

unique identifier” is changed to “a combination of numbers selected by the Secretary of State using a selection system or method approved by the Secretary of Agriculture.” The change to the interim rule meets the express statutory requirement in section 1324(c)(2)(C) of the amended Food Security Act of 1985 that an approved unique identifier be numerically organized on master lists. The definition in the interim rule would have permitted, contrary to the statutory text, an identifier that may not have been able to be numerically organized in the master list.

This final rule also affirms the information contained in the interim rule concerning Executive Order 12372 and 12988, and the Paperwork Reduction Act.

Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

#### List of Subjects in 9 CFR Part 205

Agricultural commodities, Archives and records, Intergovernmental relations, Reporting and recordkeeping requirements.

■ Accordingly, the interim rule that amended 9 CFR part 205 and that was published at 71 FR 56338 on September 27, 2006, is adopted with the following change:

#### PART 205—CLEAR TITLE PROTECTION FOR PURCHASES OF FARM PRODUCTS

■ 1. Amend § 205.1 by revising the definition of “approved unique identifier” to read as follows:

##### § 205.1 Definitions

\* \* \* \* \*

*Approved Unique Identifier* means a combination of numbers selected by the Secretary of State using a selection system or method approved by the Secretary of Agriculture.

##### Alan Christian,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.  
[FR Doc. E7-8794 Filed 5-7-07; 8:45 am]

BILLING CODE 3410-KD-P

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

#### 12 CFR Parts 509 and 585

[OTS-2007-0008]

RIN 1550-AC14

#### Prohibited Service at Savings and Loan Holding Companies

**AGENCIES:** Office of Thrift Supervision (OTS), Treasury.

**ACTION:** Interim final rule with request for comment.

**SUMMARY:** OTS is adopting an interim final rule implementing section 710(a) of the Financial Services Regulatory Relief Act of 2006, which added a new section 19(e) to the Federal Deposit Insurance Act (FDIA). Section 19(e) of the FDIA prohibits any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or money laundering or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such an offense from holding certain positions with respect to a savings and loan holding company (SLHC). The interim final rule describes the actions that are prohibited under the new statute and describes procedures for applying for an OTS order granting a case-by-case exemption. The rule also provides two regulatory exemptions: An exemption for certain SLHC employees whose activities and responsibilities are limited solely to agriculture, forestry, retail merchandising, manufacturing, or public utilities operations, and a temporary exemption for certain persons who held positions with respect to a SLHC as of the date of enactment of section 19(e) of the FDIA.

**DATES:** The interim final rule is effective on May 8, 2007. Comments on the rule must be received by July 9, 2007.

**ADDRESSES:** You may submit comments, identified by OTS-2007-0008, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>, select “Office of Thrift Supervision” from the agency drop-down menu, then click submit. Select Docket ID “OTS-2007-0008” to submit or view public comments and to view supporting and related materials for this notice of proposed rulemaking. The “User Tips” link at the top of the page provides information on using [Regulations.gov](http://www.regulations.gov), including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

- *Mail:* Regulation Comments, Chief Counsel’s Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: OTS-2007-0008.

- *Hand Delivery/Courier:* Guard’s Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel’s Office, Attention: OTS-2007-0008.

**Instructions:** All submissions received must include the agency name and docket number for this rulemaking. All comments received will be entered into the docket and posted on [Regulations.gov](http://www.regulations.gov) without change, including any personal information provided. Comments, including attachments and other supporting materials received are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

**Viewing Comments Electronically:** Go to <http://www.regulations.gov>, select “Office of Thrift Supervision” from the agency drop-down menu, then click “Submit.” Select Docket ID “OTS-2007-0008” to view public comments for this notice of proposed rulemaking.

**Viewing Comments On-Site:** You may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906-5922, send an e-mail to [public.info@ots.treas.gov](mailto:public.info@ots.treas.gov), or send a facsimile transmission to (202) 906-6518. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

#### FOR FURTHER INFORMATION CONTACT:

Donna Deale, Director, Holding Companies and Affiliates, Supervision Policy, (202) 906-7488, or Karen Osterloh, Special Counsel, Regulations and Legislation, (202) 906-6639, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Under section 19(a) of the FDIA, a person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or money laundering or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such an offense may not:

- Become, or continue as, an institution-affiliated party with respect to an insured depository institution;
- Own or control, directly or indirectly, any insured depository institution; or

- Otherwise participate, directly or indirectly, in the conduct of the affairs of any insured depository institution.<sup>1</sup> Under section 19(a)(1)(B) of the FDIA, an insured depository institution may not permit any person to engage in the prohibited conduct or continue any prohibited relationship. Section 19(b) of the FDIA states that whoever knowingly violates the statute shall be fined not more than \$1,000,000 for each day the prohibition is violated or imprisoned for not more than 5 years or both.

Section 710(a) of the Financial Services Regulatory Relief Act of 2006, Pub. L. 109–251, effective October 13, 2006, amended section 19 of the FDIA by adding a new paragraph (e). New section 19(e)(1) applies sections 19(a) and (b) of the FDIA “to any savings and loan holding company as if such savings and loan holding company were an insured depository institution \* \* \*.” Section 19(e)(2) of the FDIA authorizes the Director of OTS to provide exemptions from the prohibitions, by regulation or order, if the exemption is consistent with the purposes of new paragraph (e).

OTS is amending its regulations to add a new part 585 to implement these new restrictions. The OTS interim final rule incorporates interpretations contained in the FDIC’s Statement of Policy issued under section 19(a) of the FDIA (63 FR 66177) (Dec. 1, 1998) (FDIC’s SOP) and in the FDIC’s rules at 12 CFR part 303, subpart L—Section 19 of the FDI Act (Consent to Service of Persons Convicted of Certain Criminal Offenses) and 12 CFR part 308, subpart M—Procedures and Standards Applicable to an Application pursuant to Section 19 of the FDIA. The provisions of the new interim final rule are summarized below.

## II. Description of the Interim Final Rule

### *What does this part do? (§ 585.10)*

Section 585.10 states that new part 585 implements the prohibitions under section 19(e)(1) of the FDIA. Section 585.10 also states that the new rule implements section 19(e)(2) of the FDIA, which permits the Director to provide

<sup>1</sup> 12 U.S.C. 1829(a)(1). The Federal Deposit Insurance Corporation (FDIC) may give prior written consent to actions that would otherwise violate the prohibition. The statute imposes a ten-year ban against the FDIC’s consent for a person convicted of certain crimes enumerated in Title 18 of the United States Code, absent a motion by FDIC and approval by the sentencing court.

exemptions, by regulation or order, from the application of the prohibition. The new part provides an exemption for SLHC employees whose activities and responsibilities are limited solely to agriculture, forestry, retail merchandising, manufacturing, or public utilities operations, and a temporary exemption for certain persons who held positions with respect to a SLHC as of the date of enactment of section 19(e) of the FDIA. The interim final rule also describes procedures for applying for an OTS order granting an exemption on a case-by-case basis.

### *What definitions apply to this part? (§ 585.20)*

Section 585.20 lists definitions used in the new part. These definitions are discussed throughout this preamble in connection with the relevant substantive provision.

### **Prohibition**

#### *What actions are prohibited? (§ 585.30)*

Paragraph (a) of this section reiterates the prohibitions that apply to persons under section 19(e) of the FDIA.<sup>2</sup> Specifically, paragraph (a) states that if a person was convicted of a criminal offense described below, or agreed to enter into a pre-trial diversion or similar program in connection with a prosecution for such a criminal offense, he or she may not hold certain positions with any SLHC.

First, the person may not become, or continue as, an institution-affiliated party with respect to any SLHC. For the purposes of the new part, the term “institution-affiliated party” is defined in 12 U.S.C. 1813(u), except that this definition is applied by substituting SLHC for insured depository institution each place that it appears. Under this definition, an “institution-affiliated party” of a SLHC includes:

- Any director, officer, employee, or controlling stockholder (other than a bank holding company) of, or agent for, a SLHC. This category would also include persons who are deemed to be *de facto* employees of a SLHC, based on applicable standards of employment law.<sup>3</sup>

- Any person who has filed or is required to file a change in control notice with the appropriate Federal banking agency under 12 U.S.C. 1817(j)—the Change in Bank Control Act.

<sup>2</sup> A person is defined to include only individuals, but does not include a corporation, firm or other business entity. See Section A. of FDIC’s SOP, 63 FR at 66184.

<sup>3</sup> *Id.*

- Any shareholder, consultant, joint venture partner, and any other person determined by [OTS] (by regulation or case-by-case) who participates in the conduct of the affairs of the SLHC. Participation in the conduct of the affairs of the SLHC is discussed below.

- Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the SLHC.

Second, the person may not own or control, directly or indirectly, a SLHC. For the purposes of defining “control” and ownership under section 19(a) of the FDIA, FDIC’s SOP uses the definition of “control” in the Change in Bank Control Act (12 U.S.C. 1817(j)(8)(B)). The OTS rule implementing the Change in Bank Control Act and the Savings and Loan Holding Company Act is at 12 CFR part 574. The rule provides that a person will own or control a SLHC if he or she owns or controls that company under 12 CFR part 574.

Finally, the person may not otherwise participate, directly or indirectly, in the conduct of the affairs of a SLHC. Given the changes in banking, including financial modernization and the rapid pace of technology, a regulatory listing of activities that constitute participation is neither practical nor advisable. Accordingly, like FDIC’s SOP, the interim final rule does not define precisely what activities constitute “participation.” Rather, agency and court decisions will provide the guide as to what standards will be applied. As a general proposition, however, participation will depend upon the degree of influence or control over the management or affairs of the SLHC. Those who exercise major policymaking functions at a SLHC would fall within this category.<sup>4</sup>

OTS notes that the statutory prohibitions do not directly apply to a person who is an institution-affiliated party with respect to a non-depository institution *subsidiary* of a SLHC, owns or controls such a subsidiary, or participates in the affairs of such a subsidiary.<sup>5</sup> However, it is possible that a person occupying such a position with a subsidiary could be subject to the

<sup>4</sup> *Id.*

<sup>5</sup> Accordingly, section 585.20 of the interim rule: (1) defines SLHC by cross-reference to OTS existing regulations at 12 CFR 583.20, and (2) excludes a subsidiary of a SLHC that is not itself a SLHC.

prohibitions if the person participates in the conduct of the affairs of the SLHC. For example, a director or officer of a subsidiary will be covered if he or she is in a position to influence or control the management or affairs of the SLHC.<sup>6</sup>

Section 585.30(b) restates the statutory prohibition applicable to SLHCs. Specifically, this section provides that a SLHC may not permit any person described above to engage in any conduct or to continue any prohibited relationship. OTS believes that section 19(e) imposes a duty upon the SLHC to make a reasonable inquiry regarding a person's history, which consists of taking steps appropriate under the circumstances, consistent with applicable law, to avoid hiring or permitting participation in its affairs by a person who has a conviction or program entry for a covered offense. At a minimum, each SLHC should establish a screening process that provides information concerning any convictions or program entry pertaining to a job applicant. This would include, for example, the completion of a written employment application requiring a listing of all convictions and program entries.<sup>7</sup>

*What convictions or agreements to enter into pre-trial diversions or similar programs are covered by this part? (§ 585.40)*

Section 585.40 describes the types of convictions and agreements that are covered by the part. The interim final rule states that part 585 applies to:

- Any conviction of a criminal offense (*i.e.*, a felony or misdemeanor) involving dishonesty, breach of trust, or money laundering. Convictions do not cover arrests, pending cases not brought to trial, acquittals, convictions reversed on appeal, pardoned convictions, or expunged convictions.<sup>8</sup>

- Any agreement to enter into a pretrial diversion or similar program in connection with a prosecution for a criminal offense involving dishonesty, breach of trust or money laundering. A pretrial diversion or similar program is a program involving a suspension or eventual dismissal of charges or of a criminal prosecution based upon the person's agreement for treatment, rehabilitation, restitution, or other non-criminal or non-punitive alternative.<sup>9</sup>

<sup>6</sup> Compare Section A. of FDIC's SOP, 63 FR at 66184 ("Directors and officers of \* \* \* subsidiaries of an insured depository institution will be covered if they are in a position to influence or control the management or affairs of the insured institution.")

<sup>7</sup> See Introduction to FDIC's SOP, 63 FR at 66184.

<sup>8</sup> See Section B.(1) of FDIC's SOP, 63 FR at 66184.

<sup>9</sup> See Section B.(2) of FDIC's SOP, 63 FR at 66184-85.

A determination whether a criminal offense involves dishonesty or breach of trust will be based on the statutory elements of the crime, rather than the specific factual circumstances surrounding a crime.<sup>10</sup> For SLHCs attempting to comply with the prohibitions, the analysis of the factual background behind crimes could prove to be an impossible task since records and factual background will not always be available.

"Dishonesty" means directly or indirectly to cheat or defraud, to cheat or defraud for monetary gain or its equivalent, or to wrongfully take property belonging to another in violation of any criminal statute. It includes acts involving a want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which federal, state or local laws define as dishonest. A "breach of trust" means a wrongful act, use, misappropriation, or omission with respect to any property or fund which has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation, or omission. All convictions for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances, as defined under Federal law, require an application unless the person is exempt under § 585.100.<sup>11</sup>

As noted above, a conviction of a criminal offense excludes pardoned and expunged convictions. OTS solicits comments on whether states and other jurisdictions have any analogous procedures for expunging any record regarding participation in a pretrial diversion and similar program and whether it is feasible to recognize these procedures in the final rule.

*What adjudications and offenses are not covered by this part? (§ 585.50)*

The interim final rule excludes certain types of adjudications and criminal offenses from coverage. Specifically, the part does not cover any adjudication by a court against a person as a youthful offender or as a juvenile delinquent. Such convictions are generally not considered to be convictions for criminal offenses. Moreover, it is questionable whether SLHCs could obtain records regarding such adjudications.

The rule also does not cover certain *de minimis* criminal offenses. OTS

<sup>10</sup> See Section B.(3) of FDIC's SOP, 63 FR at 66185.

<sup>11</sup> *Id.*

believes that the exempted offenses are of such a minimal nature and of such low risk that the affected person may hold any position with a SLHC. This approach has the advantage of addressing a large number of persons who have agreed to pretrial diversion since in most cases, the crimes involved in such programs are not serious ones that involve significant risk. Under the interim final rule, a criminal offense is *de minimis* if six criteria are met. First, the person may have only one conviction or pretrial diversion. Second, the offense must have been punishable by imprisonment for a term of less than one year, a fine of less than \$1,000, or both, and the person must not have served time in jail for the offense. Third, the conviction or program must be entered at least five years before the date the person first held a position described in § 585.30(a) above. Fourth, the offense may not involve an insured depository institution, an insured credit union, or other banking organization (including a SLHC, bank holding company, or financial holding company). Fifth, the person must disclose the conviction or pretrial diversion or similar program to all insured depository institutions, insured credit unions, and other banking organizations the affairs of which he or she participates. Finally, the person must be covered by a fidelity bond to the same extent as others in similar positions with the SLHC.<sup>12</sup>

Like the FDIC policy statement, the OTS interim final rule states that a *de minimis* criminal offense must be punishable by imprisonment for a term of less than one year, a fine of less than \$1,000, or both. OTS specifically requests comment on two alternatives to this standard. First, OTS is considering applying a standard that more closely tracks the way state and local jurisdictions distinguish misdemeanor and felony offenses. OTS specifically requests suggestions on how this might be accomplished. Alternatively, OTS may define a *de minimis* criminal offense by reference to the prison sentence or fine actually imposed on an individual in a particular case. For pretrial diversions, this criterion could be based on the suspended sentence or, where there is no suspended sentence, on the maximum punishment under the statute. OTS specifically solicits comments on whether this alternative is appropriate and, if so, what prison sentence or fine should constitute a *de minimis* offense.

<sup>12</sup> See Sections B.(4) & B.(5) of FDIC's SOP, 63 FR at 66185.

## Exemptions

*Who is exempt from the prohibition under this part? (§ 585.100)*

As noted above, section 19(e)(2) of the FDIA authorizes the Director of OTS to provide exemptions from the prohibitions, by regulation or order, if the exemption is consistent with the purposes of the prohibition. The primary purpose of section 19 of the FDIA, as originally enacted, appears to be to lower insured depository institutions' risk of exposure to theft, embezzlement, and other misconduct by the institution's employees, contractors, and others involved in the institution's operations and affairs. Accordingly, when reviewing applications for relief from section 19(a) of the FDIA, an essential criterion assessed by FDIC is whether the affiliation, control, or participation of a person in the conduct of the affairs of a depository institution will threaten the safety and soundness of any insured depository institution; will threaten the interests of the depositors of any such institution; or will threaten to impair the public confidence in any such institution.<sup>13</sup> OTS believes that it is appropriate to consider these impacts when it decides whether to issue an exemption. Additionally, while the focus of the FDIA is on the impact to the depository institution and the deposit insurance fund, OTS believes that the purposes of new section 19(e) of the FDIA also require consideration of an exempted person's ability to impact the SLHC, particularly with respect to major policymaking.<sup>14</sup>

In the months following the enactment of section 19(e) of the FDIA, OTS received several inquiries from SLHCs that conduct forestry, manufacturing, or retail merchandising operations at the holding company

<sup>13</sup> See section D. of FDIC's SOP, 63 FR at 66185.

<sup>14</sup> OTS believes that all directors, and those officers of a SLHC who meet the definition of "executive officer" of the SLHC under 12 CFR 215.2(e)(1)(Regulation O), are involved in major policymaking. Individuals that meet the definition of "officer" under the Securities and Exchange Commission's rules at 17 CFR 240.16a-1(f) are also involved in major policymaking. 17 CFR 240.16a-1(f) states: "The term 'officer' shall mean an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Officers of the issuer's parent(s) or subsidiaries shall be deemed officers of the issuer if they perform such policy-making functions for the issuer \* \* \*. For these purposes, a 'policy-making function' is not intended to include policy-making functions that are not significant."

level. These SLHCs employ thousands of employees that engage solely in these operations. The SLHCs report that the vast majority of these employees have no policymaking functions, do not otherwise participate in the conduct of the affairs of the SLHC or the subsidiary insured depository institution, and have no working relationship with the subsidiary insured depository institution. These SLHCs argue that applying section 19(e) of the FDIA to these employees would require the SLHCs to implement unnecessary and costly background checks and undertake unnecessary personnel actions. They also indicate that the application of section 19(e) of the FDIA would place them at a competitive disadvantage with respect to others in their industry that do not own an insured depository institution. As a result, several SLHCs requested exemptions from the prohibitions in section 19(e) of the FDIA for employees in their forestry, manufacturing, and retail merchandising operations.

OTS believes that it is unlikely that employees whose responsibilities and activities are limited solely to forestry, manufacturing or retail merchandising operations at the SLHC level would constitute a threat to safety and soundness of a subsidiary insured depository institution, would threaten the interests of the institution's depositors, or would threaten to impair the public confidence in the institution. While employees at the highest levels may be in a position to impact the major policymaking functions of the SLHC, the exemption granted in the interim final rule imposes certain conditions designed to ensure that the SLHC would not be materially impacted (see discussion of conditions below). Subject to these conditions, OTS finds that an exemption for SLHC employees whose responsibilities and activities are limited solely to forestry, manufacturing, and retail merchandising operations is consistent with the purposes of section 19(e) of the FDIA.

In addition to forestry, manufacturing, and retail merchandising employees, OTS reviewed existing SLHC operations to determine whether a broader exemption might be appropriate and necessary. Based on this review, OTS has concluded that its regulated SLHCs also engage in agricultural operations or provide public utilities at the SLHC level and has decided to extend the exemption to SLHC employees whose activities and responsibilities are limited solely to such operations. Employees engaged solely in such activities at the SLHC level are similar

to forestry, manufacturing and retail merchandising employees with respect to their ability to threaten the safety and soundness of the institution, threaten the interests of depositors or impair the public confidence of an institution. Moreover, the exemption granted in the interim final rule imposes certain conditions designed to ensure that the SLHC would not be materially impacted. Subject to these conditions, OTS believes that an exemption for these SLHC employees is also consistent with the purposes of section 19(e) of the FDIA.

To qualify for the exemption, the employee's responsibilities and activities must be limited solely to agriculture, forestry, retail merchandising, manufacturing, or public utilities operations. The exemption would apply to employees who are directly engaged in these activities and to employees who provide administrative services in support of these activities. Because the employee's responsibilities and activities must be limited solely to the listed operations, however, the exemption may not exempt all support personnel. For example, if a SLHC's human resources division also serves divisions or SLHC subsidiaries that conduct operations beyond those listed in the exemption, employees of that division would not fall within the exemption, unless it can be demonstrated that a employee's particular responsibilities and activities are limited solely to the listed operations.

As noted above, the interim final rule includes conditions designed to ensure that an exempted person does not have the ability to impact the SLHC, particularly with regard to major policymaking functions. Specifically, the rule requires a SLHC to maintain a list of all policymaking positions and review this list annually. The employee's position may not appear on the SLHC's list, and the employee may not, in fact, exercise any policymaking function with respect to the SLHC.<sup>15</sup> Finally, the employee may not be an institution-affiliated party of the SLHC other than by virtue of the exempted

<sup>15</sup> OTS examiners will review the list of policymaking positions during regularly scheduled SLHC examinations. Examiners may request a list of other positions or job classifications within the organization to reasonably conclude that such positions would not normally entail policymaking functions. Examiners will also review the SLHC's policies, procedures, and practices in complying with this section. During this review, OTS examiners will consider the SLHC's methods for identifying and maintaining the list of policymaking positions, as well as review a sample of employees occupying policymaking positions to verify that the SLHC obtains appropriate background checks.

employment, may not own or control, directly or indirectly, the SLHC and may not participate, directly or indirectly, in the conduct of the affairs of the SLHC.<sup>16</sup>

OTS requests comments on all aspects of this exemption. For example: Are the conditions imposed on this exemption appropriate? Are additional conditions needed to protect the interests described above? Are there other facts or circumstances that might warrant additional exemptions for classes of persons or SLHCs?

OTS may modify this exemption based on the comments received on the interim final rule. If OTS narrows the scope of this exemption in the final rule, it will provide a delayed effective date for the modification to permit persons and SLHCs to comply with the changes. Until that delayed effective date, any person or SLHC may rely on the exemption contained in § 585.100(a).

In addition to this exemption for employees, OTS is temporarily exempting any prohibited person who was an institution-affiliated party with respect to a SLHC, who owned or controlled, directly or indirectly a SLHC, or who otherwise participated directly or indirectly in the conduct of the affairs of the SLHC on October 13, 2006. The exemption would permit the person to continue to hold the position with the SLHC for a limited time. The exemption expires 120 days after the effective date of this interim final rule, unless the SLHC or the person has filed an application seeking a case-by-case exemption for the person under § 585.110 within the 120-day time period. If the SLHC or the person files such an application, the exemption expires upon OTS's disposition of the application.

OTS believes that this exemption is necessary to ensure that the new statute does not needlessly disrupt SLHC operations by requiring the immediate termination of existing relationships. OTS has designed this exemption to ensure that SLHCs have sufficient time to determine which persons have convictions or pre-trial diversions involving the described criminal offenses, and to provide a meaningful opportunity for the SLHC or the prohibited person to demonstrate that the person's continued relationship with the SLHC is consistent with the purposes of the statute. Accordingly, OTS has concluded that this exemption is consistent with the purposes of section 19(e) of the FDIA.

<sup>16</sup> As a result of these conditions, an officer of a SLHC, for example, would not be within the scope of the exemption.

#### *How do I apply for a case-by-case exemption? (§ 585.110)*

In addition to the regulatory exemption at § 585.100, the interim final rule sets out an application process for a case-by-case exemption from the prohibitions. To obtain a case-by-case exemption, a person or SLHC must file an application with OTS. An applicant may not file an application less than one year after the OTS's denial of the same exemption.<sup>17</sup> Additionally, an applicant may seek an exemption only with respect to a designated position (or designated positions) with a named SLHC. Thus, if OTS has approved an exemption for a person for a designated position with respect to a named SLHC, another exemption must be obtained before the person may hold a different position with the named SLHC or become an institution-affiliated party of another SLHC, own or control directly or indirectly another SLHC, or participate in the conduct of the affairs of another SLHC.<sup>18</sup> For these purposes, an exemption granted for a position with respect to a named SLHC does *not* exempt a position with respect to another SLHC that is within the same corporate family (e.g., a SLHC that is a parent or subsidiary of the named SLHC).<sup>19</sup>

OTS will process the application under the standard treatment in 12 CFR part 516, subpart A, and will review the application under the procedures in 12 CFR part 516, subpart E (excluding 12 CFR 516.270 and 516.280). The prohibitions in section 19(e) of the FDIA, however, will continue to apply pending OTS action on an application unless the person qualifies for the temporary exemption at § 585.100(b).

#### *What factors will OTS consider in reviewing my exemption application? (§ 585.120)*

An application may cover either a specified position with a named SLHC or a person to serve at a specified position with a named SLHC. In determining whether to approve an exemption application, OTS will first consider the extent to which the position that is the subject of the application would permit a person to:

- Participate in the major policymaking functions of the SLHC; or
- Threaten the safety and soundness of any insured depository institution

<sup>17</sup> See FDIC rules at 12 CFR 308.158(b).

<sup>18</sup> See FDIC rules at 12 CFR 303.222.

<sup>19</sup> In the event of a merger or similar transaction, the person or SLHC would not have to seek a new exemption if the SLHC is the resulting entity in the transaction and the responsibilities of the position do not materially change in connection with the transaction.

that is controlled by the SLHC, the interests of its depositors, or the public confidence in the insured depository institution.<sup>20</sup>

OTS will also consider whether the applicant has demonstrated the person's fitness to hold the described position. Some applications may be approved without an extensive review of a person's fitness, because the position will not permit a person to participate in major policymaking functions or to threaten the safety and soundness of a depository institution, the interests of its depositors or public confidence in the institution. Persons who will occupy clerical, maintenance, service or purely administrative positions, for example, will generally fall into this category.

In making the determinations under § 585.120, OTS will consider all relevant factors including the position, the amount of influence and control a person will be able to exercise over the affairs and operations of the SLHC and the insured depository institution, the ability of the SLHC management to supervise and control the activities of the person, and, where applicable, the level of ownership that a person has in the SLHC. In addition, OTS will consider the specific nature and circumstances of the criminal offense and any evidence of rehabilitation. The question of whether a person was guilty of the underlying offense, however, is not a relevant consideration.<sup>21</sup>

#### *How will I know if my application is approved? (§ 585.130)*

OTS will issue an order approving or denying an application. An approval order will include a summary of the relevant factors that OTS considered in approving the application, and will require fidelity bond coverage for a position to the same extent as similar positions with the SLHC. The approval order may also include such other conditions as may be appropriate.

A denial order will include a summary of the relevant factors that OTS considered in the denial. The denial order will also include a statement indicating that the applicant may file a written request demonstrating good cause for a hearing on the denial, and that the applicant must file this request within 20 days after the date of issuance of the denial order.

#### *What procedures govern a hearing on my application? (§ 585.140)*

OTS will review a hearing request to determine if the applicant has

<sup>20</sup> See OTS's discussion of § 585.100 above.

<sup>21</sup> See FDIC rules at 12 CFR 308.157 and Section D. of FDIC' SOP, 63 FR at 66185.

demonstrated good cause for a hearing on the application. Within 30 days after the filing of a request, OTS will notify the applicant in writing of its decision to grant or deny the hearing request. If OTS grants the request, it will order a hearing to be commenced within 60 days of the issuance of the notification. Parties may request a later hearing date.

OTS rules at 12 CFR part 509 contain the rules of practice and procedure in adjudicatory proceedings. The interim final rule adds a new subpart D to part 509 to govern the procedures for hearings on a denial of an application for a case-by-case exemption under section 19(e) of the FDIA. The interim final rule incorporates many of the rules of practice and procedure applicable in adjudicatory proceedings at 12 CFR part 509. In addition, it specifically addresses such matters as: The use of written submissions in lieu of hearing, the location and timing of the hearing, the designation of a presiding officer, a prohibition on discovery, the issuance of subpoenas, the taking of testimony and depositions, the administration of oaths, transcripts, the supplementation of the record, recommendations by the presiding officer, certification of the record, burden of proof, and the decision by the Director.

### III. Regulatory Findings

#### A. Advance Notice and Public Comment

The Administrative Procedure Act (APA) authorizes agencies to waive notice and comment procedures on a rule when the agency “for good cause finds \* \* \* that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>22</sup> OTS believes the rule meets the APA standard and that it may issue this rule as a final rule without advance notice and comment.

Section 19(e) became effective on October 13, 2006, and imposes severe penalties for violations. Under this statute, those who knowingly violate section 19(e) are now subject to fines of not more than \$1 million for each day the prohibition is violated, imprisonment for not more than 5 years, or both. OTS believes that SLHCs and others must be given timely guidance to permit them to conform their behavior and avoid the severe penalties prescribed by the statute. Accordingly, to the extent that the interim final rule interprets the prohibitions in section 19(e) of the FDIA, OTS finds that any delay in the issuance of the interim final rule is impractical and contrary to the public interest. OTS also finds that prior

notice and comment on its interpretation of the section 19(e) prohibitions is unnecessary. OTS closely conformed its interpretations of section 19(e) to the interpretations contained in FDIC’s SOP, which was previously subject to notice and public comment and has been in effect since 1998. SLHCs should be familiar with the concepts in FDIC’s SOP since it applies to certain individuals who hold positions with SLHCs.<sup>23</sup>

As noted above, the interim final rule also contains a regulatory exemption for SLHC employees if their responsibilities and activities are limited solely to agriculture, forestry, retail merchandising, manufacturing, or public utilities operations. As discussed more fully in this preamble, OTS has concluded that the application of the section 19 prohibition to these employees will not serve the purposes of the statute. Moreover, any delay in the issuance of this exemption for notice and comment procedures would require SLHCs to implement unnecessary and costly background checks and to undertake unnecessary personnel actions to terminate or transfer employees. Accordingly, OTS finds that notice and public comment on this aspect of the rule is also unnecessary and contrary to the public interest.

Similarly, the interim final rule includes a temporary exemption for certain persons who held positions with respect to a SLHC as of the date of enactment of section 19(e) of the FDIA. This exemption was designed to ensure that SLHC operations are not needlessly disrupted by requiring the immediate termination of existing relationships. Accordingly, OTS also finds that notice and public comment on this exemption is also unnecessary and contrary to the public interest.

Finally, the interim final rule prescribes application and hearing procedures for exemption requests. This portion of the interim final rule is an agency rule of procedure and practice, which is exempt from notice and comment procedures.<sup>24</sup> In addition, this portion of the interim final rule closely follows the related FDIC rules and the interpretations contained in FDIC’s SOP. Since the related FDIC rules and FDIC’s SOP were subject to notice and public comment and have been applicable to depository institutions and certain SLHC positions for many years, OTS believes that prior notice and

comment on these standards are also unnecessary and contrary to the public interest.

Although OTS has concluded that public notice and comment are not required for this interim final rule, it invites comments during the 60-day period following publication. In developing a final rule, OTS will consider all public comments it receives within that period.

#### B. Effective Date

Under section 553(d) of the APA, a rule may not be effective until 30 days after its publication.<sup>25</sup> This provision, however, does not apply where the agency finds good cause for making the rule effective immediately. For the reasons set forth above, OTS finds that there is good cause for making this rule effective immediately. OTS also notes that the APA’s delayed effective date requirement does not apply to a substantive rule that grants or recognizes an exemption or that relieves a restriction. As described in this preamble, this interim final rule exempts certain persons from the prohibitions in section 19(e) of the FDIA and prescribes procedures for granting additional exemptions on a case-by-case basis. Because this rule grants exemptions and relieves restrictions from the statutory prohibition, it is not subject to the 30-day delayed effective date requirement.

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRIA)<sup>26</sup> requires that new regulations and amendments to existing regulations take effect on the first day of a calendar quarter that begins on or after the date of publication of the rule. This delayed effective date provision, however, applies only if the rule imposes additional reporting, disclosure, or other new requirements on insured depository institutions. This rule imposes no reporting, disclosure or other requirements on any insured depository institution. Section 302 is inapplicable.

#### C. Regulatory Flexibility Act

An initial regulatory flexibility analysis under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) is required only when an agency is required to publish a notice of proposed rulemaking.<sup>27</sup> As already noted, OTS has determined that publication of a notice of proposed rulemaking is not required for this interim final rule. Accordingly, the RFA does not require

<sup>23</sup> See Section A. of FDIC’s SOP, 63 FR at 66184 (Section 19 would apply to [a holding company’s] directors and officers to the extent that they have the power to define and direct the policies of the insured institution.”)

<sup>24</sup> 5 U.S.C. 553.

<sup>25</sup> 5 U.S.C. 553(d).

<sup>26</sup> 12 U.S.C. 4802.

<sup>27</sup> 5 U.S.C. 603.

<sup>22</sup> 5 U.S.C. 553(b)(B).

an initial regulatory flexibility analysis. Nonetheless, OTS has considered the likely impact of this rule on small entities. This interim final rule provides guidance to SLHCs and others explaining how OTS will interpret newly enacted statutory prohibitions, provides exemptions from these prohibitions, and describes procedures for obtaining case-by-case exemptions from the newly enacted prohibitions contained in section 19(e) of the FDIA. On the whole, the interim final rule will reduce the burden of compliance with the new statute. For these reasons, the OTS has concluded that the interim final rule should not have a significant impact on a substantial number of small entities, as defined in the RFA.

#### D. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995, OTS may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. OTS is requesting comment on a proposed information collection. OTS also gives notice that the proposed collection of information was submitted to OMB for review and approval (44 U.S.C. 3507(d)). At the end of the comment period, the comments and recommendations received will be analyzed to determine whether the information collection should be modified. Any material modifications will be submitted to OMB for review and approval. All comments will become a matter of public record.

Send comments, referring to the collection by title of the proposal or by "Prohibited Service at SLHCs (1550-NEW)," to OMB and OTS at these addresses: Office of Information and Regulatory Affairs, Attention: Desk Officer for OTS, U.S. Office of Management and Budget, 725-17th Street, NW., Room 10235, Washington, DC 20503, or by fax to (202) 395-6974; and Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, by fax to (202) 906-6518, or by e-mail to [infocollection.comments@ots.treas.gov](mailto:infocollection.comments@ots.treas.gov). OTS will post comments and the related index on the OTS Internet Site at <http://www.ots.treas.gov>. In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906-5922, send an e-mail to [public.info@ots.treas.gov](mailto:public.info@ots.treas.gov), or send a facsimile transmission to (202) 906-

7755. To obtain a copy of the submission to OMB, contact Marilyn K. Burton at [marilyn.burton@ots.treas.gov](mailto:marilyn.burton@ots.treas.gov), (202) 906-6467, or facsimile number (202) 906-6518, Litigation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of OTS's functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

In this interim final rule, OTS is soliciting comments concerning the following information collection.

*Title:* Prohibited Service at Savings and Loan Holding Companies.

*OMB Control Number:* 1550-NEW.

*Type of Review:* New collection.

*Frequency of Response:* On occasion.

*Affected Public:* Savings and loan holding companies.

*Abstract:* OTS is publishing this interim final rule implementing section 710(a) of the Financial Services Regulatory Relief Act of 2006, which added a new section 19(e) to the Federal Deposit Insurance Act (FDIA). Section 19(e) of the FDIA prohibits any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or money laundering or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such an offense (prohibited person) from holding certain positions with respect to a savings and loan holding company (SLHC). This interim rule describes actions that are prohibited under the new statute and describes procedures for applying for an OTS order granting a case-by-case exemption.

In order for a prohibited person to obtain or to continue in certain positions with an SLHC, the SLHC or the individual will need to apply to the OTS for an approval order for a case-by-case exemption. OTS does not believe that this requirement is punitive in

intent. Rather, the primary criteria in assessing such applications is whether the prohibited person in his/her proposed capacity at the SLHC participates in the major policy making functions of the SLHC or threatens the safety and soundness of the insured depository institution that is controlled by the SLHC, the interests of its depositors, or the public confidence in the institution. The proposed collection of information is not burdensome in nature and pertains to the position at the SLHC to be held by the prohibited person, the prohibited person's level of ownership of the SLHC, the specific nature of the offense involved, evidence of rehabilitation, and other relevant factors.

*Estimated Number of Respondents:* 50.

*Estimated Burden Hours per Response:* 16 hours.

*Estimated Total Burden:* 800 hours.

#### E. Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995,<sup>28</sup> requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in the 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 interim final rule will not result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year. Rather, this interim final rule will reduce the burden of compliance with newly enacted statutory prohibitions applicable to SLHCs and others by explaining how OTS will interpret newly enacted statutory prohibitions, providing regulatory exemptions from these prohibitions, and describing procedures for obtaining case-by-case exemptions from the newly enacted prohibitions contained in section 19(e) of the FDIA. Accordingly, OTS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

#### F. Executive Order 12866

OTS has determined that the interim final rule with request for comment is

<sup>28</sup> Pub. L. 104-4, 109 Stat. 48 (March 22, 1995) (Unfunded Mandates Act).

not a significant regulatory action under Executive Order 12866.

### G. Plain Language

Section 722 of the Gramm-Leach-Bliley Act (12 U.S.C. 4809) requires the Agencies to use "plain language" in all proposed and final rules published after January 1, 2000. OTS believes that the interim final rule is presented in a clear and straightforward manner and solicits comments on ways to make the rule easier to understand.

### List of Subjects

#### 12 CFR Part 509

Administrative practice and procedure, Penalties.

#### 12 CFR Part 585

Administrative practice and procedure, Holding companies, Reporting and recordkeeping requirements, Savings associations.

### Authority and Issuance

■ For the reasons in the preamble, OTS is amending chapter V of title 12 of the Code of Federal Regulations as set forth below:

## PART 509—RULES OF PRACTICE AND PROCEDURE IN ADJUDICATORY PROCEEDINGS

■ 1. Revise the authority citation for part 509 to read as follows:

**Authority:** 5 U.S.C. 504, 554–557; 12 U.S.C. 1464, 1467, 1467a, 1468, 1817(j), 1818, 1820(k), 1829(e), 3349, 4717; 15 U.S.C. 78(l), 78o–5, 78u–2; 28 U.S.C. 2461 note; 31 U.S.C. 5321; 42 U.S.C. 4012a.

■ 2. In § 509.1, add a new paragraph (i) to read as follows:

### § 509.1 Scope.

\* \* \* \* \*

(i) Subpart D of this part governs hearings on denials of applications for case-by-case exemptions under 12 CFR part 585, which implements section 19(e) of the FDIA.

■ 3. Add a new subpart D to read as follows:

### Subpart D—Exemptions under Section 19(e) of the FDIA

Sec.  
509.300 Scope.  
509.301 Hearing procedures.

### Subpart D—Exemptions under Section 19(e) of the FDIA

#### § 509.300 Scope.

The procedures in this subpart D govern hearings on denials of applications for case-by-case exemptions under 12 CFR part 585. Part 585 implements section 19(e) of the

FDIA, which prohibits persons who have been convicted of certain criminal offenses or who have agreed to enter into a pre-trial diversion or similar program in connection with a prosecution for such criminal offenses from occupying various positions with a savings and loan holding company.

#### § 509.301 Hearing procedures.

(a) *Hearings.* The following procedures apply to hearings under 12 CFR part 585.

(1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Director.

(2) An applicant may elect in writing to have the matter determined on the basis of written submissions, rather than an oral hearing.

(3) The parties to the hearing are OTS Enforcement counsel and the applicant.

(4) 12 CFR 509.2, 509.4, 509.6 through 509.12, and 509.16 apply to the hearing.

(5) Discovery is not permitted.

(6) A party may introduce relevant and material documents and make oral argument at the hearing.

(7) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties before to the hearing. Witnesses must be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party may cross-examine any witness presented by the opposing party. OTS will furnish a transcript of the proceedings upon an applicant's request and upon the payment of the costs of the transcript.

(8) The presiding officer has the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas duces tecum. If the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees are paid in accordance with 12 CFR 509.14.

(9) Upon the request of a party, the record will remain open for five business days following the hearing for additional submissions to the record.

(10) OTS Enforcement Counsel has the burden of proving a *prima facie* case that a person is prohibited from a position under section 19(e) of the FDIA. The applicant has the burden of proof on all other matters.

(11) The presiding officer must make recommendations to the Director, where possible, within 20 days after the last day for the parties to submit additions to the record.

(12) The presiding officer must forward his or her recommendation to the Director who shall promptly certify the entire record, including the presiding officer's recommendations. The Director's certification will close the record.

(b) *Decision.* After the certification of the record, the Director will notify the parties of his or her decision by issuing an order approving or denying the application.

(1) An approval order will require fidelity bond coverage for the position to the same extent as similar positions with the savings and loan holding company. The approval order may include such other conditions as may be appropriate.

(2) A denial order will include a summary of the relevant factors under 12 CFR 585.120(b).

■ 4. Add a new part 585 to read as follows:

## PART 585—PROHIBITED SERVICE AT SAVINGS AND LOAN HOLDING COMPANIES

Sec.

585.10 What does this part do?

585.20 What definitions apply to this part?

### Subpart A—Prohibition

585.30 What actions are prohibited?

585.40 What convictions or agreements to enter into pre-trial diversions or similar programs are covered by this part?

585.50 What adjudications and offenses are not covered by this part?

### Subpart B—Exemptions

585.100 Who is exempt from the prohibition under this part?

585.110 How do I apply for a case-by-case exemption?

585.120 What factors will OTS consider in reviewing my exemption application?

585.130 How will I know if my application is approved?

585.140 What procedures govern a hearing on my application?

**Authority:** 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, and 1829(e)

### § 585.10 What does this part do?

This part implements section 19(e)(1) of the Federal Deposit Insurance Act (FDIA), which prohibits persons who have been convicted of certain criminal offenses or who have agreed to enter into a pre-trial diversion or similar program in connection with a prosecution for such criminal offenses from occupying various positions with a savings and loan holding company. This

part also implements section 19(e)(2) of the FDIA, which permits the Director to provide exemptions, by regulation or order, from the application of the prohibition. This part provides an exemption for savings and loan holding company employees whose activities and responsibilities are limited solely to agriculture, forestry, retail merchandising, manufacturing, or public utilities operations, and a temporary exemption for certain persons who held positions with respect to a savings and loan holding company as of October 13, 2006. The part also describes procedures for applying for an OTS order granting a case-by-case exemption.

#### **§ 585.20 What definitions apply to this part?**

The following definitions apply to this part:

*Institution-affiliated party* is defined at 12 U.S.C. 1813(u), except that the phrase “savings and loan holding company” is substituted for “insured depository institution” each place that it appears in that definition.

*Person* means an individual and does not include a corporation, firm or other business entity.

*Savings and loan holding company* is defined at 12 CFR 583.20, but excludes a subsidiary of a savings and loan holding company that is not itself a savings and loan holding company.

#### **Subpart A—Prohibition**

##### **§ 585.30 What actions are prohibited?**

(a) *Person*. If a person was convicted of a criminal offense described in § 585.40, or agreed to enter into a pre-trial diversion or similar program in connection with a prosecution for such a criminal offense, he or she may not:

(1) Become, or continue as, an institution-affiliated party with respect to any savings and loan holding company.

(2) Own or control, directly or indirectly, any savings and loan holding company. A person will own or control a savings and loan holding company if he or she owns or controls that company under 12 CFR part 574.

(3) Otherwise participate, directly or indirectly, in the conduct of the affairs of any savings and loan holding company.

(b) *Savings and loan holding company*. A savings and loan holding company may not permit any person described in paragraph (a) of this section to engage in any conduct or to continue any relationship prohibited under that paragraph.

##### **§ 585.40 What convictions or agreements to enter into pre-trial diversions or similar programs are covered by this part?**

(a) *Covered convictions and agreements*. Except as described in § 585.50, this part covers:

(1) Any conviction of a criminal offense involving dishonesty, breach of trust, or money laundering. Convictions do not cover arrests, pending cases not brought to trial, acquittals, convictions reversed on appeal, pardoned convictions, or expunged convictions.

(2) Any agreement to enter into a pretrial diversion or similar program in connection with a prosecution for a criminal offense involving dishonesty, breach of trust or money laundering. A pretrial diversion or similar program is a program involving a suspension or eventual dismissal of charges or of a criminal prosecution based upon an agreement for treatment, rehabilitation, restitution, or other non-criminal or non-punitive alternative.

(b) *Dishonesty or breach of trust*. A determination whether a criminal offense involves dishonesty or breach of trust is based on the statutory elements of the crime.

(1) “Dishonesty” means directly or indirectly to cheat or defraud, to cheat or defraud for monetary gain or its equivalent, or to wrongfully take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving a want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which federal, state or local laws define as dishonest.

(2) “Breach of trust” means a wrongful act, use, misappropriation, or omission with respect to any property or fund which has been committed to a person in a fiduciary or official capacity, or the misuse of one’s official or fiduciary position to engage in a wrongful act, use, misappropriation, or omission.

##### **§ 585.50 What adjudications and offenses are not covered by this part?**

(a) *Youthful offender or juvenile delinquent*. This part does not cover any adjudication by a court against a person as:

(1) A youthful offender under any youthful offender law; or

(2) A juvenile delinquent by a court with jurisdiction over minors as defined by state law.

(b) *De minimis criminal offense*. This part does not cover *de minimis* criminal offenses. A criminal offense is *de minimis* if:

(1) The person has only one conviction or pretrial diversion or similar program of record;

(2) The offense was punishable by imprisonment for a term of less than one year, a fine of less than \$1,000, or both, and the person did not serve time in jail.

(3) The conviction or program was entered at least five years before the date the person first held a position described in § 585.30(a); and

(4) The offense did not involve an insured depository institution, insured credit union, or other banking organization (including a savings and loan holding company, bank holding company, or financial holding company).

(5) The person must disclose the conviction or pretrial diversion or similar program to all insured depository institutions and other banking organizations the affairs of which he or she participates.

(6) The person must be covered by a fidelity bond to the same extent as others in similar positions with the savings and loan holding company.

#### **Subpart B—Exemptions**

##### **§ 585.100 Who is exempt from the prohibition under this part?**

(a) *Employees*. An employee of a savings and loan holding company is exempt from the prohibition in § 585.30, if all of the following conditions are met:

(1) The employee’s responsibilities and activities are limited solely to agriculture, forestry, retail merchandising, manufacturing, or public utilities operations.

(2) The savings and loan holding company maintains a list of all policymaking positions and reviews this list annually.

(3) The employee’s position does not appear on the savings and loan holding company’s list of policymaking positions, and the employee does not, in fact, exercise any policymaking function with the savings and loan holding company.

(4) The employee:

(i) Is not an institution-affiliated party of the savings and loan holding company other than by virtue of the employment described in paragraph (a) of this section.

(ii) Does not own or control, directly or indirectly, the savings and loan holding company; and

(iii) Does not participate, directly or indirectly, in the conduct of the affairs of the savings and loan holding company.

(b) *Temporary exemption*. (1) Any prohibited person who was an institution-affiliated party with respect to a savings and loan holding company, who owned or controlled, directly or

indirectly a savings and loan holding company, or who otherwise participated directly or indirectly in the conduct of the affairs of a savings and loan holding company on October 13, 2006, may continue to hold the position with the savings and loan holding company.

(2) This exemption expires on September 5, 2007, unless the savings and loan holding company or the person files an application seeking a case-by-case exemption for the person under § 585.110 by that date. If the savings and loan holding company or the person files such an application, the temporary exemption expires on:

(i) The date of issuance of an OTS order approving the application under § 585.130(a);

(ii) The expiration of the 20-day period for filing a request for hearing under § 585.130(b) provided there is no timely request for hearing following the issuance of an OTS order denying the application under that section;

(iii) The date that OTS denies a timely request for hearing under § 585.140(a) following the issuance of an OTS order denying the application under § 585.130(b);

(iv) The date that the Director issues a decision under § 585.140(d); or

(v) The date an applicant withdraws the application.

**§ 585.110 How do I apply for a case-by-case exemption?**

(a) *Who may file.* (1) A savings and loan holding company or a person who was convicted of a criminal offense described in § 585.40 or who has agreed to enter into a pre-trial diversion or similar program in connection with a prosecution for such a criminal offense ("you") may file an application seeking an OTS order granting an exemption from the prohibitions in this part.

(2) You may seek an exemption only for a designated position (or positions) with respect to a named savings and loan holding company.

(3) You may not file an application less than one year after the latter of the date of OTS's denial of the same exemption under § 585.130(b), § 585.140(a)(2) or § 585.140(d).

(b) *Application and review procedures.* You may seek OTS approval by filing your application with OTS under the standard treatment described in 12 CFR part 516, subpart A of this chapter. OTS will review your application under 12 CFR part 516, subpart E of this chapter (excluding 12 CFR 516.270 and 516.280).

(c) *Prohibition pending OTS action.* Unless you are exempt under § 585.100(b), the prohibitions in

§ 585.30 continue to apply pending OTS action on your application.

**§ 585.120 What factors will OTS consider in reviewing my application?**

(a) *OTS review.* (1) In determining whether to approve an exemption application filed under § 585.110, OTS will consider the extent to which the position that is the subject of your application enables a person to:

(i) Participate in the major policymaking functions of the savings and loan holding company; or

(ii) Threaten the safety and soundness of any insured depository institution that is controlled by the savings and loan holding company, the interests of its depositors, or the public confidence in the insured depository institution.

(2) OTS will also consider whether you have demonstrated the person's fitness to hold the described position. Some positions may be approved without an extensive review of a person's fitness because the position does not enable a person to take the actions described in paragraph (a)(1) of this section.

(b) *Factors.* In making the determinations under paragraph (a) of this section, OTS will consider the following factors:

(1) The position;

(2) The amount of influence and control a person holding the position will be able to exercise over the affairs and operations of the savings and loan holding company and the insured depository institution;

(3) The ability of the management of the savings and loan holding company to supervise and control the activities of a person holding the position;

(4) The level of ownership that the person will have at the savings and loan holding company;

(5) The specific nature and circumstances of the criminal offense. The question whether a person who was convicted of a crime or who agreed to enter into a pretrial diversion or similar program for a crime was guilty of that crime is not relevant;

(6) Evidence of rehabilitation; and

(7) Any other relevant factor.

**§ 585.130 How will I know if my application is approved?**

(a) *Approval.* If OTS approves your application, OTS will issue an approval order. An approval order will include a summary of the relevant factors that OTS considered under § 585.120, will require fidelity bond coverage for the position to the same extent as similar positions with the SLHC. The approval order may include such other conditions as may be appropriate.

(b) *Denial.* If OTS denies your application, OTS will issue a denial order. The denial order will include the following written information:

(1) A summary of the relevant factors that OTS considered under § 585.120; and

(2) A statement indicating that you may file a written request demonstrating good cause for a hearing on the denial of your application, and that you must file this request with OTS within 20 days of the date of issuance of the order.

**§ 585.140 What procedures govern a hearing on my application?**

(a) *OTS review of hearing request.* OTS will review your hearing request to determine if you have demonstrated good cause for a hearing on your application. Within 30 days after the filing of a timely request for a hearing, OTS will notify you in writing of its decision to grant or deny the hearing request. If OTS grants your request for a hearing, it will order a hearing to be commenced within 60 days of the issuance of the notification. Upon the request of a party, the OTS may order a later hearing date.

(b) *Hearing procedures.* Hearing procedures are set out at 12 CFR part 509, subpart D of this chapter.

Dated: April 30, 2007.

By the Office of Thrift Supervision.

**John M. Reich,**

*Director.*

[FR Doc. E7-8677 Filed 5-7-07; 8:45 am]

BILLING CODE 6720-01-P

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. FAA-2006-26775; Directorate Identifier 2007-CE-01-AD; Amendment 39-15042; AD 2007-10-01]

RIN 2120-AA64

**Airworthiness Directives; Air Tractor, Inc. Model AT-602 Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain Air Tractor, Inc. (Air Tractor) Model AT-602 airplanes. This AD requires you to install access holes to do repetitive detailed visual inspections for cracks in the horizontal stabilizer brace tube assembly, and if any cracks are found as a result of a visual inspection, to replace