U.S.C. 371c), a *sale* of Federal funds by a member bank, whether State or national, to an affiliate of the member bank is subject to the limitations prescribed in that section.

(12 U.S.C. 371c)

§ 250.161 Capital notes and debentures as "capital," "capital stock," or "surplus."

(a) The Board of Governors has been presented with the question whether capital notes or debentures issued by banks, that are subordinated to deposit liabilities, may be considered as part of a bank's *capital stock, capital,* or *surplus,* for purposes of various provisions of the Federal Reserve Act that impose requirements or limitations upon member banks.

(b) A *note* or *debenture* is an evidence of debt, embodying a promise to pay a certain sum of money on a specified date. Such a debt instrument issued by a commercial bank is quite different from its *stock,* which evidences a proprietary or *equity* interest in the assets of the bank. Likewise, the proceeds of a note or debenture that must be repaid on a specified date cannot reasonably be regarded as *surplus funds* of the issuing corporation.

(c) Federal law (12 U.S.C. 51c) expressly provides that the term *capital,* as used in provisions of law relating to the capital of national banks, shall mean ''the amount of unimpaired common stock plus the amount of preferred stock outstanding and unimpaired.'' In addition, when Congress in 1934 deemed it desirable to permit certain notes and debentures—those sold by State banks to the Reconstruction Finance Corporation—to be considered as *capital* or *capital stock* for purposes of membership in the Federal Reserve System, Congress felt it necessary to implement that objective by a specific amendment to section 9 of the Federal Reserve Act (12 U.S.C. 321). These plain evidences of Congressional intent compel the conclusion that, for purposes of statutory limitations and requirements, *capital* notes and debentures may not properly be regarded as part of either *capital* or *capital stock*.

(d) Accordingly, under the law, capital notes or debentures do not constitute *capital, capital stock,* or *surplus* for the purposes of provisions of the Federal Reserve Act, including, among others, those that limit member banks with respect to purchases of investment securities (12 U.S.C. 24, 335), investments in bank premises (12 U.S.C. 371d), loans on stock or bond collateral (12 U.S.C. 248(m)), deposits with nonmember banks (12 U.S.C. 463), and bank acceptances (12 U.S.C. 372, 373), as well as provisions that limit the amount of paper of one borrower that may be discounted by a Federal Reserve Bank for any member bank (12 U.S.C. 84, 330, 345).

(12 U.S.C. 24, 84, 248, 321, 330, 335, 345, 371c, 371d, 372, 373, 463)

[33 FR 9866, July 10, 1968, as amended at 61 FR 19806, May 3, 1996]

§ 250.162 Undivided profits as "capital stock and surplus".

(a) The Board of Governors has reexamined the question whether a member bank's undivided profits may be considered as part of its *capital stock and surplus,* as that or a similar term is used in provisions of the Federal Reserve Act that limit member banks with respect to the following: Purchases of investment securities (12 U.S.C. 335), loans on stock or bond collateral (12 U.S.C. 248(m)), deposits with nonmember banks (12 U.S.C. 463), bank acceptances (12 U.S.C. 372, 373), investments in and by Edge and Agreement corporations (12 U.S.C. 601, 615, 618), and the amount of paper of one borrower that may be discounted or accepted as collateral for an advance by a Federal Reserve Bank (12 U.S.C. 330, 345, 347).

(b) Upon such reexamination the Board concludes that its negative view expressed in 1964 is unnecessarily restrictive in the light of the Congressional purpose in establishing limitations on bank activities in terms of a bank's capital structure. Accordingly, the Board has decided that, for the purposes of the limitations set forth above, undivided profits may be included as part of *capital stock and surplus*.

(c) As used herein, the term *undivided profits* includes paid-in or earned profits (unearned income must be deducted); reserves for loan losses or bad debts, less the amount of tax which would become payable with respect to