

DEPARTMENT OF THE TREASURY**Office of the Comptroller of the
Currency****12 CFR Parts 4 and 19**

[Docket No. 05-12]

RIN 1557-AC94

FEDERAL RESERVE SYSTEM**12 CFR Parts 263 and 264a**

[Docket No. R-1230]

**FEDERAL DEPOSIT INSURANCE
CORPORATION****12 CFR Part 308 and 336**

RIN 3064-AC92

DEPARTMENT OF THE TREASURY**Office of Thrift Supervision****12 CFR Parts 507 and 509**

[No. 2005-27]

RIN 1550-AB99

**One-Year Post-Employment
Restrictions for Senior Examiners**

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); and Office of Thrift Supervision (OTS), Treasury.

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The OCC, Board, FDIC and OTS (the Agencies) propose to adopt rules to implement section 6303(b) of the Intelligence Reform and Terrorism Prevention Act of 2004 (Intelligence Reform Act), which added a new section 10(k) to the Federal Deposit Insurance Act (FDI Act). Section 10(k) imposes post-employment restrictions on senior examiners of depository institutions and depository institution holding companies. Under section 10(k), a senior examiner employed or commissioned by an Agency may not knowingly accept compensation as an employee, officer, director, or consultant from certain depository institutions or depository institution holding companies he or she examined, or from certain related entities, for one year after the examiner leaves the employment or service of the Agency. If an examiner violates the one-year restriction, the statute requires the appropriate Federal banking agency to

seek penalties. Accordingly, the examiner may be subject to an order of removal and prohibition or a civil money penalty of up to \$250,000. The Agencies have the discretion to seek both types of remedy. Section 10(k) will become effective on December 17, 2005.

DATES: Comments must be received on or before October 4, 2005.

ADDRESSES:

OCC: You should include OCC and Docket Number 05-12 in your comment. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *OCC Web Site:* <http://www.occ.treas.gov>. Click on "Contact the OCC," scroll down and click on "Comments on Proposed Regulations."

- *E-mail:* regs.comments@occ.treas.gov.

- *Fax:* (202) 874-4448.

- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 1-5, Washington, DC 20219.

- *Hand Delivery/Courier:* 250 E Street, SW., Attn: Public Information Room, Mail Stop 1-5, Washington, DC 20219.

Instructions: All submissions received must include the agency name (OCC) and docket number or Regulatory Information Number (RIN) for this notice of proposed rulemaking. In general, OCC will enter all comments received into the docket without change, including any business or personal information that you provide. You may review comments and other related materials by any of the following methods:

- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC. You can make an appointment to inspect comments by calling (202) 874-5043.

Board: You may submit comments, identified by Docket No. R-1230, by any of the following methods:

- *Agency Web Site:* <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* regs.comments@federalreserve.gov.

Include docket number in the subject line of the message.

- *FAX:* 202/452-3819 or 202/452-3102.

- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal

Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, except as necessary for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP-500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FDIC: You may submit comments, identified by RIN number, by any of the following methods:

- *Agency Web Site:* <http://www.fdic.gov/regulations/laws/federal.propose.html>. Follow

instructions for submitting comments on the Agency Web Site.

- *E-mail:* Comments@FDIC.gov.

Include the RIN number in the subject line of the message.

- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

- *Hand Delivery/Courier:* Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Instructions: All submissions received must include the agency name and RIN for this rulemaking. All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal/propose.html> including any personal information provided.

OTS: You may submit comments, identified by No. 2005-27, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* regs.comments@ots.treas.gov. Please include No. 2005-27 in the subject line of the message and include your name and telephone number in the message.

- *Fax:* (202) 906-6518.

- *Mail:* Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: No. 2005-27.

- *Hand Delivery/Courier:* Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, Attention: No. 2005-27.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this

rulemaking. All comments received will be posted without change to the OTS Internet Site at <http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1>.

In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906-5922, send an e-mail to public.info@ots.treas.gov, or send a facsimile transmission to (202) 906-7755. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

FOR FURTHER INFORMATION CONTACT:

OCC: Mitchell Plave, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090; Stuart Feldstein, Assistant Director, Legislative and Regulatory Activities Division, (202) 874-5090; or Barrett Aldemeyer, Senior Counsel, Administrative and Internal Law Division, (202) 874-4460, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Cary K. Williams, Assistant General Counsel, (202) 452-3295, Kieran J. Fallon, Assistant General Counsel, (202) 452-5270, Andrea Tokheim, Attorney, (202) 452-2300, Legal Division; William Spaniel, Deputy Associate Director, (202) 452-3469, or Jinai Holmes, Senior Financial Analyst, (202) 452-2834, Division of Banking Supervision and Regulation; for users of Telecommunication Devices for the Deaf (TDD) only, contact (202) 263-4869.

FDIC: Robert J. Fagan, Ethics Program Manager, Legal Division, (202) 898-6808; Stephen P. Gaddie, Special Assistant to the Deputy Director, Division of Supervision and Consumer Protection, (202) 898-6575; Richard Osterman, Senior Counsel, Legal Division, (202) 898-7028; and Kymberly K. Copa, Counsel, Legal Division, (202) 898-8832.

OTS: Elizabeth Moore, Special Counsel, Litigation Division, (202) 906-7039; or Karen Osterloh, Special Counsel, Regulations and Legislation Division, (202) 906-6639, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:**I. Background**

Recently, Congress added a new Federal post-employment restriction that applies in certain circumstances to “senior examiners” of depository institutions and depository institution holding companies. Under section 6303(b) of the Intelligence Reform Act,¹ which added a new section 10(k) to the FDI Act, an officer or employee of an Agency or a Federal Reserve Bank (Reserve Bank) who acts as a “senior examiner” for a particular depository institution may not, within one year after terminating employment with the relevant Agency or Reserve Bank, knowingly accept compensation as an officer, director, employee or consultant from such depository institution or any company (including a bank holding company or savings and loan holding company) that controls the depository institution.² Section 10(k) imposes a similar post-employment restriction on an officer or employee who acts as the “senior examiner” of a particular depository institution holding company, but, in these circumstances, the post-employment restrictions apply to relationships with the depository institution holding company and any depository institution subsidiary of the holding company.³ The post-employment restrictions in section 10(k) are in addition to any other conflict of interest and ethics rules and restrictions that may apply to examiners under applicable Federal law or the internal codes of conduct established by an Agency or a Reserve Bank.

As discussed further below, under section 10(k), an officer or employee of an Agency or a Reserve Bank serves as the “senior examiner” of a particular depository institution or depository institution holding company only if the examiner has “continuing, broad responsibility” for the examination or inspection of that depository institution or depository institution holding company. In addition, to be subject to the post-employment restrictions in section 10(k), an officer or employee must have served as the senior examiner

for the institution or holding company for two or more months during the final twelve months of his or her employment with the Agency or Reserve Bank. If a senior examiner violates the one-year post-employment restrictions in section 10(k), the statute requires the appropriate Federal banking agency to initiate proceedings to impose an order of removal and prohibition or a civil money penalty on the former senior examiner, and permits the Agency to seek both remedies. These penalties are discussed more fully in Part II.C below.

Congress directed each Agency to prescribe rules or regulations to administer and carry out section 10(k), including rules, regulations or guidelines to define the scope of persons who are “senior examiners.” Congress required the Agencies to consult with each other to assure that these rules are, to the extent possible, consistent, comparable, and practicable, taking into account any differences in the supervisory programs utilized by the Agencies for the supervision of depository institutions and depository institution holding companies.

Accordingly, the Agencies today are jointly requesting comment on proposed rules that would implement the post-employment restrictions in section 10(k). The Agencies have consulted with each other in developing the proposed rules, which are substantively similar. The proposed rules of the Agencies, however, differ slightly to reflect differences in the supervisory programs and jurisdictions of the Agencies. In addition, there are slight, non-substantive differences in the organization of the Agencies’ proposed rules.

II. Description of the Proposal**A. Definition of “Senior Examiner”**

The post-employment restrictions in section 10(k) apply only to an officer or employee of an Agency or Reserve Bank who serves as the “senior examiner” (or in a functionally equivalent position) of a particular depository institution or depository institution holding company and, in this capacity, has “continuing, broad responsibility for the examination (or inspection) of that depository institution or depository institution holding company” on behalf of the relevant Agency or Reserve Bank.⁴ The legislative history of section 10(k) indicates that the statute’s post-employment restrictions were “intended to apply only to senior examiners who have a meaningful relationship with a financial institution, such as an

examiner-in-charge or a senior examiner with dedicated responsibility to oversee a particular institution.”⁵ Moreover, this legislative history indicates that the statute was “not intended to apply to less senior examiners who may examine or inspect dozens of financial institutions in a single year without developing a sustained relationship with any one institution,” or to “persons holding supervisory positions that do not involve routine interactions with an institution for purposes of examining or inspecting the institution’s books or operations.”⁶

Consistent with the statute and Congress’s intent, the proposed rules provide that an officer or employee of an Agency or a Reserve Bank will be considered the “senior examiner” for a particular depository institution or depository institution holding company if:

- The individual has been designated or commissioned to conduct examinations or inspections on behalf of the relevant Agency;
- The relevant Agency or Reserve Bank has assigned the individual continuing, broad, and lead responsibility for examining or inspecting the depository institution or holding company; and
- The individual’s responsibilities for the depository institution or holding company represent a substantial portion of the individual’s assigned responsibilities and require the individual to routinely interact with officers or employees of the institution, holding company, or its affiliates.

To be considered a “senior examiner,” an officer or employee must meet each of the criteria listed above. Thus, an examiner who spends a substantial portion of his or her time conducting or leading a targeted examination (such as a review of an institution’s credit risk management, information systems or internal audit functions), but who does not have broad and lead responsibility for the Agency’s or Reserve Bank’s overall examination program with respect to the institution, would not be considered a “senior examiner” with respect to the institution. An examiner who may divide his or her time across a portfolio of depository institutions or holding companies, each of which does not represent a substantial portion of the examiner’s responsibilities, also would not be considered a “senior examiner.” Such an examiner is not likely to develop the type and degree of

¹ Pub. L. 108–458, 118 Stat. 3638, 3751–53 (Dec. 17, 2004).

² For purposes of section 10(k), the term “depository institution” includes an uninsured branch or agency of a foreign bank, if such branch or agency is located in a state of the United States. See 12 U.S.C. 1820(k)(2)(A).

³ For purposes of the post-employment restriction of section 10(k), the term “depository institution holding company” means a bank holding company or a savings and loan holding company, and also includes, among other things, a foreign bank that has a branch, agency, or commercial lending company subsidiary in the United States.

⁴ See 12 U.S.C. 1820(k)(1)(B).

⁵ 150 Cong. Rec. S10356 (daily ed. Oct. 4, 2004) (statement of Sen. Levin).

⁶ *Id.*

relationship with any one institution that the post-employment restriction was designed to address. In addition, for purposes of section 10(k), the examiner must have "continuing" responsibility for the relevant Agency's or Reserve Bank's supervisory program with respect to the particular depository institution or depository institution holding company. The Agencies believe that an examiner would have "continuing" responsibility for an institution or holding company only when the examiner's responsibilities for the institution or company were expected to continue for a sufficient period of time, for example, for at least two months, that would enable the examiner to develop the type and degree of "meaningful," "dedicated" and "sustained" relationship with the institution or company that the statute was designed to address.⁷

The Agencies believe that the proposed definition of "senior examiner" properly applies the post-employment restrictions in section 10(k) to those examiners who, by reason of their position and assigned responsibilities, have broad responsibility for a depository institution or depository institution holding company and will devote a substantial amount of their time to that institution or holding company on a continuing basis. It is these senior examiners who may develop the type and degree of meaningful and ongoing relationship with a particular institution intended to be covered by the statute.

To help examiners comply with the one-year post-employment restrictions, the Agencies will notify an examiner in writing if the relevant Agency believes the examiner's assigned responsibilities would cause the examiner to be considered a "senior examiner" with respect to any depository institution or depository institution holding company. Nonetheless, the post-employment restrictions in section 10(k) and the proposed rules apply directly to senior examiners, and examiners are responsible for becoming familiar with and ensuring their own compliance with the statute. Accordingly, examiners who have questions concerning whether they may be considered a "senior examiner" for an institution or holding company should contact the appropriate persons at their respective Agency or Reserve Bank.

Because the titles and roles of examiners vary among the Agencies, the Agencies have set forth below a brief description of the types of examiners

that each Agency anticipates, in light of the structure and nature of the Agency's supervisory program, would be subject to the post-employment restrictions in section 10(k). We invite comment on whether the proposed definition of "senior examiner," combined with notice to those examiners, is sufficient to identify those Agency or Reserve Bank employees who are subject to section 10(k).

1. OCC

The OCC expects that the one-year post-employment restrictions would apply to examiners-in-charge (EIC) of a bank in the OCC's Large Bank or Mid-Size Bank programs. OCC employees who may examine multiple depository institutions in a single year typically do not develop the type and degree of relationship with any one institution that would cause them to be considered "senior examiners" under the proposal.

For banks in the OCC's Large and Mid-Size Bank programs, the EIC coordinates and oversees all of the examination and supervisory activities for all of the affiliated national banks that may be part of that banking organization's family of national banks (e.g., separately chartered national trust company or credit card banks). In those cases, the EIC is considered to be a "senior examiner" for purposes of this regulation for each national bank within the family of national banks.

The proposal applies only to OCC employees who have overall responsibility for a national bank on a sustained basis. While the proposal would primarily cover large and mid-size bank program EICs, there may be others who meet the "senior examiner" criteria, such as individuals who serve as acting EICs for banks in the OCC's Large or Mid-Size Bank program for the period of time described in the statute. The OCC anticipates that approximately 50 examiners would be covered by the one-year post-employment restrictions.

The proposal would not cover Portfolio Managers for national banks supervised by a field office of the OCC, typically community banks. Although Portfolio Managers serve as the designated point-of-contact for national banks in their portfolios and lead the examination activities for institutions in their portfolios, they may also perform examinations of several institutions not in their portfolios, including serving as EIC for some of those examinations. Accordingly, Portfolio Managers typically do not develop the type and degree of relationship with any one institution sought to be covered by the statute.

The OCC will develop policies and procedures to identify and notify those examiners who will be subject to the post-employment restrictions.

2. Board

The Board expects that the post-employment restrictions in section 10(k) would apply to those examiners who serve as central points of contact, or in functionally equivalent positions (collectively, CPCs), for a limited number of large and complex or larger regional state member banks, bank holding companies, or foreign banks. CPCs are assigned broad, lead and overall responsibility for the Federal Reserve's supervisory and examination program for a particular institution. In addition, given the nature of large and complex banking organizations and a few larger regional banking organizations, CPCs that are assigned to such organizations typically are expected to devote a substantial portion, and in some cases all, of their time and attention to the supervision, examination, or inspection of that organization. The Board currently estimates that approximately 50 examiners that serve as CPCs for large and complex or larger regional banking organizations would be considered the senior examiner for the organization for purposes of section 10(k) and the proposed rules. The Board expects to develop policies and procedures to notify those Board examiners that are subject to the post-employment restrictions in section 10(k).

3. FDIC

As the FDIC's supervisory program is currently structured, most examiners-in-charge (EICs) at the FDIC would not be considered senior examiners or satisfy the requirement that the senior examiner serve for two or more months in that role during the last 12 months of employment with the FDIC. FDIC employees who examine or inspect multiple financial institutions in a single year (even as an EIC in some cases) typically do not develop a sustained or meaningful relationship with any one institution and, therefore, would not be considered "senior examiners" under the proposal. The proposal is intended to apply only to FDIC examiners who have overall responsibility for an insured depository institution that involves "routine interactions with the institution for purposes of examining or inspecting the institution's books or operations" and that creates the opportunity for a

⁷ 150 Cong. Rec. S10356 (daily ed. Oct. 4, 2004) (statement of Sen. Levin).

meaningful or sustained relationship with that institution.⁸

Under the current organization of the FDIC's Division of Supervision and Consumer Protection, certain FDIC examiners would, however, clearly seem to be covered—examiners in the Large State Nonmember Bank Onsite Supervision Program and examiners assigned to the FDIC's Dedicated Examiner Program who are assigned to the largest banking organizations.

The Large State Nonmember Bank Onsite Supervision Program provides for visitations and targeted reviews of the institutions covered by the Program throughout the year, instead of traditional, annual, point-in-time examinations. Examiners assigned to the Program focus on all aspects of ongoing supervision for institutions in the Program, including:

- Preparing and implementing, or assisting in preparing or implementing, supervisory plans;
- Risk-scoping supervisory activities and conducting ongoing targeted reviews in accordance with the institution's supervisory plan;
- Meeting with institution management to communicate findings;
- Preparing limited scope reports; and
- Completing annual reports of examinations.

These Program examiners are the FDIC's primary source of supervision and oversight of their assigned institutions, and they must have an intimate knowledge of their institution's operations and considerable access to institution management to perform their duties.

In addition, although the FDIC is not the primary Federal regulator for the largest banking organizations currently in the Dedicated Examiner Program, the FDIC examiners in this Program are dedicated to the institution, have an intimate knowledge of their assigned institutions, considerable access to, and potentially close working relationships with, institution management, and are the FDIC's primary source of supervisory information and oversight of these institutions. These dedicated examiners, therefore, appear to meet the statutory requirement of being a senior examiner (or a functionally equivalent position) of a depository institution with continuing, broad responsibility for examining that institution. Furthermore, absent the "cooling off" period, permitting a dedicated examiner to go to work for his or her assigned

institution could create a perceived conflict of interest.

On the other hand, the proposal would not be expected typically to cover Relationship Managers for institutions within a field or territory office. Although Relationship Managers serve as the local point-of-contact for FDIC-supervised institutions in their portfolios, and they would normally be expected to lead the examination activities in which they specialize for the banks in their portfolios, they are also expected to perform examinations of banks that are not in their portfolios, including acting as the EIC for some of those examinations. In addition, Relationship Managers are not required to be the EIC during safety and soundness examinations of institutions in their portfolios, and, unlike dedicated and large State nonmember examiners, Relationship Managers may be onsite at their assigned institutions relatively infrequently. Moreover, the FDIC does not expect that a Relationship Manager will typically spend a substantial portion of his or her time on any particular institution to which he or she is assigned. Rather, these are journeyman level field examiners assigned to a particular institution as a local point of contact for the convenience of the institution and the FDIC, but these examiners also will be expected to examine a number of other institutions during the course of a year, both as an EIC and as a staff examiner.

It is the FDIC's view that the duties of Relationship Managers do not generally meet the requirements of being a "senior examiner or a functionally equivalent position of a depository institution with continuing, broad responsibility for the examination of that institution." However, it is possible that, based on individual circumstances, a particular Relationship Manager could be considered a senior examiner for purposes of the post-employment restrictions. Most generalist examiners employed by the FDIC would not be covered by the post-employment restrictions in section 10(k). While the proposal would primarily cover FDIC examiners in the Large State Nonmember Bank Onsite Supervision Program, examiners in its Dedicated Examiner Program, and possibly a limited number of EICs, there may be others who have "continuing, broad responsibility" for examining or inspecting insured depository institutions, such as individuals who conduct certain special examinations or serve in an acting capacity in a covered position.

4. OTS

As OTS's supervisory program is currently structured, the post-employment restrictions in section 10(k) would primarily cover OTS examiners-in-charge (EICs) at OTS's largest savings associations and holding companies. Other EICs inspect multiple savings associations and savings and loan holding companies in a single year and, as a result, typically do not develop a meaningful and sustained relationship with any one entity. Accordingly, OTS believes that these EICs would not satisfy the definition of senior examiner either because they do not have continuing responsibilities at the entity or because their responsibilities with respect to the particular savings association or savings and loan holding company would not represent a substantial portion of their assigned responsibilities. Most of these EICs also would not satisfy the two of twelve months service requirement.

Examiners who are *not* EICs typically would not be senior examiners because they do not have "broad and lead" responsibilities for examinations or inspections. As noted in the legislative history, however, the definition of senior examiner may apply to more than one examiner at the same entity. Under OTS's interpretation of this criterion, an examiner would have "broad and lead" responsibility if he or she has significant, major responsibilities regarding the conduct of the overall examination program at an entity, whether or not that examiner is designated as an EIC. Thus, non-EICs at OTS's largest savings associations or holding companies could also satisfy the definition of senior examiner.

Other OTS officers or employees typically would not be senior examiners. For example, Washington headquarters employees, Regional Directors, Deputy Regional Directors, Assistant Regional Directors for Support or Operations, and Field Managers typically would not satisfy one or more of the proposed criteria for senior examiner and would not be subject to the post-employment restrictions.

B. One-Year Post-Employment Restrictions

If an officer or employee of an Agency or a Reserve Bank serves as the senior examiner for a depository institution during two or more months of the individual's final twelve months of employment with the Agency or Reserve Bank, section 10(k) prohibits the individual from knowingly accepting compensation as an employee, officer, director, or consultant from the

⁸ See 150 Cong. Rec. s10356 (daily ed. Oct. 4, 2004) (statement of Sen. Levin).

depository institution or any company that controls the depository institution (including a bank holding company or savings and loan holding company) for one year after leaving the employment of the Agency or Reserve Bank. With respect to holding companies, the one-year prohibition extends only to companies that control the depository institution and would not prohibit the senior examiner from accepting employment with a subsidiary or affiliate of the bank holding company, savings and loan holding company, or other company that controls the bank (other than the depository institution subsidiary for which the individual served as a senior examiner).⁹

If an officer or employee serves as the senior examiner for a depository institution holding company for two or more months during the last twelve months of his or her employment with an Agency or a Reserve Bank, the statute prohibits the individual from becoming employed by, or otherwise accepting compensation in the manner described above, from that holding company or any depository institution subsidiary of the holding company for one year after leaving the employment of the Agency or Reserve Bank.

To assist examiners, the Agencies have tailored their rules to identify how these restrictions would apply to senior examiners for the different types of institutions and holding companies, including foreign banks, under the Agencies' jurisdictions.

Under section 10(k), a person is deemed to be a consultant for purposes of the one-year post-employment restrictions only if such person "directly works on matters for, or on behalf of," the relevant depository institution, depository institution holding company or other company.¹⁰ The Agencies have incorporated this rule of construction into the proposed rules. We interpret this provision to mean that a former senior examiner who joins a consulting or other firm may not, during the twelve-month post-employment "cooling-off" period, participate in any work that the firm is conducting for a depository institution or company that the former senior examiner would be

⁹ The Agencies note, however, that a former senior examiner may not evade the post-employment restrictions in section 10(k) by nominally accepting employment with a company not directly covered by the post-employment restrictions, but then functionally serve as an officer, employee, director, or consultant for a depository institution or company that the former senior examiner would have been prohibited from working for directly.

¹⁰ See 12 U.S.C. 1820(k)(3).

prohibited from doing directly.¹¹ The former senior examiner would not, however, violate the post-employment restrictions in section 10(k) by joining a firm that performs work for such an institution or company as long as the former senior examiner does not personally participate in any such work. The Agencies request comment on whether the meaning of "consultant" is sufficiently clear.

Section 10(k) expressly authorizes the head of each Agency to waive application of the statute's post-employment restrictions to a senior examiner on a case-by-case basis if the head of the Agency determines that "granting the waiver would not affect the integrity of the supervisory program of [such Agency]."¹² The Agencies have incorporated this waiver provision into the proposed rules. The Agencies expect to grant waivers only in special circumstances. If an Agency grants a waiver to a senior examiner, the post-employment restrictions in section 10(k), and the associated penalties, would not apply to the senior examiner.

C. Penalties

If a senior examiner violates the post-employment restrictions in section 10(k), the statute requires the appropriate Agency to seek one of the following penalties:

- An order (1) removing the individual from his or her position at, or prohibiting the individual from further participation in the affairs of, the relevant depository institution, depository institution holding company, or other company for a period of up to five years, and (2) prohibiting the individual from participating in the conduct of the affairs of any insured depository institution for a period of up to five years; or

- A civil monetary penalty of not more than \$250,000.¹³

An Agency also has the discretion to seek both of these penalties.

A former senior examiner who is subject to a removal and prohibition order under section 10(k) also is subject to paragraphs (6) and (7) of section 8(e) of the FDI Act.¹⁴ These provisions

¹¹ Of course, a former senior examiner who is self-employed similarly may not accept compensation for work performed as a consultant in his or her individual capacity for the relevant depository institution, depository institution holding company, or other company.

¹² See 12 U.S.C. 1820(k)(5).

¹³ See 12 U.S.C. 1820(k)(6)(A). If the appropriate Federal banking agency does not assess a civil monetary penalty against a senior examiner who violates the post-employment restrictions in section 10(k), the Attorney General of the United States may bring a civil action to impose such a penalty against the senior examiner. *Id.*

¹⁴ See 12 U.S.C. 1820(k)(6)(B).

further define the scope of the penalties specified in section 10(k). For example, they would prohibit an individual, for the duration of the prohibition order, from participating in the affairs of any bank holding company or subsidiary of a bank holding company, savings and loan holding company or subsidiary of a savings and loan holding company, any foreign bank that operates a branch, agency or commercial lending company subsidiary in the United States or any subsidiary of such a foreign bank, or certain other entities, such as credit unions.¹⁵ In addition, these provisions would prohibit the individual, during the term of the prohibition order, from accepting employment with any appropriate Federal financial institutions regulatory agency (as defined in 12 U.S.C. 1818(e)(7)(D)), and certain other Federal agencies. The penalties that may apply to a senior examiner under section 10(k) are in addition to any other administrative, civil, or criminal penalty that may apply.

Under section 10(k), to obtain an order of removal or prohibition, an Agency must follow the rules and procedures that apply in similar types of proceedings against depository institutions and institution-affiliated parties. Specifically, section 10(k) states that removal and prohibition proceedings must be conducted in accordance with section 8(e)(4) of the FDI Act, which provides the individual the right to an administrative hearing prior to final Agency action. Section 10(k) further provides that an Agency seeking to impose a civil monetary penalty on a former senior examiner must do so either in accordance with section 8(i) of the FDI Act, which also provides the individual the right to an administrative hearing prior to final Agency action, or through a civil action brought in an appropriate United States District Court.¹⁶

The Agencies do not believe it is necessary to codify these procedures, which are set forth in the statute, in their proposed rules. Accordingly, the proposed rules merely cross-reference the required statutory procedures. Under the proposal, proceedings against examiners for violations of the post-employment restrictions would take place in accordance with the Agencies' rules of practice and procedure. Accordingly, the Agencies propose to amend the scope sections of their

¹⁵ The appropriate agencies may waive for an individual the application of this restriction as it applies to a particular institution or other company, as provided in section 8(e)(7)(B) of the FDI Act (12 U.S.C. 1818(e)(7)(B)).

¹⁶ See 12 U.S.C. 1820(k)(6).

respective Rules of Practice and Procedure to reflect the addition of proceedings under section 10(k).

Section 10(k) assigns responsibility for seeking penalties to the "appropriate Federal banking agency" (as determined under section 3 of the FDI Act) for the institution or company that employs the former senior examiner (or otherwise compensates the senior examiner) after the examiner has left the service of an Agency or Reserve Bank.¹⁷ For example, the OCC would be responsible for seeking penalties against a former employee of a Reserve Bank who, after acting as a "senior examiner" at a bank holding company, accepts compensation, in violation of section 10(k), from a subsidiary national bank. As a corollary, the Board would be responsible for seeking penalties against a former OCC employee who accepts prohibited compensation from the holding company of a national bank. When a senior examiner becomes associated with an entity that is not a depository institution or a depository institution holding company, the "appropriate Federal banking agency" is the Agency that employed the senior examiner.

As noted above, in some cases, the Agency responsible for enforcing the post-employment restrictions in section 10(k) with respect to a senior examiner may be a different Agency than the Agency that employed or commissioned the examiner. The Agency that employed or commissioned the examiner, however, would remain responsible for determining whether the examiner was the "senior examiner" for a depository institution or depository institution holding company while the examiner was employed or commissioned by the Agency in accordance with the rules of that Agency. For example, if an examiner commissioned by the Board and employed by a Reserve Bank leaves the employment of the Reserve Bank and immediately accepts employment with a national bank subsidiary of a bank holding company, the Board would be responsible for determining, under the Board's rules and guidance, whether the examiner served as the "senior examiner" for the parent bank holding company for the requisite period prior to his or her departure from the Reserve Bank. If the Board determined that the examiner was the "senior examiner" for the parent bank holding company of the national bank subsidiary, then the OCC would seek to impose appropriate penalties for violations of the post-

employment restrictions in section 10(k) with respect to the former examiner.

D. Effective Date

The Intelligence Reform Act provides that the post-employment restrictions imposed by section 10(k) shall become effective on December 17, 2005.¹⁸ Accordingly, section 10(k) and the proposed rules apply only to officers or employees of an Agency or Reserve Bank who terminate their employment with the Agency or Reserve Bank on or after December 17, 2005. The Agencies note, however, that, because of the statute's twelve-month "look-back" provision, an officer or employee who leaves an Agency or a Reserve Bank within one year of December 17, 2005, may be subject to the post-employment restrictions in section 10(k) based on the nature of their examination responsibilities as far back as December 17, 2004.

For example, if an Agency examiner terminates his or her employment with the relevant Agency on January 1, 2006, and the individual, while employed by the Agency, served as the "senior examiner" for a particular depository institution from May 1, 2005 to October 1, 2005, the individual is subject to the post-employment restrictions. Although the service that caused the individual to be considered a "senior examiner" occurred prior to December 17, 2005, such service occurred during the last twelve months of the individual's employment with the Agency and, accordingly, the examiner may not become employed by the relevant depository institution, or any company that controls the depository institution, until January 2, 2007.

As noted above, section 10(k) does not apply to any Agency or Reserve Bank employee who resigns *before* December 17, 2005. Thus, in the foregoing example, if the examiner terminated his or her employment with the Agency on November 1, 2005, the employee would not be subject to the post-employment restrictions in section 10(k).

Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. We invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?

- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?

- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?

- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?

- What else could we do to make the regulation easier to understand?

Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) requires that each federal Agency either certify that a proposed rule would not, if adopted in final form, have a significant impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis (IRFA) of the proposal and publish the analysis for comment. See 5 U.S.C. 603, 605. Section 10(k) and the proposed rules impose post-employment restrictions on certain senior examiners employed by an Agency or a Reserve Bank and do not impose any obligations or restrictions on banking organizations, including small banking organizations. On this basis, the Agencies certify that this proposal, if it is adopted in final form, would not have a significant impact on a substantial number of small entities, within the meaning of those terms as used in the RFA. Commenters are invited to provide the Agencies with any information they may have about the likely quantitative effects of the proposal.

Executive Order 12866

The OCC and OTS have determined that this proposed rulemaking is not a significant regulatory action under Executive Order 12866.

Executive Order 13132

The OCC has determined that this proposal does not have any federalism implications as required by Executive Order 13132.

Unfunded Mandates Reform Act of 1995

Under section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), the OCC and OTS must prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal

¹⁷ See 12 U.S.C. 1820(k)(6)(A).

¹⁸ See section 6303(d) of the Intelligence Reform Act.

governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the OCC and OTS to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. The OCC and OTS have determined that their respective portions of the proposed rulemaking will not result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Accordingly, neither the OCC nor OTS has prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 3506; 5 CFR 1320 Appendix A.1), the Agencies reviewed the proposed rule. No collections of information pursuant to the Paperwork Reduction Act are contained in the proposed rule.

List of Subjects

12 CFR Part 4

Administrative practice and procedure, Availability and release of information, Confidential business information, Contracting outreach program, Freedom of information, National banks, Organization and functions (government agencies), Reporting and recordkeeping requirements, Women and minority businesses.

12 CFR Part 19

Administrative practice and procedure, Crime, Equal access to justice, Investigation, National banks, Penalties, Securities.

12 CFR Part 263

Administrative practice and procedure, Claims, Crime, Equal access to justice, Lawyers, Penalties.

12 CFR Part 264a

Conflicts of interest.

12 CFR Part 308

Administrative practice and procedure, Bank deposit insurance, Claims, Crime, Equal access to justice, Investigations, Lawyers, Penalties.

12 CFR Part 336

Conflict of interests.

12 CFR Part 507

Ethics, Governmental employees, OTS employees.

12 CFR Part 509

Administrative practice and procedure, Penalties.

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons set forth in the preamble, the OCC proposes to amend parts 4 and 19 of title 12 of the Code of Federal Regulations as follows:

1. The title of part 4 is revised to read as follows:

PART 4—ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS

2. The authority citation for part 4 is revised to read as follows:

Authority: 12 U.S.C. 93a. Subpart A also issued under 5 U.S.C. 552; Subpart B also issued under 5 U.S.C. 552; E.O. 12600 (3 CFR 1987 Comp., p. 235). Subpart C also issued under 5 U.S.C. 301, 552; 12 U.S.C. 161, 481, 482, 484(a), 1442, 1817(a)(3), 1818(u) and (v), 1820(d)(6), 1820(k), 1821(c), 1821(o), 1821(t), 1831m, 1831p–1, 1831o, 1867, 1951 *et seq.*, 2601 *et seq.*, 2801 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3401 *et seq.*; 15 U.S.C. 77uu(b), 78q(c)(3); 18 U.S.C. 641, 1905, 1906; 29 U.S.C. 1204; 31 U.S.C. 9701; 42 U.S.C. 3601; 44 U.S.C. 3506, 3510. Subpart D also issued under 12 U.S.C. 1833e.

3. A new subpart E is added to part 4 to read as follows:

Subpart E—One-Year Restrictions on Post-Employment Activities of Senior Examiners

Sec.

- 4.72 Scope and purpose.
- 4.73 Definitions.
- 4.74 One-year post-employment restrictions.
- 4.75 Effective date; waivers.
- 4.76 Penalties.

§ 4.72 Scope and purpose.

This subpart describes those OCC examiners who are subject to the post-employment restrictions set forth in section 10(k) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1820(k)) and implements those restrictions for officers and employees of the OCC.

§ 4.73 Definitions.

For purposes of this subpart: *Bank holding company* means any company that controls a bank (as provided in section 2 of the Bank

Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*)).

Consultant. For purposes of this subpart, a consultant for a national bank, bank holding company, or other company shall include only an individual who works directly on matters for, or on behalf of, such bank, bank holding company, or other company.

Control has the meaning given in section 2 of the Bank Holding Company Act (12 U.S.C. 1841(a)). For purposes of this subpart, a foreign bank shall be deemed to control any branch or agency of the foreign bank.

Depository institution has the meaning given in section 3 of the FDI Act (12 U.S.C. 1813(c)). For purposes of this subpart, a depository institution includes an uninsured branch or agency of a foreign bank, if such branch or agency is located in any State.

Federal Reserve means the Board of Governors of the Federal Reserve System and the Federal Reserve Banks.

Foreign bank means any foreign bank or company described in section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)).

Insured depository institution has the meaning given in section 3 of the FDI Act (12 U.S.C. 1813(c)(2)).

National bank means a national banking association or a Federal branch or agency of a foreign bank.

Senior examiner. For purposes of this subpart, an officer or employee of the OCC is considered to be the "senior examiner" for a particular national bank if

(1) The officer or employee has been commissioned by the OCC to conduct examinations on behalf of the OCC;

(2) The officer or employee has been assigned continuing, broad, and lead responsibility for examining the national bank; and

(3) The officer's or employee's responsibilities for examining the national bank—

(i) Represent a substantial portion of the officer's or employee's assigned responsibilities; and

(ii) Require the officer or employee to interact routinely with officers or employees of the national bank or its affiliates.

§ 4.74 One-year post-employment restrictions.

An officer or employee of the OCC who serves as the senior examiner of a national bank for two or more months during the last twelve months of such individual's employment with the OCC may not, within one year after leaving the employment of the OCC, knowingly accept compensation as an employee,

officer, director or consultant from the national bank, or any company (including a bank holding company) that controls the national bank.

§ 4.75 Effective date; waivers.

The post-employment restrictions set forth in section 10(k) of the FDI Act and § 4.74 do not apply to any officer or employee of the OCC, or any former officer or employee of the OCC, if—

(a) The individual ceased to be an officer or employee of the OCC before December 17, 2005; or

(b) The Comptroller of the Currency certifies, in writing and on a case-by-case basis, that granting the individual a waiver of the restrictions would not affect the integrity of the OCC's supervisory program.

§ 4.76 Penalties.

(a) *Penalties under section 10(k) of FDI Act.* If a senior examiner of a national bank, after leaving the employment of the OCC, accepts compensation as an employee, officer, director, or consultant from that bank, or any company (including a bank holding company) that controls that bank, then the examiner shall, in accordance with section 10(k)(6) of the FDI Act, be subject to one of the following penalties—

(1) An order:

(i) Removing the individual from office or prohibiting the individual from further participation in the affairs of the relevant national bank, bank holding company, or other company that controls such institution for a period of up to five years; and

(ii) Prohibiting the individual from participating in the affairs of any insured depository institution for a period of up to five years; or

(2) A civil monetary penalty of not more than \$250,000.

(b) *Enforcement by appropriate Federal banking agency.* Violations of § 4.74 shall be administered or enforced by the appropriate Federal banking agency for the depository institution or depository institution holding company that provided compensation to the former senior examiner. For purposes of this paragraph, the appropriate Federal banking agency for a company that is not a depository institution or depository institution holding company shall be the Federal banking agency that formerly employed the senior examiner.

(c) *Scope of prohibition orders.* Any senior examiner who is subject to an order issued under paragraph (a) of this section shall, as required by 12 U.S.C. 1820(k)(6)(B), be subject to paragraphs (6) and (7) of section 8(e) of the FDI Act (12 U.S.C. 1818(e)(6)–(7)) in the same

manner and to the same extent as a person subject to an order issued under section 8(e).

(d) *Procedures.* The procedures applicable to actions under paragraph (a) of this section are provided in section 10(k)(6) of the FDI Act (12 U.S.C. 1820(k)(6)) and in 12 C.F.R. part 19.

(e) *Remedies not exclusive.* The OCC may seek both of the penalties described in paragraph (a) of this section. In addition, a senior examiner who accepts compensation as described in § 4.74 may be subject to other administrative, civil or criminal remedies or penalties as provided in law.

PART 19—RULES OF PRACTICE AND PROCEDURE

4. The authority citation for part 19 continues to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 93a, 164, 505, 1817, 1818, 1820, 1831m, 1831o, 1972, 3102, 3108(a), 3909 and 4717; 15 U.S.C. 78(h) and (i), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, and 78w; 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; and 42 U.S.C. 4012a.

5. In section 19.1:

a. Redesignate paragraph (g) as paragraph (h);

b. Remove the word “and” at the end of the paragraph (f); and

c. Add a new paragraph (g) to read as follows:

§ 19.1 Scope.

(g) Removal, prohibition, and civil monetary penalty proceedings under section 10(k) of the FDI Act (12 U.S.C. 1820(k)) for violations of the post-employment restrictions imposed by that section; and

Dated: July 26, 2005.

Julie L. Williams,

Acting Comptroller of the Currency.

Board of Governors of the Federal Reserve System

12 CFR Chapter II

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend part 263 and add a new part 264a to Title 12, Chapter II, of the Code of Federal Regulations as follows:

PART 263—RULES OF PRACTICE FOR HEARINGS

1. The authority citation for part 263 continues to read as follows:

Authority: 5 U.S.C. 504; 12 U.S.C. 248, 324, 504, 505, 1817(j), 1818, 1828(c), 1831o,

1831p–1, 1847(b), 1847(d), 1884(b), 1972(2)(F), 3105, 3107, 3108, 3907, 3909; 15 U.S.C. 21, 78o–4, 78o–5, 78u–2; and 28 U.S.C. 2461 note.

2. Section 263.1 is amended by redesignating paragraph (g) as paragraph (h), removing the word “and” at the end of the paragraph (f), and adding new paragraph (g) to read as follows:

§ 263.1 Scope.

* * * * *

(g) Removal, prohibition, and civil monetary penalty proceedings under section 10(k) of the FDI Act (12 U.S.C. 1820(k)) for violations of the special post-employment restrictions imposed by that section; and

* * * * *

3. New part 264a is added to read as follows:

PART 264a—POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS

Sec.

264a.1 What is the purpose and scope of this part?

264a.2 Who is considered a senior examiner of the Federal Reserve?

264a.3 What special post-employment restrictions apply to senior examiners?

264a.4 When do these special restrictions become effective and may they be waived?

264a.5 What are the penalties for violating these special post-employment restrictions?

264a.6 What other definitions and rules of construction apply for purposes of this part?

Authority: 12 U.S.C. 1820(k).

§ 264a.1 What is the purpose and scope of this part?

This part identifies those officers and employees of the Federal Reserve that are subject to the special post-employment restrictions set forth in section 10(k) of the Federal Deposit Insurance Act (FDI Act) and implements those restrictions as they apply to officers and employees of the Federal Reserve.

§ 264a.2 Who is considered a senior examiner of the Federal Reserve?

For purposes of this part, an officer or employee of the Federal Reserve is considered to be the “senior examiner” for a particular state member bank, bank holding company or foreign bank if—

(a) The officer or employee has been commissioned by the Board to conduct examinations or inspections on behalf of the Board;

(b) The officer or employee has been assigned continuing, broad and lead responsibility for examining or inspecting the state member bank, bank holding company or foreign bank; and

(c) The officer's or employee's responsibilities for examining, inspecting and supervising the state member bank, bank holding company or foreign bank—

(1) Represent a substantial portion of the officer's or employee's assigned responsibilities; and

(2) Require the officer or employee to interact routinely with officers or employees of the state member bank, bank holding company or foreign bank or its affiliates.

§ 264a.3 What special post-employment restrictions apply to senior examiners?

(a) *Senior Examiners of State Member Banks.* An officer or employee of the Federal Reserve who serves as the senior examiner of a state member bank for two or more months during the last twelve months of such individual's employment with the Federal Reserve may not, within one year after leaving the employment of the Federal Reserve, knowingly accept compensation as an employee, officer, director or consultant from—

(1) The state member bank; or

(2) Any company (including a bank holding company) that controls the state member bank.

(b) *Senior Examiners of Bank Holding Companies.* An officer or employee of the Federal Reserve who serves as the senior examiner of a bank holding company for two or more months during the last twelve months of such individual's employment with the Federal Reserve may not, within one year of leaving the employment of the Federal Reserve, knowingly accept compensation as an employee, officer, director or consultant from—

(1) The bank holding company; or

(2) Any depository institution that is controlled by the bank holding company.

(c) *Senior Examiners of Foreign Banks.* An officer or employee of the Federal Reserve who serves as the senior examiner of a foreign bank for two or more months during the last twelve months of such individual's employment with the Federal Reserve may not, within one year of leaving the employment of the Federal Reserve, knowingly accept compensation as an employee, officer, director or consultant from—

(1) The foreign bank; or

(2) Any branch or agency of the foreign bank located in the United States; or

(3) Any other depository institution controlled by the foreign bank.

§ 264a.4 When do these special restrictions become effective and may they be waived?

The post-employment restrictions set forth in section 10(k) of the FDI Act and § 264a.3 do not apply to any officer or employee of the Federal Reserve, or any former officer or employee of the Federal Reserve, if—

(a) The individual ceased to be an officer or employee of the Federal Reserve before December 17, 2005; or

(b) The Chairman of the Board of Governors certifies, in writing and on a case-by-case basis, that granting the individual a waiver of the restrictions would not affect the integrity of the Federal Reserve's supervisory program.

§ 264a.5 What are the penalties for violating these special post-employment restrictions?

(a) *Penalties under section 10(k) of FDI Act.*—A senior examiner of the Federal Reserve who, after leaving the employment of the Federal Reserve, violates the restrictions set forth in § 264a.3 shall, in accordance with section 10(k)(6) of the FDI Act, be subject to one or both of the following penalties—

(1) An order:

(i) Removing the individual from office or prohibiting the individual from further participation in the affairs of the relevant state member bank, bank holding company, foreign bank or other depository institution or company for a period of up to five years; and

(ii) Prohibiting the individual from participating in the affairs of any insured depository institution for a period of up to five years; and/or

(2) A civil monetary penalty of not more than \$250,000.

(b) *Imposition of penalties.* The penalties described in paragraph (a) of this section shall be imposed by the appropriate Federal banking agency as determined under section 10(k)(6) of the FDI Act, which may be an agency other than the Federal Reserve.

(c) *Scope of prohibition orders.* Any senior examiner who is subject to an order issued under paragraph (a) of this section shall, as required by section 10(k)(6)(B) of the FDI Act, be subject to paragraphs (6) and (7) of section 8(e) of the FDI Act in the same manner and to the same extent as a person subject to an order issued under section 8(e).

(d) *Procedures.* The procedures applicable to actions under paragraph (a) of this section are provided in section 10(k)(6) of the FDI Act.

(e) *Other penalties.* The penalties set forth in paragraph (a) of this section are not exclusive, and a senior examiner who violates the restrictions in § 264a.3

also may be subject to other administrative, civil or criminal remedies or penalties as provided in law.

§ 264a.6 What other definitions and rules of construction apply for purposes of this part?

For purposes of this part—

(a) *Bank holding company* means any company that controls a bank (as provided in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*)).

(b) A person shall be deemed to act as a *consultant* for a bank or other company only if such person works directly on matters for, or on behalf of, such bank or other company.

(c) *Control* has the meaning given in section 2 of the Bank Holding Company Act.

(d) *Depository institution* has the meaning given in section 3 of the FDI Act and includes an uninsured branch or agency of a foreign bank, if such branch or agency is located in any State.

(e) *Federal Reserve* means the Board of Governors of the Federal Reserve System and the Federal Reserve Banks.

(f) *Foreign bank* means any foreign bank or company described in section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)).

(g) *Insured depository institution* has the meaning given in section 3 of the FDI Act.

Dated: July 27, 2005.

By order of the Board of Governors of the Federal Reserve System.

Jennifer J. Johnson,
Secretary of the Board.

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the preamble, the FDIC proposes to amend chapter III of title 12 of the Code of Federal Regulations as follows:

PART 336—FDIC EMPLOYEES

1. Subpart C is added to Part 336 to read as follows:

Subpart C—One-Year Restriction on Post-Employment Activities of Senior Examiners

Sec.

336.10 Purpose and scope.

336.11 Definitions.

336.12 One-year post-employment restriction.

336.13 Penalties.

Authority: 12 U.S.C. 1819 and 1820(k).

§ 336.10 Purpose and scope.

This subpart applies to officers or employees of the FDIC who are subject to the post-employment restrictions set forth in section 10(k) of the Federal Deposit Insurance Act, 12 U.S.C. 1820(k), and implements those restrictions as they apply to officers and employees of the FDIC.

§ 336.11 Definitions.

For purposes of this subpart:

(a) *Bank holding company* has the meaning given to such term in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)).

(b) A *consultant* for an insured depository institution or other company shall include only individuals who work directly on matters for, or on behalf of, such institution or other company.

(c) *Control* has the meaning given to such term in section 336.3(b), and a foreign bank shall be deemed to control any insured branch of the foreign bank.

(d) *Depository institution* means any bank or savings association, including a branch of a foreign bank, if such branch is located in the United States and is insured by the FDIC.

(e) *Foreign bank* means any bank or company described in section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)).

(f) *Savings and loan holding company* has the meaning given to such term in section 10(a)(1)(D) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(D)).

(g) A *senior examiner* for an insured depository institution means an officer or employee of the FDIC—

(1) Who has been commissioned by the FDIC to conduct examinations or inspections of insured depository institutions on behalf of the FDIC;

(2) Who has been assigned continuing, broad, and lead responsibility for the examination or inspection of the institution;

(3) Who routinely interacts with officers or employees of the institution or its affiliates; and

(4) Whose responsibilities with respect to the institution represent a substantial portion of the FDIC officer or employee's overall responsibilities.

§ 336.12 One-year post-employment restriction.

(a) *Prohibition.* An officer or employee of the FDIC who serves as a senior examiner of an insured depository institution for at least 2 months during the last 12 months of that individual's employment with the FDIC may not, within 1 year after the termination date of his or her employment with the FDIC, knowingly

accept compensation as an employee, officer, director, or consultant from—

(1) The insured depository institution; or

(2) Any company (including a bank holding company or savings and loan holding company) that controls such institution.

(b) *Waivers.* The post-employment restrictions in paragraph (a) of this section will not apply to a senior examiner if the FDIC Chairperson certifies in writing and on a case-by-case basis that a waiver of the restrictions will not affect the integrity of the FDIC's supervisory program.

(c) *Effective Date.* The post-employment restrictions in paragraph (a) of this section will not apply to any officer or employee of the FDIC, or any former officer or employee of the FDIC, who ceased to be an officer or employee of the FDIC before December 17, 2005.

§ 336.13 Penalties.

(a) *Penalties under section 10(k) of the FDI Act.* A senior examiner of the FDIC who violates the post-employment restrictions set forth in § 336.12 shall be subject to the following penalties—

(1) An order—

(i) Removing such person from office or prohibiting such person from further participation in the affairs of the relevant insured depository institution or company (including a bank holding company or savings and loan holding company) that controls such institution for a period of up to five years, and

(ii) Prohibiting any further participation by such person, in any manner, in the affairs of any insured depository institution for a period of up to five years; or

(2) A civil monetary penalty of not more than \$250,000; or

(3) Both.

(b) *Enforcement by appropriate Federal banking agency of hiring entity.* Violations of § 336.12 shall be enforced by the appropriate Federal banking agency of the depository institution, depository institution holding company, or other company at which the violation occurred, as determined under section 10(k)(6), which may be an agency other than the FDIC.

(c) *Scope of prohibition orders.* Any senior examiner who is subject to an order issued under paragraph (a)(1) of this section shall, as required by 12 U.S.C. 1820(k)(6)(B), be subject to paragraphs (6) and (7) of section 8(e) in the same manner and to the same extent as a person subject to an order issued under section 8(e).

(d) *Other penalties.* The penalties set forth in paragraph (a) of this section are not exclusive, and a senior examiner

who violates the restrictions in § 336.12 may also be subject to other administrative, civil, or criminal remedies or penalties as provided by law.

PART 308—RULES OF PRACTICE AND PROCEDURES

1. The authority for part 308 continues to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1815(e), 1817, 1818, 1820, 1828, 1829, 1829b, 1831i, 1831m(g)(4), 1831o, 1831p-1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717; 15 U.S.C. 78 (h) and (i), 78o-4(c), 78o-5, 78q-1, 78s, 78u, 78u-2, 78u-3, 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Sec. 3100(s) Pub. L. 104–134, 110 Stat. 1321–358.

2. In § 308.1, redesignate paragraph (g) as paragraph (h), remove the word “and” at the end of the paragraph (f), and add a new paragraph (g) to read as follows:

§ 308.1 Scope.

* * * * *

(g) Proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) to impose penalties for violations of the post-employment restrictions under that subsection; and

* * * * *

Dated at Washington, DC, this 19th day of July, 2005.

By order of the Board of Directors.
Federal Deposit Insurance Corporation.

Robert E. Feldman,
Executive Secretary.

Department of the Treasury

Office of Thrift Supervision

12 CFR Chapter V

Authority and Issuance

For the reasons set forth in the preamble, OTS proposes to amend chapter V of title 12 of the Code of Federal Regulations as follows:

1. Add a new part 507 to read as follows:

PART 507—RESTRICTIONS ON POST-EMPLOYMENT ACTIVITIES OF SENIOR EXAMINERS

Sec.

507.1 What does this part do?

507.2 Who is a senior examiner?

507.3 What post-employment restrictions apply to senior examiners?

507.4 When will OTS waive the post-employment restrictions?

507.5 What are the penalties for violating the post-employment restrictions?

Authority: 12 U.S.C. 1462a, 1463 and 1820(k).

§ 507.1 What does this part do?

This part implements section 10(k) of the Federal Deposit Insurance Act (FDIA), which prohibits senior examiners from accepting compensation from certain companies following the termination of their employment. See 12 U.S.C. 1820(k). Except where otherwise provided, the terms used in this part have the meanings given in section 3 of the FDIA (12 U.S.C. 1813).

§ 507.2 Who is a senior examiner?

An individual is a senior examiner for a particular savings association or savings and loan holding company if:

(a) The individual is an officer or employee of OTS (including a special government employee) who has been designated by OTS to conduct examinations or inspections of savings associations or savings and loan holding companies;

(b) The individual has been assigned continuing, broad and lead responsibility for the examination or inspection of that savings association or savings and loan holding company; and

(c) The individual's responsibilities for examining, inspecting, or supervising that savings association or savings and loan holding company:

(1) Represent a substantial portion of the individual's assigned responsibilities at OTS; and

(2) Require the individual to interact on a routine basis with officers and employees of the savings association, savings and loan holding company, or its affiliates.

§ 507.3 What post-employment restrictions apply to senior examiners?

(a) *Prohibition.* (1) *Senior examiner of savings association.* An individual who serves as a senior examiner of a savings association for two or more of the last 12 months of his or her employment with OTS may not, within one year after the termination date of his or her employment with OTS, knowingly accept compensation as an employee, officer, director, or consultant from:

(i) The savings association; or

(ii) A savings and loan holding company, bank holding company, or any other company that controls the savings association.

(2) *Senior examiner of a savings and loan holding company.* An individual who serves as a senior examiner of a savings and loan holding company for two or more of the last 12 months of his or her employment with OTS may not, within one year after the termination date of his or her employment with OTS, knowingly accept compensation as an employee, officer, director, or consultant from:

(i) The savings and loan holding company; or

(ii) Any depository institution that is controlled by the savings and loan holding company.

(b) *Effective date.* The post-employment restrictions in paragraph (a) of this section do not apply to any senior examiner who terminated his employment at OTS before December 17, 2005.

(c) *Definitions.* For the purposes of this section:

(1) *Consultant.* An individual acts as a consultant for a savings association or other company only if he or she directly works on matters for, or on behalf of, the savings association or company.

(2) *Control.* Control has the same meaning given in part 574 of this chapter.

§ 507.4 When will OTS waive the post-employment restrictions?

The post-employment restriction in § 507.3 will not apply to a senior examiner if the Director certifies in writing and on a case-by-case basis that a waiver of the restriction will not affect the integrity of OTS's supervisory program.

§ 507.5 What are the penalties for violating the post-employment restrictions?

(a) *Penalties.* A senior examiner who violates § 507.3 shall, in accordance with 12 U.S.C. 1820(k)(6), be subject to one or both of the following penalties:

(1) An order:

(i) Removing the person from office or prohibiting the person from further participating in the conduct of the affairs of the relevant depository institution, savings and loan holding company, bank holding company or other company for up to five years; and

(ii) Prohibiting the person from participating in the affairs of any insured depository institution for up to five years.

(2) A civil money penalty not to exceed \$250,000.

(b) *Scope of prohibition orders.* Any senior examiner who is subject to an order issued under paragraph (a)(1) of this section shall be subject to 12 U.S.C. 1818(e)(6) and (7) in the same manner and to the same extent as a person subject to an order issued under 12 U.S.C. 1818(e).

(c) *Procedures.* 12 U.S.C. 1820(k) describes the procedures that are applicable to actions under paragraph (a) of this section and the appropriate Federal banking agency authorized to take the action, which may be an agency other than OTS. Where OTS is the appropriate Federal banking agency, it will conduct administrative proceedings under 12 CFR part 509.

(d) *Other penalties.* The penalties under this section are not exclusive. A senior examiner who violates the restriction in § 507.3 may also be subject to other administrative, civil, or criminal remedy or penalty as provided by law.

PART 509—RULES OF PRACTICE AND PROCEDURES IN ADJUDICATORY PROCEEDINGS

2. The authority citation for part 509 is amended to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 1464, 1467, 1467a, 1468, 1817(j), 1818, 1820(k), 3349, 4717; 15 U.S.C. 78(l); 78o–5, 78u–2; 28 U.S.C. 2461 note; 31 U.S.C. 5321; 42 U.S.C. 4012a.

3. In § 509.1, redesignate paragraph (g) as paragraph (h) and add a new paragraph (g) to read as follows:

§ 509.1 Scope.

* * * * *

(g) Proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) to impose penalties on senior examiners for violation of post-employment prohibitions.

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Dated: July 26, 2005.
Office of Thrift Supervision.

Richard M. Riccobono,
Acting Director.

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