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Community Reinvestment Act Regulations

AGENCY: Office of Thrift Supervision, Treasury (OTS).

ACTION: Final rule.

SUMMARY: In this final rule, OTS is revising the definition of ''small savings association'' under its Community Reinvestment Act (CRA) regulations. Under the revised definition, ''small savings association'' means a savings association with total assets of less than $1 billion. This definition will apply without regard to any holding company assets. This change will permit additional small savings associations to be subject to streamlined examinations as well as reduced data collection and reporting burdens under the CRA. This change is consistent with OTS's ongoing efforts to identify and reduce regulatory burden, particularly for smaller institutions. The final rule will not relieve small savings associations from other existing and ongoing compliance requirements or legal obligations under the CRA. At the same time, OTS is withdrawing other changes to the CRA regulations that had been proposed.

DATES: This final rule is effective October 1, 2004.

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SUPPLEMENTARY INFORMATION:

Introduction

After considering the comments on a joint advance notice of proposed rulemaking (ANPR) published on July 19, 2001 (66 FR 37602), and a joint notice of proposed rulemaking (NPR) published on February 6, 2004 (69 FR 5729), OTS is revising its regulation implementing the CRA (12 U.S.C. 2901 *et seq.*). This final rule revises the definition of ''small savings association'' to mean a savings association with total assets of less than $1 billion (without regard to any holding company assets). At the same time, OTS is withdrawing other changes to the CRA regulations that had been proposed in the NPR.

Background

In 1977, Congress enacted the CRA to encourage insured banks and thrifts to help meet the credit needs of their entire communities, including low- and moderate-income areas, consistent with safe and sound lending practices. In the CRA, Congress found that regulated financial institutions are required to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business, and that the convenience and needs of communities include the need for credit as well as deposit services. The CRA plays an important role in improving access to credit among under-served rural and urban communities.

On May 4, 1995, OTS, along with the Office of Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Board of Governors of the Federal Reserve System (FRB) (collectively, the banking agencies) adopted major amendments to regulations implementing the CRA (60 FR 22156). In connection with that rulemaking, the banking agencies received a large number of comments from small institutions seeking regulatory relief. These commenters stated that they incurred significant regulatory burdens and costs from having to document CRA performance, and that these burdens and costs impeded their ability to improve their CRA performance. The 1995 regulations reflected the banking agencies' objectives that the CRA regulations provide for performance-based assessment standards that minimize compliance burdens while stimulating improved performance.

Under the 1995 rule, an institution is considered small if, at the end of either of the two previous years, it had less than $250 million in assets and was independent or affiliated with a holding company with total bank and thrift assets of less than $1 billion. Under the regulations, a small institution's CRA performance is evaluated under a streamlined test that focuses primarily on lending. The test considers the institution's loan-to-deposit ratio; the percentage of loans in its assessment areas; its record of lending to borrowers of different income levels and businesses and farms of different sizes; the geographic distribution of its loans; and its record of taking action, if warranted, in response to written complaints about its performance in helping to meet credit needs in its assessment areas.

The 2001 ANPR

In the 1995 rulemaking, the banking agencies stated that they intended to review the CRA regulations in 2002. The banking agencies indicated that the regulations would be reviewed for their effectiveness in placing performance over process, promoting consistency in evaluations, and eliminating unnecessary burden. 60 FR 22156, 22177 (1995). The banking agencies initiated this review in July 2001 with the publication in the **Federal Register** of a joint ANPR (66 FR 37602). The banking agencies solicited comment on the fundamental issue of whether any change to the regulations would be beneficial or warranted. They specifically requested comment on eight discrete aspects of the regulations. One of those aspects involved small institutions and the streamlined small institution evaluation.

The ANPR explained that some had suggested that the asset thresholds for being considered a small institution are too low. Others had asserted that holding company assets are irrelevant—if an institution has less than $250 million in assets, it should be considered small even if it is affiliated with a large holding company. Still others had suggested that holding company assets are relevant only if the holding company provides support for CRA activities or otherwise directs the CRA activities of an institution.

The ANPR asked several questions concerning the small institution performance standards, including:

• Do the provisions relating to asset size and holding company affiliation provide a reasonable and sufficient standard for defining ''small institutions'' that are eligible for the streamlined small institution evaluation test? If so, why? If not, how should the regulations be revised?

• Are the small institution performance standards effective in evaluating such institutions' CRA performance? If so, why? If not, how should the regulations be revised?

Comments on the 2001 ANPR

The banking agencies received about 400 comment letters on the ANPR. As summarized in the 2004 NPR, most of these comments were submitted by banks, thrifts, and their trade associations (''financial institutions''), and by local and national nonprofit community advocacy and community development organizations (''community organizations'').

Most small institutions commented that they were satisfied that qualifying under the ''small institution'' definition substantially reduced their CRA compliance burden. Many commenters, however, argued that the small institution performance standards should be available to a larger number of institutions. Generally, these commenters raised many of the same concerns raised in the 1995 rulemaking. Primarily, these commenters argued that the regulatory burden of the CRA rules impedes smaller banks from improving their CRA performance. Many financial institutions suggested that, to reduce undue burden, the agencies should raise significantly the small institution asset threshold and eliminate or significantly raise the holding company limitation. These commenters cited the burdens on retail institutions that are subject to the ''large institution'' CRA tests because they slightly exceed the asset threshold for small institutions. Commenters asserted that these institutions have difficulty achieving a ''low satisfactory'' or better rating on the investment test and, as a result, have difficulty achieving an ''outstanding'' rating overall. Commenters added that these institutions encounter serious challenges competing with larger institutions for suitable investments and, as a result, sometimes invest in activities inconsistent with their business strategy, their own best financial interests, or community needs. Commenters also asserted that data collection and reporting are proportionally more burdensome for institutions within a range moderately exceeding the threshold than for institutions far above the threshold.

Some commenters asserted that upon exceeding the $250 million threshold, institutions face a threefold increase in compliance costs for CRA due to the need for new personnel, data collection and reporting costs, and the particular burdens imposed by the investment test applicable to large retail institutions. They asserted that raising the existing asset threshold for small institutions would be consistent with the banking agencies' intent in 1995 to avoid regulatory burdens counterproductive to the objectives of the CRA. They also questioned the benefit of reporting small business and small farm loan data, especially by institutions that serve limited geographic areas. Some commenters suggested that institutions be relieved of reporting such data and that examiners instead sample files or review only the data gathered and maintained by institutions pursuant to other laws or procedures (for example, the Call Report or Thrift Financial Report).

Financial institutions also commented that changes in the industry had rendered the threshold out-of-date. They pointed to the consolidation in the banking and thrift industries through mergers and acquisitions, and the growing gap between ''mega-institutions'' and those under $1 billion in assets. They noted that the number of institutions considered small, and the percentage of overall bank and thrift assets held by those institutions, has decreased significantly since the 1995 revisions. The financial institutions suggested raising the small institution asset-size threshold from $250 million to amounts ranging from $500 million to $2 billion. They also generally suggested eliminating or raising the $1 billion holding company threshold. They contended that affiliation with a large holding company does not enable an otherwise small institution to perform any better under the large retail institution test than a small institution without such an affiliation.

Community organizations opposed changing the definition of ''small institution.'' These commenters were primarily concerned that reducing the number of institutions subject to the large retail institution test—and, therefore, the investment test—would reduce the level of investment in low- and moderate-income urban and rural communities. Community organizations were also concerned that the reduction in publicly available small business and small farm loan data would follow a reduction in the number of large retail institutions.

The 2004 NPR

In the 2004 NPR, the banking agencies considered the institution asset-size and holding company asset-size thresholds in light of these comments. The NPR explained that the regulations distinguish between small and large institutions for several important reasons. The NPR noted that institutions' capacities to undertake certain activities, and the burdens of those activities, vary by asset size, sometimes disproportionately. Examples of such activities include identifying, underwriting, and funding qualified equity investments, and collecting and reporting loan data. The case for imposing certain burdens is sometimes more compelling with larger institutions than with smaller ones. For instance, the number and volume of loans and services generally tend to increase with asset size, as do the number of people and areas served, although the amount and quality of an institution's service to its community certainly is not always directly related to its size. Furthermore, evaluation methods appropriately differ depending on institution size.

The NPR further explained that the banking agencies originally included the holding company limitation to reflect the ability of a holding company of a certain size (over $1 billion) to support a bank or thrift subsidiary's compliance activities. The NPR noted, however, that anecdotal evidence suggested that a relatively small institution with a sizable holding company often finds addressing its CRA responsibilities no less burdensome than does a similarly-sized institution without a sizable holding company. Thus, the banking agencies proposed to eliminate the holding company limitation on small institution eligibility.

The preamble to the NPR indicated that several factors led the banking agencies to propose raising the asset threshold. First, with the increase in consolidation at the large end of the asset size spectrum, the gap in assets between the smallest and largest institutions has grown substantially since the line was drawn at $250 million in 1995. Because some compliance costs are fixed, the compliance burden on institutions in a range moderately exceeding any threshold, measured as the cost of compliance relative to asset size, generally will be proportionally higher than the burden on institutions far above the same threshold. Yet, the asset gap between the smallest institutions above the threshold and the largest institutions continues to grow. As a result, the compliance burden on the smallest institutions above the threshold has grown disproportionately. Second, the number of institutions defined as ''small'' has declined by over 2,000 since the threshold was set in 1995, and their percentage of industry assets has declined substantially. Third, some asset growth since 1995 has been due to inflation, not real growth. Fourth, the banking agencies are committed to reducing burden where feasible and appropriate.

The NPR proposed to raise the small institution asset threshold to $500 million, without reference to holding company assets. The banking agencies calculated that raising the asset threshold to $500 million and eliminating the holding company limitation would reduce the number of institutions subject to the large retail institution test but decrease the percentage of industry assets subject to the large retail institution test only slightly.

The banking agencies explained that the proposed changes would not diminish in any way the obligation of all insured depository institutions subject to CRA to help meet the credit needs of their communities. Instead, the proposed changes were meant only to address the regulatory burdens associated with evaluating institutions under CRA. The NPR sought comment on whether the proposal would improve the effectiveness of CRA evaluations, while reducing unwarranted burden.

The NPR also proposed several additional changes to the CRA regulations involving institutions or affiliates that engage in discriminatory, illegal, or abusive credit practices and amending the specifications for the CRA Disclosure Statements that each agency banking prepares annually for each institution that reports data. The preamble to the NPR further indicated that the banking agencies would begin using publicly available HMDA and CRA data to disclose additional information in the public CRA performance evaluations. This final rule withdraws these other proposed changes to the CRA regulations.

Comments on the 2004 NPR

OTS received approximately 800 comments on the 2004 NPR. Most were from financial institutions and their trade associations (''Financial Institution Comments'') or from consumer and community members and organizations (*e.g.*, civil rights organizations, Community Development Corporations, Community Development Financial Institutions, community developers, housing authorities, and individuals) (''Consumer Comments''). Other commenters included members of Congress, other Federal government agencies, and state and local governments, agencies, and organizations.

The Financial Institution Comments strongly supported raising the asset threshold and eliminating the holding company test. Most of these commenters expressly supported raising the asset threshold beyond the level in the proposed rule. Most suggested thresholds ranging from $1 billion to $2 billion. Many commenters argued that raising the asset threshold would reduce regulatory burden and allow community banks to focus their resources on economic development and meeting credit demands of the community, rather than compliance burdens. They also asserted that raising the asset threshold was necessary to reflect consolidation in the bank and thrift industries. Other commenters noted that raising the asset threshold to $1 billion would have only a small effect on the amount of total industry assets under the large institution test but would provide substantial additional relief by reducing the compliance burden on more than 500 additional institutions.

The Consumer Comments strongly opposed raising the asset threshold and urged the banking agencies to withdraw the proposed rule. Most of the comments focused on the proposed raising of the asset threshold to $500 million but did not specifically mention the proposed elimination of the holding company test. Many Consumer Comments argued that raising the asset threshold would eliminate the investment and service parts of the CRA examination for many institutions, would reduce the rigor of CRA examinations, and would lead to less access to banking services and capital for underserved communities. In particular, these commenters argued that Low Income Housing Tax Credits and Individual Development Accounts would suffer, diminishing the effectiveness of the Administration's housing and community development programs. The commenters observed that this would be contrary to the statutory obligation on financial institutions to affirmatively serve credit and deposit needs on a continuing basis. Commenters also noted that the change would disproportionately affect rural communities and small cities where smaller institutions have a significant market share. Other commenters emphasized the need for rural banks and other depository institutions to serve the investment and deposit needs of all the communities in which they are chartered and from which they take deposits.

Comments from members of Congress were mixed. One letter (including House Capital Markets Subcommittee Chairman Richard Baker and six other Republican members of the House Financial Services Committee) supported raising the asset threshold to $1 billion. It stated that such a move would not have a significant impact on the total amount of assets nor the total number of institutions covered by the large institution examination, but would provide relief to many additional institutions. Congressional Democrats, on the other hand, opposed raising the asset threshold. OTS received one letter from 31 Senators (including Senate Banking Committee Ranking Member Paul Sarbanes), one letter from Senators Herb Kohl and Russell D. Feingold, one letter from seven House Representatives (including House Financial Services Committee Ranking Member Barney Frank), one letter from House Financial Services Committee Member Nydia Velazquez, and one letter from House Representative Louise Slaughter. These letters echoed the Consumer Comments discussed above.

Today's Final Rule

Having carefully reviewed all the comments submitted, OTS is amending the definition of ''small savings association'' to mean a savings association with total assets of less than $1 billion (without regard to any holding company assets). This change will be effective October 1, 2004. It will apply to OTS's CRA examinations beginning in the fourth quarter of 2004. Of course, any small savings association that prefers to be assessed under the lending, investment, and service tests may so elect in accordance with 12 CFR 563e.21(a)(3), if it collects and reports the data required for other savings associations under 12 CFR 563e.42.

This change should reduce the existing CRA examination and reporting burden on the affected savings associations in order for these institutions to be able to dedicate scarce resources to better meet the credit needs of their local communities and in areas requiring continuing vigilance, for example, offsetting the appreciable burden arising from implementation of anti-money laundering (AML) programs, Bank Secrecy Act (BSA) requirements, and other compliance initiatives. This change will permit the additional ''small savings associations'' to be subject to streamlined CRA examinations that focus on lending as well as benefiting from reduced data collection and reporting burdens under the CRA. The final rule will not in any manner relieve small savings associations of all other existing and ongoing compliance requirements and legal obligations under the CRA.

OTS is able to use its expertise to make a predictive assessment that this change will reduce unwarranted burden without negatively impacting upon the purpose of CRA to require each Federal banking agency to encourage institutions to help meet the credit needs of local communities in which they are chartered consistent with safe and sound operation. 12 U.S.C. 2901(b). This revision is consistent with the agency's ongoing efforts to identify and reduce regulatory burden, particularly for smaller institutions, where appropriate and feasible.

OTS is also making this change to take into account substantial institution asset growth and consolidation in the bank and thrift industries since the definition was originally adopted. Although the final rule will increase the number of thrift institutions eligible for evaluation under the small institution performance standards, it will not have a significant impact on the portion of combined thrift and bank assets subject to evaluation under the large retail institution performance standards. Around the time the CRA rule was developed and promulgated in 1994–1995, total thrift and bank assets covered by the lending, investment, and service tests for large institutions represented 86.2% of total thrift and bank industry assets, including 87.9% of thrift industry assets. Based on March 31, 2004 Thrift Financial Report data, raising the asset threshold to $1 billion (and eliminating consideration of holding company assets) will result in 86.4% of thrift industry assets being covered by the large institution test. Thus, the overwhelming majority of thrift assets will remain covered by the large institution test, there will be only a slight drop in the percentage of thrift industry assets covered by the large institution test as compared to the percentage when the 1995 rule was developed and promulgated, and the change will bring the percentage of thrift assets covered by the large institution test in line with the 1994 combined thrift and bank industry average. The dollar value of thrift assets covered by the large institution test will increase substantially compared to when the rule was promulgated, from approximately $678.3 billion in 1995 to $1 trillion.

Further, the total number of thrifts and the total dollar value of thrift assets, as a percentage of the combined bank and thrift industries, has dropped since 1995. Whereas in December 1995, OTS-regulated thrifts accounted for 12% of the number of thrifts and banks and 14.4% of total thrift and bank industry assets, by March 2004 OTS-regulated thrifts accounted for 10.1% of the number of thrifts and banks and 12.4% of total thrift and bank industry assets. Thus, the impact of the change on the combined bank and thrift industries will be minimal. Of course, the impact on the bank and thrift industries as a whole would increase to the extent the other banking agencies follow suit.

The regulatory burden reduction for small savings associations, however, will be significant. Thrifts remain home mortgage lenders, in part, because unlike banks, they must have at least 65% of their assets in the form of what are generally mortgages or mortgage-related loans in order to avoid the adverse consequences of failing to meet the qualified thrift lender test under the Home Owners' Loan Act (HOLA). 12 U.S.C. 1467a(m). Thrifts are also subject to HOLA lending and investment limits, including limits on commercial loans and community development investments. 12 U.S.C. 1464(c)(2)(A) and (c)(3)(A); 12 CFR 560.30. Small institutions often do not engage in significant amounts of small business or small farm lending.

According to the FRB's analysis of 2003 CRA data for the Federal Financial Institutions Examination Council (FFIEC), thrifts accounted for approximately 21.9% (by number of loans) and 7.9% (by amount of loans) of the small business loans originated or purchased reported by all banks and thrifts combined. A closer look reveals that thrifts under $1 billion in assets contributed only about 0.5% of the total (by number of loans) and 2.2% of the total (by amount of loans), while thrifts over $1 billion in assets contributed about 21.4% of the total (by number of loans) and 5.7% of the total (by amount of loans). Similarly, thrifts only accounted for approximately 11.3% (by number of loans) and 3.6% (by amount of loans) of the small farm loans originated or purchased reported by all banks and thrifts combined in 2003. Thrifts under $1 billion in assets contributed about 1.2% of the total (by number of loans) and 1.5% of the total (by amount of loans) while thrifts over $1 billion in assets contributed about 10.1% of the total (by number of loans) and 2.1% of the total (by amount of loans). See Table 4–2, ''Savings Association Lending by Asset Size,'' CRA National Aggregate Reports, available at *http://www.ffiec.gov/webcraad/cranaag.htm.*

This pattern of lending by savings associations under $1 billion in assets has remained fairly constant over the years. It demonstrates that thrifts, in the main, make mortgage-related loans that are reported under HMDA. By raising the asset threshold, the burden associated with reporting requirements for loans that constitute a minor part of the overall business of small thrifts will be relieved without significant impact to the CRA data collection as a whole and the benefits derived from such data.

Moreover, OTS's examination experience since implementing the current CRA regulations indicates that there is not a significant change in the way that smaller institutions meet their CRA obligations once they cross the $250 million threshold. Institutions between $250 million and $1 billion tend to continue to meet the credit needs of their communities by making loans in their assessment areas. We have no belief that institutions impacted by this regulatory change will alter their lending habits. Institutions under $1 billion in assets generally do not have the financial capacity to hire specialized staff, engage in significant investments, or open new branches. Indeed, an interagency Q&A on CRA has previously recognized that factors outside of an institution's control may prevent it from engaging in certain activities. It provides, ''Examiners will take into account statutory and supervisory limitations on an institution's ability to engage in any lending, investment, and service activities. For example, a savings association that has made few or no qualified investments due to its limited investment authority may still receive a low satisfactory rating under the investment test if it has a strong lending record.'' Q&A 21(b)(4), 66 FR 36620, 36631 (July 12, 2001). Accordingly, the lending focus under the small savings association performance standards is particularly well tailored to evaluating the performance of thrifts with under $1 billion in assets.

Far from being an exemption from CRA requirements, the small savings association performance standards provide for OTS to evaluate the record of a small savings association in meeting the credit needs of its assessment area under particular lending-focused criteria. Those criteria, enumerated in OTS's regulation at 12 CFR 563e.26 are:

(1) The savings association's loan-to-deposit ratio, adjusted for seasonal variations and, as appropriate, other lending-related activities, such as loan originations for sale to the secondary

markets, community development loans, or qualified investments;

(2) The percentage of loans and, as appropriate, other lending-related activities located in the savings association's assessment area(s);

(3) The savings association's record of lending to and, as appropriate, engaging in other lending-related activities for borrowers of different income levels and businesses and farms of different sizes;

(4) The geographic distribution of the savings association's loans; and

(5) The savings association's record of taking action, if warranted, in response to written complaints about its performance in helping to meet credit needs in its assessment area(s).

As discussed in Appendix A to OTS's CRA rule (12 CFR Part 563e, App. A), savings associations evaluated under the small savings association performance standards will only receive a ''satisfactory'' performance evaluation if, in general, the savings association demonstrates:

(1) A reasonable loan-to-deposit ratio (considering seasonal variations) given the savings association's size, financial condition, the credit needs of its assessment area(s), and taking into account, as appropriate, lending-related activities such as loan originations for sale to the secondary markets and community development loans and qualified investments;

(2) A majority of its loans and, as appropriate, other lending-related activities are in its assessment area(s);

(3) A distribution of loans to and, as appropriate, other lending related-activities for individuals of different income levels (including low- and moderate-income individuals) and businesses and farms of different sizes that is reasonable given the demographics of the savings association's assessment area(s);

(4) A record of taking appropriate action, as warranted, in response to written complaints, if any, about the savings association's performance in helping to meet the credit needs of its assessment area(s); and

(5) A reasonable geographic distribution of loans given the savings association's assessment area(s).

As further discussed in Appendix A, a savings association that meets each of the standards for a ''satisfactory'' rating and exceeds some or all of those standards may be considered for an overall rating of ''outstanding.'' In assessing whether a savings association's performance is ''outstanding,'' OTS considers the extent to which the savings association exceeds each of the performance standards for a ''satisfactory'' rating and its performance in making qualified investments and providing branches and other services and delivery systems that enhance credit availability in its assessment area(s).

In contrast, a savings association may receive a rating of ''needs to improve'' or ''substantial noncompliance'' depending on the degree to which its performance has failed to meet the standards for a ''satisfactory'' rating.

The interagency CRA Qs&As elaborate further. One Q&A states, ''Examiners can consider 'lending-related activities,' including community development loans and lending-related qualified investments, when evaluating the first four performance criteria of the small institution test.'' Q&A 26(a)–1, 66 FR at 36637. Another Q&A states that examiners will consider these types of lending-related activities ''when it is necessary to determine whether an institution meets or exceeds the standards for a satisfactory rating'' or ''at an institution's request.'' Q&A 26(a)–2, 66 FR at 36637. Still another asks, ''Under the small institution performance standards, how will qualified investments be considered for purposes of determining whether a small institution receives a satisfactory CRA rating?'' The answer provided is that the ''small institution performance standards focus on lending and other lending-related activities. Therefore, examiners will consider only lending-related qualified investment for the purposes of determining whether the small institution receives a satisfactory CRA rating.'' Q&A 26(a)–5, 66 FR at 36637.

Thus, under OTS CRA regulations, as further interpreted in the interagency Qs&As, OTS already considers, and will continue to consider, a small savings association's performance in making community development loans and qualified investments and providing community development services, at the savings association's request, for purposes of raising a rating. While community development activities are not required for small savings associations, information a savings association provides about its community development activities may impact a rating. For example, a savings association that might otherwise be rated ''satisfactory'' may be rated ''outstanding,'' or a savings association that might otherwise be rated less than ''satisfactory'' may be rated ''satisfactory'' depending on its performance in a variety of community development activities.

Therefore, even though the asset threshold is being raised, all small savings associations would continue to have an incentive to perform community development activities to improve their CRA rating. In particular, savings associations with between $250 million and $1 billion in assets that may already have significant commitments to make qualified investments and perform community development services, though now recategorized as ''small,'' will continue to have incentives to perform a range of community development activities. Those activities can be fully considered during their examination.

Application to Savings Associations Only

This final rule only applies to OTS-regulated savings associations. The change to the small institution asset threshold would not affect entities regulated by the OCC, FDIC, or the FRB. OTS is aware that section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4803) directs the banking agencies to work jointly to make uniform all regulations and guidelines implementing common statutory or supervisory policies. While uniformity is the ultimate goal of section 303, the statute recognizes that the results of these efforts must be ''consistent with the principles of safety and soundness, statutory law and policy and the public interest.'' The uniformity required by section 303, for example, is not intended to result in unreasonable or unwarranted requirements that add to burden. S. Rep. 103–169, at 48 (1993), reprinted in 1994 U.S.C.C.A.N. 1881.

Consequently, the four Federal banking agencies have occasionally imposed or retained non-uniform regulatory requirements based on different conclusions regarding safety and soundness, and other policy and public interest considerations. See, *e.g.*, Joint Report: Differences in Accounting and Capital Standards Among the Federal Banking Agencies; Report to Congress, 69 FR 8523 (February 24, 2004). Where there are different interpretations of common statutes, the banking agencies are encouraged to highlight and explain the differences, so that users will have clear notice of any areas of difference among regulations or guidelines relating to a common statutory scheme or supervisory concern. S. Rep. 103–169, at 48 (1993), reprinted in 1994 U.S.C.C.A.N. 1881.

Other Issues

OTS is withdrawing the remaining portions of its proposed rule.

Credit Terms and Practices

The NPR proposed adding regulatory text providing that evidence that an institution or affiliate engages in discriminatory, illegal, or abusive credit practices would adversely affect the evaluation of the institution's CRA performance. Under the proposal, evidence pertaining to the institution's loans would be considered, regardless of their location, while evidence pertaining to an affiliate's loans would only be considered if the lending was by an affiliate with loans considered under the lending test and occurred in the institution's assessment area. Examples of discriminatory or illegal practices the proposal identified were: (1) Discriminating, such as Equal Credit Opportunity Act (ECOA) or Fair Housing Act violations; (2) violating the Home Ownership and Equity Protection Act (HOEPA); (3) violating section 5 of the Federal Trade Commission Act (FTC Act); (4) violating section 8 of the Real Estate Settlement Procedures Act (RESPA); and (5) violating the right of rescission under the Truth in Lending Act (TILA). Equity stripping was the only other practice listed, which the proposal defined as engaging in a pattern or practice of lending based predominantly on the foreclosure or liquidation value of the collateral in connection with home mortgage and secured consumer loans. The justification for the proposed change was to better address abusive lending practices in CRA evaluations.

Commenters were united in their opposition to this portion of the proposal. The main argument against it expressed by Financial Institution Commenters was that CRA should not consider compliance with other statutes that are already covered in compliance examinations, such as the ECOA, the Fair Housing Act, the FTC Act, HOEPA, RESPA, and TILA, since that approach would be repetitive and create unnecessary complexity. Others suggested that a predatory lending component should be focused on patterns of prohibited, predatory or abusive conduct. A further comment was to urge the banking agencies not to penalize institutions for practices just because the banking agencies may regard them as abusive or predatory if those practices are not illegal.

Consumer Commenters opposed the proposed predatory lending standard, expressing concern that it could protect predatory lenders by its omissions. Several commenters went out of their way to state very specifically and clearly that they would prefer no change to the rule with regard to predatory lending to finalizing the proposed standard. Many comments harshly criticized the proposed standard for not covering enough types of predatory conduct. Many commenters specifically listed fee packing, high prepayment penalties, flipping, and mandatory arbitration, as among the additional abuses that the standard should also address. Other commenters listed some additional practices such as targeting minorities, low-income people, and the elderly for subprime lending; originating sub-prime loans for borrowers who could qualify for prime loans; encouraging refinancing of unsecured debt to increase the loan size, points, fees, and commissions; selling single-premium credit insurance products; charging yield spread premiums and other compensation that rewards brokers for steering borrowers to higher cost products and large loans; and purchasing and investing in predatory loans as part of mortgage backed securities.

Even with regard to equity stripping, which the proposal was designed to address, the commenters emphasized that the proposal should not focus solely on lending based on the foreclosure value of the collateral. They pointed out that equity stripping also occurs from excessive fees and unnecessary products and that this type of equity stripping is also abusive, even if it does not lead to delinquency or foreclosure. One large consumer organization added that without conducting file reviews of individual loans, even the one predatory practice identified in the proposed rule would not be discovered. Many Consumer Commenters urged that the anti-predatory lending standard must apply to the financial institution and all of its affiliates, whether inside or outside the assessment area, not just real estate secured loans by the financial institution in its assessment area.

In light of the comments received, OTS is withdrawing this portion of its proposal. OTS's CRA rule will continue to indicate that evidence of discriminatory or other illegal credit practices adversely affects the performance evaluation. 12 CFR 563.28(c). An interagency Q&A on CRA will continue to address what is meant by ''discriminatory or other illegal credit practices.'' Q&A 28(c)–1, 66 FR at 36640. No further action is required at this time.

Enhancement of Disclosure Statements and Public Performance Evaluations

The ANPR also solicited comment on CRA data collection requirements. Specifically, it asked whether the data collection and reporting and public file requirements are effective and efficient approaches for assessing an institution's CRA performance while minimizing burden. The NPR proposed to amend the specifications for the CRA Disclosure Statements that each banking agency prepares annually for each institution that is reporting data. The revised statements would include as additional data items the number and amount of small business and small farm loans by census tract. The justification was to enhance the data disclosed to the public. The preamble to the NPR further indicated that the banking agencies would begin using publicly available HMDA and CRA data to disclose additional information in the public CRA performance evaluations. The following additional data would be disclosed by assessment area: (1) The number, type, and amount of purchased loans; (2) the number, type, and amount of HOEPA loans and loans for which the rate spread information is reported under HMDA; and (3) the number, type, and amount of loans that were originated or purchased by an affiliate and included in the institution's evaluation, as well as the identity of the affiliate. The justification was to make it easier for the public to evaluate lending by individual institutions.

Relatively few Financial Institution Commenters addressed these data issues and those that did reflected no strong consensus. Several commented on distinguishing loan purchases from originations in the public evaluation. More opposed than favored such an approach. The main argument against drawing the distinction was that such a move could suggest that purchases are not as beneficial as originations—a suggestion disputed by these commenters—and that the distinction would be purely technical. Similarly, several commented on distinguishing HOEPA loans from other loans in the public evaluation. More opposed than favored that approach as well. The main argument against was that HOEPA loans are not necessarily predatory but that such an implication could be drawn from making this distinction in the public evaluation. One large trade organization opposed revising the CRA Disclosure Statements to include the number and amount of small business and small farm loans by census tract. It argued that the privacy of the financial information of borrowers at many small, mostly rural institutions would be breached because many of these institutions have only one or two business borrowers in some census tracts.

The Consumer Commenters, however, supported the enhanced data disclosure the banking agencies proposed for the public portion of the CRA report. They specifically voiced support for disclosure of the specific census tract location of small business loans, distinguishing purchases from loan originations, and disclosing high cost loans. However, they were unequivocal that the potential beneficial effects of this aspect of the proposal were outweighed by the harm from other aspects of the proposal. Many of these commenters further argued that the banking agencies should not merely report the new data on CRA examinations, but should use the new data to provide less favorable weight on CRA examinations to high cost loans and loan purchases than to prime loans and loan originations.

In light of the comments received, OTS is also withdrawing this portion of its proposal. OTS believes that the data disclosure changes would add to burden without providing corresponding benefits.

Regulatory Analysis

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995, the OTS may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. This collection of information is currently approved under OMB Control Number 1550–0012. OTS is giving notice that, with this final rule, the changed collection of information has been submitted to OMB for review and approval.

Title of Proposal: Community Reinvestment—12 CFR Part 563e.

Frequency of Response: Annual.

Affected Public: Savings associations.

Abstract: This final rule revises the definition of ''small savings association'' under OTS's CRA regulations. Under the final rule, ''small savings association'' is defined as a savings association with total assets of less than $1 billion, without regard to any holding company assets. This change permits additional small savings associations to be subject to streamlined examinations as well as reduced data collection and reporting burdens under the CRA.

Estimated Number of Respondents: 923.

Estimated Burden Hours per Response: Small business and small farm loan register, 219 hours; Other loan data, 25 hours; Assessment area delineation, 2 hours; Small business and small farm loan data, 8 hours; Community development loan data, 13 hours; HMDA out-of-MSA loan data, 253 hours; Data on lending by a consortium or third party, 17 hours; Affiliated lending data, 38 hours; Request for designation as a wholesale or limited purpose bank, 4 hours; and Public file, 10 hours.

Estimated Total Burden: 80,998 hours.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS certifies that since this final rule will reduce burden and will not raise costs for small institutions, it will not have a significant economic impact on a substantial number of small entities. It does not impose any additional paperwork or regulatory reporting requirements. It will increase only slightly the overall number of small savings associations, as defined for Regulatory Flexibility Act purposes ($150 million in assets or less), that will qualify for the reduced data collection requirements in 12 CFR Part 563e applicable to small savings associations.

The Small Business Administration submitted comments on the NPR requesting further information to support the conclusion of no significant impact. In response, OTS has calculated that, based on March 31, 2004 data, there were 477 savings associations with $150 million in assets or less, representing 51.8% of all thrifts, $33.7 billion in assets, and 2.9% of thrift industry assets. Only 30 of these institutions—representing 3.3% of all thrifts, $1.5 billion in assets, and 0.1% of thrift industry assets—failed to qualify for the small savings association test because they were part of a holding company with over $1 billion in assets and will now qualify as ''small'' under the revised definition. Accordingly, a regulatory flexibility analysis is not required.

Executive Order 12866 Determination

OTS has determined that this rulemaking is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act of 1995 Determination

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. OTS has determined that this rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more. Accordingly, OTS has not prepared a budgetary impact statement nor specifically addressed the regulatory alternatives considered.

List of Subjects in 12 CFR Part 563e

Community development, Credit, Investments, Reporting and recordkeeping requirements, Savings associations.

Office of Thrift Supervision

12 CFR Chapter V

■ For the reasons outlined in the preamble, the Office of Thrift Supervision amends part 563e of chapter V of title 12 of the Code of Federal Regulations as set forth below:

PART 563e—COMMUNITY REINVESTMENT

■ 1. The authority citation for part 563e continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, 1814, 1816, 1828(c), and 2901 through 2907.

■ 2. Revise § 563e.12(t) to read as follows:

§ 563e.12 Definitions.

* * * * *

(t) *Small savings association* means a savings association that, as of December 31 of either of the prior two calendar years, had total assets of less than $1 billion.

* * * * *

Dated: August 12, 2004.

By the Office of Thrift Supervision.

James E. Gilleran,

Director.

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