Interim Guidelines for Use in Applying Loans-To-One-Borrower Requirements Adopted in The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA)

Summary: The FIRREA of 1989 requires thrift institutions to comply with the loans-to-one-borrower limits set forth for national banks effective August 9, 1989. Management should take immediate steps to alert its lending officers of these new restrictions and to set the institution's lending policies and loan approval limits accordingly.

For Further Information Contact:
The Office of Thrift Supervision (OTS) for the District in which you are located, or the Office of Supervision Policy of the OTS.

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Lending Limits:
The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) Title III, Section 301, amends the Home Owners' Loan Act of 1933 effective August 9, 1989. Specifically, FIRREA provides that Section 5200 of the Revised Statutes shall apply to savings associations in the same manner and to the same extent as it applies to national banks. Section 5200 of the Revised Statutes is codified as 12 U.S.C. 84. A copy of 12 U.S.C. 84 and the implementing Office of Comptroller (OCC) regulation with interpretations, as well as, a proposed amendment are attached. While no determination has yet been made concerning the status of the Comptroller's regulations and interpretations, copies are attached to assist in understanding their current application to national banks by the OCC.

The basic requirements are as follows:

1. Savings associations can lend up to 15% of their unimpaired capital and unimpaired surplus to one borrower for loans and extensions of credit not fully secured.

2. In addition to this 15%, savings associations can lend up to 10% of their unimpaired capital and unimpaired surplus to a borrower, that has exhausted the initial 15% limit, for loans and extensions of credit fully secured by readily marketable collateral having a market value, as determined by readily and continuously available price quotations, at least equal to the outstanding loan balance.

3. There are ten exceptions to the 15% and 10% limitations listed in one and two above. Some exceptions provide no capital and surplus limit and others provide a different limit. A complete list of these exceptions may be found in the attached Section 5200 of the Revised Statutes (12 U.S.C. Section 84).

4. FIRREA also provides that a savings association may make loans-to-one-borrower under one of the following special exemptions:

a. A savings association may lend to one borrower for any purpose not to exceed $150,000; or

b. to develop domestic residential housing units, not to exceed the lesser of $30,000,000 or 30% of the savings association's unimpaired capital and unimpaired surplus, provided:

i. the purchase price of each single family home in the development being financed does not exceed $80,000;

ii. the savings association is and continues to be in compliance with the fully phased-in capital standards proscribed under FIRREA;

iii. loans made under this exemption to all borrowers, in aggregate, do not exceed 150% of the savings association's unimpaired capital and unimpaired surplus;

iv. the Director of the OTS has authorized the association to avail itself of the higher limit; and

v. such loans shall comply with all applicable loan-to-value requirements.

5. A savings association's loans-to-one-borrower to finance the sale of office of thrift supervision TB 32 was rescinded 10/21/91. Incorporated into Thrift Activities 211.

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of REO may exceed the 15% and 10% limits, provided that it shall not exceed 50% of the savings association's unimpaired capital and unimpaired surplus.

6. The Director of OTS may impose more stringent restrictions on a savings association's loans-to-one-borrower if the Director determines that such action is necessary to protect the safety and soundness of the association.

In addition, FIRREA provides civil money penalty authority for OTS for violations of the law. The three-tiered system prescribes penalties in amounts from $5,000 per day up to, but not to exceed, the lesser of $1,000,000 or 1% of the total assets of the institution.

These rules however raise questions regarding applying national bank standards to thrifts since the definition of capital and other differences need to be resolved. These unresolved questions are presently under review in the Office of Thrift Supervision (OTS). In the meantime, institutions should consult with their legal counsel to resolve questions regarding the limits found in 12 U.S.C. 84 in this interim period.

Legally Binding Commitments:

In the case of legally binding loan commitments entered into prior to August 9, 1989, the following guidance is provided:

If a legally binding loan commitment was entered into but not funded prior to FIRREA's enactment, and the loan is funded post-enactment, then the loan is subject to the loans-to-one-borrower preexisting regulatory limitation under 12 C.F.R. 563.9-3, not the FIRREA limitation. Several factual items must be emphasized, however.

First, this conclusion assumes that the loan commitment was legally binding prior to FIRREA's enactment. It is incumbent upon the association to demonstrate that the commitment represents a legally binding commitment to fund (e.g., written agreement under 12 C.F.R. Section 32.7 requiring either a written agreement or other file documentation). Where doubts exist as to the legally binding nature of the commitment, supervisory personnel may require a legal opinion of the association's counsel.

In general, loan commitments for which the prospective borrower has paid no fee to the thrift should be reviewed closely to determine if a binding commitment exists. Such agreements typically contain broad provisions permitting the lenders to decline to fund on subjective grounds that effectively render the commitment unenforceable. In absence of payment of such a fee, the association must overcome the strong presumption that the commitment is not legally binding with convincing evidence.

Finally, advances under renewals or extensions of such pre-enactment commitments must conform to the new loans-to-one-borrower limitations under FIRREA if the renewal or extension of the commitment is made on or after FIRREA's date of enactment (August 9, 1989). This position is consistent with the OCC's transition rules (12 C.F.R. Section 32.7), a copy of which is attached.

Attachments
Attachment I to TB 32

Section 5200 of the Revised Statutes
12 U.S.C. Section 84
Lending Limits
(Last Amended in 1983)
(8) Loans or extensions of credit secured by a segregated deposit account in the lending bank shall not be subject to any limitations based on capital and surplus.

(7) Loans or extensions of credit to any financial institution or to any receiver, examiner, trustee, or any other person in charge of the business and property of such financial institution, when such loans or extensions of credit are approved by the Comptroller of the Currency, shall not be subject to any limitations based on capital and surplus.

(6) (A) Loans and extensions of credit arising from the disbursement by any State or foreign bank of a State or foreign consumer loan or a consumer loan by any other person that is engaged in the business of making consumer loans shall be made only upon the written endorsement of the last agent of the State or foreign bank that is engaged in the business of making consumer loans.

(B) Loans and extensions of credit secured by the security of any financial institution or any other person that is engaged in the business of making consumer loans shall be made only upon the written endorsement of the last agent of the State or foreign bank that is engaged in the business of making consumer loans.

(5) Loans and extensions of credit secured by a negotiable order of withdrawal or a certificate of deposit issued by a bank or trust company in the name of any person that is engaged in the business of making consumer loans shall be made only upon the written endorsement of the last agent of the State or foreign bank that is engaged in the business of making consumer loans.

(4) Loans and extensions of credit secured by a negotiable order of withdrawal or a certificate of deposit issued by a bank or trust company in the name of any person that is engaged in the business of making consumer loans shall be made only upon the written endorsement of the last agent of the State or foreign bank that is engaged in the business of making consumer loans.

(3) Loans and extensions of credit secured by a negotiable order of withdrawal or a certificate of deposit issued by a bank or trust company in the name of any person that is engaged in the business of making consumer loans shall be made only upon the written endorsement of the last agent of the State or foreign bank that is engaged in the business of making consumer loans.

(2) Loans and extensions of credit secured by a negotiable order of withdrawal or a certificate of deposit issued by a bank or trust company in the name of any person that is engaged in the business of making consumer loans shall be made only upon the written endorsement of the last agent of the State or foreign bank that is engaged in the business of making consumer loans.

(1) Loans and extensions of credit secured by a negotiable order of withdrawal or a certificate of deposit issued by a bank or trust company in the name of any person that is engaged in the business of making consumer loans shall be made only upon the written endorsement of the last agent of the State or foreign bank that is engaged in the business of making consumer loans.

Appendix I
Attachment II to TB 32

12 U.S.C. Part 32
National Bank Lending Limits
With Interpretations 32.101 through 32.111

From Code of Federal Regulations as of January 1, 1989
Comptroller of the Currency, Treasury

Concerning the indebtedness of these executive officers or principal shareholders. The disclosure in paragraph (a)(1) above may be based on information compiled as the basis for reporting in the Commercial Bank Report of Condition and Income. The disclosure in paragraph (a)(2) above may be based on information contained in the reports referred to in §31.8 of this part.

c) A national bank shall maintain records of any requests for information under paragraph (a) of this section, and records of the disposition of such requests, for a period of two years.

d) The definitions of terms set forth in Regulation O, 12 CFR 215, and made applicable thereby to Subpart B of that regulation, 12 CFR 215.20-215.23, apply for purposes of this subpart, except that with respect to disclosures required pursuant to paragraph (a)(1) of §31.5, the term "bank" shall mean a Federally-chartered "insured bank", as that term is used in 12 U.S.C. 1811.

§31.6 Reports by executive officers and principal shareholders.

Pursuant to 13 U.S.C. 1971(c)(1), executive officers and principal shareholders of banks are required annually to report to the bank's board of directors their indebtedness, and the indebtedness of their related interests, from correspondent banks of the insiders themselves. This requirement is restated in Regulation O, 12 CFR 215.22.

§31.8 Executive officer and principal shareholders.

Pursuant to 13 U.S.C. 1971(c)(1), executive officers and principal shareholders of banks are required annually to report to the bank's board of directors their indebtedness, and the indebtedness of their related interests, from correspondent banks of the insiders themselves. This requirement is restated in Regulation O, 12 CFR 215.22.

PART 32—LENDING LIMITS

§32.1 Authority, purpose, and scope.


(b) Purpose. R.S. §320 (12 U.S.C. 64) is intended to prevent one individual, or a relatively small group, from borrowing an unduly large amount of the bank's funds. It is also intended to safeguard the bank's depositors by spreading the loans among a relatively large number of persons engaged in different lines of business.

c) Scope. This part applies to all loans and extensions of credit made by national banks and their domestic operating subsidiaries. This part does not apply to loans made by a national bank to its affiliates (as that term is defined in subsection (b)(1) of section 22A of the Federal Reserve Act (12 U.S.C. 371c(b)(1))), operating subsidiaries, and Edge Act or Agreement Corporation subsidiaries.

Source: 48 FR 15821, Apr. 12, 1983, unless otherwise noted.

§32.2 Definitions.

For purposes of this part:
(a) "Loans and extensions of credit" means any direct or indirect advance of funds (including obligations of makers and endorsers arising from the discounting of commercial paper) to a
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person made on the basis of any obligation of that person to repay the funds, or repayable from specific property pledged by or on behalf of a person. "Loans and extensions of credit" also includes a "contractual commitment to advance funds" as that term is defined in this section.

(b) "Person" means an individual; sole proprietorship; partnership; joint venture; association; trust; estate; business trust; corporation; not-for-profit corporation; sovereign government or agency, instrumentality, or political subdivision thereof, or any similar entity or organization.

(c) "Unimpaired capital and unimpaired surplus" is equivalent to the term "capital and surplus" and has the meaning set forth in 12 CFR 7.1190.

(d) "Contractual commitment to advance funds" means (1) an obligation to make payments (directly or indirectly) to a third party contingent upon default by the bank's customer in the performance of an obligation under the terms of that customer's contract with the third party or upon some other stated condition, or (2) an obligation to guarantee or stand as surety for the benefit of a third party.

(e) A "standby letter of credit" is any letter of credit, or similar arrangement, however named or described, which represents an obligation to the beneficiary on the part of the issuer (1) to repay money borrowed by or advanced to or for the account of the account party, or (2) to make payment on account of any indebtedness undertaken by the account party, or (3) to make payment on account of any default by the account party in the performance of an obligation.

(f) A "standby letter of credit" is any letter of credit, or similar arrangement, however named or described, which represents an obligation to the beneficiary on the part of the issuer (1) to repay money borrowed by or advanced to or for the account of the account party, or (2) to make payment on account of any indebtedness undertaken by the account party, or (3) to make payment on account of any default by the account party in the performance of an obligation.

§ 223. General limitations.

12 U.S.C. 84(a)(1) provides:

The total loans and extensions of credit by a national banking association to persons outstanding at one time and not fully secured, as determined in a manner consistent with paragraph (2) of this section, by collateral having a market value at least equal to the amount of the extension of credit shall not exceed 15 per centum of the unimpaired capital and unimpaired surplus at the association.

§ 223. Additional general limitations: loans fully secured by readily marketable collateral.

(a) Loan. 12 U.S.C. 84(a)(2) provides:

The total loans and extensions of credit by a national banking association to persons outstanding at one time and not fully secured by readily marketable collateral having a market value, as determined by reliable and commonly available price quotations, at least equal to the amount of the
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funds outstanding shall not exceed 10 per cent of the unimpaired capital and unpaired surplus of the association. This limitation shall be separate from and in addition to the limitation contained in paragraph (1) of this subsection.

(b) Compliance with Section 36(a)(2). Each loan or extension of credit based on the foregoing limitation shall be secured by readily marketable collateral having a current market value of at least 100 percent of the amount of the loan or extension of credit at all times. "Current market value" means the bid or closing price listed for an item in a regularly published listing or an electronic reporting service.

(c) For purposes of this part, "readily marketable collateral" means financial instruments and bullion which are salable under ordinary circumstances with reasonable promptness at a fair market value determined by quotations based on actual transactions on an auction or a similarly available daily bid and ask price market. "Financial instruments" include stocks, notes, bonds, and debentures traded on a national securities exchange, "OTC margin stocks" (as defined in Regulation U of the Federal Reserve Board), commercial paper, negotiable certificates of deposit, bankers' acceptances, and shares in money market and mutual funds of the type which issue shares in which banks or other financial institutions may perfect a security interest.

(d) Each bank must institute adequate procedures to ensure that the collateral value fully secures the outstanding loan at all times. "Collateral value" means the fair market value of the collateral as determined by quotations based on actual transactions on an auction or a similarly available daily bid and ask price market.

(e) Financial instruments may be denominated in foreign currencies which are freely convertible to U.S. dollars. If collateral is denominated and payable in a currency other than that of the loan or extension of credit which it secures, the bank's procedures must require that the collateral be revalued at least monthly, using appropriate foreign exchange rates. In addition to being revalued at current market value.

(f) If collateral value falls below 100 percent of the outstanding loan, the loan shall be increased to the extent that the loan is no longer in accordance with this section and exceeds the general 15 percent limitation, the loan must be brought into conformity within five business days, except where judicial proceedings, regulatory actions, or other extraordinary occurrences prevent the bank from taking action.

§ 32.5 Combining loans to separate borrowers.

(a)(1) General rule. Loans or extensions of credit to one person will be attributed to other persons, for purposes of this part, when (1) the proceeds of the loans or extensions of credit are to be used for the direct benefit of the other person or persons or (2) a "common enterprise" is deemed to exist between the persons.

(2) "Common enterprise." (i) Whether two or more persons are engaged in a "common enterprise" will depend upon a realistic evaluation of the facts and circumstances of particular transactions.

(ii) Where the expected source of repayment for each loan or extension of credit is the same for each person, a "common enterprise" will be deemed to exist and the loans or extensions of credit must be combined.

(iii) Where loans or extensions of credit are made to persons who are related through common control, including where one person is controlled by another person, a "common enterprise" will be deemed to exist if the persons are engaged in interdependent businesses or there is substantial financial interdependence among them. A "common enterprise" will be deemed to exist if 50 percent or more of one person's gross receipts or gross expenditures (on an annual basis) are derived from transactions with one or more persons related through common control (as defined in Paragraph (a)(2)(v) of this section). Gross receipts and expenditures include gross revenue, expenses, intercompany loans, dividends, capital contributions, and similar receipts or payments.

(iii) A "common enterprise" will also be deemed to exist when separate persons borrow from a bank for the purpose of acquiring a business enterprise of which those persons will own more than 50 percent of the voting securities.

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(a) For the purposes of paragraph (a)(3)(ii) of this section, "control" shall be presumed to exist when:

(A) One or more persons acting in concert directly or indirectly own, control, or have power to vote 25 percent or more of any class of voting securities of another person; or

(B) One or more persons acting in concert control, in any manner, the election of a majority of the directors, trustees, or other persons exercising similar functions of another person; or

(C) Any other circumstances exist which indicate that one or more persons acting in concert directly or indirectly exercise a controlling influence over the management or policies of another person.

(b) Loans to corporations. (1) For purposes of this paragraph, a corporation is a "subsidiary" of any person which owns or beneficially owns more than 50 percent of the voting stock of that corporation, unless ownership need not be direct. Thus, if A owns more than 50 percent of the voting stock of Corporation X which, in turn, owns more than 50 percent of the voting stock of Corporation Y Corporation Y would be considered a subsidiary of both A and of Corporation X.

(2) Loans or extensions of credit to a person or to subsidiaries of one person need not be combined for purposes of this paragraph if the bank has determined that the person and subsidiaries involved are not engaged in a "common economic enterprise" as that term is defined in paragraph (a) of this section.

(3) Notwithstanding paragraph (b)(2) of this section, loans or extensions of credit by a national bank to a "corporate group" may not exceed 50 percent of the bank's unimpaired capital or surplus. This aggregate limitation applies only to loans made pursuant to sections 24 (a)(1) and (a)(2). A "corporate group" includes a person and all of its subsidiaries.

(c) Loans to partnerships, joint ventures, and associations. (1) Loans or extensions of credit to a partnership, joint venture, or association shall, for purposes of this part, be considered loans or extensions of credit to each member of such partnership, joint venture, or association.

(2) Loans or extensions of credit to members of a partnership, joint venture, or association shall, for purposes of this part, be attributed to the partnership, joint venture, or association where one or more of the tests set forth in paragraph (a) of this section is satisfied with respect to one or more such members. However, loans to members of a partnership, joint venture, or association will not be attributed to other members of the partnership, joint venture, or association under this paragraph unless one or more of the tests set forth in paragraph (a) of this section is satisfied with respect to such other members. The tests set forth in paragraph (a) of this section shall be deemed to be satisfied when loans or extensions of credit made to members of a partnership, joint venture, or association for the purpose of purchasing an interest in such partnership, joint venture, or association.

(3) The rule set forth in paragraph (c)(1) of this subsection is not applicable to limited partners in limited partnerships or to members of joint ventures or associations if such partners or members, by the terms of the partnership, joint venture, or association for the purpose of purchasing an interest in such partnership, joint venture, or association. However, the rules set forth in paragraph (b)(1) of this section are applicable to such partners or members.

(d) Loans to foreign governments, their agencies, and instrumentalities. (1) Notwithstanding paragraphs (a), (b), and (c) of this section, extensions of credit to foreign governments, their agencies, and instrumentalities will be combined with one another under section 34 only if they fail to meet either of the following tests at the time the loan or extension of credit is made:

(1) The borrower has resources or revenue of its own sufficient over time to service its debt obligations ("means" test).

(2) The purpose of the loan or extension of credit is consistent with the purposes of the borrower's general business ("purpose" test).

(3) In order to show that the "means" and "purpose" tests have
been satisfied, a bank shall, at a minimum, assemble and retain in its files the following items:

(I) A statement (accompanied by supporting documentation) describing the legal status and the degree of financial and operational autonomy of the borrowing entity.

(II) Financial statements for the borrowing entity for a minimum of three years prior to the date the loan or extension of credit was made or for each year less than three that the borrowing entity has been in existence.

(III) Financial statements for each year the loan or extension of credit is outstanding.

(IV) The bank's assessments of the borrower's means of servicing the loan or extension of credit, including specific reasons in support of that assessment. The assessment shall include an analysis of the borrower's financial history, its present and projected economic and financial performance, and the significance of any financial support provided to the borrower by third parties, including the borrower's central government, if the government's support exceeds the borrower's annual revenues from other sources. It will be presumed that the "meaningful" test has not been satisfied. No such presumption will be made, however, because of a guarantee by the central government of the borrower's debt.

(V) A loan agreement or other written statement from the borrower which clearly describes the purpose of the loan or extension of credit. The written representation will ordinarily constitute sufficient evidence that the "purpose" test has been satisfied. However, when, at the time the funds are disbursed, the bank knows or has reason to know of other information suggesting that the borrower will use the proceeds in a manner inconsistent with the written representation, it may not, without further inquiry, accept the representation.

(Approved by the Office of Management and Budget under control number 1517-0138)

the limits of 12 U.S.C. 84. The same principles of disqualification from the exception applies to any renewal or extension of either the entire loan or an installment thereof.

(b) Bankers' acceptances (1) Law 12 U.S.C. 84(a)(2) provides:

The purchase of bankers' acceptances of the kind described in section 13 of the Federal Reserve Act and issued by other banks shall not be subject to any limitation based on capital and surplus.

(2) This exception permits the purchase by a national bank without limitation of bankers' acceptances created by other banks provided that such acceptances are of the kind described in 12 U.S.C. 372 and 373 (elicitable acceptances). Acceptances other than those described in sections 372 and 373 must be included within the purchasing bank's lending limit to each acceptor bank.

(3) The limits under which a national bank may itself accept drafts eligible for rediscoun are contained in sections 372 and 373. These limits are distinct from the limits under section 84. Acceptances by a national bank of "ineligible" drafts, i.e., news or articles which do not meet the requirements for discount with a Federal Reserve bank, are subject to the limitations of section 84.

(4) During any period within which a national bank may accept drafts eligible for rediscoun, but having given value therefor, the amount given is considered, for purposes of this part, as a loan or extension of credit to the customer for whose the acceptance was made and is subject to the lending limits. To the extent that a loan or extension of credit created by discounting the acceptance is covered by a bona fide participation agreement, the discounting bank need only consider that portion of the discounted acceptance which it retains as being subject to the limitations of section 84.

(2) Loans secured by bills of lading or warehouse receipts covering readily marketable staples. (1) Law 12 U.S.C. 84(c)(3) provides:

Loans and extensions of credit secured by bills of lading, warehouse receipts covering readily marketable staples shall be subject to a limitation of 38 per cent of capital and surplus in addition to the general limitations if the market value of the staples securing such additional loan or extension of credit at all times equals or exceeds 118 per cent of the outstanding amount of such loan or extension of credit. The staples shall be fully covered by insurance whenever it is customary to insure such staples.

(2) This exception allows a national bank to make loans or extensions of credit to one person in an amount equal to 28 per cent of its capital and surplus in addition to the general 18 per cent permitted by section 84(a)(1) and in addition to the 10 per cent permitted by section 84(a)(2), provided the collateral requirements of section 84(a)(3) are met.

(3) A readily marketable staple means an article of commerce, agriculture, or industry of such use as to make it the subject of dealings in a ready market with sufficiently frequent price quotations as to make (1) the price fairly and definitely ascertainable, and (2) the staple itself easy to realize upon sale at any time at a price which would not involve any considerable sacrifice from the amount at which it is valued as collateral. Staples eligible for this exception must be nonperishable, may be refrigerated or frozen, and must be fully covered by insurance when such insurance is customary. This exception is intended to apply primarily to basic commodities such as wheat and other grains, cotton, wool, and basic metals such as tin, copper, lead, and the like. Whether a commodity is readily marketable depends upon existing conditions and it is possible that a commodity that qualifies at one time may cease to qualify at a later date. Fabricated commodities which do not constitute standardized interchangeable units and do not possess uniformly broad marketability do not qualify as readily marketable collateral.

(4) Commodities sometimes fail to qualify as nonperishable because of the manner in which they are handled or stored during the life of the loan or extension of credit. Accordingly, the question as to whether a commodity is nonperishable must be determined on a case-by-case basis.
(6) The long-term credit of a bank, in the same manner for (1) not more than 10 months if secured by nonperishable staples and (ii) not more than six months if secured by refrigerated or frozen staples.

(7) If the long-term credit of a bank, in the same manner for (1) not more than 10 months if secured by nonperishable staples and (ii) not more than six months if secured by refrigerated or frozen staples.

(8) If the long-term credit of a bank, in the same manner for (1) not more than 10 months if secured by nonperishable staples and (ii) not more than six months if secured by refrigerated or frozen staples.

(9) If the long-term credit of a bank, in the same manner for (1) not more than 10 months if secured by nonperishable staples and (ii) not more than six months if secured by refrigerated or frozen staples.

(10) If the long-term credit of a bank, in the same manner for (1) not more than 10 months if secured by nonperishable staples and (ii) not more than six months if secured by refrigerated or frozen staples.

(11) If the long-term credit of a bank, in the same manner for (1) not more than 10 months if secured by nonperishable staples and (ii) not more than six months if secured by refrigerated or frozen staples.

(12) If the long-term credit of a bank, in the same manner for (1) not more than 10 months if secured by nonperishable staples and (ii) not more than six months if secured by refrigerated or frozen staples.

(13) If the long-term credit of a bank, in the same manner for (1) not more than 10 months if secured by nonperishable staples and (ii) not more than six months if secured by refrigerated or frozen staples.

(14) If the long-term credit of a bank, in the same manner for (1) not more than 10 months if secured by nonperishable staples and (ii) not more than six months if secured by refrigerated or frozen staples.

(15) If the long-term credit of a bank, in the same manner for (1) not more than 10 months if secured by nonperishable staples and (ii) not more than six months if secured by refrigerated or frozen staples.
bank shall not be subject to any limitation based on capital and surplus.

(3) The bank must ensure that a security interest has been perfected in the deposit, including the assignment of a specifically identified deposit and any other actions required by state law.

(2) Deposit accounts which may qualify for this exception include deposits in any form generally recognized as deposits. In the case of a deposit eligible for withdrawal prior to the maturity of the secured loan, the bank must establish internal procedures which will prevent the release of the security.

(4) A deposit which is denominated and payable in a currency other than that of the loan or extension of credit which it secures may be eligible for this exception if it is freely convertible to U.S. dollars. The deposit must be revalued at least monthly, using appropriate foreign exchange rates, to ensure that the loan or extension of credit remains fully secured. This exception applies to only that portion of the loan or extension of credit that is covered by the U.S. dollar value of the deposit. If the U.S. dollar value of the deposit falls to the extent that the loan is in unconformance with this exception and exceeds the general 15 per cent limitation, the loan must be brought into conformance within five business days, except where judicial proceedings, regulatory actions, or other extraordinary occurrences prevent the bank from taking such action. This provision does not authorize for national banks to take deposits denominated in foreign currencies.

(a) Loans or extensions of credit to any financial institution with the approval of the Comptroller. (1) 12 U.S.C. 44(c)(27) provides:

Loans or extensions of credit to any financial institution or to any receiver, conservator, superintendent of banks, or other agent in possession of the assets and business and property of such financial institution, when such loans or extensions of credit are approved by the Comptroller of the Currency, shall not be subject to any limitation based on capital and surplus.

(3) This exception is intended to apply only in emergency situations where a national bank is called upon to provide assistance to another financial institution.

(3) For purposes of this paragraph

(a) "financial institution" means a commercial bank, savings bank, trust company, savings and loan association, or credit union.

(b) "Dissolved installment consumer paper.

(1) Law 13 U.S.C. 44(c)(28) provides:

(4) Loans and extensions of credit arising from the discount of negotiable or nonnegotiable installment consumer paper which carries a full recourse endorsement or unconditional guarantees by the person transferring the paper shall be subject under this section to a maximum limitation equal to 30 per cent of such capital and surplus, notwithstanding the collateral requirements set forth in subsection (a)(2).

(5) If the bank's files or the knowledge of its officers of the financial condition of each maker of such consumer paper is reasonably adequate, and an officer of the bank designated for that purpose by the board of directors of the bank certifies in writing that the bank is relying primarily upon the responsibility of each maker for payment of such loans or extensions of credit and not upon any full or partial recourse endorsement or guarantees by the transferor, the limitations of this section as to the loans or extensions of credit of each such maker shall be the sole applicable loan limitations.

(2) This exception allows a national bank to discount negotiable or nonnegotiable installment consumer paper of one person in an amount equal to 10 per cent of its capital and surplus (in addition to the 15 per cent permitted by section 44(a)(11)) if the paper carries a full recourse endorsement or unconditional guarantees by the seller transferring such paper. Unconditional guarantees may be in the form of a repurchase agreement or a repurchase agreement in any form of a repurchase agreement or a repurchase agreement. A condition reasonably within the power of the bank to perform, such as the repossession of collateral, will not be considered to make conditional an otherwise unconditional agreement.

(3) For purposes of this paragraph

(a) "consumer" means any user of any products, commodities, goods, or services, whether leased or purchased, and does not include any person who purchases products or commodities for the purpose of resale or for fabrication into goods for sale.

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(4) For purposes of this paragraph (c), "consumer paper" includes paper relating to automobiles, mobile homes, residence, office equipment, household items, tuition fees, insurance premiums, and similar consumer items. Also included is paper covering the lease (where the bank is not the owner or lessor) or purchase of equipment for use in manufacturing, farming, construction, or excavation.

(b) Under certain circumstances, installment consumer paper which otherwise meets the requirements of this exception will be considered a loan or extension of credit to the maker of the paper rather than the seller of the paper. Specifically, where (i) through the bank's files it has been determined that the financial condition of each maker is reasonably adequate to repay the loan or extension of credit, and (ii) an officer designated by the bank's Chairman or Chief Executive Officer pursuant to authorization by the Board of Directors certifies in writing that the bank is relying primarily upon the maker to repay the loan or extension of credit, the loan or extension of credit is subject only to the sending limits of the maker of the paper. Where paper is purchased in substantial quantities, the records, evaluation, and certification may be in such form as is appropriate for the class and quantity of paper involved.

(i) Loans secured by livestock or dairy cattle. (1) Loans secured by livestock. (1) Law 13 U.S.C. 66(c)(XWA) provides:

Loans and extensions of credit secured by snapping documents or instruments transferring or securing title covering livestock or giving a lien on livestock when the market value of the livestock securing the obligation is not at any time less than 115 percent of the face amount of the note covered hereby, notwithstanding the collateral requirements set forth in subsection (a), to a maximum limitation equal to 25 per centum of such capital and surplus.

(ii) This exception allows a national bank to make loans or extensions of credit to one person in an amount equal to 10 percent of its capital and surplus (in addition to the 15 percent permitted by section 66(c)(X)), if the loans or extensions of credit are secured by livestock having a market value at least equal to 115 percent of the outstanding loan balance at all times. The loan or extension of credit may be secured by shipping documents or other instruments which transfer title to, secure title to, or give a first lien on livestock. "Livestock" includes dairy and beef cattle, hogs, sheep, goats, horses, mules, poultry, and fish, whether or not held for resale. To support compliance with this exception, the bank must maintain in its files an inspection and appraisal report on the livestock pledged. The inspection and appraisal report should be performed at least every 12 months, or more frequently as deemed prudent.

(iii) Under the laws of certain states, a person furnishing pasturage under a grazing contract may have a lien on the livestock for the amount due for pasturage. If the lien which is based on pasturage furnished by the lessor prior to the making of the loan (A) is assigned to the bank by a recordable instrument and (B) is protected against being defeated by some other lien or claim, by payment to a person other than the bank, or otherwise, it would qualify under this exception provided the amount of such perfected lien is at least equal to the amount of the loan and the value of the livestock is at no time less than 115 percent of the loan. Where the amount due under the grazing contract is dependent upon future performance thereunder, the resulting lien has uncertain prospective value and does not meet the requirements of the exception.

(2) Loans secured by dairy cattle. (1) Law 12 U.S.C. 66(c)(XWB) provides:

Loans and extensions of credit which arise from the discount by dealers in dairy cattle of paper given in payment for dairy cattle, which paper carries a full recourse endorsement or unconditional guarantee of the seller, and which are secured by the cattle being sold, shall be subject under this section, notwithstanding the collateral requirements set forth in subsection (a), to a limitation of 25 per centum of such capital and surplus.

(iii) This exception allows a national bank to discount paper of a person given in payment for dairy cattle in an amount equal to 10 percent of its capital and surplus (in addition to the 15
per cent permitted by section 84(a)(1)). The discounted paper must carry the full recourse endorsement or unconditional guarantee of the seller and the dairy castle must secure the debt. Lien on the cattle may be in any form which allows the bank to maintain a perfected security interest in the cattle under applicable state law.

(3) The exception for loans and extensions of credit secured by livestock is separate and apart from the exception for loans and extensions of credit created by the discount of paper for the purchase of dairy cattle. Therefore, a national bank may make loans or extensions of credit to one person secured by each type of collateral in an amount equal to 10 percent of its capital and surplus (in addition to the 15 percent permitted under section 84(a)(1)).

(ii) Loans to Student Loan Marketing Association. 12 U.S.C. 84(c)(10) provides:

Loans or extensions of credit to the Student Loan Marketing Association shall not be subject to any limitation based on capital and surplus.

§ 22.7 Transitional rules.

(a) Loans or extensions of credit which were in violation of 12 U.S.C. 84 prior to the relevant effective dates of this part will be considered to remain in violation of section 84 and subject to actions under 12 U.S.C. 83 and 1818, and other appropriate laws after those dates until they are paid in full, regardless of whether the loans or extensions of credit conform to the rules established in this part. Renewals or extensions of such loans or extensions of credit will also be considered violations of law.

(b) A national bank which has outstanding loans or extensions of credit to a person in violation of section 84 as of the relevant effective dates of this part may make additional advances to such person after those dates if the additional advances are permitted under this part. The additional advances, however, may not be used directly or indirectly to repay any outstanding illegal loans or extensions of credit.

(c) Loans or extensions of credit which were in conformance with section 84 prior to the relevant effective dates of this part but are not in conformance with the rules established in this part will not be considered to violate the violations of law during the existing contract terms of such loans or extensions of credit. Renewals or extensions of such loans or extensions of credit which are not in conformance with the rules set forth in this part may be made on or after the effective dates of this part; however, all loans or extensions of credit made under such renewals or extensions must conform with the rules set forth in this part no later than January 1, 1986.

(d) If a national bank, prior to the relevant effective dates of this part, entered into a legally binding commitment to advance funds on or after those dates, and such commitment was in conformance with section 84, advances under such commitment may be made notwithstanding the fact that such advances are not in conformance with this part. The bank must, however, demonstrate that the commitment represents a legal obligation to fund, either by a written agreement or through file documentation. Advances under renewals or extensions of such commitments must conform to this part if the renewal or extension of the commitment is made after the relevant effective dates of this part.

§ 22.8 Substitute lending limit for banks with agricultural or oil and gas loans.

(a) Definitions. For purposes of this section:

(1) "Agricultural loans" include loans or extensions of credit secured by farm land, loans to finance agricultural production and other loans to farmers reported in the bank's Report of Condition and Income (Call Report). The following are examples of each type of loan: borrowing for planting, storing of crops, breeding and marketing of livestock, financing fisheries, purchases of farm machinery and equipment, maintenance and operations of the farm, and discounted notes of farmers.

(2) "Oil and gas loans" include loans or extensions of credit to oil and gas companies, petroleum refiners, and companies primarily engaged in the oil and gas...
Compitroller of the Currency, Treasury

gas-related business, for example: operating oil and gas field properties, common drilling, performing exploration services on a contract basis, performing oil and gas field services, manufacturing or leasing of oil field machinery and equipment, pipeline transportation of petroleum, natural gas transmission or distribution, and investing in oil and gas royalties or leases. (3) "Special category loan charge-offs" mean agricultural or oil and gas loans charged-off during the period from January 1, 1986 through December 31, 1986, which have been or will be reported in a special memorandum item in the bank's Call Report in accordance with the Comptroller of the Currency's capital forbearance policy. (b) A national bank which has special category loan charge-offs resulting in a reduction in its unimpaired capital and unimpaired surplus since December 31, 1985, may substitute a lending limit calculated under this section for the general limitation provided at 12 U.S.C. 541(a)(1), up to a maximum amount of 30 percent of unimpaired capital and unimpaired surplus, until January 1, 1986. (c) The substitute lending limit in paragraph (b) of this section is the lesser of the following amounts: (1) 15 percent of unimpaired capital and unimpaired surplus on December 31, 1985, or (2) 15 percent of the total of: (i) the difference between the sum of special category loan charge-offs and the sum of recoveries on those charge-offs plus (ii) Unimpaired capital and unimpaired surplus or (3) 20 percent of unimpaired capital and unimpaired surplus. (51 FR 39943, Oct. 30, 1986, as amended at 52 FR 20918, May 14, 1987)

INTERPRETATIONS § 32.104 Interpretations of accommodation papers. The liability of a drawer, endorser, or guarantor who does not receive any of the proceeds, or the benefit of the proceeds, of the loan or extension of credit is not a loan or extension of credit to such person for purposes of this part unless one of the tests set forth in 12 CFR 32.5(a)(1) is satisfied. § 32.102 Sale of Federal funds. (a) Definitions. "Sale of Federal funds" for purposes of this section, any transaction among depository institutions involving the transfer of immediately available funds resulting from credits to deposit balances at Federal Reserve banks, or from credits to new or existing deposit balances due to a correspondent depository institution. (b) Sale of Federal funds with a maturity of one business day or under a continuing contract are not "loans and extensions of credit" for purposes of this part. However, sales of Federal funds with a maturity of more than one business day are subject to the lending limits. (c) A "continuing contract" refers to an agreement that remains in effect for more than one business day but has no specified maturity and requires no advance notice for termination. § 32.105 Purchase of securities subject to repurchase agreements. (a) The purchase of "Type I securities," as defined in 12 CFR 1.3(a), subject to an agreement that the seller will repurchase at the end of a stated period is not a "loan or extension of credit" for purposes of this part. (b) The purchase of other types of securities subject to an agreement that the seller will repurchase at the end of a stated period is regarded as a loan from the purchasing bank to the seller and not as an obligation of the underlying obligor of the security.

§ 32.104 Purchase of third-party paper. Where a bank purchases third-party paper subject to an agreement that the seller will repurchase the paper upon default or at the end of a stated period after default, the seller's obligation to repurchase is subject to 12 U.S.C. 84 and is measured by the total unpaid balance of the paper owned by the bank less any applicable dealer reserves. Where the seller's obligation to repurchase is limited, the seller's total loans or extensions of credit for purposes of 13 U.S.C. 84 are measured
§ 32.105 Overdrafts.

Overdrafts, whether or not prearranged, are "loans and extensions of credit" for purposes of this part. This rule does not apply to "intra-day" or "daylight" overdrafts.

§ 32.106 Loans charged off in whole or in part.

The lending limits apply to all existing loans or extensions of credit to a person by the bank, including loans or extensions of credit which have been charged off on the books of the bank in whole or in part. Loans or extensions of credit which have become unenforceable by reason of discharge in bankruptcy or are no longer legally enforceable for other reasons are not "loans and extensions of credit" for purposes of this part.

§ 32.107 Sale of loan participations.

(a) When a bank sells a participation in a loan or extension of credit, including the origination of a bank's own acceptance, that portion of the loan that is sold on a non recourse basis will not be applied to the bank's lending limits. In order to remove a loan or extension of credit from a bank's lending limit, a participation must result in a pro rata sharing of credit risk proportionate to their respective interests of the originating and participating lender. This is so even where the participation agreement provides that repayment must be applied first to the shares sold. In that case the pro rata sharing may only be accomplished if the agreement also provides that, in case of a default or event of default as defined in the agreement, participants shall share in all subsequent repayments and collections in proportion to the percentage of participation at the time of the occurrence of the event.

(b) The provisions of the above paragraph apply to all "loans and extensions of credit," as defined in § 32.3(a) of this part, including "commercial commitments" to advance funds," as defined in § 32.3(d) of this part.

§ 32.108 Interest or discount on loans.

The lending limits do not apply to the portion of a loan or extension of credit that represents accrued or discounted interest.

§ 32.109 Loans to or guaranteed by general obligations of a State or political subdivision.

(a) A loan or extension of credit to a bank customer which is guaranteed or fully secured by a "general obligation" of any State or political subdivision thereof, within the meaning of 12 CFR 1.3(g), is not considered an obligation of the customer for purposes of 12 U.S.C. 84. The lending bank should obtain the opinion of competent counsel that the guarantee or collateral is a valid and enforceable obligation of the public body.

(b) A loan or extension of credit to a State or political subdivision thereof is not subject to any limitation based on capital or surplus if the loan or extension of credit constitutes a "general obligation" of the State or political subdivision within the meaning of 12 CFR 1.3(g). The lending bank should obtain the opinion of competent counsel that the loan or extension of credit is a valid and enforceable obligation of the borrower.

§ 32.110 Loans to industrial development authorities.

A loan or extension of credit to an industrial development authority or similar public entity created for the purpose of constructing and leasing a plant facility, including a health care facility, to an industrial occupant is not a loan or extension of credit to the authority for the purposes of 12 U.S.C. 84 if: (a) the bank relies on the credit of the industrial occupant in making the loan; (b) the authority's liability with respect to the loan is limited so as to whatever interest it has in
the particular facility; (c) the authorization of the bank as security for the loan or a promissory note from the lessee to the bank provides a higher order of security than the assignment of a lease; and (d) the industrial occupant's lease rentals are assigned and paid directly to the bank.

A loan or extension of credit meeting the above criteria will be deemed a loan or extension of credit to the lessee and will be combined with other obligations of the lessee for purposes of section 84.


The lending limits prescribed by 12 U.S.C. 84 are separate and distinct from the investment limits prescribed by 12 U.S.C. 24. Accordingly, a national bank may make loans or extensions of credit to one borrower up to the full amount permitted by 12 U.S.C. 84 and also hold eligible investment securities of the same obligor up to the full amount permitted by 12 U.S.C. 24. In order for a security to be an "investment security" it must be eligible for investment by a national bank in accordance with the standards set forth in 12 CFR Part 1.

**PART 32—DEPOSITION OF UNCLAIMED PROPERTY RECOVERED FROM CLOSED NATIONAL BANKS**

**§ 32.1 Authority.**

The Office of the Comptroller of the Currency, Treasury, of the particular facility; (c) the authorization of the bank as security for the loan or a promissory note from the lessee to the bank provides a higher order of security than the assignment of a lease; and (d) the industrial occupant's lease rentals are assigned and paid directly to the bank. A loan or extension of credit meeting the above criteria will be deemed a loan or extension of credit to the lessee and will be combined with other obligations of the lessee for purposes of section 84.


The lending limits prescribed by 12 U.S.C. 84 are separate and distinct from the investment limits prescribed by 12 U.S.C. 24. Accordingly, a national bank may make loans or extensions of credit to one borrower up to the full amount permitted by 12 U.S.C. 84 and also hold eligible investment securities of the same obligor up to the full amount permitted by 12 U.S.C. 24. In order for a security to be an "investment security" it must be eligible for investment by a national bank in accordance with the standards set forth in 12 CFR Part 1.

**PART 32—DEPOSITION OF UNCLAIMED PROPERTY RECOVERED FROM CLOSED NATIONAL BANKS**

§ 32.1 Authority.

§ 32.3 Purpose.

§ 32.4 General requirements and procedures for filing claims.

§ 32.6 Processing of claims forms.

§ 32.7 Disposition of remaining property.

§ 32.8 Liability of the Office.

**Authority:** 13 U.S.C. 316.

**Source:** 68 FR 20007, June 30, 2003, unless otherwise noted.

**§ 32.1 Authority.**


**§ 32.3 Purpose.**

The purpose of this part is to establish procedures to govern the disposition of unclaimed property in the possession or custody of the Office that was recovered from insolvent national banks and banks in the District of Columbia closed before and during the 1930's. Information regarding the filing and processing of claims and the disposition of property is included.

**§ 32.4 Definitions.**

For purposes of this part, the term: "Bank" means a national banking association or a bank located in the District of Columbia subject to the supervision of the Office that was closed before or during the 1930's and from which unclaimed property was recovered by a receiver and delivered into the possession or custody of the Office.

"Bank customer" means the person or entity who appears from the records of the receivers appointed by the Office to be the last known owner of the unclaimed property or in whose name the property was held by the bank.

"Claim" means a written assertion of lawful entitlement to, or custody or possession of, unclaimed property that is filed in accordance with requirements established by the Office.

"Claimant" means any person or entity, including a state under its applicable statutory law, asserting a demonstrable legal interest in title to, or custody or possession of, unclaimed property.

"Office" means the Office of the Comptroller of the Currency.

"Unclaimed property" means any document, article, item, asset, other property, or the proceeds thereof, recovered from a safe deposit box or other safekeeping arrangement with a bank that is in the possession, custody, or control of the Office in its capacity as successor to a receiver of the bank.

**§ 32.6 General requirements and procedures for filing claims.**

(a) General requirements. Any person, including an entity or a state, that may have a legal interest in title
Attachment III to TB 32

July 18, 1989 Notice of Proposed Rulemaking
(Proposed Amendments to Temporary Rule of June 24, 1988)
chapter, and §§ 70.7 (a) through (f), §§ 70.8, and §§ 70.32, 70.42, 70.51 to 70.56, inclusive, §§ 70.60 to 70.62, inclusive, and §§ 70.7 of Part 70 of this chapter, and to the provisions of Parts 19, 20 and 21 and Subpart B of Part 34 of this chapter. In addition, any person engaging in activities in non-agreement States or in offshore waters under the general licenses provided in this section:

Dated at Rockville, MD, this 12th day of July, 1989.

For the Nuclear Regulatory Commission,

Samuel J. Challa,
Secretary of the Commission.

[FR Doc. 89-17022 Filed 7-17-90; 8:45 am]
BILLING CODE 7680-01-M

DEPARTMENT OF THE TREASURY
Comptroller of the Currency

12 CFR Part 32
(Docket: No. 89-7)

National Bank Lending Limits

AGENCY: Office of the Comptroller of the Currency.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (the "OCC") is proposing to amend a temporary rule (the "Temporary Rule"), which revised the OCC's regulation concerning national bank lending limits with respect to the treatment of loan commitments. In issuing the Temporary Rule, the OCC emphasized in the preamble that it would provide relief for national banks that have experienced a decline in their capital, and hence, in their lending limits, after entering into loan commitments. Nonetheless, the substantive provisions of the Temporary Rule were applicable to all national banks.

In response to comments received which objected to the impact of the Temporary Rule on banks that have not experienced a capital decline, the OCC is proposing to amend the Temporary Rule. This amendment is intended to revise and clarify the effect of the rule on the loan commitments of national banks that have not experienced a decline in capital, by restoring some flexibility to banks in managing their loan commitments relative to their lending limits.

Although the Temporary Rule was effective when it was published, on June 24, 1988, this amendment proposes a modified transition period. As part of this transition period, the OCC proposes not to take administrative action to enforce the Temporary Rule against banks until the effective date of a final rule. However, this amendment does not propose any change to the effective date of the Temporary Rule or to the retroactive validation of loan commitments made prior to the effective date of the Temporary Rule, that were within a bank's lending limit when made. During this modified transition period, the OCC expects all national banks to become familiar with the Temporary Rule and its revisions and to implement their lending practices as necessary.

DATE: Comments must be received by September 19, 1989.

ADRESSER: Comments should be directed to: Docket No. 89-7, Communications Division, Fifth Floor, Office of the Comptroller of the Currency, 480 F. E. Plaza East, SW., Washington, DC 20229; Attn: Jackie England. Comments will be available for public inspection and photocopying at the same location.

FOR FURTHER INFORMATION CONTACT: Ellen C. Starr or Deborah Katz, Attorneys, Legal Advisory Services Division, (202) 447-1800; or Jon A. Negy or William C. Kerr, National Bank Examiners, Supervision Policy/Research Division (202) 447-1104.

SUPPLEMENTARY INFORMATION

Drafting Information

The principal drafters of this document were Ellen C. Starr, Attorney, Legal Advisory Services Division, and William C. Kerr, National Bank Examiners, Supervision Policy/Research Division.

Background

National banks are subject to a statutory limitation on the "total loans and extensions of credit" as "* * * in a person outstanding at one time." 12 U.S.C. section 32. Section 32 defines "loans and extensions of credit" as including "all direct or indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds or repayable from specific property pledged by or on behalf of the person." * * * 12 U.S.C. section 32(1)(l). In addition, the term "loans and extensions of credit" includes, "to the extent specified by the Comptroller of the Currency,* * * any liability of a national banking association to advance funds to or on behalf of a person pursuant to a contractual commitment." * * * 12 U.S.C. section 32(1)(l). The OCC issued a regulation on national bank lending limits. See 12 CFR Part 32 (1988).

At Part 32, the OCC generally restated the statutory definition of "loans and extensions of credit," and included within that definition a "contractual commitment to advance funds." See 12 CFR 32.2(a). A "contractual commitment to advance funds" was separately defined, and excluded "undischarged loan funds and loan commitments not yet drawn upon" which were not otherwise the equivalent of a contractual commitment to advance funds as defined in the regulation. Id. at § 32.2(d). Thus, prior to the Temporary Rule, a loan commitment that was not the equivalent of a "contractual commitment to advance funds" was not considered a loan or extension of credit, such that a national bank's lending limit was not applicable to it, until funds were actually disbursed under the commitment.

The OCC adopted this definition of a "contractual commitment to advance funds" largely in response to comments which advocated that loan commitments and undischarged loan funds should not be subject to the lending limit until the funds were disbursed. See 50 FR 10604 (April 12, 1985). Nonetheless, the OCC expressed some concern that banks might not monitor commitments to ensure that they were properly managed. 32 FR at 10604. For example, the OCC noted that there was no legal prohibition against a national bank's entering into a loan commitment with a borrower which, alone or in combination with other obligations of that borrower, would exceed the bank's lending limit if funded. Id. Further, the OCC noted that the opportunity to generate fee income or the desire to retain a large borrower as a customer may create an incentive for a bank to provide a loan commitment in excess of its lending limit, where the bank speculated that its future capital levels would increase or that it would be able to sell any overline to another bank at the time of funding the commitment. Id.

Unfortunately, a number of banks experienced problems under the definition of a "contractual commitment to advance funds" established by Part 32. The problems involved the question of which loan commitments constituted "contractual commitments to advance funds and extensions of credit," subject to the limitations of section 32, but also when a bank's lending limit was applied to such a loan commitment, i.e., to determine its legality under section 32.

Section 32 does not expressly address when a bank's lending limit is applied to a loan or extension of credit, to
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a commitment is treated as a loan, it
must be included by the bank in computing its lending limit for all subsequent loans to the borrower." Id. [Emphasis added.] The effect of the
Temporary Rule, then, was to allow a bank to fully fund a loan commitment that was within the bank’s lending limit when made, even if the bank’s lending limit subsequently declined.

The Temporary Rule also addressed
"overline" loan commitments, i.e., those loan commitments which would exceed the bank’s lending limit if funded when made. Id. The OCC stated that such commitments would still be permitted, because they would not be treated as "loans and extensions of credit" until funded. Thus, "if a bank has made a binding, written loan commitment to one borrower that, in combination with all other outstanding loans and commitments to that borrower, is in excess of its lending limit on the day of the commitment, the commitment is not a loan on that date." Id.

In that event, "the lending limit must be calculated and applied on the date funds are advanced, even if capital subsequently is reduced." Id. A bank entering into such an "overline" loan commitment would violate section 84 if it subsequently funded the overline commitment in an amount which, alone or in combination with all other loans and extensions of credit outstanding to the borrower at the time of funding, exceeded the bank’s lending limit. Id.

Even in issuing the Temporary Rule, however, the OCC cautioned that "[w]hen a bank is requested to enter into an outstanding binding commitment which may exceed its lending limit now or in the future, prudent banking practice would dictate that the bank take precautions to permit escape from such a dilemma." Id. at 23752. As an example, the OCC suggested including "a protective clause in the commitment which would release the bank from its obligation if funding the commitment would result in an overline." Id.

The Temporary Rule achieved its
substantive purpose through an amendment to the definition of a "contractual commitment to advance funds." The Temporary Rule deleted that portion of the definition of a "contractual commitment to advance funds" which excluded "undisbursed loan funds and loan commitments not yet drawn upon" which were not otherwise the equivalent of a contractual commitment to advance funds. In its place, the Temporary Rule added in part: "A binding, written commitment to lend is a 'contractual commitment to advance funds' under this part if it and all other outstanding loans (including other binding commitments) to the borrower are within the bank’s lending limit on the date of the commitment." Id. at 23753-54.

In order to provide the swiftest relief, the Temporary Rule was made effective on publication, i.e., on June 24, 1988. Id. at 23753. In addition, the Temporary Rule was made retroactive, to permit "a bank to honor all legally binding commitments which were made in good faith prior to the effective date of the amendment and were within the bank’s lending limit when made, even if the advances would cause the bank to exceed its present lending limit if they were treated as loans." Id. at 23752. The Preamble specifically stated, however, that the Temporary Rule would not "retroactively validate advances that were made prior to the effective date of the new rule and that exceeded the lending limit at that time." Id.

Summary of Comments Received on the
Temporary Rule: Agency Action

Although the Temporary Rule was
made effective on publication, the OCC requested comment on it, providing a 90-day comment period which ended on September 22, 1988. Id. at 23752. During the comment period, the OCC received only 13 comment letters from national banks and one trade association. Of these letters, only one opposed the intent of the Temporary Rule contending that it encouraged the perpetuation of poor management practices. This commenter suggested that banks make use of protective clauses in loan commitments. As an alternative, if the OCC chose to issue the Temporary Rule as a final rule, this commenter argued that all loan commitments should be treated consistently, i.e., that an "overline" commitment should be treated as an illegal loan on the day it was entered into, rather than on the day it was funded.

The remaining 12 comment letters supported the intent of the Temporary Rule and expressed appreciation to the OCC for responding to the dilemmas imposed upon banks which had experienced, or might experience, an unexpected decline in capital. Some commenters offered minor suggestions for amending the Temporary Rule. Most notable however, were four comments that addressed the effect of the Temporary Rule on banks which had not experienced a decline in capital; each of these commenters observed that the adverse impact of the Temporary Rule on "healthy" banks. These comments are discussed below.
Three commenters suggested that the Temporary Rule be expanded, to apply to binding oral commitments in addition to binding written loan commitments. The OCC has considered this suggestion, but has chosen to maintain the present scope of the Temporary Rule, which applies to binding written loan commitments only. Although the OCC recognizes that in some states, some oral commitments to lend may in fact be binding, the binding nature of these commitments is often determined only through litigation. With the Temporary Rule, the OCC has for the first time offered a bank a method of protecting itself and its outstanding loan commitments from a subsequent decline in the bank’s capital. As a prudent banking practice and for ease of monitoring compliance with section 84’s lending limit, the OCC is requiring banks which would take advantage of the protection provided by the Temporary Rule to enter into binding written commitments to lend, rather than oral commitments, even where that oral loan commitment may be supported by bank documentation.

One commenter requested that any final rule be clarified to permit renewals of loan commitments, including unfunded commitments, that were within the bank’s legal lending limit when made, even though the commitment may be greater than the lending limit at the time of its renewal. In response to this comment, the OCC has considered the effect of the Temporary Rule on renewals of loan commitments generally, whether funded or unfunded.

The OCC has previously recognized that the renewal of an existing outstanding loan is not an advance of funds within the meaning of section 84. Thus, the OCC has allowed a bank to renew an outstanding loan, even where the bank’s lending limit has declined such that a new loan, if made as of the date of the renewal, would have resulted in a violation of the bank’s lending limit. The renewal of a loan which is in excess of the bank’s presently applicable lending limit, but which was legal when made, does not constitute a violation of section 84; rather, the loan is considered “nonconforming.” As an integral part of the renewal of a loan in excess of the bank’s presently applicable lending limit, however, the OCC has consistently required that the bank make every effort to bring the loan into conformance with its lending limit through the sale of participations or other loan restructuring prior to renewing the loan.

In that the Temporary Rule deems a loan commitment which is within a bank’s lending limit when made to be a loan, a question was raised about the treatment of a renewal of an unfunded or partially funded loan commitment which was within the bank’s lending limit when made but which would exceed the bank’s lending limit if entered into on the date of renewal. An argument may be made that an underwrite loan commitment should be treated as a loan in all respects, allowing for a renewal of the commitment even after the bank’s capital has declined. However, the OCC views the expiration of an unfunded or partially funded loan commitment, or any restructuring of the commitment, as an opportunity for a bank to bring that loan commitment into conformance with the bank’s then-applicable lending limit. Thus, where a bank has entered into and funded or partially funded a loan commitment which was within the bank’s lending limit when made, and the bank’s lending limit subsequently declines, the bank may renew that portion of the loan commitment which has been funded, as though the loan commitment were a term loan. Alternatively, the bank may enter into a new loan commitment, which, with all other outstanding obligations of the borrower, is within its new lower lending limit. As a loan commitment within the bank’s lending limit when made, this commitment would be construed as a loan, which subsequently may be fully funded, even if the bank’s capital and lending limit should again decline. The OCC has determined that an unfunded loan commitment, or the unfunded portion of any loan commitment, which would exceed the bank’s lending limit if made on the date of renewal, may not be renewed. If a bank renews an unfunded loan commitment, which renewal is in excess of its legal lending limit when made, the renewal will be construed as an overrun commitment, not subject to the protections of the Temporary Rule. Such a renewal does not of itself constitute a violation of Section 84, however; the bank will violate Section 84 only when funds provided pursuant to an overrun commitment exceed the bank’s lending limit. If the bank renews the funded portion of a partially funded loan commitment which was within the bank’s lending limit when made, but which now exceeds the bank’s lending limit, the loan will be considered “nonconforming” to the extent that funds disbursed prior to the date of the renewal exceed the bank’s lending limit as of the date of the renewal. If the bank advances additional funds, however, the bank will exceed its lending limit, and hence, violate Section 84.

Another commenter, while agreeing with the intent of the Temporary Rule, suggested that the OCC take action less formally, either through an interpretive ruling or through an internal advisory letter to national bank examiners. However, the Temporary Rule amended the OCC’s definition of a “contractual commitment to advance funds” stated at 12 CFR § 32.2(f). The OCC has determined that a regulation is the appropriate mechanism by which to implement the intent of the Temporary Rule. Further, issuing the Temporary Rule as a regulation is consistent with the OCC’s continuing effort to consolidate its existing regulations and interpretive rulings on national bank lending limits into one comprehensive regulation.

As noted above, four comments addressed the effect of the Temporary Rule on a bank which had not experienced a decline in capital. Three of these comments, each from a national bank, specifically objected to the Temporary Rule, generally protesting that it restricted the flexibility of banks in managing their loan commitments relative to their lending limits. One national bank commenter stated that the Temporary Rule imposed “new and burdensome constraints on the ability of all national banks to manage their relationships with substantial borrowers.” It is in response to these comments that the OCC is proposing a revision of the Temporary Rule.

Each of the three comment letters which specifically objected to the effect of the Temporary Rule on the lending practices of banks which had not experienced a decline in capital did so for the same reason, which may be described with an example. Thus, assume that a national bank has a lending limit of $1,000,000.00. The bank has one loan, in the amount of $5,000,000.00, outstanding to Borrower. At Borrower’s request, the bank enters into a legally binding written commitment with Borrower for an additional $5,000,000.00, to be funded at a later date. After entering into the loan commitment, but before it is funded, Borrower requests a short term loan of $10,000.00, from the bank. Prior to the Temporary Rule, the bank would have been allowed to extend the short term credit requested without exceeding its lending limit. Under the Temporary Rule, however, the $5,000,000.00 loan commitment must be counted as a loan when made, because as of that date it was within the bank’s lending limit. By
entering into the commitment, the bank has reached its lending limit, and may not extend the additional short term credit Borrower requested without violating Section 84. The example above demonstrates that, as a result of the Temporary Rule, healthy banks may not make some extensions of credit which they could have made prior to the Temporary Rule. Thus, the Temporary Rule has been seen as placing an additional and unnecessary burden on healthy banks. In response to these objections, the OCC is proposing to amend the Temporary Rule.

The proposed amendment is intended to allow a bank which has entered into a loan commitment with a borrower, which was within the bank's lending limit when made, to extend additional credit to that borrower, when aggregated with all other funds actually disbursed to the borrower, does not exceed the bank's lending limit. In proposing this revision, the OCC has recognized that most banks do carefully and effectively monitor funds actually disbursed to a borrower, thereby avoiding a violation of Section 84, even though the nominal amount of credit available to that borrower, through loans or loan commitments, exceeds the bank's lending limit.

Summary of the Proposed Revision of the Temporary Rule. With Examples

Three of the commenters objecting to the impact of the Temporary Rule on banks which had not experienced a decline in capital proposed an alternative to the Temporary Rule's treatment of loan commitments. These commenters suggested that a bank not be required to consider a loan commitment which was within the bank's lending limit when made as a loan, which, when combined with all other outstanding obligations of the borrower, must be within the bank's lending limit. Rather, these commenters proposed that the bank be allowed to make an election, choosing whether a loan commitment which is within the bank's lending limit when made should be treated as a loan as of the day it is entered into or as of the day it is funded. Although the OCC considered that alternative, the OCC has rejected it in favor of this proposed revision. In rejecting the suggestion offered by the commenters, the OCC considered that a bank may not be in the best position, at the time of entering into an underlne loan commitment, to determine whether that commitment should be treated as a loan or as an underlne commitment. Such a decision may better be made after the loan commitment has been entered into.
51,000,000.00 loan, the bank has 
effectively elected to disqualify its July 
1, 1988, loan commitment. As a 
disqualified underline commitment, the 
loan commitment may subsequently be 
funded only to the extent of the bank's 
lending limit on the date of funding. 
Thus, if Borrower later seeks to have the 
loan commitment funded, the bank may 
provide only $4,000,000.00 without 
violating section 84. Of course, the bank 
may attempt to sell participations for the 
remaining $1,000,000.00 of the loan 
commitment. 

Note that if Borrower had requested a 
short term loan of $500,000.00 on 
August 1, 1988, rather than a loan, the 
July 1, 1988, loan commitment would not 
have been disqualified. The proposed 
revision provides that a qualifying loan 
commitment may only be disqualified by 
a subsequent loan or extension of credit 
which would cause the bank to exceed 
its lending limit when combined with 
any underline commitments to lend and 
all other outstanding obligations of the 
borrower. A loan commitment of 
$1,000,000.00, entered into on August 1, 
1988, would have been an Artline 
commitment. Since an Artline 
commitment is not considered a loan or an 
extension of credit until it is funded, the 
Artline commitment could not have 
triggered the disqualification of the July 
1, 1988, loan commitment. 

Example II: This example illustrates the 
consideration that must be given to a 
nonconforming loan, in excess of the 
bank's lending limit, as result of the 
bank having fully funded a qualifying 
loan commitment, after the bank has 
experienced a decline in its capital, and 
hence, its lending limit. Assume that a 
national bank has a lending limit of 
$10,000,000.00. On June 1, 1988, the bank 
had one loan, in the amount of 
$5,000,000.00, outstanding to Borrower. On 
July 1, 1988, at Borrower's request, the 
bank enters into a legally binding 
written loan commitment with Borrower 
for an additional $5,000,000.00, to be 
funded at a later date. As this loan 
commitment, when combined with all 
other outstanding obligations of 
Borrower to the bank, is within the 
bank's lending limit when it is made, it 
qualifies for the protection of the 
Temporary Rule. Unless it is 
 disqualified, this loan commitment may 
be fully funded, notwithstanding a 
subsequent decline in the bank's lending 
limit. 

On October 1, 1988, Borrower requests 
that the bank fully fund its July 1, 1988, 
loan commitment. By this time, the 
bank's lending limit has declined to 
$7,000,000.00. As the loan commitment 
was within the bank's lending limit 
when made, and has not subsequently 
been disqualified from the protection of 
the Temporary Rule, the bank may fully 
fund this loan commitment without 
violating section 84. However, when the 
bank fully funds that commitment, it will 
have total extensions of credit 
outstanding to Borrower of 
$10,000,000.00, exceeding its lending 
limit by $3,000,000.00. 

On November 1, 1988, Borrower 
requests a second loan commitment of 
$500,000.00 from the bank. As the bank has 
exceeded its lending limit to Borrower, 
and has nonconforming extensions of credit 
outstanding to Borrower, the bank 
may not make this loan without 
violating section 84. 

On learning of the bank's inability to 
extend this credit to Borrower, Borrower 
noted that on November 15, 1988, it will 
repay the first of five $1,000,000.00 
installments of principal on its 
$5,000,000.00 loan. Borrower further 
noted that its present outstanding 
obligations, at $10,000,000.00, do not 
result in a violation of section 84. Thus, 
Borrower asks whether, on receiving 
that $1,000,000.00 payment, the bank 
may then make the requested 
$500,000.00 available to Borrower, for 
total outstanding credit to Borrower of 
$9,500,000.00. 

Notwithstanding a reduction in 
Borrower's outstanding obligations, to 
an amount less than the $10,000,000.00 
which the bank has extended to 
Borrower without violating section 84, 
the bank may not make the requested 
$500,000.00 available to Borrower. Even 
though Borrower will reduce its total 
outstanding obligations to Borrower of 
$9,500,000.00, the bank will not bring its 
total extensions of credit to 
Borrower at this time. 

Proposed Revisions to the Temporary 
Rule 
In order to achieve the results 
intended by this revision, the proposal 
would amend the definition of a 
"qualifying commitment to advance 
funds," at 12 CFR 32.2(d), to include a 
"qualifying commitment to lend." The 
revision would also add a definition of a 
"qualifying commitment to lend" to the 
definitions provided by Part 32. The 
definition of a "qualifying commitment to lend" notes that all written legally 
binding loan commitments, which, when 
combined with all other outstanding 
obligations of the borrower, are within 
the bank's lending limit when made, are 
qualifying commitments to lend. The
PART 32—LENDING LIMIT

1. The authority citation for Part 32—LENDING LIMIT continues to read as follows:

2. Section 32.2, paragraph (f), is revised, and a new paragraph (f) is added, to read as follows:

§ 32.2 Definitions.

(d) "Contractual commitment to advance funds" means (1) an obligation to make payments (directly or indirectly) to a third party contingent upon default by the bank's customer in the performance of an obligation under the terms of that customer's contract with the third party or upon some other stated condition, (2) an obligation to guarantee or stand as a surety for the benefit of a third party, or (3) a qualifying commitment to lend (as defined at paragraph (f) of this section). This definition also does not include equivalent to a contractual commitment to advance funds, as amended by the Temporary Rule on National Bank Lending Limits, 55 FR 20973 (June 24, 1990), the Comptroller of the Currency will not take administrative enforcement action against the bank, its officers, directors, or employees for a violation of 12 U.S.C. § 84. This policy will apply to loans and extensions of credit made from the date the Temporary Rule on National Bank Lending Limits became effective, June 24, 1990, until [insert 60 days after the effective date of the final rule].

Date: July 11, 1993.
Robert L. Clarke.
[Comptroller of the Currency.]  

(Fr Doc. 90-10704 Filed 07-17-90, 8:40 am)  

BILLING CODE 4810-32-M

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

14 CFR Part 39

Airworthiness Directives; Aerospatiale Model ATR42 Series Airplanes  

AGENCY: Federal Aviation Administration (FAA), DOT.  

SUMMARY: This notice proposes to revise an existing airworthiness directive (AD), applicable to Aerospatiale Model ATR42 series airplanes, which currently prohibits use of the autopilot when operating in icing conditions. That action was prompted by an incident in which a Model ATR42 airplane operating in icing conditions (believed to have been freezing rain) experienced roll excursions and autopilot disconnect. This condition, if not corrected, could result in loss of control of the airplane. This action would require installation of vortex generators on the upper wing surface as a terminating action to the prohibition of use of the autopilot when operating in icing conditions.

DATE: Comments must be received no later than September 8, 1993.

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 89-NM-101-AD, 17900 Pacific Highway South, C-48000, Seattle, Washington 98128. The applicable service information may be obtained from Aerospatiale, 216 Route des Paysans, 31800 Toulouse, Cedex 03, France. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Standardization Branch, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Robert C. McCracken, Standardization Branch, ANM-112, telephone (206) 431-7897. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68906, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Interested persons wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 89-NM-101-AD." The post card will be date/time stamped and returned to the commenter.