the word ''Japan'' and adding the phrase ''the country of origin'' in its place.

e. Paragraph (b)(4)(ii) would be amended by removing the phrase ''Japanese Plant Protection Service'' and adding the phrase ''plant protection service of the country of origin'' in its place.

f. Paragraph (b)(7) would be removed.

g. In paragraph (f), the word ''Japan'' would be removed and the phrase ''the country of origin of the Unshu oranges'' would be added in its place.

Done in Washington, DC, this 22nd day of March 1995.

Terry L. Medley,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 95–7600 Filed 3–28–95; 8:45 am]

BILLING CODE 3410–34–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 303 and 359

RIN 3064–AB11

Regulation of Golden Parachutes and Other Benefits Which May Be Subject to Misuse

AGENCY: Federal Deposit Insurance Corporation (FDIC or Corporation).

ACTION: Notice of proposed rulemaking.

SUMMARY: The FDIC is proposing a rule limiting golden parachute and indemnification payments to institution-affiliated parties by insured depository institutions and depository institution holding companies. The purpose of this rule is to prevent the improper disposition of institution assets and to protect the financial soundness of insured depository institutions, depository institution holding companies, and the federal deposit insurance funds.

DATES: Comments must be received by May 30, 1995.

ADDRESSES: Send comments to Robert E. Feldman, Acting Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. Comments may be hand-delivered to room 400, 1776 F Street, N.W., Washington, D.C. 20429, on business days between 8:30 a.m. and 5:00 p.m. [FAX number: (202) 898–3838.]

FOR FURTHER INFORMATION CONTACT: Robert F. Miailovich, Associate Director, Division of Supervision, (202) 898–6918, 550 17th Street, N.W., Washington, D.C.; Michael D. Jenkins, Examination Specialist, Division of Supervision, (202) 898–6896, 1776 F Street, N.W., Washington, D.C. 20429; Jeffrey M. Kopchik, Counsel, Legal Division, (202) 898–3872; Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

No collection of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) is contained in the proposed rule. Consequently, no information was submitted to the Office of Management and Budget for review.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601 *et seq.*), it is certified that the proposed rule will not have a significant impact on a substantial number of small entities.

Background

Section 2523 of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 [1] (Fraud Act) amended the Federal Deposit Insurance Act (FDI Act) by adding a new section 18(k). Pub. L. No. 101–647, § 2523 (1990). This section 18(k)(1) provides that ''[t]he Corporation may prohibit or limit, by regulation or order, any golden parachute payment or indemnification payment''. 12 U.S.C. 1828(k)(1). The terms ''golden parachute payment'' and ''indemnification payment'' are defined in sections 18(k)(4) and (5)(A) of the FDI Act, respectively. *Id*. at 1828(k) (4) and (5)(A). The statute's proscriptions are applicable to insured depository institutions and depository institution holding companies. *Id*.

On October 7, 1991, the FDIC published a notice of proposed rulemaking entitled ''Regulation of Golden Parachutes and Other Benefits Which Are Subject to Misuse'' to implement this provision of the Fraud Act. 56 FR 50529 (1991) (to be codified at 12 CFR Part 359). By the end of the sixty day comment period, the FDIC received 186 letters commenting on the proposed regulation. The majority of these comment letters suggested that the FDIC revise the proposed rule in order to strike a more equitable balance between the protection of the deposit insurance funds and the needs of depository institutions and depository institution holding companies to attract and retain qualified directors and management. Many of the comment letters also suggested certain technical amendments to the proposed rule to make it reflect more accurately the FDIC's intentions as stated in the preamble. A few comment letters requested that no regulation be promulgated. These letters expressed the opinion that abuses should be dealt with on a case-by-case basis through the use of enforcement proceedings. It should be noted that the FDIC was gratified to observe the exceptionally high level of preparation and thought which went into many of the comment letters.

Due to the significant amount of time which has passed since the publication of the first proposed rule (the First Proposal), the FDIC has decided to publish a second proposal for public comment (the Second Proposal). The Second Proposal incorporates many of the suggestions which were made by the commenters to the First Proposal.

Summary of the Second Proposal

The golden parachute portion of the Second Proposal affects insured depository institutions seeking to make the golden parachute payments [2] only if the institution is in a ''troubled'' condition.[3] The proposed regulation would apply to affiliated depository institution holding companies either if the holding company itself is troubled or if it seeks to make a golden parachute payment to an institution-affiliated party (IAP) of a troubled subsidiary insured depository institution. The indemnification portion of the Second Proposal is applicable to all insured depository institutions and their holding companies regardless of their financial condition.

Generally, the Second Proposal prohibits institutions which are insolvent, in conservatorship or receivership, rated ''4'' or ''5'', in a troubled condition as defined in the regulations of the appropriate federal banking agency, or which are subject to a proceeding to terminate deposit insurance from making any payment to an institution-affiliated party which is contingent on the termination of that person's affiliation with the institution, except payments of death or disability benefits, payments pursuant to qualified retirement plans and employee welfare

[1] The Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 is title XXV of the Crime Control Act of 1990, S. 3266, which was passed by Congress on October 27, 1990 and signed by the President on November 29, 1990.

[2] The terms ''golden parachute payment'' and ''golden parachute'' are used interchangeably throughout this discussion.

[3] The use of the term ''troubled'' in this preamble shall refer to an institution or holding company which meets any of the criteria set forth in §§ 359.1(f)(1)(ii) (A) through (E) of the Second Proposal.

benefit plans and two other exceptions which are described in more detail below. The Second Proposal also prohibits institutions from paying or reimbursing an institution-affiliated party's legal and other professional expenses incurred in administrative or civil proceedings instituted by any federal banking agency unless certain criteria are satisfied. Under no circumstances does the Second Proposal allow the reimbursement or payment of fines or penalties assessed against an institution-affiliated party as a result of such a proceeding.

The Second Proposal recognizes several ''exceptions'' to the prohibition against golden parachute payments.[4] First, § 359.4(b) of the Second Proposal allows an insured depository institution or its depository institution holding company to make a golden parachute payment to an institution-affiliated party who is hired by an institution or holding company with the written consent of the appropriate federal banking agency at a time when the institution or holding company satisfies or is expected to satisfy any of the criteria set forth in § 359.1(f)(1)(ii) of the Second Proposal,[5] and whose golden parachute agreement is approved by the FDIC in its corporate capacity as the regulator of operating state nonmember banks. These criteria are taken from section 18(k) of the FDI Act. (12 U.S.C 1828(k)(4)(A)(ii)).

Second, § 359.4(c) of the Second Proposal permits a golden parachute payment, not to exceed twelve months salary, to an institution-affiliated party in the event of an unassisted change in control, with the prior consent of the appropriate federal banking agency.

The third ''exception'' is contained in § 359.1(f) of the Second Proposal, which defines a ''golden parachute payment''. The FDIC recognizes that one important tool in restoring an institution to financial health may be institutional downsizing through personnel reductions in force. In such situations, institutions may choose to employ an existing severance pay plan or adopt a new plan to assist employees whose employment is terminated. In addition, many corporations (in various industries) maintain severance pay plans which pay benefits to employees who lose their jobs through no fault of their own, for reasons such as an overall reduction in force. Thus, § 359.1(f)(2)(v) of the Second Proposal provides that the term ''golden parachute payment'' does not include any payment made pursuant to a nondiscriminatory severance plan or arrangement which provides for the payment of severance benefits to all eligible employees upon involuntary termination for other than cause, or early retirement, in conjunction with a reduction in force. However, the Second Proposal limits the maximum severance benefit that any employee may receive pursuant to such a plan to twelve months' base salary, although an institution may request consent to make larger payments. In the event that any senior executive officer, as defined in § 303.14(a)(3) of these regulations, is eligible for such severance benefits, the depository institution or holding company must provide 30 days prior written notice to its primary regulator and the FDIC before making such a payment to those individuals.

The fourth ''exception'' to the golden parachute payment prohibition is contained in § 359.1(d) of the Second Proposal which defines ''*bona fide* deferred compensation plan or arrangement''. Section 18(k) of the FDI Act explicitly authorizes the FDIC to define, by regulation or order, permissible *bona fide* deferred compensation plan[s] or arrangement[s]. (12 U.S.C. 1828(k)(4)(C)(ii)).

The definition of ''golden parachute payment'' contained in § 359.1(f) of the Second Proposal also sets forth several other straightforward exceptions which do not require further discussion here.

Section 18(k)(2) of the FDI Act provides that the FDIC ''shall prescribe, by regulation, the factors to be considered by the Corporation in taking any action pursuant to paragraph (1) [its authority to prohibit or limit golden parachute payments and indemnification payments]''. The section also sets forth a number of illustrative factors that should be considered. The Corporation has carefully considered these factors in arriving at the conclusion that golden parachute payments generally should be prohibited, except in the narrow circumstances delineated in § 359.4 of the Second Proposal. Section 359.4 of the Second Proposal also sets forth a procedure to allow an institution or institution-affiliated party which desires to make a payment or enter into an agreement which it determines should not be prohibited, but which is not clearly covered by any of the express ''exceptions'' to the prohibition, to solicit appropriate regulatory approvals. In so doing, the institution or institution-affiliated party will be required to address certain of the factors enumerated in section 18(k) of the FDI Act, and the appropriate federal banking agency and the Corporation may consider the remaining factors and any other circumstances which bear on the issue of whether the proposed payment would be contrary to the intent of the prohibition.

Section 18(k) of the FDI Act also authorizes the FDIC to prohibit or limit indemnification payments. (12 U.S.C. 1828(k)(5).) A ''prohibited indemnification payment'' is defined in the Second Proposal as payment by an insured depository institution or its depository institution holding company for the benefit of an IAP in order to pay or reimburse such person for any liability or legal expense sustained with regard to an administrative or civil enforcement action which results in a final order or settlement pursuant to which the IAP is assessed a civil money penalty, removed from office, prohibited from participating in the conduct of the affairs of an insured depository institution or required to cease and desist from or take any affirmative action described in section 8(b) of the FDI Act. The legislative history of the Fraud Act, which added section 18(k) to the FDI Act, makes it clear that this section is intended (i) to preserve the deterrent effects of administrative enforcement or civil actions by insuring that institution-affiliated parties who are found to have violated the law, engaged in unsafe or unsound banking practices or breached any fiduciary duty to the institution, pay any civil money penalties and associated legal expenses out of their own pockets without reimbursement from the institution or its holding company and (ii) to safeguard the assets of financial institutions by prohibiting the expenditure of funds to defend, pay penalties imposed on or reimburse institution-affiliated parties who have been found to have violated the law. 136 Cong. Rec. E3687 (daily ed. November 2, 1990) (statement of Rep. Schumer).

The FDIC is of the opinion that it would be inconsistent with the intent of the Fraud Act categorically to prohibit insured depository institutions and holding companies from advancing funds to pay or reimburse IAP's for reasonable legal or other professional expenses incurred in defending against an administrative or civil action brought by a federal banking agency prior to the entry of a final order. Therefore, § 359.5 of the Second Proposal sets forth the circumstances under which such indemnification payments may be

[4] More precisely, only two of these are actual exceptions to the prohibition in that they permit a payment or agreement which is covered by the statutory language. The others are definitions of statutory terms which have been developed or refined by the Corporation.

[5] These criteria are that the institution or holding company is insolvent, in conservatorship of receivership, troubled, rated ''4'' or ''5'', or subject to a proceeding to terminate deposit insurance.

made. The FDIC is of the opinion that five criteria must be satisfied in order to permit an institution to make or agree to make any indemnification payment to or for the benefit of any IAP prior to the entry of a final order in the IAP's favor. However, an institution or its holding company may purchase commercial insurance policies or fidelity bonds, at a reasonable cost, which may pay the cost of defending an administrative proceeding or civil action. Such insurance cannot pay any penalty or judgement. However, it may pay restitution to the insured depository institution, depository institution holding company or the receiver.

Issues Raised By Commentators—Golden Parachutes

The FDIC has carefully reviewed and analyzed the substantial number of comment letters which it received in response to the First Proposal. With regard to the golden parachute portion of the First Proposal, the most significant issues raised by the comment letters are discussed below.

1. Bona Fide Deferred Compensation Plans

A substantial number of commenters raised the issue of whether the requirement that *bona fide* deferred compensation plans be ''funded'' in order to be excluded from the regulation's proscriptions is appropriate. Section 359.1(d)(2) of the First Proposal established a requirement that a nonqualified [6] deferred compensation plan be ''funded'' in order to be considered a ''*bona fide* deferred compensation plan or arrangement'' which is excluded from the definition of golden parachute payment. The term funded was defined as meaning that ''specific assets are segregated or otherwise set aside so that such assets are not available to the institution or holding company for any purpose other than distribution to the participating employee(s) and are not available to satisfy claims of the institution's or holding company's creditors''. First Proposal § 359.1(d)(2). The vast majority of comment letters which the FDIC received raised the issue of the appropriate definition of *bona fide* deferred compensation plan and virtually every letter which raised this issue disagreed with the Corporation's imposition of the funding requirement. The predominant argument against such a requirement is that when Congress drafted section 18(k)(4)(C)(ii) of the FDI Act to exclude *bona fide* deferred compensation plans from the definition of golden parachute, it was aware and approved of the established industry practice of utilizing unfunded, nonqualified deferred compensation plans (commonly referred to as elective, excess or supplemental plans) to supplement the traditional tax qualified defined benefit or defined contribution retirement plan. Many of the comment letters also pointed out that the Internal Revenue Code (26 U.S.C. 1 *et seq.*) (the ''Code'') recognizes these types of nonqualified deferred compensation plans and urged the FDIC to look to the Code as being dispositive. Almost all of the relevant comment letters expressed grave concerns that the FDIC's imposition of the funding requirement would upset established deferred compensation plans and prompt depository institutions and holding companies to incur significant unwanted expenses by terminating these plans and making cash payments to the beneficiaries. Nonetheless, Congress chose not to define the term ''*bona fide* deferred compensation plan'', but explicitly left that task to the FDIC.

First, it should be pointed out that the FDIC is not bound by the provisions of the Internal Revenue Code, or any other federal statute, in defining the term *bona fide* deferred compensation plan or arrangement. While the Code's explanation and treatment of such plans may be instructive, it is not binding on the Corporation in the context of this rulemaking. Similarly, the fact that the industry has utilized unfunded, non-qualified plans for a period of time and would be inconvenienced by the implementation of the proposed regulation is insufficient to compel the change that the majority of comments advocate. The FDIC's responsibility is to ascertain the proper meaning of the term *bona fide* deferred compensation plan, while ensuring that such definition does not permit depository institutions, holding companies or institution-affiliated parties to circumvent the intent of the statute by exploiting an imprecisely drafted definition. On the other hand, if the Corporation can accomplish its purposes in a manner that is less disruptive but just as effective as the scheme set forth in the First Proposal, such an alternative bears close scrutiny.

The FDIC has been persuaded by the many comments it received with regard to the definition of *bona fide* deferred compensation plan that the funding requirement which was contained in § 359.1(d)(2) of the First Proposal is not necessary and should be deleted. Thus, the definition of *bona fide* deferred compensation plan or arrangement, which appears in § 359.1(d) of the Second Proposal, does not contain such a requirement. This provision of the Second Proposal permits unfunded, nonqualified deferred compensation plans provided the institution or holding company utilizes either a rabbi or a secular trust (which are properly accounted for) or the benefits or payments are expensed as an accrued liability according to generally accepted accounting principles (GAAP). Second Proposal § 359.1(d). It is the FDIC's judgment that these requirements will permit depository institutions and holding companies to utilize deferred compensation plans for legitimate purposes, while ensuring that such plans can not be used as a vehicle to make what would otherwise be considered a prohibited golden parachute payment.

2. Severance Pay Plans

All the comment letters which raised the issue expressed support for the FDIC's decision to except traditional severance pay plans which cover reductions in force from the definition of golden parachute payment. However, a substantial percentage of these letters urged the Corporation to increase the allowable amount of severance pay from six to twelve months salary and to expand the exception to include payments pursuant to voluntary resignations or early retirements which occur in conjunction with a reduction in force instituted by a depository institution or holding company. After careful consideration, the Corporation has elected to increase the permissible amount of severance pay from six to twelve months' salary. In addition, the regulation has been amended to permit institutions to request consent to pay greater severance benefits. Second Proposal § 359.1(f)(2)(v). The FDIC requests public comment on this new alternative. The inclusion in the exception of voluntary resignations and early retirements in conjunction with a reduction in force provides depository institutions and holding companies with more flexibility in achieving an optimum workforce size and cost savings. Second Proposal § 359.1(f)(2)(v). The FDIC has also decided to include a definition of the term ''nondiscriminatory'' in § 359.1(j) of the Second Proposal in an effort to make it clear how this term should be applied in the context of this regulation. The Corporation emphasizes that this exception is only applicable to institution-affiliated parties who are

[6] The term ''nonqualified'' refers to a benefit plan which is not qualified (or is not intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401).

terminated, resign or retire due to a reduction in force and receive severance benefits pursuant to a existing nondiscriminatory severance pay plan.

3. White Knight Exception

Section 359.4 of the First Proposal sets forth what is commonly referred to as the ''white knight'' exception to the golden parachute prohibition. This provision permits a troubled depository institution or holding company to hire an individual and agree to pay him/her a golden parachute payment upon termination of employment, provided that the amount and terms of the golden parachute payment receive the prior written consent of the appropriate federal banking agency and the FDIC. As we stated in the preamble to the First Proposal:

> The purpose of this exception is to permit a troubled institution or holding company to attempt to reverse its slide toward economic failure by attracting competent, new management which enjoys the confidence of that institution's primary federal regulator and the FDIC. . . . [T]he FDIC is aware that individuals who possess the experience and expertise which qualify them for such a position are highly sought after business persons who, in most circumstances, already have established successful careers with other financial institutions. In order to induce such an individual to leave an established, stable career for a job in a troubled institution which may not survive regardless of that individual's efforts, it is generally necessary to agree to pay that individual some sort of severance payment in the event that the efforts of the individual for the institution are not successful. It is the FDIC's view that . . . such agreements reflect good business judgment, recognize the realities of the marketplace and may benefit both the institution and the deposit insurance funds.

(56 FR 50531, October 7, 1991). While every comment letter which addressed this exception supported it, a significant percentage of those letters urged the FDIC to broaden the exception in certain respects. First, it was recommended that the Corporation revise § 359.4 of the First Proposal to automatically grandfather institution-affiliated parties who were hired to assist troubled depository institutions and holding companies prior to the effective date of the final regulation. The FDIC has carefully considered this suggestion and is of the opinion that such an across-the-board grandfathering would not be prudent. Section 359.4 is structured so that the appropriate federal banking agency and the FDIC have an opportunity to review the amount and terms of any proposed severance arrangement prior to it being entered into. To grandfather all such existing severance agreements would deny the appropriate federal banking agency and the FDIC the opportunity to conduct this review. However, institution-affiliated parties, insured depository institutions and holding companies are of course free to request review and approval of existing agreements for institution-affiliated parties who were hired at a time when the depository institution or holding company already met any of the criteria listed in § 359.1(f)(1)(ii) of the Second Proposal.

Second, a significant number of commentators also suggested that the white knight exception be broadened to encompass individuals who are hired ''in contemplation of'' the depository institution or holding company becoming troubled. These letters urged this revision as a way to allow depository institutions to address their problems sooner and, thus, more effectively. The FDIC concurs in this line of reasoning. It makes good sense that the value of this exception can be enhanced by not restricting its coverage to institutions which are already categorized as troubled. If existing management or a board of directors is of the reasoned opinion that the institution in question is sliding toward becoming troubled and that new management is needed to arrest that slide, then prudent business practice would suggest that it is better to hire such new management sooner rather than later. Therefore, the exception has been expanded to allow applicants to apply for an exemption prior to becoming troubled when they are of the opinion that they are approaching a troubled condition and new management is needed. Second Proposal § 359.4(b).

Third, several comment letters suggested that the FDIC broaden the § 359.4 exception of the First Proposal to include current officers and employees of a depository institution who are promoted to executive positions at a time when the institution is troubled. While the FDIC agrees that ''it is not axiomatic that competent new management can only be found outside of an institution'', the underlying reason for allowing what would otherwise be a prohibited golden parachute payment is not present in the case of a current employee who is promoted to an executive position. As we stated earlier, this type of severance payment will be approved in limited circumstances as a way to entice competent management to sever established ties with their current employer and take a calculated risk that they can assist in bringing a troubled institution back to financial health. This rationale does not apply to the case of a current employee of a troubled institution since he/she does not need to be enticed to give up an established, stable career with another employer.

The FDIC's experience since the publication of the First Proposal has made it clear that some confusion exists concerning the proper procedure to request and the effect of obtaining prior written consent for a white knight exception. Interested parties are referred to new § 359.6 of the Second Proposal, ''Filing Instructions''. In terms of effect, the FDIC would like to clarify that approval of a white knight exception does not improve the white knight's position in the event of the insolvency of the institution as the FDIC (in its corporate capacity) can neither bind a receiver nor affect the provability of receivership claims. In the event that the insured depository institution is placed into receivership or conservatorship, the FDIC (in its corporate capacity) would not be obligated to pay the promised severance benefit and the white knight would be accorded no preferential treatment on the basis of such prior approval.

4. Permissible Golden Parachutes in Changes in Control

Several comment letters noted that the First Proposal does not provide an exception to the prohibition against golden parachute payments in the case of a change in control where the depository institution to be acquired is troubled. These letters raised the arguments which were briefly mentioned in the preamble to the First Proposal (56 FR 50529, October 7, 1991) concerning the benefits of protecting executive officers of companies which are the subject of hostile takeovers so that their business decisions concerning what is best for their company are not influenced by the acquisition's ultimate effect on their employment. While the FDIC agrees that golden parachute payments can serve a useful purpose in such circumstances, expanding the exceptions permitted pursuant to § 359.4 of the First Proposal to include golden parachute payments made in the context of changes in control would open the door to the possibility of payments being made to institution-affiliated parties who are substantially responsible for the depository institution's troubled condition. After balancing the relative advantages and disadvantages of expanding § 359.4 to include this exception, the FDIC is of the opinion that the safety of the deposit insurance funds and the soundness of the banking system in general is best served by permitting limited golden parachute payments with prior regulatory approval in the context of

unassisted changes in control.[7] While this decision does not adopt completely the position advocated by the majority of comment letters, the FDIC is concerned that a more open-ended exception would have the unfortunate result of allowing institution-affiliated parties who are substantially responsible for the troubled condition of their depository institutions to receive golden parachute payments.

5. Definition of Golden Parachute Payment

A significant number of comment letters pointed out that a literal reading of the definition of golden parachute payment contained in § 359.1(g) of the First Proposal would include certain forms of retirement payments being made to former institution-affiliated parties who retired and began collecting such payments at a time when the depository institution or its holding company did not satisfy any of the circumstances delineated in §§ 359.1(g)(1)(ii) (A) through (E) of the First Proposal, but which institution or holding company subsequently became troubled. It was also brought to our attention that a literal reading of the definition seemed to provide that even when a troubled depository institution or its holding company ceased satisfying any of the criteria delineated in §§ 359.1(g)(1)(ii) (A) through (E) of the First Proposal, golden parachute payments to institution-affiliated parties who leave the institution subsequent to its return to financial health would continue to be prohibited. It is not the FDIC's intent that the regulation produce either of these results. Institution-affiliated parties who retire from an insured depository institution or holding company at a time when it is not troubled and begin collecting periodic retirement payments should not have to worry that the subsequent deterioration of the institution or holding company will jeopardize their continuing to receive such payments, at least as far as this regulation is concerned.[8] Similarly, if a depository institution or holding company recovers from its troubled condition, then it is no longer covered under the scope of the regulation with respect to its existing institution-affiliated parties, and what might have been considered prohibited golden parachute payments would no longer be unlawful and could be paid to an institution-affiliated party whose employment is terminated once the institution or holding company is no longer troubled.[9] It is our opinion that the revised definition of bona fide deferred compensation plan or arrangement contained in § 359.1(d) of the Second Proposal should alleviate these concerns since the revised definition recognizes and includes well-established forms of deferred compensation. However, the FDIC has also chosen to revise the definition of golden parachute payment, which is contained in § 359.1(f) of the Second Proposal, to make it clear that to be a golden parachute, an institution-affiliated party's employment by or affiliation with an insured depository institution or holding company must terminate at a time when the institution or holding company is troubled or in contemplation of it becoming troubled. Second Proposal § 359.1(f)(1)(iii). If an institution-affiliated party's employment is terminated at a time when the depository institution or holding company is troubled, the payment of prohibited golden parachute payments to that individual will continue to be prohibited even after the institution or holding company ceases to be troubled.

6. Definition of Depository Institution Holding Company

Section 359.1(f) of the First Proposal, the definition of ''depository institution holding company'', includes any bank holding company, savings and loan holding company and any direct or indirect subsidiary thereof, other than an insured depository institution. A number of comment letters raised the concern that the definition in the First Proposal is not consistent with the definition of depository institution holding company contained in section 3(w)(1) of the FDI Act. A number of comment letters also argued that the broader definition used in the First Proposal would improperly include non-financial services affiliates that are not involved with the business conducted by the insured depository institution within the purview of the regulation. Pursuant to the First Proposal, golden parachute payments by a non-financial services company to one of its executives would be restricted simply because that company was ultimately owned by a holding company which also owned an insured depository institution. After considering this point, the FDIC agrees that the definition of depository institution holding company in the Second Proposal should mirror the definition contained in section 3(w)(1) of the FDI Act. Second Proposal § 359.1(b).

7. Scope of Rule

Section 359.1(j) of the First Proposal contains the definition of institution-affiliated party. A number of comment letters raised the issue that the regulatory definition proposed by the FDIC goes beyond the statutory definition contained in section 3(u) of the FDI Act by including persons who have a certain relationship with a depository institution holding company. However, in carefully reviewing the language of section 18(k)(4)(A) of the FDI Act, the FDIC is of the opinion that Congress intended to include within the statute's scope individuals who are institution-affiliated parties of depository institution holding companies.

> The term ''golden parachute payment'' means any payment * * * by any insured depository institution or depository institution holding company for the benefit of any institution-affiliated party pursuant to an obligation of such institution or holding company that * * * is contingent on the termination of such party's affiliation with the institution or holding company * * * [Emphasis added].

12 U.S.C. 1828(k)(4)(A). This interpretation is consistent with section 8(b)(3) of the FDI Act which provides that the Act's enforcement provisions are equally applicable to bank holding companies. Our consultations with the Federal Reserve Board staff have established that the Federal Reserve Board's established position is that it has the authority to take enforcement action against institution-affiliated parties of bank holding companies pursuant to section 8(b)(3) of the FDI Act.

The FDIC is also of the opinion that to interpret section 18(k) to not apply to institution-affiliated parties of holding companies would subvert the statute's intent by leaving a significant gap in its coverage. Federal Reserve staff has advised the Corporation that some of the most abusive golden parachute payments which were made prior to the enactment of the statute and were known to Congress at the time involved IAPs of holding companies. Thus, the FDIC has decided not to revise the definition of IAP contained in the First Proposal, except for a minor technical change.

[7] Obviously, this analysis does not apply to situations where the Corporation is assisting in the acquisition of a troubled insured depository institution pursuant to section 13 of the FDI Act.

[8] Obviously, the financial deterioration of the institution or holding company may adversely affect the institution's or holding company's ability to make the payments regardless of the regulation.

[9] This payment could include benefits which continued to accrue during the tenure of the institution's or holding company's troubled condition.

8. Limitation to Executive Officers and Directors

Several comment letters suggested that the scope of the regulation should be limited to cover only executive officers and directors of insured depository institutions and depository institution holding companies, as opposed to institution-affiliated parties of institutions and holding companies. On the other hand, section 18(k)(4) of the FDI Act explicitly refers to ''institution-affiliated party''.

While potential golden parachute abuses could theoretically involve non-executive officers and non-directors, it has been the FDIC's experience that such instances are extremely rare. It is not the FDIC's intent to place unfair and inappropriate limits on payments to a bank or holding company's non-official or non-managerial staff. This is evidenced, for example, by the severance pay exception which is contained in § 359.1(f)(2)(v) of the Second Proposal. In the Corporation's view, it is very unlikely that a bank teller (or other non-executive/non-director) would come within the scope of this rule since bank tellers generally do not get paid golden parachutes. That being the case, and in view of the fact that the statute uses the term ''institution-affiliated party'', the FDIC has chosen not to explicitly exclude employees who are not senior executive officers or directors from the Second Proposal's scope. It should also be pointed out that any such employee who feels that he/she is being unfairly affected by the rule could apply for permission to receive a payment pursuant to § 359.4 of the Second Proposal.

9. Golden Parachute Agreements Entered Into Prior to Effective Date of Final Regulation

The First Proposal took the position that the regulation could limit or prohibit golden parachute and/or indemnification payments which are sought to be made pursuant to contracts and agreements which were entered into prior to the effective date of the final regulation, *i.e.,* as of the effective date of the statute. A number of comment letters briefly asserted that the regulation could not lawfully affect such agreements since to do so would be ''unconstitutional''. However, the vast majority of comment letters which raised this issue did not explain in any detail the basis for this alleged unconstitutionality.

The FDIC has examined this issue in greater depth and while we remain convinced that ample precedent exists to support the position which was taken in the First Proposal, no compelling need exists to apply the regulation in this fashion. However, the FDIC views the Second Proposal as putting institutions and IAPs on notice of the Corporation's views with regard to these types of agreements and the FDIC will look unfavorably upon any golden parachute agreement which is entered into after the date of this proposal but before the effective date of the final regulation as an attempt to circumvent the regulation.

10. Prior Approval of Otherwise Prohibited Golden Parachutes

Section 359.2(b) of the First Proposal permits the payment of a golden parachute provided that such payment is approved by the institution's appropriate federal banking agency, with the written concurrence of the FDIC. Several comment letters pointed out, however, that this subsection afforded only depository institutions and holding companies the right to request such an exception. In the interest of fairness, the FDIC has revised this subsection to permit institution-affiliated parties to also request permission to receive such a payment.[10]

Section 359.2(b) of the First Proposal also requires that applicants requesting permission to make or receive an otherwise prohibited golden parachute payment shall provide the appropriate federal banking agency and the FDIC with certain information. First Proposal §§ 359.2(b) (1) through (4). A significant number of commentators asserted that this section of the First Proposal improperly reverses the burden of proof as delineated in section 18(k)(2) of the FDI Act to compel the applicant to demonstrate that the applicant has no reasonable basis to believe that the institution-affiliated party to whom the payment is to be made has committed any fraudulent act, is substantially responsible for the insolvency of the institution or holding company, has materially violated any banking law or regulation or has violated certain specific federal criminal laws. These comment letters also asserted that the structure of the proposed regulation requires the applicant to ''prove a negative'', an impossible task.

The FDIC is of the opinion that the arguments advanced in the comment letters concerning an inappropriate reversal of the burden of proof are misplaced. First, a careful reading of section 18(k)(2) of the FDI Act reveals that it does not establish a burden of proof, in the traditional legal sense, at all. What this subsection does is to delineate certain factors which Congress suggests that the FDIC consider in evaluating a request to pay or receive an otherwise prohibited golden parachute payment. This list of factors is not mandatory, nor is it exclusive. The only mandatory language in section 18(k)(2) requires the FDIC to prescribe whatever factors it ultimately decides to consider in any regulation it promulgates. The statute does not address the question of which party bears the burden of producing evidence or the burden of proof. What the FDIC has chosen to do in the First Proposal is to place the burden of production of evidence where it most reasonably belongs, with the party that possesses or has the most complete access to the information which is necessary for the Corporation to make an informed and equitable judgment. The FDIC is not requiring that a party seeking to make or receive a golden parachute payment ''prove his or her innocence''.

In response to the comment letters, the FDIC has revised § 359.2(b) of the First Proposal in an effort to clarify how this section will function. These revisions make it clear that the depository institution, holding company or institution-affiliated party seeking a determination that an otherwise prohibited golden parachute payment is permissible is required to inform the appropriate federal banking agency and the FDIC of any information of which it is aware that would indicate that there is a reasonable basis to believe that the institution-affiliated party in question satisfies any of the criteria set forth in §§ 359.4(d) (1) through (4) of the Second Proposal. If the applicant is not aware of any such information, it shall so certify.

11. Condition of Institution at Time of Termination of Employment Is Crucial

Previously in this preamble, we clarified that the Second Proposal should not be construed to cut off the payment of retirement benefits to former institution-affiliated employees who retired and began receiving retirement payments at a time when the depository institution or its holding company was not troubled, in the event that such institution or holding company subsequently becomes troubled. This same question arises in the case of non-retirement benefits. For example, while most golden parachute payments are lump sum, the Corporation is aware of instances where such payments are made in periodic installments. The

[10] Such a request should be in letter form to the FDIC's Regional Director (DOS) for the region in which the depository institution or holding company is headquartered.

FDIC is of the opinion that as long as the institution-affiliated party did not terminate his/her employment in contemplation of the depository institution or holding company becoming troubled in an effort to circumvent the regulation's proscriptions, such payments should be allowed to continue because the nexus between the institution-affiliated party and the institution's or holding company's troubled condition would not be present. However, this is not meant to suggest that such retirement benefits or permissible golden parachute payments will be continued in the event that the institution is placed into conservatorship or receivership.

12. Other Golden Parachute Issues

A number of comment letters took issue with the fact that the First Proposal prohibits the payment of a golden parachute by both an insured depository institution and its holding company when either of those entities is troubled. These letters suggested that the First Proposal should be revised to provide that only the troubled entity be prohibited from making a golden parachute payment. The FDIC has carefully considered this suggestion and has decided to scale back its original proposal and to adopt a modified version of the commenters' suggestion. Thus, a troubled insured depository institution may not make a golden parachute payment to any of its IAPs, excluding any of the exceptions described previously. In addition, a depository institution holding company may not make a golden parachute payment to any of its IAPs if it is troubled and may not pay a golden parachute to an IAP of an affiliated insured depository institution if that institution is troubled.

The FDIC received several comment letters which suggested that the Corporation make an exception to the golden parachute prohibition for depository institutions with a composite rating of ''4'', but which exceed all applicable regulatory capital requirements. The FDIC has decided not to incorporate this exception into the Second Proposal since an institution's capital level is only one indication of its overall financial health.

A significant number of comment letters expressed concern that the criteria delineated in § 359.1(g)(1)(ii)(C) of the First Proposal (that the depository institution or holding company be designated troubled by its primary federal regulator) is overly broad since it would include any institution or holding company which is subject to a written supervisory agreement even if that institution or holding company is not experiencing significant financial difficulties. Since the nature of written supervisory agreements vary and that the facts of each case are so individual, the FDIC prefers not to make a blanket exception to the rule in this case. Rather, the Corporation will consider exceptions on a case by case basis pursuant to § 359.4(d) of the Second Proposal.

Issues Raised By Commentators—Indemnification Payments

The FDIC has carefully reviewed and analyzed the comment letters with regard to the indemnification portion of the First Proposal.

1. Criteria for Making Indemnification Payments

Section 359.5 of the First Proposal delineates the circumstances under which an insured depository institution or depository institution holding company may make or agree to make indemnification payments to institution-affiliated parties. The comment letters made it clear that this section of the First Proposal is viewed as being just as significant as the sections dealing with golden parachute payments. The overwhelming majority of comment letters expressed the opinion that the prohibitions contained in this section of the First Proposal would make it unreasonably difficult for depository institutions and holding companies to attract and retain competent officers, directors and employees.

Section 359.5(a) of the First Proposal sets forth six criteria which must be met in order for a depository institution or holding company to make or agree to make indemnification payments to an institution-affiliated party. The majority of comment letters which raised indemnification issues focused on § 359.5(a)(1) of the First Proposal. This subsection provides that in order to indemnify an institution-affiliated party, the institution's or holding company's board of directors, in good faith, must determine in writing that the institution-affiliated party has a ''substantial likelihood of prevailing on the merits''. The consensus of commentators' opinions was that this standard is so difficult to meet that a board of directors very rarely, if ever, would be able to authorize indemnification. Many comment letters pointed out that requests for indemnification are customarily made at the commencement of an administrative action or civil proceeding when the institution-affiliated party and his/her counsel are just beginning to assemble their case. Thus, many of the facts and circumstances surrounding the conduct in question are not yet known. This being the case, the commentators argued that it would be very difficult for a board of directors to find that an institution-affiliated party had a substantial likelihood of prevailing on the merits. Too many unanswered questions would be present for such a finding to be realistically made. The commentators recommended a variety of lesser standards, most notably that the institution-affiliated party ''acted in good faith and in a manner he/she believed to be in the best interests of the institution'', that there is a ''reasonable likelihood of prevailing on the merits'' or that the FDIC defer to the applicable state law standard.

After considerable review, the FDIC agrees with the position expressed by the majority of commentators that the standard contained in § 359.5(a)(1) of the First Proposal imposes too significant an obstacle to reasonable and fair indemnification payments. However, the Corporation does not agree with the commentators who suggested that it should defer to the applicable state law standard. In enacting section 18(k) of the FDI Act, Congress made it quite clear that there was to be one uniform federal standard to govern the making of indemnification payments by insured depository institutions and depository institution holding companies. In an effort to balance the need of depository institutions to attract and retain qualified directors and management with the protection of the deposit insurance funds, the FDIC has decided to revise § 359.5(a)(1) of the First Proposal to utilize a somewhat less stringent standard. Therefore, § 359.5 of the Second Proposal requires that the depository institution's or holding company's board of directors determines in writing that the institution-affiliated party requesting indemnification ''acted in good faith and in a manner which he/she believed to be in the best interests of the institution''. Of course, the FDIC expects that an institution's board of directors will make such a finding only after due investigation.

2. Continual Monitoring by Board of Directors Not Required

A significant number of comment letters also took issue with the FDIC's requirement, contained in § 359.5(a)(3) of the First Proposal, that the institution's or holding company's board of directors continually monitor actions against institution-affiliated parties so that it can reassess its

decision to permit indemnification. These commentators expressed the opinion that such a requirement places an unfair and undue burden on both the board of directors and the institution-affiliated party seeking indemnification. The proposed standard would mean that a board's decision would never be ''final'', regardless of the amount of time, effort and painstaking review that went into it. It would also mean that an institution-affiliated party could never depend on indemnification since a prior decision to approve indemnification could be revoked at any time. The FDIC agrees that there is value in encouraging an amount of certainty in such cases. Thus, this requirement has been deleted from the Second Proposal.

3. Permissible Indemnification Payments

Section 359.5(a)(4) of the First Proposal prohibits the use of indemnification payments to pay or reimburse an institution-affiliated party for the amount of, or any cost incurred in connection with, any settlement of an administrative proceeding or civil action instituted by any federal banking agency or any judgment or penalty imposed with respect to any such matter where the IAP is assessed a civil money penalty, removed from office or made subject to a cease and desist order. The FDIC received a substantial number of comment letters which addressed this particular restriction. Interestingly, however, while the proscription of the use of indemnification to pay for settlements was criticized, the arguments against it were often diametrically opposed. For example, a number of comment letters made the argument that to prohibit the use of indemnification to pay for costs associated with settlements would force institution-affiliated parties to litigate every action to its ultimate conclusion in the hope of earning the right to be indemnified. On the other hand, an approximately equal number of comment letters argued just as vociferously that this requirement would compel institution-affiliated parties to settle actions immediately before costs became prohibitively high, thereby denying them an opportunity to defend themselves. Other comment letters pointed out that negotiated settlements benefit all parties involved and that a settlement where the institution-affiliated party does not admit to wrongdoing should not come within the definition of indemnification payment contained in section 18(k)(5)(A) of the FDI Act because the settlement agreement would not contain any penalty or require any affirmative action that would, if embodied in a final order, preclude indemnification under FDI Act section 18(k)(5)(A) and § 359.5(a)(5) of the First Proposal.

After considerable review, the FDIC has chosen not to permit indemnification of settlement costs by the depository institution or holding company where the IAP is assessed a civil money penalty, removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution or required to cease and desist from or take any affirmative action described in section 8(b) of the Act.[11] However, insured depository institutions and depository institution holding companies may purchase commercial insurance policies or fidelity bonds, at a reasonable cost, which may pay all costs incurred in an action or proceeding which is settled, except civil money penalties and judgements. As we noted earlier, it is also permissible for insurance policies and bonds to pay restitution to the depository institution, holding company or receiver.

4. Involvement by Majority or All of Board of Directors

A significant number of comment letters pointed out that § 359.5(b) of the First Proposal, which prohibits an institution-affiliated party who is requesting indemnification from participating in any way in the board's discussion and approval of such payments, does not take into account situations where the majority or all the members of the board of directors are the subject of an enforcement action or civil proceeding. Thus, consistent with several recommendations we received, the FDIC has added new §§ 359.5 (c) and (d) to the Second Proposal. Section 359.5(c) provides that if a majority of the members of an institution's or holding company's board of directors are named as respondents in an administrative proceeding or civil action commenced by any federal banking agency the remaining board member(s) may either make an independent decision concerning authorization of indemnification payments or retain independent legal counsel to provide an opinion as to whether the conditions contained in § 359.5(a) of the Second Proposal have been met. If the entire board of directors is subject to the administrative action or civil proceeding, § 359.5(d) of the Second Proposal requires the board to retain independent legal counsel to opine as to whether the conditions set forth in § 359.5(a) have been met. If independent legal counsel is of the opinion that these conditions have been met, the board may rely on such an opinion in authorizing the requested indemnification.[12] The FDIC would regard legal counsel as being ''independent'' (for purposes of this regulation) if the attorney(s) is not a member of the depository institution's or holding company's in-house legal staff, does not have an ongoing relationship with the depository institution or holding company and no other conflict of interest is present. The FDIC is of the opinion that these procedures effectively address the difficulties inherent in situations where the majority of or the entire board of directors of an institution or holding company are the subjects of an enforcement proceeding. The use of independent legal counsel ensures an unbiased review of the five criteria necessary to approve indemnification and does not impose any undue hardship upon the depository institution or holding company in question.

5. Definition of Indemnification Payment

Section 359.1(h) of the First Proposal contained the definition of ''indemnification payment''. A number of comment letters expressed concern that even if an institution or holding company could qualify to purchase a commercial insurance policy or fidelity bond which would cover the costs of defending and/or settling an administrative action or civil proceeding commenced by a federal banking agency, the proposed regulation prohibited an institution or holding company from purchasing such coverage. First Proposal § 359.1(h)(2). Upon further consideration, as we noted earlier herein, the FDIC is of the opinion that if a depository institution or holding company can purchase, at reasonable rates, a commercial insurance policy or fidelity bond which will pay the costs of defending and/or settling an administrative action or civil proceeding commenced by a federal banking agency, neither the statute nor any consideration of safe and sound banking practice require the Corporation to interfere with such an arrangement. Section 359.1(l)(2) of the Second Proposal reflects this change. This revision should address the concerns

[11] If indemnification was authorized and paid by the depository institution or holding company pursuant to section 359.5 of this part, the IAP is obligated to reimburse the institution or holding company, respectively.

[12] Of course, the board of directors could decline to approve the indemnification request despite counsel's favorable opinion.

raised by numerous comment letters that the proposed regulation's restriction would impair the ability of depository institutions and holding companies to attract and retain competent management and directors. It is important to emphasize that the Second Proposal would prohibit such an insurance policy or bond from being used to pay or reimburse an institution-affiliated party for the amount of any judgment or civil money penalty assessed against him/her.

6. Fees Incurred During Investigations

The First Proposal did not address the question of whether indemnification for counsel fees incurred during the investigative stage of a potential administrative enforcement action should be permitted. In view of the definition of indemnification payment contained in section 18(k)(5)(A) of the FDI Act and its specific reference to ''any administrative proceeding or civil action instituted by the appropriate Federal banking agency'', the FDIC is of the opinion that indemnification of such expenses incurred prior to the commencement of a formal action should not be prohibited.

Technical Amendments

The comment letters also suggested a number of technical revisions to the First Proposal to clarify certain provisions or avoid certain anomalies. The definition of golden parachute payment contained in section 18(k)(4)(A) of the FDI Act refers to ''any payment (or any agreement to make any payment) in the nature of compensation * * *.'' The definition contained in section 359.1(g)(1) of the First Proposal deleted the phrase ''in the nature of compensation''. Several comment letters pointed out that the deletion of this phrase from the regulatory definition could be construed to prohibit the customary payment of certain accrued benefits upon termination of employment (e.g., accrued vacation, sick leave, etc.). Since it is not the FDIC's intent to prohibit depository institutions and holding companies, even those that are troubled, from paying terminating employees for accrued but unused benefits such as vacation or sick time, this phrase has been added to the Second Proposal.[13] Second Proposal § 359.1(f)(1).

Several comment letters also pointed out that the definition of ''*bona fide* deferred compensation plan or arrangement'' contained in § 359.1(d)(1) of the First Proposal did not allow for reasonable earnings on elective deferred compensation. Section 359.1(d)(1) of the Second Proposal makes it clear that a *bona fide* deferred compensation plan includes the reasonable investment return on such elective deferrals.

Section 18(k)(4)(C) of the FDI Act and § 359.1(g)(2) of the First Proposal delineate certain types of payments which are not included within the definition of golden parachute. In describing such payments, the words ''nondiscriminatory'' and ''benefit plan'' are used. In view of the fact that the precise definition of these terms is very important, the FDIC has added them to the list of definitions contained in the Second Proposal. Second Proposal §§ 359.1 (c) and (j). In a similar vein, several comment letters suggested that the term ''indemnification payment'' contained in § 359.1(h) of the First Proposal be changed to ''prohibited indemnification payment'' in order to avoid confusion with certain types of indemnification payments which are permissible. The FDIC agrees with and has adopted this suggestion. Second Proposal § 359.1(l).

A significant number of comment letters pointed out that while the definition of an excess deferred compensation plan contained in § 359.1(d)(2)(i) of the First Proposal correctly referenced the limitations imposed by section 415 of the Internal Revenue Code of 1986, sections 401(a)(17) and 402(g) of the Code are also applicable, but were not referenced. The FDIC has revised the Second Proposal to include references to these two provisions of the Internal Revenue Code, as well as any other applicable provisions. Second Proposal § 359.1(d)(2)(i).

A very small number of comment letters informed us that certain states, particularly California, have statutes which require all covered employers to pay severance benefits in certain circumstances. These commentators were concerned that the definition of golden parachute payment in the First Proposal would conflict with such state statutes. In order to avoid such a conflict, the FDIC revised the definition of golden parachute payment to explicitly exclude any severance or similar payment which is required to be paid pursuant to state law which applies to all employers, except those that are exempted due to their small number of employees or other similar criteria. Second Proposal § 359.1(f)(2)(vi).

The FDIC has also chosen to clarify the definition of ''payment'' contained in § 359.1(*l*) of the First Proposal by making it explicit that the phrase ''the conferring of any benefit'' includes the granting of stock options and stock appreciation rights. Second Proposal § 359.1(k)(3).

The FDIC has added a new subsection to the proposed regulation, § 359.6, entitled ''Filing Instructions''. This new subsection contains instructions on where and how to file written requests for prior approval to make certain payments which are otherwise not permitted.

Closed Bank/Receivership Issues

The FDIC has added a new § 359.7 to the proposed regulation to make it clear that this regulation would not bind any receiver of a failed insured depository institution. The fact that the FDIC or any other federal banking agency consents to certain types of payments does not imply that the approving agency or the receiver will be responsible for making the payments in event of the insolvency of the institution or that the recipient will receive some sort of preference over other creditors from the receivership.

Other Enforcement Authority

The FDIC notes that its authority to regulate golden parachutes and indemnification payments pursuant to section 18(k) of the FDI Act is in addition to its safety and soundness enforcement authority pursuant to section 8 of the FDI Act.

Delegations of Authority

The FDIC is also proposing to amend § 303.7 of its regulations, 12 CFR 303.7, to add a new paragraph (g) which would delegate the Board's authority to the Executive Director, Supervision and Resolutions, Director of the Division of Supervision, and where confirmed in writing by the Director, to an associate director, or to the appropriate regional director or deputy regional director, to approve or deny requests to make excess nondiscriminatory severance plan payments as permitted by § 359.1(f)(2)(v) and golden parachute payments to ''white knights'', in change of control situations and other golden parachute payments which are not covered under any of the regulation's explicit exceptions, as permitted by § 359.4.

Request for Public Comment

The FDIC hereby requests comment on all aspects of the Second Proposal, including both legal and policy considerations. In particular, the Corporation is especially interested in whether the revisions to the First Proposal in response to the first set of

[13] Claims for certain benefits may not be provable or constitute ''actual direct compensatory damages'' under 12 U.S.C. 1821(e)(3) if the institution is placed into receivership. This regulation does not provide otherwise.

public comment letters adequately address the concerns which were raised. Of course, commenters should discuss any new issues which have been raised as a result of these revisions by the FDIC. Interested parties are invited to submit comments during a 60 day comment period.

List of Subjects

12 CFR Part 303

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, Banking, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 359

Banks, Banking, Golden parachute payments, Indemnity payments.

For the reasons set out in the preamble, the FDIC Board of Directors hereby proposes to amend 12 CFR part 303 and to add part 359 to title 12, chapter III, subchapter B, of the Code of Federal Regulations as follows:

PART 303—APPLICATIONS, REQUESTS, SUBMITTALS, DELEGATIONS OF AUTHORITY, AND NOTICES REQUIRED TO BE FILED BY STATUTE OR REGULATION

1. The authority citation for part 303 continues to read as follows:

Authority: 12 U.S.C. 378, 1813, 1815, 1816, 1817(a)(2)(b), 1817(j), 1818, 1819 (''Seventh'', ''Eighth'' and ''Tenth''), 1828, 1831e, 1831o, 1831p–1(a); 15 U.S.C. 1607.

2. In § 303.7, the section heading is revised and a new paragraph (g) is added to read as follows:

§ 303.7 Delegation of authority to the Executive Director for Supervision and Resolutions, the Director of the Division of Supervision and to the associate directors, regional directors and deputy regional directors to act on certain applications, requests, and notices of acquisition of control.

* * * * *

(g) *Requests pursuant to section 18(k) of the Act.* Authority is delegated to the Executive Director, the Director, and where confirmed in writing by the Executive Director or Director, to an associate director, or to the appropriate regional director or deputy regional director, to approve or deny requests pursuant to section 18(k) of the Act to make:

(1) Excess nondiscriminatory severance plan payments as provided by 12 CFR 359.1(f)(2)(v); and

(2) Golden parachute payments permitted by 12 CFR 359.4.

3. New part 359 is added to read as follows:

PART 359—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

Sec.

Authority: 12 U.S.C. 1828(k).

§ 359.0 Scope.

(a) This part limits and/or prohibits, in certain circumstances, the ability of insured depository institutions, their subsidiaries and affiliated depository institution holding companies to make golden parachute and indemnification payments to institution-affiliated parties (IAP).

(b) The limitations on golden parachute payments apply to troubled insured depository institutions which seek to make golden parachute payments to their IAPs. The limitations also apply to depository institution holding companies which are troubled and seek to make golden parachute payments to their IAPs as well as healthy holding companies which seek to make golden parachute payments to IAPs of a troubled insured depository institution subsidiary. A ''golden parachute payment'' is generally considered to be any payment to an IAP which is contingent on the termination of that person's employment and is received when the insured depository institution making the payment is troubled or, if the payment is being made by an affiliated holding company, either the holding company itself or the insured depository institution employing the IAP, is troubled. The definition of golden parachute payment does not include payments pursuant to qualified retirement plans, nonqualified *bona fide* deferred compensation plans, nondiscriminatory severance pay plans, other types of common benefit plans, state statutes and death benefits. Certain limited exceptions to the golden parachute payment prohibition are provided for in cases involving the hiring of a ''white knight'' and unassisted changes in control. A procedure is also set forth whereby an institution or IAP can request permission to make what would otherwise be a prohibited golden parachute payment.

(c) The limitations on indemnification payments apply to all insured depository institutions, their subsidiaries and affiliated depository institution holding companies regardless of their financial health. Generally, this part prohibits insured depository institutions, their subsidiaries and affiliated holding companies from indemnifying an IAP for costs sustained with regard to an administrative or civil enforcement action commenced by any federal banking agency which results in a final order or settlement pursuant to which the IAP is assessed a civil money penalty, removed from office, prohibited from participating in the affairs of an insured depository institution or required to cease and desist from or take an affirmative action described in section 8(b) (12 U.S.C. 1818(b)) of the Federal Deposit Insurance Act (FDI Act). However, there are exceptions to this general prohibition. First, an institution or holding company may purchase commercial insurance to cover such expenses, except judgments and penalties. Second, the institution or holding company may indemnify an IAP directly, except for judgments and penalties, if its board of directors makes certain specific findings.

§ 359.1 Definitions.

(a) *Act* means the Federal Deposit Insurance Act, as amended (12 U.S.C. 1811, *et seq.*).

(b) *Appropriate federal banking agency, bank holding company, depository institution holding company* and *savings and loan holding company* have the meanings given to such terms in section 3 of the Act.

(c) *Benefit plan* means any plan, contract, agreement or other arrangement which is an ''employee welfare benefit plan'' as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services or cafeteria plans; provided however, that such term shall not include any plan intended to be subject to paragraphs (f)(2)(iii) and (v) of this section.

(d) *Bona fide deferred compensation plan or arrangement* means any plan, contract, agreement or other arrangement whereby:

(1) An IAP voluntarily elects to defer all or a portion of the reasonable compensation, wages or fees paid for services rendered which otherwise would have been paid to such party at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals) and

the insured depository institution or depository institution holding company either:

(i) Recognizes compensation expense and accrues a liability for the benefit payments according to generally accepted accounting principles (GAAP); or

(ii) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; or

(2) An insured depository institution or depository institution holding company establishes a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (e)(1) of this section:

(i) Solely for the purpose of providing benefits for certain IAPs in excess of the limitations on contributions and benefits imposed by sections 415, 401(a)(17), 402(g) or any other applicable provision of the Internal Revenue Code of 1986 (26 U.S.C. 415, 401(a)(17), 402(g)); or

(ii) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees (excluding severance payments described in paragraph (f)(2)(v) of this section and permissible golden parachute payments described in § 359.4); and

(3) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in paragraphs (d)(1) and (2) of this section, the following requirements shall apply:

(i) The plan was in effect at least one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(ii) Any payment made pursuant to such plan is made in accordance with the terms of the plan as in effect no later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section and in accordance with any amendments to such plan during such one year period that do not increase the benefits payable thereunder;

(iii) The IAP has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(iv) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);

(v) Any payment made pursuant to such plan is not based on any acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(vi) The insured depository institution or depository institution holding company has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; and

(vii) Payments pursuant to such plans shall not be in excess of the accrued liability computed in accordance with GAAP.

(e) *Corporation* means the Federal Deposit Insurance Corporation, in its corporate capacity.

(f)(1) The term *golden parachute payment* means any payment (or any agreement to make any payment) in the nature of compensation by any insured depository institution or an affiliated depository institution holding company for the benefit of any current or former IAP pursuant to an obligation of such institution or holding company that:

(i) Is contingent on, or by its terms is payable on or after, the termination of such party's primary employment or affiliation with the institution or holding company; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency (or similar event) of the insured depository institution which is making the payment or bankruptcy or insolvency (or similar event) of the depository institution holding company which is making the payment; or

(B) The appointment of any conservator or receiver for such insured depository institution; or

(C) A determination by the insured depository institution's or depository institution holding company's appropriate federal banking agency, respectively, that the insured depository institution or depository institution holding company is in a troubled condition, as defined in the applicable regulations of the appropriate federal banking agency (§ 303.14(a)(4) of this chapter); or

(D) The insured depository institution is assigned a composite rating of 4 or 5 by the appropriate federal banking agency or informed in writing by the Corporation that it is rated a 4 or 5 under the Uniform Financial Institutions Rating System of the Federal Financial Institutions Examination Council, or the depository institution holding company is assigned a composite rating of 4 or 5 or unsatisfactory by its appropriate federal banking agency; or

(E) The insured depository institution is subject to a proceeding to terminate or suspend deposit insurance for such institution; and

(iii)(A) Is payable to an IAP whose employment by or affiliation with an insured depository institution is terminated at a time when the insured depository institution by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A) through (E) of this section, or in contemplation of any of these conditions; or

(B) Is payable to an IAP whose employment by or affiliation with an insured depository institution holding company is terminated at a time when the insured depository institution holding company by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A), (C) or (D) of this section, or in contemplation of any of these conditions.

(2) *Exceptions.* The term *golden parachute payment* shall not include:

(i) Any payment made pursuant to a pension or retirement plan which is qualified (or is intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401) or pursuant to a pension or other retirement plan which is governed by the laws of any foreign country; or

(ii) Any payment made pursuant to a benefit plan as that term is defined in paragraph (c) of this section; or

(iii) Any payment made pursuant to a *bona fide* deferred compensation plan or arrangement as defined in paragraph (d) of this section; or

(iv) Any payment made by reason of termination caused by the death or disability of an institution-affiliated party; or

(v) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement which provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause, voluntary resignation, or early retirement, in conjunction with a reduction in force instituted by the insured depository institution or depository institution holding company;

provided, however, that no employee shall receive any such payment which exceeds the base compensation paid to such employee during the twelve months (or such longer period or greater benefit as the Corporation shall consent to) immediately preceding termination of employment, resignation or early retirement, and such severance pay plan or arrangement shall not have been adopted or modified to increase the amount or scope of severance benefits at a time when the insured depository institution or depository institution holding company was in a condition specified in paragraph (f)(1)(ii) of this section or in contemplation of such a condition without the prior written consent of the appropriate federal banking agency; *provided further, however,* that no such payment shall be made to any senior executive officer (as defined in § 303.14(a)(3) of this chapter) of any insured depository institution or depository institution holding company without providing 30 days prior written notice to the appropriate federal banking agency and the FDIC; or

(vi) Any severance or similar payment which is required to be made pursuant to a state statute or foreign law which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria); or

(vii) Any other payment which the Corporation determines to be permissible in accordance with § 359.4 of this part.

(g) *Insured depository institution* means any bank or savings association the deposits of which are insured by the Corporation pursuant to the Act, or any subsidiary thereof.

(h) *Institution-affiliated party (IAP)* means:

(1) Any director, officer, employee, or controlling stockholder (other than a depository institution holding company) of, or agent for, an insured depository institution or depository institution holding company;

(2) Any other person who has filed or is required to file a change-in-control notice with the appropriate federal banking agency under section 7(j) of the Act (12 U.S.C. 1817(j));

(3) Any shareholder (other than a depository institution holding company), consultant, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution or depository institution holding company; and

(4) Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in: Any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution or depository institution holding company.

(i) *Liability or legal expense* means:

(1) Any legal or other professional fees and expenses incurred in connection with any claim, proceeding, or action;

(2) The amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(3) The amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

(j) *Nondiscriminatory* means that the plan, contract or arrangement in question applies to all employees of an insured depository institution or depository institution holding company who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of service requirements. A nondiscriminatory plan, contract or arrangement may provide different benefits to IAPs based only upon length of service and/or position. In the event that an employee's position is used as a basis for providing a different level of benefits, employees who are not senior executive officers (as defined in § 303.14(a)(3) of this chapter) of the insured depository institution or depository institution holding company shall be treated more favorably than senior executive officers.

(k) *Payment* means:

(1) Any direct or indirect transfer of any funds or any asset;

(2) Any forgiveness of any debt or other obligation;

(3) The conferring of any benefit, including but not limited to stock options and stock appreciation rights; and

(4) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(i) The determination, after such date, of the liability for the payment of such amount; or

(ii) The liquidation, after such date, of the amount of such payment.

(l) *Prohibited indemnification payment.* (1) The term *prohibited indemnification payment* means any payment (or any agreement or arrangement to make any payment) by any insured depository institution or an affiliated depository institution holding company for the benefit of any person who is or was an IAP of such insured depository institution, to pay or reimburse such person for any liability or legal expense with regard to any administrative proceeding or civil action instituted by any federal banking agency which results in a final order or settlement pursuant to which such person:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution; or

(iii) Is required to cease and desist from or take any affirmative action described in section 8(b) of the Act with respect to such institution.

(2) *Exception.* The term *prohibited indemnification payment* shall not include any reasonable payment by an insured depository institution or depository institution holding company which is used to purchase any commercial insurance policy or fidelity bond, provided that such insurance policy or bond shall not be used to pay or reimburse an IAP for the cost of any judgment or civil money penalty assessed against such person in an administrative proceeding or civil action commenced by any federal banking agency, but may pay the amount of any restitution to the insured depository institution, depository institution holding company or receiver.

§ 359.2 Golden parachute payments prohibited.

No insured depository institution or depository institution holding company shall make or agree to make any golden parachute payment, except as provided in this part.

§ 359.3 Prohibited indemnification payments.

No insured depository institution or depository institution holding company shall make or agree to make any prohibited indemnification payment, except as provided in this part.

§ 359.4 Permissible golden parachute payments.

(a) An insured depository institution or depository institution holding company may agree to make or may make a golden parachute payment if and to the extent that:

(1) The appropriate federal banking agency, with the written concurrence of the Corporation, determines that such a payment or agreement is permissible; or

(2) Such an agreement is made in order to hire a person to become an IAP either at a time when the insured depository institution or depository institution holding company satisfies or in an effort to prevent it from imminently satisfying any of the criteria set forth in § 359.1(f)(1)(ii), and the institution's appropriate federal banking agency and the Corporation consent in writing to the amount and terms of the golden parachute payment. Such consent by the FDIC and the institution's appropriate federal banking agency shall not improve the IAP's position in the event of the insolvency of the institution since such consent can neither bind a receiver nor affect the provability of receivership claims. In the event that the institution is placed into receivership or conservatorship, the FDIC and/or the institution's appropriate federal banking agency shall not be obligated to pay the promised golden parachute and the IAP shall not be accorded preferential treatment on the basis of such prior approval; or

(3) Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, not to exceed twelve months salary, to an IAP in the event of a change in control of the insured depository institution; *provided, however,* that an insured depository institution or depository institution holding company shall obtain the consent of the appropriate federal banking agency prior to making such a payment and this paragraph (a)(3) shall not apply to any change in control of an insured depository institution which results from an assisted transaction as described in section 13 of the Act (12 U.S.C. 1823) or the insured depository institution being placed into conservatorship or receivership; and

(4) An insured depository institution, depository institution holding company or IAP making a request pursuant to paragraphs (a)(1) through (3) of this section shall demonstrate that it does not possess and is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:

(i) The IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the depository institution or depository institution holding company that has had or is likely to have a material adverse effect on the institution or holding company;

(ii) The IAP is substantially responsible for the insolvency of, the appointment of a conservator or receiver for, or the troubled condition, as defined by applicable regulations of the appropriate federal banking agency, of the insured depository institution, depository institution holding company or any insured depository institution subsidiary of such holding company;

(iii) The IAP has materially violated any applicable federal or state banking law or regulation that has had or is likely to have a material effect on the insured depository institution or depository institution holding company; and

(iv) The IAP has violated or conspired to violate section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of title 18 of the United States Code, or section 1341 or 1343 of such title affecting a federally insured financial institution as defined in title 18 of the United States Code.

(b) In making a determination under paragraphs (a)(1) through (3) of this section, the appropriate federal banking agency and the Corporation may consider:

(1) Whether, and to what degree, the IAP was in a position of managerial or fiduciary responsibility;

(2) The length of time the IAP was affiliated with the insured depository institution or depository institution holding company, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and

(3) Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of section 18(k) of the Act or this part.

§ 359.5 Permissible indemnification payments.

(a) An insured depository institution or depository institution holding company may make or agree to make reasonable indemnification payments to an IAP with respect to an administrative proceeding or civil action initiated by any federal banking agency if:

(1) The insured depository institution's or depository institution holding company's board of directors, in good faith, determines in writing after due investigation and consideration that the institution-affiliated party acted in good faith and in a manner he/she believed to be in the best interests of the institution;

(2) The insured depository institution's or depository institution holding company's board of directors, respectively, in good faith, determines in writing after due investigation and consideration that the payment of such expenses will not materially adversely affect the institution's or holding company's safety and soundness;

(3) The indemnification payments are limited to the payment or reimbursement of reasonable legal, professional or other expenses incurred in connection with an IAP's involvement in an administrative proceeding or civil action instituted by any federal banking agency; but in no event shall such indemnification pay or reimburse an IAP for the amount of, or any cost incurred in connection with, any judgment, penalty or settlement with respect to any such claim, proceeding or action, pursuant to which the IAP:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution; or

(iii) Is required to cease and desist from or take any affirmative action described in section 8(b) of the Act with respect to such institution;

(4) The IAP agrees in writing to reimburse the insured depository institution or depository institution holding company for such indemnification payments in the event that the proceeding or action results in a final order or is settled on terms under which the IAP:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution; or

(iii) Is required to cease and desist from or take any affirmative action described in section 8(b) of the Act with respect to such institution; and

(5) The insured depository institution or depository institution holding company provides the appropriate federal banking agency and the FDIC with prior written notice of its board of directors' authorization of such indemnification.

(b) An IAP requesting indemnification payments shall not participate in any way in the board's discussion and approval of such payments; *provided, however,* that such IAP may present his/her request to the board and respond to any inquiries from the board concerning his/her involvement in the circumstances giving rise to the

administrative proceeding or civil action.

(c) In the event that a majority of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the remaining members of the board may authorize independent legal counsel to review the indemnification request and provide the remaining members of the board with an opinion of counsel as to whether the conditions delineated in paragraph (a) of this section have been met. If independent legal counsel opines that said conditions have been met, the remaining members of the board of directors may rely on such opinion in authorizing the requested indemnification.

(d) In the event that all of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the board shall authorize independent legal counsel to review the indemnification request and provide the board with an opinion of counsel as to whether the conditions delineated in paragraph (a) of this section have been met. If independent legal counsel opines that said conditions have been met, the board of directors may rely on such opinion in authorizing the requested indemnification.

§ 359.6 Filing instructions.

Requests to make excess nondiscriminatory severance plan payments pursuant to § 359.1(f)(2)(v) and golden parachute payments permitted by § 359.4 shall be submitted in writing to the FDIC regional director (Supervision) for the region in which the institution is located. The request shall be in letter form and shall contain all relevant factual information as well as the reasons why such approval should be granted. In the event that the consent of the institution's primary federal regulator is required in addition to that of the FDIC, the requesting party shall submit a copy of its letter to the FDIC to the institution's primary federal regulator. In the case of national banks, such written requests shall be submitted to the OCC district office where the institution is located. In the case of state member banks and bank holding companies, such written requests shall be submitted to the Federal Reserve district bank where the institution or holding company, respectively, is located. In the case of savings associations and savings association holding companies, such written requests shall be submitted to the OTS regional office where the institution or holding company, respectively, is located. In cases where the prior consent of only the institution's primary federal regulator is required and that agency is not the FDIC, a written request satisfying the requirements of this paragraph shall be submitted to the primary federal regulator as described in this paragraph.

§ 359.7 Applicability in the event of receivership.

The provisions of this part, or any consent or approval granted hereunder by the FDIC (in its corporate capacity), shall not in any way bind any receiver of a failed insured depository institution. Any consent or approval granted hereunder by the FDIC or any other federal banking agency shall not in any way obligate such agency or receiver to pay any claim or obligation pursuant to any golden parachute, severance, indemnification or other agreement. Claims for employee welfare benefits or other benefits which are contingent, even if otherwise vested, when the FDIC is appointed as receiver for any depository institution, including any contingency for termination of employment, are not provable claims or actual, direct compensatory damage claims against such receiver. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of any IAP contrary to 12 U.S.C. 1828(k)(3).

By order of the Board of Directors, dated at Washington, D.C., this 21st day of March, 1995.

Federal Deposit Insurance Corporation

Robert E. Feldman,

Acting Executive Secretary.

[FR Doc. 95–7603 Filed 3–28–95; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 944

[Docket No. 950222055–5055–01]

RIN 0648–AH92

Restricting or Prohibiting Attracting Sharks by Chum or Other Means in the Monterey Bay National Marine Sanctuary

AGENCY: Sanctuaries and Reserves Division (SRD), Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Extension of comment period.

SUMMARY: The National Oceanic and Atmospheric Administration's Sanctuaries and Reserves Division (SRD) is considering amending the regulations for the Monterey Bay National Marine Sanctuary (MBNMS or Sanctuary) to restrict or prohibit the attracting of sharks by the use of chum or other means in the MBNMS. An advance notice of proposed rulemaking published February 28, 1995 (60 FR 10812) discusses the reasons SRD is considering restricting or prohibiting this activity in the MBNMS. A thirty day comment period was to close on March 30, 1995. This notice extends the comment period by fifteen days.

DATES: Comments must be received by April 14, 1995.

ADDRESSES: Comments should be sent to Elizabeth Moore, Sanctuaries and Reserves Division, National Oceanic and Atmospheric Administration, 1305 East West Highway, SSMC4 12th Floor, Silver Spring, Maryland, 20910. Comments will be available for public inspection at the same address and at the Monterey Bay National Marine Sanctuary office at 299 Foam Street, Suite D, Monterey, California, 93940.

FOR FURTHER INFORMATION CONTACT: Elizabeth Moore at (301) 713–3141 or Aaron King at (408) 647–4257 or at mbmns@igc.apc.org.

Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program.

Dated: March 21, 1995.

Frank Maloney,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 95–7606 Filed 3–28–95; 8:45 am]

BILLING CODE 3510–08–M

INTERNATIONAL TRADE COMMISSION

19 CFR Part 210

Notice of Proposed Rulemaking Concerning Federal Register Notices and Service of Documents on Other Agencies

AGENCY: International Trade Commission.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The Commission proposes to amend certain final rules for investigations and related proceedings under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) to do the following: eliminate the **Federal Register** publication requirement for