

FEDERAL RESERVE SYSTEM

12 CFR Part 268

[Docket No. OP-1239]

Rules Regarding Equal Opportunity

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interim rule with request for comments.

SUMMARY: The Board of Governors of the Federal Reserve System (the Board) is soliciting comments on an interim rule that would amend the section of its Rules Regarding Equal Opportunity (EEO Rules) which governs the employment of persons who are not United States citizens consistent with the Board's requirements for the security of its information. The amendments would clarify the limitations on access to sensitive information for non-citizen employees.

The amendment, which concerns the internal management of the Board, is issued as an immediately effective interim rule, with opportunity for public comment, to ensure that hiring decisions facing the Board can be made as soon as possible.

DATES: This interim rule is effective November 8, 2005.

Applicability Date: This interim rule is applicable to all decisions on access to Sensitive Information of the Board as of November 8, 2005.

Comment Date: Submit comments on or before January 3, 2006.

ADDRESSES: You may submit comments, identified by Docket No. OP-1239, by any of the following methods:

- Agency Web Site: <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: regs.comments@federalreserve.gov. Include docket number in the subject line of the message.
- FAX: 202/452-3819 or 202/452-3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, DC 20551.

All public comments are available from the Board's web site at www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, except as necessary for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP-500 of the Board's Martin Building (20th and C Streets, N.W.) between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Alicia S. Foster, Senior Counsel (202-452-5289), Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue N.W., Washington, D.C., 20551. For users of Telecommunications Device for the Deaf ("TDD") only, contact 202/263-4869.

SUPPLEMENTARY INFORMATION:

The Board proposes to amend § 268.205 of its Rules Regarding Equal Opportunity (12 CFR 268.205), governing the employment of persons who are not United States citizens in accordance with the Board’s security requirements. The amendments are effective immediately, subject to revision based on public comment.

Currently, § 268.205 permits the employment of non-citizens in positions that do not require access to sensitive information, subject to a preference for citizens over equally qualified non-citizens. Positions that require access to sensitive information currently are reserved for United States citizens or “intending citizens” (that is, non-citizens seeking U.S. citizenship). Under the existing § 268.205, “sensitive information” is defined to mean—(1) information of the Federal Open Market Committee (FOMC); (2) national security classified information; and (3) confidential supervisory information of the Board.

The framers of the Federal Reserve Act made special provision for the Board to be free to hire staff independent of other provisions of law governing the federal government service in order to ensure that the Board is able to hire the highest possible quality of staff to obtain the “special talent” it needs to carry out its important responsibilities. See, comments of Senators Owen and Reed, 51 Cong. Rec. 1138, 1141 (1913). In recent years, the Board, like employers throughout the United States, has been having greater difficulty identifying qualified United States citizens, nationals, or “intending citizens” as candidates for positions in a number of important job families. In particular, the percentage of Ph.D economists graduating from U.S. universities who are citizens or permanent residents has declined steadily from 73 percent in 1980, to 54

percent in 1990, to 43 percent in 2001. In order to perform its statutory duties to implement monetary policy and serve as the lender of last resort (as well as its other statutory responsibilities), the Board must hire a significant number of Ph.D economists. The shrinking pool of graduates with Ph.D.'s in economics and other needed skills who are U.S. citizens, nationals, or "intending citizens" has prompted the Board to reconsider its hiring policies.

To address the diminishing number of available graduates with Ph.Ds in economics and other needed skills who are U.S. citizens, the Board proposes to revise its policy regarding hiring for positions that require access to sensitive information. This will allow the Board to hire qualified non-citizens in certain positions of importance to the Board's duties and for which a growing proportion of qualified candidates in the applicant pool are non-citizens. Currently, the Board does not hire individuals who are non-citizens into positions that require access to certain types of sensitive information unless the non-citizen intends to obtain and does, in fact, seek U.S. citizenship. The Board proposes to amend its rule to allow it to hire non-citizens without intention of becoming U.S. citizens into positions that require access to sensitive FOMC information in certain circumstances. The Board does not propose to change its policy governing access to national security information or confidential supervisory information. Moreover, while the Board's rule governs hiring, access to FOMC information is ultimately limited by the rules of the FOMC.

The interim rule would retain the Board's preference for U.S. citizens and U.S. nationals over equally qualified non-citizens. Under both the current and interim

rule, U.S. citizens, U.S. nationals, and intending citizens¹ (all of whom are now referred to as “Protected Individuals”) may be hired into a position requiring access to sensitive information. The interim rule focuses only on non-citizens who do not intend to obtain U.S. citizenship and, in particular, on the hiring of these non-citizens into positions requiring access to FOMC information.

For purposes of hiring individuals into positions that require access to FOMC information, the interim rule would distinguish between non-citizens from a country on the Country List contained in the annual federal appropriations laws specifying countries, including a general category of “countries allied with the United States in a current defense effort,” whose citizens are eligible to be hired as federal employees using appropriated funds and non-citizens from a country that is not on the Country List.² Because the Board’s funds are not appropriated, the Board is not subject to this limitation on hiring. However, Congress periodically affirms that other government agencies may use appropriated funds to hire non-citizens from countries on the Country List. The rule uses the term “Country List” as a common point of reference.

Under the interim rule, the Board may hire into a position that requires access to Class III or Class II FOMC information a non-citizen who does not intend to obtain U.S. citizenship and who is from a country that is on the Country List.³ In addition, if he or she meets three conditions set forth in the rule, that person may be granted access to Class I FOMC information. Those conditions are: (1) the employee’s

¹ An intending citizen is an individual who is a lawfully admitted permanent resident alien, refugee, or asylum grantee and who has evidenced an intention to become a U.S. citizen.

² The appropriations ban that contains the Country List is codified at 5 U.S.C. 3101 *note*. Which countries are considered to be “allied with the U.S. in a current defense effort,” is a decision made by the Department of State, Office of the Assistant Legal Adviser for Treaty Affairs.

³ FOMC information is classified as Class III, II, and I information, in increasing order of sensitivity.

Division Director recommends the employee be given access to Class I FOMC information; (2) the employee has resided in the United States for at least six years and has been employed for at least two years with the Board and/or with one or more of the Reserve Banks; and (3) the employee has passed a background investigation acceptable to the Board. If the Country List changes so that the employee's country is no longer on the Country List, the employee's access to Class II FOMC information would not be affected by the change in the Country List. Similarly, the employee would continue to be eligible for access to Class I information and may be granted such access if he or she meets the remaining conditions outlined above for employees from a country on the Country List.

Under the interim rule, the Board may hire into a position that requires access to Class III FOMC information a person who is a non-citizen without intention of becoming a U.S. citizen and who is from a country that is not on the Country List. Upon meeting the three conditions discussed above, a non-citizen from such a country may also be granted access to Class II information. However, the Board would not provide access to Class I information to a non-citizen from a country that is not on the Country List.

The interim rule does not change access by a non-citizen to confidential supervisory information or classified information. As result, the existing limitations on who may have access to this information would be continued.

Beyond the changes discussed above, the interim rule includes a more comprehensive definition of "FOMC information" that contains a description of the three internal security designations that apply to this information. The interim rule also replaces the citation to Executive Order 11356 with the citation to Executive Order 12958

entitled, “Classified National Security Information,” as this executive order, and its amendments, control what information is considered classified. The definition of “confidential supervisory information” remains unchanged.

The interim rule also separately addresses what access is applicable to each of the three types of sensitive information, i.e., FOMC information, classified information, and confidential supervisory information. For example, as discussed above, the interim rule provides new parameters for access that are applicable only to FOMC information. The rule would also change the present language on access to classified information to provide that access is determined by the applicable executive orders and amendments. This more general reference incorporates the current rule’s exception for hiring a non-citizen for a position requiring access to classified information if he or she is able to obtain a security clearance. Further, with respect to confidential supervisory information, the interim rule would specify that access to this information is limited to Protected Individuals (formerly citizens, nationals and intending citizens) with a need to know employed by the Board or by a Federal Reserve Bank.

The interim rule would also update some of the terminology used in the current rule. In this respect, the interim rule would substitute the term “Protected Individual” for “U.S. citizens and intending citizens.” The term “Protected Individual” covers U.S. citizens, U.S. nationals, and aliens meeting the requirements of 8 U.S.C. 1324(a)(3)(B) who have filed a declaration of intention to become a citizen of the United States. This more inclusive term is consistent with existing immigration law, which no longer uses the term “intending citizen” but uses instead the term “Protected Individual.”

Further, where the current rule refers only to “U.S. citizens,” the interim rule would add the term “national” to make clear that both U.S. citizens and U.S. nationals are, in fact, similarly treated. The term “national” refers to certain individuals who are not citizens of the U.S. and typically are born in or are descendants of individuals in the outlying possessions of the U.S. Thus, the interim rule provides that the hiring preference is a preference for U.S. citizens and U.S. nationals over equally qualified non-citizens.

The Board also proposes to add a definition of “employee” to clarify the coverage of the rule and a definition of “national.” The interim rule includes a revised definition of “non-citizen” that more accurately reflects its meaning.

This rule relates solely to matters of agency management or personnel, and, therefore, is not subject to the public notice and comment provisions of the Administrative Procedures Act, 5 U.S.C. 553(a)(2). However, the Board has in the past found public comment on this matter to be helpful and invites comment on this rule. While allowing comment, the Board has determined that it is unnecessary, and would be impracticable, to defer the effective date of this action until after notice and after public comments have been received and considered (5 U.S.C. 553(d)(3)). Issuance of this rule as an interim rule is appropriate, in any event, because the rule concerns only the internal management and personnel of the Board and is not subject to statutory delay. In addition, the Board is facing immediate hiring decisions that would be subject to this rule. The Board believes that issuance of the regulation as an interim rule is necessary for the Board to conduct its internal management in an expeditious and efficient manner. The Board will consider all public comments received and make changes in its procedures

based on those comments where appropriate. On these bases, the Board has determined that good cause exists to make this action effective immediately. As this rule concerns only agency management or personnel, it is not a rule subject to the Congressional Review Act (CRA), 5 U.S.C. 804(3)(B), and therefore an analysis under the CRA is not required.

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 et seq.), the Board believes that this rule will not have a significant economic impact on a substantial number of small entities. This rule governs the Board's dealings with its employees and applicants for employment, and would not affect small entities as defined for purposes of the Regulatory Flexibility Act. Accordingly, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. ch. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the proposal under the authority delegated to the Board by the Office of Management and Budget. No collections of information pursuant to the Paperwork Reduction Act are contained in this proposal.

Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires each federal banking agency to use plain language in all rules published after January 1, 2000. In light of this requirement, the Board has sought to present the interim rule in a simple and straightforward manner. The Board invites comment on whether the Board could take additional steps to make the rule easier to understand.

List of Subjects in 12 CFR part 268

Administrative practice and procedure, Aged, Civil rights, Equal employment opportunity, Federal buildings and facilities, Federal Reserve System, Government employees, Individuals with disabilities, Religious discrimination, Sex discrimination, Wages.

Authority and Issuance

For the reasons set out in the preamble, the Board amends 12 CFR part 268 as follows:

Part 268-RULES REGARDING EQUAL OPPORTUNITY

1. The authority citation for part 268 continues to read as follows:

Authority: 12 U.S.C. 244 and 248 (i), (k), and (l).

2. Revise 268.205 to read as follows

268.205 Employment of aliens; Access to sensitive information

(a) Definitions. The definitions contained in this paragraph (a) apply only to this section:

(1) Classified Information means information that is classified for national security purposes under Executive Order No. 12958, entitled “Classified National Security Information,” including any amendments or superseding orders that the President of the United States may issue from time to time.

(2) Confidential Supervisory Information means confidential supervisory information of the Board, as defined in 12 CFR § 261.2(c).

(3) Country List refers to the list contained in the annual federal appropriations laws of specific countries, including a general category of “countries allied with the United

States in a current defense effort,” and the particular Non-Citizens from those countries who are eligible to be hired as Federal employees in the excepted service or in the senior executive service and be paid by appropriated funds. The appropriation ban is codified at 5 U.S.C. 3101 *note*. The list of eligible countries and Non-Citizens is subject to legislative and other change.

(4) Employee means an individual who works full-time or part-time and is appointed into Board service for a period of more than 90 days. The term “employee” does not include members of the Board.

(5) FOMC Information means confidential information of the Federal Open Market Committee (FOMC) regardless of the form or format in which it is created, conveyed, or maintained. FOMC information includes information derived from confidential FOMC materials. Three internal security designations, which are subject to change by the FOMC, apply to FOMC Information as follows:

(i) Class I FOMC generally applies to materials containing policymaker input, such as that related to monetary policy decisions at meetings, views expressed by policy makers on future policy, and identification of meeting participants who express particular views. Examples of Class I FOMC Information include, but are not limited to, the “Bluebook,” drafts of meeting minutes, unreleased meeting transcripts, documents reflecting the preparation of semi-annual forecasts and related testimony, and certain sensitive internal memorandums and reports.

(ii) Class II FOMC covers information that is less sensitive than Class I FOMC. This designation generally applies to staff forecasts prepared for the FOMC and to information about open market operations. Examples of Class II FOMC Information include, but are

not limited to, Part I of the “Greenbook,” reports of the Manager on domestic and foreign open market operations, and other materials on economic and financial developments.

(iii) Class III FOMC covers information that is less sensitive than either Class II or Class I. This designation generally applies to background information supporting policy discussions and includes, but is not limited to, Part II of the Greenbook.

(6) National refers to any individual who meets the requirements described in 8 U.S.C. § 1408.

(7) Non-Citizen refers to any individual who is not a citizen (by birth or naturalization) of the United States.

(8) Protected Individual means--

(i) A citizen or National of the United States, or

(ii) An alien who:

(A) Meets the conditions set forth in 8 U.S.C. § 1324b(a)(3)(B), as amended, and

(B) Has filed with the Board or the appropriate Federal Reserve Bank a declaration of intention to become a citizen of the United States.

(9) Sensitive Information means FOMC Information; Classified Information; and Confidential Supervisory Information.

(b) Hiring.

(1) Prohibition against hiring unauthorized aliens. An individual is eligible for employment with the Board only if he or she satisfies the requirements of Section 101 of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a.

(2) Preference. Consistent with applicable law, where two applicants for employment at the Board are equally qualified for a position, the Board shall prefer the citizen or National of the United States over the equally qualified Non-Citizen.

(3) Protected Individuals access to Sensitive Information. The Board may hire a person to a position that requires access to Sensitive Information if the person is a Protected Individual.

(4) Non-Citizens access to Sensitive Information. The Board shall not hire a Non-Citizen, other than a Protected Individual, into a position that requires access to Sensitive Information except in accordance with paragraph (c) below.

(c) Access to Sensitive Information.

(1) Generally. The Board will grant access to Sensitive Information only in accordance with the Board's rules and policies regarding access to Sensitive Information and, if applicable, the rules and policies of the FOMC.

(2) FOMC Information.

(i) Access by a Non-Citizen from a country on the Country List. An Employee, other than a Protected Individual, who is a Non-Citizen from a country that is on the Country List on the date the Employee begins employment with the Federal Reserve System shall be granted access to Class I FOMC Information only upon the recommendation of the Employee's Division Director after six years of residence in the United States, at least two of which include satisfactory employment by the Board and/or one or more of the Federal Reserve Banks, and a background investigation acceptable to the Board. If the Employee's country is deleted from the Country List after the date the Employee begins employment with the Federal Reserve System, the Employee's access to Class II FOMC

information will not be affected by the change in the Country List. Similarly, the Employee would continue to be eligible for access to Class I information and may be granted such access if he or she meets the remaining conditions outlined above for employees from a country on the Country List.

(ii) Access by a Non-Citizen from a country not on the Country List. An Employee, other than a Protected Individual, who, on the date the Employee begins employment with the Federal Reserve System, is a Non-Citizen from a country that is not on the Country List: (A) shall not be granted access to Class I FOMC Information, and (B) shall be granted access to Class II FOMC Information only upon the recommendation of the Employee's Division Director after six years of residence in the United States, at least two of which include satisfactory employment by the Board and/or one or more of the Federal Reserve Banks, and a background investigation acceptable to the Board.

(3) Classified Information. Access to Classified Information is limited to those persons who are permitted access to Classified Information pursuant to the applicable executive orders and any subsequent amendments or superseding orders that the President of the United States may issue from time to time.

(4) Confidential Supervisory Information. Access to Confidential Supervisory Information is limited to Protected Individuals with a need to know employed by the Board or by a Federal Reserve Bank.

By order of the Board of Governors of the Federal Reserve System,
November 2, 2005.

(Signed)
Jennifer J. Johnson
Secretary of the Board