

FEDERAL DEPOSIT INSURANCE CORPORATION**12 CFR Part 338**

RIN 3064-AB72

Fair Housing**AGENCY:** Federal Deposit Insurance Corporation (FDIC).**ACTION:** Final rule.

SUMMARY: The FDIC is amending its fair housing regulation to clarify certain nondiscriminatory advertising requirements with regard to the type of slogan and logotype insured state nonmember banks may use in written, oral and visual advertisements, the type of fair housing posters they may display, and the location for displaying the poster. The final rule also eliminates the FDIC's separate fair housing recordkeeping requirements that serve as a substitute monitoring program permitted by the Federal Reserve Board's Regulation B, which implements the Equal Credit Opportunity Act. Furthermore, the final rule reduces the burden associated with maintaining, updating, and reporting a register of home loan applications by requiring insured state nonmember banks to comply only with the Federal Reserve Board's Regulation C, which implements the Home Mortgage Disclosure Act. The final rule simply cross-references Regulations B and C.

This action is being taken in accordance with section 303(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 which requires the federal bank and thrift regulatory agencies to review and streamline their regulations and policies in order to improve efficiency, reduce unnecessary costs, eliminate unwarranted constraints on credit availability, and remove inconsistencies and outmoded and duplicative requirements.

The final rule seeks to reduce burden on insured state nonmember banks and to more closely align the FDIC's fair housing regulation with those of other federal bank and thrift regulatory agencies.

EFFECTIVE DATE: August 6, 1997.

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SUPPLEMENTARY INFORMATION:**I. Proposed Rule**

In accordance with section 303(a) of the Riegle Community Development and Regulatory Improvement Act (CDRIA) of 1994 (12 U.S.C. 4803(a)), the FDIC conducted a systematic review of its regulations and written policies and determined that it was appropriate to revise part 338, Fair Housing (12 CFR part 338). A notice of proposed rulemaking on this issue was published on September 20, 1996 (61 FR 49420).

A. Subpart A (Advertising)

The proposed rule revised subpart A of part 338 by clarifying certain nondiscriminatory advertising requirements. Currently, § 338.4 requires all insured state nonmember banks engaged in extending loans for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling to display an Equal Housing Lender poster where deposits are received or home loans are made in a manner clearly visible to the general public entering the bank. Also, current § 338.3 requires all insured state nonmember banks to include in all written and visual advertisements a copy of the Equal Housing Lender logotype and legend contained in the poster and, with respect to oral advertisements, a statement that the bank is an "Equal Housing Lender." These advertising requirements are intended to help an insured state nonmember bank communicate to its customers (or potential customers) seeking home loans that the bank is committed to fair lending.

The proposed rule revised § 338.3 to give insured state nonmember banks the option of using either the FDIC's Equal Housing Lender logotype and legend, or the Equal Housing Opportunity logotype and legend contained in the Equal Housing Opportunity poster as prescribed by regulations of the Department of Housing and Urban Development (HUD) (specifically, 24 CFR 110.25(a)), in written and visual advertisements. With respect to oral advertisements, insured state nonmember banks were also offered the option of using the slogan "Equal Opportunity Lender" in lieu of the current slogan "Equal Housing Lender." The optional use of either poster, logotype or slogan is designed to provide flexibility for institutions that offer a broader variety of loan products

than mortgage loans (e.g., auto, consumer, and credit card extensions of credit).

In addition, the proposed rule clarified placement of the poster in § 338.4. Regardless of which poster an institution chooses to display, the poster must be displayed in a single central location clearly visible to the general public entering the area, either where deposits are received or where home loans are made. This change was designed to create consistency and eliminate confusion among insured state nonmember banks about the need for multiple posters.

The proposed rule also eliminated a reference to HUD's advertising regulations. As a result of HUD's regulatory review, part 109 (Fair Housing Advertising) was removed from its regulations (24 CFR part 109) and will be relegated to other non-codified guidance. See 61 FR 14378 (April 1, 1996). Accordingly, § 338.1 was revised to eliminate the reference to Part 109. New information was also added to § 338.3 advising all insured state nonmember banks to refer to HUD for further guidance concerning fair housing advertising beyond that set forth in § 338.3.

No changes were proposed to the definitions governing subpart A (§ 338.2).

B. Subpart B (Recordkeeping Requirements)

Section 338.6 of the proposed rule eliminated the definitions of application, dwelling, home improvement loan, and home purchase loan. Because these definitions have created some confusion within the industry, the FDIC believed that eliminating them from part 338 would create consistency by automatically subjecting insured state nonmember banks to the relevant definitions in the Federal Reserve Board's Regulations B and C (12 CFR parts 202 and 203). Regulation B implements the Equal Credit Opportunity Act (ECOA, 15 U.S.C. 1691-1691f), and Regulation C implements the Home Mortgage Disclosure Act (HMDA, 12 U.S.C. 2801-2810). Proposed § 338.6 also reinstated a definition for controlled entity, which is a "corporation, partnership, association, or other business entity with respect to which a bank possesses directly or indirectly, the power to direct or cause the direction of management and policies, whether through the ownership of voting securities, by contract, or otherwise." This term is used in § 338.9 (which governs mortgage lending of a controlled entity), and the definition

was inadvertently omitted from part 338 when it was last amended in 1991.

Section 338.7 currently requires insured state nonmember banks to request and maintain certain information regarding the race and other personal characteristics of applicants for a home purchase loan. The purpose of collecting and retaining this information is to monitor the institution's compliance with ECOA, and § 338.7 serves as a substitute monitoring system permitted by Regulation B. However, § 338.7 requires the collection of more extensive data. For example, under current § 338.7(a)(1), institutions that have no office located in a primary metropolitan statistical area (PMSA) or a metropolitan statistical area (MSA), or which have total assets of \$10 million or less, are also required to request and retain information on the location of the property to be purchased. Further, current § 338.7(a)(2) requires insured state nonmember banks that have an office located in a PMSA or MSA and that have total assets exceeding \$10 million to request and retain essentially all of the information listed on the model Residential Loan Application Form contained in appendix B of Regulation B (12 CFR part 202, appendix B). Under Regulation B, the only information that must be requested is the race or national origin, sex, marital status, and age of home loan applicants.

Current § 338.8 also notifies institutions of their duty to maintain, update, and report a register of home loan applications consistent with Regulation C. Information required to be collected includes the type of loan requested, the purpose of the loan, whether the loan was approved or denied (including an option for collecting denial reasons for disapproved loans), and the type of purchaser (if the loan was sold). Further, § 338.8 requires all institutions subject to Regulation C to report data on the sex, race or national origin and income of applicants. Until recently, such data were optional under Regulation C for institutions with assets between \$10 and \$30 million.

When the FDIC's proposed rule was issued, Regulation C required the collection of data only for institutions with assets of \$30 million or more. However, current § 338.8 extends the requirements to all insured state nonmember institutions with assets exceeding \$10 million that have offices located in a PMSA or an MSA. Regulation C specifies a quarterly schedule for entering the required data on the HMDA register, whereas § 338.8 currently requires more rigorous

updating (within 30 days after final disposition of the loan application).

The proposed rule eliminated the FDIC's separate fair housing recordkeeping requirements contained in § 338.7 that serve as a substitute monitoring program permitted by Regulation B. The proposed rule also removed the requirements in § 338.8 that insured state nonmember banks maintain, update and report a register of home loan applications that are duplicative and more rigorous than the requirements of Regulation C. Instead, the proposed rule simply cross-referenced Regulations B and C and required insured state nonmember banks to comply only with those regulations. However, the FDIC proposed to revise § 338.8 to require those institutions subject to Regulation C to collect and report the reasons for denial of each loan application. The reporting of loan denial reasons is currently optional under Regulation C.

The proposed rule also revised § 338.5, which describes the purpose of subpart B, to reflect the changes to §§ 338.6, 338.7, and 338.8.

II. Final Rule

The FDIC received 15 comment letters reflecting the views of one law firm that represents insured state nonmember banks, one community-based organization, three trade associations, four bank holding companies, and six insured state nonmember banks.

A. Subpart A (Advertising)

The vast majority of the commenters favored the changes with respect to the advertising requirements which would permit insured state nonmember banks to use either the FDIC's Equal Housing Lender poster, logotype or slogan, or HUD's Equal Housing Opportunity poster, logotype or slogan. Commenters also generally approved of clarifying placement of the poster in a single central location within a bank readily visible to customers. One commenter suggested that the FDIC provide a definition of "advertisement" in subpart A which would include certain electronic advertisements. However, the FDIC believes it would be more appropriate to address this issue in connection with release of the agency's examination guidelines for electronic banking activities. Another commenter suggested that the definitions for dwelling, handicap and familial status, which are identical to the definitions for the same terms contained in the Fair Housing Act (42 U.S.C. 3602), be replaced with cross-references. The FDIC originally inserted those definitions in subpart A for ease of

reference so that bankers and their attorneys would not have to consult the Fair Housing Act, and the agency believes that logic still applies.

The FDIC is eliminating from the final rule a proposed section, § 338.3(c), which would have advised all insured state nonmember banks to consult the U.S. Department of Housing and Urban Development (HUD) for further guidance concerning fair housing advertising beyond that set forth in § 338.3. No comments were received on this aspect of this proposal. However, upon further reflection the FDIC believes that this provision is unnecessary because questions concerning the size of the logotype and legend in print advertising occur rather infrequently and can be handled through informal referrals to HUD. Accordingly, § 338.3(c) is being removed from the final rule. Other than this modification, the FDIC is retaining the advertising portion of part 338 (subpart A) as proposed.

B. Subpart B (Recordkeeping Requirements)

Two commenters suggested definitional changes to subpart B. One commenter suggested that § 338.7 be modified to require insured nonmember banks to collect the "government" monitoring information required by Regulation C. However, § 338.7 contains a cross-reference to Regulation B, not Regulation C. Moreover, Regulation B uses the term "monitoring information". Although the FNMA/FHLMC residential mortgage loan application form contains a section on "government monitoring" information, the FDIC believes that it is more appropriate to parallel the language of Regulation B rather than an application that may be subject to change. Therefore, this change is not being implemented. Another commenter suggested adding a definition of "home loan", which is used in § 338.9 (mortgage lending of a controlled entity), to § 338.6 or clarifying the term in § 338.9. The FDIC agrees that this term is ambiguous. It is intended to cover home purchase loans and home improvement loans as defined in §§ 203.2 (f) and (g) of Regulation C (12 CFR 203.2 (f), (g)). Accordingly, the FDIC is modifying § 338.9 by replacing the term "home loan" with the phrase "home purchase loans or home improvement loans as defined in Regulation C".

A majority of the comments favored eliminating the additional data collection and retention requirements imposed by subpart B of part 338 that go beyond the requirements of Regulations B and C. However, one

commenter indicated that the FDIC should increase the current data collection and retention requirements of § 338.7. The commenter indicated that the elimination of such data would make it very difficult for neighborhood organizations to work with lenders in identifying and assisting in the removal of real and perceived barriers to credit. However, the FDIC remains convinced that the collection of the additional data imposed by § 338.7 beyond Regulation B is unnecessary because collection of this or similar data is standard industry practice. Even without the additional data collection and retention requirements, the settlement agreements negotiated between the Department of Justice and several lenders alleged to have engaged in discriminatory lending practices indicate that sufficient data are still available to identify lenders who may be impeding access to credit.

The FDIC also considered completely removing §§ 338.7 and 338.8 because, absent a specific requirement by the FDIC in part 338, all insured state nonmember banks would still be required by Regulation B to collect information about an applicant's race and other personal characteristics in applications for certain dwelling-related loans and, pursuant to Regulation C, to maintain, update and report a register of home loan applications. Two commenters did not perceive a need for a regulatory cross-reference to Regulations B and C. However, the FDIC believes that it is appropriate to provide a cross-reference to Regulations B and C to put insured state nonmember banks on notice of their responsibilities under ECOA and HMDA.

Section 338.8 of the proposed rule also required those institutions that are subject to Regulation C to collect and report the reasons for denial of each loan application that would be reportable under Regulation C. The reporting of denial reasons is currently optional under Regulation C. However, both the OCC and the OTS require those depository institutions they supervise that are subject to Regulation C to collect and report loan denial reasons. See 12 CFR 27.3(a)(1)(i) and 12 CFR 528.6, respectively. While comments on this issue were mixed, the FDIC has decided to eliminate the requirement in the final rule for the following reasons.

Previously, depository institutions with assets of \$10 million or less were exempt from HMDA. Section 2225 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA) (12 U.S.C. 2808) increased this exemption by adjusting the \$10 million figure by the change since 1975 in the Consumer Price Index (CPI). By

an interim rule amending Regulation C, the Federal Reserve Board increased the asset-size exemption threshold for HMDA reporters to \$28 million in accordance with the EGRPRA amendment. Thus, depository institutions with assets of \$28 million or less as of December 31, 1996 are exempt from HMDA data collection and reporting requirements during 1997. This regulatory change became effective February 1, 1997 (62 FR 3603, January 24, 1997). However, depository institutions with assets between \$28 million and \$30 million as of December 31, 1996 will still have the option of collecting and reporting HMDA data. See 12 CFR 203.4(b)(2)(ii). The Federal Reserve Board will amend the asset-size exemption threshold annually based on November CPI data and publish the new threshold in the **Federal Register** each December for compliance beginning January 1 (62 FR 28620, May 27, 1997). The FDIC intends to notify insured state nonmember banks of these changes via supervisory guidance in the near future.

Because these statutory and regulatory amendments significantly reduced the number of insured state nonmember banks that are required to collect and report HMDA data from 3052 to 1593, it would be less burdensome to allow collection and reporting of data on denial reasons to remain an option as currently prescribed by Regulation C. Furthermore, the 1995 HMDA data shows that approximately 92% of the insured state nonmember banks with assets of \$28 million or more exercised this option and voluntarily collected and reported 83% of denial reasons. Moreover, as part of their regulatory review under section 303(a) of CDRIA, the Federal Reserve Board will be reviewing Regulation C. Until the Federal Reserve Board determines how, if at all, it will revise Regulation C, it would be premature for the FDIC to require collecting and reporting of loan denial reasons. Accordingly, the FDIC is adopting its proposed recordkeeping requirements for part 338 (subpart B) with the exception of mandatory recording and reporting of loan denial reasons.

The final rule modifies proposed § 338.5 (purpose of subpart B) to reflect the elimination of denial reasons from § 338.8 and to clarify that the FDIC is simply providing a cross-reference to Regulations B and C in §§ 338.7 and 338.8, rather than imposing the agency's own recordkeeping requirements.

III. Regulatory Flexibility Act

The Board of Directors, in accordance with the Regulatory Flexibility Act (5 U.S.C. 606(b)), has reviewed and

approved this final rule, and in so doing, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This final rule reduces burden on insured state nonmember banks by clarifying or removing unnecessary provisions.

IV. Paperwork Reduction Act

The final rule contains two collections of information that have Office of Management and Budget (OMB) Paperwork Reduction Act clearance numbers. The first collection is a recordkeeping requirement imposed by the Federal Reserve Board's Regulation B and enforced by the FDIC with regard to insured State nonmember banks. This collection carries OMB clearance number 3064-0085 which expires on September 30, 1998. This final rulemaking is consistent with the OMB approved collection and will be subject to routine public comment and OMB submission and review in 1998 pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

The second collection is a recordkeeping and reporting requirement imposed by the Federal Reserve Board's Regulation C and enforced by the FDIC with regard to insured State nonmember banks. This collection carries OMB clearance number 3064-0046 which expires on July 31, 1997. The FDIC submitted to OMB its request for a three year renewal of this Paperwork Reduction Act clearance on June 13, 1997. See notice and request for comments published at 62 FR 33410, June 19, 1997.

V. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Title II, Pub. L. 104-121) provides generally for agencies to report rules to Congress and the General Accounting Office (GAO) for review. The reporting requirement is triggered when a federal agency issues a final rule. Accordingly, the FDIC will file the appropriate reports with Congress and the GAO as required by SBREFA.

Because the Office of Management and Budget has determined that this final revision of part 338 does not constitute a "major rule" as defined by SBREFA, the final rule will take effect 30 days from publication in the **Federal Register**.

List of Subjects in 12 CFR Part 338

Advertising, Aged, Banks, Banking, Civil rights, Credit, Fair housing, Individuals with disabilities, Marital status discrimination, Mortgages,

Religious discrimination, Reporting and recordkeeping requirements, Sex discrimination, Signs and symbols.

For the reasons set forth in the preamble, 12 CFR part 338 is amended as set forth below.

PART 338—FAIR HOUSING

1. The authority citation for part 338 is revised to read as follows:

Authority: 12 U.S.C. 1817, 1818, 1819, 1820(b), 2801 *et seq.*; 15 U.S.C. 1691 *et seq.*; 42 U.S.C. 3605, 3608; 12 CFR parts 202, 203; 24 CFR part 110.

Subpart A—Advertising

2. Section 338.1 is revised to read as follows:

§ 338.1 Purpose.

The purpose of this subpart A is to prohibit insured state nonmember banks from engaging in discriminatory advertising with regard to residential real estate-related transactions. This subpart A also requires insured state nonmember banks to publicly display either the Equal Housing Lender poster set forth in § 338.4(b) of the FDIC's regulations or the Equal Housing Opportunity poster prescribed by part 110 of the regulations of the United States Department of Housing and Urban Development (24 CFR part 110). This subpart A enforces section 805 of title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601–3619 (Fair Housing Act), as amended by the Fair Housing Amendments Act of 1988.

3. Section 338.3 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 338.3 Nondiscriminatory advertising.

(a) * * *

(1) With respect to written and visual advertisements, this requirement may be satisfied by including in the advertisement a copy of the logotype with the Equal Housing Lender legend contained in the Equal Housing Lender poster prescribed in § 338.4(b) of the FDIC's regulations or a copy of the logotype with the Equal Housing Opportunity legend contained in the Equal Housing Opportunity poster prescribed in § 110.25(a) of the United States Department of Housing and Urban Development's regulations (24 CFR 110.25(a)).

(2) With respect to oral advertisements, this requirement may be satisfied by a statement, in the spoken text of the advertisement, that the bank is an "Equal Housing Lender" or an "Equal Opportunity Lender."

* * * * *

4. Section 338.4 is amended by revising the section heading and paragraph (a) to read as follows:

§ 338.4 Fair housing poster.

(a) Each bank engaged in extending loans for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall conspicuously display either the Equal Housing Lender poster set forth in paragraph (b) of this section or the Equal Housing Opportunity poster prescribed by § 110.25(a) of the United States Department of Housing and Urban Development's regulations (24 CFR 110.25(a)), in a central location within the bank where deposits are received or where such loans are made in a manner clearly visible to the general public entering the area, where the poster is displayed.

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5. Subpart B is amended by revising the subpart heading to read as follows:

Subpart B—Recordkeeping

6. Section 338.5 is revised to read as follows:

§ 338.5 Purpose.

The purpose of this subpart B is two-fold. First, this subpart B notifies all insured state nonmember banks of their duty to collect and retain certain information about a home loan applicant's personal characteristics in accordance with Regulation B of the Board of Governors of the Federal Reserve System (12 CFR part 202) in order to monitor an institution's compliance with the Equal Credit Opportunity Act of 1974 (15 U.S.C. 1691 *et seq.*). Second, this subpart B notifies certain insured state nonmember banks of their duty to maintain, update and report a register of home loan applications in accordance with Regulation C of the Board of Governors of the Federal Reserve System (12 CFR part 203), which implements the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*).

7. Section 338.6 is revised to read as follows:

§ 338.6 Definitions applicable to this subpart B.

For purposes of this subpart B—
(a) *Bank* means an insured state nonmember bank as defined in section 3 of the Federal Deposit Insurance Act.

(b) *Controlled entity* means a corporation, partnership, association, or other business entity with respect to which a bank possesses, directly or indirectly, the power to direct or cause the direction of management and

policies, whether through the ownership of voting securities, by contract, or otherwise.

8. Section 338.7 is revised to read as follows:

§ 338.7 Recordkeeping requirements.

All banks that receive an application for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence where the extension of credit will be secured by the dwelling shall request and retain the monitoring information required by Regulation B of the Board of Governors of the Federal Reserve System (12 CFR part 202).

9. Section 338.8 is revised to read as follows:

§ 338.8 Compilation of loan data in register format.

Banks and other lenders required to file a Home Mortgage Disclosure Act loan application register (LAR) with the Federal Deposit Insurance Corporation shall maintain, update and report such LAR in accordance with Regulation C of the Board of Governors of the Federal Reserve System (12 CFR part 203).

10. Section 338.9 is amended by revising the introductory text to read as follows:

§ 338.9 Mortgage lending of a controlled entity.

Any bank which refers any applicants to a controlled entity and which purchases any home purchase loans or home improvement loans as defined in Regulation C of the Board of Governors of the Federal Reserve Board (12 CFR part 203) originated by the controlled entity, as a condition to transacting any business with the controlled entity, shall require the controlled entity to enter into a written agreement with the bank. The written agreement shall provide that the entity shall:

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Appendix A to Subpart B of Part 338 [Removed]

11. Appendix A to subpart B of part 338 is removed.

Appendix B to Subpart B of Part 338 [Removed]

12. Appendix B to subpart B of part 338 is removed.

By order of the Board of Directors.

Dated at Washington, D.C. this 24th day of June, 1997.

Federal Deposit Insurance Corporation.

Robert E. Feldman,
Executive Secretary.

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