unacceptable risk of the introduction of disease into the United States.

We have considered all of the comments we received on the proposal and have determined that the expressed concerns have merit. Therefore, we are withdrawing the proposed rule of February 25, 1994, referenced above.

Authority: 21 U.S.C. 111, 136, and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.2(d).

Done in Washington, DC, this 7th day of June 1996.

Terry L. Medley,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 96–15173 Filed 6–13–96; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 545, 556, 560, 563, and 571

[No. 96–48]

RIN 1550–AA89

Conflicts of Interest, Corporate Opportunity and Hazard Insurance

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of Thrift Supervision (OTS or agency) is proposing to update and substantially streamline its regulations and policy statements concerning conflicts of interest, usurpation of corporate opportunity and hazard insurance. This notice of proposed rulemaking is based on a detailed staff review of each pertinent regulation and policy statement to determine whether they are necessary, impose the least possible burden consistent with safety and soundness and statutory requirements and are written in a clear, straightforward manner. Today's proposal is being made pursuant to the Regulatory Reinvention Initiative of the Vice President's National Performance Review and section 303 of the Community Development and Regulatory Improvement Act of 1994.

DATES: Comments must be received on or before August 13, 1996.

ADDRESSES: Send comments to Manager, Dissemination Branch, Records Management and Information Policy, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention Docket No. 96–48. These submissions may be hand-delivered to 1700 G Street, NW., from 9:00 a.m. to 5:00 p.m. on business days; they may be sent by facsimile transmission to FAX Number (202) 906–7755. Comments will be available for inspection at 1700 G Street, NW., from 9:00 a.m. until 4:00 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Robyn Dennis, Program Manager, (202) 906–5751; or Francis Raue, Policy Analyst, (202) 906–5750, Supervision Policy; or Dorene Rosenthal, Counsel (Banking and Finance), (202) 906–7268, Regulations and Legislation Division, Chief Counsel's Office.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background of the Proposal

In a comprehensive review of the agency's regulations in the spring of 1995, OTS identified numerous obsolete or redundant regulations that could be quickly repealed. OTS also identified several key regulatory areas for a more intensive, systematic regulatory burden review. These areas—lending and investment authority, subsidiaries and equity investments, corporate governance, conflicts of interest, corporate opportunity and hazard insurance—were selected because they have a significant impact on thrift operations, and have not been developed on an interagency basis or been comprehensively reviewed for many years. Today's proposal presents the results of an intensive review of OTS's regulations and policy statements on conflicts of interest, corporate opportunity and hazard insurance.

Since commencing its reinvention initiative in the spring of 1995, OTS has already repealed eight percent of its regulations. In addition, in January of 1996, OTS issued a comprehensive proposal on its lending and investment regulations.[1] Burden reduction proposals regarding corporate governance and subsidiaries and equity investments will be issued in the near future.

Today's proposal regarding conflicts of interest, corporate opportunity and hazard insurance will also result in significant regulatory burden reduction. The proposal affects the following regulatory sections:

Section 545.126—Referral of insurance business
Section 556.16—Insurance agencies—usurpation of corporate opportunity
Section 563.35—Restrictions involving loan services
Section 563.40—Restrictions on loan procurement fees, kickbacks and unearned fees
Section 563.44—Loans involving mortgage insurance
Section 571.4—Hazard insurance
Section 571.7—Conflicts of interest
Section 571.9—Corporate opportunity in savings associations

OTS is proposing to repeal five of these provisions in their entirety. The remaining three provisions—loan procurement fees, conflicts of interest, and corporate opportunity—will be retained in the form of regulations, but streamlined and clarified. The proposed changes will, if adopted in final form, reduce the amount of CFR text devoted to conflicts, corporate opportunity and hazard insurance from six pages to half a page.

In developing this proposal, we have consulted with those who use the regulations on a daily basis, including OTS regional staff and representatives of the thrift industry. A focus group of five thrift institutions and an industry trade association discussed staff's initial recommendations. We have also reviewed the other federal banking agencies' regulations and policy statements concerning conflicts, corporate opportunity and hazard insurance.

II. Objectives

The overarching goal of OTS's reinvention initiative is to reduce regulatory burden on savings associations to the greatest extent possible consistent with statutory requirements and safety and soundness. In the context of conflicts, corporate opportunity and hazard insurance, we believe maximum burden reduction can be achieved by pursuing three specific objectives.

First, we are attempting to eliminate duplication and overlap. The conflicts, corporate opportunity and hazard insurance regulations have existed essentially unchanged for over 20 years. During this time, there have been significant statutory and regulatory advances, including enactment of the Real Estate Settlement Procedures Act of 1974 (RESPA),[2] amendments to the Home Owners' Loan Act of 1933

[1] 61 FR 1162 (January 17, 1996).

[2] Pub. L. 93–533, 88 Stat. 1724, Dec. 22, 1974.

(HOLA)[3] and promulgation of the Interagency Real Estate Lending Guidelines.[4] As a result, much of OTS's conflicts of interest, corporate opportunity and hazard insurance regulations and policy statements have become outdated or obsolete. For example, the policy statement regarding hazard insurance (§ 571.4) has been largely superseded by the Interagency Real Estate Lending Guidelines. Similarly, the regulatory provisions prohibiting a savings association from conditioning the extension of credit on the borrower obtaining certain other services from the institution (tying arrangements) (§ 563.35) have been superseded by tying prohibitions in HOLA section 5(q). Additionally, the regulatory provisions governing kick-backs and unearned fees for loans (§ 563.40) are largely duplicative of RESPA. Redundant regulatory coverage causes confusion and wastes both industry and government resources. Today's proposal eliminates duplication wherever possible.

Second, as part of its reinvention effort, OTS is seeking to move away from regulations that micromanage thrift operations. Our goal is to focus the regulations on issues that are truly vital to safe and sound operations, leaving other matters for handbook guidance. For example, the regulations currently include three detailed provisions, which occupy three pages of CFR text, governing when federal thrifts can refer customers to affiliates that sell insurance. Although insurance referrals were thought to be an important issue 20 years ago when thrift service corporations were first authorized to sell insurance, insurance referrals clearly do not lie at the heart of safety and soundness today. Nor do they present issues distinct from the general questions that arise whenever a thrift refers many other types of business to affiliates. Accordingly, OTS is proposing to repeal the insurance referral provisions in their entirety, leaving insurance referrals to be handled in the same way as other corporate opportunity issues. (*See* discussion of corporate opportunity below.)

Third, in its reinvention effort, OTS is seeking to enhance the conciseness and clarity of its regulations. Accordingly, the three provisions slated for retention in today's proposal are being revised to remove ambiguous and imprecise language. For example, the current 306-word policy statement on conflicts of interest (§ 571.7) is being converted to a 53-word regulation. The oblique reference to actions that may create the ''appearance of a conflict of interest'' is being removed. Instead, there will be a simple statement of a fiduciary's common law duty ''not [to] advance [his or her] personal interests, or those of others, at the expense of [his or her] institution.''

Similarly, the corporate opportunity policy statement (§ 571.9) is being converted to a regulation containing a simple statement of a fiduciary's common law duty not to ''take advantage of corporate opportunities belonging to [his or her] savings association.'' A second sentence describes when an opportunity will be deemed to ''belong'' to a savings association. The new regulation will be about one-third the length of the current policy statement.

Each of the provisions being retained have been redrafted using plain language techniques pioneered by the Department of Interior and promoted by the Vice President's Regulatory Reinvention Initiative. Plain language drafting emphasizes the use of informative headings, short sentences, paragraphs and sections, non-technical language (including the use of ''you''), and sentences in the active voice. The goal of plain language drafting is to enhance clarity, thereby decreasing industry frustration, inadvertent violations, the need to seek clarification in correspondence and phone calls, and the amount of time institutions must devote to understanding the regulations.

OTS is hopeful that the foregoing reforms will result in a significant decrease in regulatory burden in the areas of conflicts, corporate opportunity and hazard insurance.

III. Description of the Proposal

For each area covered by today's proposal—conflicts of interest, corporate opportunity and hazard insurance—this section provides historical background, an analysis of the disposition of the current rules and a description of the proposed rules.

A. Conflicts of Interest

1. Historical Background

The Federal Home Loan Bank Board (FHLBB), the predecessor to OTS, adopted the conflicts of interest policy statement (§ 571.7) in 1970. The FHLBB stated that the principles enunciated there are basic to the continued viability and public acceptance of the thrift industry in contemporary society.[5] The policy statement, which prohibits insiders from engaging in conflicts of interest that adversely affect savings associations, has remained unchanged for over 25 years.

In 1974, Congress enacted RESPA to effect certain changes in settlement procedures for residential real estate loans. It was designed, among other things, to eliminate kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services. Such kickbacks and fees also can create a conflict between an officer or director's personal interests and those of his or her association.

The following year, in response to abuses involving certain loan practices, the FHLBB issued another rulemaking intended ''to delineate, and prohibit or control, transactions which are, or are likely to be, conflicts of interest'' and ''to prohibit financial, lending or managerial policies or practices of insured institutions which are detrimental to, or inconsistent with, sound and economic home-financing.''[6] The FHLBB revised the regulations prohibiting the tying of loans and certain related services (§ 563.35) and promulgated a new regulation prohibiting loan procurement fees, kickbacks and unearned fees (§ 563.40). This regulation reiterated and expanded upon the RESPA prohibitions on kickbacks and fees. A separate regulation was promulgated to limit the potential for abuse and risk as a result of self-dealing business practices relating to mortgage insurance (§ 563.44). Basically, this regulation prohibits a savings association from insuring any loan with an affiliated mortgage insurance company.

The Garn-St Germain Depository Institutions Act of 1982[7] also addressed concerns about self-dealing practices related to lending. This Act added a new HOLA section 5(q) prohibiting certain tying arrangements.

Thus, the statutes, regulations and policy guidance concerning conflicts of interest have evolved in a manner that results in a significant amount of duplication and overlap.

2. Disposition of Current Rules

a. *Section 571.7 Conflicts of interest.* This policy statement says, in essence, that directors, officers and other affiliated persons[8] have a fundamental duty to avoid placing themselves in a position which creates, or which leads

[3] 12 U.S.C. 1461, *et seq.*

[4] 57 FR 62890 (December 31, 1992).

[5] FHLBB Memorandum to The Management of Each Insured Institution from Chairman Martin (November 19, 1970).

[6] 40 FR 43832, 43842 (September 23, 1975).

[7] Pub. L. 97–320, 96 Stat. 1469, Oct. 15, 1982.

[8] The terms ''director,'' ''officer'' and ''affiliated person'' are defined below under the description of the Conflicts of interest Proposed Rule.

to or could lead to, a conflict of interest or appearance of a conflict of interest between their personal financial interests and the interests of their association, where the interests of the association are adversely affected.

OTS proposes to codify this policy statement as a regulation, after making modifications to clarify and simplify the language. OTS believes this statement serves as an important reminder to thrift insiders of their fiduciary duties to avoid conflicts of interest. (*See* description of the Proposed Rule below.)

As noted above in the discussion of objectives, OTS believes that its regulations should focus on issues vital to safety and soundness. Fiduciary duties lie at the heart of safety and soundness. The thrift crisis of the 1980s provided numerous examples of how fiduciary breaches can undermine the stability of an institution. Thus, we believe it is appropriate for the regulations to contain a brief statement regarding the importance of avoiding conflicts of interest.[9] To eliminate any mention of conflicts of interest from the CFR would not accurately reflect current OTS policy.

b. *Section 563.35 Restrictions involving loan services.* Paragraph (a) enumerates specific services typically involved in real estate lending that cannot be ‘‘tied’’ to the granting of a loan: insurance services (except insurance or a guarantee provided by a government agency or private mortgage insurance); building materials or construction services; borrower legal services; real estate or brokerage services; and real estate property management services.

OTS proposes to delete this paragraph because it is redundant of HOLA section 5(q), which prohibits a savings association from conditioning the extension of credit on the borrower obtaining certain other services from the institution. To the extent the regulatory language provides useful illustrations of the type of conduct HOLA prohibits, OTS will include this guidance in the Thrift Activities Handbook.

Paragraphs (b) and (c) relate to hazard insurance. These paragraphs and their proposed disposition will be discussed below in Part III.C., ‘‘Hazard insurance.’’

Paragraph (d) provides that a savings association must give residential borrowers a written itemization of fees in excess of $100 to be paid by the borrower for the lender’s attorney. This requirement was promulgated to protect the borrower from hidden subsidization of legal services provided to the lender that are unrelated to the borrower’s particular loan.[10]

OTS proposes to delete this provision because borrowers’ interests are adequately protected by RESPA, which prohibits kickbacks and unearned fees (12 U.S.C. 2607).[11]

c. *Section 563.40 Restrictions on loan procurement fees, kickbacks and unearned fees.* Paragraph (a) provides that no affiliated person of a savings association may receive, either directly or indirectly, from the association (or any other source) any fee in connection with the procurement of a loan from the association or a subsidiary of the association.

Under this provision, loan procurement fees (*i.e.,* fees for finding loan applicants) are prohibited, regardless of whether they are earned or unearned. The term ‘‘loan procurement fee’’ does not include payments for loan origination services (such as title examination, appraisals, credit reports, drawing up of papers, loan closings, and other services necessary and incident to loan origination).

OTS believes that loan procurement fees pose the risk that insiders may approve bad loans in order to obtain fees. Thus, we propose to retain this provision but to make clarifying amendments to more precisely tailor the scope of the regulation to the practices we wish to prohibit. (*See* description of Proposed Rule below.)

Paragraph (b) prohibits the payment of unearned fees for loan origination and settlement services, but this does not prohibit savings associations and third parties from paying fees for loan origination services actually rendered. This paragraph extends the RESPA prohibition on kickbacks and unearned fees in connection with ‘‘federally related mortgage loans’’ (*i.e.,* loans secured by a 1–4 family home) to *any* loan on real property. This rule was promulgated by the FHLBB to standardize the initial loan charges restrictions applicable to all types of real property loans.[12]

OTS proposes to delete this paragraph because the regulation extends the RESPA consumer protection provisions to commercial real estate loans. We do not believe this protection is necessary for commercial borrowers. None of the other banking agencies imposes a similar restriction on banks. Thus, removing this provision will establish parity with banks. To the extent paragraph (b) protects thrifts from insiders engaging in prohibited conflicts of interest, these conflicts would be covered by the new conflicts of interest regulation.

d. *Section 563.44 Mortgage insurance.* Paragraph (a) contains definitions used in this section. Paragraph (b) prohibits a savings association (or service corporation affiliate) from insuring any loan with a mortgage insurance company if certain affiliations are present. The affiliations deemed to give rise to harmful conflicts of interest are: the mortgage insurance company maintains a deposit account at the association;[13] there is an interrelationship of insiders or employees; the association, affiliate or insiders have an ownership interest in the mortgage company above specified limits; or the mortgage insurance company pays a fee or commission to the association, an affiliate or insiders.

Paragraph (c) provides an exception to grandfather investments made by savings associations in the Pennsylvania Mortgage Insurance Company prior to promulgation of § 563.44. *See* 43 FR 60571, 60572 (December 28, 1978).

OTS proposes to repeal § 563.44 since prohibited tying of products is now covered by the statutory anti-tying provisions in HOLA section 5(q). In addition, RESPA requires a lender to make disclosure to a borrower when it has an interest in a mortgage insurance company and to inform the borrower that services need not be obtained from

[9] We are aware that none of the other federal banking agencies has specific regulations regarding fiduciary duties, except the Office of the Comptroller of the Currency (OCC), which has a regulation on conflicts of interest. 12 CFR 2.5. Recently, the OCC proposed repeal of this provision, 60 FR 47498, 47500 (September 13, 1995), on grounds that it merely restates common law and a provision in the National Bank Act requiring national bank directors to take an oath to perform their duties diligently, honestly, and lawfully (12 U.S.C. 73). Savings associations do not operate under a statutory provision equivalent to 12 U.S.C. 73. For the reasons stated above, OTS believes that a brief regulation on conflicts is important.

[10] *See* FHLBB Letter of Tumler, Congressional Affairs (Sept. 18, 1978).

[11] In addition, RESPA also protects an institution’s interest in selecting its own settlement attorney. The law provides that an arrangement requiring a borrower to pay the services of an attorney chosen by the lender to represent the lender’s interest in a real estate transaction is not a violation of the general prohibition against requiring the use of any particular provider of settlement services (12 U.S.C. 2607(c)).

[12] Before RESPA was enacted, the FHLBB had proposed a regulation that would have imposed restrictions with respect to initial loan charges on all real estate loans. 39 FR 42382 (December 5, 1974). These restrictions were different than RESPA’s restrictions with respect to federally related mortgage loans. The FHLBB decided not to adopt its proposed restrictions and instead applied RESPA’s restrictions to all loans. 40 FR 43832, 43839 (September 23, 1975).

[13] The rationale for this provision was to ensure that a mortgage company was not forced to maintain an account at the association as a condition for the placement or renewal of mortgage insurance with the company. 41 FR 7497, 7498 (February 19, 1976).

that particular company. Common law fiduciary duties, the statutory rules governing transactions with affiliates, and OTS's new conflicts of interest regulation will cover conflicts of interest related to mortgage insurance companies. Thus, § 563.44 adds an unnecessary additional layer of regulation.

3. Proposed Rules

a. *Conflicts of interest.* As indicated above, OTS proposes to convert its general policy statement on conflicts of interest (§ 571.7) to a regulation (proposed § 563.200). Proposed § 563.200 prohibits directors,[14] officers,[15] employees, persons having the power to control the management or policies of savings associations, and other persons who owe fiduciary duties to savings associations from advancing their own personal or business interests, or those of others, at the expense of the institutions they serve.[16]

The proposed rule differs from the current OTS policy statement on conflicts of interest (§ 571.7) in several respects. First, today's proposal removes an ''appearance of a conflict of interest'' from the scope of the rule. The OTS continues to urge fiduciaries to avoid even the appearance of a conflict of interest as a matter of good business practice. However, OTS intends to focus its supervisory efforts on actual conflicts.

Second, the proposal simplifies the language used to describe prohibited conflicts. This should make it easier for persons covered by the rule to understand what conduct is prohibited. The language of the proposed rule tracks the language of OTS's 1992 ''Statement Concerning Responsibilities of Officers and Directors,'' which clarified OTS policy and reiterated general common law standards on the duty of loyalty and the duty of care that directors and officers owe their institutions.[17] This statement is much shorter and clearer than the current policy statement and is the same standard employed by the Federal Deposit Insurance Corporation (FDIC).[18]

Third, the current policy statement covers ''affiliated persons.''[19] The term affiliated person does not precisely match the scope of persons who at common law owe fiduciary duties to institutions. For example, immediate family members are included within the definition of affiliated person but they generally do not owe fiduciary duties under the common law.

The proposed regulation refers specifically to directors, officers, employees, persons having the power to control the management or policies of savings associations and other persons who owe fiduciary duties to savings associations. No reference is made to affiliated persons.

As indicated above, ''directors'' and ''officers'' are defined in OTS regulations. ''Employee'' is not defined, but this term is intended to have its common meaning. OTS believes that coverage of employees is important because there have been instances where employees' conflicts of interest have harmed savings associations.

Persons having the power to control the management or policies of savings associations would include both natural persons and companies. Generally, a shareholder of a savings association controls the management or policies of a savings association if the shareholder owns twenty-five percent or more of the voting stock of the institution.[20] Any other shareholder or other person who makes significant policy decisions for the institution would also be covered by the proposed regulation.

OTS does not attempt to define in this regulation who else (besides directors, officers, employees and persons who control management) owes fiduciary duties to savings associations. If a person owes a fiduciary duty under common law to a savings association, then that person must not advance his or her own interests at the expense of the institutions he or she serves.

b. *Prohibition on loan procurement fees.* OTS is moving the prohibition on loan procurement fees (§ 563.40(a)) to a new section (§ 560.130) in its proposed Part 560 on Lending and Investment and is narrowing the scope of the rule.

The current rule covers ''affiliated persons.'' Today's proposal will apply only to directors, officers[21] and natural persons having the power to control the management or policies of savings associations. OTS continues to believe that loan procurement fees paid to these persons pose a threat to the safety and soundness of savings associations. Such fees provide incentives to these individuals to bring loans into the association and to press for their approval, without giving proper consideration to whether they are a good investment for the institution. This is a classic example of a conflict of interest: the person's interest in financial gain from a loan procurement fee would be adverse to the institution's interest in making only high quality loans.

However, by eliminating the reference to ''affiliated person,'' the rule will no longer apply to holding companies and holding company affiliates of savings associations. OTS believes that loan procurement fees paid to corporate affiliates pose less risk for several reasons. First, these fees, unlike fees paid to officers and directors, are subject to section 23B of the Federal Reserve Act (FRA).[22] Under section 23B, all payments to corporate affiliates must be on arms-length terms for services actually rendered. Second, as a practical matter, an individual officer or director generally would have greater ability to directly or indirectly influence a loan approval than a corporate affiliate because of direct reporting relationships.

With the proposed change, affiliates of thrifts that are mortgage brokers will

[14] The term ''director'' is defined in OTS regulations as: any director, trustee or person performing similar functions with respect to an organization. (§ 561.18.)

[15] The term ''officer'' is defined in OTS regulations as: the president, vice-president (but not an assistant vice-president or second vice-president, or other vice-president with similar authority to an assistant or second vice-president), the secretary, the treasurer, the comptroller, any person performing similar functions with respect to any organization, and the chairman of the board of directors if the chairman participates in the management of the organization. (§ 561.35.) The term ''officer'' would include ''senior executive officer,'' defined in OTS regulations as: chief executive officer, chief operating officer, chief financial officer, chief lending officer, chief investment officer and any other individual who exercises significant influence over, or participates in major policy decisions of the savings association or a savings and loan holding company. (§ 574.9(a)(2).)

[16] This statement reiterates the current common law fiduciary duty these individuals and entities owe to their institutions. *See, e.g.,* E. Brodsky & M.P. Adamski, *Law of Corporate Officers and Directors: Rights, Duties and Liabilities*, ch. 3 and 4 (1984 and Supp. 1995) (directors and officers have fiduciary duties to avoid conflicts of interest and corporate usurpation); and H. Henn & J. Alexander, *Laws of Corporations*, §§ 235–238 (3d ed. 1983) (controlling shareholders may owe fiduciary duties to corporations).

[17] CEO Letter from Director Ryan (November 18, 1992).

[18] FDIC Financial Institutions Letter 87–92 (December 17, 1992).

[19] The term ''affiliated person'' is defined in OTS regulations to include: officers, directors, controlling persons of savings associations; immediate family members of officers, directors and controlling persons; and corporations and trusts with common ownership or control with the association. (§ 561.5.)

[20] *See* 12 U.S.C. 1817(j) and 1467a.

[21] The proposed rule, like the current rule, would not apply to loan officers and branch managers who do not make significant policy decisions for the institution. However, any loan procurement bonus or incentive system for employees who are not senior executive officers must be consistent with the safe and sound operation of the savings association. For illustrative examples of what compensation provisions OTS may consider unsafe and unsound, *see* OTS Regulatory Bulletin 27a, ''Executive Compensation.'' This bulletin does not specifically apply to incentive programs for employees who are not senior executive officers, but it does provide general guidance in this area.

[22] 12 U.S.C. 371c–1.

be able to receive an arms-length fee when acting as agent soliciting loans for affiliated thrifts.

B. Corporate Opportunity

1. Historical Background

In 1974, the FHLBB adopted a general corporate opportunity policy statement to apprise savings association officers, directors and controlling persons of their fiduciary duty not to appropriate business opportunities that belong to the association.[23] The policy statement was not intended to impose new legal duties, but simply to codify existing common law fiduciary principles.[24]

The following year, the FHLBB promulgated §§ 545.126, 556.16, and 571.9(b). Taken together, these provisions describe in elaborate detail when federal thrifts can refer insurance business to insurance agencies that affiliated persons control without raising concerns about usurpation of corporate opportunity. As structured, these provisions impose a general ban on referral of insurance business to affiliated persons, but then carve out numerous exceptions (*e.g.* when the thrift is located in a state that prohibits insurance sales by thrifts).

The FHLBB developed these rules to apply general corporate opportunity law to the operation of insurance agencies by management of federal associations, and to avoid case-by-case determinations. The rules focused on the insurance business because insurance brokerage had recently been added to the list of preapproved activities for savings association service corporations. These rules were designed to eliminate opportunities for insider abuse and to protect insurance business opportunities for savings associations and their subsidiaries.

2. Disposition of Current Rules

a. *Section 545.126 Referral of Insurance Business.* This section prohibits a federal savings association from referring any insurance business to an agency owned by officers or directors of the association, or by individuals having the power to direct its management, subject to certain exceptions. The exceptions are: (i) a state statute or regulation prohibits a federal savings association's service corporation (or wholly owned subsidiary thereof) from engaging in the insurance business; (ii) the state regulator has denied the association's application to engage in the insurance business; (iii) the state regulator has an established and well-known policy of denying such applications; (iv) the referral takes place within a reasonable time after a change in state law, regulation or policy; and (v) an application to establish or acquire an insurance business is pending with OTS or the appropriate state agency.

OTS proposes to delete this provision. This regulation was enacted over 20 years ago to control the perceived risks of usurpation of corporate opportunity related to the insurance agency business. In the agency's experience, insurance referrals have not presented risks that differ either in degree or kind from the risks presented by referrals of other types of business. Accordingly, insurance referrals, like other referrals, will be reviewed under the proposed general corporate opportunity regulation. (*See* description of the Proposed Rule below.)

b. *Section 556.16 Insurance agencies—usurpation of corporate opportunities.* This section, which substantially duplicates § 545.126, provides that a federal savings association's corporate opportunity to engage in the insurance business is usurped if it refers any insurance business to an agency owned by officers or directors of the association, or by individuals having the power to direct its management, subject to certain exceptions. The policy statement contains a number of exceptions to this general rule. Exceptions apply if the referral takes place: (i) while an application to establish or acquire an insurance business is pending with OTS or the appropriate state agency; (ii) while a state statute or regulation prohibits a federal savings association's service corporation (or wholly owned subsidiary thereof) from engaging in the insurance business; (iii) while the state licensing authority or regulator has an established and well-known policy of refusing to accept or process applications by federal savings associations to engage in the insurance business; or (iv) within a reasonable time after a change in state law, regulation or policy. Additional exceptions apply for referrals where (i) the referral took place before May 20, 1971; (ii) the association's application to obtain necessary state approval to engage in the insurance business was denied; (iii) a disinterested majority of the association's board of directors votes for sound business reasons to reject the opportunity; or (iv) there is no economic justification for the association to engage in the insurance business. This section also provides that if a corporate opportunity is usurped, the association is entitled to the benefit of the transaction.

Section 556.16 was published in 1975 at the same time the FHLBB promulgated § 545.126. It appears that the FHLBB may have intended for § 556.16 to state the standards applicable to insurance referrals that had already occurred and for § 545.126 to state the standards applicable to all subsequent insurance referrals. However, § 556.16 is not worded in a manner that limits it to retrospective application. Thus, OTS has traditionally read both sections together.

OTS proposes repealing § 556.16 for the reasons discussed above under § 545.126.

c. *Section 571.9 Corporate opportunity in savings associations.* Paragraph (a) of this policy statement states that it is a breach of fiduciary duty for a director, officer or person having the power to direct the management of an institution to take advantage of a business opportunity for his or her own or another person's personal profit or benefit when the opportunity is within the corporate powers of the association or its service corporation and when the opportunity is of present or potential practical advantage to the association. Any of these persons who usurps a corporate opportunity is liable to the association or its service corporation for the benefit of the transaction or business.

This paragraph further provides that in determining whether an opportunity is of present or potential practical advantage to the association, OTS will consider, among other things, the financial, managerial and technical resources of the association and its service corporation, and the reasonable ability of the association directly or through a service corporation to acquire such resources.

OTS proposes to codify this policy statement as a regulation, with modifications to shorten and simplify the regulatory language. (*See* description of the Proposed Rule below.) A general regulation concerning usurpation of corporate opportunity will serve as an important reminder to thrift insiders of their fundamental duty to protect the interests of their institution. OTS believes that avoiding corporate usurpation is as essential to safety and soundness as avoiding conflicts of interest. Thus, the OTS believes it is appropriate for the regulations to contain a brief statement regarding corporate usurpation.

Paragraph (b) provides that a usurpation of corporate opportunity to engage in the insurance business is an unsafe and unsound practice. For the reasons set forth above under § 545.126, OTS proposes deleting this paragraph.

[23] 37 FR 6696 (February 22, 1974).

[24] *Id.*

Insurance referrals will be treated the same as other types of referrals. They will be subject to the general standards in the proposed corporate opportunity regulation.

3. Proposed Rule

Paragraph (a) of OTS's proposed corporate opportunity regulation prohibits directors or officers of savings associations, persons having the power to control the management or policies of savings associations and other persons who owe a fiduciary duty to savings associations from taking advantage of corporate opportunities belonging to their savings association or its subsidiaries. Paragraph (b) of the proposed rule, like the current policy statement on corporate opportunity, indicates that a corporate opportunity will be deemed to belong to the savings association if: (a) It is within the corporate powers of the savings association or its subsidiary; and (b) the opportunity is of present or potential practical advantage to the savings association, directly or through its subsidiary.

OTS intends for common law standards governing usurpation of corporate opportunity to be applied in determining when an opportunity would be of present or potential practical advantage to an institution. Examples of the types of issues that fiduciaries should consider under this standard include, without limitation, an institution's financial condition and management resources, the level of risk presented by the business, and potential profit from the business weighed against any profits that might arise from transfer of the business. Prior OTS interpretations have indicated that a usurpation of corporate opportunity does not occur when an institution receives fair market value consideration for transfer of a line of business. By definition, an institution that receives fair market value receives as much as it conveys.

The scope of the proposed regulation on corporate opportunity differs from the scope of the current policy statement in one small respect. The current policy statement refers to directors, officers and other persons having power to direct management of savings associations which includes both natural persons and companies. To this OTS proposes to add a reference to ''other persons who owe fiduciary duties to savings associations.'' [25] This will ensure that the scope of the regulation equates to the scope of common law fiduciary duties.

In the past questions have arisen regarding the extent to which the corporate opportunity doctrine applies to dealings between savings associations and their holding companies. The reference in the proposed regulation to persons having power to direct management or policies of savings associations includes holding companies. Thus, under the proposed regulation, the dealings of holding companies with their subsidiary thrifts will be subject to the doctrine of usurpation of corporate opportunity to the same extent as provided by common law.

OTS realizes, however, that there is not a great deal of common law guidance regarding the nature of a controlling shareholder's duties to the depositors of a wholly-owned thrift or bank, especially with respect to the usurpation doctrine. OTS also believes that the transactions with affiliates provisions of sections 23A and 23B of the FRA,[26] as well as general principles of safety and soundness, generally provide an adequate basis for regulating dealings between thrifts and their holding companies. Thus, barring egregious circumstances or instances where a thrift is undercapitalized or unprofitable, OTS supervisors and examiners will generally defer to holding company decisions regarding where to allocate lines of business within a holding company structure, provided there is no violation of FRA sections 23A and 23B or general principles of safety and soundness.

C. Hazard Insurance

1. Historical Background

The FHLBB published a 1966 policy statement providing for the maintenance of hazard insurance policies on real property securing loans made or purchased by savings associations (§ 571.4).[27] The FHLBB's regulation on restrictions involving loan services (§ 563.35), published in 1975, contains additional hazard insurance requirements.

Over the past several years, the safety and soundness restrictions on thrifts' lending have been substantially revised. The Federal Deposit Insurance Corporation Improvement Act of 1991 [28] required the federal banking agencies to develop uniform real estate lending standards. In 1992, OTS, Board of Governors of the Federal Reserve System, FDIC and OCC adopted a uniform rule on real estate lending and developed Interagency Guidelines for Real Estate Lending Policies. These rules and guidelines generally require that institutions adopt real estate lending policies consistent with safety and soundness and that such policies include prudent underwriting standards. Among other things, prudent underwriting standards include guidelines regarding insurance coverage of security property.

2. Disposition of Current Rules

a. *Section 571.4 Hazard insurance.* Paragraph (a) of this policy statement provides that all savings associations should include in their loan contracts provisions requiring borrowers to maintain hazard insurance in a sufficient amount to protect the savings association from loss in the event of damage to or destruction of the real estate securing the savings association's loans.

Paragraph (b) requires the insurance policy to name and protect the savings association as mortgagee in an amount at least equal to its insurable interest in the security. The policy also must cover perils commonly included in ''Standard Fire and Extended Coverage,'' as well as other perils commonly required by institutional lenders operating in the same area.

Paragraph (c) stipulates that examiners will review loan files for evidence that appropriate hazard insurance is in force.

Details regarding hazard insurance are unnecessary in light of the general safety and soundness requirements set forth in the Interagency Real Estate Lending Guidelines and standard business practices in the mortgage lending industry. OTS proposes to delete this section. As noted in the objectives section, OTS does not believe its regulations should micromanage thrift operations. OTS examiners will review the sufficiency of thrifts' lending standards and practices during examinations.

[25] Employees are specifically mentioned in the proposed conflicts regulation, but not in the proposed corporate opportunity regulation. OTS has encountered a number of instances in which employee conflicts have been problematic. Similar problems have not arisen in the usurpation area. In those rare instances where an employee breaches a common law duty regarding usurpation of corporate opportunity, the employee will be covered by the general reference in the corporate opportunity regulation to ''other persons who owe fiduciary duties to savings associations.''

[26] 12 U.S.C. 371c and 371c–1.

[27] 31 FR 9539 (July 14, 1966). In 1959 the FHLBB published a policy statement requiring federally chartered associations to maintain hazard insurance on the property securing loans (§ 556.4). As part of Phase I of OTS's Regulatory Review, this provision was deleted because it imposed duplicative requirements to those set forth in § 571.4. 61 FR 66866, 66869 (December 27, 1995).

[28] Pub. L. 102–242, 105 Stat. 2236, Dec. 19, 1991.

b. *Section 563.35 Restrictions involving loan services.* Paragraphs (b) and (c) contain additional hazard insurance requirements. Paragraph (b) requires a savings association to inform borrowers of their right to freely select providers of insurance services. Paragraph (c) says a savings association may refuse to make a loan if the borrower's choice of insurance services would provide insufficient coverage.

OTS proposes to repeal § 563.35 (b) and (c). Savings associations have authority to refuse to make loans in the absence of adequate insurance coverage with or without paragraph (c). As for paragraph (b), OTS believes that RESPA provides an adequate safety net regarding loan origination practices. Eliminating paragraphs (b) and (c) will establish parity with banks.

IV. Proposed Disposition of Conflicts of Interest, Corporate Opportunity and Hazard Insurance Regulations and Policy Statements

The following chart displays the proposed disposition of OTS's existing conflicts of interest, corporate opportunity and hazard insurance regulations and policy statements. OTS intends to review all the regulations and policy statements that it is proposing to repeal to determine which are appropriate to convert into guidance in the Thrift Activities Handbook.

Original provision	New provision	Comment
§ 545.126	....	Removed.
§ 556.16	....	Removed.
§ 563.35	....	Removed.
§ 563.40(a)	§ 560.130	Modified.
§ 563.40(b)	....	Removed.
§ 563.44	....	Removed.
§ 571.4	....	Removed.
§ 571.7	§ 563.200	Modified.
§ 571.9(a)	§ 563.201	Modified.
§ 571.9(b)	....	Removed.

V. Executive Order 12866

The Director of OTS has determined that this proposed rule does not constitute a ''significant regulatory action'' for the purposes of Executive Order 12866.

VI. Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. As discussed in the preamble, this proposed rule reduces regulatory burden and clarifies the fiduciary duties that directors, officers and other fiduciaries owe to savings associations. OTS has determined that the proposed rule will not result in expenditures by state, local, or tribal governments or by the private sector of $100 million or more. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

VII. Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects

12 CFR Part 545

Accounting, Consumer protection, Credit, Electronic funds transfers, Investments, Manufactured homes, Mortgages, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 556

Savings associations.

12 CFR Part 560

Consumer protection, Investments, Manufactured homes, Mortgages, Reporting and recordkeeping requirements, Savings associations, Securities.

12 CFR Part 563

Accounting, Advertising, Crime, Currency, Flood insurance, Investments, Mortgages, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

12 CFR Part 571

Hazard insurance, Conflict of interests, Corporate opportunity.

Accordingly, the Office of Thrift Supervision proposes to amend chapter V, title 12, Code of Federal Regulations, as set forth below.

PART 545—OPERATIONS

1. The authority citation for part 545 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1828.

§ 545.126 [Removed]

2. Section 545.126 is removed.

PART 556—STATEMENTS OF POLICY

3. The authority citation for part 556 continues to read as follows:

Authority: 5 U.S.C. 552, 559; 12 U.S.C. 1464, 1701j–3; 15 U.S.C. 1693–1693r.

§ 556.16 [Removed]

4. Section 556.16 is removed.

PART 560—LENDING AND INVESTMENT

5. Part 560 as proposed to be added at 61 FR 1177 is amended as follows:

a. The authority citation for part 560 is revised to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1701j–3, 1828, 3803, 3806; 42 U.S.C. 4106

b. Section 560.130 is added to read as follows:

§ 560.130 Prohibition on loan procurement fees.

If you are a director, officer, or other natural person having the power to direct the management or policies of a savings association, you must not receive, either directly or indirectly, any commission, fee, or other compensation in connection with the procurement of any loan made by the association or a subsidiary of the association.

PART 563—OPERATIONS

6. The authority citation for part 563 continues to read as follows:

Authority: 12 U.S.C. 375b, 1462, 1462a, 1463, 1464, 1467a, 1468, 1817, 1828, 3806; 42 U.S.C. 4106.

§ 563.35 [Removed]

7. Section 563.35 is removed.

§ 563.40 [Removed]

8. Section 563.40 is removed.

§ 563.44 [Removed]

9. Section 563.44 is removed.

10. Section 563.200 is added to read as follows:

§ 563.200 Conflicts of interest.

If you are a director, officer, or employee of a savings association, or have the power to direct its management or policies, or otherwise owe a fiduciary duty to a savings association, you must not advance your own personal or business interests, or those of others, at the expense of the savings association.

11. Section 563.201 is added to read as follows:

§ 563.201 Corporate opportunity.

(a) If you are a director or officer of a savings association, or have the power to direct its management or policies, or otherwise owe a fiduciary duty to a savings association, you must not take advantage of corporate opportunities belonging to the savings association.

(b) A corporate opportunity belongs to a savings association if:

(1) The opportunity is within the corporate powers of a savings association or a subsidiary of the savings association; and

(2) The opportunity is of present or potential practical advantage to the savings association, either directly or through its subsidiary.

PART 571—STATEMENTS OF POLICY

12. The authority citation for part 571 continues to read as follows:

Authority: 5 U.S.C. 552, 559; 12 U.S.C. 1462a, 1463, 1464.

§§ 571.4, 571.7, 571.9 [Removed]

13. Sections 571.4, 571.7 and 571.9 are removed.

Dated: May 29, 1996.

By the Office of Thrift Supervision.

Jonathan L. Fiechter,

Acting Director.

[FR Doc. 96–14000 Filed 6–13–96; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 864

[Docket No. 94P–0341]

Medical Devices; Classification/Reclassification of Immunohistochemistry Reagents and Kits

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to classify/reclassify immunohistochemistry reagents and kits (IHC's) (in-vitro diagnostic devices) into three classes depending on intended use. These actions are being taken under the Federal Food, Drug, and Cosmetic Act (the act), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) and the Safe Medical Devices Act of 1990 (the SMDA). The intention of this proposal is to regulate these pre- and post-1976 devices in a consistent fashion. Therefore, FDA is proposing classification or reclassification of these products as applicable.

DATES: Submit written comments by August 30, 1996.

ADDRESSES: Submit written comments on the proposed rule to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Max Robinowitz, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD, 20850–4011, 301–594–1293, ext. 136, or FAX 301–594–5941.

SUPPLEMENTARY INFORMATION:

I. Background

The act (21 U.S.C. 201 *et seq*.), as amended by the 1976 amendments (Pub. L. 94–295) and the SMDA (Pub. L. 101–629), established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are: Class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the act (21 U.S.C. 360c), devices that were in commercial distribution before May 28, 1976, the enactment date of the 1976 amendments, are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendations for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. A device that is first offered in commercial distribution after May 28, 1976, and which FDA determines to be substantially equivalent to a device classified under this scheme, is classified into the same class as the device to which it is substantially equivalent. The agency determines whether new devices are substantially equivalent to previously offered devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360 (k)) and part 807 of the regulations (21 CFR 807). A device that was not in commercial distribution prior to May 28, 1976, and that has not been found by FDA to be substantially equivalent to a legally marketed device, is classified automatically by statute (section 513(f) of the act) into class III, without any FDA rulemaking proceeding.

The scope of products covered by this proposal includes both pre-1976 devices which have not been previously classified as well as post-1976 devices which are statutorily classified into class III. The intention of this proposal is to regulate these pre- and post-1976 devices in a consistent fashion. Therefore, FDA is proposing classification or reclassification of these products, as applicable.

Fluorescent-labeled immunohistochemistry in vitro diagnostic devices (IHC's) have been used for patient diagnosis since the early 1940's and enzyme-linked IHC's have been used since the early 1970's. IHC's, however, were not classified as a part of the 1979 FDA classification activities. In addition, new IHC's have been marketed for the first time since the passage of the 1976 amendments. When used in a standardized controlled manner, IHC's enhance the accuracy and scope of surgical pathology, provide objective data to histopathological examination, and contribute to improved patient care. IHC's can specifically and objectively demonstrate the presence and distribution of antigens that may be of use in narrowing differential diagnoses. IHC results are integrated by the user pathologist and interpreted together with other types of data used in pathological diagnostic decisionmaking (Refs. 1 through 4). Because pathologists, the principal users of IHC's, were concerned about the regulation of IHC's, the College of American Pathologists, the American Society of Clinical Pathologists, the Association of Pathology Chairs, the Biological Stain Commission, and the Association of Directors of Anatomic and Surgical Pathology requested a review of the classification of IHC reagents and submitted a Petition for Classification of IHC's as class II (special controls) medical devices during the summer of 1994. In response to this petition, FDA convened the Panel to consider classification/reclassification of these devices.

II. Panel Recommendation

The Hematology and Pathology Devices Panel (the Panel) met on October 21, 1994, and made the following recommendation regarding the classification of five Immunohistochemistry devices.

A. Identification

Immunohistochemistry test systems (IHC's) are in-vitro diagnostic devices that consist of polyclonal or monoclonal antibodies and ancillary reagents that are used to identify, by immunological techniques, antigens in specimens of tissues or intact cells in cytologic specimens. IHC's are primary antibody reagents that are labeled with instructions for use and performance