

DEPARTMENT OF THE TREASURY**Office of the Comptroller of the Currency****12 CFR Part 26**

[Docket ID OCC–2018–0011]

RIN 1557–AE22

FEDERAL RESERVE SYSTEM**12 CFR Parts 212 and 238**

[Docket No. R–1641]

RIN 7100–AF31

FEDERAL DEPOSIT INSURANCE CORPORATION**12 CFR Part 348**

RIN 3064–AE57

Thresholds Increase for the Major Assets Prohibition of the Depository Institution Management Interlocks Act Rules

AGENCY: Office of the Comptroller of the Currency (OCC); Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking and request for public comment.

SUMMARY: The OCC, the Board, and the FDIC (collectively, the agencies) are inviting comment on a proposed rule that would increase the major assets prohibition thresholds for management interlocks in the agencies' rules implementing the Depository Institution Management Interlocks Act (DIMIA). The DIMIA major assets prohibition prohibits a management official of a depository organization with total assets exceeding \$2.5 billion (or any affiliate of such an organization) from serving at the same time as a management official of an unaffiliated depository organization with total assets exceeding \$1.5 billion (or any affiliate of such an organization). DIMIA provides that the agencies may adjust, by regulation, the major assets prohibition thresholds in order to allow for inflation or market changes. The agencies propose to raise the major assets prohibition thresholds to \$10 billion to account for changes in the United States banking market since the current thresholds were established in 1996. The agencies also propose three alternative approaches for increasing the thresholds based on market changes or inflation. Increasing the major assets prohibition thresholds would relieve certain depository organizations below the adjusted thresholds from having to

ask the agencies for an exemption from the major assets prohibition. The agencies do not expect the proposal to materially increase anticompetitive risk.

DATES: Comments must be received on or before April 1, 2019.

ADDRESSES: Comments should be directed to:

OCC: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments through the Federal eRulemaking Portal or email, if possible. Please use the title "Thresholds Increase for the Major Assets Prohibition of the Depository Institution Management Interlocks Act Rules" to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

Federal eRulemaking Portal—"Regulations.gov": Go to www.regulations.gov. Enter "Docket ID OCC–201X–0011" in the Search box and click "Search." Click on "Comment Now" to submit public comments.

- Click on the "Help" tab on the *Regulations.gov* home page to get information on using *Regulations.gov*, including instructions for submitting public comments.

- *Email:* regs.comments@occ.treas.gov.

- *Mail:* Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

- *Fax:* (571) 465–4326.

Instructions: You must include "OCC" as the agency name and "Docket ID OCC–201X–0011" in your comment. In general, OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information that you provide such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- *Viewing Comments Electronically:* Go to www.regulations.gov. Enter "Docket ID OCC–201X–0011" in the

Search box and click "Search." Click on "Open Docket Folder" on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on "View all documents and comments in this docket" and then using the filtering tools on the left side of the screen.

- Click on the "Help" tab on the *Regulations.gov* home page to get information on using *Regulations.gov*. The docket may be viewed after the close of the comment period in the same manner as during the comment period.

- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing-impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

Board: When submitting comments, please consider submitting your comments by email or fax because paper mail in the Washington, DC area and at the Board may be subject to delay. You may submit comments, identified by Docket No. R–1641 and RIN 7100–AF31, by any of the following methods:

- *Agency Website:* <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- *Email:* regs.comments@federalreserve.gov. Include docket number in the subject line of the message.

- *FAX:* (202) 452–3819 or (202) 452–3102.

- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments will be made available on the Board's website at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Otherwise, comments will not be edited to remove any identifying or contact information. Public comments also may be viewed electronically or in paper in Room 3515, 1801 K Street NW (between 18th and 19th Streets NW), between 9:00 a.m. and 5:00 p.m. on weekdays.

FDIC: You may submit comments, identified by RIN 3064–AE57, by any of the following methods:

• *Agency Website:* <https://www.fdic.gov/regulations/laws/federal/>. Follow instructions for submitting comments on the Agency website.

• *Email:* Comments@fdic.gov. Include the RIN 3064–AE57 on the subject line of the message.

• *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

• *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

Instructions: All comments received must include the agency name and RIN 3064–AE57 for this rulemaking. All comments received will be posted without change to <https://www.fdic.gov/regulations/laws/federal/>, including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E–1002, Arlington, VA 22226 by telephone at (877) 275–3342 or (703) 562–2200.

FOR FURTHER INFORMATION CONTACT:

OCC: Daniel Perez, Attorney, Christopher Rafferty, Attorney, Chief Counsel's Office, (202) 649–5490; or for persons who are deaf or hearing-impaired, TTY, (202) 649–5597; Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

Board: Michelle Kidd, Senior Counsel, (202) 736–5554; Claudia Von Pervieux, Senior Counsel, (202) 452–2552; or Andrew Hartlage, Counsel, (202) 452–6483, of the Legal Division; Katie Cox, Manager, (202) 452–2721; or Melissa Clark, Senior Supervisory Financial Analyst, (202) 452–2277, of the Division of Supervision and Regulation, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. For the hearing impaired only, Telecommunication Device for the Deaf, (202) 263–4869, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

FDIC: Karen J. Currie, Senior Examination Specialist, Division of Risk Management Supervision, (202) 898–3981; Mark Mellon, Counsel, Legal Division, (202) 898–3884; Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

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I. Introduction

A. Summary of Proposed Rule and Policy Objectives

The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) (collectively, the agencies) are inviting comment on a notice of proposed rulemaking (proposed rule or proposal) that would increase the major assets prohibition thresholds for management interlocks in the agencies' rules implementing the Depository Institution Management Interlocks Act (DIMIA).¹ The proposed increase in the thresholds would account for changes in the United States banking market since Congress established the current thresholds in 1996. Under the major assets prohibition of the current rules, a management official² of a depository organization³ (or any affiliate of such

¹ 12 U.S.C. 3201 *et seq.*

² In the agencies' rules, "management official" is defined to include directors; advisory or honorary directors of a depository institution with total assets of \$100 million or more; "senior executive officers," as that term is defined in the agencies' rules regarding notice of addition or change of directors and senior executive officers; branch managers; trustees of depository organizations under the control of trustees; and any persons who have a representative or nominee as defined in the agencies' rules on management interlocks, serving in any of the capacities described above. 12 CFR 26.2(j)(1) (OCC); 12 CFR 212.2(j)(1) and 238.92(j)(1) (Board); and 12 CFR 348.2(k)(1) (FDIC).

³ In the agencies' rules, the term "depository organization" means a depository institution or a depository holding company. "Depository institution" means a commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank, or a credit union, chartered under the laws of the United States and having a principal office located in the United States. Additionally, a United States office of a foreign commercial bank, including a branch or agency, is a depository institution. "Depository holding company" means a bank holding company or a savings and loan holding company (as more fully defined in section 202 of the Interlocks Act (12 U.S.C. 3201)) having its principal office located in the United States. 12 CFR 26.2 (OCC); 12 CFR 212.2 and 238.92 (Board); and 12 CFR 348.2 (FDIC).

organization) with total assets exceeding \$2.5 billion may not serve as a management official of an unaffiliated depository organization (or any affiliate of such organization) with total assets exceeding \$1.5 billion without seeking an exemption. The proposed rule would increase both thresholds to \$10 billion.

In addition, the agencies are proposing three alternative approaches for increasing the asset thresholds, described below.

By increasing the major assets prohibition thresholds, the proposed rule and proposed alternative approaches would reduce the number of depository organizations subject to the major assets prohibition and reduce burden by relieving depository organizations below the increased thresholds from having to ask the agencies for an exemption from the major assets prohibition. The agencies anticipate that raising the thresholds will facilitate small depository organizations in finding qualified directors by eliminating the need to file a request for an exemption from the major assets prohibition.

B. Background

DIMIA—implemented through the agencies' rules at 12 CFR parts 26, 212, 238 subpart J, and 348—fosters competition by prohibiting a management official from serving at the same time as a management official of an unaffiliated depository organization in situations where the management interlock may have an anticompetitive effect.⁴ DIMIA and the agencies' rules achieve this purpose through three restrictions.

The first, the community prohibition, prohibits a management official of a depository organization from serving at the same time as a management official of an unaffiliated depository organization if the involved depository organizations (or a depository institution affiliate thereof) have offices in the same community.⁵ The second, the relevant metropolitan statistical area (RMSA) prohibition, prohibits a management official of a depository organization from serving at the same time as a management official of an unaffiliated depository organization if the involved depository organizations (or a depository institution affiliate thereof) have offices in the same

⁴ 12 CFR 26.1(b) (OCC); 12 CFR 212.1(b) and 238.91(b) (Board); and 12 CFR 348.1(b) (FDIC).

⁵ In the agencies' rules, "community" means a city, town, or village, and contiguous and adjacent cities, towns, or villages. 12 CFR 26.2(c) (OCC); 12 CFR 212.2(c) and 238.92(c) (Board); and 12 CFR 348.2(c) (FDIC).

RMSA⁶ and each depository organization has total assets of \$50 million or more. The third, the major assets prohibition, prohibits a management official of a depository organization with total assets exceeding \$2.5 billion (or any affiliate of such an organization) from serving at the same time as a management official of an unaffiliated depository organization with total assets exceeding \$1.5 billion (or any affiliate of such an organization), regardless of the location of the two depository organizations. While the first two prohibitions capture the risk of anticompetitive effects from management interlocks between depository organizations that operate within overlapping geographical areas, the major assets prohibition addresses management interlocks between depository organizations that are large enough that a management interlock may present anticompetitive concerns despite the fact that the involved organizations may not have offices in the same community or RMSA.

DIMIA allows the agencies to prescribe regulations that permit otherwise prohibited interlocks under certain circumstances.⁷ Pursuant to the general exemption provision of the agencies' regulations, the appropriate agency may exempt a prohibited interlock in response to an application by a depository organization if the appropriate agency finds that the interlock would not result in a monopoly or substantial lessening of competition and would not present safety and soundness concerns.⁸

The \$1.5 billion and \$2.5 billion thresholds for the DIMIA major assets prohibition were enacted through amendments to DIMIA in the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA).⁹ During hearings for EGRPRA, it was noted that the increase of the asset thresholds to \$1.5 billion and \$2.5

billion was made because the previous asset threshold numbers did not "realistically reflect the size of large institutions in today's market."¹⁰

DIMIA, as amended, provides that the agencies may adjust the thresholds as necessary "to allow for inflation or market changes."¹¹ The current major assets thresholds have not been adjusted since 1996, do not reflect the growth and consolidation among U.S. depository organizations that has occurred in the intervening years, and do not realistically reflect the size of large institutions in today's market. For instance, total assets at depository organizations have grown nearly 250 percent between the fourth quarter of 1996 and the fourth quarter of 2017. Moreover, in a March 2017 report to Congress mandated by EGRPRA, the agencies committed to reducing regulatory burden by adjusting the major assets thresholds in the agencies' DIMIA regulations.¹²

II. Description of Proposed Rule

A. Proposal To Increase Asset Thresholds to \$10 Billion

The agencies are proposing to raise the major assets prohibition thresholds from \$1.5 billion and \$2.5 billion to \$10 billion each. As proposed, the major assets prohibition would restrict management interlocks between unaffiliated depository organizations with total assets exceeding \$10 billion (or any affiliates of such organizations).

The proposed threshold increase, and applying the major assets prohibition to larger depository organizations rather than small institutions (*i.e.*, community banks), is consistent with the purpose of DIMIA.¹³ A \$10 billion major assets prohibition threshold would prohibit interlocks between larger depository organizations, which could present a risk of anticompetitive conduct at the national banking market level, while exempting smaller or community-banking-organization-sized depository organizations, which do not present the

same competitive risks at the national banking market level.

In addition, the proposal is consistent with the current thresholds that Congress and the agencies have used to distinguish between small institutions and larger institutions. For example, section 201 and 203 of the Economic Growth, Regulatory Relief, and Consumer Protection Act provide certain procedural burden relief for institutions with less than \$10 billion in total consolidated assets.¹⁴ Additionally, the Dodd-Frank Wall Street Reform and Consumer Protection Act uses a \$10 billion threshold to distinguish between large banks subject to supervision by the Bureau of Consumer Financial Protection and small banks subject to prudential regulator supervision.¹⁵ A \$10 billion threshold also is consistent with the asset threshold used by the Board to distinguish between community banking organizations and larger banking organizations for supervisory and regulatory purposes,¹⁶ the asset threshold used by the FDIC to distinguish between "small" and "large" institutions for purposes of its assessment regulations,¹⁷ and the asset threshold used by the OCC to distinguish community banks from midsize and large banks.¹⁸

Further, having a single, consistent asset threshold would simplify the agencies' DIMIA regulations and enable depository organizations to identify more easily whether they may be subject to the major assets prohibition.

¹⁴ Economic Growth, Regulatory Relief, and Consumer Protection Act, Public Law 115–174, § 201, 203, 132 Stat. 1296, 1306, 1309 (2018) (enacting a "Community Bank Leverage Ratio" capital simplification framework that is generally available to depository institutions and depository institution holding companies with \$10 billion or less in total consolidated assets and exempting generally from the prohibitions of section 13 of the Bank Holding Company Act of 1956, also known as the "Volcker Rule," certain entities with \$10 billion or less in total consolidated assets).

¹⁵ Public Law 111–203, § 1025 & 1026, 124 Stat. 1376, 1990–95 (2010).

¹⁶ Bd. of Governors of the Fed. Reserve Sys., Commercial Bank Examination Manual (rev. Jan. 2018), <https://www.federalreserve.gov/publications/files/cbem.pdf>.

¹⁷ See 12 CFR 327.8(e) and (f). For the purposes of the FDIC's assessment regulations, a "small institution" generally is an insured depository institution with less than \$10 billion in total assets. Generally, a "large institution" is an insured depository institution with more than \$10 billion in total assets or that is treated as a large institution for assessment purposes under section 327.16(f).

¹⁸ Comptroller's Handbook, "OCC Community Bank Supervision" (June 2018), <https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/community-bank-supervision/pub-ch-community-bank-supervision.pdf>.

⁶ In the agencies' rules, "RMSA" means an MSA, a primary MSA, or a consolidated MSA that is not comprised of designated Primary MSAs to the extent that these terms are defined and applied by the Office of Management and Budget. 12 CFR 26.2(m) (OCC); 12 CFR 212.2(m) and 238.92(m) (Board); and 12 CFR 348.2(c) (FDIC).

⁷ 12 U.S.C. 3207.

⁸ 12 CFR 26.6(a) (OCC); 12 CFR 212.6(a) and 238.96(a) (Board); and 12 CFR 348.6(a) (FDIC). The agencies have published an interagency interpretation that explains which agency is the appropriate agency for purposes of filing a request for a general exemption under the agencies' rules. See *Permissible Interlocks—Regulatory Exceptions; Agency Approval*, 1 Fed. Res. Reg. Serv. (Bd. of Governors of the Fed. Reserve Sys.) § 3–831 (Nov. 18, 1992), 2006 WL 3928616.

⁹ See Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. 104–208, Title II, 110 Stat. 3009–9, § 2210(a).

¹⁰ *The Economic Growth and Regulatory Paperwork Reduction Act—S. 650: Hearings Before the Subcomm. on Fin. Insts. and Regulatory Relief of the S. Comm. on Banking, Hous., & Urban Affairs*, 104 Cong. 90 (1995) (statement of Eugene A. Ludwig, Comptroller of the Currency).

¹¹ 12 U.S.C. 3203.

¹² Federal Financial Institutions Examination Council, Joint Report to Congress: Economic Growth and Regulatory Paperwork Reduction Act, 82 FR 15900, 15903 (Mar. 30, 2017), https://www.ffiec.gov/pdf/2017_FFIEC_EGRPRA_Joint-Report_to_Congress.pdf.

¹³ Legislative history indicates that Congress intended for the major assets prohibition to apply to "larger" organizations. See H.R. Rep. No. 95–1383, at 5 (1978); S. Rep. No. 95–323, at 13 (1977).

B. Expected Impact

The proposed rule would increase the number of depository organizations that would no longer be subject to the major assets prohibition and therefore reduce the number of institutions that need to seek an exemption from the major assets prohibition from the appropriate agency.

As of December 31, 2017, 1,021 depository organizations had total assets of more than \$1.5 billion and were subject to the major assets prohibition.¹⁹ In addition, 698 depository organizations with total assets of more than the \$2.5 billion threshold were subject to restrictions on management interlocks with unaffiliated depository organizations with total assets exceeding the \$1.5 billion threshold. If the agencies raise the \$1.5 billion asset threshold to \$10 billion, they would exempt 764 depository organizations from the major assets prohibition as of December 31, 2017. Of these 764 depository organizations, 224 are FDIC-supervised depository institutions, 113 are OCC-supervised depository institutions, 91 are Board-supervised depository institutions, and 336 are Board-supervised depository holding companies. As of December 31, 2017, 257 depository organizations reported total assets greater than \$10 billion and would remain subject to the major assets prohibition.

Increasing the thresholds of the major assets prohibition would allow smaller depository organizations to form management interlocks with other smaller depository organizations and would relieve the depository organization seeking to add a management official from the associated burden of seeking a general exemption from the appropriate agency with respect to such a management interlock (unless the interlock would be prohibited by the community or RMSA prohibitions). The agencies believe that with fewer depository organizations subject to the major assets prohibition thresholds, the proposed rule would expand the pool of available management officials for smaller

depository organizations no longer covered by the major assets prohibition.

The agencies do not expect the proposal to materially increase anticompetitive risk. The increase to the major assets prohibition thresholds is insufficient to materially increase the risk of anticompetitive interlocks between depository organizations at the national banking market level, and the proposal does not affect DIMIA prohibitions against interlocks within overlapping geographical areas.

C. Future Adjustments to the Thresholds

Following adjustment of the thresholds by this proposed rule, if adopted, the agencies would make further adjustments to the thresholds to account for inflation through direct final rule without notice and comment pursuant to 12 CFR 26.3(c), 212.3(c), 238.93(c), and 348.3(c). If the agencies determine that further adjustments to the thresholds are warranted for reasons other than inflation, the agencies then would propose another adjustment through a subsequent notice of proposed rulemaking with the opportunity to comment.

III. Alternative Approaches To Adjust the Asset Thresholds

As described above, in order to account for market changes since the agencies' DIMIA regulations were last updated, the agencies propose to increase the major assets prohibition thresholds to \$10 billion. The agencies also invite comment on three alternative approaches discussed below. Consistent with the agencies' authority under DIMIA, two of the alternative approaches, like the proposed approach, are based on market changes, and the third alternative approach is based on inflation.²⁰ Because the proposal and the alternative approaches all would raise the major assets prohibition thresholds, the agencies expect that the impact for each proposal would be similar (*i.e.*, each approach would result in a greater number of depository organizations exempted from the major assets prohibition), varying only in the degree of the impact (*i.e.*, the number of depository organizations exempted).

A. Thresholds Adjustment Based on Percentage of the Number of Banking Organizations Covered by Prohibition

Under the first alternative approach, the agencies would adjust the major assets prohibition thresholds so that approximately the same percentage of the total number of banking

organizations²¹ that were covered by the thresholds as of the fourth quarter of 1996—the year in which the \$1.5 billion and \$2.5 billion major assets prohibition thresholds were established by statute—would be covered as of fourth quarter 2017. By adjusting the major assets prohibition thresholds so that they cover the same percentage of the total number of banking organizations as was covered in 1996, this alternative approach accounts for changes in the U.S. banking market and seeks to maintain the prohibition's initial scope and impact—which was limited to only relatively large depository organizations—as well as the protections it provides against anticompetitive risk. This approach would increase the current thresholds of \$1.5 billion and \$2.5 billion to \$7.9 billion and \$11.8 billion, respectively.

As of the fourth quarter of 1996, the major assets prohibition thresholds covered the top 1.9 percent and 1.3 percent of banking organizations by asset size. By the fourth quarter of 2017, the percentage of banking organizations covered by the thresholds had increased to 6.83 percent and 4.44 percent. Adjusting the major assets prohibition thresholds to account for this market change would result in adjusted asset thresholds of \$7.9 billion and \$11.8 billion.

Raising the current \$1.5 billion threshold to \$7.9 billion would result in an additional 702 depository organizations being exempted from the major assets prohibition. Of these 702 depository organizations, 207 are FDIC-supervised depository institutions, 102 are OCC-supervised depository institutions, 82 are Board-supervised depository institutions, and 311 are Board-supervised depository holding companies. As of December 31, 2017, 78 depository organizations reported total assets greater than \$7.9 billion but less than \$11.8 billion. Finally, 241 depository organizations reported total assets greater than \$11.8 billion and would remain subject to the major assets prohibition.

²¹ The agencies' analysis, and resulting percentages and thresholds, for this approach relies on "banking organizations" instead of "depository organizations" to avoid double-counting the assets of depository institutions held by depository holding companies that reported consolidated holding company assets. As used here, the term "banking organization" includes all depository holding companies, as defined by the agencies' DIMIA regulations, that reported consolidated assets greater than zero and all depository institutions, as defined by the agencies' DIMIA regulations, with reported assets greater than zero that are not consolidated under a holding company.

¹⁹ The analysis in this preamble reflecting changes in the number of depository organizations exempted does not incorporate credit unions because this proposed rule does not apply to credit unions. Data used in this analysis were drawn from the December 31, 1996, and December 31, 2017, Consolidated Reports of Condition and Income (Call Reports), Consolidated Financial Statements for Holding Companies, Parent Company Only Financial Statements for Large Holding Companies, Parent Company Only Financial Statements for Small Holding Companies, and Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks.

²⁰ See 12 U.S.C. 3203.

B. Thresholds Adjustment Based on Asset Growth

Under this second alternative approach, the agencies would propose to adjust the major assets prohibition thresholds to reflect the rate of asset growth for depository organizations over the period between the fourth quarter of 1996 and the fourth quarter of 2017. This approach seeks to replicate the major assets prohibition's coverage of the 1996 banking market by using total asset growth as a measure of market change. Total assets at depository organizations have grown by \$15.6 trillion between the fourth quarter of 1996 and the fourth quarter of 2017. This growth represents an increase of three and one-half times the amount of total assets in the fourth quarter of 1996. Under this approach, the current major assets prohibition thresholds would be multiplied by the aforementioned rate of asset growth (3.5) to account for market changes for depository organizations. As a result, the current assets thresholds would be raised from \$1.5 billion and \$2.5 billion to \$5.3 billion and \$8.8 billion, respectively.

Raising the \$1.5 billion asset threshold to \$5.3 billion would result in an additional 616 depository organizations being exempted from the major assets prohibition. Of these 616 depository organizations, 182 are FDIC-supervised depository institutions, 89 are OCC-supervised depository institutions, 74 are Board-supervised depository institutions, and 271 are Board-supervised depository holding companies. As of December 31, 2017, 109 depository organizations reported total assets greater than \$5.3 billion, but less than \$8.8 billion. Finally, 296 depository organizations reported total assets greater than \$8.8 billion and would remain subject to the major assets prohibition.

C. Thresholds Adjustment Increased Based on Inflation

Under the third alternative approach, the agencies would adjust the major assets prohibition thresholds based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). Adjusting the asset thresholds based on inflation from the fourth quarter of 1996 to the fourth quarter of 2017 would increase the major assets prohibition thresholds from \$1.5 billion and \$2.5 billion to \$2.3 billion and \$3.9 billion, respectively. Although the agencies' current rules allow an adjustment for inflation based on the CPI-W to be published as a final rule without notice and comment, the

agencies believe it is appropriate to seek comment on an inflation-based approach given the length of time that has passed without change to the thresholds and given the extent to which the banking market has changed during that time.

Raising the \$1.5 billion asset threshold to \$2.3 billion would exempt an additional 288 depository organizations from the major assets prohibition. Of these 288 depository organizations, 83 are FDIC-supervised depository institutions, 45 are OCC-supervised depository institutions, 36 are Board-supervised depository institutions, and 124 are Board-supervised depository holding companies. As of December 31, 2017, 219 depository organizations reported total assets greater than \$2.3 billion but less than \$3.9 billion. Finally, 514 depository organizations reported total assets greater than \$3.9 billion and would remain subject to the major assets prohibition.

IV. FDIC Technical Amendments

In addition to the proposed adjustment of the thresholds for the major assets prohibition, the FDIC intends to make two purely technical corrections to FDIC regulations, both pertaining to DIMIA implementation, by means of a separate final rule without notice and comment. The first correction pertains to 12 CFR 303.249 and would remove an erroneous statement. The second pertains to 12 CFR 348.4(i) and would correct a citation. Both technical corrections will be explained in further detail in the FDIC final rule.

V. Request for Comment

The agencies invite comment on all aspects of this proposal, including the specific questions enumerated below.

Question 1: Are depository organizations the appropriate unit for measuring market change for purposes of the agencies' proposal? In addition, are banking organizations the appropriate unit for measuring market change for purposes of the agencies' alternative approach based on the percentage of the number of banking organizations covered by the prohibition? For all of the proposed approaches, would another unit of measurement be more appropriate? If so, what unit of measurement and why?

Question 2: Is the proposed \$10 billion asset threshold appropriate to carry out the purposes of the major assets prohibition? Would one of the other alternative approaches proposed to adjust the thresholds be more appropriate to meet the purposes of the

major assets prohibition? Would some other dollar amount, or some combination of asset thresholds or factors, be more appropriate? If so, what threshold, factor, or combination thereof would be appropriate, and why?

Question 3: Is the measurement period of the fourth quarter of 1996 through the fourth quarter of 2017, as used in the agencies' alternative approaches, appropriate for purposes of measuring market change? Should the agencies shorten or extend this measurement period? If so, why?

Question 4: Are there any other approaches to adjusting the major assets prohibition thresholds that would be more appropriate than the approaches proposed by the agencies? If so, what approach would be more appropriate and why?

VI. Regulatory Analysis

A. Paperwork Reduction Act of 1995

Certain provisions of the proposed rule contain "collection of information" requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521). In accordance with the requirements of the PRA, the agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB control number for the OCC is 1557–0014; the Board's is 7100–0134; and the FDIC's is 3064–0118. These information collections will be extended for three years, with revision. The information collection requirements contained in this proposed rulemaking have been submitted by the OCC and FDIC to OMB for review and approval under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB's implementing regulations (5 CFR 1320). The Board reviewed the proposed rule under the authority delegated to the Board by OMB.

Comments are invited on:

a. Whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

b. The accuracy or the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the **ADDRESSES** section of this document. A copy of the comments may also be submitted to the OMB desk officer by mail to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503; facsimile to (202) 395-6974; or email to oir_submission@omb.eop.gov, Attention, Federal Banking Agency Desk Officer.

Proposed Information Collection

Title of Information Collection: Management Official Interlocks.

Frequency: Annual, event driven.

Affected Public: Businesses or other for-profit.

Respondents

OCC: National banks, Federal savings associations, and U.S. offices of foreign commercial banks, including Federal branches and agencies.

Board: State member banks (SMBs), bank holding companies (BHCs), savings and loan holding companies (SLHCs), and their affiliates; and U.S. offices of foreign commercial banks, including state-licensed branches and agencies.

FDIC: State nonmember banks, state savings associations, and certain subsidiaries of those entities; and U.S. offices of foreign commercial banks, including insured branches and agencies.

Current Actions: The proposed rule would revise section _____.3, "Prohibitions," of the agencies' DIMIA rules²² by increasing the major asset prohibition thresholds from \$2.5 billion and \$1.5 billion to \$10 billion each. Section _____.6, "General Exemption,"²³ contains a process for applying for an exemption from the prohibitions in section _____.3. With the increase in the major assets prohibition thresholds in section _____.3, it is likely that fewer applications will be filed under section _____.6. Therefore, the agencies have reduced their respondent counts for section _____.6 accordingly. Also, in order to be consistent across the agencies, the agencies are applying a conforming methodology for calculating

the burden estimates for the reporting and recordkeeping requirements.

PRA Burden Estimates

OCC

OMB control number: 1557-0014.

Estimated number of respondents: 2.

Estimated average hours per response:

Reporting Sections 26.4(h)(1)(i) and 26.6(b)—4.

Recordkeeping Section 26.5(b)—3.

Estimated annual burden hours: 14.

Board

OMB control number: 7100-NEW

(The current management official interlocks reporting and recordkeeping requirements are housed under OMB control number 7100-0134 and will be separated out in a new OMB control number).

Estimated number of respondents: 4.

Estimated average hours per response:

Reporting Sections 212.4(h)(1)(i) and 212.6(b)—4.

Recordkeeping Section 212.5(b)—3.

Estimated annual burden hours: 28.

FDIC

OMB control number: 3064-0118.

Estimated number of respondents: 6.

Estimated average hours per response:

Reporting Sections 348.4(h)(1)(i) and 348.6(b)—4.

Recordkeeping Section 348.5(b)—3.

Estimated annual burden hours: 42.

B. Regulatory Flexibility Act

In general, the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires that in connection with a rulemaking, an agency prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small entities. The SBA has defined "small entities" to include certain organizations with total assets less than or equal to \$550 million.²⁴ Under 5 U.S.C. 605(b), this analysis is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a brief explanatory statement in the **Federal Register** along with its rule.

OCC: The OCC currently supervises approximately 886 small entities.²⁵

²⁴ 13 CFR 121.201.

²⁵ The OCC bases its estimate of the number of small entities on the SBA's size thresholds for commercial banks and savings institutions, and trust companies, which are \$550 million and \$38.5 million, respectively. Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if it should classify an OCC-supervised institution as a small entity. The OCC uses December 31, 2017, to determine size because a "financial institution's assets are determined by

Because the major assets prohibition of DIMIA prevents a management official of a depository organization with total assets exceeding \$2.5 billion (depository organization threshold) or any affiliate of such organization from serving as a management official of an unaffiliated depository organization with total assets exceeding \$1.5 billion (unaffiliated organization threshold) it is unlikely to affect any OCC-supervised small institutions. Therefore, the OCC certifies that the proposed rule would not have a significant economic impact on a substantial number of OCC-supervised small entities.

Board: The Board is providing an initial regulatory flexibility analysis with respect to this proposed rule. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities. In connection with a proposed rule, the RFA requires an agency to prepare an Initial Regulatory Flexibility Analysis describing the impact of the rule on small entities or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. An initial regulatory flexibility analysis must contain (1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap with, or conflict with the proposed rule; and (6) a description of any significant alternatives to the proposed rule which accomplish its stated objectives.²⁶

The Board has considered the potential impact of the proposed rule on small entities in accordance with the RFA. Based on its analysis and for the reasons stated below, the Board believes that this proposed rule will not have a significant economic impact on a

averaging the assets reported on its four quarterly financial statements for the preceding year." See footnote 8 of the U.S. Small Business Administration's *Table of Size Standards*.

²⁶ 5 U.S.C. 603.

²² See 12 CFR 26.3 (OCC); 12 CFR 212.3 and 238.3 (Board); 12 CFR 348.3 (FDIC).

²³ See 12 CFR 26.6 (OCC); 12 CFR 212.6 and 238.6 (Board); 12 CFR 348.6 (FDIC).

substantial number of small entities. Nevertheless, the Board is publishing and inviting comment on this initial regulatory flexibility analysis. A final regulatory flexibility analysis will be conducted after comments received during the public comment period have been considered.

1. Reasons for the Proposal

As discussed in the Supplementary Information, the proposed rule would adjust the major assets prohibition thresholds for management interlocks in the Board's rules implementing DIMIA. Under the current major assets prohibition, a management official of a depository organization with total assets exceeding \$2.5 billion (or any affiliate of such an organization) from serving at the same time as a management official of an unaffiliated depository organization with total assets exceeding \$1.5 billion (or any affiliate of such an organization), regardless of the location of the two depository organizations. For these purposes, the term "depository organization" means a depository institution or a depository holding company. "Depository institution" means a commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank, or a credit union, chartered under the laws of the United States and having a principal office located in the United States. Additionally, a United States office, including a branch or agency, of a foreign commercial bank is a depository institution. "Depository holding company" means a bank holding company or a savings and loan holding company (as more fully defined in section 202 of DIMIA) having its principal office located in the United States.²⁷ The primary benefit of the proposed rule would be to exclude from the major assets prohibition management interlocks involving depository organizations with total assets in excess of the current asset thresholds but below the proposed asset thresholds. Raising the thresholds will help to facilitate small banks in finding qualified directors by eliminating the need to file a request for an exemption from the major assets prohibition.

2. Statement of Objectives and Legal Basis

As discussed above, the Board's objective in proposing this rule would be to reduce the number of depository organizations subject to the major assets

prohibition. The Board has authority under DIMIA to prescribe regulations to carry out DIMIA with respect to state banks that are members of the Federal Reserve System, bank holding companies, and savings and loan holding companies.²⁸

3. Description of Small Entities To Which the Regulation Applies

The Board's proposal would apply to state member banks, bank holding companies, and savings and loan holding companies having their principal offices in the United States. Under regulations issued by the Small Business Administration, a small entity includes a depository institution, bank holding company, or savings and loan holding company with total assets of \$550 million or less and trust companies with total assets of \$38.5 million or less. As of June 30, 2018, there were approximately 3,053 small bank holding companies, 184 small savings and loan holding companies, and 541 small state member banks. The proposed rule would increase the total asset level at which depository organizations and their affiliates become subject to the major assets prohibition from \$1.5 billion and \$2.5 billion to \$10 billion and \$10 billion, respectively.

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements

To the extent that a small entity is subject to the major assets prohibition by virtue of its affiliation with a banking organization that has total assets exceeding \$10 billion, the proposed rule would not impose any additional requirements on those small entities because they were already subject to the major assets prohibition. The proposed changes to the major assets prohibition would not impose any new reporting, recordkeeping, and other compliance requirements. Accordingly, the Board believes that the proposed rule will not have a significant economic impact on small banking organizations supervised by the Board.

5. Identification of Duplicative, Overlapping, or Conflicting Federal Regulations

The Board is aware of no other Federal rules that duplicate, overlap, or conflict with the proposed changes to the major assets prohibition thresholds.

6. Discussion of Significant Alternatives

The Board believes that the proposed rule will not have a significant economic impact on small entities supervised by the Board and therefore

believes that there are no significant alternatives to the proposed rule that would reduce the economic impact on small entities supervised by the Board.

The Board welcomes comment on all aspects of its analysis. In particular, the Board requests that commenters describe the nature of any impact on small entities and provide empirical data to illustrate and support the extent of the impact.

FDIC: The Regulatory Flexibility Act (RFA) generally requires that, in connection with a proposed rule, an agency prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the rulemaking on small entities.²⁹ A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined "small entities" to include banking organizations with total assets less than or equal to \$550 million.³⁰ The FDIC supervises 3,643 depository institutions,³¹ of which 2,840 are defined as small banking entities by the terms of the RFA.³²

The proposed rule will only affect institutions with total consolidated assets between the current thresholds of \$1.5 billion and \$2.5 billion and the proposed threshold of \$10 billion. Therefore, the proposed rule will likely affect zero small entities.

Accordingly, the FDIC believes that the proposed rule will not have a significant impact on a substantial number of small entities. For the reasons described above and pursuant to 5 U.S.C. 605(b), the FDIC certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would this rule have any significant effects on small entities that the FDIC has not identified?

²⁹ 5 U.S.C. 601 *et seq.*

³⁰ The SBA defines a small banking organization as having \$550 million or less in assets, where "a financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." 13 CFR 121.201 n.8 (2018). "SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates . . ." 13 CFR 121.103(a)(6) (2018). Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is "small" for the purposes of RFA.

³¹ FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).

³² Call Report, December 31, 2017.

²⁷ 12 CFR 212.2 and 231.92.

²⁸ 12 U.S.C. 3207(2).

C. OCC Unfunded Mandates Reform Act of 1995 Determination

The OCC analyzed the proposed rule under the factors set forth in the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532). Under this analysis, the OCC considered whether the proposed rule includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (adjusted for inflation). The proposed rule does not impose new mandates. Therefore, the OCC concludes that the proposed rule will not result in an expenditure of \$100 million or more annually by state, local, and tribal governments or by the private sector.

D. Riegle Community Development and Regulatory Improvement Act

The Riegle Community Development and Regulatory Improvement Act of 1994 requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, new regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.

The proposed rule would reduce burden and imposes no additional reporting, disclosure, or other requirements on IDIs, including small depository institutions, nor on the customers of depository institutions. Nonetheless, in connection with determining an effective date for the proposed rule, the agencies invite comment on any administrative burdens that the proposed rule would place on depository institutions, including small depository institutions, and customers of depository institutions.

E. Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the Federal banking agencies to use plain language in all proposed and final rules published after

January 1, 2000. The agencies have sought to present the proposed rule in a simple and straightforward manner, and invite comment on the use of plain language. For example:

- Have the agencies organized the material to inform your needs? If not, how could the agencies present the proposed rule more clearly?
- Are the requirements in the proposed rule clearly stated? If not, how could the proposed rule be more clearly stated?
- Does the proposed rule contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the proposed rule easier to understand? If so, what changes would achieve that?
- Is this section format adequate? If not, which of the sections should be changed and how?
- What other changes can the agencies incorporate to make the proposed rule easier to understand?

List of Subjects

12 CFR Part 26

Antitrust, Banks, banking, Holding companies, Management official interlocks, National banks.

12 CFR Part 212

Antitrust, Banks, banking, Holding companies, Management official interlocks.

12 CFR Part 238

Administrative practice and procedure, Banks, banking, Holding companies, Reporting and recordkeeping requirements, Securities.

12 CFR Part 348

Antitrust, Banks, banking, Holding companies.

Authority and Issuance

For the reasons stated in the preamble, the OCC proposes to amend 12 CFR part 26, the Board proposes to amend 12 CFR parts 212 and 238, and the FDIC proposes to amend 12 CFR part 348 as follows:

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

PART 26—MANAGEMENT OFFICIAL INTERLOCKS

- 1. The authority citation for part 26 continues to read as follows:

Authority: 12 U.S.C. 1, 93a, 1462a, 1463, 1464, 3201–3208, 5412(b)(2)(B).

- 2. Section 26.3 is amended by revising the first sentence of paragraph (c) to read as follows:

§ 26.3 Prohibitions.

* * * * *

(c) *Major assets.* A management official of a depository organization with total assets exceeding \$10 billion (or any affiliate of such an organization) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding \$10 billion (or any affiliate of such an organization), regardless of the location of the two depository organizations. * * *

* * * * *

FEDERAL RESERVE SYSTEM

PART 212—MANAGEMENT OFFICIAL INTERLOCKS (REGULATION L)

- 3. The authority citation for part 212 continues to read as follows:

Authority: 12 U.S.C. 3201–3208; 15 U.S.C. 19.

- 4. Section 212.3 is amended by revising the first sentence of paragraph (c) to read as follows:

§ 212.3 Prohibitions.

* * * * *

(c) *Major assets.* A management official of a depository organization with total assets exceeding \$10 billion (or any affiliate of such an organization) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding \$10 billion (or any affiliate of such an organization), regardless of the location of the two depository organizations. * * *

PART 238—SAVINGS AND LOAN HOLDING COMPANIES (REGULATION LL)

- 5. The authority citation for part 238 is revised to read as follows:

Authority: 5 U.S.C. 552, 559; 12 U.S.C. 1462, 1462a, 1463, 1464, 1467, 1467a, 1468, 1813, 1817, 1829e, 1831i, 1972, 3201–3208; 15 U.S.C. 78 l.

- 6. Section 238.93 is amended by revising the first sentence of paragraph (c) to read as follows:

§ 238.93 Prohibitions.

* * * * *

(c) *Major assets.* A management official of a depository organization with total assets exceeding \$10 billion (or any affiliate of such an organization) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding \$10 billion (or any affiliate of such an organization), regardless of the

location of the two depository organizations. * * *

FEDERAL DEPOSIT INSURANCE CORPORATION

PART 348—MANAGEMENT OFFICIAL INTERLOCKS

■ 7. The authority citation for part 348 continues to read as follows:

Authority: 12 U.S.C. 3207, 12 U.S.C. 1823(k).

■ 8. Section 348.3 is amended by revising the first sentence of paragraph (c) to read as follows:

§ 348.3 Prohibitions.

(c) *Major assets.* A management official of a depository organization with total assets exceeding \$10 billion (or any affiliate of such an organization) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding \$10 billion (or any affiliate of such an organization), regardless of the location of the two depository organizations. * * *

* * * * *

Dated: December 18, 2018.

William A. Rowe,
Chief Risk Officer.

By order of the Board of Governors of the Federal Reserve System, December 14, 2018.

Ann E. Misback,
Secretary of the Board.

Dated at Washington, DC, this 18th day of December 2018.

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

Robert E. Feldman,
Executive Secretary.

[FR Doc. 2018-28038 Filed 1-30-19; 8:45 am]

BILLING CODE 4810-33-P; 6210-01-P; 6714-01-P

representative. This change will ensure that each employee has a say in their representative and eliminate unnecessary hurdles for employees who no longer wish to be represented.

DATES: Submit comments on or before April 1, 2019. A public hearing will be held at 10 a.m. in Washington, DC at a date and location to be announced later.

ADDRESSES: You may submit comments, identified by Docket No. C-7198, by any of the following methods:

—*Federal eRulemaking Portal:* <http://regulations.gov>. Follow the instructions for submitting comments.

—*Agency Website:* <http://www.nmb.gov>. Follow the instructions for submitting comments.

—*Email:* legal@nmb.gov. Include Docket No. C-7198 in the subject line of the message.

—*Fax:* (202) 692-5085.

—*Mail and Hand Delivery:* National Mediation Board, 1301 K Street NW, Ste. 250E, Washington, DC 20005.

Instructions: All submissions received must include the agency name and docket number. All comments received will be posted without change to <http://www.nmb.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.nmb.gov>.

FOR FURTHER INFORMATION CONTACT:

Mary Johnson, General Counsel,
National Mediation Board, (202) 692-5040, legal@nmb.gov.

SUPPLEMENTARY INFORMATION: The Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.* establishes the NMB whose functions, among others, are to administer certain provisions of the RLA with respect to investigating disputes as to the representative of a craft or class. In accordance with its authority under 45 U.S.C. 152, Ninth, the Board has considered changes to its rules to better facilitate the statutory mission to investigate representation disputes “among a carrier’s employees as to who are the representatives of such employees.”

Currently, while employees have the ability to decertify a representative under the RLA, the process to decertify is unnecessarily complex and convoluted. By failing to have in place a straight-forward process for decertification of a representative, the Board is maintaining an unjustifiable hurdle for employees who no longer wish to be represented and failing to fulfill the statutory purpose of “freedom of association among employees.” 45 U.S.C. 151a(2).

Unlike the National Labor Relations Act, the RLA has no statutory provision for decertification of a bargaining representative. The Supreme Court, however, has held that, under Section 2, Fourth, 45 U.S.C. 152, Fourth, employees of the craft or class “have the right to determine who shall be the representative of the group or, indeed, whether they shall have any representation at all.” *Bhd. of Railway and Steamship Clerks v. Assoc. for the Benefit of Non-Contract Employees*, 380 US 650, 670 (1965)(ABNE). In *ABNE*, the Court further noted that the legislative history of the RLA supports the view that employees have the option of rejecting collective representation. *Id.* at 669. *citing* Hearings on H.R. 7650, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 34-35. In *International Brotherhood of Teamsters v. Bhd. of Railway, Airline and Steamship Clerks*, the United States Court of Appeals for the District of Columbia (D.C. Circuit), stated that “it is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation. On its face that is a most unlikely rule, especially taking into account the inevitability of substantial turnover of personnel within the unit.” 402 F.2d 196, 202 (1968). *See also Russell v. National Mediation Board*, 714 F.2d 1332 (1983).

Under its current procedures, the NMB allows indirect rather than direct decertification. The Board does not allow an employee or a group of employees of a craft or class to apply for an election to vote for their current representative or for no union. Employees who wish to become unrepresented must follow a more convoluted path to an election because of the Board’s requirement of the “straw man.” This straw man requirement means that if a craft or class of employees want to decertify, they must find a person willing to put their name up, *i.e.* “John Smith,” and then explain to at least fifty percent of the workforce that John Smith does not want to represent them, but if they want to decertify they have to sign the card authorizing him to represent them. Thus, in order to become unrepresented, employees are required to first sign an authorization card to have a strawman step in to represent them. In the resulting election, the ballot options will include the names of the current representative; John Smith, the strawman applicant; “no union;” and an option to write in the name of another

NATIONAL MEDIATION BOARD

29 CFR Parts 1203 and 1206

[Docket No. C-7198]

RIN 3140-AA01

Decertification of Representatives

AGENCY: National Mediation Board.

ACTION: Proposed rule with requests for comments.

SUMMARY: The National Mediation Board (NMB or Board) is proposing to amend its regulations to provide a straightforward procedure for the decertification of representatives. The Board believes this change is necessary to fulfill the statutory mission of the Railway Labor Act, protecting employees’ right to select their