The provisions of 5 U.S.C. 553(d) relating to notice of the effective date of a rule have not been followed in connection with the adoption of these amendments because the low reserve tranche adjustment and the reservable liabilities adjustment are expected, ministerial amendments prescribed by statute. Moreover, they are required to be effective for the next calendar year even though the data which they are required to reflect are only available late in the prior year. In addition, the reservable liabilities adjustment and the increase in deposit cutoff levels for reporting purposes relieve a restriction on depository institutions, and the low reserve tranche will have a *de minimis* effect on depository institutions with net transaction accounts exceeding $49.3 million. Accordingly, there is good cause to determine, and the Board so determines, that such notice is impracticable or unnecessary.

Regulatory Flexibility Analysis

The Board certifies that these amendments will not have a substantial economic impact on small depository institutions. *See* ''Notice and public participation'' above.

List of Subjects in 12 CFR Part 204

Banks, banking, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Board is amending 12 CFR Part 204 as follows:

PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

1. The authority citation for Part 204 continues to read as follows:

Authority: 12 U.S.C. 248(a), 248(c), 371a, 461, 601, 611, and 3105.

2. In § 204.9 paragraph (a) is revised to read as follows:

§ 204.9 Reserve requirement ratios.

(a)(1) *Reserve percentages.* The following reserve ratios are prescribed for all depository institutions, Edge and Agreement corporations, and United States branches and agencies of foreign banks:

Category	Reserve requirement [1]
Net transaction accounts:	
$0 to $49.3 million	3 percent of amount.
Over $49.3 million	$1,479,000 plus 10 percent of amount over $49.3 million.
Nonpersonal time deposits.	0 percent.
Eurocurrency liabilities.	0 percent.

[1] Before deducting the adjustment to be made by the paragraph (a)(2) of this section.

(2) *Exemption from reserve requirements.* Each depository institution, Edge or agreement corporation, and U.S. branch or agency of a foreign bank is subject to a zero percent reserve requirement on an amount of its transaction accounts subject to the low reserve tranche in paragraph (a)(1) of this section not in excess of $4.4 million determined in accordance with § 204.3(a)(3).

* * * * *

By order of the Board of Governors of the Federal Reserve System, November 21, 1996.

William W. Wiles,

Secretary of the Board.

[FR Doc. 96–30148 Filed 11–26–96; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

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

[No. 96–111]

RIN 1550–AA89

Conflicts of Interest, Corporate Opportunity and Hazard Insurance

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS or agency) is today issuing a final rule updating and substantially streamlining its regulations and policy statements concerning conflicts of interest, usurpation of corporate opportunity and hazard insurance. These amendments are being made pursuant to the Regulatory Reinvention Initiative of the Vice President's National Performance Review (Reinvention Initiative) and section 303 of the Community Development and Regulatory Improvement Act of 1994 (CDRIA), which requires OTS and other federal banking agencies to review, streamline, and modify regulations and policies to improve efficiency, reduce unnecessary costs, and remove inconsistent, outmoded and duplicative requirements.

EFFECTIVE DATE: January 1, 1997.

FOR FURTHER INFORMATION CONTACT: Robyn Dennis, Manager, Thrift Policy, (202) 906–5751; or Francis Raue, Policy Analyst, (202) 906–5750, Supervision Policy; Deborah Dakin, Assistant Chief Counsel, (202) 906–6445, Regulations and Legislation Division, Chief Counsel's Office.

SUPPLEMENTARY INFORMATION:

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I. Background

In a comprehensive review of its regulations, beginning in the spring of 1995, pursuant to section 303 of the CDRIA [1] and the Administration's Reinvention Initiative, OTS identified its conflicts of interest, corporate opportunity and hazard insurance regulations and policy statements as an important area for updating and streamlining. Each conflicts of interest, corporate opportunity and hazard insurance regulation and policy statement was reviewed to determine whether it was current and understandable; imposed the least possible burden consistent with safety and soundness and statutory requirements; addressed subject matter more suited for handbook guidance; and was written in a clear, straightforward manner. OTS also sought industry input regarding staff's initial recommendations through an industry focus group consisting of five thrift representatives, an industry trade association and OTS staff. As a result of this review, OTS identified a number of ways in which its conflicts of interest, corporate opportunity and hazard insurance regulations and policy statements could be revised to reduce regulatory burden. On June 14, 1996, OTS issued a notice of proposed rulemaking.[2]

Today's final rule is substantially similar to the June proposal. The conflicts of interest rule has been clarified to give more specificity on what conflicts are prohibited. The conflicts of interest provisions apply if there is disclosure to the board of directors, the interested person refrains from participation in discussion of the

[1] 12 U.S.C. 4803(a)(1).

[2] 61 FR 30190 (June 14, 1996).

transaction and recuses himself or herself from voting on the transaction. In addition, the final rule on corporate opportunity incorporates a safe harbor. The corporate opportunity safe harbor applies if there is disclosure to the board of directors, and a disinterested and independent majority of the board rejects the proposed business opportunity.

The final rule reduces the number of conflicts of interest, corporate opportunity and hazard insurance regulations and policy statements from eight to three and results in a net reduction of more than five pages of CFR text. As proposed, OTS has removed in their entirety five unnecessary, duplicative and outdated regulations and policy statements: § 545.126 (referral of insurance business), § 556.16 (insurance agencies—usurpation of corporate opportunity), § 563.35 (restrictions involving loan services), § 563.44 (loans involving mortgage insurance) and § 571.4 (hazard insurance). 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.

OTS's objective 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 of interest, 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. For example, the policy statement regarding hazard insurance (§ 571.4) has been largely superseded by the Interagency Real Estate Lending Guidelines.[3] 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 section 5(q) of the Home Owners' Loan Act of 1933, as amended (HOLA).[4] Additionally, the regulatory provisions governing kick-backs and unearned fees for loans (§ 563.40) are largely duplicative of the Real Estate Settlement Practice Act of 1974 (RESPA).[5].

[3] Formerly, Appendix A to Subpart D of Part 563, recodified without change as, Appendix to § 560.101 (61 FR 50951, 50978–81 (September 30, 1996)).

[4] 12 U.S.C. 1461, *et seq.*

[5] Pub. L. 93–533, 88 Stat. 1724 (1974).

Second, as part of its reinvention effort, OTS is seeking to move away from regulations that micromanage thrift operations. Accordingly, today OTS is repealing in their entirety detailed regulations concerning when federal thrifts can refer customers to affiliates that sell insurance, leaving insurance referrals to be handled in the same way as other corporate opportunity issues.

Third, in its reinvention effort, OTS is seeking to enhance the conciseness and clarity of its regulations. Accordingly, each of the three final rules has been redrafted using plain language techniques pioneered by the Department of Interior and promoted by the Reinvention Initiative.

In summary, OTS believes that regulations should generally be limited to essential safety and soundness requirements. If regulations are unnecessarily detailed and rigid, regulated entities may find themselves unable to respond to market innovations. Today's final rule achieves what OTS believes is the right balance by placing key safety and soundness requirements in binding regulations and putting more expansive guidance on prudent practices in the Thrift Activities Regulatory Handbook.

II. Summary of Comments and Description of the Final Rule

A. General Discussion of the Comments

The public comment period on the June 14 proposal closed on August 13, 1996. Ten commenters responded to the notice of proposed rulemaking. Four state and national trade associations, three federal savings associations, one law firm, one dual bank and savings and loan holding company, and one mortgage insurance corporation submitted comments.

All but three of the commenters generally supported OTS efforts to update and streamline its conflicts of interest, corporate opportunity and hazard insurance regulations and policy statements. Commenters commended OTS's proposed elimination of duplicative, overlapping and burdensome restrictions and indicated that the proposed modifications would give institutions greater flexibility in structuring their operations. Commenters believed that the proposed changes would significantly reduce regulatory burden on the thrift industry and promote operational flexibility.

Several commenters raised concerns, however, that the proposed conflicts of interest and corporate opportunity regulations were unclear and failed to give meaningful guidance about what practices were prohibited. Commenters also expressed concern that OTS's intended approach for dealing with corporate opportunity within a holding company structure was only to be part of guidance and not included in the regulatory text. In response, OTS has refined the language of the rules and provided examples in the preamble to clarify the scope of the provisions. These concerns and OTS's responses are addressed in detail in the description of the final rules.

A few commenters expressed concern over the elimination of the hazard insurance provision allowing thrifts to force-place insurance and to reject policies that would provide inadequate protection to the institution. They agreed with OTS's view that these were matters of general safety and soundness principles with respect to lending practices, but believe that thrifts would be in a weaker bargaining position with borrowers if these provisions were removed. These concerns are discussed in detail below in the section-by-section analysis in reference to §§ 563.35 and 571.4.

B. Section-by-Section Analysis

1. Conflicts of Interest

Section 563.35 Restrictions Involving Loan Services

OTS proposed deleting paragraph (a) of § 563.35, which enumerates specific services typically involved in real estate lending that cannot be ''tied'' to the granting of a loan. OTS received no comments on this paragraph, which is duplicative of HOLA section 5(q). The paragraph is deleted as proposed.

OTS proposed to remove paragraph (b) of § 563.35, which requires a savings association to inform borrowers of their right to freely select providers of insurance services (*e.g.*, hazard and mortgage insurance) and paragraph (c), which provides that a savings association may refuse to make a loan if the borrower's choice of insurance services would provide insufficient coverage.

OTS received no comments on paragraph (b). One commenter urged OTS to retain paragraph (c) to protect thrifts from having to accept insurance that provided insufficient coverage. OTS's significantly streamlined and revised lending rule[6] sets forth the basic rules governing lending practices. Federal savings associations have the authority under these rules to refuse to make loans in the absence of adequate insurance coverage, with or without paragraph (c) of § 563.35. Coincident

[6] 61 FR 50951, 50971 (September 30, 1996), to be codified at 12 CFR Part 560.

with this authority, borrowers must be provided the right to freely select insurance carriers, within the parameters established by the savings associations as necessary to meet their legitimate business needs and consistent with applicable law. Although the commenter noted that legislation had been proposed in at least one state that would prohibit a lender from refusing to accept a hazard insurance policy from any insurer admitted in the state and selected by the borrower, OTS's revised lending rules contain a detailed provision addressing preemption of state laws relating to lending practices.[7] The states cannot force federal savings associations to accept insurance coverage that the associations deem inadequate. Accordingly, for the reasons set forth above and in the preamble to the proposed rule, paragraphs (b) and (c) are deleted as proposed.

OTS proposed to delete paragraph (d) of § 563.35, which 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. OTS received no comments on this paragraph, which is removed as proposed. Instead these settlement practices of savings associations will be governed by RESPA.

Section 563.40 Restrictions on Loan Procurement Fees, Kickbacks and Unearned Fees

OTS proposed retaining in modified form paragraph (a) of § 563.40, which prohibits certain persons from receiving any fee in connection with the procurement of a loan from the association or a subsidiary of the association. After considering the comments received, which are discussed below in Part II.C., OTS has decided to retain this paragraph with some technical corrections from the proposed rule, as new § 560.130.

OTS proposed deleting paragraph (b) of § 563.40, which prohibits the payment of unearned fees for loan origination and settlement services. This provision overlaps RESPA. OTS received no comments on this paragraph, which is removed as proposed.

Section 563.44 Mortgage Insurance

OTS proposed to repeal § 563.44, which prohibits a savings association (or service corporation affiliate) from insuring any loan with a mortgage insurance company if certain affiliations are present.

One commenter noted that it is appropriate to eliminate this provision because consumers are adequately protected by RESPA and the regulations promulgated thereunder, and conflicts of interests would be covered by existing law. Another commenter asserted that allowing thrifts to invest in mortgage insurance companies would create a conflict of interest that poses a risk to the safety and soundness of the thrift.

As indicated in the preamble to the proposed rule, OTS believes that common law fiduciary duties, the statutory rules governing transactions with affiliates, and OTS's new conflicts of interest regulation are adequate to address any conflicts of interest relating to the mortgage insurance business. OTS also notes that, under RESPA, a lender must disclose its interest in an affiliated mortgage company and give borrowers a choice of insurance providers.

For these reasons and those set forth in the preamble to the proposed rule, § 563.44 is removed, as proposed.

Section 571.7 Conflicts of Interest Policy Statement

OTS proposed codifying this policy statement as a regulation, after making modifications to clarify and simplify the language. OTS received two comments urging the agency not to adopt a conflicts of interest regulation. As indicated in the preamble to the proposed rule, fiduciary duties lie at the heart of safety and soundness. OTS believes a regulation will serve as an important reminder to thrift insiders of their fiduciary duties to avoid conflicts of interest. Therefore, OTS is promulgating a conflicts of interest regulation, with some modifications from the proposal, as described below in Part II.C.

2. Corporate Opportunity

Section 545.126 Referral of Insurance Business

OTS proposed removing § 545.126, which 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. This section is removed, as proposed. General corporate opportunity principles will govern insurance referrals.

OTS also notes that the Department of Housing and Urban Development recently issued regulations that *inter alia,* govern fee payments for settlement service referrals.[8] Savings associations are advised to review these rules for applicability to their operations.

Section 556.16 Insurance Agencies—Usurpation of Corporate Opportunities

OTS proposed to eliminate § 556.16, which substantially duplicates § 545.126, and 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. OTS received no comments on this section, which is removed as proposed. As noted above, general corporate opportunity principles will govern insurance referrals.

Section 571.9 Corporate Opportunity in Savings Associations

OTS proposed retaining in modified form, and codifying as a regulation, paragraph (a) of § 571.9, which states that it is a breach of fiduciary duty for officers, directors and certain other persons 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.

OTS received two comments urging the agency not to adopt a corporate usurpation regulation. OTS believes that avoiding corporate usurpation is as essential to safety and soundness as avoiding conflicts of interest. Therefore, it is adopting the regulation, with modifications from the proposal, as described below in Part II.C.

OTS proposed removing paragraph (b) of § 571.9, which provides that a usurpation of corporate opportunity to engage in the insurance business is an unsafe and unsound practice. OTS received no comments on this provision, which is removed as proposed. As noted above, OTS believes that the general prohibition on usurpation of corporate opportunity will be sufficient to address any usurpation of insurance opportunities.

3. Hazard Insurance

Section 571.4 Hazard Insurance

OTS proposed removing § 571.4, which contains detailed provisions

[7] 61 FR at 50972, to be codified at 12 CFR 560.2.

[8] 61 FR 29239 (June 7, 1996). The effective date of these rules was delayed until July 31, 1997 by section 2103(f) of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (1996).

concerning a savings association's obligation to require 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.

OTS received two comments urging the agency to retain the provision as a protection to thrifts from law suits by borrowers relating to ''force placing'' insurance [9] and to modify the rule to specifically cover ''force placing'' insurance.

OTS disagrees that a specific provision on hazard insurance is necessary for several reasons. First, details regarding hazard insurance are unnecessary in light of the general safety and soundness requirements set forth in OTS's revised lending regulations and Interagency Real Estate Lending Guidelines as well as standard business practices in the mortgage lending industry. Second, savings associations clearly have the right to contract with borrowers to include whatever terms they deem appropriate in loan agreements (when not in contravention of law), including provisions governing force placing insurance. OTS's elimination of its hazard insurance policy statement does not alter this right.

For the reasons set forth above and in the preamble to the proposed rule, this section is removed as proposed.

C. Description of Final Rule

1. New § 560.130 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 Part 560 on Lending and Investment and is narrowing the scope of the rule. OTS is promulgating new § 560.130 substantially as proposed, with some technical corrections.

The rule prohibits directors, officers and natural persons having the power to control the management or policies of savings associations from receiving, directly or indirectly, any commission, fee or other compensation in connection with the procurement of any loan by the savings association or a subsidiary of the savings association.

The current rule applies to affiliated persons. This has been changed to natural persons. As OTS noted in the preamble to the proposed loan procurement rule, the revised regulation would not apply to holding companies and holding company affiliates of savings associations. Therefore, affiliates of thrifts that are mortgage brokers will be able to receive an arms-length fee when acting as agent soliciting loans for affiliated thrifts. It is OTS's belief that loan procurement fees paid to corporate affiliates pose less risk than those paid to individuals because these fees will be subject to section 23B of the FRA and corporate affiliates will generally have less ability than officers and directors to influence the daily workings of an institution's loan approval process. OTS wants to clarify here that the revised rule is not intended to cover payments made in the ordinary course of business in the form of dividends or capital gains received by shareholders of the holding company who are also officers or directors of the savings association. In addition, it is OTS's view that to ''receive'' a prohibited payment, a person must have accepted that payment. For example, it is not enough that a payment is made to the person's account without his or her knowledge or consent.

OTS received one comment urging the agency to eliminate the loan procurement rule. This commenter believed that the proposed rule was too vague and that the common law duties of loyalty and care, other OTS guidance and RESPA are sufficient to address the subject matter of the regulation.

OTS disagrees. As indicated in the preamble to the proposed rule, the regulation has been amended from current § 563.40 to more precisely tailor the scope of the regulation to the persons the agency believes should be covered and the practices the agency wishes to prohibit. While OTS agrees that the subject matter of this rule is generally covered by common law fiduciary duties and other OTS guidance, OTS continues to believe that loan procurement fees paid to the persons enumerated in the rule pose a particular 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. Therefore, OTS believes that a specific rule addressing loan procurement fees is appropriate.

Accordingly, § 563.40(a) is amended and moved to new § 560.130, as proposed, with technical corrections.

2. New § 563.200 Conflicts of Interest

OTS proposed codifying its conflicts of interest policy statement (§ 571.7) as a regulation in new § 563.200 and clarifying and simplifying the text of the rule. OTS's proposed conflicts of interest regulation prohibited 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 from advancing their own personal or business interests, or those of others, at the expense of the institutions they serve.

OTS is making two changes in the final rule from the proposal after considering issues raised in the comment letters. First, two commenters pointed out that the phrase ''or those of others'' was vague. OTS agrees and is therefore modifying this phrase to read ''or those of others with whom you have a personal or business relationship.'' This language more precisely identifies those related interests that would give rise to a conflict of interest.

Second, one commenter suggested that OTS include in the regulation a safe harbor to provide greater certainty about what transactions are excluded from the rule. OTS is sympathetic to the commenter's desire for greater certainty in this area; however, OTS is not including a safe harbor provision in its regulation. To give greater guidance regarding what transactions may be excluded, OTS is adding a paragraph to the end of its conflicts of interest rule that provides that if a person with a fiduciary duty to a savings association has an interest in a matter or transaction before the board of directors, he or she must do three things. First, the person must disclose to the board of directors all material non-privileged information relevant to the board's decision. This includes the existence, nature and extent of his or her conflicting interest and the facts known to the person as to the matter or transaction under consideration. Second, the interested person may not participate in the board discussion of the matter. Third, if the person with the conflict is a director, he or she must recuse himself or herself from voting on the matter.[10] Absent unusual circumstances, OTS will not take enforcement action against a person who has complied with these requirements.

[9] ''Force placing'' insurance is when the savings association exercises its right under a contract with a borrower to purchase insurance coverage at the borrower's expense in the event the borrower fails to purchase or provide insurance.

[10] *See In the Matter of Neil M. Bush*, ERC 90–30 (Decision and Order) at 21–22 (April 18, 1991); *In the Matter of Simpson*, OTS Order No. AP 92–123 (November 18, 1992), *upheld on appeal*, 29 F.3d 1418 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1096 (1995).

Several comments sought additional clarification of the types of conduct that would be acceptable or impermissible under the rule. OTS wants to emphasize that the regulation is a reformulation of the current policy statement, written more concisely, and is intended to encompass the common law of conflicts of interest as it has been articulated in Director's Orders. The regulation does not impose any new requirements on persons covered by the rule but reiterates general common law standards on the fiduciary duty officers, directors and others owe to the institutions they serve. Prior OTS interpretations of the policy statement will continue to provide guidance as to the scope of the rule.

To further clarify the type of conduct OTS intends to include and exclude from the coverage of the rule, the following examples are provided. A person who owes a fiduciary duty to a savings association and receives money or other benefits (*e.g.*, a loan, forgiveness of debt, goods or services) from a third party in return for the savings association granting a loan to or purchasing property from the third party would be receiving a benefit that is covered by the rule. Similarly, payments by the third party to a spouse, child, parent, sibling or business partner of a person identified in the rule would generally provide a benefit to the person because of the personal or business relationship and would likewise be covered by the rule. In addition, a person who owes a fiduciary duty to a savings association may not advance a transaction between the savings association and companies in which that persons owns shares, is on the board of directors or is an officer, at the expense of the institution.

Generally, a person will not be deemed to be advancing his, her or its interests at the expense of the institution if the transaction complies with sections 23A and 23B of the Federal Reserve Act (FRA),[11] Federal Reserve Board Regulation O, and the safe harbor described above.[12] Likewise, the rule does not prohibit an executive officer, director or principal shareholder from receiving a loan from the association in accordance with 12 CFR 563.43.

Section 571.7 is amended, codified as a regulation, and moved to new § 563.200, with changes from the proposal, as indicated above.

[11] 12 U.S.C. 371c and 371c–1.

[12] 12 CFR Part 215.

3. New § 563.201 Corporate Opportunity

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 indicates that a corporate opportunity will be deemed to belong to the savings association if: (i) it is within the corporate powers of the savings association or its subsidiary; and (ii) the opportunity is of present or potential practical advantage to the savings association, directly or through its subsidiary.

OTS indicated in the preamble to the proposed rule and reiterates here, that the agency 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 should be considered 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.

OTS received several comments on its proposed corporate opportunity regulation. OTS is making one change to the final rule to reflect the comments received. One commenter urged OTS to include a provision in the regulation recognizing the role of the board of directors in determining whether an opportunity is advantageous to the institution. OTS agrees with this suggestion. OTS is adding a paragraph to the new regulation which provides that OTS will not deem a person to have taken advantage of a corporate opportunity belonging to the savings association if a disinterested and independent majority of the savings association's board of directors, after receiving a full and fair presentation of the matter, rejected the opportunity as a matter of sound business judgment. This safe harbor is not intended to affect the rights of others, for example the Federal Deposit Insurance Corporation or shareholders, to bring actions alleging usurpation of corporate opportunity under applicable provisions of law.

A ''disinterested'' director is one without an interest in the matter or transaction before the board of directors. This determination will vary with the facts and circumstances of each case. The examples set forth above in the discussion of the conflicts of interest rule provide some guidance on whether a director has an interest in a transaction. An ''independent'' director for purposes of this rule is: (i) One who is not a salaried officer or employee of the savings association, any subsidiary, or any holding company affiliate; [13] and (ii) one who is not dominated or controlled by an interested director. What will be considered ''a full and fair presentation of the facts relating to a given matter'' will vary depending upon the transaction. At a minimum, the interested director must disclose the nature and extent of his or her interest in the transaction.

Several commenters addressed the language in the preamble concerning OTS's intended treatment of business allocation within a holding company structure. OTS indicated that 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 noted, however, that other provisions of law 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 sections 23A and 23B of the FRA or general principles of safety and soundness.

Two commenters asked that this language be specifically included in the regulation or in handbook guidance. OTS has determined not to incorporate this language in the regulation for several reasons. First, it is the agency's view that the standard it has enunciated for the treatment of holding companies is not specific enough to be included in regulatory text. Second, holding companies are covered by the rule and OTS reserves the right to take action against holding companies for

[13] *See* 12 CFR 563.33 (1996).

usurpation of corporate opportunity in the special circumstances described above. However, OTS reiterates that it will generally defer to holding company business allocation decisions. OTS's decision not to put this standard in the regulation in no way reflects a departure from this stated position. OTS intends to incorporate this language into the Thrift Activities Regulatory Handbook.

One commenter asked OTS to amend the general prohibition paragraph to provide that usurpation of corporate opportunity was only actionable if it was ''for [a person's] personal profit or benefit.'' Usurpation of corporate opportunity is prohibited based on fiduciary principles, not whether a benefit accrues to an individual. It is enough that an opportunity belongs to the institution and is usurped from the institution. The concept of personal gain is more appropriate to a conflicts of interest analysis than a corporate opportunity analysis.

OTS notes that depending on the circumstances relating to a given matter or transaction, the conflicts of interest regulation (new § 563.200) may apply in addition to the corporate opportunity rule.

Section 571.9(a) is amended, codified as a regulation and moved to new § 563.201, with changes from the proposal, as indicated above.

III. Disposition of Existing Conflicts of Interest, Corporate Opportunity and Hazard Insurance Regulations and Policy Statements

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.

IV. Executive Order 12866

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

V. 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. OTS has determined that the final 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.

VI. Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS certifies that this final rule will not have a significant economic impact on a substantial number of small entities. As discussed in the preamble, this final rule reduces regulatory burden and clarifies the fiduciary duties that directors, officers and other fiduciaries owe to savings associations. It does not create new standards but reiterates the common law duty that directors, officers and other fiduciaries owe to the institutions they serve.

List of Subjects

12 CFR Part 545

Accounting, Consumer protection, Credit, Electronic funds transfers, Investments, 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, Conflicts of interest, Corporate opportunity, Crime, Currency, Investments, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

12 CFR Part 571

Accounting, Investments, Reporting and recordkeeping requirements, Savings associations.

Accordingly, the Office of Thrift Supervision amends 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. The authority citation for part 560 continues to read as follows:

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

6. 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, directly or indirectly, any commission, fee, or other compensation in connection with the procurement of any loan made by the savings association or a subsidiary of the savings association.

PART 563—OPERATIONS

7. 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.

§ 563.35 [Removed]

8. Section 563.35 is removed.

§ 563.40 [Removed]

9. Section 563.40 is removed.

§ 563.44 [Removed]

10. Section 563.44 is removed.

11. 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:

(a) You must not advance your own personal or business interests, or those of others with whom you have a

personal or business relationship, at the expense of the savings association; and

(b) You must, if you have an interest in a matter or transaction before the board of directors:

(1) Disclose to the board all material nonprivileged information relevant to the board's decision on the matter or transaction, including:

(i) The existence, nature and extent of your interests; and

(ii) The facts known to you as to the matter or transaction under consideration;

(2) Refrain from participating in the board's discussion of the matter or transaction; and

(3) Recuse yourself from voting on the matter or transaction (if you are a director).

12. 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 the 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.

(c) OTS will not deem you to have taken advantage of a corporate opportunity belonging to the savings association if a disinterested and independent majority of the savings association's board of directors, after receiving a full and fair presentation of the matter, rejected the opportunity as a matter of sound business judgment.

PART 571—STATEMENTS OF POLICY

13. 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]

14. Sections 571.4, 571.7 and 571.9 are removed.

Dated: November 18, 1996.

By the Office of Thrift Supervision.

Nicolas P. Retsinas,

Director.

[FR Doc. 96–30031 Filed 11–26–96; 8:45 am]

BILLING CODE 6720–01–P

12 CFR Parts 560, 563, 574, 575, 583, 584

[No. 96–113]

RIN 1550–AB05

Amendments Implementing Economic Growth and Regulatory Paperwork Reduction Act

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Interim final rule.

SUMMARY: The Office of Thrift Supervision (OTS or Office) is issuing this interim final rule to implement provisions of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA). Among other actions, EGRPRA expanded and clarified federal thrifts' lending and investment authority, amended the Qualified Thrift Lender (QTL) test, authorized OTS to grant antitying exceptions to savings associations that conform to those granted to banks by the Board of Governors of the Federal Reserve System (FRB), and modified OTS's oversight authority over bank holding companies that own savings associations. Today's interim final rule implements these statutory changes. OTS is making today's rule effective immediately to enable thrifts to take advantage of the expanded flexibility and burden reduction afforded by EGRPRA. However, OTS will be accepting comment on any issues raised by these newly implemented regulations for the next sixty days.

DATES: This interim rule is effective on November 27, 1996. Comments must be received by January 27, 1997.

ADDRESSES: Send comments to Manager, Dissemination Branch, Records Management and Information Policy, Office of Thrift Supervision, 1700 G Street, NW., Washington, D.C. 20552. Attention Docket No. 96–113. 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: William J. Magrini, Senior Project Manager, (202) 906–5744, Supervision Policy; Ellen J. Sazzman, Counsel (Banking and Finance), (202) 906–7133, or Deborah Dakin, Assistant Chief Counsel, (202) 906–6445, Regulations and Legislation Division, Chief Counsel's Office. For information about holding company or branching issues, contact Kevin A. Corcoran, Assistant Chief Counsel, (202) 906–6962, Business Transactions Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

Summary of Relevant Statutory Changes

Credit card and education lending: Section 2303(b) of the EGRPRA [1] amended section 5 of the Home Owners'' Loan Act (HOLA),[2] to confirm and clarify that federal savings associations may engage in credit card lending without a percentage of assets investment limitation, as OTS has long maintained. Section 2303(b) also amended HOLA section 5 to permit federal thrifts to make education loans without investment restriction. Previously, education loans were limited to 5% of a thrift's total assets.[3]

Commercial lending: Section 2303(c) of EGRPRA also expanded the small business and agricultural lending authority of federal thrifts. Federal thrifts have long been authorized to make loans secured by business or agricultural real estate in amounts up to 400% of capital,[4] and to make additional secured and unsecured loans to businesses and farms in amounts up to 10% of total assets.[5] EGRPRA left the 400% non-residential real estate lending cap intact, but increased the 10% of assets limit to 20% of assets, provided that amounts in excess of 10% of assets may only be used for ''small business loans'' as that term is defined by the Director of OTS.

Qualified Thrift Lender test: Section 2303(e) and (g) of EGRPRA amended the QTL test in section 10(m) of the HOLA [6] to provide that investments in educational, small business, credit card, and credit card account loans are includable without limit for purposes of satisfying the QTL test. Under the QTL test, savings associations must hold ''qualified thrift investments'' equal to at least 65% of their ''portfolio assets'' as defined by statute.[7] Before EGRPRA, ''qualified thrift investments'' (QTI) were defined in a manner that required every savings association to hold a

[1] Pub. L. 104–208, tit. 12, 110 Stat. 3009 (September 30, 1996).

[2] 12 U.S.C. 1464(c)(1).

[3] 12 U.S.C. 1464(c)(3)(A). Federal thrifts continue to be authorized to make other consumer loans in an amount up to 35% of total assets. Credit card loans and education loans do not count against this 35% cap. 12 U.S.C. 1464(c)(2)(D).

[4] 12 U.S.C. 1464(c)(2)(B).

[5] 12 U.S.C. 1464(c)(2)(A).

[6] 12 U.S.C. 1467a(m).

[7] *Id.*, and 12 CFR 563.50–563.52.