

As before, these advances will be treated as an extension of credit and taken into account in calculating the bank's lending limit if the bank seeks to make an additional loan to the same borrower.

#### Accrued and Discounted Interest

Section 32.2(j)(2)(ii) of the proposal clarified the type of accrued and discounted interest that would qualify for an exclusion from the definition of "loans and extensions of credit". The proposal also provided, however, that accrued and discounted interest would be treated as an extension of credit if a bank sought to make another loan to the borrower.

Several commenters, particularly large banks with loans to foreign governments, objected to this provision of the paragraph. One commenter stated that this provision would be a major problem for banks seeking to restructure loans to foreign governments with substantial accrued interest. The proposed provision could severely impair a bank's ability to participate in any new extensions of credit in connection with that type of sovereign debt restructuring. Other commenters pointed to the 1982 Garn-St Germain amendments, Pub. L. 97-320 (1982), which changed the language of 12 U.S.C. 84 from "total obligations" of a borrower to "loans and extensions of credit". These commenters argued that the 1982 amendment reflects a shift in the focus of the statute. They argued that the 1982 amendment confirms that § 84 is not directed to interest that is contractually due but is intended to limit only the funds that actually leave the bank in the form of principal. In short, these commenters believe that the lending limits apply to money loaned, not money owed.

The OCC believes these comments have merit. In order to provide greater flexibility to banks seeking to improve their recoveries through loan work-outs and restructured loans with troubled debtors, the final rule modifies the OCC's previous approach. Under the final rule, a bank need not attribute past-due or accrued interest to a borrower for purposes of the lending limit. However, as already noted, all loans made by a national bank must be underwritten in accordance with prudent banking practices, in addition to adhering to specific quantitative limitations such as the lending limits. National banks therefore should consider the possibility of unscheduled interest accruals in determining the amount of the bank's original extension of credit, and also must bear the prudent banking practices standard in mind when extending additional credit to a

borrower with past-due or accrued interest.

#### Renewals

The proposal incorporated an OCC interpretive position that excludes from the definition of "loans and extensions of credit" certain loan renewals or restructurings if the bank first exercised "best efforts" to bring the loan into conformity with its lending limit. Several commenters questioned whether the use of the term "best efforts" sets a standard that is too high to provide any practical application. The OCC agrees and the final rule uses the term "reasonable" efforts, which better reflects the OCC expectation and the original intent of the proposed amendment.

#### Items in the Process of Collection

The OCC has generally taken the interpretive position that giving credit for uncollected items is a loan or an extension of credit. However, under the proposal, the OCC also created an exception for instances where payment is required by Regulation CC of the Federal Reserve Board, 12 CFR part 229. Regulation CC specifies certain time frames within which funds must be made available. Several commenters correctly pointed out that although the intent of the proposal was to provide additional flexibility, the effect of the change did not achieve that result. In fact, the proposal may have prevented a bank from giving credit for an uncollected item prior to the day stated in the mandatory availability schedule in Regulation CC, by requiring the bank to treat that advance as an extension of credit.

The final rule amends this paragraph by providing that amounts paid on items in the normal process of collection do not constitute a loan or extension of credit. However, once an item is returned or dishonored by the paying bank, it no longer is in the normal process of collection. Payment by a bank against a dishonored item would be an extension of credit.

#### Participation Loans

Section 32.2(j)(2)(vi) of the final rule revises the proposal's treatment of participation loans. The proposal incorporated interpretive positions previously found at § 32.107 and included a new provision requiring a bank that originates a loan to receive funding from the participants on the same day. If the bank did not receive participant funding on the same day, the proposal required the bank to treat unfunded portions as a loan from the originating bank to the borrower. Many

commenters suggested that the OCC eliminate the same-day funding requirement because it is impractical. The OCC disagrees with that contention and believes the participant funding provision is an important protection to the originating bank that will help ensure prompt funding by participants.

The commenters, however, correctly point out that delays in the timing and delivery in funding a participation are not infrequent. The OCC does not intend for inadvertent funding delays to cause lending limit violations. The final rule therefore extends the funding period to provide a more realistic timeframe to address temporary or inadvertent funding errors. The final rule provides that a participation loan is not attributed to the originating bank if it receives funding from the participants before the close of business on the day after it makes funds available to the borrower. The final rule also sets forth standards for an originating bank that, if followed, shield the bank from a lending limit violation in the event that a participant fails to fund.

#### Special Lending Limits (§ 32.3(b))

Section 32.3(b)(3)(ii) of the proposal required an inspection and valuation of livestock that is "current, taking into account the nature and frequency of turnover of the livestock" in order to qualify for the special lending limit for loans secured by documents covering livestock. Former part 32 required that an "inspection and appraisal report" be performed at least every 12 months or more frequently as deemed prudent. The proposal recognized the differences in turnover between different kinds of livestock that secure a loan. It removed the presumption that an inspection and appraisal report performed every 12 months is adequate.

Several commenters questioned this change. The commenters read the former rule to require an inspection report only once every 12 months. Although some commenters characterized the proposal as more burdensome than the old requirement, the OCC believes it is not. In fact, the former rule required an inspection and appraisal report more frequently than once a year, if it was prudent to do so. The proposal actually reduced burden by allowing the use of valuations, rather than appraisals, when appropriate. Recognizing the need for clarity, however, the final rule includes the requirement that an inspection or valuation be made no less frequently than every 12 months.

Section 32.3(b)(5) of the proposal also provided a new exception to the lending limits to enable a bank to renew a