

jurisdiction deposit insurance requirement as an alternative to a favorable CCS determination, we would enable foreign banks that have U.S. offices approved by the Federal Reserve Board under a standard other than CCS to qualify for the exemption.<sup>31</sup> In addition, if we required only a favorable CCS determination, the proposed rule would deny the exemption to a foreign bank that has never applied to the Board for approval of a U.S. office even if the foreign bank's home country has promulgated insider lending restrictions similar to those under U.S. law and the bank otherwise meets our proposed requirements.

#### *Comment Solicited*

We solicit comment on proposed Rule 13k-1(b)(1). Should we rely alternatively on a home jurisdiction deposit insurance requirement or a favorable CCS determination, as proposed? Should we use only a favorable CCS determination as the sole criterion? If so, would we be excluding banks from countries that appear to have a developed bank regulatory regime but have nevertheless not received a favorable CCS determination? Conversely, should we rely exclusively on a home jurisdiction deposit insurance requirement? If so, should we require that the home jurisdiction deposit insurance requirement meet certain specified criteria? Or are we correct in deferring to the home jurisdiction bank supervisor and positing only a general home jurisdiction deposit insurance requirement, as proposed? Are there other criteria that should be used, either as alternatives to those that have been proposed or as the sole criteria?

We have based the proposed CCS determination alternative on the Federal Reserve Board's practice of determining whether, upon application to the Board, a specific bank is subject to CCS in its home jurisdiction. However, for the

purpose of the proposed foreign bank exemption under Section 402, because most banks within a particular jurisdiction are likely to be similarly regulated, it may be appropriate to require that at least one bank in the foreign bank's home jurisdiction has been the subject of a favorable CCS determination. We solicit comment on whether the proposed exemption should be available to a foreign bank that has specifically received a favorable CCS determination, as proposed. Should we instead permit a foreign bank to qualify for the proposed exemption if its home jurisdiction is also the home jurisdiction of at least one bank that has received a favorable CCS determination?

#### *D. The Home Jurisdiction Insider Lending Restriction Condition*

In addition to having to fulfill one of the two conditions set forth in proposed Rule 13k-1(b)(1), a foreign bank would also have to meet one of three alternate conditions in proposed Rule 13k-1(b)(2) in order to be eligible for the foreign bank exemption. The first two conditions are based on primary requirements of the Federal Reserve Act's insider lending restrictions.<sup>32</sup> These conditions would require a foreign bank's loan to an executive officer or director to be either on market terms to unrelated parties or, if pursuant to an employee benefit or compensation plan, on terms no more beneficial to those offered to its other employees. Moreover, because Section 13(k) prohibits an issuer from making or arranging for an insider loan through a subsidiary,<sup>33</sup> proposed Rule 13k-1(b)(2) would permit a foreign bank to make a loan to the executive officers or directors of its parent company<sup>34</sup> only when the loan is on market terms to unrelated parties or, if pursuant to the parent company's employee benefit or compensation plan, on terms no more favorable to those offered to the parent company's other employees. Alternatively, a foreign bank insider loan could also qualify for the Section 13(k) exemption if it has received the prior approval of the foreign bank's home jurisdiction supervisor.

This second provision of proposed Rule 13k-1(b) would be consistent with Section 402 by conditioning the

exemption on a foreign bank's adherence to one of the main insider lending restrictions of Regulation O. Since many jurisdictions have adopted insider lending restrictions similar to those of Regulation O,<sup>35</sup> we do not believe that this proposed provision should pose an undue burden for many foreign banks.

The proposed exemption would recognize that differences exist between and among Regulation O and bank insider lending regulatory regimes in foreign jurisdictions. For example, as proposed Rule 13k-1(b)(2)'s last alternative condition reflects, some jurisdictions hinge the legality of a bank insider loan on its pre-approval by the home jurisdiction bank supervisor. Again in the interest of comity, we believe that some measure of deference to the home jurisdiction bank supervisor regarding the content of its insider lending restrictions is appropriate.

We are aware that some foreign banks believe that a favorable CCS determination for its home jurisdiction should suffice to qualify a foreign bank for the exemption from insider lending.<sup>36</sup> We have not based our proposed rule on this approach because whether a foreign bank is subject to insider lending restrictions in its home country is not a specific statutory or regulatory criterion that the Federal Reserve Board must consider when making its CCS determination. Consequently, in many instances, a favorable CCS determination does not reveal whether a foreign bank's home country has insider lending restrictions similar to those under Federal Reserve

<sup>35</sup> The Basel Committee on Bank Supervision of the Bank for International Settlements ("Basel Committee") has developed its "Core Principles for Effective Banking Supervision" ("Core Principles") and its "Core Principles Methodology" in order to provide the international financial community with a benchmark against which the effectiveness of bank supervisory regimes can be assessed." See Basel Committee, *Core Principles Methodology*, 3 (1999). Principle 10 of the *Core Principles Methodology* provides that "banking supervisors must have in place requirements that banks lend to related companies and individuals on an arms-length basis, that such extensions of credit are effectively monitored, and that other appropriate steps are taken to control or mitigate the risks." *Core Principles Methodology* at 25. According to the Basel Committee, "the vast majority of countries have endorsed the Core Principles and have declared their intention to implement them." *Core Principles* at 1.

<sup>36</sup> For example, the Institute of International Bankers has requested that we adopt a rule that would exempt a foreign bank under Section 402 if it derives from a country that the Federal Reserve Board has determined provides CCS over its banking institutions or if it is subject in its home jurisdiction to insider lending regulations modeled on the core principles of Regulation O. We will make a copy of this letter publicly available.

<sup>31</sup> The Federal Reserve Board has approved several applications from foreign banks for U.S. branch or agency offices under a standard that does not require a CCS determination but only a finding that the home country supervisor is "actively working to establish arrangements for the consolidated supervision" of the bank and all other factors are consistent with approval. See 12 CFR 211.24(c)(1)(iii). A less rigorous standard also exists for the Board's approval of a foreign bank's application for a U.S. "representative" office. See 12 CFR 211.24(d)(2). The home country of a foreign bank that has received Board approval under either of these other standards may have adopted insider lending restrictions although its banking regulations may not yet fully meet CCS criteria. This foreign bank would not be eligible for the exemption from Exchange Act Section 13(k)'s insider lending prohibition if we were to adopt a rule that made a favorable CCS determination the sole criterion for the exemption.

<sup>32</sup> The Federal Reserve Act's insider lending restrictions are set forth in Regulation O (12 CFR 215.1 *et seq.*) as well as in the Act itself at 12 U.S.C. 375a and 375b.

<sup>33</sup> Exchange Act Section 13(k)(1).

<sup>34</sup> Proposed Rule 13k-1(a)(4) would define the "parent company" of a foreign bank as a corporation or other organization that directly or indirectly owns more than 50 percent of the voting securities or equity of the foreign bank.