AT-10561

FEDERAL RESERVE BANK OF NEW YORK

August 6, 1992

Proposed FDIC Regulation Restricting Equity Investments at insured State-Chartered Banks

To All State Member Banks
in the Second Federal Reserve District:

The Federal Deposit Insurance Corporation (FDIC) has proposed a new regulation that will implement certain provisions of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) designed to ensure that State-chartered insured banks are not exposed to undue risk as a result of their activities and investments, which could threaten the deposit insurance funds. In a related action, the FDIC has also issued a separate proposal designed to eliminate certain provisions of the agency's regulations pertaining to State-chartered banks that are members of the Savings Association Insurance Fund.

Enclosed — for State member banks — are copies of the FDIC's proposals, which have been reprinted from the *Federal Register*, together with a letter from the FDIC to all insured State-chartered banks supervised by that agency. The Board of Governors of the Federal Reserve System has requested that we make these documents available to all State member banks in this District.

CHESTER B. FELDBERG,
Executive Vice President.

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FDIC
Federal Deposit Insurance Corporation
Washington, DC 20429

Office of Executive Director
Supervision and Resolutions

FIL-52-92
July 15, 1992

EQUITY INVESTMENTS

TO: CHIEF EXECUTIVE OFFICER

SUBJECT: Proposed Restrictions on Equity Investments of State Banks

The FDIC Improvement Act of 1991 (FDICIA) added Section 24 to the Federal Deposit Insurance Act imposing new restrictions on activities and investments of insured state-chartered banks, including limitations on the type and amount of equity investments. In response, the FDIC Board of Directors has issued for public comment a proposed regulation that would implement provisions of the law restricting the ability of state banks to own corporate stock and mutual fund shares or to have equity ownership in other investments such as real estate development projects. A copy of the proposed rule is enclosed. Comments will be accepted until August 10, 1992

The new law prohibits equity investments of a kind not permitted for national banks but provides a partial exception for an institution meeting two conditions: (1) the bank had ownership of qualifying stocks or mutual funds during the 14-month period from September 30, 1990, through November 26, 1991; and (2) the bank's state permitted such investments as of September 30, 1991. The proposal establishes the procedures whereby an institution that meets these two conditions and wants to retain or acquire new qualifying stock or mutual fund shares provides the necessary notice to the FDIC of its intention. The notice is specified by the law and, as such, may be submitted before a final regulation is issued. For further guidance on the notice requirement, please contact the appropriate regional office for the FDIC's Division of Supervision (DOS) as listed in this mailing.

The FDIC, in making its determination whether to approve an institution's request to retain or acquire stock or mutual fund shares, is required to look at any significant risk to the insurance fund. A bank receiving FDIC approval to continue making these investments is subject to a limit under the statute tied to its level of capital. The proposal would define the limits on types of investments and would provide guidance to calculate the capital limitation.

The proposal also would require reports from state-chartered banks on two other matters. First, an institution with equity investments not exempted from the prohibition would be required to submit to the FDIC a plan to divest such holdings as quickly as can be prudently done but no later than December 19, 1996. Second, a bank that was lawfully engaging in insurance underwriting as principal on November 21, 1991, or a bank that had a subsidiary that was lawfully providing insurance as principal on that date, is exempt from the general prohibition on these activities but would be required to give notice of its activity to the FDIC.

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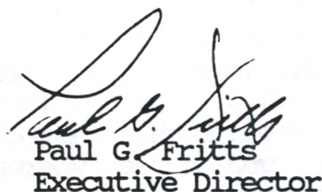
The same statute also imposes restrictions on the corporate activities of state banks, effective in December 1992. However, the attached proposal deals only with equity investment limits because they went into effect December 19, 1991, and there is a need to clarify how the FDIC will implement these restrictions. The FDIC in the near future intends to issue a separate proposal relating to the restrictions on state bank activities that will become effective in December.

In a related action, the FDIC Board has issued a separate proposal to eliminate parts of Section 333.3 of the agency's regulations regarding state banks that are members of the Savings Association Insurance Fund (SAIF). The current regulation provides that these SAIF-member banks are under the same prohibitions against equity investments that apply to savings associations. By proposing to eliminate this part of the regulation, the effect would be to put SAIF-member banks under the same restrictions on equity investments that apply to banks that are members of the Bank Insurance Fund (i.e., those in the first proposal outlined here). A copy of this separate proposal also is attached. Comments will be accepted until August 10, 1992.

Questions about the two proposals on equity investments should be directed to Curtis L. Vaughn, a DOS examination specialist at 202-898-6759, or Pamela E.F. LeCren, Counsel in the Legal Division at 202-898-3730.



Paul G. Fritts
Executive Director

Attachments

Distribution: FDIC-Supervised Banks (Commercial and Savings)

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12 CFR Part 362

RIN 3064-AA29

Activities and Investments of Insured State Banks

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Proposed rule.

SUMMARY: The FDIC is proposing to add new regulations governing the activities and investments of insured state banks. The proposal implements a portion of new section 24 of the Federal Deposit Insurance Act (FDI Act). Under the proposal, insured state banks are prohibited, subject to certain exceptions, from making equity investments of a type, or in an amount, that are not permissible for a national bank. The proposal requires banks to file with the FDIC their plan for the divestiture of any prohibited equity investments; it establishes procedures regarding notices to the FDIC pertaining to excepted equity investments; delegates authority to act on notices and divestiture plans from the FDIC's Board of Directors to the Director of the Division of Supervision and to regional directors, and requires that certain information be provided to the FDIC regarding existing insurance underwriting activities that the law allows to be continued.

DATES: Comments must be received by August 10, 1992.

ADDRESSES: Send comments to Hoyle L. Robinson, Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429. Comments may be hand delivered to room F-402, 1776 F Street NW., Washington, DC on business days between 8:30 a.m. and 5 p.m. Comments may also be inspected in room F-402 between 8:30 a.m. and 5 p.m. on business days. [FAX number: (202) 898-3838.]

FOR FURTHER INFORMATION CONTACT: Curtis L. Vaughn, Examination Specialist, (202) 898-6759, Shirley K. Basse, Review Examiner, (202) 898-6815, or Cheryl A. Steffen, Review Examiner, (202) 898-6768, Division of Supervision, FDIC, 550 17th Street, NW., Washington, DC 20429; Pamela E.F. LeCren, Counsel, (202) 898-3730, or Grovetta N. Gardineer, Senior Attorney, (202) 898-3905, Legal Division, FDIC, 550 17th Street, NW., Washington, DC 20429; Victor L. Saulsbury, Financial Analyst, (202) 898-3950, or David K. Horne, Financial Economist, (202) 898-3981, Division of Research and Statistics, FDIC, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this proposed rule has been submitted to the Office of Management and Budget for review pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). Comments on the collection of information should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC, 20503, Attention: Desk Officer for the Federal Deposit Insurance Corporation, with copies of such comments to be sent to Steven F. Hanft, Office of the Executive Secretary, room F-453, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429. The collection of information in this regulation is found in § 362.3(c), § 362.3(d), and § 362.4 and takes the form of (1) a requirement to submit a divestiture plan covering the disposition of equity investments that may no longer be retained, (2) a requirement to file a notice of intent to retain and acquire common or preferred stock listed on a national securities exchange or shares of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a), and (3) a notice concerning certain insurance activities conducted by well-capitalized insured state banks and/or any of their subsidiaries as of November 21, 1991. The information will allow the FDIC to properly discharge its responsibilities under section 24 of the Federal Deposit Insurance Corporation Act as amended by section 303 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA, 12 U.S.C. 1831a). The information in the divestiture plans and notices will be used by the FDIC for assuring compliance with the law and as part of the process of determining risk to the applicable insurance fund and for granting exceptions, if warranted, to the restrictions contained in section 24 of the Federal Deposit Insurance Corporation Act.

The estimated annual reporting burden for the collection of information requirement in the regulation is summarized as follows:

Plan for Divestiture of Prohibited Equity Investments

Number of Respondents: 1879.
Number of Responses Per Respondent: 1.
Total Annual Responses: 1879.
Hours Per Response: 16.
Total Annual Burden Hours: 30,064.

Notice of Intent To Invest in Common or Preferred Stock or Shares of an Investment Company

Number of Respondents: 1038.
Number of Responses Per Respondent: 1.
Total Annual Responses: 1038.
Hours Per Response: 8.
Total Annual Burden Hours: 8,304.

Notice of Insurance Activities

Number of Respondents: 10.
Number of Responses Per Respondent: 1.
Total Annual Responses: 10.
Hours Per Response: 6.
Total Annual Burden Hours: 60.

Background

On December 19, 1991, the Federal Deposit Insurance Corporation

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Improvement Act of 1991 (FDICIA) (Pub. L. 102-242, 105 Stat. 2236) was signed into law. Section 303 of FDICIA added section 24 to he Federal Deposit Insurance Corporation Act, "Activities of Insured State Banks" (FDI Act) (12 U.S.C. 1831a). With certain exceptions, section 24 of the FDI Act limits the activities and equity investments of state chartered insured banks to activities and equity investments that are permissible for national banks. While much of section 24 does not become effective until December 19, 1992, the provisions of section 24 that deal with equity investments were effective upon enactment, December 19, 1991.[1]

Paragraph (c) of section 24 (12 U.S.C. 1831a(c)), "Equity Investments by Insured State Banks", provides that no insured state bank may directly, or indirectly acquire or retain any equity investment of a type that is not permissible for a national bank. This paragraph became effective December 19, 1991. Several exceptions to the general prohibition to making or retaining equity investments are found in paragraph (c) itself and in subsequent paragraphs of section 24. In addition, paragraph (c) provides a "transition rule" that requires insured state banks to divest prohibited equity investments as quickly as can be prudently done but in no event any later than December 19, 1996. The FDIC is given the authority to establish conditions and restrictions governing the retention of the prohibited investments during the divestiture period. Paragraph (c) expressly provides for an exception for the retention or acquisition of equity investments in majority owned subsidiaries and equity investments in qualified low income housing.

Section 24(f) (12 U.S.C. 1831a(f)) "Common and Preferred Stock Investment", also effective upon enactment of FDICIA, provides that no insured state bank may directly or indirectly acquire or retain any equity investment of a type, or in an amount, that is not permissible for a national bank and is not otherwise permitted under section 24. Like paragraph (c), paragraph (f) contains several exceptions to the general prohibition.

Paragraph (f)(2) creates a limited "grandfather" for investments in common or preferred stock listed on a national securities exchange or shares of registered investment companies. The exception allows insured state banks that (a) are located in a state that as of September 30, 1991 permitted the bank to invest in common or preferred stock listed on a national securities exchange ("listed stock") or shares of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) ("registered shares"), and (b) which made or maintained investments in listed stock or registered shares during the period from September 30, 1990 to November 26, 1991, to acquire and retain, subject to the FDIC's approval, listed stock or registered shares to the same extent to which the bank did so during the period from September 30, 1990 to November 26, 1991 ("relevant period") up to an aggregate maximum of 100 percent of the bank's capital. A bank must file a written notice with the FDIC of its intent to take advantage of the exception and must receive the FDIC's approval before it can lawfully retain or acquire listed stock or registered shares pursuant to the exception provided by paragraph (f)(2). If a bank made investments in listed stock or registered shares during the relevant period that exceed in the aggregate 100 percent of the bank's capital as measured on December 19, 1991, the bank must divest the excess over the three year period beginning on December 19, 1991 at a rate of no less than ⅓ of the excess each year. (The FDIC's option as to the scope and applicability of the "grandfather" provided for by section 24(f)(2) is discussed at length below.)

Paragraph (d)(2) provides an exception for the retention of an equity interest in a subsidiary that was engaged "in a state" in insurance activities "as principal" on November 21, 1991 so long as the subsidiary's activities continue to be confined to offering the same type of insurance to residents of the state, individuals employed in the state and any other person to whom the subsidiary provided insurance as principal without interruption since such person resided in or was employed in the state.

Paragraph (e) indicates that nothing in section 24 shall be construed as prohibiting an insured state bank in Massachusetts, New York or Connecticut from owning stock in a savings bank life insurance company provided that consumer disclosures are made.

Section 24(g) grants the FDIC the authority to make determinations under section 24 by regulation or order and section 24(i) indicates that nothing in section 24 shall be construed as limiting the authority of the FDIC to impose more stringent restrictions than those set out in section 24.

It is the FDIC's opinion that an insured state bank which prior to December 19, 1991 entered into commitments to acquire equity investments at some time after December 19, 1991 of a type, or in an amount, which are now prohibited to insured state banks pursuant to section 24 may not proceed with the acquisition. Generally speaking, banks in this circumstance should have a defense to a breach of contract claim on the basis of impossibility of performance (i.e., performance under the contract would be illegal as a result of subsequently enacted legislation). See *Connolly* v. *Pension Benefit Guaranty Corporation,* 475 U.S. 211 (1986); *Omnia Commercial Co.* v. *U.S.*, 261 U.S. 502, 511 (1923); *Louisville and Nashville R.R. Co.* v. *Mottley,* 219 U.S. 467 (1911). In short, the FDIC is adopting the position that, with regard to a fully executory contract, there had been no "acquisition" of an equity investment prior to December 19, 1991 which is eligible for retention over the divestiture period. Partially performed contracts will need to be reviewed on the facts in order to determine whether it can be said that an equity investment was "acquired" before December 19, 1991. Insured state banks should be reminded, however that, even if it is determined that the completion of a partially performed contract does not violate the prohibition of section 24, the equity investment must be divested if it is a nonconforming investment. Insured state banks should note that this position is the same that the FDIC adopted in 1989 regarding state savings associations. (See, 54 FR 53545, December 29, 1989).

The FDIC is proposing to add a new part to its regulations that would implement those portions of section 24

[1] Unlike paragraphs (a) and (d), of section 24, paragraphs (c) and (f) do not contain any language delaying their effectiveness until December 19, 1992. Nor does the delayed effectiveness of paragraph (a) which concerns "activities" of insured state banks control the timing of paragraphs (c) and (f) even though "activity" is defined to include acquiring or retaining any investment. As paragraphs (c) and (f) distinguish between other types of investments and investments that are equity investments, the specific treatment accorded equity investments under the statute governs. In short, equity investments are set apart and treated separately under the statute. This is consistent with the same treatment accorded equity investments by state savings associations under section 28 of the FDI Act (12 U.S.C. 1831(e)) as added by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA", Pub. L. 101-73, 103 Stat. 183). Section 28(a) prohibited state savings associations from engaging in certain activities after January 1, 1990. Section 28(c) prohibited state savings associations from making certain equity investments. Section 28 also defines "activity" to include acquiring or retaining any investment. The section's legislative history clearly indicates that paragraph (c) was immediately effective upon enactment, i.e., making it clear that making an equity investment is not an "activity". (135 Cong. Rec. S10203 (daily ed. August 4, 1989)).

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that are presently in effect, i.e., the provisions described above. It is the agency's intent to at a later date propose amendments addressing the remainder of section 24, i.e., the provisions of section 24 concerning activities of insured state banks and their subsidiaries. Those provisions do not take effect until December 19, 1992.

A description of the proposal, as well as a request for specific comments, follows.

Elsewhere in today's **Federal Register** the FDIC is proposing to amend § 333.3 of the FDIC's regulations (12 CFR 333.3) "Savings Association Insurance Fund (SAIF) member state banks formerly savings associations." This amendment would relieve SAIF member state banks from the restrictions of section 333.3 in so far as that regulation makes SAIF member state banks subject to the equity investment restrictions applicable to savings associations found in § 303.13 of the FDIC's regulations. (12 CFR 303.13). The effect of the amendment would be to eliminate what is currently a disparate treatment among banks as to their equity investments based upon their deposit insurance fund membership. It is the FDIC's present intent to consider whether or not to modify or eliminate the remainder of § 333.3 at the same time additional regulations implementing the remainder of section 24 of the FDI Act are considered.

Scope and Applicability of Exception Created by Section 24(f)(2)

The FDIC has preliminarily reached several conclusions concerning the interpretation of section 24(f) and the "grandfather" conferred thereby. These conclusions form the basis of the portion of proposed regulation which deals with equity investments in stock listed on a national securities exchange and shares of investment companies. We recognize that the language of the statute may be susceptible to a different interpretation, however, at this time it is the FDIC's opinion that the interpretation discussed below is the interpretation that is the most consistent with the overall intent of section 24. We specifically invite comment on our interpretation and the proposal's reliance thereon.

The FDIC is preliminarily of the opinion that:

1. The exception afforded by paragraph (2) of section 24(f) applies only to an insured state bank (an "Eligible Bank") which (a) is located in a state that permitted, as of September 30, 1991, investment in common or preferred stock listed on a national securities exchange or shares of an investment company registered under the Investment Company Act of 1940 [2] ("Listed Stock" and "Registered Shares", respectively) and (b) made or maintained investments in Listed Stock or Registered Shares during the period beginning on September 30, 1990 and ending on November 26, 1991 (the "Relevant Period"); provided that under no circumstances does section 24(f) allow the aggregate amount of investments in Listed Stock and Registered Shares to exceed 100 percent of the Eligible Bank's capital; and provided further that the Eligible Bank has filed a notice with, and obtained the approval of, the FDIC concerning its intentions to acquire or retain investments in Listed Stock or Registered Shares.

2. An Eligible Bank may, subject to approval of the FDIC, retain, or acquire in the future, investments in Listed Stock or Registered Shares in an amount not to exceed the percentage of the Eligible Bank's capital that was invested in Listed Stock or Registered Shares during the Relevant Period.

3. An Eligible Bank must obtain the approval of the FDIC in order lawfully to retain, or acquire in the future, Listed Stock or Registered Shares. Any such approval may be granted only after receipt by the FDIC of written notice from the Eligible Bank concerning its intention to acquire or retain the investments. The approval may contain such conditions or restrictions (including ordering divestiture of some or all of the investments) as the FDIC determines is appropriate to avoid significant risk to the insurance fund of which the Eligible Bank is a member or to avoid any adverse effect on the safety and soundness of the bank.

Analysis of Exception

Section 24(f)(2) provides an exception to the general prohibition to making or retaining equity investments that are not permissible investments for national banks. The exception has limited applicability to specified investments by a potentially small group of state banks. A two part test applies. First, the bank must be an Eligible Bank. (See section 24(f)(2)(A) and 24(f)(2)(B).) Second, it must notify the FDIC of its intent to effect investments pursuant to the exception in paragraph (f)(2) and receive FDIC approval to do so. (See section 24(f)(6).)

Once eligibility has been determined, and provided that FDIC grants its approval,[3] the Eligible Bank may retain the Listed Stock or Registered Shares, and continue to make investments of the same type as it made during the Relevant Period, in an aggregate amount not exceeding the percentage of the Eligible Bank's capital represented by such investment made during the Relevant Period.

For example, if during the Relevant Period the bank had 30 percent of its capital invested in Listed Stock and 45 percent of its capital invested in Registered Shares, it is limited to a maximum investment of 30 percent of capital in Listed Stock and a maximum investment of 45 percent of capital in Registered Shares in the future under section 24(f)(2).[4]

Also by way of example, if the bank had invested 50 percent of its capital in Registered Shares, but did not make or maintain any investment in Listed Stock, it would not be eligible to invest in Listed Stock in the future pursuant to section 24(f), and its maximum investment in Registered Shares would be limited to 50 percent of capital.

The FDIC may decline approval for any Eligible Bank to continue to make the same type of investments up to the same level of capital made during the Relevant Period if to do so may pose a significant risk to the deposit insurance fund. The FDIC also may order any Eligible Bank to divest some or all of its investments made during or subsequent to the Relevant Period if continue ownership of such investments would have an adverse effect on its safety and soundness.[5]

Any bank which invested during the Relevant Period in Listed Stock or Registered Shares in excess of 100 percent of its capital, as measured on December 19, 1991, is required to divest the excess investments over the three year period beginning December 19, 1991.

The purpose of section 24 is to ensure that state banks are not exposed to undue risk as a result of their activities

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[2] 15 U.S.C. 80a–1 et seq.

[3] The authority of the FDIC to grant or deny approval carries with it the implied authority to condition or restrict approval.

[4] The Bank may sell any investment and replace it with another investment of the same type. The bank is not limited to buying common or preferred stock or shares of investment companies in which it previously invested, *i.e.*, stock or shares of the same issuer.

[5] The language of section 24(f)(7) does not limit the authority of the FDIC to order divestiture of stock or shares acquired between September 30, 1990 and November 26, 1991. Moreover, section 24(i) expressly indicates that section 24 shall not construed to limit the authority of the appropriate Federal banking agency to impose more stringent restrictions than those contained in section 24. The FDIC therefore would be able, for example, to exercise its cease-and-desist authority if it determines that continued exercise of any "grandfathered" investment authority presents a safety and soundness concern.

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and investments which would threaten the deposit insurance funds. In view of this purpose, the FDIC concludes that the exception contained in section 24(f)(2) should be read narrowly. To read the exception broadly would be inconsistent with general tenets of statutory construction [6] and generally accepted notions of the purpose of statutory "grandfather provisions" such as the exception set forth in section 24(f). Such provisions frequently are included in legislation to avoid harsh, unfair or disruptive results on business relationships or activities undertaken prior to a change in the law.

The FDIC's reading of section 24(f)(2) allows Eligible Banks that were engaged in the business of making investments in Listed Stock or Registered Shares prior to enactment of the statute, to continue to do so to the same extent after enactment, subject to FDIC approval. It is the FDIC's present opinion that this reading will not be disruptive to banks already engaged in these investments and that to read section 24(f) as outlined above is consistent with the purpose of the limited exception. A contrary interpretation could permit banks to expand their investments or initiate such investments for the first time which, in the FDIC's present opinion, does not seem justified in the face of the Congressional ban on such investments which is applicable to all other insured state banks.

Description of Proposal and Request for Comments

As reflected in § 362.1 of the proposal, it is the FDIC's intent in adopting part 362 to implement the provisions of section 24 of the FDI Act and to ensure that activities and investments undertaken by insured state banks (1) do not present a risk to either the Savings Association Insurance Fund (SAIF) or the Bank Insurance Fund (BIF), (2) are safe and sound, (3) are consistent with the purposes of federal deposit insurance, and (4) are consistent with the law. For the most part, the proposed regulation closely follows the equity investment provisions of section 24. Relevant definitions have been added as has a provision requiring that divestiture plans be submitted covering prohibited equity investments. In addition, a provision has been added requiring that information be filed with the FDIC that will enable the FDIC to monitor compliance with section 24(d)(2)(B) of the FDI Act. That provision creates a limited "grandfather" for certain state banks and/or their subsidiaries that were engaging in certain insurance activities as of November 21, 1991. Lastly, the proposal contains delegations of authority from the Broad of Directors to the Director of the Division of Supervision. The Director may in turn delegate that authority to the regional directors.

1. Definitions.

Company

The term "company" is defined in the proposal as any corporation, partnership, business trust, association, joint venture, pool, syndicate or other similar business organization. The term is intended to include entities organized to conduct a specific business or businesses but does not include sole proprietorships.

Control

"Control" as defined in the proposal has the same meaning as set forth in § 303.13(a)(2) of the FDIC's regulations. As defined therein, "control" means the power to directly or indirectly vote 25 percent or more of the voting stock of a bank or company, the ability to control in any manner the election of directors or trustees, or the ability to exercise a controlling influence over the management and policies of a bank or company.

Convert its Charter

The phrase "convert its charter" as used in the proposal refers to any instance in which a bank undergoes any transaction which causes the bank to operate under a different form of charter than that under which it operated as of December 19, 1991. The definition is intended to encompass any transaction as a result of which a bank will from that point forward conduct business pursuant to a type of charter created by state statute that is new as to the particular bank. For example, if a bank that is operating under a savings bank charter begins to operate under a commercial bank charter, the savings bank will be said to have converted its charter regardless of how the transaction is accomplished.

Depository Institution

The term "depository institution" as used in the proposal has the meaning set out in section 3(c)(1) of the FDI Act, i.e., any bank or savings association.

Equity Interest in Real Estate

As defined under the proposal "equity interest in real estate" means any form of direct or indirect ownership of any interest in real property, whether in the form of an equity interest, partnership, joint venture or other form, which is accounted for as an investment in real estate or real estate joint ventures under generally accepted accounting principles or is otherwise determined to be an investment in a real estate venture under Federal Financial Institutions Examination Council Call Report Instructions. These instructions require that the following direct and indirect investments be included as real estate ventures:

(1) Any real estate acquired, directly or indirectly, and held for development, resale, or other investment purposes, but does not include real estate acquired in any manner for debts previously contracted.

(2) Any debt or equity investments by the bank in real estate subsidiaries that have not been consolidated; associated companies; and corporate joint ventures, unincorporated joint ventures, and general and limited partnerships over which the bank exercises significant influence if such investors are primarily engaged in the holding of real estate for development, resale, or other investment purposes.

(3) Real estate acquisition, development or construction arrangements which are accounted for as direct investments in real estate or as real estate joint ventures in accordance with guidance prepared by the American Institute of Certified Public Accountants in Notices to Practitioners issued in November 1983, November 1984, and February 1986.

(4) Real estate acquired and held for investment that has been sold under contract and accounted for under the deposit method of accounting in accordance with FASB Statement No. 66, "Accounting for Sales of Real Estate".

(5) Receivables resulting from sales of real estate acquired and held for investment accounted for under the installment, cost recovery, reduced profit, or percentage-of-completion method of accounting in accordance with FASB Statement No. 66, "Accounting for Sales of Real Estate" when the buyer's initial investment is less than 10 percent of the sales value of the real estate sold.

(6) Any other loans secured by real estate and advanced for real estate acquisition, development, or investment purposes if the insured depository institution has virtually the same risks and potential rewards as an investor in the borrower's real estate venture.

Characterization as an investment under item 6 above might include

[6] 2A C. Dallas Sands, Sutherland Statutory Construction § 47.11 (4th ed. 1984); *Commissioner of Internal Revenue v. Clark*, 109 S.Ct. 1455, 1463 (1989).

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instances in which the insured depository institution: (a) Provides all or substantially all necessary funds to acquire, develop or construct the property and the borrower has little or no equity in the property, (b) funds the commitment or origination fees, or both, by including them in the amount of the loan, (c) funds all or substantially all interest and fees during the term of the loan by adding them to the loan balance, (d) has no security other than the acquisition, construction or development project, (e) structures the arrangement so that foreclosure during development is unlikely because the borrower is not required to make any payments until the project is complete, or (f) finds that in order to recover the investment in the project, the property must be sold to independent third parties, the borrower must obtain refinancing from another source, or the property must be placed in service and generate sufficient net cash flow to service the debt principal and interest.

In general, the FDIC intends to treat loans as investments in real estate on the basis of item 6 when the depository institution participates in the residual profits of the project and one or more of the other five characteristics of a direct investment in real estate or a real estate joint venture is present.

As bank lending standards have evolved over the past several years, in many cases bank assets which are carried as loans on the bank's books have taken on more characteristics associated with investments rather than loans. Accounting for income from real estate loans and for real estate investment is substantially different and the improper classification of these assets can distort an institution's earnings picture. Accounting convention recognizes that, depending upon the circumstances, there is little substantive difference between certain loans and direct investments in real estate and that in those instances the loans should in fact be accounted for as direct real estate investments. The proposed regulation adopts this approach. Comment is specifically requested on the propriety of doing so.

The proposal contains three exclusions from the definition of "equity interest in real estate": (1) Real property used, or intended to be used, as offices or related facilities for the conduct of the bank's or its subsidiaries' business, (2) an interest in real estate that arises out of a debt previously contracted ("dpc property") provided that the real estate is not held any longer than the shorter of the period allowed for holding such real estate under state law or the time period national banks may hold such property, and (3) interests that are primarily in the nature of charitable contributions to community development corporations provided contributions to any one community development corporation do not exceed 2 percent of the bank's tier one capital and total contributions to all such corporations do not exceed 5 percent of the bank's tier one capital. These exclusions parallel § 7.3005, 7.3020, 7.3025 and 7.7480 of the Office of the Comptroller of the Currency's regulations. (12 CFR 7.3005, 7.3020, 7.3025, 7.7480). Insured state nonmember banks should note that, under the proposed exclusion, if state law allows a bank to hold dpc property for a longer period of time than a national bank is permitted to hold such property, the state bank must have divested the dpc property to or before the time that a national bank would be required to have divested the property or the dpc property will be considered to be an equity investment.

Equity Investment

Section 24(c)(1) of the FDI Act provides that an insured state bank may not, directly or indirectly, acquire or retain any equity investment of a type that is not permissible for a national bank and section 24(f)(1) provides that an insured state bank may not, directly or indirectly, acquire or retain any equity investment of a type, or in an amount, that is not permissible for a national bank. The FDIC is proposing to define equity investment for purposes of the proposal to mean any equity security, partnership interest, any equity interest in real estate and any transaction which in substance falls within any of these categories, even though it may be structured as some other form of business transaction. This broad definition of equity investment is consistent with the FDIC's treatment of a similar prohibition for savings associations found under section 28 of the FDI Act. (See also § 303.13(a)(4) of the FDIC's regulations.)

Equity Security

"Equity security" is defined under the proposal as any stock, certificate of interest or participation in any profit-sharing agreement, collateral trust certificate, pre-organization certificate or subscription, transferable share, investment contract, or voting-trust certificate; any security immediately convertible at the option of the holder without payment of substantial additional consideration into such security; any security carrying any warrant or right to subscribe to or purchase any such security; and any certificate of interest or participation in, temporary or interim certificate for, or receipt for any of the foregoing unless it is acquired through foreclosure or settlement in lieu of foreclosure. The definition is the same as that used in § 303.13(a) of the FDIC's regulations.

Equity Investment Permissible for a National Bank

The phrase "equity investment permissible for a national bank" is defined to mean any equity investment expressly authorized for national banks under the National Bank Act or any other federal statute, regulations issued by the Office of the Comptroller of the Currency pursuant to the authority of the National Bank Act or other federal statute, and any formal interpretation or order issued by the Office of the Comptroller of the Currency.

It may be difficult to define with certainty those equity investments that are permissible for a national bank if orders and interpretations issued by the Comptroller of the Currency are recognized. Orders and interpretations represent an ongoing process that continually refines the definition of permissible investments, at times tied to narrow circumstances. It may, therefore, be inappropriate to recognize orders and interpretations. Additionally, staff opinions issued by the Office of the Comptroller of the Currency, including its Chief Counsel, have been held as not binding on the agency in that they do not constitute final agency action. (*American Land Title Association* v. *Clarke*, 743 F.Supp. 491 (W.D.Tex. 1989)). In view of all of the foregoing, the FDIC requests comments on the propriety of including equity investments authorized by an order or formal interpretation of the Office of the Comptroller of the Currency as "permissible for the purposes of this proposal. If it is appropriate to recognize interpretations of the Office of the Comptroller of the Currency, what should the FDIC consider to constitute a formal interpretation? Lastly, insured state banks should be advised that regardless of how the FDIC defines "permissible for a national bank", insured state banks should be prepared to document to the FDIC's satisfaction that their equity investments are permissible for a national bank.

Lower Income

One of the exceptions under the proposal to the general prohibition on acquiring equity investments not permissible for a national bank allows insured state banks to become limited

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partners in partnerships that develop housing projects designed to primarily benefit "lower income" persons. "Lower income" is defined for the purposes of the proposal to mean an income that is less than or equal to the median income (as determined by state or federal statistics) for the area in which the housing project is located. The "area" in which a housing project is located shall be understood to refer to the relevant Metropolitan Statistical area (MSA) if the project is located within an MSA. If the project is not located in an MSA, the median income of the "area" shall be understood to refer to the median income of the state or territory as a whole exclusive of the designated MSA's. The FDIC invites comment generally on the issue of what state or federal statistics the FDIC should recognize for the purposes of applying this definition; how the term "area" should be construed for the purposes of applying the definition; and what federal and state statistics are readily available to insured state banks.

National Securities Exchange

The term "national securities exchange" has been defined under the proposal to mean an exchange that is registered as a national securities exchange by the Securities and Exchange Commission pursuant to section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) and the National Market System. The National Market System refers to the top tier of the three tiers of over-the-counter securities traded through the National Association of Securities Dealers Automated Quotation system (NASDAQ). The FDIC is of the opinion that if a security is listed on a registered exchange or is traded in the National Market System the security will be more liquid due to a wide market, sufficient information will be available about the security and the issuer for the market to make informed pricing decisions about the security, and the opportunities for fraud and manipulation of the security are minimized. Comment is requested on whether the FDIC should recognize other exchanges and quotation services as national securities exchanges. Should securities quoted on the bottom two tiers of NASDAQ be considered to be listed on a national securities exchange? Should the FDIC adopt a different approach entirely to defining what constitutes a national securities exchange? If so, what approach is recommended?

Significant Risk to the Deposit Insurance Fund

"Significant risk to the deposit insurance fund" will be considered to be present whenever it is likely that either of the deposit insurance funds administered by the FDIC may suffer any loss whatever. Although the statute and the regulation use the term "significant" in confunction with the word "loss", the test of significant risk is met if there is a likelihood of any loss whatsoever to either of the funds regardless of how small. Therefore, the amount, or the relative or absolute size of the loss that may result to either of the funds from an insured state bank engaging in an activity is not probative. What is relevant, rather, is the likelihood that some loss to either of the funds may occur. Additionally, it is not necessary that making the equity investment will result in the failure or threatened failure of an insured state bank before a significant risk of loss to either fund is considered to be present. The proposed definition is the same that is used in section 303.13(a) of the FDIC's regulations and is consistent with passages of the legislative history of section 24. (See, S. Rep. No. 102–167, 102d Cong., 1st Sess. 54 (1991)).

Subsidiary

The term "subsidiary" is defined as any company directly or indirectly controlled by an insured state bank. This term has the same meaning as found in section 337.4 of the FDIC's regulations.

Tier One Capital

"Tier one capital" as defined in the proposal has the same meaning as found in Part 325 of the FDIC's regulations when that term is used with reference to an insured state nonmember bank and any other insured bank for which the FDIC is the appropriate federal banking agency. The term shall be understood to refer to "Tier one capital" as defined by the Board of Governors of the Federal Reserve System when the term is used in reference to an insured state member bank. At this time Part 325 defines "tier one capital" as common stockholders' equity, noncumulative perpetual preferred stock and minority interests in consolidated subsidiaries, minus all intangible assets other than mortgage servicing rights eligible for inclusion in core capital and supervisory goodwill eligible for inclusion in core capital. The Board of Governors of the Federal Reserve System defines tier one capital in appendix A to 12 CFR Part 208. As defined therein tier one capital generally means common stockholders' equity, qualifying noncumulative perpetual preferred stock (including related surplus) plus minority interests in the equity accounts of consolidated subsidiaries minus goodwill. Only those capital elements that technically meet the definition of tier one capital can be included as tier one capital for the purposes of this proposal.

Well-capitalized

A "well-capitalized" insured state bank is defined in the proposal to mean an insured state bank that has a ratio of total capital to risk-weighted assets of not less than 10.0 percent; a ratio of Tier 1 capital to risk-weighted assets of not less than 6.0 percent; a ratio of Tier 1 capital to total book assets of not less than 5.0 percent; and which has not been notified that it is in a "troubled condition" for purposes of section 32 of the Federal Deposit Insurance Act. That section requires prior notice of a change in directors or senior executive officers in certain circumstances, including an instance in which the bank is in a troubled condition. An insured state bank will not be considered to be "well-capitalized" unless the above capital levels are not exclusive of the bank's investment in any subsidiary or department that engages in any activity that is not permissible for a national bank. The bank's "investment" in its subsidiary will be considered to equal the amount invested in the subsidiary's equity securities plus any debt issued by the subsidiary that is held by the bank. The bank's investment in a department will be considered to equal the total of any funds transferred to the department which is represented on the department's accounts and records as an accounts payable, a liability, or equity of the department except that transfers of funds to the department in payment of services rendered by the department will not be considered an investment in the department.

With regard to the requirement that the ratio of Tier 1 capital to risk-weighted assets be not less than 6.0 percent, readers should note that the FDIC does not intend to suggest that as a bank's total risk-based capital ratio increases that its Tier 1 capital must always increase proportionately so that 60 percent of a bank's total risk-based capital is always Tier 1 capital. For example, a bank with 11 percent total risk-based capital would not be required to have a 6.6 percent Tier 1 capital ratio in order to qualify as well-capitalized. Rather, the minimum ratio of Tier 1 capital to risk-weighted assets would still be 6.0 percent.

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If a bank has been required pursuant to an order, directive, or a consent agreement to raise its capital to a higher level than that described above, the bank will not be considered to be "well-capitalized" unless the bank meets such higher level.

Whether or not the bank is in a "troubled condition" has been included as part of the definition of "well-capitalized" in recognition of the fact that the capital cushion cannot be judged to be more than adequate unless all the facts and circumstances are taken into account. Likewise, the proposed definition requires that the bank's activities that are not permissible for a national bank be in effect separately capitalized, i.e., the bank must be in a position that it could entirely lose its investment in the subsidiary or department and such loss will not cause its capital to fall below a level that is significantly above the level of capital that is considered to be the minimum necessary for the sound operation of a bank.

Comment is specifically requested on the specific capital level or levels that the FDIC should consider necessary in order for a bank to be well-capitalized for the purposes of part 362. Comment is also specifically requested on whether excluding the investment in certain subsidiaries or departments is warranted and whether the term "investment" as used herein is appropriate.

The FDIC expects to eventually conform the meaning of "well-capitalized" as used in part 362 with the meaning of "well-capitalized" as used for the purposes of section 38 of the FDI Act, "Prompt Corrective Action". Final rules have yet to be issued by the FDIC defining "well-capitalized" for the purposes of section 38. The FDIC wishes to make clear that proposing to adopt the definition of well-capitalized as set out herein should not be read as limiting in any way the FDIC's discretion in formulating a proposed definition of that term for purposes of section 38. If a different meaning of the term "well-capitalized" is adopted for purposes of administering the prompt corrective action provisions of the FDI Act, the FDIC will propose amending the definition as used in part 362. Comment is requested on whether it is appropriate that the term be defined the same in the both contexts.

Insured State Bank

"Insured state bank" as used in the proposal refers to any state bank, whether or not a member of the Federal Reserve System, that is insured by the FDIC. The term should be understood to include any insured branch of a foreign bank that is not a federal branch.

The FDI Act does not contain a definition of the term "insured state bank". It does, however, define "state member bank", "state nonmember bank", "insured bank" and "state depository institution". "Insured bank" is defined to mean any bank the deposits of which are insured by the FDIC. It is logical to assume that in enacting section 24 Congress was aware of the distinction between member and nonmember banks and that by using the term state bank it meant to include both types of state banks. What is more, since the FDI Act does not when defining the term insured bank distinguish between insured banks that are member banks and insured banks that are nonmember banks, it follows once again that the reference in section 24 to insured state banks was meant to encompass all types of state banks that are insured regardless of membership in the Federal Reserve System. It also follows that section 24 was thought to encompass state branches of foreign banks as the term "state depository institution" as defined in the FDI Act specifically includes any insured branch which is not a federal branch.

The amendment to section 9 of the Federal Reserve Act (12 U.S.C. 330) enacted by section 303(b) of FDICIA does not dictate another reading of the plain language of section 24.

That amendment is merely a technical amendment which makes clear that the Federal Reserve Board may impose conditions and restrictions upon membership in the Federal Reserve System that are consistent with the requirements and restrictions of section 24.

2. Exceptions to General Prohibition on Acquiring or Retaining Prohibited Equity Investments

Majority Owned Subsidiary

Section 24(c) of the FDI Act notwithstanding, an insured state bank is not prohibited from acquiring or retaining a majority stock interest in a subsidiary even if the stock investment in that subsidiary is one that would not be permissible for a national bank. This exception is contained in section 362.3(b)(1) of the proposal. If an insured state bank holds less than a majority interest in the subsidiary, and that equity investment is of a type that would be prohibited to a national bank, the exception does not apply and the equity investment is subject to divestiture.[7] Majority ownership for this exception is understood to mean ownership of greater than 50% of the outstanding voting stock of the subsidiary.

The exception for majority owned subsidiaries is itself limited. Insured state banks should note that section 24(d) provides that no subsidiary of an insured state bank may engage, after December 19, 1992, in any activity that is prohibited to a subsidiary of a national bank unless the bank meets its applicable capital requirements and the FDIC determines that the conduct of the activity in question by the subsidiary will not pose a significant risk to the deposit insurance fund. The FDIC will consider further proposed rulemaking to implement the requirement that activities by majority owned subsidiaries be approved by the FDIC. That rulemaking will consider such things as whether the FDIC should establish parameters for operations of majority owned subsidiaries, e.g., structural and/or operational restrictions to ensure that the conduct of the activity in question will not present a significant risk to the insurance fund.

Section 362.3(b)(1) of the proposal indicates that an insured state bank will not be permitted to retain its majority interest in a subsidiary pursuant to this exception if the bank was required under § 333.3 of the FDIC's regulations to request the FDIC's permission to retain that investment and the application was denied. Section 333.3 applies to state banks that are members of SAIF. Under § 333.3, a SAIF member state bank may not acquire or retain an equity investment that is not permissible for a federal savings association. An institution that meets its capital requirements may apply for permission to retain an interest in a subsidiary that would otherwise be prohibited. In order for the application to be approved, the FDIC must determine that retaining the equity investment in the subsidiary will not pose a significant risk to SAIF. Although the FDIC is proposing to delete the above described portion of § 333.3 (See proposed rule published elsewhere in today's **Federal Register**), it is the FDIC's belief that any denial previously made by the FDIC pursuant to regulation operates to limit the exception as the FDIC has already determined that retaining the investment will pose a significant risk to SAIF. It would

[7] It is our understanding that national banks may own a minority interest in certain types of subsidiaries. Therefore, an insured state bank may hold a minority interest in a subsidiary (i.e., is not required to hold at least 80% of the stock of the company) if a national bank could do so.

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jeopardize SAIF to hold otherwise as it would in effect allow the bank to retain an investment expected to adversely affect the fund only to require the bank to later seek the FDIC's permission to retain the investment pursuant to whatever procedures the FDIC adopts to implement the portion of section 24 dealing with activities of subsidiaries. If the SAIF member state bank must divest its interest in a subsidiary, the divestiture must be in accordance with whatever conditions and restrictions which were previously established by the FDIC.

Qualified Housing Projects

The proposed regulation recites the exception for qualified housing projects found in section 24(c)(3) of the FDI Act. Under that exception, an insured state bank is not prohibited from investing as a limited partner in a partnership, the sole purpose of which is direct or indirect investment in the acquisition, rehabilitation, or new construction of a residential housing project intended to primarily benefit lower income persons throughout the period of the bank's investment so long as the investments, when aggregated with any existing equity investment in such a partnership or partnerships, does not exceed 2 percent of the bank's total assets. The proposed regulation indicates that banks are to take as the measure of their total assets the figure reported on the bank's most recent consolidated report of condition. The FDIC has chosen the most recent report of condition as the comparison point in an attempt to provide a more stable asset base against which the bank's investments can be measured. If an investment in a qualified housing project does not exceed the limit at the time the investment is made, the investment shall be considered to be a legal investment even if the bank's total assets subsequently decline. In that event, however, no further investments in qualified housing projects would be permissible until the bank's total assets increase.

Comment is requested on how the FDIC should construe the terms "primarily" and "residential" as used in this exception (i.e., how much commercial activity can go on in a building before it is no longer residential or no longer is intended to primarily benefit lower income persons); whether or not the FDIC should include unfunded commitments as part of the bank's investment in partnership under this exception; and what problems if any the exception as written poses for banks meeting their Community Reinvestment Act obligations.

Insured state banks should note that because the definition of equity investment does not include an interest in community development corporations up to an aggregate of 5% of a bank's tier one capital, (see discussion of "equity investment in real estate" definition) insured state banks may, under the proposal, invest in qualified housing projects excepted by section 362.3(b)(2) up to 2% of their total assets in addition to investing in community development corporations up to an aggregate maximum of 5% of tier one capital.

Savings Bank Life Insurance

Under the proposal an insured state bank is not prohibited from owning stock in a savings bank life insurance company if the bank is located in Massachusetts, New York or Connecticut provided that the savings bank life insurance company prominently discloses to purchasers of life insurance policies and annuities that these instruments are not insured by the FDIC, are not obligations of, and are not guaranteed by, any insured state bank. Section 24(e)(1)(B) of the FDI Act provides that this exception shall only apply if the bank meets the consumer disclosure provision of section 18(k) of the FDI Act. Section 18(k) does not contain any consumer disclosure provisions. In the absence of any other guidance in the statute's legislative history, the FDIC is proposing that the following or a similar disclosure will suffice to meet the statutory obligation to make consumer disclosures: "This [policy/annuity/insurance product] is not a federally insured deposit and is not an obligation of, nor is it guaranteed by, any federally insured bank." The proposal does not establish a specific time frame in which the disclosure must be made nor is the disclosure required to be on a specific form. The FDIC requests comments relating to the specific timing of these disclosures and to the necessity of having the disclosures given to the customer separately or printed on or in the insurance documents. Should customers be required to acknowledge receipt of the disclosures with their signature?

The FDIC is required under section 24 to make a finding whether savings bank life insurance activities of insured state banks pose, or may pose, any significant risk to the insurance funds. These findings will be announced separately from this portion of the rulemaking, however, the FDIC is taking this opportunity to request comment on the risks posed by savings bank life insurance activities. Specific comments are requested relating to the necessity of anti-tying provisions between bank lending activities and sales of insurance, the need for further disclosure to consumers and the need for direct financial reporting to the FDIC. Comments directed to this issue will be used in formulating the FDIC's study.

Director and Officer Liability Insurance

An insured state bank is not prohibited from acquiring up to 10 percent of the voting stock of a company that solely provides or reinsures directors', trustees' and officers' liability insurance coverage or bankers' blanket bond group insurance coverage for insured depository institutions. Any shares in excess of this limit that were purchased before December 19, 1991 shall be divested as quickly as prudently possible but in no event later than December 19, 1996. The term "provides" shall be understood to mean underwriting or assuming the insurance risk rather than acting in the capacity of an agent. If the companion proposal amending section 333.3 is adopted, insured state banks that are members of SAIF that were not permitted to acquire or retain voting stock in a directors and officers liability insurance company unless that company insured the bank's officers and directors would no longer be under those constraints. (See section 24(f)(3)(A) of the FDI Act).

Shares of Depository Institutions

Under section 24, an insured state bank is not prohibited from acquiring or retaining the voting shares of a depository institution if the institution engages only in activities permissible for national banks; the institution is subject to examination and regulation by a state bank supervisor; 20 or more depository institutions own voting shares of the institution but no one institution owns more than 15 percent of the voting shares; and the institution's voting shares are owned only be depository institutions (other than directors' qualifying shares or shares held under or acquired through a plan established for the benefit of the officers and employees). See section 24(f)(3)(B) of the FDI Act). This exception is repeated in the proposal at § 362.3(b)(6).

Interests in Insurance Subsidiaries

As indicated above, section 24 of the FDI Act will, after December 19, 1992, limit the activities that may be conducted by a company in which an insured state bank has the majority equity interest, i.e., a subsidiary. The statute contains an exception, however, for a well-capitalized insured state bank whose majority owned subsidiary was lawfully providing insurance as

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principal in a state on November 21, 1991. (See section 24(d)(2)(C) of the FDI Act). An exception is also provided for a subsidiary of an insured state bank that was required before June 1, 1991 to provide title insurance as a condition of the bank's initial chartering under state law provided further that control of the bank has not changed since that date.

In the case of a bank relying upon the exception contained in section 24(d)(2)(C), the activities of the subsidiary must be limited to providing, as principal, insurance of the same type as provided by the subsidiary on November 21, 1991. Insurance of that type may be provided to residents of the state, individuals employed in the state, and any other person to whom the subsidiary provided insurance as principal without interruption since such person resided in or was employed in the state. This exception has been included in the proposal (rather than in a rulemaking to follow later) as there is a need to collect information from "eligible" banks so that the FDIC can enforce the limits of the exception. (See § 362.4 of the proposal). We are asking that the proposed information be collected at this time as it should be easier for the affected institutions to collect the information on their insurance activities, and those of their subsidiaries, as of November 21, 1991 now rather than asking that the institutions reconstruct those activities at a later date.

For the purposes of the proposal the term "principal" shall be understood to mean underwriting or assuming the risk of insurance rather than acting in the capacity of an agent. (See, 137 Cong. Rec. S17317 daily ed. November 21, 1991) (colloquy between Sen. Graham and Sen. Garn)). The term "insurance of the same type" shall be understood to encompass whatever type of insurance policies and/or products that the bank and/or its subsidiary were authorized by state law to issue as of November 21, 1991 and were in fact providing to the public. In short, the bank and/or its subsidiary must have been actively engaged in insurance underwriting on November 21, 1991.

Comment is specifically requested on how the FDIC should construe the word "type". Is it appropriate to distinguish between, for example, life insurance products such as whole life and term life? Are variable rate annuities and single premium fixed rate annuities different types of insurance products? If the FDIC were to distinguish in this manner, a bank that was lawfully underwriting whole life insurance policies on November 21, 1991 but was not on that date underwriting term life insurance could not begin to offer term life insurance policies. Should credit life insurance be considered a different type of insurance than regular life insurance? What types of casualty insurance should be considered to be of the same type?

The statutory and regulatory exception is limited to banks and/or subsidiaries that were "lawfully providing insurance as principal" on November 21, 1991. As already indicated, the FDIC construes the language of the statute as requiring that the bank and/or subsidiary must have actually underwritten policies and/or other insurance products that were outstanding as of November 21, 1991. The exception is further limited to the types of insurance lawfully provided on November 21, 1991 "in a state." The FDIC shall construe the phrase "in a state" as excepting insurance underwriting activities by an insured state bank only in the state in which the bank was chartered as of November 21, 1991 and limiting the subsidiary of the bank to insurance underwriting activities only in the state in which the subsidiary was incorporated and doing business as of November 21, 1991.

The FDIC believes that this reading of section 24 is consistent with the provision's legislative history which, among other things, clearly indicates that the exception was intended to lapse if any changes in an insured state bank's underwriting capability within its own state occurred. (See, 137 Cong. Rec. S17316 (daily ed. November 21, 1991) (remarks of Sen. Graham)). The legislative history also indicates that the provision was intended to close a loophole in the law that permitted one state to be used as a base for nationwide insurance underwriting and that the language did so by limiting the activities to the state that authorizes it but nowhere else. (See, 137 Cong. Rec. S18619 (daily ed. November 21, 1991) (remarks of Sen. Dodd)). The construction of the exception adopted by the proposal somewhat narrowly circumscribes the exception and is therefore consistent with the above. It is also consistent with one of the basic tenets of statutory construction which provides that exceptions should be narrowly construed within the purpose of the overall provision. In view of the overall indication that insurance underwriting activities that are not be permissible for national banks are inappropriate for insured state banks, it is in the FDIC's view appropriate to adopt a narrow reading of the exception.

Common or Preferred Stock; Shares of Investment Companies

As indicated above, it is the FDIC's present opinion (on which the FDIC has sought comment) that section 24(f)(2) of the FDI Act creates a limited "grandfather" for investments in listed stock and registered shares. The "grandfather" is found in the proposed regulation at § 362.3(b)(4). Section 362.3(b)(4) provides that to the extent the FDIC permits, and subject to the requirements of § 362.3(d), "Notice and Approval of Intent to Invest in Common or Preferred Stock or Shares of an Investment Company; Divestiture of Excess Investments", an insured state bank may (1) retain the listed stock or registered shares that the bank lawfully acquired or held prior to December 19, 1991, and (2) continue to acquire listed stock or registered shares in the future, provided that the bank is located in a state that authorized investments in listed stock or registered shares as of September 30, 1991 and the bank exercised the authority to make such investments sometime during the period from September 30, 1990 to November 26, 1991.

The exception as formulated in the proposal is not a blanket authorization and the amount of the investments that are permissible thereunder is narrowly circumscribed. The limits of the permissible investments that may be made or retained pursuant to the exception, as well as the need for the FDIC's approval in order for an insured state bank to take advantage of the exception, are set out in § 362.3(d) of the proposal. (See discussion in paragraph #4 below).

Section 24(f)(5) of the FDI Act provides that the exception created by section 24(f)(2) will cease to operate if the bank converts its charter or undergoes a change in control. "Change in control" as used in section 24(f)(5) is not defined. Section 362.3(b)(4) of the proposal specifies four types of transactions, in addition to a charter conversion, (see definition of charter conversion discussed above in paragraph #1) the occurrence of which will terminate the grandfathered investment authority. Under the proposal, any time a bank undergoes a transaction for which a notice is required to be filed under section 7(j) of the FDI Act (12 U.S.C. 1817(j)); any time the bank undergoes a transaction subject to section 3 of the Bank Holding Company Act (12 U.S.C. 1842); any time control of the bank's parent company changes; or any time the bank is merged into another depository institution, the

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exception will cease to apply. Thus, for example, if 25 percent or more of the bank's voting stock is acquired by an individual, the bank will no longer be able to make investments in listed stock or registered shares pursuant to the authority of § 362.3(b)(4). If the bank is acquired by a bank holding company or control (as that term is defined in the proposal) of the bank's parent company changes, the bank will lose the ability to rely upon § 362.3(b)(4). Likewise, if the bank is merged into another depository institution, the acquiring institution will not inherit the exception provided by § 362.3(b)(4).

Change in control has been in effect defined to include the above four types of transactions or events. The "definition" has been broadly fashioned in light of the general policy embodied in section 24(c) and section 24(f)(1) of the FDI Act that equity investments which are not permissible for national banks are not appropriate investments for insured state banks. Although Congress enacted a limited exception for certain banks, Congress also indicated that the exception ceases to apply whenever control of an eligible bank no longer resides with the same person or entity that controlled the bank on December 19, 1991. In light of the broader Congressional action to generally prohibit equity investments, it would seem appropriate to broadly define the universe of events that are considered to constitute a change in control.

Comment is requested on the propriety of including the four types of transactions or events as transaction or events that terminate the availability of the exception. Does the reference to section 3 of the Bank Holding Company Act, or any of the other identified events, cause some transactions to be considered a change in control that do not warrant inclusion?

If an insured state bank undergoes a change in control within the meaning of the proposal, or the bank converts its charter, and thus is no longer able to take advantage of the exception, the bank cannot make any additional investments in listed stock or registered shares. Under the proposal, however, the bank is not required to divest its existing investments unless the FDIC determines that retaining the investments will adversely affect the bank's safety and soundness and the FDIC has issued an order requiring the bank to divest the stock and/or shares pursuant to the authority of section 24(f)(7) or section 8 of the FDI Act. (See § 362.3(d)(3)). The fact that the FDIC has not taken such action, however, does not preclude the bank's appropriate banking agency (when that agency is an agency other than the FDIC) from taking steps to require divestiture of the stock and/or shares.

3. Divestiture of Prohibited Equity Investments

Requirement to Divest

Any equity investment acquired prior to December 19, 1991 that is not of a type, or in an amount, that is permissible for a national bank, and which does not fall within one of the exceptions of this proposed rulemaking, must be divested as quickly as prudently possible but in no event later than December 19, 1996. Although the FDIC is required by statute to see that a bank divests any prohibited equity investment as quickly as prudently possible, it is not the responsibility of the FDIC to determine exactly how an institution will accomplish the divestiture. The FDIC is, however, the final arbiter of when divestiture can be prudently accomplished. It is clear that it would not be prudent to hold equity investments that are subject to divestiture arbitrarily until the final divestiture date without adequate documentation as to the reasons that prolonging the divestiture program would be prudent. The FDIC will review a bank's plan for divestiture and take such action as may be appropriate if the plan does not allow for divestiture as quickly as can be prudently possible.

Under the proposal, SAIF member state banks that hold an equity investment which was subject to divestiture pursuant to § 333.3 of the FDIC's regulations and which is also subject to divestiture under this proposal are not allotted until 1996 to complete divestiture. In such a case, the equity investment must be divested as quickly as prudently possible but in no event later than July 4, 1994 or any earlier date established by a divestiture plan that was filed with and approved by the FDIC pursuant to § 333.3. The FDIC believes that it is inappropriate to allow such institutions a longer time to accomplish divestiture as it has been established that the institutions can prudently accomplish divestiture in advance of December 19, 1996. It would also be an inappropriate diversion of the FDIC's resources to revisit the question of divestiture of these assets.

Divestiture Plan

The proposal requires any insured state bank that is required to divest an equity investment to submit a divestiture plan with the regional director for the Division of Supervision for the region in which the bank's principal office is located not later than 60 days from the effective date of the regulation. An insured state bank that is required to submit a divestiture plan which shall describe the obligor, type, amount, book and market values (estimated or known) of the equity investments subject to divestiture as of the bank's most recent call report date prior to the filing; set forth the bank's plan to comply with the divestiture period; describe the anticipated gain or loss, if any, from the divestiture of the investment(s) and the impact on the bank's capital; and include a copy of a resolution by the bank's board of directors or board of trustees authorizing the filing of the divestiture plan. The regional director may request additional information as deemed appropriate.

It is the FDIC's intent to review each plan for the purpose of determining whether or not the insured state bank that filed the plan can prudently divest the equity investments in question in a more expeditious fashion than that contemplated under the plan filed with the regional office. The proposal specifically provides that an insured state bank that has filed a divestiture plan may act in accordance with its plan until such time as the bank is informed in writing by the appropriate FDIC official that the plan is unacceptable.

Retention of Equity Investments During Divestiture Period

Upon review of the divestiture plan and such additional information as requested by the regional director, and at any time during the divestiture period, the FDIC may impose such conditions and restrictions on the retention of the equity investments as the FDIC deems appropriate including requiring divestiture in advance of December 19, 1996. It is contemplated that the FDIC will communicate in writing its objection or nonobjection to the bank's divestiture plan. The FDIC's decision concerning the adequacy of the divestiture plan will be based on the information presented. As subsequent events may alter the continued validity of the FDIC's original determination, any nonobjection on the part of the FDIC will typically be conditioned upon the continued validity of any assumptions upon which the plan is based, the continued vitality of the bank in question, and the continuation of facts and circumstances existing at the time the nonobjection was communicated.

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4. Notice and Approval of Intent to Invest in Listed Common or Preferred Stock or Shares of Investment Company; Divestiture of Stock or Shares in Excess of 100% of Capital

Requirement to File Notice and Receive FDIC Approval

Section 362.3(d) of the proposal provides that no insured state bank may acquire or retain listed stock or registered shares pursuant to the exception set out in § 362.3(b)(4) unless the bank files a one-time notice with the FDIC of its intent to take advantage of the exception and the FDIC determines, after reviewing the notice, that retaining the listed stock or registered shares the bank presently holds, and acquiring listed stock or registered shares in the future, will not present a significant risk to the deposit insurance fund of which the bank is a member. (The definition of "significant risk to the fund" is discussed in paragraph #1 above.) Until the FDIC has made its determination, a bank may retain the listed stock or shares that it lawfully held on December 19, 1991 (provided those investments do not exceed 100 percent of the bank's tier one capital). The bank may not, however, make any new investments in listed stock or registered shares until the bank receives the FDIC's approval.

Content of Notice

Section 362.3(d)(2) of the proposal provides that the one-time notice must be filed with the FDIC regional director for the Division of Supervision for the region in which the bank's principal office is located. The notice can be in the form of a letter or any other form convenient to the bank but it must contain the following information:

(1) A description of the listed stock and/or shares held by the bank as of December 19, 1991 and the book and market value of the stock or shares;

(2) The highest dollar amount of the bank's investments in listed stock and/or shares during the period from September 30, 1990 to November 26, 1991;

(3) A description of the bank's funds management policies including a discussion of how investments in listed stock or registered shares relates to the objectives of those policies;

(4) A description of the bank's investment policies including a discussion of the extent to which those policies limit concentrations in listed stock or registered shares, set an aggregate limit on such investments, and/or deal with the sale of the investments in light of market conditions;

(5) A discussion of how the quality of the bank's existing investments was determined and how the bank will judge the quality of future investments; and

(6) Such other information as requested by the regional director.

The notice must be accompanied by a resolution of the bank's board of directors or trustees authorizing the filing of the notice. For the purposes of supplying the information required by item #2, the notice must set out the highest dollar amount of the bank's investment during the period in listed stock calculated as a percentage of the bank's tier one capital as reported in the bank's call report for the quarter in which the high dollar investment occurred; the highest dollar amount during the period of the bank's investment in registered shares calculated as a percentage of the bank's tier one capital as reported in the bank's call report for the quarter in which the high dollar investment occurred; and the total combined percentage of the foregoing.

The FDIC is of the opinion that the information listed in § 362.3(d)(2) is the minimum information necessary in order for the FDIC to properly evaluate whether the retention of the bank's existing investments in listed stocks and/or registered shares, and the continued exercise of the bank's grandfathered investment authority, may pose a significant risk to the deposit insurance fund. Comments are requested on the appropriateness of the requested information; what burden, if any, is entailed by the notice as proposed; and what information in addition to or in lieu of that which is proposed should be included in the notice.

FDIC Determination

Section 362.3(d)(3) of the proposal, "FDIC Determination", sets out the standard against which the FDIC will evaluate notices filed pursuant to paragraph (d)(1), i.e., whether there is a significant risk to the fund posed by the exercise of the grandfathered investment authority. It also indicates that the FDIC may condition or restrict approval as necessary or appropriate and provides that the FDIC may require the notifying bank to divest some or all of its investments in listed stock and/or registered shares. If, upon a review of the notice, it is determined that the exercise of the grandfathered investment authority poses a significant risk to the fund, the notice will not be approved. The FDIC may, however, approve the notice subject to whatever conditions or restrictions are reasonably necessary to prevent that risk from occurring.

The recitation that the FDIC may impose conditions or restrictions in connection with an approval is nothing more than a restatement of the FDIC's existing implied authority to take such action. Insured state banks should note in this regard that section 24(i) of the FDI Act specifically provides that nothing in section 24 shall be construed as limiting the authority of the FDIC to impose more stringent conditions. Nor does section 24 limit the authority of the FDIC to take cease-and-desist action against any insured state bank in the event the exercise of its grandfathered investment authority is found to constitute under the circumstances an unsafe and unsound banking practice.

Divestiture of listed stock and/or registered shares may be ordered if the FDIC has reason to believe that retention of the investments in question will have an adverse effect on the safety and soundness of the notifying bank. Divestiture is not limited to investments held by the bank at the time it files its notice. If the FDIC grants approval for an insured state bank to make investments pursuant to § 362.3(b)(4), and it is determined at any time after the approval is given that the retention of listed stock and/or registered shares acquired pursuant to that approval poses a safety and soundness risk to the bank, the FDIC may require the divestiture of any of the investments.

The FDIC may deny a bank's application to fully exercise the grandfathered investment authority otherwise available to it under section 24(f)(2) of the FDI Act and § 362.3(b)(4) of the proposal but grant approval to make and retain investments in listed stock and/or registered shares to a lesser extent than the highest level of such investments made by the bank during the relevant period. If the FDIC does so, the bank must divest existing investments in excess of the level the FDIC approves as quickly as prudently possible but in no event later than December 19, 1996. A divestiture plan must be filed with the FDIC no later than 60 days after the bank receives notice that approval to retain its existing investments was not granted. The divestiture plan must contain the information specified in § 362.3(c)(3) of the proposal.

Insured state banks should note that they may not lawfully acquire any additional listed stock or registered shares until the FDIC has rendered its determination and granted its approval. (See section 24(f)(6)). The FDIC recognizes that section 24 contemplates

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that notices normally will be reviewed and a determination will be made within 60 days. It is therefore the FDIC's intention to respond to the notices within 60 days to the extent practicable.

However, the FDIC has concluded that the 60-day period in paragraph (f)(6)(B) of section 24 does not allow a bank to make additional investments if the FDIC does not respond before expiration of the 60-day period from the FDIC's receipt of the notice. Paragraph (f)(6) is captioned, "Notice *and Approval*" [emphasis added] which contemplates affirmative approval by the FDIC.[8] In addition, paragraph (f)(6) does not expressly indicate the bank may proceed in the absence of a determination by the FDIC within the 60-day period,[9] nor does it require that the FDIC "shall" or "must" make a determination within the 60-day period.[10]

Neither the earlier provision found in H.R. Rep. No. 102–330 nor the statute as enacted expressly specifies a consequence for any failure by the FDIC to act within the 60-day period. A well-recognized rule uniformly applied by the courts holds that:

> A statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision.[11]

The FDIC Board of Directors has followed this rule.[12]

The FDIC has therefore concluded that section 24(f)(6) does not require the FDIC to act within the 60-day period. Although the FDIC is not required by law to do so, it is the FDIC's intent to respond to notices filed pursuant to § 362.3(d) within 60 days of receipt of the notice.

Maximum Permissible Investment

Section 362.3(d)(4) of the proposal, "Maximum Permissible Investment", sets out the maximum investment in listed stock and/or registered shares that an insured state bank can make under § 362.3(b)(4), i.e., the highest amount of investment permitted by the statute that the FDIC can allow should it approve the bank's notice filed under § 362.3(d)(1). Under § 362.3(d)(4) of the proposal an insured state bank's investments in listed stock pursuant to the exception contained in § 362.3(b)(4) may not exceed the highest level of investment that the bank made during the period from September 30, 1990 to November 26, 1991 expressed as a percentage of the bank's tier one capital as reported for the quarter in which the high investment occurred. Likewise, an insured state bank's investment in registered shares may not exceed the highest level of investment the bank made during that period expressed as a percentage of the bank's tier one capital as reported for the quarter in which the high investment occurred. In no event may the aggregate of the bank's investments in listed stock and registered shares exceed 100 percent of the bank's tier one capital.

The bank's investment in listed stock is treated separately from its investment in registered shares thus, the bank is allotted two limits, the aggregate of which cannot exceed 100 percent of the bank's tier one capital. If for example, the bank's highest investment in listed stock over the period represented 45 percent of the bank's tier one capital, the maximum permissible investment in listed stock that the FDIC may allow is 45 percent of tier one capital. If the bank had not made or maintained any investments in registered shares during the period, the FDIC cannot permit future investments in registered shares.

If the FDIC determines that a significant risk will be posed to the deposit insurance fund if the FDIC approves (1) the retention of existing investments in listed stock and/or registered shares, and (2) the continued or future investment in such stock and/or shares to the maximum possible investment, the FDIC may set a lower percentage of the bank's tier one capital as the bank's maximum permissible investment.

Once the FDIC has determined the bank's permissible maximum investment, investments in listed stock and/or registered shares may be made in the future only if the new investment, when added to outstanding investments, does not cause the bank to exceed the permissible maximum percentage of the bank's tier one capital as reported on the bank's call report for the period immediately preceding the investment. In short, the bank is not limited to the highest dollar amount of the investment that it made during the period from September 30, 1990 to November 26, 1991. The permissible maximum percentage is set based upon that amount, however, the percentage, once determined, is used with reference to the bank's tier one capital at the time an investment is made. What is more, if the investment when made is within the maximum permissible investment percentage, the investment will not be considered to be in violation of the bank's tier one capital later declines.

The FDIC recognizes in proposing § 362.3(d)(4) as drafted that there are many possibilities to choose from in deciding when to measure capital for purposes of applying the grandfather provided for by the statute for listed stocks and registered shares. Comment is specifically requested on alternative ways that the regulation might do so and the pro's and con's of those alternatives. Additionally, comment is specifically requested on whether or not the regulation should measure the investment as a percentage of total capital as opposed to tier one capital.

Diverstiture of Excess Stock or Shares

Section 24(f)(4) of the FDI Act provides a transition period during which an insured state bank is required to divest any stock and/or shares that it held as of December 19, 1991 in excess of 100 percent of the bank's capital. Section 362.3(d)(5) of the proposal sets out the diverstiture requirement and, as provided by the statute, indicates that the excess must be diversted by at least ⅓ in each of the three years beginning on December 19, 1991. The proposal indicates that the excess is to be determined by looking to the bank's tier one capital as measured on December

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[8] An earlier version of the provision was simply entitled "Notice of Paragraph (2) Activities". The word "approval" was subsequently added to the title. H.R. Rep. No. 102–330, 102d Cong., 1st Sess., at 55 (Nov. 19, 1991).

[9] The language of paragraph (f)(6) as enacted stands in clear contrast with the language found in H.R. Rep. No. 102–330. The earlier version provided a bank could engage in any investment activity pursuant to paragraph (2) only if notice were filed and "the Corporation *has not determined, within 60 days of receiving such notice*" [emphasis added] that the investment could pose a significant risk to the appropriate insurance fund. Under the earlier version, one might argue that failure of the FDIC to act within 60 days satisfied the second of the two elements of the provision, thus a bank could proceed with its investments as notice had been filed and the FDIC had not determined within 60 days of receipt of the notice that there is a risk to the fund. However, the above language was not enacted.

[10] Paragraph (f)(6) thus stands in contrast to other provisions of the FDI Act and other federal statutes, which (a) clearly provide a set time period in which the FDIC must act on a notice, and (b) provide that failure to act cuts off the FDIC's ability to object to the conduct or activity which is the subject of the notice (absent some other independent authority to do so). (See, for example section 7(j) of the FDI Act (12 U.S.C. 1817(j)), section 32 of the FDI Act (12 U.S.C. 1831i), and 12 U.S.C. 3204(8)).

[11] *Fort Worth National Corp.* v. *Federal Savings and Loan Insurance Corp.*, 469 F.2d 47, 58 (5th Cir. 1972). *See* e.g., *Mayor's Office of Employ* v. *U.S. Dept. of Labor*, 775 F.2d 196, 201 (7th Cir. 1985); *St. Regis Mohawk Tribe, New York* v. *Brock*, 769 F.2d 37, 41 (2d Cir. 1985); *Thomas* v. *Barry*, 729 F.2d 1469, 1470 n. 5 (D.C. Cir. 1984); *Marshall* v. *Local Union No. 1374, Int. Ass'n of Mach.*, 558 F.2d 1354, 1357 (9th Cir. 1977); *Usery* v. *Whitin Mach. Works, Inc.*, 554 F.2d 498, 501 (1st Cir. 1977); and *Maryland Casualty Co.* v. *Cardillo*, 99 F.2d 432, 434 (D.C. Cir. 1938).

[12] FDIC Docket No. 86–43k, par. 5111, A–1205 (January 19, 1988).

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19, 1991. (Tier one capital as measured in the bank's December 31, 1991 call report may be used if it is more convenient to do so.)

Insured state banks are required to reduce the excess to a level that is no greater than 100 percent of the bank's tier one capital by December 19, 1994 if the maximum permissible investment set by the FDIC in connection with a notice filed pursuant to § 362.3(d)(1) is 100 percent of tier one capital. Insured state banks that have such an excess are presently subject to the diverstiture requirement and should have already divested ⅓ of the excess or be planning to divest ⅓ of the excess prior to December 19, 1992. The requrement to divest at least ⅓ of the excess each year is waived if divesting a lesser amount will reduce the bank's outstanding investment to 100 percent of the bank's current tier one capital. Banks for which the FDIC has set a maximum permissible investment that is lower than 100 percent of tier one capital, must submit a diverstiture plan with the FDIC regional office within 60 days of being so informed. Such excess investment must be divested as quickly as prudently possible but in no event later than December 19, 1996.

5. Notification of Exempt Insurance Activities

Section 362.4 of the proposal directs any insured state bank that was lawfully providing insurance as principal on November 21, 1991, or which has a subsidiary that was lawfully providing insurance as principal on that date, to provide certain information concerning those activities to the FDIC regional director. The information is being requested so that the FDIC will be able to monitor compliance with § 362.3(b)(7) of the proposal. The information may be submitted in letter form.

6. Delegation of Authority

Under the proposal the authority to review and act on divestiture plans as well as the authority to approve or deny notices filed concerning "grandfathered" equity investments is delegated to the Director of the Division of Supervision. The Director may in turn, where confirmed in writing, delegate that authority to any associate director of the Division of Supervision or the appropriate regional director or deputy regional director.

Regulatory Flexibility Analysis

The Board of Directors has concluded after reviewing the proposed regulation that the regulation, if adopted, will not impose a significant economic hardship on small institutions. The proposal does not necessitate the devleopment of sophisticated recordkeeping or reporting systems by small institutions nor will small institutions need to seek out the expertise of specialized accountants, lawyers, or managers in order to comply with the regulation. The Board of Directors therefore hereby certifies pursuant to section 605 of the Regulatory Flexibility Act (5 U.S.C. 605) that the proposal, if adopted, will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.).

List of Subjects in 12 CFR Part 362

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Insured depository institution, Investments.

In consideration of the foregoing, the FDIC hereby proposes to amend chapter III, title 12 of the Code of Federal Regulatiions by adding a new Part 362 to read as follows:

PART 362—ACTIVITIES AND INVESTMENTS OF INSURED STATE BANKS

Sec.
362.1 Purpose and scope.
362.2 Definitions.
362.3 Equity investments.
362.4 Notification of exempt insurance activites.
362.5 Delegation of authority

Authority: 12 U.S.C. 1816, 1818, 1819(tenth), 1831a.

§ 362.1 Purpose and scope.

The purpose of this part is to implement the provisions of section 24 of the Federal Deposit Insurance Act (12 U.S.C. 1831a) which sets forth certain restrictions and prohibitions on the activities and investments of insured state banks. In addition, consistent with the overall purpose of section 24, it is the intent of this part to ensure that activities and investments undertaken by insured state banks do not present a risk to either of the deposit insurance funds, are safe and sound, are consistent with the purposes of federal deposit insurance, and are otherwise consistent with law.

§ 362.2 Definitions.

For the purposes of this section, the following definitions shall apply:

(a) *Company* shall mean any corporation, partnership, business trust, association, joint venture, pool, syndicate or other similar business organization.

(b) *Control* shall mean the power to vote, directly or indirectly, 25 per centum or more of any class of the voting stock of a company, the ability to control in any manner the election of a majority of a company's directors or trustees, or the ability to exercise a controlling influence over the management and policies of a company.

(c) An insured state bank wil be considered to convert its charter if the bank undergoes any transaction which causes the bank to operate under a different form of charter than that under which it operated as of December 19, 1991.

(d) *Depository institution* means any bank or savings association.

(e) *Equity interest in real estate* means any form of direct or indirect ownership of any interest in real property, whether in the form of an equity interest, partnership, joint venture or other form, which is accounted for as an investment in real estate or real estate joint ventures under generally accepted accounting principles or is otherwise determined to be an investment in a real estate venture under Federal Financial Institutions Examination Council Call Report Instructions. The term shal include, for example, real estate acquisition, development or construction arrangements which are accounted for as direct investments in real estate or as real estate joint ventures in accordance with generally accepted accounting principles, and any other loans secured by real estate or advanced for real estate acquisition, development or investment purposes if the insured state bank in substance has virtually the same risks and potential rewards as an investor in the borrower's real estate. The phrase equity interest in real estate does not include the following:

(1) An interest in real property that is used or intended to be used by the insured state bank or its subsidiaries as offices or related facilities for the conduct of its business or future expansion of its business;

(2) An interest in real property that is acquired in satisfaction of debts previously contracted for in good faith or acquired in sales under judgments, decrees or mortgages held by the insured state bank or acquired under deed in lieu of foreclosure provided that the property is not intended to be held for real estate investment purposes and is not held longer than the shorter of any time limit on holding such property set by applicable state law or regulation or the time limit on holding such property that is applicable by statute or regulation for a national bank; and

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(3) Interests in real property that are primarily in the nature of charitable contributions to community development corporations provided that the contribution to any one community development corporation does not exceed 2 percent of the bank's tier one capital and the bank's total contribution to all such corporations does not exceed 5 percent of the bank's tier one capital.

(f) *Equity investment* means any equity security as defined in § 362.2(g); any partnership interest; any equity interest in real estate as defined in § 362.2(e); and any transaction which in substance falls into any of these categories even though it may be structured as some other form of business transaction.

(g) *Equity security* means any stock, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, or voting-tust certificate; any security immediately convertible at the option of the holder without payment of substantial additional consideration into such a security; any security carrying any warrant or right to subscribe to or purchase any such security; and any certificate of interest or participation in, temporary or interim certificate for, or receipt for any of the foregoing. The term *equity security* does not include any of the foregoing if it is acquired through foreclosure or settlement in lieu of foreclosure.

(h) *Equity investment permissible for a national bank* shall be understood to refer to an equity investment expressly authorized for national banks under the National Bank Act (12 U.S.C. 21 et seq.) or any other statute; regulations issued by the Office of the Comptroller of the Currency; or any order or formal interpretation issued by the Office of the Comptroller of the Currency.

(i) *Insured state bank* shall mean any state bank insured by the Federal Deposit Insurance Corporation (FDIC) whether or not a member of the Federal Reserve System and any insured branch of a foreign bank that is not a federal branch.

(j) *Lower income* means income that is less than or equal to the median income for the area in which the qualified housing project is located as determined by state or federal statistics. The "area" in which a housing project is located shall be understood to refer to the relevant Metropolitan Statistical Area (MSA) in which the project is located if the project is located within an MSA. If the project is not located in an MSA, the median income of the "area" in which the project is located shall be understood to refer to the median income of the state or territory in which the project is located exclusive of the designated MSA's.

(k) *National securities exchange* means a securities exchange that is registered as a national securities exchange by the Securities and Exchange Commission pursuant to section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) and the National Market System, i.e., the top tier of the National Association of Securities Dealers Automated Quotation System (NASDAQ).

(l) *Residents of the state* shall be understood to include companies or partnerships incorporated in, organized under the laws of, licensed to do business in, or having an office in the state.

(m) *Significant risk to the deposit insurance fund* shall be understood to be present whenever it is likely that any insurance fund administered by the FDIC may suffer any loss whatever.

(n) *Subsidiary* menas any company directly or indirectly controlled by an insured state bank.

(o) *Tier one capital* shall have the same meaning as set forth in part 325 of this chapter in the case of an insured state nonmember bank and, in the case of an insured state member bank, shall have the same meaning as set forth in regulations defining the term tier one capital as adopted by the bank's appropriate federal banking agency.

(p) *Well-capitalized insured state bank* shall mean an insured state bank which has a ratio of total capital to risk-weighted assets of not less than 10.0 percent; a ratio of Tier 1 capital to risk-weighted assets of not less than 6.0 percent; a ratio of Tier 1 capital to total book assets of not less than 5.0 percent; and which has not been notified by its appropriate Federal banking agency that it is in a "troubled condition" as that term is defined by the appropriate Federal banking agency in its regulations implementing section 32 of the Federal Deposit Insurance Act. For the purposes of this definition, the terms "risk-weighted assets," "total capital," and "total book assets" shall have the respective meaning prescribed in regulations issued by the appropriate Federal banking agency. In order to be considered well-capitalized, an insured state bank must meet the above requirements exclusive of the bank's investment in any department of the bank, and any subsidiary of the bank, that engages in any activity that is not permissible for a national bank. An insured state bank that has been required pursuant to an order, capital directive, or consent agreement to raise its capital to a level higher than the capital levels set out above (exclusive of any investment in a subsidiary or department described above) will not be considered to be "well-capitalized" unless the higher capital levels are met. The bank's "investment" in its subsidiary will be considered to equal the amount invested in the subsidiary's equity securities plus any debt issued by the subsidiary that is held by the bank. The bank's investment in a department will be considered to equal the total of any funds transferred to the department which is represented on the department's accounts and records as an accounts payable, a liability, or equity of the department except that transfers of funds to the department in payment of services rendered by the department will not be considered an investment in the department.

§ 362.3 Equity investments.

(a) *Prohibited investments.* No insured state bank may directly or indirectly acquire or retain any equity investment of a type, or in an amount, that is not permissible for a national bank.

(b) *Exceptions*—(1) *Majority owned subsidiaries.* An insured state bank is not prohibited from acquiring or retaining a majority interest in a subsidiary. If the FDIC denied an application by a Savings Association Insurance Fund (SAIF) member state bank for permission to acquire or retain the majority interest in a subsidiary pursuant to § 333.3 of this chapter, this exception does not apply. If the denial concerned an application for permission to retain the investment, the SAIF member state bank must divest its interest in the subsidiary in accordance with whatever conditions and restrictions are set forth in the FDIC's order denying the application.

(2) *Qualified housing projects.* (i) Subject to the limitation contained in paragraph (b)(2)(ii) of this section, an insured state bank is not prohibited from investing as a limited partner in a partnership the sole purpose of which is direct or indirect investment in the acquisition, rehabilitation, or new construction of a qualified housing project. A qualified housing project shall be understood to mean residential real estate intended to primarily benefit lower income persons throughout the period of the bank's investment.

(ii) Investments described in paragraph (b)(2)(i) of this section may only be made if the equity investment, when aggregated with any existing equity investment in such a partnership or partnerships, does not exceed 2

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percent of the bank's total assets as reported on the bank's most recent consolidated report of condition.

(3) *Savings bank life insurance.* Unless it is otherwise found to pose a significant risk to the insurance fund of which the bank is a member, an insured state bank located in Massachusetts, New York, or Connecticut is not prohibited from owning stock in a savings bank life insurance company provided that the savings bank life insurance company prominently discloses to purchasers of life insurance policies, annuities, and other insurance products that the policies, annuities and other products offered to the public are not insured by the FDIC, are not obligations of, and are not guaranteed by, any insured state bank. The following or a similar statement will satisfy this requirement: "This [policy, annuity, insurance product] is not a federally insured deposit and is not an obligation of, nor is it guaranteed by, any federally insured bank."

(4) *Common or preferred stock; shares of investment companies.* (i) To the extent permitted by the FDIC, and subject to the requirements of paragraph (d) of this section, an insured state bank that is located in a state which as of September 30, 1991 authorized investment in:

(A) (*1*) Common or preferred stock listed on a national securities exchange (listed stock); or

(*2*) Shares of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, et seq.) (registered shares); and

(B) Which during any time in the period beginning on September 30, 1990 and ending on November 26, 1991 made or maintained an investment in such listed stock or registered shares, may retain whatever listed stock or registered shares that were lawfully acquired or held prior to December 19, 1991, and continue to acquire listed stock or registered shares.

(ii) The exception provided for by paragraph (b)(4)(i) of this section shall cease to apply to any insured state bank if the bank converts its charter, the bank undergoes any transaction for which a notice is required to be filed under section 7(j) of the Federal Deposit Insurance Act (12 U.S.C. 1817(j)), the bank undergoes any transaction subject to section 3 of the Bank Holding Company Act (12 U.S.C. 1842), control of the bank's parent company changes, or the bank is merged into another depository institution. In such event the insured state bank may not make any additional investments pursuant to the exception provided for by paragraph (b)(4)(i) of this section. The bank is not prohibited under this section from retaining its existing investments provided that the FDIC does not order divestiture under paragraph (d)(3) of this section or section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818).

(5) *Stock of company that provides director and official liability insurance.* An insured state bank is not prohibited from acquiring up to 10 percent of the voting stock of a company that solely provides or reinsures directors', trustees', and officers' liability insurance coverage or bankers' blanket bond group insurance coverage for insured depository institutions.

(6) *Shares of depository institutions.* An insured state bank is not prohibited from acquiring or retaining the voting shares of a depository institution if the institution engages only in activities permissible for national banks; the institution is subject to examination and regulation by a state bank supervisor; 20 or more depository institutions own voting shares of the institution but no one institution owns more than 15 percent of the shares; and the institution's voting shares (other than directors' qualifying shares or shares held under or acquired through a plan established for the benefit of the officers and employee) are owned only by depository institutions.

(7) *Interests in insurance subsidiaries.* (i) A well-capitalized insured state bank is not prohibited from retaining after December 19, 1992 its equity investment in a majority owned subsidiary that was lawfully providing insurance as principal in a state on November 21, 1991 provided that the activities of the subsidiary continue to be limited to providing, as principal, insurance of the same type provided by the subsidiary as of November 21, 1991 to residents of the state, individuals employed in the state, and any other person to whom the subsidiary provided insurance as principal without interruption since such person resided in or was employed in the state. In the case of resident companies or partnerships, the subsidiary's activities must be limited to providing insurance to the company's or partnership's employees residing in the state and/or to providing insurance to cover the company's or partnership's property located in the state.

(ii) An insured state bank is not prohibited from retaining after December 19, 1992 its equity investment in a title insurance subsidiary provided that the bank was required before June 1, 1991 to provide title insurance as a condition of the bank's initial chartering under state law and none of the transactions described in paragraph (b)(4)(ii) of this section has occurred since june June 1, 1991.

(c) *Divestiture of prohibited equity investments*—(1) *Requirement to divest.* Any equity investment acquired prior to December 19, 1991 that is not of a type, or in an amount, that is permissible for a national bank, and which does not fall within one of the exceptions in paragraph (b) of this section, must be divested as quickly as prudently possible but in no event later than December 19, 1996. If a SAIF member state bank holds an equity investment that was subject to divestiture pursuant to § 333.3 of this chapter, and the equity investment is subject to divestiture under paragraph (c)(1) of this section, the equity investment must be divested as quickly as prudently possible but in no event later than July 4, 1994 or any earlier date established by a divestiture plan that was filed by the bank under, and approved by the FDIC pursuant to, § 333.3 of this chapter.

(2) *Requirement to file divestiture plan.* Any insured state bank that is required by paragraph (c)(1) of this section to divest an equity investment must submit a divestiture plan with the regional director for the Division of Supervision for the region in which the bank's principal office is located not later than 60 days from [insert effective date of final regulation]. An insured state bank that has submitted a plan pursuant to this section may proceed to act in accordance with that plan unless and until it is informed in writing by the FDIC that the plan is unacceptable.

(3) *Content of divestiture plan.* The divestiture plan shall:

(i) Describe the obligor, type, amount, book and market values (estimated or known) of the equity investments subject to divestiture as of the bank's most recent consolidated report of condition prior to the filing;

(ii) Set forth the bank's plan to comply with paragraph (c)(1) of this section;

(iii) Describe the anticipated gain or loss (anticipated or realized) if any from the divestiture of the investment and the impact thereof on the bank's capital (including capital ratios before and after the sale);

(iv) Include a copy of a resolution by the bank's board of directors or board of trustees authorizing the filing of the divestiture plan; and

(v) Such other information as requested by the regional director.

(4) *Retention of equity investments during divestiture period.* Upon review of the divestiture plan and such additional information as requested by the regional director, and at any time

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during the divestiture period, the FDIC may impose such conditions and restrictions on the retention of the equity investments during the divestiture period as the FDIC deems appropriate including requiring divestiture in advance of December 19, 1996.

(d) *Notice and approval of intent to invest in common or preferred stock or shares of an investment company; divestiture of excess investments.* (1) Notice and required FDIC determination. No insured state bank may acquire or retain any listed stock or registered shares pursuant to paragraph (b)(4) of this section unless the bank files a 1-time notice with the FDIC setting forth the bank's intention to acquire and retain the listed stock or registered shares and the FDIC has determined that acquiring or retaining the listed stock or registered shares that are the subject of the notice will not pose a significant risk to the deposit insurance fund of which the bank is a member. The notice must be filed with the regional director for the Division of Supervision for the region in which the bank's principal office is located.

(2) *Content of notice.* The notice shall contain:

(i) A description of the obligor, type, amount and book and market values of the listed stock and/or registered shares held as of December 19, 1991;

(ii) The highest dollar amount of the bank's investments in listed stock and/or registered shares between September 30, 1990 and November 26, 1991, both in the aggregate and individually in each of the two categories, expressed as a percentage of tier one capital as reported in the consolidated report of condition for the quarter in which the high dollar amount of investment occurred;

(iii) A description of the bank's funds management policies and how the bank's investments (planned or existing) in listed stock and/or registered shares relate to the objectives set out in the bank's funds management policies;

(iv) A description of the bank's investment policies and a discussion of to what extent those policies:

(A) Limit concentrations in listed stock and/or registered shares both by issue and by industry;

(B) Set an aggregate limit on investment in listed stock and/or registered shares; and

(C) Deal with the sale of listed stock and/or registered shares in light of market conditions;

(v) A discussion of the parameters used to determine the quality of the bank's outstanding and proposed investments in listed stock and/or registered shares as well as future investments;

(vi) A copy of a resolution by the board of directors or board of trustees authorizing the filing of the notice; and

(vii) Such additional information as deemed appropriate by the regional director.

(3) *FDIC determination.* Approval of a notice filed under paragraph (d)(1) of this section will not be granted unless the FDIC determines that acquiring and retaining the listed stock and/or registered shares does not pose a significant risk to the insurance fund of which the bank is a member. Approval may be made subject to whatever conditions or restrictions the FDIC determines is necessary or appropriate. The FDIC may require diverstiture of some or all of the investments in listed stock or registered shares made during the period from September 30, 1990 to December 19, 1991, as well as any investments in listed stock or registered shares made subsequent to that period if it is determined that retention of the investments in question will have an adverse effect on the safety and soundness of the bank.

(4) *Maximum permissible investment.* (i) The maximum permissible investment in listed stock an insured state bank may hold pursuant to paragraph (b)(4) of this section may not exceed the highest level of investment made by the bank in such stock during the period from September 30, 1990 to November 26, 1991 expressed as a percentage of the bank's tier one capital as reported by the bank in its consolidated report of condition for the quarter in which the high investment occurred.

(ii) The maximum permissible investment in registered shares an insured state bank may hold pursuant to paragraph (b)(4) of this section may not exceed the highest level of investment made by the bank in such shares during the period from September 30, 1990 to November 26, 1991 expressed as a percentage of the bank's tier one capital as reported by the bank in its consolidated report of condition for the quarter in which the high investment occurred.

(iii) The aggregate maximum investment in stock and shares an insured state bank may hold pursuant to paragraph (b)(4) of this section may not exceed 100 percent of the bank's tier one capital.

(iv) Notwithstanding § 362.3(d)(4) (i), (ii) and (iii), the FDIC, in response to a notice filed under paragraph (d)(1) of this section, may set a percentage as the maximum permissible investment for any insured state bank that is lower than that which would otherwise be applicable.

(v) Any acquisition of listed stock or registered shares by an insured state bank made after December 19, 1991 pursuant to approval of a notice filed under paragraph (d)(1) of this section may not, when made, exceed the maximum permissible investment percentage (as set out in the FDIC's approval of such notice) of the bank's tier one capital as reported on the bank's consolidated report of condition for the period immediately preceding the acquisition.

(5) *Divestiture of excess stock and/or shares.* (i) An insured state bank that held as of December 19, 1991 investments in listed stock and/or registered shares in an aggregate amount in excess of 100 percent of the bank's tier one capital as measured on December 19, 1991 is prohibited from retaining the excess listed stock and/or registered shares. (Tier one capital as reprted on the bank's December 31, 1991 consolidated report of condition may be used in lieu of calculating tier one capital as of December 19, 1991.) Such bank's outstanding investment in listed stock or registered shares must comply by no later than December 19, 1994 with the maximum permissible investment set for the bank by the FDIC in connection with the notice filed pursuant to § 362.3(d)(1) if the bank's maximum permissible investment is 100 percent of tier one capital. In such event, the bank shall divest the excess investment by not less than ⅓ in each of the three years beginning on December 19, 1991, provided however, that the bank shall be relieved of the obligation to divest at least ⅓ of its excess investment each year if divesting a lesser amount will reduce the bank's outstanding investment to 100 percent of its current tier one capital. If the bank's maximum permissible investment set by the FDIC is lower than 100 percent of tier one capital, paragraph (d)(5)(ii) of this section shall apply.

(ii) If an insured state bank does not receive approval in connection with a notice filed pursuant to paragraph (d)(1) of this section to retain its outstanding investment in listed stock and/or registered shares, the bank must, as quickly as prudently possible but in no event later than December 19, 1996, divest the listed stock and/or registered shares for which approval to retain was denied. The bank must file a divestiture plan with the regional director for the

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Division of Supervision for the region in which the bank's principal office is located no later than 60 days after the bank receives notice that approval to retain the investment(s) was denied. The divestiture plan shall contain the information specified in paragraph (c)(3) of this section.

§ 362.4 Notification of exempt insurance activities.

Any insured state bank that was lawfully providing insurance as principal in a state on November 21, 1991, and any insured state bank that has a subsidiary that was lawfully providing insurance as principal in a state on November 21, 1991, shall submit a notice to the regional director for the Division of Supervision for the region in which the bank's principal office is located not later than 60 days from [insert effective date of final regulation]. The notice requirement does not apply in the case of an insured state bank described in § 362.3(b)(7)(ii). The notice shall contain the following information:

(a) The name of the bank/or subsidiary;

(b) The state in which the bank is chartered;

(c) If applicable, a recitation of the authority for the bank or subsidiary to conduct insurance underwriting activities;

(d) The state in which the subsidiary is incorporated; and

(e) A description of the insurance policies and other insurance products that the bank and/or subsidiary provided to the public as of November 21, 1991 in the state(s) identified in paragraphs (b) and (d) of this section.

§ 362.5 Delegation of authority.

The authority to review and act upon divestiture plans submitted pursuant to § 362.3(c)(2) as well as the authority to approve or deny notices filed pursuant to § 362.3(d) is delegated to the Director, Division of Supervision, and where confirmed in writing by the Director, to an associate director, Division of Supervision or the appropriate regional director of deputy regional director.

By Order of the Board of Directors.

Dated at Washington, D.C. this 16th day of June, 1992.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 92-15361 Filed 7-8-92; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 333

RIN 3064-AA55

Extension of Corporate Powers

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Proposed rule.

SUMMARY: The FDIC is proposing to amend its current regulations on extension of corporate powers to eliminate language which makes certain prohibitions concerning equity investments by savings associations applicable to state banks that are members of the Savings Association Insurance Fund. Such banks would thereafter be subject to the restrictions of proposed new regulations on activities and investments of insured state banks in lieu of the current restrictions. The proposed new regulations are published elsewhere in today's **Federal Register**. The effect of the proposed amendment would be to subject Savings Association Insurance Fund member state banks and Bank Insurance Fund member state banks to the same restrictions in so far as their equity investments are concerned.

DATES: Comments must be received by August 10, 1992.

ADDRESSES: Send comments to Hoyle L. Robinson, Executive Secretary, Attention: Room F-400, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC, 20429. Comments may be hand delivered to room F-402, 1776 F Street NW., Washington, DC between 8:30 a.m. and 5 p.m. on business days. [FAX number: (202) 898-3838.]

FOR FURTHER INFORMATION CONTACT: Curtis L. Vaughn, Examination Specialist, (202) 898-6759, Shirley K. Basse, Review Examiner, (202) 898-6815, or Cheryl A. Steffen, Review Examiner, (202) 898-6768, Division of Supervision, FDIC, 550 17th Street NW., Washington, DC, 20429; Pamela E.F. LeCren, Counsel, (202) 898-3730, Counsel, or Grovetta N. Gardineer, (202) 898-3905, Senior Attorney, Legal Division, FDIC, 550 17th Street NW., Washington, DC, 20429; Victor L. Saulsbury, (202) 898-3950, Financial Analyst, or David K. Horne, (202) 898-3981, Financial Economist, Division of Research and Statistics, FDIC, 550 17th Street NW., Washington, DC, 20429.

SUPPLEMENTARY INFORMATION: On December 19, 1991, President George Bush signed into law the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) (Pub. L. 102-242, 105 Stat. 2236). Section 303 of FDICIA added section 24 to the Federal Deposit Insurance Corporation Act, "Activities of Insured State Banks" (FDI Act) (12 U.S.C. 1831a). With certain exceptions, section 24 of the FDI Act limits the activities and equity investments of state chartered insured banks to the activities and equity investments that are permissible for national banks. While much of section 24 is not effective until December 19, 1992, the portions of section 24 dealing with equity investments were effective upon enactment, December 19, 1991.

Paragraph (c) of section 24 "Equity Investments by Insured State Banks", (12 U.S.C. 1831a(c)), provides that no insured state bank may directly or indirectly acquire or retain any equity investment of a type that is not permissible for a national bank. As already indicated, this paragraph became effective December 19, 1991. Several exceptions to the general prohibition to making or retaining equity investments are found in paragraph (c) itself and in subsequent paragraphs of section 24. In addition, paragraph (c) provides a "transition rule" that requires insured state banks to divest prohibited equity investments as quickly as can be prudently done but in no event any later than December 19, 1996. The FDIC is given the authority to establish conditions and restrictions governing the retention of the prohibited investments during the divestiture period. Paragraph (c) expressly provides for an exception for the retention or acquisition of equity investments in majority owned subsidiaries and equity investments in qualified low income housing.

Section 24(f), "Common and Preferred Stock Investment", (12 U.S.C. 1831a(f)) which also became effective upon enactment of FDICIA, provides that no insured state bank may directly or indirectly acquire or retain any equity investment of a type, or in an amount, that is not permissible for a national bank and which is not otherwise permitted under section 24. Like paragraph (c), paragraph (f) contains several exceptions to the general prohibition.

Paragraph (f)(2) creates a limited "grandfather" for investments in common or preferred stock or shares of investment companies. The exception allows insured state banks that (a) are located in a state that as of September 30, 1991 permitted the bank to invest in common or preferred stock listed on a national securities exchange or shares of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), and (b) which made or maintained investments in listed stock or registered shares during the period from September 30, 1990 to November 26, 1991, to acquire or retain, subject to the FDIC's approval, listed stock or registered shares to the same extent to which the bank did so during the period from September 30, 1990 to November 26, 1991 ("relevant period") up to an aggregate maximum of 100 percent of the bank's capital. A bank must file a written notice with the FDIC of its intent to take advantage of the exception (and must receive the FDIC's approval) before it can lawfully retain or acquire listed stock or registered shares pursuant to the exception provided by paragraph (f)(2). If a bank made investments in listed stock or registered shares during the relevant period that exceed in the aggregate 100 percent of the bank's capital as measured on December 19, 1991, the bank must divest the excess over the three year period beginning on December 19, 1991 at a rate of no less than ⅓ of the excess each year.

Paragraph (d)(2) provides an exception for the retention of an equity interest in a subsidiary that was engaged in a state in insurance activities as principal on November 21, 1991 so long as the subsidiary's activities continue to be confined to offering the same type of insurance to residents of the state, individuals employed in the state and any other person to whom the subsidiary provided insurance as principal without interruption since such person resided in or was employed in the state.

Paragraph (e) indicates that nothing in section 24 shall be construed as prohibiting an insured state bank in Massachusetts, New York or Connecticut from owning stock in a savings bank life insurance company provided that consumer disclosures are made.

Section 24(g) grants the FDIC the authority to make determinations under section 24 by regulation or order.

Elsewhere in today's **Federal Register** the FDIC is proposing to add a new part

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362 to the FDIC's regulations that would implement the equity investment provisions of section 24.

On April 30, 1991 the FDIC amended the FDIC's regulations by adding a new § 333.3 to part 333, "Extension of Corporate Powers" (12 CFR 333.3). That section, among other things, causes state banks that are members of the Savings Association Insurance Fund ("SAIF member state banks") to be subject to the conditions and restrictions regarding equity investments to which state savings associations are subject pursuant to § 303.13 of the FDIC's regulations (12 CFR 303.13). Section 303.13 was adopted by the FDIC on December 12, 1989 (54 FR 53540, December 29, 1989) in order to implement section 28 of the FDI Act (12 U.S.C. 1831e) which placed certain prohibitions on the activities and equity investments of state savings associations. Section 28 was added to the FDI Act as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (Pub. L. 101-73, 103 Stat. 183 (1989)).

Among other things, section 28 of the FDI Act and § 303.13 of the FDIC's regulations prohibit state chartered savings associations from acquiring or retaining any equity investment of a type or in an amount that is not permissible for a federal savings association. If a state savings association meets it fully phased-in capital requirements and the FDIC determines that there is not a significant risk to the deposit insurance fund, a state savings association may acquire or retain an equity investment in a service corporation that would not be permissible for a federal savings association. Equity investments acquired prior to August 8, 1989 that are prohibited investments must be divested as quickly as prudently possible but in no event later than July 1, 1994. The FDIC may set conditions and restrictions governing the retention of the prohibited equity investments during the divestiture period.

It was the determination of the FDIC's Board of Directors when § 333.3 was adopted that savings associations which convert to state chartered banks and retain their membership in SAIF should continue to be subject to the safeguards enacted by FIRREA. The action was found necessary by the Board of Directors to protect SAIF from harm. At the same time, however, the Board of Directors indicated that it was not its intent to permanently establish two classes of state banks that would be treated differently based upon their membership in a particular deposit insurance fund. The FDIC subsequently undertook a review of the issue of expanded bank powers with the hopes of proposing a regulation applicable to all state banks. Before the FDIC could publish a proposal, however, Congress enacted FDICIA along with the provisions described above concerning equity investments.

It is the FDIC's opinion that § 333.3 was not repealed by implication with the enactment of section 303 of FDICIA. However, in light of the action by Congress, the FDIC's previously expressed intent to adopt uniform treatment for state banks, and the fact that the equity investment provisions of section 24 of the FDI Act are currently effective, the FDIC is proposing to amend § 333.3 of this part to allow state banks to be governed by the equity investment provisions of section 24 of the FDI Act and any regulations adopted by the FDIC pursuant thereto.

Regulatory Flexibility Analysis

The Board of Directors has determined that the proposed amendment, if adopted, will not have a significant economic impact on a substantial number of small entities. The proposed amendment will not necessitate the development of sophisticated recordkeeping and reporting systems by small institutions nor the expertise of specialized staff accountants, lawyers or managers that small institutions are less likely to have absent hiring additional employees or obtaining these services from outside vendors. On the contrary, the proposed amendment if adopted, will relieve what may be perceived as a burden on SAIF member state banks (both large and small) in that they are currently subject to a different set of rules regarding their equity investments than that to which Bank Insurance Fund member state banks are subject. SAIF member state banks are presently required to comply with the most restrictive rule and therefore must determine which rule is in fact the more restrictive. This amendment would relieve that burden and place SAIF member state banks on a par with BIF member state banks.

As the proposed amendment will not have a disparate economic impact on small institutions, the FDIC is not required to conduct a Regulatory Flexibility Act analysis. (See section 605 of the Regulatory Flexibility Act (5 U.S.C. 605)).

List of Subjects in 12 CFR Part 333

Banks, banking.

In consideration of the foregoing, the FDIC hereby proposes to amend chapter III, title 12 of the Code of Federal Regulations by amending part 333 as follows:

PART 333—EXTENSION OF CORPORATE POWERS

1. The authority citation for part 333 continues to read as follows:

Authority: 12 U.S.C. 1816, 1818, 1819, 1828(m).

§ 333.3 [Amended]

2. Section 333.3(a) is amended by removing "set forth in § 303.13(a) through § 303.13(f) of this chapter" where it appears in the first sentence and adding in lieu thereof "set forth in § 303.13(a) through § 303.13(c), and § 303.13(f) of this chapter".

By Order of the Board of Directors.

Dated at Washington, DC this 16th day of June, 1992.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 92-15360 Filed 7-8-92; 8:45 am]

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