

B. Compensation Leading to Material Financial Loss

Compensation that could lead to material financial loss to an institution is prohibited as an unsafe and unsound practice.

[60 FR 35678, 35687, July 10, 1995, as amended at 61 FR 43952, Aug. 27, 1996]

PART 571—STATEMENTS OF POLICY

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

SOURCE: 54 FR 49666, Nov. 30, 1989, unless otherwise noted.

§ 571.2 [Reserved]**§ 571.5 [Reserved]****§ 571.6 Policy considerations regarding "de novo" applications for a Federal savings association charter.**

The Office deems it advisable that *de novo* applicants for permission to organize a Federal savings association be informed of certain policies governing application review which the Office will generally apply.

(a) *Minimum initial capitalization.* (1) In order to ensure adequate reserve levels for *de novo* applicants during their initial period of operations, it is the Office's policy that it will not approve any such applicant having less than three million dollars in initial capital stock (stock associations) or initial pledged savings (mutual associations), except as provided in paragraph (a)(2) of this section.

(2) The Office will consider approving a *de novo* applicant having at least two million dollars in initial capital stock (stock institutions) or initial pledged savings (mutual institutions) if the applicant provides in its application and

in the business plan described in paragraph (b) of this section, that:

(i) The applicant will be located in, and intends to serve, an area with a population not exceeding 50,000; and

(ii) The applicant will be community-oriented, as demonstrated by:

(A) A substantial number of the organizers residing in the community in which the applicant is to be located;

(B) A plan to focus capital-raising activities on subscribers in the community in which the applicant will be located;

(C) Provision of adequate local public deposit facilities acceptable to the Office, in the community in which the applicant will be located;

(D) A commitment to local home financing and related services; and

(E) Office concentration in the community in which the applicant is located and, if desired, in communities of similar size.

(iii) For purposes of determining appropriate minimum capital, the population of the area will be calculated upon a determination of the delineated market area or the county or Standard Metropolitan Statistical Area (SMSA) in which the association will be located, whichever is greater.

(iv) Any material change from the qualifying criteria set forth in paragraphs (a)(3)(i) and (a)(3)(ii) of this section may be made if the applicant has increased its capital to at least three million dollars and receives the prior approval of the Regional Director, or his or her designee.

(b) *Business and investment plans of newly-chartered associations.* (1) Pursuant to section 5(a)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1815(a)(2)), the Office must consider the following factors enumerated in section 6 of the Federal Deposit Insurance Act (12 U.S.C. 1816) in order for an applicant to obtain insurance of accounts by the Federal Deposit Insurance Corporation:

(i) The financial history and condition of the association;

(ii) The adequacy of its capital structure;

(iii) Its future earnings prospects;

(iv) The general character and fitness of its management;

(v) The risk presented to the Savings Association Insurance Fund or the Bank Insurance Fund, as the case may be;

(vi) The convenience and needs of the community to be served; and

(vii) Whether or not its corporate powers are consistent with the purposes of the Federal Deposit Insurance Act.

(2) Pursuant to section 5(e) of the Home Owners' Loan Act, the Office may grant a new Federal savings association charter only:

(i) To persons of good character and responsibility;

(ii) If in the judgment of the Director of the Office a necessity exists for such association in the community to be served;

(iii) If there is a reasonable probability of the association's usefulness and success; and

(iv) If the association can be established without undue injury to properly conducted existing local thrift and home financing institutions.

(3) In order for the Office to consider the factors enumerated in section 5(a)(2) of the Federal Deposit Insurance Act and to make the determinations required under section 5(e) of the Home Owners Loan Act of 1933, a *de novo* applicant for a federal charter shall submit a business plan describing its management, operations, investments, and financial projections for the first three years of operation. The business plan shall provide for the continuation or succession of competent management subject to the approval of the Regional Director, and shall further provide that any material change in, or deviation from, the business plan must receive the prior approval of the Regional Director.

(c) *Composition of the board of directors.* (1) A majority of a *de novo* association's board of directors must be representative of the state in which the association is located. The Office generally will consider a director to be representative of the state if such director resides, works or maintains a place of business in the state in which the association is located. If the association is located in a Metropolitan Statistical Area (MSA), Primary Metropolitan Statistical Area (PMSA) or

Consolidated Metropolitan Statistical Area (CMSA) which incorporates portions of more than one state, a director will be considered representative of the association's state if he or she resides, works or maintains a place of business in the MSA, PMSA or CMSA in which the association is located.

(2) The *de novo* association's board of directors must be diversified and composed of individuals with varied business and professional experience. In addition, except in the case of a *de novo* association that is wholly-owned by a holding company, no more than one-third of a board of directors may be in closely related businesses. The background of each director must reflect a history of responsibility and personal integrity, and must show a level of competence and experience sufficient to demonstrate that such individual has the ability to direct the policies of the association in a safe and sound manner. Where a *de novo* association is owned by a holding company which does not have substantial independent economic substance, the foregoing standards will be applied to the holding company.

(d) *Policies pertaining to management officials.* (1) Proposed stockholders of ten percent or more of the stock of a *de novo* association will be considered as management officials of the association for the purpose of the Office's evaluation of the character and qualifications of the management of the association. In connection with the Office's consideration of an association's application for permission to organize and subsequent to issuance of a federal savings association charter to the association by the Office, any individual or group of individuals acting in concert, who owns or proposes to acquire, directly or indirectly, ten percent or more of the stock of an association subject to this policy, shall submit a Biographical and Financial Report to the Regional Director.

(2) Each new director of a *de novo* association shall sign an "Oath of Director for Savings Associations". The original of the document, executed, shall be submitted to the Regional Director.

(3) Any individual who is an (i) existing or proposed director, (ii) existing or

proposed officer, or (iii) proposes to own, directly or indirectly, or acting in concert with any other individual, ten percent or more of the *de novo* association's stock, may not pledge more than 50 percent of his or her stock for a period of three years following issuance of the association's federal savings association charter to secure borrowed funds to finance his or her total stock purchase.

(4)(i) All controlling shareholders shall personally agree to maintain the association's regulatory capital at the required regulatory level for a minimum of five years after the granting of a federal charter. In determining whether to approve a proposed stock acquisition, the Office will consider the financial position of any proposed controlling shareholder and his or her ability to fulfill the regulatory capital maintenance agreement. Controlling shareholders shall execute an agreement with the Office that, in the event the association fails to meet its regulatory capital requirement, they will pay to the association an amount calculated as follows:

(A) If the controlling shareholder holds less than 80 percent of the total stock: The required payment will equal the percent of the association's total stock held by the controlling shareholder multiplied by the total regulatory capital deficiency of the association.

(B) If the controlling shareholding holds 80 percent or more of the total stock: The required payment will equal 100 percent of the association's total regulatory capital deficiency.

(ii) At the end of the fifth year after granting a federal charter, a controlling shareholder may apply to the Regional Director for a release from this obligation. Applicants may be released from the regulatory capital maintenance requirement if the Regional Director determines that the association is meeting its regulatory capital requirement and that there is no basis for supervisory concern.

(iii) Upon disposition of the stock of an association by a controlling shareholder who has executed a regulatory capital maintenance agreement pursuant to this section such that the shareholder no longer meets the definition

of a controlling shareholder, the Director or his or her designee will release the obligation upon a showing that:

(A) The association's regulatory capital meets its required regulatory level, or,

(B) In the case where a person or persons propose to acquire 25 percent or more of the stock, such person or persons have assumed the obligation under the regulatory capital maintenance agreement and have demonstrated the financial capacity to perform such obligation.

(iv)(A) For purposes of this section the term "acting in concert" shall have the meaning set forth at § 574.2(c) of this chapter: *Provided*, that organizers and members of the board of directors will not be deemed to be acting in concert, solely due to their joint activity in forming and/or managing a *de novo* association; however, other factors, such as agreements between the parties with respect to profits, losses or expenses, or which affect the disposition of their ownership interests, will be deemed to evidence that the parties are acting in concert.

(B) For purposes of this section, the term "controlling shareholder" shall mean any individual who will control, or any group of individuals acting in concert to control, or controlling persons for a company which does not have substantial independent economic substance that will control, directly or indirectly, 25 percent or more of the stock of a *de novo* association.

(e) In connection with an application for a federal charter for a *de novo* association, the applicant shall include a plan for avoidance of conflicts of interest and usurpation of corporate opportunity in the business plan required pursuant to paragraph (b) of this section. The plan shall:

(1) Identify specific areas where conflicts of interest and abuse of corporate opportunity may occur within the framework of the association's current management structure;

(2) Describe specific policies and actions that the association will institute to avoid potential conflicts of interest and corporate-opportunity abuses; and

(3) Establish specific procedures for dealing with directors and management officials who violate the association's policies in these areas.

(f) This policy statement does not apply to any application for a federal savings association charter submitted in connection with a transfer or an acquisition of the business or accounts of a savings association if the Office determines that such transfer or acquisition is instituted for supervisory purposes or in connection with applications for federal charters for interim *de novo* associations chartered for the purpose of facilitating mergers or holding company reorganizations.

(g) For purposes of this section, the terms “*de novo* association” and “*de novo* applicant” mean any savings and loan association, building and loan association, homestead association, cooperative bank, or savings bank which has submitted to the Regional Director an application for permission to organize a Federal savings association, and the business of which has not been conducted previously under any charter or conducted in substantially the same form as is proposed to be conducted by the *de novo* association for a period of three years.

[54 FR 49666, Nov. 30, 1989, as amended at 60 FR 66720, Dec. 26, 1995]

§§ 571.10—571.12 [Reserved]

§ 571.14 [Reserved]

§ 571.15 Fiduciary activities of state-chartered savings associations and service corporations.

Although state law would primarily govern the fiduciary activities of state-chartered savings associations and service corporations in which these institutions invest, it must be recognized that these activities may have implications with respect to the Federal interest in the safe and sound operation of savings associations. Accordingly, savings associations are urged to follow the standards for the exercise of trust powers contained in part 550 of this chapter. Savings associations are particularly urged not to engage in dealings prohibited by § 550.10. In establishing trust departments, savings associations should also observe the proce-

dures and policies required by §§ 550.5, 550.6, 550.7, 550.8, 550.9, 550.11, and 550.13. Savings associations should also take whatever steps are necessary to ensure that their service corporation subsidiaries adhere to these standards. The examinations staff will monitor the fiduciary activities of all savings associations and may take exception to practices which deviate materially from the standards of part 550, and the Office may regulate or prohibit such fiduciary activities that threaten the safety or soundness of savings associations.

§§ 571.16—571.19 [Reserved]

§ 571.23 [Reserved]

§ 571.24 Guidelines relating to non-discrimination in lending.

(a) *General.* Fair housing and equal opportunity in home financing is a policy of the United States established by Federal statutes and Presidential orders and proclamations. In furtherance of the Federal civil rights laws and the economical home financing purposes of the statutes administered by the Office, the Office has adopted, in part 528 of this chapter, nondiscrimination regulations that, among other things, prohibit arbitrary refusals to consider loan applications on the basis of the age or location of a dwelling, and prohibit discrimination based on race, color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the person has the capacity to contract), or national origin in fixing the amount, interest rate, duration, application procedures, collection or enforcement procedures, or other terms or conditions of housing related loans. Such discrimination is also prohibited in the purchase of loans and securities. This section provides supplementary guidelines to aid savings associations in developing and implementing nondiscriminatory lending policies. Each savings association should reexamine its underwriting standards at least annually in order to ensure equal opportunity.

(b) *Loan underwriting standards.* The basic purpose of the Office's nondiscrimination regulations is to require that every applicant be given an equal

opportunity to obtain a loan. Each loan applicant's creditworthiness should be evaluated on an individual basis without reference to presumed characteristics of a group. The use of lending standards which have no economic basis and which are discriminatory in effect is a violation of law even in the absence of an actual intent to discriminate. However, a standard which has a discriminatory effect is not necessarily improper if its use achieves a genuine business need which cannot be achieved by means which are not discriminatory in effect or less discriminatory in effect.

(c) *Discriminatory practices*—(1) *Discrimination on the basis of sex or marital status.* The Civil Rights Act of 1968 and the National Housing Act prohibit discrimination in lending on the basis of sex. The Equal Credit Opportunity Act, in addition to this prohibition, forbids discrimination on the basis of marital status. Refusing to lend to, requiring higher standards of creditworthiness of, or imposing different requirements on, members of one sex or individuals of one marital status, is discrimination based on sex or marital status. Loan underwriting decisions must be based on an applicant's credit history and present and reasonably foreseeable economic prospects, rather than on the basis of assumptions regarding comparative differences in creditworthiness between married and unmarried individuals, or between men and women.

(2) *Discrimination on the basis of language.* Requiring fluency in the English language as a prerequisite for obtaining a loan may be a discriminatory practice based on national origin.

(3) *Income of husbands and wives.* A practice of discounting all or part of either spouse's income where spouses apply jointly is a violation of section 527 of the National Housing Act. As with other income, when spouses apply jointly for a loan, the determination as to whether a spouse's income qualifies for credit purposes should depend upon a reasonable evaluation of his or her past, present, and reasonably foreseeable economic circumstances. Information relating to child-bearing intentions of a couple or an individual may not be requested.

(4) *Supplementary income.* Lending standards which consider as effective only the non-overtime income of the primary wage-earner may result in discrimination because they do not take account of variations in employment patterns among individuals and families. The Office favors loan underwriting which reasonably evaluates the credit worthiness of each applicant based on a realistic appraisal of his or her own past, present, and foreseeable economic circumstances. The determination as to whether primary income or additional income qualifies as effective for credit purposes should depend upon whether such income may reasonably be expected to continue through the early period of the mortgage risk. Automatically discounting other income from bonuses, overtime, or part-time employment, will cause some applicants to be denied financing without a realistic analysis of their credit worthiness. Since statistics show that minority group members and low- and moderate-income families rely more often on such supplemental income, the practice may be racially discriminatory in effect, as well as artificially restrictive of opportunities for home financing.

(5) *Applicant's prior history.* Loan decisions should be based upon a realistic evaluation of all pertinent factors respecting an individual's creditworthiness, without giving undue weight to any one factor. The savings association should, among other things, take into consideration that:

(i) In some instances, past credit difficulties may have resulted from discriminatory practices;

(ii) A policy favoring applicants who previously owned homes may perpetuate prior discrimination;

(iii) A current, stable earnings record may be the most reliable indicator of credit-worthiness, and entitled to more weight than factors such as educational level attained;

(iv) Job or residential changes may indicate upward mobility; and

(v) Preferring applicants who have done business with the lender can perpetuate previous discriminatory policies.

(6) *Income level or racial composition of area.* Refusing to lend or lending on

less favorable terms in particular areas because of their racial composition is unlawful. Refusing to lend, or offering less favorable terms (such as interest rate, downpayment, or maturity) to applicants because of the income level in an area can discriminate against minority group persons.

(7) *Age and location factors.* Sections 528.2, 528.2a, and 528.3 of this chapter prohibit loan denials based upon the age or location of a dwelling. These restrictions are intended to prohibit use of unfounded or unsubstantiated assumptions regarding the effect upon loan risk of the age of a dwelling or the physical or economic characteristics of an area. Loan decisions should be based on the present market value of the property offered as security (including consideration of specific improvements to be made by the borrower) and the likelihood that the property will retain an adequate value over the term of the loan. Specific factors which may negatively affect its short-range future value (up to 3-5 years) should be clearly documented. Factors which in some cases may cause the market value of a property to decline are recent zoning changes or a significant number of abandoned homes in the immediate vicinity of the property. However, not all zoning changes will cause a decline in property values, and proximity to abandoned buildings may not affect the market value of a property because of rehabilitation programs or affirmative lending programs, or because the cause of abandonment is unrelated to high risk. Proper underwriting considerations include the condition and utility of the improvements, and various physical factors such as street conditions, amenities such as parks and recreation areas, availability of public utilities and municipal services, and exposure to flooding and land faults. However, arbitrary decisions based on age or location are prohibited, since many older, soundly constructed homes provide housing opportunities which may be precluded by an arbitrary lending policy.

(8) *Fair Housing Act (title VIII, Civil Rights Act of 1968, as amended).* Savings associations, must comply with all regulations promulgated by the Department of Housing and Urban Develop-

ment to implement the Fair Housing Act, found at 24 CFR part 100 *et seq.*, except that they shall use the Equal Housing Lender logo and poster prescribed by Office regulations at 12 CFR 528.4 and 528.5 rather than the Equal Housing Opportunity logo and poster required by 24 CFR parts 109 and 110.

(d) *Marketing practices.* Savings associations should review their advertising and marketing practices to ensure that their services are available without discrimination to the community they serve. Discrimination in lending is not limited to loan decisions and underwriting standards; a savings association does not meet its obligations to the community or implement its equal lending responsibility if its marketing practices and business relationships with developers and real estate brokers improperly restrict its clientele to segments of the community. A review of marketing practices could begin with an examination of an association's loan portfolio and applications to ascertain whether, in view of the demographic characteristics and credit demands of the community in which the institution is located, it is adequately serving the community on a nondiscriminatory basis. The Office will systematically review marketing practices where evidence of discrimination in lending is discovered.

[54 FR 49666, Nov. 30, 1989, as amended at 60 FR 66870, Dec. 27, 1995]

PART 572—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS

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APPENDIX A TO PART 572—SAMPLE FORM OF NOTICE OF SPECIAL FLOOD HAZARDS AND AVAILABILITY OF FEDERAL DISASTER RELIEF ASSISTANCE