July 15, 2005

MEMORANDUM TO: The Board of Directors

FROM: William F. Kroener, III
General Counsel

Michael J. Zamorski
Director, Division of Supervision and

SUBJECT: Notice of Proposed Rulemaking Implementing Senior Examiner Post-employment Restrictions Insurance Act, as added by the Intelligence Reform and Terrorism Prevention Act of 2004

RECOMMENDATION:

We recommend that the Board of Directors ("Board") issue a joint notice of proposed rulemaking, in conjunction with the other Federal banking agencies, amending Parts 336 and 308 of the FDIC's rules and regulations to implement and define the scope of FDIC examiners covered by the new senior examiner post-employment restrictions, which will take effect on December 17, 2005, and to add enforcement actions for violations of the restrictions to the list of proceedings covered by the Uniform Rules of Practice and Procedure. Congress directed the Federal banking agencies to issue implementing regulations, and without this rulemaking, FDIC examiners could face uncertainty as to the scope of the post-employment restrictions.

BACKGROUND:

This proposal would implement section 6303(b) of the Intelligence Reform and Terrorism Prevention Act of 2004 (Intelligence Reform Act), which added a new subsection (k) to section 10 of the Federal Deposit Insurance Act (FDI Act). That legislation imposes a one-year post-employment restriction on senior examiners of depository institutions and depository institution holding companies. Under section 10(k), a senior examiner employed by the OCC, Board, FDIC, or OTS (each an Agency and, collectively, the Agencies) may not accept compensation from the depository institution or depository institution holding company he or she supervised or from certain related entities. If an examiner violates the one-year restriction, he or she shall be subject to an order of removal and prohibition from the depository institution or depository institution holding company he or she examined and from the banking industry as a whole for a period of up to 5 years, or to a civil money penalty of up to $250,000, or both.

Section 10(k) generally describes a senior examiner as an officer or employee of the Agency who has “continuing, broad responsibility” for the examination or inspection of a depository institution or a depository institution holding company. To be subject to the post-employment restriction, a senior examiner must have served for 2 or more months during the final 12 months of his or her employment with one of the Agencies (hereinafter, the “2 of 12 requirement”) as the senior examiner (or the functional equivalent of a senior examiner) of a depository institution or depository institution holding company. Under section 10(k), the appropriate Federal banking agency must impose an order of removal and prohibition, a civil money penalty, or both, on a covered examiner who violates the one-year post-employment restriction.

The notice of proposed rulemaking follows the statutory language and provides some practical guidance as to the intended scope, using the legislative history of the provision as a guide. A senior examiner would have to be commissioned by the FDIC to conduct examinations, have been assigned continuing, broad, and lead responsibility for the examination of a particular institution, routinely interact with officers or employees of that institution, and devote a substantial portion of his or her time to supervising, examining, or inspecting that institution.

At the FDIC, it is expected that examiners in the Large State Nonmember Bank Onsite Supervision Program and in the Dedicated Examiner Program will meet the definition of senior examiner. Most examiners-in-charge (EICs) would not meet the definition or the 2 of 12 requirement. Most Relationship Examiners (RMs) also would not be considered senior examiners. However, it is possible that certain EICs and RMs, by virtue of their particular circumstances, may be considered senior examiners and may be covered by the restrictions. The FDIC, like the other banking agencies, plans to notify covered examiners to the extent possible, to allow them to make their career plans accordingly.

As the post-employment restrictions and the proposed rule apply directly to senior examiners, and carry significant penalties for violations, examiners are responsible for becoming familiar with and ensuring their own compliance with the statute and implementing regulations. Accordingly, examiners who have any questions or concerns as to whether they are covered by the restrictions, and to what extent, are encouraged to contact their ethics officer.

The proposed rule would apply to FDIC senior examiners departing the FDIC on or after December 17, 2005, consistent with the effective date of the statute. Thus, the post-employment restrictions would not apply to those examiners who may depart before that date. The restrictions also would not apply to a senior examiner who obtains a waiver. By statute, waivers may only be granted by the Chairperson of the FDIC, on a case-by-case basis, based on a written certification that granting a waiver would not affect the integrity of the FDIC's supervisory program.

Congress directed the Agencies to issue regulations to administer and carry out section 10(k), including regulations or guidelines to define the scope of persons who are “senior examiners.” Staff at the Agencies have worked together to develop a joint notice of proposed rulemaking with regulatory texts that differ slightly to reflect technical differences of nomenclature and supervision among the Agencies.

CONCLUSION:

For the reasons discussed above, we believe that the Board should adopt a notice of proposed rulemaking to administer and carry the post-employment restrictions in section 10(k) of the Federal Deposit Insurance Act, including a proposed definition of the scope of senior examiner. The notice should request comments on all aspects of the proposed rule, including that definition. Following a 60-day comment period, the FDIC should proceed to finalize the rule prior to the effective date of the statute, December 17, 2005, in order to identify the FDIC's senior examiners at that time and notify them in a timely fashion.

Staff members knowledgeable about this case: Robert J. Fagan, Stephen P. Gaddie, and Kymberly K. Copa

Attachment