CITY OF MILWAUKEE

Form CA-43

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September 1, 2004

To the Honorable
Committee on Public Safety
City Hall, Room 205

Re: Common Council File No. 040176: A substitute ordinance relating to required security features for currency exchanges, payday loan agencies and title loan agencies

Dear Committee Members:

This letter will respond to your request for the opinion of this office as to the legality and enforceability of the above-referenced proposed ordinance (denoted as "Substitute 2"). We find this proposed ordinance to be problematic on two grounds:

(1) It implicates the issue of the scope and extent of the City's police powers, which have been delegated to it by the legislature, per Wis. Stat. § 62.11(5) and whether any provisions of the proposed ordinance exceed the limits of those police powers.

(2) It raises issues arising under the Equal Protection Clause, embodied in the Fourteenth Amendment of the U.S. Constitution and Article 1, § 1 of the Wisconsin Constitution, in that certain security measures may be mandated with respect to the categories of business within its scope that are not required of other businesses that are similar in nature or that implicate comparable security concerns.

We will first discuss these police-power and equal-protection issues generally, emphasizing the standards applicable to evaluation of the provisions of this proposed ordinance. We will then apply those standards to an evaluation of the legality and enforceability of each of the specific security measures mandated by the proposed

ordinance. For your convenience, we attach a copy of a previous opinion of this office, dated May 7, 2003, concerning the application of the "public health, safety and welfare" special-use permit criterion contained in § 295-311-2-d-1, *Milwaukee Code of Ordinances* to the payday loan industry, to which we refer subsequently in this letter.

Legal Doctrines Affecting the Legality and Enforceability of the Proposed Ordinance

1. The Police Power and its Limits

The proposed ordinance consists of a series of regulatory measures aimed at three distinct, but somewhat related, lines of businesses: Currency exchanges, payday loan agencies and title loan agencies[1] (collectively, "quasi-financial institutions"). The City's legal authority to regulate business practices in this fashion derives from its statutory police powers to act in furtherance of the public health, safety and welfare, as set forth in Wis. Stat. § 62.11(5). This provision states as follows:

> (5) Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers

[1] Although the proposed ordinance lumps these three types of businesses into one category, there are, in fact, significant distinctions among them. For example, payday loan agencies do not cash checks and require customers to be employed and to have a regular bank checking account – in contrast to currency exchanges, which do cash checks and which do not impose these requirements upon their customers. Title loan agencies make only secured loans upon vehicles or other collateral; payday loan agencies make only personal (unsecured) loans and currency exchanges generally do not engage in the lending business at all. While these distinctions do not necessarily render invalid the proposed ordinance's approach of treating quasi-financial institutions as a single category, subject to a single regulatory regime, the Committee should be aware that the legality or enforceability of particular security measures as applied to specific "branches" of the quasi-financial industry may be affected by them.

> hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

The extent of the City's discretion in the exercise of its police powers is broad, although not unlimited, and, in cases such as these, the requisite standards and analysis are well-established. It is a basic principle that ordinances enjoy a presumption of validity. *State ex rel. Grand Bazaar Liquors Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 208-209, 313 N.W.2d 805, 808 (1982); *State ex rel. Hammermill Paper Company v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784, 792-793 (1973). The subject-matter of this proposed ordinance does not implicate any "fundamental rights" or "suspect classes," such as would require a particularly high standard of scrutiny. *Dog Federation of Wisconsin, Inc. v. City of South Milwaukee*, 178 Wis. 2d 353, 367, 504 N.W.2d 375, 381 (Ct. App. 1993); *New York City Friends of Ferrets v. City of New York*, 876 F. Supp. 529, 533, 534 (S.D.N.Y. 1995). Under such circumstances courts will employ the less-stringent "rational basis" standard of review to the constitutionality of this proposed ordinance. *Id.*, citing *Funk v. Wollin Silo and Equipment, Inc.*, 148 Wis. 2d 59, 69, 435 N.W.2d 244, 248 (1989).

This standard requires that courts uphold the constitutionality, legality, and enforceability of a municipal ordinance if the ordinance is "rationally related" to promotion of the public health, safety, morals or general welfare. *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee, supra*, 105 Wis. 2d 203, 209, 211, 313 N.W.2d 805, 808, 810 (1982). Every presumption is exercised in favor of sustaining "police power" ordinances, and the burden of proof is on the party challenging the validity of such an ordinance: if there is any "reasonable basis for its enactment" the ordinance is sustained. *State ex rel. Baer v. City of Milwaukee*, 33 Wis. 2d 624, 630, 633-634, 148 N.W.2d 21, 24, 26 (1967). *State ex rel. Normal Hall, Inc. v. Gurda*, 234 Wis. 290, 299-300, 291 N.W. 350, 354-355 (1940). In *Thorp v. Town of Lebanon*, 235 Wis. 2d 610, 612 N.W.2d 59, 2000 WI 60 (2000), the Wisconsin Supreme Court reaffirmed the following mode of analysis to any constitutionally-based claim that the provisions of an ordinance lacks a "rational basis," stating as follows:

> . . . [W]e note that the burden on a plaintiff to prove that an ordinance lacks a rational relationship to a valid governmental objective is difficult. The rational basis test has been characterized as creating a 'frequently

> insurmountable task' for the challenger of an ordinance to prove 'beyond a reasonable doubt that the ordinance possesses no rational basis to any legitimate municipal objective' *Grand Bazaar*, 105 Wis. 2d 209, 313 N.W.2d 805. Moreover, ordinances enjoy a presumption of validity, even when they are challenged on the basis of equal protection. *State v. Post*, 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995). An opponent of an ordinance must establish the ordinance's unconstitutionality beyond a reasonable doubt. *Id.*: *Kimec v. Town of Spider Lake*, 60 Wis. 2d 640, 651, 211 N.W.2d 471 (1973) . . . ." 235 Wis. 2d 610, 637, 612 N.W.2d 59, 74.

In formulating a proposed ordinance, care should be taken to assure the following: (a) that the means employed by the ordinance are "reasonable"; (b) that the means employed by the ordinance are "rationally related" to the attainment of its stated objectives; and (c) that the ordinance itself operates in a nondiscriminatory fashion. *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee, supra; Clark Oil and Refining Corp. v. City of Tomah*, 30 Wis. 2d 547, 141 N.W.2d 299 (1966); *Froncek v. City of Milwaukee*, 269 Wis. 276, 281-282, 69 N.W.2d 242, 245-246 (1955). While the police-power "test" applicable to this proposed ordinance is not particularly stringent, it must still be met. "The rational-basis standard of review is 'not a toothless one.'" *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee, supra*, 105 Wis.2d 203, 209, 313 N.W.2d 805, 809, *citing Schweiker v. Wilson*, 450 U.S. 221, 234, 101 S.Ct. 1074, 1082, 67 L.Ed.2d 186 (1981).

The ostensible aim of the security measures mandated by the proposed ordinance is to reduce the incidence of robberies, burglaries and other criminal activity occurring at quasi-financial institutions. This is certainly an objective directly related to enhancement of public safety and thus well within the parameters of the City's police powers. The difficulty is that the legislative record in this case is so sparse as to be essentially devoid of any content demonstrating the requisite "rational relationship" between the specific provisions of the proposed ordinance and the attainment of this objective. For example, the ordinance file contains a City map contending that 22 robberies occurred near "check cashing businesses" through July 14, 2004. This map raises more questions than it answers, including:

(1) Over what period of time prior to July 14, 2004 did the robberies occur?

(2) Did these robberies occur "within [a] one quarter mile buffer area" of such businesses (as indicated by the title of the chart) or right at the site of the businesses, i.e. on the premises or against customers entering or leaving those premises (as indicated by the chart itself)?

(3) Did these robberies occur at only check cashing/currency exchange outlets or did any occur at the other two legs of the quasi-financial tripod, payday loan agencies or title loan agencies – and, if so, how many?

(4) How do the number of robberies at these locations over the relevant period of time compare with the incidence of similar crimes in or around other businesses that pose potential security risks (e.g. banks, jewelry stores, pawnbrokers, etc.)?

(5) How would the specific measures enumerated in the proposed ordinance enhance security and forestall robberies and similar crimes in and around quasi-financial institution outlets? (Nothing in the ordinance file addresses this issue, not even the Police Chief's letter of endorsement.)

We caution that regulatory measures may not be imposed against the quasi-financial industry due to opposition to its presence in the City or to its lending or other credit practices, including interest rates or collection methods. These are matters properly reserved for State regulation and that are in all likelihood pre-empted by State law. *See* our opinion of May 7, 2003 (attached).

2. Equal Protection Considerations

The proposed ordinance may also be subject to challenge on equal-protection grounds because it targets quasi-financial institutions, but not (a) conventional financial institutions such as banks or credit unions; or (b) other types of retail business that operate on a cash basis and that carry potentially sizable amounts of cash on the premises. The issue here is whether a classification consisting of currency exchanges, payday loan agencies and title loan agencies for purposes of determining an appropriate array of security features associated with the usual conduct of business, will withstand scrutiny under the equal-protection clauses of the United States and Wisconsin Constitutions.[2]

The U.S. Supreme Court has stated that: "The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985), citing *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982); *see also McDonald v. Village of Winnetka*, 371 F.3d 992, 1008 (7th Cir. 2004); *DeSalle v. Wright*, 969 F.2d 273, 275 (7th Cir. 1992). "The Equal Protection Clause grants to all Americans 'the right to be free from invidious discrimination in statutory classifications and other governmental activity." *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996); citing *Harris v. McRae*, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980). The Wisconsin Supreme Court has stated that:

> Traditionally, we have recognized two types of equal protection claims. The first involves intentional discrimination based on membership in a particular class or group. *See, e.g., State v. Chosa*, 108 Wis.2d 392, 395-97, 321 N.W.2d 280 (1982). The second involves challenges to legislation alleged to make irrational and arbitrary classifications. *See, e.g., State v. Post*, 197 Wis.2d 279, 541 N.W.2d 115 (1995).

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[2] The equal-protection guarantees of the United States and Wisconsin Constitutions are identical. *Kenosha County v. C&S Management, Inc.* 223 Wis. 2d 3763, 393-394, 588 N.W.2d 236, 246-247 (1999); *In the Matter of Care and Maintenance of K.C. v. Department of Health & Social Services*, 142 Wis.2d 906, 915, 420 N.W.2d 37, 39 (1988)..

Penterman v. Wisconsin Electric Power Company, 211 Wis.2d 483-484, 565 N.W.2d 521, 534 (1997).

An equal-protection challenge to the proposed ordinance seems to fit the second category more closely. In this respect it must be emphasized that police-power legislation is accorded a broad presumption of validity as against equal-protection challenges. The Seventh Circuit has gone so far as to state that a challenge to laws or policies alleged to make irrational distinctions "rarely succeeds nowadays." *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). The U.S. Supreme Court described the obstacles facing such challenges as follows:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations... Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.

427 U.S. at 303, 96 S.Ct. at 2516-2517; *see also Heller v. Doe*, 509 U.S. 312, 319-320, 113 S.Ct. 2637, 2642-2643, 125 L.Ed.2d 257 (1993); *Forseth v. Village of Sussex*, 199 F.3d 363, 371 (7th Cir. 2000); *Listle v. Milwaukee County*, 138 F.3d 1155, 1158-1159 (7th Cir., 1998); *Northwest Properties v. Outagamie County*, 223 Wis.2d 483, 490-491, 589 N.W.2d 683, 687 (Ct. App. 1998).

The classification drawn by the proposed ordinance, *i.e.*, that of quasi-financial institutions, is unrelated to any "fundamental personal right" and is not premised upon any "inherently suspect distinctions." Thus, it is subject only to rational-basis review for equal-protection purposes. That is not a difficult standard to meet, and has been described by the U.S. Supreme Court as follows:

> Under rational-basis review, where a group possesses "distinguishing characteristics relevant to interests the State has the authority to implement," a State's decision to act on the basis of those differences does not give rise to a constitutional violation. . . . "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purposes." . . . Moreover, the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative "'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" . . .

(Citations omitted). *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 366-367, 121 S.Ct. 955, 963-964, 148 L.Ed.2d 866 (2001); *see also, Discovery House, Inc. v. Consolidated City of Indianapolis*, 319 F.3d 277, 282 (7th Cir. 2003); *Gusewelle v. City of Wood River*, --- F.3d ---, 2004 WL 1516710 at p. 9 (7th Cir. 7/8/2004); *In re Commitment of Dennis H.*, 2002 WI 104, 255 Wis.2d 359, 381-382, 647 N.W.2d 851, 861; *In the Matter of the Care and Maintenance of K.C. v. Department of Health & Social Services*, 142 Wis.2d 906, 916, 420 N.W.2d 37, 40 (1988).

If a proposed City ordinance directed at regulation of a particular business or industry avoids "invidious discrimination" and satisfies the foregoing rational-basis test, it should withstand a constitutional equal-protection challenge. Indeed, the City has already adopted operational standards governing one line of business. See, § 68-4.3, *Milwaukee Code of Ordinances* (convenience food stores). As noted, these are not particularly difficult standards, but they are ones that must be met. The problem under these circumstances is the virtual absence of any legislative record as to why this particular classification (i.e., quasi-financial institutions) was targeted for this particular array of required security features. In order to deal with any potential equal-protection challenge, we suggest that the legislative record underlying this proposed ordinance be enhanced with evidence and legislative findings substantiating the basis and rationale for the specific industry classification that it has selected. The current legislative record is insufficient for this purpose.

In this respect, we have examined Federal regulations mandating the adoption of certain security measures by conventional financial institutions, including banks and thrift institutions.[3] Congress has authorized "Federal supervisory agencies" to promulgate such regulations per 12 U.S.C. 1882(a), which states as follows:

> § 1882. Security measures
>
> (a) Rules for installation, maintenance, and operation of security devices and procedures
>
> Within six months from July 7, 1968, each Federal supervisory agency shall promulgate rules establishing minimum standards with which each bank or savings and loan association must comply with respect to the installation, maintenance, and operation of security devices and procedures, reasonable in cost, to discourage robberies, burglaries, and larcenies and to assist in the identification and apprehension of persons who commit such acts.

Federal regulations have divided conventional financial institutions into four categories for purposes of this statute: (a) national banks, 12 C.F.R. Part 21; (b) state banks that are Federal Reserve members, 12 C.F.R. Part 208; (c) FDIC-insured banks that are not Federal Reserve members, 12 C.F.R. Part 326; and (d) savings associations, a/k/a "thrifts," 12 C.F.R. Part 568. Institutions falling within any of these categories, however, are required to adopt essentially the same security measures:

(1) Appointment of a "security officer" and development of a "security program" by the institution's board of directors for each location, which would include provisions for opening and closing procedures, identification of perpetrators of crimes against the institution, identification of currency handled by the institution, maintenance of a security video camera, and retention of actual or attempted robberies, burglaries, or larcenies.

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[3] The State of Wisconsin has chosen not to intervene in this area. There are no Wisconsin statutes or Administrative Code provisions mandating any form of security features for financial institutions.

(2) Initial and periodic training of employees in robbery prevention and proper conduct during and after robberies.

(3) Maintenance of a vault, safe, or other "secure space" to protect cash and other liquid assets, as well are a lighting system to illuminate the area outside the vault (or equivalent) if it is visible from outside the banking officer area.

(4) Installation of "tamper-resistant locks" on exterior doors and windows that may be opened.

(5) Maintenance of an alarm system or equivalent "for promptly notifying the nearest responsible law-enforcement officers of an attempted or perpetrated robbery, burglary, or larceny.

(6) Other security devices and measures deemed to be appropriate by the institution's designated "security officer" given that institution's security environment and cost considerations.

These regulations affecting the businesses most closely analogous to quasi-financial institutions are contained in 12 C.F.R. §§ 21.3, 208.61, 326.3, and 568.3, copies of which are attached to this opinion.

The Legality and Enforceability of the Specific Security Measures Included Within The Proposed Ordinance.

Given this background, we can now assess the status of each of the specific items comprising the array of mandated security features enumerated in the proposed ordinance.

1. Limits on advertising upon windows and glass entrance and exit doors. The proposed ordinance states that this is designed "to allow a reasonable level of vision into the premises from outside." This appears reasonable on its face as a crime deterrent. We are, however, concerned about disparate treatment of quasi-financial institutions, as compared with conventional financial institutions (which are not required to implement a measure of this type), convenience stores, or other businesses

that may be prone to criminal activity and whose operations implicate security concerns, at least without further substantiation of the basis for this distinction.

2. Maintenance of a safe on the premises. We again believe that this is a reasonable crime deterrent. Federal regulations impose a similar requirement upon banks and savings associations. We also note that a comparable on-premises safe requirement has been imposed upon convenience food stores (§ 68-4.3-2-c., *Milwaukee Code of Ordinances*).

3. Provision of lighting for the parking area. We are skeptical of the "rational basis" for this measure, which is not required of any other business. We also note the practical difficulty of applying this requirement in those (frequent) situations where quasi-financial institutions share a common parking area with other businesses in a strip mall or other retail cluster.

4. Installation and maintenance of on-premises security cameras. Generally, this is a reasonable crime-deterrent measure, and one imposed by Federal regulation upon banks and savings associations. We would inquire as to the basis for the particular requirements in this proposed ordinance as contrasted to parallel (but different and somewhat less stringent) security-camera requirements imposed upon convenience food stores, § 68-4.3-2-e., *Milwaukee Code of Ordinances*.

5. Glass/transparent entrance and exit doors. This requirement is very similar to item #1, above, and we take the same position as we have expressed in that case.

6. Location of customer service area. This requirement is most likely within the reasonable scope of the City's police powers as a crime deterrent, although it does impinge more directly upon the conduct of the day-to-day business of a quasi-financial institution than is the case with store-design measures such as those presented in items ## 1 and 5, above. A parallel requirement has been imposed upon convenience food stores. § 68-4.3-2-a., *Milwaukee Code of Ordinances*. Again, banks and savings associations do not face similar requirements (unless it becomes part of an individual institution's own "security program"), and we are concerned that the legislative record contains no exposition of the basis for this distinction.

7. Perimeter and panic alarms. This is certainly a reasonable and effective crime deterrent. Convenience food stores are not subject to any such requirement by City ordinance, but banks, savings associations, and other conventional financial institutions are, which bolsters the conclusion that this requirement would likely pass muster as to legality and enforceability.

8. Requirement of two on-duty employees. This requirement applies, under the proposed ordinance, whenever a quasi-financial institution is open for business and for 15 minutes before opening and after closing. This is a very costly and restrictive mandate not imposed by the City upon any other business or industry, or applicable to other types of financial institutions (by Federal regulation) or to other cash businesses. There is also no clear relationship between this requirement and deterrence of criminal activity on or around the premises of quasi-financial institutions or (for that matter) any other discernible rational basis for it. As such, we believe that this item is both beyond the legitimate scope of the City's police powers and vulnerable to challenge on equal-protection grounds and is thus neither legal nor enforceable.

9. Requirement of an armored courier pickup for cash transfers of over $5,000. Our opinion on this item is identical to our opinion with respect to item #8, above. This is an extremely costly mandate, and one not imposed by City ordinance on any other type of business, including businesses such as jewelers, pawnbrokers, and other retailers that regularly deal in large amounts of cash or by Federal regulations upon conventional financial institutions.

10. Maintenance by quasi-financial institutions of lists of employee names, home addresses, and home telephone numbers. Our opinion as to this item is identical to that expressed with respect to items ## 8 and 9, above. This requirement additionally would endanger the personal safety of employees if lists fell into the wrong hands.

11. Mandatory robbery-prevention training. We believe that this requirement is directly related to deterrence of crime and is thus a legitimate objective of the City's police powers. Federal regulations require a variant of this requirement to be incorporated into the "security program" of each regulated conventional financial institution. We are concerned, however, that the City does not require managers or employees of any other line of business or industry (including other types of financial

institutions or cash-based retail outlets) to obtain such training and believe that this disparity implicates potential equal-protection concerns.

We reiterate that the most serious problem affecting the status of this proposed ordinance is the virtual lack of a legislative record in the ordinance file. In our opinion, many of the questions that we have raised might be sufficiently resolved by augmentation of that record with additional evidence and appropriate legislative findings. Please contact this office if you have any additional questions as to the legality or enforceability of this proposed ordinance. We will be pleased to consult with you on any further development of its provisions.

Very truly yours,

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May 7, 2003

Craig Zetley, Chairman
Board of Zoning Appeals
809 North Broadway, 1st Floor
Milwaukee, WI 53202

Re: Payday Loan or Title Loan Agencies
BOZA Case Numbers 24480, 24481, and 24482

Dear Mr. Zetley:

In your letter of February 27, 2003, you have requested the advice of this office concerning the range of information that can be considered by the Board of Zoning Appeals ("Board") when interpreting and applying the criteria set forth in the Zoning Code ("Code") for issuance of special-use permits to "payday loan" or "title loan" agencies (sometimes collectively referred to in this opinion as the "payday loan" industry). Section 295-311-2-d-1 of the Code, sets forth the following as one of the criteria applicable to evaluation of any application for a special-use permit:

> Protection of Public Health, Safety, and Welfare. The use will be designed, located, and operated in a manner so that the public health, safety, and welfare is protected.

The question concerning the scope of the Board's authority has arisen as a consequence of certain business practices associated with the operation of "payday loan" or "title loan" agencies, which have engendered controversy. These include such matters as lending practices, interest rates, and loan "rollovers." Your question is directed at whether such matters may be considered by the Board as factors governing its determination on special-use permit applications submitted by such businesses. We have additionally reviewed correspondence that has been transmitted to you by counsel for Payday Loan Store of Wisconsin, Inc., an applicant for three special-use permits that are now pending before the Board, and for Legal Action of Wisconsin, Inc., an opponent of the pending applications. Given that these permit applications refer to "payday loan" agencies, our discussion will focus upon that line of business; we note, however, that we are not aware of any distinction between "payday loan" and "title loan" agencies with respect to the specific issue raised by your letter of February 27, 2003.

A "payday loan" agency (more precisely entitled a "deferred deposit" agency) is a business that provides short-term loans to individuals at very high rates of interest. Typically, in a "payday loan" arrangement, the following steps occur:

1. The borrower will provide to the lender items such as a paycheck stub, photo identification, and/or a recent bank statement;

2. The borrower then completes a loan application and submits a post-dated check to the lender and in return receives cash proceeds of the loan, which will be less than the face amount of the check;

3. The post-dated check is then held by the lender until the loan is due—usually a period of two weeks or thereabouts reflecting the fact that such loans are generally intended to get the borrower through the period until his or her next payday (hence the term "payday loan"); and

4. At the due date, the lender will deposit the check unless the borrower is able to pay the loan in full (generally the face amount of the check) at that time or unless the lender and the borrower agree to "roll over" the loan for an additional period.

The "payday loan" industry is regulated by the Wisconsin Department of Financial Institutions under § 138.09, *Wis. Stats.* and other applicable statutes, particularly the Wisconsin Consumer Act (chs. 421-427, *Wis. Stats.*) and its implementing regulations, which may be found at Wis. Adm. Code ch. DFI-Bkg 80. One noteworthy feature of this regulatory scheme is that loans made thereunder that are either "precomputed" or "based upon the actuarial method," after October 31, 1984, are not subject to any maximum interest-rate limit. § 138.09(7)(bp), *Wis. Stats.*

With the foregoing in mind, we now turn to a discussion of the applicable legal principles. The pending permit applications request the issuance of a special-use permit. A "special use" is defined in § 295-102-619 of the Code as follows:

> SPECIAL USE means a use which is generally acceptable in a particular zoning district but which, because of its characteristics and the characteristics of the zoning district in which it would be located, requires review on a case-by-case

basis to determine whether it should be permitted, conditionally permitted, or denied.

Thus, a "payday loan" agency is a lawful use, the operation of which both the State and the City have seen fit to permit. Whether such a use will, in fact, be permitted to operate at any particular location is subject to case-by-case review by the Board, in accordance with the special-use permit criteria set forth in § 295-311-2-d of the Code. The key in this respect is case-by-case review. If a type of use is designated as a "special use" in a particular zoning district, the Board cannot simply permit or ban all such uses on a blanket basis, but must instead perform that review with respect to each application, as directed by the Code.

The extent of the Board's discretion in evaluating special-use permit applications submitted by "payday loan" agencies and similar businesses is governed by the measure of the City's "police power." The Code (ch. 295, Milwaukee Code of Ordinances) represents a traditional and extremely well-established vehicle for the exercise of police powers vested in the City. *See* § 62.11(5), *Wis. Stats.*; *Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56, 235 Wis.2d 409, 611 N.W.2d 693; *State ex rel. American Oil Company v. Bessent*, 27 Wis.2d 537, 135 N.W.2d 317 (1965). Indeed, the adoption of a comprehensive zoning code represents the primary vehicle by which a municipality promotes the public health, safety, and welfare through regulation of the use of land within its jurisdiction. *Village of Euclid, OH v. Ambler Realty Company*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *City of Milwaukee v. Leavitt*, 31 Wis.2d 72, 142 N.W.2d 169 (1966). Notably, the literal text of § 295-311-2-d-1 of the Code, setting forth the special-use criterion referenced in your letter of February 27, 2003 is stated in explicit police-power terms—*i.e.*, whether the use in question "will be designed, located, and operated in a manner so that the public health, safety, and welfare is protected." The Board has broad discretion to hear testimony and apply this criterion to the full extent necessary to assure protection of the public health, safety, and welfare. The City, in the exercise of its police-power, has delegated this authority to the Board.

The question before us thus concerns the legitimate extent of the Board's authority to regulate the operations of the "payday loan" industry as an exercise of its delegated police powers and under the "public welfare" criterion of the special-use permit ordinance, § 295-311-2-d-1 of the Code. We have found no cases directly relevant to this inquiry, but we can provide some guidance through the application of well-established principles.

It cannot be fairly disputed (and counsel for Payday Loan Store of Wisconsin, Inc. acknowledges) that the Board may exercise such regulatory authority over traditional land-use criteria, including (but not necessarily limited to) those enumerated in the special-use conditions set forth by §§ 295-311-2-d-2 through 2-d-4 and 295-311-e of the Code. It also cannot be fairly disputed (and counsel for Payday Loan Store of Wisconsin, Inc. also acknowledges) that the definition of a "special use" set forth in § 295-201-619 of the Code authorizes the Board "to conduct a location specific inquiry to see if the proposed special use creates conflicts with the characteristics of the location and surrounding neighborhood."

The difficulty is that your inquiry reaches beyond consideration of traditional land-use criteria or other site-specific considerations. It implicates the broader question of whether (and if so, to what extent) the Board may exercise its delegated police powers to regulate the lending practices and other business conduct of the "payday loan" industry—and, if it disapproves of that conduct, whether it may consequently deny or limit the issuance of special-use permits to applicants from that industry. This question is far more problematic, particularly as this industry is, as earlier noted, a lawful enterprise that the State has not chosen to prohibit or (in the case of interest rates charged on loans made after October 31, 1984) even to limit. Thus, we must consider whether the Board may intervene in an area where the State has chosen not to.

The available case law provides no reliable guidance applicable to this specific context. We have found two Wisconsin cases supporting a broad construction of the type of "public welfare" criterion implicated here. In those cases, however, the secondary impacts of the land use in question were significantly more tangible and directly applicable to the general public than the comparable adverse secondary impacts here (*i.e.*, the risk of loan defaults by "payday loan" customers and the resultant financial distress and potential bankruptcies).

First, we consider the decision of the Wisconsin Supreme Court in *Edward Kraemer & Sons, Inc. v. Sauk County Board of Adjustment*, 183 Wis.2d 1, 515 N.W.2d 256 (1994). In that case, the Court upheld the board's broad discretion to consider generalized effects on public welfare in its evaluation of an application submitted by a mining corporation for a "special exception" that would authorize it to extract minerals on land zoned for agricultural use. The Court specifically rejected the contention that the board's discretion was limited to consideration of only the specific standards enumerated in the zoning ordinance applicable to "mining extraction" activities and ruled that the board may also consider standards of general applicability that may be pertinent to consideration of the impact of a proposed use upon the "public welfare." In this respect, the Court stated as follows:

> . . . [T]he "public health, safety and welfare" standard, is a general standard that provides the Board with flexibility and discretion to consider how a proposed special exception could affect the public welfare. The standard allows the Board to consider potential harm to individuals living near the proposed mineral extraction site, including exposure to health hazards from the dust and threats to safety posed by blasting. The public health, safety and welfare standard is also broad enough to enable the Board to consider the generalized effects on the public welfare that concern the Board in this case—harm to the public that would result from partial destruction of a natural area that both permit supporters and opponents agree is of great geologic importance.

183 Wis.2d at 11, 515 N.W.2d at 260. The court also rejected the contention that the application of the "public welfare" standard by the board constituted an impermissible delegation of legislative authority. *Id.*, 183 Wis.2d at 14-15, 515 N.W.2d at 261-262. The environmental harm described by the Court, however, was more directly related to the proposed land use and more likely to affect the general public in the vicinity of the mine, than the risks of harm posed by the grant of a special-use permit to a "payday loan" agency.

In a more recent case the Wisconsin Court of Appeals confirmed that the "general welfare" component of the criteria applicable to special use permits may be broadly construed by boards of appeal to include consideration of positive, community-wide secondary impacts of a proposed use. *Sills v. Walworth County Land Management Committee*, 2002 WI 111, 254 Wis. 2d 538, 648 N.W.2d 878 [petition for review denied 2002 WI 109, 254 Wis. 2d 261 648 N.W.2d 477] dealt with the review of the grant of a conditional use permit by the Walworth County Land Management Committee. The facts in that case involve a request to permit the creation and operation of a public museum at a historic estate located on Geneva Lake. In reaching its decision to grant the conditional use permit, the Walworth County Land Management Committee considered not only traditional zoning factors such as traffic and impact upon property values but also the historic benefit of preserving the site as a public museum.

The Court of Appeals, in upholding the Committee's decision concluded that "the phrase general welfare" has a broad meaning encompassing a wide range of areas." 648 N.W.2d at 883. The Court went on to say that it was " . . . persuaded that the general welfare is promoted by the preservation of historical sites and maintenance of museums to educate the public and to inspire patriotism and respect for our history." 648 N.W.2d at 884. As is the case with the Code, the

Walworth County ordinance set forth as its stated purpose the promotion of the general welfare of Walworth County, including comfort, health, safety, prosperity and aesthetics. 648 N.W.2d at 883. The decision supports a broad interpretation of the general welfare and acknowledges that "the weight to be accorded all of this evidence was within the discretion of the Committee." 648 N.W.2d at 885, citing *Delta Biological Resources Inc. v. Bd. of Zoning Appeals*, 160 Wis. 2d 905, 915, 467 N.W.2d 164 (Ct. App. 1991).

Similarly, zoning boards of appeal have been accorded considerable discretion to regulate matters that influence the physical and visual environment, such as aesthetics and architectural design. *See, e.g., Gabriel v. Village of Wind Point*, 157 Wis.2d 668, 460 N.W.2d 800 (Ct. App. 1990); *Racine County v. Plourde*, 38 Wis.2d 403, 157 N.W.2d 591 (1968); *State ex rel. Saveland P.A. Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955); McQuillin, *The Law of Municipal Corporations* (2000 rev.), Vol. 8 at §§ 25.29-25.31. And, in a few contexts, zoning regulations excluding certain businesses from particular zoning districts or sections of a local jurisdiction have been upheld on the basis of proven adverse secondary impacts upon the general public in those specific geographical areas. Such situations most frequently arise with respect to regulation of the location of adult bookstores and movie houses or other adult businesses. *See, e.g., City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); however, the permissible scope of such regulation may not extend so far as to ban an adult or other lawful use from locating anywhere within a jurisdiction. *Town of Wayne v. Bishop*, 210 Wis. 218, 565 N.W.2d 201 (Ct. App. 1997).

Thus, while the available case law seems to accord significant discretion to the Board in applying the "public welfare" component of the special-use permit criteria contained in § 295-311-2-d-1 of the Code, it does not indicate that that discretion is unlimited or that it might extend to regulation of a "payday loan" agency's lending and other business practices. Such matters have no bearing upon the appearance or physical environment of the locations in which "payday loan" agencies choose to operate; nor do they affect the compatibility between those agencies and neighboring land uses. Nor does this situation resemble the adult-use context in the sense of implicating proven adverse secondary impacts upon the general public arising from the very nature of the business and resulting from its location in particular zoning districts or areas of the jurisdiction. While adverse secondary impacts may certainly be felt by that segment of the "payday loan" industry's customer base that falls into default on their loan-repayment obligations, there is, to our knowledge, no proof demonstrating that the existence or operation of the industry, in and of itself, is somehow inimical to the interests of the general public. Indeed, it can be argued to the contrary—*i.e.*, that the "payday loan" industry fills a needed market niche in

providing short-term credit to a class of borrowers who, for a variety of reasons, find such credit to be necessary or useful, even at very high rates of interest and other loan charges.

A second item of concern is the significant possibility that a reviewing court would find State preemption of regulation of the "payday loan" industry's business practices. The police power does not extend to matters preempted by State statute or regulation. Municipalities may not pass ordinances or make regulations that "infringe the spirit of a state law or are repugnant to the general power of the state." *Anchor Savings & Loan Assn. v. Madison Equal Opportunities Commission*, 120 Wis.2d 391, 396, 355 N.W.2d 234, 237 (1984); *Fox v. City of Racine*, 225 Wis. 542, 545, 275 N.W. 513, 514 (1937). Further, "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden." *Fox v. City of Racine, supra*, 225 Wis. at 545, 275 N.W. at 514; *DeRosso Landfill Company, Inc. v. City of Oak Creek*, 200 Wis.2d 642, 651, 547 N.W.2d 770, 773 (1996); *Wisconsin's Environmental Decade v. Department of Natural Resources*, 85 Wis.2d 518, 529, 271 N.W.2d 69, 74 (1978).

In this instance, the legislature has passed a comprehensive statutory scheme for the regulation of all branches of the credit industry (including its "payday loan" component), including provisions for regulation of rates of interest (ch. 138, *Wis. Stats.*) and of the industry's consumer-lending practices (chs. 421-427, *Wis. Stats.*). Significantly, in § 138.09(7)(bp), *Wis. Stats.*, the legislature made, and consciously expressed, its choice not to impose any fixed maximum rate of interest upon the precise categories of loans most commonly offered by "payday loan" agencies. This statutory scheme is supplemented by a regulatory regime under the auspices of the Department of Financial Institutions. In *Anchor Savings & Loan Assn. v. Madison Equal Opportunities Commission, supra*, the Wisconsin Supreme Court ruled that the City of Madison did not have the power to regulate the credit practices of a state-chartered savings and loan association, invalidating an ordinance barring discrimination in mortgage lending on the basis of marital status on the grounds that it was pre-empted by state legislation. Notably, this included the legislature's adoption of "a complex and comprehensive statutory structure dealing with all aspects of credit and lending in ch. 138, Stats., which governs rates of interest, variable rate contracts, federal rate parity, residential mortgages and credit discrimination." 120 Wis.2d at 397-398, 355 N.W.2d at 238. The Supreme Court also specifically rejected the contention that the Madison ordinance came within the City's "home-rule" powers under Art. XI § 3(1). Not coincidentally, the subject matter of the *Anchor Savings & Loan* case is closely related to that encompassed by this opinion, and the source of the State preemption in that case is one of the

very same chapters of the Wisconsin Statutes (ch. 138) implicated in the regulation of the credit practices of the "payday loan" industry.

We have also searched for non-Wisconsin cases that might provide guidance on the issue of the application of zoning regulations to the "payday loan" industry, and have found two such cases, both from Missouri. The decisions in these cases, however, are not directed to the specific inquiry raised by your letter and are thus of limited value. In *State ex rel. Sunshine Enterprises of Missouri, Inc. v. Board of Adjustment of the City of St. Ann*, 64 S.W.3d 210 (Mo. Sup. Ct. 2002), the Missouri Supreme Court invalidated a local zoning ordinance prohibiting the location of "short-term loan establishments" anywhere within the City of St. Ann, on the grounds that it conflicted with a state statute classifying "personal services" businesses and financial institutions as "permitted uses" within "general commercial districts." Although Wisconsin appears to have not adopted a comparable statute, this decision is consistent with the general principle, noted above, that "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required." In *Missouri Title Loans, Inc. v. City of St. Louis Board of Adjustment*, 62 S.W.3d 408 (Mo. Ct. App. E.D. 2001), the Missouri Court of Appeals upheld a determination by the board to deny a conditional-use permit to a "title loan" agency on the basis of an evidentiary record indicating that the grant of that permit would decrease neighborhood property values, increase traffic, and attract undesirable business invitees. Such a determination, however, was not premised upon a general "public welfare" conditional-use criterion comparable to § 295-311-2-d-1 of the Code and would be more akin to an application of a protection-of-property criterion such as that found in § 295-311-2-d-2 of the Code.

Thus, while we do not necessarily agree with the suggestion of counsel for Payday Loan Store of Wisconsin, Inc. that the "public welfare" criterion set forth in § 295-311-2-d-1 of the Code refers only to matters related to "land use," we do not believe that the scope of that criterion is unlimited. The text of the Zoning Code states that a special-use permit shall not be granted unless the Board makes a finding that the proposed use will be "operated in a manner that the public health, safety, and welfare is protected." That text does encompass not only "land use" issues, but also those matters within the traditional reach of the City's police powers under § 62.11(5) *Wis. Stats*. We caution, however, that there is a significant risk that it would not encompass any attempt to regulate the lending or other business practices of the "payday loan" industry, and that the courts may very well invalidate any determination by the Board upon an application submitted by a "payday loan" agency based in whole or in part upon any such attempt. Further, we believe that any such attempt may be preempted by existing State

legislation and administrative regulation applicable to regulation of the credit practices and related operations of the "payday loan" industry.

If you have any further questions concerning this matter, please contact this office for further guidance.

Very truly yours,

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SSM:lmb
1082-2003-760:67047

CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER I--COMPTROLLER OF THE CURRENCY, DEPARTMENT OF THE TREASURY
PART 21--MINIMUM SECURITY DEVICES AND PROCEDURES, REPORTS OF SUSPICIOUS
ACTIVITIES, AND BANK SECRECY ACT COMPLIANCE PROGRAM
SUBPART A--MINIMUM SECURITY DEVICES AND PROCEDURES
Current through July 22, 2004; 69 FR 43774

§ 21.3 Security program.

(a) Contents of security program. The security program shall:

(1) Establish procedures for opening and closing for business and for the safekeeping of all currency, negotiable securities, and similar valuables at all times;

(2) Establish procedures that will assist in identifying persons committing crimes against the institution and that will preserve evidence that may aid in their identification or conviction; such procedures may include, but are not limited to:

(i) Using identification devices, such as prerecorded serial-numbered bills, or chemical and electronic devices;

(ii) Maintaining a camera that records activity in the banking office; and

(iii) Retaining a record of any robbery, burglary or larceny committed or attempted against a banking office;

(3) Provide for initial and periodic training of employees in their responsibilities under the security program and in proper employee conduct during and after a robbery; and

(4) Provide for selecting, testing, operating and maintaining appropriate security devices, as specified in paragraph (b) of this section.

(b) Security devices. Each national bank shall have, at a minimum, the following security devices:

(1) A means of protecting cash or other liquid assets, such as a vault, safe, or other secure space;

(2) A lighting system for illuminating, during the hours of darkness, the area around the vault, if the vault is visible from outside the banking office;

(3) Tamper-resistant locks on exterior doors and exterior windows designed to be opened;

(4) An alarm system or other appropriate device for promptly notifying the nearest responsible law enforcement officers of an attempted or perpetrated robbery, burglary or larceny; and

(5) Such other devices as the security officer determines to be appropriate, taking into consideration:

(i) The incidence of crimes against financial institutions in the area;

(ii) The amount of currency or other valuables exposed to robbery, burglary, or larceny;

(iii) The distance of the banking office from the nearest responsible law enforcement officers and the time required for such law enforcement officers ordinarily to arrive at the banking office;

(iv) The cost of the security devices;

(v) Other security measures in effect at the banking office; and

(vi) The physical characteristics of the banking office structure and its surroundings.

<General Materials (GM) - References, Annotations, or Tables>

12 C. F. R. § 21.3

12 CFR § 21.3

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER II--FEDERAL RESERVE SYSTEM
SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
PART 208--MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)
SUBPART F--MISCELLANEOUS REQUIREMENTS
Current through July 22, 2004; 69 FR 43774

§ 208.61 Bank security procedures.

(a) Authority, purpose, and scope. Pursuant to section 3 of the Bank Protection Act of 1968 (12 U.S.C. 1882), member banks are required to adopt appropriate security procedures to discourage robberies, burglaries, and larcenies, and to assist in the identification and prosecution of persons who commit such acts. It is the responsibility of the member bank's board of directors to comply with the provisions of this section and ensure that a written security program for the bank's main office and branches is developed and implemented.

(b) Designation of security officer. Upon becoming a member of the Federal Reserve System, a member bank's board of directors shall designate a security officer who shall have the authority, subject to the approval of the board of directors, to develop, within a reasonable time, but no later than 180 days, and to administer a written security program for each banking office.

(c) Security program.

(1) The security program shall:

(i) Establish procedures for opening and closing for business and for the safekeeping of all currency, negotiable securities, and similar valuables at all times;

(ii) Establish procedures that will assist in identifying persons committing crimes against the institution and that will preserve evidence that may aid in their identification and prosecution. Such procedures may include, but are not limited to: maintaining a camera that records activity in the banking office; using identification devices, such as prerecorded serial-numbered bills, or chemical and electronic devices; and retaining a record of any robbery, burglary, or larceny committed against the bank;

(iii) Provide for initial and periodic training of officers and employees in their responsibilities under the security program and in proper employee conduct during and after a burglary, robbery, or larceny; and

(iv) Provide for selecting, testing, operating, and maintaining appropriate security devices, as specified in paragraph (c)(2) of this section.

(2) Security devices. Each member bank shall have, at a minimum, the following security devices:

(i) A means of protecting cash and other liquid assets, such as a vault, safe, or other secure space;

(ii) A lighting system for illuminating, during the hours of darkness, the area around the vault, if the vault is visible from outside the banking office;

(iii) Tamper-resistant locks on exterior doors and exterior windows that may be opened;

(iv) An alarm system or other appropriate device for promptly notifying the nearest responsible law enforcement officers of an attempted or perpetrated robbery or burglary; and

(v) Such other devices as the security officer determines to be appropriate, taking into consideration: the incidence of crimes against financial institutions in the area; the amount of currency and other valuables exposed to robbery, burglary, or larceny; the distance of the banking office from the nearest responsible law enforcement officers; the cost

of the security devices; other security measures in effect at the banking office; and the physical characteristics of the structure of the banking office and its surroundings.

(d) Annual reports. The security officer for each member bank shall report at least annually to the bank's board of directors on the implementation, administration, and effectiveness of the security program.

(e) Reserve Banks. Each Reserve Bank shall develop and maintain a written security program for its main office and branches subject to review and approval of the Board.

< General Materials (GM) - References, Annotations, or Tables >

12 C. F. R. § 208.61

12 CFR § 208.61

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER III--FEDERAL DEPOSIT INSURANCE CORPORATION
SUBCHAPTER B--REGULATIONS AND STATEMENTS OF GENERAL POLICY
PART 326--MINIMUM SECURITY DEVICES AND PROCEDURES AND BANK SECRECY ACT
[FN1] COMPLIANCE
SUBPART A--MINIMUM SECURITY PROCEDURES
Current through July 22, 2004; 69 FR 43774

§ 326.3 Security program.

(a) Contents of security program. The security program shall:

(1) Establish procedures for opening and closing for business and for the safekeeping of all currency, negotiable securities, and similar valuables at all times;

(2) Establish procedures that will assist in identifying persons committing crimes against the bank and that will preserve evidence that may aid in their identification and prosecution; such procedures may include, but are not limited to:

(i) Retaining a record of any robbery, burglary, or larceny committed against the bank;

(ii) Maintaining a camera that records activity in the banking office; and

(iii) Using identification devices, such as prerecorded serial-numbered bills, or chemical and electronic devices;

(3) Provide for initial and periodic training of officers and employees in their responsibilities under the security program and in proper employee conduct during and after a robbery, burglary or larceny; and

(4) Provide for selecting, testing, operating and maintaining appropriate security devices, as specified in paragraph (b) of this section.

(b) Security devices. Each insured nonmember bank shall have, at a minimum, the following security devices:

(1) A means of protecting cash or other liquid assets, such as a vault, safe, or other secure space;

(2) A lighting system for illuminating, during the hours of darkness, the area around the vault, if the vault is visible from outside the banking office;

(3) An alarm system or other appropriate device for promptly notifying the nearest responsible law enforcement officers of an attempted or perpetrated robbery or burglary;

(4) Tamper-resistant locks on exterior doors and exterior windows that may be opened; and

(5) Such other devices as the security officer determines to be appropriate, taking into consideration:

(i) The incidence of crimes against financial institutions in the area;

(ii) The amount of currency or other valuables exposed to robbery, burglary, and larceny;

(iii) The distance of the banking office from the nearest responsible law enforcement officers;

(iv) The cost of the security devices;

(v) Other security measures in effect at the banking office; and

(vi) The physical characteristics of the structure of the banking office and its surroundings.

< < PART 326--MINIMUM SECURITY DEVICES AND PROCEDURES AND BANK SECRECY ACT
[FN1] COMPLIANCE > >

Westlaw.

[FN1] In its original form, subchapter II of chapter 53 of Title 31, United States Code was part of Pub.L. 91-508 which requires recordkeeping for and reporting of currency transactions by banks and others and is commonly known as the "Bank Secrecy Act."

< General Materials (GM) - References, Annotations, or Tables >

12 C. F. R. § 326.3

12 CFR § 326.3

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
CHAPTER V--OFFICE OF THRIFT SUPERVISION, DEPARTMENT OF THE TREASURY
PART 568--SECURITY PROCEDURES UNDER THE BANK PROTECTION ACT
Current through July 22, 2004; 69 FR 43774

§ 568.3 Security program.

(a) Contents of security program. The security program shall:

(1) Establish procedures for opening and closing for business and for the safekeeping of all currency, negotiable securities, and similar valuables at all times;

(2) Establish procedures that will assist in identifying persons committing crimes against the association and that will preserve evidence that may aid in their identification and prosecution. Such procedures may include, but are not limited to:

(i) Maintaining a camera that records activity in the office;

(ii) Using identification devices, such as prerecorded serial-numbered bills, or chemical and electronic devices; and

(iii) Retaining a record of any robbery, burglary, or larceny committed against the association;

(3) Provide for initial and periodic training of officers and employees in their responsibilities under the security program and in proper employee conduct during and after a burglary, robbery, or larceny; and

(4) Provide for selecting, testing, operating and maintaining appropriate security devices, as specified in paragraph (b) of this section.

(b) Security devices. Each savings association shall have, at a minimum, the following security devices:

(1) A means of protecting cash and other liquid assets, such as a vault, safe, or other secure space;

(2) A lighting system for illuminating, during the hours of darkness, the area around the vault, if the vault is visible from outside the office;

(3) Tamper-resistant locks on exterior doors and exterior windows that may be opened;

(4) An alarm system or other appropriate device for promptly notifying the nearest responsible law enforcement officers of an attempted or perpetrated robbery or burglary; and

(5) Such other devices as the security officer determines to be appropriate, taking into consideration:

(i) The incidence of crimes against financial institutions in the area;

(ii) The amount of currency and other valuables exposed to robbery, burglary, or larceny;

(iii) The distance of the office from the nearest responsible law enforcement officers;

(iv) The cost of the security devices;

(v) Other security measures in effect at the office; and

(vi) The physical characteristics of the structure of the office and its surroundings.

<General Materials (GM) - References, Annotations, or Tables>

12 C. F. R. § 568.3

12 CFR § 568.3

END OF DOCUMENT

Westlaw.