

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Part 344

RIN 3064-AB74

#### Recordkeeping and Confirmation Requirements for Securities Transactions

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Deposit Insurance Corporation (FDIC) is issuing for comment a notice of proposed rulemaking that would amend its regulations governing recordkeeping and confirmation requirements for securities transactions. The proposed rulemaking updates, clarifies and streamlines the FDIC regulations and reduces unnecessary regulatory costs and other burdens. The proposed rule reorganizes the regulation, clarifies areas where the rule was confusing, incorporates significant interpretive positions, and updates various provisions to address market developments and regulatory changes by other regulators that affect requirements for recordkeeping and confirmation of securities transactions by banks.

**DATES:** Comments must be received by January 23, 1997.

**ADDRESSES:** Comments should be directed to Jerry L. Langley, Executive Secretary, Attention: Room F-402, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. Comments may be hand delivered to Room F-402, 1776 F Street, N.W., Washington, DC 20429, on business days between 8:30 a.m. and 5:00 p.m. or transmitted by fax or the Internet. The FDIC's fax number is (202) 898-3838 and its Internet address is: COMMENTS@FDIC.GOV. Comments will be available for inspection and photocopying in Room 100, 801 17th Street, NW, Washington, DC between

9:00 a.m. and 5:00 p.m. on business days.

**FOR FURTHER INFORMATION CONTACT:** Miguel D. Browne, Deputy Assistant Director, Division of Supervision, Securities, Capital Markets and Trust Branch, (202) 898-6789; John F. Harvey, Review Examiner (Trust), Securities, Capital Markets and Trust Branch, Division of Supervision, (202) 898-6762; Patrick J. McCarty, Counsel, Regulations and Legislation Section, Legal Division, (202) 898-8708, and Gerald Gervino, Senior Attorney, Regulations and Legislation Section, Legal Division, (202) 898-3723.

#### SUPPLEMENTARY INFORMATION:

##### Background

In 1979, the FDIC adopted Part 344 to require banks under its jurisdiction to establish uniform procedures and recordkeeping and confirmation requirements with respect to effecting securities transactions for customers. The requirements reflected, in part, the recommendations of the Securities and Exchange Commission's (SEC) Final Report of the Securities and Exchange Commission on Bank Securities Activities (June 30, 1977). Part 344's recordkeeping and confirmation requirements were patterned after the SEC's rules applicable to broker/dealers and were intended to serve similar purposes for banks involved in effecting customers' securities transactions.<sup>1</sup> See 44 FR 43261 (July 24, 1979). The Board of Governors of the Federal Reserve System (FRB) and the Office of the Comptroller of the Currency (OCC) also adopted regulations substantially identical to part 344 in 1979. See 12 CFR 208.8(k), 44 FR 43258 (July 24, 1979) (FRB regulation); 12 CFR part 344, 44 FR 43254 (July 24, 1979) (OCC regulation).

On December 22, 1995, the OCC published a notice of proposed rulemaking (60 FR 66517) (OCC proposal) to revise 12 CFR part 12, the OCC's Recordkeeping and Confirmation Requirements for Securities Transactions regulation. The purpose of the proposal was to modernize part 12,

<sup>1</sup> Brokers and dealers generally must register with the Securities and Exchange Commission under the Securities Exchange Act of 1934. See 15 U.S.C. 78o(a)(1). Banks are excluded from the definitions of "broker" and "dealer" and thus are not subject to the registration provisions. See 15 U.S.C. 78c(a)(4) and (5).

address various market developments and regulatory changes, and reduce regulatory burden, where possible. The FRB published a substantially similar yet somewhat differently worded proposed rule on December 26, 1995. See 60 FR 66759. The FDIC published an advance notice of proposed rulemaking on May 24, 1996, soliciting comment on issues similar to those raised in the OCC's and FRB's proposed rules, as well as issues which the OCC and FRB proposals did not address. See 61 FR 26135. The OCC published its final rule revising part 12 on December 2, 1996. See 61 FR 63958.

The FDIC and the other federal banking agencies are required by section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI) to review their regulations to streamline them to improve efficiency, to reduce unnecessary costs and to eliminate unwarranted constraints on credit availability. 12 U.S.C. 4803(a). Section 303(a) also requires the Federal banking agencies to work jointly to make uniform all regulations and guidelines implementing common statutory or supervisory policies. As noted above, on July 24, 1979 the FDIC and the other Federal banking agencies promulgated regulations addressing recordkeeping and confirmation requirements for securities transactions effected by banks. These regulations were virtually identical.

Consistent with section 303 of CDRI, the FDIC has reviewed the OCC and FRB proposals and attempted to draft its notice of proposed rulemaking in order that it will be nearly uniform with the other proposals. We note at the outset that the FDIC would prefer a rule which is uniform with the other agencies. The FDIC's proposed rule is closer in structure, definitions, language and form to that of the FRB's proposal than the OCC's final rule. The FDIC requests comment on all aspects of the notice of proposed rulemaking.

#### *Comments Received and Changes Made*

The FDIC received 10 comments on the advance notice of proposed rulemaking. The comment letters included four from banks and bank holding companies, four from trade associations, and two from broker/dealers. Commenters generally supported the proposed changes to part

344, but several commenters requested changes. One commenter stated that it was imperative that the Federal banking agencies work together to issue identical regulations governing securities confirmation and recordkeeping requirements. The FDIC has carefully considered each of the comments and has made several changes in response to the comments received.

Overall, the notice of proposed rulemaking adopts many of the changes to part 344 which were identified in the ANPR. The section-by-section discussion in the preamble identifies substantive changes made to certain sections of the existing rule.

#### Section-by-Section Discussion

##### *Purpose and Scope (§ 344.1)*

The notice of proposed rulemaking makes some very minor language changes to the "Purpose" part of § 344.1 to clarify which banks are subject to the jurisdiction of the FDIC.

The "Scope" part of § 344.1 has also been revised and reorganized to clarify the types of securities transactions which are generally subject to the regulation. Generally, any state nonmember insured bank effecting a securities transaction for a customer is subject to the requirements of part 344, unless the transaction specifically is exempted.

##### *Exceptions (§ 344.2)*

The notice of proposed rulemaking relocates and expands the "Exceptions" section of part 344 from the end of the regulation to near the beginning so that it will be clearer as to what types of transactions are not subject to the regulation. The proposal provides in paragraph (a) five exceptions for: (1) Banks conducting a small number of securities transactions; (2) certain government securities transactions; (3) certain municipal securities transactions; (4) securities transactions conducted by a foreign branch of a bank; and (5) certain securities transactions with a broker/dealer. The notice of proposed rulemaking also clarifies that even though these types of transactions are exempted from compliance with all or certain sections of part 344, the FDIC expects a bank conducting securities transactions for its customers to maintain effective systems of records and controls to ensure safe and sound operations.

The FDIC is including in the notice of proposed rulemaking a new exception (5) for certain securities transactions effected through broker/dealers. The FDIC requested comment in the ANPR on whether part 344 ought to apply to

securities transactions effected by broker/dealers who have entered into "networking arrangements" with banks. Most commenters believe that the FDIC's recordkeeping and confirmation requirements should not apply to these type of bank operations with a registered broker/dealer. Registered broker/dealers are already subject to the SEC's recordkeeping and confirmation rules and are required to provide their customers with confirmations similar to those which banks must provide their customers under part 344.<sup>2</sup> The FDIC has determined that part 344 should not generally apply to securities transactions effected by these registered broker/dealers where the bank customer has in fact knowingly become a customer of the broker/dealer. Language has been added to § 344.2(a)(5) to establish a two-part test. In order for the exception to apply: (A) The broker/dealer must be fully disclosed to the customer and (B) the customer must have a direct contractual agreement, e.g. a signed account agreement, with the broker/dealer. The FDIC believes it is very important that the customer understand that they are dealing with a broker/dealer and not the bank. Banks which enter into networking arrangements with broker/dealers and who do not want those securities transactions to be subject to Part 344 should take adequate steps to make sure that the two-part test is being observed. Full disclosure by the broker/dealer to the bank customers is consistent with the Interagency Statement on Retail Sale of Nondeposit Investment Products.<sup>3</sup> The FDIC also agrees that when an employee of the bank is working for and under the control and supervision of a registered broker/dealer while soliciting, recommending, purchasing or selling securities to customers pursuant to a networking arrangement, Part 344 requirements would not apply. Exception (5) has been drafted to make it clear that dual employee arrangements are not subject to Part 344.

With respect to networking arrangements, the FDIC requests comment regarding whether it is common for banks with networking arrangements to receive separate surcharges or fees from bank customers in addition to the transaction volume compensation they receive from the

broker/dealer. The FDIC would also like to receive comment on whether banks which impose these additional surcharges or fees should be required to comply with Part 344 or separately disclose those additional fees in some other manner.

##### *Definitions (§ 344.3)*

The notice of proposed rule adds eight new definitions and requests comment on modifying two existing definitions. Six of the definitions—"asset-backed security," "completion of the transaction," "crossing of buy and sell orders," "debt security," "government security," and "municipal security"—were identified in the ANPR and are included unchanged in the notice of proposed rulemaking. The FDIC has defined these terms the same way that the Federal Reserve has proposed them. The OCC proposal has the same terms but the structure and language used are somewhat different.

The FDIC is also proposing to add two new definitions; "bank" and "cash management sweep account" which weren't in the ANPR. With respect to the term "Bank," the FDIC proposes to define the term to mean "state nonmember insured bank (except a District bank) or a foreign bank having an insured branch." This change is consistent with the minor language modifications made to § 344.1 and shortens the regulation by eliminating the need to repeat "state nonmember insured bank (except a District bank) or a foreign bank having an insured branch" where "Bank" is currently found.

The other new definition would be "Cash management sweep account." The FDIC requested comment in the ANPR with respect to bank "sweep account" activities. Most commenters thought that part 344 should clarify how "sweep accounts" are treated under the rule. While several commenters recommended that sweep accounts be included in the definition of periodic accounts the FDIC has decided not to do so for several reasons. First, the FDIC believes that sweep accounts are different in kind from typical periodic plans such as dividend reinvestment plans (DRIPs) and automatic investment plans. Sweep accounts do not normally invest in securities at the regular intervals (i.e; monthly or quarterly) as do DRIPs and automatic investment plans. Second, sweep accounts are a significant product/service in their own right which account for several billions of dollars worth of transactions on a daily basis and probably exceed the dollar volume in traditional periodic plans. Due to these differences, the FDIC

<sup>2</sup> It is not unusual for a bank effecting a securities transaction to forward orders to a registered broker/dealer for execution and clearing. Under these circumstances, the requirements of part 344 would apply because the bank is effecting the securities transaction for its customer.

<sup>3</sup> FDIC Financial Institutions Letter 9-94 (February 17, 1994); and FDIC Financial Institutions Letter 61-95 (September 13, 1995).

believes it is not appropriate to include sweep accounts in the definition of periodic plans. Third, the FDIC believes that bank customers with sweep accounts should receive confirmations more frequently than periodic plan account holders. The FDIC is proposing that banks be required to issue confirmations for sweep accounts at least monthly, if there are securities transactions in the account, and at least quarterly when there are no transactions. Quarterly confirmations are proposed for periodic plans. The FDIC believes it would be confusing if sweep accounts were to be included in the definition of periodic plans and yet be subject to a more frequent confirmation requirement. For these reasons, the FDIC is proposing a separate definition for sweep accounts and requests comment on the adequacy of such definition.

The term "cash management sweep account" would cover any prearranged, automatic transfer of funds above a certain dollar level from a deposit account to purchase a security or securities or any prearranged, automatic redemption or sale of a security or securities when a deposit account drops below a certain dollar level with the proceeds being transferred into a deposit account. The term would only cover transactions involving the purchase or sale of securities. The FDIC requests comment on whether it is necessary to provide clarification regarding reporting requirements where monies (interest, dividends, etc.) earned on a security are deposited into a sweep account. The FDIC also requests comment on whether the term "cash management sweep account" is appropriate.

The FDIC notes that not all sweep accounts will be treated the same under part 344. First, totally excluded from the coverage of part 344 would be sweep accounts which sweep from a deposit account into another deposit account such as a money market deposit account (MMDA). According to a recently published Federal Reserve study, billions of dollars are being swept from noninterest bearing deposit accounts into MMDAs.<sup>4</sup> Since there is no purchase or sale of a security involved in this type of sweep transaction, part 344 would not apply.

While very similar to sweeps into MMDAs, sweep accounts which automatically transfer idle cash from a deposit account into a money market mutual fund would be subject to part

344. Shares of money market mutual funds, or any other interest in an open-end investment company, are "securities" within the Federal securities laws as well as the definition of "security" in part 344. Sweep accounts which automatically purchase or sell shares in money market mutual funds, or any other mutual fund, would therefore be subject to the regulation. As noted above, the FDIC is proposing in § 344.6(d) that banks be required to provide either monthly or quarterly statements to its customers depending upon the frequency of securities transactions. Banks would be required to provide notifications to customers at the end of the month if a purchase or sale of a security has occurred in their cash management sweep account. Banks would be required to provide quarterly statements to cash management sweep account customers at a minimum.

A third common type of sweep account offered by banks involves transferring idle cash into a repurchase agreement on government securities. This type of transaction is clearly within the scope of part 344, since there is a security being purchased or sold.

However, government securities are subject to the Government Securities Act of 1986, 15 U.S.C. 78o-5, and the rulemaking authority of the Bureau of the Public Debt, Department of Treasury. The Treasury Department requires broker/dealers and banks to provide next day confirmations on hold in custody repurchase agreements on government securities. See 17 CFR parts 400 through 405, 449, and 450. We note that banks offering sweep transactions involving repurchase agreements on government securities will be subject to more frequent confirmation requirements than other sweep accounts under part 344.

The FDIC is also requesting comment on modifications to two definitions. The FDIC proposes to modify the existing definition of "customer" to specifically exclude those persons and accounts who enter into written agreements with fully disclosed broker/dealers for securities transactions. This modification, which parallels the proposed exception in § 344.2(a)(5), is intended to make it clear that bank customers who enter into written agreements with fully disclosed broker/dealers, such as broker/dealers with networking agreements with the bank, are not "customers" of the bank for purposes of part 344.

The other proposed modification is to the term "investment discretion." The FDIC proposes to replace the word "recommendations" with the word "decisions." The result would be to

narrow the definition of investment discretion to situations in which the bank actually makes investment decisions with respect to a customer's account as opposed to where the bank merely makes recommendations to the customer. This change would conform the FDIC's definition to the OCC and FRB's regulatory language as well as track the definition in the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78c(a)(35). We note that the OCC proposed in December of 1995 a different definition of the term "investment discretion" in connection with its Trust Regulations. See 60 FR 66163. The FDIC requests comment on whether an alternate definition should be considered.

#### *Recordkeeping (§ 344.4)*

With respect to recordkeeping, the notice of proposed rulemaking makes several non-substantive changes. Section 344.4 (a) remains identical in substance to the existing rule. The FDIC proposes to add headings and paragraphs to make the rule easier to read. A new paragraph (5) has been added to require banks to retain copies of all written notifications which are provided. This is not a new requirement, but is merely a relocation of the recordkeeping requirement which is found in current § 344.4.

The FDIC proposes to make similar changes to the section of the rule regarding record maintenance. A new heading for § 344.4(b), entitled "Manner of maintenance" is proposed. Language has been added which attempts to make it clear that banks do not have to maintain their records in any particular form or format, as long as the records are clear, and accurately reflect the information required under § 344.4(a). This provision is intended to give banks flexibility in the maintenance of records required by part 344. The FDIC also recognizes that better and more affordable technology will increase banks' interest in replacing paper files with electronic data bases and filing systems. The FDIC has no objection to a bank using an electronic or automated recordkeeping system. Accordingly, the proposed rule specifically permits the use of electronic or automated records as long as the records are easily retrievable and readily available for inspection and the bank has the capability to reproduce the records in hard copy form. Further, the FDIC proposes to add language which makes it clear that a bank using a third party service provider to maintain the records would meet the rule's recordkeeping requirements.

<sup>4</sup>Senior Financial Officer Survey May 1996, Division of Monetary Affairs, Board of Governors of the Federal Reserve System (August 8, 1996).

*Content and Time of Customer Notification (§ 344.5)*

The FDIC is proposing to revise existing § 344.4 "Content and time of customer notification" in several material respects. The FDIC has added language to the beginning of § 344.5 to make it clear that banks may provide the written confirmations required by mail, facsimile or other electronic means. The SEC recently issued guidance to the broker/dealer community regarding the delivery of confirmations by electronic means. SEC Release No. 33-7288, 61 FR 24644 (May 15, 1996). The FDIC recognizes that banks will want to, and should be permitted to, use new confirmation delivery systems as technology advances. In appropriate situations, a bank may satisfy the "written" notification requirement through electronic communications. Where a customer has a facsimile machine, a bank may fulfill its notification delivery requirement by sending the notification by facsimile transmission. Similarly, consistent with SEC guidance a bank may satisfy the notification delivery requirement by other electronic communications when the parties agree to use electronic instead of hard-copy notifications; the parties have the ability to print or download the notification; the recipient affirms or rejects the trade through electronic notification; the system cannot automatically delete the electronic notification; and both parties have the capacity to receive electronic messages. The FDIC will consider granting banks permission to use electronic confirmations in other situations depending upon advances in technology and other regulatory developments.

In proposed § 344.5(a)(1) the FDIC has added clarifying language regarding the use of broker/dealer confirmations to satisfy the written notification requirements. There has been some confusion regarding direct mailing of broker/dealer confirmations to bank customers. The FDIC has added language which would make it clear that banks have the option of either (1) having a broker/dealer executing a transaction for the bank to send a confirmation directly to the bank's customer or (2) choosing to forward a copy of the broker/dealer confirmation to the bank customer when it is received. The FDIC believes banks should have the option of directing a broker/dealer to send a confirmation directly to the bank's customer as this will improve bank service by accelerating the delivery of confirmations to its customer. Banks

using this option are ultimately responsible for the timely delivery of confirmations as well as accurate disclosure of all information required therein.

Another significant change in proposed § 344.5(a)(1) is the shortening of the timeframe banks have for forwarding broker/dealer confirmations to customers. Under existing § 344.4, banks are required to forward a broker/dealer's confirmation within five business days of receipt. With the settlement period being shortened to T+3, see proposed § 344.7, and general improvement in communications, the FDIC believes that shortening the timeframe for banks sending out broker/dealer confirmations is justified. The proposed rule requires banks to send broker/dealer confirmations within one business day of receipt.

With respect to disclosure of other remuneration, the FDIC is adding clarifying language to proposed § 344.5(a)(2). Even when banks use a broker/dealer confirmation, they must provide a statement regarding the amount of any remuneration the bank will receive from the customer or any other source in connection with the transaction. There are certain exceptions—where there is a written agreement between the bank and the customer, in government and municipal securities transactions where the bank acts as a dealer, and in mutual fund transactions where the customer receives a current prospectus. Proposed paragraph (a)(2) is being revised to make it consistent with the remuneration disclosure requirements found in paragraph (b)(6).

With respect to the content of the written notification issued by a bank, the first seven requirements under the proposed rule are virtually identical to the existing rule. § 344.4(b)(1)–(7). The FDIC has added new language to proposed paragraph (b)(6) regarding the exceptions from the disclosure of remuneration requirement for mutual fund transactions. Banks are not required to provide a statement regarding the source and amount of other remuneration if the bank provides the customer with a current prospectus which discloses all current fees, loads and expenses at or before completion of the transaction. This exception is consistent with current securities industry practice which is based on a 1979 SEC No Action Letter. See Letter to the Investment Company Institute, reprinted in [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) 82041 (Mar. 19, 1979). The FDIC believes adding this language to the text of the regulation

will provide clearer guidance to banks, their counsel and examiners in this area.

The FDIC is proposing to add five confirmation disclosure requirements for debt security transactions. See proposed § 344.5(b)(8)–(12). Paragraphs (b)(8)–(11) address yield information disclosure, while paragraph (b)(12) requires disclosure that a debt security has not been rated by a nationally recognized statistical rating organization, if that is the case. These requirements are consistent with those of the SEC's confirmation rule, Rule 10b-10. See 17 CFR 240.10b-10(a)(2)(i)(D).

*Notification By Agreement; Alternative Forms and Times of Notification (§ 344.6)*

In addition to the notification requirements in proposed § 344.5, the regulation authorizes alternative forms and times of notification under § 344.6 for certain specific types of accounts. These are: (1) Accounts in which the bank exercises investment discretion in other than an agency capacity; (2) accounts in which the bank exercises investment discretion in an agency capacity; (3) cash management sweep accounts; (4) transactions for a collective investment fund account; and (5) transactions for a periodic plan account. The proposed rule makes very minor changes to the current § 344.5. The proposed rule revises the name of the section and adds headings in an effort to eliminate confusion and enhance readability. The one major change is the addition of a subsection addressing the notification requirements for cash management sweep accounts.

Under proposed § 344.6(a) a bank and its customer can agree, in writing, to a different arrangement as to the time and content of written notification to be received. This provision may be of benefit to both banks and their customers in that it permits bank customers to opt for periodic statements—monthly or quarterly—if they do not desire to receive confirmations within 3 days of the transaction. Banks may benefit by not having to produce as many confirmations for the same account and/or not having to produce confirmations as quickly. The FDIC would like to receive comment regarding the typical written notification timeframes in standard bank account documents. The FDIC would like to know if bank customers who sign bank account agreements providing for alternate notification arrangements are aware of their right to receive written notifications in as little as 3 days. Comment is specifically requested as to

whether the FDIC should require banks to provide more disclosure to its customers regarding when they are entitled to receive written notifications. Commenters who support requiring additional disclosures by banks should provide specific examples of the types or forms of disclosure that are, or should be, made.

The FDIC proposes to add a new paragraph (d) to § 344.6 to address the notification requirements for cash management sweep accounts. The FDIC believes that banks offering cash management sweep accounts should provide notification similar to that provided by registered broker/dealers offering similar services. As discussed under § 344.3, the FDIC has proposed a new definition "cash management sweep accounts". Section 344.6(d) in the proposed rule provides the timeframe for notification for cash management sweep accounts. The proposed rule clarifies that, with respect to cash management sweep accounts, the time for notification is each month in which a purchase or sale of securities takes place in the customer's account and not less than once every 3 months if there are no securities transactions in the account. Under the SEC's Rule 10b-10, broker/dealers must provide a confirmation after the end of each monthly period for transactions in money market mutual funds. See 17 CFR 240.10b-10(b)(2).

As discussed above, § 344.6(d) does not control the notification requirements for cash management sweep accounts which sweep idle funds into repurchase agreements on government securities. Confirmation requirements for sweeps into repurchase agreements on government securities are subject to the Government Securities Act of 1986 and the Treasury Department regulations thereunder. The Treasury Department regulations normally require next day confirmations on sweeps into hold in custody repurchase agreements on government securities.

Under proposed § 344.6(f) the FDIC is proposing to revise the time frame for providing confirmations for periodic plan accounts. The FDIC proposes to loosen the confirmation requirements for periodic plans from "as soon as possible" to "not less than once every three months". The FDIC believes that this timeframe is consistent with current industry practice and the SEC's notification requirements. This timeframe also will serve to reduce unnecessary regulatory burden.

#### *Settlement of Securities Transactions (§ 344.7)*

The FDIC's ANPR requested comment on the need for, and effect of, adopting the T+3 securities settlement requirement for banks. The FDIC was considering whether part 344 should adopt a provision which tracks the SEC's securities settlement rule or whether part 344 should merely cross reference the SEC's rule. We note that the FRB's proposal would have required banks to comply with the standard settlement cycle observed by the United States securities industry.<sup>5</sup> While the cross referencing of the SEC's settlement rule would provide uniformity with the securities industry and avoid the time consuming task of the FDIC amending part 344 when the SEC makes material changes to their rule, the rule would not be clear on its face as to the settlement requirements expected of banks. In addition, cross referencing would require many small banks to have access to the SEC's rules and be aware of current SEC interpretations of such rules. The notice of proposed rulemaking sets forth a new section, § 344.7, with a T+3 settlement rule which tracks the SEC's settlement rule.<sup>6</sup>

#### *Securities Trading Policies and Procedures (§ 344.8)*

In the notice of proposed rulemaking the FDIC proposes to split the existing § 344.6 "Securities trading policies and procedures" in two, separating the trading policies and procedures from the bank personnel securities trading reporting requirements. New § 344.8 would retain virtually unchanged paragraphs (a), (b) and (c) of the existing § 344.6 addressing orders and execution of trades, the equitable allocation of securities and prices for accounts and the crossing of buy and sell orders. The one substantive change to be found in the proposal addresses the separation of order and execution functions from the traditional back office clearing functions. See proposed § 344.8(a)(2). The FRB proposal raised this issue and the FDIC believes, based on the recent highly publicized cases involving a lack of internal controls for securities and commodities trading, that such a

provision is appropriate. The proposed rulemaking adds a new provision which would require banks to adopt written policies and procedures with separate supervisory procedures and reporting lines for back office functions.

#### *Personal Securities Trading Reporting by Directors, Officers and Employees (§ 344.9)*

The FDIC proposes to create a new § 344.9 addressing personal securities trading reporting by bank personnel. The FDIC believes that a separate section is warranted. The FDIC proposes to relocate the substance of paragraph (d) of existing § 344.6 to new § 344.9. In addition, the FDIC is proposing to add two new paragraphs: one which requires certain bank directors to report personal securities trading and the other which identifies an alternate report which bank personnel subject to the reporting requirement can use. New headings have been added to identify more clearly the requirements of the section.

There are two substantive changes proposed to new § 344.9. The first substantive change proposed is to expand the scope of the regulation to cover certain bank directors. The existing regulation only applies to bank officers and employees even though bank directors may be involved in making investment recommendations or decisions for customer accounts. The proposed paragraph (b) would require those bank directors who are (1) involved in making investment recommendations or decisions for customer accounts or (2) participate in the determination of such recommendations or decisions to provide the same quarterly reports on personal securities trading which bank officers and employees are required to provide. As a point of clarification, individuals who are both officers and directors of a bank are subject to the provisions and reporting requirement of paragraph (a).

This proposed reporting requirement would not apply to all bank directors, nor would it necessarily require reporting by all the bank directors who serve on the bank's investment or trust committee. For example, the proposed reporting requirement would not apply to directors who, through their position on the trust or investment committee, approve or become aware of the trust department's general asset allocation recommendations or those directors who approve of or who know that the bank is recommending specific industries, sectors or foreign markets. Directors who receive monthly or quarterly reports detailing past trading activity in specific securities for

<sup>5</sup>The text of the FRB's proposal is as follows: "Settlement of securities transactions. All contracts for the purchase or sale of a security shall provide for completion of the transaction within the number of business days in the standard settlement cycle for the security followed by registered broker/dealers in the United States unless otherwise agreed to by the parties at the time of the transaction." See 60 FR 66764.

<sup>6</sup>See Securities Exchange Act of 1934 Rule 15c6-1, 17 CFR 240.15c6-1; 58 FR 52891 (Oct. 13, 1993); 60 FR 26604 (May 17, 1995) (amendments to the rule).

customer accounts wouldn't be subject to the proposed reporting requirement because such information would not provide such directors with any advantage for personal trading. For this reason the FDIC has left out the provision requiring officers or employees who, in connection with their duties, obtain information concerning which securities are being purchased, sold or recommended. The FDIC requests comment regarding whether this provision should be included in new paragraph (b).

The proposed reporting requirement in new paragraph (b) would apply, however, to those directors who actively participate in making decisions or recommendations with respect to the purchase or sale of specific securities (both debt and equity) for customer accounts prior to transactions taking place. Directors who have such information could possibly use such information to trade for their own gain. The FDIC would like to remind bank directors, officers and employees that the use of such information for personal trading is illegal and could result in significant criminal and regulatory actions against the individual as well as the bank.

The second substantive change identifies an alternate report for personal securities trading. The proposed § 344.9(a) and (b) continue to provide that personal securities trading reports must be filed with the bank within 10 business days<sup>7</sup> of the end of the calendar quarter. New paragraph (d) clarifies that a bank director, officer or employee may fulfill the reporting requirement under proposed § 344.9 (a) or (b) by providing a copy of the report required under SEC Rule 17j-1. If a bank acts as an investment adviser to an investment company registered under the Investment Company Act of 1940, the bank's directors, officers and employees—as "access persons"—would be required to comply with and file a personal securities trading report with the bank. Proposed paragraph (d) makes it clear that the Rule 17j-1 report, which is more detailed than the report required under § 344.9, will be accepted by the FDIC in lieu of filing the § 344.9 report. This proposed change is consistent with the OCC's interpretative position published as part of their final rule.

<sup>7</sup>The FDIC has added the word "business" to the regulation to make it clear that the personal securities trading reports must be filed within 10 business, as opposed to calendar, days after the end of the calendar quarter. This is consistent with past interpretations and merely serves to clarify existing regulatory practice.

#### Waivers (§ 344.10)

The notice of proposed rulemaking restates the FDIC's existing waiver provision found in existing § 344.8.

#### Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Paperwork Reduction Project (3064-0028), Washington DC 20503, with copies of such comments to be sent to Steven F. Hanft, Office of the Executive Secretary, Room F-454, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429.

The collection of information requirements in this proposed rule are found in 12 CFR §§ 344.2(b), 344.4(a), 344.5(a) and (b), 344.8, and 344.9. The collections consist of recordkeeping requirements, §§ 344.2(b) and 344.4(a); the provision of written confirmations, §§ 344.5 (a) and (b) and 344.6; the establishment of written policies and procedures for placing orders and executing trades as well as back office functions, § 344.8; the reporting of personal securities trading by certain bank directors, officers and employees, § 344.9.

The likely respondents/recordkeepers are state nonmember insured banks.

*Estimated average annual burden hours per respondent/recordkeeper:* 19.43 hours.

*Estimated number of respondents and/or recordkeepers:* 5,663 state nonmember insured banks.

*Estimated total annual reporting and recordkeeping burden:* 109,818 hours.

*Start-up costs to respondents:* None.

Records under this part are to be maintained for at least three years.

#### Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)), the initial regulatory flexibility analysis otherwise required under section 603 of the RFA (5 U.S.C. 603) is not required if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and the agency publishes such certification and a succinct statement explaining the reasons for such certification in the Federal Register along with its general notice of proposed rulemaking.

The FDIC hereby certifies that the proposal will not have a significant economic impact on a substantial number of small entities. The proposal should result in a net benefit to all banks regardless of size due to the streamlining and clarifications provided in the proposed rule, but the economic impact on small banks will not be significant. Most banks with total assets of under \$100 million will not engage in securities activities in a manner covered by this regulation. Rather, a small bank typically will use either a registered broker/dealer who has rented space on the bank's premises in what is commonly referred to as a "networking arrangement" or an "introducing broker" who will refer a customer to a dealer that can effect the desired transaction, both of which situations are outside the scope of part 344, as proposed.

#### List of Subjects in 12 CFR Part 344

Banks, Banking, Reporting and recordkeeping requirements, Securities.

#### Authority and Issuance

For the reasons set out in the preamble, the FDIC proposes to revise Part 344 of title 12 of the Code of Federal Regulations to read as follows:

### **PART 344—RECORDKEEPING AND CONFIRMATION REQUIREMENTS FOR SECURITIES TRANSACTIONS**

#### Sec.

- 344.1 Purpose and scope.
- 344.2 Exceptions.
- 344.3 Definitions.
- 344.4 Recordkeeping.
- 344.5 Content and time of notification.
- 344.6 Notification by agreement; alternative forms and times of notification.
- 344.7 Settlement of securities transactions.
- 344.8 Securities trading policies and procedures.
- 344.9 Personal securities trading reporting by bank directors, officers and employees.
- 344.10 Waivers.

Authority: 12 U.S.C. 1817, 1818 and 1819.

#### **§ 344.1 Purpose and scope.**

(a) *Purpose.* The purpose of this part is to ensure that purchasers of securities in transactions effected by a state nonmember insured bank (except a District bank) or a foreign bank having an insured branch are provided adequate information regarding transactions. This part is also designed to ensure that banks subject to this part maintain adequate records and controls with respect to the securities transactions they effect.

(b) *Scope; General.* Any security transaction effected for a customer by a bank is subject to this part unless

excepted by § 344.2. A bank effecting transactions in government securities is subject to the notification, recordkeeping, and policies and procedures requirements of this part. This part also applies to municipal securities transactions by a bank that is not registered as a "municipal securities dealer" with the Securities and Exchange Commission. See 15 U.S.C. 78c(a)(30) and 78o-4.

#### § 344.2 Exceptions.

(a) A bank effecting securities transactions for customers is not subject to all or part of this part 344 to the extent that they qualify for one or more of the following exceptions:

(1) *Small number of transactions.* The requirements of §§ 344.4(a) (2) through (4) and 344.8(a) (1) through (3) do not apply to a bank effecting an average of fewer than 200 securities transactions per year for customers over the prior three calendar year period. The calculation of this average does not include transactions in government securities.

(2) *Government securities.* The recordkeeping requirements of § 344.4 do not apply to banks effecting fewer than 500 government securities brokerage transactions per year. This exemption does not apply to government securities dealer transactions by banks.

(3) *Municipal securities.* This part does not apply to transactions in municipal securities effected by a bank registered with the Securities and Exchange Commission as a "municipal securities dealer" as defined in title 15 U.S.C. 78c(a)(30). See 15 U.S.C. 78o-4.

(4) *Foreign branches.* Activities of foreign branches of a bank shall not be subject to the requirements of this part.

(5) *Transactions effected by registered broker/dealers.* (i) This part does not apply to securities transactions effected for a bank customer by a registered broker/dealer if:

(A) The broker/dealer is fully disclosed to the bank customer; and

(B) The bank customer has a direct contractual agreement with the broker/dealer.

(ii) This exemption extends to bank arrangements with broker/dealers which involve bank employees when acting as employees of, and subject to the supervision of, the registered broker/dealer when soliciting, recommending, or effecting securities transactions.

(b) *Safe and sound operations.* Notwithstanding this section, every bank effecting securities transactions for customers shall maintain, directly or indirectly, effective systems of records and controls regarding their customer

securities transactions to ensure safe and sound operations. The records and systems maintained must clearly and accurately reflect the information required under this part and provide an adequate basis for an audit.

#### § 344.3 Definitions.

(a) *Asset-backed security* means a security that is serviced primarily by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders.

(b) *Bank* means a state nonmember insured bank (except a District bank) or a foreign bank having an insured branch.

(c) *Cash management sweep account* means a prearranged, automatic transfer of funds above a certain dollar level from a deposit account to purchase a security or securities, or any prearranged, automatic redemption or sale of a security or securities when a deposit account drops below a certain level with the proceeds being transferred into a deposit account.

(d) *Collective investment fund* means funds held by a bank as fiduciary and, consistent with local law, invested collectively:

(1) In a common trust fund maintained by such bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as trustee, executor, administrator, guardian, or custodian under the Uniform Gifts to Minors Act; or

(2) In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or similar trusts which are exempt from Federal income taxation under the Internal Revenue Code (Title 26 of the United States Code).

(e) *Completion of the transaction* means:

(1) For purchase transactions, the time when the customer pays the bank any part of the purchase price (or the time when the bank makes the book-entry for any part of the purchase price, if applicable), however, if the customer pays for the security prior to the time payment is requested or becomes due, then the transaction shall be completed when the bank transfers the security into the account of the customer; and

(2) For sale transactions, the time when the bank transfers the security out of the account of the customer or, if the security is not in the bank's custody, then the time when the security is

delivered to the bank, however, if the customer delivers the security to the bank prior to the time delivery is requested or becomes due then the transaction shall be completed when the bank makes payment into the account of the customer.

(f) *Crossing of buy and sell orders* means a security transaction in which the same bank acts as agent for both the buyer and the seller.

(g) *Customer* means any person or account, including any agency, trust, estate, guardianship, or other fiduciary account for which a bank makes or participates in making the purchase or sale of securities, but does not include a person or account having a direct, contractual agreement with a fully disclosed broker/dealer, broker, dealer, dealer bank or issuer of the securities that are the subject of the transaction.

(h) *Debt security* means any security, such as a bond, debenture, note, or any other similar instrument that evidences a liability of the issuer (including any security of this type that is convertible into stock or a similar security) and fractional or participation interests in one or more of any of the foregoing; provided, however, that securities issued by an investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., shall not be included in this definition.

(i) *Government security* means:

(1) A security that is a direct obligation of, or obligation guaranteed as to principal and interest by, the United States;

(2) A security that is issued or guaranteed by a corporation in which the United States has a direct or indirect interest and which is designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors;

(3) A security issued or guaranteed as to principal and interest by any corporation whose securities are designated, by statute specifically naming the corporation, to constitute exempt securities within the meaning of the laws administered by the Securities and Exchange Commission; or

(4) Any put, call, straddle, option, or privilege on a security described in paragraph (i) (1), (2), or (3) of this section other than a put, call, straddle, option, or privilege that is traded on one or more national securities exchanges, or for which quotations are disseminated through an automated quotation system operated by a registered securities association.

(j) *Investment discretion* means that, with respect to an account, a bank directly or indirectly:

(1) Is authorized to determine what securities or other property shall be purchased or sold by or for the account; or

(2) Makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for these investment decisions.

(k) *Municipal security* means a security which is a direct obligation of, or an obligation guaranteed as to principal or interest by, a State or any political subdivision, or any agency or instrumentality of a State or any political subdivision, or any municipal corporate instrumentality of one or more States or any security which is an industrial development bond (as defined in section 103(c)(2) of the Internal Revenue Code of 1954) the interest on which is excludable from gross income under section 103(a)(1) of such Code if, by reason of the application of paragraph (4) or (6) of section 103(c) of such Code (determined as if paragraphs (4)(A), (5) and (7) were not included in such section 103(c), paragraph (1) of such section 103(c) does not apply to such security.

(l) *Periodic plan* means any written authorization for a bank acting as agent to purchase or sell for a customer a specific security or securities, in a specific amount (calculated in security units or dollars) or to the extent of dividends and funds available, at specific time intervals, and setting forth the commission or charges to be paid by the customer or the manner of calculating them. Periodic plans include dividend reinvestment plans, automatic investment plans, and employee stock purchase plans.

(m) *Security* means any interest or instrument commonly known as a security, whether in the nature of debt or equity, including any stock, bond, note, debenture, evidence of indebtedness or any participation in or right to subscribe to or purchase any of the foregoing. The term security does not include:

(1) A deposit or share account in a federally or state insured depository institution;

(2) A loan participation;

(3) A letter of credit or other form of bank indebtedness incurred in the ordinary course of business;

(4) Currency;

(5) Any note, draft, bill of exchange, or bankers acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of

days of grace, or any renewal thereof the maturity of which is likewise limited;

(6) Units of a collective investment fund;

(7) Interests in a variable amount (master) note of a borrower of prime credit; or

(8) U.S. Savings Bonds.

#### § 344.4 Recordkeeping.

(a) *General rule.* A bank effecting securities transactions for customers shall maintain the following records for at least three years:

(1) *Chronological records.* An itemized daily record of each purchase and sale of securities maintained in chronological order, and including:

(i) Account or customer name for which each transaction was effected;

(ii) Description of the securities;

(iii) Unit and aggregate purchase or sale price;

(iv) Trade date; and

(v) Name or other designation of the broker/dealer or other person from whom the securities were purchased or to whom the securities were sold;

(2) *Account records.* Account records for each customer, reflecting:

(i) Purchases and sales of securities;

(ii) Receipts and deliveries of securities;

(iii) Receipts and disbursements of cash; and

(iv) Other debits and credits pertaining to transactions in securities;

(3) A separate memorandum (order ticket) of each order to purchase or sell securities (whether executed or cancelled), which shall include:

(i) The accounts for which the transaction was effected;

(ii) Whether the transaction was a market order, limit order, or subject to special instructions;

(iii) The time the order was received by the trader or other bank employee responsible for effecting the transaction;

(iv) The time the order was placed with the broker/dealer, or if there was no broker/dealer, time the order was executed or cancelled;

(v) The price at which the order was executed; and

(vi) The broker/dealer utilized;

(4) *Record of broker/dealers.* A record of all broker/dealers selected by the bank to effect securities transactions and the amount of commissions paid or allocated to each broker during the calendar year; and

(5) *Notifications.* A copy of the written notification required by §§ 344.5 and 344.6.

(b) *Manner of maintenance.* Records may be maintained in whatever manner, form or format a bank deems appropriate, provided however, the

records required by this section must clearly and accurately reflect the information required and provide an adequate basis for the audit of the information. Records may be maintained in hard copy, automated or electronic form provided the records are easily retrievable, readily available for inspection, and capable of being reproduced in a hard copy. A bank may contract with third party service providers, including broker/dealers, to maintain records required under this part.

#### § 344.5 Content and time of notification.

Every bank effecting a securities transaction for a customer shall give, send or have sent, by mail, facsimile or other means of electronic transmission, to the customer at or before completion of the transaction one of the types of written notification identified below:

(a) *Broker/dealer's confirmations.* (1) A copy of the confirmation of a broker/dealer relating to the securities transaction. A bank may either have the broker/dealer send the confirmation directly to the bank's customer or send a copy of the broker/dealer's confirmation to the customer upon receipt of the confirmation by the bank. If a bank chooses to send a copy of the broker/dealer's confirmation, it must be sent within one business day from the bank's receipt of the broker/dealer's confirmation; and

(2) If the bank is to receive remuneration from the customer or any other source in connection with the transaction, a statement of the source and amount of any remuneration to be received if such would be required under paragraph (b)(6) of this section; or

(b) *Written notification.* A written notification disclosing:

(1) Name of the bank;

(2) Name of the customer;

(3) Whether the bank is acting as agent for such customer, as agent for both such customer and some other person, as principal for its own account, or in any other capacity;

(4) The date and time of execution, or the fact that the time of execution will be furnished within a reasonable time upon written request of the customer, and the identity, price, and number of shares or units (or principal amount in the case of debt securities) of the security purchased or sold by the customer;

(5) The amount of any remuneration received or to be received, directly or indirectly, by any broker/dealer from such customer in connection with the transaction;

(6)(i) The amount of any remuneration received or to be received by the bank



from the customer, and the source and amount of any other remuneration received or to be received by the bank in connection with the transaction, unless:

(A) Remuneration is determined pursuant to a prior written agreement between the bank and the customer; or  
(B) In the case of government securities and municipal securities, the bank received the remuneration in other than an agency transaction; or  
(C) In the case of open end investment company securities, the bank has provided the customer with a current prospectus which discloses all current fees, loads and expenses at or before completion of the transaction;

(ii) If the bank elects not to disclose the source and amount of remuneration it has or will receive from a party other than the customer pursuant to paragraph (b)(6)(i) (A), (B), or (C) of this section, the written notification must disclose whether the bank has received or will receive remuneration from a party other than the customer, and that the bank will furnish within a reasonable time the source and amount of this remuneration upon written request of the customer. This election is not available, however, if, with respect to a purchase, the bank was participating in a distribution of that security; or, with respect to a sale, the bank was participating in a tender offer for that security;

(7) Name of the broker/dealer utilized; or where there is no broker/dealer, the name of the person from whom the security was purchased or to whom the security was sold, or a statement that the bank will furnish this information within a reasonable time upon written request;

(8) In the case of a transaction in a debt security subject to redemption before maturity, a statement to the effect that the debt security may be redeemed in whole or in part before maturity, that the redemption could affect the yield represented and that additional information is available upon request;

(9) In the case of a transaction in a debt security effected exclusively on the basis of a dollar price:

(i) The dollar price at which the transaction was effected; and

(ii) The yield to maturity calculated from the dollar price, provided however, that this shall not apply to a transaction in a debt security that either has a maturity date that may be extended by the issuer thereof, with a variable interest payable thereon, or is an asset-backed security that represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment;

(10) In the case of a transaction in a debt security effected on the basis of yield:

(i) The yield at which the transaction was effected, including the percentage amount and its characterization (e.g., current yield, yield to maturity, or yield to call) and if effected at yield to call, the type of call, the call date and call price; and

(ii) The dollar price calculated from the yield at which the transaction was effected; and

(iii) If effected on a basis other than yield to maturity and the yield to maturity is lower than the represented yield, the yield to maturity as well as the represented yield; provided however, that this paragraph (b)(10) shall not apply to a transaction in a debt security that either has a maturity date that may be extended by the issuer with a variable interest rate payable thereon, or is an asset-backed security that represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment;

(11) In the case of a transaction in a debt security that is an asset-backed security, which represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment, a statement indicating that the actual yield of the asset-backed security may vary according to the rate at which the underlying receivables or other financial assets are prepaid and a statement of the fact that information concerning the factors that affect yield (including at a minimum estimated yield, weighted average life, and the prepayment assumptions underlying yield) will be furnished upon written request of the customer; and

(12) In the case of a transaction in a debt security, other than a government security, that the security is unrated by a nationally recognized statistical rating organization, if that is the case.

**§ 344.6 Notification by agreement; alternative forms and times of notification.**

A bank may elect to use the following alternative notification procedures if the transaction is effected for:

(a) *Notification by agreement.* Accounts (except periodic plans) where the bank does not exercise investment discretion and the bank and the customer agree in writing to a different arrangement as to the time and content of the written notification; provided however, that such agreement makes clear the customer's right to receive the written notification pursuant to § 344.5 (a) or (b) at no additional cost to the customer.

(b) *Trust accounts.* Accounts (except collective investment funds) where the bank exercises investment discretion in other than an agency capacity, in which instance the bank shall, upon request of the person having the power to terminate the account or, if there is no such person, upon the request of any person holding a vested beneficial interest in such account, give or send to such person the written notification within a reasonable time. The bank may charge such person a reasonable fee for providing this information.

(c) *Agency accounts.* Accounts where the bank exercises investment discretion in an agency capacity, in which instance:

(1) The bank shall give or send to each customer not less frequently than once every three months an itemized statement which shall specify the funds and securities in the custody or possession of the bank at the end of such period and all debits, credits and transactions in the customer's accounts during such period; and

(2) If requested by the customer, the bank shall give or send to each customer within a reasonable time the written notification described in § 344.5. The bank may charge a reasonable fee for providing the information described in § 344.5.

(d) *Cash management sweep accounts.* A bank effecting a securities transaction for a cash management sweep account shall give or send its customer a written notification as described in § 344.5 for each month in which a purchase or sale of a security takes place in the account and not less than once every three months if there are no securities transactions in the account.

(e) *Collective investment fund accounts.* The bank shall at least annually furnish to the customer a copy of a financial report of the fund, or provide notice that a copy of such report is available and will be furnished upon request to each person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account. This report shall be based upon an audit made by independent public accountants or internal auditors responsible only to the board of directors of the bank.

(f) *Periodic plan accounts.* The bank shall give or send to the customer not less than once every three months a written statement showing:

(1) The funds and securities in the custody or possession of the bank;

(2) All service charges and commissions paid by the customer in connection with the transaction; and

(3) All other debits and credits of the customer's account involved in the transaction; provided that upon written request of the customer, the bank shall give or send the information described in § 344.5, except that any such information relating to remuneration paid in connection with the transaction need not be provided to the customer when the remuneration is paid by a source other than the customer. The bank may charge a reasonable fee for providing information described in § 344.5.

**§ 344.7 Settlement of securities transactions.**

(a) A bank shall not effect or enter into a contract for the purchase or sale of a security (other than an exempted security as defined in 15 U.S.C. 78c(a)(12), government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

(b) Paragraphs (a) and (c) of this section shall not apply to contracts:

(1) For the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association; or

(2) For the purchase or sale of securities that the Securities and Exchange Commission (SEC) may from time to time, taking into account then existing market practices, exempt by order from the requirements of paragraph (a) of SEC Rule 15c6-1, 17 CFR 240.15c6-1(a), either unconditionally or on specified terms and conditions, if the SEC determines that an exemption is consistent with the public interest and the protection of investors.

(c) Paragraph (a) of this section shall not apply to contracts for the sale for cash of securities that are priced after 4:30 p.m. Eastern time on the date the securities are priced and that are sold by an issuer to an underwriter pursuant to a firm commitment underwritten offering registered under the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, or sold to an initial purchaser by a bank participating in the offering. A bank shall not effect or enter into a contract for the purchase or sale of the securities that provides for payment of funds and delivery of securities later than the fourth business day after the date of the contract unless otherwise expressly

agreed to by the parties at the time of the transaction.

(d) For purposes of paragraphs (a) and (c) of this section, the parties to a contract shall be deemed to have expressly agreed to an alternate date for payment of funds and delivery of securities at the time of the transaction for a contract for the sale for cash of securities pursuant to a firm commitment offering if the managing underwriter and the issuer have agreed to the date for all securities sold pursuant to the offering and the parties to the contract have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.

**§ 344.8 Securities trading policies and procedures.**

(a) *Policies and procedures.* Every bank effecting securities transactions for customers shall establish written policies and procedures providing:

(1) Assignment of responsibility for supervision of all officers or employees who:

(i) Transmit orders to or place orders with broker/dealers; or

(ii) Execute transactions in securities for customers; and

(2) Assignment of responsibility for supervision and reporting, separate from those in paragraph (a)(1) of this section, with respect to all officers or employees who process orders for notification or settlement purposes, or perform other back office functions with respect to securities transactions effected for customers; and

(3) For the fair and equitable allocation of securities and prices to accounts when orders for the same security are received at approximately the same time and are placed for execution either individually or in combination; and

(4) Where applicable, and where permissible under local law, for the crossing of buy and sell orders on a fair and equitable basis to the parties to the transaction.

**§ 344.9 Personal securities trading reporting by bank directors, officers and employees.**

(a) *Officers and employees subject to reporting.* Bank officers and employees who:

(1) Make investment recommendations or decisions for the accounts of customers;

(2) Participate in the determination of such recommendations or decisions; or

(3) In connection with their duties, obtain information concerning which securities are being purchased or sold or recommend such action, must report to

the bank, within ten business days after the end of the calendar quarter, all transactions in securities made by them or on their behalf, either at the bank or elsewhere in which they have a beneficial interest. The report shall identify the securities purchased or sold and indicate the dates of the transactions and whether the transactions were purchases or sales.

(b) *Directors subject to reporting.* Bank directors who:

(1) Make investment recommendations or decisions for the accounts of customers; or

(2) Participate in the determination of such recommendations or decisions must report to the bank, within ten business days after the end of the calendar quarter, all transactions in securities made by them or on their behalf, either at the bank or elsewhere in which they have a beneficial interest. The report shall identify the securities purchased or sold and indicate the dates of the transactions and whether the transactions were purchases or sales.

(c) *Exempt transactions.* Excluded from this reporting requirement are:

(1) Transactions for the benefit of the director, officer or employee over which the director, officer or employee has no direct or indirect influence or control;

(2) Transactions in mutual fund shares;

(3) Transactions in government securities; and

(4) All transactions involving in the aggregate \$10,000 or less during the calendar quarter.

(d) *Alternative report.* Where a bank acts as an investment adviser to an investment company registered under the Investment Company Act of 1940, the bank's directors, officers and employees may fulfill their reporting requirement under paragraph (a) or (b) of this section by filing with the bank the "access persons" personal securities trading report required by (SEC) Rule 17j-1, 17 CFR 270.17j-1.

**§ 344.10 Waivers.**

The Board of Directors of the FDIC, in its discretion, may waive for good cause all or any part of this part 344.

Dated at Washington, D.C., this 11th day of December, 1996.

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

Jerry L. Langley,

*Executive Secretary.*

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