes of determining whether an export trading company is operated principally for the purposes described in subparagraph (F)(i)—

(I) the operations of such company during the 2-year period beginning on the date such company commences operations shall not be taken into account in making any such determination; and

(II) not less than 4 consecutive years of operations of such company (not including any portion of the pe-

riod referred to in subclause (I)) shall be taken into account in making any such determination.

(ii) A company shall not be treated as operated principally for the purposes described in subparagraph (F)(i) unless—

(I) the revenues of such company from the export, or facilitating the export, of goods or services produced in the United States exceed the revenues of such company from the import, or facilitating the import, into the United States of goods or services produced outside the United States; and

(II) at least ⅓ of such company's total revenues are revenues from the export, or facilitating the export, of goods or services produced in the United States by persons not affiliated with such company.

(H) (i) The Board may not prescribe by regulation any maximum dollar amount limitation on the value of goods which an export trading company may maintain in inventory at any time.

(ii) Notwithstanding clause (i), the Board may issue an order establishing a maximum dollar amount limitation on the value of goods which a particular export trading company may maintain in inventory at any time (after such company has been operating for a reasonable period of time) if the Board finds that, under the facts and circumstances, such limitation is necessary to prevent risks that would affect the financial or managerial resources of an investor bank holding company to an extent which would be likely to have a materially adverse effect on the safety and soundness of any subsidiary bank of such bank holding company.

The Board shall include in its annual report to the Congress a description and a statement of the reasons for approval of each activity approved by it by order or regulation under such paragraph during the period covered by the report.

(d) *Hardship exemption of company controlling one bank prior to July 1, 1968.* To the extent that such action would not be substantially at variance with the purposes of this Act and subject to such conditions as it considers necessary to protect the public interest, the Board by order, after opportunity for hearing, may grant exemptions from the provisions of this section to any bank holding company which controlled one bank prior to July 1, 1968, and has not thereafter acquired the control of any other bank in order (1) to avoid disrupting business relationships that have existed over a long period of years without adversely affecting the banks or communities involved, or (2) to avoid forced sales of small locally owned banks to purchasers not similarly representative of community interests, or (3) to allow retention of banks that are so small in relation to the holding company's total interests and so small in relation to the banking market to be served as to minimize the likelihood that the bank's powers to grant or deny credit may be influenced by a desire to further the holding company's other interests.

(e) *Divestiture of nonexempt shares.* With respect to shares which were not subject to the prohibitions of this section as originally enacted by reason of any exemption with respect thereto but which were made subject to such prohibitions by the subsequent repeal of such exemption, no bank holding company shall retain direct or indirect ownership or control of such shares after five years from the date of the repeal of such exemption, except as provided in paragraph (2) of subsection (a). Any bank holding company subject to such five-year limitation on the retention of nonbanking assets shall endeavor to divest itself of such shares promptly and such bank holding company shall report its progress in such divestiture to the Board two years after repeal of the exemption applicable to it and annually thereafter.

(f) *Certain companies not treated as bank holding companies.*

(1) Except as provided in paragraph (9), any company which—

(A) on March 5, 1987, controlled an institution which became a bank as a result

of the enactment of the Competitive Equality Amendments of 1987; and

(B) was not a bank holding company on the day before the date of the enactment of the Competitive Equality Amendments of 1987,

shall not be treated as a bank holding company for purposes of this Act solely by virtue of such company's control of such institution.

(2) Paragraph (1) shall cease to apply to any company described in such paragraph if—

(A) such company directly or indirectly—

(i) acquires control of an additional bank or an insured institution (other than an insured institution described in paragraph (10) or (12) of this subsection) after March 5, 1987; or

(ii) acquires control of more than 5 percent of the shares or assets of an additional bank or a savings association other than—

(I) shares held as a bona fide fiduciary (whether with or without the sole discretion to vote such shares);

(II) shares held by any person as a bona fide fiduciary solely for the benefit of employees of either the company described in paragraph (1) or any subsidiary of that company and the beneficiaries of those employees;

(III) shares held temporarily pursuant to an underwriting commitment in the normal course of an underwriting business;

(IV) shares held in an account solely for trading purposes;

(V) shares over which no control is held other than control of voting rights acquired in the normal course of a proxy solicitation;

(VI) loans or other accounts receivable acquired in the normal course of business;

(VII) shares or assets acquired in securing or collecting a debt previously contracted in good faith, during the 2-year period beginning on the date of such acquisition or for such additional time (not exceeding 3 years) as the Board may permit if the Board determines that such an extension will not be detrimental to the public interest;

(VIII) shares or assets of a savings association described in paragraph (10) or (12) of this subsection;

(IX) shares of a savings association held by any insurance company, as defined in section 2(a)(17) of the Investment Company Act of 1940, except as provided in paragraph (11); and

(X) shares issued in a qualified stock issuance under section 10(q) of the Home Owners' Loan Act;

except that the aggregate amount of shares held under this clause (other than under subclauses (I), (II), (III), (IV), (V), and (VIII)) may not exceed 15 percent of all outstanding shares or of the voting power of a savings association; or

(B) any bank subsidiary of such company fails to comply with the restrictions contained in paragraph (3)(B).

(3) (A) The Congress finds that banks controlled by companies referred to in paragraph (1) may, because of relationships with affiliates, be involved in conflicts of interest, concentration of resources, or other effects adverse to bank safety and soundness, and may also be able to compete unfairly against banks controlled by bank holding companies by combining banking services with financial services not permissible for bank holding companies. The purpose of this paragraph is to minimize any such potential adverse effects or inequities by temporarily restricting the activities of banks controlled by companies referred to in paragraph (1) until such time as the Congress has enacted proposals to allow, with appropriate safeguards, all banks or bank holding companies to compete on a more equal basis with banks controlled by companies referred to in paragraph (1) or, alternatively, proposals to permanently restrict the activities of banks controlled by companies referred to in paragraph (1).

(B) Until such time as the Congress has taken action pursuant to subparagraph (A), a bank controlled by a company described in paragraph (1) shall not—

(i) engage in any activity in which such bank was not lawfully engaged as of March 5, 1987;

(ii) offer or market products or services of an affiliate that are not permissible for bank holding companies to provide under subsection (c)(8), or permit its products or services to be offered or marketed in connection with products and services of an affiliate, unless—

(I) the Board, by regulation, has determined such products and services are permissible for bank holding companies to provide under subsection (c)(8);

(II) such products and services are described in section 20 of the Banking Act of 1933 and the Board, by regulation, has permitted bank holding companies to offer or market such products or services, but has prohibited bank holding companies and their affiliates from principally engaging in the offering or marketing of such products or services; or

(III) such products or services were being so offered or marketed as of March 5, 1987, and then only in the same manner in which they were being offered or marketed as of that date; or

(iii) after the date of the enactment of the Competitive Equality Amendments of 1987, permit any overdraft (including an intraday overdraft), or incur any such overdraft in such bank's account at a Federal Reserve bank, on behalf of an affiliate, other than an overdraft described in subparagraph (C).

(C) For purposes of subparagraph (B)(iii), an overdraft is described in this subparagraph if—

(i) such overdraft results from an inadvertent computer or accounting error that is beyond the control of both the bank and the affiliate; or

(ii) such overdraft—

(I) is permitted or incurred on behalf of an affiliate which is monitored by, reports to, and is recognized as a primary dealer by the Federal Reserve Bank of New York; and

(II) is fully secured, as required by the Board, by bonds, notes, or other obligations which are direct obligations of the United States or on which the principal and interest are fully guaranteed by the United States or by securities and obligations eligible for settlement on the Federal Reserve book entry system.

(4) If any company described in paragraph (1) loses the exemption provided under such paragraph by operation of paragraph (2), such company shall divest control of each bank it controls within 180 days after such company becomes a bank holding company due to the loss of such exemption.

(5) This subsection shall cease to apply to any company described in paragraph (1) if such company—

(A) registers as a bank holding company under section 5(a) of this Act;

(B) immediately upon such registration, complies with all of the requirements of this Act, and regulations prescribed by the Board pursuant to this Act, including the nonbanking restrictions of this section; and

(C) does not, at the time of such registration, control banks in more than one State, the acquisition of which would be prohibited by section 3(d) of this Act if an application for such acquisition by such company were filed under section 3(a) of this Act.

(6) Each company described in paragraph (1) shall, within 60 days after the date of enactment of the Competitive Equality Amendments of 1987, provide the Board with the name and address of such company, the name and address of each bank such company controls, and a description of each such bank's activities.

(7) The Board may, from time to time, examine a company described in paragraph (1), or a bank controlled by such company, or require reports under oath from appropri-

ate officers or directors of such company or bank solely for purposes of assuring compliance with the provisions of this subsection and enforcing such compliance.

(8) (A) In addition to any other power of the Board, the Board may enforce compliance with the provisions of this Act which are applicable to any company described in paragraph (1), and any bank controlled by such company, under section 8 of the Federal Deposit Insurance Act and such company or bank shall be subject to such section (for such purposes) in the same manner and to the same extent as if such company or bank were a State member insured bank.

(B) Any violation of this Act by any company described in paragraph (1), and any bank controlled by such company, may also be treated as a violation of the Federal Deposit Insurance Act for purposes of subparagraph (A).

(C) No provision of this paragraph shall be construed as limiting any authority of the Comptroller of the Currency or the Federal Deposit Insurance Corporation.

(9) A company described in paragraph (1) shall be—

(A) treated as a bank holding company for purposes of section 106 of the Bank Holding Company Act Amendments of 1970 and section 22(h) of the Federal Reserve Act and any regulation prescribed under any such section; and

(B) subject to the restrictions of section 106 of the Bank Holding Company Act Amendments of 1970, in connection with any transaction involving the products or services of such company or affiliate and those of a bank affiliate, as if such company or affiliate were a bank and such bank were a subsidiary of a bank holding company.

(10) For purposes of clauses (i) and (ii)(VIII) of paragraph (2)(A), an insured institution is described in this paragraph if—

(A) the insured institution was acquired (or any shares or assets of such institution were acquired) by a company described in paragraph (1) in an acquisition under section 408(m) of the National Housing Act or section 13(k) of the Federal Deposit Insurance Act; and

(B) either—

(i) the insured institution is located in a State in which such company controlled a bank on March 5, 1987; or

(ii) the insured institution has total assets of $500,000,000 or more at the time of such acquisition.

(11) Shares described in clause (ii)(IX) of paragraph (2)(A) shall not be excluded for purposes of clause (ii) of such paragraph if—

(A) all shares held under such clause (ii)(IX) by all insurance company affiliates of such savings association in the aggregate exceed 5 percent of all outstanding shares or of the voting power of the savings association; or

(B) such shares are acquired or retained with a view to acquiring, exercising, or transferring control of the savings association.

(12) For purposes of clauses (i) and (ii)(VIII) of paragraph (2)(A), an insured institution is described in this paragraph if the insured institution was acquired (or any shares or assets of such institution were acquired) by a company described in paragraph (1)—

(A) from the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or the Director of the Office of Thrift Supervision, in any capacity; or

(B) in an acquisition in which the insured institution has been found to be in danger of default (as defined in section 3 of the Federal Deposit Insurance Act by the appropriate Federal or State authority.

(13) A company described in paragraph (1) that holds shares issued in a qualified stock issuance pursuant to section 10(q) of the Home Owners' Loan Act by any savings association or savings and loan holding company (neither of which is a subsidiary) shall not be deemed to control such savings association or savings and loan holding company solely because such company holds such shares unless—

(A) the company fails to comply with any requirement or condition imposed by paragraph (2)(A)(ii)(X) or section 10(q)

of the Home Owners' Loan Act with respect to such shares; or

(B) the shares are acquired or retained with a view to acquiring, exercising, or transferring control of the savings association or savings and loan holding company.

(g) *Limitations on certain banks.*

(1) Notwithstanding any other provision of this section (other than the last sentence of subsection (a)(2)), a bank holding company which controls an institution that became a bank as a result of the enactment of the Competitive Equality Amendments of 1987 may retain control of such institution if such institution does not—

(A) engage in any activity after the date of the enactment of such Amendments which would have caused such institution to be a bank (as defined in section 2(c), as in effect before such date) if such activities had been engaged in before such date; or

(B) increase the number of locations from which such institution conducts business after March 5, 1987.

(2) The limitations contained in paragraph (1) shall cease to apply to a bank described in such paragraph at such time as the acquisition of such bank, by the bank holding company referred to in such paragraph, would not be prohibited under section 3(d) of this Act if—

(A) an application for such acquisition were filed under section 3(a) of this Act; and

(B) such bank were treated as an additional bank (under section 3(d)).

(h) *Tying provisions.*

(1) An institution described in subparagraph (D), (F), (G), (H), (I), or (J) of section 2(c)(2) shall be treated as a bank, and a company that controls such an institution shall be treated as a bank holding company, for purposes of section 106 of the Bank Holding Company Act Amendments of 1970 and section 22(h) of the Federal Reserve Act and any regulation prescribed under any such section.

(2) A company that controls an institution described in subparagraph (D), (F), (G), (H), (I), or (J) of section 2(c)(2) and any of such company's other affiliates, shall be subject to the tying restrictions of section 106 of the Bank Holding Company Act Amendments of 1970 in connection with any transaction involving the products or services of such company or affiliate and those of such institution, as if such company or affiliate were a bank and such institution were a subsidiary of a bank holding company.

(i) *Acquisition of savings associations.*

(1) The Board may approve an application by any bank holding company under subsection (c)(8) to acquire any savings association in accordance with the requirements and limitations of this section.

(2) In approving an application by a bank holding company to acquire a savings association, the Board shall not impose any restriction on transactions between the savings association and its holding company affiliates, except as required under sections 23A and 23B of the Federal Reserve Act or any other applicable law.

(3) (A) Notwithstanding any other provision of this Act, any qualified savings association which became a federally chartered stock company in December of 1986 and which is acquired by any bank holding company without Federal financial assistance after June 1, 1991, and before March 1, 1992, and any subsidiary of any such association, may after such acquisition continue to engage within the home State of the qualified savings association in insurance agency activities in which any Federal savings association (or any subsidiary thereof) may engage in accordance with the Home Owners' Loan Act and regulations pursuant to such Act if the qualified savings association or subsidiary thereof was continuously engaged in such activity from June 1, 1991, to the date of the acquisition.

(B) For purposes of this paragraph, the term *"qualified savings association"* means any savings association that—

(i) was chartered or organized as a savings association before June 1, 1991;

(ii) had, immediately before the acquisition of such association by the bank holding company referred to in subparagraph (A), negative tangible capital and total insured deposits in excess of $3,000,000,000; and

(iii) will meet all applicable regulatory capital requirements as a result of such acquisition.

(4) (A) Upon receiving any application or notice by a bank holding company to acquire, directly or indirectly, a savings association under subsection (c)(8), the Board shall solicit comments and recommendations from the Director with respect to such acquisition.

(B) The comments and recommendations of the Director under subparagraph (A) with respect to any acquisition subject to such subparagraph shall be transmitted to the Board not later than 30 days after the receipt by the Director of the notice relating to such acquisition (or such shorter period as the Board may specify if the Board advises the Director that an emergency exists that requires expeditious action).

(5) (A) The Board shall consult with the Director, as appropriate, in establishing the scope of an examination by the Board of a bank holding company that directly or indirectly controls a savings association.

(B) Upon the request of the Director, the Board shall furnish the Director with a copy of any inspection report, additional examination materials, or supervisory information relating to any bank holding company that directly or indirectly controls a savings association.

(6) The Board and the Director shall cooperate in any enforcement action against any bank holding company that controls a savings association, if the relevant conduct involves such association.

(7) For purposes of this section, the term "Director" means the Director of the Office of Thrift Supervision.

(j) *Notice procedures for nonbanking activities.*

(1) (A) Except as provided in paragraph (3), no bank holding company may engage in any nonbanking activity or acquire or retain ownership or control of the shares of a company engaged in activities based on subsection (c)(8) or (a)(2) without providing the Board with written notice of the proposed transaction or activity at least 60 days before the transaction or activity is proposed to occur or commence.

(B) The notice submitted to the Board shall contain such information as the Board shall prescribe by regulation or by specific request in connection with a particular notice.

(C) (i) Any notice filed under this subsection shall be deemed to be approved by the Board unless, before the end of the 60-day period beginning on the date the Board receives a complete notice under subparagraph (A), the Board issues an order disapproving the transaction or activity and setting forth the reasons for disapproval.

(ii) The Board may extend the 60-day period referred to in clause (i) for an additional 30 days. The Board may further extend the period with the agreement of the bank holding company submitting the notice pursuant to this subsection.

(iii) In the event a hearing is requested or the Board determines that a hearing is warranted, the Board may extend the notice period provided in this subsection for such time as is reasonably necessary to conduct a hearing and to evaluate the hearing record. Such extension shall not exceed the 91-day period beginning on the date that the hearing record is complete.

(D) (i) Any transaction or activity may commence before the expiration of any period for disapproval established under this paragraph if the Board issues a written notice of approval.

(ii) The Board may prescribe regulations which provide for a shorter notice period with respect to particular activities or transactions.

(E) In the case of any notice to engage in, or to acquire or retain ownership or

control of shares of any company engaged in, any activity pursuant to subsection (c)(8) or (a)(2) that has not been previously approved by regulation, the Board may extend the notice period under this subsection for an additional 90 days. The Board may further extend the period with the agreement of the bank holding company submitting the notice pursuant to this subsection.

(2) (A) In connection with a notice under this subsection, the Board shall consider whether performance of the activity by a bank holding company or a subsidiary of such company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.

(B) The Board may deny any proposed transaction or activity for which notice has been submitted pursuant to this subsection if the bank holding company submitting such notice neglects, fails, or refuses to furnish the Board all the information required by the Board.

(C) Nothing in this subsection limits the authority of the Board to impose conditions in connection with an action under this section.

(3) No notice under paragraph (1) of this subsection or under subsection (c)(8) or (a)(2)(B) is required for a proposal by a bank holding company to engage in any activity or acquire the shares or assets of any company, other than an insured depository institution, if the proposal qualifies under paragraph (4).

(4) A proposal qualifies under this paragraph if all of the following criteria are met:

(A) Both before and immediately after the proposed transaction—

(i) the acquiring bank holding company is well capitalized;

(ii) the lead insured depository institution of such holding company is well capitalized;

(iii) well capitalized insured depository institutions control at least 80 percent of the aggregate total risk-weighted assets of insured depository institutions controlled by such holding company; and

(iv) no insured depository institution controlled by such holding company is undercapitalized.

(B) (i) At the time of the transaction, the acquiring bank holding company, its lead insured depository institution, and insured depository institutions that control at least 90 percent of the aggregate total risk-weighted assets of insured depository institutions controlled by such holding company are well managed.

(ii) Except as provided in paragraph (6), no insured depository institution controlled by the acquiring bank holding company has received 1 of the 2 lowest composite ratings at the later of the institution's most recent examination or subsequent review.

(C) Following consummation of the proposal, the bank holding company engages directly or through a subsidiary solely in—

(i) activities that are permissible under subsection (c)(8), as determined by the Board by regulation or order thereunder, subject to all of the restrictions, terms, and conditions of such subsection and such regulation or order; and

(ii) such other activities as are otherwise permissible under this section, subject to the restrictions, terms and conditions, including any prior notice or approval requirements, provided in this section.

(D) (i) The book value of the total assets to be acquired does not exceed 10 percent of the consolidated total risk-weighted assets of the acquiring bank holding company.

(ii) The gross consideration to be paid for the securities or assets does not exceed 15 percent of the consolidated Tier 1 capital of the acquiring bank holding company.

(E) For proposals described in paragraph (5)(B), the Board has not, before the con-

clusion of the period provided in paragraph (5)(B), advised the bank holding company that a notice under paragraph (1) is required.

(F) During the 12-month period ending on the date on which the bank holding company proposes to commence an activity or acquisition, no administrative enforcement action has been commenced, and no cease and desist order has been issued pursuant to section 8 of the Federal Deposit Insurance Act, against the bank holding company or any depository institution subsidiary of the holding company, and no such enforcement action, order, or other administrative enforcement proceeding is pending as of such date.

(5) (A) A bank holding company that qualifies under paragraph (4) and that proposes to engage de novo, directly or through a subsidiary, in any activity that is permissible under subsection (c)(8), as determined by the Board by regulation, may commence that activity without prior notice to the Board and must provide written notification to the Board not later than 10 business days after commencing the activity.

(B) (i) At least 12 business days before commencing any activity pursuant to paragraph (3) (other than an activity described in subparagraph (A) of this paragraph) or acquiring shares or assets of any company pursuant to paragraph (3), the bank holding company shall provide written notice of the proposal to the Board, unless the Board determines that no notice or a shorter notice period is appropriate.

(ii) A notification under this subparagraph shall include a description of the proposed activities and the terms of any proposed acquisition.

(6) Any insured depository institution which has been acquired by a bank holding company during the 12-month period preceding the date on which the company proposes to commence an activity or acquisition pursuant to paragraph (3) may be excluded for purposes of paragraph (4)(B)(ii) if—

(A) the bank holding company has developed a plan for the institution to restore the capital and management of the institution which is acceptable to the appropriate Federal banking agency; and

(B) all such insured depository institutions represent, in the aggregate, less than 10 percent of the aggregate total risk-weighted assets of all insured depository institutions controlled by the bank holding company.

(7) The Board may, by regulation, adjust the percentages and the manner in which the percentages of insured depository institutions are calculated under paragraph (4)(B)(i), (4)(D), or (6)(B) if the Board determines that any such adjustment is consistent with safety and soundness and the purposes of this Act.

[12 USC 1843. As amended by acts of July 1, 1966 (80 Stat. 238); Dec. 31, 1970 (84 Stat. 1763); Nov. 16, 1977 (91 Stat. 1389); Nov. 10, 1978 (92 Stat. 3671); March 31, 1980 (94 Stat. 186); Oct. 8, 1982 (96 Stat. 1236); Oct. 15, 1982 (96 Stat. 1479, 1489, 1527, 1536); Jan. 12, 1983 (96 Stat. 2511); Oct. 22, 1986 (100 Stat. 2095); Aug. 10, 1987 (101 Stat. 557, 558, 628, 635); Aug. 23, 1988 (102 Stat. 1384); Aug. 9, 1989 (103 Stat. 408, 409, 410, 411, 546); Dec. 19, 1991 (105 Stat. 2384); Sept. 23, 1994 (108 Stat. 2239, 2240); and Sept. 30, 1996 (110 Stat. 3009-404, 406, 413, 425, 476).]

Section 601(b) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 USC 1843 note) reads as follows:

> (b) If the Board of Governors of the Federal Reserve System, in approving an application by a bank holding company to acquire a savings association, imposed any restriction that would have been prohibited under section 4(i)(2) of the Bank Holding Company Act of 1956 (as added by subsection (a) of this section) if that section had been in effect when the application was approved, the Board shall modify that approval in a manner consistent with that section.]

SECTION 5—Administration (12 USC 1844)

(a) *Registration of bank holding company.* Within one hundred and eighty days after the date of enactment of this Act, or within one hundred and eighty days after becoming a bank holding company, whichever is later, each bank holding company shall register with the Board on forms prescribed by the Board, which shall include such information with respect to the financial condition and operations, management, and intercompany relationships of the bank holding company and its subsid-

iaries, and related matters, as the Board may deem necessary or appropriate to carry out the purposes of this Act. The Board may, in its discretion, extend the time within which a bank holding company shall register and file the requisite information.

(b) *Regulations and orders.* The Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this Act and prevent evasions thereof.

(c) *Reports required by Board; examinations; cost of examination.* The Board from time to time may require reports under oath to keep it informed as to whether the provisions of this Act and such regulations and orders issued thereunder have been complied with; and the Board may make examinations of each bank holding company and each subsidiary thereof, the cost of which shall be assessed against, and paid by, such holding company. The Board shall, as far as possible, use the reports of examinations made by the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the appropriate State bank supervisory authority for the purposes of this section.

(d) *Reports to Congress; recommendations.* Before the expiration of two years following the date of enactment of this Act, and each year thereafter in the Board's annual report to the Congress, the Board shall report to the Congress the results of the administration of this Act, stating what, if any, substantial difficulties have been encountered in carrying out the purposes of this Act, and any recommendations as to changes in the law which in the opinion of the Board would be desirable.

(e) *Termination of activities or ownership or control of nonbank subsidiaries constituting serious risk.*

(1) Notwithstanding any other provision of this Act, the Board may, whenever it has reasonable cause to believe that the continuation by a bank holding company of any activity or of ownership or control of any of its nonbank subsidiaries, other than a nonbank subsidiary of a bank, constitutes a serious risk to the financial safety, soundness, or stability of a bank holding company subsidiary bank and is inconsistent with sound banking principles or with the purposes of this Act or with the Financial Institutions Supervisory Act of 1966, order the bank holding company or any such nonbank subsidiaries, after due notice and opportunity for hearing, and after considering the views of the bank's primary supervisor, which shall be the Comptroller of the Currency in the case of a national bank or the Federal Deposit Insurance Corporation and the appropriate State supervisory authority in the case of an insured nonmember bank, to terminate such activities or to terminate (within one hundred and twenty days or such longer period as the Board may direct in unusual circumstances) its ownership or control of any such subsidiary either by sale or by distribution of the shares of the subsidiary to the shareholders of the bank holding company. Such distribution shall be pro rata with respect to all of the shareholders of the distributing bank holding company, and the holding company shall not make any charge to its shareholders arising out of such a distribution.

(2) The Board may in its discretion apply to the United States district court within the jurisdiction of which the principal office of the holding company is located, for the enforcement of any effective and outstanding order issued under this section, and such court shall have jurisdiction and power to order and require compliance therewith, but except as provided in section 9 of this Act, no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

(f) *Powers of Board respecting applications, examinations, or other proceedings.* In the course of or in connection with an application, examination, investigation or other proceeding under this Act, the Board, or any member or designated representative thereof, including any person designated to conduct any hearing under this Act, shall have the power to administer oaths and affirmations, to take or cause to be taken depositions, and to issue, revoke,

quash, or modify subpoenas and subpoenas duces tecum: and the Board is empowered to make rules and regulations to effectuate the purposes of this subsection. The attendance of witnesses and the production of documents provided for in this subsection may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place where such proceeding is being conducted. Any party to proceedings under this Act may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district or the United States court in any territory in which such proceeding is being conducted or where the witness resides or carries on business, for the enforcement of any subpoena or subpoena duces tecum issued pursuant to this subsection and such courts shall have jurisdiction and power to order and require compliance therewith. Witnesses subpoenaed under this subsection shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Any service required under this subsection may be made by registered mail, or in such other manner reasonably calculated to give actual notice as the Board may by regulation or otherwise provide. Any court having jurisdiction of any proceeding instituted under this subsection may allow to any such party such reasonable expenses and attorneys' fees as it seems just and proper. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in such person's power so to do, in obedience to the subpoena of the Board, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or, to imprisonment for a term of not more than one year or both.

[12 USC 1844. As amended by act of Nov. 10, 1978 (92 Stat. 3646).]

SECTION 6

[Section 6 was repealed by section 9 of the act of July 1, 1966 (80 Stat. 240).]

SECTION 7—Reservation of Rights to States (12 USC 1846)

(a) No provision of this act shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof.

(b) *State taxation authority not affected.* No provision of this Act shall be construed as affecting the authority of any State or political subdivision of any State to adopt, apply, or administer any tax or method of taxation to any bank, bank holding company, or foreign bank, or any affiliate of any bank, bank holding company, or foreign bank, to the extent that such tax or tax method is otherwise permissible by or under the Constitution of the United States or other Federal law.

[12 USC 1846. As amended by acts of Aug. 10, 1987 (101 Stat. 563) and Sept. 29, 1994 (108 Stat. 2341).]

SECTION 8—Penalties (12 USC 1847)

(a) *Criminal penalty.*

(1) Whoever knowingly violates any provision of this Act, or, being a company, violates any regulation or order issued by the Board under this Act, shall be imprisoned not more than 1 year, fined not more than $100,000 per day for each day during which the violation continues, or both.

(2) Whoever, with the intent to deceive, defraud, or profit significantly, knowingly violates any provision of this Act shall be imprisoned not more than 5 years, fined not more than $1,000,000 per day for each day during which the violation continues, or both.

(3) Every officer, director, agent, and employee of a bank holding company shall be subject to the same penalties for false entries in any book, report, or statement of such bank holding company as are applicable to officers, directors, agents, and employees of member banks for false entries in any books, reports, or statements of member banks under section 1005 of title 18, United States Code.

(b) *Civil money penalty.*

(1) Any company which violates, and any individual who participates in a violation of, any provision of this Act, or any regulation or order issued pursuant thereto, shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation continues.

(2) Any penalty imposed under paragraph (1) may be assessed and collected by the Board in the manner provided in subparagraphs (E), (F), (G), and (I) of section 8(i)(2) of the Federal Deposit Insurance Act for penalties imposed (under such section) and any such assessment shall be subject to the provisions of such section.

(3) The company or other person against whom any penalty is assessed under this subsection shall be afforded an agency hearing if such association or person submits a request for such hearing within 20 days after the issuance of the notice of assessment. Section 8(h) of the Federal Deposit Insurance Act shall apply to any proceeding under this subsection.

(4) All penalties collected under authority of this subsection shall be deposited into the Treasury.

(5) For purposes of this section, the term "violate" includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(6) The Board shall prescribe regulations establishing such procedures as may be necessary to carry out this subsection.

(c) *Notice under this section after separation from service.* The resignation, termination of employment or participation, or separation of an institution-affiliated party (within the meaning of section 3(u) of the Federal Deposit Insurance Act) with respect to a bank holding company (including a separation caused by the deregistration of such a company) shall not affect the jurisdiction and authority of the Board to issue any notice and proceed under this section against any such party, if such notice is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such holding company (whether such date occurs before, on, or after the date of the enactment of this subsection).

(d) *Penalty for failure to make reports.*

(1) Any company which—

(A) maintains procedures reasonably adapted to avoid any inadvertent error and, unintentionally and as a result of such an error—

(i) fails to make, submit, or publish such reports or information as may be required under this Act or under regulations prescribed by the Board pursuant to this Act, within the period of time specified by the Board; or

(ii) submits or publishes any false or misleading report or information; or

(B) inadvertently transmits or publishes any report which is minimally late,

shall be subject to a penalty of not more than $2,000 for each day during which such failure continues or such false or misleading information is not corrected. The company shall have the burden of proving that an error was inadvertent and that a report was inadvertently transmitted or published late.

(2) Any company which—

(A) fails to make, submit, or publish such reports or information as may be required under this Act or under regulations prescribed by the Board pursuant to this Act, within the period of time specified by the Board; or

(B) submits or publishes any false or misleading report or information, in a manner not described in paragraph (1)

shall be subject to a penalty of not more than $20,000 for each day during which such failure continues or such false or misleading information is not corrected.

(3) Notwithstanding paragraph (2), if any company knowingly or with reckless disregard for the accuracy of any information or report described in paragraph (2) submits or publishes any false or misleading report or information, the Board may, in its discretion, assess a penalty of not more than $1,000,000 or 1 percent of total assets of such company, whichever is less, per day for each day during which such failure continues or such false or misleading information is not corrected.

(4) Any penalty imposed under paragraph (1), (2), or (3) shall be assessed and collected by the Board in the manner provided in subsection (b) (for penalties imposed under such subsection) and any such assessment (including the determination of the amount of the penalty) shall be subject to the provisions of such subsection.

(5) Any company against which any penalty is assessed under this subsection shall be afforded an agency hearing if such company submits a request for such hearing within 20 days after the issuance of the notice of assessment. Section 8(h) of the Federal Deposit Insurance Act shall apply to any proceeding under this subsection.

[12 USC 1847. As amended by acts of Nov. 10, 1978 (92 Stat. 3647); Oct. 15, 1982 (96 Stat. 1522); and Aug. 9, 1989 (103 Stat. 461, 475, 481).]

SECTION 9—Judicial Review (12 USC 1848)

Any party aggrieved by an order of the Board under this Act may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within thirty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

[12 USC 1848. As amended by acts of Aug. 28, 1958 (72 Stat. 951) and July 1, 1966 (80 Stat. 240).]

SECTION 10—Tax Provisions

[Subsections (a) and (b) contain language added to subchapter O of chapter 1 of the Internal Revenue Code of 1954 (26 USC). This language was subsequently incorporated into the Bank Holding Company Tax Act of 1976, along with additional language also amending the Internal Revenue Code. It was repealed by act of Nov. 5, 1990 (104 Stat. 1388.]

SECTION 11—Saving Provision (12 USC 1849)

(a) *General rule.* Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law, nor shall anything herein contained constitute a defense to any action, suit, or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct, except as specifically provided in this section.

(b) *Antitrust review.*

(1) The Board shall immediately notify the Attorney General of any approval by it pursuant to section 3 of a proposed acquisition, merger, or consolidation transaction. If the Board has found that it must act immediately in order to prevent the probable failure of a bank or bank holding company involved in any such transaction, the transaction may be consummated immediately upon approval by the Board. If the Board has advised the Comptroller of the Currency or the State supervisory authority, as the case may be, of the existence of an emergency requiring expeditious action and has required the submission of views and recommendations within ten days, the transaction may not be consummated before the fifth calendar day after the date of approval by the Board. In all other cases, the transaction may not be consummated before the thirtieth calendar day after the date of approval by the Board or, if the Board has not received any adverse comment from the Attorney General of the United States relating to competitive factors, such shorter period of time as may be prescribed by the Board with the concurrence of the Attorney General, but in no event less than 15 calendar days after the date of approval. Any action brought under the antitrust laws arising out of an acquisition, merger, or consolidation

transaction approved under section 3 shall be commenced prior to the earliest time under this subsection at which the transaction approval under section 3 might be consummated. The commencement of such an action shall stay the effectiveness of the Board's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented. In any judicial proceeding attacking any acquisition, merger, or consolidation transaction approved pursuant to section 3 on the ground that such transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act. 15 U.S.C. 2), the standards applied by the court shall be identical with those that the Board is directed to apply under section 3 of this Act. Upon the consummation of an acquisition, merger, or consolidation transaction approved under section 3 in compliance with this Act and after the termination of any antitrust litigation commenced within the period prescribed in this section, or upon the termination of such period of no such litigation is commenced therein, the transaction may not thereafter be attached in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this Act shall exempt any bank holding company involved in such a transaction from complying with the antitrust laws after the consummation of such transaction.

(2) (A) If—

(i) the Federal Deposit Insurance Corporation learns that a bank insured by such Corporation is in danger of closing; and

(ii) the Corporation is considering assisting the acquisition of such bank and its affiliated banks by another bank or holding company under section 13(f) of the Federal Deposit Insurance Act and such acquisition is subject to the approval of the Board under section 3 of this Act,

the Corporation shall immediately notify the Board of such facts.

(B) Upon receipt of notice from the Federal Deposit Insurance Corporation under subparagraph (A) or at such earlier time as deemed appropriate by the Board, the Board shall immediately notify the Attorney General of the United States of the facts concerning the possible acquisition.

(C) Within 5 days of receiving notice under subparagraph (B), the Attorney General shall notify the Board in writing of the Attorney General's preliminary finding as to the consistency of the possible acquisition with the antitrust laws.

(D) The Board may reduce or eliminate the post-approval waiting period established under paragraph (1) for an acquisition to which this paragraph applies, except that such period may not be eliminated or reduced to less than 5 days without the concurrence of the Attorney General.

(c) *Antitrust proceedings; Board and State banking agency as party; representation by counsel.* In any action brought under the antitrust laws arising out of any acquisition, merger, or consolidation transaction approved by the Board under section 3 of this Act, the Board and any State banking supervisory agency having jurisdiction within the State involved, may appear as a party of its own motion and as of right, and be represented by its counsel.

(d) *Treatment of merger transactions consummated prior or subsequent to May 9, 1956, and not in litigation prior to July 1, 1966.* Any acquisition, merger, or consolidation of the kind described in section 3(a) of this Act which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this amendment, shall be conclusively presumed not to have been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(e) *Antitrust litigation; substantive law applicable to proceedings pending on or after July*

1, 1966 with respect to merger transactions. Any court having pending before it on or after the date of enactment of this amendment any litigation initiated under the antitrust laws by the Attorney General with respect to any acquisition, merger, or consolidation of the kind described in section 3(a) of this Act shall apply the substantive rule of law set forth in section 3 of this Act.

(f) *Definition of "antitrust laws."* For the purposes of this section, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1–7), the Act of October 15, 1914 (the Clayton Act, 15 U.S.C. 12–27), and any other Acts in pari materia.

[12 USC 1849. As amended by acts of July 1, 1966 (80 Stat. 240) and Dec. 31, 1970 (84 Stat. 1766) Oct. 2, 1976 (90 Stat. 1503); Nov. 16, 1977 (91 Stat. 1390); Aug. 10, 1987 (101 Stat. 628); and Sept. 23, 1994 (108 Stat. 2226). The date of the amendment referred to in paragraphs (d) and (e) is July 1, 1966.]

SECTION 12—Separability of Provisions (12 USC 1841 note)

If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

SECTION 105—Party in Interest

With respect to any proceeding before the Federal Reserve Board wherein an applicant seeks authority to acquire a subsidiary which is a bank under section 3 of the Bank Holding Company Act of 1956, to engage directly or indirectly in a nonbanking activity pursuant to section 4 of such Act, or to engage in an activity otherwise prohibited under section 106 of this Act, a party who would become a competitor of the applicant or subsidiary thereof by virtue of the applicant's or its subsidiary's acquisition, entry into the business involved, or activity, shall have the right to be a party in interest in the proceeding and, in the event of an adverse order of the Board, shall have the right as an aggrieved party to obtain judicial review thereof as provided in section 9 of such Act of 1956 or as otherwise provided by law.

[12 USC 1850.]

SECTION 106—Tie-In Arrangements

(a) *Definitions.* As used in this section, the terms "bank", "bank holding company", "subsidiary", and "Board" have the meaning ascribed to such terms in section 2 of the Bank Holding Company Act of 1956. For purposes of this section only, the term "company", as used in section 2 of the Bank Holding Company Act of 1956, means any person, estate, trust, partnership, corporation, association, or similar organization, but does not include any corporation the majority of the shares of which are owned by the United States or by any State. The term "trust service" means any service customarily performed by a bank trust department.

[12 USC 1971.]

(b) *Certain tie-in arrangements; prohibition; exceptions.*

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

(A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

(B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition and the prohibitions of section 4(c)(9) and 4(h)(2) of the Bank Holding Company Act of 1956 as it considers will not be contrary to the purposes of this section.

(2) (A) No bank which maintains a correspondent account in the name of another bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank, or to any related interest of such person, unless such extension of

credit is made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(B) No bank shall open a correspondent account at another bank while such bank has outstanding an extension of credit to an executive officer or director of, or other person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, the bank desiring to open the account, or to any related interest of such person, unless such extension of credit was made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(C) No bank which maintains a correspondent account at another Bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank, or to any related interest of such person, unless such extension of credit is made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(D) No bank which has outstanding an extension of credit to an executive officer or director of, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, another bank, or to any related interest of such person shall open a correspondent account at such other bank, unless such extension of credit was made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(E) For purposes of this paragraph, the term "extension of credit" shall have the meaning prescribed by the Board pursuant to section 22(h) of the Federal Reserve Act (12 U.S.C. 375b), and the term "executive officer" shall have the same meaning given it under section 22(g) of the Federal Reserve Act.

(F) (i) Any bank which, and any institution-affiliated party (within the meaning of section 3(u) of the Federal Deposit Insurance Act) with respect to such bank who, violates any provision of this paragraph shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(ii) Notwithstanding clause (i), any bank which, and any institution-affiliated party (within the meaning of section 3(u) of the Federal Deposit Insurance Act) with respect to such bank who—

(I) (aa) commits any violation described in clause (i);

(bb) recklessly engages in an unsafe or unsound practice in conducting the affairs of such bank; or

(cc) breaches any fiduciary duty;

(II) which violation, practice, or breach—

(aa) is part of a pattern of misconduct;

(bb) causes or is likely to cause more than a minimal loss to such bank; or

(cc) results in pecuniary gain or other benefit to such party,

shall forfeit and pay a civil penalty of not more than $25,000 for each day

during which such violation, practice, or breach continues.

(iii) Notwithstanding clauses (i) and (ii), any bank which, and any institution-affiliated party (within the meaning of section 3(u) of the Federal Deposit Insurance Act) with respect to such bank who—

(I) knowingly—

(aa) commits any violation described in clause (i);

(bb) engages in any unsafe or unsound practice in conducting the affairs of such bank; or

(cc) breaches any fiduciary duty; and

(II) knowingly or recklessly causes a substantial loss to such bank or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach,

shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under clause (iv) for each day during which such violation, practice, or breach continues.

(iv) The maximum daily amount of any civil penalty which may be assessed pursuant to clause (iii) for any violation, practice, or breach described in such clause is—

(I) in the case of any person other than a bank, an amount to not exceed $1,000,000; and

(II) in the case of a bank, an amount not to exceed the lesser of—

(aa) $1,000,000; or

(bb) 1 percent of the total assets of such bank.

(v) Any penalty imposed under clause (i), (ii), or (iii) may be assessed and collected—

(I) in the case of a national bank, by the Comptroller of the Currency;

(II) in the case of a State member bank, by the Board; and

(III) in the case of an insured nonmember State bank, by the Federal Deposit Insurance Corporation,

in the manner provided in subparagraphs (E), (F), (G), and (I) of section 8(i)(2) of the Federal Deposit Insurance Act for penalties imposed (under such section) and any such assessment shall be subject to the provisions of such section.

(vi) The bank or other person against whom any penalty is assessed under this subparagraph shall be afforded an agency hearing if such bank or person submits a request for such hearing within 20 days after the issuance of the notice of assessment. Section 8(h) of the Federal Deposit Insurance Act shall apply to any proceeding under this subparagraph.

(vii) All penalties collected under authority of this subsection shall be deposited into the Treasury.

(viii) For purposes of this paragraph, the term "violate" includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(ix) The Comptroller of the Currency, the Board, and the Federal Deposit Insurance Corporation shall prescribe regulations establishing such procedures as may be necessary to carry out this subparagraph.

(G) (i) Each executive officer and each stockholder of record who directly or indirectly owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of an insured bank shall make a written report to the board of directors of such bank for any year during which such executive officer or shareholder has outstanding an extension of credit from a bank which maintains a corresponding account in the name of such bank. Such report shall include the following information:

(*I*) the maximum amount of indebtedness to the bank maintaining the correspondent account during such year of (a) such executive officer or stockholder of record, (b) each company controlled by such executive officer of stockholder, or (c) each political or campaign committee the

funds or services of which will benefit such executive officer or stockholder, or which is controlled by such executive officer or stockholder;

(2) the amount of indebtedness to the bank maintaining the correspondent account outstanding as of a date not more than ten days prior to the date of filing of such report of (a) such executive officer or stockholder of record, (b) each company controlled by such executive officer or stockholder, or (c) each political or campaign committee the funds or services of which will benefit such executive officer or stockholder;

(3) the range of interest rates charged on such indebtedness of such executive officer or stockholder of record; and

(4) the terms and conditions of such indebtedness of such executive officer or stockholder of record.

(ii) The appropriate Federal banking agencies are authorized to issue rules and regulations, including definitions of terms, to require the reporting and public disclosure of information by any bank or executive officer or principal shareholder thereof concerning any extension of credit by a correspondent bank to the reporting bank's executive officers or principal shareholders, or the related interests of such persons.

(H) For the purpose of this paragraph—

(i) the term "bank" includes a mutual savings bank, a savings bank, and a savings association (as those terms are defined in section 3 of the Federal Deposit Insurance Act);

(ii) the term "related interests of such persons" includes any company controlled by such executive officer, director, or person, or any political or campaign committee the funds or services of which will benefit such executive officer, director, or person or which is controlled by such executive officer, director, or person; and

(iii) the terms "control of a company" and "company" have the same meaning as under section 22 (h) of the Federal Reserve Act (12 U.S.C. 375b).

(I) The resignation, termination of employment or participation, or separation of an institution-affiliated party (within the meaning of section 3(u) of the Federal Deposit Insurance Act) with respect to such a bank (including a separation caused by the closing of such a bank) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice and proceed under this section against any such party, if such notice is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such bank (whether such date occurs before, on, or after the date of the enactment of this subparagraph).

[12 USC 1972. As amended by acts of Nov. 10, 1978 (92 Stat. 3690); Oct. 15, 1982 (96 Stat. 1520, 1523, 1526); Aug. 9, 1989 (103 Stat. 461, 473); Dec. 19, 1991 (105 Stat. 2359); and Sept. 30, 1996 (110 Stat. 3009-413).]

(c) *Jurisdiction of courts; duty of U.S. attorneys; equitable proceedings; petition; expedition of cases; temporary restraining orders; bringing in additional parties; subpoenas.* The district courts of the United States have jurisdiction to prevent and restrain violations of subsection (b) of this section and it is the duty of the United States attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. The proceedings may be by way of a petition setting forth the case and praying that the violation be enjoined or otherwise prohibited. When the parties complained of have been duly notified of the petition, the court shall proceed, as soon as possible, to the hearing and determination of the case. While the petition is pending, and before final decree, the court may at any time make such temporary restraining order or prohibition as it deems just. Whenever it appears to the court that the ends of justice require that other parties be brought before it, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and subpoenas to that

end may be served in any district by the marshal thereof.

[12 USC 1973.]

(d) *Actions by United States; subpoenas for witnesses.* In any action brought by or on behalf of the United States under subsection (b), subpoenas for witnesses may run into any district, but no writ of subpoena may issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the prior permission of the trial court upon proper application and cause shown.

[12 USC 1974.]

(e) *Civil actions by persons injured; jurisdiction and venue; amount of recovery.* Any person who is injured in his business or property by reason of anything forbidden in subsection (b) may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him and the cost of suit, including a reasonable attorney's fee.

[12 USC 1975.]

(f) *Injunctive relief of persons against threatened loss or damages; equitable proceedings; preliminary injunctions.* Any person may sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by reason of a violation of subsection (b), under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity and under the rules governing such proceedings. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

[12 USC 1976.]

(g) *Limitation of actions; suspension of limitations.*

(1) Subject to paragraph (2), any action to enforce any cause of action under this section shall be forever barred unless commenced within four years after the cause of action accrued.

(2) Whenever any enforcement action is instituted by or on behalf of the United States with respect to any matter which is or could be the subject of a private right of action under this section, the running of the statute of limitations in respect of every private right of action arising under this section and based in whole or in part on such matter shall be suspended during the pendency of the enforcement action so instituted and for one year thereafter: *Provided,* That whenever the running of the statute of limitations in respect of a cause of action arising under this section is suspended under this paragraph, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within the four-year period referred to in paragraph (1).

[12 USC 1977.]

(h) *Actions under other Federal or State laws unaffected; regulations or orders barred as a defense.* Nothing contained in this section shall be construed as affecting in any manner the right of the United States or any other party to bring an action under any other law of the United States or of any State, including any right which may exist in addition to specific statutory authority, challenging the legality of any act or practice which may be proscribed by this section. No regulation or order issued by the Board under this section shall in any manner constitute a defense to such action.

[12 USC 1978.]

Board of Governors of the Federal Reserve System

Official Staff Commentary on Regulation Z Truth in Lending

As revised effective February 28, 1997

Any inquiry relating to Regulation Z should be addressed to the Federal Reserve Bank of the Federal Reserve District in which the inquiry arises.

August 1997

Contents

Official Staff Commentary on Regulation Z

As revised effective February 28, 1997*

INTRODUCTION

1. *Official status.* This commentary is the vehicle by which the staff of the Division of Consumer and Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation Z. Good faith compliance with this commentary affords protection from liability under section 130(f) of the Truth in Lending Act. Section 130(f) (15 USC 1640) protects creditors from civil liability for any act done or omitted in good faith in conformity with any interpretation issued by a duly authorized official or employee of the Federal Reserve System.

2. *Procedure for requesting interpretations.* Under appendix C of the regulation, anyone may request an official staff interpretation. Interpretations that are adopted will be incorporated in this commentary following publication in the *Federal Register.* No official staff interpretations are expected to be issued other than by means of this commentary.

3. *Status of previous interpretations.* All statements and opinions issued by the Federal Reserve Board and its staff interpreting previous Regulation Z remain effective until October 1, 1982 only insofar as they interpret that regulation. When compliance with revised Regulation Z becomes mandatory on October 1, 1982, the Board and staff interpretations of the previous regulation will be entirely superseded by the revised regulation and this commentary except with regard to liability under the previous regulation.

4. *Rules of construction.*

(a) Lists that appear in the commentary may be exhaustive or illustrative; the appropriate construction should be clear from the context. In most cases, illustrative lists are introduced by phrases such as "including, but not limited to," "among other things," "for example," or "such as."

(b) Throughout the commentary and regulation, reference to the regulation should be construed to refer to revised Regulation Z, unless the context indicates that a reference to previous Regulation Z is also intended.

(c) Throughout the commentary, reference to "this section" or "this paragraph" means the section or paragraph in the regulation that is the subject of the comment.

5. *Comment designations.* Each comment in the commentary is identified by a number and the regulatory section or paragraph which it interprets. The comments are designated with as much specificity as possible according to the particular regulatory provision addressed. For example, some of the comments to section 226.18(b) are futher divided by subparagraph, such as comment 18(b)(1)-1 and comment 18(b)(2)-1. In other cases, comments have more general application and are designated, for example, as comment 18-1 or comment 18(b)-1. This introduction may be cited as comments I-1 through I-7. Comments to the appendixes may be cited, for example, as comment app. A-1.

6. *Cross-references.* The following cross-references to related material appear at the end of each section of the commentary: (a) "Statute"—those sections of the Truth in Lending Act on which the regulatory provision is based (and any other relevant statutes); (b) "Other sections"—other provisions in the regulation necessary to understand that section; (c) "Previous regulation"—parallel provisions in previous Regulation Z; and (d) "1981 changes"—a brief description of the major changes made by the 1981 revisions to Regulation Z. Where appropriate, a fifth category ("Other regulations") provides cross-references to other regulations.

7. *Transition rules.*

(a) Though compliance with the revised regulation is not mandatory until April 1, 1982, creditors may begin complying as of April 1, 1981. During the intervening year, a creditor may convert its entire operation to the new requirements at one time, or it

* Compliance with revisions optional until October 1, 1997.

may convert to the new requirements in stages. In general, however, a creditor may not mix the regulatory requirements when making disclosures for a particular closed-end transaction or open-end account; all the disclosures for a single closed-end transaction (or open-end account) must be made in accordance with the previous regulation, or all the disclosures must be made in accordance with the revised regulation. As an exception to the general rule, the revised rescission rules and the revised advertising rules may be followed even if the disclosures are based on the previous regulation. For purposes of this regulation, the creditor is not required to take any particular action beyond the requirements of the revised regulation to indicate its conversion to the revised regulation.

(b) The revised regulation may be relied on to determine if any disclosures are required for a particular transaction or to determine if a person is a "creditor" subject to Truth in Lending requirements, whether or not other operations have been converted to the revised regulation. For example, layaway plans are not subject to the revised regulation, nor are oral agreements to lend money if there is no finance charge. These provisions may be relied on even if the creditor is making other disclosures under the previous regulation. The new rules governing whether or not disclosures must be made for refinancings and assumptions are also available to a creditor that has not yet converted its operations to the revised regulation.

(c) In addition to the above rules, applicable to both open-end and closed-end credit, the following guidelines are relevant to open-end credit:

- The creditor need not remake initial disclosures that were made under the previous regulation, even if the revised periodic statements contain terminology that is inconsistent with those initial disclosures.
- A creditor may add inserts to its old open-end forms in order to convert them to the revised rules until such time as the old forms are used up.
- No change-in-terms notice is required for changes resulting from the conversion to the revised regulation.
- The previous billing rights statements are substantially similar to the revised billing rights statements and may continue to be used, except that, if the creditor has an automatic debit program, it must use the revised automatic debit provision.
- For those creditors wishing to use the annual billing rights statement, the creditor may count from the date on which it sent its last statement under the previous regulation in determining when to give the first statement under the new regulation. For example, if the creditor sent a semiannual statement in June 1981 and converts to the new regulation in October 1981, the creditor must give the billing rights statement sometime in 1982, and it must not be fewer than 6 nor more than 18 months after the June statement.
- Section 226.11 of the revised regulation affects only credit balances that are created on or after the date the creditor converts the account to the revised regulation.

SUBPART A—GENERAL

SECTION 226.1—Authority, Purpose, Coverage, Organization, Enforcement and Liability

1(c) Coverage

1. *Foreign applicability.* Regulation Z applies to all persons (including branches of foreign banks and sellers located in the United States) that extend consumer credit to residents (including resident aliens) of any state as defined in section 226.2. If an account is located in the United States and credit is extended to a U.S. resident, the transaction is subject to the regulation. This will be the case whether or not a particular advance or purchase on the account takes place in the United States and whether or not the extender of credit is chartered or based in the United States or a foreign country. Thus, a U.S. resident's use in

Europe of a credit card issued by a bank in the consumer's home town is covered by the regulation. The regulation does not apply to a foreign branch of a U.S. bank when the foreign branch extends credit to a U.S. citizen residing or visiting abroad or to a foreign national abroad.

References

Statute: § 102
Other sections: None
Previous regulation: § 226.1
1981 changes: A discussion of coverage has been added to section 226.1 so that the reader will understand from the start what is subject to the regulation. Language has also been added to explain the reorganization of the regulation into subparts that group together the provisions relating to general matters, open-end credit, closed-end credit, and miscellaneous rules. The provisions on consumer leasing have been issued by the Board as a separate regulation, Regulation M (12 CFR 213).

SECTION 226.2—Definitions and Rules of Construction

2(a) Definitions

2(a)(2) "Advertisement"

1. *Coverage.* Only commercial messages that promote consumer credit transactions requiring disclosures are advertisements. Messages inviting, offering, or otherwise announcing generally to prospective customers the availability of credit transactions, whether in visual, oral, or print media, are covered by the regulation. Examples include:

- Messages in a newspaper, magazine, leaflet, promotional flyer, or catalog
- Announcements on radio, television, or public address sytem
- Direct mail literature or other printed material on any exterior or interior sign
- Point-of-sale displays
- Telephone solicitations
- Price tags that contain credit information
- Letters sent to customers as part of an organized solicitation of business
- Messages on checking account statements offering auto loans at a stated annual percentage rate

The term does *not* include:

- Direct personal contacts, such as followup letters, cost estimates for individual consumers, or oral or written communication relating to the negotiation of a specific transaction
- Informational material, for example, interest rate and loan term memos, distributed only to business entities
- Notices required by federal or state law, if the law mandates that specific information be displayed and only the information so mandated is included in the notice
- News articles the use of which is controlled by the news medium
- Market research or educational materials that do not solicit business

2. *Persons covered.* All "persons" must comply with the advertising provisions in sections 226.16 and 226.24, not just those that meet the definition of creditor in section 226.2(a)-(17). Thus, home builders, merchants, and others who are not themselves creditors must comply with the advertising provisions of the regulation if they advertise consumer credit transactions. However, under section 145 of the act, the owner and the personnel of the medium in which an advertisement appears, or through which it is disseminated, are not subject to civil liability for violations.

2(a)(4) "Billing Cycle" or "Cycle"

1. *Intervals.* In open-end credit plans, the billing cycle determines the intervals for which periodic disclosure statements are required; these intervals are also used as measuring points for other duties of the creditor. Typically, billing cycles are monthly, but they may be more frequent or less frequent (but not less frequent than quarterly).

2. *Creditors that do not bill.* The term "cycle" is interchangeable with "billing cycle" for definitional purposes, since some creditors' cycles do not involve the sending of bills in the traditional sense but only statements of account activity. This is commonly the case with financial institutions when peri-

odic payments are made through payroll deduction or through automatic debit of the consumer's asset account.

3. *Equal cycles.* Although cycles must be equal, there is a permissible variance to account for weekends, holidays, and differences in the number of days in months. If the actual date of each statement does not vary by more than four days from a fixed "day" (for example, the third Thursday of each month) or "date" (for example, the 15th of each month) that the creditor regularly uses, the intervals between statements are considered equal. The requirement that cycles be equal applies even if the creditor applies a daily periodic rate to determine the finance charge. The requirement that intervals be equal does not apply to the transitional billing cycle that can occur when the creditor occasionally changes its billing cycles so as to establish a new statement day or date. (See the commentary to section 226.9(c).)

4. *Payment reminder.* The sending of a regular payment reminder (rather than a late payment notice) establishes a cycle for which the creditor must send periodic statements.

2(a)(6) "Business Day"

1. *Business function test.* Activities that indicate that the creditor is open for substantially all of its business functions include the availability of personnel to make loan disbursements, to open new accounts, and to handle credit transaction inquiries. Activities that indicate that the creditor is not open for substantially all of its business functions include a retailer's merely accepting credit cards for purchases or a bank's having its customer-service windows open only for limited purposes such as deposits and withdrawals, bill paying, and related services.

2. *Rescission rule.* A more precise rule for what is a business day (all calendar days except Sundays and the federal legal holidays listed in 5 USC 6103(a)) applies when the right of rescission is involved.

2(a)(7) "Card Issuer"

1. *Agent.* An agent of a card issuer is considered a card issuer. Because agency relationships are traditionally defined by contract and by state or other applicable law, the regulation does not define agent. Merely providing services relating to the production of credit cards or data processing for others, however, does not make one the agent of the card issuer. In contrast, a financial institution may become the agent of the card issuer if an agreement between the institution and the card issuer provides that the cardholder may use a line of credit with the financial institution to pay obligations incurred by use of the credit card.

2(a)(8) "Cardholder"

1. *General rule.* A cardholder is a natural person at whose request a card is issued for consumer credit purposes or who is a co-obligor or guarantor for such a card issued to another. The second category does not include an employee who is a co-obligor or guarantor on a card issued to the employer for business purposes, nor does it include a person who is merely the authorized user of a card issued to another.

2. *Limited application of regulation.* For the limited purposes of the rules on issuance of credit cards and liability for unauthorized use, a cardholder includes *any* person, including an organization, to whom a card is issued for *any* purpose—including a business, agricultural, or commercial purpose.

3. *Issuance.* See the commentary to section 226.12(a).

4. *Dual-purpose cards and dual-card systems.* Some card issuers offer dual-purpose cards that are for business as well as consumer purposes. If a card is issued to an individual for consumer purposes, the fact that an organization has guaranteed to pay the debt does not make it business credit. On the other hand, if a card is issued for business purposes, the fact that an individual sometimes uses it for consumer purchases does not subject the card issuer to the provisions on periodic statements, billing-error resolution, and other protections afforded to consumer credit. Some card issuers offer dual-card systems—that is, they issue two cards to the same individual, one intended for business use, the other for consumer or

personal use. With such a system, the same person may be a cardholder for general purposes when using the card issued for consumer use, and a cardholder only for the limited purposes of the restrictions on issuance and liability when using the card issued for business purposes.

2(a)(9) "Cash Price"

1. *Components.* This amount is a starting point in computing the amount financed and the total sale price under section 226.18 for credit sales. Any charges imposed equally in cash and credit transactions may be included in the cash price, or they may be treated as other amounts financed under section 226.18(b)(2).

2. *Service contracts.* Service contracts include contracts for the repair or the servicing of goods, such as mechanical breakdown coverage, even if such a contract is characterized as insurance under state law.

3. *Rebates.* The creditor has complete flexibility in the way it treats rebates for purposes of disclosure and calculation. See the commentary to section 226.18(b).

2(a)(10) "Closed-End Credit"

1. *General.* The coverage of this term is defined by exclusion. That is, it includes any credit arrangement that does not fall within the definition of open-end credit. Subpart C contains the disclosure rules for closed-end credit when the obligation is subject to a finance charge or is payable by written agreement in more than four installments.

2(a)(11) "Consumer"

1. *Scope.* Guarantors, endorsers, and sureties are not generally consumers for purposes of the regulation, but they may be entitled to rescind under certain circumstances and they may have certain rights if they are obligated on credit card plans.

2. *Rescission rules.* For purposes of rescission under sections 226.15 and 226.23, a consumer includes any natural person whose ownership interest in his or her principal dwelling is subject to the risk of loss. Thus, if a security interest is taken in A's ownership interest in a house and that house is A's principal dwelling, A is a consumer for purposes of rescission, even if A is not liable, either primarily or secondarily, on the underlying consumer credit transaction. An ownership interest does not include, for example, leaseholds or inchoate rights, such as dower.

3. *Land trusts.* Credit extended to land trusts, as described in the commentary to section 226.3(a), is considered to be extended to a natural person for purposes of the definition of consumer.

2(a)(12) "Consumer Credit"

1. *Primary purpose.* There is no precise test for what constitutes credit offered or extended for personal, family, or household purposes, nor for what constitutes the primary purpose. See, however, the discussion of business purposes in the commentary to section 226.3(a).

2(a)(13) "Consummation"

1. *State law governs.* When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law; Regulation Z does not make this determination. A contractual commitment agreement, for example, that under applicable law binds the consumer to the credit terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a nonrefundable fee) unless, of course, applicable law holds otherwise.

2. *Credit v. sale.* Consummation does not occur when the consumer becomes contractually committed to a *sale* transaction, unless the consumer also becomes legally obligated to accept a particular credit arrangement. For example, when a consumer pays a nonrefundable deposit to purchase an automobile, a purchase contract may be created, but consummation for purposes of the regulation does not occur unless the consumer also contracts for financing at that time.

2(a)(14) "Credit"

1. *Exclusions.* The following situations are not considered credit for purposes of the regulation:

- Layaway plans, unless the consumer is contractually obligated to continue making payments. Whether the consumer is so obligated is a matter to be determined under applicable law. The fact that the consumer is not entitled to a refund of any amounts paid towards the cash price of the merchandise does not bring layaways within the definition of credit.
- Tax liens, tax assessments, court judgments, and court approvals of reaffirmation of debts in bankruptcy. However, third-party financing of such obligations (for example, a bank loan obtained to pay off a tax lien) is credit for purposes of the regulation.
- Insurance premium plans that involve payment in installments with each installment representing the payment for insurance coverage for a certain future period of time, unless the consumer is contractually obligated to continue making payments
- Home improvement transactions that involve progress payments, if the consumer pays, as the work progresses, only for work completed and has no contractual obligation to continue making payments
- "Borrowing" against the accrued cash value of an insurance policy or a pension account, if there is no independent obligation to repay
- Letters of credit
- The execution of option contracts. However, there may be an extension of credit when the option is exercised, if there is an agreement at that time to defer payment of a debt.
- Investment plans in which the party extending capital to the consumer risks the loss of the capital advanced. This includes, for example, an arrangement with a home purchaser in which the investor pays a portion of the downpayment and of the periodic mortgage payments in return for an ownership interest in the property, and shares in any gain or loss of property value.
- Mortgage assistance plans administered by a government agency in which a portion of the consumer's monthly payment amount is paid by the agency. No finance charge is imposed on the subsidy amount, and that amount is due in a lump-sum payment on a set date or upon the occurrence of certain events. (If payment is not made when due, a new note imposing a finance charge may be written, which may then be subject to the regulation.)

2(a)(15) "Credit Card"

1. *Usable from time to time.* A credit card must be usable from time to time. Since this involves the possibility of repeated use of a single device, checks and similar instruments that can be used only once to obtain a single credit extension are not credit cards.

2. *Examples.* Examples of credit cards include:

- A card that guarantees checks or similar instruments, if the asset account is also tied to an overdraft line or if the instrument directly accesses a line of credit
- A card that accesses both a credit and an asset account (that is, a debit-credit card)
- An identification card that permits the consumer to defer payment on a purchase
- An identification card indicating loan approval that is presented to a merchant or to a lender, whether or not the consumer signs a separate promissory note for each credit extension

In contrast, credit card does not include, for example:

- A check-guarantee or debit card with no credit feature or agreement, even if the creditor occasionally honors an inadvertent overdraft
- Any card, key, plate, or other device that is used in order to obtain petroleum products for business purposes from a wholesale distribution facility or to gain access to that facility, and that is required to be used without regard to payment terms.

3. *Charge card.* Generally, charge cards are cards used in connection with an account on which outstanding balances cannot be carried

from one billing cycle to another and are payable when a periodic statement is received. Under the regulation, a reference to credit cards generally includes charge cards. The term "charge card" is, however, distinguished from "credit card" in sections 226.5a, 226.9(e), 226.9(f) and 226.28(d), and appendixes G–10 through G–13. When the term "credit card" is used in those provisions, it refers to credit cards other than charge cards.

2(a)(16) "Credit Sale"

1. *Special disclosure.* If the seller is a creditor in the transaction, the transaction is a credit sale and the special credit sale disclosures (that is, the disclosures under section 226.18(j)) must be given. This applies even if there is more than one creditor in the transaction and the creditor making the disclosures is not the seller. See the commentary to section 226.17(d).

2. *Sellers who arrange credit.* If the seller of the property or services involved arranged for financing but is not a creditor as to that sale, the transaction is not a credit sale. Thus, if a seller assists the consumer in obtaining a direct loan from a financial institution and the consumer's note is payable to the financial institution, the transaction is a loan and only the financial institution is a creditor.

3. *Refinancings.* Generally, when a credit sale is refinanced within the meaning of section 226.20(a), loan disclosures should be made. However, if a new sale of goods or services is also involved, the transaction is a credit sale.

4. *Incidental sales.* Some lenders "sell" a product or service—such as credit, property, or health insurance—as part of a loan transaction. Section 226.4 contains the rules on whether the cost of credit life, disability or property insurance is part of the finance charge. If the insurance is financed, it may be disclosed as a separate credit sale transaction or disclosed as part of the primary transaction; if the latter approach is taken, either loan or credit sale disclosures may be made. See the commentary to section 226.17(c)(1) for further discussion of this point.

5. *Credit extensions for educational purposes.* A credit extension for educational purposes in which an educational institution is the creditor may be treated as either a credit sale or a loan, regardless of whether the funds are given directly to the student, credited to the student's account, or disbursed to other persons on the student's behalf. The disclosure of the total sale price need not be given if the transaction is treated as a loan.

2(a)(17) "Creditor"

1. *General.* The definition contains four independent tests. If any one of the tests is met, the person is a creditor for purposes of that particular test.

Paragraph 2(a)(17)(i)

1. *Prerequisites.* This test is composed of two requirements, both of which must be met in order for a particular credit extension to be subject to the regulation and for the credit extension to count towards satisfaction of the numerical tests mentioned in footnote 3 to section 226.2(a)(17). *First,* there must be either or both of the following:

- A written (rather than oral) agreement to pay in more than four installments. A letter that merely confirms an oral agreement does not constitute a written agreement for purposes of the definition.
- A finance charge imposed for the credit. The obligation to pay the finance charge need not be in writing.

Second, the obligation must be payable to the person in order for that person to be considered a creditor. If an obligation is made payable to "bearer," the creditor is the one who initially accepts the obligation.

2. *Assignees.* If an obligation is initially payable to one person, that person is the creditor even if the obligation by its terms is simultaneously assigned to another person. For example:

- An auto dealer and a bank have a business relationship in which the bank supplies the dealer with credit sale contracts that are initially made payable to the dealer and provide for the immediate assignment of the obligation to the bank. The dealer and purchaser execute the contract only after

the bank approves the creditworthiness of the purchaser. Because the obligation is initially payable on its face to the dealer, the dealer is the only creditor in the transaction.

3. *Numerical tests.* The examples below illustrate how the numerical tests of footnote 3 are applied. The examples assume that consumer credit with a finance charge or written agreement for more than four installments was extended in the years in question and that the person did not extend such credit in 1982.

4. *Counting transactions.* For purposes of closed-end credit, the creditor counts each credit transaction. For open-end credit, "transactions" means accounts, so that outstanding accounts are counted instead of individual credit extensions. Normally the number of transactions is measured by the preceding calendar year; if the requisite number is met, then the person is a creditor for all transactions in the current year. However, if the person did not meet the test in the preceding year, the number of transactions is measured by the current calendar year. For example, if the person extends consumer credit 26 times in 1983, it is a creditor for purposes of the regulation for the last extension of credit in 1983 and for all extensions of consumer credit in 1984. On the other hand, if a business begins in 1983 and extends consumer credit 20 times, it is not a creditor for purposes of the regulation in 1983. If it extends consumer credit 75 times in 1984, however, it becomes a creditor for purposes of the regulation (and must begin making disclosures) after the 25th extension of credit in that year and is a creditor for all extensions of consumer credit in 1985.

5. *Relationship between consumer credit in general and credit secured by a dwelling.* Extensions of credit secured by a dwelling are counted towards the 25-extensions test. For example, if in 1983 a person extends unsecured consumer credit 23 times and consumer credit secured by a dwelling twice, it becomes a creditor for the succeeding extensions of credit, whether or not they are secured by a dwelling. On the other hand, extensions of consumer credit not secured by a dwelling are *not* counted towards the number of credit extensions secured by a dwelling. For example, if in 1983 a person extends credit not secured by a dwelling eight times and credit secured by a dwelling three times, it is not a creditor.

6. *Effect of satisfying one test.* Once one of the numerical tests is satisfied, the person is also a creditor for the other type of credit. For example, in 1983 a person extends consumer credit secured by a dwelling five times. That person is a creditor for all succeeding credit extensions, whether they involve credit secured by a dwelling or not.

7. *Trusts.* In the case of credit extended by trusts, each individual trust is considered a separate entity for purposes of applying the criteria. For example:

- A bank is the trustee for three trusts. Trust A makes 15 extensions of consumer credit annually; Trust B makes 10 extensions of consumer credit annually; and Trust C makes 30 extensions of consumer credit annually. Only Trust C is a creditor for purposes of the regulation.

8. *Loans from employee savings plans.* Some employee savings plans permit participants to borrow money up to a certain percentage of their account balances, and use a trust to administer the receipt and disbursement of funds. Unless each participant's account is an individual plan and trust, the creditor should apply the numerical tests to the plan as a whole rather than to the individual account, even if the loan amount is determined by reference to the balance in the individual account and the repayments are credited to the individual account. The person to whom the obligation is originally made payable (whether the plan, the trust, or the trustee) is the creditor for purposes of the act and regulation.

Paragraph 2(a)(17)(iii)

1. *Card issuers subject to subpart B.* Section 226.2(a)(17)(iii) makes certain card issuers creditors for purposes of the open-end credit provisions of the regulation. This includes, for example, the issuers of so-called travel and entertainment cards that expect repayment at the first billing and do not impose a finance charge. Since all disclosures are to be made

only as applicable, such card issuers would omit finance charge disclosures. Other provisions of the regulation regarding such areas as scope, definitions, determination of which charges are finance charges, Spanish language disclosures, record retention, and use of model forms, also apply to such card issuers.

Paragraph 2(a)(17)(iv)

1. *Card issuers subject to subparts B and C.* Section 226.2(a)(17)(iv) includes as creditors card issuers extending closed-end credit in which there is a finance charge or an agreement to pay in more than four installments. These card issuers are subject to the appropriate provisions of subparts B and C, as well as to the general provisions.

2(a)(18) "Downpayment"

1. *Allocation.* If a consumer makes a lump-sum payment, partially to reduce the cash price and partially to pay prepaid finance charges, only the portion attributable to reducing the cash price is part of the downpayment. (See the commentary to section 226.2(a)(23).)

2. *Pickup payments.* Creditors may treat the deferred portion of the downpayment, often referred to as "pickup payments," in a number of ways. If the pickup payment is treated as part of the downpayment:

- It is subtracted in arriving at the amount financed under section 226.18(b)
- It may, but need not, be reflected in the payment schedule under section 226.18(g)

If the pickup payment does not meet the definition (for example, if it is payable after the second regularly scheduled payment) or if the creditor chooses not to treat it as part of the downpayment:

- It must be included in the amount financed
- It must be shown in the payment schedule

Whichever way the pickup payment is treated, the total of payments under section 226.18(h) must equal the sum of the payments disclosed under section 226.18(g).

2(a)(19) "Dwelling"

1. *Scope.* A dwelling need not be the consumer's *principal* residence to fit the definition, and thus a vacation or second home could be a dwelling. However, for purposes of the definition of residential mortgage transaction and the right to rescind, a dwelling must be the principal residence of the consumer. See the commentary to sections 226.2(a)(24), 226.15, and 226.23.

2. *Use as a residence.* Mobile homes, boats, and trailers are dwellings if they are in fact used as residences, just as are condominium and cooperative units. Recreational vehicles, campers, and the like not used as residences are not dwellings.

3. *Relation to exemptions.* Any transaction involving a security interest in a consumer's principal dwelling (as well as in any real property) remains subject to the regulation despite the general exemption in section 226.3(b) for credit extensions over $25,000.

2(a)(20) "Open-End Credit"

1. *General.* This definition describes the characteristics of open-end credit (for which the applicable disclosure and other rules are contained in subpart B), as distinct from closed-end credit. Open-end credit is consumer credit that is extended under a plan and meets *all three* criteria set forth in the definition.

2. *Existence of a plan.* The definition requires that there be a plan, which connotes a contractual arrangement between the creditor and the consumer. Some creditors offer programs containing a number of different credit features. The consumer has a single account with the institution that can be accessed repeatedly via a number of subaccounts established for the different program features and rate structures. Some features of the program might be used repeatedly (for example, an overdraft line), while others might be used infrequently (such as the part of the credit line available for secured credit). If the program as a whole is subject to prescribed terms and otherwise meets the definition of open-end credit, such a program would be considered a single, multifeatured plan.

3. *Repeated transactions.* Under this criterion, the creditor must reasonably contemplate re-

peated transactions. This means that the credit plan must be usable from time to time and the creditor must legitimately expect that there will be repeat business rather than a one-time credit extension. The creditor must expect repeated dealings with the consumer under the credit plan as a whole and need not believe the consumer will reuse a particular feature of the plan. A standard based on reasonable belief by a creditor necessarily includes some margin for judgmental error. The fact that a particular consumer does not return for further credit extensions does not prevent a plan from having been properly characterized as open-end. For example, if much of the customer base of a clothing store makes repeat purchases, the fact that some consumers use the plan only once would not affect the characterization of the store's plan as open-end credit. The criterion regarding repeated transactions is a question of fact to be decided in the context of the creditor's type of business and the creditor's relationship with the consumer. For example:

- It would be more reasonable for a thrift institution chartered for the benefit of its members to contemplate repeated transactions with a member than for a seller of aluminum siding to make the same assumption about its customers.
- It would be more reasonable for a bank to make advances from a line of credit for the purchase of an automobile than for an automobile dealer to sell a car under an open-end plan.

4. *Finance charge on an outstanding balance.* The requirement that a finance charge may be computed and imposed from time to time on the outstanding balance means that there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated. A plan may meet the definition of open-end credit even though a finance charge is not normally imposed, provided the creditor has the right, under the plan, to impose a finance charge from time to time on the outstanding balance. For example, in some plans, such as certain "china club" plans, a finance charge is not imposed if the consumer pays all or a specified portion of the outstanding balance within a given time period. Such a plan could meet the finance-charge criterion, if the creditor has the right to impose a finance charge, even though the consumer actually pays no finance charges during the existence of the plan because the consumer takes advantage of the option to pay the balance (either in full or in installments) within the time necessary to avoid finance charges.

5. *Reusable line.* The total amount of credit that may be extended during the existence of an open-end plan is unlimited because available credit is generally replenished as earlier advances are repaid. A line of credit is self-replenishing even though the plan itself has a fixed expiration date, as long as during the plan's existence the consumer may use the line, repay, and reuse the credit. The creditor may verify credit information such as the consumer's continued income and employment status or information for security purposes. This criterion of unlimited credit distinguishes open-end credit from a series of advances made pursuant to a closed-end credit loan commitment. For example:

- Under a closed-end commitment, the creditor might agree to lend a total of $10,000 in a series of advances as needed by the consumer. When a consumer has borrowed the full $10,000, no more is advanced under that particular agreement, even if there has been repayment of a portion of the debt.

This criterion does not mean that the creditor must establish a specific credit limit for the line of credit or that the line of credit must always be replenished to its original amount. The creditor may reduce a credit limit or refuse to extend new credit in a particular case due to changes in the economy, the creditor's financial condition, or the consumer's creditworthiness. (The rules in section 226.5b (f), however, limit the ability of a creditor to suspend credit advances for home-equity plans.) While consumers should have a reasonable expectation of obtaining credit as long as they remain current and within any preset credit limits, further extensions of credit need not be an absolute right in order for the plan to meet the self-replenishing criterion.

6. *Open-end real estate mortgages.* Some credit plans call for negotiated advances under so-called open-end real estate mortgages. Each such plan must be independently measured against the definition of "open-end credit," regardless of the terminology used in the industry to describe the plan. The fact that a particular plan is called an open-end real estate mortgage, for example, does not, by itself, mean that it is open-end credit under the regulation.

2(a)(21) "Periodic Rate"

1. *Basis.* The periodic rate may be stated as a percentage (for example, 1½ percent per month) or as a decimal equivalent (for example, .015 monthly). It may be based on any portion of a year the creditor chooses. Some creditors use 1/360 of an annual rate as their periodic rate. These creditors:

- May disclose a 1/360 rate as a "daily" periodic rate, without further explanation, if it is in fact only applied 360 days per year. But if the creditor applies that rate for 365 days, the creditor must note that fact and, of course, disclose the true annual percentage rate.
- Would have to apply the rate to the balance to disclose the annual percentage rate with the degree of accuracy required in the regulation (that is, within 1/8 of 1 percentage point of the rate based on the actual 365 days in the year).

2. *Transaction charges.* "Periodic rate" does not include initial one-time transaction charges, even if the charge is computed as a percentage of the transaction amount.

2(a)(22) "Person"

1. *Joint ventures.* A joint venture is an organization and is therefore a person.

2. *Attorneys.* An attorney and his or her client are considered to be the same person for purposes of this regulation when the attorney is acting within the scope of the attorney-client relationship with regard to a particular transaction.

3. *Trusts.* A trust and its trustee are considered to be the same person for purposes of this regulation.

2(a)(23) "Prepaid Finance Charge"

1. *General.* Prepaid finance charges must be taken into account under section 226.18(b) in computing the disclosed amount financed, and must be disclosed if the creditor provides an itemization of the amount financed under section 226.18(c).

2. *Examples.* Common examples of prepaid finance charges include:

- Buyer's points
- Service fees
- Loan fees
- Finder's fees
- Loan-guarantee insurance
- Credit-investigation fees

However, in order for these or any other finance charges to be considered prepaid, they must be either paid separately in cash or check or withheld from the proceeds. Prepaid finance charges include any portion of the finance charge paid prior to or at closing or settlement.

3. *Exclusions.* "Add-on" and "discount" finance charges are not prepaid finance charges for purposes of this regulation. Finance charges are not "prepaid" merely because they are precomputed, whether or not a portion of the charge will be rebated to the consumer upon prepayment. See the commentary to section 226.18(b).

4. *Allocation of lump-sum payments.* In a credit sale transaction involving a lump-sum payment by the consumer and a discount or other item that is a finance charge under section 226.4, the discount or other item is a prepaid finance charge to the extent the lump-sum payment is not applied to the cash price. For example, a seller sells property to a consumer for $10,000, requires the consumer to pay $3,000 at the time of the purchase, and finances the remainder as a closed-end credit transaction. The cash price of the property is $9,000. The seller is the creditor in the transaction and therefore the $1,000 difference between the credit and cash prices (the discount) is a finance charge. (See the commentary to

sections 226.4(b)(9) and 226.4(c)(5).) If the creditor applies the entire $3,000 to the cash price and adds the $1,000 finance charge to the interest on the $6,000 to arrive at the total finance charge, all of the $3,000 lump-sum payment is a downpayment and the discount is not a prepaid finance charge. However, if the creditor only applies $2,000 of the lump-sum payment to the cash price, then $2,000 of the $3,000 is a downpayment and the $1,000 discount is a prepaid finance charge.

2(a)(24) "Residential Mortgage Transaction"

1. *Relation to other sections.* This term is important in six provisions in the regulation:

- Section 226.4(c)(7)—exclusions from the finance charge
- Section 226.15(f)—exemption from the right of rescission
- Section 226.18(q)—whether or not the obligation is assumable
- Section 226.19—special timing rules
- Section 226.20(b)—disclosure requirements for assumptions
- Section 226.23(f)—exemption from the right of rescission

2. *Lien status.* The definition is not limited to first lien transactions. For example, a consumer might assume a paid-down first mortgage (or borrow part of the purchase price) and borrow the balance of the purchase price from a creditor who takes a second mortgage. The second mortgage transaction is a "residential mortgage transaction" if the dwelling purchased is the consumer's principal residence.

3. *Principal dwelling.* A consumer can have only *one* principal dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of applying this definition to a particular transaction. See the commentary to sections 226.15(a) and 226.23(a).

4. *Construction financing.* If a transaction meets the definition of a residential mortgage transaction and the creditor chooses to disclose it as several transactions under section 226.17(c)(6), each one is considered to be a residential mortgage transaction, even if different creditors are involved. For example:

- The creditor makes a construction loan to finance the initial construction of the consumer's principal dwelling, and the loan will be disbursed in five advances. The creditor gives six sets of disclosures (five for the construction phase and one for the permanent phase). Each one is a residential mortgage transaction.
- One creditor finances the initial construction of the consumer's principal dwelling and another creditor makes a loan to satisfy the construction loan and provide permanent financing. Both transactions are residential mortgage transactions.

5. *Acquisition.* A transaction is not "to finance the acquisition" of the consumer's principal dwelling (and therefore is not a residential mortgage transaction) if the consumer had previously purchased the dwelling and acquired some title to the dwelling, even though the consumer has not acquired full legal title. Thus, the following types of transactions are not residential mortgage transactions:

- The financing of a balloon payment due under a land sale contract
- An extension of credit made to a joint owner of property to buy out the other joint owner's interest

As a result, in giving the disclosures for these transactions several provisions of the regulation are not applicable, for example, the exceptions to the right of rescission (sections 226.23(f)(1) and 226.15(f)(1)), the early disclosure requirement (section 226.19(a)), and the disclosure concerning assumability (section 226.18(q)). In the following situation, by contrast, since the transaction is not a residential mortgage transaction, no disclosures are required by section 226.20(b) and therefore the right of rescission does not apply:

- A written agreement between a creditor holding a seller's mortgage and the buyer of the property which allows the buyer to assume the mortgage, where the buyer pre-

viously purchased the property and agreed with the seller to make the mortgage payments.

6. *Multiple-purpose transactions.* A transaction meets the definition of this section if any part of the loan proceeds will be used to finance the acquisition or initial construction of the consumer's principal dwelling. For example, a transaction to finance the initial construction of the consumer's principal dwelling is a residential mortgage transaction even if a portion of the funds will be disbursed directly to the consumer or used to satisfy a loan for the purchase of the land on which the dwelling will be built.

2(a)(25) "Security Interest"

1. *Threshold test.* The threshold test is whether a particular interest in property is recognized as a security interest under applicable law. The regulation does not determine whether a particular interest *is* a security interest under applicable law. If the creditor is unsure whether a particular interest is a security interest under applicable law (for example, if statutes and case law are either silent or inconclusive on the issue), the creditor may at its option consider such interests as security interests for Truth in Lending purposes. However, the regulation and the commentary do exclude specific interests, such as after-acquired property and accessories, from the scope of the definition regardless of their categorization under applicable law, and these named exclusions may not be disclosed as security interests under the regulation. (But see the discussion of exclusions elsewhere in the commentary to section 226.2(a)(25).)

2. *Exclusions.* The general definition of security interest excludes three groups of interests: incidental interests, interests in after-acquired property, and interests that arise solely by operation of law. These interests may not be disclosed with the disclosures required under section 226.18, but the creditor is not precluded from preserving these rights elsewhere in the contract documents, or invoking and enforcing such rights, if it is otherwise lawful to do so. If the creditor is unsure whether a particular interest is one of the excluded interests, the creditor may, at its option, consider such interests as security interests for Truth in Lending purposes.

3. *Incidental interests.* Incidental interests in property that are not security interests include, among other things:

- Assignment of rents
- Right to condemnation proceeds
- Interests in accessories and replacements
- Interests in escrow accounts, such as for taxes and insurance
- Waiver of homestead or personal property rights

The notion of an "incidental interest" does not encompass an explicit security interest in an insurance policy if that policy is the primary collateral for the transaction—for example, in an insurance premium financing transaction.

4. *Operation of law.* Interests that arise solely by operation of law are excluded from the general definition. Also excluded are interests arising by operation of law that are merely repeated or referred to in the contract. However, if the creditor has an interest that arises by operation of law, such as a vendor's lien, and takes an independent security interest in the same property, such as a UCC security interest, the latter interest is a disclosable security interest unless otherwise provided.

5. *Rescission rules.* Security interests that arise solely by operation of law are security interests for purposes of rescission. Examples of such interests are mechanics' and materialmen's liens.

6. *Specificity of disclosure.* A creditor need not separately disclose multiple security interests that it may hold in the same collateral. The creditor need only disclose that the transaction is secured by the collateral, even when security interests from prior transactions remain of record and a new security interest is taken in connection with the transaction. In disclosing the fact that the transaction is secured by the collateral, the creditor also need not disclose how the security interest arose. For example, in a closed-end credit transaction, a rescission notice need not specifically state that a new security interest is "acquired"

or an existing security interest is "retained" in the transaction.

The acquisition or retention of a security interest in the consumer's principal dwelling instead may be disclosed in a rescission notice with a general statement such as the following: "Your home is the security for the new transaction."

2(b) Rules of Construction

1. *Footnotes.* Footnotes are used extensively in the regulation to provide special exceptions and more detailed explanations and examples. Material that appears in a footnote has the same legal weight as material in the body of the regulation.

References

Statute: § 103
Other sections: None
Other regulations: Regulation E (12 CFR 205.2(d))
Previous regulation: §§ 226.2, 226.8, and 226.9
1981 changes: Section 226.2 implements amended section 103 of the act. Separate definitions for "comparative index of credit cost," "discount," "organization," "period," "real property," "real property transaction," "regular price," and "surcharge" have been deleted. The definitions relating specifically to consumer leases are now found in the separate consumer leasing regulation, Regulation M (12 CFR 213).

Several terms are now defined elsewhere in the regulation or commentary rather than in section 226.2. For example, "finance charge" is described and explained in section 226.4, and "agricultural purpose" is discussed in the commentary to section 226.3. Some terms, such as "unauthorized use," are now defined as part of the substantive sections to which they apply. Other terms previously defined, such as "customer" and "organization," are merged into new definitions. Section 226.2 contains new definitions for "arranger of credit," "business day," "closed-end credit," "consumer," "consummation," "downpayment," "prepaid finance charge," and "residential mortgage transaction."

The major changes in the definitions are as follows:

"Arranger of credit" has a significantly different meaning. It reflects the statutory amendment that limits "arrangers" to those who regularly arrange credit extensions for persons who are not themselves creditors. This definition was deleted effective October 1, 1982.

"Billing cycle" largely restates the prior definition, but requires cycles to be regular, and allows the four-day variance to be measured from a regular day as well as date. The definition also incorporates an interpretation that cycles may be no longer than quarterly.

"Business day" is new in the sense that the term previously appeared only in a footnote to the rescission provision, but it is now of general applicability. The general rule that it is a day when the creditor is open for business is new, but the rule for rescission purposes is the same as in the previous regulation.

"Cash price" now explicitly permits inclusion of various incidental charges imposed equally in cash and credit transactions.

"Consumer" has a narrower meaning in that guarantors, sureties, and endorsers are excluded from the general definition.

"Consumer credit" reflects the new statutory exemption for agricultural credit.

"Consummation" is a significant departure from longstanding interpretations of the previous definition. It now focuses only on the time the consumer becomes contractually obligated, rather than the time the consumer pays a nonrefundable fee or suffers an economic penalty for failing to go forward with the credit transaction.

"Credit" generally parallels the previous definition, but modifies the previous interpretations of the definition by excluding more transactions.

"Creditor" reflects the statutory amendments to the act that were intended to eliminate the problem of multiple creditors in a transaction. The "regularly" standard is still used, but it is now defined in terms of the frequency of the credit extensions. The new definition also requires that there be a *written* agreement to pay in more than four installments if no finance charge is imposed. Fi-

nally, the obligation must be initially payable to a person for that person to be the creditor.

"Dwelling" reflects the statutory amendment that expanded the scope of the definition to include *any* residential structure, whether or not it is real property under state law.

"Open-end credit" reflects the amended statutory definition requiring that the creditor reasonably contemplate repeated transactions. The new definition no longer requires the consumer to have the privilege of paying either in installments or in full.

"Periodic rate" combines the previous definitions of "period" and "periodic rate" with clarification in the commentary concerning transaction charges and 360-day-year factors.

"Security interest" is much narrower than the previous definition. Reflecting the legislative history of the simplification amendments, incidental interests are expressly excluded from the definition. Except for purposes of rescission, interests that arise solely by operation of law are also excluded.

SECTION 226.3—Exempt Transactions

3(a) Business, Commercial, Agricultural, or Organizational Credit

1. *Primary purposes.* A creditor must determine in each case if the transaction is primarily for an exempt purpose. If some question exists as to the primary purpose for a credit extension, the creditor is, of course, free to make the disclosures, and the fact that disclosures are made under such circumstances is not controlling on the question of whether the transaction was exempt.

2. *Factors.* In determining whether credit to finance an acquisition—such as securities, antiques, or art—is primarily for business or commercial purposes (as opposed to a consumer purpose), the following factors should be considered:

- The relationship of the borrower's primary occupation to the acquisition. The more closely related, the more likely it is to be business purpose.
- The degree to which the borrower will personally manage the acquisition. The more personal involvement there is, the more likely it is to be business purpose.
- The ratio of income from the acquisition to the total income of the borrower. The higher the ratio, the more likely it is to be business purpose.
- The size of the transaction. The larger the transaction, the more likely it is to be business purpose.
- The borrower's statement of purpose for the loan.

Examples of business-purpose credit include:

- A loan to expand a business, even if it is secured by the borrower's residence or personal property
- A loan to improve a principal residence by putting in a business office
- A business account used occasionally for consumer purposes

Examples of consumer-purpose credit include:

- Credit extensions by a company to its employees or agents if the loans are used for personal purposes
- A loan secured by a mechanic's tools to pay a child's tuition
- A personal account used occasionally for business purposes

3. *Non-owner-occupied rental property.* Credit extended to acquire, improve, or maintain rental property (regardless of the number of housing units) that is not owner-occupied is deemed to be for business purposes. This includes, for example, the acquisition of a warehouse that will be leased or a single-family house that will be rented to another person to live in. If the owner expects to occupy the property for more than 14 days during the coming year, the property cannot be considered non-owner-occupied and this special rule will not apply. For example, a beach house that the owner will occupy for a month in the coming summer and rent out the rest of the year is owner-occupied and is not governed by this special rule. See comment 3(a)-4, however, for rules relating to owner-occupied rental property.

4. *Owner-occupied rental property.* If credit is extended to acquire, improve, or maintain rental property that is or will be owner-

occupied within the coming year, different rules apply:

- Credit extended to acquire the rental property is deemed to be for business purposes if it contains more than two housing units.
- Credit extended to improve or maintain the rental property is deemed to be for business purposes if it contains more than four housing units. Since the amended statute defines "dwelling" to include one to four housing units, this rule preserves the right of rescission for credit extended for purposes other than acquisition.

Neither of these rules means that an extension of credit for property containing fewer than the requisite number of units is necessarily consumer credit. In such cases, the determination of whether it is business or consumer credit should be made by considering the factors listed in comment 3(a)-2.

5. *Business credit later refinanced.* Business purpose credit that is exempt from the regulation may later be rewritten for consumer purposes. Such a transaction is consumer credit requiring disclosures only if the existing obligation is satisfied and replaced by a new obligation made for consumer purposes undertaken by the same obligor.

6. *Agricultural purpose.* An "agricultural purpose" includes the planting, propagating, nurturing, harvesting, catching, storing, exhibiting, marketing, transporting, processing, or manufacturing of food, beverages (including alcoholic beverages), flowers, trees, livestock, poultry, bees, wildlife, fish, or shellfish by a natural person engaged in farming, fishing, or growing crops, flowers, trees, livestock, poultry, bees, or wildlife. The exemption also applies to a transaction involving real property that includes a dwelling (for example, the purchase of a farm with a homestead) if the transaction is primarily for agricultural purposes.

7. *Organizational credit.* The exemption for transactions in which the borrower is not a natural person applies, for example, to loans to corporations, partnerships, associations, churches, unions, and fraternal organizations. The exemption applies regardless of the purpose of the credit extension and regardless of the fact that a natural person may guarantee or provide security for the credit.

8. *Land trusts.* Credit extended for consumer purposes to a land trust is considered to be credit extended to a natural person rather than credit extended to an organization. In some jurisdictions, a financial institution financing a residential real estate transaction for an individual uses a land trust mechanism. Title to the property is conveyed to the land trust for which the financial institution itself is trustee. The underlying installment note is executed by the financial institution in its capacity as trustee and payment is secured by a trust deed, reflecting title in the financial institution as trustee. In some instances, the consumer executes a personal guaranty of the indebtedness. The note provides that it is payable only out of the property specifically described in the trust deed and that the trustee has no personal liability on the note. Assuming the transactions are for personal, family, or household purposes, these transactions are subject to the regulation since in substance (if not form) consumer credit is being extended.

3(b) Credit Over $25,000 Not Secured by Real Property or a Dwelling

1. *Coverage.* Since a mobile home can be a dwelling under section 226.2(a)(19), this exemption does not apply to a credit extension secured by a mobile home used or expected to be used as the principal dwelling of the consumer, even if the credit exceeds $25,000. A loan commitment for closed-end credit in excess of $25,000 is exempt even though the amounts actually drawn never actually reach $25,000.

2. *Open-end credit.* An open-end credit plan is exempt under section 226.3(b) (unless secured by real property or personal property used or expected to be used as the consumer's principal dwelling) if either of the following conditions is met:

- The creditor makes a firm commitment to lend over $25,000 with no requirement of additional credit information for any advances.

- The initial extension of credit on the line exceeds $25,000.

If a security interest is taken at a later time in any real property, or in personal property used or expected to be used as the consumer's principal dwelling, the plan would no longer be exempt. The creditor must comply with all of the requirements of the regulation, including, for example, providing the consumer with an initial disclosure statement. If the security interest being added is in the consumer's principal dwelling, the creditor must also give the consumer the right to rescind the security interest. (See the commentary to section 226.15 concerning the right of rescission.)

3. *Closed-end credit—subsequent changes.* A closed-end loan for over $25,000 may later be rewritten for $25,000 or less, or a security interest in real property or in personal property used or expected to be used as the consumer's principal dwelling may be added to an extension of credit for over $25,000. Such a transaction is consumer credit requiring disclosures only if the existing obligation is satisfied and replaced by a new obligation made for consumer purposes undertaken by the same obligor. (See the commentary to section 226.23(a)(1) regarding the right of rescission when a security interest in a consumer's principal dwelling is added to a previously exempt transaction.)

3(c) Public-Utility Credit

1. *Examples.* Examples of public utility services include:

- Gas, water, or electrical services
- Cable television services
- Installation of new sewer lines, water lines, conduits, telephone poles, or metering equipment in an area not already serviced by the utility

The exemption does *not* apply to extensions of credit, for example:

- To purchase appliances such as gas or electric ranges, grills, or telephones
- To finance home improvements such as new heating or air conditioning systems.

3(d) Securities or Commodities Accounts

1. *Coverage.* This exemption does not apply to a transaction with a broker registered solely with the state or to a separate credit extension in which the proceeds are used to purchase securities.

3(e) Home Fuel Budget Plans

1. *Definition.* Under a typical home fuel budget plan, the fuel dealer estimates the total cost of fuel for the season, bills the customer for an average monthly payment, and makes an adjustment in the final payment for any difference between the estimated and the actual cost of the fuel. Fuel is delivered as needed, no finance charge is assessed, and the customer may withdraw from the plan at any time. Under these circumstances, the arrangement is exempt from the regulation, even if a charge to cover the billing costs is imposed.

3(f) Student Loan Programs

1. *Coverage.* This exemption applies to the Guaranteed Student Loan program (administered by the federal government, state and private nonprofit agencies), the Auxiliary Loans to Assist Students (also known as PLUS) program, and the National Direct Student Loan program.

References

Statute: §§ 103(s) and (t) and 104
Other sections: § 226.12(a) and (b)
Previous regulation: § 226.3 and interpretations §§ 226.301 and 226.302.
1981 changes: The business-credit exemption has been expanded to include credit for agricultural purposes. The rule of interpretation section 226.302, concerning credit relating to structures containing more than four housing units, has been modified and somewhat expanded by providing more exclusions for transactions involving rental property.

The exemption for transactions above $25,000 secured by real estate has been narrowed; all transactions secured by the consumer's principal dwelling (even if not considered real property) are now subject to the regulation.

The public-utility exemption now covers the financing of the extension of a utility into an area not earlier served by the utility, in addition to the financing of services.

The securities-credit exemption has been extended to broker-dealers registered with the CFTC as well as the SEC.

A new exemption has been created for home fuel budget plans.

SECTION 226.4—Finance Charge

4(a) Definition

1. *Charges in comparable cash transactions.* Charges imposed uniformly in cash and credit transactions are not finance charges. In determining whether an item is a finance charge, the creditor should compare the credit transaction in question with a similar cash transaction. A creditor financing the sale of property or services may compare charges with those payable in a similar cash transaction by the seller of the property or service.

i. For example, the following items are not finance charges:

A. Taxes, license fees, or registration fees paid by both cash and credit customers.
B. Discounts that are available to cash and credit customers, such as quantity discounts.
C. Discounts available to a particular group of consumers because they meet certain criteria, such as being members of an organization or having accounts at a particular financial institution. This is the case even if an individual must pay cash to obtain the discount, provided that credit customers who are members of the group and do not qualify for the discount pay no more than the nonmember cash customers.
D. Charges for a service policy, auto club membership, or policy of insurance against latent defects offered to or required of both cash and credit customers for the same price.

ii. In contrast, the following items are finance charges:

A. Inspection and handling fees for the staged disbursement of construction-loan proceeds.
B. Fees for preparing a Truth in Lending disclosure statement, if permitted by law (for example, the Real Estate Settlement Procedures Act prohibits such charges in certain transactions secured by real property).
C. Charges for a required maintenance or service contract imposed only in a credit transaction.

iii. If the charge in a credit transaction exceeds the charge imposed in a comparable cash transaction, only the difference is a finance charge. For example:

A. If an escrow agent is used in both cash and credit sales of real estate and the agent's charge is $100 in a cash transaction and $150 in a credit transaction, only $50 is a finance charge.

2. *Costs of doing business.* Charges absorbed by the creditor as a cost of doing business are not finance charges, even though the creditor may take such costs into consideration in determining the interest rate to be charged or the cash price of the property or service sold. However, if the creditor separately imposes a charge on the consumer to cover certain costs, the charge is a finance charge if it otherwise meets the definition. For example:

- A discount imposed on a credit obligation when it is assigned by a seller-creditor to another party is not a finance charge as long as the discount is not separately imposed on the consumer. (See section 226.4(b)(6).)
- A tax imposed by a state or other governmental body on a creditor is not a finance charge if the creditor absorbs the tax as a cost of doing business and does not separately impose the tax on the consumer. (For additional discussion of the treatment of taxes, see other commentary to section 226.4(a).)

3. *Forfeitures of interest.* If the creditor reduces the interest rate it pays or stops paying interest on the consumer's deposit account or any portion of it for the term of a credit transaction (including, for example, an overdraft on a checking account or a loan secured by a certificate of deposit), the interest lost is

a finance charge. (See the commentary to section 226.4(c)(6).) For example:

- A consumer borrows $5,000 for 90 days and secures it with a $10,000 certificate of deposit paying 15 percent interest. The creditor charges the consumer an interest rate of 6 percent on the loan and stops paying interest on $5,000 of the $10,000 certificate for the term of the loan. The interest lost is a finance charge and must be reflected in the annual percentage rate on the loan.

However, the consumer must be *entitled* to the interest that is not paid in order for the lost interest to be a finance charge. For example:

- A consumer wishes to buy from a financial institution a $10,000 certificate of deposit paying 15 percent interest but has only $4,000. The financial institution offers to lend the consumer $6,000 at an interest rate of 6 percent but will pay the 15 percent interest only on the amount of the consumer's deposit, $4,000. The creditor's failure to pay interest on the $6,000 does not result in an additional finance charge on the extension of credit, provided the consumer is entitled by the deposit agreement with the financial institution to interest only on the amount of the consumer's deposit.
- A consumer enters into a combined time deposit/credit agreement with a financial institution that establishes a time deposit account and an open-end line of credit. The line of credit may be used to borrow against the funds in the time deposit. The agreement provides for an interest rate on any credit extension of, for example, 1 percent. In addition, the agreement states that the creditor will pay 0 percent interest on the amount of the time deposit that corresponds to the amount of the credit extension(s). The interest that is not paid on the time deposit by the financial institution is not a finance charge (and therefore does not affect the annual percentage rate computation).

4. *Treatment of fees for use of automated teller machines.* Any charge imposed on a cardholder by a card issuer for the use of an automated teller machine (ATM) to obtain a cash advance (whether in a proprietary, shared, interchange, or other system) is not a finance charge to the extent that it does not exceed the charge imposed by the card issuer on its cardholders for using the ATM to withdraw cash from a consumer asset account, such as a checking or savings account. (See the commentary to section 226.6(b).)

5. *Taxes.* i. Generally, a tax imposed by a state or other governmental body solely on a creditor is a finance charge if the creditor separately imposes the charge on the consumer.

ii. In contrast, a tax is not a finance charge (even if it is collected by the creditor) if applicable law imposes the tax:

A. Solely on the consumer;
B. On the creditor and the consumer jointly; or
C. On the credit transaction, without indicating which party is liable for the tax; or
D. On the creditor, if applicable law directs or authorizes the creditor to pass the tax on to the consumer. (For purposes of this section, if applicable law is silent as to passing on the tax, the law is deemed not to authorize passing it on.)

iii. For example, a stamp tax, property tax, intangible tax, or any other state or local tax imposed on the consumer, or on the credit transaction, is not a finance charge even if the tax is collected by the creditor.

iv. In addition, a tax is not a finance charge if it is excluded from the finance charge by another provision of the regulation or commentary (for example, if the tax is imposed uniformly in cash and credit transactions).

4(a)(1) Charges by Third Parties

1. *Choosing the provider of a required service.* An example of a third-party charge included in the finance charge is the cost of required mortgage insurance, even if the consumer is allowed to choose the insurer.

2. *Annuities associated with reverse mortgages.* Some creditors offer annuities in connection with a reverse-mortgage transaction

The amount of the premium is a finance charge if the creditor requires the purchase of the annuity incident to the credit. Examples include the following:

i. The credit documents reflect the purchase of an annuity from a specific provider or providers.
ii. The creditor assesses an additional charge on consumers who do not purchase an annuity from a specific provider.
iii. The annuity is intended to replace in whole or in part the creditor's payments to the consumer either immediately or at some future date.

4(a)(2) Special Rule; Closing Agent Charges

1. *General.* This rule applies to charges by a third party serving as the closing agent for the particular loan. An example of a closing agent charge included in the finance charge is a courier fee where the creditor requires the use of a courier.

2. *Required closing agent.* If the creditor requires the use of a closing agent, fees charged by the closing agent are included in the finance charge only if the creditor requires the particular service, requires the imposition of the charge, or retains a portion of the charge. Fees charged by a third-party closing agent may be otherwise excluded from the finance charge under section 226.4. For example, a fee that would be paid in a comparable cash transaction may be excluded under section 226.4(a); a lump-sum fee for real estate closing costs may be excluded under section 226.4(c)(7).

4(a)(3) Special Rule; Mortgage Broker Fees

1. *General.* A fee charged by a mortgage broker is excluded from the finance charge if it is the type of fee that is also excluded when charged by the creditor. For example, to exclude an application fee from the finance charge under section 226.4(c)(1), a mortgage broker must charge the fee to all applicants for credit, whether or not credit is extended.

2. *Coverage.* This rule applies to charges paid by consumers to a mortgage broker in connection with a consumer credit transaction secured by real property or a dwelling.

3. *Compensation by lender.* The rule requires all mortgage broker fees to be included in the finance charge. Creditors sometimes compensate mortgage brokers under a separate arrangement with those parties. Creditors may draw on amounts paid by the consumer, such as points or closing costs, to fund their payment to the broker. Compensation paid by a creditor to a mortgage broker under an agreement is not included as a separate component of a consumer's total finance charge (although this compensation may be reflected in the finance charge if it comes from amounts paid by the consumer to the creditor that are finance charges, such as points and interest).

4(b) Examples of Finance Charges

1. *Relationship to other provisions.* Charges or fees shown as examples of finance charges in section 226.4(b) may be excludable under section 226.4(c), (d), or (e). For example:

- Premiums for credit life insurance, shown as an example of a finance charge under section 226.4(b)(7), may be excluded if the requirements of section 226.4(d)(1) are met.
- Appraisal fees mentioned in section 226.4(b)(4) are excluded for real property or residential mortgage transactions under section 226.4(c)(7).

Paragraph 4(b)(2)

1. *Checking account charges.* The checking or transaction account charges discussed in section 226.4(b)(2) include, for example, the following situations:

- An account with an overdraft line of credit incurs a $4.50 service charge, while an account without a credit feature has a $2.50 service charge; the $2.00 difference is a finance charge. If the difference is not related to account activity, however, it may be excludable as a participation fee. (See the commentary to section 226.4(c)(4).)
- A service charge of $5.00 for each item that triggers an overdraft credit line is a finance charge. However, a charge imposed

uniformly for any item that overdraws a checking account, regardless of whether the items are paid or returned and whether the account has a credit feature or not, is not a finance charge.

Paragraph 4(b)(3)

1. *Assumption fees.* The assumption fees mentioned in section 226.4(b)(3) are finance charges only when the assumption occurs and the fee is imposed on the new buyer. The assumption fee is a finance charge in the new buyer's transaction.

Paragraph 4(b)(5)

1. *Credit loss insurance.* Common examples of the insurance against credit loss mentioned in section 226.4(b)(5) are mortgage-guaranty insurance, holder-in-due-course insurance, and repossession insurance. Such premiums must be included in the finance charge only for the period that the creditor requires the insurance to be maintained.

2. *Residual-value insurance.* Where a creditor requires a consumer to maintain residual-value insurance or where the creditor is a beneficiary of a residual-value insurance policy written in connection with an extension of credit (as is the case in some forms of automobile balloon-payment financing, for example), the premiums for the insurance must be included in the finance charge for the period that the insurance is to be maintained. If a creditor pays for residual-value insurance and absorbs the payment as a cost of doing business, such costs are not considered finance charges. (See comment 4(a)-2.)

Paragraphs 4(b)(7) and (8)

1. *Preexisting insurance policy.* The insurance discussed in section 226.4(b)(7) and (8) does not include an insurance policy (such as a life or an automobile collision insurance policy) that is already owned by the consumer, even if the policy is assigned to or otherwise made payable to the creditor to satisfy an insurance requirement. Such a policy is not "written in connection with" the transaction, as long as the insurance was not purchased for use in that credit extension, since it was previously owned by the consumer.

2. *Insurance written in connection with a transaction.* Insurance sold after consummation in closed-end credit transactions or after the opening of a plan in open-end credit transactions is not "written in connection with" the credit transaction if the insurance is written because of the consumer's default (for example, by failing to obtain or maintain required property insurance) or because the consumer requests insurance after consummation or the opening of a plan (although credit-sale disclosures may be required for the insurance sold after consummation if it is financed).

3. *Substitution of life insurance.* The premium for a life insurance policy purchased and assigned to satisfy a credit life insurance requirement must be included in the finance charge, but only to the extent of the cost of the credit life insurance if purchased from the creditor or the actual cost of the policy (if that is less than the cost of the insurance available from the creditor). If the creditor does not offer the required insurance, the premium to be included in the finance charge is the cost of a policy of insurance of the type, amount, and term required by the creditor.

4. *Other insurance.* Fees for required insurance not of the types described in section 226.4(b)(7) and (8) are finance charges and are not excludable. For example:

- The premium for a hospitalization insurance policy, if it is required to be purchased only in a credit transaction, is a finance charge.

Paragraph 4(b)(9)

1. *Discounts for payment by other than credit.* The discounts to induce payment by other than credit mentioned in section 226.4(b)(9) include, for example, the following situation:

- The seller of land offers individual tracts for $10,000 each. If the purchaser pays cash, the price is $9,000, but if the purchaser finances the tract with the seller the price is $10,000. The $1,000 difference is a finance charge for those who buy the tracts on credit.

2. *Exception for cash discounts.* Discounts offered to induce consumers to pay for property or services by cash, check, or other means not involving the use of either an open-end credit plan or a credit card (whether open-end or closed-end credit is extended on the card) may be excluded from the finance charge under section 167(b) of the act (as amended by Pub. L. 97-25, July 27, 1981). The discount may be in whatever amount the seller desires, either as a percentage of the regular price (as defined in section 103(z) of the act, as amended) or a dollar amount. This provision applies only to transactions involving an open-end credit plan or a credit card. The merchant must offer the discount to prospective buyers whether or not they are cardholders or members of the open-end credit plan. The merchant may, however, make other distinctions. For example:

- The merchant may limit the discount to payment by cash and not offer it for payment by check or by use of a debit card.
- The merchant may establish a discount plan that allows a 15 percent discount for payment by cash, a 10 percent discount for payment by check, and a 5 percent discount for payment by a particular credit card. None of these discounts is a finance charge.

Section 171(c) of the act excludes section 167(b) discounts from treatment as a finance charge or other charge for credit under any state usury or disclosure laws.

3. *Determination of the regular price.* The "regular price" is critical in determining whether the difference between the price charged to cash customers and credit customers is a "discount" or a "surcharge," as these terms are defined in amended section 103 of the act. The "regular price" is defined in section 103 of the act as "the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of an open-end credit account or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted. . . ." For example, in the sale of motor vehicle fuel, the tagged or posted price is the price displayed at the pump. As a result, the higher price (the open-end credit or credit card price) must be displayed at the pump, either alone or along with the cash price. Service station operators may designate separate pumps or separate islands as being for either cash or credit purchases and display only the appropriate prices at the various pumps. If a pump is capable of displaying on its meter either a cash or a credit price depending upon the consumer's means of payment, both the cash price and the credit price must be displayed at the pump. A service station operator may display the cash price of fuel by itself on a curb sign, as long as the sign clearly indicates that the price is limited to cash purchases.

4(b)(10) Debt-Cancellation Fees

1. *Definition.* Debt-cancellation coverage provides for payment or satisfaction of all or part of a debt when a specified event occurs. The term includes guaranteed automobile protection, or GAP, agreements, which pay or satisfy the remaining debt after property insurance benefits are exhausted.

4(c) Charges Excluded from the Finance Charge

Paragraph 4(c)(1)

1. *Application fees.* An application fee that is excluded from the finance charge is a charge to recover the costs associated with processing applications for credit. The fee may cover the costs of services such as credit reports, credit investigations, and appraisals. The creditor is free to impose the fee in only certain of its loan programs, such as mortgage loans. However, if the fee is to be excluded from the finance charge under section 226.4(c)(1), it must be charged to all applicants, not just to applicants who are approved or who actually receive credit.

Paragraph 4(c)(2)

1. *Late-payment charges.* Late-payment charges can be excluded from the finance charge under section 226.4(c)(2) whether or not the person imposing the charge continues

to extend credit on the account or continues to provide property or services to the consumer. In determining whether a charge is for actual unanticipated late payment on a 30-day account, for example, factors to be considered include:

- The terms of the account. For example, is the consumer required by the account terms to pay the account balance in full each month? If not, the charge may be a finance charge.
- The practices of the creditor in handling the accounts. For example, regardless of the terms of the account, does the creditor allow consumers to pay the accounts over a period of time without demanding payment in full or taking other action to collect? If no effort is made to collect the full amount due, the charge may be a finance charge.

Section 226.4(c)(2) applies to late-payment charges imposed for failure to make payments as agreed, as well as failure to pay an account in full when due.

2. *Other excluded charges.* Charges for "deliquency, default, or a similar occurrence" include, for example, charges for reinstatement of credit privileges or for submitting as payment a check that is later returned unpaid.

Paragraph 4(c)(3)

1. *Assessing interest on an overdraft balance.* A charge on an overdraft balance computed by applying a rate of interest to the amount of the overdraft is not a finance charge, even though the consumer agrees to the charge in the account agreement, unless the financial institution agrees in writing that it will pay such items.

Paragraph 4(c)(4)

1. *Participation fees—periodic basis.* The participation fees mentioned in section 226.4(c)(4) do not necessarily have to be formal membership fees, nor are they limited to credit card plans. The provision applies to any credit plan in which payment of a fee is a condition of access to the plan itself, but it does not apply to fees imposed separately on individual closed-end transactions. The fee may be charged on a monthly, annual, or other periodic basis; a one-time, non-recurring fee imposed at the time an account is opened is not a fee that is charged on a periodic basis, and may not be treated as a participation fee.

2. *Participation fees—exclusions.* Minimum monthly charges, charges for non-use of a credit card, and other charges based on either account activity or the amount of credit available under the plan are not excluded from the finance charge by section 226.4(c)(4). Thus, for example, a fee that is charged and then refunded to the consumer based on the extent to which the consumer uses the credit available would be a finance charge. (See the commentary to section 226.4(b)(2). Also, see comment 14(c)-7 for treatment of certain types of fees excluded in determining the annual percentage rate for the periodic statement.)

Paragraph 4(c)(5)

1. *Seller's points.* The seller's points mentioned in section 226.4(c)(5) include any charges imposed by the creditor upon the noncreditor seller of property for providing credit to the buyer or for providing credit on certain terms. These charges are excluded from the finance charge even if they are passed on to the buyer, for example, in the form of a higher sales price. Seller's points are frequently involved in real estate transactions guaranteed or insured by governmental agencies. A "commitment fee" paid by a noncreditor seller (such as a real estate developer) to the creditor should be treated as seller's points. Buyer's points (that is, points charged to the buyer by the creditor), however, are finance charges.

2. *Other seller-paid amounts.* Mortgage insurance premiums and other finance charges are sometimes paid at or before consummation or settlement on the borrower's behalf by a noncreditor seller. The creditor should treat the payment made by the seller as seller's points and exclude it from the finance charge if, based on the seller's payment, the consumer is not legally bound to the creditor for the charge. A creditor who gives disclosures before the payment has been made should

base them on the best information reasonably available.

Paragraph 4(c)(6)

1. *Lost interest.* Certain federal and state laws mandate a percentage differential between the interest rate paid on a deposit and the rate charged on a loan secured by that deposit. In some situations because of usury limits the creditor must reduce the interest rate paid on the deposit and, as a result, the consumer loses some of the interest that would otherwise have been earned. Under section 226.4(c)-(6), such "lost interest" need not be included in the finance charge. This rule applies only to an interest reduction imposed because a rate differential is required by law and a usury limit precludes compliance by any other means. If the creditor imposes a differential that exceeds that required, only the lost interest attributable to the excess amount is a finance charge. (See the commentary to section 226.4(a).)

Paragraph 4(c)(7)

1. *Real estate or residential mortgage transaction charges.* The list of charges in section 226.4(c)(7) applies both to residential mortgage transactions (which may include, for example, the purchase of a mobile home) and to other transactions secured by real estate. The fees are excluded from the finance charge even if the services for which the fees are imposed are performed by the creditor's employees rather than by a third party. In addition, the cost of verifying or confirming information connected to the item is also excluded. For example, credit-report fees cover not only the cost of the report but also the cost of verifying information in the report. In all cases, charges excluded under section 226.4(c)(7) must be bona fide and reasonable.

2. *Lump-sum charges.* If a lump sum charged for several services includes a charge that is not excludable, a portion of the total should be allocated to that service and included in the finance charge. However, a lump sum charged for conducting or attending a closing (for example, by a lawyer or a title company) is excluded from the finance charge if the charge is primarily for services related to items listed in section 226.4(c)(7) (for example, reviewing or completing documents), even if other incidental services such as explaining various documents or disbursing funds for the parties are performed. The entire charge is excluded even if a fee for the incidental services would be a finance charge if it were imposed separately.

3. *Charges assessed during the loan term.* Real estate or residential mortgage transaction charges excluded under section 226.4(c)(7) are those charges imposed solely in connection with the initial decision to grant credit. This would include, for example, a fee to search for tax liens on the property or to determine if flood insurance is required. The exclusion does not apply to fees for services to be performed periodically during the loan term, regardless of when the fee is collected. For example, a fee for one or more determinations during the loan term of the current tax-lien status or flood-insurance requirements is a finance charge, regardless of whether the fee is imposed at closing, or when the service is performed. If a creditor is uncertain about what portion of a fee to be paid at consummation or loan closing is related to the initial decision to grant credit, the entire fee may be treated as a finance charge.

4(d) Insurance and Debt-Cancellation Coverage

1. *General.* Section 226.4(d) permits insurance premiums and charges to be excluded from the finance charge. The required disclosures must be made in writing. The rules on location of insurance disclosures for closed-end transactions are in section 226.17(a).

2. *Timing of disclosures.* If disclosures are given early, for example under section 226.17(f) or section 226.19(a), the creditor need not redisclose if the actual premium is different at the time of consummation. If insurance disclosures are not given at the time of early disclosure and insurance is in fact written in connection with the transaction, the disclosures under section 226.4(d) must be made in order to exclude the premiums from the finance charge.

3. *Premium-rate increases.* The creditor should disclose the premium amount based on the rates currently in effect and need not designate it as an estimate even if the premium rates may increase. An increase in insurance rates after consummation of a closed-end credit transaction or during the life of an open-end credit plan does not require redisclosure in order to exclude the additional premium from treatment as a finance charge.

4. *Unit-cost disclosures.* One of the transactions for which unit-cost disclosures (such as 50 cents per year for each $100 of the amount financed) may be used in place of the total insurance premium involves a particular kind of insurance plan. For example, a consumer with a current indebtedness of $8,000 is covered by a plan of credit life insurance coverage with a maximum of $10,000. The consumer requests an additional $4,000 loan to be covered by the same insurance plan. Since the $4,000 loan exceeds, in part, the maximum amount of indebtedness that can be covered by the plan, the creditor may properly give the insurance cost disclosures on the $4,000 loan on a unit-cost basis.

5. *Required credit life insurance.* Credit life, accident, health, or loss-of-income insurance must be voluntary in order for the premium or charges to be excluded from the finance charge. Whether the insurance is in fact required or optional is a factual question. If the insurance is required, the premiums must be included in the finance charge, whether the insurance is purchased from the creditor or from a third party. If the consumer is required to elect one of several options—such as to purchase credit life insurance, or to assign an existing life insurance policy, or to pledge security such as a certificate of deposit—and the consumer purchases the credit life insurance policy, the premium must be included in the finance charge. (If the consumer assigns a preexisting policy or pledges security instead, no premium is included in the finance charge. The security interest would be disclosed under section 226.6(c) or section 226.18(m). See the commentary to section 226.4(b)(7) and (8).)

6. *Other types of voluntary insurance.* Insurance is not credit life, accident, health, or loss-of-income insurance if the creditor or the credit account of the consumer is not the beneficiary of the insurance coverage. If such insurance is not required by the creditor as an incident to or a condition of credit, it is not covered by section 226.4.

7. *Signatures.* If the creditor offers a number of insurance options under section 226.4(d), the creditor may provide a means for the consumer to sign or initial for each option, or it may provide for a single authorizing signature or initial with the options selected designated by some other means, such as a check mark. The insurance authorization may be signed or initialed by any consumer, as defined in section 226.2(a)(11), or by an authorized user on a credit card account.

8. *Property insurance.* To exclude property insurance premiums or charges from the finance charge, the creditor must allow the consumer to choose the insurer and disclose that fact. This disclosure must be made whether or not the property insurance is available from or through the creditor. The requirement that an option be given does not require that the insurance be readily available from other sources. The premium or charge must be disclosed only if the consumer elects to purchase the insurance from the creditor; in such a case, the creditor must also disclose the term of the property insurance coverage if it is less than the term of the obligation.

9. *Single-interest insurance.* Blanket and specific single-interest coverage are treated the same for purposes of the regulation. A charge for either type of single-interest insurance may be excluded from the finance charge if:

- The insurer waives any right of subrogation
- The other requirements of section 226.4(d)(2) are met. This includes, of course, giving the consumer the option of obtaining the insurance from a person of the consumer's choice. The creditor need not ascertain whether the consumer is able to purchase the insurance from someone else.

10. *Single-interest insurance defined.* The term "single-interest insurance" as used in the

regulation refers only to the types of coverage traditionally included in the term "vendor's single-interest insurance" (or "VSI"), that is, protection of tangible property against normal property damage, concealment, confiscation, conversion, embezzlement, and skip. Some comprehensive insurance policies may include a variety of additional coverages, such as repossession insurance and holder-in-due-course insurance. These types of coverage do not constitute single-interest insurance for purposes of the regulation, and premiums for them do not qualify for exclusion from the finance charge under section 226.4(d). If a policy that is primarily VSI also provides coverages that are not VSI or other property insurance, a portion of the premiums must be allocated to the nonexcludable coverages and included in the finance charge. However, such allocation is not required if the total premium in fact attributable to all of the non-VSI coverages included in the policy is $1.00 or less (or $5.00 or less in the case of a multiyear policy).

11. *Initial term.* The initial term of insurance coverage determines the period for which a premium amount must be disclosed. In some cases the initial term is clear, for example, a property insurance policy on an automobile written for one year (even though the term of the credit transaction is four years) or a credit life insurance policy for the term of the credit transaction purchased by paying or financing a single premium. In other cases, however, it may not be clear what the initial term of the insurance is, for example, when the consumer agrees to pay a premium that is assessed periodically and the consumer is under no obligation to continue making the payments. In cases such as this, the cost disclosure may be made on the basis of a premium for one year of insurance coverage. The premium must be clearly labeled as being for one year.

12. *Loss-of-income insurance.* The loss-of- income insurance mentioned in section 226.4(d) includes involuntary unemployment insurance, which provides that some or all of the consumer's payments will be made if the consumer becomes unemployed involuntarily.

4(d)(3) Voluntary Debt-Cancellation Fees

1. *General.* Fees charged for the specialized form of debt-cancellation agreement known as guaranteed automobile protection (GAP) agreements must be disclosed according to section 226.4(d)(3) rather than according to section 226.4(d)(2) for property insurance.

2. *Disclosures.* Creditors can comply with section 226.4(d)(3) by providing a disclosure that refers to debt-cancellation coverage whether or not the coverage is considered insurance. Creditors may use the model credit insurance disclosures only if the debt-cancellation coverage constitutes insurance under state law.

4(e) Certain Security-Interest Charges

1. *Examples.*

i. *Excludable charges.* Sums must be actually paid to public officials to be excluded from the finance charge under section 226.4(e)(1) and (3). Examples are charges or other fees required for filing or recording security agreements, mortgages, continuation statements, termination statements, and similar documents, as well as intangible property or other taxes even when the charges or fees are imposed by the state solely on the creditor and charged to the consumer (if the tax must be paid to record a security agreement). (See comment 4(a)-5 regarding the treatment of taxes, generally.)

ii. *Charges not excludable.* If the obligation is between the creditor and a third party (an assignee, for example), charges or other fees for filing or recording security agreements, mortgages, continuation statements, termination statements, and similar documents relating to that obligation are not excludable from the finance charge under this section.

2. *Itemization.* The various charges described in section 226.4(e)(1) and (3) may be totaled and disclosed as an aggregate sum, or they may be itemized by the specific fees and taxes imposed. If an aggregate sum is disclosed, a general term such as security-interest fees or filing fees may be used.

3. *Notary fees.* In order for a notary fee to be

excluded under section 226.4(e)(1), all of the following conditions must be met:

- The document to be notarized is one used to perfect, release, or continue a security interest.
- The document is required by law to be notarized.
- A notary is considered a public official under applicable law.
- The amount of the fee is set or authorized by law.

4. *Nonfiling insurance.* The exclusion in section 226.4(e)(2) is available only if nonfiling insurance is purchased. If the creditor collects and simply retains a fee as a sort of "self-insurance" against nonfiling, it may not be excluded from the finance charge. If the nonfiling insurance premium exceeds the amount of the fees excludable from the finance charge under section 226.4(e)(1), only the excess is a finance charge. For example:

- The fee for perfecting a security interest is $5.00 and the fee for releasing the security interest is $3.00. The creditor charges $10.00 for nonfiling insurance. Only $8.00 of the $10.00 is excludable from the finance charge.

4(f) Prohibited Offsets

1. *Earnings on deposits or investments.* The rule that the creditor shall not deduct any earnings by the consumer on deposits or investments applies whether or not the creditor has a security interest in the property.

References

Statute: §§ 106, 167, and 171(c)
Other sections: §§ 226.9(d) and 226.12
Previous regulation: § 226.4 and interpretations § 226.401 through 226.407.
1981 changes: While generally continuing the rules under the previous regulation, section 226.4 reflects amendments to section 106 of the act and makes certain other changes in the rules for determining the finance charge. For example, section 226.4(a) expressly excludes from the finance charge amounts payable in comparable cash transactions. Section 226.8(o) of the previous regulation, dealing with discounts for prompt payment of a credit sale, was deleted in the revised regulation since the general test for a finance charge now focuses on a comparison of cash and credit transactions. With respect to various exclusions from the finance charge: application fees imposed on all applicants are no longer finance charges, continuing to extend credit to a consumer is no longer a controlling test for determining whether a late payment charge is bona fide, seller's points are not to be included in the finance charge, and the special exclusions for real estate transactions apply to all "residential mortgage transactions."

The simplified rules for excluding insurance from the finance charge allow unit-cost disclosure in certain closed-end credit transactions, permit initials as well as signatures on the authorization, permit any consumer to authorize insurance for other consumers, and delete the requirement that the authorization be separately dated.

SUBPART B—OPEN-END CREDIT

SECTION 226.5—General Disclosure Requirements

5(a) Form of Disclosures

Paragraph 5(a)(1)

1. *Clear and conspicuous.* The "clear and conspicuous" standard requires that disclosures be in a reasonably understandable form. It does not require that disclosures be segregated from other material or located in any particular place on the disclosure statement, or that numerical amounts or percentages be in any particular type size. The standard does not prohibit:

- Pluralizing required terminology ("finance charge" and "annual percentage rate")
- Adding to the required disclosures such items as contractual provisions, explanations of contract terms, state disclosures, and translations
- Sending promotional material with the required disclosures
- Using commonly accepted or readily un-

derstandable abbreviations (such as "mo." for "month" or "Tx." for "Texas") in making any required disclosures
- Using codes or symbols such as "APR" (for annual percentage rate), "FC" (for finance charge), or "Cr" (for credit balance), so long as a legend or description of the code or symbol is provided on the disclosure statement

2. *Integrated document.* The creditor may make both the initial disclosures (§ 226.6) and the periodic-statement disclosures (§ 226.7) on more than one page, and use both the front and the reverse sides, so long as the pages constitute an integrated document. An integrated document would not include disclosure pages provided to the consumer at different times or disclosures interspersed on the same page with promotional material. An integrated document would include, for example:

- Multiple pages provided in the same envelope that cover related material and are folded together, numbered consecutively, or clearly labelled to show that they relate to one another
- A brochure that contains disclosures and explanatory material about a range of services the creditor offers, such as credit, checking account, and electronic fund transfer features

Paragraph 5(a)(2)

1. *When disclosures must be "more conspicuous."* The terms "finance charge" and "annual percentage rate," when required to be used with a number, must be disclosed more conspicuously than other required disclosures, except in the two cases provided in footnote 9. At the creditor's option, "finance charge" and "annual percentage rate" may also be disclosed more conspicuously than the other required disclosures even when the regulation does not so require. The following examples illustrate these rules:

- In disclosing the annual percentage rate as required by section 226.6(a)(2), the term "annual percentage rate" is subject to the "more conspicuous" rule.
- In disclosing the amount of the finance charge, required by section 226.7(f), the term "finance charge" is subject to the "more conspicuous" rule.
- Although neither "finance charge" nor "annual percentage rate" need be emphasized when used as part of general informational material or in textual descriptions of other terms, emphasis is permissible in such cases. For example, when the terms appear as part of the explanations required under section 226.6(a)(3) and (4), they may be equally conspicuous as the disclosures required under sections 226.6(a)(2) and 226.7(g).

2. *Making disclosures more conspicuous.* In disclosing the terms "finance charge" and "annual percentage rate" more conspicuously, only the words "finance charge" and "annual percentage rate" should be accentuated. For example, if the term "total finance charge" is used, only "finance charge" should be emphasized. The disclosures may be made more conspicuous by, for example:

- Capitalizing the words when other disclosures are printed in lower case
- Putting them in bold print or a contrasting color
- Underlining them
- Setting them off with asterisks
- Printing them in larger type

3. *Disclosure of figures—exception to "more conspicuous" rule.* The terms "annual percentage rate" and "finance charge" need not be more conspicuous than figures (including, for example, numbers, percentages, and dollar signs).

5(b) Time of Disclosures

5(b)(1) Initial Disclosures

1. *Disclosure before the first transaction.* The rule that the initial disclosure statement must be furnished "before the first transaction" requires delivery of the initial disclosure statement before the consumer becomes obligated on the plan. For example, the initial disclosures must be given before the consumer makes the first purchase (such as when a consumer opens a credit plan and makes purchases contemporaneously at a retail store), receives the first advance, or pays any fees or

charges under the plan other than an application fee or refundable membership fee (see below). The prohibition on the payment of fees other than application or refundable membership fees before initial disclosures are provided does not apply to home-equity plans subject to section 226.5b. See the commentary to section 226.5b(h) regarding the collection of fees for home-equity plans covered by section 226.5b.

- If the consumer pays a membership fee before receiving the Truth in Lending disclosures, or the consumer agrees to the imposition of a membership fee at the time of application and the Truth in Lending disclosure statement is not given at that time, disclosures are timely as long as the consumer, after receiving the disclosures, can reject the plan. The creditor must refund the membership fee if it has been paid, or clear the account if it has been debited to the consumer's account.
- If the consumer receives a cash advance check at the same time the Truth in Lending disclosures are provided, disclosures are still timely if the consumer can, after receiving the disclosures, return the cash advance check to the creditor without obligation (for example, without paying finance charges).
- Initial disclosures need not be given before the imposition of an application fee under section 226.4(c)(1).
- If, after receiving the disclosures, the consumer uses the account, pays a fee, or negotiates a cash advance check, the creditor may consider the account not rejected for purposes of this section.

2. *Reactivation of suspended account.* If an account is temporarily suspended (for example, because the consumer has exceeded a credit limit, or because a credit card is reported lost or stolen) and then is reactivated, no new initial disclosures are required.

3. *Reopening closed account.* If an account has been closed (for example, due to inactivity, cancellation, or expiration) and then is reopened, new initial disclosures are required. No new initial disclosures are required, however, when the account is closed merely to assign it a new number (for example, when a credit card is reported lost or stolen) and the "new" account then continues on the same terms.

4. *Converting closed-end to open-end credit.* If a closed-end credit transaction is converted to an open-end credit account under a written agreement with the consumer, the initial disclosures under section 226.6 must be given before the consumer becomes obligated on the open-end credit plan. (See the commentary to section 226.17 on converting open-end credit to closed-end credit.)

5. *Balance transfers.* A creditor that solicits the transfer by a consumer of outstanding balances from an existing account to a new open-end plan must comply with section 226.6 before the balance transfer occurs. Card issuers that are subject to the requirements of section 226.5a may establish procedures that comply with both sections in a single disclosure statement.

5(b)(2) Periodic Statements

Paragraph 5(b)(2)(i)

1. *Periodic statements not required.* Periodic statements need not be sent in the following cases:

- If the creditor adjusts an account balance so that at the end of the cycle the balance is less than $1—so long as no finance charge has been imposed on the account for that cycle
- If a statement was returned as undeliverable. If a new address is provided, however, within a reasonable time before the creditor must send a statement, the creditor must resume sending statements. Receiving the address at least 20 days before the end of a cycle would be a reasonable amount of time to prepare the statement for that cycle. For example, if an address is received 22 days before the end of the June cycle, the creditor must send the periodic statement for the June cycle. (See section 226.13(a)(7).)

2. *Termination of credit privileges.* When an open-end account is terminated without being

converted to closed-end credit under a written agreement, the creditor must continue to provide periodic statements to those consumers entitled to receive them under section 226.5(b)(2)(i) (for example, when an open-end credit plan ends and consumers are paying off outstanding balances) and must continue to follow all of the other open-end credit requirements and procedures in subpart B.

Paragraph 5(b)(2)(ii)

1. *14-day rule.* The 14-day rule for mailing or delivering periodic statements does not apply if charges (for example, transaction or activity charges) are imposed regardless of the timing of a periodic statement. The 14-day rule does apply, for example:

- If current debits retroactively become subject to finance charges when the balance is not paid in full by a specified date
- If charges other than finance charges will accrue when the consumer does not make timely payments (for example, late payment charges or charges for exceeding a credit limit)

2. *Computer malfunction.* Footnote 10 does not extend to the failure to provide a periodic statement because of computer malfunction.

3. *Calling for periodic statements.* The creditor may permit consumers to call for their periodic statements but may not require them to do so. If the consumer wishes to pick up the statement and the plan has a free-ride period, the statement (including a statement provided by electronic means) must be made available in accordance with the 14-day rule.

5(c) Basis of Disclosures and Use of Estimates

1. *Legal obligation.* The disclosures should reflect the credit terms to which the parties are legally bound at the time of giving the disclosures.

- The legal obligation is determined by applicable state or other law.
- The fact that a term or contract may later be deemed unenforceable by a court on the basis of equity or other grounds does not, by itself, mean that disclosures based on that term or contract did not reflect the legal obligation.
- The legal obligation normally is presumed to be contained in the contract that evidences the agreement. But this may be rebutted if another agreement between the parties legally modifies that contract.

2. *Estimates—obtaining information.* Disclosures may be estimated when the exact information is unknown at the time disclosures are made. Information is unknown if it is not reasonably available to the creditor at the time disclosures are made. The "reasonably available" standard requires that the creditor, acting in good faith, exercise due diligence in obtaining information. In using estimates, the creditor is not required to disclose the basis for the estimated figures, but may include such explanations as additional information. The creditor normally may rely on the representations of other parties in obtaining information. For example, the creditor might look to insurance companies for the cost of insurance.

3. *Estimates—redisclosure.* If the creditor makes estimated disclosures, redisclosure is not required for that consumer, even though more accurate information becomes available before the first transaction. For example, in an open-end plan to be secured by real estate, the creditor may estimate the appraisal fees to be charged; such an estimate might reasonably be based on the prevailing market rates for similar appraisals. If the exact appraisal fee is determinable after the estimate is furnished but before the consumer receives the first advance under the plan, no new disclosure is necessary.

5(d) Multiple Creditors; Multiple Consumers

1. *Multiple creditors.* Under section 226.5(d):

- Creditors must choose which of them will make the disclosures
- A single, complete set of disclosures must be provided, rather than partial disclosures from several creditors
- All disclosures for the open-end credit plan must be given, even if the disclosing credi-

tor would not otherwise have been obligated to make a particular disclosure

2. *Multiple consumers.* Disclosures may be made to either obligor on a joint account. Disclosure responsibilities are not satisfied by giving disclosures to only a surety or guarantor for a principal obligor or to an authorized user. In rescindable transactions, however, separate disclosures must be given to each consumer who has the right to rescind under section 226.15.

5(e) Effect of Subsequent Events

1. *Events causing inaccuracies.* Inaccuracies in disclosures are not violations if attributable to events occurring after disclosures are made. For example, when the consumer fails to fulfill a prior commitment to keep the collateral insured and the creditor then provides the coverage and charges the consumer for it, such a change does not make the original disclosures inaccurate. The creditor may, however, be required to provide a new disclosure(s) under section 226.9(c).

2. *Use of inserts.* When changes in a creditor's plan affect required disclosures, the creditor may use inserts with outdated disclosure forms. Any insert:

- Should clearly refer to the disclosure provision it replaces
- Need not be physically attached or affixed to the basic disclosure statement
- May be used only until the supply of outdated forms is exhausted

References

Statute: §§ 121(a) through (c), 122(a) and (b), 124, 127(a) and (b), and 163(a)
Other sections: §§ 226.6, 226.7, and 226.9
Previous regulation: §§ 226.6(a) and (c) through (g), and 226.7(a) through (c)
1981 changes: Section 226.5 implements amendments to the act and reflects several simplifying changes to the regulation. The use of required terminology, except for "finance charge" and "annual percentage rate," is no longer required. Type size requirements have been deleted. Initial and periodic statement disclosures may be multipage, so long as they constitute an integrated statement. New rules are provided for the basis of disclosures and for the use of estimates. The rules for credit plans involving multiple creditors or multiple consumers now provide that only one creditor need make the disclosures and that the disclosures need be made to only one primarily liable consumer.

SECTION 226.5a—Credit and Charge Card Applications and Solicitations

1. *General.* Section 226.5a generally requires that credit disclosures be contained in application forms and preapproved solicitations initiated by a card issuer to open a credit or charge card account. (See the commentary to section 226.5a(a)(3) and 226.5a(e) for exceptions; see also section 226.2(a)(15) and accompanying commentary for the definition of charge card.)

2. *Combining disclosures.* The initial disclosures required by section 226.6 do not substitute for the disclosures required by section 226.5a; however, a card issuer may establish procedures so that a single disclosure statement meets the requirements of both sections. For example, if a card issuer in complying with section 226.5a(e)(2) provides all the applicable disclosures required under section 226.6, in a form that the consumer may keep and in accordance with the other format and timing requirements for that section, the issuer satisfies the initial disclosure requirements under section 226.6 as well as the disclosure requirements of section 226.5a(e)(2). Or if, in complying with section 226.5a(c) or 226.5a(d)(2), a card issuer provides an integrated document that the consumer may keep, and provides the section 226.5a disclosures (in a tabular format) along with the additional disclosures required under section 226.6 (presented outside of the table), the card issuer satisfies the requirements of both sections 226.5a and 226.6.

5a(a) General Rules

5a(a)(2) Form of Disclosures

1. *Prominent location.* Certain of the required

disclosures provided on or with an application or solicitation must be prominently located—that is, readily noticeable to the consumer. There are, however, no requirements that the disclosures be in any particular location or in any particular type size or typeface.

2. *Multiple accounts or varying terms.* If a tabular format is required to be used, card issuers offering several types of accounts may disclose the various terms for the accounts in a single table or may provide a separate table for each account. Similarly, if rates or other terms vary from state to state, card issuers may list the states and the various disclosures in a single table or in separate tables.

3. *Additional information.* The table containing the disclosures required by section 226.5a should contain only the information required or permitted by this section. (See the commentary to section 226.5a(b) for guidance on information permitted in the table.) Other credit information may be presented on or with an application or solicitation, provided such information appears outside the required table.

4. *Location of certain disclosures.* A card issuer has the option of disclosing any of the fees in section 226.5a(b)(8) through (10) in the required table or outside the table.

5. *Terminology.* In general, section 226.5a(a)(2)(iv) requires that the terminology used for the disclosures specified in section 226.5a(b) be consistent with that used in the disclosures under sections 226.6 and 226.7. This standard requires that the section 226.5a(b) disclosures be close in meaning to those under sections 226.6 and 226.7; however, the terminology used need not be identical. In addition, section 226.5a(a)(2)(i) requires that the headings, content, and format of the tabular disclosures be substantially similar, but need not be identical, to the tables in appendix G. A special rule applies to the grace-period disclosure, however; the term "grace period" must be used, either in the heading or in the text of the disclosure.

6. *Deletion of inapplicable disclosures.* Generally, disclosures need only be given as applicable. Card issuers may, therefore, delete inapplicable headings and their corresponding boxes in the table. For example, if no transaction fee is imposed for purchases, the disclosure form may contain the heading "Transaction fee for purchases" and a box showing "none," or the heading and box may be deleted from the table. There is an exception for the grace-period disclosure, however; even if no grace period exists, that fact must be stated.

5a(a)(3) Exceptions

1. *Coverage.* Certain exceptions to the coverage of section 226.5a are stated in section 226.5a(a)(3); in addition, the requirements of section 226.5a do not apply to the following:

- Lines of credit accessed solely by account numbers
- Addition of a credit or charge card to an existing open-end plan

2. *Noncoverage of "consumer-initiated" requests.* Applications provided to a consumer upon request are not covered by section 226.5a, even if the request is made in response to the card issuer's invitation to apply for a card account. To illustrate, if a card issuer invites consumers to call a toll-free number or to return a response card to obtain an application, the application sent in response to the consumer's request need not contain the disclosures required under section 226.5a. Similarly, if the card issuer invites consumers to call and make an oral application on the telephone, section 226.5a does not apply to the application made by the consumer. If, however, the card issuer calls a consumer or initiates a telephone discussion with a consumer about opening a card account and contemporaneously takes an oral application, such applications are subject to section 226.5a, specifically section 226.5a(d).

3. *General-purpose applications.* The requirements of this section do not apply to general purpose applications unless the application, or material accompanying it, indicates that it can be used to open a credit or charge card account.

5a(a)(5) Certain Fees That Vary by State

1. *Manner of disclosing range.* If the card

issuer discloses a range of fees instead of disclosing the amount of the fee imposed in each state, the range may be stated as the lowest authorized fee (zero, if there are one or more states where no fee applies) to the highest authorized fee.

5a(b) Required Disclosures

5a(b)(1) Annual Percentage Rate

1. *Periodic rate.* The periodic rate, expressed as such, may be disclosed in the table in addition to the required disclosure of the corresponding annual percentage rate.

2. *Variable-rate accounts—definition.* For purposes of section 226.5a(b)(1), a variable-rate account exists when rate changes are part of the plan and are tied to an index or formula. (See the commentary to section 226.6(a)(2) for examples of variable-rate plans.)

3. *Variable-rate accounts—rates in effect.* For variable-rate disclosures in direct-mail applications and solicitations subject to section 226.5a(c), and in applications and solicitations made available to the general public subject to section 226.5a(e), the rules concerning accuracy of the annual percentage rate are stated in section 226.5a(b)(1)(ii). For variable-rate disclosures in telephone applications and solicitations subject to section 226.5a(d), the card issuer must provide an annual percentage rate currently applicable when oral disclosures are provided under section 226.5a(d)(1). For the alternate disclosures under section 226.5a(d)(2), the card issuer must provide the annual percentage rate in effect at the time the disclosures are mailed or delivered. A rate in effect also includes the rate as of a specified date (which rate is then updated from time to time, for example, each calendar month) or an estimated rate provided in accordance with section 226.5(c).

4. *Variable-rate accounts—other disclosures.* In describing how the applicable rate will be determined, the card issuer must identify the index or formula and disclose any margin or spread added to the index or formula in setting the rate. The card issuer may disclose the margin or spread as a range of the highest and lowest margins that may be applicable to the account. A disclosure of any applicable limitations on rate increases or decreases may also be included in the table.

5. *Introductory rates—discounted rates.* If the initial rate is temporary and is lower than the rate that will apply after the temporary rate expires, the card issuer must disclose the annual percentage rate that would otherwise apply to the account. In a fixed-rate account, the card issuer must disclose the rate that will apply after the introductory rate expires. In a variable-rate account, the card issuer must disclose a rate based on the index or formula applicable to the account in accordance with the rules in section 226.5a(b)(1)(ii) and comment 5a(b)(1)-3. An initial discounted rate may be provided in the table along with the rate required to be disclosed if the card issuer also discloses the time period during which the introductory rate will remain in effect.

6. *Introductory rates—premium rates.* If the initial rate is temporary and is higher than the permanently applicable rate, the card issuer must disclose the initial rate. The issuer may disclose in the table the rate that would otherwise apply if the issuer also discloses the time period during which the initial rate will remain in effect.

5a(b)(2) Fees for Issuance or Availability

1. *Membership fees.* Membership fees for opening an account must be disclosed under this paragraph. A membership fee to join an organization that provides a credit or charge card as a privilege of membership must be disclosed only if the card is issued automatically upon membership. Such a fee need not be disclosed if membership results merely in eligibility to apply for an account.

2. *Enhancements.* Fees for optional services in addition to basic membership privileges in a credit or charge card account (for example, travel insurance or card-registration services) should not be disclosed in the table if the basic account may be opened without paying such fees.

3. *One-time fees.* Disclosure of nonperiodic fees is limited to fees related to opening the account, such as one-time membership fees.

The following are examples of fees that should not be disclosed in the table:

- Fees for reissuing a lost or stolen card
- Statement-reproduction fees
- Application fees described in section 226.4(c)(1)

4. *Waived or reduced fees.* If fees required to be disclosed are waived or reduced for a limited time, the introductory fees or the fact of fee waivers may be provided in the table in addition to the required fees if the card issuer also discloses how long the fees or waivers will remain in effect.

5. *Fees stated as annual amount.* Fees imposed periodically must be stated as an annual total. For example, if a fee is imposed quarterly, the disclosures would state the total amount of the fees for one year. (See, however, the commentary to section 226.9(e) with regard to disclosure of such fees in renewal notices.)

5a(b)(4) Transaction Charges

1. *Charges imposed by person other than card issuer.* Charges imposed by a third party, such as a seller of goods, would not be disclosed under this section; the third party would be responsible for disclosing the charge under section 226.9(d)(1).

5a(b)(5) Grace Period

1. *How disclosure is made.* The card issuer may, but need not, refer to the beginning or ending point of any grace period and briefly state any conditions on the applicability of the grace period. For example, the grace period disclosure might read "30 days" or "30 days from the date of the periodic statement (provided you have paid your previous balance in full by the due date)."

5a(b)(6) Balance-Computation Method

1. *Form of disclosure.* In cases where the card issuer uses a balance-calculation method that is identified by name in the regulation, the card issuer may only disclose the name of the method in the table. In cases where the card issuer uses a balance-computation method that is not identified by name in the regulation, the disclosure in the table should clearly explain the method in as much detail as set forth in the descriptions of balance methods in section 226.5a(g). The explanation need not be as detailed as that required for the disclosures under section 226.6(a)(3). (See the commentary to section 226.5a(g) for guidance on particular methods.)

2. *Determining the method.* In determining the appropriate balance-computation method for purchases for disclosure purposes, the card issuer must assume that a purchase balance will exist at the end of any grace period. Thus, for example, if the average-daily-balance method will include new purchases or cover two billing cycles only if purchase balances are not paid within the grace period, the card issuer would disclose the name of the average-daily-balance method that includes new purchases or covers two billing cycles, respectively. The card issuer should not assume the existence of a purchase balance, however, in making other disclosures under section 226.5a(b).

5a(b)(7) Statement on Charge Card Payments

1. *Applicability and content.* The disclosure that charges are payable upon receipt of the periodic statement is applicable only to charge card accounts. In making this disclosure, the card issuer may make such modifications as are necessary to more accurately reflect the circumstances of repayment under the account. For example, the disclosure might read, "Charges are due and payable upon receipt of the periodic statement and must be paid no later than 15 days after receipt of such statement."

5a(b)(8) Cash-Advance Fee

1. *Applicability.* The card issuer must disclose only those fees it imposes for a cash advance that are finance charges under section 226.4. For example, a charge for a cash advance at an automated teller machine (ATM) would be disclosed under section 226.5a(b)(8) if no similar charge is imposed for ATM transactions not involving an extension of credit.

(See comment 4(a)-5 for a description of such a fee.)

5a(b)(9) Late-Payment Fee

1. *Applicability.* The disclosure of the fee for a late payment includes only those fees that will be imposed for actual, unanticipated late payments. (See the commentary to section 226.4(c)(2) for additional guidance on late-payment fees.)

5a(b)(10) Over-the-Limit Fee

1. *Applicability.* The disclosure of fees for exceeding a credit limit does not include fees for other types of default or for services related to exceeding the limit. For example, no disclosure is required of fees for reinstating credit privileges or fees for the dishonor of checks on an account that, if paid, would cause the credit limit to be exceeded.

5a(c) Direct-Mail Applications and Solicitations

1. *Accuracy.* In general, disclosures in direct-mail applications and solicitations must be accurate as of the time of mailing. (An accurate variable annual percentage rate is one in effect within 60 days before mailing.)

2. *Mailed publications.* Applications or solicitations contained in generally available publications mailed to consumers (such as subscription magazines) are subject to the requirements applicable to "take-ones" in section 226.5a(e), rather than the direct-mail requirements of section 226.5a(c). However, if a primary purpose of a card issuer's mailing is to offer credit or charge card accounts—for example, where a card issuer "prescreens" a list of potential cardholders using credit criteria, and then mails to the targeted group its catalog containing an application or a solicitation for a card account—the direct-mail rules apply. In addition, a card issuer may use a single application form as a "take-one" (in racks in public locations, for example) and for direct mailings, if the card issuer complies with the requirements of section 226.5a(c) even when the form is used as a "take-one"—that is, by presenting the required section 226.5a disclosures in a tabular format. When used in a direct mailing, the credit-term disclosures must be accurate as of the mailing date, whether or not the section 226.5a (e)(1)(ii) and (iii) disclosures are included; when used in a take-one, the disclosures must be accurate for as long as the takeone forms remain available to the public if the section 226.5a(e)(1)(ii) and (iii) disclosures are omitted. (If those disclosures are included in the take-one, the credit term disclosures need only be accurate as of the printing date.)

5a(d) Telephone Applications and Solicitations

1. *Coverage.* This paragraph applies if:

- A telephone conversation between a card issuer and consumer may result in the issuance of a card as a consequence of an issuer-initiated offer to open an account for which the issuer does not require any application (that is, a "preapproved" telephone solicitation).
- The card issuer initiates the contact and at the same time takes application information over the telephone.

This paragraph does not apply to:

- Telephone applications initiated by the consumer.
- Situations where no card will be issued—because, for example, the consumer indicates that he or she does not want the card, or the card issuer decides either during the telephone conversation or later not to issue the card.

5a(e) Applications and Solicitations Made Available to General Public

1. *Coverage.* Applications and solicitations made available to the general public include what are commonly referred to as "take-one" applications typically found at counters in banks and retail establishments, as well as applications contained in catalogs, magazines and other generally available publications. In the case of credit unions, this paragraph applies to applications and solicitations to open card accounts made available to those in the general field of membership.

2. *Cross-selling.* If a card issuer invites a con-

sumer to apply for a credit or charge card (for example, where the issuer engages in cross-selling), an application provided to the consumer at the consumer's request is not considered an application made available to the general public and therefore is not subject to section 226.5a(e). For example, the following are not covered:

- A consumer applies in person for a car loan at a financial institution and the loan officer invites the consumer to apply for a credit or charge card account; the consumer accepts the invitation.
- An employee of a retail establishment, in the course of processing a sales transaction using a bank credit card, asks a customer if he or she would like to apply for the retailer's credit or charge card; the customer responds affirmatively.

3. *Toll-free telephone number.* If a card issuer, in complying with any of the disclosure options of section 226.5a(e), provides a telephone number for consumers to call to obtain credit information, the number must be toll-free for nonlocal calls made from an area code other than the one used in the card issuer's dialing area. Alternatively, a card issuer may provide any telephone number that allows a consumer to call for information and reverse the telephone charges.

5a(e)(1) Disclosure of Required Credit Information

1. *Date of printing.* Disclosure of the month and year fulfills the requirement to disclose the date an application was printed.

2. *Form of disclosures.* The disclosures specified in section 226.5a(e)(1)(ii) and (iii) may appear either in or outside the table containing the required credit disclosures.

5a(e)(2) Inclusion of Certain Initial Disclosures

1. *Accuracy of disclosures.* The disclosures required by section 226.5a(e)(2) generally must be current as of the time they are made available to the public. Disclosures are considered to be made available at the time they are placed in public locations (in the case of "take-ones") or mailed to consumers (in the case of publications).

2. *Accuracy—exception.* If a card issuer discloses all the information required by section 226.5a(e)(1)(ii) on the application or solicitation, the disclosures under section 226.5a(e)(2) need only be current as of the date of printing. (A current variable annual percentage rate would be one in effect within 30 days before printing.)

5a(e)(3) No Disclosure of Credit Information

1. *When disclosure option available.* A card issuer may use this option only if the issuer does not include on or with the application or solicitation any statement that refers to the credit disclosures required by section 226.5a(b). Statements such as "no annual fee," "low interest rate," "favorable rates," and "low costs" are deemed to refer to the required credit disclosures and, therefore, may not be included on or with the solicitation or application, if the card issuer chooses to use this option.

5a(e)(4) Prompt Response to Requests for Information

1. *Prompt disclosure.* Information is promptly disclosed if it is given within 30 days of a consumer's request for information but in no event later than delivery of the credit or charge card.

2. *Information disclosed.* When a consumer requests credit information, card issuers need not provide all the required credit disclosures in all instances. For example, if disclosures have been provided in accordance with section 226.5a(e)(1) or (2) and a consumer calls or writes a card issuer to obtain information about changes in the disclosures, the issuer need only provide the items of information that have changed from those previously disclosed on or with the application or solicitation. If a consumer requests information about particular items, the card issuer need only provide the requested information. If, however, the card issuer has made disclosures in accordance with the option in section 226.5a(e)(3) and a consumer calls or writes the card issuer

requesting information about costs, all the required disclosure information must be given.

3. *Manner of response.* A card issuer's response to a consumer's request for credit information may be provided orally or in writing, regardless of the manner in which the consumer's request is received by the issuer. Furthermore, the card issuer may provide the information listed in either section 226.5a(e)(1) or (2). Information provided in writing need not be in a tabular format.

5a(f) Special Charge Card Rule—Card Issuer and Person Extending Credit Not the Same Person

1. *Duties of charge card issuer.* Although the charge card issuer is not required to disclose information about the underlying open-end credit plan if the card issuer meets the conditions set forth in section 226.5a(f), the card issuer must disclose the information relating to the charge card plan itself.

2. *Duties of creditor maintaining open-end plan.* Section 226.5a does not impose disclosure requirements on the creditor that maintains the underlying open-end credit plan. This is the case even though the creditor offering the open-end credit plan may be considered an agent of the charge card issuer. (See comment 2(a)(7)-1.)

3. *Form of disclosures.* The disclosures required by section 226.5a(f) may appear either in or outside the table containing the required credit disclosures in circumstances where a tabular format is required.

5a(g) Balance-Computation Methods Defined

1. *Daily-balance method.* Card issuers using the daily-balance method may disclose it using the name "average daily balance (including new purchases)" or "average daily balance (excluding new purchases)," as appropriate. Alternatively, such card issuers may explain the method. (See comment 7(e)-5 for a discussion of the daily-balance method.)

2. *Two-cycle average-daily-balance methods.* The "two-cycle average-daily-balance" methods described in section 226.5a(g)(2)(i) and (ii) include those methods in which the average daily balances for two billing cycles may be added together to compute the finance charge. Such methods also include those in which a periodic rate is applied separately to the balance in each cycle, and the resulting finance charges are added together. The method is a "two-cycle average daily balance" even if the finance charge is based on both the current- and prior-cycle balances only under certain circumstances, such as when purchases during a prior cycle were carried over into the current cycle and no finance charge was assessed during the prior cycle. Furthermore, the method is a "two-cycle average-daily-balance method" if the balances for both the current and prior cycles are average daily balances, even if those balances are figured differently. For example, the name "two-cycle average-daily-balance (excluding new purchases)" should be used to describe a method in which the finance charge for the current cycle, figured on an average daily balance excluding new purchases, will be added to the finance charge for the prior cycle, figured on an average daily balance of only new purchases during that prior cycle.

SECTION 226.5b—Requirements for Home-Equity Plans

1. *Coverage.* This section applies to all open-end credit plans secured by the consumer's "dwelling," as defined in section 226.2(a)(19), and is not limited to plans secured by the consumer's *principal* dwelling. (See the commentary to section 226.3(a), which discusses whether transactions are consumer or business-purpose credit, for guidance on whether a home-equity plan is subject to Regulation Z.)

2. *Changes to home-equity plans entered into on or after November 7, 1989.* Section 226.9(c) applies if, by written agreement under section 226.5b(f)(3)(iii), a creditor changes the terms of a home-equity plan—entered into on or after November 7, 1989—at or before its scheduled expiration, for example, by renewing a plan on different terms. A new plan results, however, if the plan is renewed (with or without changes to the terms) after

the scheduled expiration. The new plan is subject to all open-end credit rules, including sections 226.5b, 226.6, and 226.15.

3. *Transition rules and renewals of preexisting plans.* The requirements of this section do not apply to home-equity plans entered into before November 7, 1989. The requirements of this section also do not apply if the original consumer, on or after November 7, 1989, renews a plan entered into prior to that date (with or without changes to the terms). If, on or after November 7, 1989, a security interest in the consumer's dwelling is added to a line of credit entered into before that date, the substantive restrictions of this section apply for the remainder of the plan, but no new disclosures are required under this section.

4. *Disclosure of repayment phase—applicability of requirements.* Some plans provide in the initial agreement for a period during which no further draws may be taken and repayment of the amount borrowed is made. All of the applicable disclosures in this section must be given for the repayment phase. Thus, for example, a creditor must provide payment information about the repayment phase as well as about the draw period, as required by section 266.5b(d)(5). If the rate that will apply during the repayment phase is fixed at a known amount, the creditor must provide an annual percentage rate under section 226.5b(d)(6) for that phase. If, however, a creditor uses an index to determine the rate that will apply at the time of conversion to the repayment phase—even if the rate will thereafter be fixed—the creditor must provide the information in section 226.5b(d)(12), as applicable.

5. *Payment terms—applicability of closed-end provisions and substantive rules.* All payment terms that are provided for in the initial agreement are subject to the requirements of subpart B and not subpart C of the regulation. Payment terms that are subsequently added to the agreement may be subject to subpart B or to subpart C, depending on the circumstances. The following examples apply these general rules to different situations:

- If the initial agreement provides for a repayment phase or for other payment terms such as options permitting conversion of part or all of the balance to a fixed rate during the draw period, these terms must be disclosed pursuant to sections 226.5b and 226.6, and not under subpart C. Furthermore, the creditor must continue to provide periodic statements under section 226.7 and comply with other provisions of subpart B (such as the substantive requirements of section 226.5b(f)) throughout the plan, including the repayment phase.
- If the consumer and the creditor enter into an agreement during the draw period to repay all or part of the principal balance on different terms (for example, with a fixed rate of interest) and the amount of available credit will be replenished as the principal balance is repaid, the creditor must continue to comply with subpart B. For example, the creditor must continue to provide periodic statements and comply with the substantive requirements of section 226.5b(f) throughout the plan.
- If the consumer and creditor enter into an agreement during the draw period to repay all or part of the principal balance and the amount of available credit will not be replenished as the principal balance is repaid, the creditor must give closed-end credit disclosures pursuant to subpart C for that new agreement. In such cases, subpart B, including the substantive rules, does not apply to the closed-end credit transaction, although it will continue to apply to any remaining open-end credit available under the plan.

6. *Spreader clause.* When a creditor holds a mortgage or deed of trust on the consumer's dwelling and that mortgage or deed of trust contains a "spreader clause" (also known as a "dragnet" or cross-collateralization clause), subsequent occurrences such as the opening of an open-end plan are subject to the rules applicable to home-equity plans to the same degree as if a security interest were taken directly to secure the plan, unless the creditor effectively waives its security interest under the spreader clause with respect to the subsequent open-end credit extensions.

5b(a) Form of Disclosures

5b(a)(1) General

1. *Written disclosures.* The disclosures required under this section must be clear and conspicuous and in writing, but need not be in a form the consumer can keep. (See the commentary to section 226.6(e) for special rules when disclosures required under section 226.5b(d) are given in a retainable form.)

2. *Disclosure of annual percentage rate—more-conspicuous requirement.* As provided in section 226.5(a)(2), when the term "annual percentage rate" is required to be disclosed with a number, it must be more conspicuous than other required disclosures.

3. *Segregation of disclosures.* While most of the disclosures must be grouped together and segregated from all unrelated information, the creditor is permitted to include information that explains or expands on the required disclosures, including, for example:

- Any prepayment penalty
- How a substitute index may be chosen
- Actions the creditor may take short of terminating and accelerating an outstanding balance
- Renewal terms
- Rebate of fees

An example of information that does not explain or expand on the required disclosures and thus cannot be included is the creditor's underwriting criteria, although the creditor could provide such information separately from the required disclosures.

4. *Method of providing disclosures.* A creditor may provide a single disclosure form for all of its home-equity plans, as long as the disclosure describes all aspects of the plans. For example, if the creditor offers several payment options, all such options must be disclosed. (See, however, the commentary to section 226.5b(d)(5)(iii) and 226.5b(d)(12)(x) and (xi) for disclosure requirements relating to these provisions.) If any aspects of a plan are linked together, the creditor must disclose clearly the relationship of the terms to each other. For example, if the consumer can only obtain a particular payment option in conjunction with a certain variable-rate feature, this fact must be disclosed. A creditor has the option of providing separate disclosure forms for multiple options or variations in features. For example, a creditor that offers different payment options for the draw period may prepare separate disclosure forms for the two payment options. A creditor using this alternative, however, must include a statement on each disclosure form that the consumer should ask about the creditor's other home-equity programs. (This disclosure is required only for those programs available generally to the public. Thus, if the only other programs available are employee preferred-rate plans, for example, the creditor would not have to provide this statement.) A creditor that receives a request for information about other available programs must provide the additional disclosures as soon as reasonably possible.

5b(a)(2) Precedence of Certain Disclosures

1. *Precedence rule.* The list of conditions provided at the creditor's option under section 226.5b(d)(4)(iii) need not precede the other disclosures.

5b(b) Time of Disclosures

1. *Mail and telephone applications.* If the creditor sends applications through the mail, the disclosures and a brochure must accompany the application. If an application is taken over the telephone, the disclosures and brochure may be delivered or mailed within three business days of taking the application. If an application is mailed to the consumer following a telephone request, however, the creditor also must send the disclosures and a brochure along with the application.

2. *General-purpose applications.* The disclosures and a brochure need not be provided when a general-purpose application is given to a consumer unless (1) the application or materials accompanying it indicate that it can be used to apply for a home-equity plan or (2) the application is provided in response to a consumer's specific inquiry about a home-equity plan. On the other hand, if a general-purpose application is provided in response to a consumer's specific inquiry only about

credit other than a home-equity plan, the disclosures and brochure need not be provided even if the application indicates it can be used for a home-equity plan, unless it is accompanied by promotional information about home-equity plans.

3. *Publicly available applications.* Some creditors make applications for home-equity plans, such as "take-ones," available without the need for a consumer to request them. These applications must be accompanied by the disclosures and a brochure, such as by attaching the disclosures and brochure to the application form.

4. *Response cards.* A creditor may solicit consumers for its home-equity plan by mailing a "response card" which the consumer returns to the creditor to indicate interest in the plan. If the only action taken by the creditor upon receipt of the response card is to send the consumer an application form or to telephone the consumer to discuss the plan, the creditor need not send the disclosures and brochure with the response card.

5. *Denial or withdrawal of application.* In situations where footnote 10a permits the creditor a three-day delay in providing disclosures and the brochure, if the creditor determines within that period that an application will not be approved, the creditor need not provide the consumer with the disclosures or brochure. Similarly, if the consumer withdraws the application within this three-day period, the creditor need not provide the disclosures or brochure.

6. *Intermediary agent or broker.* In determining whether or not an application involves an "intermediary agent or broker" as discussed in footnote 10a, creditors should consult the provisions in comment 19(b)-3.

5b(c) Duties of Third Parties

1. *Disclosure requirements.* Although third parties who give applications to consumers for home-equity plans must provide the brochure required under section 226.5b(e) in all cases, such persons need provide the disclosures required under section 226.5b(d) only in certain instances. A third party has no duty to obtain disclosures about a creditor's home-equity plan or to create a set of disclosures based on what it knows about a creditor's plan. If, however, a creditor provides the third party with disclosures along with its application form, the third party must give the disclosures to the consumer with the application form. The duties under this section are those of the third party; the creditor is not responsible for ensuring that a third party complies with those obligations. If an intermediary agent or broker takes an application over the telephone or receives an application contained in a magazine or other publication, footnote 10a permits that person to mail the disclosures and brochure within three business days of receipt of the application. (See the commentary to section 226.5b(h) about imposition of nonrefundable fees.)

5b(d) Content of Disclosures

1. *Disclosures given as applicable.* The disclosures required under this section need be made only as applicable. Thus, for example, if negative amortization cannot occur in a home-equity plan, a reference to it need not be made.

2. *Duty to respond to requests for information.* If the consumer, prior to the opening of a plan, requests information as suggested in the disclosures (such as the current index value or margin), the creditor must provide this information as soon as reasonably possible after the request.

5b(d)(1) Retention of Information

1. *When disclosure not required.* The creditor need not disclose that the consumer should make or otherwise retain a copy of the disclosures if they are retainable—for example, if the disclosures are not part of an application that must be returned to the creditor to apply for the plan.

5b(d)(2) Conditions for Disclosed Terms

Paragraph 5b(d)(2)(i)

1. *Guaranteed terms.* The requirement that the creditor disclose the time by which an application must be submitted to obtain the

disclosed terms does not require the creditor to guarantee any terms. If a creditor chooses not to guarantee any terms, it must disclose that all of the terms are subject to change prior to opening the plan. The creditor also is permitted to guarantee some terms and not others, but must indicate which terms are subject to change.

2. *Date for obtaining disclosed terms.* The creditor may disclose either a specific date or a time period for obtaining the disclosed terms. If the creditor discloses a time period, the consumer must be able to determine from the disclosure the specific date by which an application must be submitted to obtain any guaranteed terms. For example, the disclosure might read, "To obtain the following terms, you must submit your application within 60 days after the date appearing on this disclosure," provided the disclosure form also shows the date.

Paragraph 5b(d)(2)(ii)

1. *Relation to other provisions.* Creditors should consult the rules in section 226.5b(g) regarding refund of fees.

5b(d)(4) Possible Actions by Creditor

Paragraph 5b(d)(4)(i)

1. *Fees imposed upon termination.* This disclosure applies only to fees (such as penalty or prepayment fees) that the creditor imposes if it terminates the plan prior to normal expiration. The disclosure does not apply to fees that are imposed either when the plan expires in accordance with the agreement or if the consumer terminates the plan prior to its scheduled maturity. In addition, the disclosure does not apply to fees associated with collection of the debt, such as attorneys' fees and court costs, or to increases in the annual percentage rate linked to the consumer's failure to make payments. The actual amount of the fee need not be disclosed.

2. *Changes specified in the initial agreement.* If changes may occur pursuant to section 226.5b(f)(3)(i), a creditor must state that certain changes will be implemented as specified in the initial agreement.

Paragraph 5b(d)(4)(iii)

1. *Disclosure of conditions.* In making this disclosure, the creditor may provide a highlighted copy of the document that contains such information, such as the contract or security agreement. The relevant items must be distinguished from the other information contained in the document. For example, the creditor may provide a cover sheet that specifically points out which contract provisions contain the information, or may mark the relevant items on the document itself. As an alternative to disclosing the conditions in this manner, the creditor may simply describe the conditions using the language in section 226.5b(f)(2)(i)–(iii), 226.5b(f)(3)(i) (regarding freezing the line when the maximum annual percentage rate is reached), and 226.5b (f)(3)(vi) or language that is substantially similar. The condition contained in section 226.5b(f)(2)(iv) need not be stated. In describing specified changes that may be implemented during the plan, the creditor may provide a disclosure such as: "Our agreement permits us to make certain changes to the terms of the line at specified time or upon the occurrence of specified events."

2. *Form of disclosure.* The list of conditions under section 226.5b(d)(4)(iii) may appear with the segregated disclosures or apart from them. If the creditor elects to provide the list of conditions with the segregated disclosures, the list need not comply with the precedence rule in section 226.5b(a)(2).

5b(d)(5) Payment Terms

Paragraph 5b(d)(5)(i)

1. *Length of the plan.* The combined length of the draw period and any repayment period need not be stated. If the length of the repayment phase cannot be determined because, for example, it depends on the balance outstanding at the beginning of the repayment period, the creditor must state that the length is determined by the size of the balance. If the length of the plan is indefinite (for example, because there is no time limit on the period during which the consumer can take advances), the creditor must state that fact.

2. *Renewal provisions.* If, under the credit agreement, a creditor retains the right to review a line at the end of the specified draw period and determine whether to renew or extend the draw period of the plan, the possibility of renewal or extension—regardless of its likelihood—should be ignored for purposes of the disclosures. For example, if an agreement provides that the draw period is five years and that the creditor may renew the draw period for an additional five years, the possibility of renewal should be ignored and the draw period should be considered five years. (See the commentary accompanying section 226.9(c)(1) dealing with change in terms requirements.)

Paragraph 5b(d)(5)(ii)

1. *Determination of the minimum periodic payment.* This disclosure must reflect how the minimum periodic payment is determined, but need only describe the principal and interest components of the payment. Other charges that may be part of the payment (as well as the balance-computation method) may, but need not, be described under this provision.

2. *Fixed-rate and term-payment options during draw period.* If the home-equity plan permits the consumer to repay all or part of the balance during the draw period at a fixed rate (rather than a variable rate) and over a specified time period, this feature must be disclosed. To illustrate, a variable-rate plan may permit a consumer to elect during a ten-year draw period to repay all or a portion of the balance over a three-year period at a fixed rate. The creditor must disclose the rules relating to this feature including the period during which the option can be selected, the length of time over which repayment can occur, any fees imposed for such a feature, and the specific rate or a description of the index and margin that will apply upon exercise of this choice. For example, the index and margin disclosure might state, "If you choose to convert any portion of your balance to a fixed rate, the rate will be the highest prime rate published in the *Wall Street Journal* that is in effect at the date of conversion plus a margin." If the fixed rate is to be determined according to an index, it must be one that is outside the creditor's control and is publicly available in accordance with section 226.5b(f)(1). The effect of exercising the option should not be reflected elsewhere in the disclosures, such as in the historical example required in section 226.5b(d)(12)(xi).

3. *Balloon payments.* In programs where the occurrence of a balloon payment is possible, the creditor must disclose the possibility of a balloon payment even if such a payment is uncertain or unlikely. In such cases, the disclosure might read, "Your minimum payments may not be sufficient to fully repay the principal that is outstanding on your line. If they are not, you will be required to pay the entire outstanding balance in a single payment." In programs where a balloon payment will occur, such as programs with interest-only payments during the draw period and no repayment period, the disclosures must state that fact. For example, the disclosure might read, "Your minimum payments will not repay the principal that is outstanding on your line. You will be required to pay the entire outstanding balance in a single payment." In making this disclosure, the creditor is not required to use the term "balloon payment." The creditor also is not required to disclose the amount of the balloon payment. (See, however, the requirement under section 226.5b(d)(5)(iii).) The balloon-payment disclosure does not apply in cases where repayment of the entire outstanding balance would occur only as a result of termination and acceleration. The creditor also need not make a disclosure about balloon payments if the final payment could not be more than twice the amount of other minimum payments under the plan.

Paragraph 5b(d)(5)(iii)

1. *Minimum-periodic-payment example.* In disclosing the payment example, the creditor may assume that the credit limit as well as the outstanding balance is $10,000 if such an assumption is relevant to calculating payments. (If the creditor only offers lines of credit for less than $10,000, the creditor may assume an outstanding balance of $5,000 instead of $10,000 in making this disclosure.) The example should reflect the payment comprised only of principal and interest. Creditors may provide an additional example reflecting other

charges that may be included in the payment, such as credit-insurance premiums. Creditors may assume that all months have an equal number of days, that payments are collected in whole cents, and that payments will fall on a business day even though they may be due on a non-business day. For variable-rate plans, the example must be based on the last rate in the historical example required in section 226.5b(d)(12)(xi), or a more recent rate. In cases where the last rate shown in the historical example is different from the index value and margin (for example, due to a rate cap), creditors should calculate the rate by using the index value and margin. A discounted rate may not be considered a more recent rate in calculating this payment example for either variable- or fixed-rate plans.

2. *Representative examples.* In plans with multiple payment options within the draw period or within any repayment period, the creditor may provide representative examples as an alternative to providing examples for each payment option. The creditor may elect to provide representative payment examples based on three categories of payment options. The first category consists of plans that permit minimum payment of only accrued finance charges ("interest-only" plans). The second category includes plans in which a fixed percentage or a fixed fraction of the outstanding balance or credit limit (for example, 2 percent of the balance or 1/180th of the balance) is used to determine the minimum payment. The third category includes all other types of minimum-payment options, such as a specified dollar amount plus any accrued finance charges. Creditors may classify their minimum-payment arrangements within one of these three categories even if other features exist, such as varying lengths of a draw or repayment period, required payment of pastdue amounts, late charges, and minimum dollar amounts. The creditor may use a single example within each category to represent the payment options in that category. For example, if a creditor permits minimum payments of 1 percent, 2 percent, 3 percent or 4 percent of the outstanding balance, it may pick one of these four options and provide the example required under section 226.5b(d)(5)(iii) for that option alone. The example used to represent a category must be an option commonly chosen by consumers, or a typical or representative example. (See the commentary to section 226.5b(d)(12)(x) and (xi) for a discussion of the use of representative examples for making those disclosures. Creditors using a representative example within each category must use the same example for purposes of the disclosures under section 226.5b(d)(5)(iii) and 226.5b(d)(12)(x) and (xi).) Creditors may use representative examples under section 226.5b(d)(5) only with respect to the payment example required under paragraph (d)(5)(iii). Creditors must provide a full narrative description of all payment options under section 226.5b(d)(5)(i) and (ii).

3. *Examples for draw and repayment periods.* Separate examples must be given for the draw and repayment periods unless the payments are determined the same way during both periods. In setting forth payment examples for any repayment period under this section (and the historical example under section 226.5b(d)(12)(xi)), creditors should assume a $10,000 advance is taken at the beginning of the draw period and is reduced according to the terms of the plan. Creditors should not assume an additional advance is taken at any time, including at the beginning of any repayment period.

4. *Reverse mortgages.* Reverse mortgages, also know as reverse-annuity or home-equity-conversion mortgages, in addition to permitting the consumer to obtain advances, may involve the disbursement of monthly advances to the consumer for a fixed period or until the occurrence of an event such as the consumer's death. Repayment of the reverse mortgage (generally a single payment of principal and accrued interest) may be required to be made at the end of the disbursements or, for example, upon the death of the consumer. In disclosing these plans, creditors must apply the following rules, as applicable:

- If the reverse mortgage has a specified period for advances and disbursements but repayment is due only upon occurrence of a future event such as the death of the consumer, the creditor must assume that

disbursements will be made until they are scheduled to end. The creditor must assume repayment will occur when disbursements end (or within a period following the final disbursement which is not longer than the regular interval between disbursements). This assumption should be used even though repayment may occur before or after the disbursements are scheduled to end. In such cases, the creditor may include a statement such as "The disclosures assume that you will repay the line at the time the draw period and our payments to you end. As provided in your agreement, your repayment may be required at a different time." The single payment should be considered the "minimum periodic payment" and consequently would not be treated as a balloon payment. The example of the minimum payment under section 226.5b(d)(5)(iii) should assume a single $10,000 draw.

- If the reverse mortgage has neither a specified period for advances or disbursements nor a specified repayment date and these terms will be determined solely by reference to future events, including the consumer's death, the creditor may assume that the draws and disbursements will end upon the consumer's death (estimated by using actuarial tables, for example) and that repayment will be required at the same time (or within a period following the date of the final disbursement which is not longer than the regular interval for disbursements). Alternatively, the creditor may base the disclosures upon another future event it estimates will be most likely to occur first. (If terms will be determined by reference to future events which do not include the consumer's death, the creditor must base the disclosures upon the occurrence of the event estimated to be most likely to occur first.)
- In making the disclosures, the creditor must assume that all draws and disbursements and accrued interest will be paid by the consumer. For example, if the note has a nonrecourse provision providing that the consumer is not obligated for an amount greater than the value of the house, the creditor must nonetheless assume that the full amount to be drawn or disbursed will be repaid. In this case, however, the creditor may include a statement such as "The disclosures assume full repayment of the amount advanced plus accrued interest, although the amount you may be required to pay is limited by your agreement."
- Some reverse mortgages provide that some or all of the appreciation in the value of the property will be shared between the consumer and the creditor. The creditor must disclose the appreciation feature, including describing how the creditor's share will be determined, any limitations, and when the feature may be exercised.

5b(d)(6) Annual Percentage Rate

1. *Preferred-rate plans.* If a creditor offers a preferential fixed-rate plan in which the rate will increase a specified amount upon the occurrence of a specified event, the creditor must disclose the specific amount the rate will increase.

5b(d)(7) Fees Imposed by Creditor

1. *Applicability.* The fees referred to in section 226.5b(d)(7) include items such as application fees, points, annual fees, transaction fees, fees to obtain checks to access the plan, and fees imposed for converting to a repayment phase that is provided for in the original agreement. This disclosure includes any fees that are imposed by the creditor to use or maintain the plan, whether the fees are kept by the creditor or a third party. For example, if a creditor requires an annual credit report on the consumer and requires the consumer to pay this fee to the creditor or directly to the third party, the fee must be specifically stated. Third-party fees to open the plan that are initially paid by the consumer to the creditor may be included in this disclosure or in the disclosure under section 226.5b(d)(8).

2. *Manner of describing fees.* Charges may be stated as an estimated dollar amount for each fee, or as a percentage of a typical or representative amount of credit. The creditor may provide a stepped fee schedule in which a fee will increase a specified amount at a specified

date. (See the discussion contained in the commentary to section 226.5b(f)(3)(i).)

3. *Fees not required to be disclosed.* Fees that are not imposed to open, use, or maintain a plan, such as fees for researching an account, photocopying, paying late, stopping payment, having a check returned, exceeding the credit limit, or closing out an account do not have to be disclosed under this section. Credit report and appraisal fees imposed to investigate whether a condition permitting a freeze continues to exist—as discussed in the commentary to section 226.5b(f)(3)(vi)—are not required to be disclosed under this section or section 226.5b(d)(8).

4. *Rebates of closing costs.* If closing costs are imposed they must be disclosed, regardless of whether such costs may be rebated later (for example, rebated to the extent of any interest paid during the first year of the plan).

5. *Terms used in disclosure.* Creditors need not use the terms "finance charge" or "other charge" in describing the fees imposed by the creditor under this section or those imposed by third parties under section 226.5b(d)(8).

5b(d)(8) Fees Imposed by Third Parties to Open a Plan

1. *Applicability.* Section 226.5b(d)(8) applies only to fees imposed by third parties to open the plan. Thus, for example, this section does not require disclosure of a fee imposed by a government agency at the end of a plan to release a security interest. Fees to be disclosed include appraisal, credit report, government agency, and attorneys' fees. In cases where property insurance is required by the creditor, the creditor either may disclose the amount of the premium or may state that property insurance is required. For example, the disclosure might state, "You must carry insurance on the property that secures this plan."

2. *Itemization of third-party fees.* In all cases creditors must state the total of third-party fees as a single dollar amount or a range except that the total need not include costs for property insurance if the creditor discloses that such insurance is required. A creditor has two options with regard to providing the more detailed information about third-party fees. Creditors may provide a statement that the consumer may request more specific cost information about third-party fees from the creditor. As an alternative to including this statement, creditors may provide an itemization of such fees (by type and amount) with the early disclosures. Any itemization provided upon the consumer's request need not include a disclosure about property insurance.

3. *Manner of describing fees.* A good faith estimate of the amount of fees must be provided. Creditors may provide, based on a typical or representative amount of credit, a range for such fees or state the dollar amount of such fees. Fees may be expressed on a unit-cost basis, for example, $5 per $1,000 of credit.

4. *Rebates of third-party fees.* Even if fees imposed by third parties may be rebated, they must be disclosed. (See the commentary to section 226.5b(d)(7).)

5b(d)(9) Negative Amortization

1. *Disclosure required.* In transactions where the minimum payment will not or may not be sufficient to cover the interest that accrues on the outstanding balance, the creditor must disclose that negative amortization will or may occur. This disclosure is required whether or not the unpaid interest is added to the outstanding balance upon which interest is computed. A disclosure is not required merely because a loan calls for nonamortizing or partially amortizing payments.

5b(d)(10) Transaction Requirements

1. *Applicability.* A limitation on automated teller machine usage need not be disclosed under this paragraph unless that is the only means by which the consumer can obtain funds.

5b(d)(12) Disclosures for Variable-Rate Plans

1. *Variable-rate provisions.* Sample forms in appendix G-14 provide illustrative guidance on the variable-rate rules.

Paragraph 5b(d)(12)(iv)

1. *Determination of annual percentage rate.* If the creditor adjusts its index through the addition of a margin, the disclosure might read, "Your annual percentage rate is based on the index plus a margin." The creditor is not required to disclose a specific value for the margin.

Paragraph 5b(d)(12)(viii)

1. *Preferred-rate provisions.* This paragraph requires disclosure of preferred-rate provisions, where the rate will increase upon the occurrence of some event, such as the borrower-employee leaving the creditor's employ or the consumer closing an existing deposit account with the creditor.

2. *Provisions on conversion to fixed rates.* The commentary to section 226.5b(d)(5)(ii) discusses the disclosure requirements for options permitting the consumer to convert from a variable rate to a fixed rate.

Paragraph 5b(d)(12)(ix)

1. *Periodic limitations on increases in rates.* The creditor must disclose any annual limitations on increases in the annual percentage rate. If the creditor bases its rate limitation on 12 monthly billing cycles, such a limitation should be treated as an annual cap. Rate limitations imposed on less than an annual basis must be stated in terms of a specific amount of time. For example, if the creditor imposes rate limitations on only a semiannual basis, this must be expressed as a rate limitation for a six-month time period. If the creditor does not impose periodic limitations (annual or shorter) on rate increases, the fact that there are no annual rate limitations must be stated.

2. *Maximum limitations on increases in rates.* The maximum annual percentage rate that may be imposed under each payment option over the term of the plan (including the draw period and any repayment period provided for in the initial agreement) must be provided. The creditor may disclose this rate as a specific number (for example, 18 percent) or as a specific amount above the initial rate. For example, this disclosure might read, "The maximum annual percentage rate that can apply to your line will be 5 percentage points above your initial rate." If the creditor states the maximum rate as a specific amount above the initial rate, the creditor must include a statement that the consumer should inquire about the rate limitations that are currently available. If an initial discount is not taken into account in applying maximum rate limitations, that fact must be disclosed. If separate overall limitations apply to rate increases resulting from events such as the exercise of a fixed-rate conversion option or leaving the creditor's employ, those limitations also must be stated. Limitations do not include legal limits in the nature of usury or rate ceilings under state or federal statutes or regulations.

3. *Form of disclosures.* The creditor need not disclose each periodic or maximum rate limitation that is currently available. Instead, the creditor may disclose the range of the lowest and highest periodic and maximum rate limitations that may be applicable to the creditor's home-equity plans. Creditors using this alternative must include a statement that the consumer should inquire about the rate limitations that are currently available.

Paragraph 5b(d)(12)(x)

1. *Maximum-rate-payment example.* In calculating the payment creditors should assume the maximum rate is in effect. Any discounted or premium initial rates or periodic rate limitations should be ignored for purposes of this disclosure. If a range is used to disclose the maximum cap under section 226.5b(d)(12)(ix), the highest rate in the range must be used for the disclosure under this paragraph. As an alternative to making disclosures based on each payment option, the creditor may choose a representative example within the three categories of payment options upon which to base this disclosure. (See the commentary to section 226.5b(d)(5).) However, separate examples must be provided for the draw period and for any repayment period unless the payment is determined the same way in both periods. Creditors should calculate the example for the repayment period based on an assumed $10,000 balance. (See the commentary to section 226.5b(d)(5) for a

discussion of the circumstances in which a creditor may use a lower outstanding balance.)

2. *Time the maximum rate could be reached.* In stating the date or time when the maximum rate could be reached, creditors should assume the rate increases as rapidly as possible under the plan. In calculating the date or time, creditors should factor in any discounted or premium initial rates and periodic-rate limitations. This disclosure must be provided for the draw phase and any repayment phase. Creditors should assume the index and margin shown in the last year of the historical example (or a more recent rate) is in effect at the beginning of each phase.

Paragraph 5b(d)(12)(xi)

1. *Index movement.* Index values and annual percentage rates must be shown for the entire 15 years of the historical example and must be based on the most recent 15 years. The example must be updated annually to reflect the most recent 15 years of index values as soon as reasonably possible after the new index value becomes available. If the values for an index have not been available for 15 years, a creditor need only go back as far as the values have been available and may start the historical example at the year for which values are first available.

2. *Selection of index values.* The historical example must reflect the method of choosing index values for the plan. For example, if an average of index values is used in the plan, averages must be used in the example, but if an index value as of a particular date is used, a single index value must be shown. The creditor is required to assume one date (or one period, if an average is used) within a year on which to base the history of index values. The creditor may choose to use index values as of any date or period as long as the index value as of this date or period is used for each year in the example. Only one index value per year need be shown, even if the plan provides for adjustments to the annual percentage rate or payment more than once in a year. In such cases, the creditor can assume that the index rate remained constant for the full year for the purpose of calculating the annual percentage rate and payment.

3. *Selection of margin.* A value for the margin must be assumed in order to prepare the example. A creditor may select a representative margin that it has used with the index during the six months preceding preparation of the disclosures and state that the margin is one that it has used recently. The margin selected may be used until the creditor annually updates the disclosure form to reflect the most recent 15 years of index values.

4. *Amount of discount or premium.* In reflecting any discounted or premium initial rate, the creditor may select a discount or premium that it has used during the six months preceding preparation of the disclosures, and should disclose that the discount or premium is one that the creditor has used recently. The discount or premium should be reflected in the example for as long as it is in effect. The creditor may assume that a discount or premium that would have been in effect for any part of a year was in effect for the full year for purposes of reflecting it in the historical example.

5. *Rate limitations.* Limitations on both periodic and maximum rates must be reflected in the historical example. If ranges of rate limitations are provided under section 226.5b (d)(12)(ix), the highest rates provided in those ranges must be used in the example. Rate limitations that may apply more often than annually should be treated as if they were annual limitations. For example, if a creditor imposes a 1 percent cap every six months, this should be reflected in the example as if it were a 2 percent annual cap.

6. *Assumed advances.* The creditor should assume that the $10,000 balance is an advance taken at the beginning of the first billing cycle and is reduced according to the terms of the plan, and that the consumer takes no subsequent draws. As discussed in the commentary to section 226.5b(d)(5), creditors should not assume an additional advance is taken at the beginning of any repayment period. If applicable, the creditor may assume the $10,000 is both the advance and the credit limit. (See the commentary to section 226.5b(d)(5) for a dis-

cussion of the circumstances in which a creditor may use a lower outstanding balance.)

7. *Representative payment options.* The creditor need not provide an historical example for all of its various payment options, but may select a representative payment option within each of the three categories of payments upon which to base its disclosure. (See the commentary to section 226.5b(d)(5).)

8. *Payment information.* The payment figures in the historical example must reflect all significant program terms. For example, features such as rate and payment caps, a discounted initial rate, negative amortization, and rate carryover must be taken into account in calculating the payment figures if these would have applied to the plan. The historical example should include payments for as much of the length of the plan as would occur during a 15-year period. For example:

- If the draw period is 10 years and the repayment period is 15 years, the example should illustrate the entire 10-year draw period and the first 5 years of the repayment period.
- If the length of the draw period is 15 years and there is a 15-year repayment phase, the historical example must reflect the payments for the 15-year draw period and would not show any of the repayment period. No additional historical example would be required to reflect payments for the repayment period.
- If the length of the plan is less than 15 years, payments in the historical example need only be shown for the number of years in the term. In such cases, however, the creditor must show the index values, margin and annual percentage rates and continue to reflect all significant plan terms such as rate limitations for the entire 15 years.

A creditor need show only a single payment per year in the example, even though payments may vary during a year. The calculations should be based on the actual payment-computation formula, although the creditor may assume that all months have an equal number of days. The creditor may assume that payments are made on the last day of the billing cycle, the billing date or the payment-due date, but must be consistent in the manner in which the period used to illustrate payment information is selected. Information about balloon payments and remaining balance may, but need not, be reflected in the example.

9. *Disclosures for repayment period.* The historical example must reflect all features of the repayment period, including the appropriate index values, margin, rate limitations, length of the repayment period, and payments. For example, if different indices are used during the draw and repayment periods, the index values for that portion of the 15 years that reflect the repayment period must be the values for the appropriate index.

10. *Reverse mortgages.* The historical example for reverse mortgages should reflect 15 years of index values and annual percentage rates, but the payment column should be blank until the year that the single payment will be made, assuming that payment is estimated to occur within 15 years. (See the commentary to section 226.5b(d)(5) for a discussion of reverse mortgages.)

5b(e) Brochure

1. *Substitutes.* A brochure is a suitable substitute for the Board's home-equity brochure if it is, at a minimum, comparable to the Board's brochure in substance and comprehensiveness. Creditors are permitted to provide more detailed information than is contained in the Board's brochure.

2. *Effect of third-party delivery of brochure.* If a creditor determines that a third party has provided a consumer with the required brochure pursuant to section 226.5b(c), the creditor need not give the consumer a second brochure.

5b(f) Limitations on Home-Equity Plans

1. *Coverage.* Section 226.5b(f) limits both actions that may be taken and language that may be included in contracts, and applies to any assignee or holder as well as to the original creditor. The limitations apply to the draw period and any repayment period, and to any

renewal or modification of the original agreement.

Paragraph 5b(f)(1)

1. *External index.* A creditor may change the annual percentage rate for a plan only if the change is based on an index outside the creditor's control. Thus, a creditor may not make rate changes based on its own prime rate or cost of funds and may not reserve a contractual right to change rates at its discretion. A creditor is permitted, however, to use a published prime rate, such as that in the *Wall Street Journal,* even if the bank's own prime rate is one of several rates used to establish the published rate.

2. *Publicly available.* The index must be available to the public. A publicly available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify rates imposed under the plan.

3. *Provisions not prohibited.* This paragraph does not prohibit rate changes that are specifically set forth in the agreement. For example, stepped-rate plans, in which specified rates are imposed for specified periods, are permissible. In addition, preferred-rate provisions, in which the rate increases by a specified amount upon the occurrence of a specified event, also are permissible.

Paragraph 5b(f)(2)

1. *Limitations on termination and acceleration.* In general, creditors are prohibited from terminating and accelerating payment of the outstanding balance before the scheduled expiration of a plan. However, creditors may take these actions in the four circumstances specified in section 226.5b(f)(2). Creditors are not permitted to specify in their contracts any other events that allow termination and acceleration beyond those permitted by the regulation. Thus, for example, an agreement may not provide that the balance is payable on demand nor may it provide that the account will be terminated and the balance accelerated if the rate cap is reached.

2. *Other actions permitted.* If an event permitting termination and acceleration occurs, a creditor may instead take actions short of terminating and accelerating. For example, a creditor could temporarily or permanently suspend further advances, reduce the credit limit, change the payment terms, or require the consumer to pay a fee. A creditor also may provide in its agreement that a higher rate or higher fees will apply in circumstances under which it would otherwise be permitted to terminate the plan and accelerate the balance. A creditor that does not immediately terminate an account and accelerate payment or take another permitted action may take such action at a later time, provided one of the conditions permitting termination and acceleration exists at that time.

Paragraph 5b(f)(2)(i)

1. *Fraud or material misrepresentation.* A creditor may terminate a plan and accelerate the balance if there has been fraud or material misrepresentation by the consumer in connection with the plan. This exception includes fraud or misrepresentation at any time, either during the application process or during the draw period and any repayment period. What constitutes fraud or misrepresentation is determined by applicable state law and may include acts of omission as well as overt acts, as long as any necessary intent on the part of the consumer exists.

Paragraph 5b(f)(2)(ii)

1. *Failure to meet repayment terms.* A creditor may terminate a plan and accelerate the balance when the consumer fails to meet the repayment terms provided for in the agreement. However, a creditor may terminate and accelerate under this provision only if the consumer actually fails to make payments. For example, a creditor may not terminate and accelerate if the consumer, in error, sends a payment to the wrong location, such as a branch rather than the main office of the creditor. If a consumer files for or is placed in bankruptcy, the creditor may terminate and accelerate under this provision if the consumer fails to meet the repayment terms of the agreement. This section does not override any state or other law that requires a right to cure

notice, or otherwise places a duty on the creditor before it can terminate a plan and accelerate the balance.

Paragraph 5b(f)(2)(iii)

1. *Impairment of security.* A creditor may terminate a plan and accelerate the balance if the consumer's action or inaction adversely affects the creditor's security for the plan, or any right of the creditor in that security. Action or inaction by third parties does not, in itself, permit the creditor to terminate and accelerate.

2. *Examples.* A creditor may terminate and accelerate, for example, if:

- the consumer transfers title to the property or sells the property without the permission of the creditor
- the consumer fails to maintain required insurance on the dwelling
- the consumer fails to pay taxes on the property
- the consumer permits the filing of a lien senior to that held by the creditor
- the sole consumer obligated on the plan dies
- the property is taken through eminent domain
- a prior lienholder forecloses

By contrast, the filing of a judgment against the consumer would permit termination and acceleration only if the amount of the judgment and collateral subject to the judgment is such that the creditor's security is adversely affected. If the consumer commits waste or otherwise destructively uses or fails to maintain the property such that the action adversely affects the security, the plan may be terminated and the balance accelerated. Illegal use of the property by the consumer would permit termination and acceleration if it subjects the property to seizure. If one of two consumers obligated on a plan dies, the creditor may terminate the plan and accelerate the balance if the security is adversely affected. If the consumer moves out of the dwelling that secures the plan and that action adversely affects the security, the creditor may terminate a plan and accelerate the balance.

Paragraph 5b(f)(3)

1. *Scope of provision.* In general, a creditor may not change the terms of a plan after it is opened. For example, a creditor may not increase any fee or impose a new fee once the plan has been opened, even if the fee is charged by a third party, such as a credit reporting agency, for a service. The change-of-terms prohibition applies to all features of a plan, not only those required to be disclosed under this section. For example, this provision applies to charges imposed for late payment, although this fee is not required to be disclosed under section 226.5b(d)(7).

2. *Charges not covered.* There are three charges not covered by this provision. A creditor may pass on increases in taxes since such charges are imposed by a governmental body and are beyond the control of the creditor. In addition, a creditor may pass on increases in premiums for property insurance that are excluded from the finance charge under section 226.4(d)(2), since such insurance provides a benefit to the consumer independent of the use of the line and is often maintained notwithstanding the line. A creditor also may pass on increases in premiums for credit insurance that are excluded from the finance charge under section 226.4(d)(1), since the insurance is voluntary and provides a benefit to the consumer.

Paragraph 5b(f)(3)(i)

1. *Changes provided for in agreement.* A creditor may provide in the initial agreement that further advances will be prohibited or the credit line reduced during any period in which the maximum annual percentage rate is reached. A creditor also may provide for other specific changes to take place upon the occurrence of specific events. Both the triggering event and the resulting modification must be stated with specificity. For example, in home-equity plans for employees, the agreement could provide that a specified higher rate or margin will apply if the borrower's employment with the creditor ends. A contract could contain a stepped-rate or stepped-fee schedule providing for specified changes in the rate or the fees on certain dates or after a specified

period of time. A creditor also may provide in the initial agreement that it will be entitled to a share of the appreciation in the value of the property as long as the specific appreciation share and the specific circumstances which require the payment of it are set forth. A contract may permit a consumer to switch among minimum-payment options during the plan.

2. *Prohibited provisions.* A creditor may not include a general provision in its agreement permitting changes to any or all of the terms of the plan. For example, creditors may not include boilerplate language in the agreement stating that they reserve the right to change the fees imposed under the plan. In addition, a creditor may not include any "triggering events" or responses that the regulation expressly addresses in a manner different from that provided in the regulation. For example, an agreement may not provide that the margin in a variable-rate plan will increase if there is a material change in the consumer's financial circumstances, because the regulation specifies that temporarily freezing the line or lowering the credit limit is the permissible response to a material change in the consumer's financial circumstances. Similarly a contract cannot contain a provision allowing the creditor to freeze a line due to an insignificant decline in property value since the regulation allows that response only for a significant decline.

Paragraph 5b(f)(3)(ii)

1. *Substitution of index.* A creditor may change the index and margin used under the plan if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable.

Paragraph 5b(f)(3)(iii)

1. *Changes by written agreement.* A creditor may change the terms of a plan if the consumer expressly agrees in writing to the change at the time it is made. For example, a consumer and a creditor could agree in writing to change the repayment terms from interest-only payments to payments that reduce the principal balance. The provisions of any such agreement are governed by the limitations in section 226.5b(f). For example, a mutual agreement could not provide for future annual percentage rate changes based on the movement of an index controlled by the creditor or for termination and acceleration under circumstances other than those specified in the regulation. By contrast, a consumer could agree to a new credit limit for the plan, although the agreement could not permit the creditor to later change the credit limit except by a subsequent written agreement or in the circumstances described in section 226.5b(f)(3)(vi).

2. *Written agreement.* The change must be agreed to in writing by the consumer. Creditors are not permitted to assume consent because the consumer uses an account, even if use of an account would otherwise constitute acceptance of a proposed change under state law.

Paragraph 5b(f)(3)(iv)

1. *Beneficial changes.* After a plan is opened, a creditor may make changes that unequivocally benefit the consumer. Under this provision, a creditor may offer more options to consumers, as long as existing options remain. For example, a creditor may offer the consumer the option of making lower monthly payments or could increase the credit limit. Similarly, a creditor wishing to extend the length of the plan on the same terms may do so. Creditors are permitted to temporarily reduce the rate or fees charged during the plan (though a change-in-terms notice may be required under section 226.9(c) when the rate or fees are returned to their original level). Creditors also may offer an additional means of access to the line, even if fees are associated with using the device, provided the consumer retains the ability to use prior access devices on the original terms.

Paragraph 5b(f)(3)(v)

1. *Insignificant changes.* A creditor is permitted to make insignificant changes after a plan is opened. This rule accommodates operational and similar problems, such as changing the address of the creditor for purposes of sending payments. It does not permit a creditor to change a term such as a fee charged for late payments.

2. *Examples of insignificant changes.* Creditors may make minor changes to features such as the billing cycle date, the payment-due date (as long as the consumer does not have a diminished grace period if one is provided), and the day of the month on which index values are measured to determine changes to the rate for variable-rate plans. A creditor also may change its rounding practice in accordance with the tolerance rules set forth in section 226.14 (for example, stating an exact APR of 14.3333 percent as 14.3 percent, even if it had previously been stated as 14.33 percent). A creditor may change the balance-computation method it uses only if the change produces an insignificant difference in the finance charge paid by the consumer. For example, a creditor may switch from using the average-daily-balance method (including new transactions) to the daily-balance method (including new transactions).

Paragraph 5b(f)(3)(vi)

1. *Suspension of credit or reduction of credit limit.* A creditor may prohibit additional extensions of credit or reduce the credit limit in the circumstances specified in this section of the regulation. In addition, as discussed under section 226.5b(f)(3)(i), a creditor may contractually reserve the right to take such actions when the maximum annual percentage rate is reached. A creditor may not take these actions under other circumstances, unless the creditor would be permitted to terminate the line and accelerate the balance as described in section 226.5b(f)(2). The creditor's right to reduce the credit limit does not permit reducing the limit below the amount of the outstanding balance if this would require the consumer to make a higher payment.

2. *Temporary nature of suspension or reduction.* Creditors are permitted to prohibit additional extensions of credit or reduce the credit limit only while one of the designated circumstances exists. When the circumstance justifying the creditor's action ceases to exist, credit privileges must be reinstated, assuming that no other circumstance permitting such action exists at that time.

3. *Imposition of fees.* If not prohibited by state law, a creditor may collect only bona fide and reasonable appraisal and credit-report fees if such fees are actually incurred in investigating whether the condition permitting the freeze continues to exist. A creditor may not, in any circumstances, impose a fee to reinstate a credit line once the condition has been determined not to exist.

4. *Reinstatement of credit privileges.* Creditors are responsible for ensuring that credit privileges are restored as soon as reasonably possible after the condition that permitted the creditor's action ceases to exist. One way a creditor can meet this responsibility is to monitor the line on an ongoing basis to determine when the condition ceases to exist. The creditor must investigate the condition frequently enough to assure itself that the condition permitting the freeze continues to exist. The frequency with which the creditor must investigate to determine whether a condition continues to exist depends upon the specific condition permitting the freeze. As an alternative to such monitoring, the creditor may shift the duty to the consumer to request reinstatement of credit privileges by providing a notice in accordance with section 226.9(c)(3). A creditor may require a reinstatement request to be in writing if it notifies the consumer of this requirement on the notice provided under section 226.9(c)(3). Once the consumer requests reinstatement, the creditor must promptly investigate to determine whether the condition allowing the freeze continues to exist. Under this alternative, the creditor has a duty to investigate only upon the consumer's request.

5. *Suspension of credit privileges following request by consumer.* A creditor may honor a specific request by a consumer to suspend credit privileges. If the consumer later requests that the creditor reinstate credit privi-

leges, the creditor must do so provided no other circumstance justifying a suspension exists at that time. If two or more consumers are obligated under a plan and each has the ability to take advances, the agreement may permit any of the consumers to direct the creditor not to make further advances. A creditor may require that all persons obligated under a plan request reinstatement.

6. *Significant decline defined.* What constitutes a significant decline for purposes of section 226.5b(f)(3)(vi)(A) will vary according to individual circumstances. In any event, if the value of the dwelling declines such that the initial difference between the credit limit and the available equity (based on the property's appraised value for purposes of the plan) is reduced by 50 percent, this constitutes a significant decline in the value of the dwelling for purposes of section 226.5b(f)(3)(vi)(A). For example, assume that a house with a first mortgage of $50,000 is appraised at $100,000 and the credit limit is $30,000. The difference between the credit limit and the available equity is $20,000, half of which is $10,000. The creditor could prohibit further advances or reduce the credit limit if the value of the property declines from $100,000 to $90,000. This provision does not require a creditor to obtain an appraisal before suspending credit privileges, although a significant decline must occur before suspension can occur.

7. *Material change in financial circumstances.* Two conditions must be met for section 226.5b(f)(3)(vi)(B) to apply. First, there must be a "material change" in the consumer's financial circumstances, such as a significant decrease in the consumer's income. Second, as a result of this change, the creditor must have a reasonable belief that the consumer will be unable to fulfill the payment obligations of the plan. A creditor may, but does not have to, rely on specific evidence (such as the failure to pay other debts) in concluding that the second part of the test has been met. A creditor may prohibit further advances or reduce the credit limit under this section if a consumer files for or is placed in bankruptcy.

8. *Default of a material obligation.* Creditors may specify events that would qualify as a default of a material obligation under section 226.5b(f)(3)(vi)(C). For example, a creditor may provide that default of a material obligation will exist if the consumer moves out of the dwelling or permits an intervening lien to be filed that would take priority over future advances made by the creditor.

9. *Government limits on the annual percentage rate.* Under section 226.5b(f)(3)(vi)(D), a creditor may prohibit further advances or reduce the credit limit if, for example, a state usury law is enacted which prohibits a creditor from imposing the agreed-upon annual percentage rate.

5b(g) Refund of Fees

1. *Refund of fees required.* If any disclosed term, including any term provided upon request pursuant to section 226.5b(d), changes between the time the early disclosures are provided to the consumer and the time the plan is opened, and the consumer as a result decides to not enter into the plan, a creditor must refund all fees paid by the consumer in connection with the application. All fees, including credit-report fees and appraisal fees, must be refunded whether such fees are paid to the creditor or directly to third parties. A consumer is entitled to a refund of fees under these circumstances whether or not terms are guaranteed by the creditor under section 226.5b(d)(2)(i).

2. *Variable-rate plans.* The right to a refund of fees does not apply to changes in the annual percentage rate resulting from fluctuations in the index value in a variable-rate plan. Also, if the maximum annual percentage rate is expressed as an amount over the initial rate, the right to refund of fees would not apply to changes in the cap resulting from fluctuations in the index value.

3. *Changes in terms.* If a term, such as the maximum rate, is stated as a range in the early disclosures, and the term ultimately applicable to the plan falls within that range, a change does not occur for purposes of this section. If, however, no range is used and the term is changed (for example, a rate cap of 6 rather than 5 percentage points over the initial rate), the change would permit the consumer

to obtain a refund of fees. If a fee imposed by the creditor is stated in the early disclosures as an estimate and the fee changes, the consumer could elect to not enter into the agreement and would be entitled to a refund of fees. On the other hand, if fees imposed by third parties are disclosed as estimates and those fees change, the consumer is not entitled to a refund of fees paid in connection with the application. Creditors must, however, use the best information reasonably available in providing disclosures about such fees.

4. *Timing of refunds and relation to other provisions.* The refund of fees must be made as soon as reasonably possible after the creditor is notified that the consumer is not entering into the plan because of the changed term, or that the consumer wants a refund of fees. The fact that an application fee may be refunded to some applicants under this provision does not render such fees finance charges under section 226.4(c)(1) of the regulation.

5b(h) Imposition of Nonrefundable Fees

1. *Collection of fees after consumer receives disclosures.* A fee may be collected after the consumer receives the disclosures and brochure and before the expiration of three days, although the fee must be refunded if, within three days of receiving the required information, the consumer decides not to enter into the agreement. In such a case, the consumer must be notified that the fee is refundable for three days. The notice must be clear and conspicuous and in writing, and may be included with the disclosures required under section 226.5b(d) or as an attachment to them. If disclosures and brochure are mailed to the consumer, footnote 10d of the regulation provides that a nonrefundable fee may not be imposed until six business days after the mailing.

2. *Collection of fees before consumer receives disclosures.* An application fee may be collected before the consumer receives the disclosures and brochure (for example, when an application contained in a magazine is mailed in with an application fee) provided that it remains refundable until three business days after the consumer receives the section 226.5b disclosures. No other fees except a refundable membership fee may be collected until after the consumer receives the disclosures required under section 226.5b.

3. *Relation to other provisions.* A fee collected before disclosures are provided may become nonrefundable except that, under section 226.5b(g), it must be refunded if the consumer elects not to enter into the plan because of a change in terms. (Of course, all fees must be refunded if the consumer later rescinds under section 226.15.)

SECTION 226.6—Initial Disclosure Statement

1. *Consistent terminology.* Language on the initial and periodic disclosure statements must be close enough in meaning to enable the consumer to relate the two sets of disclosures; however, the language need not be identical. For example, in making the disclosure under section 226.6(a)(3), the creditor may refer to the "outstanding balance at the end of the billing cycle," while the disclosure for section 226.7(i) refers to the "ending balance" or "new balance."

2. *Separate initial disclosures permitted.* In a certain open-end credit program involving more than one creditor—a card issuer of travel-and-entertainment cards and a financial institution—the consumer has the option to pay the card issuer directly or to transfer to the financial institution all or part of the amount owing. In this case, the creditors may send separate initial disclosure statements.

6(a) Finance Charge

Paragraph 6(a)(1)

1. *When finance charges accrue.* Creditors may provide a general explanation about finance charges beginning to run and need not disclose a specific date. For example, a disclosure that the consumer has 30 days from the closing date to pay the new balance before finance charges will accrue on the account would describe when finance charges begin to run.

2. *Free-ride periods.* In disclosing whether or

not a free-ride period exists, the creditor need not use "free period," "free-ride period," or any other particular descriptive phrase or term. For example, a statement that "the finance charge begins on the date the transaction is posted to your account" adequately discloses that no free-ride period exists. In the same fashion, a statement that "finance charges will be imposed on any new purchases only if they are not paid in full within 25 days after the close of the billing cycle" indicates that a free-ride period exists in the interim.

Paragraph 6(a)(2)

1. *Range of balances.* The range of balances disclosure is inapplicable:

- If only one periodic rate may be applied to the entire account balance
- If only one periodic rate may be applied to the entire balance for a feature (for example, cash advances), even though the balance for another feature (purchases) may be subject to two rates (a 1.5 percent periodic rate on purchase balances of $0–$500, while balances above $500 are subject to a 1 percent periodic rate). Of course, the creditor must give a range of balances disclosure for the purchase feature.

2. *Variable-rate disclosures—coverage.* This section covers open-end credit plans under which rate changes are part of the plan and are tied to an index or formula. A creditor would use variable-rate disclosures (and thus be excused from the requirement of giving a change-in-terms notice when rate increases occur as disclosed) for plans involving rate changes such as the following:

- Rate changes that are tied to the rate the creditor pays on its six-month money market certificates
- Rate changes that are tied to Treasury bill rates
- Rate changes that are tied to changes in the creditor's commercial lending rate

In contrast, the creditor's contract reservation to increase the rate without reference to such an index or formula (for example, a plan that simply provides that the creditor reserves the right to raise its rates) would not be considered a variable-rate plan for Truth in Lending disclosure purposes. (See the rule in section 226.5b(f)(1) applicable to home-equity plans, however, which prohibits "rate-reservation" clauses.) Moreover, an open-end credit plan in which the employee receives a lower rate contingent upon employment (that is, with the rate to be increased upon termination of employment) is not a variable-rate plan. (With regard to such employee preferential-rate plans, however, see comment 9(c)-1, which provides that if the specific change that would occur is disclosed on the initial disclosure statement, no notice of a change in terms need be given when the term later changes as disclosed.)

3. *Variable-rate plan—rate(s) in effect.* In disclosing the rate(s) in effect at the time of the initial disclosures (as is required by section 226.6(a)(2)), the creditor may use an insert showing the current rate; may give the rate as of a specified date and then update the disclosure from time to time, for example, each calendar month; or may disclose an estimated rate under section 226.5(c).

4. *Variable-rate plan—additional disclosures required.* In addition to disclosing the rates in effect at the time of the initial disclosures, the disclosures under footnote 12 also must be made.

5. *Variable-rate plan—index.* The index to be used must be clearly identified; the creditor need not give, however, an explanation of how the index is determined or provide instructions for obtaining it.

6. *Variable-rate plan—circumstances for increase.* Circumstances under which the rate(s) may increase include, for example:

- An increase in the Treasury bill rate
- An increase in the Federal Reserve discount rate

The creditor must disclose when the increase will take effect; for example:

- "An increase will take effect on the day that the Treasury bill rate increases," or
- "An increase in the Federal Reserve discount rate will take effect on the first day of the creditor's billing cycle."

7. *Variable-rate plan—limitations on increase.* In disclosing any limitations on rate increases, limitations such as the maximum increase per year or the maximum increase over the duration of the plan must be disclosed. When there are no limitations, the creditor may, but need not, disclose that fact. (A maximum interest rate must be included in dwelling-secured open-end credit plans under which the interest rate may be changed. See section 226.30 and the commentary to that section.) Legal limits such as usury or rate ceilings under state or federal statutes or regulations need not be disclosed. Examples of limitations that must be disclosed include:

- "The rate on the plan will not exceed 25 percent annual percentage rate."
- "Not more than ½ percent increase in the annual percentage rate per year will occur."

8. *Variable-rate plan—effects of increase.* Examples of effects that must be disclosed include:

- Any requirement for additional collateral if the annual percentage rate increases beyond a specified rate
- Any increase in the scheduled minimum periodic payment amount

9. *Variable-rate plan—change-in-terms notice not required.* No notice of a change in terms is required for a rate increase under a variable-rate plan as defined in comment 6(a)(2)-2.

10. *Discounted variable-rate plans.* In some variable-rate plans, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. Typically, this initial rate is lower than the rate would be if it were calculated using the index or formula.

- For example, a creditor may calculate interest rates according to a formula using the six-month Treasury bill rate plus a 2 percent margin. If the current Treasury bill rate is 10 percent, the creditor may forgo the 2 percent spread and charge only 10 percent for a limited time, instead of setting an initial rate of 12 percent, or the creditor may disregard the index or formula and set the initial rate at 9 percent.
- When creditors use an initial rate that is not calculated using the index or formula for later rate adjustments, the initial disclosure statement should reflect: (1) the initial rate (expressed as a periodic rate and a corresponding annual percentage rate), together with a statement of how long it will remain in effect; (2) the current rate that would have been applied using the index or formula (also expressed as a periodic rate and a corresponding annual percentage rate); and (3) the other variable-rate information required by footnote 12 to section 226.6(a)(2).
- In disclosing the current periodic and annual percentage rates that would be applied using the index or formula, the creditor may use any of the disclosure options described in comment 6(a)(2)-3.

Paragraph 6(a)(3)

1. *Explanation of balance-computation method.* A shorthand phrase such as "previous-balance method" does not suffice in explaining the balance computation method. (See appendix G-1 for model clauses.)

2. *Allocation of payments.* Disclosure about the allocation of payments and other credits is not required. For example, the creditor need not disclose that payments are applied to late charges, overdue balances, and finance charges before being applied to the principal balance; or in a multifeatured plan, that payments are applied first to finance charges, then to purchases, and then to cash advances. (See comment 7-1 for definition of multifeatured plan.)

Paragraph 6(a)(4)

1. *Finance charges.* In addition to disclosing the periodic rate(s) under section 226.6(a) (2), disclosure is required of any other type of finance charge that may be imposed, such as minimum, fixed, transaction, and activity charges; required insurance; or appraisal or credit report fees (unless excluded from the finance charge under section 226.4(c)(7).)

6(b) Other Charges

1. *General; examples of other charges.* Under

section 226.6(b), significant charges related to the plan (that are not finance charges) must also be disclosed. For example:

i. Late-payment and over-the-credit-limit charges.
ii. Fees for providing documentary evidence of transactions requested under section 226.13 (Billing-Error Resolution).
iii. Charges imposed in connection with real estate transactions such as title, appraisal, and credit-report fees (see section 226.4(c)(7)).
iv. A tax imposed on the credit transaction by a state or other governmental body, such as a documentary stamp tax on cash advances (see the commentary to section 226.4(a)).
v. A membership or participation fee for a package of services that includes an open-end credit feature, unless the fee is required whether or not the open-end credit feature is included. For example, a membership fee to join a credit union is not an "other charge," even if membership is required to apply for credit. For example, if the primary benefit of membership in an organization is the opportunity to apply for a credit card, and the other benefits offered (such as a newsletter or a member information hotline) are merely incidental to the credit feature, the membership fee would be disclosed as an "other charge."
vi. Automated teller machine (ATM) charges described in comment 4(a)-5 that are not finance charges.
vii. Charges imposed for the termination of an open-end credit plan.

2. *Exclusions.* The following are examples of charges that are not "other charges":

- Fees charged for documentary evidence of transactions for income tax purposes
- Amounts payable by a consumer for collection activity after default; attorney's fees, whether or not automatically imposed; foreclosure costs; post-judgment interest rates imposed by law; and reinstatement or reissuance fees
- Premiums for voluntary credit life or disability insurance, or for property insurance, that are not part of the finance charge
- Application fees under section 226.4(c)(1)
- A monthly service charge for a checking account with overdraft protection that is applied to all checking accounts, whether or not a credit feature is attached
- Charges for submitting as payment a check that is later returned unpaid (see commentary to section 226.4(c)(2)
- Charges imposed on a cardholder by an institution other than the card issuer for the use of the other institution's ATM in a shared or interchange system (See also comment 7(b)-2.)
- Taxes and filing or notary fees excluded from the finance charge under section 226.4(e)

6(c) Security Interests

1. *General.* Disclosure is not required about the type of security interest, or about the creditor's rights with respect to that collateral. In other words, the creditor need not expand on the term "security interest." Also, since no specified terminology is required, the creditor may designate its interests by using, for example, "pledge," "lien," or "mortgage" (instead of "security interest").

2. *Identification of property.* Identification of the collateral by type is satisfied by stating, for example, "motor vehicle" or "household appliances." (Creditors should be aware, however, that the federal credit practices rules, as well as some state laws, prohibit certain security interests in household goods.) The creditor may, at its option, provide a more specific identification (for example, a model and serial number.)

3. *Spreader clause.* The fact that collateral for preexisting credit extensions with the institution is being used to secure the present obligation constitutes a security interest and must be disclosed. (Such security interests may be known as "spreader" or "dragnet" clauses, or as "cross-collateralization" clauses.) A specific identification of that collateral is unnecessary, but a reminder of the interest arising from the prior indebtedness is required. This may be accomplished by using language such as "collateral securing other loans with us may also secure this loan." At the creditor's

option, a more specific description of the property involved may be given.

4. *Additional collateral.* If collateral is required when advances reach a certain amount, the creditor should disclose the information available at the time of the initial disclosures. For example, if the creditor knows that a security interest will be taken in household goods if the consumer's balance exceeds $1,000, the creditor should disclose accordingly. If the creditor knows that security will be required if the consumer's balance exceeds $1,000, but the creditor does not know what security will be required, the creditor must disclose on the inital disclosure statement that security will be required if the balance exceeds $1,000, and the creditor must provide a change-in-terms notice under section 226.9(c) at the time the security is taken. (See comment 6(c)-2.)

5. *Collateral from third party.* In certain situations, the consumer's obligation may be secured by collateral belonging to a third party. For example, an open-end credit plan may be secured by an interest in property owned by the consumer's parents. In such cases, the security interest is taken in connection with the plan and must be disclosed, even though the property encumbered is owned by someone other than the consumer.

6(d) Statement of Billing Rights

See the commentary to appendix G-3.

6(e) Home-Equity Plan Information

1. *Additional disclosures required.* For home-equity plans, creditors must provide several of the disclosures set forth in section 226.5b(d) along with the disclosures required under section 226.6. Creditors also must disclose a list of the conditions that permit the creditor to terminate the plan, freeze or reduce the credit limit, and implement specified modifications to the original terms. (See comment 5b(d)(4)(iii)-1.)

2. *Form of disclosures.* The home-equity disclosures provided under this section must be in a form the consumer can keep, and are governed by section 226.5(a)(1). The segregation standard set forth in section 226.5b(a) does not apply to home-equity disclosures provided under section 226.6.

3. *Disclosure of payment and variable-rate examples.* The payment-example disclosure in section 226.5b(d)(5)(iii) and the variable-rate information in section 226.5b(d)(12)(viii), (x), (xi), and (xii) need not be provided with the disclosures under section 226.6 if:

- The disclosures under section 226.5b(d) were provided in a form the consumer could keep; and
- The disclosures of the payment example under section 226.5b(d)(5)(iii), the maximum-payment example under section 226.5b(d)(12)(x) and the historical table under section 226.5b(d)(12)(xi) included a representative payment example for the category of payment options the consumer has chosen.

For example, if a creditor offers three payment options (one for each of the categories described in the commentary to section 226.5b(d)(5)), describes all three options in its early disclosures, and provides all of the disclosures in a retainable form, that creditor need not provide the section 226.5b(d)(5)(iii) or 226.5b(d)(12) disclosures again when the account is opened. If the creditor showed only one of the three options in the early disclosures (which would be the case with a separate disclosure form rather than a combined form, as discussed under section 226.5b(a)), the disclosures under section 226.5b(d)(5)(iii) and 226.5b(d)(12)(viii), (x), (xi) and (xii) must be given to any consumer who chooses one of the other two options. If the section 226.5b(d)(5)(iii) and 226.5b(d)(12) disclosures are provided with the second set of disclosures, they need not be transaction-specific, but may be based on a representative example of the category of payment option chosen.

4. *Disclosures for the repayment period.* The creditor must provide disclosures about both the draw and repayment phases when giving the disclosures under section 226.6. Specifically, the creditor must make the disclosures in section 226.6(e), state the corresponding annual percentage rate (as required in section 226.6(a)(2)), and provide the variable-rate in-

formation required in footnote 12 for the repayment phase. To the extent the corresponding annual percentage rate, the information in footnote 12, and any other required disclosures are the same for the draw and repayment phase, the creditor need not repeat such information, as long as it is clear that the information applies to both phases.

References

Statute: § 127(a)
Other sections: §§ 226.4, 226.5, 226.7, 226.9, 226.14, and appendix G
Previous regulation: § 226.7(a) and interpretation § 226.706
1981 changes: Section 226.6 implements the amended statute which requires disclosure of the fact that *no* free period exists. Disclosures about the minimum periodic payment and the Comparative Index of Credit Cost have been eliminated. The security interest disclosures have been simplified. "Other charges" no longer include voluntary credit life or disability insurance, required property insurance premiums, default charges, or fees for collection activity. Disclosures for variable rate plans are now required by the regulation, replacing interpretation section 226.707. The regulation no longer specifies the exact language to be used for the billing rights notice; creditors may use any version "substantially similar" to the one in appendix G.

SECTION 226.7—Periodic Statement

1. *Multifeatured plans.* Some plans involve a number of different features, such as purchases, cash advances, or overdraft checking. Groups of transactions subject to different finance charge terms because of the dates on which the transactions took place are treated like different features for purposes of disclosures on the periodic statements. The commentary includes some special rules for multifeatured plans.

2. *Separate periodic statements permitted.* In a certain open-end credit program involving more than one creditor—a card issuer of travel-and-entertainment cards and a financial institution—the consumer has the option to pay the card issuer directly or to transfer to the financial institution all or part of the amount owing. In this case, the creditors may send separate periodic statements that reflect the separate obligations owed to each.

7(a) Previous Balance

1. *Credit balances.* If the previous balance is a credit balance, it must be disclosed in such a way so as to inform the consumer that it is a credit balance, rather than a debit balance.

2. *Multifeatured plans.* In a multifeatured plan, the previous balance may be disclosed either as an aggregate balance for the account or as separate balances for each feature (for example, a previous balance for purchases and a previous balance for cash advances). If separate balances are disclosed, a total previous balance is optional.

3. *Accrued finance charges allocated from payments.* Some open-end credit plans provide that the amount of the finance charge that has accrued since the consumer's last payment is directly deducted from each new payment, rather than being separately added to each statement and reflected as an increase in the obligation. In such a plan, the previous balance need not reflect finance charges accrued since the last payment.

7(b) Identification of Transactions

1. *Multifeatured plans.* In identifying transactions under section 226.7(b) for multifeatured plans, creditors may, for example, choose to arrange transactions by feature (such as disclosing sale transactions separately from cash advance transactions) or in some other clear manner, such as by arranging the transactions in general chronological order.

2. *Automated teller machine (ATM) charges imposed by other institutions in shared or interchange systems.* A charge imposed on the cardholder by an institution other than the card issuer for the use of the other institution's ATM in a shared or interchange system and included by the terminal-operating institution in the amount of the transaction need not be separately disclosed on the periodic statement.

7(c) Credits

1. *Identification—sufficiency.* The creditor need not describe each credit by type (returned merchandise, rebate of finance charge, etc.)—"credit" would suffice—except if the creditor is using the periodic statement to satisfy the billing-error correction notice requirement. (See the commentary to section 226.13(e) and (f).)

2. *Format.* A creditor may list credits relating to credit extensions (payments, rebates, etc.) together with other types of credits (such as deposits to a checking account), as long as the entries are identified so as to inform the consumer which type of credit each entry represents.

3. *Date.* If only one date is disclosed (that is, the crediting date as required by the regulation), no further identification of that date is necessary. More than one date may be disclosed for a single entry, as long as it is clear which date represents the date on which credit was given.

4. *Totals.* Where the creditor lists the credits made to the account during the billing cycle, the creditor need not disclose total figures for the amounts credited.

7(d) Periodic Rates

1. *Disclosure of periodic rates—whether or not actually applied.* Any periodic rate that may be used to compute finance charges (and its corresponding annual percentage rate) must be disclosed whether or not it is applied during the billing cycle. For example:

- If the consumer's account has both a purchase feature and a cash advance feature, the creditor must disclose the rate for each, even if the consumer only makes purchases on the account during the billing cycle.
- If the rate varies (such as when it is tied to a particular index), the creditor must disclose each rate in effect during the cycle for which the statement was issued.

2. *Disclosure of periodic rates required only if imposition possible.* With regard to the periodic rate disclosure (and its corresponding annual percentage rate), only rates that *could have* been imposed during the billing cycle reflected on the periodic statement need to be disclosed. For example:

- If the creditor is changing rates effective during the next billing cycle (either because it is changing terms or because of a variable-rate plan), the rates required to be disclosed under section 226.7(d) are only those in effect during the billing cycle reflected on the periodic statement. For example, if the monthly rate applied during May was 1.5 percent, but the creditor will increase the rate to 1.8 percent effective June 1, 1.5 percent (and its corresponding annual percentage rate) is the only required disclosure under section 226.7(d) for the periodic statement reflecting the May account activity.
- If the consumer has an overdraft line that might later be expanded upon the consumer's request to include secured advances, the rates for the secured advance feature need not be given until such time as the consumer has requested and received access to the additional feature.
- If rates applicable to a particular type of transaction changed after a certain date and the old rate is only being applied to transactions that took place prior to that date, the creditor need not continue to disclose the old rate for those consumers that have no outstanding balances to which that rate could be applied.

3. *Multiple rates—same transaction.* If two or more periodic rates are applied to the *same* balance for the same type of transaction (for example, if the finance charge consists of a monthly periodic rate of 1.5 percent applied to the outstanding balance and a required credit life insurance component calculated at 0.1 percent per month on the same outstanding balance), the creditor may do either of the following:

- Disclose each periodic rate, the range of balances to which it is applicable, and the corresponding annual percentage rate for each (for example, 1.5 percent monthly, 18 percent annual percentage rate; 0.1 percent monthly, 1.2 percent annual percentage rate)

- Disclose one composite periodic rate (that is, 1.6 percent per month) along with the applicable range of balances and corresponding annual percentage rate

4. *Corresponding annual percentage rate.* In disclosing the annual percentage rate that corresponds to each periodic rate, the creditor may use "corresponding annual percentage rate," "nominal annual percentage rate," "corresponding nominal annual percentage rate," or similar phrases.

5. *Rate same as actual annual percentage rate.* When the corresponding rate is the same as the actual annual percentage rate (historical rate) required to be disclosed (§ 226.7(g)), the creditor need disclose only one annual percentage rate, but must use the phrase "annual percentage rate."

6. *Ranges of balances.* See comment 6(a)(2)-1.

7(e) Balance on Which Finance Charge Computed

1. *Limitation to periodic rates.* Section 226.7(e) only requires disclosure of the balance(s) to which a periodic rate was applied and does not apply to balances on which other kinds of finance charges (such as transaction charges) were imposed. For example, if a consumer obtains a $1,500 cash advance subject to both a 1 percent transaction fee and a 1 percent monthly periodic rate, the creditor need only disclose the balance subject to the monthly rate (which might include portions of earlier cash advances not paid off in previous cycles).

2. *Split rates applied to balance ranges.* If split rates were applied to a balance because different portions of the balance fall within two or more balance ranges, the creditor need not separately disclose the portions of the balance subject to such different rates since the range of balances to which the rates apply has been separately disclosed. For example, a creditor could disclose a balance of $700 for purchases even though a monthly periodic rate of 1.5 percent applied to the first $500, and a monthly periodic rate of 1 percent to the remainder. This option to disclose a combined balance does not apply when the finance charge is computed by applying the split rates to each day's balance (in contrast, for example, to applying the rates to the average daily balance). In that case, the balances must be disclosed using any of the options that are available if two or more daily rates are imposed. (See comment 7(e)-5.)

3. *Monthly rate on average daily balance.* If a creditor computes a finance charge on the average daily balance by application of a monthly periodic rate or rates, the balance is adequately disclosed if the statement gives the amount of the average daily balance on which the finance charge was computed and also states how the balance is determined.

4. *Multifeatured plans.* In a multifeatured plan, the creditor must disclose a separate balance (or balances, as applicable) to which a periodic rate was applied for each feature or group of features subject to different periodic rates or different balance computation methods. Separate balances are not required, however, merely because a "free-ride" period is available for some features but not others. A total balance for the entire plan is optional. This does not affect how many balances the creditor must disclose—or may disclose—within each feature. (See, for example, comment 7(e)-5.)

5. *Daily rate on daily balance.* If the finance charge is computed on the balance each day by application of one or more daily periodic rates, the balance on which the finance charge was computed may be disclosed in any of the following ways for each feature:

- If a single daily periodic rate is imposed, the balance to which it is applicable may be stated as:
  - —a balance for each day in the billing cycle
  - —a balance for each day in the billing cycle on which the balance in the account changes
  - —the sum of the daily balances during the billing cycle
  - —the average daily balance during the billing cycle, in which case the creditor shall explain that the average daily balance is or can be multiplied by the

number of days in the billing cycle and the periodic rate applied to the product to determine the amount of the finance charge

- If two or more daily periodic rates may be imposed, the balances to which the rates are applicable may be stated as:
  - —a balance for each day in the billing cycle
  - —a balance for each day in the billing cycle on which the balance in the account changes
  - —two or more average daily balances, each applicable to the daily periodic rates imposed for the time that those rates were in effect, as long as the creditor explains that the finance charge is or may be determined by (1) multiplying each of the average balances by the number of days in the billing cycle (or if the daily rate varied during the cycle, by multiplying by the number of days the applicable rate was in effect), (2) multiplying each of the results by the applicable daily periodic rate, and (3) adding these products together.

6. *Explanation of balance-computation method.* See the commentary to section 226.6(a)(3).

7. *Information to compute balance.* In connection with disclosing the finance charge balance, the creditor need not give the consumer all of the information necessary to compute the balance if that information is not otherwise required to be disclosed. For example, if current purchases are included from the date they are posted to the account, the posting date need not be disclosed.

8. *Nondeduction of credits.* The creditor need not specifically identify the total dollar amount of credits not deducted in computing the finance charge balance. Disclosure of the amount of credits not deducted is accomplished by listing the credits (§ 226.7(c)) and indicating which credits will not be deducted in determining the balance (for example, "Credits after the 15th of the month are not deducted in computing the finance charge.").

9. *Use of one balance-computation method explanation when multiple balances disclosed.* Sometimes the creditor will disclose more than one balance to which a periodic rate was applied, even though each balance was computed using the same balance-computation method. For example, if a plan involves purchases and cash advances that are subject to different rates, more than one balance must be disclosed, even though the same computation method is used for determining the balance for each feature. In these cases, one explanation of the balance-computation method is sufficient. Sometimes the creditor separately discloses the portions of the balance that are subject to different rates because different portions of the balance fall within two or more balance ranges, even when a combined balance disclosure would be permitted under comment 7(e)-2. In these cases, one explanation of the balance-computation method is also sufficient (assuming, of course, that all portions of the balance were computed using the same method).

7(f) Amount of Finance Charge

1. *Total.* A total finance charge amount for the plan is not required.

2. *Itemization—types of finance charges.* Each type of finance charge (such as periodic rates, transaction charges, and minimum charges) imposed during the cycle must be separately itemized; for example, disclosure of only a combined finance charge attributable to both a minimum charge and transaction charges would not be permissible. Finance charges of the same type may be disclosed, however, individually or as a total. For example, five transaction charges of $1 may be listed separately or as $5.

3. *Itemization—different periodic rates.* Whether different periodic rates are applicable to different types of transactions or to different balance ranges, the creditor may give the finance charge attributable to each rate or may give a total finance charge amount. For example, if a creditor charges 1.5 percent per month on the first $500 of a balance and 1 percent per month on amounts over $500, the creditor may itemize the two components ($7.50 and $1.00) of the $8.50 charge, or may disclose $8.50.

4. *Multifeatured plans.* In a multifeatured plan, in disclosing the amount of the finance charge attributable to the application of periodic rates no total periodic rate disclosure for the entire plan need be given.

5. *Finance charges not added to account.* A finance charge that is not included in the new balance because it is payable to a third party (such as required life insurance) must still be shown on the periodic statement as a finance charge.

6. *Finance charges other than periodic rates.* See comment 6(a)(4)-1 for examples.

7. *Accrued finance charges allocated from payments.* Some plans provide that the amount of the finance charge that has accrued since the consumer's last payment is directly deducted from each new payment, rather than being separately added to each statement and therefore reflected as an increase in the obligation. In such a plan, no disclosure is required of finance charges that have accrued since the last payment.

8. *Start-up fees.* Points, loan fees, and similar finance charges relating to the opening of the account that are paid prior to the issuance of the first periodic statement need not be disclosed on the periodic statement. If, however, these charges are financed as part of the plan, including charges that are paid out of the first advance, the charges must be disclosed as part of the finance charge on the first periodic statement. However, they need not be factored into the annual percentage rate. (See footnote 33 in the regulation.)

7(g) Annual Percentage Rate

1. *Rate same as corresponding annual percentage rate.* See comment 7(d)-5.

2. *Multifeatured plans.* In a multifeatured plan, the actual annual percentage rate that reflects the finance charge imposed during the cycle may be separately stated for each feature or may be described as a composite for the whole plan.

7(h) Other Charges

1. *Identification.* In identifying any "other charges" actually imposed during the billing cycle, the type is adequately described as "late charge" or "membership fee," for example. Similarly, "closing costs" or "settlement costs," for example, may be used to describe charges imposed in connection with real estate transactions that are excluded from the finance charge under section 226.4(c)(7), if the same term (such as "closing costs") was used in the initial disclosures and if the creditor chose to itemize and individually disclose the costs included in that term. Even though the taxes and filing or notary fees excluded from the finance charge under section 226.4(e) are not required to be disclosed as "other charges" under section 226.6(b), these charges may be included in the amount shown as "closing costs" or "settlement costs" on the periodic statement, if the charges were itemized and disclosed as part of the "closing costs" or "settlement costs" on the initial disclosure statement. (See comment 6(b)-1 for examples of "other charges.")

2. *Date.* The date of imposing or debiting "other charges" need not be disclosed.

3. *Total.* Disclosure of the total amount of other charges is optional.

4. *Itemization—types of "other charges".* Each type of "other charge" (such as late-payment charges, over-the-credit-limit charges, ATM fees that are not finance charges, and membership fees) imposed during the cycle must be separately itemized; for example, disclosure of only a total of "other charges" attributable to both an over-the-credit-limit charge and a late-payment charge would not be permissible. "Other charges" of the same type may be disclosed, however, individually or as a total. For example, three ATM fees of $1 may be listed separately or as $3.

7(i) Closing Date of Billing Cycle; New Balance

1. *Credit balances.* See comment 7(a)-1.

2. *Multifeatured plans.* In a multifeatured plan, the new balance may be disclosed for each feature or for the plan as a whole. If separate new balances are disclosed, a total new balance is optional.

3. *Accrued finance charges allocated from payments.* Some plans provide that the amount of the finance charge that has accrued since the consumer's last payment is directly deducted from each new payment, rather than being separately added to each statement and therefore reflected as an increase in the obligation. In such a plan, the new balance need not reflect finance charges accrued since the last payment.

7(j) Free-Ride Period

1. *Wording.* Although the creditor is required to indicate any time period the consumer may have to pay the balance outstanding without incurring additional finance charges, no specific wording is required, so long as the language used is consistent with that used on the initial disclosure statement. For example, "To avoid additional finance charges, pay the new balance before _____ " would suffice.

7(k) Address for Notice of Billing Errors

1. *Wording.* The periodic statement must contain the address for consumers to use in asserting billing errors under section 226.13. Since all disclosures must be "clear," the statement should indicate the general purpose for the address, although no elaborate explanation or particular wording is required.

2. *Telephone number.* A telephone number may be included, but the address for billing-error inquiries, which is the required disclosure, must be clear and conspicuous. One way to ensure that the address is clear and conspicuous is to include a precautionary instruction that telephoning will not preserve the consumer's billing-error rights. Both of the billing rights statements in appendix G contain such a precautionary instruction, so that a creditor could, by including either of these statements with each periodic statement, ensure that the required address is provided in a clear and conspicuous manner.

References

Statute: § 127(b)
Previous regulation: § 226.7(b)(1) and interpretation § 226.701, 226.703, 226.706, and 226.707
Other sections: §§ 226.4 through 226.6, 226.8, 226.14, and appendix G
1981 changes: Under § 226.7, required terminology is no longer mandated except for the terms "finance charge" and "annual percentage rate." The requirement in the previous regulation about the location of disclosures has been deleted.

Under the revised section 226.7, disclosure of credits to the account no longer have to indicate the type of credit. A short disclosure for variable-rate plans must be included on the periodic statement. Disclosures relating to multifeatured accounts have been clarified.

Section 226.7 now specifically requires a periodic statement disclosure of "other charges" (nonfinance charges related to the plan) that are actually imposed during the billing cycle.

Disclosures about minimum charges that might be imposed on the account and about the Comparative Index of Credit Cost have been deleted.

SECTION 226.8—Identification of Transactions

1. *Application of identification rules.* Section 226.8 deals with the requirement (imposed by section 226.7(b)) for identification of each credit transaction made during the billing cycle. The rules for identifying transactions on periodic statements vary, depending on whether:

- The transaction involves sale credit (purchases) or nonsale credit (cash advances, for example)
- An actual copy of the credit document reflecting the transaction accompanies the statement (this is the distinction between so-called "country club" and "descriptive" billing)
- The creditor and seller are the same or related persons

2. *Sale credit.* The term "sale credit" refers to a purchase in which the consumer uses a credit card or otherwise directly accesses an open-end line of credit (see comment 8-3 if access is by means of a check) to obtain goods or services from a merchant, whether or

not the merchant is the card issuer. "Sale credit" even includes:

- Premiums for voluntary credit life insurance whether sold by the card issuer or another person
- The purchase of funds-transfer services (such as telegrams) from an intermediary

3. *Nonsale credit.* The term "nonsale credit" refers to any form of loan credit including, for example:

- Cash advances
- Overdraft checking
- The use of a "supplemental credit device" in the form of a check or draft or the use of the overdraft feature of a debit card, even if such use is in connection with a purchase of goods or services
- Miscellaneous debits to remedy mispostings, returned checks, and similar entries

4. *Actual copy.* An actual copy does not include a recreated document. It includes, for example, a duplicate, carbon, or photographic copy, but does not include a so-called "facsimile draft" in which the required information is typed, printed, or otherwise recreated. If a facsimile draft is used, the creditor must follow the rules that apply when a copy of the credit document is not furnished.

5. *Same or related persons.* For purposes of identifying transactions, the term "same or related persons" refers to, for example:

- Franchised or licensed sellers of a creditor's product or service
- Sellers who assign or sell open-end sales accounts to a creditor or arrange for such credit under a plan that allows the consumer to use the credit only in transactions with that seller

A seller is not related to the creditor merely because the seller and the creditor have an agreement authorizing the seller to honor the creditor's credit card.

6. *Transactions resulting from promotional material.* In describing transactions with third-party sellers resulting from promotional material mailed by the creditor, creditors may use the rules either for "related" or for "nonrelated" sellers and creditors.

7. *Credit insurance offered through the creditor.* When credit insurance that is not part of the finance charge (for example, voluntary credit life insurance) is offered to the consumer through the creditor but is actually provided by another company, the creditor has the option of identifying the premiums in one of two ways on the periodic statement. The creditor may describe the premiums using either the rule in section 226.8(a)(2) for "related" sellers and creditors, or the rule in section 226.8(a)(3) for "nonrelated" sellers and creditors. This means, therefore, that the creditor may identify the insurance either by providing, under section 226.8(a)(2), a brief identification of the services provided (for example, "credit life insurance"), or by disclosing, under section 226.8(a)(3), the name and address of the company providing the insurance (for example, ABC Insurance Company, New York, New York). In either event, the creditor would, of course, also provide the amount and the date of the transaction.

8. *Transactions involving creditors and sellers with corporate connections.* In a credit card plan established for use primarily with sellers that have no corporate connection with the creditor, the creditor may describe all transactions under the plan by using the rules in section 226.8(a)(3)—creditor and seller not same or related persons—including transactions involving a seller that has a corporate connection with the creditor. In other credit card plans, the creditor may describe transactions involving a seller that has a corporate connection with the creditor, such as subsidiary-parent, using the rules in section 226.8(a)(3) where it is unlikely that the consumer would know of the corporate connection between the creditor and the seller—for example, where the names of the creditor and the seller are not similar, and the periodic statement is issued in the name of the creditor only.

8(a) Sale Credit

1. *Date—disclosure of only one date.* If only the required date is disclosed for a transaction,

the creditor need not identify it as the "transaction date." If the creditor discloses more than one date (for example, the transaction date and the posting date), the creditor must identify each.

2. *Date—disclosure of month and day only.* The month and day are sufficient disclosure of the date on which the transaction took place, unless the posting of the transaction is delayed so long that the year is needed for a clear disclosure to the consumer.

3. *When transaction takes place.* If the consumer conducts the transaction in person, the date of the transaction is the calendar date on which the consumer made the purchase or order, or secured the advance. For transactions billed to the account on an ongoing basis (other than installments to pay a precomputed amount), the date of the transaction is the date on which the amount is debited to the account. This might include, for example, monthly insurance premiums. For mail or telephone orders, a creditor may disclose as the transaction date either the invoice date, the debiting date, or the date the order was placed by telephone.

4. *Transactions not billed in full.* If sale transactions are not billed in full on any single statement, but are billed periodically in precomputed installments, the first periodic statement reflecting the transaction must show either the full amount of the transaction together with the date the transaction actually took place; *or* the amount of the first installment that was debited to the account together with the date of the transaction or the date on which the first installment was debited to the account. In any event, subsequent periodic statements should reflect each installment due, together with either any other identifying information required by section 226.8(a) (such as the seller's name and address in a three-party situation) or other appropriate identifying information relating the transaction to the first billing. The debiting date for the particular installment, or the date the transaction took place, may be used as the date of the transaction on these subsequent statements.

8(a)(1) Copy of Credit Document Provided

1. *Format.* The information required by section 226.8(a)(1) may appear either on the copy of the credit document reflecting the transaction or on the periodic statement.

8(a)(2) Copy of Credit Document Not Provided—Creditor and Seller Same or Related Person(s)

1. *Property identification—sufficiency of description.* The "brief identification" provision in section 226.8(a)(2) requires a designation that will enable the consumer to reconcile the periodic statement with the consumer's own records. In determining the sufficiency of the description, the following rules apply:

- While item-by-item descriptions are not necessary, reasonable precision is required. For example, "merchandise," "miscellaneous," "second-hand goods," or "promotional items" would not suffice.
- A reference to a department in a sales establishment that accurately conveys the identification of the types of property or services available in the department is sufficient—for example, "jewelry," "sporting goods."

2. *Property identification—number or symbol.* The "brief identification" may be made by disclosing on the periodic statement a number or symbol that is related to an identification list printed elsewhere on the statement.

3. *Property identification—additional document.* In making the "brief identification" required by section 226.8(a)(2), the creditor may identify the property by describing the transaction on a document accompanying the periodic statement (for example, on a facsimile draft). (See also footnote 17.)

4. *Small creditors.* Under footnote 18, which provides a further identification alternative to a creditor with fewer than 15,000 accounts, the creditor need count only its own accounts and not others serviced by the same data processor or other shared-service provider.

5. *Date of transaction—foreign transactions.* In a foreign transaction, the debiting date may be considered the transaction date.

8(a)(3) Copy of Credit Document Not Provided—Creditor and Seller Not Same or Related Person(s)

1. *Seller's name.* The requirement contemplates that the seller's name will appear on the periodic statement in essentially the same form as it appears on transaction documents provided to the consumer at the time of the sale. The seller's name may also be disclosed as, for example:

- A more complete spelling of the name that was alphabetically abbreviated on the receipt or other credit document
- An alphabetical abbreviation of the name on the periodic statement even if the name appears in a more complete spelling on the receipt or other credit document. Terms that merely indicate the form of a business entity, such as "Inc.," "Co.," or "Ltd.," may always be omitted.

2. *Location of transaction.* The disclosure of the location where the transaction took place generally requires an indication of both the city, and the state or foreign country. If the seller has multiple stores or branches within that city, the creditor need not identify the specific branch at which the sale occurred.

3. *No fixed location.* When no meaningful address is available because the consumer did not make the purchase at any fixed location of the seller, the creditor:

- May omit the address
- May provide some other identifying designation, such as "aboard plane," "ABC Airways Flight," "customer's home," "telephone order," or "mail order"

4. *Date of transaction—foreign transactions.* See comment 8(a)(2)-5.

8(b) Nonsale Credit

1. *Date of transaction.* If only one of the required dates is disclosed for a transaction, the creditor need not identify it. If the creditor discloses more than one date (for example, transaction date and debiting date), the creditor must identify each.

2. *Amount of transaction.* If credit is extended under an overdraft checking account plan or by means of a debit card with an overdraft feature, the amount to be disclosed is that of the credit extension, not the face amount of the check or the total amount of the debit/credit transaction.

3. *Amount—disclosure on cumulative basis.* If credit is extended under an overdraft checking account plan or by means of a debit card with an overdraft feature, the creditor may disclose the amount of the credit extensions on a cumulative daily basis, rather than the amount attributable to each check or each use of the debit/credit card.

4. *Identification of transaction type.* The creditor may identify a transaction by describing the type of advance it represents, such as cash advance, loan, overdraft loan, or any readily understandable trade name for the credit program.

References

Statute: § 127(b)(2)
Previous regulation: § 226.7(k)
Other sections: § 226.7
1981 changes: Section 226.8 has been streamlined and reorganized to facilitate its use. Technical detail has been deleted from the regulation for inclusion in the commentary. The regulation implements the amended section 127(b)(2) of the act by providing for protection from civil liability under certain circumstances when required information is not provided and by reducing disclosure responsibilities for certain small creditors. For descriptive billing of nonsale transactions, the regulation now permits the use of the debiting date in all cases.

SECTION 226.9—Subsequent Disclosure Requirements

9(a) Furnishing Statement of Billing Rights

9(a)(1) Annual Statement

1. *General.* The creditor may provide the annual billing rights statement:

- By sending it in one billing period per

year to each consumer that gets a periodic statement for that period or
- By sending a copy to all of its account holders sometime during the calendar year but not necessarily all in one billing period (for example, sending the annual notice in connection with renewal cards or when imposing annual membership fees).

2. *Substantially similar.* See the commentary to appendix G-3.

9(a)(2) Alternative Summary Statement

1. *Changing from long-form to short-form statement and vice versa.* If the creditor has been sending the long-form annual statement, and subsequently decides to use the alternative summary statement, the first summary statement must be sent no later than 12 months after the last long-form statement was sent. Conversely, if the creditor wants to switch to the long-form, the first long-form statement must be sent no later than 12 months after the last summary statement.

2. *Substantially similar.* See the commentary to appendix G-4.

9(b) Disclosures for Supplemental Credit Devices and Additional Features

1. *Credit device—examples.* "Credit device" includes, for example, a blank check, payee-designated check, blank draft or order, or authorization form for issuance of a check; it does not include a check issued payable to a consumer representing loan proceeds or the disbursement of a cash advance.

2. *Credit feature—examples.* A new credit "feature" would include, for example:

- The addition of overdraft checking to an existing account (although the regular checks that could trigger the overdraft feature are not themselves "devices")
- The option to use an existing credit card to secure cash advances, when previously the card could only be used for purchases

Paragraph 9(b)(1)

1. *Same finance charge terms.* If the new means of accessing the account is subject to the same finance charge terms as those previously disclosed, the creditor:

- Need only provide a reminder that the new device or feature is covered by the earlier disclosures (For example, in mailing special checks that directly access the credit line, the creditor might give a disclosure such as "Use this as you would your XYZ card to obtain a cash advance from our bank") or
- May remake the section 226.6(a) finance charge disclosures.

Paragraph 9(b)(2)

1. *Different finance charge terms.* If the finance charge terms are different from those previously disclosed, the creditor may satisfy the requirement to give the finance charge terms either by giving a complete set of new initial disclosures reflecting the terms of the added device or feature or by giving only the finance charge disclosures for the added device or feature.

9(c) Change in Terms

1. *"Changes" initially disclosed.* No notice of a change in terms need be given if the specific change is set forth initially, such as: rate increases under a properly disclosed variable-rate plan, a rate increase that occurs when an employee has been under a preferential rate agreement and terminates employment, or an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum. In contrast, notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase (for example, when an increase may occur under the creditor's contract reservation right to increase the periodic rate). The rules in section 226.5b(f) relating to home-equity plans, however, limit the ability of a creditor to change the terms of such plans.

2. *State law issues.* Examples of issues not addressed by section 226.9(c) because they are controlled by state or other applicable law include:

- The types of changes a creditor may make
- How changed terms affect existing balances, such as when a periodic rate is changed and the consumer does not pay off the entire existing balance before the new rate takes effect

3. *Change in billing cycle.* Whenever the creditor changes the consumer's billing cycle, it must give a change-in-terms notice if the change either affects any of the terms required to be disclosed under section 226.6 or increases the minimum payment, unless an exception under section 226.9(c)(2) applies; for example, the creditor must give advance notice if the creditor initially disclosed a 25-day free-ride period on purchases and the consumer will have fewer days during the billing cycle change.

9(c)(1) Written Notice Required

1. *Affected consumers.* Change-in-terms notices need only go to those consumers who may be affected by the change. For example, a change in the periodic rate for check overdraft credit need not be disclosed to consumers who do not have that feature on their accounts.

2. *Timing—effective date of change.* The rule that the notice of the change in terms be provided at least 15 days before the change takes effect permits midcycle changes when there is clearly no retroactive effect, such as the imposition of a transaction fee. Any change in the balance computation method, in contrast, would need to be disclosed at least 15 days prior to the billing cycle in which the change is to be implemented.

3. *Timing—advance notice not required.* Advance notice of 15 days is not necessary—that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change—in two circumstances:

- If there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default
- If the consumer agrees to the particular change. This provision is intended for use in the unusual instance when a consumer substitutes collateral or when the creditor can advance additional credit only if a change relatively unique to that consumer is made, such as the consumer's providing additional security or paying an increased minimum-payment amount. Therefore, the following are not "agreements" between the consumer and the creditor for purposes of section 226.9(c)(1): the consumer's general acceptance of the creditor's contract reservation of the right to change terms; the consumer's use of the account (which might imply acceptance of its terms under state law); and the consumer's acceptance of a unilateral term change that is not particular to that consumer, but rather is of general applicability to consumers with that type of account.

4. *Form of change-in-terms notice.* A complete new set of the initial disclosures containing the changed term complies with section 226.9(c) if the change is highlighted in some way on the disclosure statement, or if the disclosure statement is accompanied by a letter or some other insert that indicates or draws attention to the term change.

5. *Security interest change—form of notice.* A copy of the security agreement that describes the collateral securing the consumer's account may be used as the notice, when the term change is the addition of a security interest or the addition or substitution of collateral.

6. *Changes to home-equity plans entered into on or after November 7, 1989.* Section 226.9(c) applies when, by written agreement under section 226.5b(f)(3)(iii), a creditor changes the terms of a home equity plan—entered into on or after November 7, 1989—at or before its scheduled expiration, for example, by renewing a plan on terms different from those of the original plan. In disclosing the change:

- If the index is changed, the maximum annual percentage rate is increased (to the limited extent permitted by section 226.30), or a variable-rate feature is added to a fixed-rate plan, the creditor must include the disclosures required by section 226.5b(d)(12)(x) and (d)(12)(xi), unless these disclosures are unchanged from those given earlier.

- If the minimum payment requirement is changed, the creditor must include the disclosures required by section 226.5b(d)(5)(iii) (and, in variable-rate plans, the disclosures required by section 226.5b(d)(12)(x) and (d)(12)(xi)) unless the disclosures given earlier contained representative examples covering the new minimum payment requirement. (See the commentary to section 226.5b(d)(5)(iii), (d)(12)(x), and (d)(12)(xi) for a discussion of representative examples.)

When the terms are changed pursuant to a written agreement as described in section 226.5b(f)(3)(iii), the advance-notice requirement does not apply.

9(c)(2) Notice Not Required

1. *Changes not requiring notice.* The following are examples of changes that do not require a change-in-terms notice:

- A change in the consumer's credit limit
- A change in the name of the credit card or credit card plan
- The substitution of one insurer for another
- A termination or suspension of credit privileges
- Changes arising merely by operation of law; for example, if the creditor's security interest in a consumer's car automatically extends to the proceeds when the consumer sells the car

2. *Skip features.* If a credit program allows consumers to skip or reduce one or more payments during the year, or involves temporary reductions in finance charges, no notice of the change in terms is required either prior to the reduction or upon resumption of the higher rates or payments if these features are explained on the initial disclosure statement (including an explanation of the terms upon resumption). For example, a merchant may allow consumers to skip the December payment to encourage holiday shopping, or a teacher's credit union may not require payments during summer vacation. Otherwise, the creditor must give notice prior to resuming the original schedule or rate, even though no notice is required prior to the reduction. The change-in-terms notice may be combined with the notice offering the reduction. For example, the periodic statement reflecting the reduction or skip feature may also be used to notify the consumer of the resumption of the original schedule or rate, either by stating explicitly when the higher payment or charges resume or by indicating the duration of the skip option. Language such as "You may skip your October payment," or "We will waive your finance charges for January" may serve as the change-in-terms notice.

9(c)(3) Notice for Home-Equity Plans

1. *Written request for reinstatement.* If a creditor requires the request for reinstatement of credit privileges to be in writing, the notice under section 226.9(c)(3) must state that fact.

2. *Notice not required.* A creditor need not provide a notice under this paragraph if, pursuant to the commentary to section 226.5b(f)(2), a creditor freezes a line or reduces a credit line rather than terminating a plan and accelerating the balance.

9(d) Finance Charge Imposed at Time of Transaction

1. *Disclosure prior to imposition.* A person imposing a finance charge at the time of honoring a consumer's credit card must disclose the amount of the charge, or an explanation of how the charge will be determined, prior to its imposition. This must be disclosed before the consumer becomes obligated for property or services that may be paid for by use of a credit card. For example, disclosure must be given before the consumer has dinner at a restaurant, stays overnight at a hotel, or makes a deposit guaranteeing the purchase of property or services.

9(e) Disclosures Upon Renewal of Credit or Charge Card

1. *Coverage.* This paragraph applies to credit and charge card accounts of the type subject to 226.5a. (See section 226.5a(a)(3) and the accompanying commentary for discussion of the types of accounts subject to section 226.5a.) The disclosure requirements are triggered when a card issuer imposes any annual or other periodic fee on such an account,

whether or not the card issuer originally was required to provide the application and solicitation disclosures described in section 226.5a.

2. *Form.* The disclosures under this paragraph must be clear and conspicuous, but need not appear in a tabular format or in a prominent location. The disclosures need not be in a form the cardholder can retain.

3. *Terms at renewal.* Renewal notices must reflect the terms actually in effect at the time of renewal. For example, a card issuer that offers a preferential annual percentage rate to employees during their employment must send a renewal notice to employees disclosing the lower rate actually charged to employees (although the card issuer also may show the rate charged to the general public).

4. *Variable rate.* If the card issuer cannot determine the rate that will be in effect if the cardholder chooses to renew a variable-rate account, the card issuer may disclose the rate in effect at the time of mailing or delivery of the renewal notice. Alternatively, the card issuer may use the rate as of a specified date (and then update the rate from time to time, for example, each calendar month) or use an estimated rate under section 226.5(c).

5. *Renewals more frequent than annual.* If a renewal fee is billed more often than annually, the renewal notice should be provided each time the fee is billed. In this instance, the fee need not be disclosed as an annualized amount. Alternatively, the card issuer may provide the notice no less than once every 12 months if the notice explains the amount and frequency of the fee that will be billed during the time period covered by the disclosure, and also discloses the fee as an annualized amount. The notice under this alternative also must state the consequences of a cardholder's decision to terminate the account after the renewal-notice period has expired. For example, if a $2 fee is billed monthly but the notice is given annually, the notice must inform the cardholder that the monthly charge is $2, the annualized fee is $24, and $2 will be billed to the account each month for the coming year unless the cardholder notifies the card issuer. If the cardholder is obligated to pay an amount equal to the remaining unpaid monthly charges if the cardholder terminates the account during the coming year but after the first month, the notice must disclose the fact.

6. *Terminating credit availability.* Card issuers have some flexibility in determining the procedures for how and when an account may be terminated. However, the card issuer must clearly disclose the time by which the cardholder must act to terminate the account to avoid paying a renewal fee. State and other applicable law govern whether the card issuer may impose requirements such as specifying that the cardholder's response be in writing or that the outstanding balance be repaid in full upon termination.

7. *Timing of termination by cardholder.* When a card issuer provides notice under section 226.9(e)(1), a cardholder must be given at least 30 days or one billing cycle, whichever is less, from the date the notice is mailed or delivered to make a decision whether to terminate an account. When notice is given under section 226.9(e)(2), a cardholder has 30 days from mailing or delivery to decide to terminate an account.

8. *Timing of notices.* A renewal notice is deemed to be provided when mailed or delivered. Similarly, notice of termination is deemed to be given when mailed or delivered.

9. *Prompt reversal of renewal fee upon termination.* In a situation where a cardholder has provided timely notice of termination and a renewal fee has been billed to a cardholder's account, the card issuer must reverse or otherwise withdraw the fee promptly. Once a cardholder has terminated an account, no additional action by the cardholder may be required.

9(e)(3) Notification on Periodic Statements

1. *Combined disclosures.* If a single disclosure is used to comply with both sections 226.9(e) and 226.7, the periodic statement must comply with the rules in section 226.5a and 226.7. For example, the words "grace period" must be used and the name of the balance-calculation method must be identified (if listed in section 226.5a(g)) to comply with

the requirements of section 226.5a, even though the use of those terms would not otherwise be required for periodic statements under section 226.7. A card issuer may include some of the renewal disclosures on a periodic statement and others on a separate document so long as there is some reference indicating that they relate to one another. All renewal disclosures must be provided to a cardholder at the same time.

2. *Preprinted notices on periodic statements.* A card issuer may preprint the required information on its periodic statements. A card issuer that does so, however, using the advance-notice option under section 226.9(e)(1), must make clear on the periodic statement when the preprinted renewal disclosures are applicable. For example, the card issuer could include a special notice (not preprinted) at the appropriate time that the renewal fee will be billed in the following billing cycle, or could show the renewal date as a regular (preprinted) entry on all periodic statements.

9(f) Change in Credit Card Account Insurance Provider

1. *Coverage.* This paragraph applies to credit card accounts of the type subject to section 226.5a if credit insurance (typically life, disability, and unemployment insurance) is offered on the outstanding balance of such an account. (Credit card accounts subject to section 226.9(f) are the same as those subject to section 226.9(e); see comment 9(e)-1.) Charge card accounts are not covered by this paragraph. In addition, the disclosure requirements of this paragraph apply only where the card issuer initiates the change in insurance providers. For example, if the card issuer's current insurance provider is merged into or acquired by another company, these disclosures would not be required. Disclosures also need not be given in cases where card issuers pay for credit insurance themselves and do not separately charge the cardholder.

2. *No increase in rate or decrease in coverage.* The requirement to provide the disclosure arises when the card issuer changes the provider of insurance, even if there will be no increase in the premium rate charged the consumer and no decrease in coverage under the insurance policy.

3. *Form of notice.* If a substantial decrease in coverage will result from the change in providers, the card issuer either must explain the decrease or refer to an accompanying copy of the policy or group certificate for details of the new terms of coverage. (See the commentary to appendix G-13.)

4. *Discontinuation of insurance.* In addition to stating that the cardholder may cancel the insurance, the card issuer may explain the effect the cancellation would have on the consumer's credit card plan.

5. *Mailing by third party.* Although the card issuer is responsible for the disclosures, the insurance provider or another third party may furnish the disclosures on the card issuer's behalf.

Paragraph 9(f)(3) Substantial Decrease in Coverage

1. *Determination.* Whether a substantial decrease in coverage will result from the change in providers is determined by the two-part test in section 226.9(f)(3): first, whether the decrease is in a significant term of coverage; and second, whether the decrease might reasonably be expected to affect a cardholder's decision to continue the insurance. If both conditions are met, the decrease must be disclosed in the notice.

References

Statute: §1 27(a)(7)
Other sections: §§ 226.4 through 226.7 and appendix G
Previous regulation: § 226.7(d) through (f) and (j) and interpretation § 226.705 and 226.708
1981 changes: Section 226.9(a) implements the statutory change that the long-form statement of billing rights be provided only once a year. The provision now permits two rather than one means of providing the long-form statement to consumers. The verbatim text of the annual statement is no longer required; creditors may use any version "substantially similar" to the one in appendix G. If the

creditor elects to use the alternative summary statement, the new regulation no longer requires that the long-form statement be sent upon receiving a billing-error notice and at the consumer's request. The rules in section 226.708 on switching the type of billing-rights statement used have been modified.

Under section 226.9(b) disclosure requirements have been streamlined when supplemental credit devices or new credit features are added to an existing open-end plan.

Section 226.9(c) substantially changes the change-in-terms rules. Change-in-terms disclosures must now be made 15 days before the effective date of the change, rather than 15 days before the billing cycle in which the change will take effect. The kinds of changes that will trigger disclosures have been reduced: change-in-terms notices are no longer required for the types of changes described in section 226.9(c)(2). But the provision reverses interpretation section 226.705, which indicated that certain changes in the balance computation method did not require disclosure because they could result in lowered finance charges; now, any change in the balance computation method requires disclosure.

When a finance charge is imposed at the time of a transaction, section 226.9(d) only requires disclosure of the finance charge at point-of-sale; the amount financed and annual percentage rate figured in accordance with the closed-end credit provisions need no longer be disclosed. Furthermore, the finance charge disclosure now may be made orally by the person honoring the card.

SECTION 226.10—Prompt Crediting of Payments

10(a) General Rule

1. *Crediting date.* Section 226.10(a) does not require the creditor to post the payment to the consumer's account on a particular date; the creditor is only required to credit the payment *as of* the date of receipt.

2. *Date of receipt.* The "date of receipt" is the date that the payment instrument or other means of completing the payment reaches the creditor. For example:

- Payment by check is received when the creditor gets it, not when the funds are collected.
- In a payroll deduction plan in which funds are deposited to an asset account held by the creditor, and from which payments are made periodically to an open-end credit account, payment is received on the date when it is debited to the asset account (rather than on the date of the deposit), provided the payroll deduction method is voluntary and the consumer retains use of the funds until the contractual payment date.
- If the consumer elects to have payment made by a third-party payor such as a financial institution, through a preauthorized payment or telephone bill-payment arrangement, payment is received when the creditor gets the third-party payor's check or other transfer medium, such as an electronic fund transfer, as long as the payment meets the creditor's requirements as specified under section 226.10(b).

10(b) Specific Requirements for Payments

1. *Payment requirements.* The creditor may specify requirements for making payments, such as:

- Requiring that payments be accompanied by the account number or the payment stub
- Setting a cutoff hour for payment to be received, or set different hours for payment by mail and payments made in person
- Specifying that only checks or money orders should be sent by mail
- Specifying that payment is to be made in U.S. dollars
- Specifying one particular address for receiving payments, such as a post office box

The creditor may be prohibited, however, from specifying payment for preauthorized electronic fund transfer. (See section 913 of the Electronic Fund Transfer Act.)

2. *Payment requirements—limitations.* Requirements for making payments must be reasonable; it should not be difficult for most consumers to make conforming payments. For

example, it would not be reasonable to require that all payments be made in person between 10 a.m. and 11 a.m., since this would require consumers to take time off from their jobs to deliver payments.

3. *Acceptance of nonconforming payments.* If the creditor accepts a nonconforming payment (for example, payment at a branch office, when it had specified that payment be sent to headquarters), finance charges may accrue for the period between receipt and crediting of payments.

4. *Implied guidelines for payments.* In the absence of specified requirements for making payments (see section 226.10(b)):

- Payments may be made at any location where the creditor conducts business
- Payments may be made any time during the creditor's normal business hours
- Payment may be by cash, money order, draft, or other similar instrument in properly negotiable form, or by electronic fund transfer if the creditor and consumer have so agreed

References

Statute: § 164
Other sections: § 226.7
Previous regulation: § 226.7(g)
1981 changes: Much of the explanatory detail of the previous regulation is now in the commentary. The revised regulation gives the creditor five days in which to credit nonconforming payments, whereas the previous regulation required the crediting of such payments promptly, with an outside limit of five days. The five days in which to credit are available whenever the creditor accepts payment that does not conform to the creditor's disclosed specifications, in contrast to the previous regulation, which only allowed deferred crediting for payments made at the wrong location.

SECTION 226.11—Treatment of Credit Balances

1. *Timing of refund.* The creditor may also fulfill its obligations under section 226.11 by:

- Refunding any credit balance to the consumer immediately
- Refunding any credit balance prior to receiving a written request (under section 226.11(b)) from the consumer
- Making a good faith effort to refund any credit balance before six months have passed. If that attempt is unsuccessful, the creditor need not try again to refund the credit balance at the end of the six-month period.

2. *Amount of refund.* The phrase "any part of the credit balance remaining in the account" in section 226.11(b) and (c) means the amount of the credit balance at the time the creditor is required to make the refund. The creditor may take into consideration intervening purchases or other debits to the consumer's account (including those that have not yet been reflected on a periodic statement) that decrease or eliminate the credit balance.

Paragraph 11(b)

1. *Written requests—standing orders.* The creditor is not required to honor standing orders requesting refunds of any credit balance that may be created on the consumer's account.

Paragraph 11(c)

1. *Good faith effort to refund.* The creditor must take positive steps to return any credit balance that has remained in the account for over six months. This includes, if necessary, attempts to trace the consumer through the consumer's last known address or telephone number, or both.

2. *Good faith effort unsuccessful.* Section 226.11 imposes no further duties on the creditor if a good faith effort to return the balance is unsuccessful. The ultimate disposition of the credit balance (or any credit balance of $1 or less) is to be determined under other applicable law.

References

Statute: § 165
Previous regulation: § 226.7(h)
1981 changes: Under the previous regulation,

the creditor's duty to refund credit balances applied only to "excess payments"; section 226.11 of the revised regulation implements the amendments to section 165 of the statute which impose refunding duties on the creditor whatever the source of the credit balance. The revised regulation permits the creditor, in computing the refund, to take account of intervening debits, not just the difference between the previous balance and the overpayment as is provided in the previous regulation. The revised regulation gives the creditor seven business days in which to make the refund after receiving the consumer's written request, whereas the previous regulation required the creditor to make the refund promptly, with an outside limit of five business days. This provision also implements the amended statute by requiring a good faith effort to refund the credit balance after six months.

SECTION 226.12—Special Credit Card Provisions

1. *Scope.* Sections 226.12(a) and (b) deal with the issuance and liability rules for credit cards, whether the card is intended for consumer, business, or any other purposes. Sections 226.12(a) and (b) are exceptions to the general rule that the regulation applies only to consumer credit. (See sections 226.1 and 226.3.)

12(a) Issuance of Credit Cards

Paragraph 12(a)(1)

1. *Explicit request.* A request or application for a card must be explicit. For example, a request for overdraft privileges on a checking account does not constitute an application for a credit card with overdraft checking features.

2. *Addition of credit features.* If the consumer has a non-credit card, the addition of credit features to the card (for example, the granting of overdraft privileges on a checking account when the consumer already has a check guarantee card) constitutes issuance of a credit card.

3. *Variance of card from request.* The request or application need not correspond exactly to the card that is issued. For example:

- The name of the card requested may be different when issued
- The card may have features in addition to those reflected in the request or application

4. *Permissible form of request.* The request or application may be oral (in response to a telephone solicitation by a card issuer, for example) or written.

5. *Time of issuance.* A credit card may be issued in response to a request made before any cards are ready for issuance (for example, if a new program is established), even if there is some delay in issuance.

6. *Persons to whom cards may be issued.* A card issuer may issue a credit card to the person who requests it and to anyone else for whom that person requests a card and who will be an authorized user on the requester's account. In other words, cards may be sent to consumer A on A's request, and also (on A's request) to consumers B and C, who will be authorized users on A's account. In these circumstances, the following rules apply:

- The additional cards may be imprinted in either A's name or in the names of B and C.
- No liability for unauthorized use (by persons other than B and C), not even the $50, may be imposed on B or C since they are merely users and not "cardholders" as that term is defined in section 226.2 and used in section 226.12(b); of course, liability of up to $50 for unauthorized use of B's and C's cards may be imposed on A.
- Whether B and C may be held liable for their own use, or on the account generally, is a matter of state or other applicable law.

7. *Issuance of non-credit cards.* The issuance of an unsolicited device that is not, but may become, a credit card, is not prohibited provided:

- the device has some substantive purpose other than obtaining credit, such as access to non-credit services offered by the issuer;
- it cannot be used as a credit card when issued; and

- a credit capability will be added only on the recipient's request.

For example, the card issuer could send a check guarantee card on an unsolicited basis, but could not add a credit feature to that card without the consumer's specific request. The reencoding of a debit card or other existing card that had no credit privileges when issued would be appropriate after the consumer has specifically requested a card with credit privileges. Similarly, the card issuer may add a credit feature, for example, by reprogramming the issuer's computer program or automated teller machines, or by a similar program adjustment.

8. *Unsolicited issuance of PINs.* A card issuer may issue personal identification numbers (PINs) to existing credit cardholders without a specific request from the cardholders, provided the PINs cannot be used alone to obtain credit. For example, the PINs may be necessary if consumers wish to use their existing credit cards at automated teller machines or at merchant locations with point-of-sale terminals that require PINs.

Paragraph 12(a)(2)

1. *Renewal.* "Renewal" generally contemplates the regular replacement of existing cards because of, for example, security reasons or new technology or systems. It also includes the reissuance of cards that have been suspended temporarily, but does not include the opening of a new account after a previous account was closed.

2. *Substitution—examples.* "Substitution" encompasses the replacement of one card with another because the underlying account relationship has changed in some way—such as when the card issuer has:

- Changed its name
- Changed the name of the card
- Changed the credit or other features available on the account. For example, the original card could be used to make purchases and obtain cash advances at teller windows. The substitute card might be usable, in addition, for obtaining cash advances through automated teller machines. (If the substitute card constitutes an access device, as defined in Regulation E, then the Regulation E issuance rules would have to be followed.) The "substitution" of one card with another on an unsolicited basis is not permissible, however, where in conjunction with the substitution an additional credit card account is opened and the consumer is able to make new purchases or advances under both the original and the new account with the new card. For example, if a retail card issuer replaces its credit card with a combined reatiler/bank card, each of the creditors maintains a separate account, and both accounts can be accessed for new transactions by use of the new credit card, the card cannot be provided to a consumer without solicitation.
- Substituted a card user's name on the substitute card for the cardholder's name appearing on the original card
- Changed the merchant base. However, the new card must be honored by at least one of the persons that honored the original card.

3. *Substitution—successor card issuer.* "Substitution" also occurs when a successor card issuer replaces the original card issuer (for example, when a new card issuer purchases the accounts of the original issuer and issues its own card to replace the original one). A permissible substitution exists even if the original issuer retains the existing receivables and the new card issuer acquires the right only to future receivables, provided use of the original card is cut off when use of the new card becomes possible.

4. *Substitution—non-credit-card plan.* A credit card that replaces a retailer's open-end credit plan *not* involving a credit card is not considered a substitute for the retailer's plan—even if the consumer used the retailer's plan. A credit card cannot be issued in these circumstances without a request or application.

5. *One-for-one rule.* An accepted card may be replaced by no more than one renewal or substitute card. For example, the card issuer may not replace a credit card permitting purchases

and cash advances with two cards, one for the purchases and another for the cash advances.

6. *One-for-one rule—exception.* The regulation does not prohibit the card issuer from replacing a debit/credit card with a credit card and another card with only debit functions (or debit functions plus an associated overdraft capability), since the latter card could be issued on an unsolicited basis under Regulation E.

7. *Methods of terminating replaced card.* The card issuer need not physically retrieve the original card, provided the old card is voided in some way; for example:

- The issuer includes with the new card a notification that the existing card is no longer valid and should be destroyed immediately.
- The original card contained an expiration date.
- The card issuer, in order to preclude use of the card, reprograms computers or issues instructions to authorization centers.

8. *Incomplete replacement.* If a consumer has duplicate credit cards on the same account (card A—one type of bank credit card, for example), the card issuer may not replace the duplicate cards with one card A and one card B (card B—another type of bank credit card) unless the consumer requests card B.

9. *Multiple entities.* Where multiple entities share responsibilities with respect to a credit card issued by one of them, the entity that issued the card may replace it on an unsolicited basis, if that entity terminates the original card by voiding it in some way, as described in comment 12(a)(2)-7. The other entity or entities may not issue a card on an unsolicited basis in these circumstances.

12(b) Liability of Cardholder for Unauthorized Use

1. *Meaning of "cardholder."* For purposes of this provision, "cardholder" includes any person (including organizations) to whom a credit card is issued for any purpose, including business. When a corporation is the cardholder, required disclosures should be provided to the corporation (as opposed to an employee user).

2. *Imposing liability.* A card issuer is not required to impose liability on a cardholder for the unauthorized use of a credit card; if the card issuer does not seek to impose liability, the issuer need not conduct any investigation of the cardholder's claim.

3. *Reasonable investigation.* If a card issuer seeks to impose liability when a claim of unauthorized use is made by a cardholder, the card issuer must conduct a reasonable investigation of the claim. In conducting its investigation, the card issuer may reasonably request the cardholder's cooperation. The card issuer may not automatically deny a claim based solely on the cardholder's failure or refusal to comply with a particular request; however, if the card issuer otherwise has no knowledge of facts confirming the unauthorized use, the lack of information resulting from the cardholder's failure or refusal to comply with a particular request may lead the card issuer reasonably to terminate the investigation. The procedures involved in investigating claims may differ, but actions such as the following represent steps that a card issuer may take, as appropriate, in conducting a reasonable investigation:

i. Reviewing the types or amounts of purchases made in relation to the cardholder's previous purchasing pattern.
ii. Reviewing where the purchases were delivered in relation to the cardholder's residence or place of business.
iii. Reviewing where the purchases were made in relation to where the cardholder resides or has normally shopped.
iv. Comparing any signature on credit slips for the purchases to the signature of the cardholder or an authorized user in the card issuer's records, including other credit slips.
v. Requesting documentation to assist in the verification of the claim.
vi. Requesting a written, signed statement from the cardholder or authorized user.
vii. Requesting a copy of a police report, if one was filed.
viii. Requesting information regarding the cardholder's knowledge of the person

who allegedly used the card or of that person's authority to do so.

12(b)(1) Limitation on Amount

1. *Meaning of "authority."* Footnote 22 defines unauthorized use in terms of whether the user has "actual, implied, or apparent authority." Whether such authority exists must be determined under state or other applicable law.

2. *Liability limits—dollar amounts.* As a general rule, the cardholder's liability for a series of unauthorized uses cannot exceed either $50 or the value obtained through the unauthorized use before the card issuer is notified, whichever is less.

12(b)(2) Conditions of Liability

1. *Issuer's option not to comply.* A card issuer that chooses not to impose any liability on cardholders for unauthorized use need not comply with the disclosure and identification requirements discussed below.

Paragraph 12(b)(2)(ii)

1. *Disclosure of liability and means of notifying issuer.* The disclosures referred to in section 226.12(b)(2)(ii) may be given, for example, with the initial disclosures under section 226.6, on the credit card itself, or on periodic statements. They may be given at any time preceding the unauthorized use of the card.

Paragraph 12(b)(2)(iii)

1. *Means of identifying cardholder or user.* To fulfill the condition set forth in section 226.12(b)(2)(iii), the issuer must provide some method whereby the cardholder or the authorized user can be identified. This could include, for example, signature, photograph, or fingerprint on the card, or electronic or mechanical confirmation.

2. *Identification by magnetic strip.* Unless a magnetic strip (or similar device not readable without physical aids) must be used in conjunction with a secret code or the like, it would not constitute sufficient means of identification. Sufficient identification also does not exist if a "pool" or group card, issued to a corporation and signed by a corporate agent who will not be a user of the card, is intended to be used by another employee for whom no means of identification is provided.

3. *Transactions not involving card.* The cardholder may not be held liable under section 226.12(b) when the card itself (or some other sufficient means of identification of the cardholder) is not presented. Since the issuer has not provided a means to identify the user under these circumstances, the issuer has not fulfilled one of the conditions for imposing liability. For example, when merchandise is ordered by telephone by a person without authority to do so, using a credit card account number or other number only (which may be widely available), no liability may be imposed on the cardholder.

12(b)(3) Notification to Card Issuer

1. *How notice must be provided.* Notice given in a normal business manner—for example, by mail, telephone, or personal visit—is effective even though it is not given to, or does not reach, some particular person within the issuer's organization. Notice also may be effective even though it is not given at the address or phone number disclosed by the card issuer under section 226.12(b)(2)(ii).

2. *Who must provide notice.* Notice of loss, theft, or possible unauthorized use need not be initiated by the cardholder. Notice is sufficient so long as it gives the "pertinent information," which would include the name or card number of the cardholder and an indication that unauthorized use has or may have occurred.

3. *Relationship to section 226.13.* The liability protections afforded to cardholders in section 226.12 do not depend upon the cardholder's following the error-resolution procedures in section 226.13. For example, the written-notification and time-limit requirements of section 226.13 do not affect the section 226.12 protections.

12(b)(5) Business Use of Credit Cards

1. *Agreement for higher liability for business use cards.* The card issuer may not rely on

section 226.12(b)(5) if the business is clearly not in a position to provide 10 or more cards to employees (for example, if the business has only 3 employees). On the other hand, the issuer need not monitor the personnel practices of the business to make sure that it has at least 10 employees at all times.

2. *Unauthorized use by employee.* The protection afforded to an employee against liability for unauthorized use in excess of the limits set in section 226.12(b) applies only to unauthorized use by someone other than the employee. If the employee uses the card in an unauthorized manner, the regulation sets no restriction on the employee's potential liability for such use.

12(c) Right of Cardholder to Assert Claims or Defenses Against Card Issuer

1. *Relationship to section 226.13.* The section 226.12(c) credit card "holder in due course" provision deals with the consumer's right to assert against the card issuer a claim or defense conserning property or services purchased with a credit card, if the merchant has been unwilling to resolve the dispute. Even though certain merchandise disputes, such as nondelivery of goods, may also constitute "billing errors" under section 226.13, that section operates independently of section 226.12(c). The cardholder whose asserted billing error involves undelivered goods may institute the error-resolution procedures of section 226.13; but whether or not the cardholder has done so, the cardholder may assert claims or defenses under section 226.12(c). Conversely, the consumer may pay a disputed balance and thus have no further right to assert claims and defenses, but still may assert a billing error if notice of that billing error is given in the proper time and manner. An assertion that a particular transaction resulted from unauthorized use of the card could also be both a "defense" and a billing error.

2. *Claims and defenses assertible.* Section 226.12(c) merely preserves the consumer's right to assert against the card issuer any claims or defenses that can be asserted against the merchant. It does not determine what claims or defenses are valid as to the merchant; this determination must be made under state or other applicable law.

12(c)(1) General Rule

1. *Situations excluded and included.* The consumer may assert claims or defenses only when the goods or services are "purchased with the credit card." This could include:

- Mail or telephone orders, if the purchase is charged to the credit card account

But it would exclude:

- Use of a credit card to obtain a cash advance, even if the consumer then uses the money to purchase goods or services. Such a transaction would not involve "property or services purchased with the credit card."
- The purchase of goods or services by use of a check accessing an overdraft account and a credit card used solely for identification of the consumer. (On the other hand, if the credit card is used to make partial payment for the purchase and not merely for identification, the right to assert claims or defenses would apply to credit extended via the credit card, although not to the credit extended on the overdraft line.)
- Purchases made by use of a check-guarantee card in conjunction with a cash-advance check (or by cash-advance checks alone). See footnote 24. A cash-advance check is a check that, when written, does not draw on an asset account; instead, it is charged entirely to an open-end credit account.
- Purchases effected by use of either a check guarantee card or a debit card when used to draw on overdraft credit lines (see footnote 24). The debit card exemption applies whether the card accesses an asset account via point-of-sale terminals, automated teller machines, or in any other way, and whether the card qualifies as an "access device" under Regulation E or is only a paper-based debit card. If a card serves both as an ordinary credit card and also as check guarantee or debit card, a transaction will be subject to this rule on asserting claims and defenses when used as an ordinary credit card, but not when used as a check-guarantee or debit card.

12(c)(2) Adverse Credit Reports Prohibited

1. *Scope of prohibition.* Although an amount in dispute may not be reported as delinquent until the matter is resolved:

i. That amount may be reported as disputed.
ii. Nothing in this provision prohibits the card issuer from undertaking its normal collection activities for the delinquent and undisputed portion of the account.

2. *Settlement of dispute.* A card issuer may not consider a dispute settled and report an amount disputed as delinquent or begin collection of the disputed amount until it has completed a reasonable investigation of the cardholder's claim. A reasonable investigation requires an independent assessment of the cardholder's claim based on information obtained from both the cardholder and the merchant, if possible. In conducting an investigation, the card issuer may request the cardholder's reasonable cooperation. The card issuer may not automatically consider a dispute settled if the cardholder fails or refuses to comply with a particular request. However, if the card issuer otherwise has no means of obtaining information necessary to resolve the dispute, the lack of information resulting from the cardholder's failure or refusal to comply with a particular request may lead the card issuer reasonably to terminate the investigation.

12(c)(3) Limitations

Paragraph 12(c)(3)(i)

1. *Resolution with merchant.* The consumer must have tried to resolve the dispute with the merchant. This does not require any special procedures or correspondence between them, and is a matter for factual determination in each case. The consumer is not required to seek satisfaction from the manufacturer of the goods involved. When the merchant is in bankruptcy proceedings, the consumer is not required to file a claim in those proceedings.

Paragraph 12(c)(3)(ii)

1. *Geographic limitation.* The question of where a transaction occurs (as in the case of mail or telephone orders, for example) is to be determined under state or other applicable law.

2. *Merchant honoring card.* The exceptions (stated in footnote 26) to the amount and geographic limitations do not apply if the merchant merely honors, or indicates through signs or advertising that it honors, a particular credit card.

12(d) Offsets by Card Issuer Prohibited

Paragraph 12(d)(1)

1. *"Holds" on accounts.* "Freezing" or placing a hold on funds in the cardholder's deposit account is the functional equivalent of an offset and would contravene the prohibition in section 226.12(d)(1), unless done in the context of one of the exceptions specified in section 226.12(d)(2). For example, if the terms of a security agreement permitted the card issuer to place a hold on the funds, the hold would not violate the offset prohibition. Similarly, if an order of a bankruptcy court required the card issuer to turn over deposit account funds to the trustee in bankruptcy, the issuer would not violate the regulation by placing a hold on the funds in order to comply with the court order.

2. *Funds intended as deposits.* If the consumer tenders funds as a deposit (to a checking account, for example), the card issuer may not apply the funds to repay indebtedness on the consumer's credit card account.

3. *Types of indebtedness; overdraft accounts.* The offset prohibition applies to any indebtedness arising from transactions under a credit card plan, including accrued finance charges and other charges on the account. The prohibition also applies to balances arising from transactions not using the credit card itself but taking place under plans that involve credit cards. For example, if the consumer writes a check that accesses an overdraft line of credit, the resulting indebtedness is subject to the offset prohibition since it is incurred through a credit card plan, even though the consumer did not use an associated check guarantee or debit card.

4. *When prohibition applies in case of termi-*

nation of account. The offset prohibition applies even after the card issuer terminates the cardholder's credit card privileges, if the indebtedness was incurred prior to termination. If the indebtedness was incurred after termination, the prohibition does not apply.

Paragraph 12(d)(2)

1. *Security interest—limitations.* In order to qualify for the exception stated in section 226.12(d)(2), a security interest must be affirmatively agreed to by the consumer and must be disclosed in the issuer's initial disclosures under section 226.6. The security interest must not be the functional equivalent of a right of offset; as a result, routinely including in agreements contract language indicating that consumers are giving a security interest in any deposit accounts maintained with the issuer does not result in a security interest that falls within the exception in section 226.12(d)(2). For a security interest to qualify for the exception under section 226.12(d)(2) the following conditions must be met:

- The consumer must be aware that granting a security interest is a condition for the credit card account (or for more favorable account terms) and must specifically intend to grant a security interest in a deposit account. Indicia of the consumer's awareness and intent could include, for example:
  —Separate signature or initials on the agreement indicating that a security interest is being given.
  —Placement of the security agreement on a separate page, or otherwise separating the security interest provisions from other contract and disclosure provisions.
  —Reference to a specific amount of deposited funds or to a specific deposit account number.
- The security interest must be obtainable and enforceable by creditors generally. If other creditors could not obtain a security interest in the consumer's deposit accounts to the same extent as the card issuer, the security interest is prohibited by section 226.12(d)(2).

2. *Security interest—after-acquired property.* As used in section 226.12(d), the term "security interest" does not exclude (as it does for other Regulation Z purposes) interests in after-acquired property. Thus, a consensual security interest in deposit-account funds, including funds deposited after the granting of the security interest, would constitute a permissible exception to the prohibition on offsets.

3. *Court order.* If the card issuer obtains a judgment against the cardholder, and if state and other applicable law and the terms of the judgment do not so prohibit, the card issuer may offset the indebtedness against the cardholder's deposit account.

Paragraph 12(d)(3)

1. *Automatic payment plans—scope of exception.* With regard to automatic debit plans under section 226.12(d)(3), the following rules apply:

- The cardholder's authorization must be in writing and signed or initialed by the cardholder.
- The authorizing language need not appear directly above or next to the cardholder's signature or initials, provided it appears on the same document and that it clearly spells out the terms of the automatic debit plan.
- If the cardholder has the option to accept or reject the automatic debit feature (such option may be required under section 913 of the Electronic Fund Transfer Act), the fact that the option exists should be clearly indicated.

2. *Automatic payment plans—additional exceptions.* The following practices are not prohibited by section 226.12(d)(1):

- Automatically deducting charges for participation in a program of banking services (one aspect of which may be a credit card plan)
- Debiting the cardholder's deposit account on the cardholder's *specific* request rather than on an *automatic* periodic basis (for example, a cardholder might check a box on the credit card bill stub, requesting the issuer to debit the cardholder's account to pay that bill)

12(e) Prompt Notification of Returns and Crediting of Refunds

Paragraph 12(e)(1)

1. *Normal channels.* The term "normal channel" refers to any network or interchange system used for the processing of the original charge slips (or equivalent information concerning the transactions).

Paragraph 12(e)(2)

1. *Crediting account.* The card issuer need not actually post the refund to the consumer's account within three business days after receiving the credit statement, provided that it credits the account as of a date within that time period.

References

Statute: §§ 103(1), 132, 133, 135, 162, 166, 167, 169, and 170
Other sections: § 226.13
Other regulations: Regulation E (12 CFR 205)
Previous regulation: § 226.13
1981 changes: The issuance rules in section 226.12(a) make clear that cards may be sent to the person making the request and also to any other person for whom a card is requested, except that no liability for unauthorized use may be imposed on persons who are only authorized users.

The principal differences in section 226.12(b) about conditions of liability are as follows: the requirement that the cardholder be given a postage-paid, preaddressed card or envelope for notification of loss or theft has been deleted (corresponding to an amendment to the act); the required disclosures of maximum liability and of means of notification have been simplified; and the required provision of a means of identification has been changed in that the issuer now may provide a means to identify either the cardholder or the authorized user. Finally, anyone may provide the notification to the card issuer, not just the cardholder.

Section 226.12(d) on offsets clarifies that the offset prohibition does not apply to consensual security interests. The separate promptness standard which used to apply in addition to the seven-business-day and three-business-day standards has been deleted from section 226.12(e) on prompt notification of returns. Section 226.12(f) now clarifies rules on clearing accounts.

Section 226.12(g), dealing with the relationship of the regulation to Regulation E (Electronic Fund Transfers), has been added.

SECTION 226.13—Billing-Error Resolution

1. *General prohibitions.* Footnote 27 prohibits a creditor from responding to a consumer's billing-error allegation by accelerating the debt or closing the account, and reflects protections authorized by section 161(d) of the Truth in Lending Act and section 701 of the Equal Credit Opportunity Act. The footnote also alerts creditors that failure to comply with the error-resolution procedures may result in the forfeiture of disputed amounts as prescribed in section 161(e) of the act. (Any failure to comply may also be a violation subject to the liability provisions of section 130 of the act.)

2. *Charges for error resolution.* If a billing error occurred, whether as alleged or in a different amount or manner, the creditor may not impose a charge related to any aspect of the error-resolution process (including charges for documentation or investigation) and must credit the consumer's account if such a charge was assessed pending resolution. Since the act grants the consumer error-resolution rights, the creditor should avoid any chilling effect on the good faith assertion of errors that might result if charges are assessed when no billing error has occurred.

13(a) Definition of Billing Error

Paragraph 13(a)(1)

1. *Actual, implied, or apparent authority.* Whether use of a credit card or open-end credit plan is authorized is determined by state or other applicable law.

Paragraph 13(a)(3)

1. *Coverage.* Section 226.13(a)(3) covers dis-

putes about goods or services that are "not accepted" or "not delivered . . . as agreed"; for example:

- The appearance on a periodic statement of a purchase, when the consumer refused to take delivery of goods because they did not comply with the contract
- Delivery of property or services different from that agreed upon
- Delivery of the wrong quantity
- Late delivery
- Delivery to the wrong location

Section 226.13(a)(3) does not apply to a dispute relating to the quality of property or services that the consumer accepts. Whether acceptance occurred is determined by state or other applicable law.

Paragraph 13(a)(5)

1. *Computational errors.* In periodic statements that are combined with other information, the error-resolution procedures are triggered only if the consumer asserts a computational billing error in the credit-related portion of the periodic statement. For example:

- If a bank combines a periodic statement reflecting the consumer's credit card transactions with the consumer's monthly checking statement, a computational error in the checking account portion of the combined statement is not a billing error.

Paragraph 13(a)(6)

1. *Documentation requests.* A request for documentation such as receipts or sales slips, unaccompanied by an allegation of an error under section 226.13(a) or a request for additional clarification under section 226.13(a)(6), does not trigger the error-resolution procedures. For example, a request for documentation merely for purposes such as tax preparation or recordkeeping does not trigger the error-resolution procedures.

13(b) Billing-Error Notice

1. *Withdrawal.* The consumer's withdrawal of a billing-error notice may be oral or written.

Paragraph 13(b)(1)

1. *Failure to send periodic statement—timing.* If the creditor has failed to send a periodic statement, the 60-day period runs from the time the statement should have been sent. Once the statement is provided, the consumer has another 60 days to assert any billing errors reflected on it.

2. *Failure to reflect credit—timing.* If the periodic statement fails to reflect a credit to the account, the 60-day period runs from transmittal of the statement on which the credit should have appeared.

3. *Transmittal.* If a consumer has arranged for periodic statements to be held at the financial institution until called for, the statement is "transmitted" when it is first made available to the consumer.

Paragraph 13(b)(2)

1. *Identity of the consumer.* The billing error notice need not specify both the name and the account number if the information supplied enables the creditor to identify the consumer's name and account.

13(c) Time for Resolution; General Procedures

1. *Temporary or provisional corrections.* A creditor may temporarily correct the consumer's account in response to a billing-error notice but is not excused from complying with the remaining error-resolution procedures within the time limits for resolution.

2. *Correction without investigation.* A creditor may correct a billing error in the manner and amount asserted by the consumer without the investigation or the determination normally required. The creditor must comply, however, with all other applicable provisions. If a creditor follows this procedure, no presumption is created that a billing error occurred.

Paragraph 13(c)(2)

1. *Time for resolution.* The phrase "two complete billing cycles" means two actual billing cycles occurring after receipt of the billing error notice, not a measure of time equal to

two billing cycles. For example, if a creditor on a monthly billing cycle receives a billing error notice mid-cycle, it has the remainder of that cycle plus the next two full billing cycles to resolve the error.

13(d) Rules Pending Resolution

1. *Disputed amount.* "Disputed amount" is the dollar amount alleged by the consumer to be in error. When the allegation concerns the description or identification of the transaction (such as the date or the seller's name) rather than a dollar amount, the disputed amount is the amount of the transaction or charge that corresponds to the disputed transaction identification. If the consumer alleges a failure to send a periodic statement under section 226.13(a)(7), the disputed amount is the entire balance owing.

13(d)(1) Consumer's Right to Withhold Disputed Amount; Collection Action Prohibited

1. *Prohibited collection actions.* During the error-resolution period, the creditor is prohibited from trying to collect the disputed amount from the consumer. Prohibited collection actions include, for example, instituting court action, taking a lien, or instituting attachment proceedings.

2. *Right to withhold payment.* If the creditor reflects any disputed amount or related finance or other charges on the periodic statement, and is therefore required to make the disclosure under footnote 30, the creditor may comply with that disclosure requirement by indicating that payment of any disputed amount is not required pending resolution. Making a disclosure that only refers to the disputed amount would, of course, in no way affect the consumer's right under section 226.13(d)(1) to withhold related finance and other charges. The disclosure under footnote 30 need not appear in any specific place on the periodic statement, need not state the specific amount that the consumer may withhold, and may be preprinted on the periodic statement.

3. *Imposition of additional charges on undisputed amounts.* The consumer's withholding of the disputed amount from the total bill cannot subject undisputed balances (including new purchases or cash advances made during the present or subsequent cycles) to the imposition of finance or other charges. For example, if on an account with a free-ride period (that is, an account in which paying the new balance in full allows the consumer to avoid the imposition of additional finance charges), a consumer disputes a $2 item out of a total bill of $300 and pays $298 within the free-ride period, the consumer would not lose the free ride as to any undisputed amounts, even if the creditor determines later that no billing error occurred. Furthermore, finance or other charges may not be imposed on any new purchases or advances that, absent the unpaid disputed balance, would not have finance or other charges imposed on them. Finance or other charges that would have been incurred even if the consumer had paid the disputed amount would not be affected.

4. *Automatic payment plans—coverage.* The coverage of this provision is limited to the card issuer's intrainstitutional payment plans. It does not apply to:

- Inter-institutional payment plans that permit a cardholder to pay automatically any credit card indebtedness from an asset account not held by the card issuer receiving payment
- Intra-institutional automatic payment plans offered by financial institutions that are not credit card issuers

5. *Automatic payment plans—time of notice.* While the card issuer does not have to restore or prevent the debiting of a disputed amount if the billing-error notice arrives after the three-business-day cutoff, the card issuer must, however, prevent the automatic debit of any part of the disputed amount that is still outstanding and unresolved at the time of the next scheduled debit date.

13(d)(2) Adverse Credit Reports Prohibited

1. *Report of dispute.* Although the creditor must not issue an adverse credit report because the consumer fails to pay the disputed amount or any related charges, the creditor may report that the amount or the account is

in dispute. Also, the creditor may report the account as delinquent if undisputed amounts remain unpaid.

2. *"Person."* During the error-resolution period, the creditor is prohibited from making an adverse credit report about the disputed amount to any person—including employers, insurance companies, other creditors, and credit bureaus.

3. *Creditor's agent.* Whether an agency relationship exists between a creditor and an issuer of an adverse credit report is determined by state or other applicable law.

13(e) Procedures if Billing Error Occurred as Asserted

1. *Correction of error.* The phrase "as applicable" means that the necessary corrections vary with the type of billing error that occurred. For example, a misidentified transaction (or a transaction that is identified by one of the alternative methods in section 226.8) is cured by properly identifying the transaction and crediting related finance and any other charges imposed. The creditor is not required to cancel the amount of the underlying obligation incurred by the consumer.

2. *Form of correction notice.* The written correction notice may take a variety of forms. It may be sent separately, or it may be included on or with a periodic statement that is mailed within the time for resolution. If the periodic statement is used, the amount of the billing error must be specifically identified. If a separate billing-error correction notice is provided, the accompanying or subsequent periodic statement reflecting the corrected amount may simply identify it as "credit."

13(f) Procedures if Different Billing Error or No Billing Error Occurred

1. *Different billing error.* Examples of a "different billing error" include:

- Differences in the amount of an error (for example, the customer asserts a $55.00 error but the error was only $53.00)
- Differences in other particulars asserted by the consumer (such as when a consumer asserts that a particular transaction never occurred, but the creditor determines that only the seller's name was disclosed incorrectly)

2. *Form of creditor's explanation.* The written explanation (which also may notify the consumer of corrections to the account) may take a variety of forms. It may be sent separately, or it may be included on or with a periodic statement that is mailed within the time for resolution. If the creditor uses the periodic statement for the explanation and correction(s), the corrections must be specifically identified. If a separate explanation, including the correction notice, is provided, the enclosed or subsequent periodic statement reflecting the corrected amount may simply identify it as a "credit." The explanation may be combined with the creditor's notice to the consumer of amounts still owing, which is required under section 226.13(g)(1), provided it is sent within the time limit for resolution. (See commentary to section 226.13(e).)

13(g) Creditor's Rights and Duties After Resolution

Paragraph 13(g)(1)

1. *Amounts owed by consumer.* Amounts the consumer still owes may include both minimum periodic payments and related finance and other charges that accrued during the resolution period. As explained in the commentary to section 226.13(d)(1), even if the creditor later determines that no billing error occurred, the creditor may not include finance or other charges that are imposed on undisputed balances solely as a result of a consumer's withholding payment of a disputed amount.

2. *Time of notice.* The creditor need not send the notice of amount owed within the time period for resolution, although it is under a duty to send the notice promptly after resolution of the alleged error. If the creditor combines the notice of the amount owed with the explanation required under section 226.13 (f)(1), the combined notice must be provided within the time limit for resolution.

Paragraph 13(g)(2)

1. The creditor need not allow any free-ride period disclosed under sections 226.6(a)(1) and 226.7(j) to pay the amount due under section 226.13(g)(1) if no error occurred and the consumer was not entitled to a free-ride period at the time the consumer asserted the error.

Paragraph 13(g)(3)

1. *Time for payment.* The consumer has a minimum of 10 days to pay (measured from the time the consumer could reasonably be expected to have received notice of the amount owed) before the creditor may issue an adverse credit report; if an initially disclosed free-ride period allows the consumer a longer time in which to pay, the consumer has the benefit of that longer period.

Paragraph 13(g)(4)

1. *Credit reporting.* Under section 226.13(g)(4)(i) and (iii) the creditor's additional credit reporting responsibilities must be accomplished promptly. The creditor need not establish costly procedures to fulfill this requirement. For example, a creditor that reports to a credit bureau on scheduled updates need not transmit corrective information by an unscheduled computer or magnetic tape; it may provide the credit bureau with the correct information by letter or other commercially reasonable means when using the scheduled update would not be "prompt." The creditor is not responsible for ensuring that the credit bureau corrects its information immediately.

2. *Adverse report to credit bureau.* If a creditor made an adverse report to a credit bureau that disseminated the information to other creditors, the creditor fulfills its section 226.13(g)(4)(ii) obligations by providing the consumer with the name and address of the credit bureau.

13(i) Relation to Electronic Fund Transfer Act and Regulation E

1. *Coverage.* Credit extended directly from a non-overdraft credit line is governed solely by Regulation Z, even though a combined credit card/access device is used to obtain the extension.

2. *Incidental credit under agreement.* Credit extended incident to an electronic fund transfer under an agreement between the consumer and the financial institution is governed by section 226.13(i), which provides that certain error resolution procedures in both this regulation and Regulation E apply. Incidental credit that is not extended under an agreement between the consumer and the financial institution is governed *solely* by the error-resolution procedures in Regulation E. For example:

- Credit inadvertently extended incident to an electronic fund transfer is governed solely by the Regulation E error-resolution procedures, if the bank and the consumer do not have an agreement to extend credit when the consumer's account is overdrawn.

3. *Application to debit/credit transactions—examples.* If a consumer withdraws money at an automated teller machine and activates an overdraft credit feature on the checking account:

- An error asserted with respect to the transaction is subject, for error-resolution purposes, to the applicable Regulation E provisions (such as timing and notice) for the entire transaction.
- The creditor need not provisionally credit the consumer's account, under section 205.11(c)(2)(i) of Regulation E, for any portion of the unpaid extension of credit.
- The creditor must credit the consumer's account under section 205.11(e) with any finance or other charges incurred as a result of the alleged error.
- The provision of section 226.13(d) and (g) apply only to the credit portion of the transaction.

References

Statute: §§ 161 and 162
Other sections: §§ 226.6 through 226.8
Other regulations: Regulation E (12 CFR 205)
Previous regulation: §§ 226.2(j) and (cc), and 226.14
1981 changes: Section 226.13 reflects several

substantive changes from the previous regulation and a complete restructuring of the error-resolution provisions. The new organization, for example, arranges the creditor's responsibilities in chronological sequence.

Section 226.13(a)(7) implements amended section 161(b) of the act and provides that the creditor's failure to send a periodic statement to the consumer's current address is a billing error, unless the creditor received written notice of the address change fewer than 20 days (instead of 10 days) before the end of the billing cycle.

Several provisions regarding the creditor's duties after a billing error is alleged have been revised. The previous regulation immunized a creditor from liability for inadvertently taking collection action or making an adverse credit report within two days after receiving a billing-error notice; these provisions are deleted from the revised regulation. The revised regulation no longer requires placement "on the face" of the periodic statement of the disclosure about payment of disputed amounts.

The revised regulation changes the rule in the previous regulation that a card issuer must prevent or restore an automatic debit of a disputed amount if it receives a billing-error notice within 16 days after transmitting the periodic statement that reflects the alleged error. Under the revised regulation, the card issuer must prevent an automatic debit if it receives a billing-error notice up to 3 days before the scheduled payment date (provided that the notice is received within the 60 days for the consumer to assert the error).

SECTION 226.14—Determination of Annual Percentage Rate

14(a) General Rule

1. *Tolerance.* The tolerance of ⅛ of 1 percentage point above or below the annual percentage rate applies to any required disclosure of the annual percentage rate. The disclosure of the annual percentage rate is required in sections 226.6, 226.7, 226.9, 226.15, 226.16, and 226.26.

2. *Rounding.* The regulation does not require that the annual percentage rate be calculated to any particular number of decimal places; rounding is permissible within the ⅛ of 1 percent tolerance. For example, an exact annual percentage rate of 14.33333 percent may be stated as 14.33 percent or as 14.3 percent, or even as 14¼ percent; but it could not be stated as 14.2 percent or 14 percent, since each varies by more than the permitted tolerance.

3. *Periodic rates.* No explicit tolerance exists for any periodic rate as such; a disclosed periodic rate may vary from precise accuracy (for example, due to rounding) only to the extent that its annualized equivalent is within the tolerance permitted by section 226.14(a). Further, a periodic rate need not be calculated to any particular number of decimal places.

4. *Finance charges.* The regulation does not prohibit creditors from assessing finance charges on balances that include prior, unpaid finance charges; state or other applicable law may do so, however.

5. *Good faith reliance on faulty calculation tools.* Footnote 31a absolves a creditor of liability for an error in the annual percentage rate or finance charge that resulted from a corresponding error in a calculation tool used in good faith by the creditor. Whether or not the creditor's use of the tool was in good faith must be determined on a case-by-case basis, but the creditor must in any case have taken reasonable steps to verify the accuracy of the tool, including any instructions, before using it. Generally, the footnote is available only for errors directly attributable to the calculation tool itself, including software programs; it is not intended to absolve a creditor of liability for its own errors, or for errors arising from improper use of the tool, from incorrect data entry, or from misapplication of the law.

14(b) Annual Percentage Rate for Section 226.5a and 226.5b Disclosures, for Initial Disclosures and for Advertising Purposes

1. *Corresponding annual percentage rate computation.* For purposes of sections 226.5a, 226.5b, 226.6 and 226.16, the annual percentage rate is determined by multiplying the periodic rate by the number of periods in the year.

This computation reflects the fact that, in such disclosures, the rate (known as the corresponding annual percentage rate) is prospective and does not involve any particular finance charge or periodic balance. This computation also is used to determine any annual percentage rate for oral disclosures under section 226.26(a).

14(c) Annual Percentage Rate for Periodic Statements

1. *General rule.* Section 226.14(c) requires disclosure of the corresponding annual percentage rate for each periodic rate (under section 226.7(d)). It is figured by multiplying each periodic rate by the number of periods per year. This disclosure is like that provided on the initial disclosure statement. The periodic statement also must reflect (under section 226.7(g)) the annualized equivalent of the rate actually applied during a particular cycle (the historical rate); this rate may differ from the corresponding annual percentage rate because of the inclusion of fixed, minimum, or transaction charges. Sections 226.14(c)(1) through (c)(4) state the computation rules for the historical rate.

2. *Periodic rates.* Section 226.14(c)(1) applies if the only finance charge imposed is due to the application of a periodic rate to a balance. The creditor may compute the annual percentage rate either:

- by multiplying each periodic rate by the number of periods in the year or
- by the "quotient" method. This method refers to a composite annual percentage rate when different periodic rates apply to different balances. For example, a particular plan may involve a periodic rate of 1½ percent on balances up to $500, and 1 percent on balances over $500. If, in a given cycle, the consumer has a balance of $800, the finance charge would consist of $7.50 (500 × .015) plus $3.00 (300 × .01), for a total finance charge of $10.50. The annual percentage rate for this period may be disclosed either as 18 percent on $500 and 12 percent on $300, or as 15.75 percent on a balance of $800 (the quotient of $10.50 divided by $800, multiplied by 12).

3. *Charges not based on periodic rates.* Section 226.14(c)(2) applies if the finance charge imposed includes a charge not due to the application of a periodic rate (other than a charge relating to a specific transaction). For example, if the creditor imposes a minimum $1 finance charge on all balances below $50, and the consumer's balance was $40 in a particular cycle, the creditor would disclose an annual percentage rate of 30 percent (1/40 × 12).

4. *No balance.* Footnote 32 to section 226.14(c)(2) would apply not only when minimum charges are imposed on an account with no balance, but also to a plan in which a periodic rate is applied to advances from the date of the transaction. For example, if on May 19 the consumer pays the new balance in full from a statement dated May 1 and has no further transactions reflected on the June 1 statement, that statement would reflect a finance charge with no account balance.

5. *Transaction charges.* Section 226.14(c)(3) transaction charges include, for example:

- A loan fee of $10 imposed on a particular advance
- A charge of 3 percent of the amount of each transaction

The reference to avoiding duplication in the computation requires that the amounts of transactions on which transaction charges were imposed not be included both in the amount of total balances *and* in the "other amounts on which a finance charge was imposed" figure. For further explanation and examples of how to determine the components of this formula, see appendix F.

6. *Daily rate with specific transaction charge.* Section 226.14(c)(3) sets forth an acceptable method for calculating the annual percentage rate if the finance charge results from a charge relating to a specific transaction and the application of a daily periodic rate. This section includes the requirement that the creditor follow the rules in appendix F in calculating the annual percentage rate, especially footnote 1 to appendix F, which addresses the daily rate/transaction charge situation by providing that the "average of daily balances"

shall be used instead of the "sum of the balances."

7. *Charges related to opening, renewing, or continuing account.* Footnote 33 is applicable to section 226.14(c)(2) and (c)(3). The charges involved here do not relate to a specific transaction or to specific activity on the account, but relate solely to the opening, renewing, or continuing of the account. For example, an annual fee to renew an open-end credit account that is a percentage of the credit limit on the account, or that is charged only to consumers who have not used their credit card for a certain dollar amount in transactions during the preceding year, would not be included in the calculation of the annual percentage rate, even though the fee may not be excluded from the finance charge under section 226.4(c)(4). (See comment 4(c)(4)-2). Inclusion of these charges in the annual percentage rate calculation results in significant distortions of the annual percentage rate and delivery of a possibly misleading disclosure to consumers. The rule in footnote 33 applies even if the loan fee, points, or similar charges are billed on a subsequent periodic statement or withheld from the proceeds of the first advance on the account.

8. *Classification of charges.* If the finance charge includes a charge not due to the application of a periodic rate, the creditor must determine the proper annual percentage rate computation method according to the type of charge imposed. If the charge is tied to a specific transaction (for example, 3 percent of the amount of each transaction), then the method in section 226.14(c)(3) must be used. If a fixed or minimum charge is applied, that is, one not tied to any specific transaction, then the formula in section 226.14(c)(2) is appropriate.

9. *Small finance charges.* Section 226.14(c)(4) gives the creditor an alternative to section 226.14(c)(2) and (c)(3) if small finance charges (50 cents or less) are involved; that is, if the finance charge includes minimum or fixed fees not due to the application of a periodic rate and the total finance charge for the cycle does not exceed 50 cents. For example, while a monthly activity fee of 50 cents on a balance of $20 would produce an annual percentage rate of 30 percent under the rule in section 226.14(c)(2), the creditor may disclose an annual percentage rate of 18 percent if the periodic rate generally applicable to all balances is 1½ percent per month. This option is consistent with the provision in footnote 11 to sections 226.6 and 226.7 permitting the creditor to disregard the effect of minimum charges in disclosing the ranges of balances to which periodic rates apply.

10. *Transactions at end of billing cycle.* The annual percentage rate reflects transactions and charges imposed during the billing cycle. However, it may be impracticable to post a transaction that occurs at the end of a billing cycle until the following cycle, such as a cash advance that occurs on the last day of a billing cycle and is posted to the account in the following cycle. A card issuer that uses the date of the transaction to figure finance charges should calculate the annual percentage rate as follows for the billing cycle in which the transaction and charges are posted:

i. The denominator is calculated as if the transaction occurred on the first day of the billing cycle; and
ii. The numerator includes the amount of the transaction charge plus all finance charges derived from the application of the periodic rate to the amount of the transaction (including all charges from a prior cycle).

14(d) Calculations Where Daily Periodic Rate Applied

1. *Quotient method.* Section 226.14(d) addresses use of a daily periodic rate(s) to determine some or all of the finance charge and use of the quotient method to determine the annual percentage rate. Since the quotient formula in section 226.14(c)(1)(ii) does not work when a daily rate is being applied to a series of daily balances, section 226.14(d) gives the creditor two alternative ways to figure the annual percentage rate—either of which satisfies the requirement in section 226.7(g).

2. *Daily rate with specific transaction charge.* If the finance charge results from a charge relating to a specific transaction and the application of a daily periodic rate, see comment

14(c)-6 for guidance on an appropriate calculation method.

References

Statute: § 107
Other sections: §§ 226.6, 226.7, 226.9, 226.15, 226.16, and 226.26.
Previous regulation: § 226.5(a) and interpretation §§ 226.501 and 226.506.
1981 changes: Section 226.14 reflects the statutory amendment permitting a ⅛ of 1 percent tolerance for annual percentage rates. The revised regulation no longer reflects the provision dealing with finance charges imposed on specified ranges or brackets of balances. The revised regulation includes a footnote providing that loan fees, points, or similar charges unrelated to any specific transaction are not figured into the annual percentage rate computation.

SECTION 226.15—Right of Rescission

1. *Transactions not covered.* Credit extensions that are not subject to the regulation are not covered by section 226.15 even if the customer's principal dwelling is the collateral securing the credit. For this purpose, "credit extensions" also would include the occurrences listed in comment 15(a)(1)-1. For example, the right of rescission does not apply to the opening of a business-purpose credit line, even though the loan is secured by the customer's principal dwelling.

15(a) Consumer's Right to Rescind

Paragraph 15(a)(1)

1. *Occurrences subject to right.* Under an open-end credit plan secured by the consumer's principal dwelling, the right of rescission generally arises with each of the following occurrences:

- Opening the account
- Each credit extension
- Increasing the credit limit
- Adding to an existing account a security interest in the consumer's principal dwelling
- Increasing the dollar amount of the security interest taken in the dwelling to secure the plan. For example, a consumer may open an account with a $10,000 credit limit, $5,000 of which is initially secured by the consumer's principal dwelling. The consumer has the right to rescind at that time and (except as noted in section 226.15(a)(1)(ii)) with each extension on the account. Later, if the creditor decides that it wants the credit line fully secured, and increases the amount of its interest in the consumer's dwelling, the consumer has the right to rescind the increase.

2. *Exceptions.* Although the consumer generally has the right to rescind with each transaction on the account, section 125(e) of the act provides an exception: the creditor need not provide the right to rescind at the time of each credit extension made under an open-end credit plan secured by the consumer's principal dwelling to the extent that the credit extended is in accordance with a previously established credit limit for the plan. This limited rescission option is available whether or not the plan existed prior to the effective date of the act.

3. *Security interest arising from transaction.* In order for the right of rescission to apply, the security interest must be retained as part of the credit transaction. For example:

- A security interest that is acquired by a contractor who is also extending the credit in the transaction
- A mechanic's or materialman's lien that is retained by a subcontractor or supplier of a contractor-creditor, even when the latter has waived its own security interest in the consumer's home

The security interest is not part of the credit transaction, and therefore the transaction is not subject to the right of rescission when, for example:

- A mechanic's or materialman's lien is obtained by a contractor who is not a party to the credit transaction but merely is paid with the proceeds of the consumer's cash advance
- All security interests that may arise in connection with the credit transaction are validly waived

- The creditor obtains a lien and completion bond that in effect satisfies all liens against the consumer's principal dwelling as a result of the credit transaction

Although liens arising by operation of law are not considered security interests for purposes of disclosure under section 226.2, that section specifically includes them in the definition for purposes of the right of rescission. Thus, even though an interest in the consumer's principal dwelling is not a required disclosure under section 226.6(c), it may still give rise to the right of rescission.

4. *Consumer.* To be a consumer within the meaning of section 226.2, that person must at least have an ownership interest in the dwelling that is encumbered by the creditor's security interest, although that person need not be a signatory to the credit agreement. For example, if only one spouse enters into a secured plan, the other spouse is a consumer if the ownership interest of that spouse is subject to the security interest.

5. *Principal dwelling.* A consumer can only have *one* principal dwelling at a time. (But see comment 15(a)(1)-6.) A vacation or other second home would not be a principal dwelling. A transaction secured by a second home (such as a vacation home) that is not currently being used as the consumer's principal dwelling is not rescindable, even if the consumer intends to reside there in the future. When a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within one year or upon completion of construction, the new dwelling is considered the principal dwelling if it secures the open-end credit line. In that case, the transaction secured by the new dwelling is a residential mortgage transaction and is not rescindable. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, an advance on an open-end line to finance B and secured by B is a residential mortgage transaction. Dwelling, as defined in section 226.2, includes structures that are classified as personalty under state law. For example, a transaction secured by a mobile home, trailer, or houseboat used as the consumer's principal dwelling may be rescindable.

6. *Special rule for principal dwelling.* Notwithstanding the general rule that consumers may have only one principal dwelling, when the consumer is acquiring or constructing a new principal dwelling, a credit plan or extension that is subject to Regulation Z and is secured by the equity in the consumer's current principal dwelling is subject to the right of rescission regardless of the purpose of that loan (for example, an advance to be used as a bridge loan). For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a loan to finance B and secured by A is subject to the right of rescission. Moreover, a loan secured by both A and B is, likewise, rescindable.

Paragraph 15(a)(2)

1. *Consumer's exercise of right.* The consumer must exercise the right of rescission in writing, but not necessarily on the notice supplied under section 226.15(b). Whatever the means of sending the notification of rescission—mail, telegram, or other written means—the time period for the creditor's performance under section 226.15(d)(2) does not begin to run until the notification has been received. The creditor may designate an agent to receive the notification so long as the agent's name and address appear on the notice provided to the consumer under section 226.15(b).

Paragraph 15(a)(3)

1. *Rescission period.* The period within which the consumer may exercise the right to rescind runs for three business days from the last of three events:

- The occurrence that gives rise to the right of rescission
- Delivery of *all* material disclosures that are relevant to the plan
- Delivery to the consumer of the required rescission notice

For example, an account is opened on Friday, June 1, and the disclosures and notice of the

right to rescind were given on Thursday, May 31; the rescission period will expire at midnight of the third business day after June 1—that is, Tuesday, June 5. In another example, if the disclosures are given and the account is opened on Friday, June 1, and the rescission notice is given on Monday, June 4, the rescission period expires at midnight of the third business day after June 4—that is, Thursday, June 7. The consumer must place the rescission notice in the mail, file it for telegraphic transmission, or deliver it to the creditor's place of business within that period in order to exercise the right.

2. *Material disclosures.* Footnote 36 sets forth the material disclosures that must be provided before the rescission period can begin to run. The creditor must provide sufficient information to satisfy the requirements of section 226.6 for these disclosures. A creditor may satisfy this requirement by giving an initial disclosure statement that complies with the regulation. Failure to give the other required initial disclosures (such as the billing-rights statement) or the information required under section 226.5b does not prevent the running of the rescission period, although that failure may result in civil liability or administrative sanctions. The payment terms set forth in footnote 36 apply to any repayment phase set forth in the agreement. Thus, the payment terms described in section 226.6(e)(2) for any repayment phase as well as for the draw period are "material disclosures."

3. *Material disclosures—variable-rate program.* For a variable-rate program, the material disclosures also include the disclosures listed in footnote 12 to section 226.6(a)(2): the circumstances under which the rate may increase; the limitations on the increase; and the effect of an increase. The disclosures listed in footnote 12 to section 226.6(a)(2) for any repayment phase also are material disclosures for variable-rate programs.

4. *Unexpired right of rescission.* When the creditor has failed to take the action necessary to start the three-day rescission period running, the right to rescind automatically lapses on the occurrence of the earliest of the following three events:

- The expiration of three years after the occurrence giving rise to the right of rescission
- Transfer of all the consumer's interest in the property
- Sale of the consumer's interest in the property, including a transaction in which the consumer sells the dwelling and takes back a purchase money note and mortgage or retains legal title through a device such as an installment-sale contract

Transfer of all the consumer's interest includes such transfers as bequests and gifts. A sale or transfer of the property need not be voluntary to terminate the right to rescind. For example, a foreclosure sale would terminate an unexpired right to rescind. As provided in section 125 of the act, the three-year limit may be extended by an administrative proceeding to enforce the provisions of section 226.15. A partial transfer of the consumer's interest, such as a transfer bestowing coownership on a spouse, does not terminate the right of rescission.

Paragraph 15(a)(4)

1. *Joint owners.* When more than one consumer has the right to rescind a transaction, any one of them may exercise that right and cancel the transaction on behalf of all. For example, if both a husband and wife have the right to rescind a transaction, either spouse acting alone may exercise the right and both are bound by the rescission.

15(b) Notice of Right to Rescind

1. *Who receives notice.* Each consumer entitled to rescind must be given:

- Two copies of the rescission notice
- The material disclosures

In a transaction involving joint owners, both of whom are entitled to rescind, both must receive the notice of the right to rescind and disclosures. For example, if both spouses are entitled to rescind a transaction, each must receive two copies of the rescission notice and one copy of the disclosures.

2. *Format.* The rescission notice may be physically separated from the material disclo-

sures or combined with the material disclosures, so long as the information required to be included on the notice is set forth in a clear and conspicuous manner. See the model notices in appendix G.

3. *Content.* The notice must include all of the information outlined in section 226.15(b)(1) through (5). The requirement in section 226.15(b) that the transaction or occurrence be identified may be met by providing the date of the transaction or occurrence. The notice may include additional information related to the required information, such as:

- A description of the property subject to the security interest
- A statement that joint owners may have the right to rescind and that a rescission by one is effective for all
- The name and address of an agent of the creditor to receive notice of rescission

4. *Time of providing notice.* The notice required by section 226.15(b) need not be given before the occurrence giving rise to the right of rescission. The creditor may deliver the notice after the occurrence, but the rescission period will not begin to run until the notice is given. For example, if the creditor provides the notice on May 15, but disclosures were given and the credit limit was raised on May 10, the three-business-day rescission period will run from May 15.

15(c) Delay of Creditor's Performance

1. *General rule.* Until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded, the creditor must not, either directly or through a third party:

- Disburse advances to the consumer
- Begin performing services for the consumer
- Deliver materials to the consumer

A creditor may, however, continue to allow transactions under an existing open-end credit plan during a rescission period that results solely from the addition of a security interest in the consumer's principal dwelling. (See comment 15(c)-3 for other actions that may be taken during the delay period.)

2. *Escrow.* The creditor may disburse advances during the rescission period in a valid escrow arrangement. The creditor may not, however, appoint the consumer as "trustee" or "escrow agent" and distribute funds to the consumer in that capacity during the delay period.

3. *Permissible actions.* Section 226.15(c) does not prevent the creditor from taking other steps during the delay, short of beginning actual performance. Unless otherwise prohibited, such as by state law, the creditor may, for example:

- Prepare the cash advance check
- Perfect the security interest
- Accrue finance charges during the delay period

4. *Performance by third party.* The creditor is relieved from liability for failure to delay performance if a third party with no knowledge that the rescission right has been activated provides materials or services, as long as any debt incurred for materials or services obtained by the consumer during the rescission period is not secured by the security interest in the consumer's dwelling. For example, if a consumer uses a bank credit card to purchase materials from a merchant in an amount below the floor limit, the merchant might not contact the card issuer for authorization and therefore would not know that materials should not be provided.

5. *Delay beyond rescission period.* The creditor must wait until it is reasonably satisfied that the consumer has not rescinded. For example, the creditor may satisfy itself by doing one of the following:

- Waiting a reasonable time after expiration of the rescission period to allow for delivery of a mailed notice
- Obtaining a written statement from the consumer that the right has not been exercised.

When more than one consumer has the right to rescind, the creditor cannot reasonably rely on the assurance of only one consumer, because other consumers may exercise the right.

15(d) Effects of Rescission

Paragraph 15(d)(1)

1. *Termination of security interest.* Any security interest giving rise to the right of rescission becomes void when the consumer exercises the right of rescission. The security interest is automatically negated, regardless of its status and whether or not it was recorded or perfected. Under section 226.15(d)(2), however, the creditor must take any action necessary to reflect the fact that the security interest no longer exists.

2. *Extent of termination.* The creditor's security interest is void only to the extent that it is related to the occurrence giving rise to the right of rescission. For example, upon rescission:

- If the consumer's right to rescind is activated by the opening of a plan, any security interest in the principal dwelling is void.
- If the right arises due to an increase in the credit limit, the security interest is void as to the amount of credit extensions over the prior limit, but the security interest in amounts up to the original credit limit is unaffected.
- If the right arises with each individual credit extension, then the interest is void as to that extension, and other extensions are unaffected.

Paragraph 15(d)(2)

1. *Refunds to consumer.* The consumer cannot be required to pay any amount in the form of money or property either to the creditor or to a third party as part of the occurrence subject to the right of rescission. Any amounts of this nature already paid by the consumer must be refunded. "Any amount" includes finance charges already accrued, as well as other charges such as broker fees, application and commitment fees, or fees for a title search or appraisal, whether paid to the creditor, paid by the consumer directly to a third party, or passed on from the creditor to the third party. It is irrelevant that these amounts may not represent profit to the creditor. For example:

- If the occurrence is the opening of the plan, the creditor must return any membership or application fee paid.
- If the occurrence is the increase in a credit limit or the addition of a security interest, the creditor must return any fee imposed for a new credit report or filing fees.
- If the occurrence is a credit extension, the creditors must return fees such as application, title, and appraisal or survey fees, as well as any finance charges related to the credit extension.

2. *Amounts not refundable to consumer.* Creditors need not return any money given by the consumer to a third party outside of the occurrence, such as costs incurred for a building permit or for a zoning variance. Similarly, the term "any amount" does not apply to money or property given by the creditor to the consumer; those amounts must be tendered by the consumer to the creditor under section 226.15(d)(3).

3. *Reflection of security-interest termination.* The creditor must take whatever steps are necessary to indicate that the security interest is terminated. Those steps include the cancellation of documents creating the security interest, and the filing of release or termination statements in the public record. In a transaction involving subcontractors or suppliers that also hold security interests related to the occurrence rescinded by the consumer, the creditor must ensure that the termination of their security interests is also reflected. The 20-day period for the creditor's action refers to the time within which the creditor must begin the process. It does not require all necessary steps to have been completed within that time, but the creditor is responsible for seeing the process through to completion.

Paragraph 15(d)(3)

1. *Property exchange.* Once the creditor has fulfilled its obligation under section 226.15(d)(2), the consumer must tender to the creditor any property or money the creditor has already delivered to the consumer. At the consumer's option, property may be tendered at the location of the property. For example, if fixtures or furniture have been delivered to the

consumer's home, the consumer may tender them to the creditor by making them available for pickup at the home, rather than physically returning them to the creditor's premises. Money already given to the consumer *must* be tendered at the creditor's place of business. For purpose of property exchange, the following additional rules apply:

- A cash advance is considered money for purposes of this section even if the creditor knows what the consumer intends to purchase with the money.
- In a three-party open-end credit plan (that is, if the creditor and seller are not the same or related persons), extensions by the creditor that are used by the consumer for purchases from third-party sellers are considered to be the same as cash advances for purposes of tendering value to the creditor, even though the transaction is a purchase for other purposes under the regulation. For example, if a consumer exercises the unexpired right to rescind after using a three-party credit card for one year, the consumer would tender the amount of the purchase price for the items charged to the account, rather than tendering the items themselves to the creditor.

2. *Reasonable value.* If returning the property would be extremely burdensome to the consumer, the consumer may offer the creditor its reasonable value rather than returning the property itself. For example, if building materials have already been incorporated into the consumer's dwelling, the consumer may pay their reasonable value.

Paragraph 15(d)(4)

1. *Modifications.* The procedures outlined in section 226.15(d)(2) and (d)(3) may be modified by a court. For example, when a consumer is in bankruptcy proceedings and prohibited from returning anything to the creditor, or when the equities dictate, a modification might be made.

15(e) Consumer's Waiver of Right to Rescind

1. *Need for waiver.* To waive the right to rescind, the consumer must have a bona fide personal financial emergency that must be met before the end of the rescission period. The existence of the consumer's waiver will not, of itself, automatically insulate the creditor from liability for failing to provide the right of rescission.

2. *Procedure.* To waive or modify the right to rescind, the consumer must give a written statement that specifically waives or modifies the right, and also includes a brief description of the emergency. Each consumer entitled to rescind must sign the waiver statement. In a transaction involving multiple consumers, such as a husband and wife using their home as collateral, the waiver must bear the signatures of both spouses.

15(f) Exempt Transactions

1. *Residential mortgage transaction.* Although residential mortgage transactions would seldom be made on bona fide open-end credit plans (under which repeated transactions must be reasonably contemplated), an advance on an open-end plan could be for a downpayment for the purchase of a dwelling that would then secure the remainder of the line. In such a case, only the particular advance for the downpayment would be exempt from the rescission right.

2. *State creditors.* Cities and other political subdivisions of states acting as creditors are not exempt from section 226.15.

3. *Spreader clause.* When the creditor holds a mortgage or deed of trust on the consumer's principal dwelling and that mortgage or deed of trust contains a "spreader clause" (also known as a "dragnet" or cross-collateralization clause), subsequent occurrences such as the opening of a plan or individual credit extensions are subject to the right of rescission to the same degree as if the security interest were taken directly to secure the open-end plan, unless the creditor effectively waives its security interest under the spreader clause with respect to the subsequent open-end credit extensions.

References

Statute: §§ 113, 125, and 130 and the Hous-

ing and Community Development Technical Amendments Act of 1984 § 205 (Pub. L. 98-479).

Other sections: § 226.2 and appendix G

Previous regulation: § 226.9

1981 changes: Section 226.15 reflects the statutory amendments of 1980, providing for a limited right of rescission when individual credit extensions are made in accordance with a previously established credit limit for an open-end credit plan. The 1980 amendments provided that this limited rescission right be available for a three-year trial period. However, Pub. L. 98-479 now permanently exempts such individual credit extensions from the right of rescission.

The right to rescind applies not only to real property used as the consumer's principal dwelling, but to personal property as well. The regulation provides no specific text or format for the rescission notice.

When a consumer exercises the right to rescind, the creditor now has 20 days to return a consumer's money or property and take the necessary action to terminate the security interest. The creditor has 20 days to take possession of the money or property after the consumer's tender before the consumer may keep it without further obligation.

Under the revised regulation, the waiver provision has been relaxed. The lien status of the mortgage is irrelevant for purposes of the residential mortgage transaction exemption. The exemption for agricultural loans from the right to rescind has been deleted.

SECTION 226.16—Advertising

1. *Clear and conspicuous standard.* Section 226.16 is subject to the general "clear and conspicuous" standard for subpart B (see section 226.5(a)(1)) but prescribes no specific rules for the format of the necessary disclosures. The credit terms need not be printed in a certain type size nor need they appear in any particular place in the advertisement.

2. *Expressing the annual percentage rate in abbreviated form.* Whenever the annual percentage rate is used in an advertisement for open-end credit, it may be expressed using a readily understandable abbreviation such as APR.

16(a) Actually Available Terms

1. *General rule.* To the extent that an advertisement mentions specific credit terms, it may state only those terms that the creditor is actually prepared to offer. For example, a creditor may not advertise a very low annual percentage rate that will not in fact be available at any time. Section 226.16(a) is not intended to inhibit the promotion of new credit programs, but to bar the advertising of terms that are not and will not be available. For example, a creditor may advertise terms that will be offered for only a limited period, or terms that will become available at a future date.

2. *Specific credit terms.* "Specific credit terms" is not limited to the disclosures required by the regulation but would include any specific components of a credit plan, such as the minimum periodic payment amount or seller's points in a plan secured by real estate.

16(b) Advertisement of Terms That Require Additional Disclosures

1. *Terms requiring additional disclosures.* In section 226.16(b) the phrase "the terms required to be disclosed under section 226.6" refers to the terms in section 226.6(a) and 226.6(b).

2. *Use of positive terms.* An advertisement must state a credit term as a positive number in order to trigger additional disclosures. For example, "no annual membership fee" would not trigger the additional disclosures required by section 226.16(b). (See, however, the rules in section 226.16(d) relating to advertisements for home-equity plans.)

3. *Implicit terms.* Section 226.16(b) applies even if the triggering term is not stated explicitly, but may be readily determined from the advertisement.

4. *Membership fees.* A membership fee is not a triggering term nor need it be disclosed under section 226.16(b)(3) if it is required for participation in the plan whether or not an open-end credit feature is attached. (See comment 6(b)-1.)

5. *Variable-rate plans.* In disclosing the annual percentage rate in an advertisement for a variable-rate plan, as required by section 226.16(b)(2), the creditor may use an insert showing the current rate, may give the rate as of a specified recent date, or may disclose an estimated rate under section 226.5(c). The additional requirement in section 226.16(b)(2) to disclose the variable-rate feature may be satisfied by disclosing that "the annual percentage rate may vary" or a similar statement, but the advertisement need not include the information required by footnote 12 to section 226.6(a)(2).

6. *Discounted variable-rate plans—disclosure of the annual percentage rates.* The advertised annual percentage rates for discounted variable-rate plans must, in accordance with comment 6(a)(2)-10, include both the initial rate (with the statement of how long it will remain in effect) and the current indexed rate (with the statement that this second rate may vary). The options listed in comment 16(b)-5 may be used in disclosing the current indexed rate.

7. *Triggering terms.* The following are examples of terms that trigger additional disclosures:

- "Small monthly service charge on the remaining balance," which describes how the amount of a finance charge will be determined.
- "12 percent Annual Percentage Rate" or "A $15 annual membership fee buys you $2,000 in credit," which describe required disclosures using positive numbers.

8. *Minimum, fixed, transaction, activity, or similar charge.* The charges to be disclosed under section 226.16(b)(1) are those that are considered finance charges under section 226.4.

9. *Deferred-billing and deferred-payment programs.* Statements such as "Charge it—you won't be billed until May" or "You may skip your January payment" are not in themselves triggering terms, since the timing for initial billing or for monthly payments are not terms required to be disclosed under section 226.6. However, a statement such as "No finance charge until May" or any other statement regarding when finance charges begin to accrue is a triggering term, whether appearing alone or in conjunction with a description of a deferred-billing or deferred-payment program such as the examples above.

16(c) Catalogs and Multiple-Page Advertisements

1. *Definition.* The multiple-page advertisements to which section 226.16(c) refers are advertisements consisting of a series of sequentially numbered pages—for example, a supplement to a newspaper. A mailing consisting of several separate flyers or pieces of promotional material in a single envelope does not constitute a single multiple-page advertisement for purposes of section 226.16(c).

Paragraph 16(c)(1)

1. *General.* Section 226.16(c)(1) permits creditors to put credit information together in one place in a catalog or multiple-page advertisement. The rule applies only if the catalog or multiple-page advertisement contains one or more of the triggering terms from section 226.16(b).

Paragraph 16(c)(2)

1. *Table or schedule if credit terms depend on outstanding balance.* If the credit terms of a plan vary depending on the amount of the balance outstanding, rather than the amount of any property purchased, a table or schedule complies with section 226.16(c)(2) if it includes the required disclosures for representative balances. For example, a creditor would disclose that a periodic rate of 1.5 percent is applied to balances of $500 or less, and a 1 percent rate is applied to balances greater than $500.

16(d) Additional Requirements for Home-Equity Plans

1. *Trigger terms.* Negative as well as affirmative references trigger the requirement for additional information. For example, if a creditor states "no annual fee," "no points," or "we waive closing costs" in an advertisement, ad-

ditional information must be provided. (See comment 16(d)-4 regarding the use of a phrase such as "no closing costs.") Inclusion of a statement such as "low fees," however, would not trigger the need to state additional information. References to payment terms include references to the draw period or any repayment period, to the length of the plan, to how the minimum payments are determined and to the timing of such payments.

2. *Fees to open the plan.* Section 226.16 (d)(1)(i) requires a disclosure of any fees imposed by the creditor or a third party to open the plan. In providing the fee information required under this paragraph, the corresponding rules for disclosure of this information apply. For example, fees to open the plan may be stated as a range. Similarly, if property insurance is required to open the plan, a creditor either may estimate the cost of the insurance or provide a statement that such insurance is required. (See the commentary to section 226.5b(d)(7) and (8).)

3. *Statements of tax deductibility.* An advertisement referring to deductiblity for tax purposes is not misleading if it includes a statement such as "consult a tax advisor regarding the deductibility of interest."

4. *Misleading terms prohibited.* Under section 226.16(d)(5), advertisements may not refer to home-equity plans as "free money" or use other misleading terms. For example, an advertisement could not state "no closing costs" or "we waive closing costs" if consumers may be required to pay any closing costs, such as recordation fees. In the case of property insurance, however, a creditor may state, for example, "no closing costs" even if property insurance may be required, as long as the creditor also provides a statement that such insurance may be required. (See the commentary to this section regarding fees to open a plan.)

5. *Relation to other sections.* Advertisements for home-equity plans must comply with all provisions in section 226.16, not solely the rules in section 226.16(d). If an advertisement contains information (such as the payment terms) that triggers the duty under section 226.16(d) to state the annual percentage rate, the additional disclosures in section 226.16(b) must be provided in the advertisement. While section 226.16(d) does not require a statement of fees to use or maintain the plan (such as membership fees and transaction charges), such fees must be disclosed under section 226.16(b)(1) and (3).

6. *Inapplicability of closed-end rules.* Advertisements for home-equity plans are governed solely by the requirements in section 226.16, and not by the closed-end advertising rules in section 226.24. Thus, if a creditor states payment information about the repayment phase, this will trigger the duty to provide additional information under section 226.16, but not under section 226.24.

7. *Balloon payment.*In some programs, a balloon payment will occur if only the minimum payments under the plan are made. If an advertisement for such a program contains any statement about a minimum periodic payment, the advertisement must also state that a balloon payment will result (not merely that a balloon payment "may" result). (See comment 5b(d)(5)(ii)-3 for guidance on items not required to be stated in the advertisement, and on situations in which the balloon-payment requirement does not apply.)

References

Statute: §§ 141 and 143
Previous regulation: § 226.10(a) through (c) and interpretation § 226.1002
Other sections: §§ 226.2 and 226.6
1981 changes: Section 226.16 reflects the statutory changes to section 143 of the act which reduce both the number of triggering terms and the additional disclosures required by the use of those terms. Membership or participation fees are included among the additional disclosures required when a triggering term is used. The substance of interpretation section 226.1002, requiring disclosure of representative amounts of credit in catalogs and multiple-page advertisements, has been incorporated in simplified form in paragraph (c).

SUBPART C—CLOSED-END CREDIT

SECTION 226.17—General Disclosure Requirements

17(a) Form of Disclosures

Paragraph 17(a)(1)

1. *Clear and conspicuous.* This standard requires that disclosures be in a reasonably understandable form. For example, while the regulation requires no mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other. In addition, although no minimum type size is mandated, the disclosures must be legible, whether typewritten, handwritten, or printed by computer.

2. *Segregation of disclosures.* The disclosures may be grouped together and segregated from other information in a variety of ways. For example, the disclosures may appear on a separate sheet of paper or may be set off from other information on the contract or other documents:

- By outlining them in a box
- By bold print dividing lines
- By a different color background
- By a different type style

(The general segregation requirement described in this subparagraph does not apply to the disclosures required under sections 226.19(b) and 226.20(c) although the disclosures must be clear and conspicuous.)

3. *Location.* The regulation imposes no specific location requirements on the segregated disclosures. For example:

- They may appear on a disclosure statement separate from all other material.
- They may be placed on the same document with the credit contract or other information, so long as they are segregated from that information.
- They may be shown on the front or back of a document.
- They need not begin at the top of a page.
- They may be continued from one page to another.

4. *Content of segregated disclosures.* Footnotes 37 and 38 contain exceptions to the requirement that the disclosures under section 226.18 be segregated from material that is not directly related to those disclosures. Footnote 37 lists the items that may be added to the segregated disclosures, even though not directly related to those disclosures. Footnote 38 lists the items required under section 226.18 that may be deleted from the segregated disclosures and appear elsewhere. Any one or more of these additions or deletions may be combined and appear either together with or separate from the segregated disclosures. The itemization of the amount financed under section 226.18(c), however, must be separate from the other segregated disclosures under section 226.18. If a creditor chooses to include the security-interest charges required to be itemized under sections 226.4(e) and 226.18(o) in the amount-financed itemization, it need not list these charges elsewhere.

5. *Directly related.* The segregated disclosures may, at the creditor's option, include any information that is directly related to those disclosures. The following is directly related information:

i. A description of a grace period after which a late-payment charge will be imposed. For example, the disclosure given under section 226.18(*l*) may state that a late charge will apply to "any payment received more than 15 days after the due date."
ii. A statement that the transaction is not secured. For example, the creditor may add a category labelled "unsecured" or "not secured" to the security-interest disclosures given under section 226.18(m).
iii. The basis for any estimates used in making disclosures. For example, if the maturity date of a loan depends solely on the occurrence of a future event, the creditor may indicate that the disclosures assume that event will occur at a certain time.
iv. The conditions under which a demand feature may be exercised. For example, in a loan subject to demand after five years, the disclosures may state that the

loan will become payable on demand in five years.

v. An explanation of the use of pronouns or other references to the parties to the transaction. For example, the disclosures may state, " 'You' refers to the customer and 'we' refers to the creditor."

vi. Instructions to the creditor or its employees on the use of a multiple-purpose form. For example, the disclosures may state, "Check box if applicable."

vii. A statement that the borrower may pay a minimum finance charge upon prepayment in a simple-interest transaction. For example, when state law prohibits penalties, but would allow a minimum finance charge in the event of prepayment, the creditor may make the section 226.18(k)(1) disclosure by stating, "You may be charged a minimum finance charge."

viii. A brief reference to negative amortization in variable-rate transactions. For example, in the variable-rate disclosure, the creditor may include a short statement such as "Unpaid interest will be added to principal." (See the commentary to section 226.18(f)(1)(iii).)

ix. A brief caption identifying the disclosures. For example, the disclosures may bear a general title such as "Federal Truth in Lending Disclosures" or a descriptive title such as "Real Estate Loan Disclosures."

x. A statement that a due-on-sale clause or other conditions on assumption are contained in the loan document. For example, the disclosure given under section 226.18(q) may state, "Someone buying your home may, subject to conditions in the due-on-sale clause contained in the loan document, assume the remainder of the mortgage on the original terms."

xi. If a state or federal law prohibits prepayment penalties and excludes the charging of interest after prepayment from coverage as a penalty, a statement that the borrower may have to pay interest for some period after prepayment in full. The disclosure given under section 226.18(k) may state, for example, "If you prepay your loan on other than the regular installment date, you may be assessed interest charges until the end of the month."

xii. More than one hypothetical example under section 226.18(f)(1)(iv) in transactions with more than one variable-rate feature. For example, in a variable-rate transaction with an option permitting consumers to convert to a fixed-rate transaction, the disclosures may include an example illustrating the effects on the payment terms of an increase resulting from conversion in addition to the example illustrating an increase resulting from changes in the index.

xiii. The disclosures set forth under section 226.18(f)(1) for variable-rate transactions subject to section 226.18(f)(2).

xiv. A statement whether or not a subsequent purchaser of the property securing an obligation may be permitted to assume the remaining obligation on its original terms.

xv. A late-payment-fee disclosure under section 226.18(*l*) on a single-payment loan.

6. *Multiple-purpose forms.* The creditor may design a disclosure statement that can be used for more than one type of transaction, so long as the required disclosures for individual transactions are clear and conspicuous. (See the commentary to appendices G and H for a discussion of the treatment of disclosures that do not apply to specific transactions.) Any disclosure listed in section 226.18 (except the itemization of the amount financed under section 226.18(c)) may be included on a standard disclosure statement even though not all of the creditor's transactions include those features. For example, the statement may include:

- The variable-rate disclosure under section 226.18(f)
- The demand feature disclosure under section 226.18(i)
- A reference to the possibility of a security interest arising from a spreader clause, under section 226.18(m)
- The assumption policy disclosure under section 226.18(q)
- The required deposit disclosure under section 226.18(r)

7. *Balloon-payment financing with leasing characteristics.* In certain credit sale or loan transactions, a consumer may reduce the dollar amount of the payments to be made during the course of the transaction by agreeing to make, at the end of the loan term, a large final payment based on the expected residual value of the property. The consumer may have a number of options with respect to the final payment, including, among other things, retaining the property and making the final payment, refinancing the final payment, or transferring the property to the creditor in lieu of the final payment. Such transactions may have some of the characteristics of lease transactions subject to Regulation M, but are considered credit transactions where the consumer assumes the indicia of ownership, including the risks, burdens and benefits of ownership upon consummation. These transactions are governed by the disclosure requirements of this regulation instead of Regulation M. Creditors should not include in the segregated Truth in Lending disclosures additional information. Thus, disclosures should show the large final payment in the payment schedule and should not, for example, reflect the other options available to the consumer at maturity.

Paragraph 17(a)(2)

1. *When disclosures must be more conspicuous.* The following rules apply to the requirement that the terms "annual percentage rate" and "finance charge" be shown more conspicuously:

- The terms must be more conspicuous only in relation to the other required disclosures under section 226.18. For example, when the disclosures are included on the contract document, those two terms need not be more conspicuous as compared to the heading on the contract document or information required by state law.
- The terms need not be more conspicuous except as part of the finance charge and annual percentage rate disclosures under section 226.18(d) and (e), although they may, at the creditor's option, be highlighted wherever used in the required disclosures. For example, the terms may, but need not, be highlighted when used in disclosing a prepayment penalty under section 226.18(k) or a required deposit under section 226.18(r).
- The creditor's identity under section 226.18(a) may, but need not, be more prominently displayed than the finance charge and annual percentage rate.
- The terms need not be more conspicuous than figures (including, for example, numbers, percentages, and dollar signs).

2. *Making disclosures more conspicuous.* The terms "finance charge" and "annual percentage rate" may be made more conspicuous in any way that highlights them in relation to the other required disclosures. For example, they may be:

- Capitalized when other disclosures are printed in capital and lower case
- Printed in larger type, bold print or different type face
- Printed in a contrasting color
- Underlined
- Set off with asterisks

17(b) Time of Disclosures

1. *Consummation.* As a general rule, disclosures must be made before "consummation" of the transaction. The disclosures need not be given by any particular time before consummation, except in certain mortgage transactions and variable-rate transactions secured by the consumer's principal dwelling with a term greater than one year under section 226.19. (See the commentary to section 226.2(a)(13) regarding the definition of consummation.)

2. *Converting open-end to closed-end credit.* Except for home-equity plans subject to section 226.5b in which the agreement provides for a repayment phase, if an open-end credit account is converted to a closed-end transaction under a written agreement with the consumer, the creditor must provide a set of closed-end credit disclosures before consummation of the closed-end transaction. (See the commentary to section 226.19(b) for the timing rules for additional disclosures required upon the conversion to a variable-rate transaction secured by a consumer's principal dwelling with a term greater than one year.) If consummation of the closed-end transaction

occurs at the same time as the consumer enters into the open-end agreement, the closed-end credit disclosures may be given at the time of conversion. If disclosures are delayed until conversion and the closed-end transaction has a variable-rate feature, disclosures should be based on the rate in effect at the time of conversion. (See the commentary to section 226.5 regarding conversion of closed-end to open-end credit.)

17(c) Basis of Disclosures and Use of Estimates

Paragraph 17(c)(1)

1. *Legal obligation.* The disclosures shall reflect the credit terms to which the parties are legally bound as of the outset of the transaction. In the case of disclosures required under section 226.20(c), the disclosures shall reflect the credit terms to which the parties are legally bound when the disclosures are provided. The legal obligation is determined by applicable state law or other law. (Certain transactions are specifically addressed in this commentary. See, for example, the discussion of buydown transactions elsewhere in the commentary to section 226.17(c).)

- The fact that a term or contract may later be deemed unenforceable by a court on the basis of equity or other grounds does not, by itself, mean that disclosures based on that term or contract did not reflect the legal obligation.

2. *Modification of obligation.* The legal obligation normally is presumed to be contained in the note or contract that evidences the agreement. But this presumption is rebutted if another agreement between the parties legally modifies that note or contract. If the parties informally agree to a modification of the legal obligation, the modification should not be reflected in the disclosures unless it rises to the level of a change in the terms of the legal obligation. For example:

- If the creditor offers a preferential rate, such as an employee preferred rate the disclosures should reflect the terms of the legal obligation. (See the commentary to section 226.19(b) for an example of a preferred-rate transaction that is a variable-rate transaction.)
- If the contract provides for a certain monthly payment schedule but payments are made on a voluntary payroll deduction plan or an informal principal-reduction agreement, the disclosures should reflect the schedule in the contract.
- If the contract provides for regular monthly payments but the creditor informally permits the consumer to defer payments from time to time, for instance, to take account of holiday seasons or seasonal employment, the disclosures should reflect the regular monthly payments.

3. *Third-party buydowns.* In certain transactions, a seller or other third party may pay an amount, either to the creditor or to the consumer, in order to reduce the consumer's payments or buy down the interest rate for all or a portion of the credit term. For example, a consumer and a bank agree to a mortgage with an interest rate of 15 percent and level payments over 25 years. By a separate agreement, the seller of the property agrees to subsidize the consumer's payments for the first two years of the mortgage, giving the consumer an effective rate of 12 percent for that period.

- If the lower rate is reflected in the credit contract between the consumer and the bank, the disclosures must take the buydown into account. For example, the annual percentage rate must be a composite rate that takes account of both the lower initial rate and the higher subsequent rate, and the payment schedule disclosures must reflect the two payment levels. However, the amount paid by the seller would not be specifically reflected in the disclosures given by the bank, since that amount constitutes seller's points and thus is not part of the finance charge.
- If the lower rate is not reflected in the credit contract between the consumer and the bank and the consumer is legally bound to the 15 percent rate from the outset, the disclosures given by the bank must not reflect the seller buydown in any way. For example, the annual percentage rate and payment schedule would not take into

account the reduction in the interest rate and payment level for the first two years resulting from the buydown.

4. *Consumer buydowns.* In certain transactions, the consumer may pay an amount to the creditor to reduce the payments or obtain a lower interest rate on the transaction. Consumer buydowns must be reflected in the disclosures given for that transaction. To illustrate, in a mortgage transaction, the creditor and consumer agree to a note specifying a 14 percent interest rate. However, in a separate document, the consumer agrees to pay an amount to the creditor at consummation, in return for a reduction in the interest rate to 12 percent for a portion of the mortgage term. The amount paid by the consumer may be deposited in an escrow account or may be retained by the creditor. Depending upon the buydown plan, the consumer's prepayment of the obligation may or may not result in a portion of the amount being credited or refunded to the consumer. In the disclosures given for the mortgage, the creditor must reflect the terms of the buydown agreement. For example:

- The amount paid by the customer is a prepaid finance charge (even if deposited in an escrow account).
- A composite annual percentage rate must be calculated, taking into account both interest rates, as well as the effect of the prepaid finance charge.
- The payment schedule must reflect the multiple payment levels resulting from the buydown.

The rules regarding consumer buydowns do not apply to transactions known as "lender buydowns." In lender buydowns, a creditor pays an amount (either into an account or to the party to whom the obligation is sold) to reduce the consumer's payments or interest rate for all or a portion of the credit term. Typically, these transactions are structured as a buydown of the interest rate during an initial period of the transaction with a higher-than-usual rate for the remainder of the term. The disclosures for lender buydowns should be based on the terms of the legal obligation between the consumer and the creditor. (See comment 17(c)(1)-3 for the analogous rules concering third-party buydowns.)

5. *Split buydowns.* In certain transactions, a third party (such as a seller) and a consumer both pay an amount to the creditor to reduce the interest rate. The creditor must include the portion paid by the consumer in the finance charge and disclose the corresponding multiple payment levels and composite annual percentage rate. The portion paid by the third party and the corresponding reduction in interest rate, however, should not be reflected in the disclosures unless the lower rate is reflected in the credit contract. (See the discussion on third-party and consumer buydown transactions elsewhere in the commentary to section 226.17(c).)

6. *Wraparound financing.* Wraparound transactions, usually loans, involve the creditor's wrapping the outstanding balance on an existing loan and advancing additional funds to the consumer. The preexisting loan, which is wrapped, may be to the same consumer or to a different consumer. In either case, the consumer makes a single payment to the new creditor, who makes the payments on the preexisting loan to the original creditor. Wraparound loans or sales are considered new single-advance transactions, with an amount financed equalling the sum of the new funds advanced by the wrap creditor and the remaining principal owed to the original creditor on the preexisting loan. In disclosing the itemization of the amount financed, the creditor may use a label such as "the amount that will be paid to creditor X" to describe the remaining principal balance on the preexisting loan. This approach to Truth in Lending calculations has no effect on calculations required by other statutes, such as state usury laws.

7. *Wraparound financing with balloon payments.* For wraparound transactions involving a large final payment of the new funds before the maturity of the preexisting loan, the amount financed is the sum of the new funds and the remaining principal on the preexisting loan. The disclosures should be based on the shorter term of the wrap loan, with a large final payment of both the new funds and the total remaining principal on the preexisting

loan (although only the wrap loan will actually be paid off at that time.)

8. *Basis of disclosures in variable-rate transactions.* The disclosures for a variable-rate transaction must be given for the full term of the transaction and must be based on the terms in effect at the time of consummation. Creditors should base the disclosures only on the initial rate and should not assume that this rate will increase. For example, in a loan with an initial rate of 10 percent and a 5 percentage points rate cap, creditors should base the disclosures on the initial rate and should not assume that this rate will increase 5 percentage points. However, in a variable-rate transaction with a seller buydown that is reflected in the credit contract, a consumer buydown, or a discounted or premium rate, disclosures should not be based solely on the initial terms. In those transactions, the disclosed annual percentage rate should be a composite rate based on the rate in effect during the initial period and the rate that is the basis of the variable-rate feature for the remainder of the term. (See the commentary to section 226.17(c) for a discussion of buydown, discounted, and premium transactions and the commentary to section 226.19(a)(2) for a discussion of the redisclosure in certain residential mortgage transactions with a variable-rate feature).

9. *Use of estimates in variable-rate transactions.* The variable-rate feature does not, by itself, make the disclosures estimates.

10. *Discounted and premium variable-rate transactions.* In some variable-rate transactions, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest-rate adjustments. Typically, this initial rate charged to consumers is lower than the rate would be if it were calculated using the index or formula. However, in some cases the initial rate may be higher. In a discounted transaction, for example, a creditor may calculate interest rates according to a formula using the six-month Treasury bill rate plus a 2 percent margin. If the Treasury bill rate at consummation is 10 percent, the creditor may forgo the 2 percent spread and charge only 10 percent for a limited time, instead of setting an initial rate of 12 percent.

i. When creditors use an initial interest rate that is not calculated using the index or formula for later rate adjustments, the disclosures should reflect a composite annual percentage rate based on the initial rate for as long as it is charged and, for the remainder of the term, the rate that would have been applied using the index or formula at the time of consummation. The rate at consummation need not be used if a contract provides for a delay in the implementation of changes in an index value. For example, if the contract specifies that rate changes are based on the index value in effect 45 days before the change date, creditors may use any index value in effect during the 45 days before consummation in calculating a composite annual percentage rate.
ii. The effect of the multiple rates must also be reflected in the calculation and disclosure of the finance charge, total of payments, and payment schedule.
iii. If a loan contains a rate or payment cap that would prevent the initial rate or payment, at the time of the first adjustment, from changing to the rate determined by the index or formula at consummation, the effect of that rate or payment cap should be reflected in the disclosures.
iv. Because these transactions involve irregular payment amounts, an annual percentage rate tolerance of ¼ of 1 percent applies, in accordance with section 226.22(a)(3) of the regulation.
v. Examples of discounted variable-rate transactions include:
   A. A 30-year loan for $100,000 with no prepaid finance charges and rates determined by the Treasury bill rate plus 2 percent. Rate and payment adjustments are made annually. Although the Treasury bill rate at the time of consummation is 10 percent, the creditor sets the interest rate for one year at 9 percent, instead of 12 percent according to the formula. The disclosures should reflect a composite annual percentage rate of 11.63 percent based on

9 percent for one year and 12 percent for 29 years. Reflecting those two rate levels, the payment schedule should show 12 payments of $804.62 and 348 payments of $1,025.31. The finance charge should be $266,463.32 and the total of payments $366,463.32.

B. Same loan as above, except with a 2 percent rate cap on periodic adjustments. The disclosures should reflect a composite annual percentage rate of 11.53 percent based on 9 percent for the first year, 11 percent for the second year, and 12 percent for the remaining 28 years. Reflecting those three rate levels, the payment schedule should show 12 payments of $804.62, 12 payments of $950.09, and 336 payments of $1,024.34. The finance charge should be $265,234.76, and the total of payments $365,234.76.

C. Same loan as above, except with a 7½ percent cap on payment adjustments. The disclosures should reflect a composite annual percentage rate of 11.64 percent, based on 9 percent for one year and 12 percent for 29 years. Because of the payment cap, five levels of payments should be reflected. The payment schedule should show 12 payments of $804.62, 12 payments of $864.97, 12 payments of $929.84, 12 payments of $999.58, and 312 payments of $1,070.04. The finance charge should be $277,040.60, and the total of payments $377,040.60.

vi. A loan in which the initial interest rate is set according to the index or formula used for later adjustments but is not set at the value of the index or formula at consummation. For example, if a creditor commits to an initial rate based on the formula on a date prior to consummation, but the index has moved during the period between that time and consummation, a creditor should base its disclosures on the initial rate.

11. *Examples of variable-rate transactions.* Variable-rate transactions include:

- Renewable balloon-payment instruments where the creditor is both unconditionally obligated to renew the balloon-payment loan at the consumer's option (or is obligated to renew subject to conditions within the consumer's control) and has the option of increasing the interest rate at the time of renewal. Disclosures must be based on the payment amortization (unless the specified term of the obligation with renewals is shorter) and on the rate in effect at the time of consummation of the transaction. (Examples of conditions within a consumer's control include requirements that a consumer be current in payments or continue to reside in the mortgaged property. In contrast, setting a limit on the rate at which the creditor would be obligated to renew or reserving the right to change the credit standards at the time of renewal are examples of conditions outside a consumer's control.) If, however, a creditor is not obligated to renew as described above, disclosures must be based on the term of the balloon-payment loan. Disclosures also must be based on the term of the balloonpayment loan in balloon-payment instruments in which the legal obligation provides that the loan will be renewed by a "refinancing" of the obligation, as that term is defined by section 226.20(a). If it cannot be determined from the legal obligation that the loan will be renewed by a "refinancing," disclosures must be based either on the term of the balloon-payment loan or on the payment amortization, depending on whether the creditor is unconditionally obligated to renew the loan as described above. (This discussion does not apply to construction loans subject to section 226.17(c)(6).)
- "Shared-equity" or "shared-appreciation" mortgages that have a fixed rate of interest and an appreciation share based on the consumer's equity in the mortgaged property. The appreciation share is payable in a lump sum at a specified time. Disclosures must be based on the fixed interest rate. (As discussed in the commentary to section 226.2, other types of shared-equity arrangements are not considered "credit" and are not subject to Regulation Z.)
- Preferred-rate loans where the terms of the legal obligation provide that the initial un-

derlying rate is fixed but will increase upon the occurrence of some event, such as an employee leaving the employ of the creditor, and the note reflects the preferred rate. The disclosures are to be based on the preferred rate.
- "Price-level-adjusted mortgages" or other indexed mortgages that have a fixed rate of interest but provide for periodic adjustments to payments and the loan balance to reflect changes in an index measuring prices or inflation. Disclosures are to be based on the fixed interest rate.

Graduated-payment mortgages and step-rate transactions without a variable-rate feature are not considered variable-rate transactions.

12. *Graduated-payment adjustable-rate mortgages.* These mortgages involve both a variable interest rate and scheduled variations in payment amounts during the loan term. For example, under these plans, a series of graduated payments may be scheduled before rate adjustments affect payment amounts, or the initial scheduled payment may remain constant for a set period before rate adjustments affect the payment amount. In any case, the initial payment amount may be insufficient to cover the scheduled interest, causing negative amortization from the outset of the transaction. In these transactions, the disclosures should treat these features as follows:

- The finance charge includes the amount of negative amortization based on the assumption that the rate in effect at consummation remains unchanged.
- The amount financed does not include the amount of negative amortization.
- As in any variable-rate transaction, the annual percentage rate is based on the terms in effect at consummation.
- The schedule of payments discloses the amount of any scheduled initial payments followed by an adjusted level of payments based on the initial interest rate. Since some mortgage plans contain limits on the amount of the payment adjustment, the payment schedule may require several different levels of payments, even with the assumption that the original interest rate does not increase.

13. *Growth-equity mortgages.* Also referred to as payment-escalated mortgages, these mortgage plans involve scheduled payment increases to prematurely amortize the loan. The initial payment amount is determined as for a long-term loan with a fixed interest rate. Payment increases are scheduled periodically, based on changes in an index. The larger payments result in accelerated amortization of the loan. In disclosing these mortgage plans, creditors may either—

- estimate the amount of payment increases, based on the best information reasonably available, or
- disclose by analogy to the variable-rate disclosures in section 226.18(f)(1).

(This discussion does not apply to growth-equity mortgages in which the amount of payment increases can be accurately determined at the time of disclosure. For these mortgages, as for graduated-payment mortgages, disclosures should reflect the scheduled increases in payments.)

14. *Reverse mortgages.* Reverse mortgages, also known as reverse-annuity or home-equity-conversion mortgages, typically involve the disbursement of monthly advances to the consumer for a fixed period or until the occurrence of an event such as the consumer's death. Repayment of the loan (generally a single payment of principal and accrued interest) may be required to be made at the end of the disbursements or, for example, upon the death of the consumer. In disclosing these transactions, creditors must apply the following rules, as applicable:

- If the reverse mortgage has a specified period for disbursements but repayment is due only upon the occurrence of a future event such as the death of the consumer, the creditor must assume that disbursements will be made until they are scheduled to end. The creditor must assume repayment will occur when disbursements end (or within a period following the final disbursement which is not longer than the regular interval between disbursements). This assumption should be used even though repayment may occur before or after the disbursements are scheduled to end.

In such cases, the creditor may include a statement such as "The disclosures assume that you will repay the loan at the time our payments to you end. As provided in your agreement, your repayment may be required at a different time."

- If the reverse mortgage has neither a specified period for disbursements nor a specified repayment date and these terms will be determined solely by reference to future events, including the consumer's death, the creditor may assume that the disbursements will end upon the consumer's death (estimated by using actuarial tables, for example) and that repayment will be required at the same time (or within a period following the date of the final disbursement which is not longer than the regular interval for disbursements). Alternatively, the creditor may base the disclosures upon another future event it estimates will be most likely to occur first. (If terms will be determined by reference to future events which do not include the consumer's death, the creditor must base the disclosures upon the occurence of the event estimated to be most likely to occur first.)
- In making the disclosures, the creditor must assume that all disbursements and accrued interest will be paid by the consumer. For example, if the note has a nonrecourse provision providing that the consumer is not obligated for an amount greater than the value of the house, the creditor must nonetheless assume that the full amount to be disbursed will be repaid. In this case, however, the creditor may include a statement such as "The disclosures assume full repayment of the amount advanced plus accrued interest, although the amount you may be required to pay is limited by your agreement."
- Some reverse mortgages provide that some or all of the appreciation in the value of the property will be shared between the consumer and the creditor. Such loans are considered variable-rate mortgages, as described in comment 17(c)(1)–11, and the appreciation feature must be disclosed in accordance with section 226.18(f)(1). If the reverse mortgage has a variable interest rate, is written for a term greater than one year, and is secured by the consumer's principal dwelling, the shared-appreciation feature must be described under section 226.19(b)(2)(vii).

15. *Morris Plan transactions.* When a deposit account is created for the sole purpose of accumulating payments and then is applied to satisfy entirely the consumer's obligation in the transaction, each deposit made into the account is considered the same as a payment on a loan for purposes of making disclosures.

16. *Number of transactions.* Creditors have flexibility in handling credit extensions that may be viewed as multiple transactions. For example:

- When a creditor finances the credit sale of a radio and a television on the same day, the creditor may disclose the sales as either one or two credit sale transactions.
- When a creditor finances a loan along with a credit sale of health insurance, the creditor may disclose in one of several ways: a single credit sale transaction, a single loan transaction, or a loan and a credit sale transaction.
- The separate financing of a downpayment in a credit sale transaction may, but need not, be disclosed as two transactions (a credit sale and a separate transaction for the financing of the downpayment).

17. *Special rules for tax refund–anticipation loans.* Tax-refund loans, also known as refund-anticipation loans (RALs), are transactions in which a creditor will lend up to the amount of a consumer's expected tax refund. RAL agreements typically require repayment upon demand, but also may provide that repayment is required when the refund is made. The agreements also typically provide that if the amount of the refund is less than the payment due, the consumer must pay the difference. Repayment often is made by a preauthorized offset to a consumer's account held with the creditor when the refund has been deposited by electronic transfer. Creditors may charge fees for RALs in addition to fees for filing the consumer's tax return electronically. In RAL transactions subject to the regulation the following special rules apply:

- If, under the terms of the legal obligation,

repayment of the loan is required when the refund is received by the consumer (such as by deposit into the consumer's account), the disclosures should be based on the creditor's estimate of the time the refund will be delivered even if the loan also contains a demand clause. The practice of a creditor to demand repayment upon delivery of refunds does not determine whether the legal obligation requires that repayment be made at that time; this determination must be made according to applicable state or other law. (See comment 17(c)(5)-1 for the rules regarding disclosures if the loan is payable solely on demand or is payable either on demand or on an alternate maturity date.)

- If the consumer is required to repay more than the amount borrowed, the difference is a finance charge unless excluded under section 226.4. In addition, to the extent that any fees charged in connection with the loan (such as for filing the tax return electronically) exceed those fees for a comparable cash transaction (that is, filing the tax return electronically without a loan), the difference must be included in the finance charge.

18. *Pawn transactions.* When, in connection with an extension of credit, a consumer pledges or sells an item to a pawnbroker creditor in return for a sum of money and retains the right to redeem the item for a greater sum (the redemption price) within a specified period of time, disclosures are required. In addition to other disclosure requirements that may be applicable under section 226.18, for purposes of pawn transactions:

i. The amount financed is the initial sum paid to the consumer. The pawnbroker creditor need not provide a separate itemization of the amount financed if that entire amount is paid directly to the consumer and the disclosed description of the amount financed is "the amount of cash given directly to you" or a similar phrase.

ii. The finance charge is the difference between the initial sum paid to the consumer and the redemption price plus any other finance charges paid in connection with the transaction. (See section 226.4.)

iii. The term of the transaction, for calculating the annual percentage rate, is the period of time agreed to by the pawnbroker creditor and the consumer. The term of the transaction does not include a grace period (including any statutory grace period) after the agreed redemption date.

Paragraph 17(c)(2)(i)

1. *Basis for estimates.* Disclosures may be estimated when the exact information is unknown at the time disclosures are made. Information is unknown if it is not reasonably available to the creditor at the time the disclosures are made. The "reasonably available" standard requires that the creditor, acting in good faith, exercise due diligence in obtaining information. For example, the creditor must at a minimum utilize generally accepted calculation tools but need not invest in the most sophisticated computer program to make a particular type of calculation. The creditor normally may rely on the representations of other parties in obtaining information. For example, the creditor might look to the consumer for the time of consummation, to insurance companies for the cost of insurance, or to realtors for taxes and escrow fees. The creditor may utilize estimates in making disclosures even though the creditor knows that more precise information will be available by the point of consummation. However, new disclosures may be required under section 226.17(f) or 226.19.

2. *Labelling estimates.* Estimates must be designated as such in the segregated disclosures. Even though other disclosures are based on the same assumption on which a specific estimated disclosure was based, the creditor has some flexibility in labelling the estimates. Generally, only the particular disclosure for which the exact information is unknown is labelled as an estimate. However, when several disclosures are affected because of the unknown information, the creditor has the option of labelling either every affected disclosure or only the disclosure primarily affected. For example, when the finance charge is unknown because the date of consummation is unknown, the creditor must label the finance charge as an estimate and may also label as

estimates the total of payments and the payment schedule. When many disclosures are estimates, the creditor may use a general statement, such as "all numerical disclosures except the late payment disclosure are estimates," as a method to label those disclosures as estimates.

3. *Simple-interest transactions.* If consumers do not make timely payments in a simple-interest transaction, some of the amounts calculated for Truth in Lending disclosures will differ from amounts that consumers will actually pay over the term of the transaction. Creditors may label disclosures as estimates in these transactions. For example, because the finance charge and total of payments may be larger than disclosed if consumers make late payments, creditors may label the finance charge and total of payments as estimates. On the other hand, creditors may choose not to label disclosures as estimates and may base all disclosures on the assumption that payments will be made on time, disregarding any possible inaccuracies resulting from consumers' payment patterns.

Paragraph 17(c)(2)(ii)

1. *Per diem interest.* This paragraph applies to any numerical amount (such as the finance charge, annual percentage rate, or payment amount) that is affected by the amount of the per diem interest charge that will be collected at consummation. If the amount of per diem interest used in preparing the disclosures for consummation is based on the information known to the creditor at the time the disclosure document is prepared, the disclosures are considered accurate under this rule, and affected disclosures are also considered accurate, even if the disclosures are not labeled as estimates. For example, if the amount of per diem interest used to prepare disclosures is less than the amount of per diem interest charged at consummation, and as a result the finance charge is understated by $200, the disclosed finance charge is considered accurate even though the understatement is not within the $100 tolerance of section 226.18(d)(1), and the finance charge was not labeled as an estimate. In this example, if in addition to the understatement related to the per diem interest, a $90 fee is incorrectly omitted from the finance charge, causing it to be understated by a total of $290, the finance charge is considered accurate because the $90 fee is within the tolerance in section 226.18(d)(1).

Paragraph 17(c)(3)

1. *Minor variations.* Section 226.17(c)(3) allows creditors to disregard certain factors in calculating and making disclosures. For example:

- Creditors may ignore the effects of collecting payments in whole cents. Because payments cannot be collected in fractional cents, it is often difficult to amortize exactly an obligation with equal payments; the amount of the last payment may require adjustment to account for the rounding of the other payments to whole cents.
- Creditors may base their disclosures on calculation tools that assume that all months have an equal number of days, even if their practice is to take account of the variations in months for purposes of collecting interest. For example, a creditor may use a calculation tool based on a 360-day year, when it in fact collects interest by applying a factor of 1/365 of the annual rate to 365 days. This rule does not, however, authorize creditors to ignore, for disclosure purposes, the effects of applying 1/360 of an annual rate to 365 days.

2. *Use of special rules.* A creditor may utilize the special rules in section 226.17(c)(3) for purposes of calculating and making all disclosures for a transaction or may, at its option, use the special rules for some disclosures and not others.

Paragraph 17(c)(4)

1. *Payment-schedule irregularities.* When one or more payments in a transaction differ from the others because of a long or short first period, the variations may be ignored in disclosing the payment schedule, finance charge, annual percentage rate, and other terms. For example:

- A 36-month auto loan might be consummated on June 8 with payments due on

July 1 and the first of each succeeding month. The creditor may base its calculations on a payment schedule that assumes 36 equal intervals and 36 equal installment payments, even though a precise computation would produce slightly different amounts because of the shorter first period.
- By contrast, in the same example, if the first payment were not scheduled until August 1, the irregular first period would exceed the limits in section 226.17(c)(4); the creditor could not use the special rule and could not ignore the extra days in the first period in calculating its disclosures.

2. *Measuring odd periods.* In determining whether a transaction may take advantage of the rule in section 226.17(c)(4), the creditor must measure the variation against a regular period. For purposes of that rule:

- The first period is the period from the date on which the finance charge begins to be earned to the date of the first payment.
- The term is the period from the date on which the finance charge begins to be earned to the date of the final payment.
- The regular period is the most common interval between payments in the transaction.

In transactions involving regular periods that are monthly, semimonthly, or multiples of a month, the length of the irregular and regular periods may be calculated on the basis of either the actual number of days or an assumed 30-day month. In other transactions, the length of the periods is based on the actual number of days.

3. *Use of special rules.* A creditor may utilize the special rules in section 226.17(c)(4) for purposes of calculating and making some disclosures but may elect not to do so for all of the disclosures. For example, the variations may be ignored in calculating and disclosing the annual percentage rate but taken into account in calculating and disclosing the finance charge and payment schedule.

4. *Relation to prepaid finance charges.* Prepaid finance charges, including "odd-days" or "per diem" interest, paid prior to or at closing may not be treated as the first payment on a loan. Thus, creditors may not disregard an irregularity in disclosing such finance charges.

Paragraph 17(c)(5)

1. *Demand disclosures.* Disclosures for demand obligations are based on an assumed one-year term, unless an alternate maturity date is stated in the legal obligation. Whether an alternate maturity date is stated in the legal obligation is determined by applicable law. An alternate maturity date is not inferred from an informal principal reduction agreement or a similar understanding between the parties. However, when the note itself specifies a principal reduction schedule (for example, "payable on demand or $2,000 plus interest quarterly"), an alternate maturity is stated and the disclosures must reflect that date.

2. *Future event as maturity date.* An obligation whose maturity date is determined solely by a future event, as for example a loan payable only on the sale of property, is not a demand obligation. Because no demand feature is contained in the obligation, demand disclosures under section 226.18(i) are inapplicable. The disclosures should be based on the creditor's estimate of the time at which the specified event will occur, and may indicate the basis for the creditor's estimate, as noted in the commentary to section 226.17(a).

3. *Demand after stated period.* Most demand transactions contain a demand feature that may be exercised at any point during the term, but certain transactions convert to demand status only after a fixed period. For example, in states prohibiting due-on-sale clauses, the Federal National Mortgage Association (FNMA) requires mortgages that it purchases to include a call option rider that may be exercised after 7 years. These mortgages are generally written as long-term obligations but contain a demand feature that may be exercised only within a 30-day period at 7 years. The disclosures for these transactions should be based upon the legally agreed-upon maturity date. Thus, if a mortgage containing the 7-year FNMA call option is written as a 20-year obligation, the disclosures should be based on the 20-year term, with the demand feature disclosed under section 226.18(i).

4. *Balloon mortgages.* Balloon payment mortgages, with payments based on a long-term amortization schedule and a large final payment due after a shorter term, are not demand obligations unless a demand feature is specifically contained in the contract. For example, a mortgage with a term of 5 years and a payment schedule based on 20 years would not be treated as a mortgage with a demand feature, in the absence of any contractual demand provisions. In this type of mortgage, disclosures should be based on the 5-year term.

Paragraph 17(c)(6)

1. *Series of advances.* Section 226.17(c)(6)(i) deals with a series of advances under an agreement to extend credit up to a certain amount. A creditor may treat all of the advances as a single transaction or disclose each advance as a separate transaction. If these advances are treated as one transaction and the timing and amounts of advances are unknown, creditors must make disclosures based on estimates, as provided in section 226.17(c)(2). If the advances are disclosed separately, disclosures must be provided before each advance occurs, with the disclosures for the first advance provided by consummation.

2. *Construction loans.* Section 226.17(c)(6)(ii) provides a flexible rule for disclosure of construction loans that may be permanently financed. These transactions have two distinct phases, similar to two separate transactions. The construction loan may be for initial construction or subsequent construction, such as rehabilitation or remodelling. The construction period usually involves several disbursements of funds at times and in amounts that are unknown at the beginning of that period, with the consumer paying only accrued interest until construction is completed. Unless the obligation is paid at that time, the loan then converts to permanent financing in which the loan amount is amortized just as in a standard mortgage transaction. Section 226.17(c)(6)(ii) permits the creditor to give either one combined disclosure for both the construction financing and the permanent financing, or a separate set of disclosures for the two phases. This rule is available whether the consumer is initially obligated to accept construction financing only or is obligated to accept both construction and permanent financing from the outset. If the consumer is obligated on both phases and the creditor chooses to give two sets of disclosures, both sets must be given to the consumer initially, because both transactions would be consummated at that time. (Appendix D provides a method of calculating the annual percentage rate and other disclosures for construction loans, which may be used, at the creditor's option, in disclosing construction financing.)

3. *Multiple-advance construction loans.* Section 226.17(c)(6)(i) and (ii) are not mutually exclusive. For example, in a transaction that finances the construction of a dwelling that may be permanently financed by the same creditor, the construction phase may consist of a series of advances under an agreement to extend credit up to a certain amount. In these cases, the creditor may disclose the construction phase as either one or more than one transaction and also disclose the permanent financing as a separate transaction.

4. *Residential mortgage transaction.* See the commentary to section 226.2(a)(24) for a discussion of the effect of section 226.17(c)(6) on the definition of a residential mortgage transaction.

5. *Allocation of points.* When a creditor utilizes the special rule in section 226.17(c)(6) to disclose credit extensions as multiple transactions, buyer's points or similar amounts imposed on the consumer must be allocated for purposes of calculating disclosures. While such amounts should not be taken into account more than once in making calculations, they may be allocated between the transactions in any manner the creditor chooses. For example, if a construction-permanent loan is subject to five points imposed on the consumer and the creditor chooses to disclose the two phases separately, the five points may be allocated entirely to the construction loan, entirely to the permanent loan, or divided in any manner between the two. However, the entire five points may not be applied twice, that is, to both the construction and the permanent phases.

17(d) Multiple Creditors; Multiple Consumers

1. *Multiple creditors.* If a credit transaction involves more than one creditor:

- The creditors must choose which of them will make the disclosures.
- A single, complete set of disclosures must be provided, rather than partial disclosures from several creditors.
- All disclosures for the transaction must be given, even if the disclosing creditor would not otherwise have been obligated to make a particular disclosure. For example, if one of the creditors is the seller, the total sale price disclosure under section 226.18(j) must be made, even though the disclosing creditor is not the seller.

2. *Multiple consumers.* When two consumers are joint obligors with primary liability on an obligation, the disclosures may be given to either one of them. If one consumer is merely a surety or guarantor, the disclosures must be given to the principal debtor. In rescindable transactions, however, separate disclosures must be given to each consumer who has the right to rescind under section 226.23, although the disclosures required under section 226.19(b) need only be provided to the consumer who expresses an interest in a variable-rate loan program.

17(e) Effect of Subsequent Events

1. *Events causing inaccuracies.* Inaccuracies in disclosures are not violations if attributable to events occurring after the disclosures are made. For example, when the consumer fails to fulfill a prior commitment to keep the collateral insured and the creditor then provides the coverage and charges the consumer for it, such a change does not make the original disclosures inaccurate. The creditor may, however, be required to make new disclosures under sections 226.17(f) or 226.19 if the events occurred between disclosure and consummation or under section 226.20 if the events occurred after consummation.

17(f) Early Disclosures

1. *Change in rate or other terms.* Redisclosure is required for changes that occur between the time disclosures are made and consummation if the annual percentage rate in the consummated transaction exceeds the limits prescribed in this section, even if the initial disclosures would be considered accurate under the tolerances in sections 226.18(d) or 226.22(a). To illustrate:

i. *General.*
   A. If disclosures are made in a regular transaction on July 1, the transaction is consummated on July 15, and the actual annual percentage rate varies by more than ⅛ of 1 percentage point from the disclosed annual percentage rate, the creditor must either redisclose the changed terms or furnish a complete set of new disclosures before consummation. Redisclosure is required even if the disclosures made on July 1 are based on estimates and marked as such.
   B. In a regular transaction, if early disclosures are marked as estimates and the disclosed annual percentage rate is within ⅛ of 1 percentage point of the rate at consummation, the creditor need not redisclose the changed terms (including the annual percentage rate).

ii. *Nonmortgage loan.* If disclosures are made on July 1, the transaction is consummated on July 15, and the finance charge increased by $35 but the disclosed annual percentage rate is within the permitted tolerance, the creditor must at least redisclose the changed terms that were not marked as estimates. (See section 226.18(d)(2) of this part.)

iii. *Mortgage loan.* At the time TILA disclosures are prepared in July, the loan closing is scheduled for July 31 and the creditor does not plan to collect per diem interest at consummation. Consummation actually occurs on August 5, and per diem interest for the remainder of August is collected as a prepaid finance charge. Assuming there were no other changes requiring redisclosure, the creditor may rely on the disclosures prepared in July that were accurate when they were prepared. However, if the creditor prepares new disclosures in

August that will be provided at consummation, the new disclosures must take into account the amount of the per diem interest known to the creditor at that time.

2. *Variable rate.* The addition of a variable-rate feature to the credit terms, after early disclosures are given, requires new disclosures.

3. *Content of new disclosures.* If redisclosure is required, the creditor has the option of either providing a complete set of new disclosures or providing disclosures of only the terms that vary from those originally disclosed. (See the commentary to section 226.19(a)(2).)

4. *Special rules.* In residential mortgage transactions subject to section 226.19, the creditor must redisclose if, between the delivery of the required early disclosures and consummation, the annual percentage rate changes by more than a stated tolerance. When subsequent events occur *after* consummation, new disclosures are required only if there is a refinancing or an assumption within the meaning of section 226.20.

Paragraph 17(f)(2)

1. *Irregular transactions.* For purposes of this paragraph, a transaction is deemed to be "irregular" according to the definition in footnote 46 of 226.22(a)(3).

17(g) Mail or Telephone Orders—Delay in Disclosures

1. *Conditions for use.* When the creditor receives a mail or telephone request for credit, the creditor may delay making the disclosures until the first payment is due if the following conditions are met:

- The credit request is initiated without face-to-face or direct telephone solicitation. (Creditors may, however, use the special rule when credit requests are solicited by mail.)
- The creditor has supplied the specified credit information about its credit terms either to the individual consumer or to the public generally. That information may be distributed through advertisements, catalogs, brochures, special mailers, or similar means.

2. *Insurance.* The location requirements for the insurance disclosures under section 226.18(n) permit them to appear apart from the other disclosures. Therefore, a creditor may mail an insurance authorization to the consumer and then prepare the other disclosures to reflect whether or not the authorization is completed by the consumer. Creditors may also disclose the insurance cost on a unit-cost basis, if the transaction meets the requirements of section 226.17(g).

17(h) Series of Sales—Delay in Disclosures

1. *Applicability.* The creditor may delay the disclosures for individual credit sales in a series of such sales until the first payment is due on the current sale, assuming the two conditions in this paragraph are met. If those conditions are not met, the general timing rules in section 226.17(b) apply.

2. *Basis of disclosures.* Creditors structuring disclosures for a series of sales under section 226.17(h) may compute the total sale price as either:

- The cash price for the sale plus that portion of the finance charge and other charges applicable to that sale; or
- The cash price for the sale, other charges applicable to the sale, and the total finance charge and outstanding principal.

17(i) Interim Student Credit Extensions

1. *Definition.* Student credit plans involve extensions of credit for education purposes where the repayment amount and schedule are not known at the time credit is advanced. These plans include loans made under any student credit plan, whether government or private, where the repayment period does not begin immediately. (Certain student credit plans that meet this definition are exempt from Regulation Z. See section 226.3(f). Creditors in interim student credit extensions need not disclose the terms set forth in this paragraph at the time the credit is actually extended but must make complete disclosures

at the time the creditor and consumer agree upon the repayment schedule for the total obligation. At that time, a new set of disclosures must be made of all applicable items under section 226.18.

2. *Basis of disclosures.* The disclosures given at the time of execution of the interim note should reflect two annual percentage rates, one for the interim period and one for the repayment period. The use of section 226.17(i) in making disclosures does not, by itself, make those disclosures estimates. Any portion of the finance charge, such as statutory interest, that is attributable to the interim period and is paid by the student (either as a prepaid finance charge, periodically during the interim period, in one payment at the end of the interim period, or capitalized at the beginning of the repayment period) must be reflected in the interim annual percentage rate. Interest subsidies, such as payments made by either a state or the federal government on an interim loan, must be excluded in computing the annual percentage rate on the interim obligation, when the consumer has no contingent liability for payment of those amounts. Any finance charges that are paid separately by the student at the outset or withheld from the proceeds of the loan are prepaid finance charges. An example of this type of charge is the loan guarantee fee. The sum of the prepaid finance charges is deducted from the loan proceeds to determine the amount financed and included in the calculation of the finance charge.

3. *Consolidation.* Consolidation of the interim student credit extensions through a renewal note with a set repayment schedule is treated as a new transaction with disclosures made as they would be for a refinancing. Any unearned portion of the finance charge must be reflected in the new finance charge and annual percentage rate, and is not added to the new amount financed. In itemizing the amount financed under section 226.18(c), the creditor may combine the principal balances remaining on the interim extensions at the time of consolidation and categorize them as the amount paid on the consumer's account.

4. *Approved student credit forms.* See the commentary to appendix H regarding disclosure forms approved for use in certain student credit programs.

References

Statute: §§ 121, 122, 124, and 128, and the Higher Education Act of 1965 (20 USC 1071) as amended by Public Law 97-35, August 13, 1981
Other sections: § 226.2 and appendix H
Previous regulation: §§ 226.6 and 226.8
1981 changes: With few exceptions, the disclosures must now appear apart from all other information and may not be interspersed with that information. The disclosures must be based on the legal obligation between the parties, rather than any side agreement.

The assumed maturity period for demand loans has been increased from six months to one year. Any alternate maturity date must be stated in the legal obligation rather than inferred from the documents, in order to form a basis for disclosures.

In multiple-advance transactions, a series of advances up to a certain amount and construction loans that may be permanently financed may be disclosed, at the creditor's option, as either a single transaction or several transactions. Appendix D is applicable only to multiple advances for the construction of a dwelling, whereas its predecessor, interpretation section 226.813, could be used for all multiple-advance transactions.

If disclosures are made before the date of consummation, the creditor need not provide updated disclosures at consummation unless the annual percentage rate has changed beyond certain limits or a variable rate feature has been added.

SECTION 226.18—Content of Disclosures

1. *As applicable.* The disclosures required by this section need be made only as applicable. Any disclosure not relevant to a particular transaction may be eliminated entirely. For example:

- In a loan transaction, the creditor may delete disclosure of the total sale price.

- In a credit sale requiring disclosure of the total sale price under section 226.18(j), the creditor may delete any reference to a downpayment where no downpayment is involved.

Where the amounts of several numerical disclosures are the same, the "as applicable" language also permits creditors to combine the terms, so long as it is done in a clear and conspicuous manner. For example:

- In a transaction in which the amount financed equals the total of payments, the creditor may disclose "amount financed/total of payments," together with descriptive language, followed by a single amount.
- However, if the terms are separated on the disclosure statement and separate space is provided for each amount, both disclosures must be completed, even though the same amount is entered in each space.

2. *Format.* See the commentary to section 226.17 and appendix H for a discussion of the format to be used in making these disclosures, as well as acceptable modifications.

18(a) Creditor

1. *Identification of creditor.* The creditor making the disclosures must be identified. This disclosure may, at the creditor's option, appear apart from the other disclosures. Use of the creditor's name is sufficient, but the creditor may also include an address and/or telephone number. In transactions with multiple creditors, any one of them may make the disclosures; the one doing so must be identified.

18(b) Amount Financed

1. *Disclosure required.* The net amount of credit extended must be disclosed using the term "amount financed" and a descriptive explanation similar to the phrase in the regulation.

2. *Rebates and loan premiums.* In a loan transaction, the creditor may offer a premium in the form of cash or merchandise to prospective borrowers. Similarly, in a credit sale transaction, a seller's or manufacturer's rebate may be offered to prospective purchasers of the creditor's goods or services. At the creditor's option, these amounts may be either reflected in the Truth in Lending disclosures or disregarded in the disclosures. If the creditor chooses to reflect them in the section 226.18 disclosures, rather than disregard them, they may be taken into account in any manner as part of those disclosures.

Paragraph 18(b)(1)

1. *Downpayments.* A downpayment is defined in section 226.2(a)(18) to include, at the creditor's option, certain deferred downpayments or pickup payments. A deferred downpayment that meets the criteria set forth in the definition may be treated as part of the downpayment, at the creditor's option.

- Deferred downpayments that are not treated as part of the downpayment (either because they do not meet the definition or because the creditor simply chooses not to treat them as downpayments) are included in the amount financed.
- Deferred downpayments that are treated as part of the downpayment are not part of the amount financed under section 226.18(b)(1).

Paragraph 18(b)(2)

1. *Adding other amounts.* Fees or other charges that are not part of the finance charge and that are financed rather than paid separately at consummation of the transaction are included in the amount financed. Typical examples are real estate settlement charges and premiums for voluntary credit life and disability insurance excluded from the finance charge under section 226.4. This paragraph does not include any amounts already accounted for under section 226.18(b)(1), such as taxes, tag and title fees, or the costs of accessories or service policies that the creditor includes in the cash price.

Paragraph 18(b)(3)

1. *Prepaid finance charges.* Prepaid finance charges that are paid separately in cash or by check should be deducted under section 226.18(b)(3) in calculating the amount financed. To illustrate:

- A consumer applies for a loan of $2,500 with a $40 loan fee. The face amount of the note is $2,500 and the consumer pays the loan fee separately by cash or check at closing. The principal loan amount for purposes of section 226.18(b)(1) is $2,500 and $40 should be deducted under section 226.18(b)(3), thereby yielding an amount financed of $2,460.

In some instances, as when loan fees are financed by the creditor, finance charges are incorporated in the face amount of the note. Creditors have the option, when the charges are not add-on or discount charges, of determining a principal loan amount under section 226.18(b)(1) that either includes or does not include the amount of the finance charges. (Thus the principal loan amount may, but need not, be determined to equal the face amount of the note.) When the finance charges are included in the principal loan amount, they should be deducted as prepaid finance charges under section 226.18(b)(3). When the finance charges are not included in the principal loan amount, they should not be deducted under section 226.18(b)(3). The following examples illustrate the application of section 226.18(b) to this type of transaction. Each example assumes a loan request of $2,500 with a loan fee of $40; the creditor assesses the loan fee by increasing the face amount of the note to $2,540.

- If the creditor determines the principal loan amount under section 226.18(b)(1) to be $2,540, it has included the loan fee in the principal loan amount and should deduct $40 as a prepaid finance charge under section 226.18(b)(3), thereby obtaining an amount financed of $2,500.
- If the creditor determines the principal loan amount under section 226.18(b)(1) to be $2,500, it has not included the loan fee in the principal loan amount and should not deduct any amount under section 226.18(b)(3), thereby obtaining an amount financed of $2,500.

The same rules apply when the creditor does not increase the face amount of the note by the amount of the charge but collects the charge by withholding it from the amount advanced to the consumer. To illustrate, the following examples assume a loan request of $2,500 with a loan fee of $40; the creditor prepares a note for $2,500 and advances $2,460 to the consumer.

- If the creditor determines the principal loan amount under section 226.18(b)(1) to be $2,500, it has included the loan fee in the principal loan amount and should deduct $40 as a preapid finance charge under section 226.18(b)(3), thereby obtaining an amount financed of $2,460.
- If the creditor determines the principal loan amount under section 226.18(b)(1) to be $2,460, it has not included the loan fee in the principal loan amount and should not deduct any amount under section 226.18 (b)(3), thereby obtaining an amount financed of $2,460.

Thus in the examples where the creditor derives the net amount of credit by determining a principal loan amount that does not include the amount of the finance charge, no subtraction is appropriate. Creditors should note, however, that although the charges are not subtracted as prepaid finance charges in those examples, they are nonetheless finance charges and must be treated as such.

2. *Add-on or discount charges.* All finance charges must be deducted from the amount of credit in calculating the amount financed. If the principal loan amount reflects finance charges that meet the definition of a prepaid finance charge in section 226.2, those charges are included in the section 226.18(b)(1) amount and deducted under section 226.18(b)(3). However, if the principal loan amount includes finance charges that do not meet the definition of a prepaid finance charge, the section 226.18(b)(1) amount must exclude those finance charges. The following examples illustrate the application of section 226.18(b) to these types of transactions. Each example assumes a loan request of $1,000 for one year, subject to a 6 percent precomputed interest rate, with a $10 loan fee paid separately at consummation.

- The creditor assesses add-on interest of $60 which is added to the $1,000 in loan proceeds for an obligation with a face

amount of $1,060. The principal for purposes of section 226.18(b)(1) is $1,000, no amounts are added under section 226.18(b)(2), and the $10 loan fee is a prepaid finance charge to be deducted under section 226.18(b)(3). The amount financed is $990.

- The creditor assesses discount interest of $60 and distributes $940 to the consumer, who is liable for an obligation with a face amount of $1,000. The principal under section 226.18(b)(1) is $940, which results in an amount financed of $930, after deduction of the $10 prepaid finance charge under section 226.18(b)(3).
- The creditor assesses $60 in discount interest by increasing the face amount of the obligation to $1,060, with the consumer receiving $1,000. The principal under section 226.18(b)(1) is thus $1,000 and the amount financed $990, after deducting the $10 prepaid finance charge under section 226.18(b)(3).

18(c) Itemization of Amount Financed

1. *Disclosure required.* The creditor has two alternatives in complying with section 226.18(c):

- The creditor may inform the consumer, on the segregated disclosures, that a written itemization of the amount financed will be provided on request, furnishing the itemization only if the customer in fact requests it.
- The creditor may provide an itemization as a matter of course, without notifying the consumer of the right to receive it or waiting for a request.

Whether given as a matter of course or only on request, the itemization must be provided at the same time as the other disclosures required by section 226.18, although separate from those disclosures.

2. *Additional information.* Section 226.18(c) establishes only a minimum standard for the material to be included in the itemization of the amount financed. Creditors have considerable flexibility in revising or supplementing the information listed in section 226.18(c) and shown in model form H-3, although no changes are required. The creditor may, fo example, do one or more of the following:

- Include amounts that reflect payments nc part of the amount financed. For example escrow items and certain insurance premi ums may be included, as discussed in th commentary to section 226.18(g).
- Organize the categories in any order. Fc example, the creditor may rearrange th terms in a mathematical progression thi depicts the arithmetic relationship of th terms.
- Add categories. For example, in a cred sale, the creditor may include the cas price and the downpayment.
- Further itemize each category. For ex ample, the amount paid directly to the cor sumer may be subdivided into the amou given by check and the amount credited the consumer's savings account.
- Label categories with different languag from that shown in section 226.18(c). F example, an amount paid on the consun er's account may be revised to specifical identify the account as "your auto loa with us."
- Delete, leave blank, mark "N/A" or othe wise note inapplicable categories in th itemization. For example, in a credit sa with no prepaid finance charges amounts paid to others, the amount nanced may consist of only the cash pri less downpayment. In this case, the iter ization may be composed of only a sing category and all other categories may eliminated.

3. *Amounts appropriate to more than one ca egory.* When an amount may appropriately placed in any of several categories and t creditor does not wish to revise the categori shown in section 226.18(c), the creditor h considerable flexibility in determining whe to show the amount. For example:

- In a credit sale, the portion of the purcha price being financed by the creditor m be viewed as either an amount paid to t consumer or an amount paid on the cc sumer's account.

4. *RESPA transactions.* The Real Esta Settlement Procedures Act (RESPA) requi

creditors to provide good faith estimates of closing costs and a settlement statement listing the amounts paid by the consumer. Transactions subject to RESPA are exempt from the requirements of section 226.18(c) if the creditor complies with RESPA's requirements for a good faith estimate and settlement statement. The itemization of the amount financed need not be given, even though the content and timing of the good faith estimate and settlement statement under RESPA differ from the requirements of sections 226.18(c) and 226.19(a)(2). If a creditor chooses to substitute RESPA's settlement statement for the itemization when redisclosure is required under section 226.19(a)(2), the statement must be delivered to the consumer at or prior to consummation. The disclosures required by sections 226.18(c) and 226.19(a)(2) may appear on the same page or on the same document as the good faith estimate or the settlement statement, so long as the requirements of section 226.17(a) are met.

Paragraph 18(c)(1)(i)

1. *Amounts paid to consumer.* This encompasses funds given to the consumer in the form of cash or a check, including joint proceeds checks, as well as funds placed in an asset account. It may include money in an interest-bearing account even if that amount is considered a required deposit under section 226.18(r). For example, in a transaction with total loan proceeds of $500, the consumer receives a check for $300 and $200 is required by the creditor to be put into an interest-bearing account. Whether or not the $200 is a required deposit, it is part of the amount financed. At the creditor's option, it may be broken out and labelled in the itemization of the amount financed.

Paragraph 18(c)(1)(ii)

1. *Amounts credited to consumer's account.* The term "consumer's account" refers to an account in the nature of a debt with that creditor. It may include, for example, an unpaid balance on a prior loan, a credit sale balance or other amounts owing to that creditor. It does not include asset accounts of the consumer such as savings or checking accounts.

Paragraph 18(c)(1)(iii)

1. *Amounts paid to others.* This includes, for example, tag and title fees; amounts paid to insurance companies for insurance premiums; security interest fees, and amounts paid to credit bureaus, appraisers or public officials. When several types of insurance premiums are financed, they may, at the creditor's option, be combined and listed in one sum, labelled "insurance" or similar term. This includes, but is not limited to, different types of insurance premiums paid to one company and different types of insurance premiums paid to different companies. Except for insurance companies and other categories noted in footnote 40, third parties must be identified by name.

2. *Charges added to amounts paid to others.* A sum is sometimes added to the amount of a fee charged to a consumer for a service provided by a third party (such as for an extended warranty or a service contract) that is payable in the same amount in comparable cash and credit transactions. In the credit transaction, the amount is retained by the creditor. Given the flexibility permitted in meeting the requirements of the amount-financed itemization (see the commentary to section 226.18(c)), the creditor in such cases may reflect that the creditor has retained a portion of the amount paid to others. For example, the creditor could add to the category "amount paid to others" language such as "(we may be retaining a portion of this amount)."

Paragraph 18(c)(1)(iv)

1. *Prepaid finance charge.* Prepaid finance charges that are deducted under section 226.18(b)(3) must be disclosed under this section. The prepaid finance charges must be shown as a total amount but may, at the creditor's option, also be further itemized and described. All amounts must be reflected in this total, even if portions of the prepaid finance charge are also reflected elsewhere. For example, if at consummation the creditor collects interim interest of $30 and a credit re-

port fee of $10, a total prepaid finance charge of $40 must be shown. At the creditor's option, the credit report fee paid to a third party may also be shown elsewhere as an amount included in section 226.18(c)(1)(iii). The creditor may also further describe the two components of the prepaid finance charge, although no itemization of this element is required by section 226.18(c)(1)(iv).

2. *Prepaid mortgage insurance premiums.* RESPA requires creditors to give consumers a settlement statement disclosing the costs associated with mortgage loan transactions. Included on the settlement statement are mortgage insurance premiums collected at settlement, which are prepaid finance charges. In calculating the total amount of prepaid finance charges, creditors should use the amount for mortgage insurance listed on the line for mortgage insurance on the settlement statement (line 1002 on HUD-1 or HUD 1-A), without adjustment, even if the actual amount collected at settlement may vary because of RESPA's escrow-accounting rules. Figures for mortgage insurance disclosed in conformance with RESPA shall be deemed to be accurate for purposes of Regulation Z.

18(d) Finance Charge

1. *Disclosure required.* The creditor must disclose the finance charge as a dollar amount, using the term "finance charge," and must include a brief description similar to that in section 226.18(d). The creditor may, but need not, further modify the descriptor for variable-rate transactions with a phrase such as "which is subject to change." The finance charge must be shown on the disclosures only as a total amount; the elements of the finance charge must not be itemized in the segregated disclosures, although the regulation does not prohibit their itemization elsewhere.

18(d)(2) Other Credit

1. *Tolerance.* When a finance-charge error results in a misstatement of the amount financed, or some other dollar amount for which the regulation provides no specific tolerance, the misstated disclosure does not violate the act or the regulation if the finance-charge error is within the permissible tolerance under this paragraph.

18(e) Annual Percentage Rate

1. *Disclosure required.* The creditor must disclose the cost of the credit as an annual rate, using the term "annual percentage rate," plus a brief descriptive phrase comparable to that used in section 226.18(e). For variable-rate transactions, the descriptor may be further modified with a phrase such as "which is subject to change." Under section 226.17(a), the terms "annual percentage rate" and "finance charge" must be more conspicuous than the other required disclosures.

2. *Exception.* Footnote 42 provides an exception for certain transactions in which no annual percentage rate disclosure is required.

18(f) Variable Rate

1. *Coverage.* The requirements of section 226.18(f) apply to all transactions in which the terms of the legal obligation allow the creditor to increase the rate originally disclosed to the consumer. It includes not only increases in the interest rate but also increases in other components, such as the rate of required credit life insurance. The provisions, however, do not apply to increases resulting from delinquency (including late payment), default, assumption, acceleration or transfer of the collateral. Section 226.18(f)(1) applies to variable-rate transactions that are not secured by the consumer's principal dwelling and to those that are secured by the principal dwelling but have a term of one year or less. Section 226.18(f)(2) applies to variable-rate transactions that are secured by the consumer's principal dwelling and have a term greater than one year. Moreover, transactions subject to section 226.18(f)(2) are subject to the special early-disclosure requirements of section 226.19(b). (However, "shared-equity" or "shared-appreciation" mortgages are subject to the disclosure requirements of section 226.18(f)(1) and not to the requirements of sections 226.18(f)(2) and 226.19(b) regardless of the general coverage of those sections.) Creditors are permitted under footnote 43 to substitute in any variable-rate transaction the

disclosures required under section 226.19(b) for those disclosures ordinarily required under section 226.18(f)(1). Creditors who provide variable-rate disclosures under section 226.19(b) must comply with all of the requirements of that section, including the timing of disclosures, and must also provide the disclosures required under section 226.18(f)(2). Creditors utilizing footnote 43 may, but need not, also provide disclosures pursuant to section 226.20(c). (Substitution of disclosures under section 226.18(f)(1) in transactions subject to section 226.19(b) is not permitted under the footnote.)

Paragraph 18(f)(1)

1. *Terms used in disclosure.* In describing the variable-rate feature, the creditor need not use any prescribed terminology. For example, limitations and hypothetical examples may be described in terms of interest rates rather than annual percentage rates. The model forms in appendix H provide examples of ways in which the variable-rate disclosures may be made.

Paragraph 18(f)(1)(i)

1. *Circumstances.* The circumstances under which the rate may increase include identification of any index to which the rate is tied, as well as any conditions or events on which the increase is contingent.

- When no specific index is used, any identifiable factors used to determine whether to increase the rate must be disclosed.
- When the increase in the rate is purely discretionary, the fact that any increase is within the creditor's discretion must be disclosed.
- When the index is internally defined (for example, by that creditor's prime rate), the creditor may comply with this requirement by either a brief description of that index or a statement that any increase is in the discretion of the creditor. An externally defined index, however, must be identified.

2. *Conversion feature.* In variable-rate transactions with an option permitting consumers to convert to a fixed-rate transaction, the conversion option is a variable-rate feature that must be disclosed. In making disclosures under section 226.18(f)(1), creditors should disclose the fact that the rate may increase upon conversion; identify the index or formula used to set the fixed rate; and state any limitations on and effects of an increase resulting from conversion that differ from other variable-rate features. Because section 226.18 (f)(1)(iv) requires only one hypothetical example (such as an example of the effect on payments resulting from changes in the index), a second hypothetical example need not be given.

Paragraph 18(f)(1)(ii)

1. *Limitations.* This includes any maximum imposed on the amount of an increase in the rate at any time, as well as any maximum on the total increase over the life of the transaction. When there are no limitations, the creditor may, but need not, disclose that fact. Limitations do not include legal limits in the nature of usury or rate ceilings under state or federal statutes or regulations. (See section 226.30 for the rule requiring that a maximum interest rate be included in certain variable-rate transactions.)

Paragraph 18(f)(1)(iii)

1. *Effects.* Disclosure of the effect of an increase refers to an increase in the number or amount of payments or an increase in the final payment. In addition, the creditor may make a brief reference to negative amortization that may result from a rate increase. (See the commentary to section 226.17(a)(1) regarding directly related information.) If the effect cannot be determined, the creditor must provide a statement of the possible effects. For example, if the exercise of the variable-rate feature may result in either more or larger payments, both possibilities must be noted.

Paragraph 18(f)(1)(iv)

1. *Hypothetical example.* The example may, at the creditor's option, appear apart from the other disclosures. The creditor may provide either a standard example that illustrates the terms and conditions of that type of credit offered by that creditor or an example that directly reflects the terms and conditions of the

particular transaction. In transactions with more than one variable-rate feature, only one hypothetical example need be provided. (See the commentary to section 226.17(a)(1) regarding disclosure of more than one hypothetical example as directly related information.)

2. *Hypothetical example not required.* The creditor need not provide a hypothetical example in the following transactions with a variable-rate feature:

- Demand obligations with no alternate maturity date
- Interim student credit extensions
- Multiple-advance construction loans disclosed pursuant to appendix D, part I

Paragraph 18(f)(2)

1. *Disclosure required.* In variable-rate transactions that have a term greater than one year and are secured by the consumer's principal dwelling, the creditor must give special early disclosures under section 226.19(b) in addition to the later disclosures required under section 226.18(f)(2). The disclosures under section 226.18(f)(2) must state that the transaction has a variable-rate feature and that variable-rate disclosures have been provided earlier. (See the commentary to section 226.17(a)(1) regarding the disclosure of certain directly related information in addition to the variable-rate disclosures required under section 226.18(f)(2).)

18(g) Payment Schedule

1. *Amounts included in repayment schedule.* The repayment schedule should reflect all components of the finance charge, not merely the portion attributable to interest. A prepaid finance charge, however, should not be shown in the repayment schedule as a separate payment. The payments may include amounts beyond the amount financed and finance charge. For example, the disclosed payments may, at the creditor's option, reflect certain insurance premiums where the premiums are not part of either the amount financed or the finance charge, as well as real estate escrow amounts such as taxes added to the payment in mortgage transactions.

2. *Deferred downpayments.* As discussed in the commentary to section 226.2(a)(18), deferred downpayments or pickup payments that meet the conditions set forth in the definition of downpayment may be treated as part of the downpayment. Even if treated as a downpayment, that amount may nevertheless be disclosed as part of the payment schedule, at the creditor's option.

3. *Total number of payments.* In disclosing the number of payments for transactions with more than one payment level, creditors may but need not disclose as a single figure the total number of payments for all levels. For example, in a transaction calling for 108 payments of $350, 240 payments of $335, and 12 payments of $330, the creditor need not state that there will be a total of 360 payments.

Paragraph 18(g)(1)

1. *Demand obligations.* In demand obligations with no alternate maturity date, the creditor has the option of disclosing only the due dates or periods of scheduled interest payments in the first year (for example, "interest payable quarterly" or "interest due the first of each month"). The amounts of the interest payments need not be shown.

Paragraph 18(g)(2)

1. *Abbreviated disclosure.* The creditor may disclose an abbreviated payment schedule when the amount of each regularly scheduled payment (other than the first or last payment) includes an equal amount to be applied on principal and a finance charge computed by application of a rate to the decreasing unpaid balance. This option is also available when mortgage-guarantee insurance premiums, paid either monthly or annually, cause variations in the amount of the scheduled payments, reflecting the continual decrease or increase in the premium due. In addition, in transactions where payments vary because interest and principal are paid at different intervals, the two series of payments may be disclosed separately and the abbreviated payment schedule may be used for the interest payments. For example, in transactions with fixed quarterly principal payments and monthly interest pay-

ments based on the outstanding principal balance, the amount of the interest payments will change quarterly as principal declines. In such cases the creditor may treat the interest and principal payments as two separate series of payments, separately disclosing the number, amount, and due dates of principal payments, and, using the abbreviated payment schedule, the number, amount, and due dates of interest payments. This option may be used when interest and principal are scheduled to be paid on the same date of the month as well as on different dates of the month. The creditor using this alternative must disclose the dollar amount of the highest and lowest payments and make reference to the variation in payments.

2. *Combined payment-schedule disclosures.* Creditors may combine the option in this paragraph with the general payment-schedule requirements in transactions where only a portion of the payment schedule meets the conditions of section 226.18(g)(2). For example, in a graduated-payment mortgage where payments rise sharply for five years and then decline over the next 25 years because of decreasing mortgage insurance premiums, the first five years would be disclosed under the general rule in section 226.18(g) and the next 25 years according to the abbreviated schedule in section 226.18(g)(2).

3. *Effect on other disclosures.* Section 226.18(g)(2) applies only to the payment schedule disclosure. The actual amounts of payments must be taken into account in calculating and disclosing the finance charge and the annual percentage rate.

18(h) Total of Payments

1. *Disclosure required.* The total of payments must be disclosed using that term, along with a descriptive phrase similar to the one in the regulation. The descriptive explanation may be revised to reflect a variable-rate feature with a brief phrase such as "based on the current annual percentage rate which may change."

2. *Calculation of total of payments.* The total of payments is the sum of the payments disclosed under section 226.18(g). For example, if the creditor disclosed a deferred portion of the downpayment as part of the payment schedule, that payment must be reflected in the total disclosed under this paragraph.

3. *Exception.* Footnote 44 permits creditors to omit disclosure of the total of payments in single-payment transactions. This exception does not apply to a transaction calling for a single payment of principal combined with periodic payments of interest.

4. *Demand obligations.* In demand obligations with no alternate maturity date, the creditor may omit disclosure of payment amounts under section 226.18(g)(1). In those transactions, the creditor need not disclose the total of payments.

18(i) Demand Feature

1. *Disclosure requirements.* The disclosure requirements of this provision apply not only to transactions payable on demand from the outset, but also to transactions that are not payable on demand at the time of consummation but convert to a demand status after a stated period. In demand obligations in which the disclosures are based on an assumed maturity of one year under section 226.17(c)(5), that fact must also be stated. Appendix H contains model clauses that may be used in making this disclosure.

2. *Covered demand features.* The type of demand feature triggering the disclosures required by section 226.18(i) includes only those demand features contemplated by the parties as part of the legal obligation. For example, this provision does not apply to transactions that convert to a demand status as a result of the consumer's default. A due-on-sale clause is not considered a demand feature. A creditor may, but need not, treat its contractual right to demand payment of a loan made to its executive officers as a demand feature to the extent that the contractual right is required by Regulation O (12 CFR 215.5) or other federal law.

3. *Relationship to payment schedule disclosures.* As provided in section 226.18(g)(1), in demand obligations with no alternate maturity date, the creditor need only disclose the due dates or payment periods of any scheduled

interest payments for the first year. If the demand obligation states an alternate maturity, however, the disclosed payment schedule must reflect that stated term; the special rule in section 226.18(g)(1) is not available.

18(j) Total Sale Price

1. *Disclosure required.* In a credit sale transaction, the "total sale price" must be disclosed using that term, along with a descriptive explanation similar to the one in the regulation. For variable-rate transactions, the descriptive phrase may, at the creditor's option, be modified to reflect the variable-rate feature. For example, the descriptor may read: "The total cost of your purchase on credit, which is subject to change, including your downpayment of . . . ." The reference to a downpayment may be eliminated in transactions calling for no downpayment.

2. *Calculation of total sale price.* The figure to be disclosed is the sum of the cash price, other charges added under section 226.18(b)(2), and the finance charge disclosed under section 226.18(d).

18(k) Prepayment

1. *Disclosure required.* The creditor must give a definitive statement of whether or not a penalty will be imposed or a rebate will be given.

- The fact that no penalty will be imposed may not simply be inferred from the absence of a penalty disclosure; the creditor must indicate that prepayment will not result in a penalty.
- If a penalty or refund is possible for one type of prepayment, even though not for all, a positive disclosure is required. This applies to any type of prepayment, whether voluntary or involuntary as in the case of prepayments resulting from acceleration.
- Any difference in rebate or penalty policy, depending on whether prepayment is voluntary or not, must not be disclosed with the segregated disclosures.

2. *Rebate-penalty disclosure.* A single transaction may involve both a precomputed finance charge and a finance charge computed by application of a rate to the unpaid balance (for example, mortgages with mortgage-guarantee insurance). In these cases, disclosures about both prepayment rebates and penalties are required. Sample form H-15 in appendix H illustrates a mortgage transaction in which both rebate and penalty disclosures are necessary.

3. *Prepaid finance charge.* The existence of a prepaid finance charge in a transaction does not, by itself, require a disclosure under section 226.18(k). A prepaid finance charge is not considered a penalty under section 226.18(k)(1), nor does it require a disclosure under section 226.18(k)(2). At its option, however, a creditor may consider a prepaid finance charge to be under section 226.18(k)(2). If a disclosure is made under section 226.18(k)(2) with respect to a prepaid finance charge or other finance charge, the creditor may further identify that finance charge. For example, the disclosure may state that the borrower "will not be entitled to a refund of the prepaid finance charge" or some other term that describes the finance charge.

Paragraph 18(k)(1)

1. *Penalty.* This applies only to those transactions in which the interest calculation takes account of all scheduled reductions in principal, as well as transactions in which interest calculations are made daily. The term "penalty" as used here encompasses only those charges that are assessed strictly because of the prepayment in full of a simple-interest obligation, as an addition to all other amounts. Items which are penalties include, for example:

- Interest charges for any period after prepayment in full is made. (See the commentary to section 226.17(a)(1) regarding disclosure of interest charges assessed for periods after prepayment in full as directly related information.)
- A minimum finance charge in a simple-interest transaction. (See the commentary to section 226.17(a)(1) regarding the disclosure of a minimum finance charge as directly related information.)

Items which are not penalties include, for example:

- Loan-guarantee fees
- Interim interest on a student loan

Paragraph 18(k)(2)

1. *Rebate of finance charge.* This applies to any finance charges that do not take account of each reduction in the principal balance of an obligation. This category includes, for example:

- Precomputed finance charges such as add-on charges
- Charges that take account of some but not all reductions in principal, such as mortgage guarantee insurance assessed on the basis of an annual declining balance, when the principal is reduced on a monthly basis

No description of the method of computing earned or unearned finance charges is required or permitted as part of the segregated disclosures under this section.

18(*l*) Late Payment

1. *Definition.* This paragraph requires a disclosure only if charges are added to individual delinquent installments by a creditor who otherwise considers the transaction ongoing on its original terms. Late payment charges do not include:

- The right of acceleration
- Fees imposed for actual collection costs, such as repossession charges or attorney's fees
- Deferral and extension charges
- The continued accrual of simple interest at the contract rate after the payment due date. However, an increase in the interest rate is a late payment charge to the extent of the increase.

2. *Content of disclosure.* Many state laws authorize the calculation of late charges on the basis of either a percentage or a specified dollar amount and permit imposition of the lesser or greater of the two charges. The disclosure made under section 226.18(*l*) may reflect this alternative. For example, stating that the charge in the event of a late payment is 5 percent of the late amount, not to exceed $5.00, is sufficient. Many creditors also permit a grace period during which no late charge will be assessed; this fact may be disclosed as directly related information. (See the commentary to section 226.17(a).)

18(m) Security Interest

1. *Purchase-money transactions.* When the collateral is the item purchased as part of, or with the proceeds of, the credit transaction, section 226.18(m) requires only a general identification such as "the property purchased in this transaction." However, the creditor may identify the property by item or type instead of identifying it more generally with a phrase such as "the property purchased in this transaction." For example, a creditor may identify collateral as "a motor vehicle," or as "the property purchased in this transaction." Any transaction in which the credit is being used to purchase the collateral is considered a purchase-money transaction and the abbreviated property identification may be used, whether the obligation is treated as a loan or a credit sale.

2. *Non-purchase-money transactions.* In nonpurchase-money transactions, the property subject to the security interest must be identified by item or type. This disclosure is satisfied by a general disclosure of the category of property subject to the security interest, such as "motor vehicles," "securities," "certain household items," or "household goods." (Creditors should be aware, however, that the federal credit practices rules, as well as some state laws, prohibit certain security interests in household goods.) At the creditor's option, however, a more precise identification of the property or goods may be provided.

3. *Mixed collateral.* In some transactions in which the credit is used to purchase the collateral, the creditor may also take other property of the consumer as security. In those cases, a combined disclosure must be provided, consisting of an identification of the purchase-money collateral consistent with comment 18(m)-1 and a specific identification of the other collateral consistent with comment 18(m)-2.

4. *After-acquired property.* An after-acquired property clause is not a security interest to be disclosed under section 226.18(m).

5. *Spreader clause.* The fact that collateral for preexisting credit with the institution is being used to secure the present obligation constitutes a security interest and must be disclosed. (Such security interests may be known as "spreader" or "dragnet" clauses, or as "cross-collateralization" clauses.) A specific identification of that collateral is unnecessary but a reminder of the interest arising from the prior indebtedness is required. The disclosure may be made by using language such as "collateral securing other loans with us may also secure this loan." At the creditor's option, a more specific description of the property involved may be given.

6. *Terms used in disclosure.* No specified terminology is required in disclosing a security interest. Although the disclosure may, at the creditor's option, use the term "security interest," the creditor may designate its interest by using, for example, "pledge," "lien," or "mortgage."

7. *Collateral from third party.* In certain transactions, the consumer's obligation may be secured by collateral belonging to a third party. For example, a loan to a student may be secured by an interest in the property of the student's parents. In such cases, the security interest is taken in connection with the transaction and must be disclosed, even though the property encumbered is owned by someone other than the consumer.

18(n) Insurance and Debt Cancellation

1. *Location.* This disclosure may, at the creditor's option, appear apart from the other disclosures. It may appear with any other information, including the amount-financed itemization, any information prescribed by state law, or other supplementary material. When this information is disclosed with the other segregated disclosures, however, no additional explanatory material may be included.

2. *Debt cancellation.* Creditors may use the model credit-insurance disclosures only if the debt-cancellation coverage constitutes insurance under state law. Otherwise, they may provide a parallel disclosure that refers to debt-cancellation coverage.

18(o) Certain Security Interest Charges

1. *Format.* No special format is required f these disclosures; under section 226.4(e), tax and fees paid to government officials wi respect to a security interest may be aggr gated, or may be broken down by individu charge. For example, the disclosure could labelled "filing fees and taxes," and all fun disbursed for such purposes may be aggr gated in a single disclosure. This disclosu may appear, at the creditor's option, apa from the other required disclosures. The incl sion of this information on a statement r quired under the Real Estate Settlement Proc dures Act is sufficient disclosure for purpos of Truth in Lending.

18(p) Contract Reference

1. *Content.* Creditors may substitute, for t phrase "appropriate contract document," a r erence to specific transaction documents which the additional information is four such as "promissory note" or "retail insta ment sale contract." A creditor may, at option, delete inapplicable items in the cc tract reference, as for example when the cc tract documents contain no information garding the right of acceleration.

18(q) Assumption Policy

1. *Policy statement.* In many mortgages, creditor cannot determine, at the time disc sure must be made, whether a loan may assumable at a future date on its origi terms. For example, the assumption clau commonly used in mortgages sold to the F eral National Mortgage Association and Federal Home Loan Mortgage Corporati conditions an assumption on a variety of f tors such as the creditworthiness of the sub quent borrower, the potential for impairm of the lender's security, and execution of assumption agreement by the subsequent b rower. In cases where uncertainty exists as the future assumability of a mortgage, the c closure under section 226.18(q) should refl that fact. In making disclosures in such cas the creditor may use phrases such as "subj to conditions," "under certain circumstance or "depending on future conditions." T

creditor may provide a brief reference to more specific criteria such as a due-on-sale clause, although a complete explanation of all conditions is not appropriate. For example, the disclosure may state, "Someone buying your home may be allowed to assume the mortgage on its original terms, subject to certain conditions, such as payment of an assumption fee." See comment 17(a)(1)-5 for an example of a reference to a due-on-sale clause.

2. *Original terms.* The phrase "original terms" for purposes of section 226.18(q) does not preclude the imposition of an assumption fee, but a modification of the basic credit agreement, such as a change in the contract interest rate, represents different terms.

18(r) Required Deposit

1. *Disclosure required.* The creditor must inform the consumer of the existence of a required deposit. (Appendix H provides a model clause that may be used in making that disclosure.) Footnote 45 describes three types of deposits that need not be considered required deposits. Use of the phrase "need not" permits creditors to include the disclosure even in cases where there is doubt as to whether the deposit constitutes a required deposit.

2. *Pledged-account mortgages.* In these transactions, a consumer pledges as collateral funds that the consumer deposits in an account held by the creditor. The creditor withdraws sums from that account to supplement the consumer's periodic payments. Creditors may treat these pledged accounts as required deposits or they may treat them as consumer buydowns in accordance with the commentary to section 226.17(c)(1).

3. *Escrow accounts.* The escrow exception in footnote 45 applies, for example, to accounts for such items as maintenance fees, repairs, or improvements, whether in a realty or a nonrealty transaction. (See the commentary to section 226.17(c)(1) regarding the use of escrow accounts in consumer buydown transactions.)

4. *Interest-bearing accounts.* When a deposit earns at least 5 percent interest per year, no disclosure is required under section 226.18 (r). This exception applies whether the deposit is held by the creditor or by a third party.

5. *Morris Plan transactions.* A deposit under a Morris Plan, in which a deposit account is created for the sole purpose of accumulating payments and this is applied to satisfy entirely the consumer's obligation in the transaction, is not a required deposit.

6. *Examples of amounts excluded.* The following are among the types of deposits that need not be treated as required deposits:

- Requirement that a borrower be a customer or a member even if that involves a fee or a minimum balance
- Required property insurance escrow on a mobile home transaction
- Refund of interest when the obligation is paid in full
- Deposits that are immediately available to the consumer
- Funds deposited with the creditor to be disbursed (for example, for construction) before the loan proceeds are advanced
- Escrow of condominium fees
- Escrow of loan proceeds to be released when the repairs are completed

References

Statute: § 128, the Garn–St Germain Depository Institutions Act of 1982 (Pub. L. 97-320) and the Real Estate Settlement Procedures Act (12 USC 2602)
Other sections: §§ 226.2, 226.17, and appendix H
Other regulations: 12 CFR 545.6-2(a) and 12 CFR 29
Previous regulation: §§ 226.4 and 226.8
1981 changes: Five of the required disclosures must be explained to the consumer in a manner similar to the descriptive phrases shown in the regulation. A written itemization of the amount financed need not be provided unless the consumer requests it. The finance charge must be provided in all transactions, including real estate transactions, but must be shown only as a total amount. The disclosed finance charge is considered accurate if it is within a specified range.

The variable-rate hypothetical is required in all variable-rate transactions and may be either

general or transaction-specific. The penalty and rebate disclosures in the event of prepayment have been modified and combined. The requirement of an explanation of how the rebates or penalties are computed has been eliminated. The late-payment disclosure has also been narrowed to include only charges imposed before maturity for late payments.

The information required in the security interest disclosure has been decreased by the deletion of the type of security interest and a reduction in the property description requirement. The disclosure of the required deposit is limited to a statement that the annual percentage rate does not reflect the required deposit; the presence of a required deposit has no effect on the annual percentage rate.

Two disclosure requirements have been added: a reference to the contract documents for additional information and, in a residential mortgage transaction, a statement of the creditor's assumption policy.

SECTION 226.19—Certain Residential Mortgage Transactions

19(a)(1) Time of Disclosure

1. *Coverage.* This section requires early disclosure of credit terms in residential mortgage transactions that are also subject to the Real Estate Settlement Procedures Act (RESPA) and its implementing Regulation X, administered by the Department of Housing and Urban Development (HUD). To be covered by this section, a transaction must be both a residential mortgage transaction under section 226.2(a) and a federally related mortgage loan under RESPA. "Federally related mortgage loan" is defined under RESPA (12 USC 2602) and Regulation X (24 CFR 3500.5(b)), and is subject to any interpretations by HUD.

2. *Timing and use of estimates.* Truth in Lending disclosures must be given (a) before consummation or (b) within three business days after the creditor receives the consumer's written application, whichever is earlier. The three-day period for disclosing credit terms coincides with the time period within which creditors subject to RESPA must provide good faith estimates of settlement costs. If the creditor does not know the precise credit terms, the creditor must base the disclosures on the best information reasonably available and indicate that the disclosures are estimates under section 226.17(c)(2). If many of the disclosures are estimates, the creditor may include a statement to that effect (such as "all numerical disclosures except the late-payment disclosure are estimates") instead of separately labelling each estimate. In the alternative, the creditor may label as an estimate only the items primarily affected by unknown information. (See the commentary to section 226.17(c)(2).) The creditor may provide explanatory material concerning the estimates and the contingencies that may affect the actual terms, in accordance with the commentary to section 226.17(a)(1).)

3. *Written application.* Creditors may rely on RESPA and Regulation X (including any interpretations issued by HUD) in deciding whether a "written application" has been received. In general, Regulation X requires disclosures "to every person from whom the Lender receives or for whom it prepares a written application on an application form or forms normally used by the Lender for a Federally Related Mortgage Loan" (24 CFR 3500.6(a)). An application is received when it reaches the creditor in any of the ways applications are normally transmitted—by mail, hand delivery, or through an intermediary agent or broker. (See comment 19(b)-3 for guidance in determining whether or not the transaction involves an intermediary agent or broker.) If an application reaches the creditor through an intermediary agent or broker, the application is received when it reaches the creditor, rather than when it reaches the agent or broker.

4. *Exceptions.* The creditor may determine within the three-day period that the application will not or cannot be approved on the terms requested, as, for example, when a consumer applies for a type or amount of credit that the creditor does not offer, or the consumer's application cannot be approved for some other reason. In that case, the creditor need not make the disclosures under this section. If the creditor fails to provide early disclosures and the transaction is later consum

mated on the original terms, the creditor will be in violation of this provision. If, however, the consumer amends the application because of the creditor's unwillingness to approve it on its original terms, no violation occurs for not providing disclosures based on the original terms. But the amended application is a new application subject to this section.

5. *Itemization of amount financed.* In many residential mortgage transactions, the itemization of the amount financed required by section 226.18(c) will contain items, such as origination fees or points, that also must be disclosed as part of the good faith estimates of settlement costs required under RESPA. Creditors furnishing the RESPA good faith estimates need not give consumers any itemization of the amount financed, either with the disclosures provided within three days after application or with the disclosures given at consummation or settlement.

19(a)(2) Redisclosure Required

1. *Conditions for redisclosure.* Creditors must make new disclosures if the annual percentage rate at consummation differs from the estimate originally disclosed by more than ⅛ of 1 percentage point in regular transactions or ¼ of 1 percentage point in irregular transactions, as defined in footnote 46 of section 226.22(a)(3). The creditor must also redisclose if a variable rate feature is added to the credit terms after the original disclosures have been made. The creditor has the option of redisclosing information under other circumstances, if it wishes to do so.

2. *Content of new disclosures.* If redisclosure is required, the creditor may provide a complete set of new disclosures, or may redisclose only the terms that vary from those originally disclosed. If the creditor chooses to provide a complete set of new disclosures, the creditor may but need not highlight the new terms, provided that the disclosures comply with the format requirements of section 226.17(a). If the creditor chooses to disclose only the new terms, all the new terms must be disclosed. For example, a different annual percentage rate will almost always produce a different finance charge, and often a new schedule of payments; all of these changes would have to be disclosed. If, in addition, unrelated terms such as the amount financed or prepayment penalty vary from those originally disclosed, the accurate terms must be disclosed. However, no new disclosures are required if the *only* inaccuracies involve estimates other than the annual percentage rate, and no variable rate feature has been added.

3. *Timing.* Redisclosures, when necessary, must be given no later than "consummation or settlement." "Consummation" is defined in section 226.2(a). "Date of settlement" is defined in Regulation X (24 CFR 3500.2(a)) and is subject to any interpretations issued under RESPA and Regulation X.

4. *Basis of disclosures.* In some cases, a creditor may delay redisclosure until settlement, which may be at a time later than consummation. If a creditor chooses to redisclose at settlement, disclosures may be based on the terms in effect at settlement, rather than at consummation. For example, in a variable-rate transaction, a creditor may choose to base disclosures on the terms in effect at settlement despite the general rule in the commentary to section 18(f) that variable-rate disclosures should be based on the terms in effect at consummation.

19(b) Certain Variable-Rate Transactions

1. *Coverage.* Section 226.19(b) applies to all closed-end variable-rate transactions that are secured by the consumer's principal dwelling and have a term greater than one year. The requirements of this section apply not only to transactions financing the initial acquisition of the consumer's principal dwelling, but also to any other closed-end variable-rate transaction secured by the principal dwelling. Closed-end variable-rate transactions that are not secured by the principal dwelling, or are secured by the principal dwelling but have a term of one year or less, are subject to the disclosure requirements of section 226.18(f)(1) rather than those of section 226.19(b). (Furthermore, "shared-equity" or "shared-appreciation" mortgages are subject to the disclosure requirements of section 226.18(f)(1) rather than those of section 226.19(b) regardless of the

general coverage of those sections.) For purposes of this section, the term of a variable-rate demand loan is determined in accordance with the commentary to section 226.17(c)(5). In determining whether a construction loan that may be permanently financed by the same creditor is covered under this section, the creditor may treat the construction and the permanent phases as separate transactions with distinct terms to maturity or as a single combined transaction. For purposes of the disclosures required under section 226.18, the creditor may nevertheless treat the two phases either as separate transactions or as a single combined transaction in accordance with section 226.17(c)(6). Finally, in any assumption of a variable-rate transaction secured by the consumer's principal dwelling with a term greater than one year, disclosures need not be provided under sections 226.18(f)(2)(ii) or 226.19(b).

2. *Timing.* A creditor must give the disclosures required under this section at the time an application form is provided or before the consumer pays a nonrefundable fee, whichever is earlier. In cases where a creditor receives a written application through an intermediary agent or broker, however, footnote 45b provides a substitute timing rule requiring the creditor to deliver the disclosures or place them in the mail not later than three business days after the creditor receives the consumer's written application. (See comment 19(b)-3 for guidance in determining whether or not the transaction involves an intermediary agent or broker.) This three-day rule also applies where the creditor takes an application over the telephone. If, however, the consumer merely requests an application over the telephone, the creditor must include the early disclosures required under this section with the application that is sent to the consumer. In cases where the creditor solicits applications through the mail, the creditor must also send the disclosures required under this section if an application form is included with the solicitation. In cases where an open-end credit account will convert to a closed-end transaction subject to this section under a written agreement with the consumer, disclosures under this section may be given at the time of conversion. (See the commentary to section 226.20(a) for information on the timing requirements for 226.19(b)(2) disclosures when a variable-rate feature is later added to a transaction.)

3. *Intermediary agent or broker.* In certain transactions involving an "intermediary agent or broker," a creditor may delay providing disclosures. A creditor may not delay providing disclosures in transactions involving either a legal agent (as determined by applicable law) or any other third party that is not an "intermediary agent or broker." In determining whether or not a transaction involves an "intermediary agent or broker" the following factors should be considered:

- The number of applications submitted by the broker to the creditor as compared to the total number of applications received by the creditor. The greater the percentage of total loan applications submitted by the broker in any given period of time, the less likely it is that the broker would be considered an "intermediary agent or broker" of the creditor during the next period.
- The number of applications submitted by the broker to the creditor as compared to the total number of applications received by the broker. (This factor is applicable only if the creditor has such information.) The greater the percentage of total loan applications received by the broker that is submitted to a creditor in any given period of time, the less likely it is that the broker would be considered an "intermediary agent or broker" of the creditor during the next period.
- The amount of work (such as document preparation) the creditor expects to be done by the broker on an application based on the creditor's prior dealings with the broker and on the creditor's requirements for accepting applications, taking into consideration the customary practice of brokers in a particular area. The more work that the creditor expects the broker to do on an application, in excess of what is usually expected of a broker in that area, the less likely it is that the broker would be considered an "intermediary agent or broker" of the creditor.

An example of an "intermediary agent or broker" is a broker who, customarily within a brief time after receiving an application, inquires about the credit terms of several creditors with whom the broker does business and submits the application to one of them. The broker is responsible for only a small percentage of the applications received by that creditor. During the time the broker has the application, it might request a credit report and an appraisal (or even prepare an entire loan package if customary in that particular area).

4. *Other variable-rate regulations.* Transactions in which the creditor is required to comply with and has complied with the disclosure requirements of the variable-rate regulations of other federal agencies are exempt from the requirements of section 226.19(b), by virtue of footnote 45a, and are exempt from the requirements of section 226.20(c), by virtue of footnote 45c. Those variable-rate regulations include the regulations issued by the Federal Home Loan Bank Board and those issued by the Department of Housing and Urban Development. The exception in footnotes 45a and 45c is also available to creditors that are required by state law to comply with the federal variable-rate regulations noted above and to creditors that are authorized by title VIII of the Depository Institutions Act of 1982 (12 USC 3801 et seq.) to make loans in accordance with those regulations. Creditors using this exception should comply with the timing requirements of those regulations rather than the timing requirements of Regulation Z in making the variable-rate disclosures.

5. *Examples of variable-rate transactions.* The following transactions, if they have a term greater than one year and are secured by the consumer's principal dwelling, constitute variable-rate transactions subject to the disclosure requirements of section 226.19(b).

- Renewable balloon-payment instruments where the creditor is both unconditionally obligated to renew the balloon-payment loan at the consumer's option (or is obligated to renew subject to conditions within the consumer's control) and has the option of increasing the interest rate at the time of renewal. (See comment 17(c)(1)-11 for a discussion of conditions within a consumer's control in connection with renewable balloon-payment loans.)
- Preferred-rate loans where the terms of the legal obligation provide that the initial underlying rate is fixed but will increase upon the occurrence of some event, such as an employee leaving the employ of the creditor, and the note reflects the preferred rate. The disclosures under section 226.19(b)(1) and 226.19(b)(2)(v), (viii), (ix), (x) and (xiii) are not applicable to such loans.
- "Price-level-adjusted mortgages" or other indexed mortgages that have a fixed rate of interest but provide for periodic adjustments to payments and the loan balance to reflect changes in an index measuring prices or inflation. The disclosures under section 226.19(b)(1) are not applicable to such loans, nor are the following provisions to the extent they relate to the determination of the interest rate by the addition of a margin, changes in the interest rate, or interest-rate discounts: Section 226.19 (b)(2)(i), (iii), (iv), (v), (vi), (vii), (viii), (ix), and (x). (See comments 20(c)-2 and 30-1 regarding the inapplicability of variable-rate adjustment notices and interest-rate limitations to price-level-adjusted or similar mortgages.)

Graduated-payment mortgages and step-rate transactions without a variable-rate feature are not considered variable-rate transactions.

Paragraph 19(b)(1)

1. *Substitutes.* Creditors who wish to use publications other than the *Consumer Handbook on Adjustable Rate Mortgages* must make a good faith determination that their brochures are suitable substitutes to the *Consumer Handbook.* A substitute is suitable if it is, at a minimum, comparable to the *Consumer Handbook* in substance and comprehensiveness. Creditors are permitted to provide more detailed information than is contained in the *Consumer Handbook.*

2. *Applicability.* The *Consumer Handbook* need not be given for variable-rate transactions subject to this section in which the un-

derlying interest rate is fixed. (See comment 19(b)-4 for an example of a variable-rate transaction where the underlying interest rate is fixed.)

Paragraph 19(b)(2)

1. *Disclosure for each variable-rate program.* A creditor must provide disclosures to the consumer that fully describe each of the creditor's variable-rate loan programs in which the consumer expresses an interest. If a program is made available only to certain customers of an institution, a creditor need not provide disclosures for that program to other consumers who express a general interest in a creditor's ARM programs. Disclosures must be given at the time an application form is provided or before the consumer pays a nonrefundable fee, whichever is earlier. If program disclosures cannot be provided because a consumer expresses an interest in individually negotiating loan terms that are not generally offered, disclosures reflecting those terms may be provided as soon as reasonably possible after the terms have been decided upon, but not later than the time a nonrefundable fee is paid. If a consumer who has received program disclosures subsequently expresses an interest in other available variable-rate programs subject to section 226.19(b)(2), or the creditor and consumer decide on a program for which the consumer has not received disclosures, the creditor must provide appropriate disclosures as soon as reasonably possible. The creditor, of course, is permitted to give the consumer information about additional programs subject to section 226.19(b) initially.

2. *Variable-rate loan program defined.* If the identification, the presence or absence, or the exact value of a loan feature must be disclosed under this section, variable-rate loans that differ as to such features constitute separate loan programs. For example, separate loan programs would exist based on differences in any of the following loan features:

- The index or other formula used to calculate interest rate adjustments
- The rules relating to changes in the index value, interest rate, payments, and loan balance
- The presence or absence of, and the amount of, rate or payment caps
- The presence of a demand feature
- The possibility of negative amortization
- The possibility of interest rate carryover
- The frequency of interest rate and payment adjustments
- The presence of a discount feature

In addition, if a loan feature must be taken into account in preparing the disclosures required by section 226.19(b)(2)(viii) and (x), variable-rate loans that differ as to that feature constitute separate programs under section 226.19(b)(2). If, however, a representative value may be given for a loan feature or the feature need not be disclosed under section 226.19(b)(2), variable-rate loans that differ as to such features do not constitute separate loan programs. For example, separate loan programs would not exist based on differences in the following loan features:

- The amount of a discount
- The amount of a margin

3. *Form of program disclosures.* A creditor may provide separate program disclosure forms for each ARM program it offers or a single disclosure form that describes multiple programs. A disclosure form may consist of more than one page. For example, a creditor may attach a separate page containing the historical payment example for a particular program. A disclosure form describing more than one program need not repeat information applicable to each program that is described. For example, a form describing multiple programs may disclose the information applicable to all of the programs in one place with the various program features (such as options permitting conversion to a fixed rate) disclosed separately. The form, however, must state if any program feature that is described is available only in conjunction with certain other program features. Both the separate- and multiple-program disclosures may illustrate more than one loan maturity or payment amortization—for example, by including multiple-payment and loan-balance columns in the historical payment example. Disclosures may be inserted or printed in the *Consumer Handbook* (or a

suitable substitute) as long as they are identified as the creditor's loan-program disclosures.

4. *As applicable.* The disclosures required by this section need only be made as applicable. Any disclosure not relevant to a particular transaction may be eliminated. For example, if the transaction does not contain a demand feature, the disclosure required under section 226.19(b)(2)(xi) need not be given. As used in this section, "payment" refers only to a payment based on the interest rate, loan balance, and loan term and does not refer to payment of other elements such as mortgage insurance premiums.

5. *Revisions.* A creditor must revise the disclosures required under this section once a year as soon as reasonably possible after the new index value becomes available. Revisions to the disclosures also are required when the loan program changes.

Paragraph 19(b)(2)(i)

1. *Change in interest rate, payment, or term.* A creditor must disclose the fact that the terms of the legal obligation permit the creditor, after consummation of the transaction, to increase (or decrease) the interest rate, payment, or term of the loan initially disclosed to the consumer. For example, the disclosures for a variable-rate program in which the interest rate and payment (but not loan term) can change might read, "Your interest rate and payment can change yearly." In transactions where the term of the loan may change due to rate fluctuations, the creditor must state that fact.

Paragraph 19(b)(2)(ii)

1. *Identification of index or formula.* If a creditor ties interest rate changes to a particular index, this fact must be disclosed, along with a source of information about the index. For example, if a creditor uses the weekly average yield on U.S. Treasury securities adjusted to a constant maturity as its index, the disclosure might read, "Your index is the weekly average yield on U.S. Treasury securities adjusted to a constant maturity of one year published weekly in the *Wall Street Journal.*" If no particular index is used, the creditor must briefly describe the formula used to calculate interest rate changes.

2. *Changes at creditor's discretion.* If interest rate changes are at the creditor's discretion, this fact must be disclosed. If an index is internally defined, such as by a creditor's prime rate, the creditor should either briefly describe that index or state that interest rate changes are at the creditor's discretion.

Paragraph 19(b)(2)(iii)

1. *Determination of interest rate and payment.* This provision requires an explanation of how the creditor will determine the consumer's interest rate and payment. In cases where a creditor bases its interest rate on a specific index and adjusts the index through the addition of a margin, for example, the disclosure might read, "Your interest rate is based on the index plus a margin, and your payment will be based on the interest rate, loan balance, and remaining loan term." In transactions where paying the periodic payments will not fully amortize the outstanding balance at the end of the loan term and where the final payment will equal the periodic payment plus the remaining unpaid balance, the creditor must disclose this fact. For example, the disclosure might read, "Your periodic payments will not fully amortize your loan and you will be required to make a single payment of the periodic payment plus the remaining unpaid balance at the end of the loan term." The creditor, however, need not reflect any irregular final payment in the historical example or in the disclosure of the initial and maximum rates and payments. If applicable, the creditor should also disclose that the rate and payment will be rounded.

Paragraph 19(b)(2)(iv)

1. *Current margin value and interest rate.* Because the disclosures can be prepared in advance, the interest rate and margin may be several months old when the disclosures are delivered. A statement, therefore, is required alerting consumers to the fact that they should inquire about the current margin value applied to the index and the current interest rate. For

example, the disclosure might state, "Ask us for our current interest rate and margin."

Paragraph 19(b)(2)(v)

1. *Discounted and premium interest rate.* In some variable-rate transactions, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. Typically, this initial rate charged to consumers is lower than the rate would be if it were calculated using the index or formula. However, in some cases the initial rate may be higher. If the initial interest rate will be a discount or a premium rate, creditors must alert the consumer to this fact. For example, if a creditor discounted a consumer's initial rate, the disclosure might state, "Your initial interest rate is not based on the index used to make later adjustments." (See the commentary to section 226.17(c)(1) for a further discussion of discounted and premium variable-rate transactions). In addition, the disclosure must suggest that consumers inquire about the amount that the program is currently discounted. For example, the disclosure might state, "Ask us for the amount our adjustable-rate mortgages are currently discounted." In a transaction with a consumer buydown or with a third-party buydown that will be incorporated in the legal obligation, the creditor should disclose the program as a discounted variable-rate transaction, but need not disclose additional information regarding the buydown in its program disclosures. (See the commentary to section 226.19(b)(2)(viii) for a discussion of how to reflect the discount or premium in the historical example.)

Paragraph 19(b)(2)(vi)

1. *Frequency.* The frequency of interest rate and payment adjustments must be disclosed. If interest rate changes will be imposed more frequently or at different intervals than payment changes, a creditor must disclose the frequency and timing of both types of changes. For example, in a variable-rate transaction where interest rate changes are made monthly, but payment changes occur on an annual basis, this fact must be disclosed. In certain ARM transactions, the interval between loan closing and the initial adjustment is not known and may be different from the regular interval for adjustments. In such cases, the creditor may disclose the initial adjustment period as a range of the minimum and maximum amount of time from consummation or closing. For example, the creditor might state: "The first adjustment to your interest rate and payment will occur no sooner than 6 months and no later than 18 months after closing. Subsequent adjustments may occur once each year after the first adjustment." (See comments 19(b)(2)(viii)-7 and 19(b)(2)(x)-4 for guidance on other disclosures when this alternative disclosure rule is used.)

Paragraph 19(b)(2)(vii)

1. *Rate and payment caps.* The creditor must disclose limits on changes (increases or decreases) in the interest rate or payment. If an initial discount is not taken into account in applying overall or periodic rate limitations, that fact must be disclosed. If separate overall or periodic limitations apply to interest rate increases resulting from other events, such as the exercise of a fixed-rate conversion option or leaving the creditor's employ, those limitations must also be stated. Limitations do not include legal limits in the nature of usury or rate ceilings under state or federal statutes or regulations. (See section 226.30 for the rule requiring that a maximum interest rate be included in certain variable-rate transactions.) The creditor need not disclose each periodic or overall rate limitation that is currently available. As an alternative, the creditor may disclose the range of the lowest and highest periodic and overall rate limitations that may be applicable to the creditor's ARM transactions. For example, the creditor might state: "The limitation on increases to your interest rate at each adjustment will be set at an amount in the following range: between 1 and 2 percentage points at each adjustment. The limitation on increases to your interest rate over the term of the loan will be set at an amount in the following range: between 4 and 7 percentage points above the initial interest rate." A creditor using this alternative rule must include a statement in its program disclosures suggesting that the consumer ask about the overall rate limitations currently of-

fered for the creditor's ARM programs. (See comments 19(b)(2)(viii)-6 and 19(b)(2)(x)-3 for an explanation of the additional requirements for a creditor using this alternative rule for disclosure of periodic and overall rate limitations.)

2. *Negative amortization and interest-rate carryover.* A creditor must disclose, where applicable, the possibility of negative amortization. For example, the disclosure might state, "If any of your payments is not sufficient to cover the interest due, the difference will be added to your loan amount." Loans that provide for more than one way to trigger negative amortization are separate variable-rate programs requiring separate disclosures. (See the commentary to section 226.19(b)(2) for a discussion on the definition of a variable-rate loan program and the format for disclosure.) If a consumer is given the option to cap monthly payments that may result in negative amortization, the creditor must fully disclose the rules relating to the option, including the effects of exercising the option (such as negative amortization will occur and the principal loan balance will increase); however, the disclosure in section 226.19(b)(2)(viii) need not be provided.

3. *Conversion option.* If a loan program permits consumers to convert their variable-rate loans to fixed-rate loans, the creditor must disclose that the interest rate may increase if the consumer converts the loan to a fixed-rate loan. The creditor must also disclose the rules relating to the conversion feature, such as the period during which the loan may be converted, that fees may be charged at conversion, and how the fixed rate will be determined. The creditor should identify any index or other measure or formula used to determine the fixed rate and state any margin to be added. In disclosing the period during which the loan may be converted and the margin, the creditor may use information applicable to the conversion feature during the six months preceding preparation of the disclosures and state that the information is representative of conversion features recently offered by the creditor. The information may be used until the program disclosures are otherwise revised. Although the rules relating to the conversion option must be disclosed, the effect of exercising the option should not be reflected elsewhere in the disclosures, such as in the historical example or in the calculation of the initial and maximum interest rate and payments.

4. *Preferred-rate loans.* Section 226.19(b) applies to preferred-rate loans, where the rate will increase upon the occurrence of some event, such as an employee leaving the creditor's employ, whether or not the underlying rate is fixed or variable. In these transactions, the creditor must disclose the event that would allow the creditor to increase the rate such as that the rate may increase if the employee leaves the creditor's employ. The creditor must also disclose the rules relating to termination of the preferred rate, such as that fees may be charged when the rate is changed and how the new rate will be determined.

Paragraph 19(b)(2)(viii)

1. *Index movement.* This section requires a creditor to provide an historical example, based on a $10,000 loan amount originating in 1977, showing how interest rate changes implemented according to the terms of the loan program would have affected payments and the loan balance at the end of each year during a 15-year period. (In all cases, the creditor need only calculate the payments and loan balance for the term of the loan. For example, in a five-year loan, a creditor would show the payments and loan balance for the five-year term, from 1977 to 1981, with a zero loan balance reflected for 1981. For the remaining ten years, 1982–1991, the creditor need only show the remaining index values, margin, and interest rate and must continue to reflect all significant loan-program terms such as rate limitations affecting them.) Pursuant to this section, the creditor must provide a history of index values for the preceding 15 years. Initially, the disclosures would give the index values from 1977 to the present. Each year thereafter, the revised program disclosures should include an additional year's index value until 15 years of values are shown. If the values for an index have not been available for 15 years, a creditor need only go back as far as the values are available in

giving a history and payment example. In all cases, only one index value per year need be shown. Thus, in transactions where interest rate adjustments are implemented more frequently than once per year, a creditor may assume that the interest rate and payment resulting from the index value chosen will stay in effect for the entire year for purposes of calculating the loan balance as of the end of the year and for reflecting other loan program terms. In cases where interest rate changes are at the creditor's discretion (see the commentary to section 226.19(b)(2)(ii)), the creditor must provide a history of the rates imposed for the preceding 15 years, beginning with the rates in 1977. In giving this history, the creditor need only go back as far as the creditor's rates can reasonably be determined.

2. *Selection of index values.* The historical example must reflect the method by which index values are determined under the program. If a creditor uses an average of index values or any other index formula, the history given should reflect those values. The creditor should select one date or, when an average of single values is used as an index, one period and should base the example on index values measured as of that same date or period for each year shown in the history. A date or period at any time during the year may be selected, but the same date or period must be used for each year in the historical example. For example, a creditor could use values for the first business day in July or for the first week ending in July for each of the 15 years shown in the example.

3. *Selection of margin.* For purposes of the disclosure required under section 226.19 (b)(2)(viii), a creditor may select a representative margin that has been used during the six months preceding preparation of the disclosures, and should disclose that the margin is one that the creditor has used recently. The margin selected may be used until a creditor revises the disclosure form.

4. *Amount of discount or premium.* For purposes of the disclosure required under section 226.19(b)(2)(viii), a creditor may select a discount or premium (amount and term) that has been used during the six months preceding preparation of the disclosures, and should disclose that the discount or premium is one that the creditor has used recently. The discount or premium should be reflected in the historical example for as long as the discount or premium is in effect. A creditor may assume that a discount that would have been in effect for any part of a year was in effect for the full year for purposes of reflecting it in the historical example. For example, a 3-month discount may be treated as being in effect for the entire first year of the example; a 15-month discount may be treated as being in effect for the first two years of the example. In illustrating the effect of the discount or premium, creditors should adjust the value of the interest rate in the historical example, and should not adjust the margin or index values. For example, if during the six months preceding preparation of the disclosures the fully indexed rate would have been 10 percent but the first year's rate under the program was 8 percent, the creditor would discount the first interest rate in the historical example by 2 percentage points.

5. *Term of the loan.* In calculating the payments and loan balances in the historical example, a creditor need not base the disclosures on each term to maturity or payment amortization that it offers. Instead, disclosures for ARMs may be based upon terms to maturity or payment amortizations of 5, 15, and 30 years, as follows: ARMs with terms or amortizations from over 1 year to 10 years may be based on a 5-year term or amortization; ARMs with terms or amortizations from over 10 years to 20 years may be based on a 15-year term or amortization; and ARMs with terms or amortizations over 20 years may be based on a 30-year term or amortization. Thus, disclosures for ARMs offered with any term from over 1 year to 40 years may be based solely on terms of 5, 15, and 30 years. Of course, a creditor may always base the disclosures on the actual terms or amortizations offered. If the creditor bases the disclosures on 5-, 15-, or 30-year terms or payment amortizations as provided above, the term or payment amortization used in making the disclosure must be stated.

6. *Rate caps.* A creditor using the alternative

rule described in comment 19(b)(2)(vii)-1 for disclosure of rate limitations must base the historical example upon the highest periodic and overall rate limitations disclosed under section 226.19(b)(2)(vii). In addition, the creditor must state the limitations used in the historical example. (See comment 19(b)(2)(x)-3 for an explanation of the use of the highest rate limitation in other disclosures.)

7. *Frequency of adjustments.* In certain transactions, creditors may use the alternative rule described in comment 19(b)(2)(vi)-1 for disclosure of the frequency of rate and payment adjustments. In such cases, the creditor may assume for purposes of the historical example that the first adjustment occurred at the end of the first full year in which the adjustment could occur. For example, in an ARM in which the first adjustment may occur between 6 and 18 months after closing and annually thereafter, the creditor may assume that the first adjustment occurred at the end of the first year in the historical example. (See comment 19(b)(2)(x)-4 for an explanation of how to compute the maximum interest rate and payment when the initial adjustment period is not known.)

Paragraph 19(b)(2)(ix)

1. *Calculation of payments.* A creditor is required to include a statement on the disclosure form that explains how a consumer may calculate his or her actual monthly payments for a loan amount other than $10,000. The example should be based upon the most recent payment shown in the historical example. However, in transactions in which the latest payment shown in the historical example is not for the latest year of index values shown (such as in a five-year loan), a creditor may provide additional examples based on the initial and maximum payments disclosed under section 226.19(b)(2)(x). The creditor, however, is not required to calculate the consumer's payments. (See the model clauses in appendix H-4(C).)

Paragraph 19(b)(2)(x)

1. *Initial and maximum interest rate and payment.* The disclosure form must state the initial and maximum interest rates and payments for a $10,000 loan originated at the most recent interest rate (index value plus margin) shown in the historical example. In calculating the maximum payments under this paragraph, a creditor should assume that the interest rate increases as rapidly as possible under the loan program, and the maximum payment disclosed should reflect the amortization of the loan during this period. Thus, in a loan with 2 percentage point annual (and 5 percentage point overall) interest rate limitations or "caps," the maximum interest rate would be 5 percentage points higher than the most recent rate shown in the historical example. Moreover, the loan would not reach the maximum interest rate until the fourth year because of the 2 percentage point annual rate limitations, and the maximum payment disclosed would reflect the amortization of the loan during this period. If the loan program includes a discounted or premium initial interest rate, the most recent rate shown in the historical example should be adjusted by the amount of the discount or premium reflected elsewhere in the disclosure for purposes of the requirements of this paragraph. Furthermore, this disclosure should state the amount by which the most recent rate has been adjusted. (See the commentary to section 226.19(b)(2)(viii) regarding disclosure of the amount of a discount or premium.) The creditor may use an interest rate applicable to the program that is more recent than the latest rate shown in the historical example.

2. *Term of the loan.* In calculating the initial and maximum payments, the creditor need not base the disclosures on each term to maturity or payment amortization offered under the program. Instead, the creditor may follow the rules set out in comment 19(b)(2)(viii)-5. In calculating the initial and maximum payment, the terms to maturity or payment amortizations selected for the purpose of making disclosures under section 226.19(b)(2)(viii) must be used. In addition, creditors must state the term or payment amortization used in making the disclosures under this section.

3. *Rate caps.* A creditor using the alternative rule for disclosure of interest rate limitations

described in comment 19(b)(2)(vii)-1 must calculate the maximum interest rate and payments based upon the highest periodic and overall rate limitations disclosed under section 226.19(b)(2)(vii). In addition, the creditor must state the rate limitations used in calculating the maximum interest rate and payment. (See comment 19(b)(2)(viii)-6 for an explanation of the use of the highest rate limitation in other disclosures.)

4. *Frequency of adjustments.* In certain transactions, a creditor may use the alternative rule for disclosure of the frequency of rate and payment adjustments described in comment 19(b)(2)(vi)-1. In such cases, the creditor must base the calculations of the initial and maximum rates and payments upon the earliest possible first adjustment disclosed under section 226.19(b)(2)(vi). (See comment 19(b)(2)(viii)-7 for an explanation of how to disclose the historical example when the initial adjustment period is not known.)

Paragraph 19(b)(2)(xi)

1. *Demand feature.* If a variable-rate loan subject to section 226.19(b) requirements contains a demand feature, as discussed in the commentary to section 226.18(i), this fact must be disclosed. (Pursuant to section 226.18(i), creditors would also disclose the demand feature in the standard disclosures given later.)

Paragraph 19(b)(2)(xii)

1. *Adjustment notices.* A creditor must disclose to the consumer the type of information that will be contained in subsequent notices of adjustments and when such notices will be provided. (See the commentary to section 226.20(c) regarding notices of adjustments.) For example, the disclosure might state, "You will be notified at least 25, but no more than 120, days before the due date of a payment at a new level. This notice will contain information about the index and interest rates, payment amount, and loan balance." In transactions where there may be interest rate adjustments without accompanying payment adjustments in a year, the disclosure might read, "You will be notified once each year during which interest rate adjustments, but no payment adjustments, have been made to your loan. This notice will contain information about the index and interest rates, payment amount, and loan balance."

Paragraph 19(b)(2)(xiii)

1. *Multiple loan programs.* A creditor that offers multiple variable-rate loan programs is required to have disclosures for each variable-rate loan program subject to section 226.19(b)(2). Unless disclosures for all of its variable-rate programs are provided initially, the creditor must inform the consumer that other closed-end variable-rate programs exist and that disclosure forms are available for these additional loan programs. For example, the disclosure form might state, "Information on other adjustable-rate mortgage programs is available upon request."

References

Statute: § 128(b)(2) and the Real Estate Settlement Procedures Act (12 USC 2602)
Other sections: §§ 226.2, 226.17, and 226.22
Other regulations: Regulation X (24 CFR 3500.2(a), 3500.5(b), and 3500.6(a))
Previous regulation: None
1981 changes: This section implements section 128(b)(2), a new provision that requires early disclosure of credit terms in certain mortgage transactions.

SECTION 226.20—Subsequent Disclosure Requirements

20(a) Refinancings

1. *Definition.* A refinancing is a new transaction requiring a complete new set of disclosures. Whether a refinancing has occurred is determined by reference to whether the original obligation has been satisfied or extinguished and replaced by a new obligation, based on the parties' contract and applicable law. The refinancing may involve the consolidation of several existing obligations, disbursement of new money to the consumer or on the consumer's behalf, or the rescheduling of payments under an existing obligation. In

any form, the new obligation must completely replace the prior one.

- Changes in the terms of an existing obligation, such as the deferral of individual installments, will not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation.
- A substitution of agreements that meets the refinancing definition will require new disclosures, even if the substitution does not substantially alter the prior credit terms.

2. *Exceptions.* A transaction is subject to section 226.20(a) only if it meets the general definition of a refinancing. Section 226.20(a)(1) through (5) lists five events that are not treated as refinancings, even if they are accomplished by cancellation of the old obligation and substitution of a new one.

3. *Variable rate.*

i. If a variable-rate feature was properly disclosed under the regulation, a rate change in accord with those disclosures is not a refinancing. For example, no new disclosures are required when the variable-rate feature is invoked on a renewable balloon-payment mortgage that was previously disclosed as a variable-rate transaction.

ii. Even if it is not accomplished by the cancellation of the old obligation and substitution of a new one, a new transaction subject to new disclosures results if the creditor either:

A. Increases the rate based on a variable-rate feature that was not previously disclosed; or

B. Adds a variable-rate feature to the obligation. A creditor does not add a variable-rate feature by changing the index of a variable-rate transaction to a comparable index, whether the change replaces the existing index or substitutes an index for one that no longer exists.

iii. If either of the events in paragraph 20(a)(iii) ii.A. or ii.B. occurs in a transaction secured by a principal dwelling with a term longer than one year, the disclosures required under section 226.19(b) also must be given at that time.

4. *Unearned finance charge.* In a transaction involving precomputed finance charges, the creditor must include in the finance charge on the refinanced obligation any unearned portion of the original finance charge that is not rebated to the consumer or credited against the underlying obligation. For example, in a transaction with an add-on finance charge, a creditor advances new money to a consumer in a fashion that extinguishes the original obligation and replaces it with a new one. The creditor neither refunds the unearned finance charge on the original obligation to the consumer nor credits it to the remaining balance on the old obligation. Under these circumstances, the unearned finance charge must be included in the finance charge on the new obligation and reflected in the annual percentage rate disclosed on refinancing. Accrued but unpaid finance charges are included in the amount financed in the new obligation.

5. *Coverage.* Section 226.20(a) applies only to refinancings undertaken by the original creditor or a holder or servicer of the original obligation. A "refinancing" by any other person is a new transaction under the regulation, not a refinancing under this section.

Paragraph 20(a)(1)

1. *Renewal.* This exception applies both to obligations with a single payment of principal and interest and to obligations with periodic payments of interest and a final payment of principal. In determining whether a new obligation replacing an old one is a renewal of the original terms or a refinancing, the creditor may consider it a renewal even if:

- Accrued unpaid interest is added to the principal balance
- Changes are made in the terms of renewal resulting from the factors listed in section 226.17(c)(3)
- The principal at renewal is reduced by a curtailment of the obligation

Paragraph 20(a)(2)

1. *Annual-percentage-rate reduction.* A reduction in the annual percentage rate with a corresponding change in the payment schedule is not a refinancing. If the annual percentage

rate is subsequently increased (even though it remains below its original level) and the increase is effected in such a way that the old obligation is satisfied and replaced, new disclosures must then be made.

2. *Corresponding change.* A corresponding change in the payment schedule to implement a lower annual percentage rate would be a shortening of the maturity, or a reduction in the payment amount or the number of payments of an obligation. The exception in section 226.20(a)(2) does not apply if the maturity is lengthened, or if the payment amount or number of payments is increased beyond that remaining on the existing transaction.

Paragraph 20(a)(3)

1. *Court agreements.* This exception includes, for example, agreements such as reaffirmations of debts discharged in bankruptcy, settlement agreements, and post-judgment agreements. (See the commentary to section 226.2(a)(14) for a discussion of court-approved agreements that are not considered "credit.")

Paragraph 20(a)(4)

1. *Workout agreements.* A workout agreement is not a refinancing unless the annual percentage rate is increased or additional credit is advanced beyond amounts already accrued plus insurance premiums.

Paragraph 20(a)(5)

1. *Insurance renewal.* The renewal of optional insurance added to an existing credit transaction is not a refinancing, assuming that appropriate Truth in Lending disclosures were provided for the initial purchase of the insurance.

20(b) Assumptions

1. *General definition.* An assumption as defined in section 226.20(b) is a new transaction and new disclosures must be made to the subsequent consumer. An assumption under the regulation requires the following three elements:

- A residential mortgage transaction
- An express acceptance of the subseque consumer by the creditor
- A written agreement

The assumption of a nonexempt consum credit obligation requires no disclosures unle all three elements are present. For example, a automobile dealer need not provide Truth Lending disclosures to a customer who a sumes an existing obligation secured by a automobile. However, a residential mortgag transaction with the elements described in se tion 226.20(b) is an assumption that calls f new disclosures; the disclosures must be give whether or not the assumption is accompanie by changes in the terms of the obligatio (See comment 2(a)(24)-5 for a discussion assumptions that are not considered residenti mortgage transactions.)

2. *Existing residential mortgage transactio* A transaction may be a residential mortgag transaction as to one consumer and not to t other consumer. In that case, the creditor mu look to the assuming consumer in determini whether a residential mortgage transaction e ists. To illustrate:

- The original consumer obtained a mortgag to purchase a home for vacation purpose The loan was not a residential mortgag transaction as to that consumer. The mo gage is assumed by a consumer who w use the home as a principal dwelling. As that consumer, the loan is a residenti mortgage transaction. For purposes of se tion 226.20(b), the assumed loan is a "existing residential mortgage transactio requiring disclosures, if the other criter for an assumption are met.

3. *Express agreement.* "Expressly agree means that the creditor's agreement must r late specifically to the new debtor and mu unequivocally accept that debtor as a prima obligor. The following events are not co strued to be express agreements between t creditor and the subsequent consumer:

- Approval of creditworthiness
- Notification of a change in records
- Mailing of a coupon book to the subs quent consumer
- Acceptance of payments from the ne consumer

4. *Retention of original consumer.* The retention of the original consumer as an obligor in some capacity does not prevent the change from being an assumption, provided the new consumer becomes a primary obligor. But the mere addition of a guarantor to an obligation for which the original consumer remains primarily liable does not give rise to an assumption. However, if neither party is designated as the primary obligor but the creditor accepts payment from the subsequent consumer, an assumption exists for purposes of section 226.20(b).

5. *Status of parties.* Section 226.20(b) applies only if the previous debtor was a consumer and the obligation is assumed by another consumer. It does not apply, for example, when an individual takes over the obligation of a corporation.

6. *Disclosures.* For transactions that are assumptions within this provision, the creditor must make disclosures based on the "remaining obligation." For example:

- The amount financed is the remaining principal balance plus any arrearages or other accrued charges from the original transaction.
- If the finance charge is computed from time to time by application of a percentage rate to an unpaid balance, in determining the amount of the finance charge and the annual percentage rate to be disclosed, the creditor should disregard any prepaid finance charges paid by the original obligor but must include in the finance charge any prepaid finance charge imposed in connection with the assumption.
- If the creditor requires the assuming consumer to pay any charges as a condition of the assumption, those sums are prepaid finance charges as to that consumer, unless exempt from the finance charge under section 226.4.

If a transaction involves add-on or discount finance charges, the creditor may make abbreviated disclosures, as outlined in section 226.20(b)(1) through (5). Creditors providing disclosures pursuant to this section for assumptions of variable-rate transactions secured by the consumer's principal dwelling with a term longer than one year need not provide new disclosures under sections 226.18(f)(2)(ii) or 226.19(b). In such transactions, a creditor may disclose the variable-rate feature solely in accordance with section 226.18(f)(1).

7. *Abbreviated disclosures.* The abbreviated disclosures permitted for assumptions of transactions involving add-on or discount finance charges must be made clearly and conspicuously in writing in a form that the consumer may keep. However, the creditor need not comply with the segregation requirement of section 226.17(a)(1). The terms "annual percentage rate" and "total of payments," when disclosed according to section 226.20(b)(4) and (5), are not subject to the description requirements of section 226.18(e) and (h). The term "annual percentage rate" disclosed under section 226.20(b)(4) need not be more conspicuous than other disclosures.

20(c) Variable-Rate Adjustments

1. *Timing of adjustment notices.* This section requires a creditor (or a subsequent holder) to provide certain disclosures in cases where an adjustment to the interest rate is made in a variable-rate transaction subject to section 226.19(b). There are two timing rules, depending on whether payment changes accompany interest rate changes. A creditor is required to provide at least one notice each year during which interest rate adjustments have occurred without accompanying payment adjustments. For payment adjustments, a creditor must deliver or place in the mail notices to borrowers at least 25, but not more than 120, calendar days before a payment at a new level is due. The timing rules also apply to the notice required to be given in connection with the adjustment to the rate and payment that follows conversion of a transaction subject to section 226.19(b) to a fixed-rate transaction. (In cases where an open-end account is converted to a closed-end transaction subject to section 226.19(b), the requirements of this section do not apply until adjustments are made following conversion.)

2. *Exceptions.* Section 226.20(c) does not apply to "shared-equity," "shared-appreciation," or price-level-adjusted or similar mortgages.

3. *Basis of disclosures.* The disclosures required under this section shall reflect the terms of the parties' legal obligation, as required under section 226.17(c)(1).

Paragraph 20(c)(1)

1. *Current and prior interest rates.* The requirements under this paragraph are satisfied by disclosing the interest rate used to compute the new adjusted payment amount ("current rate") and the adjusted interest rate that was disclosed in the last adjustment notice, as well as all other interest rates applied to the transaction in the period since the last notice ("prior rates"). (If there has been no prior adjustment notice, the prior rates are the interest rate applicable to the transaction at consummation, as well as all other interest rates applied to the transaction in the period since consummation.) If no payment adjustment has been made in a year, the current rate is the new adjusted interest rate for the transaction, and the prior rates are the adjusted interest rate applicable to the loan at the time of the last adjustment notice, and all other rates applied to the transaction in the period between the current and last adjustment notices. In disclosing all other rates applied to the transaction during the period between notices, a creditor may disclose a range of the highest and lowest rates applied during that period.

Paragraph 20(c)(2)

1. *Current and prior index values.* This section requires disclosure of the index or formula values used to compute the current and prior interest rates disclosed in section 226.20(c)(1). The creditor need not disclose the margin used in computing the rates. If the prior interest rate was not based on an index or formula value, the creditor also need not disclose the value of the index that would otherwise have been used to compute the prior interest rate.

Paragraph 20(c)(3)

1. *Unapplied index increases.* The requirement that the consumer receive information about the extent to which the creditor has forgone any increase in the interest rate is applicable only to those transactions permit ting interest rate carryover. The amount c increase that is forgone at an adjustment is th amount that, subject to rate caps, can be ap plied to future adjustments independently t increase, or offset decreases in, the rate that i determined according to the index or formul

Paragraph 20(c)(4)

1. *Contractual effects of the adjustment.* Th contractual effects of an interest rate adjus ment must be disclosed including the paymer due after the adjustment is made whether c not the payment has been adjusted. In transac tions where paying the periodic payments wi not fully amortize the outstanding balance a the end of the loan term and where the fina payment will equal the periodic payment plu the remaining unpaid balance, the amount c the adjusted payment must be disclosed i such payment has changed as a result of th rate adjustment. A contractual effect of a rat adjustment would include, for example, dis closure of any change in the term or maturit of the loan if the change resulted from th rate adjustment. A statement of the loan bal ance also is required. The balance required t be disclosed is the balance on which the ne adjusted payment is based. If no payment ad justment is disclosed in the notice, the balanc disclosed should be the loan balance on whic the payment disclosed under section 226.2 (c)(5) is based, if applicable, or the balance a the time the disclosure is prepared.

Paragraph 20(c)(5)

1. *Fully amortizing payment.* This paragrap requires a disclosure only when negative am ortization occurs as a result of the adjustmen A disclosure is not required simply because loan calls for non-amortizing or partially am ortizing payments. For example, in a transac tion with a five-year term and payments base on a longer amortization schedule, and wher the final payment will equal the periodic pay ment plus the remaining unpaid balance, th creditor would not have to disclose the pay ment necessary to fully amortize the loan i the remainder of the five-year term. A disclo sure is required, however, if the payment dis closed under section 226.20(c)(4) is not suff

cient to prevent negative amortization in the loan. The adjustment notice must state the payment required to prevent negative amortization. (This paragraph does not apply if the payment disclosed in section 226.20(c)(4) is sufficient to prevent negative amortization in the loan but the final payment will be a different amount due to rounding.)

References

Statute: None
Other sections: § 226.2
Previous regulations: § 226.8(j) through (*l*), and interpretation §§ 226.807, 226.811, 226.814, and 226.817.
1981 changes: While the previous regulation treated virtually any change in terms as a refinancing requiring new disclosures, this regulation limits refinancings to transactions in which the entire original obligation is extinguished and replaced by a new one. Redisclosure is no longer required for deferrals or extensions.

The assumption provision retains the substance of section 226.8(k) and interpretation section 226.807 of the previous regulation, but limits its scope to residential mortgage transactions.

SECTION 226.21—Treatment of Credit Balances

1. *Credit balance.* A credit balance arises whenever the creditor receives or holds funds in an account in excess of the total balance due from the consumer on that account. A balance might result, for example, from the debtor's paying off a loan by transmitting funds in excess of the total balance owed on the account, or from the early payoff of a loan entitling the consumer to a rebate of insurance premiums and finance charges. However, section 226.21 does not determine whether the creditor in fact owes or holds sums for the consumer. For example, if a creditor has no obligation to rebate any portion of precomputed finance charges on prepayment, the consumer's early payoff would not create a credit balance with respect to those charges. Similarly, nothing in this provision interferes with any rights the creditor may have under the contract or under state law with respect to set-off, cross-collateralization, or similar provisions.

2. *Total balance due.* The phrase "total balance due" refers to the total outstanding balance. Thus, this provision does not apply where the consumer has simply paid an amount in excess of the payment due for a given period.

3. *Timing of refund.* The creditor may also fulfill its obligation under this section by:

- Refunding any credit balance to the consumer immediately
- Refunding any credit balance prior to a written request from the consumer
- Making a good faith effort to refund any credit balance before six months have passed. If that attempt is unsuccessful, the creditor need not try again to refund the credit balance at the end of the six-month period.

Paragraph 21(b)

1. *Written requests—standing orders.* The creditor is not required to honor standing orders requesting refunds of any credit balance that may be created on the consumer's account.

Paragraph 21(c)

1. *Good faith effort to refund.* The creditor must take positive steps to return any credit balance that has remained in the account for over six months. This includes, if necessary, attempts to trace the consumer through the consumer's last known address or telephone number, or both.

2. *Good faith effort unsuccessful.* Section 226.21 imposes no further duties on the creditor if a good faith effort to return the balance is unsuccessful. The ultimate disposition of the credit balance (or any credit balance of $1 or less) is to be determined under other applicable law.

References

Statute: § 165
Other sections: None
Previous regulation: None

1981 changes: This section implements section 165 of the act, which was expanded by the 1980 statutory amendments to apply to closed-end as well as open-end credit.

SECTION 226.22—Determination of the Annual Percentage Rate

22(a) Accuracy of the Annual Percentage Rate

Paragraph 22(a)(1)

1. *Calculation method.* The regulation recognizes both the actuarial method and the United States Rule Method (U.S. Rule) as measures of an exact annual percentage rate. Both methods yield the same annual percentage rate when payment intervals are equal. They differ in their treatment of unpaid accrued interest.

2. *Actuarial method.* When no payment is made, or when the payment is insufficient to pay the accumulated finance charge, the actuarial method requires that the unpaid finance charge be added to the amount financed and thereby capitalized. Interest is computed on interest since in succeeding periods the interest rate is applied to the unpaid balance including the unpaid finance charge. Appendix J provides instructions and examples for calculating the annual percentage rate using the actuarial method.

3. *U.S. Rule.* The U.S. Rule produces no compounding of interest in that any unpaid accrued interest is accumulated separately and is not added to principal. In addition, under the U.S. Rule, no interest calculation is made until a payment is received.

4. *Basis for calculations.* When a transaction involves "step rates" or "split rates"—that is, different rates applied at different times or to different portions of the principal balance—a single composite annual percentage rate must be calculated and disclosed for the entire transaction. Assume, for example, a step-rate transaction in which a $10,000 loan is repayable in five years at 10 percent interest for the first two years, 12 percent for years 3 and 4, and 14 percent for year 5. The monthly payments are $210.71 during the first two years of the term, $220.25 for years 3 and 4, and $222.59 for year 5. The composite annual percentage rate, using a calculator with a "discounted cash flow analysis" or "internal rate of return" function, is 10.75 percent.

5. *Good faith reliance on faulty calculation tools.* Footnote 45d absolves a creditor of liability for an error in the annual percentage rate or finance charge that resulted from a corresponding error in a calculation tool used in good faith by the creditor. Whether or not the creditor's use of the tool was in good faith must be determined on a case-by-case basis, but the creditor must in any case have taken reasonable steps to verify the accuracy of the tool, including any instructions, before using it. Generally, the footnote is available only for errors directly attributable to the calculation tool itself, including software programs; it is not intended to absolve a creditor of liability for its own errors, or for errors arising from improper use of the tool, from incorrect data entry, or from misapplication of the law.

Paragraph 22(a)(2)

1. *Regular transactions.* The annual percentage rate for a regular transaction is considered accurate if it varies in either direction by not more than ⅛ of 1 percentage point from the actual annual percentage rate. For example, when the exact annual percentage rate is determined to be 10⅛ percent, a disclosed annual percentage rate from 10 percent to 10¼ percent, or the decimal equivalent, is deemed to comply with the regulation.

Paragraph 22(a)(3)

1. *Irregular transactions.* The annual percentage rate for an irregular transaction is considered accurate if it varies in either direction by not more than ¼ of 1 percentage point from the actual annual percentage rate. This tolerance is intended for more complex transactions that do not call for a single advance and a regular series of equal payments at equal intervals. The ¼ of 1 percentage point tolerance may be used, for example, in a construction loan where advances are made as construction progresses, or in a transaction where payments vary to reflect the consumer's sea

sonal income. It may also be used in transactions with graduated payment schedules where the contract commits the consumer to several series of payments in different amounts. It does not apply, however, to loans with variable-rate features where the initial disclosures are based on a regular amortization schedule over the life of the loan, even though payments may later change because of the variable-rate feature.

22(a)(4) Mortgage Loans

1. *Example.* If a creditor improperly omits a $75 fee from the finance charge on a regular transaction, the understated finance charge is considered accurate under section 226.18 (d)(1), and the annual percentage rate corresponding to that understated finance charge also is considered accurate even if it falls outside the tolerance of ⅛ of 1 percentage point provided under section 226.22(a)(2). Because a $75 error was made, an annual percentage rate corresponding to a $100 understatement of the finance charge would not be considered accurate.

22(a)(5) Additional Tolerance for Mortgage Loans

1. *Example.* This paragraph contains an additional tolerance for a disclosed annual percentage rate that is incorrect but is closer to the actual annual percentage rate than the rate that would be considered accurate under the tolerance in section 226.22(a)(4). To illustrate: in an irregular transaction subject to a ¼ of 1 percentage point tolerance, if the actual annual percentage rate is 9.00 percent and a $75 omission from the finance charge corresponds to a rate of 8.50 percent that is considered accurate under section 226.22(a)(4), a disclosed APR of 8.65 percent is within the tolerance in section 226.22(a)(5). In this example of an understated finance charge, a disclosed annual percentage rate below 8.50 or above 9.25 percent will not be considered accurate.

22(b) Computation Tools

Paragraph 22(b)(1)

1. *Board tables.* Volumes I and II of the Board's Annual Percentage Rate Tables provide a means of calculating annual percentage rates for regular and irregular transactions, respectively. An annual percentage rate computed in accordance with the instructions in the tables is deemed to comply with the regulation, even where use of the tables produces a rate that falls outside the general standard of accuracy. To illustrate:

- Volume I may be used for single-advance transactions with completely regular payment schedules or with payment schedules that are regular except for an odd first payment, odd first period or odd final payment. When used for a transaction with a large final balloon payment, volume I may produce a rate that is considerably higher than the exact rate produced using a computer program based directly on appendix J. However, the volume I rate—produced using certain adjustments in that volume—is considered to be in compliance.

Paragraph 22(b)(2)

1. *Other calculation tools.* Creditors need not use the Board tables in calculating the annual percentage rates. Any computation tools may be used, so long as they produce annual percentage rates within ⅛ or ¼ of 1 percentage point, as applicable, of the precise actuarial or U.S. Rule annual percentage rate.

22(c) Single Add-On Rate Transactions

1. *General rule.* Creditors applying a single add-on rate to all transactions up to 60 months in length may disclose the same annual percentage rate for all those transactions, although the actual annual percentage rate varies according to the length of the transaction. Creditors utilizing this provision must show the highest of those rates. For example:

- An add-on rate of 10 percent converted to an annual percentage rate produces the following actual annual percentage rates at various maturities: at 3 months, 14.94 percent; at 21 months, 18.18 percent; and at 60 months, 17.27 percent. The creditor must disclose an annual percentage rate of 18.18 percent (the highest annual percentage rate) for any transaction up to five

years, even though that rate is precise only for a transaction of 21 months.

22(d) Certain Transactions Involving Ranges of Balances

1. *General rule.* Creditors applying a fixed dollar finance charge to all balances within a specified range of balances may understate the annual percentage rate by up to 8 percent of that rate by disclosing for all those balances the annual percentage rate computed on the median balance within that range. For example:

- If a finance charge of $9 applies to all balances between $91 and $100, an annual percentage rate of 10 percent (the rate on the median balance) may be disclosed as the annual percentage rate for all balances, even though a $9 finance charge applied to the lowest balance ($91) would actually produce an annual percentage rate of 10.7 percent.

References

Statute: § 107
Other sections: § 226.17(c)(4) and appendix J
Previous regulation: § 226.5(b) through (e)
1981 changes: The section now provides a larger tolerance (¼ of 1 percentage point) for irregular transactions.

SECTION 226.23—Right of Rescission

1. *Transactions not covered.* Credit extensions that are not subject to the regulation are not covered by section 226.23 even if a customer's principal dwelling is the collateral securing the credit. For example, the right of rescission does not apply to a business-purpose loan, even though the loan is secured by the customer's principal dwelling.

23(a) Consumer's Right to Rescind

Paragraph 23(a)(1)

1. *Security interest arising from transaction.* In order for the right of rescission to apply, the security interest must be retained as part of the credit transaction. For example:

- A security interest that is acquired by a contractor who is also extending the credit in the transaction
- A mechanic's or materialman's lien that is retained by a subcontractor or supplier of the contractor-creditor, even when the latter has waived its own security interest in the consumer's home

The security interest is not part of the credit transaction and therefore the transaction is not subject to the right of rescission when, for example:

- A mechanic's or materialman's lien is obtained by a contractor who is not a party to the credit transaction but is merely paid with the proceeds of the consumer's unsecured bank loan
- All security interests that may arise in connection with the credit transaction are validly waived
- The creditor obtains a lien and completion bond that in effect satisfies all liens against the consumer's principal dwelling as a result of the credit transaction

Although liens arising by operation of law are not considered security interests for purposes of disclosure under section 226.2, that section specifically includes them in the definition for purposes of the right of rescission. Thus, even though an interest in the consumer's principal dwelling is not a required disclosure under section 226.18(m), it may still give rise to the right of rescission.

2. *Consumer.* To be a consumer within the meaning of section 226.2, that person must at least have an ownership interest in the dwelling that is encumbered by the creditor's security interest, although that person need not be a signatory to the credit agreement. For example, if only one spouse signs a credit contract, the other spouse is a consumer if the ownership interest of that spouse is subject to the security interest.

3. *Principal dwelling.* A consumer can only have one principal dwelling at a time. (But see comment 23(a)(1)-4.) A vacation or other second home would not be a principal dwelling. A transaction secured by a second home (such as a vacation home) that is not currently

being used as the consumer's principal dwelling is not rescindable, even if the consumer intends to reside there in the future. When a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within one year or upon completion of construction, the new dwelling is considered the principal dwelling if it secures the acquisition or construction loan. In that case, the transaction secured by the new dwelling is a residential mortgage transaction and is not rescindable. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a construction loan to finance B and secured by B is a residential mortgage transaction. "Dwelling," as defined in section 226.2, includes structures that are classified as personalty under state law. For example, a transaction secured by a mobile home, trailer, or houseboat used as the consumer's principal dwelling may be rescindable.

4. *Special rule for principal dwelling.* Notwithstanding the general rule that consumers may have only one principal dwelling, when the consumer is acquiring or constructing a new principal dwelling, any loan subject to Regulation Z and secured by the equity in the consumer's current principal dwelling (for example, a bridge loan) is subject to the right of rescission regardless of the purpose of that loan. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a construction loan to finance B and secured by A is subject to the right of rescission. A loan secured by both A and B is, likewise, rescindable.

5. *Addition of a security interest.* Under footnote 47, the addition of a security interest in a consumer's principal dwelling to an existing obligation is rescindable even if the existing obligation is not satisfied and replaced by a new obligation, and even if the existing obligation was previously exempt (because it was credit over $25,000 not secured by real property or a consumer's principal dwelling). The right of rescission applies only to the added security interest, however, and not to the original obligation. In those situations, only the section 226.23(b) notice need be delivered, not new material disclosures; the rescission period will begin to run from the delivery of the notice.

Paragraph 23(a)(2)

1. *Consumer's exercise of right.* The consumer must exercise the right of rescission in writing but not necessarily on the notice supplied under section 226.23(b). Whatever the means of sending the notification of rescission—mail, telegram or other written means—the time period for the creditor's performance under section 226.23(d)(2) does not begin to run until the notification has been received. The creditor may designate an agent to receive the notification so long as the agent's name and address appear on the notice provided to the consumer under section 226.23(b).

Paragraph 23(a)(3)

1. *Rescission period.* The period within which the consumer may exercise the right to rescind runs for three business days from the last of three events:

- Consummation of the transaction
- Delivery of all material disclosures
- Delivery to the consumer of the required rescission notice

For example, if a transaction is consummated on Friday, June 1, and the disclosures and notice of the right to rescind were given on Thursday, May 31, the rescission period will expire at midnight of the third business day after June 1—that is, Tuesday, June 5. In another example, if the disclosures are given and the transaction consummated on Friday, June 1, and the rescission notice is given on Monday, June 4, the rescission period expires at midnight of the third business day after June 4—that is, Thursday, June 7. The consumer must place the rescission notice in the mail, file it for telegraphic transmission, or deliver it to the creditor's place of business within that period in order to exercise the right.

2. *Material disclosures.* Footnote 48 sets forth the material disclosures that must be provided

before the rescission period can begin to run. Failure to provide information regarding the annual percentage rate also includes failure to inform the consumer of the existence of a variable-rate feature. Failure to give the other required disclosures does not prevent the running of the rescission period, although that failure may result in civil liability or administrative sanctions.

3. *Unexpired right of rescission.* When the creditor has failed to take the action necessary to start the three-business day rescission period running, the right to rescind automatically lapses on the occurrence of the earliest of the following three events:

- The expiration of three years after consummation of the transaction
- Transfer of all the consumer's interest in the property
- Sale of the consumer's interest in the property, including a transaction in which the consumer sells the dwelling and takes back a purchase money note and mortgage or retains legal title through a device such as an installment sale contract

Transfer of all the consumer's interest includes such transfers as bequests and gifts. A sale or transfer of the property need not be voluntary to terminate the right to rescind. For example, a foresclosure sale would terminate an unexpired right to rescind. As provided in section 125 of the act, the three-year limit may be extended by an administrative proceeding to enforce the provisions of this section. A partial transfer of the consumer's interest, such as a transfer bestowing co-ownership on a spouse, does not terminate the right of rescission.

Paragraph 23(a)(4)

1. *Joint owners.* When more than one consumer has the right to rescind a transaction, any one of them may exercise that right and cancel the transaction on behalf of all. For example, if both husband and wife have the right to rescind a transaction, either spouse acting alone may exercise the right and both are bound by the rescission.

23(b) Notice of Right to Rescind

1. *Who receives notice.* Each consumer entitled to rescind must be given:

- Two copies of the rescission notice
- The material disclosures

In a transaction involving joint owners, both of whom are entitled to rescind, both must receive the notice of the right to rescind and disclosures. For example, if both spouses are entitled to rescind a transaction, each must receive two copies of the rescission notice and one copy of the disclosures.

2. *Format.* The notice must be on a separate piece of paper but may appear with other information such as the itemization of the amount financed. The material must be clear and conspicuous, but no minimum type size or other technical requirements are imposed. The notices in appendix H provide models that creditors may use in giving the notice.

3. *Content.* The notice must include all of the information outlined in section 226.23(b)(1)(i) through (v). The requirement in section 226.23(b) that the transaction be identified may be met by providing the date of the transaction. The creditor may provide a separate form that the consumer may use to exercise the right of rescission, or that form may be combined with the other rescission disclosures, as illustrated in appendix H. The notice may include additional information related to the required information, such as:

- A description of the property subject to the security interest
- A statement that joint owners may have the right to rescind and that a rescission by one is effective for all
- The name and address of an agent of the creditor to receive notice of rescission

4. *Time of providing notice.* The notice required by section 226.23(b) need not be given before consummation of the transaction. The creditor may deliver the notice after the transaction is consummated, but the rescission period will not begin to run until the notice is given. For example, if the creditor provides the notice on May 15, but disclosures were given and the transaction was consummated

on May 10, the three-business day rescission period will run from May 15.

23(c) Delay of Creditor's Performance

1. *General rule.* Until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded, the creditor must not, either directly or through a third party:

- Disburse loan proceeds to the consumer
- Begin performing services for the consumer
- Deliver materials to the consumer

2. *Escrow.* The creditor may disburse loan proceeds during the rescission period in a valid escrow arrangement. The creditor may not, however, appoint the consumer as "trustee" or "escrow agent" and distribute funds to the consumer in that capacity during the delay period.

3. *Actions during the delay period.* Section 226.23(c) does not prevent the creditor from taking other steps during the delay, short of beginning actual performance. Unless otherwise prohibited, such as by state law, the creditor may, for example:

- Prepare the loan check
- Perfect the security interest
- Prepare to discount or assign the contract to a third party
- Accrue finance charges during the delay period

4. *Delay beyond rescission period.* The creditor must wait until it is reasonably satisfied that the consumer has not rescinded. For example, the creditor may satisfy itself by doing one of the following:

- Waiting a reasonable time after expiration of the rescission period to allow for delivery of a mailed notice
- Obtaining a written statement from the consumer that the right has not been exercised

When more than one consumer has the right to rescind, the creditor cannot reasonably rely on the assurance of only one consumer, because other consumers may exercise the right.

23(d) Effects of Rescission

Paragraph 23(d)(1)

1. *Termination of security interest.* Any security interest giving rise to the right of rescission becomes void when the consumer exercises the right of rescission. The security interest is automatically negated regardless of its status and whether or not it was recorded or perfected. Under section 226.23(d)(2), however, the creditor must take any action necessary to reflect the fact that the security interest no longer exists.

Paragraph 23(d)(2)

1. *Refunds to consumer.* The consumer cannot be required to pay any amount in the form of money or property either to the creditor or to a third party as part of the credit transaction. Any amounts of this nature already paid by the consumer must be refunded. "Any amount" includes finance charges already accrued, as well as other charges, such as broker fees, application and commitment fees, or fees for a title search or appraisal, whether paid to the creditor, paid directly to a third party, or passed on from the creditor to the third party. It is irrelevant that these amounts may not represent profit to the creditor.

2. *Amounts not refundable to consumer.* Creditors need not return any money given by the consumer to a third party outside of the credit transaction, such as costs incurred for a building permit or for a zoning variance. Similarly, the term "any amount" does not apply to any money or property given by the creditor to the consumer; those amounts must be tendered by the consumer to the creditor under section 226.23(d)(3).

3. *Reflection of security interest termination.* The creditor must take whatever steps are necessary to indicate that the security interest is terminated. Those steps include the cancellation of documents creating the security interest, and the filing of release or termination statements in the public record. In a transaction involving subcontractors or suppliers that also hold security interests related to the credit transaction, the creditor must ensure that the termination of their security interests is also

reflected. The 20-day period for the creditor's action refers to the time within which the creditor must begin the process. It does not require all necessary steps to have been completed within that time, but the creditor is responsible for seeing the process through to completion.

Paragraph 23(d)(3)

1. *Property exchange.* Once the creditor has fulfilled its obligations under section 226.23(d)(2), the consumer must tender to the creditor any property or money the creditor has already delivered to the consumer. At the consumer's option, property may be tendered at the location of the property. For example, if lumber or fixtures have been delivered to the consumer's home, the consumer may tender them to the creditor by making them available for pick-up at the home, rather than physically returning them to the creditor's premises. Money already given to the consumer *must* be tendered at the creditor's place of business.

2. *Reasonable value.* If returning the property would be extremely burdensome to the consumer, the consumer may offer the creditor its reasonable value rather than returning the property itself. For example, if building materials have already been incorporated into the consumer's dwelling, the consumer may pay their reasonable value.

Paragraph 23(d)(4)

1. *Modifications.* The procedures outlined in section 226.23(d)(2) and (3) may be modified by a court. For example, when a consumer is in bankruptcy proceedings and prohibited from returning anything to the creditor, or when the equities dictate, a modification might be made.

23(e) Consumer's Waiver of Right to Rescind

1. *Need for waiver.* To waive the right to rescind, the consumer must have a bona fide personal financial emergency that must be met before the end of the rescission period. The existence of the consumer's waiver will not, of itself, automatically insulate the creditor from liability for failing to provide the right of rescission.

2. *Procedure.* To waive or modify the right to rescind, the consumer must give a written statement that specifically waives or modifies the right and also includes a brief description of the emergency. Each consumer entitled to rescind must sign the waiver statement. In a transaction involving multiple consumers, such as a husband and wife using their home as collateral, the waiver must bear the signatures of both spouses.

23(f) Exempt Transactions

1. *Residential mortgage transaction.* Any transaction to construct or acquire a principal dwelling, whether considered real or personal property, is exempt. (See the commentary to section 226.23(a).) For example, a credit transaction to acquire a mobile home or houseboat to be used as the consumer's principal dwelling would not be rescindable.

2. *Lien status.* The lien status of the mortgage is irrelevant for purposes of the exemption in section 226.23(f)(1); the fact that a loan has junior lien status does not by itself preclude application of this exemption. For example, a home buyer may assume the existing first mortgage and create a second mortgage to finance the balance of the purchase price. Such a transaction would not be rescindable.

3. *Combined-purpose transaction.* A loan to acquire a principal dwelling and make improvements to that dwelling is exempt if treated as one transaction. If, on the other hand, the loan for the acquisition of the principal dwelling and the subsequent advances for improvements are treated as more than one transaction, then only the transaction that finances the acquisition of that dwelling is exempt.

4. *New advances.* The exemption in section 226.23(f)(2) applies only to refinancings (including consolidations) by the original creditor. The original creditor is the creditor to whom the written agreement was initially made payable. In a merger, consolidation, or acquisition, the successor institution is consid-

ered the original creditor for purposes of the exemption in section 226.23(f)(2). If the refinancing involves a new advance of money, the amount of the new advance is rescindable. In determining whether there is a new advance, a creditor may rely on the amount financed, refinancing costs, and other figures stated in the latest Truth in Lending disclosures provided to the consumer and is not required to use, for example, more precise information that may only become available when the loan is closed. For purposes of the right of rescission, a new advance does not include amounts attributed solely to the costs of the refinancing. These amounts would include section 226.4(c)(7) charges (such as attorney's fees and title examination and insurance fees, if bona fide and reasonable in amount), as well as insurance premiums and other charges that are not finance charges. (Finance charges on the new transaction—points, for example—would not be considered in determining whether there is a new advance of money in a refinancing since finance charges are not part of the amount financed.) To illustrate, if the sum of the outstanding principal balance plus the earned unpaid finance charge is $50,000 and the new amount financed is $51,000, then the refinancing would be exempt if the extra $1,000 is attributed solely to costs financed in connection with the refinancing that are not finance charges. Of course, if new advances of money are made (for example, to pay for home improvements) and the consumer exercises the right of rescission, the consumer must be placed in the same position as he or she was in prior to entering into the new credit transaction. Thus, all amounts of money (which would include all the costs of the refinancing) already paid by the consumer to the creditor or to a third party as part of the refinancing would have to be refunded to the consumer. (See the commentary to 226.23(d)(2) for a discussion of refunds to consumers.) A model rescission notice applicable to transactions involving new advances appears in appendix H. The general rescission notice (model form H-8) is the appropriate form for use by creditors not considered original creditors in refinancing transactions.

5. *State creditors.* Cities and other political subdivisions of states acting as creditors are not exempted from this section.

6. *Multiple advances.* Just as new disclosures need not be made for subsequent advances when treated as one transaction, no new rescission rights arise so long as the appropriate notice and disclosures are given at the outset of the transaction. For example, the creditor extends credit for home improvements secured by the consumer's principal dwelling, with advances made as repairs progress. As permitted by section 226.17(c)(6), the creditor makes a single set of disclosures at the beginning of the construction period, rather than separate disclosures for each advance. The right of rescission does not arise with each advance. However, if the advances are treated as separate transactions, the right of rescission applies to each advance.

7. *Spreader clauses.* When the creditor holds a mortgage or deed of trust on the consumer's principal dwelling and that mortgage or deed of trust contains a "spreader clause," subsequent loans made are separate transactions and are subject to the right of rescission. Those loans are rescindable unless the creditor effectively waives its security interest under the spreader clause with respect to the subsequent transactions.

8. *Converting open-end to closed-end credit.* Under certain state laws, consummation of a closed-end credit transaction may occur at the time a consumer enters into the initial open-end credit agreement. As provided in the commentary to section 226.17(b), closed-end credit disclosures may be delayed under these circumstances until the conversion of the open-end account to a closed-end transaction. In accounts secured by the consumer's principal dwelling, no new right of rescission arises at the time of conversion. Rescission rights under section 226.15 are unaffected.

23(g) Tolerances for Accuracy

23(g)(2) One Percent Tolerance

1. *New advance.* The phrase "new advance" has the same meaning as in comment 23(f)-4.

23(h) Special Rules for Foreclosures

1. *Rescission.* Section 226.23(h) applies only to transactions that are subject to rescission under section 226.23(a)(1).

Paragraph 23(h)(1)(i)

1. *Mortgage broker fees.* A consumer may rescind a loan in foreclosure if a mortgage broker fee that should have been included in the finance charge was omitted, without regard to the dollar amount involved. If the amount of the mortgage broker fee is included but misstated, the rule in section 226.23(h)(2) applies.

23(h)(2) Tolerance for Disclosures

1. *General.* This section is based on the accuracy of the total finance charge rather than its component charges.

References

Statute: §§ 113, 125, and 130
Other sections: § 226.2 and appendix H
Previous regulation: § 226.9
1981 changes: The right to rescind applies not only to real property used as the consumer's principal dwelling, but to personal property as well. The regulation provides no specific text or format for the notice of the right to rescind.

SECTION 226.24—Advertising

1. *Clear and conspicuous standard.* This section is subject to the general "clear and conspicuous" standard for this subpart but prescribes no specific rules for the format of the necessary disclosures. The credit terms need not be printed in a certain type size nor need they appear in any particular place in the advertisement. For example, a merchandise tag that is an advertisement under the regulation complies with this section if the necessary credit terms are on both sides of the tag, so long as each side is accessible.

24(a) Actually Available Terms

1. *General rule.* To the extent that an advertisement mentions specific credit terms, it may state only those terms that the creditor is actually prepared to offer. For example, a creditor may not advertise a very low annual percentage rate that will not in fact be available at any time. This provision is not intended to inhibit the promotion of new credit programs, but to bar the advertising of terms that are not and will not be available. For example, a creditor may advertise terms that will be offered for only a limited period, or terms that will become available at a future date.

24(b) Advertisement of Rate of Finance Charge

1. *Annual percentage rate.* Advertised rates must be stated in terms of an "annual percentage rate," as defined in section 226.22. Even though state or local law permits the use of add-on, discount, time-price differential, or other methods of stating rates, advertisements must state them as annual percentage rates. Unlike the transactional disclosure of the annual percentage rate under section 226.18(e), the advertised annual percentage rate need not include a descriptive explanation of the term and may be expressed using the abbreviation APR. The advertisement must state that the rate is subject to increase after consummation if that is the case, but the advertisement need not describe the rate increase, its limits, or how it would affect the payment schedule. As under section 226.18(f), relating to disclosure of a variable rate, the rate increase disclosure requirement in this provision does not apply to any rate increase due to delinquency (including late payment), default, acceleration, assumption, or transfer of collateral.

2. *Simple or periodic rates.* The advertisement may not simultaneously state any other rate, except that a simple annual rate or periodic rate applicable to an unpaid balance may appear along with (but not more conspicuously than) the annual percentage rate. For example:

- In an advertisement for real estate, a simple interest rate may be shown in the same type size as the annual percentage rate for the advertised credit.

3. *Buydowns.* When a third party (such as a seller) or a creditor wishes to promote the availability of reduced interest rates (consumer or seller buydowns), the advertised annual

percentage rate must be determined in accordance with the rules in the commentary to section 226.17(c) regarding the basis of transactional disclosures for buydowns. The seller or creditor may advertise the reduced simple interest rate, provided the advertisement shows the limited term to which the reduced rate applies and states the simple interest rate applicable to the balance of the term. The advertisement may also show the effect of the buydown agreement on the payment schedule for the buydown period without triggering the additional disclosures under section 226.24(c)(2). For example, the advertisement may state that "with this buydown arrangement, your monthly payments for the first three years of the mortgage term will be only $350" or "this buydown arrangement will reduce your monthly payments for the first three years of the mortgage term by $150."

4. *Effective rates.* In some transactions the consumer's payments may be based upon an interest rate lower than the rate at which interest is accruing. The lower rate may be referred to as the effective rate, payment rate, or qualifying rate. A creditor or seller may advertise such rates by stating the term of the reduced payment schedule, the interest rate upon which the reduced payments are calculated, the rate at which the interest is in fact accruing, and the annual percentage rate. The advertised annual percentage rate that must accompany this rate must take into account the interest that will accrue but will not be paid during this period. For example, an advertisement may state, "An effective first-year interest rate of 10 percent. Interest being earned at 14 percent. Annual percentage rate 15 percent."

5. *Discounted variable-rate transactions.* The advertised annual percentage rate for discounted variable-rate transactions must be determined in accordance with comment 17(c)(1)-10 regarding the basis of transactional disclosures for such financing. A creditor or seller may promote the availability of the initial rate reduction in such transactions by advertising the reduced initial rate, provided the advertisement shows the limited term to which the reduced rate applies.

- Limits or caps on periodic rate or payment adjustments need not be stated. To illustrate using the second example in comment 17(c)(1)-10, the fact that the rate is presumed to be 11 percent in the second year and 12 percent for the remaining 28 years need not be included in the advertisement.
- The advertisement may also show the effect of the discount on the payment schedule for the discount period without triggering the additional disclosures under section 226.24(c). For example, the advertisement may state that "with this discount, your monthly payments for the first year of the mortgage term will be only $577" or "this discount will reduce your monthly payments for the first year of mortgage term by $223."

24(c) Advertisement of Terms That Require Additional Disclosures

1. *General rule.* Under section 226.24(c)(1), whenever certain triggering terms appear in credit advertisements, the additional credit terms enumerated in section 226.24(c)(2) must also appear. These provisions apply even if the triggering term is not stated explicitly but may be readily determined from the advertisement. For example, an advertisement may state "80 percent financing available," which is in fact indicating that a 20 percent downpayment is required.

Paragraph 24(c)(1)

1. *Downpayment.* The dollar amount of a downpayment or a statement of the downpayment as a percentage of the price requires further information. By virtue of the definition of "downpayment" in section 226.2, this triggering term is limited to credit sale transactions. It includes such statements as:

- "Only 5 percent down"
- "As low as $100 down"
- "Total move-in costs of $800"

This provision applies only if a downpayment is actually required; statements such as "no downpayment" or "no trade-in required" do not trigger the additional disclosures under this paragraph.

2. *Payment period.* The number of payments required or the total period of repayment includes such statements as:

- "48-month payment terms"
- "30-year mortgage"
- "Repayment in as many as 36 monthly installments"

But it does not include such statements as "pay weekly," "monthly payment terms arranged," or "take years to repay," since these statements do not indicate a time period over which a loan may be financed.

3. *Payment amount.* The dollar amount of any payment includes statements such as:

- "Payable in installments of $103"
- "$25 weekly"
- "$1,200 balance payable in 10 equal installments"

In the last example, the amount of each payment is readily determinable, even though not explicitly stated. But statements such as "monthly payments to suit your needs" or "regular monthly payments" are not covered.

4. *Finance charge.* The dollar amount of the finance charge or any portion of it includes statements such as:

- "$500 total cost of credit"
- "$2 monthly carrying charge"
- "$50,000 mortgages, two points to the borrower"

In the last example, the $1,000 prepaid finance charge can be readily determined from the information given. Statements of the annual percentage rate or statements that there is no particular charge for credit (such as "no closing costs") are not triggering terms under this paragraph.

Paragraph 24(c)(2)

1. *Disclosure of downpayment.* The total downpayment as a dollar amount or percentage must be shown, but the word "downpayment" need not be used in making this disclosure. For example, "10 percent cash required from buyer" or "credit terms require minimum $100 trade-in" would suffice.

2. *Disclosure of repayment terms.* While the phrase "terms of repayment" generally has the same meaning as the "payment schedule" required to be disclosed under section 226.18(g), section 226.24(c)(2)(ii) provides greater flexibility to creditors in making this disclosure for advertising purposes. Repayment terms may be expressed in a variety of ways in addition to an exact repayment schedule; this is particularly true for advertisements that do not contemplate a single specific transaction. For example:

- A creditor may use a unit-cost approach in making the required disclosure, such as "48 monthly payments of $27.83 per $1,000 borrowed."
- In an advertisement for credit secured by a dwelling, when any series of payments varies because of a graduated payment feature or because of the inclusion of mortgage insurance premiums, a creditor may state the number and timing of payments, the amounts of the largest and smallest of those payments, and the fact that other payments will vary between those amounts.

3. *Annual percentage rate.* The advertised annual percentage rate may be expressed using the abbreviation APR. The advertisement must also state, if applicable, that the annual percentage rate is subject to increase after consummation.

4. *Use of examples.* Footnote 49 authorizes the use of illustrative credit transactions to make the necessary disclosures under section 226.24(c)(2). That is, where a range of possible combinations of credit terms is offered, the advertisement may use examples of typical transactions, so long as each example contains all of the applicable terms required by section 226.24(c). The examples must be labelled as such and must reflect representative credit terms that are made available by the creditor to present and prospective customers.

24(d) Catalogs and Multiple-Page Advertisements

1. *Definition.* The multiple-page advertisements to which this section refers are advertisements consisting of a series of sequentially numbered pages—for example, a supplement to a newspaper. A mailing consisting of sev-

eral separate flyers or pieces of promotional material in a single envelope does not constitute a single multiple-page advertisement for purposes of section 226.24(d).

2. *General.* Section 226.24(d) permits creditors to put credit information together in one place in a catalog or multiple-page advertisement. The rule applies only if the catalog or multiple-page advertisement contains one or more of the triggering terms from section 226.24(c)(1). A list of different annual percentage rates applicable to different balances, for example, does not trigger further disclosures under section 226.24(c)(2) and so is not covered by section 226.24(d).

3. *Representative examples.* The table or schedule must state all the necessary information for a representative sampling of amounts of credit. This must reflect amounts of credit the creditor actually offers, up to and including the higher-priced items. This does not mean that the chart must make the disclosures for the single most expensive item the seller offers, but only that the chart cannot be limited to information about less expensive sales when the seller commonly offers a distinct level of more expensive goods or services. The range of transactions shown in the table or schedule in a particular catalog or multiple-page advertisement need not exceed the range of transactions actually offered in that advertisement.

References

Statute: §§ 141, 142, and 144
Other sections: §§ 226.2, 226.4, and 226.22
Previous regulation: § 226.10(a), (b), and (d)
1981 changes: This section retains the advertising rules in a form very similar to the previous regulation, but with certain changes to reflect the 1980 statutory amendments. For example, if triggering terms appear in any advertisement, the additional disclosures required no longer include the cash price. The special rule for FHA section 235 financing has been eliminated, as well as the rule for advertising credit payable in more than four installments with no identified finance charge. Interpretation section 226.1002, requiring disclosure of representative amounts of credit in catalogs and multiple-page advertisements, has been incorporated in simplified form in section 226.24(d).

Unlike the previous regulation, if the advertised annual percentage rate is subject to increase, that fact must now be disclosed.

SUBPART D—MISCELLANEOUS

SECTION 226.25—Record Retention

25(a) General Rule

1. *Evidence of required actions.* The creditor must retain evidence that it performed the required actions as well as made the required disclosures. This includes, for example, evidence that the creditor properly handled adverse credit reports in connection with amounts subject to a billing dispute under section 226.13, and properly handled the refunding of credit balances under sections 226.11 and 226.21.

2. *Methods of retaining evidence.* Adequate evidence of compliance does not necessarily mean actual paper copies of disclosure statements or other business records. The evidence may be retained on microfilm, microfiche, or by any other method that reproduces records accurately (including computer programs). The creditor need retain only enough information to reconstruct the required disclosures or other records. Thus, for example, the creditor need not retain each open-end periodic statement, so long as the specific information on each statement can be retrieved.

3. *Certain variable-rate transactions.* In variable-rate transactions that are subject to the disclosure requirements of section 226.19(b), written procedures for compliance with those requirements as well as a sample disclosure form for each loan program represent adequate evidence of compliance. (See comment 25(a)-2 pertaining to permissible methods of retaining the required disclosures.)

4. *Home-equity plans.* In home-equity plans that are subject to the requirements of section 226.5b, written procedures for compliance with those requirements as well as a sample disclosure form and contract for each home-

equity program represent adequate evidence of compliance. (See comment 25(a)-2 pertaining to permissible methods of retaining the required disclosures.)

References

Statute: §§ 105 and 108
Other sections: Appendix I
Previous regulation: § 226.6(i)
1981 changes: Section 226.25 substitutes a uniform two-year record-retention rule for the previous requirement that certain creditors retain records through at least one compliance examination. It also states more explicitly that the record-retention requirements apply to evidence of required actions.

SECTION 226.26—Use of Annual Percentage Rate in Oral Disclosures

1. *Application of rules.* The restrictions of section 226.26 apply only if the creditor chooses to respond orally to the consumer's request for credit cost information. Nothing in the regulation requires the creditor to supply rate information orally. If the creditor volunteers information (including rate information) through oral solicitations directed generally to prospective customers, as through a telephone solicitation, those communications may be advertisements subject to the rules in sections 226.16 and 226.24.

26(a) Open-End Credit

1. *Information that may be given.* The creditor may state periodic rates in addition to the required annual percentage rate, but it need not do so. If the annual percentage rate is unknown because transaction charges, loan fees, or similar finance charges may be imposed, the creditor must give the corresponding annual percentage rate (that is, the periodic rate multiplied by the number of periods in a year, as described in sections 226.6(a)(2) and 226.7(d)). In such cases, the creditor may, but need not, also give the consumer information about other finance charges and other charges.

26(b) Closed-End Credit

1. *Information that may be given.* The creditor may state other annual or periodic rates that are applied to an unpaid balance, along with the required annual percentage rate. This rule permits disclosure of a simple interest rate, for example, but not an add-on, discount, or similar rate. If the creditor cannot give a precise annual percentage rate in its oral response because of variables in the transaction, it must give the annual percentage rate for a comparable sample transaction; in this case, other cost information may, but need not, be given. For example, the creditor may be unable to state a precise annual percentage rate for a mortgage loan without knowing the exact amount to be financed, the amount of loan fees or mortgage insurance premiums, or similar factors. In this situation, the creditor should state an annual percentage rate for a sample transaction; it may also provide information about the consumer's specific case, such as the contract interest rate, points, other finance charges, and other charges.

References

Statute: § 146
Other sections: §§ 226.6(a)(2) and 226.7(d)
Previous regulation: Interpretation § 226.101
1981 changes: This section implements amended section 146 of the act, which added a provision dealing with oral disclosures, and incorporates interpretation section 226.101.

SECTION 226.27—Spanish-Language Disclosures

1. *Subsequent disclosures.* If a creditor in Puerto Rico provides initial disclosures in Spanish, subsequent disclosures need not be in Spanish. For example, if the creditor gave Spanish-language initial disclosures, periodic statements and change-in-terms notices may be made in English.

2. *Permissible uses.* If a creditor other than in Puerto Rico provides translations of the required disclosures—either because it is required to do so by state, federal, or local law, or because it chooses to do so—the translations are not inconsistent per se with the disclosures under this regulation, and they may be provided as additional information. In both

cases, the English language disclosures required by this regulation must be clear and conspicuous, and the closed-end disclosures in English must be properly segregated in accordance with section 226.17(a)(1).

References

Statute: None
Other sections: None
Previous regulation: § 226.6(a)
1981 changes: No substantive change

SECTION 226.28—Effect on State Laws

28(a) Inconsistent Disclosure Requirements

1. *General.* There are three sets of preemption criteria; one applies to the general disclosure and advertising rules of the regulation, and two apply to the credit-billing provisions. Section 226.28 also provides for Board determinations of preemption.

2. *Rules for chapters 1, 2, and 3.* The standard for judging whether state laws that cover the types of requirements in chapters 1 (General Provisions), 2 (Credit Transactions), and 3 (Credit Advertising) of the act are inconsistent and therefore preempted, is contradiction of the federal law. Examples of laws that would be preempted include:

- A state law that requires use of the term "finance charge" but defines the term to include fees that the federal law excludes or to exclude fees the federal law includes
- A state law that requires a label such as "nominal annual interest rate" to be used for what the federal law calls the "annual percentage rate"

3. *Laws not contradictory to chapters 1, 2, and 3.* Generally, state law requirements that call for the disclosure of items of information not covered by the federal law, or that require more detailed disclosures, do not contradict the federal requirements. Examples of laws that are not preempted include:

- A state law that requires disclosure of the minimum periodic payment for open-end credit, even though not required by section 226.7.
- A state law that requires contracts to con tain warnings such as: "Read this contract before you sign. Do not sign if any spaces are left blank. You are entitled to a copy of this contract."

Similarly, a state law that requires itemization of the amount financed does not automatically contradict the permissive itemization under section 226.18(c). However, a state law requirement that the itemization appear with the disclosure of the amount financed in the segregated closed-end credit disclosures is inconsistent, and this location requirement would be preempted.

4. *Creditor's options.* Before the Board makes a determination about a specific state law, the creditor has certain options. Since the prohibition against giving the state disclosures does not apply until the Board makes its determination, the creditor may choose to give state disclosures until the Board formally determines that the state law is inconsistent. (The Board will provide sufficient time for creditors to revise forms and procedures as necessary to conform to its determinations.)

- Under this first approach, as in all cases, the federal disclosures must be clear and conspicuous, and the closed-end disclosures must be properly segregated in accordance with section 226.17(a)(1).
- This ability to give state disclosures relieves any uncertainty that the creditor might have prior to Board determinations of inconsistency.

As a second option, the creditor may apply the preemption standards to a state law, conclude that it is inconsistent, and choose not to give the state-required disclosures. However, nothing in section 226.28(a) provides the creditor with immunity for violations of state law if the creditor chooses *not* to make state disclosures and the Board later determines that the state law is not preempted.

5. *Rules for correction of billing errors and regulation of credit reports.* The preemption criteria for the fair credit billing provisions set forth in section 226.28 have two parts. With

respect to the rules on correction of billing errors and regulation of credit reports (which are in section 226.13), section 226.28(a)(2)(i) provides that a state law is inconsistent and preempted if its requirements are different from the federal law. An exception is made, however, for state laws that allow the consumer to inquire about an account and require the creditor to respond to such inquiries beyond the time limits in the federal law. Such a state law is not preempted with respect to the extra time period. For example, section 226.13 requires the consumer to submit a written notice of billing error within 60 days after transmittal of the periodic statement showing the alleged error. If a state law allows the consumer 90 days to submit a notice, the state law remains in effect to provide the extra 30 days. Any state law disclosures concerning this extended state time limit must reflect the qualifications and conform to the format specified in section 226.28(a)(2)(i). Examples of laws that would be preempted include:

- A state law that has a narrower or broader definition of "billing error"
- A state law that requires the creditor to take different steps to resolve errors
- A state law that provides different timing rules for error resolution (subject to the exception discussed above)

6. *Rules for other fair credit billing provisions.* The second part of the criteria for fair credit billing relates to the other rules implementing chapter 4 of the act (addressed in sections 226.4(c)(8), 226.5(b)(2)(ii), 226.6(d), 226.7(k), 226.9(a), 226.10, 226.11, 226.12(c) through (f), 226.13, and 226.21). Section 226.28(a)(2)(ii) provides that the test of inconsistency is whether the creditor can comply with state law without violating federal law. For example:

- A state law that allows the card issuer to offset the consumer's credit-card indebtedness against funds held by the card issuer would be preempted, since section 226.12(d) prohibits such action.
- A state law that requires periodic statements to be sent *more* than 14 days before the end of a free-ride period would not be preempted.
- A state law that permits consumers to assert claims and defenses against the card issuer without regard to the $50 and 100-mile limitations of section 226.12(c)(3)(ii) would not be preempted.

In the last two cases, compliance with state law would involve no violation of the federal law.

7. *Who may receive a chapter 4 determination.* Only states (through their authorized officials) may request and receive determinations on inconsistency with respect to the fair credit billing provisions.

8. *Preemption determination—Arizona.* Effective October 1, 1983, the Board has determined that the following provisions in the state law of Arizona are preempted by the federal law:

- Section 44–287 B.5—Disclosure of final cash price balance. This provision is preempted in those transactions in which the amount of the final cash price balance is the same as the federal amount financed, since in such transactions the state law requires the use of a term different from the federal term to represent the same amount.
- Section 44–287 B.6—Disclosure of finance charge. This provision is preempted in those transactions in which the amount of the finance charge is different from the amount of the federal finance charge, since in such transactions the state law requires the use of the same term as the federal law to represent a different amount.
- Section 44–287 B.7—Disclosure of the time balance. The time balance disclosure provision is preempted in those transactions in which the amount is the same as the amount of the federal total of payments, since in such transactions the state law requires the use of a term different from the federal term to represent the same amount.

9. *Preemption determination—Florida.* Effective October 1, 1983, the Board has determined that the following provisions in the state law of Florida are preempted by the federal law:

- Sections 520.07(2)(f) and 520.34(2)(f)—

Disclosure of amount financed. This disclosure is preempted in those transactions in which the amount is different from the federal amount financed, since in such transactions the state law requires the use of the same term as the federal law to represent a different amount.

- Sections 520.07(2)(g), 520.34(2)(g), and 520.35(2)(d)—Disclosure of finance charge and a description of its components. The finance charge disclosure is preempted in those transactions in which the amount of the finance charge is different from the federal amount, since in such transactions the state law requires the use of the same term as the federal law to represent a different amount. The requirement to describe or itemize the components of the finance charge, which is also included in these provisions, is not preempted.
- Sections 520.07(2)(h) and 520.34(2)(h)—Disclosure of total of payments. The total of payments disclosure is preempted in those transactions in which the amount differs from the amount of the federal total of payments, since in such transactions the state law requires the use of the same term as the federal law to represent a different amount from the federal law.
- Sections 520.07(2)(i) and 520.34(2)(i)—Disclosure of deferred payment price. This disclosure is preempted in those transactions in which the amount is the same as the federal total sale price, since in such transactions the state law requires the use of a different term from the federal law to represent the same amount as the federal law.

10. *Preemption determination—Missouri.* Effective October 1, 1983, the Board has determined that the following provisions in the state law of Missouri are preempted by the federal law:

- Sections 365.070-6(9) and 408.260-5(6)—Disclosure of principal balance. This disclosure is preempted in those transactions in which the amount of the principal balance is the same as the federal amount financed, since in such transactions the state law requires the use of a term different from the federal term to represent the same amount.
- Sections 365.070-6(10) and 408.260-5(7)—Disclosure of time price differential and time charge, respectively. These disclosures are preempted in those transactions in which the amount is the same as the federal finance charge, since in such transactions the state law requires the use of a term different from the federal law to represent the same amount.
- Sections 365.070-2 and 408.260-2—Use of the terms "time price differential" and "time charge" in certain notices to the buyer. In those transactions in which the state disclosure of the time price differential or time charge is preempted, the use of the terms in this notice also is preempted. The notice itself is not preempted.
- Sections 365.070-6(11) and 408.260-5(8)—Disclosure of time balance. The time balance disclosure is preempted in those transactions in which the amount is the same as the amount of the federal total of payments, since in such transactions the state law requires the use of a different term from the federal law to represent the same amount.
- Sections 365.070-6(12) and 408.260-5(9)—Disclosure of time sale price. This disclosure is preempted in those transactions in which the amount is the same as the federal total sale price, since in such transactions the state law requires the use of a different term from the federal law to represent the same amount.

11. *Preemption determination—Mississippi.* Effective October 1, 1984, the Board has determined that the following provision in the state law of Mississippi is preempted by the federal law:

- Section 63-19-31(2)(g)—Disclosure of finance charge. This disclosure is preempted in those cases in which the term "finance charge" would be used under state law to describe a different amount than the finance charge disclosed under federal law.

12. *Preemption determination—South Carolina.* Effective October 1, 1984, the Board has determined that the following provision in the

state law of South Carolina is preempted by the federal law:

- Section 37-10-102(c)—Disclosure of due-on-sale clause. This provision is preempted, but only to the extent that the creditor is required to include the disclosure with the segregated federal disclosures. If the creditor may comply with the state law by placing the due-on-sale notice apart from the federal disclosures, the state law is not preempted.

13. *Preemption determination—Arizona.* Effective October 1, 1986, the Board has determined that the following provision in the state law of Arizona is preempted by the federal law:

- Section 6-621A.2—Use of the term "the total sum of $ _____" in certain notices provided to borrowers. This term describes the same item that is disclosed under federal law as the "total of payments." Since the state law requires the use of a different term than federal law to describe the same item, the state-required term is preempted. The notice itself is not preempted.

(Note: The state disclosure notice that incorporated the above preempted term was amended on May 4, 1987, to provide that disclosures must now be made pursuant to the federal disclosure provisions.)

14. *Preemption determination—Indiana.* Effective October 1, 1988, the Board has determined that the following provision in the state law of Indiana is preempted by the federal law:

- Section 23-2-5-8—Inclusion of the loan broker's fees and charges in the calculation of, among other items, the finance charge and annual percentage rate disclosed to potential borrowers. This disclosure is inconsistent with sections 106(a) and 226.4(a) of the federal statute and regulation, respectively, and is preempted in those instances where the use of the same term would disclose a different amount than that required to be disclosed under federal law.

15. *Preemption determination—Wisconsin.* Effective October 1, 1991, the Board has determined that the following provisions in the state law of Wisconsin are preempted by the federal law:

- Section 422.308(1)—The disclosure of the annual percentage rate in cases where the amount of the annual percentage rate disclosed to consumers under the state law differs from the amount that would be disclosed under federal law, since in those cases the state law requires the use of the same term as the federal law to represent a different amount than the federal law.
- Section 766.565(5)—The provision permitting a creditor to include in an open-end home-equity agreement authorization to declare the account balance due and payable upon receiving notice of termination from a non-obligor spouse, since such provision is inconsistent with the purpose of the federal law.

28(b) Equivalent Disclosure Requirements

1. *General.* A state disclosure may be substituted for a federal disclosure only *after* the Board has made a finding of substantial similarity. Thus, the creditor may not unilaterally choose to make a state disclosure in place of a federal disclosure, even if it believes that the state disclosure is substantially similar. Since the rule stated in section 226.28(b) does not extend to any requirement relating to the finance charge or annual percentage rate, no state provision on computation, description, or disclosure of these terms may be substituted for the federal provision.

28(d) Special Rule for Credit and Charge Cards

1. *General.* The standard that applies to preemption of state laws as they affect transactions of the type subject to sections 226.5a and 226.9(e) differs from the preemption standards generally applicable under the Truth in Lending Act. The Fair Credit and Charge Card Disclosure Act fully preempts state laws relating to the disclosure of credit information in consumer credit or charge card applications or solicitations. (For purposes of this section, a single credit or charge card application or so-

licitation that may be used to open either an account for consumer purposes or an account for business purposes is deemed to be a "consumer credit or charge card application or solicitation.") For example, a state law requiring disclosure of credit terms in direct-mail solicitations for consumer credit card accounts is preempted. A state law requiring disclosures in telephone applications for consumer credit card accounts also is preempted, even if it applies to applications initiated by the consumer rather than the issuer, because the state law relates to the disclosure of credit information in applications or solicitations within the general field of preemption, that is, consumer credit and charge cards.

2. *Limitations on field of preemption.* Preemption under the Fair Credit and Charge Card Disclosure Act does not extend to state laws applying to types of credit other than open-end consumer credit and charge card accounts. Thus, for example, a state law is not preempted as it applies to disclosures in credit and charge card applications and solicitations solely for business-purpose accounts. On the other hand, state credit disclosure laws will not apply to a single application or solicitation to open either an account for consumer purposes or an account for business purposes. Such "dual purpose" applications and solicitations are treated as "consumer credit or charge card applications or solicitations" under this section and state credit disclosure laws applicable to them are preempted. Preemption under this statute does not extend to state laws applicable to home-equity plans; preemption determinations in this area are based on the Home Equity Loan Consumer Protection Act, as implemented in section 226.5b of the regulation.

3. *Laws not preempted.* State laws relating to disclosures concerning credit and charge cards other than in applications, solicitations, or renewal notices are not preempted under section 226.28(d). In addition, state laws regulating the terms of credit and charge card accounts are not preempted, nor are laws preempted that regulate the form or content of information unrelated to the information required to be disclosed under sections 226.5a and 226.9(e). Finally, state laws concerning the enforcement of the requirements of sections 226.5a and 226.9(e) and state laws prohibiting unfair or deceptive acts or practices concerning credit and charge card applications, solicitations and renewals are not preempted. Examples of laws that are not preempted include:

- A state law that requires card issuers to offer a grace period or that prohibits certain fees in credit and charge card transactions.
- A state retail-installment-sales law or a state plain-language law, except to the extent that it regulates the disclosure of credit information in applications, solicitations, and renewals of accounts of the type subject to sections 226.5a and 226.9(e).
- A state law requiring notice of a consumer's rights under antidiscrimination or similar laws or a state law requiring notice about credit information available from state authorities.

References

Statute: §§ 111 and 171(a) and (c)
Other sections: Appendix A
Previous regulation: § 226.6(b) and (c), and interpretation § 226.604
1981 changes: Section 226.28 implements amended section 111 of the act. The test for preemption of state laws relating to disclosure and advertising is now whether the state law "contradicts" the federal, rather than whether state requirements are "different."

The revised regulation contains no counterpart to section 226.6(c) of the previous regulation concerning placement of inconsistent disclosures. It also reflects the statutory amendment providing that once the Board determines that a state-required disclosure is inconsistent with federal law, the creditor may not make the state disclosure.

SECTION 226.29—State Exemptions

29(a) General Rule

1. *Classes eligible.* The state determines the classes of transactions for which it will request an exemption and makes its application

for those classes. Classes might be, for example, all open-end credit transactions, all open-end and closed-end transactions, or all transactions in which the creditor is a bank.

2. *Substantial similarity.* The "substantially similar" standard requires that state statutory or regulatory provisions and state interpretations of those provisions be generally the same as the federal act and Regulation Z. This includes the requirement that state provisions for reimbursement to consumers for overcharges be at least equivalent to those required in section 108 of the act. A state will be eligible for an exemption even if its law covers classes of transactions not covered by the federal law. For example, if a state's law covers agricultural credit, this will not prevent the Board from granting an exemption for consumer credit, even though agricultural credit is not covered by the federal law.

3. *Adequate enforcement.* The standard requiring adequate provision for enforcement generally means that appropriate state officials must be authorized to enforce the state law through procedures and sanctions comparable to those available to federal enforcement agencies. Furthermore, state law must make adequate provision for enforcement of the reimbursement rules.

4. *Exemptions granted.* Effective October 1, 1982, the Board has granted the following exemptions from portions of the revised Truth in Lending Act:

- *Maine.* Credit or lease transactions subject to the Maine Consumer Credit Code and its implementing regulations are exempt from chapters 2, 4 and 5 of the federal act. (The exemption does not apply to transactions in which a federally chartered institution is a creditor or lessor.)
- *Connecticut.* Credit transactions subject to the Connecticut Truth in Lending Act are exempt from chapters 2 and 4 of the federal act. (The exemption does not apply to transactions in which a federally chartered institution is a creditor.)
- *Massachusetts.* Credit transactions subject to the Massachusetts Truth in Lending Act are exempt from chapters 2 and 4 of the federal act. (The exemption does not apply to transactions in which a federally chartered institution is a creditor.)
- *Oklahoma.* Credit or lease transactions subject to the Oklahoma Consumer Credit Code are exempt from chapters 2 and 5 of the federal act. (The exemption does not apply to sections 132 through 135 of the federal act, nor does it apply to transactions in which a federally chartered institution is a creditor or lessor.)
- *Wyoming.* Credit transactions subject to the Wyoming Consumer Credit Code are exempt from chapter 2 of the federal act. (The exemption does not apply to transactions in which a federally chartered institution is a creditor.)

29(b) Civil Liability

1. *Not eligible for exemption.* The provision that an exemption may not extend to sections 130 and 131 of the act assures that consumers retain access to both federal and state courts in seeking damages or civil penalties for violations, while creditors retain the defenses specified in those sections.

References

Statute: §§ 108, 123, and 171(b)
Other sections: Appendix B
Previous regulation: § 226.12
1981 changes: The procedures that states must follow to seek exemptions are now located in an appendix. Exemptions under the previous regulation will be automatically revoked on April 1, 1982, when compliance with the new regulation is mandatory.

SECTION 226.30—Limitation on Rates

1. *Scope of coverage.* The requirement of this section applies to consumer credit obligations secured by a dwelling (as "dwelling" is defined in section 226.2(a)(19)) in which the annual percentage rate may increase after consummation (or during the term of the plan, in the case of open-end credit) as a result of an increase in the interest rate component of the finance charge—whether those increases are tied to an index or formula or are within a creditor's discretion. The section applies to

credit sales as well as loans. Examples of credit obligations subject to this section include:

- Dwelling-secured credit obligations that require variable-rate disclosures under the regulation because the interest rate may increase during the term of the obligation.
- Dwelling-secured open-end credit plans entered into before November 7, 1989 (the effective date of the home-equity rules) that are not considered variable-rate obligations for purposes of disclosure under the regulation but where the creditor reserves the contractual right to increase the interest rate—periodic rate and corresponding annual percentage rate—during the term of the plan.

In contrast, credit obligations in which there is no contractual right to increase the interest rate during the term of the obligation are not subject to this section. Examples include:

- "Shared-equity" or "shared-appreciation" mortgage loans that have a fixed rate of interest and a shared-appreciation feature based on the consumer's equity in the mortgaged property. (The appreciation share is payable in a lump sum at a specified time.)
- Dwelling-secured fixed-rate closed-end balloon-payment mortgage loans and dwelling-secured fixed-rate open-end plans with a stated term that the creditor may renew at maturity. (Contrast with the renewable balloon-payment instrument described in comment 17(c)(1)-11.)
- Dwelling-secured fixed-rate closed-end multiple-advance transactions in which each advance is disclosed as a separate transaction.
- "Price-level-adjusted mortgages" or other indexed mortgages that have a fixed rate of interest but provide for periodic adjustments to payments and the loan balance to reflect changes in an index measuring prices or inflation.

The requirement of this section does not apply to credit obligations entered into prior to December 9, 1987. Consequently, new advances under open-end credit plans existing prior to December 9, 1987, are not subject to this section.

2. *Refinanced obligations.* On or after December 9, 1987, when a credit obligation is refinanced, as defined in section 226.20(a), the new obligation is subject to this section if it is dwelling-secured and allows for increases in the interest rate.

3. *Assumptions.* On or after December 9, 1987, when a credit obligation is assumed, as defined in section 226.20(b), the obligation becomes subject to this section if its is dwelling-secured and allows for increases in the interest rate.

4. *Modifications of obligations.* The modification of an obligation, regardless of when the obligation was entered into, is generally not covered by this section. For example, increasing the credit limit on a dwelling-secured, open-end plan with a variable interest rate entered into before the effective date of the rule does not make the obligation subject to this section. If, however, a security interest in a dwelling is added on or after December 9, 1987, to a credit obligation that allows for interest rate increases, the obligation becomes subject to this section. Similarly, if a variable–interest rate feature is added to a dwelling-secured credit obligation, the obligation becomes subject to this section.

5. *Land trusts.* In some states, a land trust is used in residential real estate transactions. (See discussion in comment 3(a)-8).) If a consumer-purpose loan that allows for interest rate increases is secured by an assignment of a beneficial interest in a land trust that holds title to a consumer's dwelling, that loan is subject to this section.

6. *Relationship to other sections.* Unless otherwise provided for in the commentary to this section, other provisions of the regulation such as definitions, exemptions, rules, and interpretations, also apply to this section where appropriate. To illustrate:

- An adjustable-interest-rate business-purpose loan is not subject to this section even if the loan is secured by a dwelling because such credit extensions are not subject to

the regulation. (See generally section 226.3(a).)
- Creditors subject to this section are only those that fall within the definition of a creditor in section 226.2(a)(17).

7. *Consumer credit contract.* Creditors are required to specify a lifetime maximum interest rate in their credit contracts—the instrument that creates personal liability and generally contains the terms and conditions of the agreement (for example, a promissory note or home-equity line of credit agreement). In some states, the signing of a commitment letter may create a binding obligation, for example, constituting "consummation" as defined in section 226.2(a)(13). The maximum interest rate must be included in the credit contract, but a creditor may include the rate ceiling in the commitment instrument as well.

8. *Manner of stating the maximum interest rate.* The maximum interest rate must be stated in the credit contract either as a specific amount or in any other manner that would allow the consumer to easily ascertain, at the time of entering into the obligation, what the rate ceiling will be over the term of the obligation. For example, the following statements would be sufficiently specific:

- The maximum interest rate will not exceed X%.
- The interest rate will never be higher than X percentage points above the initial rate of Y%.
- The interest rate will not exceed X%, or X percentage points above [a rate to be determined at some future point in time], whichever is less.
- The maximum interest rate will not exceed X%, or the state usury ceiling, whichever is less.

The following statements would not comply with this section:

- The interest rate will never be higher than X percentage points over the prevailing market rate.
- The interest rate will never be higher than X percentage points above [a rate to be determined at some future point in time].
- The interest rate will not exceed the state usury ceiling, which is currently X%.

A creditor may state the maximum rate in terms of a maximum annual percentage rate that may be imposed. Under an open-end credit plan, this normally would be the corresponding annual percentage rate. (See generally section 226.6(a)(2).)

9. *Multiple interest-rate ceilings.* Creditors are not prohibited from setting multiple interest-rate ceilings. For example, on loans with multiple variable-rate features, creditors may establish a maximum interest rate for each feature. To illustrate, in a variable-rate loan that has an option to convert to a fixed rate, a creditor may set one maximum interest rate for the initially imposed index-based variable-rate feature and another for the conversion option. Of course, a creditor may establish one maximum interest rate applicable to all features.

10. *Interest rate charged after default.* State law may allow an interest rate after default higher than the contract rate in effect at the time of default; however, the interest rate after default is subject to a maximum interest rate set forth in a credit obligation that is otherwise subject to this section. This rule applies only in situations in which a post-default agreement is still considered part of the original obligation.

11. *Increasing the maximum interest rate—general rule.* Generally, a creditor may not increase the maximum interest rate originally set on a credit obligation subject to this section unless the consumer and the creditor enter into a new obligation. Therefore, under an open-end plan, a creditor may not increase the rate ceiling imposed merely because there is an increase in the credit limit. If an open-end plan is closed and another opened, a new rate ceiling may be imposed. Furthermore, where an open-end plan has a fixed maturity and a creditor renews the plan at maturity, or enters into a closed-end credit transaction, a new maximum interest rate may be set at that time. If the open-end plan provides for a repayment phase, the maximum interest rate cannot be increased when the repayment phase begins unless the agreement provided for such an

increase. For a closed-end credit transaction, a new maximum interest rate may be set only if the transaction is satisfied and replaced by a new obligation. (The exceptions in section 226.20(a)(1)–(5) which limit what transactions are considered refinancings for purposes of disclosure do not apply with respect to increasing a rate ceiling that has been imposed; if a transaction is satisfied and replaced, the rate ceiling may be increased.)

12. *Increasing the maximum interest rate—assumption of an obligation.* If an obligation subject to this section is assumed by a new obligor and the original obligor is released from liability, the maximum interest rate set on the obligation may be increased as part of the assumption agreement. (This rule applies whether or not the transaction constitutes an assumption as defined in section 226.20(b).)

13. *Transition rules.* Under footnote 50, if creditors properly include the maximum rate in their credit contracts, creditors need not revise their truth in lending disclosure statement forms to add the disclosures about limitations on rate increases as part of the variable-rate disclosures, until October 1, 1988. On or after that date, creditors must have the maximum rate set forth in their credit contracts and, where applicable, as part of their truth in lending disclosures in the manner prescribed in the applicable sections of the regulation.

References

Statute: Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552
Other sections: §§ 226.6, 226.18, and 226.19
Previous regulation: None
1987 changes: This section implements section 1204 of the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552, which provides that, effective December 9, 1987, adjustable-rate mortgages must include a limitation on the interest rate that may apply during the term of the mortgage loan. An adjustable-rate mortgage loan is defined in section 1204 as "any loan secured by a lien on a one-to-four family dwelling unit, including a condominium unit, cooperative housing unit, or mobile home, where the loan is made pursuant to an agreement under which the creditor may, from time to time, adjust the rate of interest." The rule in this section incorporates section 1204 into Regulation Z and limits the scope of section 1204 to dwelling-secured consumer credit subject to the Truth in Lending Act, in which a creditor has the contractual right to increase the interest rate during the term of the credit obligation.

SUBPART E—SPECIAL RULES FOR CERTAIN HOME MORTGAGE TRANSACTIONS

SECTION 226.31—General Rules

31(c) Timing of Disclosure

1. *Furnishing disclosures.* Disclosures are considered furnished when received by the consumer.

31(c)(1) Disclosures for Certain Closed-End Home Mortgages

1. *Pre-consummation waiting period.* A creditor must furnish section 226.32 disclosures at least three business days prior to consummation. Under section 226.32, "business day" has the same meaning as the rescission rule in comment 2(a)(6)-2—all calendar days except Sundays and the federal legal holidays listed in 5 USC 6103(a). However, while the disclosure rule under sections 226.15 and 226.23 extends to midnight of the third business day, the rule under section 226.32 does not. For example, under section 226.32, if disclosures were provided on a Friday, consummation could occur any time on Tuesday, the third business day following receipt of the disclosures. If the timing of the rescission rule were to be used, consummation could not occur until after midnight on Tuesday.

31(c)(1)(i) Change in Terms

1. *Redisclosure required.* Creditors must provide new disclosures when a change in terms makes disclosures previously provided under section 226.32(c) inaccurate, including disclosures based on and labeled as an estimate. A

change in terms may result from a formal written agreement or otherwise.

31(c)(1)(ii) Telephone Disclosures

1. *Telephone disclosures.* Disclosures by telephone must be furnished at least three business days prior to consummation, calculated in accord with the timing rules under section 226.31(c)(1).

31(c)(1)(iii) Consumer's Waiver of Waiting Period before Consummation

1. *Modification or waiver.* A consumer may modify or waive the right to the three-day waiting period only after receiving the disclosures required by section 226.32 and only if the circumstances meet the criteria for establishing a bona fide personal financial emergency under section 226.23(e). Whether these criteria are met is determined by the facts surrounding individual situations. The imminent sale of the consumer's home at foreclosure during the three-day period is one example of a bona fide personal financial emergency. Each consumer entitled to the three-day waiting period must sign the handwritten statement for the waiver to be effective.

31(c)(2) Disclosures for Reverse Mortgages

1. *Business days.* For purposes of providing reverse-mortgage disclosures, "business day" has the same meaning as in comment 31(c)(1)-2—all calendar days except Sundays and the federal legal holidays listed in 5 USC 6103(a). This means if disclosures are provided on a Friday, consummation could occur any time on Tuesday, the third business day following receipt of the disclosures.

2. *Open-end plans.* Disclosures for open-end reverse mortgages must be provided three business days before the first transaction under the plan (see section 226.5(b)(1)).

31(d) Basis of Disclosures and Use of Estimates

1. *Redisclosure.* Section 226.31(d) allows the use of estimates when information necessary for an accurate disclosure is unknown to the creditor, provided that the disclosure is clearly identified as an estimate. For purposes of subpart E, the rule in section 226.31(c)(1)(i) requiring new disclosures when the creditor changes terms also applies to disclosures labeled as estimates.

31(d)(3) Per Diem Interest

1. *Per diem interest.* This paragraph applies to the disclosure of any numerical amount (such as the finance charge, annual percentage rate, or payment amount) that is affected by the amount of the per diem interest charge that will be collected at consummation. If the amount of per diem interest used in preparing the disclosures for consummation is based on the information known to the creditor at the time the disclosure document is prepared, the disclosures are considered accurate under this rule, and affected disclosures are also considered accurate, even if the disclosures were not labeled as estimates. (See comment 17(c)(2)(ii)-1 generally.)

SECTION 226.32—Requirements for Certain Closed-End Home Mortgages

32(a) Coverage

Paragraph 32(a)(1)(i)

1. *Application date.* An application is deemed received when it reaches the creditor in any of the ways applications are normally transmitted. (See section 226.19(a).) For example, if a borrower applies for a 10-year loan on September 30 and the creditor counteroffers with a 7-year loan on October 10, the application is deemed received in September and the creditor must measure the annual percentage rate against the appropriate Treasury security yield as of August 15. An application transmitted through an intermediary agent or broker is received when it reaches the creditor, rather than when it reaches the agent or broker. (See comment 19(b)-3 to determine whether a transaction involves an intermediary agent or broker.)

2. *When fifteenth not a business day.* If the 15th day of the month immediately preceding the application date is not a business day, the

creditor must use the yield as of the business day immediately preceding the 15th.

3. *Calculating annual percentage rates for variable-rate loans and discount loans.* Creditors must use the rules set out in the commentary to section 226.17(c)(1) in calculating the annual percentage rate for variable-rate loans (assume the rate in effect at the time of disclosure remains unchanged) and for discount, premium, and stepped-rate transactions (which must reflect composite annual percentage rates).

4. *Treasury securities.* To determine the yield on a Treasury security for the annual percentage rate test, creditors may use the Board's "Selected Interest Rates" (statistical release H-15) or the actual auction results. Treasury auctions are held at regular intervals for the different types of securities. These figures are published by major financial and metropolitan newspapers and are also available from Federal Reserve Banks. Creditors must use the yield on the security that has the nearest maturity at issuance to the loan's maturity. For example, if a creditor must compare the annual percentage rate to Treasury securities with either 7-year or 10-year maturities, the annual percentage rate for an 8-year loan is compared with securities that have a 7-year maturity; the annual percentage rate for a 9-year loan is compared with securities that have a 10-year maturity. If the loan maturity is exactly halfway between, the annual percentage rate is compared with the Treasury security that has the lower yield. For example, if the loan has a maturity of 20 years and comparable securities have maturities of 10 years with a yield of 6.501 percent and 30 years with a yield of 6.906 percent, the annual percentage rate is compared with 10 percentage points over the yield of 6.501 percent, the lower of the two yields.

Paragraph 32(a)(1)(ii)

1. *Total loan amount.* For purposes of the "points and fees" test, the total loan amount is calculated by taking the amount financed, as determined according to section 226.18(b), and deducting any cost listed in section 226.32(b)(1)(iii) that is both included as points and fees under section 226.32(b)(1) and financed by the creditor. Some examples follow, each using a $10,000 amount borrowed, a $300 appraisal fee, and $400 in points:

i. If the consumer financed a $300 fee for a creditor-conducted appraisal and pays $400 in points at closing, the amount financed under section 226.18(b) is $9,900 ($10,000 plus the $300 appraisal fee that is paid to and financed by the creditor, less $400 in prepaid finance charges). The $300 appraisal fee paid to the creditor is added to other points and fees under section 226.32(b)(1)(iii). It is deducted from the amount financed ($9,900) to derive a total loan amount of $9,600.
ii. If the consumer pays the $300 fee for the creditor-conducted appraisal in cash at closing, the $300 is included in the points and fees calculation because it is paid to the creditor. However, because the $300 is not financed by the creditor, the fee is not part of the amount financed under section 226.18(b) ($10,000, in this case). The total loan amount is $9,600 ($10,000, less $400 in prepaid finance charges).
iii. If the consumer finances a $300 fee for an appraisal conducted by someone other than the creditor or an affiliate, the $300 fee is not included with other points and fees under section 226.32(b)(1)(iii). The amount financed under section 226.18(b) is $9,900 ($10,000 plus the $300 fee for an independently conducted appraisal that is financed by the creditor, less the $400 paid in cash and deducted as prepaid finance charges).

2. *Annual adjustment of $400 amount.* A mortgage loan is covered by section 226.32 if the total points and fees payable by the consumer at or before loan consummation exceed the greater of $400 or 8 percent of the total loan amount. The $400 figure is adjusted annually by the Board; the adjusted figure becomes effective on January 1 of the following year. The adjusted figure for 1996 is $412, reflecting a 3.00 percent increase in the CPI-U from June 1994 to June 1995, rounded to the nearest whole dollar. The Board will publish adjustments after the June figures become available each year. The adjustment for the

upcoming year will be included in any proposed commentary published in the fall, and incorporated into the commentary the following spring.

32(b) Definitions

Paragraph 32(b)(1)(i)

1. *General.* Section 226.32(b)(1)(i) includes in the total "points and fees" items defined as finance charges under section 226.4(a) and 226.4(b). Items excluded from the finance charge under other provisions of section 226.4 are not included in the total "points and fees" under paragraph 32(b)(1)(i), but may be included in "points and fees" under paragraphs 32(b)(1)(ii) and 32(b)(1)(iii). Interest, including per diem interest, is excluded from "points and fees" under section 226.32(b)(1).

Paragraph 32(b)(1)(ii)

1. *Mortgage broker fees.* In determining "points and fees" for purposes of this section, compensation paid by a consumer to a mortgage broker (directly or through the creditor for delivery to the broker) is included in the calculation whether or not the amount is disclosed as a finance charge. Mortgage broker fees that are not paid by the consumer are not included. Mortgage broker fees already included in the calculation as finance charges under section 226.32(b)(1)(i) need not be counted again under section 226.32(b)(1)(ii).

2. *Example.* Section 226.32(b)(1)(iii) defines "points and fees" to include all items listed in section 226.4(c)(7), other than amounts held for the future payment of taxes. An item listed in section 226.4(c)(7) may be excluded from the "points and fees" calculation, however, if the charge is reasonable, the creditor receives no direct or indirect compensation from the charge, and the charge is not paid to an affiliate of the creditor. For example, a reasonable fee paid by the consumer to an independent, third-party appraiser may be excluded from the "points and fees" calculation (assuming no compensation is paid to the creditor). A fee paid by the consumer for an appraisal performed by the creditor must be included in the calculation, even though the fee may be excluded from the finance charge if it is bona fide and reasonable in amount.

32(c) Disclosures

1. *Format.* The disclosures must be clear and conspicuous but need not be in any particular type size or typeface, nor presented in any particular manner. The disclosures need not be a part of the note or mortgage document.

32(c)(3) Regular Payment

1. *General.* The regular payment is the amount due from the borrower at regular intervals, such as monthly, bimonthly, quarterly, or annually. There must be at least two payments, and the payments must be in an amount and at such intervals that they fully amortize the amount owed. In disclosing the regular payment, creditors may rely on the rules set forth in section 226.18(g); however, the amounts for voluntary items not agreed to by the consumer such as credit life insurance may not be included in the regular payment.

i. If the loan has more than one payment level, the regular payment for each level must be disclosed. For example:

A. In a 30-year graduated payment mortgage where there will be payments of $300 for the first 120 months, $400 for the next 120 months, and $500 for the last 120 months, each payment amount must be disclosed, along with the length of time that the payment will be in effect.
B. If interest and principal are paid at different times, the regular amount for each must be disclosed.
C. In discounted or premium variable-rate transactions where the creditor sets the initial interest rate and later rate adjustments are determined by an index or formula, the creditor must disclose both the initial payment based on the discount or premium and the payment that will be in effect thereafter. Additional explanatory material which does not detract from the required disclosures may accompany the disclosed amounts. For example, if a monthly payment is $250 for the first six months and then increases based on an index and margin, the creditor could use language such

as the following: "Your regular monthly payment will be $250 for six months. After six months your regular monthly payment will be based on an index and margin, which currently would make your payment $350. Your actual payment at that time may be higher or lower."

2. *Balloon payments.* If a loan with a term of five years or more provides for a balloon payment, the balloon payment must be disclosed. For a loan with a term of less than five years, a balloon payment is prohibited.

32(c)(4) Variable Rate

1. *Calculating "worst-case" payment example.* Creditors may rely on instructions in section 226.19(b)(2)(x) for calculating the maximum possible increases in rates in the shortest possible timeframe, based on the face amount of the note (not the hypothetical loan amount of $10,000 required by section 226.19(b)(2)(x)). The creditor must provide a maximum payment for each payment level, where a payment schedule provides for more than one payment level and more than one maximum payment amount is possible.

32(d) Limitations

32(d)(1)(i) Balloon Payment

1. *Regular periodic payments.* The repayment schedule for a section 226.32 mortgage loan with a term of less than five years must fully amortize the outstanding principal balance through "regular periodic payments." A payment is a "regular periodic payment" if it is not more than twice the amount of other payments.

32(d)(2) Negative Amortization

1. *Negative amortization.* The prohibition against negative amortization in a mortgage covered by section 226.32 does not preclude reasonable increases in the principal balance that result from events permitted by the legal obligation unrelated to the payment schedule. For example, when a consumer fails to obtain property insurance and the creditor purchases insurance, the creditor may add a reasonable premium to the consumer's principal balance, to the extent permitted by the legal obligation.

32(d)(4) Increased Interest Rate

1. *Variable-rate transactions.* The limitation on interest-rate increases does not apply to rate increases resulting from changes in accordance with the legal obligation in a variable-rate transaction, even if the increase occurs after default by the consumer.

32(d)(5) Rebates

1. *Calculation of refunds.* The limitation applies only to refunds of precomputed (such as add-on) interest and not to any other charges that are considered finance charges under section 226.4 (for example, points and fees paid at closing). The calculation of the refund of interest includes odd-days interest, whether paid at or after consummation.

32(d)(6) Prepayment Penalties

1. *State law.* For purposes of computing a refund of unearned interest, if using the actuarial method defined by applicable state law results in a refund that is greater than the refund calculated by using the method described in section 933(d) of the Housing and Community Development Act of 1992, creditors should use the state law definition in determining if a refund is a prepayment penalty.

32(d)(7) Prepayment-Penalty Exception

Paragraph 32(d)(7)(iii)

1. *Calculating debt-to-income ratio.* "Debt" does not include amounts paid by the borrower in cash at closing or amounts from the loan proceeds that directly repay an existing debt. Creditors may consider combined debt-to-income ratios for transactions involving joint applicants.

2. *Verification.* Verification of employment satisfies the requirement for payment records for employment income.

32(e) Prohibited Acts and Practices

32(e)(1) Repayment Ability

1. *Determining repayment ability.* The information provided to the creditor in connection with section 226.32(d)(7) may be used to show that the creditor considered the consumer's income and obligations before extending the credit. Any expected income can be considered by the creditor, except equity income that the consumer would obtain through the foreclosure of a mortgage covered by section 226.32. For example, a creditor may use information about income other than regular salary or wages such as gifts, expected retirement payments, or income from housecleaning or childcare. The creditor also may use unverified income, as long as the creditor has a reasonable basis for believing that the income exists and will support the loan.

32(e)(2) Home-Improvement Contracts

Paragraph 32(e)(2)(i)

1. *Joint payees.* If a creditor pays a contractor with an instrument jointly payable to the contractor and the consumer, the instrument must name as payee each consumer who is primarily obligated on the note.

32(e)(3) Notice to Assignee

1. *Subsequent sellers or assignors.* Any person, whether or not the original creditor, that sells or assigns a mortgage subject to this section must furnish the notice of potential liability to the purchaser or assignee.

2. *Format.* While the notice of potential liability need not be in any particular format, the notice must be prominent. Placing it on the face of the note, such as with a stamp, is one means of satisfying the prominence requirement.

SECTION 226.33—Requirements for Reverse Mortgages

33(a) Definition

1. *Nonrecourse transaction.* A nonrecourse reverse-mortgage transaction limits the homeowner's liability to the proceeds of the sale of the home (or any lesser amount specified in the credit obligation). If a transaction structured as a closed-end reverse-mortgage transaction allows recourse against the consumer, and the annual percentage rate or the points and fees exceed those specified under section 226.32(a)(1), the transaction is subject to all the requirements of section 226.32, including the limitations concerning balloon payments and negative amortization.

Paragraph 33(a)(2)

1. *Default.* Default is not defined by the statute or regulation, but rather by the legal obligation between the parties and state or other law.

2. *Definite term or maturity date.* To meet the definition of a reverse-mortgage transaction, a creditor cannot require any principal, interest, or shared appreciation or equity to be due and payable (other than in the case of default) until after the consumer's death, transfer of the dwelling, or the consumer ceases to occupy the dwelling as a principal dwelling. Some state laws require legal obligations secured by a mortgage to specify a definite maturity date or term of repayment in the instrument. An obligation may state a definite maturity date or term of repayment and still meet the definition of a reverse-mortgage transaction if the maturity date or term of repayment used would not operate to cause maturity prior to the occurrence of any of the maturity events recognized in the regulation. For example, some reverse-mortgage programs specify that the final maturity date is the borrower's 150th birthday; other programs include a shorter term but provide that the term is automatically extended for consecutive periods if none of the other maturity events has yet occurred. These programs would be permissible.

33(c) Projected Total Cost of Credit

33(c)(1) Costs to Consumer

1. *Costs and charges to consumer—relation to finance charge.* All costs and charges to the

consumer that are incurred in a reverse-mortgage transaction are included in the projected total cost of credit, and thus in the total-annual-loan-cost rates, whether or not the cost or charge is a finance charge under section 226.4.

2. *Annuity costs.* As part of the credit transaction, some creditors require or permit a consumer to purchase an annuity that immediately—or at some future time—supplements or replaces the creditor's payments. The amount paid by the consumer for the annuity is a cost to the consumer under this section, regardless of whether the annuity is purchased through the creditor or a third party, or whether the purchase is mandatory or voluntary.

3. *Disposition costs excluded.* Disposition costs incurred in connection with the sale or transfer of the property subject to the reverse mortgage are not included in the costs to the consumer under this paragraph. (However, see the definition of Val_n in appendix K to the regulation to determine the effect certain disposition costs may have on the total-annual-loan-cost rates.)

33(c)(2) Payments to Consumer

1. *Payments upon a specified event.* The projected total cost of credit should not reflect contingent payments in which a credit to the outstanding loan balance or a payment to the consumer's estate is made upon the occurrence of an event (for example, a "death benefit" payable if the consumer's death occurs within a certain period of time). Thus, the table of total-annual-loan-cost rates required under section 226.33(b)(2) would not reflect such payments. At its option, however, a creditor may put an asterisk, footnote, or similar type of notation in the table next to the applicable total-annual-loan-cost rate, and state in the body of the note, apart from the table, the assumption upon which the total-annual-loan-cost is made and any different rate that would apply if the contingent benefit were paid.

33(c)(3) Additional Creditor Compensation

1. *Shared appreciation or equity.* Any shared appreciation or equity that the creditor is entitled to receive pursuant to the legal obligation must be included in the total cost of a reverse-mortgage loan. For example, if a creditor agrees to a reduced interest rate on the transaction in exchange for a portion of the appreciation or equity that may be realized when the dwelling is sold, that portion is included in the projected total cost of credit.

33(c)(4) Limitations on Consumer Liability

1. *In general.* Creditors must include any limitation on the consumer's liability (such as a nonrecourse limit or an equity-conservation agreement) in the projected total cost of credit. These limits and agreements protect a portion of the equity in the dwelling for the consumer or the consumer's estate. For example, the following are limitations on the consumer's liability that must be included in the projected total cost of credit:

i. A limit on the consumer's liability to a certain percentage of the projected value of the home.
ii. A limit on the consumer's liability to the net proceeds from the sale of the property subject to the reverse mortgage.

2. *Uniform assumption for "net proceeds" recourse limitations.* If the legal obligation between the parties does not specify a percentage for the "net proceeds" liability of the consumer, for purposes of the disclosures required by section 226.33, a creditor must assume that the costs associated with selling the property will equal 7 percent of the projected sale price (see the definition of the Val_n symbol under appendix K(b)(6)).

APPENDIX A—Effect on State Laws

1. *Who may make requests.* Appendix A sets forth the procedures for preemption determinations. As discussed in section 226.28, which contains the standards for preemption, a request for a determination of whether a state law is inconsistent with the requirements of chapters 1, 2, or 3 may be made by creditors, states, or any interested party. However, only states may request and receive determinations

in connection with the fair credit billing provisions of chapter 4.

References

Statute: §§ 111 and 171(a)
Other sections: § 226.28
Previous regulation: §§ 226.6(b) and 226.70 (supplement V, § II)
1981 changes: The procedures in appendix A were largely adapted from supplement V, section II of the previous regulation (§ 226.70), with changes made to streamline the procedures.

APPENDIX B—State Exemptions

1. *General.* Appendix B sets forth the procedures for exemption applications. The exemption standards are found in section 226.29 and are discussed in the commentary to that section.

References

Statute: §§ 123 and 171(b)
Other sections: § 226.29
Previous regulation: §§ 226.12, 226.50 (supplement II), 226.60 (supplement IV), and 226.70 (supplement V, § I)
1981 changes: The procedures in appendix B represent a combination and streamlining of the procedures set forth in the supplements to the previous regulation.

APPENDIX C—Issuance of Staff Interpretations

1. *General.* This commentary is the vehicle for providing official staff interpretations. Individual interpretations generally will not be issued separately from the commentary.

References

Statute: §§ 105 and 130(f)
Other sections: None
Previous regulation: § 226.1(d)
1981 changes: Appendix C reflects the Board's intention that this commentary serve as the vehicle for interpreting the regulation, rather than individual interpretive letters.

APPENDIX D—Multiple-Advance Construction Loans

1. *General rule.* Appendix D provides a special procedure that creditors may use, at their option, to estimate and disclose the terms of multiple-advance construction loans when the amounts or timing of advances is unknown at consummation of the transaction. This appendix reflects the approach taken in section 226.17(c)(6)(ii), which permits creditors to provide separate or combined disclosures for the construction period and for the permanent financing, if any; i.e., the construction phase and the permanent phase may be treated as one transaction or more than one transaction. Appendix D may also be used in multiple-advance transactions other than construction loans, when the amounts or timing of advances is unknown at consummation.

2. *Variable-rate multiple-advance loans.* The hypothetical disclosure required in variable-rate transactions by section 226.18(f)(1)(iv) is not required for multiple-advance loans disclosed pursuant to appendix D, part I.

3. *Calculation of the total of payments.* When disclosures are made pursuant to appendix D, the total of payments may reflect either the sum of the payments or the sum of the amount financed and the finance charge.

4. *Annual percentage rate.* Appendix D does not require the use of volume I of the Board's Annual Percentage Rate Tables for calculation of the annual percentate rate. Creditors utilizing appendix D in making calculations and disclosures may use other computation tools to determine the estimated annual percentage rate, based on the finance charge and payment schedule obtained by use of the appendix.

5. *Interest reserves.* In a multiple-advance construction loan, a creditor may establish an "interest reserve" to ensure that interest is paid as it accrues by designating a portion of the loan to be used for paying the interest that accrues on the loan. An interest reserve is not treated as a prepaid finance charge, whether the interest reserve is the same as or different from the estimated interest figure calculated under appendix D.

- If a creditor permits a consumer to make

interest payments as they become due, the interest reserve should be disregarded in the disclosures and calculations under appendix D.

- If a creditor requires the establishment of an interest reserve and automatically deducts interest payments from the reserve amount rather than allow the consumer to make interest payments as they become due, the fact that interest will accrue on those interest payments as well as the other loan proceeds must be reflected in the calculations and disclosures. To reflect the effects of such compounding, a creditor should first calculate interest on the commitment amount (exclusive of the interest reserve) and then add the figure obtained by assuming that one-half of that interest is outstanding at the contract interest rate for the entire construction period. For example, using the example shown under paragraph A, part I of appendix D, the estimated interest would be $1,117.68 ($1,093.75 plus an additional $23.93 calculated by assuming half of $1,093.75 is outstanding at the contract interest rate for the entire construction period), and the estimated annual percentage rate would be 21.18 percent.

References

Statute: None
Other sections: §§ 226.17 and 226.22
Previous regulation: Interpretation § 226.813
1981 changes: The use of appendix D is limited to multiple-advance loans for construction purposes or analogous types of transactions.

APPENDIX E—Rules for Card Issuers That Bill on a Transaction-by-Transaction Basis

Statute: None
Previous regulation: Interpretation § 226.709
Other sections: §§ 226.6 through 226.13, and 226.15
1981 changes: The rules in this appendix have been streamlined and clarified to indicate how certain card issuers that bill on a transaction basis may comply with the requirements of subpart B.

APPENDIX F—Annual Percentage Rate Computations for Certain Open-End Credit Plans

1. *Daily rate with specific transaction charge.* If the finance charge results from a charge relating to a specific transaction and the application of a daily periodic rate, see comment 14(c)-6 for guidance on an appropriate calculation method.

References

Statute: § 107
Previous regulation: § 226.5(a)(3)(ii), footnote 5(a)
Other sections: § 226.14
1981 changes: This appendix incorporates a sixth example in which the transaction amount exceeds the amount of the balance subject to the periodic rate.

APPENDIXES G AND H—Open-End and Closed-End Model Forms and Clauses

1. *Permissible changes.* Although use of the model forms and clauses is not required, creditors using them properly will be deemed to be in compliance with the regulation with regard to those disclosures. Creditors may make certain changes in the format or content of the forms and clauses and may delete any disclosures that are inapplicable to a transaction or a plan without losing the act's protection from liability. The rearrangement of the model forms and clauses may not be so extensive as to affect the substance, clarity, or meaningful sequence of the forms and clauses. Creditors making revisions with that effect will lose their protection from civil liability. Acceptable changes include, for example:

- Using the first person, instead of the second person, in referring to the borrower
- Using "borrower" and "creditor" instead of pronouns
- Rearranging the sequences of the disclosures
- Not using bold type for headings
- Incorporating certain state "plain English" requirements
- Deleting inapplicable disclosures by whit-

ing out, blocking out, filling in "N/A" (not applicable) or "0," crossing out, leaving blanks, checking a box for applicable items, or circling applicable items. (This should permit use of multipurpose standard forms.)
- Substituting appropriate references, such as "bank," "we," or a specific name, for "creditor" in the initial open-end disclosures
- Using a vertical, rather than a horizontal, format for the boxes in the closed-end disclosures

2. *Debt-cancellation coverage.* This regulation does not authorize creditors to characterize debt-cancellation fees as insurance premiums for purposes of this regulation. Creditors may provide a disclosure that refers to debt-cancellation coverage whether or not the coverage is considered insurance. Creditors may use the model credit-insurance disclosures only if the debt-cancellation coverage constitutes insurance under state law.

APPENDIX G—Open-End Model Forms and Clauses

1. *Model G-1.* The model disclosures in G-1 (different balance computation methods) may be used in both the initial disclosures under section 226.6 and the periodic disclosures under section 226.7. As is clear from the models given, "shorthand" descriptions of the balance computation methods are not sufficient. The phrase "a portion of" the finance charge should be included if the total finance charge includes other amounts, such as transaction charges, that are not due to the application of a periodic rate. In addition, if unpaid finance charges are subtracted in calculating the balance, that fact must be stated so that the disclosure of the computation method is accurate. Only model G-1(b) contains a final sentence appearing in brackets which reflects the total dollar amount of payments and credits received during the billing cycle. The other models do not contain this language because they reflect plans in which payments and credits received during the billing cycle are subtracted. If this is not the case, however, the language relating to payments and credits should be changed, and the creditor should add either the disclosure of the dollar amount as in model G-1(b) or an indication of which credits (disclosed elsewhere on the periodic statement) will not be deducted in determining the balance. (Such an indication may also substitute for the bracketed sentence in model G-1(b).) (See the commentary to section 226.7(e).)

2. *Model G-2.* This model contains the notice of liability for unauthorized use of a credit card.

3. *Models G-3 and G-4.* These set out models for the long-form billing-error rights statement (for use with the initial disclosures and as an annual disclosure or, at the creditor's option, with each periodic statement) and the alternative billing-error rights statement (for use with each periodic statement), respectively. Creditors must provide the billing-error rights statements in a form substantially similar to the models in order to comply with the regulation. The model billing-rights statements may be modified in any of the ways set forth in the first paragraph to the commentary on appendixes G and H. The models may, furthermore, be modified by deleting inapplicable information, such as:

- The paragraph concerning stopping a debit in relation to a disputed amount, if the creditor does not have the ability to debit automatically the consumer's savings or checking account for payment
- The rights stated in the special rule for credit card purchases and any limitations on those rights

The model billing rights statements also contain optional language that creditors may use. For example, the creditor may:

- Include a statement to the effect that notice of a billing error must be submitted on something other than the payment ticket or other material accompanying the periodic disclosures
- Insert its address or refer to the address that appears elsewhere on the bill

Additional information may be included on the statements as long as it does not detract from the required disclosures. For instance,

information concerning the reporting of errors in connection with a checking account may be included on a combined statement as long as the disclosures required by the regulation remain clear and conspicuous.

4. *Models G-5 through G-9.* These models set out notices of the right to rescind that would be used at different times in an open-end plan. The last paragraph of each of the rescission model forms contains a blank for the date by which the consumer's notice of cancellation must be sent or delivered. A parenthetical is included to address the situation in which the consumer's right to rescind the transaction exists beyond three business days following the date of the transaction, for example, when the notice or material disclosures are delivered late or when the date of the transaction in paragraph 1 of the notice is an estimate. The language of the parenthetical is not optional. See the commentary to section 226.2(a)(25) regarding the specificity of the security-interest disclosure for model form G-7.

5. *Models G-10(A) through G-10(C).* Models G-10(A) and G-10(B) illustrate the tabular format for providing the disclosures required under section 226.5a for applications and solicitations for credit cards other than charge cards. Model G-10(A) illustrates the permissible inclusion in the tabular format of all of the disclosures. Model G-10(B) contains only the disclosures required to be included in the table, while the three additional disclosures are shown outside of the table. The two forms also illustrate two different levels of detail in disclosing the grace period, and different arrangements of the disclosures. Model G-10(C) illustrates the tabular format disclosure for charge card applications and solicitations and reflects all of the disclosures in the table. Disclosures may be arranged in an order different from that in model forms G-10(A), (B), and (C); may be arranged vertically or horizontally; need not be highlighted aside from being included in the table; and are not required to be in any particular type size. Various features from different model forms may be combined; for example, the shorter grace-period disclosure in model form G-10(B) may be used in any disclosure. While proper use of the model forms will be deemed in compliance with the regulation, card issuers are permitted to use headings and disclosures other than those in the forms (with an exception relating to the use of "grace period") if they are clear and concise and are substantially similar to the headings and disclosures contained in model forms. For further discussion of requirements relating to form, see the commentary to section 226.5a(a)(2).

6. *Models G-11 and G-12.* Model G-11 contains clauses that illustrate the general disclosures required under section 226.5a(e) in applications and solicitations made available to the general public. Model G-12 is a model clause for the disclosure required under section 226.5a(f) when a charge card accesses an open-end plan offered by another creditor.

7. *Models G-13(A) and G-13(B).* These model forms illustrate the disclosures required under section 226.9(f) when the card issuer changes the entity providing insurance on a credit card account. Model G-13(A) contains the items set forth in section 226.9(f)(3) as examples of significant terms of coverage that may be affected by the change in insurance provider. The card issuer may either list all of these potential changes in coverage and place a check mark by the applicable changes, or list only the actual changes in coverage. Under either approach, the card issuer must either explain the changes or refer to an accompanying copy of the policy or group certificate for details of the new terms of coverage. Model G-13(A) also illustrates the permissible combination of the two notices required by section 226.9(f)—the notice required for a planned change in provider and the notice required once a change has occurred. This form may be modified for use in providing only the disclosures required before the change if the card issuer chooses to send two separate notices. Thus, for example, the references to the attached policy or certificate would not be required in a separate notice prior to a change in the insurance provider since the policy or certificate need not be provided at that time. Model G-13(B) illustrates the disclosures required under section 226.9(f)(2) when the insurance provider is changed.

APPENDIX H—Closed-End Model Forms and Clauses

1. *Models H-1 and H-2.* Creditors may make several types of changes to closed-end model forms H-1 (credit sale) and H-2 (loan) and still be deemed to be in compliance with the regulation, provided that the required disclosures are made clearly and conspicuously. Permissible changes include the addition of the information permitted by footnote 37 to section 226.17 and "directly related" information as set forth in the commentary to section 226.17(a).

The creditor may also delete or, on multipurpose forms, indicate inapplicable disclosures, such as:

- The itemization of the amount financed option (See samples H-12 through H-15.)
- The credit life and disability insurance disclosures (See samples H-11 and H-12.)
- The property insurance disclosures (See samples H-10 through H-12, and H-14.)
- The "filing fees" and "nonfiling insurance" disclosures (See samples H-11 and H-12.)
- The prepayment penalty or rebate disclosures (See samples H-12 and H-14.)
- The total sale price (See samples H-11 through H-15.)

Other permissible changes include:

- Adding the creditor's address or telephone number (See the commentary to section 226.18(a).)
- Combining required terms where several numerical disclosures are the same, for instance, if the "total of payments" equals the "total sale price" (See the commentary to section 226.18.)
- Rearranging the sequence or location of the disclosures—for instance, by placing the descriptive phrases outside the boxes containing the corresponding disclosures, or by grouping the descriptors together as a glossary of terms in a separate section of the segregated disclosures; by placing the payment schedule at the top of the form; or by changing the order of the disclosures in the boxes, including the annual percentage rate and finance charge boxes
- Using brackets, instead of checkboxes, to indicate inapplicable disclosures
- Using a line for the consumer to initial, rather than a checkbox, to indicate an election to receive an itemization of the amount financed
- Deleting captions for disclosures
- Using a symbol, such as an asterisk, for estimated disclosures, instead of an "e"
- Adding a signature line to the insurance disclosures to reflect joint policies
- Separately itemizing the filing fees
- Revising the late charge disclosure in accordance with the commentary to section 226.18(*l*)

2. *Model H-3.* Creditors have considerable flexibility in filling out model H-3 (itemization of the amount financed). Appropriate revisions, such as those set out in the commentary to section 226.18(c), may be made to this form without loss of protection from civil liability for proper use of the model forms.

3. *Models H-4 through H-7.* The model clauses are not included in the model forms although they are mandatory for certain transactions. Creditors using the model clauses when applicable to a transaction are deemed to be in compliance with the regulation with regard to that disclosure.

4. *Model H-4(A).* This model contains the variable-rate model clauses applicable to transactions subject to section 226.18(f)(1) and is intended to give creditors considerable flexibility in structuring variable-rate disclosures to fit individual plans. The information about circumstances, limitations, and effects of an increase may be given in terms of the contract interest rate or the annual percentage rate. Clauses are shown for hypothetical examples based on the specific amount of the transaction and based on a representative amount. Creditors may preprint the variable-rate disclosures based on a representative amount for similar types of transactions, instead of constructing an individualized example for each transaction. In both representative examples and transaction-specific examples, creditors may refer either to the incremental change in rate, payment amount, or number of payments, or to the resulting rate, payment

amount, or number of payments. For example, creditors may state that the rate will increase by 2 percent, with a corresponding $150 increase in the payment, or creditors may state that the rate will increase to 16 percent, with a corresponding payment of $850.

5. *Model H-4(B).* This model clause illustrates the variable-rate disclosure required under section 226.18(f)(2), which would alert consumers to the fact that the transaction contains a variable-rate feature and that disclosures were provided earlier.

6. *Model H-4(C).* This model clause illustrates the early disclosures required generally under section 226.19(b). It includes information on how the consumer's interest rate is determined and how it can change over the term of the loan, and explains changes that may occur in the borrower's monthly payment. The model clause also contains an example of how to disclose historical changes in the index or formula values used to compute interest rates for the preceding 15 years. In addition, the model clause illustrates the disclosure of the initial and maximum interest rates and payments for a loan originated at the most recent rate shown in the historical example.

7. *Model H-4(D).* This model clause illustrates the adjustment notice required under section 226.20(c) and provides examples of payment-change notices and annual notices of interest-rate changes.

8. *Model H-5.* This contains the demand feature clause.

9. *Model H-6.* This contains the assumption clause.

10. *Model H-7.* This contains the required-deposit clause.

11. *Models H-8 and H-9.* These models contain the rescission notices for a typical closed-end transaction and a refinancing, respectively. The last paragraph of each model form contains a blank for the date by which the consumer's notice of cancellation must be sent or delivered. A parenthetical is included to address the situation in which the consumer's right to rescind the transaction exists beyond three business days following the date of the transaction, for example, where the notice or material disclosures are delivered late or where the date of the transaction in paragraph 1 of the notice is an estimate. The language of the parenthetical is not optional. See the commentary to section 226.2(a)(25) regarding the specificity of the security-interest disclosure for model form H-9. The prior version of model form H-9 is substantially similar to the current version and creditors may continue to use it, as appropriate. Creditors are encouraged, however, to use the current version when reordering or reprinting forms.

12. *Sample forms.* The sample forms (H-10 through H-15) serve a different purpose than the model forms. The samples illustrate various ways of adapting the model forms to the individual transactions described in the commentary to appendix H. The deletions and rearrangements shown relate only to the specific transactions described. As a result, the samples do not provide the general protection from civil liability provided by the model forms and clauses.

13. *Sample H-10.* This sample illustrates an automobile credit sale. The cash price is $7,500 with a downpayment of $1,500. There is an 8 percent add-on interest rate and a term of three years, with 36 equal monthly payments. The credit life insurance premium and the filing fees are financed by the creditor. There is a $25 credit report fee paid by the consumer before consummation, which is a prepaid finance charge.

14. *Sample H-11.* This sample illustrates an installment loan. The amount of the loan is $5,000. There is a 12 percent simple interest rate and a term of two years. The date of the transaction is expected to be April 15, 1981, with the first payment due on June 1, 1981. The first payment amount is labelled as an estimate since the transaction date is uncertain. The odd days' interest ($26.67) is collected with the first payment. The remaining 23 monthly payments are equal.

15. *Sample H-12.* This sample illustrates a refinancing and consolidation loan. The amount of the loan is $5,000. There is a 15 percent simple interest rate and a term of three years.

The date of the transaction is April 1, 1981, with the first payment due on May 1, 1981. The first 35 monthly payments are equal, with an odd final payment. The credit disability insurance premium is financed. In calculating the annual percentage rate, the U.S. Rule has been used. Since an itemization of the amount financed is included with the disclosures, the statement regarding the consumer's option to receive an itemization is deleted.

16. *Samples H-13 through H-15.* These samples illustrate various mortgage transactions. They assume that the mortgages are subject to the Real Estate Settlement Procedures Act (RESPA). As a result, no option regarding the itemization of the amount financed has been included in the samples, because providing the good faith estimates of settlement costs required by RESPA satisfies Truth in Lending's amount-financed itemization requirement. (See footnote 39 to section 226.18(c).)

17. *Sample H-13.* This sample illustrates a mortgage with a demand feature. The loan amount is $44,900, payable in 360 monthly installments at a simple interest rate of 14.75 percent. The 15 days of interim interest ($294.34) is collected as a prepaid finance charge at the time of consummation of the loan (April 15, 1981). In calculating the disclosure amounts, the minor-irregularities provision in section 226.17(c)(4) has been used. The property insurance premiums are not included in the payment schedule. This disclosure statement could be used for notes with the seven-year call option required by the Federal National Mortgage Association (FNMA) in states where due-on-sale clauses are prohibited.

18. *Sample H-14.* This sample disclosure form illustrates the disclosures under section 226.19(b) for a variable-rate transaction secured by the consumer's principal dwelling with a term greater than one year. The sample form shows a creditor how to adapt the model clauses in appendix H-4(C) to the creditor's own particular variable-rate program. The sample disclosure form describes the features of a specific variable-rate mortgage program and alerts the consumer to the fact that information on the creditor's other closed-end variable-rate programs is available upon request. It includes information on how the interest rate is determined and how it can change over time, and explains how the monthly payment can change based on a $10,000 loan amount, payable in 360 monthly installments, based on historical changes in the values for the weekly average yield on U.S. Treasury securities adjusted to a constant maturity of one year. Index values are measured as of the first week ending in July for the years 1977 through 1987. This reflects the requirement that the index history be based on values for the same date or period each year beginning with index values for 1977. The sample disclosure also illustrates the requirement under section 226.19(b)(2)(x) that the initial and the maximum interest rates and payments be shown for a $10,000 loan originated at the most recent rate shown in the historical example. In the sample, the loan is assumed to have an initial interest rate of 9.71 percent (which was the interest rate in 1987 for the example shown) and to have 2 percentage point annual (and 5 percentage point overall) interest rate limitations or caps. Thus, the maximum amount that the interest rate could rise under this program is 5 percentage points higher than the 9.71 percent initial rate to 14.71 percent, and the monthly payment could rise from $85.62 to a maximum of $123.31. The loan would not reach the maximum interest rate until its fourth year because of the 2 percentage point annual rate limitations, and the maximum payment disclosed reflects the amortization of the loan during that period. The sample form also illustrates how to provide consumers with a method for calculating their actual monthly payment for a loan amount other than $10,000.

19. *Sample H-15.* This sample illustrates a graduated payment mortgage with a five-year graduation period and a 7½ percent yearly increase in payments. The loan amount is $44,900, payable in 360 monthly installments at a simple interest rate of 14.75 percent. Two points ($898), as well as an initial mortgage guarantee insurance premium of $225.00, are included in the prepaid finance charge. The mortgage-guarantee insurance premiums are

calculated on the basis of ¼ of 1 percent of the outstanding principal balance under an annual reduction plan. The abbreviated disclosure permitted under section 226.18(g)(2) is used for the payment schedule for years 6 through 30. The prepayment disclosure refers to both penalties and rebates because information about penalties is required for the simple-interest portion of the obligation and information about rebates is required for the mortgage insurance portion of the obligation.

20. *HRSA-500-1 9-82.* Pursuant to section 113(a) of the Truth in Lending Act, Form HRSA-500-1 9-82 issued by the U.S. Department of Health and Human Services for certain student loans has been approved. The form may be used for all Health Education Assistance Loans (HEAL) with a variable interest rate that are interim student credit extensions as defined in Regulation Z.

21. *HRSA-500-2 9-82.* Pursuant to section 113(a) of the Truth in Lending Act, Form HRSA-500-2 9-82 issued by the U.S. Department of Health and Human Services for certain student loans has been approved. The form may be used for all HEAL loans with a fixed interest rate that are interim student credit extensions as defined in Regulation Z.

22. *HRSA-502-1 9-82.* Pursuant to section 113(a) of the Truth in Lending Act, Form HRSA-502-1 9-82 issued by the U.S. Department of Health and Human Services for certain student loans has been approved. The form may be used for all HEAL loans with a variable interest rate in which the borrower has reached prepayment status and is making payments of both interest and principal.

23. *HRSA-502-2 9-82.* Pursuant to section 113(a) of the Truth in Lending Act, Form HRSA-502-2 9-82 issued by the U.S. Department of Health and Human Services for certain student loans has been approved. The form may be used for all HEAL loans with a fixed interest rate in which the borrower has reached repayment status and is making payments of both interest and principal.

References

Statute: §§ 105 and 130
Other sections: §§ 226.6, 226.7, 226.9, 226.12, 226.15, 226.18, and 226.23
Previous regulation: None
1981 changes: The model forms and clauses have no counterpart in the previous regulation.

APPENDIX I—Federal Enforcement Agencies

Statute: § 108
Other sections: None
Previous regulation: § 226.1(b)
1981 changes: None

APPENDIX J—Annual Percentage Rate Computations for Closed-End Credit Transactions

1. *Use of appendix J.* Appendix J sets forth the actuarial equations and instructions for calculating the annual percentage rate in closed-end credit transactions. While the formulas contained in this appendix may be directly applied to calculate the annual percentage rate for an individual transaction, they may also be utilized to program calculators and computers to perform the calculations.

2. *Relation to Board tables.* The Board's Annual Percentage Rate Tables also provide creditors with a calculation tool that applies the technical information in appendix J. An annual percentage rate computed in accordance with the instructions in the tables is deemed to comply with the regulation. Volume I of the tables may be used for credit transactions involving equal payment amounts and periods, as well as for transactions involving any of the following irregularities: odd first period, odd first payment and odd last payment. Volume II of the tables may be used for transactions that involve any type of irregularities. These tables may be obtained from any Federal Reserve Bank or from the Board in Washington, D.C. 20551, upon request.

References

Statute: § 107
Other sections: § 226.22
Previous regulation: § 226.40 (supplement I)

1981 changes: Paragraph (b)(2) has been revised to clarify that the term of the transaction never begins earlier than consummation of the transaction. Paragraph (b)(5)(vi) has been revised to permit creditors in single-payment transactions in which the term is less than a year and is equal to a whole number of months, to use either the 12-month method or the 365-day method to compute the number of unit periods per year.

APPENDIX K—Total-Annual-Loan-Cost Rate Computations for Reverse-Mortgage Transactions

1. *General.* The calculation of total-annual-loan-cost rates under appendix K is based on the principles set forth and the estimation or "iteration" procedure used to compute annual percentage rates under appendix J. Rather than restate this iteration process in full, the regulation cross-references the procedures found in appendix J. In other aspects the appendix reflects the special nature of reverse-mortgage transactions. Special definitions and instructions are included where appropriate.

(b) Instructions and Equations for the Total-Annual-Loan-Cost Rate

(b)(5) Number of Unit Periods between Two Given Dates

1. *Assumption as to when transaction begins.* The computation of the total-annual-loan-cost rate is based on the assumption that the reverse-mortgage transaction begins on the first day of the month in which consummation is estimated to occur. Therefore, fractional unit periods (used under appendix J for calculating annual percentage rates) are not used.

(b)(9) Assumption for Discretionary Cash Advances

1. *Amount of credit.* Creditors should compute the total-annual-loan-cost rates for transactions involving discretionary cash advances by assuming that 50 percent of the initial amount of the credit available under the transaction is advanced at closing or, in an open-end transaction, when the consumer becomes obligated under the plan. (For the purposes of this assumption, the initial amount of the credit is the principal loan amount less any costs to the consumer under section 226.33(c)(1).)

(b)(10) Assumption for Variable-Rate Reverse-Mortgage Transactions

1. *Initial discount or premium rate.* Where a variable-rate reverse-mortgage transaction includes an initial discount or premium rate, the credit should apply the same rules for calculating the total-annual-loan-cost rate as are applied when calculating the annual percentage rate for a loan with an initial discount or premium rate (see the commentary to section 226.17(c)).

(d) Reverse-Mortgage Model Form and Sample Form

(d)(2) Sample Form

1. *General.* The "clear and conspicuous" standard for reverse-mortgage disclosures does not require disclosures to be printed in any particular type size. Disclosures may be made on more than one page, and use both the front and the reverse sides, as long as the pages constitute an integrated document and the table disclosing the total-annual-loan-cost rates is on a single page.

APPENDIX L—Assumed Loan Periods for Computations of Total-Annual-Loan-Cost Rates

1. *General.* The life expectancy figures used in appendix L are those found in the U.S. Decennial Life Tables for women, as rounded to the nearest whole year and as published by the U.S. Department of Health and Human Services. The figures contained in appendix L must be used by creditors for all consumers (men and women). Appendix L will be revised periodically by the Board to incorporate revisions to the figures made in the decennial tables.