believed that *de novo* associations, as new companies, presented risks not associated with other institutions. These minimum capitalization requirements were intended to ensure that a *de novo* institution commenced operations in a safe and sound manner and to protect the insurance fund. To the same end, the FHLBB also required submission of detailed information on the institution's business plan for its first few years of operation, including descriptions of proposed management, management policies, investment policies and operations.

Minimum capitalization and business plan requirements remain appropriate safeguards because of the absence, in the case of a *de novo*, of any operating or supervisory history. However, those requirements would be revised by today's proposal.

Under the proposal, the standard minimum capitalization requirement would be decreased from \$3 million to \$2 million. The OTS could impose a higher or lower capital requirement on a case-by-case basis. The proposal would conform the minimum capitalization requirement to that of the insuring agency, the FDIC,15 while providing flexibility and information vital to the OTS in making its statutorily required determinations. It also would streamline the de novo application process and reduce the financial burden on applicants wishing to organize federal de novo institutions.

In securities offerings for a *de novo* institution, the OTS proposes that all securities of a particular class in the initial offering be sold at the same price. The minimum initial capitalization is the amount of proceeds net of all incurred and anticipated securities issuance expenses, organization expenses, pre-opening expenses, or any expenses paid (or funds advanced) by organizers that are to be reimbursed from the proceeds of the securities offering.

The business plan provisions have been revised to consolidate certain provisions, to bring the requirements up-to-date, and to delete obsolete statutory references. The proposal clarifies the required elements of the business plan, including descriptions of lending, leasing and investment activity, plans for meeting the qualified thrift lender requirements, deposit, savings and borrowing activity, compliance with the CRA, continuation or succession of competent management, and information on the proposed

institution's ability to maintain required minimum regulatory capital levels.

C. Policies Pertaining to Management Officials

Capital Maintenance Requirements. The proposal would delete the current capital maintenance requirements in order to conform to the current OTS policy. Current § 571.6(d)(4) requires controlling shareholders to agree to maintain a de novo association's required regulatory capital level for a minimum of five years. Controlling shareholders are also prohibited from pledging more than 50% of their stock to secure borrowed funds to finance their stock purchase for a period of three years. 16 Under the proposal, the provisions requiring controlling shareholders to execute capital maintenance agreements have been deleted and replaced by a new provision that requires a certification by legal counsel that the establishment of the de novo institution has been consummated in accordance with the provisions of all applicable laws and regulations, the application, and the Office's order. These changes will streamline the application process, conform the process to current OTS rules and policy and will reduce the burden on organizers of a federal de novo institution.

Since 1991, it has been the OTS's policy generally not to require prospectively the execution of capital maintenance agreements by controlling shareholders of a de novo institution. Under the Prompt Corrective Action provisions of section 38 of FDICIA, 17 which were enacted in 1991, and as implemented by OTS regulations,18 the OTS may not approve a capital restoration plan for any "undercapitalized" institution unless each company that controls the institution guarantees the institution's compliance with the plan until it has been adequately capitalized for four consecutive quarters and unless each such company provides adequate assurances of performance of the plan. Thus, sufficient statutory and regulatory protections currently exist to assure that savings associations maintain adequate capital and to deal with capital deficiencies promptly and thoroughly.

Conflicts of Interest and Usurpation of Corporate Opportunity. The proposal would delete provisions requiring the organizers of a de novo to file a plan identifying areas where conflicts of interest and abuse of corporate

opportunity may occur and describing specific policies and actions that the association will institute to avoid that abuse. Existing statutory and regulatory requirements obviate the need for this information in the application process. For instance, section 571.9, the OTS's "Corporate Opportunity Statement of Policy," makes clear that directors, officers and other persons having the power to direct the management of a savings association stand in a fiduciary relationship to the association and its accountholders or shareholders that requires them to avoid conflicts of interest and self-dealing.

The Corporate Opportunity Statement of Policy prohibits usurpation of corporate opportunities by insiders, if taking advantage of a business opportunity would breach their fiduciary obligations. The purpose of the Corporate Opportunity Statement of Policy, which was intended "to codify existing common law fiduciary principles," 19 is to protect savings associations from managers and controlling parties who might divert beneficial business opportunities from their savings associations to themselves or their affiliates in violation of applicable fiduciary rules.²⁰

Concerns relating to the avoidance of conflicts of interest and usurpation of corporate opportunity are addressed not only through the Corporate Opportunity Statement of Policy, but also by the statutory requirements governing transactions between savings associations and their affiliates and insiders. Transactions with affiliates and insider transactions at savings associations have become subject to the comprehensive statutory and regulatory framework that applies to banks under sections 23A, 23B, 22(g) and 22(h) of the Federal Reserve Act 21 (FRA). These sections of the FRA were made applicable to savings associations by provisions of FIRREA and by FDICIA. The OTS has substantially revised its regulations 22 to implement the statutory restrictions of sections 23A, 23B, 22(g) and 22(h) of the FRA.

The current statutory and regulatory structure thus eliminates the need for a separate statement of these restrictions in rules governing the organization of *de novo* institutions. Therefore, the proposed regulation deletes the requirements for the filing of plans for

¹⁵ See FDIC Policy Statement, 57 FR 12822 (April 13, 1992).

¹⁶ See 12 CFR 571.6(d)(3)(iii).

^{17 12} U.S.C.A. 1831o(e)(2)(C) (West Supp. 1994).

^{18 12} CFR 565.5.

¹⁹ 39 FR 6696 (February 22, 1974).

²⁰ See also OTS's Statement Concerning the Responsibilities of Directors and Officers of Insured Depository Institutions (November 16, 1992).

²¹ 12 U.S.C.A. 371c, 371c-1, 375 and 375b (West 1989 and Supp. 1994). *See also* 12 U.S.C.A. 1468 (West Supp. 1994).

²² See 12 CFR 563.41, 563.42 and 563.43.