



BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C. 20561

January 11, 1979

CONFIDENTIAL (FR)
CLASS II FOMC

TO: Federal Open Market Committee

FROM: Arthur L. Broida

ALB

Attached is a copy of a memorandum from the Committee's General Counsel, dated today and entitled "Opinion regarding Directive Subcommittee's recommendation to modify form of Domestic Directive."

It is contemplated that this memorandum will be considered by the Committee at its forthcoming meeting.

Attachment



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WASHINGTON, D. C. 20551

January 11, 1976

TO: Federal Open Market Committee SUBJECT: Opinion regarding
Directive Subcommittee's
FROM: Thomas J. O'Connell recommendation to modify
form of Domestic Directive

A handwritten signature in black ink, appearing to be "TJO", written over the printed name "Thomas J. O'Connell".

This memorandum addresses the issue raised during the December meeting of the FOMC relating to the recommendation by the Directive Subcommittee that the Committee's numerical targets be included in the text of the Domestic Policy Directive. The question posed was whether the Committee's adoption of the Subcommittee recommendation would foreclose options that might otherwise be available to the Committee in the event the U.S. Court of Appeals affirms the U.S. District Court order issued in the case of Merrill v. FOMC (order of March 9, 1976). Otherwise stated, would adoption of the Subcommittee's recommendation in any way compromise the Committee's ability to deal effectively with or operate under the Court's order? Appellate court affirmation of that order would require immediate release to the public of the Committee's Domestic Policy Directive, including the numerical specifications should they be added to the text of the Directive.

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Opinion:

In my judgment, adoption of the Subcommittee's recommendation to incorporate in the Domestic Policy Directive the numerical specifications would not foreclose options that might otherwise be available to the Committee.

Discussion:

Among the provisions of the District Court's order that may be affirmed on appeal is that requiring the Committee to publish in the Federal Register the Domestic Policy Directive, upon its adoption by the Committee. Further, the District Court ordered that other policy actions of the Committee, including statements and interpretations of policy, be made available for public inspection and copying upon adoption unless otherwise promptly published.

Historically, the Committee's numerical specifications have been viewed by the Committee as "interpretations" of the Committee's Policy Directives, i.e., it was the Committee's stated intent (per standard entry in Memorandum of Discussion) "...that the Directive would be interpreted in accordance with the following [numerical] specifications...." Similarly, the appellate brief filed on behalf of the Committee in Merrill argued against the breadth of disclosure required by the lower Court's order for the reason that "Although the FOMC's instructions to the Federal Reserve Bank of New York, such as the tolerance ranges, were not specifically mentioned in the District

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Court's order, the broad order of the Court apparently required disclosure of this type of information upon its adoption."

It may be reasonably assumed that should the Court of Appeals affirm the lower Court's order, the essence of that affirmation will be a requirement that the Domestic Directive and interpretations thereof be "promptly" made available to the public upon their adoption. In the context of the lower Court's order, and absent specific treatment of the term "promptly" by the Court of Appeals, it is anticipated that disclosure of the Directive and "interpretations" would be required within a day or so of their adoption.

There would appear to be only two circumstances under which some advantage might be gained by not including the specifications in the Directive. First, it is conceivable--although highly unlikely--that the Court of Appeals will affirm the lower Court's order with respect to prompt release of the Directive but not with respect to interpretations of policy. Secondly, the Committee conceivably could decide that, despite the historical record on this matter, the specifications are not "interpretations" of policy and therefore are not covered by the order. In my judgment such a position would be legally untenable.