Discussed within these subsections are topics associated with regard to the overall bank holding company organization. Included is general information, inspection objectives and procedures, and in some instances references to laws, interpretations, and Board orders. The primary topics addressed are the supervision of subsidiaries, grandfather rights, commitments, extensions of credit to BHC officials, management information systems, taxes, funding, control and ownership, reporting by foreign and domestic banking organizations, formal corrective actions, sharing of criminal referral information, investment transactions, recognition and control of risk, purchase and sale of U.S. Government guaranteed loans, and venture capital.

WHAT'S NEW IN THIS REVISED SECTION

This section is revised to include a revision of the Federal Deposit Insurance Act (FDIA) that requires a BHC or SLHC to serve as a "source of strength" to its depository institution subsidiaries. See section 38A of the FDIA and section 616(d) of the Dodd-Frank Act.

The relative merit of the degree of supervision is dependent upon a number of factors, and must be analyzed in light of efficiency and operating performance. The degree and nature of control over subsidiary organizations in a holding company system usually falls between two extremes: a tightly controlled, centralized network similar to a branch system, or a loosely controlled, decentralized system with each subsidiary operating autonomously. A bank holding company might originate as a "shell" corporation organized by investors interested in purchasing a bank, or by a bank interested in reorganizing into a holding company structure in order to expand through acquisition of nonbank concerns or other banks. The management and directorate of such a holding company are often the same as that of the bank. As the holding company expands through acquisitions, the parent may continue to exercise control through the staff of the lead bank, or may form a separate staff to overview the operations of all subsidiaries. The relative merit of the degree of supervision is dependent upon a number of factors, and must be analyzed in light of efficiency and operating performance.

The level at which policies are established and supervised, the frequency of contact between the parent and subsidiaries, and the extent to which officers and directors of the parent serve also as officers and directors of the subsidiary organizations are indicative of the level of control exercised by the parent. A centralized bank holding company is characterized by the placement of directors and officers of the parent company (or those of the lead bank) in each of its subsidiaries, with frequent group meetings held between the officers of the lead bank or holding company and those of the subsidiary organizations. While this is an efficient method of operation, this type of organization builds in the potential for conflicts of interest for those individuals who serve in dual capacities. Corporate policies should recognize this potential and provide guidance for resolution. The overriding principle should be that *no* member of the bank holding company organization should be disadvantaged by a transaction with another affiliate. Management of the investment portfolio, budgets, tax planning, personnel, correspondent relationships, loans and loan participations, and liability management are usually controlled by the parent or lead bank in a centralized system.

A decentralized system is one in which the banks act independently of the parent company, with infrequent contacts with affiliates, placement of parent or lead bank directors and officers in less than a majority of the banks within the system and infrequent reporting by subsidiaries concerning investments and operating performance. The bank holding company might act only in a minor advisory capacity. In such a decentralized system each subsidiary operates as a relatively autonomous unit, with authority and responsibility for certain actions delegated by the parent to the board and/or chief executive officer of each subsidiary.

It is the responsibility of the directors and management of the parent company to establish and supervise the policies of subsidiaries, either directly or through delegation of authority. The importance of written policies in a delegated, decentralized organization cannot be overemphasized, and the selection of qualified officers to carry out policies is equally important. If written policies have not been developed by the holding company, the examiner should recommend that major policies be written and communicated to subsidiaries. Policies should ensure that subsidiaries are not managed for cross purposes and should avoid concentrations of risks on a consolidated basis.

2010.0.1 POLICY STATEMENT ON THE RESPONSIBILITY OF BANK HOLDING COMPANIES TO ACT AS SOURCES OF STRENGTH TO THEIR SUBSIDIARY BANKS

The Board is concerned about situations where a bank has been threatened with failure notwithstanding the availability of resources to its parent bank holding company. In order to assure that the Board's policy that bank holding companies serve as sources of financial strength to subsidiary banks is understood by bank holding companies, the Board has issued a

general policy statement reaffirming and articulating these principles, and confirming that the policy applies to failing bank situations. This long-standing policy has been recognized by the Supreme Court in its decision in *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978), and has been incorporated explicitly in the Board's Regulation Y, 12 C.F.R. 225.4(a)(1).

A fundamental and long-standing principle underlying the Federal Reserve's supervision and regulation of bank holding companies is that bank holding companies should serve as sources of financial and managerial strength to their subsidiary banks. The Federal Deposit Insurance Act (FDIA) requires that a bank holding company or savings and loan holding company act as a source of strength to its depository institution(s). The term ''source of strength'' means the ability of a company that directly or indirectly owns or controls an insured depository institution to provide financial assistance to such insured depository institution in the event of financial stress to the insured depository institution. (See the FDIA, section 38A(a)–(c).) It is the policy of the Board that in serving as a source of strength to its subsidiary banks, a bank holding company should stand ready to use available resources to provide adequate capital funds to its subsidiary banks during periods of financial stress or adversity and should maintain the financial flexibility and capital-raising capacity to obtain additional resources for assisting its subsidiary banks in a manner consistent with the provisions of this policy statement.

Since the enactment of the Bank Holding Company Act in 1956, the Board has formally stated on numerous occasions that a bank holding company should act as a source of financial and managerial strength to its subsidiary banks. As the Supreme Court recognized, in the 1978 *First Lincolnwood* decision, Congress has expressly endorsed the Board's long-standing view that holding companies must serve as a "source of strength to subsidiary financial institutions."[1] In addition to frequent pronouncements over the years and the 1978 Supreme Court decision, this principle has been incorporated explicitly in Regulation Y since 1983. In particular, Section 225.4(a)(1) of Regulation Y provides that:

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

The important public policy interest in the support provided by a bank holding company to its subsidiary banks is based upon the fact that in acquiring a commercial bank, a bank holding company derives certain benefits at the corporate level that result, in part, from the ownership of an institution that can issue federally-insured deposits and has access to Federal Reserve credit. The existence of the federal "safety net" reflects important governmental concerns regarding the critical fiduciary responsibilities of depository institutions as custodians of depositors' funds and their strategic role within our economy as operators of the payments system and impartial providers of credit. Thus, in seeking the advantages flowing from the ownership of a commercial bank, bank holding companies have an obligation to serve as a source of strength and support to their subsidiary banks.

An important determinant of a bank's financial strength is the adequacy of its capital base. Capital provides a buffer for individual banking organizations to absorb losses in times of financial strain, promotes the safety of depositors' funds, helps to maintain confidence in the banking system, and supports the reasonable expansion of banking organizations as an essential element of a strong and growing economy. A strong capital cushion also limits the exposure of the federal deposit insurance fund to losses experienced by banking institutions. For these reasons, the Board has long considered adequate capital to be critical to the soundness of individual banking organizations and to the safety and stability of the banking and financial system.

Accordingly, it is the Board's policy that a bank holding company should not withhold financial support from a subsidiary bank in a weakened or failing condition when the holding company is in a position to provide the support. A bank holding company's failure to assist a troubled or failing subsidiary bank under these circumstances would generally be viewed as an unsafe and unsound banking practice or a violation of Regulation Y or both.

Where necessary, the Board is prepared to take supervisory action to require such assistance. Finally, the Board recognizes that there may be unusual and limited circumstances where flexible application of the principles set forth in this policy statement might be neces-

1. *Board of Governors* v. *First Lincolnwood Corp.,* 439 U.S. 234, 252 (1978), citing S. Rep. No. 95–323, 95th Cong., 1st Sess. 11 (1977).

sary, and the Board may from time to time identify situations that may justify exceptions to the policy.

This statement is not meant to establish new principles of supervision and regulation; rather, as already noted, it builds on public policy considerations as reflected in banking laws and regulations and long-standing Federal Reserve supervisory policies and practices. A bank holding company's failure to meet its obligation to serve as a source of strength to its subsidiary bank(s), including an unwillingness to provide appropriate assistance to a troubled or failing bank, will generally be considered an unsafe and unsound banking practice or a violation of Regulation Y, or both, particularly if appropriate resources are on hand or are available to the bank holding company on a reasonable basis. Consequently, such a failure will generally result in the issuance of a cease and desist order or other enforcement action as authorized under banking law and as deemed appropriate under the circumstances.

2010.0.2 BOARD ORDER REQUESTING A WAIVER FROM THE BOARD'S SOURCE OF STRENGTH POLICY

On December 23, 1991, the Board approved an application of a BHC to eventually acquire 100 percent of the outstanding stock of another BHC under a 5 year option. Initially, the BHC would acquire approximately 26 percent of the acquiree's total capital by purchasing a 15-year subordinated capital note agreement. It would then have the option to acquire all of the remaining stock within 5 years. The acquiring BHC requested that the Board waive any requirement of the Board that it serve as a source of financial strength to the subsidiary bank (the Board's "Source of Strength" policy) of the BHC acquired until such time that the option is exercised to acquire the actual ownership of all the shares. The Board considered the request and determined that it would not be appropriate to waive the responsibility to serve as a source of financial strength to the bank in this case. The Board noted that the option agreement and the capital note agreement together provide a mechanism for the acquiring BHC to exert control over the future ownership of the acquired BHC and many of the most important management decisions. Refer to 1992 FRB 159 and the F.R.R.S. at 4-271.3.

2010.0.3 INSPECTION OBJECTIVES

1. To determine whether the board of directors of the parent company is cognizant of and performing its duties and responsibilities.
2. To determine the adequacy of written policies and compliance with such policies by the parent and its subsidiaries.
3. To determine whether the board is properly informed as to the financial conditions, trends and policies of its subsidiaries.
4. To determine the level of supervision over subsidiaries and whether the supervision as structured has a beneficial or detrimental effect upon the subsidiaries.

2010.0.4 INSPECTION PROCEDURES

1. Determine if the holding company maintains its own staff, or whether the holding company management and directorate are the same as those of a subsidiary.
2. Determine whether the board of directors of the parent company reviews the audit reports, regulatory examination reports, and board minutes of its subsidiaries.
3. Determine the extent to which subsidiaries rely upon the parent for investment and lending guidance.
4. Determine which specific functions and decisions are performed only at the parent company level.
5. Determine the extent to which representatives of the parent company serve as officers and/or directors of subsidiaries.
6. Review minutes of the board and executive committees of the parent to determine whether the parent company reviews loan delinquency reports, comparative balance sheets and comparative income statements of the subsidiaries.
7. Review the extent of influence and control over both bank and nonbank subsidiaries.
8. Determine the degree of influence by the parent company over:
   a. Appointment of officers;
   b. Salary administration;
   c. Budget and tax planning;
   d. Capital expenditures;
   e. Dividend policy;
   f. Investment portfolio management;
   g. Loan portfolio management;
   h. Asset/liability and interest rate/risk management.

9. Determine the degree to which management of the subsidiary companies interfaces with management of the parent company to discuss policies.

The responsibility for the performance of the organization rests with the board of directors of the parent company. Parent company management should have policies in place to prevent funding practices that put at risk the welfare of the subsidiary banks or the consolidated organization.

The parent's supervision and control of subsidiary funding activities and the funding between itself and its subsidiaries should be thus evaluated. The parent should be expected to maintain policies for itself and its subsidiaries that provide guidance and controls for funding practices. The presence and wording of funding policies and the degree to which the policies are followed by the subsidiaries, and the effectiveness of the policies in reducing risk to the entire organization should also be assessed.

The importance of the parent's involvement in funding decisions and the need for monitoring and control at the parent level needs to be emphasized. As a minimum, the parent's funding policies should address the following areas:

1. *Capitalization*—The holding company's policy on capital levels should address capital for the bank subsidiaries, the nonbank subsidiaries, and the consolidated organization. The policy for bank and consolidated capital should be consistent with the Board's Capital Adequacy Guidelines and should address the asset quality of the entity in question. The policy for nonbank capital should include maintaining the capital level at industry standards and should also address the asset quality of the subsidiary, the holding company's capital for each entity should address what measures would be taken in the event capital falls below a targeted level.

Capital should also be addressed at the parent company level by specifying the degree of ***double leverage*** that the parent is willing to accept. The parent's capital policy should provide some measure of assessing each individual subsidiary's capital adequacy in the context of the double leverage within the organization.

The capital policies should include the method for calculating dividends from each entity. The amount of dividends from subsidiaries to the parent is affected by the parent's philosophy on the distribution of capital throughout the organization. Some companies tend to keep minimum capital levels in their subsidiary banks by transferring the excess capital to the parent in the form of dividends. The parent then invests these funds for its own benefit, and downstreams the funds as needed. Other companies calculate dividends based strictly on the parent's cash needs and thus keep any excess capital at the bank level.

2. *Asset/Liability Management*—The holding company's policies in the area of *asset/liability management should include interest rate sensitivity matching, maturity matching, and the use of interest rate futures and forwards.* These topics should be addressed for each entity as well as the organization as a whole. It is the parent's responsibility to see that each entity is operating consistently with the corporate goals.

The ***interest rate sensitivity policies*** should be designed to reduce the organization's vulnerability to interest rate movements. Policies concerning the asset/liability rate sensitivity match should not be limited to the subsidiary lead bank. The rate charged on parent company debt and the rate received by the parent on its advances to subsidiaries should also be addressed to monitor the parent's ability to service its debt in the face of changing interest rates. The policy should specify what degree of mismatching is considered acceptable. The interest rate sensitivity matching of the organization should be monitored on a frequent basis through the timely preparation of a matching schedule.

Maturity matching policies should be designed to provide adequate liquidity to the organization. These policies should not be limited to the subsidiary lead bank, since a parent company serving as a funding vehicle for nonbank subsidiaries can have substantial exposure through its advances to these subsidiaries. The holding company's policies should include some measure of the liquidity of the assets in the nonbank subsidiary (determined partially by the quality of these assets), for comparison against the parent's source of funding. The policies should quantify the maximum degree of exposure in the organization that is considered acceptable to management. The reporting in this area should clearly indicate the current exposure and thus the potential for liquidity problems.

The holding company's ***policies addressing interest rate futures and forwards*** should be consistent with the Board's policy in this area. Involvement in this activity should be geared towards hedging against interest rate movements rather than speculating that interest

rates will either increase or decrease. The policy should specify what use of futures and forwards is considered appropriate.

3. *Funding of Nonbank Subsidiaries*—The parent company should have policies addressing how nonbank subsidiaries fund their activities. If the subsidiaries obtain their own funding, market discipline may be a factor in controlling the activities of the subsidiaries. However, the parent cannot rely solely on market discipline due to the risks from interdependence. The parent company is still responsible under the centralized accountability approach to approve and supervise the subsidiaries' funding policies.

If the subsidiaries obtain funds from the parent, the risk from interdependence is increased. The subsidiary is less able to stand alone since it is reliant on the parent for funding. If the parent capitalizes the nonbank subsidiary through borrowed funds, bank capital is put at risk due to the increased exposure of the organization. If the borrowing results in ***double-leverage***, the risk is increased since less "hard" capital is available for support. The parent's policy on advances to nonbank subsidiaries should address this additional risk by specifying the level of borrowings that is considered acceptable relative to nonbank capital and consolidated capital. The terms of the borrowings should also be specified, and should be consistent with the company's asset/liability management policies. The policy should include contingency measures to be used in the event of liquidity problems.

2010.1.1 INSPECTION OBJECTIVES

1. To determine if the parent's funding policies adequately address funding risks to the organization.
2. To determine if the implementation of the parent's policies is effective in controlling funding risks to the organization.
3. To determine if the parent is adequately informed of actual funding practices and decisions.

2010.1.2 INSPECTION PROCEDURES

1. Review the funding policies at the parent and the subsidiary levels.
2. Determine how effectively the policies are implemented throughout the organization.
3. Discuss with management the funding practices of each subsidiary and any interorganizational funding.

WHAT'S NEW IN THIS REVISED SECTION

Effective January 2016, section 2010.2.5 is revised to reference SR-15-17, "Interagency Statement on Prudent Risk Management for Commercial Real Estate Lending" and its attachment. Refer to the Board's December 18, 2015, press release.

2010.2.05 LOAN ADMINISTRATION

The examiner should make a qualitative assessment of the parent's supervision and control of subsidiary lending activities. The System's ability to evaluate the effectiveness of a company's supervision and control of subsidiary lending activities can be strengthened not only by evaluating the parent's role in light of efficiency and operating performance, but also by evaluating the *quality* of control and supervision.

In order to assess quality, there must be a standard measure against which a company's policies can be evaluated. Establishing the minimum areas that a company's loan-administration policies should address will create a standard that will aid in evaluating the quality of the company's control and its supervision of that activity.

Current inspection procedures include the testing of subsidiaries' compliance with a parent company's policies. This section summarizes the parent's responsibilities with regard to supervising subsidiary lending. It defines the internal and external factors that should be considered in the formulation of loan policies and a strategic plan. It also outlines the minimum elements that the lending policies should include.

Internal and external factors that a banking organization should consider when formulating its loan policies and strategic plan are—

1. the size and financial condition of the credit-extending subsidiaries,
2. the expertise and size of the lending staff,
3. the need to avoid undue concentrations of risk,
4. compliance with all respective laws and regulations, and
5. market conditions.

Following are the components that generally form the basis for a sound loan policy:

1. *Geographic limits.* The trade area should be clearly defined and loan officers should be fully aware of specific geographic limitations for lending purposes. Such a policy avoids approval of loans to customers outside the trade area in opposition to primary objectives. The primary trade area should be distinguished from any secondary trade area so that emphasis for each trade area may be properly placed.
2. *Distribution of loans by category.* Limitations based on aggregate percentages of total loans in commercial, real estate, consumer, and other categories are common. Such policies are beneficial; however, they should contain provisions for deviations that are approved by the directorate or a committee. This allows credit to be distributed in relation to the market conditions of the trade area. During times of heavy loan demand in one category, an inflexible loan-distribution policy would cause that category to be slighted in favor of another. Deviations from loan distributions by category may be beneficial but are appropriate only until the risk of further increasing the loan concentration outweighs the benefits to be derived from expanding the portfolio to satisfy credit demand. See component 11, "Concentrations of credit," below.
3. *Types of loans.* The lending policy should state the types of loans that will be made and the maximum amount for each type of loan. The policy should also set forth guidelines to follow in making specific loans. Decisions about the types of loans to be granted should be based on the expertise of the lending officers, the deposit structure, and anticipated creditworthy demands of the trade area. Sophisticated credits or loans secured by collateral that require more than normal supervision should be avoided unless or until there are the necessary personnel to properly administer them. Information systems and internal controls should be in place to identify, monitor, and control the types of credit that have resulted in abnormal loss. The amount of real estate and other types

of term loans should be considered in relation to the amount of stable funds.

4. *Maximum maturities.* The loan policy should call for underwriting standards that ensure realistic repayment plans. Loan maturities should be set by taking into consideration the anticipated source of repayment, the purpose of the loan, the type of property, and the useful life of the collateral. For term loans, the lending policy should state the maximum time within which loans may be amortized. Specific procedures should be developed for situations requiring balloon payments and/or modification of the original terms of the loan. If a clean-up period[1]
5. *Loan pricing.* Rates on various loan types must be sufficient to cover the cost of funds loaned and the servicing of the loan, including overhead and possible losses, while providing an acceptable margin of profit over the long run. These costs must be known and taken into consideration before rates are established. Periodic reviews should be conducted to determine whether adjustments are necessary to reflect changes in costs or competitive factors. Specific guidelines for other factors, such as compensating balances and commitment fees, are also germane to loan pricing.
6. *Loan amount to appraised value.* The policy should outline where the responsibility for appraisals rests and should define formal, standard appraisal procedures, including procedures for possible reappraisals in case of renewal or extension. Acceptable types of appraisals and limits on the dollar amount and the type of property that personnel are authorized to appraise should be outlined. Circumstances requiring appraisals by qualified independent appraisers should be described. The maximum ratio of the loan amount to appraised value,[2] the method of valuation, and differences for various types of property should be detailed. The policy should contain a schedule listing the downpayment requirements for financing consumer goods and business equipment.
7. *Loan amount to market value of pledged securities.* In addition to the legal restrictions imposed by Federal Reserve Regulation U, the lending policy should set forth margin requirements for all types of securities acceptable as collateral. Margin requirements should be related to the marketability of the security (for example, closely held, over-the-counter, actively traded). The policy should assign responsibility and set a frequency for the periodic pricing of the collateral.
8. *Financial information.* Extension of credit on a safe and sound basis depends on complete and accurate information regarding the borrower's credit standing. One possible exception is when the loan is predicated on readily marketable collateral, the disposition of which was originally designated as the source of repayment for the advance. Current and complete financial information is necessary, including secondary sources of repayment, not only at the inception of the loan, but also throughout the term of the advance. The lending policy should define the financial-statement requirements for businesses and individuals at various borrowing levels and should include requirements for audited, nonaudited, fiscal, interim, operating, cash-flow, and other statements.[3] It should include external credit checks required at various intervals. The requirements for financial information should be defined in such a way that any credit-data exception would be a clear violation of the lending policy.
9. *Limits and guidelines for loan participations.* Section 2020.2 provides significant information regarding intercompany loan participations between holding company affiliates. The lending policy should place

11. A "clean-up period" is when a borrower is asked to repay the entire balance of a credit line and to refrain from further borrowing for a specified period of time.

2. This is often referred to as the loan-to-value ratio.

3. On March 30, 1993, federal bank regulators set forth an expanded interagency policy to encourage small-business lending. Under the policy, banks and thrifts that are well or adequately capitalized and that are rated CAMELS 1 or 2 may make small-business and agricultural loans, the aggregate value of which cannot exceed 20 percent of their total capital. To qualify for the exemption, each loan may not exceed the lesser of $900,000 or 3 percent of the institution's total capital. Further, the loans selected for this exemption by the institution may not be delinquent as of the selection date and may not be made to an insider. The loans must be separately listed or have an accounting segregation from other loans in the portfolio. They "will be evaluated solely on the basis of performance and will be exempt from examiner criticism of documentation." The institution's records must include an evaluation of its ability to collect the loan in determining the adequacy of its allowance for loan and lease losses. If a loan becomes more than 60 days past due, it may be reviewed and classified by an examiner based on its credit quality, not the level of loan documentation.

limits on the amount of loans purchased from any one source and also place an aggregate limit on such loans. The policy should set forth credit standards for any loan purchased as well as require that complete documentation be maintained by the purchasing entities. The policy should define the extent of contingent liability, holdback and reserve requirements, and the manner in which the loan will be handled and serviced.

10. *Loans to insiders.* Lending policies should address loans to insiders. Such policies should incorporate applicable regulatory limitations (for example, Federal Reserve Regulation O) and should also address situations in which it would be prudent to exercise certain restrictions even though not explicitly required to do so by regulation (for example, loans by nonbank subsidiaries to insiders).
11. *Concentrations of credit.* Credit concentrations may be defined as loans collateralized by a common security; loans to one borrower or related group of borrowers; loans dependent upon a particular agricultural commodity; aggregate loans to major employers, their employees, and their major suppliers; loans within industry groups; out-of-territory loans; aggregate amount of paper purchased from any one source; or those loans that often have been included in other homogeneous risk groupings. Credit concentrations, by their nature, are dependent on common key factors, and when weaknesses develop, they have an adverse impact on each individual loan making up the concentration.

    In identifying asset concentrations, commercial real estate loans and residential real estate loans can be viewed separately when their performance is not subject to similar economic or financial risks. In the same vein, commercial real estate development loans need not necessarily be grouped with residential real estate development loans, especially when the residential developer has firm, reliable purchase contracts for the sale of the homes upon completion. Even within the commercial development and construction sector, distinctions for concentration purposes may be made, when appropriate, between those loans that have firm take-out commitments and those that do not. Groups or classes of real estate loans should, of course, be combined and viewed as concentrations when they do share significant common characteristics and are similarly affected by adverse economic, financial, or business developments.

    Banking organizations should establish and adhere to policies that control "concentration risk." The lending policy should address the risk involved in various concentrations and indicate those that should be avoided or limited. However, before concentrations can be limited or reviewed, accounting systems must be in place to allow for the retrieval of information necessary to determine and monitor concentrations. The lending policy should provide for frequent monitoring and reporting of all concentrations.

    Banking organizations with asset concentrations are expected to put in place effective internal policies, systems, and controls to monitor and manage this risk. Concentrations that involve excessive or undue risks require close scrutiny and should be reduced over a reasonable period of time. When there is a need to reduce asset concentrations, banking organizations are normally expected to develop a plan that is realistic, prudent, and achievable in view of the particular circumstances and market conditions. In situations where concentration levels have built up over an extended period, it may take time—in some cases several years—to achieve a more balanced and diversified portfolio. What is critical is that adequate systems and controls are in place for reducing undue or excessive concentrations in accordance with a prudent plan, along with strong credit policies and loan-administration standards to control the risks associated with new loans, and adequate capital to protect the institution while its portfolio is being restructured.

    Institutions that have in place effective internal controls to manage and reduce concentrations over a reasonable period of time *need not* automatically refuse credit to sound borrowers simply because of the borrower's industry or geographic location. This principle applies to prudent loan renewals and rollovers, as well as to new extensions of credit that are underwritten in a sound manner.

    The purpose of a lending organization's policies should be to improve the overall quality of its portfolio. The replacement of unsound loans with sound loans can

enhance the quality of a portfolio, even when concentration levels are not reduced.

12. *Refinancing or renewal of loans.* Refinancings or renewals should be structured in a manner that is consistent with sound banking, supervisory, and accounting practices, and in a manner that protects the banking organization and improves its prospects for collecting or recovering on the asset.
13. *Loan origination and loan approvals.* The policy should establish loan-origination and loan-approval procedures, both generally and by size and type of loan. The loan limitations for all lending officers should be set accordingly. Lending limits should also be set for group authority, allowing a combination of officers or a committee to approve larger loans. Reporting procedures and the frequency of committee meetings should also be defined. The loan policy should further establish identification, review, and approval procedures for exception loans, including real estate and other loans with loan-to-value percentages in excess of supervisory limits.[4]
14. *Loan-administration procedures for loans secured by real estate.* The loan policy should establish loan-administration procedures covering documentation, disbursement, collateral administration and inspection, escrow administration, collection, loan payoffs, and loan review. Documentation procedures would specify, among other things, the types and frequency of financial statements and the requirements for verifying information provided by the borrower. They would also cover the type and frequency of collateral evaluations (appraisals and other estimates of value). In addition, loan-administration policies should address procedures for servicing and participation agreements and other loan-administration procedures such as those for claims processing (for example, seeking recovery on defaulted loans that are partially or fully guaranteed by a government entity or insurance program).
15. *Collection and foreclosure and the reporting and disclosure of delinquent obligations and charge-offs.* The lending policy should define delinquent obligations, provide guidelines on when loans are to be placed on nonaccrual or to be restructured, dictate appropriate procedures for reporting to senior management and to the directorate past-due credits, and provide appropriate guidance on the extent of disclosure of such credits. The policy should establish and require a follow-up collection procedure that is systematic and progressively stronger and should set forth guidelines (where applicable) for close surveillance by a loan work-out division. It should also address extensions and other forms of forbearance, the acceptance of deeds in lieu of foreclosure, and the timing of foreclosure. The policy must be consistent with supervisory instructions in the financial statements of condition and income for financial institutions and BHCs (bank call report and the FR Y-9C and the other FR Y-series reports). Guidelines should be established to ensure that all accounts are presented to and reviewed by management for charge-off after a stated period of delinquency. See section 2065.1 for disclosure, accounting, and reporting issues related to nonaccrual loans and restructured debt.
16. *Reserve for loan losses and provisions for loan losses.* The policy should set forth the parameters that management considers in determining an appropriate level of loan-loss reserves as well as provisions necessary to attain this level.

    Because an analysis of the allowance for loan and lease losses (ALLL) requires an assessment of the relative credit risks in the portfolio, many banking organizations, for analytical purposes, attribute portions of the ALLL to loans and other assets classified "substandard" by management or a supervisory agency. Management may do this because it believes, based on past history or other factors, that there may be unidentified losses associated with loans classified substandard in the aggregate.

    Furthermore, management may use this as an analytical approach in estimating the total amount necessary for the ALLL and in comparing the ALLL to various categories of loans over time. As a general rule, an individual loan classified substandard may remain in an accrual status as long as the regulatory reporting requirements for accrual treatment are met, even when an attribution of the ALLL has been made.
17. *Other.* The policy should address the handling of exceptions to the policy as well as

4. For subsidiaries that are insured depository institutions, real estate loans that are in excess of supervisory loan-to-value limits are to be identified in the subsidiaries' records. The aggregate amount of these loans is to be reported quarterly to the depository institution's board of directors.

provide for adherence to the policy via internal audits, centralized loan review, and/or "director's examinations." The policy should be reviewed annually to determine if it continues to be compatible with the BHC's objectives as well as market conditions.

2010.2.1 UNIFORM REAL ESTATE LENDING STANDARDS

On December 23, 1992, the Board announced adoption of a uniform rule and guidelines on real estate lending, along with the FDIC, OCC, and OTS, as mandated by section 304 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA). The Board's Regulation H (12 C.F.R. 208, Membership of State Banking Institutions in the Federal Reserve System) was amended to implement the uniform real estate lending standards for state member banks. Although the Board did not directly apply the regulation to bank holding companies and their nonbank subsidiaries, those entities are expected to conduct and to supervise real estate lending activities prudently, consistent with safe and sound lending standards.

The agencies' regulations require that each insured depository institution adopt and maintain comprehensive written real estate lending policies appropriate to the institution and the nature and scope of its lending activities. Lending policies must be reviewed and approved by the institution's board of directors at least annually. The policies are to include standards for loan diversification and prudent underwriting as well as loan-administration procedures and documentation, approval, and reporting requirements. Depository institutions' policies are to reflect consideration of the appendix to the banking agencies' regulations, "Interagency Guidelines for Real Estate Lending Policies." The guidelines are designed to help an institution formulate and maintain real estate lending policy that is appropriate to its size and the nature and scope of its operations, as required by the regulations. These guidelines are generally comparable to the inspection guidance provided in this section.

2010.2.2 LENDING STANDARDS FOR COMMERCIAL LOANS

The lending decision is properly that of the senior management and boards of directors of banking institutions, and not of their supervisory agencies. However, in fulfilling their roles, directors and senior managers have the obligation to monitor lending practices and to ensure that their policies are enforced and that lending practices generally remain within the overall ability of the institution to manage. The following subsections describe certain sound practices regarding lending standards and credit-approval processes for commercial loans.[5]

Sound lending practices address formal credit policies, formal credit-staff approval of transactions, loan-approval documentation, the use of forward-looking tools in the approval process, and management and lender information systems. In addition to evaluating adherence to these sound practices during inspections, supervisory personnel and examiners may wish to discuss these standards with loan portfolio managers at institutions where a full credit review is being performed. Senior management should be made aware of the potential for deterioration in the loan portfolio if lending discipline is not maintained, whether from inadequate assessment or communication of lending risks, incomplete adherence to prudent lending standards that reflect the risk appetite of the board of directors, or both.

Examiners should evaluate whether adequate internal oversight exists and whether institution management has timely and accurate information. As always, examiners should also discuss matters of concern with the institution and include them in their reports of inspection, even if cited practices and problem loans have not yet reached harmful or criticized levels. Such cautionary remarks help to alert institution management to potential or emerging sources of concern and may help to deter future problems. Any practices that extend beyond prudent bounds should be promptly corrected. See SR-98-18.

2010.2.2.1 Sound Practices in Loan Standards and Approval

Certain sound practices in lending can help to maintain strong credit discipline and ensure that an institution's decision to take risk in lending is

5. This guidance is derived, in part, from the June 1998 Federal Reserve supervisory staff report, "The Significance of Recent Changes in Bank Lending Standards: Evidence from the Loan Quality Assessment Project."

well informed, balanced, and prudent. Several of these sound practices are listed and described below.

2010.2.2.1.1 Formal Credit Policies

The Federal Reserve and other supervisory authorities have long stressed the importance of formal written credit policies in a sound credit-risk-management process. Such policies can provide crucial discipline to an institution's lending process, especially when the institution's standards are under assault due to intense competition for loans. They can serve to communicate formally an institution's appetite for credit risk in a manner that will support sound lending decisions, while focusing appropriate attention on loans being considered that diverge from approved standards.

In developing and refining loan policies, some institutions specify "guidance minimums" for financial performance ratios that apply to certain types of loans or borrowers (for example, commercial real estate). Such guidance makes explicit that loans not meeting certain financial tests (based on current performance, projected future performance, or both) should in general not be made, or alternatively should only be made under clearly specified situations. Institutions using this approach most effectively tend to avoid specifying standards for broad ranges of lending situations and instead focus on those areas of lending most vulnerable to excessive optimism, or where the institution expects loan volume to grow most significantly.

Formal policies can also provide lending discipline by clearly stating the type of covenants to be imposed for specific loan types. When designed and enforced properly, financial covenants can help significantly to reduce credit losses by communicating clear thresholds for financial performance and potentially triggering corrective or protective action at an early stage. Often, however, loan-approval documents do not describe the key financial covenants even when discussions with institutional staff disclose that such covenants are present. The staff and/or management of many institutions acknowledge that they have a "common practice" of imposing certain types of covenants on various types of loans. They indicate that such a practice is well known to lenders and others at the institution (but not articulated in their written loan policies), so that describing the actual covenants in the loan-approval document would be redundant. However, management and other approving authorities within an institution then receive no formal positive indication that "common practice" controls have been imposed and no indication of the level of financial performance that the covenants require of the borrower. As such, management and other approving authorities may be inadequately informed as to the risks and controls associated with the loan under consideration. In contrast, loan policies can create a clear expectation that (1) all key covenants should be described in loan-approval documents, (2) certain covenant types should be applied to all loans meeting certain criteria, and (3) explicit approval of any exception to these policies is necessary if such covenant requirements are to be waived.

Internal processes and requirements for underwriting decisions should be consistent with the nature, size, and complexity of the banking organization's (BO) activities. Departures from underwriting policies and standards, however, can have serious consequences for BOs of all sizes. Internal controls and credit reviews should be established and maintained to ensure compliance with those policies and procedures. When there are continued favorable economic and financial conditions, compliance monitoring of the BO's lending policies and procedures needs to be diligent to make certain that there is no undue reliance on optimistic outlooks for borrowers. Undue reliance on continued favorable economic conditions can be demonstrated by the following characteristics:

1. dependence on very rapid growth in a borrower's revenue as the "most likely" case
2. heavy reliance on favorable collateral appraisals and valuations that may not be sustainable over the longer term
3. greater willingness to make loans without scheduled amortization prior to the loan's final maturity
4. willingness to readily waive violations of key covenants, to release collateral or guarantee requirements, or even to restructure loan agreements, without corresponding concessions on the part of the borrower, on the assumption that a favorable environment will allow the borrower to recover quickly

Among the adverse effects of undue reliance on a continued favorable economy is the possibility that problem loans will not be identified properly or in a timely manner. Timely identification of problem loans is critical for providing a full awareness of the BO's risk position,

informing management and directors of that position, taking steps to mitigate risk, and providing a proper assessment of the adequacy of the allowance for credit losses and capital.[6] Similarly, an overreliance on continued ready access to financial markets on favorable terms can originate from the following situations:

1. explicit reliance on future public market debt or equity offerings, or on other sources of refinancing, as the ultimate source of principal repayment, which presumes that market liquidity and the market's appetite for such instruments will be favorable at the time that the facility is to be repaid
2. ambiguous or poorly supported analysis of the sources of repayment of the loan's principal, together with implicit reliance for repayment on some realization of the implied market valuation of the borrower (for example, through refinancing, asset sales, or some form of equity infusion), which also assumes that markets will be receptive to such transactions at the time that the facility is to be repaid
3. measuring a borrower's leverage (for example, debt-to-equity) based solely on the market capitalization of the firm without regard to "book" equity, thereby implicitly assuming that currently unrealized appreciation in the value of the firm can be readily realized if needed
4. more generally, extending loans with a risk profile that more closely resembles the profile of an equity investment, under circumstances that leave additional credit or default as the borrower's only resort if favorable expectations are not met

Banking organizations that become lax in adhering to established loan-underwriting policies and procedures, as a result of overreliance on favorable economic and financial market conditions, may have significant credit concentrations that are at great risk to possible economic and financial market downturns. See SR-99-23.

Some institutions have introduced credit scoring techniques into their small-business lending in an effort to improve credit discipline while allowing heavier reliance on statistical analysis rather than detailed and costly analysis of individual loans. Institutions should take care to make balanced and careful use of credit scoring technology for small-business lending and, in particular, avoid using this technology for loans or credit relationships that are large or complex enough to warrant a formal and individualized credit analysis.

In formalizing their lending standards and practices, institutions are not precluded from making loans that do not meet all written standards. Exceptions to policies, though, should be approved and monitored by management. Formal reporting that describes exceptions to loan policies, by type of exception and organizational unit, can be extremely valuable for informing management and directors of the number and nature of material deviations from the policies that they have designed and approved.

2010.2.2.1.2 Formal Credit-Staff Approval of Transactions

Credit discipline is also enhanced when experienced credit professionals are involved in the approval process and are independent of the line lending functions.[7] Such staff can play a vital role in ensuring adherence to formal policies and in ensuring that individual loan approvals are consistent with the overall risk appetite of the institution. These independent credit professionals can be most valuable if they have the authority to reject a loan that does not meet the institution's credit standards or, alternatively, if they must concur with a loan before it can be approved.

Providing credit staff with independent approval authority over lending decisions, rather than with a more traditional requirement for "consultation" between the lending function and credit staff, allows credit staff to influence outcomes on a broad and ongoing basis. This influence and indeed the ability of credit staff to reinforce lending discipline is clearly enhanced by their early involvement in negotiations with borrowers; a more traditional approach might be to only involve credit staff once the loan pro-

6. See section 2122.0 and SR-98-25, "Sound Credit-Risk Management and the Use of Internal Credit-Risk-Rating Systems at Large Banking Organizations." Federal Reserve guidance on credit-risk management and mitigation covers both loans and other forms of on- and off-balance-sheet credit exposure.

7. For example, loan officers might be compensated for bringing loan business into the institution. Independent credit professionals, however, would be another person who would not be compensated for bringing any loan business into the institution. That person would, however, serve as a quality control monitor that would have the independent authority to reject a loan(s) and to ensure that the institution's risk appetite and credit standards are not exceeded.

posal is well developed, allowing credit staff the opportunity to have only minor influence on the outcome of negotiations except in extreme cases. Maintaining a proper balance of lending and control functions calls for a degree of partnership between line lenders and credit staff, but also requires that the independence of credit staff not be compromised by conflicting compensation policies or reporting structures.

Independent credit staff can also support sound lending practice by maintaining complete and centralized credit files that contain all key documents relevant to each loan, including complete loan-approval packages. Such files ensure that decisions are well documented and avoid undue reliance on the files maintained by individual loan officers.

2010.2.2.1.3 Loan-Approval Documents

Institutions can help ensure a careful loan-approval decision by requiring thorough and standardized loan-approval documents. Thoroughness can be enhanced by requiring formal analysis of the borrower's financial condition, key characteristics and trends in the borrower's industry, information on collateral and its valuation, as well as financial analysis of the entities providing support or guarantees and formal forward-looking analyses appropriate to the size and type of loan being considered. Incorporating such elements into standardized formats and requiring that analysis and supporting commentary be complete and in adequate depth allows approving authorities access to all relevant information on the risk profile of the borrower. Loan-approval documents should also include all material details on the proposed loan agreement itself, including key financial covenants. Standardization of formats, and to some extent content, can be useful in ensuring that all relevant information is provided to management and other approving authorities in a manner that is understandable. Standard formats also draw attention to cases in which certain key information is not presented.

One area of particular interest in this regard is analysis and commentary on participations in syndicated loans. While it may be tempting to rely on the analysis and documentation provided by the agent institution to the transaction, it has been long-standing Federal Reserve policy that participating institutions should conduct their own analysis of the borrower and the transactions, particularly if the risk appetite or portfolio characteristics of the agent differs from that of the participating institution.

2010.2.2.1.4 Use of Forward-Looking Tools in the Approval Process

During continued periods of favorable economic conditions, institutions should guard against complacency and, in particular, the temptation to base expectations of a borrower's future financial performance almost exclusively on that borrower's recent performance. In making lending decisions, and in evaluating their loan portfolio, institutions should give sufficient consideration to the potential for negative events or developments that might limit the ability of borrowers to fulfill their loan obligations. Unforeseen changes in interest rates, sales revenue, and operating expenses can have material and adverse effects on the ability of many borrowers to meet their obligations. In prior decades, inadequate attention to these possibilities during the underwriting process contributed significantly to asset-quality problems in the system. Also, sudden turmoil within various countries can result in quick changes in currency valuations and economic conditions.

Examiners should evaluate the frequency and adequacy with which institutions conduct forward-looking analysis of borrower financial performance when considering an institution's credit-risk-management process. Formal use of forward-looking financial analysis in the loan-approval process, and financial projections in particular, can be important in guarding against such complacency, especially when financial institutions are competing intensely to attract borrowers. Such projections, if they include less favorable scenarios for the key determinants of the borrower's financial performance, can help to contain undue optimism and ensure that management and other approving authorities within the organization are formally presented with a robust analysis of the risks associated with each credit. They also provide credit staff and other risk-management personnel with information that is important for ensuring adherence to the institution's lending standards and overall appetite for loan risk.

The formal presentation of financial projections and/or other forms of forward-looking analyses of the borrower is important in making explicit the conditions required for a loan to perform and in communicating the vulnerabilities of the transaction to those responsible for approving loans. Analyses also provide a useful

benchmark against which institutions can assess the borrower's future performance. Although it may be tempting to avoid analyzing detailed projections for smaller borrowers, such as middle-market firms, these customers may collectively represent a significant portion of the institution's loan portfolio. As such, applying formal forward-looking analysis even on a basic level assists the institution in identifying and managing the overall risk of its lending activities.

Detailed analysis of industry performance and trends can be a useful supplement to such analyses. Such projections have the most value in maintaining credit discipline when, rather than only describing the single "most likely" scenario for future events, they characterize the kind of negative events that might impair the performance of the loan in the future.

2010.2.2.1.5 Stress Testing of the Borrower's Financial Capacity

The analysis of alternative scenarios, or "stress testing," should generally focus on the key determinants of performance for the borrower and the loan, such as the level of interest rates, the rate of sales or revenue growth, or the rate at which expense reductions can be realized. Meaningful stress testing of the prospective borrower's ability to meet its obligations is a vital part of a sound credit decision. Failure to recognize the potential for adverse events—whether specific to the borrower or its industry (for example, a change in the regulatory climate or the emergence of new competitors) or, alternatively, to the economy as a whole (for example, a recession)—can prove costly to a banking organization.

Mechanical reliance on threshold financial ratios (and the "cushion" they imply) alone is generally not sufficient, particularly for complex loans and loans to leveraged borrowers or others that must perform exceptionally well to meet their financial obligations successfully. Scenario analysis specific to the borrower, its industry, and its business plan is critical to identify the key risks of a loan. Such an analysis should have a significant influence on the decision to extend credit and, if credit is extended, on the decisions as to the appropriate loan size, repayment terms, collateral or guarantee requirements, financial covenants, and other elements of the loan's structure.

When properly conducted, meaningful stress testing can include assessing the effect the following situations or events will have on the borrower:

1. unexpected reductions in revenue growth or reversals, including shocks to revenue of the type and magnitude that would normally be experienced during a recession
2. unfavorable movements in market interest rates, especially for firms with high debt burdens
3. unplanned increases in capital expenditures due to technological obsolescence or competitive factors
4. deterioration in the value of collateral, guarantees, or other potential sources of principal repayment
5. adverse developments in key product or input markets
6. reversals in, or the borrower's reduced access to, public debt and equity markets

Proper stress testing typically incorporates an evaluation of the borrower's alternatives for meeting its financial obligations under each scenario, including asset sales, access to alternative funding or refinancing, or ability to raise new equity. In particular, the evaluation should focus not only on the borrower's ability to meet near-term interest obligations, but also on its ability to repay the principal of the obligation. See SR-99-23.

2010.2.2.1.6 Management and Lender Information

Management information systems that support the loan-approval process should clearly indicate the composition of the institution's current portfolio or exposure to allow for consideration of whether a proposed new loan—regardless of its own merits—might affect this composition sufficiently to be inconsistent with the institution's risk appetite. In particular, institutions active in commercial real estate lending should know the nature and magnitude of aggregate exposure within relevant subclasses, such as by the type of property being financed (that is, office, residential, or retail).

In addition to portfolio information, institutions should be encouraged to acquire or develop information systems that provide ready access for lenders and credit analysts to infor-

mation sources that can support and enhance the financial analysis of proposed loans. Depending on the nature of an institution's borrowers, appropriate information sources may include industry financial data, economic data and forecasts, and other analytical tools such as bankruptcy scoring and default-probability models.

2010.2.3 LEVERAGED LENDING

Leveraged lending has been a financing vehicle for transactions involving mergers and acquisitions, business recapitalizations, and business expansions.[8] It is an important type of financing for national and global economies, and the U.S. financial industry plays an integral role in making credit available and syndicating that credit to investors. Leveraged transactions are characterized by a degree of financial leverage that may significantly exceed industry norms as measured by ratios such as debt-to-assets, debt-to-equity, cash flow-to-total debt, or other ratios and standards that are unique to a particular industry. Leveraged borrowers, however, can have a diminished ability to respond to changing economic conditions or unexpected events, creating significant implications for an institution's overall credit-risk exposure and challenges for bank risk-management systems.

Leveraged lending activities can be conducted in a safe-and-sound fashion if pursued with a risk-management structure that provides for the appropriate underwriting, pricing, monitoring, and controls. Comprehensive credit analysis processes, frequent monitoring, and detailed portfolio reports are needed to better understand and manage the inherent risk in leveraged portfolios. Sound valuation methodologies must be used in addition to ongoing stress testing and monitoring.

Financial institutions should ensure they do not unnecessarily heighten risks by originating and then distributing poorly underwritten loans.[9] For example, a poorly underwritten leveraged loan that is pooled with other loans or is participated with other institutions may generate risks for the financial system. The leveraged lending guidance that follows is designed to assist financial institutions in providing leveraged lending to creditworthy borrowers in a safe-and-sound manner.

On March 21, 2013, the Federal Reserve Board, along with the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC), issued "Interagency Guidance on Leveraged Lending."[10] The statement provides guidance about risk rating leveraged-financed loans. See SR-13-3 and its attachment.

2010.2.3.1 Interagency Guidance on Leveraged Lending

The vast majority of community banks should not be affected by this guidance, as they have limited involvement in leveraged lending. Community and smaller institutions that are involved in leveraged lending activities should discuss with their primary regulator the implementation of cost-effective controls appropriate for the complexity of their exposures and activities.[11]

2010.2.3.1.1 Risk-Management Framework

Given the high-risk profile of leveraged transactions, financial institutions engaged in leveraged lending should adopt a risk-management framework that has an intensive and frequent review and monitoring process. The framework should have as its foundation written risk objectives, risk-acceptance criteria, and risk controls. A lack of robust risk-management processes and controls at a financial institution with significant

8. For the purpose of this guidance, references to leveraged finance, or leveraged transactions encompass the entire debt structure of a leveraged obligor (including loans and letters of credit, mezzanine tranches, senior and subordinated bonds) held by both bank and nonbank investors. References to leveraged lending and leveraged loan transactions and credit agreements refer to all debt with the exception of bond and high-yield debt held by both bank and nonbank investors.

9. For purposes of this guidance, the term "financial institution" or "institution" includes national banks, federal savings associations, and federal branches and agencies supervised by the OCC; state member banks, bank holding companies, savings and loan holding companies, and all other institutions for which the Federal Reserve is the primary federal supervisor; and state nonmember banks, foreign banks having an insured branch, state savings associations, and all other institutions for which the FDIC is the primary federal supervisor.

10. This guidance augments previously issued supervisory statements on sound credit-risk management. Refer to SR-98-18, "Lending Standards for Commercial Loans."

11. The agencies do not intend that a financial institution that originates a small number of less complex, leveraged loans should have policies and procedures commensurate with a larger, more complex leveraged loan origination business. However, any financial institution that participates in leveraged lending transactions should follow applicable supervisory guidance provided in "Participations Purchased" of this section.

leveraged lending activities could contribute to supervisory findings that the financial institution is engaged in unsafe and unsound banking practices. This guidance outlines the agencies' minimum expectations on the following topics:

- Leveraged Lending Definition
- General Policy Expectations
- Participations Purchased
- Underwriting Standards
- Valuation Standards
- Pipeline Management
- Reporting and Analytics
- Risk Rating Leveraged Loans
- Credit Analysis
- Problem-Credit Management
- Deal Sponsors
- Credit Review
- Stress Testing
- Conflicts of Interest
- Reputational Risk
- Compliance

2010.2.3.1.2 Leveraged Lending Definition

The policies of financial institutions should include criteria to define leveraged lending that are appropriate to the institution.[12] For example, numerous definitions of leveraged lending exist throughout the financial services industry and commonly contain some combination of the following:

- proceeds used for buyouts, acquisitions, or capital distributions
- transactions where the borrower's Total Debt divided by EBITDA (earnings before interest, taxes, depreciation, and amortization) or Senior Debt divided by EBITDA exceed 4.0 * EBITDA or 3.0 * EBITDA, respectively, or other defined levels appropriate to the industry or sector[13]
- a borrower recognized in the debt markets as a highly leveraged firm, which is characterized by a high debt-to-net-worth ratio
- transactions when the borrower's post-financing leverage, as measured by its leverage ratios (for example, debt-to-assets, debt-to-net-worth, debt-to-cash flow, or other similar standards common to particular industries or sectors), significantly exceeds industry norms or historical levels[14]

A financial institution engaging in leveraged lending should define it within the institution's policies and procedures in a manner sufficiently detailed to ensure consistent application across all business lines. A financial institution's definition should describe clearly the purposes and financial characteristics common to these transactions, and should cover risk to the institution from both direct exposure and indirect exposure via limited-recourse financing secured by leveraged loans, or financing extended to financial intermediaries (such as conduits and special purpose entities (SPEs)) that hold leveraged loans.

2010.2.3.1.3 General Policy Expectations

A financial institution's credit policies and procedures for leveraged lending should address the following:

- Identification of the financial institution's risk appetite, including clearly defined amounts of leveraged lending that the institution is willing to underwrite (for example, pipeline limits) and is willing to retain (for example, transaction and aggregate hold levels). The institution's designated risk appetite should be supported by an analysis of the potential effect on earnings, capital, liquidity, and other risks that result from these positions, and should be approved by its board of directors.
- A limit framework that includes limits or guidelines for single obligors and transactions, aggregate hold portfolio, aggregate pipeline exposure, and industry and geographic concentrations. The limit framework should identify the related management-approval authorities and exception-tracking provisions. In addition to notional pipeline limits, the agencies expect that financial institutions with significant leveraged transactions will implement underwriting-limit frame-

12. This guidance is not meant to include asset-based loans unless such loans are part of the entire debt structure of a leveraged obligor. Asset-based lending is a distinct segment of the loan market that is tightly controlled or fully monitored, secured by specific assets, and usually governed by a borrowing formula (or "borrowing base").

13. Cash should not be netted against debt for purposes of this calculation.

14. The designation of a financing as "leveraged lending" is typically made at loan origination, modification, extension, or refinancing. "Fallen angels" or borrowers that have exhibited a significant deterioration in financial performance after loan inception and subsequently become highly leveraged would not be included within the scope of this guidance, unless the credit is modified, extended, or refinanced.

works that assess stress losses, flex terms, economic capital usage, and earnings at risk or that otherwise provide a more nuanced view of potential risk.[15]
- Procedures for ensuring the risks of leveraged lending activities are appropriately reflected in an institution's allowance for loan and lease losses (ALLL) and capital adequacy analyses.
- Credit and underwriting approval authorities, including the procedures for approving and documenting changes to approved transaction structures and terms.
- Guidelines for appropriate oversight by senior management, including adequate and timely reporting to the board of directors.
- Expected risk-adjusted returns for leveraged transactions.
- Minimum underwriting standards (see the "Underwriting Standards" section below).
- Effective underwriting practices for primary loan origination and secondary loan acquisition.

2010.2.3.1.4 Participations Purchased

Financial institutions purchasing participations and assignments in leveraged lending transactions should make a thorough, independent evaluation of the transaction and the risks involved before committing any funds.[16] They should apply the same standards of prudence, credit assessment and approval criteria, and in-house limits that would be employed if the purchasing organization were originating the loan. At a minimum, policies should include requirements for

- obtaining and independently analyzing full credit information both before the participation is purchased and on a timely basis thereafter;
- obtaining from the lead lender copies of all executed and proposed loan documents, legal opinions, title insurance policies, Uniform Commercial Code (UCC) searches, and other relevant documents;
- carefully monitoring the borrower's performance throughout the life of the loan; and
- establishing appropriate risk-management guidelines as described in this document.

2010.2.3.1.5 Underwriting Standards

A financial institution's underwriting standards should be clear, written, and measurable, and should accurately reflect the institution's risk appetite for leveraged lending transactions. A financial institution should have clear underwriting limits regarding leveraged transactions, including the size that the institution will arrange both individually and in the aggregate for distribution. The originating institution should be mindful of reputational risks associated with poorly underwritten transactions, as these risks may find their way into a wide variety of investment instruments and exacerbate systemic risks within the general economy. At a minimum, an institution's underwriting standards should consider the following:

- Whether the business premise for each transaction is sound and the borrower's capital structure is sustainable regardless of whether the transaction is underwritten for the institution's own portfolio or with the intent to distribute. The entirety of a borrower's capital structure should reflect the application of sound financial analysis and underwriting principles.
- A borrower's capacity to repay and the ability to de-lever to a sustainable level over a reasonable period. As a general guide, institutions also should consider whether base-case cash-flow projections show the ability to fully amortize senior secured debt or repay a significant portion of total debt over the medium term.[17] Also, projections should include one or more realistic downside scenarios that reflect key risks identified in the transaction.

15. Flex terms allow the arranger to change interest-rate spreads during the syndication process to adjust pricing to current liquidity levels.

16. Refer to other joint agency guidance regarding purchased participations: OCC Loan Portfolio Management Handbook, www.occ.gov/publications/publications-by-type/comptrollers-handbook/lpm.pdf, "Loan Participations"; Board Commercial Bank Examination Manual, www.federalreserve.gov/boarddocs/supmanual/cbem/cbem.pdf, section 2045.1, "Loan Participations, the Agreements and Participants"; and FDIC Risk Management Manual of Examination Policies, "Section 3.2-Loans," www.fdic.gov/regulations/safety/manual/section3-2.html#otherCredit, Loan Participations (last updated Feb. 2, 2005).

17. In general, the base-case cash-flow projection is the borrower or deal sponsor's expected estimate of financial performance using the assumptions that are deemed most likely to occur. The financial results for the base case should be better than those for the conservative case but worse than those for the aggressive or upside case. A financial institution may adjust the base-case financial projections, if necessary. The most realistic financial projections should be used when measuring a borrower's capacity to repay and de-lever.

- Expectations for the depth and breadth of due diligence on leveraged transactions. This should include standards for evaluating various types of collateral, with a clear definition of credit-risk-management's role in such due diligence.
- Standards for evaluating expected risk-adjusted returns. The standards should include identification of expected distribution strategies, including alternative strategies for funding and disposing of positions during market disruptions, and the potential for losses during such periods.
- The degree of reliance on enterprise value and other intangible assets for loan repayment, along with acceptable valuation methodologies, and guidelines for the frequency of periodic reviews of those values.
- Expectations for the degree of support provided by the sponsor (if any), taking into consideration the sponsor's financial capacity, the extent of its capital contribution at inception, and other motivating factors. Institutions looking to rely on sponsor support as a secondary source of repayment for the loan should be able to provide documentation, including, but not limited to, financial or liquidity statements, showing recently documented evidence of the sponsor's willingness and ability to support the credit extension.
- Whether credit-agreement terms allow for the material dilution, sale, or exchange of collateral or cash-flow-producing assets without lender approval.
- Credit-agreement covenant protections, including financial performance (such as debt-to-cash flow, interest coverage, or fixed-charge coverage), reporting requirements, and compliance monitoring. Generally, a leverage level after planned asset sales (that is, the amount of debt that must be serviced from operating cash flow) in excess of 6* Total Debt/EBITDA raises concerns for most industries.
- Collateral requirements in credit agreements that specify acceptable collateral and risk-appropriate measures and controls, including acceptable collateral types, loan-to-value guidelines, and appropriate collateral-valuation methodologies. Standards for asset-based loans that are part of the entire debt structure also should outline expectations for the use of collateral controls (for example, inspections, independent valuations, and payment lockbox), other types of collateral and account maintenance agreements, and periodic reporting requirements.
- Whether loan agreements provide for distribution of ongoing financial and other relevant credit information to all participants and investors.

Nothing in the preceding standards should be considered to discourage providing financing to borrowers engaged in workout negotiations, or as part of a pre-packaged financing under the bankruptcy code. Neither are they meant to discourage well-structured, standalone asset-based credit facilities to borrowers with strong lender monitoring and controls, for which a financial institution should consider separate underwriting and risk-rating guidance.

2010.2.3.1.6 Valuation Standards

Institutions often rely on enterprise value and other intangibles when (1) evaluating the feasibility of a loan request; (2) determining the debt reduction potential of planned asset sales; (3) assessing a borrower's ability to access the capital markets; and (4) estimating the strength of a secondary source of repayment. Institutions may also view enterprise value as a useful benchmark for assessing a sponsor's economic incentive to provide financial support. Given the specialized knowledge needed for the development of a credible enterprise valuation and the importance of enterprise valuations in the underwriting and ongoing risk-assessment processes, enterprise valuations should be performed by qualified persons independent of an institution's origination function.

There are several methods used for valuing businesses. The most common valuation methods are assets, income, and market. Asset valuation methods consider an enterprise's underlying assets in terms of its net going-concern or liquidation value. Income valuation methods consider an enterprise's ongoing cash flows or earnings and apply appropriate capitalization or discounting techniques. Market valuation methods derive value multiples from comparable company data or sales transactions. However, final value estimates should be based on the method or methods that give supportable and credible results. In many cases, the income method is generally considered the most reliable.

There are two common approaches employed when using the income method. The "capitalized cash flow" method determines the value of

a company as the present value of all future cash flows the business can generate in perpetuity. An appropriate cash flow is determined and then divided by a risk-adjusted capitalization rate, most commonly the weighted average cost of capital. This method is most appropriate when cash flows are predictable and stable. The "discounted cash flow" method is a multiple-period valuation model that converts a future series of cash flows into current value by discounting those cash flows at a rate of return (referred to as the "discount rate") that reflects the risk inherent therein. This method is most appropriate when future cash flows are cyclical or variable over time. Both income methods involve numerous assumptions, and therefore, supporting documentation should fully explain the evaluator's reasoning and conclusions.

When a borrower is experiencing a financial downturn or facing adverse market conditions, a lender should reflect those adverse conditions in its assumptions for key variables such as cash flow, earnings, and sales multiples when assessing enterprise value as a potential source of repayment. Changes in the value of a borrower's assets should be tested under a range of stress scenarios, including business conditions more adverse than the base-case scenario. Stress tests of enterprise values and their underlying assumptions should be conducted and documented at origination of the transaction and periodically thereafter, incorporating the actual performance of the borrower and any adjustments to projections. The institution should perform its own discounted cash-flow analysis to validate the enterprise value implied by proxy measures such as multiples of cash flow, earnings, or sales.

Enterprise value estimates derived from even the most rigorous procedures are imprecise and ultimately may not be realized. Therefore, institutions relying on enterprise value or illiquid and hard-to-value collateral should have policies that provide for appropriate loan-to-value ratios, discount rates, and collateral margins. Based on the nature of an institution's leveraged lending activities, the institution should establish limits for the proportion of individual transactions and the total portfolio that are supported by enterprise value. Regardless of the methodology used, the assumptions underlying enterprise value estimates should be clearly documented, well supported, and understood by the institution's appropriate decisionmakers and risk-oversight units. Further, an institution's valuation methods should be appropriate for the borrower's industry and condition.

2010.2.3.1.7 Pipeline Management

Market disruptions can substantially impede the ability of an underwriter to consummate syndications or otherwise sell down exposures, which may result in material losses. Accordingly, financial institutions should have strong risk management and controls over transactions in the pipeline, including amounts to be held and those to be distributed. A financial institution should be able to differentiate transactions according to tenor, investor class (for example, pro-rata and institutional), structure, and key borrower characteristics (for example, industry).

In addition, an institution should develop and maintain the following:

- A clearly articulated and documented appetite for underwriting risk that considers the potential effects on earnings, capital, liquidity, and other risks that result from pipeline exposures.
- Written policies and procedures for defining and managing distribution failures and "hung" deals, which are identified by an inability to sell down the exposure within a reasonable period (generally 90 days from transaction closing). The financial institution's board of directors and management should establish clear expectations for the disposition of pipeline transactions that are not sold according to their original distribution plan. Such transactions that are subsequently reclassified as hold-to-maturity should also be reported to management and the board of directors.
- Guidelines for conducting periodic stress tests on pipeline exposures to quantify the potential impact of changing economic and market conditions on the institution's asset quality, earnings, liquidity, and capital.
- Controls to monitor performance of the pipeline against original expectations, and regular reports of variances to management, including the amount and timing of syndication and distribution variances and reporting of recourse sales to achieve distribution.
- Reports that include individual and aggregate transaction information that accurately risk rates credits and portrays risk and concentrations in the pipeline.
- Limits on aggregate pipeline commitments.
- Limits on the amount of loans that an institution is willing to retain on its own books (that is, borrower, counterparty, and aggregate hold levels), and limits on the underwriting risk

that will be undertaken for amounts intended for distribution.
- Policies and procedures that identify acceptable accounting methodologies and controls in both functional as well as dysfunctional markets, and that direct prompt recognition of losses in accordance with generally accepted accounting principles.
- Policies and procedures addressing the use of hedging to reduce pipeline and hold exposures, which should address acceptable types of hedges and the terms considered necessary for providing a net credit exposure after hedging.
- Plans and provisions addressing contingent liquidity and compliance with the Board's Regulation W (12 CFR part 223) when market illiquidity or credit conditions change, interrupting normal distribution channels.

2010.2.3.1.8 Reporting and Analytics

The agencies expect financial institutions to diligently monitor higher-risk credits, including leveraged loans. A financial institution's management should receive comprehensive reports about the characteristics and trends in such exposures at least quarterly, and summaries should be provided to the institution's board of directors. Policies and procedures should identify the fields to be populated and captured by a financial institution's Management Information Systems, which should yield accurate and timely reporting to management and the board of directors that may include the following:

- Individual and portfolio exposures within and across all business lines and legal vehicles, including the pipeline.
- Risk-rating distribution and migration analysis, including maintenance of a list of those borrowers who have been removed from the leveraged portfolio due to improvements in their financial characteristics and overall risk profile.
- Industry mix and maturity profile.
- Metrics derived from probabilities of default and loss given default.
- Portfolio performance measures, including noncompliance with covenants, restructurings, delinquencies, non-performing amounts, and charge-offs.
- Amount of impaired assets and the nature of impairment (that is, permanent, or temporary), and the amount of the ALLL attributable to leveraged lending.
- The aggregate level of policy exceptions and the performance of that portfolio.
- Exposures by collateral type, including unsecured transactions and those where enterprise value will be the source of repayment for leveraged loans. Reporting should also consider the implications of defaults that trigger pari passu (in a fair way) treatment for all lenders and, thus, dilute the secondary support from the sale of collateral.
- Secondary-market-pricing data and trading volume, when available.
- Exposures and performance by deal sponsors. Deals introduced by sponsors may, in some cases, be considered exposure to related borrowers. An institution should identify, aggregate, and monitor potential related exposures.
- Gross and net exposures, hedge counterparty concentrations, and policy exceptions.
- Actual versus projected distribution of the syndicated pipeline, with regular reports of excess levels over the hold targets for the syndication inventory. Pipeline definitions should clearly identify the type of exposure. This includes committed exposures that have not been accepted by the borrower, commitments accepted but not closed, and funded and unfunded commitments that have closed but have not been distributed.
- Total and segmented leveraged lending exposures, including subordinated debt and equity holdings, alongside established limits. Reports should provide a detailed and comprehensive view of global exposures, including situations when an institution has indirect exposure to an obligor or is holding a previously sold position as collateral or as a reference asset in a derivative.
- Borrower and counterparty leveraged lending reporting should consider exposures booked in other business units throughout the institution, including indirect exposures such as default swaps and total return swaps, naming the distributed paper as a covered or referenced asset or collateral exposure through repo transactions. Additionally, the institution should consider positions held in available-for-sale or traded portfolios or through structured investment vehicles owned or sponsored by the originating institution or its subsidiaries or affiliates.

2010.2.3.1.9 Risk Rating Leveraged Loans

Previously, the agencies issued guidance on rating credit exposures and credit-rating systems, which applies to all credit transactions, including those in the leveraged lending category.[18]

The risk rating of leveraged loans involves the use of realistic repayment assumptions to determine a borrower's ability to de-lever to a sustainable level within a reasonable period. For example, supervisors commonly assume that the ability to fully amortize senior secured debt or the ability to repay at least 50 percent of total debt over a five- to seven-year period provides evidence of adequate repayment capacity. If the projected capacity to pay down debt from cash flow is nominal with refinancing the only viable option, the credit will usually be adversely rated even if it has been recently underwritten. In cases when leveraged loan transactions have no reasonable or realistic prospects to de-lever, a substandard rating is likely. Furthermore, when assessing debt service capacity, extensions and restructures should be scrutinized to ensure that the institution is not merely masking repayment capacity problems by extending or restructuring the loan.

If the primary source of repayment becomes inadequate, the agencies believe that it would generally be inappropriate for an institution to consider enterprise value as a secondary source of repayment unless that value is well supported. Evidence of well-supported value may include binding purchase and sale agreements with qualified third parties or thorough asset valuations that fully consider the effect of the borrower's distressed circumstances and potential changes in business and market conditions. For such borrowers, when a portion of the loan may not be protected by pledged assets or a well-supported enterprise value, examiners generally will rate that portion doubtful or loss and place the loan on nonaccrual status.

2010.2.3.1.10 Credit Analysis

Effective underwriting and management of leveraged lending risk is highly dependent on the quality of analysis employed during the approval process as well as ongoing monitoring. A financial institution's policies should address the need for a comprehensive assessment of financial, business, industry, and management risks including, whether

- cash-flow analyses rely on overly optimistic or unsubstantiated projections of sales, margins, and merger and acquisition synergies;
- liquidity analyses include performance metrics appropriate for the borrower's industry, predictability of the borrower's cash flow, measurement of the borrower's operating cash needs, and ability to meet debt maturities;
- projections exhibit an adequate margin for unanticipated merger-related integration costs;
- projections are stress tested for one or more downside scenarios, including a covenant breach;
- transactions are reviewed at least quarterly to determine variance from plan, the related risk implications, and the accuracy of risk ratings and accrual status. From inception, the credit file should contain a chronological rationale for and analysis of all substantive changes to the borrower's operating plan and variance from expected financial performance;
- enterprise and collateral valuations are independently derived or validated outside of the origination function, are timely, and consider potential value erosion;
- collateral liquidation and asset sale estimates are based on current market conditions and trends;
- potential collateral shortfalls are identified and factored into risk rating and accrual decisions;
- contingency plans anticipate changing conditions in debt or equity markets when exposures rely on refinancing or the issuance of new equity; and
- the borrower is adequately protected from interest rate and foreign exchange risk.

2010.2.3.1.11 Problem-Credit Management

A financial institution should formulate individual action plans when working with borrowers experiencing diminished operating cash flows, depreciated collateral values, or other significant plan variances. Weak initial underwriting of transactions, coupled with poor struc-

18. Board SR-98-25, "Sound Credit Risk Management and the Use of Internal Credit Risk Ratings at Large Banking Organizations"; OCC Comptroller's Handbooks "Rating Credit Risk" and "Leveraged Lending"; and FDIC Risk Management Manual of Examination Policies, "Loan Appraisal and Classification."

ture and limited covenants, may make problem-credit discussions and eventual restructurings more difficult for an institution as well as result in less favorable outcomes.

A financial institution should formulate credit policies that define expectations for the management of adversely rated and other high-risk borrowers whose performance departs significantly from planned cash flows, asset sales, collateral values, or other important targets. These policies should stress the need for workout plans that contain quantifiable objectives and measureable time frames. Actions may include working with the borrower for an orderly resolution while preserving the institution's interests, sale of the credit in the secondary market, or liquidation of collateral. Problem credits should be reviewed regularly for risk rating accuracy, accrual status, recognition of impairment through specific allocations, and charge-offs.

2010.2.3.1.12 Deal Sponsors

A financial institution that relies on sponsor support as a secondary source of repayment should develop guidelines for evaluating the qualifications of financial sponsors and should implement processes to regularly monitor a sponsor's financial condition. Deal sponsors may provide valuable support to borrowers such as strategic planning, management, and other tangible and intangible benefits. Sponsors may also provide sources of financial support for borrowers that fail to achieve projections. Generally, a financial institution rates a borrower based on an analysis of the borrower's standalone financial condition. However, a financial institution may consider support from a sponsor in assigning internal risk ratings when the institution can document the sponsor's history of demonstrated support as well as the economic incentive, capacity, and stated intent to continue to support the transaction. However, even with documented capacity and a history of support, the sponsor's potential contributions may not mitigate supervisory concerns absent a documented commitment of continued support. An evaluation of a sponsor's financial support should include the following:

- the sponsor's historical performance in supporting its investments, financially and otherwise
- the sponsor's economic incentive to support, including the nature and amount of capital contributed at inception
- documentation of degree of support (for example, a guarantee, comfort letter, or verbal assurance)
- consideration of the sponsor's contractual investment limitations
- to the extent feasible, a periodic review of the sponsor's financial statements and trends, and an analysis of its liquidity, including the ability to fund multiple deals
- consideration of the sponsor's dividend and capital contribution practices
- the likelihood of the sponsor supporting a particular borrower compared to other deals in the sponsor's portfolio
- guidelines for evaluating the qualifications of a sponsor and a process to regularly monitor the sponsor's performance

2010.2.3.1.13 Credit Review

A financial institution should have a strong and independent credit-review function that demonstrates the ability to identify portfolio risks and documented authority to escalate inappropriate risks and other findings to its senior management. Due to the elevated risks inherent in leveraged lending, and depending on the relative size of a financial institution's leveraged lending business, the institution's credit-review function should assess the performance of the leveraged portfolio more frequently and in greater depth than other segments in the loan portfolio. Such assessments should be performed by individuals with the expertise and experience for these types of loans and the borrower's industry. Portfolio reviews should generally be conducted at least annually. For many financial institutions, the risk characteristics of leveraged portfolios, such as high reliance on enterprise value, concentrations, adverse risk rating trends, or portfolio performance, may dictate reviews that are more frequent.

A financial institution should staff its internal credit-review function appropriately and ensure that the function has sufficient resources to ensure timely, independent, and accurate assessments of leveraged lending transactions. Reviews should evaluate the level of risk, risk rating integrity, valuation methodologies, and the quality of risk management. Internal credit reviews should include the review of the institution's leveraged lending practices, policies, and procedures to ensure that they are consistent with regulatory guidance.

2010.2.3.1.14 Stress Testing

A financial institution should develop and implement guidelines for conducting periodic portfolio stress tests on loans originated to hold as well as loans originated to distribute, and sensitivity analyses to quantify the potential impact of changing economic and market conditions on its asset quality, earnings, liquidity, and capital.[19] The sophistication of stress testing practices and sensitivity analyses should be consistent with the size, complexity, and risk characteristics of the institution's leveraged loan portfolio. To the extent a financial institution is required to conduct enterprise-wide stress tests, the leveraged portfolio should be included in any such tests.

2010.2.3.1.15 Conflicts of Interest

A financial institution should develop appropriate policies and procedures to address and to prevent potential conflicts of interest when it has equity and lending positions. For example, an institution may be reluctant to use an aggressive collection strategy with a problem borrower because of the potential impact on the value of an institution's equity interest. A financial institution may encounter pressure to provide financial or other privileged client information that could benefit an affiliated equity investor. Such conflicts also may occur when the underwriting financial institution serves as financial advisor to the seller and simultaneously offers financing to multiple buyers (that is, stapled financing). Similarly, there may be conflicting interests among the different lines of business within a financial institution or between the financial institution and its affiliates. When these situations occur, potential conflicts of interest arise between the financial institution and its customers. Policies and procedures should clearly define potential conflicts of interest, identify appropriate risk-management controls and procedures, enable employees to report potential conflicts of interest to management for action without fear of retribution, and ensure compliance with applicable laws. Further, management should have an established training program for employees on appropriate practices to follow to avoid conflicts of interest and provide for reporting, tracking, and resolution of any conflicts of interest that occur.

2010.2.3.1.16 Reputational Risk

Leveraged lending transactions are often syndicated through the financial and institutional markets. A financial institution's apparent failure to meet its legal responsibilities in underwriting and distributing transactions can damage its market reputation and impair its ability to compete. Similarly, a financial institution that distributes transactions, which over time have significantly higher default or loss rates and performance issues, may also see its reputation damaged.

2010.2.3.1.17 Compliance

The legal and regulatory issues raised by leveraged transactions are numerous and complex. To ensure potential conflicts are avoided and laws and regulations are adhered to, an institution's independent compliance function should periodically review the institution's leveraged lending activity. This guidance is consistent with the principles of safety and soundness and other agency guidance related to commercial lending.

In particular, because leveraged transactions often involve a variety of types of debt and bank products, a financial institution should ensure that its policies incorporate safeguards to prevent violations of anti-tying regulations. Section 106(b) of the Bank Holding Company Act Amendments of 1970[9k] prohibits certain forms of product tying by financial institutions and their affiliates. The intent behind Section 106(b) is to prevent financial institutions from using their market power over certain products to obtain an unfair competitive advantage in other products.

In addition, equity interests and certain debt instruments used in leveraged transactions may constitute "securities" for the purposes of federal securities laws. When securities are

19. See interagency guidance "Supervisory Guidance on Stress Testing for Banking Organizations with More Than $10 Billion in Total Consolidated Assets" (see Board SR Letter 12-7 and its attachment), 77 Fed. Reg. 29458 (May 17, 2012), at www.gpo.gov/fdsys/pkg/FR-2012-05-17/html/2012-11989.htm, and the joint "Statement to Clarify Supervisory Expectations for Stress Testing by Community Banks," May 14, 2012, by the OCC at www.occ.gov/news-issuances/news-releases/2012/nr-ia-2012-76a.pdf; the Board at www.federal reserve.gov/newsevents/press/bcreg/bcreg20120514b1.pdf; and the FDIC at www.fdic.gov/news/news/press/2012/pr12054a.pdf. See also FDIC final rule, Annual Stress Test, 77 Fed. Reg. 62417 (Oct. 15, 2012) (to be codified at 12 CFR part 325, subpart C).

9k. 12 USC 1972.

involved, an institution should ensure compliance with applicable securities laws, including disclosure and other regulatory requirements. An institution should also establish policies and procedures to appropriately manage the internal dissemination of material, nonpublic information about transactions in which it plays a role.

2010.2.4 CREDIT-RISK MANAGEMENT GUIDANCE FOR HOME EQUITY LENDING

On May 16, 2005, the federal bank and thrift regulatory agencies collectively issued the following interagency guidance. The guidance is intended to promote sound credit-risk management practices at banking organizations[21] that have home equity lending programs, including open-end home equity lines of credit (HELOCs) and closed-end home equity loans (HELs). Banking organizations' credit-risk management practices for home equity lending need to keep pace with the rapid growth in home equity lending and should emphasize compliance with sound underwriting standards and practices.

The risk factors listed below, combined with an inherent vulnerability to rising interest rates, suggest that banking organizations need to fully recognize the risk embedded in their home equity portfolios. Following are the specific product, risk-management, and underwriting risk factors and trends that deserve scrutiny:

1. interest-only features that require no amortization of principal for a protracted period
2. limited or no documentation of a borrower's assets, employment, and income (known as "low do" or "no doc" lending)
3. higher loan-to-value (LTV) and debt-to-income (DTI) ratios
4. lower credit-risk scores for underwriting home equity loans;
5. greater use of automated valuation models (AVMs) and other collateral-evaluation tools for the development of appraisals and evaluations
6. an increase in the number of transactions generated through a loan broker or other third party

Home equity lending can be conducted in a safe and sound manner if pursued with the appropriate risk-management structure, including adequate allowances for loan and lease losses and appropriate capital levels. Sound practices call for fully articulated policies that address marketing, underwriting standards, collateral-valuation management, individual-account and portfolio management, and servicing.

Banking organizations should ensure that risk-management practices keep pace with the growth and changing risk profile of home equity portfolios. Management should actively assess a portfolio's vulnerability to changes in consumers' ability to pay and the potential for declines in home values. Active portfolio management is especially important for banking organizations that project or have already experienced significant growth or concentrations, particularly in higher-risk products such as high-LTV, "low doc" or "no doc," interest-only, or third-party-generated loans. (See SR-05-11.)

2010.2.4.1 Credit-Risk Management Systems

2010.2.4.1.1 Product Development and Marketing

In the development of any new product offering, product change, or marketing initiative, management should have a review and approval process that is sufficiently broad to ensure compliance with the banking organization's internal policies and applicable laws and regulations[22] and to evaluate the credit, interest-rate, operational, compliance, reputation, and legal risks. In particular, risk-management personnel should be involved in product development, including an evaluation of the targeted population and the product(s) being offered. For example, material

21. The agencies are the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the National Credit Union Administration. The interagency guidance frequently uses the term "financial institutions." Bank holding companies have financial institutions and various credit-extending nonbanking subsidiaries. The combined entity is being referred to in this guidance as a banking organization.

22. Applicable laws include the Federal Trade Commission Act; the Equal Credit Opportunity Act (ECOA); the Truth in Lending Act (TILA), including the Home Ownership and Equity Protection Act (HOEPA); the Fair Housing Act; the Real Estate Settlement Procedures Act (RESPA); and the Home Mortgage Disclosure Act (HMDA), as well as applicable state consumer protection laws.

changes in the targeted market, origination source, or pricing could have a significant impact on credit quality and should receive senior management approval.

When HELOCs or HELs are marketed or closed by a third party, banking organizations should have standards that provide assurance that the third party also complies with applicable laws and regulations, including those on marketing materials, loan documentation, and closing procedures. (For further details on agent relationships, see section 2010.2.4.1.3, "Third-Party Originations.") Finally, management should have appropriate monitoring tools and management information systems (MIS) to measure the performance of various marketing initiatives, including offers to increase a line, extend the interest-only period, or adjust the interest rate or term.

2010.2.4.1.2 Origination and Underwriting

All relevant risk factors should be considered when establishing product offerings and underwriting guidelines. Generally, these factors should include a borrower's income and debt levels, credit score (if obtained), and credit history, as well as the loan size, collateral value (including valuation methodology), lien position, and property type and location.

Consistent with the Federal Reserve's regulations on real estate lending standards, prudently underwritten home equity loans should include an evaluation of a borrower's capacity to adequately service the debt.[23] Given the home equity products' long-term nature and the large credit amount typically extended to a consumer, an evaluation of repayment capacity should consider a borrower's income and debt levels and not just a credit score.[24] Credit scores are based upon a borrower's historical financial performance. While past performance is a good indicator of future performance, a significant change in a borrower's income or debt levels can adversely alter the borrower's ability to pay. How much verification these underwriting factors require will depend upon the individual loan's credit risk.

HELOCs generally do not have interest-rate caps that limit rate increases.[25] Rising interest rates could subject a borrower to significant payment increases, particularly in a low-interest-rate environment. Therefore, underwriting standards for interest-only and variable-rate HELOCs should include an assessment of the borrower's ability to amortize the fully drawn line over the loan term and to absorb potential increases in interest rates.

2010.2.4.1.3 Third-Party Originations

Banking organizations often use third parties, such as mortgage brokers or correspondents, to originate loans. When doing so, they should have strong control systems to ensure the quality of originations and compliance with all applicable laws and regulations, and to help prevent fraud.

Brokers are firms or individuals, acting on behalf of either the banking organization or the borrower, who match the borrower's needs with institutions' mortgage-origination programs. Brokers take applications from consumers. Although they sometimes process the application and underwrite the loan to qualify the application for a particular lender, they generally do not use their own funds to close loans. Whether brokers are allowed to process and perform any underwriting will depend on the relationship between the banking organization and the broker. For control purposes, the banking organization should retain appropriate oversight of all critical loan-processing activities, such as verification of income and employment and independence in the appraisal and evaluation function.

Correspondents are financial companies that usually close and fund loans in their own name and subsequently sell them to a lender. Banking organizations commonly obtain loans through correspondents and, in some cases, delegate the underwriting function to the correspondent. In delegated underwriting relationships, a banking organization grants approval to a correspondent financial company to process, underwrite, and close loans according to the delegator's processing and underwriting requirements and is committed to purchase those loans. The delegating

23. On December 23, 1992, the Federal Reserve announced the adoption of uniform rules on real estate lending standards and issued the Interagency Guidelines for Real Estate Lending Policies. See subsection 2010.2.1. See also 12 C.F.R., section 208.51 and appendix C.

24. The Interagency Guidelines Establishing Standards for Safety and Soundness also call for documenting the source of repayment and assessing the ability of the borrower to repay the debt in a timely manner. See 12 C.F.R. 208, appendix D-1.

25. While there may be periodic rate increases, the lender must state in the consumer credit contract the maximum interest rate that may be imposed during the term of the obligation. See 12 C.F.R. 226.30(b).

banking organization should have systems and controls to provide assurance that the correspondent is appropriately managed, is financially sound, and provides mortgages that meet the banking organization's prescribed underwriting guidelines and that comply with applicable consumer protection laws and regulations. A quality-control unit or function in the delegating banking organization should closely monitor the quality of loans that the correspondent underwrites. Monitoring activities should include post-purchase underwriting reviews and ongoing portfolio-performance-management activities.

Both brokers and correspondents are compensated based upon mortgage-origination volume and, accordingly, have an incentive to produce and close as many loans as possible. Therefore, banking organizations should perform comprehensive due diligence on third-party originators prior to entering a relationship. In addition, once a relationship is established, the banking organization should have adequate audit procedures and controls to verify that the third parties are not being paid to generate incomplete or fraudulent mortgage applications or are not otherwise receiving referral or unearned income or fees contrary to RESPA prohibitions.[26] Monitoring the quality of loans by origination source, and uncovering such problems as early payment defaults and incomplete packages, enables management to know if third-party originators are producing quality loans. If ongoing credit or documentation problems are discovered, the banking organization should take appropriate action against the third party, which could include terminating its relationship with the third party.

2010.2.4.1.4 Collateral-Valuation Management

Competition, cost pressures, and advancements in technology have prompted banking organizations to streamline their appraisal and evaluation processes. These changes, coupled with banking organizations underwriting to higher LTVs, have heightened the importance of strong collateral-valuation management policies, procedures, and processes.

Banking organizations should have appropriate collateral-valuation policies and procedures that ensure compliance with the Federal Reserve's appraisal regulations[27] and the Interagency Appraisal and Evaluation Guidelines (the guidelines).[28] In addition, the banking organization should—

1. establish criteria for determining the appropriate valuation methodology for a particular transaction, based on the risk in the transaction and loan portfolio (For example, higher-risk transactions or nonhomogeneous property types should be supported by more-thorough valuations. The banking organization should also set criteria for determining the extent to which an inspection of the collateral is necessary.)
2. ensure that an expected or estimated value of the property is not communicated to an appraiser or individual performing an evaluation
3. implement policies and controls to preclude "value shopping" (Use of several valuation tools may return different values for the same property. These differences can result in systematic overvaluation of properties if the valuation choice becomes driven by the highest property value. If several different valuation tools or AVMs are used for the same property, the banking organization should adhere to a policy for selecting the most reliable method, rather than the highest value.)
4. require sufficient documentation to support the collateral valuation in the appraisal or evaluation

2010.2.4.1.5 AVMs

When AVMs are used to support evaluations or appraisals, the banking organization should validate the models on a periodic basis to mitigate the potential valuation uncertainty in the model. As part of the validation process, the banking organization should document the validation's

26. In addition, a banking organization that purchases loans subject to TILA's rules for HELs with high rates or high closing costs (loans covered by HOEPA) can incur assignee liability unless the banking organization can reasonably show that it could not determine the transaction was a loan covered by HOEPA. Also, the nature of its relationship with brokers and correspondents may have implications for liability under ECOA, and for reporting responsibilities under HMDA.

27. 12 C.F.R. 208, subpart E, and 12 C.F.R. 225, subpart G.

28. See SR-94-55, dated October 27, 1994. These revised guidelines include the June 1994 amendments. See also section 2231.0.15, appendix A.

analysis, assumptions, and conclusions. The validation process includes back-testing a representative sample of the valuations against market data on actual sales (where sufficient information is available). The validation process should cover properties representative of the geographic area and property type for which the tool is used.

Many AVM vendors, when providing a value, will also provide a "confidence score," which usually relates to the accuracy of the value provided. Confidence scores, however, come in many different formats and are calculated based on differing scoring systems. Banking organizations that use AVMs should have an understanding of how the model works as well as what the confidence scores mean. Confidence levels should be established by the banking organization that are appropriate for the risk in a given transaction or group of transactions.

When tax-assessment valuations are used as a basis for the collateral valuation, the banking organization should be able to demonstrate and document the correlation between the assessment value of the taxing authority and the property's market value as part of the validation process.

2010.2.4.1.6 Account Management

Since HELOCs often have long-term, interest-only payment features, banking organizations should have risk-management techniques that identify higher-risk accounts and adverse changes in account risk profiles, thereby enabling management to implement timely preventive action (e.g., freezing or reducing lines). Further, a banking organization should have risk-management procedures to evaluate and approve additional credit on an existing line or extending the interest-only period. Account-management practices should be appropriate for the size of the portfolio and the risks associated with the types of home equity lending.

Effective account-management practices for large portfolios or portfolios with high-risk characteristics include—

1. periodically refreshing credit-risk scores on all customers;
2. using behavioral scoring and analysis of individual borrower characteristics to identify potential problem accounts;
3. periodically assessing utilization rates;
4. periodically assessing payment patterns, including borrowers who make only minimum payments over a period of time or those who rely on the line to keep payments current;
5. monitoring home values by geographic area; and
6. obtaining updated information on the collateral's value when significant market factors indicate a potential decline in home values, or when the borrower's payment performance deteriorates and greater reliance is placed on the collateral.

The frequency of these actions should be commensurate with the risk in the portfolio. Banking organizations should conduct annual credit reviews of HELOC accounts to determine whether the line of credit should be continued, based on the borrower's current financial condition.[29]

When appropriate, banking organizations should refuse to extend additional credit or reduce the credit limit of a HELOC, bearing in mind that under Regulation Z such steps can be taken only in limited circumstances. These include, for example, when the value of the collateral declines significantly below the appraised value for purposes of the HELOC, default of a material obligation under the loan agreement, or deterioration in the borrower's financial circumstances.[30] In order to freeze or reduce credit lines due to deterioration in a borrower's financial circumstances, two conditions must be met: (1) there must be a "material" change in the borrower's financial circumstances and (2) as a result of this change, the banking organization must have a reasonable belief that the borrower will be unable to fulfill the plan's payment obligations.

Account-management practices that do not adequately control authorizations and provide for timely repayment of over-limit amounts may significantly increase a portfolio's credit risk. Authorizations of over-limit home equity lines of credit should be restricted and subject to appropriate policies and controls. A banking

29. Under the Federal Reserve's risk-based capital guidelines, an unused HELOC commitment with an original maturity of one year or more may be allocated a zero percent conversion factor if the banking organization conducts at least an annual credit review and is able to unconditionally cancel the commitment (i.e., prohibit additional extensions of credit, reduce the credit line, and terminate the line) to the full extent permitted by relevant federal law. See 12 C.F.R. 208, appendix A, III.D.4., and 12 C.F.R. 225, appendix A, III.D.4.

30. Regulation Z does not permit these actions to be taken in circumstances other than those specified in the regulation. See 12 C.F.R. 226.5b(f)(3)(vi)(A)–(F).

organization's practices should require over-limit borrowers to repay in a timely manner the amount that exceeds established credit limits. Management information systems should be sufficient to enable management to identify, measure, monitor, and control the unique risks associated with over-limit accounts.

2010.2.4.1.7 Portfolio Management

Banking organizations should implement an effective portfolio credit-risk management process for their home equity portfolios that includes the following.

2010.2.4.1.7.1 Policies

The Federal Reserve's real estate lending standards regulations require that a banking organization's real estate lending policies be consistent with safe and sound banking practices and that the banking organization's board of directors review and approve these policies at least annually. Before implementing any changes to policies or underwriting standards, management should assess the potential effect on the banking organization's overall risk profile, which would include the effect on concentrations, profitability, and delinquency and loss rates. The accuracy of these estimates should be tested by comparing them with actual experience.

2010.2.4.1.7.2 Portfolio Objectives and Risk Diversification

Effective portfolio management should clearly communicate portfolio objectives, such as growth targets, utilization, rate-of-return hurdles, and default and loss expectations. For banking organizations with significant concentrations of HELs or HELOCs, limits should be established and monitored for key portfolio segments, such as geographic area, loan type, and higher-risk products. When appropriate, consideration should be given to the use of risk mitigants, such as private mortgage insurance, pool insurance, or securitization. As the portfolio approaches concentration limits, the banking organization should analyze the situation sufficiently to enable the banking organization's board of directors and senior management to make a well-informed decision to either raise concentration limits or pursue a different course of action.

Effective portfolio management requires an understanding of the various risk characteristics of the home equity portfolio. To gain this understanding, a banking organization should analyze the portfolio by segment, using criteria such as product type, credit-risk score, DTI, LTV, property type, geographic area, collateral-valuation method, lien position, size of credit relative to prior liens, and documentation type (such as "no doc" or "low doc").

2010.2.4.1.7.3 Management Information Systems

By maintaining adequate credit MIS, a banking organization can segment loan portfolios and accurately assess key risk characteristics. The MIS should also provide management with sufficient information to identify, monitor, measure, and control home equity concentrations. Banking organizations should periodically assess the adequacy of their MIS in light of growth and changes in their appetite for risk. For banking organizations with significant concentrations of HELs or HELOCs, MIS should include, at a minimum, reports and analysis of the following:

1. production and portfolio trends by product, loan structure, originator channel, credit score, LTV, DTI, lien position, documentation type, market, and property type
2. delinquency and loss-distribution trends by product and originator channel with some accompanying analysis of significant underwriting characteristics (such as credit score, LTV, DTI)
3. vintage tracking
4. the performance of third-party originators (brokers and correspondents)
5. market trends by geographic area and property type to identify areas of rapidly appreciating or depreciating housing values

2010.2.4.1.7.4 Policy and Underwriting-Exception Systems

Banking organizations should have a process for identifying, approving, tracking, and analyzing underwriting exceptions. Reporting systems that capture and track information on exceptions, both by transaction and by relevant portfolio segments, facilitate the management of a port-

folio's credit risk. The aggregate data is useful to management in assessing portfolio risk profiles and monitoring the level of adherence to policy and underwriting standards by various origination channels. Analysis of the information may also be helpful in identifying correlations between certain types of exceptions and delinquencies and losses.

2010.2.4.1.7.5 High-LTV Monitoring

To clarify the real estate lending standards regulations and interagency guidelines, the agencies issued Guidance on High Loan-To-Value (HLTV) Residential Real Estate Lending (the HLTV guidance) in October 1999. The HLTV guidance clarified the Interagency Real Estate Lending Guidelines and the supervisory loan-to-value limits for loans on one- to four-family residential properties. Banking organizations are expected to ensure compliance with the supervisory loan-to-value limits of the Interagency Real Estate Lending Guidelines. The HLTV guidance outlines controls that the banking organizations should have in place when engaging in HLTV lending. Banking organizations should accurately track the volume of HLTV loans, including HLTV home equity and residential mortgages, and report the aggregate of such loans to the banking organization's board of directors. Specifically, banking organizations are reminded that:

1. Loans in excess of the supervisory LTV limits should be identified in the banking organization's records. The aggregate of high-LTV one-to four-family residential loans should not exceed 100 percent of the banking organization's total capital.[31] Within that limit, high-LTV loans for properties other than one- to four-family residential properties should not exceed 30 percent of capital.
2. In calculating the LTV and determining compliance with the supervisory LTVs, the banking organization should consider all senior liens. All loans secured by the property and held by the banking organization are reported as an exception if the combined LTV of a loan and all senior liens on an owner-occupied one- to four-family residential property equals or exceeds 90 percent and if there is no additional credit enhancement in the form of either mortgage insurance or readily marketable collateral.
3. For the LTV calculation, the loan amount is the legally binding commitment (that is, the entire amount that the banking organization is legally committed to lend over the life of the loan).
4. All real–estate secured loans in excess of supervisory LTV limits should be aggregated and included in a quarterly report for the banking organization's board of directors.

Certain insurance products help banking organizations mitigate the credit risks of HLTV residential loans. Insurance policies that cover a "pool" of loans can be an efficient and effective credit-risk management tool. But if a policy has a coverage limit, the coverage may be exhausted before all loans in the pool mature or pay off. The Federal Reserve considers pool insurance to be a sufficient credit enhancement to remove the HLTV designation in the following circumstances: (1) the policy is issued by an acceptable mortgage insurance company, (2) it reduces the LTV for each loan to less than 90 percent, and (3) it is effective over the life of each loan in the pool.

2010.2.4.1.7.6 Stress Testing for Portfolios

Banking organizations with home equity concentrations as well as higher-risk portfolios are encouraged to perform sensitivity analyses on key portfolio segments. This type of analysis identifies possible events that could increase risk within a portfolio segment or for the portfolio as a whole. Banking organizations should consider stress tests that incorporate interest-rate increases and declines in home values. Since these events often occur simultaneously, the agencies recommend testing for these events together. Banking organizations should also periodically analyze markets in key geographic areas, including identified "soft" markets. Management should consider developing contingency strategies for scenarios and outcomes that extend credit risk beyond internally established

31. For purposes of the Interagency Real Estate Lending Standards Guidelines, high-LTV one- to four-family residential property loans include (1) a loan for raw land zoned for one- to four-family residential use with an LTV ratio greater than 65 percent; (2) a residential land development loan or improved lot loan with an LTV greater than 75 percent; (3) a residential construction loan with an LTV ratio greater than 85 percent; (4) a loan on non-owner occupied one- to four-family residential property with an LTV greater than 85 percent; and (5) a permanent mortgage or home equity loan on an owner-occupied residential property with an LTV equal to or exceeding 90 percent without mortgage insurance, readily marketable collateral, or other acceptable collateral.

risk tolerances. These contingency plans might include increased monitoring, tightening underwriting, limiting growth, and selling loans or portfolio segments.

2010.2.4.1.8 Operations, Servicing, and Collections

Effective procedures and controls should be maintained for such support functions as perfecting liens, collecting outstanding loan documents, obtaining insurance coverage (including flood insurance), and paying property taxes. Credit-risk management should oversee these support functions to ensure that operational risks are properly controlled.

2010.2.4.1.8.1 Lien Recording

Banking organizations should take appropriate measures to safeguard their lien position. They should verify the amount and priority of any senior liens prior to closing the loan. This information is necessary to determine the loan's LTV ratio and to assess the credit support of the collateral. Senior liens include first mortgages, outstanding liens for unpaid taxes, outstanding mechanic's liens, and recorded judgments on the borrower.

2010.2.4.1.8.2 Problem-Loan Workouts and Loss-Mitigation Strategies

Banking organizations should have established policies and procedures for problem loan workouts and loss-mitigation strategies. Policies should be in accordance with the requirements of the FFIEC's Uniform Retail Credit Classification and Account Management Policy, issued June 2000 (see SR-00-8 and section 2241.0) and should, at a minimum, address the following:

1. circumstances and qualifying requirements for various workout programs including extensions, re-ages, modifications, and re-writes (Qualifying criteria should include an analysis of a borrower's financial capacity to service the debt under the new terms.)
2. circumstances and qualifying criteria for loss-mitigating strategies, including foreclosure
3. appropriate MIS to track and monitor the effectiveness of workout programs, including tracking the performance of all categories of workout loans (For large portfolios, vintage delinquency and loss tracking also should be included.)

While banking organizations are encouraged to work with borrowers on a case-by-case basis, a banking organization should not use workout strategies to defer losses. Banking organizations should ensure that credits in workout programs are evaluated separately for the allowance for loan and lease losses (ALLL), because such credits tend to have higher loss rates than other portfolio segments.

2010.2.4.1.9 Secondary-Market Activities

More banking organizations are issuing HELOC mortgage-backed securities (that is, securitizing HELOCs). Although such secondary-market activities can enhance credit availability and a banking organization's profitability, they also pose certain risk-management challenges. A banking organization's risk-management systems should address the risks of HELOC securitizations.[32]

2010.2.4.1.10 Portfolio Classifications, Allowance for Loan and Lease Losses, and Capital

The FFIEC's Uniform Retail Credit Classification and Account Management Policy governs the classification of consumer loans and establishes general classification thresholds that are based on delinquency. Banking organizations and the Federal Reserve's examiners have the discretion to classify entire retail portfolios, or segments thereof, when underwriting weaknesses or delinquencies are pervasive and present an excessive level of credit risk. Portfolios of high-LTV loans to borrowers who exhibit inadequate capacity to repay the debt within a reasonable time may be subject to classification.

Banking organizations should establish appropriate ALLL and hold capital commensurate with the riskiness of their portfolios. In determining the ALLL adequacy, a banking organization should consider how the interest-only and draw features of HELOCs during the

32. See the risk management and capital adequacy of exposures arising from secondary-market credit activities discussion in SR-97-21 (see also section 2129.05).

lines' revolving period could affect the loss curves for its HELOC portfolio. Those banking organizations engaging in programmatic subprime home equity lending or banking organizations that have higher-risk products are expected to recognize the elevated risk of the activity when assessing capital and ALLL adequacy.[33]

2010.2.5 OVERSIGHT OF CONCENTRATIONS IN COMMERCIAL REAL ESTATE LENDING AND SOUND RISK-MANAGEMENT LENDING

As part of a bank holding company inspection, the examiner should make an assessment of the parent company's supervision and control over its subsidiary lending activities, which includes an overall assessment of the banking organization's credit-risk concentrations, including the risk concentrations in commercial real estate lending. (See also section 2010.2.) Banking organizations, including bank holding companies, are responsible for establishing the necessary and appropriate management oversight of their bank and nonbank subsidiaries by administering, monitoring, and assuring adherence to the organization's lending policies and practices for controlling "concentration risk." Banking organizations should therefore have adequate management information systems (including the appropriate accounting and internal control systems) in place to accomplish their supervisory oversight and to control such credit concentrations.

The following guidance, Concentrations in Commercial Real Estate (CRE) Lending, Sound Risk-Management Practices (the guidance) was issued on December 6, 2006 (effective on December 12, 2006).[34] The guidance was developed to reinforce sound risk-management practices for institutions (includes banking organizations) with high and increasing concentrations of commercial real estate loans on their balance sheets. An institution's strong risk-management practices and its maintenance of appropriate levels of capital are important elements of a sound CRE lending program, particularly when an institution has a concentration in CRE or a CRE lending strategy leading to a concentration. However, institutions needing to improve their risk-management processes may have been provided the opportunity for some flexibility on the time frame for complying with the guidance. This time frame will be commensurate with the level and nature of CRE concentration risk, the quality of the institution's existing risk-management practices, and its levels of capital. (See 71 *Fed. Reg.* 74,580 [December 12, 2006], the Federal Reserve Board's press release dated December 6, 2006, and SR-07-01 and its attachments.) See also SR-15-17, "Interagency Statement on Prudent Risk Management for Commercial Real Estate Lending" and its attachment and the Board's December 18, 2015, press release.

2010.2.5.1 Scope of the CRE Concentration Guidance

The guidance focuses on those CRE loans for which the cash flow from the real estate is the primary source of repayment rather than loans to a borrower for which real estate collateral is taken as a secondary source of repayment or through an abundance of caution. For the purposes of this guidance, CRE loans include those loans with risk profiles sensitive to the condition of the general CRE market (for example, market demand, changes in capitalization rates, vacancy rates, or rents). CRE loans are land development and construction loans (including one- to four-family residential and commercial construction loans) and other land loans. CRE loans also include loans secured by multifamily property, and nonfarm nonresidential property where the primary source of repayment is derived from rental income associated with the property (that is, loans for which 50 percent or more of the source of repayment comes from third-party, nonaffiliated, rental income) or the proceeds of the sale, refinancing, or permanent financing of the property. Loans to real estate investment

33. See the January 2001 Interagency Expanded Guidance for Subprime Lending Programs (section 2128.08) for supervisory expectations regarding risk-management processes, the allowance for loan and lease losses, and capital adequacy for banking organizations engaging in subprime-lending programs.

34. The guidance was jointly adopted by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation after the bank supervisory agencies' careful consideration of the comments received following the initial issuance of the January 10, 2006, proposed guidance on concentrations in commercial real estate lending. The final guidance is applicable to state member banks and broadly applicable to bank holding companies and their nonbank subsidiaries. For the purposes of this section the references to banks, institutions, and banking organizations is confined to those entities for which the Board of Governors of the Federal Reserve System has supervisory authority.

trusts and unsecured loans to developers also should be considered CRE loans for purposes of this guidance if their performance is closely linked to performance of the CRE markets. The scope of the guidance does not include loans secured by nonfarm nonresidential properties where the primary source of repayment is the cash flow from the ongoing operations and activities conducted by the party, or affiliate of the party, who owns the property. Rather than defining a CRE concentration, the guidance's "Supervisory Oversight" section describes the criteria that the Federal Reserve will use as high-level indicators to identify banks potentially exposed to CRE concentration risk.

2010.2.5.2 CRE Concentration Assessments

Banks that are actively involved in CRE lending should perform ongoing risk assessments to identify CRE concentrations. The risk assessment should identify potential concentrations by stratifying the CRE portfolio into segments that have common risk characteristics or sensitivities to economic, financial, or business developments. A bank's CRE portfolio stratification should be reasonable and supportable. The CRE portfolio should not be divided into multiple segments simply to avoid the appearance of concentration risk.

The Federal Reserve recognizes that risk characteristics vary among CRE loans secured by different property types. A manageable level of CRE concentration risk will vary by bank depending on the portfolio risk characteristics, the quality of risk-management processes, and capital levels. Therefore, the guidance does not establish a CRE concentration limit that applies to all banks. Rather, banks are encouraged to identify and monitor credit concentrations and to establish internal concentration limits, and all concentrations should be reported to senior management and the board of directors on a periodic basis. Depending on the results of the risk assessment, the bank may need to enhance its risk-management systems.

2010.2.5.3 CRE Risk Management

The sophistication of a bank's CRE risk-management processes should be appropriate to the size of the portfolio, as well as the level and nature of concentrations and the associated risk to the bank. Banks should address the following key elements in establishing a risk-management framework that effectively identifies, monitors, and controls CRE concentration risk:

1. board and management oversight
2. portfolio management
3. management information systems
4. market analysis
5. credit underwriting standards
6. portfolio stress testing and sensitivity analysis
7. credit-risk review function

2010.2.5.3.1 Board and Management Oversight of CRE Concentration Risk

A bank's board of directors has ultimate responsibility for the level of risk assumed by the bank. If the bank has significant CRE concentration risk, its strategic plan should address the rationale for its CRE levels in relation to its overall growth objectives, financial targets, and capital plan. In addition, the Federal Reserve's real estate lending regulations require that each bank adopt and maintain a written policy that establishes appropriate limits and standards for all extensions of credit that are secured by liens on or interests in real estate, including CRE loans. Therefore, the board of directors or a designated committee thereof should—

1. establish policy guidelines and approve an overall CRE lending strategy regarding the level and nature of CRE exposures acceptable to the bank, including any specific commitments to particular borrowers or property types, such as multifamily housing;
2. ensure that management implements procedures and controls to effectively adhere to and monitor compliance with the bank's lending policies and strategies;
3. review information that identifies and quantifies the nature and level of risk presented by CRE concentrations, including reports that describe changes in CRE market conditions in which the bank lends; and
4. periodically review and approve CRE risk exposure limits and appropriate sublimits (for example, by nature of concentration) to conform to any changes in the bank's strategies and to respond to changes in market conditions.

2010.2.5.3.2 CRE Portfolio Management

Banks with CRE concentrations should manage not only the risk of individual loans but also portfolio risk. Even when individual CRE loans are prudently underwritten, concentrations of loans that are similarly affected by cyclical changes in the CRE market can expose a bank to an unacceptable level of risk if not properly managed. Management regularly should evaluate the degree of correlation between related real estate sectors and establish internal lending guidelines and concentration limits that control the bank's overall risk exposure.

Management should develop appropriate strategies for managing CRE concentration levels, including a contingency plan to reduce or mitigate concentrations in the event of adverse CRE market conditions. Loan participations, whole loan sales, and securitizations are a few examples of strategies for actively managing concentration levels without curtailing new originations. If the contingency plan includes selling or securitizing CRE loans, management should assess periodically the marketability of the portfolio. This should include an evaluation of the bank's ability to access the secondary market and a comparison of its underwriting standards with those that exist in the secondary market.

2010.2.5.3.3 CRE Management Information Systems

A strong management information system (MIS) is key to effective portfolio management. The sophistication of the MIS will necessarily vary with the size and complexity of the CRE portfolio and level and nature of concentration risk. The MIS should provide management with sufficient information to identify, measure, monitor, and manage CRE concentration risk. This includes meaningful information on CRE portfolio characteristics that is relevant to the bank's lending strategy, underwriting standards, and risk tolerances. A bank should periodically assess the adequacy of the MIS in light of growth in CRE loans and changes in the CRE portfolio's size, risk profile, and complexity.

Banks are encouraged to stratify the CRE portfolio by property type, geographic market, tenant concentrations, tenant industries, developer concentrations, and risk rating. Other useful stratifications may include loan structure (for example, fixed-rate or adjustable), loan purpose (for example, construction, short-term, or permanent), loan-to-value (LTV) limits, debt service coverage, policy exceptions on newly underwritten credit facilities, and affiliated loans (for example, loans to tenants). A bank should also be able to identify and aggregate exposures to a borrower, including its credit exposure relating to derivatives.

Management reporting should be timely and in a format that clearly indicates changes in the portfolio's risk profile, including risk-rating migrations. In addition, management reporting should include a well-defined process through which management reviews and evaluates concentration and risk-management reports, as well as special ad hoc analyses in response to potential market events that could affect the CRE loan portfolio.

2010.2.5.3.4 Market Analysis

Market analysis should provide the bank's management and board of directors with information to assess whether its CRE lending strategy and policies continue to be appropriate in light of changes in CRE market conditions. A bank should perform periodic market analyses for the various property types and geographic markets represented in its portfolio.

Market analysis is particularly important as a bank considers decisions about entering new markets, pursuing new lending activities, or expanding in existing markets. Market information also may be useful for developing sensitivity analysis or stress tests to assess portfolio risk.

Sources of market information may include published research data, real estate appraisers and agents, information maintained by the property taxing authority, local contractors, builders, investors, and community development groups. The sophistication of a bank's analysis will vary by its market share and exposure, as well as the availability of market data. While a bank operating in nonmetropolitan markets may have access to fewer sources of detailed market data than a bank operating in large, metropolitan markets, a bank should be able to demonstrate that it has an understanding of the economic and business factors influencing its lending markets.

2010.2.5.3.5 Credit Underwriting Standards

A bank's lending policies should reflect the level of risk that is acceptable to its board of directors and should provide clear and measurable underwriting standards that enable the bank's lending staff to evaluate all relevant credit factors. When a bank has a CRE concentration, the establishment of sound lending policies becomes even more critical. In establishing its policies, a bank should consider both internal and external factors, such as its market position, historical experience, present and prospective trade area, probable future loan and funding trends, staff capabilities, and technology resources. Consistent with the Federal Reserve's real estate lending guidelines, CRE lending policies should address the following underwriting standards:

1. maximum loan amount by type of property
2. loan terms
3. pricing structures
4. collateral valuation[35]
5. LTV limits by property type
6. requirements for feasibility studies and sensitivity analysis or stress testing
7. minimum requirements for initial investment and maintenance of hard equity by the borrower
8. minimum standards for borrower net worth, property cash flow, and debt service coverage for the property

A bank's lending policies should permit exceptions to underwriting standards only on a limited basis. When a bank does permit an exception, it should document how the transaction does not conform to the bank's policy or underwriting standards, obtain appropriate management approvals, and provide reports to the board of directors or designated committee detailing the number, nature, justifications, and trends for exceptions. Exceptions to both the bank's internal lending standards and the Federal Reserve's supervisory LTV limits[36] should be monitored and reported on a regular basis. Further, banks would analyze trends in exceptions to ensure that risk remains within the bank's established risk tolerance limits.

Credit analysis should reflect both the borrower's overall creditworthiness and project-specific considerations as appropriate. In addition, for development and construction loans, the bank should have policies and procedures governing loan disbursements to ensure that the bank's minimum borrower equity requirements are maintained throughout the development and construction periods. Prudent controls should include an inspection process, documentation on construction progress, tracking pre-sold units, pre-leasing activity, and exception monitoring and reporting.

2010.2.5.3.6 CRE Portfolio Stress Testing and Sensitivity Analysis

A bank with CRE concentrations should perform portfolio-level stress tests or sensitivity analysis to quantify the impact of changing economic conditions on asset quality, earnings, and capital. Further, a bank should consider the sensitivity of portfolio segments with common risk characteristics to potential market conditions. The sophistication of stress testing practices and sensitivity analysis should be consistent with the size, complexity, and risk characteristics of the CRE loan portfolio. For example, well-margined and seasoned performing loans on multifamily housing normally would require significantly less robust stress testing than most acquisition, development, and construction loans.

Portfolio stress testing and sensitivity analysis may not necessarily require the use of a sophisticated portfolio model. Depending on the risk characteristics of the CRE portfolio, stress testing may be as simple as analyzing the potential effect of stressed loss rates on the CRE portfolio, capital, and earnings. The analysis should focus on the more vulnerable segments of a bank's CRE portfolio, taking into consideration the prevailing market environment and the bank's business strategy.

2010.2.5.3.7 Credit-Risk Review Function

A strong credit-risk review function is critical for a bank's self-assessment of emerging risks. An effective, accurate, and timely risk-rating system provides a foundation for the bank's credit-risk review function to assess credit quality and, ultimately, to identify problem loans.

35. Refer to the Federal Reserve's appraisal regulations: 12 C.F.R. 208 subpart E and 12 C.F.R. 225, subpart G.

36. The Interagency Guidelines for Real Estate Lending state that loans exceeding the supervisory LTV guidelines should be recorded in the bank's records and reported to the board at least quarterly.

Risk ratings should be risk sensitive, objective, and appropriate for the types of CRE loans underwritten by the bank. Further, risk ratings should be reviewed regularly for appropriateness.

2010.2.5.4 Supervisory Oversight Of CRE Concentration Risk

As part of its ongoing supervisory monitoring processes, the Federal Reserve will use certain criteria to identify banks that are potentially exposed to significant CRE concentration risk. A bank that has experienced rapid growth in CRE lending, has notable exposure to a specific type of CRE, or is approaching or exceeds the following supervisory criteria may be identified for further supervisory analysis of the level and nature of its CRE concentration risk:

1. total reported loans for construction, land development, and other land[37] represent 100 percent or more of the bank's total capital[38] or
2. total commercial real estate loans as defined in this guidance[39] represent 300 percent or more of the bank's total capital, and the outstanding balance of the bank's commercial real estate loan portfolio has increased by 50 percent or more during the prior 36 months.

The Federal Reserve will use the criteria as a preliminary step to identify banks that may have CRE concentration risk. Because regulatory reports capture a broad range of CRE loans with varying risk characteristics, the supervisory monitoring criteria do not constitute limits on a bank's lending activity but rather serve as high-level indicators to identify banks potentially exposed to CRE concentration risk. Nor do the criteria constitute a "safe harbor" for banks if other risk indicators are present, regardless of their measurements under (1) and (2).

37. For commercial banks as reported in the Call Report FFIEC 031 and 041, schedule RC-C, item 1a.

38. For purposes of this guidance, the term *total capital* means the total risk-based capital as reported for commercial banks in the Call Report FFIEC 031 and 041 schedule RC-R—Regulatory Capital, line 21.

39. For commercial banks as reported in the Call Report FFIEC 031 and 041, schedule RC-C, item 1a.

2010.2.5.4.1 Evaluation of CRE Concentrations

The effectiveness of a bank's risk-management practices will be a key component of the supervisory evaluation of the bank's CRE concentrations. Examiners will engage in a dialogue with the bank's management to assess CRE exposure levels and risk-management practices. Banks that have experienced recent, significant growth in CRE lending will receive closer supervisory review than those that have demonstrated a successful track record of managing the risks in CRE concentrations.

In evaluating CRE concentrations, the Federal Reserve will consider the bank's own analysis of its CRE portfolio, including consideration of factors such as—

1. portfolio diversification across property types
2. geographic dispersion of CRE loans
3. underwriting standards
4. level of pre-sold units or other types of take-out commitments on construction loans
5. portfolio liquidity (ability to sell or securitize exposures on the secondary market)

While consideration of these factors should not change the method of identifying a credit concentration, these factors may mitigate the risk posed by the concentration.

2010.2.5.4.2 Assessment of Capital Adequacy for CRE Concentration Risk

The Federal Reserve's existing capital adequacy guidelines note that a bank should hold capital commensurate with the level and nature of the risks to which it is exposed. Accordingly, banks with CRE concentrations are reminded that their capital levels should be commensurate with the risk profile of their CRE portfolios. In assessing the adequacy of a bank's capital, the Federal Reserve will consider the level and nature of inherent risk in the CRE portfolio as well as management expertise, historical performance, underwriting standards, risk-management practices, market conditions, and any loan loss reserves allocated for CRE concentration risk. A bank with inadequate capital to serve as a buffer against unexpected losses from a CRE concentration should develop a plan for reducing its CRE concentrations or for maintaining capital appropriate to the level and nature of its CRE concentration risk.

2010.2.6 GUIDANCE ON PRIVATE STUDENT LOANS WITH GRADUATED REPAYMENT TERMS AT ORIGINATION

On January 29, 2015, interagency[40] guidance[41] was issued to provide financial institutions with principles applicable to private student loans that have graduated repayment terms. Financial institutions that originate private student loans may offer borrowers graduated repayment terms in addition to fixed amortizing terms at the time of loan origination. Graduated repayment terms are structured to provide for lower initial monthly payments that gradually increase. Refer to SR-15-2/CA-15-1 and its attachment.

Although most student loan agreements include a grace period[42] to help with the post-education transition, the agencies and SLC recognize that students leaving higher education programs may prefer more flexibility to transition into the labor market because of a number of factors, such as competitive job markets, traditionally low entry-level salaries, and higher student debt loads. Graduated repayment terms may align borrowers' income levels with loan repayment requirements, provide flexibility to repay the debt sooner if borrowers' incomes increase more quickly than projected, and may help long-term probability of full repayment.

Financial institutions that originate private student loans with graduated repayment terms should prudently underwrite the loans in a manner consistent with safe and sound lending practices. Financial institutions should provide disclosures that clearly communicate the timing and the amount of payments to facilitate a borrower's understanding of the loan's terms and features.

2010.2.6.1 Principles for Private Student Loans with Graduated Repayment Terms at Origination

Financial institutions should consider the following principles in their policies and procedures for underwriting private student loans with graduated repayment terms at origination:[43]

- *Ensure orderly repayment.* Private student loans should have defined repayment periods and promote orderly repayment over the life of the loans. Graduated repayment terms should ensure timely loan repayment and be appropriately calibrated according to reasonable industry and market standards based on the amount of debt outstanding. Graduated repayment terms should avoid negative amortization or balloon payments.
- *Avoid payment shock.*[44] Graduated repayment terms should result in monthly payments that a borrower can meet in a sustained manner over the life of the loan. Graduated increases in a borrower's monthly payment should begin early in the repayment period and phase in the amortization of the principal balance to limit payment shock to the borrower.
- *Align payment terms with a borrower's income.* Graduated repayment terms should be based on reasonable assumptions about the ability to repay of the borrower and cosigner, if any. Lender underwriting should include an assessment of a borrower's (and, if applicable, a cosigner's) ability to repay the highest amortizing payment over the term of the loan. Graduated repayment terms should not be structured in a way that could mask delinquencies or defer losses.
- *Provide borrowers with clear disclosures.* Financial institutions that offer private student loans with graduated repayment terms should provide borrowers with disclosures in compliance with all applicable laws and regulations. For example, the Truth in Lending Act, as implemented by Regulation Z, includes specific private student loan disclosure content requirements.[45] Ensuring that disclosures clearly communicate the timing and the

40. The agencies consist of the Board of Governors of the Federal Reserve System, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency.

41. In implementing this guidance, the agencies will examine financial institutions consistent with their respective authorities.

42. A grace period is the allotted amount of time during which borrowers are not expected to make payments on student loans after initially leaving higher education programs or dropping below half-time enrollment status.

43. In addition to offering graduated repayment terms at origination, financial institutions may also offer graduated repayment terms as well as other types of workout options to borrowers experiencing financial difficulties, as addressed in "Banking Agencies Encourage Financial Institutions to Work With Student Loan Borrowers Experiencing Financial Difficulties," issued July 25, 2013.

44. Payment shock occurs when a borrower experiences a significant increase in the amount of the monthly payment after a reset date.

45. 12 CFR 1026.46 and 12 CFR 1026.47.

amount of payments facilitates borrowers' understanding of their loans' terms and features.

- *Comply with all applicable federal and state consumer laws and regulations and reporting standards.*[46] Private student loans with graduated repayment terms must comply with all applicable consumer protection laws. These include, but are not limited to, the Electronic Fund Transfer Act, the Equal Credit Opportunity Act, federal and state prohibitions against unfair, deceptive, or abusive acts or practices (such as section 5 of the Federal Trade Commission Act and sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act), the Truth in Lending Act, and the regulations issued pursuant to those laws.
- *Contact borrowers before reset dates.* Before originating private students loans with graduated repayment terms, financial institutions should develop processes for contacting borrowers before the start of the repayment period and before each payment reset date. These contacts can help establish student debt as a priority in borrowers' payment hierarchies[47] and aid borrowers in responding effectively to payment increases and other potential repayment challenges.

2010.2.7 LOAN PARTICIPATIONS, THE AGREEMENTS AND PARTICIPANTS

This subsection provides supervisory and accounting guidance for examiners to use in their inspection (or examination) and review of a bank holding company's (BHC's) or bank's use, purchase, or sale of loan participation agreements.[48] BHCs should manage and control aggregate credit and other risk exposures on a consolidated basis while recognizing legal distinctions and possible obstacles to asset movements within the parent company or its subsidiaries. Additional guidance, research, and information on loan participations and loan participation agreements will be developed and considered for future issuance and implementation.

A loan participation is an agreement that transfers a stated ownership interest in a loan to one or more other BHCs or subsidiaries, or other entities. The transfer represents an ownership interest in an individual financial asset. The lead BHC (or lead subsidiary) retains a partial interest in the loan, holds all loan documentation in its own name, services the loan, and deals directly with the customer for the benefit of all participants. The lead BHC or lead subsidiary should ensure that comprehensive participation agreements with originating institutions are in place for each loan facility before they consider purchasing any participating interest.

Many BHCs and their subsidiaries purchase loans or participate in loans originated by others. In some cases, such transactions are conducted with BHC affiliates, groups of BHCs or chain banks, or other subsidiaries. Alternatively, a purchasing BHC or subsidiary may also wish to supplement its loan portfolio when loan demand is weak. In still other cases, a BHC or subsidiary may purchase or participate in a loan to accommodate another unrelated bank with which it has established an ongoing business relationship.

Purchasing or selling loans, if done properly, can have a legitimate role in a BHC's or bank's overall asset and liability management and can contribute to the efficient functioning of the financial system. In addition, these activities help a BHC or bank diversify its risks and improve its liquidity.

2010.2.7.1 Board Policies on Loan Participations

BHCs and their subsidiaries should have sufficient board-approved policies in place that govern their loan participation activities. At a minimum, the policy should include (1) the requirements for entering into a loan participation agreement, (2) limits for the aggregate amount of loans purchased from and sold to an outside source, (3) limits of all loans purchased and sold, (4) limits for the aggregate amount of loans to particular industries, (5) comprehensive participation agreements with originating BHCs or banks, (6) complete analysis and documentation of the credit quality of obligations purchased, (7) an analysis of the value and lien status of the collateral, (8) appraisal guidelines, (9) the maintenance of full independent credit information on the borrower throughout the

46. Reporting standards include, but are not limited to, quarterly Consolidated Reports of Condition and Income.

47. Payment hierarchy refers to the prioritization of a borrower's payment obligations.

48. As determined by the Board, it is permissible for a BHC or its subsidiary to make, acquire, broker, or service loans or other extensions of credit (12 CFR 225.28(b)(1) and (2)).

term of the loan, (10) guidelines for the timely transfer of all financial and nonfinancial credit information to participant BHCs or banks, and (11) collection procedures.

2010.2.7.2 Loan Participation Agreement

A loan participation agreement may enable a smaller lead BHC or lead subsidiary, acting as transferor, to originate a large loan in excess of its legal lending limit. Participants having an ownership interest are able to offset low local loan demand or invest in large loans without the burden of servicing the loan or incurring origination costs. A loan participation agreement may also allow the originating BHC or subsidiary to facilitate and grant a larger loan without causing it to have a concentration of credit (i.e., enabling risk diversification) or an impairment of its liquidity position. The participation agreement should contain provisions that require the originator to transfer, in a timely manner, all financial and nonfinancial credit information to the participant banks upon the loan's origination and throughout the term of the loan. The agreement should specify the allocation of payments, losses, and expenses. It should also state that a participant has the right to perform its own independent review of the transaction. The agreement should contain no language indicating that the lead BHC or lead subsidiary is a "lender" or that a participating BHC or subsidiary is a "borrower." The purchase of loan participations without a comprehensive agreement could be viewed as an unsafe and unsound banking practice.

2010.2.7.3 Accounting for Loan Participations

A loan participation agreement usually is structured to allow the participation transaction to receive sale treatment of a portion of the loan by the originating BHC or its subsidiary even though the participation agreement may restrict the purchaser when reselling its interest in the loan, subject to certain conditions.[49] Sale treatment is achieved by structuring the loan participation agreement so that interests sold to a purchaser meet the definition of a "participating interest" and the transaction satisfies all conditions for transfer of control over the interests. In general, FAS 166 (paragraph 8B) briefly defines a participating interest as a portion of a financial asset that

1. conveys proportionate ownership rights with equal priority to each participating interest holder.
2. involves no recourse (other than standard representations and warranties) to, or subordination by, any participating interest holder.
3. does not entitle any participating interest holder to receive cash before any other participating interest holder.

A transfer of a participating interest in an entire financial asset in which the transferor surrenders control over those interests is to be accounted for as a sale if and only if all the following conditions are met:

1. The transferred financial assets have been isolated from the transferor—put presumptively beyond the reach of the transferor and its creditors, even in bankruptcy or other receivership.[50]
2. Each purchaser has the right to pledge or exchange the interests it received, and no condition both constrains the purchaser from taking advantage of its right to pledge or exchange and provides more than a trivial benefit to the transferor.
3. The transferor does not maintain effective control over the interests.[51]

49. Three sale recognition conditions denote the transferor's surrender of control under Financial Accounting Standards (FAS) 166, "Accounting for Transfers of Financial Assets" (an amendment of FAS 140). Those conditions must be met in order for the originator (transferor) to account for the transfer of the financial assets to the participating transferee as a sale. When a loan participation is accounted for as a sale, the seller (transferor) removes the participated interest in the loan from its financial statements. FAS 166 applies to both the transferor (seller) of the participated assets and the transferee (purchaser). (See the complete text of FAS 166 (paragraphs 8B and 9) that defines a "participating interest" and the conditions for sale recognition). See also the reporting instructions for the "Consolidated Financial Statements for Bank Holding Companies" (FR Y-9C), and the FFIEC "Consolidated Reports of Condition and Income" (FFIEC 031) (bank Call Report).

50. Transferred financial assets are isolated in bankruptcy or other receivership only if the transferred financial assets would be beyond the reach of the powers of a bankruptcy trustee or other receiver for the transferor or any of its consolidated affiliates included in the financial statements being presented.

51. Examples of a transferor's effective control over the transferred financial assets include (a) an agreement that both entitles and obligates the transferor to repurchase or redeem the financial asset (or its third-party beneficial interests) before its maturity, (b) an agreement that provides the transferor with both the unilateral ability to cause the holder to return specific

2010.2.7.4 Structuring the Loan Participation Agreement

The written participation agreement should consider contingent events such as a defaulting borrower, the lead BHC or lead subsidiary becoming insolvent, or a party to the participant arrangement that is not performing as expected. The agreement should clearly state the limitations the originator or participants impose on each other and any rights that the parties retain. The participation agreement should clearly include

- the obligation of the lead BHC or lead subsidiary to furnish timely credit information and to notify the parties of significant changes in the borrower's status;
- a requirement that the lead BHC or lead subsidiary consult with the participants prior to any proposed change to the loan, guarantee, or security agreements, or taking any action when the borrower defaults;
- the lead BHC's or lead subsidiary's and participants' specific rights if the borrower defaults;
- the resolution procedures to be followed when the lead BHC or lead subsidiary or participants;
  - — do not agree on the procedures to be taken when the borrower defaults and/or;
  - — have potential conflicts when the borrower defaults on more than one loan
- provisions for terminating the agency relationship between the lead BHC or lead subsidiary and the participants upon events such as insolvency, breach of duty, negligence, or misappropriation by one of the parties to the agreement.

Some participation agreements may allocate payments using a method other than a pro rata sharing based on each participant's ownership interest. The first principal payment could be applied based on the participant's ownership interest while the remaining payments would be applied according to the lead BHC's or lead subsidiary's ownership interest. In this situation, the participation agreement should specify that if a borrower defaults, the participants would share subsequent payments and collections in proportion to their ownership interest at the time of default.[52]

A participation agreement may provide that the originating lender allow a participating BHC or subsidiary to resell, but the originator reserves the right to call at any time from whoever holds the ownership interest. The originator can then enforce the call option by cutting off or restricting the flow of interest at the call date.[53] In this situation, the originating lender has retained effective control over the participation; such a call option precludes sale accounting treatment by the transferor. The transaction, therefore, should be accounted for as a secured borrowing.

2010.2.7.5 Independent Credit Analysis

A BHC or subsidiary that acquires a loan participation should regularly perform a rigorous credit analysis on its loan participation as if it had originated the loan. Due to the indirect relationship that a participant has with a borrower, it may be difficult for the participant to receive timely credit information to allow it to conduct a comprehensive credit analysis of the transaction. However, the participant should not rely solely on the originator's credit analysis. It should gather all available relevant credit information, including the details on the collateral's value (for example, values determined by an independent appraisal or an evaluation), lien status, loan agreements, and the loan's other participation agreements that existed prior to making its commitment to acquire the loan participation. A participant also should reach an agreement with the loan originator (transferor) that it will provide ongoing, complete, and timely credit information about the borrower. It is important for the participants to maintain current and complete records on their loan participations. The absence of such information may indicate that the originator did not perform the necessary due diligence prior to making its decision to acquire the loan participation. During the life of the loan participation, the originator should monitor the loan's servicing and repayment status.

financial assets and a more-than-trivial benefit attributable to that ability, other than through a cleanup call, or (c) an agreement that permits the transferee to require the transferor to repurchase the transferred financial assets at a price that is so favorable to the transferee that it is probable that the transferee will require the transferor to repurchase them.

52. This is *not* a participating interest—no sale.

53. The cash flows from a loan participation agreement, except servicing fees, should be divided in proportion to the third parties' participating interests.

2010.2.7.6 Sales of Loan Participations in the Secondary Market

If a BHC or a subsidiary has a concentration in loan participations, it may be possible for it to sell its participating interests in the secondary market to reduce its dependence on an asset group. If the BHC or a subsidiary is not large enough to participate in the secondary market, an alternative might be to sell loans without recourse to another subsidiary or correspondent bank that also desires to diversify its loan portfolio.

2010.2.7.7 Sale of Loan Participations With or Without the Right of Recourse

The parties to a participation agreement (those having a participating ownership interest) generally may have *no recourse* to the transferor or to each other even though the transferor (e.g., the originating lender) continues to service the loan. No participant's interest should be subordinate to another. Some loan participation agreements, however, may give the seller a contractual right to repurchase the participated loan interest for purposes of working out or modifying the sale. When the seller has the right to repurchase the participation, it may provide the seller with a call option on a specific loan participation asset. If the seller's right to repurchase precludes the seller from recognizing the transaction as a sale, the transaction should be accounted for as a secured borrowing.

2010.2.7.8 Sales of 100 Percent Participations

Some loan participation agreements may be structured so that the transferor sells the entire underlying loan amount (100 percent) to the agreement's participants. If participation agreements are not structured properly they can pose unnecessary and increased risks (for example, legal, compliance, or reputational risks) to the originator and the participants. The originator would have no ownership in the loan. Such agreements should therefore clearly state that the loan participants are participating in the loan and that they are not investing in a business enterprise. The policies of a BHC or subsidiary engaged in such loan participation agreements should focus on safety and soundness concerns that include

- the program's objectives
- the plan of distribution
- the credit requirements that pertain to the borrower—the originator should structure 100 percent loan participation programs only for borrowers who meet its credit requirements
- the program participant's accessibility to the borrower's financial information (as authorized by the borrower)—the originator should allow potential loan participants to obtain and review appropriate credit and other information that would enable them to make an informed credit decision.

2010.2.7.9 Participation Transactions Between Affiliates

BHCs or their subsidiaries should not relax their credit standards when participation agreements involve their affiliates. Such agreements must be structured to comply with sections 23A and 23B of the Federal Reserve Act (FRA) and the Board's Regulation W. The Federal Reserve has determined that in certain very limited circumstances the purchase or sale of a participation agreement may be exempt from these provisions.

2010.2.7.9.1 Transfer of Low-Quality Assets

In general, a bank cannot purchase a low-quality asset, including a loan participation from an affiliate. Section 23A of the FRA provides a limited exception to the general rule prohibiting the purchase of low-quality assets if the bank performs an independent credit evaluation and commits to the purchase of the asset *before* the affiliate acquires the asset.[54] Section 223.15 of the Board's Regulation W provides an exception from the prohibition on the purchase of a low-quality asset by a member bank from an affiliate for certain loan renewals. The rule allows a member bank that purchased a loan participation from an affiliate to renew its participation in the loan, or provide additional funding under the existing participation, even if the underlying loan had become a low-quality asset, so long as certain criteria were met. These renewals or additional credit extensions may enable both the affiliate and the participating

54. 12 U.S.C. 371c(a)(3).

member bank to avoid or minimize potential losses. The exception is available only if (1) the underlying loan was not a low-quality asset at the time the member bank purchased its participation and (2) the proposed transaction would not increase the member bank's proportional share of the credit facility. The member bank must also obtain the prior approval of its entire board of directors (or its delegees) and it must give a 20-day post-consummation notice to its appropriate federal banking agency. A member bank is permitted to increase its proportionate share in a restructured loan by 5 percent (or by a higher percentage with the prior approval of the bank's appropriate federal banking agency). The scope of the exemption includes renewals of participations in loans originated by any affiliate of the member bank (not just affiliated depository institutions).

2010.2.7.10 Concentrations of Credit Involving Loan Participations

BHCs or their subsidiaries should avoid purchasing loans that generate unacceptable credit concentrations. Such concentrations may arise solely from the BHC's or subsidiary's purchases, or they may arise when loans or purchased participations are aggregated with loans originated and retained by the purchaser. The extent of contingent liabilities, holdbacks, reserve requirements, and the manner in which loans will be handled and serviced should be clearly defined. In addition, loans purchased from another source should be evaluated in the same manner as originated loans. Guidelines should be established for the type and frequency of credit and other information the BHC or its subsidiary needs to obtain from the originator to keep itself continually updated on the status of the credit. Guidelines should also be established for supplying complete and regularly updated credit information to the purchasers of loans originated and sold by the BHC or its subsidiary.

2010.2.7.11 Loan Participations and Environmental Liability

Environmental risk represents the adverse consequences that result from generating or handling hazardous substances or from being associated with the aftermath of contamination. BHCs or their subsidiaries may be indirectly liable via their lending activities for the costs resulting from cleaning up hazardous substance contamination. BHCs and their subsidiaries need to be careful that their actions making, administering, and collecting loans—including assessing and controlling environmental liability—cannot be construed as taking an active role in the management or day-to-day operations of a borrower's business. Such actions could lead to potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). BHCs or their subsidiaries that originate loans to borrowers through loan participation agreements could be transferring environmental risk and liability to the holders of participations, thus making them susceptible to such losses. The originator should establish and follow policies and procedures designed to control environmental risks. See the *Commercial Bank Examination Manual*, section 2140.1 (the "Environmental Liability" subsection) for a more detailed discussion on ways banks can protect themselves as lenders, and their loan participation agreement holders, from environmental liability.

2010.2.7.12 Red Flag Warning Signals

The following conditions may indicate that there are significant problems with the management of the BHC's or a subsidiary's loan participation portfolio:

1. the absence of formal loan participation policies.
2. the absence of any formal participation agreement.
3. the absence of credit evaluations and independent credit analysis.
4. the absence of complete loan documentation.
5. a higher volume of loan participations when compared to the volume of other loans in the loan portfolio.
6. missing loan participation agreements and documentation which should denote the rights and responsibilities of all participants.
7. the existence of numerous disputes or disagreements among the participants regarding the receipt of payment(s) in accordance with the participation agreements, documentation requirements, or any other significant aspects of the entity's loan participation transactions.
8. the originator is making loan payments to loan participation acquirers without receiving reimbursement by the original borrower.

2010.2.8 INSPECTION OBJECTIVES

Loan Administration

1. To determine if the parent's loan policies are adequate in relation to the responsibilities it has for the supervision of its credit-extending subsidiaries and whether those policies are consistent with safe and sound lending practices.
2. To determine if internal and external factors (for example, the size and financial condition of the credit-extending subsidiary, the size and expertise of its staff, avoidance of or control over credit concentrations, market conditions, and statutory and regulatory compliance) are considered in formulating and monitoring the organization's loan policies and strategic plan.
3. To determine if the loan policy is being monitored and complied with.
4. To establish whether the loan policy ensures sound assessments of the value of real estate and other collateral.

Lending Standards for Commercial Loans

1. To focus on and evaluate the strength of the credit-risk management process.
2. To determine whether the bank holding company has formal credit policies that (1) provide clear guidance on its appetite for credit risk and (2) support sound lending decisions.
3. To determine whether experienced credit professionals who are independent of line lending functions provide adequate internal control in the loan-approval process.
4. To evaluate whether loan-approval documents provide internal approving authorities and management with sufficient information on the risks of loans being considered, and that the information is in a clear and understandable format.
5. To evaluate whether forward-looking analysis tools are being adequately and appropriately used as part of the loan-approval process.
6. To determine whether credit-risk management information systems provide adequate information to management and lenders.
7. To incorporate the examiner's evaluation of the bank holding company's adherence to sound practices into the overall assessment of credit-risk management.
8. To be alert to indications of insufficiently rigorous risk assessment at banking organizations, particularly inadequate stress testing and excessive reliance on strong economic conditions and robust financial markets to support a borrower's capacity to service its debts.
9. To be attentive in reviewing a banking organization's assessment and monitoring of credit risk to ensure that undue reliance on favorable conditions does not lead to delayed recognition of emerging weaknesses in some loans.
10. To ascertain whether the banking organization has relied, to a significant and undue extent, on favorable assumptions about borrowers or the economy and financial markets. If so, to carefully consider downgrading, under the applicable supervisory rating framework, a banking organization's risk-management, management, and/or asset-quality ratings and, if deemed sufficiently significant to the banking organization, its capital adequacy rating.
11. To determine if the banking organization's loan-review activities or other internal control and risk-management processes have been weakened by staff turnover, failure to commit sufficient resources, inadequate training, and reduced scope or by less-thorough internal loan reviews. To incorporate such findings into the determination of supervisory ratings.

Leveraged Lending

1. *Risk-Management Framework, Definition, and Policy Expectations.* To determine
   a. whether the institution has established a sound definition of leveraged lending that is appropriate for the types of leveraged loans that are underwritten and if it can be applied across all business lines;
   b. whether it has adjusted (if necessary) its risk appetite and limit structure (including pipeline limits and overall portfolio limits) to conform with the institution's definition of leveraged lending and whether it has the necessary reporting in place to assess conformance with limits.
   c. if there are appropriate policies and procedures limits in place and if the institution maintains sound leveraged lending standards both for transactions that it intends to hold as well as transactions that are underwritten to distribute.
   d. if the institution's risk-management structure has strong and effective pro-

cesses and controls and if they are appropriate based on its leveraged lending activity.

2. *Participations Purchased.* To ensure that the institution applies the same standards of prudence and credit assessment techniques and in-house limits that would apply as if it had originated the loan(s).
3. *Underwriting Standards.* To assess the effectiveness of the institution's underwriting policy standards for leveraged lending to determine whether they
   a. are clear, written, and measurable;
   b. contain underwriting limits that reflect the institution's definition and risk appetite for leveraged lending;
   c. are applied equally to loans that are originated to be held and to loans that are originated to distribute; and
   d. fully reflect the underwriting standards listed in the guidance, including:
      i. sound business premise and sustainable capital structure for each transaction
      ii. capacity to repay and ability to de-lever to a sustainable level over a reasonable period
      iii. appropriate depth and breadth of due diligence
      iv. standards for valuating expected risk-adjusted returns
      v. appropriate credit agreement covenant protections
      vi. acceptable collateral agreements.
4. *Valuation Standards.* To determine:
   a. whether enterprise valuation methodologies are appropriate to the borrower's industry and condition;
   b. whether the assumptions are clearly documented, well supported, and understood by the institution's appropriate decision makers and risk-oversight units
   c. whether enterprise valuations are performed by qualified persons independent of an institution's origination function
   d. whether an institution has policies and provides for appropriate loan to value ratios, discount rates and collateral margins for loans dependent on enterprise value or illiquid and hard-to-value collateral.
5. *Pipeline Management.* To find out if there are strong risk-management standards and controls over transactions in and to the pipeline and if those standards are applied uniformly to transactions held in the portfolio and those that are distributed.
6. *Reporting and Analytics.*
   a. To determine if individual and portfolio exposures within and across all business lines and legal vehicles are captured and reported in the appropriate amount of detail to senior management and the board.
   b. To determine if the necessary risk information (as outlined in the guidance) about leveraged lending exposures (portfolio holds and pipeline exposures) are captured in reports that are distributed timely and that adequate information is distributed to senior management and the institution's board of directors at least quarterly.
7. *Risk Rating.* To verify that leveraged loans are risk rated based on the borrower's ability to repay and de-lever to a sustainable level.
8. *Credit Analysis.*
   a. To test transactions to determine if underwriting practices are effective and comprehensive.
   b. To determine if individual leveraged lending exposures contain a comprehensive assessment of financial, business, industry, and management risks based on the elements of the guidance.
9. *Problem Credit Management.*
   a. To ascertain whether the institution formulates individual action plans and expectations
   b. To evaluate workout plans to confirm that they contain quantifiable objectives and measureable time frames
   c. To determine if problem credits are regularly reviewed for risk-rating accuracy, accrual status, impairment status, and charge off.
10. *Deal Sponsors*
    a. To determine if the institution has guidelines for evaluating deal sponsors that are based on the sponsor's ability and willingness to support the transaction where sponsors are viewed as a source of repayment.
11. *Credit Review*
    a. To ensure that the institution regularly conducts an independent credit review of the leveraged lending portfolio more frequently and in greater depth than other segments of the portfolio generally at least annually. For firms making significant changes to policies, underwriting standards, procedures etc., ensure that a

credit review is scheduled to test compliance with changes.
   b. To ensure that credit review personnel have the expertise and experience to evaluate leveraged loans.
12. *Stress Testing.*
   a. To determine if the institution is conducting periodic loan- and portfolio stress tests on leveraged loan portfolios or if the portfolio has been incorporated into enterprise-wide stress testing practices.
   b. To verify the effectiveness of the institution's periodic portfolio stress tests (in accordance with stress testing guidance) in identifying what effect economic and market events could have on the institution's financial condition and leveraged lending transactions.
13. *Conflict of Interest.* To determine
   a. if policies identify and if there are procedures to address transactions in which the institution holds both an equity and lending positions;
   b. the adequacy and effectiveness of controls and training programs that aim to curb any potential conflicts of interests that result from leveraged lending.
14. *Reputational Risk.*
   a. To determine if the institution has suffered reputational damage by failing to meet its legal responsibilities in underwriting and syndicating leveraged loan transactions into the wider financial market.

Credit-Risk Management for Home Equity Lending

1. To determine if the banking organization has an appropriate review and approval process for new product offerings, product changes, and marketing initiatives.
2. To ascertain whether the banking organization has appropriate control procedures for third parties that generate loans on its behalf and if the control procedures comply with the laws and regulations that are applicable to the organization.
3. To determine if the banking organization has given full recognition to the risks embedded in its home equity lending.
4. To determine whether the banking organization's risk-management practices have kept pace with the growth and changing risk profile of its home equity portfolios and whether underwriting standards have eased.
5. To determine whether the loan policy—
   a. ensures prudent underwriting standards for home equity lending, including standards to ensure that a thorough evaluation of a borrower's capacity to service the debt is conducted (that is, the banking organization is not relying solely on the borrower's credit score);
   b. provides risk-management safeguards for potential declines in home values;
   c. ensures that the standards for interest-only and variable-rate home equity lines of credit (HELOCs) include an assessment of a borrower's ability to (1) amortize the fully drawn line of credit over the loan term and (2) absorb potential increases in interest rates; and
   d. provides appropriate collateral-valuation policies and procedures and provides for the use and validation of automated valuation models.

Loan Participations, the Agreements and Participants

1. To ascertain if the BHC engages in the purchase or sale of loans via loan participation agreements.
2. To determine if the BHC's lending policy
   a. places limits on the amount of loan participations originated, purchased, or sold based on any one source or in the aggregate;
   b. has set credit standards for the BHC's borrowers requesting loans as well as third parties acquiring loan participations from the bank as originator;
   c. requires the same credit standards for loan participations as it does for other loans;
   d. sets the amount of contingent liability, holdback (retained ownership), and the manner in which the loan should be serviced; or
   e. requires complete loan documentation for loan participations.
3. To assess the impact of any concentrations of credit to a borrower, or in the aggregate, that arise from loans involved in loan participation agreements.
4. To determine if there are any informal repurchase agreements that exist between loan participation acquirers that are designed to circumvent the originating BHC's or its subsidiary's legal lending limits, disguise delinquencies, and avoid adverse classifications.

5. To determine whether the BHC's financial condition is compromised by assessing the impact of the BHC's loan participations with its affiliates.
6. To ascertain whether loan participation transactions with affiliates are in compliance with sections 23A and 23B of the Federal Reserve Act and the Board's Regulation W.
7. To determine if there are disputes between the BHC or its subsidiaries as originator of loan participations and its participants.
8. To determine if any loan participations have been adversely classified by examiners, including examiners from other supervisory agencies (includes loan participations held by the other institutions).

2010.2.9 INSPECTION PROCEDURES

Loan Administration

1. Obtain an organizational chart and determine the various levels of responsibility and job functions of individuals involved with the lending function.
2. Obtain and review the BHC's loan policy; determine if the policy contains the appropriate components, as summarized in this section. Determine how the policy is communicated to subsidiaries. Also determine whether the loan policy reflects the December 1992 uniform interagency real estate lending standards and guidelines as they apply to subsidiary depository institutions.
3. Obtain a copy of the most recent management reports concerning the quality of loans and other aspects of the loan portfolio (delinquency list, concentrations, yield analysis, loan-distribution lists, watch loan reports, charge-off reports, participation listings, internal and external audit reports, etc.). Determine the scope and sufficiency of the work performed by any committees related to the lending function. Determine if the information provided to the directorate and senior management is sufficient for them to make judgments about the quality of the portfolio and to determine appropriate corrective action.
4. Determine if an internal process has been established for the review and approval of loans that do not conform to internal lending policy. Establish whether such loans are supported by written documentation that clearly states all the relevant credit factors that culminated in the underwriting decision. Determine if exception loans of a significant size are reported to the board of directors of the subsidiary or to the holding company.
5. Review internal and external audit reports and bank examination reports for critical comments concerning loan-policy exceptions and administration. Determine whether action was taken in response to any identified exceptions. Determine who is responsible for follow-up and what the time frames are; seek rationale if no action was taken or if the action taken was half-hearted.
6. Review the organization's financial statements, the bank Call Reports, and the BHC FR Y-series reports submitted to the Federal Reserve. Determine whether reporting is accurate and disclosure is sufficient to indicate the organization's financial position and the nature of its loan portfolios, including nonaccrual loans.
7. When reviewing lending policies, ascertain whether—
   a. the loan policies facilitate extensions of credit to sound borrowers and facilitate the workout of problem loans, and
   b. the loan policies control and reduce concentration risk by placing emphasis on effective internal policies, systems, and controls to monitor the risk.
8. Through interviews with, or review of reports submitted by, the internal auditor, lending officers, loan-review personnel, and senior management, (1) evaluate the effectiveness of the BHC's self-monitoring of adherence to loan policy, (2) determine how changes to the loan policy occur, (3) determine how loans made in contradiction to the loan policy are explained, and (4) determine the various circumstances involving levels of approval and what specific consideration occurs at these levels.
9. Presuming the inspection is concurrent with a bank's primary regulator, coordinate, on a random basis, the selection of loans subject to classification. Determine whether they conform to loan policy.
10. Review management's policies and procedures for their determination of an appropriate level of loan-loss reserves.
11. On the "Policies and Supervision" or an equivalent page of the inspection report, evaluate the BHC's oversight regarding effective lending policy and procedures.

Lending Standards for Commercial Loans

1. Review formal credit policies for clear articulation of current lending standards, including—
   a. a description of the characteristics of acceptable loans and (if applicable) "guidance" minimum financial ratios,
   b. standards for the types of covenants to be imposed for specific loan types, and
   c. the treatment and reporting of policy exceptions, both for individual loans and the entire portfolio.
2. Evaluate the role played by independent credit staff in loan approvals and, in particular, whether these credit professionals are adequately experienced, are independent of line lending functions, and have authority to reject loans either because of specific exceptions to policy or because the loan does not meet the institution's credit-risk appetite.
3. Review written policies and determine operating practice in preparing loan-approval documents to evaluate whether sufficient information is provided on the characteristics and risks of loans being considered, and whether such information is provided clearly and can be easily understood.
4. Based on written policies and review of operating practice, evaluate whether loans being considered are evaluated not only on the basis of the borrower's current performance but on the basis of forward-looking analysis of the borrower.
   a. Determine whether financial projections or other forward-looking tools are an integral part of the preapproval analysis and loan-approval documents.
   b. Determine the extent to which alternative or "downside" scenarios are identified, considered, and analyzed in the loan-approval process.
5. Review credit-risk management information systems and reports to determine whether they provide adequate information to management and lenders about—
   a. the composition of the institution's current portfolio or exposure, to allow for consideration of whether proposed loans might affect this composition sufficiently to be inconsistent with the institution's risk appetite, and
   b. data sources, analytical tools, and other information to support credit analysis.
6. When appropriate, coordinate or conduct sufficient loan reviews and transaction testing in the lending function to accurately determine the quality of loan portfolios and other credit exposures. If deficiencies in lending practices or credit discipline are indicated as a result of the preexamination risk assessment, the inspection, or bank or other examinations, arrange for the commitment of sufficient supervisory resources to conduct in-depth reviews, including transaction testing, that are adequate to ensure that the Federal Reserve achieves a full understanding of the nature, scope, and implications of the deficiencies.
7. When reviewing loans, lending policies, and lending practices—
   a. observe and analyze loan-pricing policies and practices to determine whether the institution may be unduly weighting the short-term benefit of retaining or attracting new customers through price concessions, while not giving sufficient consideration to potential longer-term consequences;
   b. be alert for indications of insufficiently rigorous risk assessment, in particular (1) excessive reliance on strong economic conditions and robust financial markets to support the capacity of borrowers to service their debts and (2) inadequate stress testing;
   c. be attentive in reviewing an institution's assessment and monitoring of credit risk to ensure that undue reliance on favorable conditions does not lead that institution to delay recognition of emerging weaknesses in some loans or to lessen staff resources assigned to internal loan review;[55] and
   d. give careful consideration to downgrading, under the applicable supervisory rating framework, a banking organization's risk-management, management, and/or asset-quality ratings and its capital adequacy rating (if sufficiently significant) when there is significant and undue reliance on favorable assumptions about borrowers or the economy and financial markets, or when that reliance has slowed the recognition of loan problems.
8. Discuss matters of concern with the senior management and the board of directors of the bank holding company and report those areas

55. Examiners should recognize that an increase in classified or special-mention loans is not per se an indication of lax lending standards. Examiners should review and consider the nature of these increases and the surrounding circumstances in reaching their conclusions about the asset quality and risk management of an institution.

of concern on core page 1, "Examiner's Comments and Matters Requiring Special Board Attention."

Leveraged Lending

Overview

Complete or update the Leveraged Lending Internal Control Questionnaire if selected for implementation.

1. Based on an evaluation of internal controls, determine the scope of the inspection. The scope should include exposures related through common ownership, guarantors, or sponsors. Also include direct and indirect leveraged lending exposure found in financial intermediaries formed to house or distribute leveraged loans (for example CLOs, SPEs, conduits etc.).
2. Inspection procedures should include both a policy review and transaction testing approach to determine the effectiveness of the institution's leveraged lending control process.

If the institution is found to lack robust risk-management processes and controls around leveraged lending that reinforces the institution's risk profile, a supervisory finding of unsafe and unsound banking practices should be considered.

3. Applicability/Risk Management Framework
   a. At the start of the inspection, ascertain whether the institution has adopted an appropriate risk-management framework for leveraged lending that includes robust policies, procedures, and risk limits that have been approved by the board of directors.
   b. Implementation of this guidance should be consistent with the size and risk profile of the institution.
   c. All aspects of the guidance should be applied to institutions that originate and distribute leveraged loans.
   d. The section on Participations Purchased should be applied to banking organizations that have limited involvement in leveraged lending; community banks overall may not be materially affected by the guidance.
4. Definition of Leveraged Lending
   a. Determine if the institution has a written policy for leveraged lending and if that policy contains criteria for defining leveraged lending that are appropriate for the institution and consistent with the guidance standards.
   b. Determine if the institution's definition includes related exposures and direct and indirect exposures.
5. General Policy Expectations
   a. Review the policy for the key risk elements referred to in the guidance (See the section on General Policy Expectations in the guidance and in the Internal Control Questionnaire). Determine if the policy includes the following elements:
      - Risk Appetite that clearly defines the amount of leveraged lending the institution is willing to underwrite and is willing to retain.
      - Limit Framework for aggregate portfolio held on balance sheet, single obligors and transactions, aggregate pipeline exposure, industry and geographic concentrations. For institutions with significant underwriting exposure, determine if limits have been established for stress losses, flex terms, economic capital, or earnings at risk associated with leveraged loans.
      - Allowance for loan and lease losses (ALLL) and capital adequacy analysis that reflect the risk of leveraged lending activities.
      - Credit approval and underwriting authorities.
      - Guidelines for senior management oversight and timely reporting to senior management and the board of directors.
      - Expected risk adjusted returns.
      - Minimum underwriting standards.
      - Underwriting practices for origination and secondary loan acquisition.
6. Participations Purchased
   a. Ascertain if the institution participating or purchasing into a leveraged loan has a clear understanding of the credit and the risks involved and also has a clear understanding of its rights and responsibilities under the participation agreement.
   b. Determine if the institution has conducted its own independent underwriting of participations and has applied the same standards of prudence, credit

assessment techniques, and in-house limits as if the institution had originated the loan(s).

c. Verify that the institution has received copies of all participation documents and any other documents relevant to the credit transaction(s).

7. Underwriting Standards
   a. Determine if the institution employs similar and consistent underwriting standards for leveraged loans it plans to hold or it plans to distribute.
      - Confirm that the institution's underwriting standards are clear, written, measurable, and reflect the institution's policy-based risk appetite for leveraged lending.
      - Evaluate the underwriting policies and standards and determine if they contain the elements found in guidance (Refer to the section on Underwriting Standards in the guidance and in the Internal Control Questionnaire):
8. Valuation Standards
   a. Confirm that the institution has policies and procedures in place for estimating enterprise value or for valuing other illiquid collateral. If enterprise value is relied on as a secondary source of repayment, determine the following:
      - If one or a combination of the three methods referred to in the guidance is used (asset, income, or market valuation).
      - If the underlying assumptions and the resulting values are well documented, supportable, and credible (Refer to the Valuations Standards section of the guidance and the Internal Control Questionnaire).
      - If enterprise value was calculated by qualified persons independent of the origination function.
      - If stress tests of key enterprise value variables and assumptions (such as cash flow earnings and sales multiples) are conducted.
      - That firms have policies that provide for appropriate loan-to-value ratios, discount rates and collateral margins.
      - If the institution has established limits for the proportion of individual transactions and the total portfolio that are supported by enterprise value.
9. Pipeline Management
   a. Determine if the institution has strong risk management and controls that are extended to deals in the pipeline, whether those deals are intended for hold, or if they are intended for distribution.
      - Determine if the institution has policies and procedures for handling distribution failures.
      - Determine if there are procedures for stress testing pipeline deals.
      - Ascertain if management reports show that transactions can be differentiated based on their key characteristics, tenor, and investor class (pro-rata and institutional), structure, and key borrower characteristics (for example, industry).
      - Determine if there are clearly articulated rationales for the effectiveness of hedging methods and if there is appropriate measurement and monitoring.
      - Confirm that the institution has developed and maintained the pipeline procedures referred to in the guidance (see the section on Pipeline Management in the guidance and in the Internal Control Questionnaire).
10. Reporting and Analytics
    a. Ascertain if the institution's risk-management framework includes an intensive and frequent review and monitoring process.
    b. Establish whether management receives comprehensive reports about the characteristics and trends of the institution's leveraged-lending portfolio at least quarterly and if summaries are provided to the board of directors.
    c. Find out if internal reports provide a detailed and comprehensive view of global exposures, including situations when an institution has an indirect exposure to an obligor or is holding a previously sold position as collateral or as a reference asset in a derivative. Borrower and counterparty leveraged lending reporting should aggregate total exposure and consider exposures booked across business lines or legal entities.
    d. Verify that internal policies identify the data fields to be populated and captured by the institution's MIS and whether the reports are accurate, timely, and if the information is provided to management and the board of directors.
    e. Confirm that MIS reporting on the leveraged lending portfolio contains the appli-

cable measures listed in the guidance. (Refer to the section on Reporting and Analytics in the guidance and in the Internal Control Questionnaire.)

11. Credit Analysis
    a. Conduct transaction testing on individual leveraged lending credits to determine if the credit analysis contains a comprehensive assessment of financial, business, and industry and management risks.
    b. Evaluate individual credits to determine if they fit the institutions definition of a leveraged loan.
    c. Determine if individual credits were analyzed in conjunction with the parameters in the guidance. (Refer to the section on Credit Analysis in the guidance and in the Internal Control Questionnaire).
    d. Verify that there are guidelines for evaluating deal sponsors and their willingness and ability to support the credit.
    e. Confirm that sponsors are used as a secondary and not a primary source of repayment.
    f. Assess the credit agreement to determine if it contains language for:
        - Material dilution, sale, or exchange of collateral or cash flow producing assets without lender approval.
        - Financial performance covenants; covenant-lite, and payment-in-kind (PIK) toggle loan structures
        - Reporting requirements and compliance monitoring.
        - The distribution of reporting and other credit information to participants and investors.
        - Acceptable collateral types, loan to value guidelines and appropriate collateral valuation methodologies
12. Internal Risk Rating
    a. Determine if individual loans are risk rated based on the borrower's demonstrated ability to repay the loan and de-lever over a reasonable period of time.
        - Confirm that the institution has evidence of adequate repayment capacity, for example borrowers demonstrate the ability to fully amortize senior debt or repay at least 50 percent of total debt over a 5–7 year period. Ensure that extensions or other restructuring are not masking an inability to repay.
        - Consider adversely rating credits that do not show the capacity to pay down debt from cash flow or if refinancing is the only option for repayment.
        - Consider a substandard rating if there are no reasonable or realistic prospects for repayment or de-levering.
13. Deal Sponsors
    a. If a deal sponsor is relied on as a secondary source of repayment, determine if management has developed guidelines for evaluating the sponsor's creditworthiness.
    b. Evaluate the sponsor based on the criteria listed in the guidance (See the section on Deal Sponsors in the guidance and in the Internal Control Questionnaire).
14. Credit Review/Problem Credit Management
    a. Assess credit review staff's expertise relative to leveraged lending.
    b. Verify that the institution conducts frequent internal credit review of leveraged-lending portfolio that is done independently of the origination function. Portfolio reviews should generally be conducted no less than annually.
    c. Evaluate the institution's procedures for dealing with problem credits including if work out plans contain quantifiable objectives and measurable time frames.
15. Stress Testing
    a. Determine if the institution has developed stress tests for leveraged loans or if the loans are included in the existing stress testing protocol.
16. Conflicts of Interest/ Reputational Risk/Compliance
    a. Confirm that the institution is meeting its legal responsibilities by underwriting and distributing transactions that do not result in undue reputational risk.
    b. Determine if potential conflicts of interest exist if the institution has both equity and lending positions in a particular transaction. Confirm that policies and procedures are in place to handle conflicts of interest.
    c. Ascertain whether the institution's compliance function periodically reviews the institution's leveraged-lending activity.
    d. Ascertain whether the institution's policies incorporate safeguards to prevent violations of anti-tying regulations.
    e. When securities are involved, determine how the institution ensures compliance with applicable securities laws, including disclosure and other regulatory requirements.

f. Ascertain what plans and provisions have been developed to ensure compliance with the Board's Regulation W (12 CFR part 223).

Credit-Risk Management for Home Equity Lending

1. Review the credit policies for home equity lending to determine if the underwriting standards address all relevant risk factors (that is, an analysis of a borrower's income and debt levels, credit score, and credit history versus the loan's size, the collateral value (including valuation methodology), the lien position, and the property type and location.
2. Determine whether the banking organization's underwriting standards include—
   a. a properly documented evaluation of the borrower's financial capacity to adequately service the debt and
   b. an adequately documented evaluation of the borrower's ability to (1) amortize the fully drawn line of credit over the loan term and (2) absorb potential increases in interest rates for interest-only and variable-rate HELOCs.
3. Assess the reasonableness and adequacy of the analyses and methodologies underlying the banking organization's evaluation of borrowers.
4. If the organization uses third parties to originate home equity loans, find out—
   a. if the organization delegates the underwriting function to a broker or correspondent;
   b if the banking organization's internal controls for delegated underwriting are adequate;
   c. whether the banking organization retains appropriate oversight of all critical loan-processing activities, such as verification of income and employment and the independence of the appraisal and evaluation function;
   d. if there are adequate systems and controls to ensure that a third-party originator is appropriately managed, is financially sound, provides mortgages that meet the banking organization's prescribed underwriting guidelines, and adheres to applicable consumer protection laws and regulations;
   e. if the banking organization has a quality-control unit or function that closely monitors (monitoring activities should include post-purchase underwriting reviews and ongoing portfolio-performance-management activities) the quality of loans that the third party underwrites; and
   f. whether the banking organization has adequate audit procedures and controls to verify that third parties are not being paid to generate incomplete or fraudulent mortgage applications or are not otherwise receiving referral or unearned income or fees contrary to RESPA prohibitions.
5. Evaluate the adequacy of the banking organization's collateral-valuation policies and procedures. Ascertain whether the organization—
   a. establishes criteria for determining the appropriate valuation methodology for a particular transaction (based on the risk in the transaction and loan portfolio);
   b. sets criteria for determining when a physical inspection of the collateral is necessary;
   c. ensures that an expected or estimated value of the property is not communicated to an appraiser or individual performing an evaluation;
   d. implements policies and controls to preclude "value shopping";
   e. requires sufficient documentation to support the collateral valuation in the appraisal or evaluation.
6. If the banking organization uses automated valuation models (AVMs) to support evaluations or appraisals, find out if the organization—
   a. periodically validates the models, to mitigate the potential valuation uncertainty in the model;
   b. adequately documents the validation's analysis, assumptions, and conclusions;
   c. back-tests a representative sample of evaluations and appraisals supporting loans outstanding; and
   d. evaluates the reasonableness and adequacy of its procedures for validating AVMs.
7. If tax-assessment valuations are used as a basis for collateral valuation, ascertain whether the banking organization is able to demonstrate and document the correlation between the assessment value of the taxing authority and the property's market value, as part of the validation process.

8. Review the risk- and account-management procedures. Verify that the procedures are appropriate for the size of the banking organization's loan portfolio, as well as for the risks associated with the types of home equity lending conducted by the organization.
9. If the banking organization has large home equity loan portfolios or portfolios with high-risk characteristics, determine if the organization—
   a. periodically refreshes credit-risk scores on all customers;
   b. uses behavioral scoring and analysis of individual borrower characteristics to identify potential problem accounts;
   c. periodically assesses utilization rates;
   d. periodically assesses payment patterns, including borrowers who make only minimum payments over a period of time or those who rely on the credit line to keep payments current;
   e. monitors home values by geographic area; and
   f. obtains updated information on the collateral's value when significant market factors indicate a potential decline in home values, or when the borrower's payment performance deteriorates and greater reliance is placed on the collateral.

   Determine that the frequency of these actions is commensurate with the risk in the portfolio.
10. Verify that annual credit reviews of home equity line of credit (HELOC) accounts are conducted. Verify if the reviews of HELOC accounts determine whether the line of credit should be continued, based on the borrower's current financial condition.
11. Determine that authorizations of over-limit home equity lines of credit are restricted and subject to appropriate policies and controls.
    a. Verify that the banking organization requires over-limit borrowers to repay, in a timely manner, the amount that exceeds established credit limits.
    b. Evaluate the sufficiency of management information systems (MIS) that enable management to identify, measure, monitor, and control the risks associated with over-limit accounts.
12. Verify that the organization's real estate lending policies are consistent with safe and sound banking practices and that its board of directors reviews and approves the policies at least annually.
13. Determine whether the MIS—
    a. allows for the segmentation of the loan portfolios;
    b. accurately assesses key risk characteristics; and
    c. provides management with sufficient information to identify, monitor, measure, and control home equity concentrations.
14. Determine whether management periodically assesses the adequacy of its MIS, in light of growth and changes in the banking organization's risk appetite.
15. If the banking organization has significant concentrations of home equity loans (HELs) or HELOCs, determine if the MIS includes, at a minimum, reports and analysis of the following:
    a. production and portfolio trends by product, loan structure, originator channel, credit score, loan to value (LTV), debt to income (DTI), lien position, documentation type, market, and property type
    b. the delinquency and loss-distribution trends by product and originator channel, with some accompanying analysis of significant underwriting characteristics (such as credit score, LTV, or DTI)
    c. vintage tracking
    d. the performance of third-party originators (brokers and correspondents)
    e. market trends by geographic area and property type, to identify areas of rapidly appreciating or depreciating housing values
16. Determine whether the banking organization accurately tracks the volume of high-LTV (HLTV) loans, including HLTV home equity and residential mortgages, and if the organization reports the aggregate of these loans to its board of directors.
17. Determine whether loans in excess of the supervisory LTV limits are identified as high-LTV loans in the banking organization's records. Determine whether the organization reports, on a quarterly basis, the dollar value of such loans to its board of directors.
18. Find out whether the organization has purchased insurance products to help mitigate the credit risks of its HLTV residential loans. If a policy has a coverage limit, determine whether the coverage may be exhausted before all loans in the pool mature or pay off.

19. Determine whether the organization's credit-risk management function oversees the support function(s). Evaluate the effectiveness of controls and procedures over staff persons responsible who are responsible for perfecting liens, collecting outstanding loan documents, obtaining insurance coverage (including flood insurance), and paying property taxes.
20. Determine whether policies and procedures have been established for home equity problem-loan workouts and loss-mitigation strategies.

Loan Participations, the Agreements and Participants

These inspection procedures are designed to ensure that originated loans that were transferred via loan participation agreements or certificates to state member banks, bank holding companies, nonbank affiliates, or other third parties were carefully evaluated. The procedures instruct examiners to determine if the asset transfers were carried out to avoid or circumvent classification and to determine the effect of the transfers on the BHC's financial condition or that of its subsidiaries. In addition, the procedures are designed to ensure that the primary regulator of another financial institution involved in the asset transfer of any low-quality assets is notified.

1. Review the board of directors' or their designated committees' policies and procedures governing how loan participation agreements and activities are created, transacted, and administered. Refer to section 2010.2.7 for the minimum items that should be included in board-approved policies on loan participation activities.
2. Determine if managerial reports provide sufficient information relative to the size and risk profile of the loan participation portfolio and evaluate the accuracy and timeliness of reports produced for the board and senior management.
3. For loan participations held (either in whole or in part) with another lending institution, review, if applicable,
   - the participation certificates and agreements, on a test basis, to determine if the contractual terms are being adhered to;
   - loan documentation to determine if it meets the BHC's (or its subsidiary's) underwriting procedures (that is, the documentation for loan participations should meet the same standards as the documentation for other loans the respective entity originates);
   - the transfer of loans immediately before the date of the inspection to determine if the loan was either nonperforming or classified and if the transfer was made to avoid possible criticism during the current inspection; and
   - losses to determine if they are shared on a pro rata or other basis according to the terms of the participation agreement.
4. Check participation certificates or agreements and records to determine whether the parties share in the risks and contractual payments on a pro rata or other basis.
5. Determine if loans are purchased on a recourse basis and that loans are sold on a nonrecourse basis.
6. Ascertain that the BHC (or its subsidiaries) do not buy back or pay interest on defaulted loans in contradiction of the underlying participation agreement.
7. Compare the volume of outstanding originated or purchased loans that were issued in the form of loan participations with the total outstanding loan portfolio.
8. Determine if the BHC (or its subsidiaries) has sufficient expertise to properly evaluate the volume of loans originated or purchased and sold as loan participations.
9. Based on the terms of the loan participation agreements, review the originator's distribution of the borrower's payments received to those entities or persons owning interests in the loan participations. Ascertain if the agreement's recourse provisions may require accounting for the transactions as a secured borrowing rather than as a sale.
10. Determine if loans are sold primarily to accommodate credit overline needs of customers or to generate fee income.
11. Determine if loans are purchased or sold to affiliates or other companies; if so, determine whether the purchasing companies request and are given sufficient information to properly evaluate the credit. (Section 23A of the Federal Reserve Act and the Board's Regulation W prohibit transfers of low-quality assets between affiliates.) See sections 2020.0, 2020.1, 2020.2.
12. Investigate any situations in which assets were transferred before the date of inspection:

a. Determine if any were transferred to avoid possible criticism during the inspection.
b. Determine whether any of the loan participations transferred were nonperforming at the time of transfer, classified during the previous examination, or transferred for any other reason that may cause the loans to be considered of questionable quality.

13. Review the BHC's policies and procedures to determine whether loan participations purchased are required to be given an independent, complete, and adequate credit evaluation. Review asset participations sold to affiliates to determine if the asset purchases were supported by an *arm's-length* and *independent* credit evaluation.
14. Determine that any assets purchased by the BHC (or its subsidiaries) were properly recorded at fair market value at the time of purchase.
15. Determine that transactions involving transfers of low-quality assets to the parent holding company or a nonbank affiliate are properly reflected at fair market value on the books of both the bank and the holding company affiliate.
16. If poor-quality assets were transferred by the BHC to another financial institution for which the Federal Reserve is not the primary regulator, prepare a memorandum to be submitted to the Reserve Bank supervisory personnel. The Reserve Bank's appropriate staff will then inform the local office of the primary federal regulator of the other institution involved in the transfer. The memorandum should include the following information, as applicable,
    - names of originating and receiving institutions;
    - type of assets involved;
    - date (or dates) of transfer;
    - total number and dollar amount of assets transferred;
    - status of the assets when transferred (e.g., nonperforming, classified, etc.); and
    - any other information that would be helpful to the other regulator. Ascertain whether the bank manages not only the risk from individual participation loans but also portfolio risk.
17. Find out if management develops appropriate strategies for managing concentration levels, including the development of a contingency plan to reduce or mitigate concentrations during adverse market conditions (such a plan may include strategies involving not only loan participations, but also whole loan sales). Find out if the BHC's (or its subsidiaries') contingency plan includes selling loans as loan participations.
18. Ascertain if management periodically assesses the marketability of its loan participation portfolio and evaluates the BHC's (or its subsidiaries') ability to access the secondary market.
19. Verify whether the BHC (or its subsidiaries) compare its underwriting standards for loan participations with those that exist in the secondary market.

2010.2.10 INTERNAL CONTROL QUESTIONNAIRE

Applicability/Risk-Management Framework

1. Has the institution adopted a risk-management framework around leveraged lending that includes:
    a. A leveraged lending policy that is based on risk objectives, risk acceptance criteria, and risk controls?
    b. Structuring transactions that reflect a sound business premise, have an appropriate capital structure, reasonable cash flow, and balance sheet leverage?
    c. A definition of leveraged lending that can be applied across all business lines?
    d. Well-defined underwriting standards that define acceptable leverage levels and amortization expectations?
    e. A limit framework?
    f. Sound MIS?
    g. Pipeline management procedures, hold limits, and expected timing for distributions?
    h. Guidelines for stress testing?
2. Is the institution able to identify leveraged exposures to related borrowers or guarantors?
3. Is the institution able to identify leveraged loans that are managed in non-lending portfolios (for example collateralized loan obligations (CLOs), special purpose entities (SPEs), or other indirect exposures)?
4. Is the institution originating leveraged loans; participating in leveraged loans, or both?

Definition of Leveraged Lending

1. Has the institution developed an appropriate written definition for leveraged lending and incorporated it into the leveraged lending policy?
2. Is the policy definition consistent with the amounts and types of leveraged loans that the institution is engaged in?

General Policy Expectations

1. Has the institution's leveraged lending policy been approved by the board of directors?
2. Does the leveraged lending policy contain the following elements:
   a. A clear statement of the amounts of leveraged lending that it is willing to underwrite and the amount(s) it is willing to hold in its own portfolio?
   b. A limit framework that establishes limits or guidelines around the following as applicable:
      1) Single obligors and transactions?
      2) Aggregate hold portfolio?
      3) Total pipeline exposure?
      4) Industry and geographic concentration?
      5) Notional pipeline limits?
      6) Stress losses, flex terms, economic capital usage, and earnings at risk?
      7) Other parameters particular to the portfolio?
      8) The required management approval authorities and exception tracking provisions?
   c. Procedures for insuring that leveraged lending risks are appropriately reflected in the institution's level of allowance for loan and lease losses (ALLL) and capital adequacy analysis?
   d. Credit and underwriting approval authorities, including the procedures for approving and documenting changes to approved transaction structures and terms?
   e. Guidelines for appropriate oversight by senior management, including adequate and timely reporting to the board of directors?
   f. Expected risk-adjusted returns for leveraged transactions?
   g. Minimum underwriting standards and underwriting practices for primary loan origination and secondary loan acquisition?

Participations Purchased

1. Has the institution, with respect to participations purchased, done its own independent underwriting of its portion of the transaction and has it adequately identified its risks?
2. Has the institution received copies of all documentation relevant to the transaction?
3. Is there evidence that the institution has reviewed the participation agreement and has a clear understanding of its rights and responsibilities under the agreement?

Underwriting Standards

1. Is the institution using similar underwriting standards for leveraged loans it plans to hold as well as for leveraged loans it plans to distribute?
2. Are the institution's underwriting standards clear, written, and measurable?
3. Do underwriting standards require:
   - A sound business premise for each transaction and that the borrower's capital structure is sustainable?
   - A determination and documentation of the borrower's capacity to repay and ability to de-lever to a sustainable level over a reasonable period?
   - Standards for evaluating various types of collateral?
   - Standards for evaluating risk-adjusted returns?
   - The acceptable degree of reliance on enterprise value and other intangible assets for loan repayment?
   - Expectations for the degree of support expected to be provided by sponsors?
   - A prohibition on material dilution, sale, or exchange of collateral or cash flow producing assets without lender approval?
   - A credit agreement that contains financial covenants, reporting covenants, and compliance monitoring? Does the loan contain covenant-lite and PIK toggle loan structures? If so, does the borrower have the ability to repay the loan under the contractual terms?
   - Guidelines for acceptable collateral types, loan-to value-guidelines, and acceptable collateral valuation methodologies?

- Loan agreements that provide for the distribution of financial information to participants and investors?

Valuation Standards

1. Does the institution have policies for valuing illiquid, intangible, or hard to value collateral that include appropriate LTV ratios, discount rates, and collateral margins?
2. Is the institution relying on enterprise value to confirm a secondary source of repayment?
   a. Has the institution documented its valuation approach to calculating enterprise value?
   b. Has the valuation been performed by qualified persons independent of the origination function?
   c. Has one or a combination of three methods been used for determining enterprise value, asset valuation, income valuation, or market valuation?
   d. If the income method is used, is it based on capitalized cash flow or discounted cash flow?
   e. Has the institution confirmed proxy measures such as multiples of cash flow earnings or sales by performing its own discounted cash flow analysis?
   f. Are stress tests of key variables and assumptions used in determining enterprise value (such as cash flow earnings and sales multiples) conducted at origination and periodically thereafter?
   g. Does the institution have established limits for the proportion of individual transactions and the total portfolio that are supported by enterprise value?

Pipeline Management

1. Do strong risk-management controls cover all transactions in the pipeline, including amounts planned for hold and those marked for distribution?
2. Does the institution have the capability to differentiate transactions based on their key characteristics, tenor, and investor class (pro-rata and institutional), structure, and key borrower characteristics (for example, industry)?
3. Does the institution have the following controls for pipeline exposure:
   - A documented appetite for underwriting pipeline risk that considers the potential effects on earnings, capital, and liquidity?
   - Written policies and procedures for "hung deals" or deals that are not sold down within a reasonable or 90-day period?
     – Have transactions reclassified as hold-to-maturity been reported to management and the board of directors?
   - Guidelines for conducting periodic stress tests of pipeline exposures?
   - Controls to monitor expected vs. actual performance?
   - Reports that show individual and aggregate transaction information, risk ratings and concentrations?
   - Limits on hold levels per borrower, counterparty, and aggregate hold levels?
   - Limits on the amounts intended for distribution?
   - Policies and procedures for acceptable accounting methods, including prompt recognition of losses?
   - Policies and procedures around acceptable hedging practices if applicable?
   - Plans to address contingent liabilities and compliance with Sections 23A and 23B of the Federal Reserve Act and Regulation W?

Reporting and Analytics

1. Does management receive quarterly comprehensive reports about the characteristics and trends of the institution's leveraged lending portfolio? Are summaries provided to the board of directors?
2. Do internal policies identify the data fields to be populated and captured by the institution's MIS? Are the reports accurate and timely?
3. As dictated by the size and complexity of the leveraged lending portfolio, does MIS reporting on the leveraged lending portfolio include the following:
   a. Individual and portfolio exposures within and across all business lines and legal vehicles including the pipeline?
   b. Risk-rating distribution and migration analysis?
   c. A list of borrowers who have been removed from the leveraged-lending portfolio due to improvements in their

financial characteristics and risk profile? Is the removal from the profile concurrent with a refinance, restructure or some other modification in the loan agreement?

d. Industry mix and maturity profile?
e. Metrics derived from probability of default and loss-given default?
f. Portfolio performance measures including covenant breaches, restructurings, delinquencies, nonperforming asset amounts, and charge offs?
g. Amount and nature of impaired assets and the amount of ALLL attributable to leveraged lending?
h. The level of policy exceptions in the portfolio?
i. Exposures by collateral type, including unsecured transactions when enterprise values will be the only source of repayment?
j. Defaults that trigger *pari-passu* treatment for all lenders?
k. Secondary market pricing data and trading volume (when available)?
l. An aggregation of exposures by and performance of deal sponsors?
m. An indication of gross and net exposures, hedge and counterparty concentrations; and indication of policy exceptions?
n. Actual vs. projected distribution levels of the pipeline with reports of excess levels of exposure over hold targets?
o. *Types of exposure in the pipeline:* committed exposures not accepted by the borrower; exposures committed and accepted but not closed; funded and unfunded commitments closed but not distributed?
p. *Total and segmented exposures:* subordinated debt and equity holdings (compared to limits); global exposures; indirect exposure (to an obligor or if the institution is holding a previously sold position as collateral or as a reference asset in a derivative)?
q. Exposures booked in other business units throughout the institution that are related to a leveraged loan or borrower? (For example, default swaps or total return swaps naming the distributed paper as a covered or referenced asset or as collateral exposure through repo transactions).
r. Positions held in leveraged loans in available for sale or traded portfolios or held in structured-investment vehicles owned or operated by the originating institution or its subsidiaries or affiliates?

Internal Risk Rating

1. Does the institution have evidence of adequate repayment capacity? For example, do borrowers demonstrate the ability to fully amortize senior debt or repay at least 50 percent of total debt over a five to seven-year period?
2. Are there extensions or other restructuring that are masking an inability to repay?
3. Has the primary source of repayment become inadequate? Is enterprise value being relied on as a secondary source of repayment? Is enterprise value well supported with binding purchase and sale agreements with qualified third parties? Does enterprise value consider the borrower's distressed circumstances?

Credit Analysis

1. Does transaction testing of individual leveraged lending credits contain the following elements and show that :
   a. *Cash flow analysis*—The analysis does not rely on overly optimistic or unsubstantiated projections of sales, margins, or merger and acquisition synergies?
   b. *Liquidity analysis*—There are measures to determine operating cash needs and cash needed to meet debt maturities? Analyze liquidity based on industry performance metrics?
   c. *Projections*—There is adequate margin for unanticipated merger-related integration costs?
   d. *Stress tests*—Projections are stress tested for one or more downside scenarios, including a covenant breach?
   e. *Variances from plan*—Transactions are reviewed at least quarterly to determine variance from plan; does the credit file contain a chronological rationale for and analysis of all changes to the operating plan and variances from the expected financial performance?
   f. *Enterprise Value*—Were enterprise values independently derived and validated outside of the origination function? Were

values calculated timely and did they consider value erosion?
g. *Collateral shortfalls*—Have shortfalls been identified and factored into the risk rating?
h. *Collateral liquidation and asset sales*—Are any liquidations and sales based on current market conditions and trends?
i. *Contingency plans*—Are there contingency analyses to anticipate changing conditions in debt or equity markets? Do the exposures rely on refinancing or the issuance of new equity?
j. *Interest Rate Risk and Foreign Exchange Risk*—Have these risks been addressed in the analysis? Are mitigants in place?

Problem Credit Management

1. Has the institution formulated and established procedures for dealing with problem credits?
2. Do work out plans contain quantifiable objectives and measurable time frames?
3. Are problem credits regularly reviewed for risk-rating accuracy, accrual status, recognition of impairment through specific allocations and charge-offs.

Deal Sponsors

1. Has the institution developed guidelines for evaluating the willingness and ability of sponsors to support the credit exposure and a process to regularly monitor sponsor performance?
2. Determine if the credit analysis has considered:
   a. If the sponsor is relied on as a secondary source of repayment and not a primary source of repayment?
   b. If the sponsor has a historical pattern of supporting investments, financially or otherwise?
   c. If the degree of support has been documented via a guarantee, comfort level, or verbal assurance?
   d. If there has been a periodic review of the sponsor's financial statements, an analysis of liquidity, and an analysis of the sponsor's ability to support multiple deals?
   e. If consideration has been given to the sponsor's dividend and capital contribution practices and the likelihood that the sponsor will support the borrower as compared to other deals in the sponsor's portfolio?

Credit Review

1. Does the institution conduct an internal credit review of the leveraged-lending portfolio regularly, but at least once per year?
2. Does the institution ensure that credit review personnel have the knowledge and ability to identify risks in the leveraged lending portfolio?

Stress Testing

1. Has the institution developed and implemented guidelines for conducting periodic portfolio stress tests on loans originated to hold and on loans originated to distribute?
2. Has the institution conducted periodic loan and leveraged lending portfolio level stress tests?
3. If applicable, has the leveraged-lending portfolio been included in enterprise wide stress tests?
4. Does stress testing of leveraged credits include sensitivity analyses to quantify the potential impact of changing economic and market conditions on the institution's asset quality, earnings, liquidity, and capital?

Reputational Risk

1. Does the institution have procedures, safeguards, actions, training, and staff reminders about the potential reputational risk associated with poorly underwritten originated leveraged loans?
2. Has there been any failure or apparent failure by the institution to meet its legal responsibilities in underwriting and distributing transactions that could damage its reputation or its ability to compete?

Conflicts of Interest

1. Has the institution developed appropriate policies and procedures to address and to prevent potential conflicts of interest when it has both equity and lending positions?
2. Do policies and procedures:

   a. Clearly define potential conflicts of interest?
   b. Identify appropriate risk-management controls and procedures?
   c. Enable employees to report potential conflicts of interest to managements without fear of retribution?
   d. Ensure compliance with applicable laws?
3. Has management:
   a. Established a training program for employees on appropriate practices to follow to avoid conflicts of interest?
   b. Provided for reporting, tracking, and resolution of any conflicts?

Compliance

1. Does the institution maintain an independent compliance review function to periodically review its leveraged-lending activity?
2. Do the institution's policies include safeguards to prevent violations of anti-tying regulations?
3. How does the institution ensure compliance with applicable securities laws, including disclosure and other regulatory requirements when equity interests and certain debt instruments have been used in leveraged transactions that may constitute "securities" under federal securities laws?
4. Have plans and provisions been developed to ensure compliance with sections 23A and 23B of the Federal Reserve Act and Regulation W?

2010.2.11 APPENDIX I - EXAMINER LOAN-SAMPLING REQUIREMENTS FOR CREDIT-EXTENDING NONBANK SUBSIDIARIES OF BHCS WITH $10-50 BILLION IN TOTAL CONSOLIDATED ASSETS

This guidance sets forth loan sampling expectations for the Federal Reserve's examination of state member bank (SMB) and the inspection of credit-extending nonbank subsidiaries of bank holding companies (BHCs) with $10-50 billion in total consolidated assets. Examiners will have the flexibility, depending upon the structure and size of subsidiary SMBs or credit-extending nonbank subsidiaries of BHCs, to utilize the guidance applicable to smaller organizations when the subsidiary's total assets are below $10 billion. This guidance clarifies expectations for the assessment of material[56] retail credit portfolios for these institutions. The guidance that follows has been solely adapted to BHC credit-extending nonbank subsidiaries.

A thorough review of a BHC's credit-extending nonbank subsidiary's loan and lease portfolio remains a fundamental element of the Federal Reserve's inspection program for these organizations. Such credit reviews are a primary means for examiners to (1) evaluate the effectiveness of a BHC's credit-extending nonbank internal loan review program and internal grading systems for determining the reliability of internal reporting of classified credits, (2) assess compliance with applicable guidance and regulations, and (3) determine the efficacy of credit-risk management and credit administration processes. Further, examiners use the findings from their credit review to identify the overall thematic credit-risk management issues, to assess asset quality, to assist in the assessment of the adequacy of the allowance for loan and lease losses (ALLL), and to inform their analysis of capital adequacy.

2010.2.11.1 Loan Sampling Methodology

Reserve Banks will establish the annual loan-sampling objective during the supervisory planning process. The annual sampling objective should provide coverage of material exposures, including those in the retail segments.[57] Reserve Banks should plan on conducting at least two loan quality reviews during the annual supervisory cycle of the BHC's credit-extending nonbank subsidiaries with $10–50 billion in total consolidated assets.

Each review should focus on one or more material commercial loan segment exposures using the comparable FR Y-9C Report loan types and, in total over the annual cycle, should cover the four highest concentrations for com-

56. A loan portfolio or portfolio segment is considered material when the portfolio or segment exceeds 25 percent of total risk-based capital (tier 1 capital plus the allowance for loan and lease losses) or contributes 25 percent or more to annual revenues.

57. Commercial loan segments include commercial and industrial (C&I) loans, 1-4 family construction, other construction loans, multifamily loans, farm loans, non-farm non-residential owner occupied, and non-farm non-residential other loans. Retail loan segments include first lien mortgages, closed-end junior liens, home equity lines of credit (HELOCs), credit cards, automobile loans, and other consumer loans.

mercial credits in terms of total risk-based capital for any FR Y-9C Report loan type from Schedule HC-C. Loan segments that generate substantial revenues are generally likely to entail higher risk. To the extent that examiners can determine that a loan category contributes 25 percent or more to annual revenues,[58] examiners should sample these segments. Examiners should also sample other loan segments that they or the bank's internal loan review have identified as exhibiting high-risk characteristics. Such risk characteristics include liberal underwriting, high levels of policy exceptions, high-delinquency trends, rapid growth, new lending products, concentrations and concentrations to industry, or significant levels of classified credits. In addition to these risk-focused samples, a sample of loans to insiders must be reviewed.[59] Annual loan sampling coverage by examiners should take into consideration the severity of the asset quality component rating, the effectiveness of the internal loan review program, the results of internal loan portfolio stress testing, and current asset quality financial trends.

During the inspection scoping phase, Reserve Bank staff should analyze the results of recent loan review reports or audits prepared for an institution's internal use and the Reserve Bank's most current assessment of credit-risk management to help establish the size and composition of loans to be selected for review. A nonbank subsidiary's internal loan review program should achieve substantial coverage beyond the examiners' annual judgmental sample of material loan portfolios. Examiners should review the findings and recommendations of the nonbank subsidiary's internal loan review program to help identify areas of risk. In selecting loans from each segment of the loan portfolio to review, examiners should include a selection of the largest loans, problem loans (past due 90 days or more, nonaccrual, restructured, or internally classified loans), and newly originated loans. Examiners should ensure the sample selection includes robust coverage of classified credits. At a minimum, loans selected for review from commercial loan segments should represent 10 percent of the committed dollar amount of credit exposure within the loan segment.

Sample sizes should be increased beyond the 10 percent minimum, based on examiner judgment, for segments when the inspection scoping process or the internal loan review program has identified

1. deficiencies with credit-risk management and administration practices,
2. unusually high loan growth,
3. credit quality or collateral values that have been adversely affected since the prior review by volatile local or national economic conditions, or
4. unreliable internal credit-risk grading.

Conversely, sample sizes should be based on the 10 percent minimum if

1. previous inspections concluded that internal loan review and credit-risk identification is effective,
2. internal loan review has reviewed a loan segment within the last 12 months and noted no material weaknesses, and
3. the inspection scoping process reveals no significant credit-risk management issues.

In general, the lower range of 10 percent sampling of each segment or the entire commercial portfolio would be acceptable when all aspects of credit risk indicate low and stable risk.

Examiners should determine classification amounts for retail credits using the Uniform Retail Classification Guidance (SR letter 00-8, "Revised Uniform Retail Credit Classification and Account Management Policy"). Annually, examiners should focus on one or more material retail loan segment exposures as divided by the comparable FR Y-9C Report loan type. Examiners should determine the appropriate sample of retail loans from material segments based on risk to be tested for compliance with internal credit administration policies and underwriting standards. While there is no minimum coverage expectation for retail portfolios or segments, the goal of sampling is to assist examiners in making an informed assessment of all aspects of retail credit-risk management. If applicable, examiners should evaluate and test secondary market origination and servicing practices and quality assurance programs. Examiners should also sample other retail loan segments, as needed, from segments the examiners or internal loan review identify as exhibiting high-risk characteristics such as liberal underwriting,

58. The 25 percent threshold should be based on internal MIS and may not be applicable or available in all instances. For the purposes of this guidance, annual revenue equals net interest income plus non interest income.

59. Federal Reserve examiners must test and evaluate Regulation O compliance annually.

high-delinquency trends, rapid growth, new lending products, or significant levels of classified credits.

2010.2.11.2 Documentation of Loan Sampling Analysis and Methodology

Examiners should discuss their analysis and objectives for achieving loan sampling coverage with Board staff during the annual supervisory planning process. Upon reaching a consensus with Board staff, the analysis and methodology should be retained in workpapers and documented in the supervisory plan. Further, examiners should document their loan sample selection methods in scoping memoranda and in the confidential section of the report of inspection. The required workpaper documentation of the commercial loan coverage calculation should be based on total loan commitments and should generally exclude loans reviewed outside of the Reserve Bank's supervisory plan when a detailed analysis of the loans by an examiner and an assessment of credit-risk management were not performed. Review of syndicated loans and participations, such as those from the Shared National Credits (SNCs) annual review, should only be included in the coverage ratio if Reserve Bank staff reviewed the credit-risk management aspects of the credit (for example, adherence to underwriting policies) and these findings are included in the examiner's assessment of overall credit-risk management practices. Examiners should continue to follow the SNC grading guidance.[60]

2010.2.11.3 Follow-Up Expectations for Inspections with Adverse Findings

Examiners should generally consider a credit-extending nonbank subsidiary's internal risk-rating system to be less reliable when examiner downgrades[61] or internal loan review downgrades equal 10 percent of the total number of loans reviewed, or 5 percent of the total dollar amount of loans and commitments reviewed. When a credit-extending nonbank subsidiary's risk-rating system is determined to be unreliable, examiners may need to expand sampling to better evaluate the effect of rating differences on the entity's ALLL and capital. In such situations, examiners should direct the BHC and its credit-extending nonbank subsidiary to take corrective action to validate its internal ratings and to evaluate whether the ALLL or capital should be increased. The Reserve Bank will follow-up with the BHC and its nonbank subsidiary to assess progress on corrective action and verify satisfactory completion. The timeframe for follow-up should correspond with the timeframe during which actions are to be completed.[62] All follow-up actions on adverse findings should be discussed with Board staff.

41. Refer to SR-77-377, "Shared National Credit Program."

61. A credit-risk grading difference is considered a downgrade when (a) a risk rating is changed by the examiner from an internal Pass rating to a classified category or (b) a risk rating is changed by the examiner within the classified categories.

62. Refer to SR-13-13/CA -13-10, "Supervisory Considerations for the Communications of Supervisory Findings."

The System's ability to evaluate the effectiveness of a company's supervision and control of subsidiary investment activities can be strengthened not only by evaluating the parent's role in light of efficiency and operating performance, but also by evaluating the quality of control and supervision. In order to assess quality there must be a standard or measuring block against which a company's policies can be evaluated. By establishing the minimum areas that a company's policies should address with respect to subsidiary investments, a standard is created which can evaluate the quality of company's control and supervision of that activity. The examiner needs to make a qualitative assessment of the parent's supervision and control of subsidiary investment activities.

2010.3.1 INSPECTION OBJECTIVES

1. Determine if the parent's investment policy is adequate for the organization.
2. Determine if the investment policy is being complied with.

2010.3.2 INSPECTION PROCEDURES

1. Determine whether the management has developed a flow chart on investment authorization procedures sufficiently detailed to assure that the execution of transactions precludes the ability to circumvent policy directives.
2. Determine whether all investment policies appear to be adequately tailored to fit the business needs of each subsidiary. Review the methods and/or process through which prior approval of new activities and investments in new instruments is granted.
3. Determine whether the boards of directors and the management of subsidiaries appear to be sufficiently involved in their respective roles to assure that the performance of fiduciary responsibilities of each appears adequate.
4. Assess the adequacy of the level of management expertise in relation to its involvement in various investment activities.
5. Evaluate the reasonableness of investment activity initiated to achieve corporate objectives in light of its potential impact on the risk exposure of subsidiaries.
6. Assess the adequacy of investment policy directives in regard to the required maintenance of adequate recordkeeping systems at subsidiaries.
7. Evaluate policy directives regarding the appropriateness of accounting practices in regard to transactions involving investment participations, swaps, other transfers of investments as well as specialized investment activities.
8. Evaluate whether investment policies adequately provide for the maintenance of a stable income stream at bank subsidiaries as well as the parent company level.
9. Determine whether investment policy directives adequately address statutory limitations, particularly those involving intercompany transactions.
10. Evaluate the effectiveness of the bank holding company's audit function in assuring that investment policies and directives are adhered to at each corporate level.

This section emphasizes the importance of integrating subsidiaries into a consolidated plan, the essential elements of the planning process, and the ultimate accountability of the board of directors of the holding company. As a minimum, the parent's consolidated plan should include the following ten elements:

1. *All plans should address a long-range goal or focus, intermediate term objectives, and short-term budgets.* A long-range focus is particularly important during a changing environment and during expansions of the organization. Long-range plans generally are broad with a service or customer orientation and market share emphasis. These plans provide the entire organization with a consistent direction and facilitate changes in the organization arising from environmental changes. Intermediate goals generally are narrower in scope. Short-term budgets are generally developed at the subsidiary level; however, they are subject to review and revision by the parent in an effort to maintain consistency throughout the organization.

2. *The planning process should be formalized.* A long-range focus, intermediate term objectives, and budgets should be written and adopted by the parent's board of directors to insure centralized accountability.

3. *Plans should be consistent and interrelated over the differing time periods.* For example, budgets should be consistent with long-range goals—the implementation of a short-term, high return orientation may be inconsistent with a long-term goal of increasing market share, or short-term compensation plans may be disfunctional in the long run.

4. *A consolidated plan should increase the consistency of goals among differing subsidiaries and the parent.* The long-range goals, intermediate term objectives, and short term goals and objectives should be periodically reviewed, preferably, annually, by the BHC's board of directors. A consolidated plan should reduce unnecessary internal competition.

5. *A consolidated plan should facilitate the allocation of resources throughout the organization.* This is particularly important when the parent is providing most, or all, of the short-term funds and long-term capital. As the parent has an awareness of all subsidiaries, it can better allocate funds and personnel to areas where they will be utilized most effectively.

6. *Plans should be formulated with an awareness to possible weaknesses and recognition to areas likely to be influenced by environmental change.* For these areas, flexibility should exist for contingency plans.

7. *Methods should be determined, in the plan, to monitor and evaluate compliance with the plan.*

8. *The consolidated plan should have a measurable aspect to determine whether budgets, objectives, and goals are being met.* If they are not met, determination as to the controllability of variances should be ascertained.

9. *Plans and goals must continually be evaluated to determine whether accomplishing the goal results in the desired and expected outcome.* For example, the desired outcome may be to increase net income by granting loans with higher interest rates and above normal risk. The granting of such loans may result in a need to increase the provision for loan losses, thus causing a decrease in earnings.

10. *Plans should be flexible enough to remain effective in a volatile environment.* If plans are too rigid, they may become disfunctional if the environment changes and actually constrain an organization's ability to react. On the other hand, flexible goals and plans should enhance an organization's ability to compete by providing the entire organization with a fluid consistent direction.

2010.4.1 INSPECTION OBJECTIVES

1. To determine if the board of directors at the parent company is cognizant of and performing its duties and responsibilities.

2. To determine if the level of supervision over subsidiaries is both adequate and beneficial.

3. To evaluate the consolidated plan for consistency, controls, and effectiveness.

4. To ascertain if the board of directors of the parent company is making judgments and decisions based on adequate information flowing from the management and financial reporting systems of the organization.

2010.4.2 INSPECTION PROCEDURES

1. Evaluate the participation by the board of directors of the parent company in giving overall direction to the organization.

2. Obtain and evaluate descriptions of all im-

portant management and financial policies, procedures, and practices.

3. Determine if contradictions or "conflicts" between expressed and unexpressed strategies and between long-term and short-term goals exist. Also determine that goals are consistent with concern over safety and soundness.

4. Determine whether the planning process is sufficiently flexible and if contingency plans exist.

5. Spell out the lines of authority associated with the planning process.

6. Determine the degree of control exercised by the parent company over the entire organization.

7. Test compliance with policies at all levels.

2010.5.1 BACKGROUND INFORMATION ON ENVIRONMENTAL LIABILITY

Banking organizations are increasingly becoming exposed to liability associated with the clean-up of hazardous substance contamination pursuant to, the Comprehensive Environmental Response, Compensation and Liability Act (''CERCLA''), the federal superfund statute. It was enacted in response to the growing problem of improper handling and disposal of hazardous substances. CERCLA authorizes the Environmental Protection Agency (''EPA'') to clean-up hazardous waste sites and to recover costs associated with the clean-up from entities specified in the statute. The superfund statute is the primary federal law dealing with hazardous substance contamination. However, there are numerous other federal statutes, as well as state statutes, that establish environmental liability that could place banking organizations at risk. For example, underground storage tanks are also covered by separate federal legislation.[1]

While the superfund statute was enacted a decade ago, it has been only since the mid-1980s that court actions have resulted in some banking organizations being held liable for the clean-up of hazardous substance contamination. In this connection, recent court decisions have had a wide array of interpretations as to whether banking organizations are owners or operators of contaminated facilities, and thereby liable under the superfund statute for clean-up costs. This has led to uncertainty on the part of banking organizations as to how to best protect themselves from environmental liability.

The relevant provisions of CERCLA, the so-called ''superfund'' statute, as it pertains to banking organizations, indicate which persons or entities are subject to liability for clean-up costs of hazardous substance contamination. These include ''. . . the owner and operator of a vessel or a facility, (or) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of. . . .'' [2] A person or entity that transports or arranges to transport hazardous substances can also be held liable for cleaning-up contamination under the superfund statute.

The liability imposed by the superfund statute is strict liability which means the government does not have to prove that the owners or operators had knowledge of or caused the hazardous substance contamination. Moreover, liability is joint and several, which allows the government to seek recovery of the entire cost of the clean-up from any individual party that is liable for those clean-up costs under CERCLA. In this connection, CERCLA does not limit the bringing of such actions to the EPA, but permits such actions to be brought by third parties.

CERCLA provides a secured creditor exemption in the definition of ''owner and operator'' by stating that these terms do not include ''. . . a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.'' [3] However, this exception has not provided banking organizations with an effective ''safe harbor'' because recent court decisions have worked to limit the application of this exemption. Specifically, courts have held that actions by lenders to protect their security interests may result in the banking organization ''participating in the management'' of a vessel or facility, thereby voiding the exemption. Additionally, once the title to a foreclosed property passes to the banking organization, courts have held that the exemption no longer applies and that the banking organization is liable under the superfund statute as an ''owner'' of the property. Under some circumstances, CERCLA may exempt landowners who acquire property without the knowledge of pre-existing conditions (the so-called ''innocent landowner defense''). However, the courts have applied a stringent standard to qualify for this defense. Because little guidance is provided by the statute as to what constitutes the appropriate timing and degree of ''due diligence'' to successfully employ this defense, banking organizations should exercise caution before relying on it.

2010.5.2 OVERVIEW OF ENVIRONMENTAL HAZARDS

Environmental risk can be characterized as adverse consequences resulting from having gen-

1. Resource Conservation and Recovery Act of 1986 (RCRA).
2. CERCLA, Section 107(a).
3. CERCLA, Section 101(20)(A)..

erated or handled hazardous substances, or otherwise having been associated with the aftermath of subsequent contamination. The following discussion highlights some common environmental hazards, but by no means covers all environmental hazards.

Hazardous substance contamination is most often associated with industrial or manufacturing processes that involve chemicals or solvents in the manufacturing process or as waste products. For years, these types of hazardous substances were disposed of in land fills, or just dumped on industrial sites. Hazardous substances are also found in many other lines of business. The following examples demonstrate the diverse sources of potential hazardous substance contamination which should be of concern to banking organizations:

- Farmers and ranchers (use of fuel, fertilizers, herbicides, insecticides, and feedlot runoff).
- Dry cleaners (various cleaning solvents).
- Service station and convenience store operators (underground storage tanks).
- Fertilizer and chemical dealers and applicators (storage and transportation of chemicals).
- Lawn care businesses (application of lawn chemicals).
- Trucking firms (local and long haul transporters of hazardous substances such as fuel or chemicals).

The real estate industry has taken the brunt of the adverse affects of hazardous waste contamination. In addition to having land contaminated with toxic substances, construction methods for major construction projects, such as commercial buildings, have utilized materials that have been subsequently determined to be hazardous, resulting in significant declines in their value. For example, asbestos was commonly used in commercial construction from the 1950's to the late 1970's. Asbestos has since been found to be a health hazard and now must meet certain federal and, in many instances, state requirements for costly removal or abatement (enclosing or otherwise sealing off).

Another common source of hazardous substance contamination is underground storage tanks. Leaks in these tanks not only contaminate the surrounding ground, but often flow into ground water and travel far away from the original contamination site. As contamination spreads to other sites, clean-up costs escalate.

2010.5.3 IMPACT ON BANKING ORGANIZATIONS

Banking organizations may encounter losses arising from environmental liability in several ways. The greatest risk to banking organizations, resulting from the superfund statute and other environmental liability statutes, is the possibility of being held solely liable for costly environmental clean-ups such as hazardous substance contamination. If a banking organization is found to be a responsible party under CERCLA, the banking organization may find itself responsible for cleaning-up a contaminated site at a cost that far exceeds any outstanding loan balance. This risk of loss results from an interpretation of the superfund statute as providing for joint and several liability. Any responsible party, including the banking organization, could be forced to pay the full cost of any clean-up. Of course, the banking organization may attempt to recover such costs from the borrower, or the owner if different than the borrower, provided that the borrower or owner continues in existence and is solvent. Banking organizations may be held liable for the clean-up of hazardous substance contamination in situations where the banking organization:

- Takes title to property pursuant to foreclosure;
- Involves the banking organization's personnel or contractors engaged by the bank in day-to-day management of the facility;
- Takes actions designed to make the contaminated property salable, possibly resulting in further contamination;
- Acts in a fiduciary capacity, including management involvement in the day-to-day operations of industrial or commercial concerns, and purchasing or selling contaminated property;
- Owns existing, or acquires (by merger or acquisition), subsidiaries involved in activities that might result in a finding of environmental liability;
- Owns existing, or acquires for future expansion, premises that have been previously contaminated by hazardous substances. For example, site contamination at a branch office where a service station having underground storage tanks once operated. Also, premises or other real estate owned could be contaminated by asbestos requiring costly clean-up or abatement.

A more common situation encountered by banking organizations has been where real prop-

erty collateral is found to be contaminated by hazardous substances. The value of contaminated real property collateral can decline dramatically, depending on the degree of contamination. As the projected clean-up costs increase, the borrower may not be able to provide the necessary funds to remove contaminated materials. In making its determination whether to foreclose, the banking organization must estimate the potential clean-up costs. In many cases this estimated cost has been found to be well in excess of the outstanding loan balance, and the banking organization has elected to abandon its security interest in the property and write off the loan. This situation occurs regardless of the fact that the superfund statute provides a secured creditor exemption. Some courts have not extended this exemption to situations where banking organizations have taken title to a property pursuant to foreclosure. These rulings have been based on a strict reading of the statute that provides the exemption to "security interests" only.

Risk of credit losses can also arise where the credit quality of individual borrowers (operators, generators, or transporters of hazardous substances) deteriorates markedly as a result of being required to clean up hazardous substance contamination. Banking organizations must be aware that significant clean-up costs borne by the borrower could threaten the borrower's solvency and jeopardize the banking organization's ultimate collection of outstanding loans to that borrower, regardless of the fact that no real property collateral is involved. Therefore, ultimate collection of loans to fund operations, or to acquire manufacturing or transportation equipment can be jeopardized by the borrower's generating or handling of hazardous substances in an improper manner. Further, some bankruptcy courts have required clean-up of hazardous substance contamination prior to distribution of a debtor's estate to secured creditors.

Borrowers may have existing subsidiaries or may be involved in merger and acquisition activity that may place the borrower at risk for the activities of others that result in environmental liability. Some courts have held that for the purposes of determining liability under the superfund statute, the corporate veil may not protect parent companies that participate in the day-to-day operations of their subsidiaries from environmental liability and court imposed clean-up costs. Additionally, borrowers can be held liable for contamination which occurred prior to their owning or using real estate.

2010.5.4 PROTECTION AGAINST ENVIRONMENTAL LIABILITY

Banking organizations have numerous ways to identify and minimize their exposure to environmental liability. Because environmental liability is relatively recent, procedures used to safeguard against such liability are evolving. The following discussion briefly describes methods currently being employed by banking organizations and others to minimize potential environmental liability.

Banking organizations should have in place adequate safeguards and controls to limit their exposure to potential environmental liability. Loan policies and procedures should address methods for identifying potential environmental problems relating to credit requests as well as existing loans. The loan policy should describe an appropriate degree of due diligence investigation required for credit requests. Borrowers in high-risk industries or localities should be held to a more stringent due diligence investigation than borrowers in low-risk industries or localities. In addition to establishing procedures for granting credit, procedures should be developed and applied to portfolio analysis, credit monitoring, loan workout situations, and—prior to taking title to real property—foreclosures. Banking organizations may avoid or mitigate potential environmental liability by having sound policies and procedures designed to identify, assess and control environmental liability.

At the same time, banking organizations must be careful that any lending policies and procedures, but especially those undertaken to assess and control environmental liability, cannot be construed as taking an active role in participating in the management or day-to-day operations of the borrower's business. Activities which could be considered active participation in the management of the borrower's business, and therefore subject the bank to potential liability, include, but are not limited to:

- having bank employees as members of the borrower's board of directors or actively participating in board decisions;
- assisting in day-to-day management and operating decisions; and
- actively determining management changes.

These considerations are especially important when the banking organization is actively involved in loan workouts or debt restructuring.

The first step in identifying and minimizing environmental risk is for banking organizations to perform environmental reviews. Such reviews may be performed by loan officers or others, and typically identify past practices and uses of the facility and property, evaluate regulatory compliance, if applicable, and identify potential future problems. This is accomplished by interviewing persons familiar with present and past uses of the facility and property, reviewing relevant records and documents, and visiting and inspecting the site.

Where the environmental review reveals possible hazardous substance contamination, an environmental assessment or audit may be required. Environmental assessments are made by personnel trained in identifying potential environmental hazards and provide a more thorough review and inspection of the facility and property. Environmental audits differ markedly from environmental assessments in that independent environmental engineers are employed to investigate, in greater detail, those factors listed previously, and actually test for hazardous substance contamination. Such testing might require collecting and analyzing air samples, surface soil samples, subsurface soil samples, or drilling wells to sample ground water.

Other measures used by some banking organizations to assist in identifying and minimizing environmental liability include: obtaining indemnities from borrowers for any clean-up costs incurred by the banking organization, and including affirmative covenants in loan agreements (and attendant default provisions) requiring the borrower to comply with all applicable environmental regulations. Although these measures may provide some aid in identifying and minimizing potential environmental liability, they are not a substitute for environmental reviews, assessments and audits, because their effectiveness is dependent upon the financial strength of the borrower.

2010.5.5 CONCLUSION

Potential environmental liability can touch on a great number of loans to borrowers in many industries or localities. Moreover, nonlending activities as well as corporate affiliations can lead to environmental liability depending upon the nature of the these activities and the degree of participation that the parent exercises in the operations of its subsidiaries. Such liability can result in losses arising from hazardous substance contamination because banking organizations are held directly liable for costly court ordered clean-ups. Additionally, the banking organization's ability to collect the loans it makes may be hampered by significant declines in collateral value, or the inability of a borrower to meet debt payments after paying for costly clean-ups of hazardous substance contamination.

Banking organizations must understand the nature of environmental liability arising from hazardous substance contamination. Additionally, they should take prudential steps to identify and minimize their potential environmental liability. Indeed, the common thread to environmental liability is the existence of hazardous substances, not types of borrowers, lines of business, or real property.

2010.5.6 INSPECTION OBJECTIVES

1. To determine whether adequate safeguards and controls have been established to limit exposure to potential environmental liability.
2. To determine whether the banking organization has identified specific credits and any lending and other banking and nonbanking activities that expose the organization to environmental liability.

2010.5.7 INSPECTION PROCEDURES

1. Review loan policies and procedures and establish whether these and other adequate safeguards and controls have been established to avoid or mitigate potential environmental liability.[4] In performing this task, ascertain whether:
   a. an environmental policy statement has been adopted;
   b. training programs are being conducted so that lending personnel are aware of environmental liability issues and are able to identify borrowers with potential problems;
   c. guidelines and procedures have been established for dealing with new borrowers and real property offered as collateral.
   d. the lending policies and procedures and other safeguards, including those to assess and control environmental liability, may not be construed as actively participating in the management of day-to-day operations of borrowers' businesses.

4. Refer to SR-91-20.

2. When reviewing individual credits determine whether the loan policy has been complied with in regard to a borrower's activities or industry that is associated with hazardous substances or environmental liability.

3. Ascertain whether appropriate periodic analysis of potential environmental liability is conducted.

Such analysis should be more rigorous as the risk of hazardous substance contamination increases. The following are examples of types of analyses and procedures that should be progressively considered as the risk of environmental liability increases:

- Environmental review—screening of the borrower's activities by lending personnel or real estate appraisers for potential environmental problems (using questionnaires, interviews, or observations).

  Review procedures might include a survey of past ownership and uses of the property, a property inspection, a review of adjacent or contiguous parcels of property, a review of company records for past use or disposal of hazardous materials, and a review of any relevant Environmental Protection Agency records.
- Environmental assessment—structured analysis by a *qualified* individual that identifies the borrower's past practices, regulatory compliance, and potential future problems. This analysis would include reviewing relevant documents, visiting and inspecting the site, and, in some cases, performing limited tests.
- Environmental audit—a professional environmental engineer performs a similar structured analysis as previously indicated for "environmental assessments," however, more comprehensive testing might involve collecting and analyzing air samples, surface soil samples, subsurface soil samples, or drilling wells to sample ground water.

4. Determine whether existing loans are reviewed internally to identify credits having potential environmental problems.

5. Review recordkeeping procedures and determine whether there is documentation as to the due diligence efforts taken at the time of making loans or acquiring real property.

6. Review loan agreements to determine if warranties, representations, and indemnifications have been included in loan agreements designed to protect the banking organization from losses stemming from hazardous substance contamination. (Although such provisions provide some protection for the lender, these agreements are not binding against the government or third parties. Such contractual protections are only as secure as the borrower's financial strength.)

7. For situations involving potential environmental liability arising from a banking organization's nonlending activities, verify that similar policies and procedures are in place.[5]

5. A banking organization's policies and procedures relating to environmental liability should apply to nonlending situations where appropriate. For example, banking organizations engaged in trust activities or contemplating a merger or acquisition should evaluate the possibility of existing or subsequent environmental liability arising from these activities.

2010.6.1 INTRODUCTION

Some depository institutions are active in selling uninsured nondeposit investment products, such as mutual funds or annuities, on their premises. Depository institutions provide these services at the retail level, directly or through various types of arrangements with third parties (an affiliated or non-affiliated party).[1]

Depository institutions selling nondeposit investment products should clearly inform customers of the nature and risks associated with these products. In particular, where nondeposit investment products are recommended or sold to retail customers, depository institutions should fully inform customers and make clear that the products

- are not insured by the Federal Deposit Insurance Corporation (FDIC);
- are not deposits or other obligations of the institution and are not guaranteed by the institution; and
- are subject to investment risks, including possible loss of the principal invested.

A depository institution should design sales activities involving these investment products to minimize the possibility of customer confusion. Further, a depository institution should design sales of the investment products to safeguard the institution from liability under the applicable antifraud provisions of the federal securities laws, which, among other things, prohibit materially misleading or inaccurate representations in connection with the sale of securities.

The purpose of this manual section is to provide an overview of the guidance addressing the retail sales of nondeposit investment products. For more information, see

- SR-94-11, "Interagency Statement on Retail Sales of Nondeposit Investment Products" (1994 interagency statement);
- SR-95-46, "Interpretation of Interagency Statement on Retail Sales of Nondeposit Investment Products"; and
- *Commercial Bank Examination Manual*, section 4580.1, "Retail Sales of Nondeposit Investment Products."

1. Sales arrangements involving companies affiliated with a depository institution subsidiary of a bank holding company could be subject to the provisions of section 106 of the Bank Holding Company Act amendments of 1970, as amended, 12 U.S.C. § 1871 et seq. For more information, see section 3070.0.7.4 of this manual.

2010.6.2 1994 INTERAGENCY STATEMENT SUMMARY

The Federal Reserve Board, along with the other federal banking agencies, issued an interagency statement on February 15, 1994, that provides comprehensive guidance on retail sales of nondeposit investment products occurring on or from depository institution premises. See SR-94-11.

The 1994 interagency statement was issued to address the expansion by depository institutions of activities involving the recommendation and sale to retail customers of nondeposit investment products, including mutual funds and annuities, as well as stocks and other investment products. The 1994 interagency statement focuses on issues that pertain specifically to the retail sale of investment products to customers on depository institution premises and seeks to avoid customer confusion of such products with those that are FDIC insured primarily through disclosure and separation of sales of investment products from other banking activities. In addition, the 1994 interagency statement provides guidance to depository institutions with respect to sales practices that are consistent with those applicable to registered securities brokers and dealers.

The 1994 interagency statement unifies pronouncements previously issued by the federal banking supervisory agencies that addressed various aspects of retail sales programs involving mutual funds, annuities, and other nondeposit investment products. This statement emphasizes the importance of adopting comprehensive policies and procedures governing sales programs and includes directions relating to the following matters:

- disclosure and advertising
- the use of identical and similarly named products
- the separation of sales programs
- the training and supervision of personnel
- sales practices and suitability
- third-party arrangements

The 1994 interagency statement applies to all depository institutions, including state member banks, and the U.S. branches and agencies of foreign banks, supervised by the Federal Reserve. This statement does not apply directly to bank holding companies or savings and loan

holding companies (holding companies). However, the board of directors and management of holding companies should consider the provisions of the statement with regard to the holding company's oversight of its depository institution subsidiaries that offer such products to retail customers.

The 1994 interagency statement applies when retail recommendations or sales of nondeposit investment products are made by the following personnel:

- employees of the depository institution
- employees of a third party, which may or may not be affiliated with the institution,[2] occurring on the premises of the institution (including telephone sales or recommendations by employees or from the institution's premises and sales or recommendations initiated by mail from its premises)
- sales resulting from a referral of retail customers by the institution to a third party when the depository institution receives a benefit for the referral

For these purposes, retail sales include (but are not limited to) sales to individuals by depository institution personnel or third-party personnel conducted in or adjacent to a depository institution's lobby area. Sales of government and municipal securities made in a depository institution's dealer department located away from the lobby area are *not* covered by the 1994 interagency statement.

The guidelines in the 1994 interagency statement generally do not apply to the sale of nondeposit investment products to nonretail customers, such as sales to fiduciary accounts administered by an institution.[3] The disclosures provided by the interagency statement, however, should be provided to customers of fiduciary accounts where the customer directs investments, such as self-directed IRA accounts. Such disclosures need not be made to customers acting as professional money managers. Fiduciary accounts administered by an affiliated trust company on the depository institution's premises should be treated as fiduciary accounts of the institution. However, as part of its fiduciary responsibility, an institution should take appropriate steps to avoid potential customer confusion when providing nondeposit investment products to the institution's fiduciary customers.

2010.6.3 SUPERVISORY REVIEW

Reserve Bank examiners review nondeposit investment product sales activities during examinations of institutions engaging in such activities on their premises, either directly or through a third party or an affiliate. In general, examiners review nondeposit investment product sales when examining a state member bank (or a state-licensed U.S. branch or agency of a foreign bank) that engages directly in the retail sale of nondeposit investment products. The review process aims to assess the nature and sufficiency of an institution's disclosures, the separation of functions, and the training of personnel involved with the sales of mutual funds and other nondeposit products. For more information on examination procedures and objectives, see the *Commercial Bank Examination Manual*.

2. The 1994 interagency statement does not apply to the subsidiaries of insured state nonmember banks, which are subject to separate provisions relating to securities activities.

3. Restrictions on a national bank's use as fiduciary of the bank's brokerage service or other entity with which the bank has a conflict of interest, including purchases of the bank's proprietary and other products, are set forth in 12 C.F.R. 9.12.

A banking organization should be able to readily determine for which entity within the bank holding company an individual is employed, and members of a banking organization's staff must be able to identify which subsidiary of the holding company employs them. The distinction is important because complex banking organizations must take steps to ensure that their officials and employees have both the corporate and legal authority to carry out their duties, and because the organization's personnel should only be performing activities that are permitted by law to be carried out by the holding company or its particular subsidiaries.

2010.8.1 IDENTIFICATION OF FACILITIES AND STAFF

Generally, unless there are statutory restrictions or the Federal Reserve or other regulators have issued explicit written proscriptions, such as those concerning mutual fund sales on bank premises, there is no fundamental legal prohibition on the entities of a banking organization sharing or using unmarked contiguous facilities and, in some instances, sharing officials and employees. There are, however, concerns about safety and soundness and conflicts of interest. These may arise when a banking organization does not take appropriate actions to define and differentiate the functions and responsibilities of each of its entities and staff.

Good corporate governance requires that a banking organization be able to readily identify the authority and responsibilities of its officials and employees at each of its entities, especially where the entities share facilities or use contiguous offices that are not clearly marked to indicate the identity of the different entities. This is necessary to ensure that—

1. an official or employee who makes a commitment to a counterparty on behalf of the organization has both the corporate and legal authority to do so,
2. the counterparty understands with whom it is dealing, and
3. each entity is in compliance with any legal restrictions under which it operates.

To accomplish the goal of ready identification, a banking organization should maintain well-defined job descriptions for each category of its staff at each entity. When officials and employees of one entity have responsibilities for other entities, particularly in shared facilities, the staff's responsibilities should be clearly defined and, when appropriate, disclosed or made clear to customers and the public in general. This procedure clarifies for both the public and the regulators for which entity officials or employees are carrying out their duties and responsibilities. Also, this clarifies whether an entity is operating within the scope of its charter, license, or other legal restrictions. Finally, a banking organization should establish and maintain appropriate internal controls designed to ensure the separation of the functions of the legal entities, when required, as well as have an adequate audit program to monitor such activities.

If officials and employees have responsibilities for other offices or affiliates of the banking organization, particularly those that share facilities, these responsibilities should be clearly defined and, when appropriate, disclosed or made clear to customers and the public in general. This procedure clarifies for which entity employees are carrying out their duties. Furthermore, in establishing employee responsibilities, management should ensure that they are within the scope of the entity's license or charter.

2010.8.2 EXAMINER GUIDANCE ON SHARING FACILITIES AND STAFF

Examiners should continue to be fully aware of the issues and potential problems involved in the sharing of staff and the sharing or use of unmarked contiguous facilities by the different entities of a banking organization with varied activities. At a minimum, examiners should check to see that a banking organization maintains clear records indicating the duties and responsibilities of the officials and employees at each of its entities. They should also take steps to check whether, in situations when an official or employee may perform duties for more than one entity in a shared facility, the banking organization has adequate policies and controls in place to ensure that its staff have the corporate and legal capacity to commit the organization to its counterparties and that the duties are carried out in conformance with the statutory restrictions applicable to each of the entities. See SR-95-34 (SUP).

One of the many basic tenets of internal control is that a banking organization (bank holding company, state member bank, and foreign banking organization) needs to ensure that its employees in sensitive positions are absent from their duties for a minimum of two consecutive weeks. Such a requirement enhances the viability of a sound internal control environment because most frauds or embezzlements require the continuous presence of the wrongdoer.

In brief, this section contains a statement emphasizing the need for banking organizations to conduct an assessment of significant risk areas before developing a policy on required absences from sensitive positions. After making this assessment, the organization should require that employees in sensitive key positions, such as trading and wire transfer, not be allowed to transact or otherwise carry out, either physically or through electronic access, their assigned duties for a minimum of two consecutive weeks per year. The prescribed period of absence should, under all circumstances, be sufficient to allow all pending transactions to clear. It should also require that an individual's daily work be processed by another employee during the employee's absence. (See SR-96-37.)

2010.9.1 STATEMENT ON REQUIRED ABSENCES FROM SENSITIVE POSITIONS

A comprehensive system of internal controls is essential for a financial institution to safeguard its assets and capital, and to avoid undue reputational and legal risk. Senior management is responsible for establishing an appropriate system of internal controls and monitoring compliance with that system. Although no single control element should be relied on to prevent fraud and abuse, these acts are more easily perpetrated when proper segregation and rotation of duties do not exist. As a result, the Federal Reserve is reemphasizing the following prudent banking practices that should be incorporated into a banking organization's internal control procedures. These practices are designed to enhance the viability of a sound internal control environment, as most internal frauds or embezzlements necessitate the constant presence of the offender to prevent the detection of illegal activities.

When developing comprehensive internal control procedures, each banking organization should first make a critical assessment of its significant areas and sensitive positions. This assessment should consider all employees, but should focus more on those with authority to execute transactions, signing authority and access to the books and records of the banking organization, as well as those employees who can influence or cause such activities to occur. Particular attention should be paid to areas engaged in trading and wire-transfer operations, including personnel who may have reconciliation or other back-office responsibilities.

After producing a profile of high-risk areas and activities, it would be expected that a minimum absence of two consecutive weeks per year be required of employees in sensitive positions. The prescribed period of absence should, under all circumstances, be sufficient to allow all pending transactions to clear and to provide for an independent monitoring of the transactions that the absent employee is responsible for initiating or processing. This practice could be implemented through a requirement that affected employees take vacation or leave, the rotation of assignments in lieu of required vacation, or a combination of both so the prescribed level of absence is attained. Some banking organizations, particularly smaller ones, might consider compensating controls such as continuous rotation of assignments in lieu of required absences to avoid placing an undue burden on the banking organization or its employees.

For the policy to be effective, individuals having electronic access to systems and records from remote locations must be denied this access during their absence. Similarly, indirect access can be controlled by not allowing others to take and carry out instructions from the absent employee. Of primary importance is the requirement that an individual's daily work be processed by another employee during his or her absence; this process is essential to bring to the forefront any unusual activity of the absent employee.

Exceptions to the required-absence policy may be necessary from time to time. However, management should exercise the appropriate discretion and properly document any waivers that are granted. Internal auditing should be made aware of individuals who receive waivers and the circumstances necessitating the exceptions.

If a banking organization's internal control procedures do not now include the above practices, they should be promptly amended. After

the procedures have been enhanced, they should be disseminated to all employees, and the documentation regarding their receipt and acknowledgment maintained. Additionally, adherence to the procedures should be included in the appropriate audit schedules, and the auditors should be cognizant of potential electronic access or other circumventing opportunities.

The development and implementation of procedures on required absences from sensitive positions is just one element of an adequate control environment. Each banking organization should take all measures to establish appropriate policies, limits, and verification procedures for an effective overall risk-management system.

2010.9.2 INSPECTION OBJECTIVES

1. To determine whether a critical assessment has been performed of a banking organization's significant areas and sensitive positions.
2. To ascertain that sound internal controls exist, including policies and procedures that provide assurances that employees in sensitive positions are absent from their duties for a minimum of two consecutive weeks per year.
3. To ascertain whether the banking organization has taken all measures to establish appropriate policies, limits, and verification procedures for an effective overall risk-management system.
4. To establish that the appropriate audit schedules and the audits include a review of minimum absence policies and procedures, including potential electronic access or other circumventing actions by employees.

2010.9.3 INSPECTION PROCEDURES

1. Determine that a profile of high-risk areas and activities is performed on a regular periodic basis.
2. Ascertain if employees assigned to sensitive positions are required to be absent for a minimum of two weeks per year while—
   a. pending sensitive transactions are monitored while they clear, and
   b. daily work is monitored and processed by another employee during the regularly assigned employee's absence.
3. Determine if required internal control procedures for minimum absences (for example, rotation of assignments, vacation or leave, or a combination of both) are being used in sensitive operations such as trading, trust, wire transfer, reconciliation, or other sensitive back-office responsibilities.
4. Ascertain if appropriate policies, limits, and verification procedures have been established and maintained for an effective overall risk-managment system.
5. Determine whether the banking organization—
   a. prohibits others from taking and carrying out instructions from the absent employees, and
   b. prevents remote electronic access to systems and records involving sensitive transactions during the regularly assigned employee's required minimum two-week absence.
6. Ascertain that the banking organization documents waivers from the two-week minimum absence policies and procedures involving sensitive positions.
7. Determine that the appropriate audit schedules and the audits include a review of such procedures, including potential electronic access or other circumventing actions by employees.

Internal loan review is an activity which provides management with information about the quality of loans and effectiveness of a banking organization's lending policies and procedures. The objectives of loan-review procedures are to identify, in a timely manner, existing or emerging credit-quality problems and to determine whether internal lending policies are being adhered to.

The size and complexity of a bank holding company will dictate the need for and structure of internal loan review. One-bank holding companies with no significant credit-extending nonbank subsidiaries will normally establish internal loan-review procedures within the subsidiary bank. In these cases, there is no need to evaluate the loan-review procedures during the inspection.

For larger multibank companies or those with significant credit-extending nonbank subsidiaries, internal loan review is usually centralized at the parent company level. In some cases, a centralized loan-review function could operate in the lead bank and cover all affiliates within the organization. However, since parent company directors and senior management are ultimately accountable for the organization's asset quality, an evaluation of the internal loan-review function should be conducted as part of the inspection process no matter where the operations are technically located within the corporate structure. Since a subsidiary bank's primary regulator will normally want to evaluate the loan-review process as it relates to the respective bank, a coordination of efforts would be appropriate. This should be handled on an ad hoc basis, as deemed necessary by the holding company's examiner-in-charge, to avoid unnecessary duplication of efforts without compromising the independence of the appraisal process.

Internal loan-review procedures may take various forms, from senior officers' review of junior-officer loans to the formation of an independent department staffed by loan-review analysts. An effective system will identify deteriorations in credits, loans that do not comply with written loan policies, and loans with technical exceptions.

The loan-review program should be delegated to a qualified and adequate staff. The review should be systematic in scope and frequency. All related extensions of credit should be identified and analyzed together. A minimum credit size should be established that allows for an efficient review while providing adequate coverage. The process should also tie problem loans or technical exceptions to the particular loan officer to allow senior management to evaluate individual performance. Loans should be reviewed shortly after origination to determine their initial quality, technical exceptions, and compliance with written loan policies. Reasonable frequency guidelines should be set for normal reviews, with problem credits receiving special and more frequent analysis. An effective loan-review procedure will incorporate an early warning system of ''red flags,'' such as overdrafts, adverse published reports, and deteriorating financial statements. Loan officers should also be encouraged to inform the organization's internal loan-review unit of developing loan problems, and they should be discouraged from withholding problem loans or adverse information from the review process.

The loan-review process should be independent of the loan-approval function, with written findings reported to a board or senior management committee that is not directly involved in lending. Follow-up and monitoring of problem credits should be instituted. The loan officer should be responsible for reporting on any corrective actions taken. The maintenance of adequate internal controls within the lending process, in particular for loan review or credit audit, is critical for maintaining proper incentives for banking organization staff to be rigorous and disciplined in their credit-analysis and lending decisions. A banking organization's credit analyses, loan terms and structures, credit decisions, and internal rating assignments have historically been reviewed in detail by experienced and independent loan-review staff. Such loan reviews have provided both motivation for better credit discipline within an institution and greater comfort for examiners—and management—that internal policies are being followed and that the banking organization continues to adhere to sound lending practice.

For larger multibank organizations, loan-review procedures are usually centralized and administered at the parent level, with loan-review staff employed by the parent company. In some cases, a centralized loan-review function may operate in the lead bank, covering all other affiliates in the organization. The parent company directors and senior management are ultimately accountable for supervision of the entire organization's asset quality. Therefore, it

should be the System's responsibility to evaluate top management's loan-review policies and procedures as they relate to the subsidiaries, both bank and nonbank, no matter where the function is technically established within the corporate structure. The holding company examiner-in-charge should attempt to coordinate efforts and cooperate with the respective banks' primary supervisors to avoid unnecessary duplication, without compromising the independence of the appraisal process.

During favorable economic and financial markets, relatively low levels of problem loans and credit losses may increase pressure within banking organizations to reduce the resources committed to loan-review functions. These reductions may include a reduction in staff, more limited portfolio coverage, and less thorough reviews of individual loans. Undoubtedly, some useful efficiencies may be gained by reducing loan-review resources, but some banking organizations may reduce the scope and depth of loan-review activities beyond levels that are prudent over the longer horizon. If reduced too far, the integrity of the lending process and the discipline of identifying unrealistic assumptions and discerning problem loans in a timely fashion may deteriorate. This may be especially true when a large proportion of lenders may not have had direct lending experience during a credit cycle when there was an economic and financial market downturn. See SR-99-23.

If supervisors and examiners find that there are weaknesses in the internal loan-review function and in activities or other internal control and risk-management processes (for example, staff turnover, failure to commit sufficient resources, inadequate adherence to established internal controls, or inadequate training), such findings should be discussed with the senior management of the parent bank holding company or other management at a corporate-wide level and, if determined to be a major concern, presented as comments on the ''Examiner's Comments and Matters Requiring Special Board Attention'' core page. Findings that could adversely affect affiliated insured depository institutions should be conveyed to the primary federal or state supervisor of the insured institution. Those findings should also be considered when assigning supervisory ratings.

Shell one-bank holding companies will not have or need a loan-review program emanating from the parent company level. Loan review will normally function within the subsidiary bank and be supervised by bank directors and management.

2010.10.1 INSPECTION OBJECTIVES

1. Review the operations of the bank holding company to determine whether there is an internal loan-review program. If not, one should be implemented.
2. Determine whether the loan-review program is independent from the loan-approval function.
3. Determine if the loan-review staff is sufficiently qualified and whether its size is adequate.
4. Determine whether the scope and frequency of the loan-review procedure is adequate to ensure that problems are being identified.
5. Determine that findings from the loan-review process are being properly reported and receive adequate follow-up attention.

2010.10.2 INSPECTION PROCEDURES

1. Review the holding company's operations to determine what types of internal loan-review procedures are being performed and whether an internal loan-review program exists.
2. If no internal loan-review program exists, determine whether the size, complexity, and financial condition of the organization warrants implementation of a formal loan-review process.
3. Review the organizational structure of the loan-review function to ensure its independence from the loan-approval processes.
4. Review the reporting process for internal loan-review findings to determine whether a director committee or independent senior management committee is being appropriately advised of the findings. Determine whether adequate follow-up procedures are in place.
5. Through loan reviews, transaction testing, and discussions with loan-review management, evaluate the quality, effectiveness and adequacy of the internal loan-review staff and internal controls in relation to the organization's size and complexity.
6. Review the operation of the loan-review process to identify the method for selecting loans and the manner in which they are analyzed and graded. Determine whether these procedures are adequate.

7. Determine if loan-review activities or other internal control and risk-management processes have been weakened by turnover of internal loan-review staff; a failure to commit sufficient resources; inadequate internal controls; inadequate training; or the absence of other adequate systems, resources, or controls. If such significant findings are found, discuss those concerns with senior management and report those findings on the core page 1, ''Examiner's Comments and Matters Requiring Special Board Attention.''
8. Determine what type of ''early warning'' system is in place and whether it is adequate.
9. Determine how the scope and frequency of the review procedure is established and whether this provides adequate coverage.

WHAT'S NEW IN THIS REVISED SECTION

Effective July 2012, this section has been revised to reference the Financial Crimes Enforcement Network's regulations and those of the Office of Foreign Assets Control, issued by the U.S. Department of the Treasury (31 C.F.R. 1020).

2010.11.1 OVERVIEW OF PRIVATE BANKING AND ITS ASSOCIATED ACTIVITIES

The role of bank regulators in supervising private-banking activities is (1) to evaluate management's ability to measure and control the risks associated with such activities and (2) to determine if the proper internal control and audit infrastructures are in place to support effective compliance with relevant laws and regulations. In this regard, the supervisors may determine that certain risks have not been identified or adequately managed by the institution, a potentially unsafe and unsound banking practice.

Private-banking functions may be performed in a specific department of a commercial bank or nonbank subsidiary of a commercial bank, a bank holding company (including a financial holding company), an Edge corporation or its foreign subsidiaries, a branch or agency of a foreign banking organization, or within multiple areas of an institution. Private banking may be the sole business of an institution. Regardless of how an institution is organized or where it is located, the results of the private-banking review should be reflected in the entity's overall supervisory assessment.[1]

This section provides examiners with guidance for reviewing private-banking activities at all types and sizes of banking organizations, including financial institutions. It is intended to supplement, not replace, existing guidance on the inspection or examination of private-banking activities and to broaden the examiner's review of general risk-management policies and practices governing private-banking activities. In addition to providing an overview of private banking, the general types of customers, and the various products and services typically provided, the "Functional Review" subsection describes the critical functions that constitute a private-banking operation and identifies certain safe and sound banking practices. These critical functions are supervision and organization, risk management, fiduciary standards, operational controls, management information systems, audit, and compliance. Included in the risk-management portion is a discussion of the basic "customer-due-diligence" (CDD) principle that is the foundation for the safe and sound operation of a private-banking business. See the CDD rules at 31 C.F.R. 1020. The "Preparation for Inspection" subsection assists in defining the inspection scope and provides a list of core requests to be made in the first-day letter. Additional inspection and examination guidance can be found in this manual, the Federal Financial Institutions Examination Council's (FFIEC) *Bank Secrecy Act/Anti–Money Laundering (BSA/AML) Examination Manual*, the Federal Reserve System's *Trading and Capital-Markets Activities Manual,* and in the FFIEC's *Information Technology Examination Handbook.*

In reviewing specific functional and product-inspection procedures (as found in the private-banking activities module that is part of the framework for risk-focused supervision of large complex institutions), all aspects of the private-banking review should be coordinated with the rest of the inspection to eliminate unnecessary duplication of effort. Furthermore, this section has introduced the review of trust activities and fiduciary services, critical components of most private-banking operations, as part of the overall private-banking review. Although the product nature of these activities differs from that of products generated by other banking activities, such as lending and deposit taking, the functional components of private banking (supervision and organization, risk management, operational controls and management information systems, audit, compliance, and financial condition/business profile) should be reviewed across product lines.

Private banking offers the personal and discrete delivery of a wide variety of financial services and products to an affluent market, primarily to high net worth individuals and their

1. Throughout this section, the word institution will be used to mean all types of banking organizations, including bank holding companies, their bank and other financial institution subsidiaries, nonbank subsidiaries, and those entities authorized to operate under section 4(k) of the Bank Holding Company Act. Institution also includes branches and agencies of foreign banks and any other types of financial institutions and entities supervised by the Federal Reserve System. The term "board of directors" will be interchangeable with references to the "senior management" of branches and agencies of foreign banks.

corporate interests. A private-banking operation typically offers its customers an all-inclusive money-management relationship, including investment portfolio management, financial-planning advice, offshore facilities, custodial services, funds transfer, lending services, overdraft privileges, hold mail, letter-of-credit financing, and bill-paying services. As the affluent market grows, both in the United States and globally, competition to serve it is becoming more intense. Consequently, the private-banking marketplace includes banks, nonbanks, and other types of banking organizations and financial institutions. Private-banking products, services, technologies, and distribution channels are still evolving. A range of private-banking products and services may be offered to customers throughout an institution's global network of affiliated entities—including branches, subsidiaries, and representative offices—in many different regions of the world, including offshore secrecy jurisdictions.

Typically, private-banking customers are high net worth individuals or institutional investors who have minimum investible assets of $1 million or more. Institutions often differentiate domestic from international private banking, and they may further segregate the international function on the basis of the geographic location of their international client base. International private-banking clients may be wealthy individuals who live in politically unstable nations and are seeking a safe haven for their capital. Therefore, obtaining detailed background information and documentation about the international client may be more difficult than it is for the domestic customer. Private-banking accounts may, for example, be opened in the name of an individual, a commercial business, a law firm, an investment adviser, a trust, a personal investment company (PIC), or an offshore mutual fund.

In 2001, the USA Patriot Act (the Patriot Act) established new and enhanced measures to prevent, detect, and prosecute money laundering and terrorist financing. In general, these measures were enacted through amendments to the Bank Secrecy Act (BSA). The measures directly affecting banking organizations are implemented primarily through regulations issued by the U.S. Department of the Treasury (31 C.F.R. 1020).[2] Section 326 of the Patriot Act (see the BSA at 31 U.S.C. 5318(*l*)) requires financial institutions (such as banks, savings associations, trust companies, and credit unions) to have *customer identification programs* (CIPs), that is, programs to collect and maintain certain records and documentation on customers. Institutions are to develop and use identity verification procedures to ensure the identity of their customers. Bank holding companies, as a matter of safety and soundness, should take appropriate measures to ensure that their financial institution subsidiaries are in compliance with the customer identification program (CIP) rule.

The CIP rule (see 31 C.F.R. 1020.220 and 12 C.F.R. 326.8(b)) applies only to a bank, not to a bank holding company solely because it owns a bank. Also, a nonbank subsidiary of a bank holding company is not subject to the CIP rule for banks solely as a result of being affiliated with a bank in a holding company structure. Even though this rule is not applicable to bank holding companies and their nonbank subsidiaries (or to savings and loan holding companies and their non–savings association subsidiaries), bank holding companies should, as a matter of safety and soundness, take appropriate measures throughout the organization to ensure that each of their entities is in compliance with any applicable CIP rule. New accounts must receive appropriate due diligence, and a holding company should generally protect the consolidated organization from any risks associated with money laundering and financial crime. The bank holding company may still be subject to other CIP rules if it has ownership in a functionally regulated entity, for example, a securities broker-dealer. (See 31 C.F.R. 1023.220 and 1026.220)

The CIPs are to include measures to—

1. require that certain information be obtained at account opening (for individuals, the information would generally include their name, address, tax identification number, and date of birth);
2. verify the identity of new account holders within a reasonable time period;
3. ensure that a banking organization has a reasonable belief that it knows each customer's identity;
4. maintain records of the information used to verify a person's identity; and

2. For banking organizations, the regulation implementing the requirements of section 326 of the Patriot Act was jointly issued by the U.S. Department of the Treasury, through the Financial Crimes Enforcement Network (FinCEN), and the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the National Credit Union Administration.

5. compare the names of new customers against government lists of known or suspected terrorists or terrorist organizations.

A customer identification program is an important component of a financial institution's overall anti-money-laundering and BSA compliance program.

The FFIEC *BSA/AML Examination Manual* provides the interagency BSA examination procedures that should be used to evaluate banking organizations' compliance with the regulation. The scope of the examination or inspection can be tailored to the reliability of the banking organization's compliance-management system and to the level of risk that the organization assumes. Relevant interagency guidance (in a frequently-asked-question format) has been issued to address the customer identification program rules. (See SR-05-9.)

Private-banking accounts are usually generated on a referral basis. Every client of a private-banking operation is assigned a salesperson or marketer, commonly known as a relationship manager (RM), as the primary point of contact with the institution. The RM is generally charged with understanding and anticipating the needs of his or her wealthy clients, and then recommending services and products for them. The number of accounts an RM handles varies, depending on the portfolio size or net worth of the particular accounts. RMs strive to provide a high level of support, service, and investment opportunities to their clients and tend to maintain strong, long-term client relationships. Frequently, RMs take accounts with them to other private-banking institutions if they change employment. Historically, initial and ongoing due diligence of private-banking clients is not always well documented in the institution's files because of RM turnover and confidentiality concerns.

Clients may choose to delegate a great deal of authority and discretion over their financial affairs to RMs. Given the close relationship between clients and their account officers, an integral part of the inspection process is assessing the adequacy of managerial oversight of the nature and volume of transactions conducted within the private-banking department or with other departments of the financial institution, as well as determining the adequacy and integrity of the RM's procedures. Policy guidelines and management supervision should provide parameters for evaluating the appropriateness of all products, especially those involving market risk. Moreover, because of the discretion given to RMs, management should develop effective procedures to review the activity of client accounts in order to protect the client from any unauthorized activity. In addition, ongoing monitoring of account activity should be conducted to detect activity that is inconsistent with the client profile (for example, frequent or sizable unexplained transfers flowing through the account).

Finally, as clients develop a return-on-assets (ROA) outlook to enhance their returns, the use of leveraging and arbitrage is becoming more evident in the private-banking business. Examiners should be alert to the totality of the client relationship product by product, in light of increasing client awareness and use of derivatives, emerging-market products, foreign exchange, and margined accounts.

2010.11.1.1 Products and Services

2010.11.1.1.1 Personal Investment Companies, Offshore Trusts, and Token-Name Accounts

Private-banking services almost always involve a high level of confidentiality for clients and their account information. Consequently, it is not unusual for private bankers to help their clients achieve their financial-planning, estate-planning, and confidentiality goals through offshore vehicles such as personal investment companies (PICs), trusts, or more exotic arrangements, such as hedge fund partnerships. While these vehicles may be used for legitimate reasons, without careful scrutiny, they may camouflage illegal activities. Private bankers should be committed to using sound judgment and enforcing prudent banking practices, especially when they are assisting clients in establishing offshore vehicles or token-name accounts.

Through their global network of affiliated entities, private banks often form PICs for their clients. These ''shell'' companies, which are incorporated in offshore secrecy jurisdictions such as the Cayman Islands, Channel Islands, Bahamas, British Virgin Islands, and Netherlands Antilles, are formed to hold the customer's assets as well as offer confidentiality by opening accounts in the PIC's name. The ''beneficial owners'' of the shell corporations are typically foreign nationals. The banking institution should know and be able to document that it knows the beneficial owners of such corporations and that it has performed the appropriate due diligence to support these efforts. Emphasis should be placed on verifying the source or

origin of the customer's wealth. Similarly, offshore trusts established in these jurisdictions should identify grantors of the trusts and sources of the grantors' wealth. *Anonymous relationships or relationships in which the RM does not know and document the beneficial owner should not be permitted.*

PICs are typically passive personal investment vehicles. However, foreign nationals have established PICs as operating accounts for business entities they control in their home countries. Accordingly, financial institutions should use extra care when dealing with beneficial owners of PICs and associated trusts; these vehicles can be used to conceal illegal activities.

2010.11.1.1.2 Deposit-Taking Activities of Subsidiary Institutions

A client's private-banking relationship frequently begins with a deposit account and then expands into other products. In fact, many institutions require private-banking customers to establish a deposit account before maintaining any other accounts. Deposit accounts serve as conduits for a client's money flows. To distinguish private-banking accounts from retail accounts, institutions usually require significantly higher minimum account balances and assess higher fees. The private-banking function or institution should have account-opening procedures and documentation requirements that must be fulfilled before a deposit account can be opened. (These standards are described in detail in the ''Functional Review'' subsection.)

Most private banks offer a broad spectrum of deposit products, including multicurrency deposit accounts that are used by clients who engage in foreign-exchange, securities, and derivatives transactions. The client's transaction activity, such as wire transfers, check writing, and cash deposits and withdrawals, is conducted through deposit accounts (including current accounts). It is very important that the transaction activity into and out of these deposit accounts (including internal transfers between affiliated deposit accounts) be closely monitored for suspicious transactions that are inconsistent with the client's profile of usual transactions.

Suspicious transactions could warrant the filing of a Suspicious Activity Report (SAR). A bank holding company or any nonbank subsidiary thereof, or a foreign bank that is subject to the Bank Holding Company Act (or any nonbank subsidiary of such a foreign bank operating in the United States), is required to file a SAR in accordance with the provision of section 208.62 of the Federal Reserve Board's Regulation H (12 C.F.R. 208.62) when suspicious transactions or activities are initially discovered and warrant or require reporting. See the reporting requirements discussed in subsection 2010.11.2.2.1.1 and the expanded examination procedures for private banking in the FFIEC's *BSA/AML Examination Manual.*

2010.11.1.1.3 Investment Management

In private banking, investment management usually consists of two types of accounts: (1) discretionary accounts in which portfolio managers make the investment decisions on the basis of recommendations from the bank's investment research resources and (2) nondiscretionary (investment advisory) accounts in which clients make their own investment decisions when conducting trades. For nondiscretionary clients, the banks typically offer investment recommendations subject to the client's written approval. Discretionary accounts consist of a mixture of instruments bearing varying degrees of market, credit, and liquidity risk that should be appropriate to the client's investment objectives and risk appetite. Both account types are governed under separate agreements between the client and the institution.

Unlike depository accounts, securities and other instruments held in the client's investment accounts are not reflected on the balance sheet of the institution because they belong to the client. These managed assets are usually accounted for on a separate ledger that is segregated according to the customer who owns the assets.

2010.11.1.1.4 Credit

Private-banking clients may request extensions of credit on either a secured or an unsecured basis. Loans backed by cash collateral or managed assets held by the private-banking function are quite common, especially in international private banking. Private-banking clients may pledge a wide range of their assets, including cash, mortgages, marketable securities, land, or buildings, to securitize their loans. Management should demonstrate an understanding of the purpose of the credit, the source of repayment, the loan tenor, and the collateral used in the financing. When lending to individuals with high net

worths, whether on a secured or an unsecured basis, the creditworthiness determination is bolstered by a thorough and well-structured customer-due-diligence process. If that process is not thorough, collateral derived from illicit activities may be subject to government forfeiture.

Borrowing mechanisms are sometimes established to afford nonresident-alien customers the ability to keep financial assets in the United States and to use such assets (via collateralized borrowing arrangements) to provide operating capital for businesses they own and operate in their home countries. Such arrangements enable these customers to keep the existence of these financial assets secret from their home-country authorities and others, while they continue to use the funds (via collateralized borrowings) to fund their businesses at home.

Private bankers need to maintain in the United States adequate CDD information on such nonresident-alien customers and their primary business interests. A well-documented CDD file may include information on the customer from ''who's who'' and similar services, Internet research, foreign tax returns and financial statements, checks conducted by the Office of Foreign Assets Control (OFAC), and written and appropriately documented Call Reports prepared by the RM.

While these lending mechanisms may be used for legitimate reasons, management needs to determine whether the arrangements are being used primarily to obfuscate the beneficial ownership of collateral assets, making it difficult for the customer's home-country government to identify who owns the assets. If so, management needs to further determine whether the practice varies from both the appropriate standards of international cooperation for transparency issues and with prudent banking practices, and if so, whether the institution is exposed to elevated legal risk.

2010.11.1.1.5 Payable-Through Accounts

Another product that may be available in private-banking operations is payable-through accounts (PTAs). PTAs are transaction deposit accounts through which U.S. banking entities (''payable-through banks'') extend check-writing privileges to the customers of a foreign bank. The foreign bank (''master account holder'') opens a master checking account with the U.S. bank and uses this account to provide its customers with access to the U.S. banking system. The master account is divided into ''subaccounts,'' each in the name of one of the foreign bank's customers. The foreign bank extends signature authority on its master account to its own customers, who may not be known to the U.S. bank. Consequently, the U.S. bank may have customers who have not been subject to the same account-opening requirements imposed on its U.S. account holders. These subaccount customers are able to write checks and make deposits at the U.S. banking entity. The number of subaccounts permitted under this arrangement may be virtually unlimited.

U.S. banking entities engage in PTAs primarily because they attract dollar deposits from the domestic market of their foreign correspondents without changing the primary bank-customer relationship; PTAs also provide substantial fee income. Generally, PTAs at U.S. banking entities have the following characteristics: they are carried on the U.S. banking entity's books as a correspondent bank account, their transaction volume is high, checks passing through the account contain wording similar to ''payable through XYZ bank,'' and the signatures appearing on checks are not those of authorized officers of the foreign bank. See the expanded examination procedures for PTAs in the FFIEC's *BSA/AML Examination Manual.*

2010.11.1.1.6 Personal Trust and Estates

In trust and estate accounts, an institution offers management services for a client's assets. When dealing with trusts under will, or ''testamentary trusts,'' the institution may receive an estate appointment (executor) and a trustee appointment if the will provided for the trust from the probate. These accounts are fully funded at origination with no opportunity for an outside party to add to the account, and all activities are subject to review by the probate or surrogates' court. On the other hand, with living trusts, or ''grantor trusts,'' the customer (grantor) may continually add to and, in some instances, has control over the corpus of the account. Trusts and estates require experienced attorneys, money managers, and generally well-rounded professionals to set up and maintain the accounts. In certain cases, bankers may need to manage a customer's closely held business or sole proprietorship. In the case of offshore trust facilities, recent changes in U.S. law have imposed additional obligations on those banks

that function as trustees or corporate management for offshore trusts and PICs.

A critical element in offering personal trust and estate services is the fiduciary responsibility of the institutions to their customers. This responsibility requires that institutions always act in the best interest of the clients pursuant to the trust documentation, perhaps even to the detriment of the bank. In these accounts, the bank is the fiduciary and the trust officer serves as a representative of the institution. Fiduciaries are held to higher standards of conduct than other bankers. Proper administration of trusts and estates includes strict controls over assets, prudent investment and management of assets, and meticulous recordkeeping. See the expanded procedures for trust and asset management services in the FFIEC's *BSA/AML Examination Manual.*

2010.11.1.1.7 Custody Services

Custodial services offered to private-banking customers include securities safekeeping, receipt and disbursement of dividends and interest, recordkeeping, and accounting. Custody relationships can be established in many ways, including by referrals from other departments in the bank or from outside investment advisers. The customer or a designated financial adviser retains full control of the investment management of the property subject to the custodianship. Sales and purchases of assets are made by instruction from the customer, and cash disbursements are prearranged or as instructed. Custody accounts involve no investment supervision and no discretion. However, the custodian may be responsible for certain losses if it fails to act properly according to the custody agreement. Therefore, procedures for proper administration should be established and reviewed.

An escrow account is a form of custody account in which the institution agrees to hold cash or securities as a middleman, or a third party. The customer, for example, an attorney or a travel agency, gives the institution funds to hold until the ultimate receiver of the funds ''performs'' in accordance with the written escrow agreement, at which time the institution releases the funds to the designated party.

2010.11.1.1.8 Funds Transfer

Funds transfer, another service offered by private-banking functions, may involve the transfer of funds between third parties as part of bill-paying and investment services on the basis of customer instructions. The adequacy of controls over funds-transfer instructions that are initiated electronically or telephonically is extremely important. Funds-transfer requests are quickly processed and, as required by law, funds-transfer personnel may have limited knowledge of the customers or the purpose of the transactions. Therefore, strong controls and adequate supervision over this area are critical. See section 4063.1 and 4125.1 of the *Commercial Bank Examination Manual*.

2010.11.1.1.9 Hold Mail, No Mail, and Electronic-Mail Only

Hold-mail, no-mail, or electronic-mail-only accounts are often provided to private-banking customers who elect to have bank statements and other documents maintained at the institution or e- mailed to them, rather than mailed to their residence. Agreements for hold-mail accounts should be in place, and the agreements should indicate that it was the customer's choice to have the statements retained at the bank and that the customer will pick up his or her mail at least annually. Variations of hold-mail services include delivery of mail to a prearranged location (such as another branch of the bank) by special courier or the bank's pouch system.

2010.11.1.1.10 Bill-Paying Services

Bill-paying services are often provided to private-banking customers for a fee. If this service is provided, an agreement between the bank and the customer should exist. Typically, a customer may request that the bank debit a deposit account for credit card bills, utilities, rent, mortgage payments, or other monthly consumer charges. In addition, the increased use of the Internet has given rise to the *electronic-mail-only account,* whereby customers elect to have statements, notices, etc., sent to them only by e-mail.

2010.11.2 FUNCTIONAL REVIEW

When discussing the functional aspects of a private-banking operation, *functional* refers to

managerial processes and procedures, such as reporting lines, quality of supervision (including involvement of the board of directors), information flows, policies and procedures, risk-management policies and methodologies, segregation of duties, management information systems, operational controls (including BSA/AML monitoring), and audit coverage. The examiner should be able to draw sound conclusions about the quality and culture of management and stated private-banking policies after reviewing the functional areas described below. Specifically, the institution's risk-identification process and risk appetite should be carefully defined and assessed. Additionally, the effectiveness of the overall control environment maintained by management should be evaluated by an internal or external audit. The effectiveness of the following functional areas is critical to any private-banking operation, regardless of its size or product offerings.

2010.11.2.1 Supervision and Organization

As part of the examiner's appraisal of an organization, the quality of supervision of private-banking activities is evaluated. The appraisal of management covers the full range of functions and activities related to the operation of the private bank. The discharge of responsibilities by bank directors should be effected through an organizational plan that accommodates the volume and business services handled, local business practices and the bank's competition, and the growth and development of the institution's private-banking business. Organizational planning is the joint responsibility of senior bank and private-bank management, should be integrated with the long-range plan for the institution, and should be consistent with any enterprise-wide risk-management program.

Both the directors and management have important roles in formulating policies and establishing programs for private-banking products, operations, internal controls, and audits. However, management alone must implement policies and programs within the organizational framework instituted by the board of directors.

2010.11.2.2 Risk Management

Sound risk-management processes and strong internal controls are critical to safe and sound banking generally and to private-banking activities in particular. Management's role in ensuring the integrity of these processes has become increasingly important as new products and technologies are introduced. Similarly, the client-selection, documentation, approval, and account-monitoring processes should adhere to sound and well-identified practices.

The quality of risk-management practices and internal controls is given significant weight in the evaluation of management and the overall condition of private-banking operations. A bank's failure to establish and maintain a risk-management framework that effectively identifies, measures, monitors, and controls the risks associated with products and services should be considered unsafe and unsound conduct. Furthermore, well-defined management practices should indicate the types of clients that the institution will and will not accept and should establish multiple and segregated levels of authorization for accepting new clients. Institutions that follow sound practices will be better positioned to design and deliver products and services that match their clients' legitimate needs, while reducing the likelihood that unsuitable clients might enter their client account base. Deficiencies noted in this area are weighted in context of the relative risk they pose to the institution and are appropriately reflected in the appraisal of management.

The private-banking function is exposed to a number of risks, including reputational, fiduciary, legal, credit, operational, and market. A brief description of some of the different types of risks follows:

1. *Reputational risk* is the potential that negative publicity regarding an institution's business practices and clients, whether true or not, could cause a decline in the customer base, costly litigation, or revenue reductions.
2. *Fiduciary risk* refers to the risk of loss due to the institution's failure to exercise loyalty; safeguard assets; and, for trusts, to use assets productively and according to the appropriate standard of care. This risk generally exists in an institution to the extent that it exercises discretion in managing assets on behalf of a customer.
3. *Legal risk* arises from the potential of unenforceable contracts, client lawsuits, or adverse judgments to disrupt or otherwise negatively affect the operations or condition of a banking organization. One key dimension of legal risk is supervisory action that could result in costly fines or other punitive

measures being levied against an institution for compliance breakdowns.
4. *Credit risk* arises from the potential that a borrower or counterparty will fail to perform on an obligation.
5. *Operational risk* arises from the potential that inadequate information systems, operational problems, breaches in internal controls, fraud, or unforeseen catastrophes will result in unexpected losses.

Although effective management of all of the above risks is critical for an institution, certain aspects of reputational, legal, and fiduciary risks are often unique to a private-banking function. In this regard, the following customer-due-diligence policies and practices are essential in the management of reputational and legal risks in the private-banking functions. (In addition, sound fiduciary practices and conflicts-of-interest issues that a private-banking operation may face in acting as fiduciary are described in the subsection on fiduciary standards.)

2010.11.2.2.1 Customer-Due-Diligence Policy and Procedures

Sound customer-due-diligence (CDD) policies and procedures are essential to minimize the risks inherent in private banking. The policies and procedures should clearly describe the target client base in terms such as "minimum investable net worth" and "types of products sought," as well as specifically indicate the type of clientele the institution will or will not accept. Policies and procedures should be designed to ensure that effective due diligence is performed on all potential clients, that client files are bolstered with additional CDD information on an ongoing basis, and that activity in client accounts is monitored for transactions that are inconsistent with the client profile and may constitute unlawful activities, such as money laundering. The client's identity, background, and the nature of his or her transactions should be documented and approved by the back office before opening an account or accepting client monies. Certain high-risk clients like foreign politicians or money exchange houses should have additional documentation to mitigate their higher risk. See 31 C.F.R. 1020, subpart F, for due diligence rules.

Money laundering is associated with a broad range of illicit activities: the ultimate intention is to disguise the money's true source—from the initial placement of illegally derived cash proceeds to the layers of financial transactions that disguise the audit trail—and make the funds appear legitimate. Under U.S. money-laundering statutes, a bank employee can be held personally liable if he or she is deemed to engage in "willful blindness." This condition occurs when the employee fails to make reasonable inquiries to satisfy suspicions about client account activities.

Since the key element of an effective CDD policy is a comprehensive knowledge of the client, the bank's policies and procedures should clearly reflect the controls needed to ensure the policy is fully implemented. CDD policies should clearly delineate the accountability and authority for opening accounts and for determining if effective CDD practices have been performed on each client. In addition, policies should delineate documentation standards and accountability for gathering client information from referrals among departments or areas within the institution as well as from accounts brought to the institution by new RMs.

In carrying out prudent CDD practices on potential private-banking customers, management should document efforts to obtain and corroborate critical background information. Private-banking employees abroad often have local contacts who can assist in corroborating information received from the customer. The information listed below should be corroborated by a reliable, independent source, when possible:

1. The customer's current address and telephone number for his or her primary residence, which should be corroborated at regular intervals, can be verified through a variety of methods, such as—
   a. visiting the residence, office, factory, or farm (with the RM recording the results of the visit or conversations in a memorandum);
   b. checking the information against the telephone directory; the client's residence, as indicated on his or her national ID card; a mortgage or bank statement or utility or property tax bill; or the electoral or tax rolls;
   c. obtaining a reference from the client's government or known employer or from another bank;
   d. checking with a credit bureau or professional corroboration organization; or
   e. any other method verified by the RM.

2. Sufficient business information about the customer should be gathered so that the RM understands the profile of the customer's commercial transactions. This information should include a description of the nature of the customer's business operations or means of generating income, primary trade or business areas, and major clients and their geographic locations, as well as the primary business address and telephone number. These items can be obtained through a combination of any of the following sources:
   a. a visit to the office, factory, or farm
   b. a reliable third party who has a business relationship with the customer
   c. financial statements
   d. Dun and Bradstreet reports
   e. newspaper or magazine articles
   f. Lexis/Nexis reports on the customer or customer's business
   g. "Who's Who" reports from the home country
   h. private investigations
3. Although it is often not possible to get proof of a client's wealth, an RM can use his or her good judgment to derive a reasonable estimate of the individual's net worth.
4. As part of the ongoing CDD process, the RM should document in memos or "call reports" the substance of discussions that take place during frequent visits with the client. Additional information about a client's wealth, business, or other interests provides insight into potential marketing opportunities for the RM and the bank, and updates and strengthens the CDD profile.

As a rule, most private banks make it a policy not to accept walk-in clients. If an exception is made, procedures for the necessary documentation and approvals supporting the exception should be in place. Similarly, other exceptions to policy and procedures should readily identify the specific exception and the required due-diligence and approval process for overriding existing procedures.

In most instances, all CDD information and documentation should be maintained and available for examination and inspection at the location where the account is located or where the financial services are rendered. If the bank maintains centralized customer files in locations other than where the account is located or the financial services are rendered, complete customer information, identification, and documentation must be made available at the location where the account is located or where the financial services are rendered within 48 hours of a Federal Reserve examiner's request. Off-site storage of CDD information will be allowed only if the bank has adopted, as part of its customer-due-diligence program, specific procedures designed to ensure that (1) the accounts are subject to ongoing Office of Foreign Assets Control screening that is equivalent to the screening afforded other accounts, (2) the accounts are subject to the same degree of review for suspicious activity, and (3) the bank demonstrates that the appropriate review of the information and documentation is being performed by personnel at the offshore location.

CDD procedures should be no different when the institution deals with a financial adviser or other type of intermediary acting on behalf of a client. To perform its CDD responsibilities when dealing with a financial adviser, the institution should identify the beneficial owner of the account (usually the intermediary's client, but in rare cases, it is the intermediary itself) and perform its CDD analysis with respect to that beneficial owner. The imposition of an intermediary between the institution and counterparty should not lessen the institution's CDD responsibilities.

The purpose of all private-banking relationships should also be readily identified. Incoming customer funds may be used for various purposes, such as establishing deposit accounts, funding investments, or establishing trusts. The bank's CDD procedures should allow for the collection of sufficient information to develop a transaction or client profile for each customer, which will be used in analyzing client transactions. Internal systems should be developed for monitoring and identifying transactions that may be inconsistent with the transaction or client profile for a customer and which may thus constitute suspicious activity.

2010.11.2.2.1.1 Suspicious Activity Reports

The proper and timely filing of Suspicious Activity Reports (SARs) is an important component of a bank's CDD program. Since 1996, the federal financial institution supervisory agencies and the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) have required banking organizations to report known or suspected violations of law as well as suspicious transactions on a SAR. See the Board's SAR regulation (Regulation H, section 208.62 [12 C.F.R. 208.62] and Regulation Y, section

225.4(f) [12 C.F.R. 225.4(f)]).[3] Law enforcement agencies use the information reported on the form to initiate investigations, and Federal Reserve staff use the SAR information in their examination and oversight of supervised institutions.

A member bank and a BHC are required to file a SAR with the appropriate federal law enforcement agencies and the Department of the Treasury. A SAR must be prepared in accordance with the form's instructions. The completed SAR is to be sent to FinCEN when an institution detects—

1. insider abuse involving any amount;
2. violations aggregating $5,000 or more in which a suspect can be identified;
3. violations aggregating $25,000 or more regardless of a potential suspect; or
4. transactions aggregating $5,000 or more that involve potential money laundering or violations of the Bank Secrecy Act.

When a SAR is filed, the management of a member bank must promptly notify its board of directors or a committee thereof.

A SAR must be filed within 30 calendar days after the date of initial detection of the facts that may constitute a basis for filing a SAR. If no suspect was identified on the date of detection of the incident requiring the filing, a member bank may delay filing a SAR for an additional 30 calendar days in order to identify the suspect. Reporting may not be delayed more than 60 calendar days after the date of initial detection of a reportable transaction. In situations involving violations requiring immediate attention, such as when a reportable violation is ongoing, the financial institution is required to immediately notify an appropriate law enforcement authority and the Board by telephone, in addition to its timely filing of a SAR.

A banking organization's internal systems for capturing suspicious activities should provide essential information about the nature and volume of activities passing through customer accounts. Any information suggesting that suspicious activity has occurred should be pursued, and, if an explanation is not forthcoming, the matter should be reported to banking organization's management. Examiners should ensure that the institution's approach to SARs is proactive and that well-established procedures cover the SAR process. Accountability should exist within the organization for the analysis and follow-up of internally identified suspicious activity; this analysis should conclude with a decision on the appropriateness of filing a SAR. See the core procedures concerning suspicious-activity-reporting requirements in the FFIEC *BSA/AML Examination Manual.*

2010.11.2.2.2 Credit-Underwriting Standards

The underwriting standards for private-banking loans to high net worth individuals should be consistent with prudent lending standards. The same credit policies and procedures that are applicable to any other type of lending arrangement should extend to these loans. At a minimum, sound policies and procedures should address the following: all approved credit products and services offered by the institution, lending limits, acceptable forms of collateral, geographic and other limitations, conditions under which credit is granted, repayment terms, maximum tenor, loan authority, collections and charge-offs, and prohibition against capitalization of interest.

An extension of credit based solely on collateral, even if the collateral is cash, does not ensure repayment. While the collateral enhances the bank's position, it should not substitute for regular credit analyses and prudent lending practices. If collateral is derived from illegal activities, it is subject to forfeiture through the seizure of assets by a government agency. The bank should perform its due diligence by adequately and reasonably ascertaining and documenting that the funds of its private-banking customers were derived from legitimate means. Banks should also verify that the use of the loan proceeds is for legitimate purposes.

In addition, bank policies should explicitly describe the terms under which "margin loans," loans collateralized by securities, are made and should ensure that they conform to applicable regulations. Management should review and approve daily MIS reports. The risk of market deterioration in the value of the underlying collateral may subject the lender to loss if the collateral must be liquidated to repay the loan. In the event of a "margin call," any shortage should be paid for promptly by the customer

3. The Board's SAR rules apply to state member banks, bank holding companies and their nonbank subsidiaries that do not report on a different SAR form (for example, broker-dealers), Edge and agreement corporations, and the U.S. branches and agencies of foreign banks supervised by the Federal Reserve.

from other sources pursuant to the terms of the margin agreement.

In addition, policies should address the acceptance of collateral held at another location, such as an affiliated entity, but pledged to the private-banking function. Under these circumstances, management of the private-banking function should, at a minimum, receive frequent reports detailing the collateral type and current valuation. In addition, management of the private-banking function should be informed of any changes or substitutions in collateral.

2010.11.2.3 Fiduciary Standards

Fiduciary risk is managed through the maintenance of an effective and accountable committee structure; retention of technically proficient staff; and development of effective policies, procedures, and controls. In managing its fiduciary risk, the bank must ensure that it carries out the following fiduciary duties:

1. *Duty of loyalty.* Trustees are obligated to make all decisions based exclusively on the best interests of trust customers. Except as permitted by law, trustees cannot place themselves in a position in which their interests might conflict with those of the trust beneficiaries.
2. *Avoidance of conflicts of interest.* Conflicts of interest arise in any transaction in which the fiduciary simultaneously represents the interests of multiple parties (including its own interests) that may be adverse to one another. Institutions should have detailed policies and procedures regarding potential conflicts of interest. All potential conflicts identified should be brought to the attention of management and the trust committee, with appropriate action taken. Conflicts of interest may arise throughout an institution. Care should be taken by fiduciary business lines, in particular, to manage conflicts of interest between fiduciary business lines and other business lines (including other fiduciary business lines). Consequently, management throughout the institution should receive training in these matters. For more information on the supervision of fiduciary activities, see section 3120.0 in this manual and section 4200.0 in the *Commercial Bank Examination Manual.*
3. *Duty to prudently manage discretionary trust and agency assets.* Since 1994, the majority of states have adopted laws concerning the prudent investor rule (PIR) with respect to the investment of funds in a fiduciary capacity. PIR is a standard of review that imposes an obligation to prudently manage the portfolio as a whole, focusing on the process of portfolio management, rather than on the outcome of individual investment decisions. Although this rule only governs trusts, the standard is traditionally applied to all accounts for which the institution is managing funds.

2010.11.2.4 Operational Controls

To minimize any operational risks associated with private-banking activities, management is responsible for establishing an effective internal control infrastructure and reliable management information systems. Critical operational controls over any private-banking activity include the establishment of written policies and procedures, segregation of duties, and comprehensive management reporting. Throughout this section, specific guidelines and inspection procedures for assessing internal controls over different private-banking activities are provided. Listed below are some of those guidelines that cover specific private-banking services.

2010.11.2.4.1 Segregation of Duties

Banking organizations should have guidelines on the segregation of employees' duties in order to prevent the unauthorized waiver of documentation requirements, poorly documented referrals, and overlooked suspicious activities. Independent oversight by the back office helps to ensure compliance with account-opening procedures and CDD documentation. Control-conscious institutions may use independent units, such as compliance, risk management, or senior management, to fill this function in lieu of the back office. The audit and compliance functions of the private-banking entity should be similarly independent so that they can operate autonomously from line management.

2010.11.2.4.2 Inactive and Dormant Accounts

Management should be aware that banking laws in most states prohibit banks from offering services that allow deposit accounts to be inactive

for prolonged periods of time (generally, 12 or more months with no externally generated account-balance activity). These regulations are based on the presumption that inactive and dormant accounts may be subject to manipulation and abuse by insiders. Policies and procedures should delineate when inactivity occurs and when inactive accounts should be converted to dormant status. Effective controls over dormant accounts should include a specified time between the last customer-originated activity and its classification as dormant, the segregation of signature cards for dormant accounts, dual control of records, and the blocking of the account so that entries cannot be posted to the account without review by more than one member of senior management.

2010.11.2.4.3 Pass-Through Accounts and Omnibus Accounts

Pass-through accounts (PTAs) extend checking-account privileges to the customers of a foreign bank; several risks are involved in providing these accounts. In particular, if the U.S. banking entity does not exercise the same due diligence and customer vetting for PTAs as it does for domestic account relationships, the use of PTAs may facilitate unsafe and unsound banking practices or illegal activities, including money laundering. Additionally, if accounts at U.S. banking entities are used for illegal purposes, the entities could be exposed to reputational risk and risk of financial loss as a result of asset seizures and forfeitures brought by law enforcement authorities. It is recommended that U.S. banking entities terminate a payable-through arrangement with a foreign bank in situations in which (1) adequate information about the ultimate users of PTAs cannot be obtained, (2) the foreign bank cannot be relied on to identify and monitor the transactions of its own customers, or (3) the U.S. banking entity is unable to ensure that its payable-through accounts are not being used for money laundering or other illicit purposes.

Omnibus, or general clearing, accounts may also exist in the private-banking system. They may be used to accommodate client funds before an account opening to expedite a new relationship, or they may fund products such as mutual funds in which client deposit accounts may not be required. However, these accounts could circumvent an audit trail of client transactions. Examiners should carefully review a bank's use of such accounts and the adequacy of its controls on their appropriate use. Generally, client monies should flow through client deposit accounts, which should function as the sole conduit and paper trail for client transactions.

2010.11.2.4.4 Hold-Mail, No-Mail, and E-Mail-Only Controls

Controls over hold-mail, no-mail, and e-mail-only accounts are critical because the clients have relinquished their ability to detect unauthorized transactions in their accounts in a timely manner. Accounts with high volume or significant losses warrant further inquiry. Hold-mail, no-mail, and e-mail-only account operations should ensure that client accounts are subject to dual control and are reviewed by an independent party.

2010.11.2.4.5 Funds Transfer—Tracking Transaction Flows

One way that institutions can improve their customer knowledge is by tracking the transaction flows into and out of customer accounts and payable-through subaccounts. Tracking should include funds-transfer activities. Policies and procedures to detect unusual or suspicious activities should identify the types of activities that would prompt staff to investigate the customer's activities and should provide guidance on the appropriate action required for suspicious activity. The following is a checklist to guide bank personnel in identifying some potential abuses:

1. indications of frequent overrides of established approval authority or other internal controls
2. intentional circumvention of approval authority by splitting transactions
3. wire transfers to and from known secrecy jurisdictions
4. frequent or large wire transfers for persons who have no account relationship with the bank, or funds being transferred into and out of an omnibus or general clearing account instead of the client's deposit account
5. wire transfers involving cash amounts in excess of $10,000
6. inadequate control of password access
7. customer complaints or frequent error conditions

2010.11.2.4.6 Custody—Detection of "Free Riding"

Custody departments should monitor account activity to detect instances of "free-riding," the practice of offering the purchase of securities without sufficient capital and then using the proceeds of the sale of the same securities to cover the initial purchase. Free-riding poses significant risk to the institution and typically occurs without the bank's prior knowledge. Free-riding also violates margin rules (Regulations T, U, and X) governing the extension of credit in connection with securities transactions. (See SR-93-13 and section 2187.0.)

2010.11.2.5 Management Information Systems

Management information systems (MIS) should accumulate, interpret, and communicate information on (1) the private-banking assets under management, (2) profitability, (3) business and transaction activities, and (4) inherent risks. The form and content of MIS for private-banking activities will be a function of the size and complexity of the private-banking organization. Accurate, informative, and timely reports that perform the following functions may be prepared and reviewed by RMs and senior management:

1. aggregate the assets under management according to customer, product or service, geographic area, and business unit
2. attribute revenue according to customer and product type
3. identify customer accounts that are related to or affiliated with one another through common ownership or common control
4. identify and aggregate customer accounts by source of referral
5. identify beneficial ownership of trust, PIC, and similar accounts

To monitor and report transaction activity and to detect suspicious transactions, management reports may be developed to—

1. monitor a specific transaction criterion, such as a minimum dollar amount or volume or activity level;
2. monitor a certain type of transaction, such as one with a particular pattern;
3. monitor individual customer accounts for variations from established transaction and activity profiles based on what is usual or expected for that customer; and
4. monitor specific transactions for BSA and SAR compliance.

In addition, reports prepared for private-banking customers should be accurate, timely, and informative. Regular reports and statements prepared for private-banking customers should adequately and accurately describe the application of their funds and should detail all transactions and activity that pertain to the customers' accounts.

Furthermore, MIS and technology play a role in building new and more direct channels of information between the institution and its private-banking customers. Active and sophisticated customers are increasing their demand for data relevant to their investment needs, which is fostering the creation of online information services. Online information can satisfy customers' desire for convenience, real-time access to information, and a seamless delivery of information.

2010.11.2.6 Audit

An effective audit function is vital to ensuring the strength of a private bank's internal controls. As a matter of practice, internal and external auditors should be independently verifying and confirming that the framework of internal controls is being maintained and operated in a manner that adequately addresses the risks associated with the activities of the organization. Critical elements of an effective internal audit function are the strong qualifications and expertise of the internal audit staff and a sound risk-assessment process for determining the scope and frequency of specific audits. The audit process should be risk-focused and should ultimately determine the risk rating of business lines and client CDD procedures. Compliance with CDD policies and procedures and the detailed testing of files for CDD documentation are also key elements of the audit function. Finally, examiners should review and evaluate management's responsiveness to criticisms by the audit function.

2010.11.2.7 Compliance

The responsibility for ensuring effective compliance with relevant laws and regulations may vary among different forms of institutions, depending on their size, complexity, and availability of resources. Some institutions may have a distinct compliance department with the centralized role of ensuring compliance institution-wide, including private-banking activities. This arrangement is strongly preferable to a situation in which an institution delegates compliance to specific functions, which may result in the management of private-banking operations being responsible for its own internal review. Compliance has a critical role in monitoring private-banking activities; the function should be independent of line management. In addition to ensuring compliance with various laws and regulations such as the Bank Secrecy Act and those promulgated by the Office of Foreign Assets Control, compliance may perform its own internal investigations and due diligence on employees, customers, and third parties with whom the bank has contracted in a consulting or referral capacity and whose behavior, activities, and transactions appear to be unusual or suspicious. Institutions may also find it beneficial for compliance to review and authorize account-opening documentation and CDD adequacy for new accounts. The role of compliance is a control function, but it should not be a substitute for regular and frequent internal audit coverage of the private-banking function. Following is a description of certain regulations that may be monitored by the compliance function.

2010.11.2.7.1 Office of Foreign Assets Control

The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals. Sanctions are imposed against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction. See 31 C.F.R. subtitle B, chapter V, part 501. OFAC acts under presidential wartime and national emergency powers, as well as under authority granted by specific legislation, to impose controls on transactions and freeze foreign assets under U.S. jurisdiction. Many of the sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments. Under the International Emergency Economic Powers Act, the President can impose sanctions, such as trade embargoes, the freezing of assets, and import surcharges, on certain foreign countries and the ''specially designated nationals'' of those countries.

A ''specially designated national'' is a person or entity who acts on behalf of one of the countries under economic sanction by the United States. Dealing with such nationals is prohibited. Moreover, their assets or accounts in the United States are frozen. In certain cases, the Treasury Department can issue a license to a designated national. This license can then be presented by the customer to the institution, allowing the institution to debit his or her account. The license can be either general or specific.

OFAC screening may be difficult when transactions are conducted through PICs, token names, numbered accounts, or other vehicles that shield true identities. Management must ensure that accounts maintained in a name other than that of the beneficial owner are subject to the same level of filtering for OFAC specially designated nationals and blocked foreign countries as other accounts. That is, the OFAC screening process must include the account's beneficial ownership as well as the official account name.

Any violation of regulations implementing designated national sanctions subjects the violator to criminal prosecution, including prison sentences and fines to corporations and individuals, per incident. Any funds frozen because of OFAC orders should be placed in a blocked account. Release of those funds cannot occur without a license from the Treasury Department.

2010.11.2.7.2 Bank Secrecy Act

Guidelines for compliance with the Bank Secrecy Act (BSA) can be found in the FFIEC *BSA/AML Examination Manual.* See also the question-and-answer format interpretations (SR-05-9) of the U.S. Department of the Treasury's regulation (31 C.F.R. 1010) for banking organizations, which is based on section 326 of the Patriot Act. In addition, the procedures for conducting BSA examinations of foreign offices of U.S. banks are detailed in the FFIEC *BSA/AML Examination Manual*. The SAR filing requirements for nonbank subsidiaries of bank holding

companies and state member banks are also set forth in SR-10-8.

2010.11.3 PREPARATION FOR INSPECTION

The following subsections provide examiners with guidance on preparing for the on-site inspection of private-banking operations, including determination of the inspection scope and drafting of the first-day-letter questionnaire that is provided to the institution.

2010.11.3.1 Pre-Inspection Review

To prepare the examiners for their assignments and to determine the appropriate staffing and scope of the inspection, the following guidelines should be followed during the pre-inspection planning process:

1. Review the prior report of inspection and workpapers for the inspection scope; structure and type of private-banking activities conducted; and findings, conclusions, and recommendations of the prior inspection. The prior inspection report and inspection plan should also provide insight to key contacts at the institution and to the time frame of the prior private-banking review.
2. Obtain relevant correspondence sent since the prior inspection, such as management's response to the report of inspection, any applications submitted to the Federal Reserve, and any supervisory action.
3. Research press releases and published news stories about the institution and its private-banking activities.
4. Review internal and external audit reports and any internal risk assessments performed by the institution on its private-banking activities. Such reports should include an assessment of the internal controls and risk profile of the private-banking function.
5. Contact the institution's management to ascertain what changes have occurred since the last inspection or are planned in the near future. For example, examiners should determine if there have been changes to the strategic plan; senior management; or the level and type of private-banking activities, products, and services offered. If there is no mention of private banking in the prior inspection report, management should be asked at this time if they have commenced or plan to commence any private-banking activities.
6. Follow these inspection procedures and also consider the core examination procedures in the FFIEC *BSA/AML Examination Manual* in order to establish the base scope for the inspection of private-banking activities. Review and follow the expanded procedures for private banking and any other expanded procedures that are deemed necessary.

2010.11.3.2 Inspection Staffing and Scope

Once the inspection scope has been established and before beginning the new inspection, the examiner-in-charge and key administrators of the inspection team should meet to discuss the private-banking inspection scope, the assignments of the functional areas of private banking, and the supplemental reviews of specific private-banking products and services. If the bank's business lines and services overlap and if its customer base and personnel are shared throughout the organization, examiners may be forced to go beyond a rudimentary review of private-banking operations. They will probably need to focus on the policies, practices, and risks within the different divisions of a particular institution and throughout the institution's global network of affiliated entities.

2010.11.3.3 Reflection of Organizational Structure

The review of private-banking activities should be conducted on the basis of the bank holding company's organizational structure. These structures may vary considerably depending on the size and sophistication of the institution, its country of origin and the other geographic markets in which it competes, and the objectives and strategies of its management and board of directors. To the extent possible, examiners should understand the level of consolidated private-banking activities an institution conducts in the United States and abroad. This broad view is needed to maintain the "big picture" impact of private banking for a particular institution.

For bank holding company inspections, examiners must consider the provisions of the Gramm-Leach Bliley Act, which amended section 5(c) of the Bank Holding Company Act, that concern examinations and inspections. In

particular, examiners must adhere to those statutory provisions that pertain to the inspections of bank holding company nobank subsidiaries that are supervised by functional regulators. See section 1040.0.

2010.11.3.4 Risk-Focused Approach

Examiners reviewing the private-banking operations should implement the risk-focused inspection approach. The exam scope and degree of testing of private-banking practices should reflect the degree of risk assumed, prior exam findings on the implementation of policies and procedures, the effectiveness of controls, and an assessment of the adequacy of the internal audit and compliance functions. If initial inquiries into the institution's internal audit and other assessment practices raise doubts about the internal system's effectiveness, expanded analysis and review are required—and examiners should perform more transaction testing. Examiners will usually need to follow the core examination procedures in the FFIEC *BSA/AML Examination Manual,* as well as the expanded procedures for private banking. Other expanded procedures should be followed if circumstances dictate.

2010.11.3.5 First-Day Letter

As part of the inspection preparation, examiners should customize the first-day-letter questionnaire to reflect the structure and type of private-banking activities of the institution and the scope of the exam. The following is a list of requests regarding private banking that examiners should consider including in the first-day letter. Responses to these items should be reviewed in conjunction with responses to the BSA, fiduciary, audit, and internal control inquiries:

1. organizational chart for the private bank on both a functional and legal-entity basis
2. business or strategic plan
3. income and expense statements for the prior fiscal year and current year to date, with projections for the remainder of the current and the next fiscal year, and income by product division and marketing region
4. balance-sheet and total assets under management (list the most active and profitable accounts by type, customer domicile, and responsible account officer)
5. most recent audits for private-banking activities
6. copies of audit committee minutes
7. copy of the CDD and SAR policies and procedures
8. list of all new business initiatives introduced last year and this year, relevant new-product-approval documentation that addresses the evaluation of the unique characteristics and risk associated with the new activity or product, and an assessment of the risk-management oversight and control infrastructures in place to manage the risks
9. list of all accounts in which an intermediary is acting on behalf of clients of the private bank, for example, as financial advisers or money managers
10. explanation of the methodology for following up on outstanding account documentation and a sample report
11. description of the method for aggregating client holdings and activities across business units throughout the organization
12. explanation of how related accounts, such as common control and family link, are identified
13. name of a contact person for information on compensation, training, and recruiting programs for relationship managers
14. list of all personal investment company accounts
15. list of reports that senior management receives regularly on private-banking activities
16. description and sample of the management information reports that monitor account activity
17. description of how senior management monitors compliance with global policies for worldwide operations, particularly for offices operating in secrecy jurisdictions
18. appropriate additional items from the core and expanded procedures for private banking, as set forth in the FFIEC *BSA/AML Examination Manual,* as well as any other items from the expanded procedures that are needed to gauge the adequacy of the BSA/AML program for private-banking activities.

2010.11.4 INSPECTION OBJECTIVES

1. To determine if the policies, practices, procedures, and internal controls regarding

private-banking activities are adequate for the risks involved.
2. To determine if the institution's officers and employees are operating in conformance with established guidelines for conducting private-banking activities.
3. To assess the financial condition and income-generation results of the private-banking activities.
4. To determine the scope and adequacy of the audit function for private-banking activities.
5. To determine compliance with applicable laws and regulations for private banking.
6. To initiate corrective action when policies, practices, procedures, or internal controls are deficient, or when violations of laws or regulations are found.

2010.11.5 INSPECTION PROCEDURES

The examiner-in-charge should supplement the following procedures, as appropriate, with the examination procedures for private banking, as set forth in the FFIEC *BSA/AML Examination Manual.*

2010.11.5.1 Private-Banking Pre-Inspection Procedures

1. As the examiner-in-charge, conduct a meeting with the lead members of the private-banking inspection team and discuss—
   a. the private-banking inspection scope *(The inspection may need to extend beyond a rudimentary review of private-banking operations if the institution's business lines and services overlap and if its customer base and personnel are shared throughout the organization. Examiners will probably need to focus on the policies, practices, and risks within the different divisions of each particular institution and throughout each institution's global network of affiliated entities.);*
   b. examiner assignments of the functional areas of private banking; and
   c. the supplemental reviews of specific private-banking products and services.
2. Review the prior report of inspection and the previous inspection workpapers; description of the inspection scope; structure and type of private-banking activities conducted; and findings, conclusions, and recommendations of the prior inspection. The prior inspection report and inspection plan should also provide information and insight on key contacts at the institution and on the time frame of the prior private-banking review.
3. Review relevant correspondence exchanged since the prior inspection, such as management's response to the report of inspection, any applications submitted to the Federal Reserve, and any supervisory actions.
4. Research press releases and published news stories about the institution and its private-banking activities.
5. Review internal and external audit reports and any internal risk assessments performed by the institution's internal or external auditors on its private-banking activities. Review information on any assessments of the internal controls and risk profile of the private-banking function.
6. Contact management at the institution to ascertain what changes in private-banking services have occurred since the last inspection or if there are any planned in the near future.
   a. Determine if the previous inspection or examination report(s) mention private banking; if not, ask management if they have commenced or plan to commence any private-banking activities within any part of the bank holding company organization.
   b. Determine if there have been any changes to the strategic plan; senior management; or the level and type of private-banking activities, products, and services offered.
   c. During the entire inspection of private-banking activities, be alert to the totality of the client relationship, product by product, in light of increasing client awareness and use of derivatives, emerging-market products, foreign exchange, and margined accounts.

2010.11.5.2 Full-Inspection Phase

1. After reviewing the private-banking functional areas, draw sound conclusions about the quality and culture of management and stated private-banking policies.
2. Evaluate the adequacy of risk-management policies and practices governing private-banking activities.
3. Assess the organization of the private-banking function and evaluate the quality of management's supervision of private-

banking activities. An appraisal of management covers the—
   a. full range of functions (i.e., supervision and organization, risk management, fiduciary standards, operational controls, management information systems, audit, and compliance) and activities related to the operation of the private-banking activities; and
   b. discharge of responsibilities by the institution's directors through a long-range organizational plan that accommodates the volume and business services handled, local business practices and the institution's competition, and the growth and development of the institution's private-banking business.
4. Determine if management has effective procedures for conducting ongoing reviews of client-account activity to detect, and protect the client from, any unauthorized activity and any account activity that is inconsistent with the client's profile (for example, frequent or sizeable unexplained transfers flowing through the account).
5. Determine if the bank holding company has initiated and maintained controls and procedures that require each subsidiary private-banking institution to have account-opening procedures and documentation requirements that must be satisfied before an account can be opened.
6. Determine if the bank holding company requires its subsidiary institutions to maintain and adhere to well-structured CCD procedures.
7. Determine if the bank holding company has proper controls and procedures to ensure each institution's proper administration of trust and estates, including strict controls over assets, prudent investment and management of assets, and meticulous record-keeping. Review previous trust examination reports and consult with the designated Federal Reserve System trust examiners.
8. Ascertain whether the bank holding company adequately supervises the custody services of its subsidiaries. The bank holding company should ensure that each institution has established and currently maintains procedures for the proper administration of custody services, including the regular review of the services on a preset schedule.
9. Determine whether subsidiary institutions are required to and actually maintain strong controls and supervision over funds transfers.
10. Ascertain if institution management and staff are required to perform due diligence, that is, to verify and document that the funds of its private-banking customers were derived through legitimate means, and when extending credit, to verify that the use of loan proceeds was legitimate.
11. Review the institution's use of deposit accounts.
   a. Assess the adequacy of the institution's controls and whether they are appropriately used.
   b. Determine if client monies flow through client deposit accounts and whether the accounts function as the sole conduit and paper trail for client transactions.
12. Determine and ensure that each institution's approach to Suspicious Activity Reports (SARs) is proactive and that the bank holding company and each institution have well-established procedures covering the SAR process. Establish whether there is accountability within the organization for the analysis and follow-up of internally identified suspicious activity (this analysis includes a sound decision on whether the bank holding company or an institution needs to file, or is required by regulation to file, a SAR).

Banking organizations, including trust institutions, are increasingly encountering various direct or indirect financial incentives to place trust assets with particular mutual funds. Such incentives include the payment of fees to banking organizations for using nonaffiliated fund families as well as other incentives for using those mutual funds that are managed by the institution or an affiliate. The payment of such fees, referred to variously as shareholder, subaccounting, or administrative service fees, may be structured as payments to reimburse the institution for performing standard recordkeeping and accounting functions for the institution's fiduciary accounts. Those functions may consist of maintaining shareholder subaccounts and records, transmitting mutual fund communications as necessary, and arranging mutual fund transactions. These fees are typically based on a percentage or basis point amount of the dollar value of assets invested, or on transaction volume. Another form of compensation may consist of a lump-sum payment based on assets transferred into a mutual fund.

In all cases, decisions to place fiduciary assets in particular investments must be consistent with the underlying trust documents and must be undertaken in the best interests of the trust beneficiary. The primary supervisory concern is that an institution may fail to act in the best interest of beneficiaries if it stands to benefit independently from a particular investment. As a result, an institution may expose itself to an increased risk of legal action by account beneficiaries, as well as to potential violations of law or regulation.

Nearly every state legislature has modified its laws explicitly to allow fiduciaries to accept fees from mutual funds under certain conditions. As for the permissibility of other financial incentives, guidance under applicable law may be less clear. Conditions involving fee payments under state law often include compliance with standards of prudence, quality, and appropriateness for the account, and a determination of the "reasonableness" of the fees received by the institution. The Office of the Comptroller of the Currency (OCC) has also adopted these general standards for national banks.[1] The Employee Retirement Income Security Act of 1974 (ERISA), however, generally prohibits fee arrangements between fiduciaries and third parties, such as mutual fund providers, with limited exceptions.[2] ERISA requirements supersede state laws and guidelines put forth by the bank regulatory agencies.

Similar conflict-of-interest concerns are raised by the investment of fiduciary-account assets in mutual funds for which the institution or an affiliate acts as investment adviser (referred to as "proprietary" funds). In this case, the institution receives a financial benefit from management fees generated by the mutual fund investments. This activity can be expected to become more prevalent as banking organizations more actively offer proprietary mutual funds.[3] See SR-99-7.

2010.12.1 DUE-DILIGENCE REVIEW NEEDED BEFORE ENTERING INTO FEE ARRANGEMENTS

Although many state laws now explicitly authorize certain fee arrangements in conjunction with the investment of trust assets in mutual funds, institutions nonetheless face heightened legal and compliance risks from activities in which a conflict of interest exists, particularly if proper fiduciary standards are not observed and documented. Even when the institution does not exercise investment discretion, disclosure or other requirements may apply. Therefore, institutions should ensure that they perform an appropriate level of due diligence before entering into any fee arrangements similar to those described earlier or placing fiduciary assets in proprietary mutual funds. The following measures should be included in this process:

1. *Reasoned legal opinion.* The institution should obtain a reasoned opinion of counsel that addresses the conflict of interest inherent

1. In general, national banks may make these investments and receive such fees if applicable law authorizes the practice and if the investment is prudent and appropriate for fiduciary accounts and consistent with established state law fiduciary requirements. This includes a "reasonableness" test for any fees received by the institution. See OCC Interpretive Letter No. 704, February 1996.

2. ERISA section 406(b)(3). See Department of Labor, Pension Welfare and Benefits Administration Advisory Opinion 97-15A and Advisory Opinion 97-16A.

3. A Federal Reserve Board interpretation of Regulation Y addresses investment of fiduciary-account assets in mutual funds for which the trustee bank's holding company acts as investment adviser. In general, such investments are prohibited unless specifically authorized by the trust instrument, court order, or state law. See 12 CFR 225.125.

in the receipt of fees or other forms of compensation from mutual fund providers in connection with the investment of fiduciary assets. The opinion should address the permissibility of the investment and compensation under applicable state or federal laws, the trust instrument, or a court order, as well as any applicable disclosure requirements or reasonableness standard for fees set forth in the law.

2. *Establishment of policies and procedures.* The institution should establish appropriate policies and procedures governing the acceptance of fees or other compensation from mutual fund providers as well as the use of proprietary mutual funds. Policies and procedures should generally address the following issues: (1) designation of decision-making authority; (2) analysis and documentation of investment decisions; (3) compliance with applicable statutes, regulations, and sound fiduciary principles, including any disclosure requirements or "reasonableness" standards for fees; and (4) staff training and methods for monitoring compliance with policies and procedures by internal or external audit staff.
3. *Analysis and documentation of investment decisions.* When fees or other compensation are received in connection with fiduciary-account investments over which the institution has investment discretion or when such investments are made in the institution's proprietary mutual funds, the institution should fully conduct appropriate analysis supporting the investment decision. This analysis should be performed regularly and would typically include factors such as historical performance comparisons with similar mutual funds, management fees and expense ratios, and ratings by recognized mutual fund rating services. The institution should determine whether the investment is, and continues to be, (1) appropriate for the individual account, (2) in the best interest of account beneficiaries, and (3) in compliance with the provisions of the "prudent investor" or "prudent man rules," as appropriate.

On June 15, 2004, an interagency advisory concerning the embassy banking business and related banking matters was issued by the federal banking and thrift agencies[1] in coordination with the U.S. Department of the Treasury's Financial Crimes Enforcement Network. The purpose of the advisory is to provide general guidance to financial institutions regarding the treatment of accounts for foreign governments, foreign embassies, and senior foreign political figures.

The joint interagency statement advises financial institutions[2] that the decision to accept or reject an embassy or foreign government account is theirs alone to make. Financial institutions should be aware, however, that there are varying degrees of risk associated with such accounts, depending on the customer and the nature of the services provided. Financial institutions should take appropriate steps to manage such risks, consistent with sound practices and applicable anti-money-laundering laws and regulations. The advisory also encourages financial institutions to direct questions about embassy banking to their primary federal bank regulators. See SR letter 04-10, "Banking Accounts for Foreign Governments, Embassies, and Political Figures."

On March 24, 2011, another interagency advisory was issued to supplement the 2004 interagency advisory. The 2011 advisory provides information to financial institutions providing account services to foreign embassies, consulates, and missions ("foreign missions") in a manner that fulfills the needs of those foreign governments while complying with the provisions of the Bank Secrecy Act (BSA). It advises that financial institutions are expected to demonstrate the capacity to conduct appropriate risk assessments and implement the requisite controls and oversight systems to effectively manage the risk identified in these relationships with foreign missions. The 2011 advisory also confirms that it is the financial institution's decision to accept or reject a foreign mission account. See SR letter 11-6, "Guidance on Accepting Accounts from Foreign Embassies, Consulates and Missions." See also the FFIEC *Bank Secrecy Act/ Anti-Money Laundering Examination Manual* for examination and inspection procedures on embassy, foreign consulate, and foreign mission accounts.

2010.13.1 INTERAGENCY ADVISORY ON ACCEPTING ACCOUNTS FOR FOREIGN GOVERNMENTS, EMBASSIES, AND POLITICAL FIGURES

The 2004 and 2011 interagency advisories answer questions on whether financial institutions should do business with foreign embassies and whether institutions should establish account services for foreign governments, foreign embassies, and senior foreign political figures. As it would with any new account, an institution should evaluate whether or not to accept a new account for a foreign government, embassy, or political figure. That decision should be made by the institution's management, under standards and guidelines established by the board of directors, and should be based on the institution's own business objectives, its assessment of the risks associated with particular accounts or lines of business, and its capacity to manage those risks. The agencies will not, in the absence of extraordinary circumstances, direct or encourage any institution to open, close, or refuse a particular account or relationship.

Providing financial services to foreign governments and embassies and to senior foreign political figures can, depending on the nature of the customer and the services provided, involve varying degrees of risk. Such services can range from account relationships that enable an embassy to handle the payment of operational expenses—for example, payroll, rent, and utilities—to ancillary services or accounts provided to embassy staff or foreign-government officials. Each of these relationships potentially poses different levels of risk. Institutions are expected to assess the risks involved in any such relationships and to take steps to ensure both that such risks are appropriately managed and that the institution can do so in full compliance with its obligations under the BSA, as amended by the USA PATRIOT Act, and the regulations promulgated thereunder.

1. The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Administration (the agencies).

2. The advisory is primarily directed to financial institutions located in the United States. The boards of directors of bank holding companies, however, should consider whether the advisory should be applied to their other U.S. subsidiaries' financial and other services.

When an institution elects to establish financial relationships with foreign governments, embassies, or senior foreign political figures, the agencies, consistent with their usual practice of risk-based supervision, will make their own assessment of the risks involved in such business. As is the case with all accounts, the institution should expect appropriate scrutiny by examiners that is commensurate with the level of risk presented by the account relationship. As in any case where higher risks are presented, the institution should expect an increased level of review by examiners to ensure that the institution has in place controls and compliance oversight systems that are adequate to monitor and manage such risks, as well as personnel trained in the management of such risks and in the requirements of applicable laws and regulations.

Institutions that have or are considering taking on relationships with foreign governments, embassies, or political figures should ensure that such customers are aware of the requirements of U.S. laws and regulations to which the institution is subject. Institutions should, to the maximum extent feasible, seek to structure such relationships in order to conform them to conventional U.S. domestic banking relationships so as to reduce the risks that might be presented by such relationships.

2010.13.2 RISK MITIGATION AND SUPERVISORY EXPECTATIONS FOR FOREIGN MISSIONS

A financial institution should manage the risks associated with transactions involving embassy, foreign consulate, and foreign mission accounts, and implement effective due diligence, monitoring, and reporting systems as part of its BSA/Anti-Money Laundering compliance program. The financial institution has the flexibility to manage its risk in a number of ways. A financial institution may reduce risk by ensuring customers are aware of the requirements of U.S. banking laws and regulations and monitoring those accounts for compliance. When establishing a customer relationship, a financial institution should assess the risks posed such as the volume of activity, number of accounts, and country risk.

A financial institution may also mitigate risk by entering into a written agreement with the foreign mission that clearly defines the terms of use for the account(s) setting forth available services, acceptable transactions, and access limitations. Similarly, the financial institution could offer limited purpose accounts, such as those used to facilitate operational expense payments (e.g., payroll, rent and utilities, routine maintenance), which are generally considered lower risk and allow the foreign mission to carry out its customary functions in the United States. Account monitoring to ensure compliance with account limitations and the terms of any service agreements is essential to mitigate risks associated with these accounts.

A financial institution may also provide ancillary services or accounts to foreign mission personnel and their families. As with foreign mission accounts, written agreements, which clearly define the terms of use for these types of services or accounts, may assist in mitigating the varying degrees of risk.

As with any type of accountholder, the agencies expect financial institutions to demonstrate the capacity to conduct appropriate risk assessments and implement the requisite controls and oversight systems to effectively manage varying degrees of risks in financial relationships with foreign missions. The agencies, consistent with their usual practice of risk-based supervision, will evaluate the risks associated with the account relationship and mitigating controls implemented. The agencies will not direct or require any financial institution to close or refuse a particular account or relationship, except in extraordinary circumstances (for example, when violations of law are identified that warrant an administrative enforcement action).