provide the appropriate Regional Director of the FDIC's Division of Supervision and Consumer Protection, as defined in 12 CFR 303.2(g), a copy of the proposed notice for approval. After being approved, the notice shall be provided to depositors by the insured depository institution at the time and in the manner specified by the appropriate Regional Director.

(c) *Form of notice.* The notice to depositors required by paragraph (a) of this section shall be provided on the official letterhead of the insured depository institution, shall bear the signature of a duly authorized officer, and, unless otherwise specified by the appropriate Regional Director, may follow the form of the notice contained in appendix B of this part.

(d) *Other requirements possible.* The FDIC may require the insured depository institution to take such other actions as the FDIC considers necessary and appropriate for the protection of depositors.

Appendix A to Part 307—[Transferring Institution Letterhead]

[Date]

[Name and Address of appropriate FDIC Regional Director]

SUBJECT: *Certification of Total Assumption of Deposits*

This certification is being provided pursuant to 12 U.S.C. 1818(q) and 12 CFR 307.2. On [*state the date the deposit assumption took effect*], [*state the name of the depository institution assuming the deposit liabilities*] assumed all of the deposits of [*state the name and location of the Transferring Institution whose deposits were assumed*]. [If applicable, state the date and method by which the transferring institution's authority to engage in banking was or will be terminated.] Please contact the undersigned, at [*telephone number*], if additional information is needed.

Sincerely,

By:

[Name and Title of Authorized Representative]

Appendix B to Part 307—[Institution Letterhead]

[Date]

[Name and Address of Depositor]

SUBJECT: *Notice to Depositor of Voluntary Termination of Insured Status*

The insured status of [*name of insured depository institution*] under the provisions of the Federal Deposit Insurance Act, will terminate as of the close of business on [*state the date*] (''termination date''). Insured deposits in the [*name of insured depository institution*] on the termination date, less all withdrawals from such deposits made subsequent to that date, will continue to be insured by the Federal Deposit Insurance Corporation, to the extent provided by law, until [*state the date*]. The Federal Deposit Insurance Corporation will not insure any new deposits or additions to existing deposits made by you after the termination date.

This Notice is being provided pursuant to 12 U.S.C. 1818(a)(6) and 12 CFR 307.3.

Please contact [*name of institution official in charge of depositor inquiries*], at [*name and address of insured depository institution*] if additional information is needed regarding this Notice or the insured status of your account(s).

Sincerely,

By: [Name and Title of Authorized Representative]

By order of the Board of Directors, at Washington DC on this 6th day of October, 2005.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 05–20590 Filed 10–13–05; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 331 and 362

RIN 3064–AC95

Interstate Banking; Federal Interest Rate Authority

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The FDIC received a petition for rulemaking to preempt certain state laws with the stated purpose of establishing parity between national banks and state-chartered banks in interstate activities and operations. The petition also requested rulemaking to implement the interest rate authority contained in the Federal Deposit Insurance Act. Generally, the requested rules would provide that the home state law of a state bank applies to the interstate activities of the bank and its operating subsidiaries to the same extent that the National Bank Act applies to the interstate activities of a national bank and its operating subsidiaries. They would also implement the federal statutory provisions addressing interest charged by FDIC-insured state banks and insured U.S. branches of foreign banks. The FDIC is requesting comments on a proposed rule to amend the FDIC's regulations in response to the rulemaking petition. Issuance of the proposed rules would serve as the FDIC's response to the rulemaking petition.

DATES: Comments must be submitted on or before December 13, 2005.

ADDRESSES: You may submit comments by any of the following methods:

- Agency Web site: *http://www.FDIC.gov/regulations/laws/federal/propose.html.* Follow the instructions for submitting comments.
- E-mail: *comments@FDIC.gov.*
- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments/Legal ESS, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- Hand Delivered/Courier: The guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.
- Public Inspection: Comments may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW., Washington, DC, between 9 a.m. and 4:30 p.m. on business days.
- Internet Posting: Comments received will be posted without change to *http://www.FDIC.gov/regulations/laws/federal/propose.html,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Robert C. Fick, Counsel, (202) 898–8962; Rodney D. Ray, Counsel, (202) 898–3556; or Joseph A. DiNuzzo, Counsel, (202) 898–7349; Legal Division, Federal Deposit Insurance Corporation, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. The Petition

The Financial Services Roundtable, a trade association for integrated financial services companies (''Petitioner''), has petitioned the FDIC to adopt rules concerning the interstate activities of insured state banks and their subsidiaries that are intended to provide parity between state banks and national banks. Generally, the requested rules would provide that a state bank's home state law governs the interstate activities of state banks and their operating subsidiaries (''Op Subs'') [1] to the same extent that the National Bank Act (''NBA'') governs a national bank's interstate business. The Petitioner requests that the FDIC adopt rules with respect to the following areas:

- The law applicable to activities conducted in a host state by a state bank that has a branch in that state,
- The law applicable to activities conducted by a state bank in a state in which the state bank does not have a branch,
- The law applicable to activities conducted by an Op Sub of a state bank,

[1] Generally, an operating subsidiary is a majority-owned subsidiary of a bank or savings association that engages only in activities that its parent bank or savings association may engage in.

• The scope and application of section 104(d) of the Gramm-Leach-Bliley Act (''GLBA'')[2] regarding preemption of certain state laws or actions that impose a requirement, limitation, or burden on a depository institution, or its affiliate, and

• Implementation of section 27 of the Federal Deposit Insurance Act (''FDI Act'')[3] (which permits state depository institutions to export interest rates) in a manner parallel to the rules issued by the Office of the Comptroller of the Currency (''OCC'') and the Office of Thrift Supervision (''OTS'').

The Petitioner argues that it is both necessary and timely for the FDIC to adopt rules that clarify the ability of state banks operating interstate to be governed by a single framework of law and regulation to the same extent as national banks. According to the Petitioner, over the last decade the federal charters for national banks and federal thrifts have been correctly interpreted by the OCC and the OTS, with the repeated support of the federal courts, to provide broad federal preemption of state laws that might appear to apply to the activities or operations of federally chartered banking institutions within a state. The result, it asserts, is that national banks and federal savings associations now can do business across the country under a single set of federal rules. In contrast, the Petitioner believes that there is widespread confusion and uncertainty with respect to the law applicable to state banks engaged in interstate banking activities. Furthermore, it argues, this uncertainty produces the potential for litigation and enforcement actions, deters state banks from pursuing profitable business opportunities, and causes substantial expense to a state bank that decides to convert to a national bank in order to gain greater legal certainty. Finally, the Petitioner asserts that the FDIC has the authority, tools and responsibility to correct this imbalance.

II. The Public Hearing

Overview

On May 24, 2005, the FDIC held a public hearing on the rulemaking petition. As indicated in the FDIC's formal announcement of the hearing (70 FR 13,413 (March 21, 2005)) the purpose of the hearing was to obtain public insight into the issues presented by the petition including how the FDIC should respond to the rulemaking request. The notice of the public hearing provided an overview of the rulemaking petition, posed general questions raised by the petition, identified legal and policy issues raised by the specific aspects of the rulemaking petition, and asked for the public's views on these and any other issues related to the petition. The notice of public hearing also included a copy of the rulemaking petition.

The sixteen speakers at the hearing presented their views on the legal, policy and other issues raised in the petition. The speakers also provided written statements. In addition, eighteen others who chose not to appear at the hearing submitted written views on the petition. The presenters at the hearing consisted of trade group representatives, state banking commissioners, representatives of consumer groups, and bankers. Those commenting who did not appear at the hearing consisted of the same categories of interested parties plus members of Congress and state attorneys general. Overall the FDIC received thirty-four written statements on the rulemaking petition.[4]

Summary of Statements in Favor of the Petition

Those in favor of the petition argued that the requested rulemaking would ensure state banks parity with national banks in their interstate operations. One speaker, representing a group of state-chartered commercial banks, stated that ''[a]t stake is the continued vitality of state bank regulation and the structure and dynamics of bank regulation at the federal level that have served our nation so well.'' A number of state banking commissioners agreed with that statement. One commented that the dual banking system is out of balance because of the ''broad OCC rulemaking of February 2004 preempting most state laws as they relate to national banks and their subsidiaries.'' He argued that ''most banks do not want the OCC [preemption rules] rolled back but want the state charter to have parity with the federal charter'' and that an FDIC rulemaking would ''re-establish order'' to preserve the dual banking system. A state banking association agreed with these views and added that one course for the FDIC would be to issue a rule codifying the FDIC's opinions on the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (''Riegle-Neal I''), the Riegle-Neal Amendments Act of 1997 (''Riegle-Neal II'')[5] and FDIC General Counsel Opinions 10 and 11[6] (''GC–10 and GC–11'') on the exportation of interest rates, noting that further study might be warranted on the other aspects of the petition.

One state banking commissioner voiced opposition to the ''broad unilateral preemption by charter-granting federal banking agencies'' and argued that an FDIC rule is necessary to ''maintain the competitiveness of the state charter.'' Another commented that the ''greatest problem is a lack of certainty for state-chartered interstate banks.'' A large commercial banking organization observed that it is important to have a ''real choice of regulatory regimes under which to operate an interstate banking business'' and noted that its bank's ''participation in the interstate marketplace as a state chartered institution may be threatened unless the FDIC acts to restore parity in the banking regulations.''

An executive for a large banking organization stated that the rules applicable to national banks have given national banks a ''significant advantage in operating multistate and national scale lending businesses.'' He maintained that, absent the requested rulemaking, state banks will continue to contend with an ''extensive patchwork of additional state and local laws and regulations in crafting any national lending program or even a modest cross border program.'' Another banker provided an example in which his bank could not obtain approval to operate an automated teller machine in Florida because it was chartered by another state. He asserted that a national bank would not have been subject to that restriction.

An attorney for a large bank noted that the requested rulemaking would benefit not only large banks with interstate operations but also small independent banks located near state borders. She argued that, if the FDIC adopts the proposed rule, state banking supervisors likely would increase the cooperation they already have demonstrated in existing cooperative agreements governing the regulation of interstate state-chartered banks.

Proponents of the petition argued that the requested rulemaking would not lead to a ''race to the bottom'' by state legislatures. The ''race-to-the-bottom'' concern is that some states will enact minimal consumer protection laws for

[2] 15 U.S.C. 6701.

[3] 12 U.S.C. 1831d.

[4] Copies of the petition and all statements we received on the petition as well as the transcript of the hearing are available on the FDIC's Web site at: *http://www.fdic.gov/news/conferences/agency/noticemay162005publichearing.html.*

[5] Pub. L. 103–328, 108 Stat. 2338 (1994) (codified to various sections of title 12 of the United States Code); Pub. L. 105–24 (1997).

[6] *General Counsel Op. No. 10,* 63 FR 19258 (Apr. 17, 1998) and *General Counsel Op. No. 11,* 63 FR 27282 (May 18, 1998).

bank customers in order to lure banks to seek charters from those states and export those weak home-state consumer laws to host states which have more encompassing and protective consumer laws. One state banking commissioner argued that consumers would still be protected by home state and federal law in areas where host state law has been preempted. He also suggested that Congress enact national consumer laws to counteract the concern about a potential for unhealthy competition among bank chartering authorities in the area of consumer protection. Another speaker noted that effective and rigorous protection of all consumers no matter where they reside perhaps could be achieved through a partnership between the respective states and the Federal Reserve or the FDIC and through cooperative agreements between and among the states. He also suggested that the FDIC could issue regulations limiting charter conversions (of state-banks) as a means to address the potential consumer protection problem.

A state banking commissioner remarked that state legislators and attorneys general are in the business of protecting the consumers in their states; thus, it is unlikely that any state would strive to be at the bottom for consumer protection in an attempt to gain a few bank charters. Another doubted the potential for unhealthy competition among bank chartering authorities in the area of consumer protection by noting that, as to the current preemption of host state laws for national banks and federal thrifts, this ''wholesale relocation of banks hasn't happened so far.''

As to the FDIC's legal authority to issue the requested rulemaking, one speaker asserted that the petition is not requesting a comprehensive federal preemption of state law, but rather seeks to fully implement an existing federal statutory framework for determining which state law applies when state banks operate across state lines. He and others argued that the FDIC has ample authority to take all the actions requested in the petition. In particular, they cited sections 8, 9 and 27 of the FDI Act,[7] Riegle Neal II and section 104 of the GLBA. One banking commissioner argued that the intent of federal law is to maintain the competitive balance between the state and national charter and that the petition is asking the FDIC to exercise its authority. Another asserted that the FDIC is the proper forum and arbiter of the questions raised in the petition and declared that ''[i]t's * * * [the FDIC's] law to interpret,'' emphasizing that the Riegle-Neal I and II provisions are codified in the FDI Act.

An attorney for a large banking organization asserted that: (i) Section 9 of the FDI Act vests sufficient power in the FDIC to implement regulations to carry out the provisions of the FDI Act; (ii) the FDIC is the only regulatory body that has the authority to issue regulations that will carry out the intent of the Riegle-Neal II and GLBA to provide parity for state-chartered banks; and (iii) section 104(d)(4) of the GLBA sets forth a broad rule for state banks and national banks that covers a full range of banking activities and ''[t]he FDIC is best equipped to adopt regulations that will implement the Congressional mandate set forth in section 104(d).'' One state banking commissioner expressed uncertainty over the constitutionality of the OCC's preemption rules but credited the OCC for bringing together ''these various laws, interpretations, and analyses in one place as an integrated resource.'' He suggested that the FDIC follow suit by publishing an interpretation of federal law for state banks, including rules on section 27 of the FDI Act and Riegle-Neal II.

The president of a financial services trade group argued that the requested rulemaking would be a natural extension of the authority Congress granted to state banks under Riegle-Neal II and that interpretations of section 104 of the GLBA and section 27 of the FDI Act would clarify the scope of these activities. She urged the FDIC to issue a rule or interpretation clarifying that: (i) Section 104 applies to all lending and other activities permitted by the GLBA; (ii) the four standards set forth in sections 104(d)(4)(D) are to be read in the disjunctive as separate standards; and (iii) the reference to ''other persons'' in section 104(d)(4)(D)(i) should be read to include other depository institutions.

Summary of Statements Opposed to the Petition

Those opposed to the rulemaking petition generally argued that the petition is a response to a competitive imbalance attributable to the OCC's preemption regulations. One speaker, representing a trade group for realtors, stated that the ''cure for any imbalance is for Congress or the OCC itself, under new leadership, to roll back the OCC regulations, not to use them as a model for the state banking system.'' She maintained that granting the petition would ''further harm the ability of states to protect their citizens; result in undue concentration of banking services and less choice for consumers; open the door to the mixing of banking and commerce; destroy the state banking system, not save it; and disrupt the competitive balance among financial service providers.'' In a supplemental statement filed in response to a hearing officer's question, another representative for the trade group noted that issues relating to preemption under Riegle-Neal have not been expressly delegated to the FDIC and that the legislative history contains no mention of Congress conferring such authority on the FDIC. Citing recent case law, the representative also stated that if the FDIC were to interpret Riegle-Neal, ''its interpretation would not be entitled to *Chevron* deference because the Act could also be interpreted by the OCC and the Federal Reserve Board.''

An attorney for a national consumer group urged rejection of the petition because ''there is no basis in federal law for allowing broad preemption of state law for state-chartered banks'' and, she argued, ''even if there were room for discretionary action on this question by the FDIC * * * allowing this petition would be terrible public policy, with devastating consequences for American consumers.'' As to the FDIC's legal authority to issue the requested regulation, she asserted that: (i) Riegle-Neal II simply put state-chartered banks on par with national banks when a state-chartered bank branches into another state; (ii) the GLBA as a whole provides no support for the position in the petition that the GLBA creates new preemptive rights to depository institutions, beyond insurance and securities activities; and (iii) state bank operating subsidiaries, agents of the banks, or other third parties are not entitled to preemptive rights.

A state banking commissioner agreed with others who commented that the FDIC does not have the statutory authority to issue the requested rulemaking and stated that ''many of us do not believe the OCC has the statutory authority to do what it has done by regulation.'' He suggested that, ''[i]nstead of adopting legally questionable regulations preempting state law, the FDIC should urge Congress to address the issue.'' The commissioner criticized ''no-rules'' states that ''have chosen to eliminate traditional consumer protections, regarding consumer lending practices, in favor of economic development.'' He argued that ''[o]nly federal laws that establish national rules applicable to all consumer lenders should be permitted to pre-empt the protection that State laws afford to their citizens.''

Another consumer group spokesman reiterated the concern expressed by

[7] 12 U.S.C. 1818, 1819, and 1831d.

others about the negative effect on consumers that might result from the requested rulemaking. He said that ''[i]f the petitioner's request is granted, state-chartered banks headquartered in states with weaker anti-predatory laws will be able to override the rigorous and comprehensive laws when they make loans or buy loans from brokers in states like North Carolina and New Mexico. At a time when minorities, immigrants, and women disproportionately receive high cost loans, it is counterproductive to strip states of their rights to protect citizens who are striving for their American dreams of their first time homeownership and wealth building.''

Two members of Congress submitted a joint statement in opposition to the petition. They asserted that the current imbalance with respect to interstate banking operations is solely the result of the OCC's recent adoption of its preemption and visitorial regulations and that the law itself is clear and there are no gaps in the law that the FDIC needs to, or should, fill. The Congressmen offered these options to address the issues raised in the petition: (i) The OCC should revise its rules to eliminate the overly broad ''obstruct, impair or condition'' language to make clear what state laws are not preempted, and publish any future preemption determinations on a case-by-case basis; (ii) the relevant parties should negotiate a workable solution that identifies what national bank core banking areas are not affected by state laws, establish a mechanism to inform parties when individual laws do not apply and why, and clearly identify which regulators are responsible for policing which practices of which institutions; (iii) the courts should begin to carefully review the OCC's regulations to determine if they are consistent with the statutory framework and not so readily defer to the OCC; and (iv) Congress should adopt the Preservation of Federalism Banking Act (H.R. 5251) which is designed to clarify when state laws are applicable to state banks.

A state attorney general, writing on behalf of his state and the attorneys general of six other states, urged the FDIC to deny the petition in its entirety. He argued that the FDIC does not have the authority to adopt the requested rules, specifying that: (i) The FDIC's rulemaking authority is significantly more limited than the OCC; (ii) the FDIC is not the primary regulator of state banks and a state bank's power derives primarily from state law; and (iii) if there is a gap to fill in Riegle-Neal II and the GLBA, it is a legislative gap that only Congress can fill. He also asserted that section 104 of the GLBA fails to provide authority for the requested rules because the anti-discrimination provisions of section 104(d)(4) have nothing to do with establishing parity between national and state banks. He commented that the requested rules would not preserve the dual banking system and would undermine the ability of states to protect their citizens. In addition, he argued that the requested rules are not necessary because many states have adopted ''wild card'' statutes and have entered into cooperative agreements that permit state banks a considerable degree of parity with national banks.

Banking commissioners of seven states submitted a joint statement in opposition to the petition. They acknowledged that the ''broad preemption by the OCC and the OTS has created an imbalance in the dual banking system,'' but voiced disagreement ''with the means recommended by the Roundtable to restore the balance.'' They argued that Congress, not the FDIC, should determine whether preemption is appropriate, particularly in the light of the unsettled status of the OCC and OTS preemption rules and activities.

A consumer group spokeswoman argued that the requested rulemaking would undermine the dual banking system by ''federalizing'' Delaware's and South Dakota's banking laws. She noted that: In passing Riegle-Neal II Congress affirmed the importance of individual state banking regulation and Riegle-Neal II created a narrow exception to this principle by permitting interstate branching by state banks; and the portions of the GLBA relied on by the petition refer largely to the sale of insurance, not to all banking and financial activities. A representative of another consumer group characterized the petition as ''audacious'' and said the requested rule would have ''lasting and harmful effects on New Yorkers and their communities.'' She suggested that the FDIC hold additional hearings at each of the FDIC's regional offices to ''afford organizations like ours in New York City and across the country opportunity to comment meaningfully.''

Summary of Other Views on the Petition

Some statements we received neither supported nor opposed the petition. A spokesman for the national trade group for state banking supervisors commented that ''recent preemption rules * * * have significantly altered the financial regulatory system, and threaten the future of our nation's dual banking system.'' He said, however, that his association hesitates to turn such decision-making authority over to any one federal agency and suggested that Congress address the issues to clarify its vision of the dual banking system. A state banking commissioner argued that the ''regulatory world is out of balance,'' but that the petition ''would not solve what is wrong with our system.'' Similarly, a spokeswoman for a national trade group for community banks said, ''[t]he balance in the dual banking system needs to be restored. However * * * we question whether this forum, as opposed to the Congress, is the appropriate one. Accordingly, we neither support nor oppose the recommendations of the petition at this time.'' Another national trade group for banks suggested that the FDIC and the industry undertake a broad, in-depth study of the current state of the dual banking system—strengths, weaknesses, possible remedies and possible outcomes. It added that a ''quick fix'' might be harmful in the long run.

A banking commissioner stated that her agency was presently in litigation on the applicability of her state's law to subsidiaries of national banks. She commented that ''the issues underlying the petition * * * are of such broad scope and have such significant implications for the financial services sector that they warrant a more comprehensive review by Congress.

III. The Proposed Rules

A. Overview

The rulemaking petition raises serious and complex legal and policy issues regarding the preemption of state law in the context of interstate banking. From the comments made in connection with the public hearing, it is clear that there is a vast and sometimes strong difference of views among many bankers, industry trade groups, public advocacy groups, state attorneys general, and members of Congress on how to respond to the petition. Issuance of the proposed rules serves as the FDIC's response to the rulemaking petition. The proposed rules implement sections 24(j) and 27 of the FDI Act (''section 24(j) and section 27, respectively'').[8]

B. Discussion of Section 24(j)

The Statute

Subsection (j) of section 24 currently provides the following:

(j) Activities of branches of out-of-state banks.

(1) Application of Host State Law

The laws of a host State, including laws regarding community reinvestment,

[8] 12 U.S.C. 1831a(j)(1) and 12 U.S.C. 1831d, respectively.

consumer protection, fair lending, and establishment of intrastate branches, shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank. To the extent host State law is inapplicable to a branch of an out-of-State State bank in such host State pursuant to the preceding sentence, home State law shall apply to such branch.

(2) Activities of Branches

An insured State bank that establishes a branch in a host State may conduct any activity at such branch that is permissible under the laws of the home State of such bank, to the extent such activity is permissible either for a bank chartered by the host State (subject to the restrictions in this section) or for a branch in the host State of an out-of-State national bank.

(3) Savings Provision

No provision of this subsection shall be construed as affecting the applicability of—

(A) any State law of any home State under subsection (b), (c), or (d) of section 1831u of this title; or

(B) Federal law to State banks and State bank branches in the home State or the host State.

(4) Definitions

The terms ''host State'', ''home State'', and ''out-of-State bank'' have the same meanings as in section 1831u(g) of this title.

The term ''home State'' as defined in 12 U.S.C. 1831u(g)(4) means ''(i) with respect to a national bank, the State in which the main office of the bank is located; and (ii) with respect to a State bank, the State by which the bank is chartered.''

The term ''host State'' as defined in section 12 U.S.C. 1831u(g)(5) means, ''with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch.''

The term ''out-of-State bank'' as defined in section 12 U.S.C. 1831u(g)(8) means, ''with respect to any State, a bank whose home State is another State.''

Subsection (j) was originally enacted by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (''Riegle-Neal I'').[9] Riegle-Neal I generally established a federal framework for interstate branching for both State banks and national banks.

As enacted, paragraph (1) of subsection (j) originally stated that:

The laws of the host state, including laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, shall apply to any branch in the host state of an out-of-state state bank *to the same extent as such state laws apply to a branch of a bank chartered by that state.* (emphasis added).[10]

Pursuant to this paragraph a branch of an out-of-state, state bank would be subject to host state law to the same extent that a branch of a bank chartered by the host state would be.

Three years after Riegle-Neal I, Congress enacted the Riegle-Neal Amendments Act of 1997 (''Riegle-Neal II'')[11] in an attempt to provide state banks that had interstate branches (*i.e.*, branches located in states other than the bank's home state) ''parity'' with national banks that had interstate branches. Riegle-Neal II revised the language of section 24(j)(1) to read as it currently does today:

The laws of a host State, including laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank. To the extent host State law is inapplicable to a branch of an out-of-State State bank in such host State pursuant to the preceding sentence, home State law shall apply to such branch.

This change made host state law apply to a branch of an out-of-state state bank only to the extent that it applies to a branch of an out-of-state national bank.

Authority To Issue Rules Regarding Section 24(j) and Section 27

The FDIC has the authority to issue rules generally to carry out the provisions of the FDI Act. Section 9(a) of the FDI Act, 12 U.S.C. 1819(a), provides that:

[T]he Corporation * * * shall have power—

* * * * *

Tenth. To prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this Act or of any other law which it has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency).

In addition, section 10(g) of the FDI Act, 12 U.S.C. 1820(g), provides that:

Except to the extent that authority under this Act is conferred on any of the Federal banking agencies other than the Corporation, the Corporation may—

(1) Prescribe regulations to carry out this Act; and

(2) By regulation define terms as necessary to carry out this Act.

Section 24(j) and section 27 are each, of course, provisions in the FDI Act. Furthermore, no other agency has been granted the authority to issue rules to restate, implement, clarify, or otherwise carry out, either section 24(j) or section 27. Consequently, sections 9(a) and 10(g) of the FDI Act expressly grant the FDIC the authority to issue rules with respect to sections 24(j) and 27.[12]

Interpretation of Section 24(j)(1)

Section 24(j)(1) states that host state law ''shall *apply to any branch* in the host state of an out-of-state state bank to the same extent as such state laws apply to a branch of an out-of-state national bank.'' (emphasis added). The statute itself does not provide an explanation of what Congress meant by the phrase ''apply to a branch.'' Clearly Congress was addressing the activities and operations of a branch in the host state, but it is not clear from the statutory text what threshold level of involvement by the branch will trigger the operation of the statute. The range of potential involvements by the branch might, under a broad interpretation, run from a very minimal involvement in the activity to, under a very narrow interpretation, performance of the entire activity at the branch by branch personnel. The proposed rules would clarify that host state law is subject to preemption when an activity is conducted at a branch of the out-of-state state bank, and would define ''activity conducted at a branch'' to mean an activity of, by, through, in, from, or substantially involving, a branch. This approach is within the range of interpretations permitted by the statutory language, but the statute itself does not indicate whether this interpretation is the most appropriate one. Since the language of this provision is susceptible to multiple meanings and presents important questions about how

[9] Pub. L. 103–328, 108 Stat. 2338 (Sept. 29, 1994).

[10] Pub. L. 103–328, sec. 102(b)(3)(B), 108 Stat. 2338 (Sept. 29, 1994).

[11] Pub. L. 105–24, 111 Stat. 238, (July 3, 1997).

[12] As indicated previously, a commenter asserted that the FDIC's interpretation of Riegle-Neal would not be entitled to *Chevron* deference because other Federal banking agencies could interpret the statute. The FDIC recognizes that there are federal court decisions, such as *Wachtel* v. *Office of Thrift Supervision,* 982 F.2d 581 (DC Cir. 1993), that indicate that where the same statute is administered by several agencies, deference to the interpretation of a statute by one agency is inappropriate. The *Wachtel* decision, however, arose in the context of an enforcement proceeding under section 8 of the FDI Act (12 U.S.C. 1818) which provides statutory enforcement authorities which are administered by each of the Federal banking agencies with respect to the depository institutions each agency supervises. This is distinguishable from the present situation because the FDIC is here proposing, through rulemaking under sections 9(a) and 10(g) of the FDI Act, to implement sections 24(j)(1) and 27 of the FDI Act, and no other agency has been expressly granted such authority.

it is to be applied, the statute is ambiguous.

In interpreting any ambiguous statutory provision the objective is to interpret the statute in light of the purposes that Congress sought to serve.[13] Although there are neither committee reports nor any conference report on Riegle-Neal II, there are several statements by the sponsors of Riegle-Neal II, and such statements have been accorded substantial weight in determining legislative intent.[14] In this case, evidence of Congress' intent can be found in the statements of the sponsors of Riegle-Neal II and in the testimony of witnesses urging congressional action. Specifically, Representative Marge Roukema, the principal sponsor of the legislation, stated that:

The essence of this legislation is to provide parity between State-chartered bank and national banks * * *

This legislation is critical to the survival of the dual banking system. * * *

This legislation is also important for consumers, because if we do not enact this legislation, State banks will likely convert to a national charter. Certainly the incentive will be there. The end result could be that there will be no consumer protection at the State level * * *

[T]he bill clarifies [that] the home State law of a State bank must be followed in situations in which a specific host State [law] does not apply to a national bank.[15]

Representative Bruce Vento echoed Representative Roukema's concerns and confirmed her views of how the bill would operate. Speaking in support of enactment, Representative Vento stated that:

Only under the limited circumstances in which the Comptroller preempts host State laws for national banks will out-of-State State-chartered banks similarly be exempted from the laws of the host State. In those cases, the out-of-State bank will be required to follow its own home State laws as regards such activity.

* * * * *

In the absence of this measure, however, most State banks with out-of-State bank branches will likely change to a national charter causing the atrophy of the dual banking State-national banking [sic] system.[16]

Statements by other co-sponsors reinforce the statements of Representatives Roukema and Vento that Riegle-Neal II was intended to provide parity between state banks and national banks with regard to interstate activities.[17] In addition, Federal Reserve Board Chairman Alan Greenspan expressed the support of the Federal Reserve Board for this legislation in a letter to Representative Roukema and stated that ''[t]he Riegle-Neal Clarification Act of 1997 [18] is an effort to create parity between national and state-chartered banks in operating out-of-state branches.'' [19] Other endorsements received by Representative Roukema that express the same understanding of the bill include those from the National Governors' Association, the Conference of State Bank Supervisors and the Independent Bankers' Association of America.[20]

The debates in the Senate also indicate that the Senate understood that the purpose of the legislation was to provide parity between state banks and national banks. In that regard, Senator D'Amato stated the following:

[T]he bill will restore balance to the dual banking system by ensuring that neither charter operates at an unfair advantage in this new interstate environment.

* * * * *

[I]t would establish that a host State's law would apply to the out-of-State branches of a State-chartered bank only to the same extent that that those laws apply to the branches of out-of-State national banks located in the host State.[21]

Consequently, legislative history indicates that the purpose of Riegle-Neal II is to provide state banks parity with national banks with regard to interstate branches to the maximum extent possible.

Moreover, the very nature of Riegle-Neal II as remedial legislation supports a broad interpretation. It is a recognized canon of statutory construction that remedial legislation should be interpreted broadly to effectuate its purposes.[22] The problem that Riegle-Neal II sought to correct was accurately described by Rep. LaFalce as follows:

Now when Congress passed the Interstate Banking and Branching bill of 1994, it did not, in my judgment, adequately anticipate the negative impact that it might have on State-chartered banks interested in branching outside their home States. However * * * it has become clear that State-chartered bank wanting to branch outside their home States are at a significant disadvantage relative national banks branching outside their home State.

Why so? Well, it is due to the fact that the national bank regulator has the authority to permit national banks to conduct operations in all the States with some level of consistency. In contrast, under the existing interstate legislation State banks branching outside their home State must comply with a multitude of different State banking laws in each and every State in which they operate.

So the complications of complying with so many different State laws in order to branch interstate has led many State banks to conclude * * * that it would be much easier to switch to a national Federal charter [sic].[23]

The problem then, as understood by Congress as well as the banking industry,[24] was that State banks operated at a disadvantage to national banks when they operated outside their home states. The reason is that when state banks operated in host states, they were subject to all of the laws of each host state in which they operated. National banks, however, operate in host states largely free of host state law because many host state laws are preempted for national banks. To remedy this problem Congress designed Riegle-Neal II to eliminate the disparity between the treatment of national bank branches and state bank branches with respect to the applicability of host state law.

The legislative history of Riegle-Neal II indicates that Congress wanted to provide state banks parity with national banks at least with regard to activities involving branches outside the bank's home state. As noted above, the proposed rules generally clarify that host state law is subject to preemption when an activity is conducted at a branch in the host state of an out-of-state, state bank. The proposed rules also include a definition of the phrase ''activity conducted at a branch'' to mean ''an activity of, by, through, in, from, or substantially involving, a branch.'' Such an interpretation is consistent with the legislative intent as detailed above. Moreover, Congress recognized that state banks are at a disadvantage to national banks when it comes to interstate activities, and Riegle-Neal II was intended to remedy that disadvantage by providing a level playing field. The language of the

[13] *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600, 608 (1979).

[14] *See, Federal Energy Administration* v. *Algonquin SNG, Inc.,* 426 U.S. 548, 564 (1976).

[15] 143 Cong. Rec. H3088–89 (daily ed. May 21, 1997) (statement of Rep. Roukema).

[16] 143 Cong. Rec. H3094 (daily ed. May 21, 1997) (statement of Rep. Vento).

[17] *See, e.g.*, 143 Cong. Rec. H3094 (daily ed. May 21, 1997) (statement of Rep. Metcalf); 143 Cong. Rec. H3094–95 (daily ed. May 21, 1997) (statement of Rep. LaFalce).

[18] Riegle-Neal II was originally introduced as the Riegle-Neal Clarification Act of 1997; its name was later changed in the Senate during deliberations to the ''Riegle-Neal Amendments Act of 1997''.

[19] 143 Cong. Rec. H3089–93 (daily ed. May 21, 1997) (statement of Rep. Roukema).

[20] *See id.*

[21] 143 Cong. Rec. S5637 (daily ed. June 12, 1997) (statement of Sen. D'Amato).

[22] *See, Tcherepnin* v. *Knight,* 389 U.S. 332, 336 (1967).

[23] 143 Cong. Rec. H3094, 95 (daily ed. May 21, 1997) (statement of Rep. LaFalce).

[24] *See,* 143 Cong. Rec. S5637 (daily ed. June 12, 1997) (statement of Sen. D'Amato); 143 Cong. Rec. H3089–93 (daily ed. May 21, 1997) (statement of Rep. Roukema).

proposed rules carry out that intention by generally ensuring that whenever a branch of an out-of-state national bank would not be subject to a host state's law, then a branch of an out-of-state, state bank would also not be subject to that host state's law.

In addition, the language of section 24(j) indicates that it is focused on state banks that have interstate branches. The first sentence of paragraph (1) of subsection (j) describes the extent to which host state ''shall apply to any branch in the host state of an out-of-state state bank.'' Consistent with the first sentence of paragraph (1), the second sentence provides that when host state law does not apply, the bank's home state law shall apply to such branch.[25] Therefore, the plain language of section 24(j)(1) indicates that it preempts host state law only with respect to a branch in the host state of the out-of-state, state bank.

As noted above, section 24(j)(1) provides that host state law applies to a branch in the host state of an out-of-state, state bank to the same extent that it applies to a branch in the host state of an out-of-state, national bank. Therefore, in order to determine if host state law is preempted for a branch of an out-of-state, state bank, it is necessary to first determine if host state law applies to a branch of an out-of-state, national bank. In order to determine if host state law applies to a branch of an out-of-state, national bank, the FDIC expects to consult with the OCC. This approach is similar to the consultations that the FDIC engages in currently when making determinations regarding the permissible activities of a national bank under section 24(a) of the FDI Act, 12 U.S.C. 1831a(a).

The federal authorities that the FDIC has relied upon in making its preemption decisions in the past generally have been focused on specific areas or subjects. For example, section 27 sets forth the interest rates that state banks may charge and expressly preempts contrary state law; and section 44 (12 U.S.C. 1831u) provides that the FDIC may approve a merger between insured banks with different home states notwithstanding contrary state law.[26] In contrast, section 24(j)(1) is not focused on a specific area or subject of host state law; rather it is unrestricted in its scope. As a result of its dependence on the law applicable to national banks, the scope of section 24(j)(1) includes every area or subject that does not apply to national bank branches in the host state.

In summary, section 24(j), as amended by Riegle-Neal II, preempts the application of host state laws to a branch of an out-of-state, state bank to the extent that those host state laws do not apply to a branch of an out-of-state, national bank. The scope of the preemption is not limited to particular areas or subjects, but is broader and might preempt host state laws dealing with lending, deposit-taking and other banking activities. Nevertheless, the preemption provided by section 24(j) only operates with respect to a branch in the host state of an out-of-state, state bank. By its terms section 24(j)(1), and therefore the proposed regulation, would not apply if the out-of-state, state bank does not have a branch in the host state.[27]

C. Discussion of Section 27

The Petitioner has requested that the FDIC implement section 27 by adopting rules parallel to those adopted by the OCC and the OTS. Section 27 is the statutory counterpart to section 85 of the NBA (12 U.S.C. 85) and section 4(g) of the Home Owners' Loan Act (''HOLA'') (12 U.S.C. 1463(g)), which apply to national banks and savings associations, respectively. The Petitioner has correctly observed that the OCC and OTS have adopted rules implementing their respective statutory provisions but the FDIC has not issued rules implementing section 27.[28] This may create ambiguity or uncertainty about the application of the statute. Additionally, in their written statements or in their testimony at the public hearing on the Petition, certain representatives of state bank supervisors requested that the FDIC ''codify'' GC–10 and GC–11 and that the authority provided by section 27 be extended to operating subsidiaries of state banks.

Considering Congress' stated desire to provide state banks and insured branches of foreign banks (collectively, ''insured state banks'') interest rate parity with national banks and to provide certainty in this area, the FDIC's Board of Directors believes it is appropriate to grant the Petitioner's request on this portion of the Petition. The FDIC also believes that it is appropriate to issue rules concerning the application of section 27 to interstate state banks.

Because section 27, as will be more fully described below, was patterned after sections 85 and 86 of the NBA (12 U.S.C. 85, 86) to provide insured state banks competitive equality with national banks, the following background information is provided to frame the discussion of the proposed section 27 rules.

Section 30 of the NBA was enacted in 1864 to protect national banks from discriminatory state usury legislation. To accomplish its goal, the statute provided several alternative interest rates that national banks were permitted, under federal law, to charge their customers. At the time of enactment, the section also specified federal remedies for violations of the interest rates provided therein. The section was subsequently divided into two sections and renumbered, with the interest rate and remedy provisions becoming sections 85 and 86 of the NBA, respectively. In addition to the interest rates included in the statute when it was enacted, section 85 was amended in 1933 to also permit national banks to charge their customers an alternative rate of one percent above the discount rate for 90 day commercial paper in effect at the Federal Reserve bank for the Federal Reserve district where the bank is located.

Shortly after the 1864 statute was enacted, *Tiffany* v. *National Bank of Missouri,* 85 U.S. 409 (1873), gave rise to the ''most favored lender doctrine.'' In *Tiffany,* Missouri state law limited interest rates for state banks to eight

[25] The powers exercised by state banks are naturally those granted by the individual states, and generally one state's laws have not been interpreted as preempting any other state's laws. Section 24(j)(1) would under certain circumstances make one state's laws (a host state's laws) inapplicable and another's (a home state's laws) applicable. However, section 24(j)(1) is a federal statute, and it is federal law that preempts the host state's law, not another state's laws.

[26] The FDIC has extraordinarily broad authority to preempt any state law that prohibits or materially obstructs FDIC-assisted, interstate acquisitions of BIF-insured institutions in default or in danger of default. See section 13(f)(4)(A) of the FDI Act (12 U.S.C. 1823(f)(4)(A)). *See also* section 13(k) of the FDI Act (12 U.S.C. 1823(k) (preempting state law that conflicts with the FDIC's authority to resolve certain savings associations); cf., *State of Colorado* v. *Resolution Trust Corporation,* 926 F.2d 931 (10th Cir. 1991) (Resolution Trust Corporation was authorized by FIRREA to override state branch banking laws in emergency acquisition under section 13(k) of the FDI Act); and section 11(n) of the FDI Act (12 U.S.C. 1821(n)) (preempting state law that conflicts with the FDIC's authority to transfer assets to a bridge bank); *see, e.g., NCNB Texas National Bank* v. *Cowden,* 895 F.2d 1488 (5th Cir. 1990) (Federal law, including section 11(n) of the FDI Act, authorized FDIC to transfer fiduciary appointments of a failed bank to a bridge bank and preempted conflicting Texas state laws relating to such transfers).

[27] Also, the preemption afforded state bank branches pursuant to section 24(j) and the proposed regulation only operates to the extent that national bank branches would not be subject to host state law. If a court were to rule that host state law did apply to a national bank branch in the host state, then the host state law would also apply to a state bank branch in the host state.

[28] The primary OCC rule implementing section 85 is 12 CFR 7.4001 (2005). The OTS rule implementing section 4(g) of HOLA is 12 CFR 560.110 (2005).

percent but allowed other lenders to charge up to ten percent. The United States Supreme Court construed section 85 as permitting the National Bank of Missouri to charge nine percent interest because Missouri law allowed other lenders to charge a higher interest rate than that allowed for state banks. In its decision, the Court explained that Congress intended to bestow the status of ''national favorites'' on national banks by protecting them from unfriendly state laws that might make it impossible for them to exist within a state. Since *Tiffany* was decided, it has become well established that national banks are generally permitted to charge the highest interest rates permitted for any competing state lender by the laws of the state where the national bank is located.

Another benefit that national banks enjoy under section 85 has become known as the ''exportation doctrine.'' The exportation doctrine is based on the United States Supreme Court's interpretation of section 85 in *Marquette National Bank* v. *First of Omaha Service Corp.,* 439 U.S. 299 (1978). In *Marquette* the Court was presented with the question of where a national bank was ''located,'' under section 85, for purposes of determining the appropriate state law to apply to loans the bank made to borrowers residing in another state. In construing the statute, the Court recognized that adopting an interpretation of the statute that would make the location of the bank depend on the whereabouts of each loan transaction (in *Marquette* the transactions at issue involved credit cards) would throw confusion into the complex system of modern interstate banking. The Court also observed that national banks could never be certain whether their contacts with residents of other states were sufficient to alter the bank's location for purposes of applying section 85. Instead, the Court focused on the physical location of the national bank at issue to determine where the bank was ''located'' for purposes of applying section 85.[29] Since *Marquette* was decided, national banks have been allowed to ''export'' interest rates allowed by the state where the national bank is located on loans made to out-of-state borrowers, even though those rates may be prohibited by the state laws where the borrowers reside.

Against this backdrop, in the high interest rate environment of the late 1970s, Congress became concerned that section 85 provided national banks with a competitive advantage over insured state banks, whose interest rates were constrained by state laws, and other federally insured depository institutions. To rectify the imbalance that had been created, Congress included provisions in Title V of the Depository Institutions Deregulation and Monetary Control Act of 1980 (''DIDMCA'')[30] that granted all federally insured financial institutions (state banks, savings associations, and credit unions) similar interest rate authority to that provided in section 85 for national banks.

Title V of DIDMCA contained three parts that preempt state usury laws. For purposes of this discussion, however, the most relevant sections are contained in Part C. Sections 521–523 of DIDMCA amended the FDI Act (for insured state banks), the National Housing Act (for insured savings associations), and the Federal Credit Union Act (for insured credit unions), respectively. Each of these sections, as enacted, contained explicit preemptive language[31] in the statutory text, unlike under section 85, but were subject to the ''opt-out'' provision in section 525 of the statute.[32] These provisions are described generally in the Conference Report for the legislation as follows:

> ''State usury ceilings on all loans made by federally insured depository institutions (except national banks) * * * will be permanently preempted subject to the right of affected states to override at any time * * *. In order for a state to override a federal preemption of state usury laws provided for in this Title the override proposal must explicitly and by its terms indicate that the state is overriding the preemption. Under this requirement the state law, constitutional provision, or other override proposal must specifically refer to this Act and indicate that the state intends to override the federal preemption this Act provides.''[33]

Thus, the specific preemptive language contained in section 27, the accompanying legislative history, and the design and structure of Title V, Part C of DIDMCA, indicate that Congress intended section 27 to have preemptive effect, subject to the ability of state legislatures to ''opt-out'' of the statute's coverage by following the prescribed statutory procedures.

Regarding section 27, specifically, subsection (a) is patterned after section 85 and provides that insured state banks are permitted to charge the greater of:

- The rate prescribed for state banks under state law, if any;
- One percent more than the discount rate on 90 day commercial paper in effect at the Federal Reserve bank for the Federal Reserve district where the bank is located; and
- The rate allowed by the laws of the state, territory or district where the bank is located.[34]

In addition, the remedial nature of the enactment and the Congressional intent of providing insured state banks competitive equality with respect to interest rates are evidenced in the statutory language ''[i]n order to prevent discrimination against State-chartered insured depository institutions * * * with respect to interest rates * * *[35] Finally, subsection (b) provides virtually identical federal remedies for violating subsection (a) of section 27 as section 86 of the NBA provides for violations of section 85.

Because of the commonalities in the design of section 27 with section 85, the use of the identical language in the two sections, and the Congressional objective of providing insured state banks parity with national banks regarding interest rates, the courts and the FDIC have construed section 27 *in pari materia* with section 85.[36] In the

[29] Unlike the situation today, all the offices of the First National Bank of Omaha were in the State of Nebraska and its charter address was in Nebraska because national banks could not operate interstate branches.

[30] Pub. L. 96–221, 94 Stat. 132, 164–168 (1980).

[31] Section 27 still contains the express preemptive language '' * * * '' notwithstanding any State constitution or statute which is hereby *preempted* for purposes of this section'' in subsection (a) and '''such State fixed rate is thereby *preempted* by the rate described in subsection (a) of this section''' in subsection (b). (Emphasis added).

[32] 12 U.S.C. 1831d note (Effective and Applicability Provisions).

[33] H.R. Rep. No. 96–842, 78–79 (1980).

[34] *FDIC Advisory Op. No. 81–3,* Letter from Frank L. Skillern, Jr., General Counsel, February 3, 1981, *reprinted in* [Transfer Binder 1988–1989] Fed. Banking L. Rep. (CCH) ¶ 81,006 (''*FDIC Advisory Op. No. 81–3*'').

[35] Senator Proxmire, the Chairman of the Senate Banking Committee and a sponsor of DIDMCA, expressed a similar intent in his comments regarding H.R. 4986, which contained the language that became section 27(a) stating:

> ''Title V * * * contains a provision which provides parity, or competitive equality, between national banks and State chartered depository institutions on lending limits * * * State chartered depository institutions are given the benefits of 12 U.S.C. 85 unless a State takes specific action to deny State chartered institutions that privilege.''

126 Cong. Rec. S3170 (daily ed. Mar. 27, 1980) (remarks of Sen. Proxmire).

[36] *Greenwood Trust Co.* v. *Commonwealth of Massachusetts,* 971 F.2d 818, 827 (1st Cir. 1992) (''The historical record clearly requires a court to read the parallel provisions of [DIDMCA] and the [NBA] *in pari materia.* It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way. [citations omitted]. So here. What is more, when borrowing of this sort occurs, the borrowed phrases do not shed their skins like so many reinvigorated reptiles. Rather, ''if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'' [citation omitted]. Because we think it is perfectly plain that this

interest of maintaining parity with national banks, the FDIC also believes the same rationale applies with regard to section 86.

D. Explanation of the Proposed Rules

1. Section 24(j) Provisions

Paragraph (a) is a definitional section that corresponds to section 24(j)(4) and recites in paragraphs (a)(1) through (a)(3) the statutory definitions of ''home state,'' ''host state'' and ''out-of-state bank'' found in 12 U.S.C. 1831u(g). However, the proposed rule also adds in paragraph (a)(4) a definition of the phrase ''activity conducted at a branch'' which is used elsewhere in the proposed rule. It defines ''activity conducted at a branch'' to mean ''an activity of, by, through, in, from, or substantially involving, a branch.'' This definition is designed to give effect to Congress' intent to grant state banks full parity with national banks with respect to interstate branches. As noted above, commenters at the FDIC's public hearing stated the need for clarity with regard to the applicability of state law to branches of out-of-state, state banks. Issuing a regulation without defining the critical terms used in the regulation would provide no clarity and could lead to further confusion. Since a national bank branch gets the benefit of preemption whether or not the entire activity is performed in its branch, and since Congress intended to grant state banks full parity with national banks in this area, the definition in the proposed rule is designed to clarify that a branch of an out-of-state state bank gets the benefit of preemption whether or not the entire activity is performed in the branch.

Paragraphs (b) and (c) of the proposed rule carry out section 24(j)(1). Paragraph (b) states that except as provided in paragraph (c), host state law applies to a branch in the host state of an out-of-state, state bank. Paragraph (c) clarifies that host state law does not apply to an activity conducted at a branch in the host state of an out-of-state, state bank whenever host state law does not apply to an activity conducted at a branch in the host state of an out-of-state, national bank. Paragraph (c) further clarifies that when host state law does not apply as a result of this preemption, then the state bank's home state law applies.

Paragraph (d) of the proposed rule carries out section 24(j)(2). Paragraph (d) states generally that subject to the restrictions contained elsewhere in Part 362 of the FDIC's rules and regulations, an out-of-state, state bank that has a branch in a host state may conduct any activity at that branch that is both permissible under its home state law and either permissible for a host state bank or permissible for a branch of an out-of-state, national bank. Part 362 sets forth the prohibitions and restrictions that a state bank is subject to when it wants to conduct as principal an activity that is not permissible for a national bank. This paragraph, like the statutory provision it is based upon, preserves those prohibitions and restrictions.

Paragraph (e) is a savings provision that implements the statutory savings provision at section 24(j)(3). It basically preserves the applicability of a state bank's home state law under the interstate merger provisions of section 44 of the FDI Act (12 U.S.C. 1831u), and the applicability of Federal law to state banks and state bank branches, whether they are in the home state or the host state.

2. Section 27 Provisions

The portion of the proposed rules implementing section 27 would be contained in Part 331, which would be titled ''Federal Interest Rate Authority.'' In addition to paralleling the existing rules implementing section 85 for national banks, as indicated in the following section-by-section analysis, some additional provisions are being proposed for clarification and to address issues specifically affecting insured state, but not national, banks.

Section 331.1 addresses the authority, purpose, and application of the rules. As indicated in the regulatory text, the rules would be issued pursuant to the FDIC's rulemaking authority in section 9(a) (Tenth) and 10(g) of the FDI Act (12 U.S.C. 1819(a) (Tenth), 1820(g)) to carry out the provisions of the FDI Act and any other law that the FDIC has the responsibility for administering or enforcing and to define the terms necessary to carry out the provisions of the FDI Act. Their purpose would be to implement Congress' explicit statutory directive in section 27 of preventing discrimination against insured state banks with regard to interest rates and to address other issues the FDIC considers appropriate to implement section 27. They would apply to a ''state bank'' and an ''insured branch,'' as defined in section 3(a)(2) and 3(s)(3) (12 U.S.C. 1813(a)(2); 1813(s)(3)), respectively. Where the rules apply equally to a ''state bank'' and an ''insured branch'' the rules use the term ''insured state banks'' as a collective reference to the statutorily defined terms. In certain instances, however, the treatment under the rules would depend on whether the institution at issue is a ''state bank'' or an ''insured branch.'' Where such a distinction is relevant, the rules use the appropriate statutorily defined term.

In addition, this section provides a rule of construction to ensure that section 27 and its implementing rules are construed in the same manner as section 85 and its implementing rules are construed by the OCC. This rule of construction is intended to inform the public of the authority and benefits provided by section 27, as well as provide insured state banks assurance that the FDIC intends that section 27 provide the same benefits to insured state banks that section 85 provides to national banks. It will also provide more practical benefits. For example, the Federal definition of ''interest'' contained in § 331.2(a), like 12 CFR 7.4001(a), contains a non-comprehensive list of charges that do and do not constitute ''interest'' for purposes of the statute. Since the OCC rule was issued, the OCC has issued interpretive letters addressing whether other charges that are not listed in the regulation, such as prepayment fees, constitute ''interest'' for purposes of section 85. The rule of construction should make it unnecessary in most instances for insured state banks to seek confirmation from the FDIC that its regulation and statute will be interpreted in the same manner, when such interpretive letters are issued by the OCC. Also, interpretive letters have been issued by the OCC advising that national bank operating subsidiaries can utilize section 85.[37] To provide parity, this provision will allow section 27 to be utilized by insured state bank subsidiaries to the same extent as section 85 can be utilized by subsidiaries of national banks (*i.e.*, to the extent the insured state bank subsidiaries are majority-owned by the insured state bank, subject to supervision of the state banking authority, and can only engage in activities that the bank could engage in directly).

Section 331.2 is essentially identical to section 7.4001 of the OCC's regulations interpreting section 85. The

portable soil includes prior judicial interpretations of the transplanted language, [citations omitted], [NBA] precedents must inform our interpretation of words and phrases that were lifted from the [NBA] and inserted into [DIDMCA]'s text.''); *General Counsel Op. No. 10; FDIC Advisory Op. No. 81–3.*

[37] OCC Interpretive Letter No. 954, December 16, 2002, *reprinted in* [Transfer Binder 2003–2004] Fed. Banking L. Rep. (CCH) ¶ 81–479; OCC Interpretive Letter No. 968, February 12, 2003, *reprinted in* [Transfer Binder 2003–2004] Fed. Banking L. Rep. (CCH), ¶ 81–493; OCC Interpretive Letter No. 974, July 21, 2003, *reprinted in* [Transfer Binder 2003–2004] Fed. Banking L. Rep. (CCH) ¶ 81–500.

Federal definition of ''interest'' in paragraph (a) was reviewed, with approval in GC–10.[38] As is the case with section 7.4001(a) of the OCC's regulation, the Federal definition in the proposed rule is intended to define ''interest'' for purposes of determining whether a particular charge is ''interest'' subject to section 27 of the FDI Act and its most favored lender and exportation rules. Also, like section 7.4001(a), the charges specified in the paragraph are non-comprehensive and other charges may be determined to constitute or not constitute ''interest'' for purposes of applying section 27. Paragraph (b) would formally recognize that insured state banks have the same most favored lender authority provided for national banks, which is permitted under the ''rate allowed by the laws of the state, territory, or district where the bank is located'' language contained in section 27. In 1981, shortly after section 27 was enacted, the FDIC's General Counsel analyzed section 27 and recognized that the most favored lender doctrine applied to insured state banks.[39] Paragraph (b) of the proposed rule is almost identical to the OCC regulatory text the FDIC's General Counsel reviewed approvingly in his the opinion. The U.S. Supreme Court, in *Marquette*, also reviewed the same regulatory text.[40] Paragraph (c), like section 7.4001(c), confirms that the Federal definition of the term ''interest'' does not change state law definitions of ''interest'' (nor how the state definition of interest is used) solely for purposes of state law. Finally, as with section 7.4001(d) for national banks, paragraph (d) of the proposed rule allows corporate borrowers and insured state banks to agree to any interest rate if the bank is located in a state whose laws deny the defense of usury to a corporate borrower.

Section 331.3 addresses where a state bank that does not maintain branches in another state, or that operates exclusively over the Internet, is ''located'' and where an insured U.S. branch of a foreign bank is ''located.'' Paragraph (a) addresses state banks and determines the location issue for non-interstate state banks and Internet banks by reference to the state that issued the charter. Paragraph (b) addresses insured branches of foreign banks and adopts an analogous method for determining the location of the insured branch to that provided in paragraph (a) for state banks. Paragraph (b) is tailored more, however, to the unique nature of insured branches, which do not operate interstate branches, do not operate exclusively over the Internet, and are an office of the foreign bank that is located in the United States operating under a license from the appropriate banking authority, as opposed to a separate incorporated entity.

Section 331.4 addresses where a state bank that maintains interstate branches is ''located'' and the interest rate that should be applied to loans made by the home office of the bank or its out-of-state branches. These issues involve the application of section 27 in the context of Riegle-Neal I and Riegle-Neal II (collectively, the ''Interstate Banking Statutes'') and were analyzed in GC–11. Except as otherwise indicated, the text of the proposed rule is based upon a detailed discussion of the interplay between section 27 and the relevant provisions of Interstate Banking Statutes that was contained in GC–11;[41] therefore, the following brief description of the proposed rule should be read in context with GC–11.

Paragraph (a) of the proposed rule defines ''home state'' and ''host state,'' for purposes of the section, without reference to national banks because the rule exclusively addresses the application of section 27 to a state bank. The rule would not apply to an insured branch of a foreign bank because section 24(j) (12 U.S.C. 1831a (j)), unlike section 27, contains no reference to an ''insured branch.'' The definition of ''non-ministerial functions,'' recognizes that the non-ministerial functions, discussed below, are factors to be considered in determining where a loan is made by an interstate state bank. The definition of the non-ministerial functions also contains a description of the three non-ministerial functions that is consistent with their description in GC–11.

Paragraph (b) recognizes that a state bank that operates interstate branches is ''located,'' for purposes of applying section 27, in the bank's home state and in each host state where the bank maintains a branch. Paragraph (c) is based on an explanation by Senator Roth of section 111 (the usury savings clause) of Riegle-Neal I (12 U.S.C. 1811 note (Restatement of Existing Law)),[42] which he sponsored.[43] In explaining the provisions, a distinction was made between ''ministerial''[44] and ''non-ministerial''[45] functions, with the latter being considered the most relevant factors for determining the appropriate state's law to apply to a particular loan. Senator Roth indicated that there were considered to be three non-ministerial functions incident to the making of a loan by an interstate bank and that if those three non-ministerial functions occur in a single state, that state's interest rate provisions should be applied to the loan (this standard is contained in paragraph (c)(1) of the proposed rule). GC–11 observed, however, that the Interstate Banking Statutes did not address other situations that could occur in the interstate context, such as where the three non-

[38] GC–10 addressed the question of what charges constitute ''interest'' for purposes of section 27. The opinion observed that the OCC and the OTS had both adopted virtually the same Federal definition of ''interest'' for purposes of applying their respective statutory counterparts to section 27. The Federal definition of ''interest'' contained in paragraph (a) of the proposed rule is identical to the regulatory definition reviewed in GC–10. The opinion concluded that section 85 and section 27 had been and should be construed *in pari materia* because of the similarities in the two statutes and the clear congressional intent of providing competitive equality to state-chartered lending institutions by the enactment of section 27. Thus, it was the Legal Division's opinion that the term ''interest,'' for purposes of section 27, included those charges that a national bank was authorized to charge under section 85 and the OCC regulation.

It is anticipated that GC–10 will be withdrawn if the proposed regulations are adopted because the rules embody the substance of the legal analysis and conclusions contained in the opinion.

[39] *FDIC Advisory Op. No. 81–3.*

[40] *Marquette*, at 548, *note* 26.

[41] Briefly, in GC–11, the FDIC's General Counsel addressed where an interstate state bank is ''located,'' for purposes of applying section 27, when it operates interstate branches and determined that such a bank could be located in its home state and in each host state where it operated a branch. The General Counsel also addressed the effect of the ''applicable law clause for state banks'' and the ''usury savings clause'' enacted in Riegle-Neal I and amendments to the ''applicable law clause for state banks'' enacted in Riegle-Neal II, on the determination of the appropriate state law to apply to loans made by an interstate state bank, either through its home office or by a branch of the bank located in a host state. In doing so, the opinion based some of its conclusions regarding the applicability of host state law, rather than home state law, on a discussion of the intended effect of the ''usury savings clause'' by Senator Roth, the sponsor of the amendment. Finally, the opinion addressed other situations that were not addressed by the Interstate Banking Statutes, which the OCC has also addressed for national banks in OCC Interpretive Letter 822, and concluded that similar analysis and treatment should apply to interstate state banks in the context of section 27.

[42] The usury savings clause provides, in pertinent part:

No provision of this title and no amendment made by this title to any other provision of law shall be construed as affecting in any way—

* * * * *

(3) The applicability of [section 85] or [section 1831d] of the Federal Deposit Insurance Act.

[43] The discussion appears at 140 Cong. Rec. S12789–12790 (daily ed. Sept. 13, 1994)(Remarks of Senator Roth).

[44] These include providing loan applications, assembling documents, providing a location for returning documents necessary for making a loan, providing account information, and receiving payments.

[45] These include the approval of credit (*i.e.*, decision to extend credit), the extension of credit itself, and the disbursal of proceeds of the loan.

ministerial functions occur in different states or where some of the non-ministerial functions occur in an office that is not considered to be the home office or a branch of the bank. In these instances, as reflected in GC–11 and paragraph (c)(2) of the proposed rule, home state rates may be used. Alternatively, as reflected in GC–11 and paragraph (c)(3) of the proposed rule, host state interest rates may be applied where a non-ministerial function occurs at a branch in a host state, if based on an assessment of all of the facts and circumstances, the loan has a clear nexus to the host state.

An issue that is not addressed in the proposed rules is whether an interstate state bank should be required to disclose to its borrowers that the interest to be charged on a loan is governed by applicable federal law and the law of the relevant state which will govern the transaction. Such a disclosure was discussed in GC–11, to prevent uncertainty regarding which state's interest rate provisions apply to loans made by interstate state banks, and was also mentioned in the OCC's corresponding Interpretive Letter 822.[46] The FDIC is interested in comments concerning whether this issue also should be addressed in section 331.4, as well as any benefits or burdens that would result from requiring such disclosure.

Section 331.5 addresses the effect of a state's election to exercise the authority provided by section 525 of DIDMCA (12 U.S.C. 1831d note (Effective and Applicability Provisions) to ''opt-out'' of the federal authority provided by section 27.[47] As proposed, section 27 would not apply to an insured state bank or an interstate branch of a state bank that is situated in a state that has opted-out of the coverage of section 27. The FDIC believes that Iowa, Wisconsin and Puerto Rico are the only jurisdictions that currently use this authority.[48] The FDIC welcomes additional information concerning these states or any other states that may have elected to opt-out under section 525.

Since a state may elect to opt-out under section 525 at any time, the FDIC is also interested in comments addressing whether it would be beneficial to include a list of the states that have opted-out in the text of the rule. The FDIC recognizes that this would require revision of the rule whenever a state repeals its existing opt-out or enacts opt-out legislation regarding section 27 and that, due to the time involved in identifying such information and revising the regulation, this may result in the rule being inaccurate for a period of time. Thus, if commenters would like to have this information incorporated in the rule, the FDIC is also interested in comments or suggestions addressing how to assure the accuracy of the state information that would be contained therein.

IV. Request for Comment

The FDIC is interested in comments on all aspects of the proposed rules, particularly responses to the specific questions posed in the above discussion of the proposed rule. In particular, we are interested in specific comments on whether the proposed rules would be either helpful or harmful to the industry and the public and, if so, how.

V. Paperwork Reduction Act

No collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) are contained in the proposed rule. Consequently, no information has been submitted to the Office of Management and Budget for review.

VI. Regulatory Flexibility Act

The FDIC certifies that this proposed rule would not have a significant economic impact on a substantial number of small businesses within the meaning of the Regulatory Flexibility Act (5 U.S.C. 605(b)). The proposed rule would clarify sections 24(j) and 27 of the FDI Act by indicating the state law that would apply in certain interstate banking activities conducted by state-chartered banks. The proposed rule would impose no new requirements or burdens on insured depository institutions. Also, it would not result in any adverse economic impact. Accordingly, the Act's requirements relating to an initial regulatory flexibility analysis is not applicable.

VII. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

List of Subjects

12 CFR Part 331

Banks, banking, Deposits, Foreign banking, Interest rates.

12 CFR Part 362

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Investments, Reporting and recordkeeping requirements.

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation hereby proposes to amend 12 CFR chapter III as follows:

1. Part 331 is added to read as follows:

PART 331—FEDERAL INTEREST RATE AUTHORITY

Sec.
331.1 Authority, purpose and application.
331.2 Interest permitted for insured state banks.
331.3 Location of non-interstate state bank or insured branch.
331.4 Location and interest rate for interstate state bank.
331.5 Effect of opt-out.

Authority: 12 U.S.C. 1819(a) (Tenth), 1820(g), 1831d, 1831d note.

§ 331.1 Authority, purpose and application.

(a) *Authority.* The regulations in this part are issued by the FDIC under the authority contained in sections 9(a)(Tenth) and 10(g) of the Federal Deposit Insurance Act (12 U.S.C. 1819(a) (Tenth), 1820(g)) to implement section 27 of the FDI Act (12 U.S.C. 1831d) and related provisions of the Depository Institution Deregulation and Monetary Control Act of 1980, Public Law 96–221, 94 Stat. 132 (1980) (''DIDMCA'').

(b) *Purpose.* Section 27 of the FDI Act was enacted to prevent discrimination against insured state-chartered banks

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[46] OCC Interpretive Letter 822, February 17, 1998, *reprinted in* [Transfer Binder 1997–1998] Fed. Banking L. Rep. (CCH) ¶ 81–265.

[47] Section 525 states:

The amendments made by sections 521 through 523 of this title shall apply only with respect to loans made in any State during the period beginning on April 1, 1980, and ending on the date, on or after April 1, 1980, on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want the amendments made by such sections to apply with respect to loans made in such State, except that such amendments shall apply to a loan made on or after the date such law is adopted or such certification is made if such loan is made pursuant to a commitment to make such loan which was entered into on or after April 1, 1980, and prior to the date on which such law is adopted or such certification is made.

[48] Act of May 10, 1980, ch. 1156, section 32, 1980 *Iowa Acts* 537, 547–48 (not codified); Act, ch. 45, section 50, 1981 *Wis. Laws* 586 (not codified); 10 *P.R. Laws Ann.* section 9981 (2002). Some states, such as Nebraska, Massachusetts, Colorado, Maine and North Carolina, opted out for a number of years, but either rescinded their respective opt-out statutes or allowed them to expire.

and insured U.S. branches of foreign banks with regard to interest rates by providing similar interest rate authority to that permitted for national banks under section 85 of the National Bank Act (12 U.S.C. 85). To maintain parity with national banks in this area, the rules contained in this Part clarify that state banks have regulatory authority that is parallel to the authority provided to national banks under regulations issued by the Office of the Comptroller of the Currency implementing section 85. Other issues the FDIC considers appropriate to implement section 27 are also addressed in the rules.

(c) *Application.* This Part applies to a ''state bank'' and an ''insured branch,'' as those terms are defined in section 3(a)(2) and 3(s)(3) of the FDI Act (12 U.S.C. 1813(a)(2); 1813(s)(3)), respectively. The reference to ''insured state banks'' in this Part, is a collective reference to ''state banks'' and ''insured branches.'' To maintain parity with national banks under section 85 of the National Bank Act, the FDIC will construe section 27 of the FDI Act and the regulations in this Part in the same manner as section 85 and its implementing regulations are construed by the Office of the Comptroller of the Currency.

§ 331.2 Interest permitted for insured state banks.

(a) *Definition.* The term ''interest'', as used in 12 U.S.C. 1831d, includes any payment compensating a creditor or prospective creditor for an extension of credit, making available a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: Numerical periodic rates, late fees, creditor-imposed not sufficient funds (NSF) fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

(b) *Most favored lender.* An insured state bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state. If state law permits different interest charges on specified classes of loans, an insured state bank making such loans is subject only to the provisions of state law relating to that class of loans that are material to the determination of the permitted interest. For example, an insured state bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company, without being so licensed, but subject to state law limitations on the size of loans made by small loan companies.

(c) *Effect on state definitions of interest.* The Federal definition of the term ''interest'' in paragraph (a) of this section does not change how interest is defined by the individual states (nor how the state definition of interest is used) solely for purposes of state law. For example, if late fees are not ''interest'' under state law where an insured state bank is located but state law permits its most favored lender to charge late fees, then an insured state bank located in that state may charge late fees to its intrastate customers. The insured state bank may also charge late fees to its interstate customers because the fees are interest under the Federal definition of interest and an allowable charge under state law where the insured state bank is located. However, the late fees would not be treated as interest for purposes of evaluating compliance with state usury limitations because state law excludes late fees when calculating the maximum interest that lending institutions may charge under those limitations.

(d) *Corporate borrowers.* An insured state bank located in a state whose state law denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by the corporate borrower.

§ 331.3 Location of non-interstate state bank or insured branch.

(a) *State bank.* A state bank that does not maintain interstate branches or operates exclusively through the Internet is located, for purposes of applying 12 U.S.C. 1831d, in the state that issued the charter.

(b) *Insured branch.* An insured branch of a foreign bank is located, for purposes of applying 12 U.S.C. 1831d, in the state that issued the license.

§ 331.4 Location and interest rate for interstate state bank.

(a) *Definitions.* For purposes this section, the following terms have the following meanings:

(1) *Home state* means the state that chartered a state bank.

(2) *Host state* means a state, other than the home state of a state bank, in which the bank maintains a branch.

(3) *Non-ministerial functions* are factors to be considered in determining where a loan is made by an interstate state bank. The non-ministerial functions are:

(i) *Approval.* The decision to extend credit occurs where the person is located who is charged with making the final judgment of approval or denial of credit.

(ii) *Disbursal.* The location where the actual physical disbursement of the proceeds of the loan occurs, as opposed to the delivery of previously disbursed funds.

(iii) *Extension of credit.* The site from which the first communication of final approval of the loan occurs.

(b) *Location.* An interstate state bank is located, for purposes of applying 12 U.S.C. 1831d, in the home state of the state bank and in each host state where the state bank maintains a branch.

(c) *Location in more than one state.* If a state bank is located in more than one state, the appropriate interest rate:

(1) Will be determined by reference to the laws of the state where all of the non-ministerial functions occur;

(2) May be determined by reference to the laws of the home state of the state bank, where the non-ministerial functions occur in branches located in different host states or any of the non-ministerial functions occur in a state where the state bank does not maintain a branch; or

(3) May be determined by reference to the laws of a host state where a non-ministerial function occurs if, based on an assessment of all of the relevant facts and circumstances, the loan has a clear nexus to that host state.

§ 331.5 Effect of opt-out.

12 U.S.C. 1831d does not apply to loans made to customers by an insured state bank or an interstate branch of a state bank situated in a state that elects to opt-out of the coverage of 12 U.S.C. 1831d, pursuant to section 525 of DIDMCA (12 U.S.C. 1831d note (Effective and Applicability Provisions).

PART 362—ACTIVITIES OF INSURED BANKS AND INSURED SAVINGS ASSOCIATIONS

2. Revise the authority citation for part 362 to read as follows:

Authority: 12 U.S.C. 1816, 1818, 1819(a)(Tenth), 1820(g), 1828(j), 1828 (m), 1828a, 1831a, 1831d, 1831e, 1831w, 1843(*l*).

3. Add new subpart F to read as follows:

Subpart F—Preemption

§ 362.19 Applicability of State Law.

(a) *Definitions.* For purposes of this section the following definitions apply.

(1) The term ''*home State*'' means (i) with respect to a State bank, the State

by which the bank is chartered, and (ii) with respect to a national bank, the State in which the main office of the bank is located.

(2) The term ''*host State*'' means with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch.

(3) The term ''*out-of-State bank*'' means, with respect to any State, a bank whose home State is another State.

(4) The phrase ''*activity conducted at a branch*'' means an activity of, by, through, in, from, or substantially involving, a branch.

(b) Except as provided in paragraph (c) of this section, the laws of a host State apply to an activity conducted at a branch in the host State by an out-of-State, State bank.

(c) A host State law does not apply to an activity conducted at a branch in the host State of an out-of-State, State bank to the same extent that a Federal court or the Office of the Comptroller of the Currency has determined in writing that the particular host State law does not apply to an activity conducted at a branch in the host State of an out-of-State, national bank. If a particular host State law does not apply to such activity of an out-of-State, State bank because of the preceding sentence, the home State law of the out-of-State, State bank applies.

(d) Subject to the restrictions of subparts A through E of this part 362, an out-of-State, State bank that has a branch in a host State may conduct any activity at such branch that is permissible under its home State law, if it is either

(1) Permissible for a bank chartered by the host State, or

(2) Permissible for a branch in the host State of an out-of-State, national bank.

(e) Savings provision. No provision of this section shall be construed as affecting the applicability of—

(1) Any State law of any home State under subsection (b), (c), or (d) of 12 U.S.C. 1831u; or

(2) Federal law to State banks and State bank branches in the home State or the host State.

Dated at Washington DC, this 6th day of October, 2005.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 05–20582 Filed 10–13–05; 8:45 am]

BILLING CODE 6714–01–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Chapter II

All Terrain Vehicles; Advance Notice of Proposed Rulemaking; Request for Comments and Information

AGENCY: Consumer Product Safety Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Commission is considering whether there may be unreasonable risks of injury and death associated with some all terrain vehicles (''ATVs''). The Commission is considering what actions, both regulatory and non-regulatory, it could take to reduce ATV-related deaths and injuries. As described below, the Commission has had extensive involvement with ATVs since 1984. However, in recent years there has been a dramatic increase in both the numbers of ATVs in use and the numbers of ATV-related deaths and injuries. According to the Commission's 2004 annual report of ATV deaths and injuries (the most recent annual report issued by the Commission), on December 31, 2004, the Commission had reports of 6,494 ATV-related deaths that have occurred since 1982. Of these, 2,019 (31 percent of the total) were under age 16, and 845 (13 percent of the total) were under age 12. The 2004 annual report states that in 2004 alone, an estimated 129,500 four-wheel ATV-related injuries were treated in hospital emergency rooms nationwide. While this represents an increase in injuries in 2004 compared with 2003, the total number of four-wheel ATVs in use in the United States has increased and the estimated risk of injury per 10,000 four-wheel ATVs in use remained essentially level over the previous year.

This advance notice of proposed rulemaking (''ANPR'') initiates a rulemaking proceeding under the Consumer Product Safety Act (''CPSA'') and the Federal Hazardous Substances Act (''FHSA'').[1] However, the notice discusses a broad range of regulatory and non-regulatory alternatives that could be used to reduce ATV-related deaths and injuries. The Commission invites public comment on these alternatives and any other approaches that could reduce ATV-related deaths and injuries. The Commission also solicits written comments concerning the risks of injury associated with ATVs, ways these risks could be addressed, and the economic impacts of the various alternatives discussed. The Commission also invites interested persons to submit an existing standard, or a statement of intent to modify or develop a voluntary standard, to address the risk of injury described in this ANPR.

DATES: Written comments and submissions in response to this ANPR must be received by December 13, 2005.

ADDRESSES: Comments should be e-mailed to *cpsc-os@cpsc.gov*. Comments should be captioned ''ATV ANPR.'' Comments may also be mailed, preferably in five copies, to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207–0001, or delivered to the Office of the Secretary, Consumer Product Safety Commission, Room 502, 4330 East-West Highway, Bethesda, Maryland; telephone (301) 504–7923. Comments also may be filed by facsimile to (301) 504–0127.

FOR FURTHER INFORMATION CONTACT: Elizabeth Leland, Project Manager, ATV Safety Review, Directorate for Economic Analysis, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–7706 or e-mail: *eleland@cpsc.gov*.

SUPPLEMENTARY INFORMATION:

A. Background

The Commission's involvement with ATVs is longstanding. ATVs first appeared on the market in the early 1970's. After a marked increase in their sales and in ATV-related incidents, the Commission became concerned about their safety in the early 1980's. On May 31, 1985, the Commission published an ANPR stating the Commission's safety concerns and outlining a range of options the Commission was considering to address ATV-related hazards. 50 FR 23139. At that time, the Commission had reports of 161 ATV-related fatalities which had occurred between January 1982 and April 1985, and the estimated number of emergency room treated injuries associated with ATVs was 66,956 in 1984. The majority of ATVs in use at that time were three-wheel models. One of the options mentioned in the ANPR was proceeding under section 12 of the CPSA to declare ATVs an imminently hazardous consumer product, see 15 U.S.C. 2061(b)(1). In 1987, the Commission filed such a lawsuit against the five companies that were major ATV distributors at that time. The lawsuit was settled by Consent Decrees filed on

[1] Chairman Hal Stratton and Commissioners Thomas H. Moore and Nancy A. Nord issued statements, copies of which are available from the Commission's Office of the Secretary or from the Commission's Web site, *http://www.cpsc.gov*.