

final form and without change the interim final rule, issued on August 11, 2008, which implemented the statutory change to national banks' community development investment authority made in the Housing and Economic Recovery Act of 2008 (HERA). The OCC also is revising Appendix 1 to part 24, the CD-1 National Bank Community Development (Part 24) Investments Form, to make technical changes that are consistent with the HERA provision and the revised regulation. Section 2503 of the HERA revised the community development investment authority in section 24(Eleventh) to restore a national bank's authority to make investments designed primarily to promote the public welfare.

DATES: *Effective Date:* April 7, 2009.

FOR FURTHER INFORMATION CONTACT:

Stephen Van Meter, Assistant Director, Community and Consumer Law Division, (202) 874-5750; Michele Meyer, Assistant Director, Patrick T. Tierney, Senior Attorney, or Rebecca Smith, Attorney, Legislative and Regulatory Activities Division, (202) 874-5090, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

Background

Introduction

The Financial Services Regulatory Relief Act of 2006 (FSRRA) ¹ made a number of changes to 12 U.S.C. 24(Eleventh), the statute that authorizes national banks' community development investments.² Prior to its amendment by the FSRRA, 12 U.S.C. 24(Eleventh) authorized a national bank "[t]o make investments designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as by providing housing, services, or jobs)" (the public welfare test). The FSRRA, among other things, narrowed the grant of authority in section 24(Eleventh) by providing that a national bank may "make investments directly or indirectly, each of which *promotes the public welfare by benefiting primarily* low- and moderate-income communities or families (such as by providing housing, services, or jobs)."³ On April 24, 2008, the OCC issued a final rule that implemented the

DEPARTMENT OF THE TREASURY

**Office of the Comptroller of the
Currency**

12 CFR Part 24

[Docket ID OCC-2009-0006]

RIN 1557-AD12

**Community and Economic
Development Entities, Community
Development Projects, and Other
Public Welfare Investments**

AGENCY: Office of the Comptroller of the
Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller
of the Currency (OCC) is adopting in

¹ Public Law 109-351, 120 Stat. 1966 (Oct. 13, 2006).

² See 12 CFR part 24 (2008) (implementing 12 U.S.C. 24(Eleventh)).

³ Public Law 109-351, § 305, 120 Stat. at 1970-71 (emphasis added).

FSRRA's narrowing of the public welfare test.⁴

On July 30, 2008, the President signed into law the HERA, which reinstated the pre-FSRRA public welfare test.⁵ Specifically, section 2503 of the HERA revised section 24(Eleventh) to provide that a national bank may “* * * make investments directly or indirectly, each of which is *designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as by providing housing, services, or jobs).*”⁶

On August 11, 2008, the OCC issued an interim final rule to implement section 2503 of the HERA.⁷ Under section 2503 of the HERA and the revisions made by the interim final rule, national banks and their subsidiaries are able to make a broader range of investments that will strengthen and stabilize communities, including communities affected by rising foreclosures. The OCC is now adopting the interim final rule in final form without change.

Description of the Interim Final Rule

The interim final rule made the following revisions to part 24 in order to implement the HERA's changes to the public welfare test.

Definition of “Community and Economic Development Entity” (CEDE) (§ 24.2(c))

The interim final rule amended the definition of a CEDE in § 24.2(c) to implement the HERA change to the public welfare test. Thus, paragraph (c) of the interim final rule defined a CEDE as “an entity that makes investments or conducts activities that primarily benefit low- and moderate-income individuals, low- and moderate-income areas, or other areas targeted by a governmental entity for redevelopment, or would receive consideration as qualified investments under 12 CFR 25.23.”

Removing the Definition of “Benefiting Primarily Low- and Moderate-Income Areas or Individuals” (§ 24.2(g))

As discussed above, the FSRRA authorized a national bank and its subsidiaries to make investments that promote the public welfare by “benefiting primarily” low- and moderate-income areas or individuals. The April 2008 final rule that implemented the FSRRA added a

definition of “benefiting primarily low and moderate-income areas or individuals.” Consistent with the HERA change to section 24(Eleventh), the August 2008 interim final rule removed the definition of “benefiting primarily low- and moderate-income areas or individuals” from part 24.

Public Welfare Investments (§ 24.3)

The interim final rule revised § 24.3, which authorizes national banks to make investments pursuant to section 24(Eleventh), to conform the wording of the regulation to the changes made by the HERA.

Examples of Qualifying Public Welfare Investments (§ 24.6)

Section 24.6 contains examples of qualifying public welfare investments. The interim final rule revised the introductory language in § 24.6 to reflect the HERA changes and restored to the examples references to investments in “targeted redevelopment areas,” which were removed by the April 2008 FSRRA final rule.

Revision to Appendix 1 to Part 24, the CD-1 National Bank Community Development (Part 24) Investments Form

The interim final rule also revised Appendix 1 to part 24, the CD-1 National Bank Community Development (Part 24) Investments Form, to reflect the changes to the regulation.

Comments on the Interim Final Rule

The OCC's interim final rule included a request for public comment on the changes implementing the HERA's revisions to section 24(Eleventh). The comment period closed on September 10, 2008. The OCC received nine comments, seven of which addressed the interim final rule.⁸ The seven commenters unanimously supported the interim final rule. One commenter expressed concern that, because many of the examples of qualifying public investments listed in § 24.6 pertain to investments that benefit low- and moderate-income areas or individuals, the list of examples could be interpreted as a requirement for national banks to demonstrate that the primary beneficiaries of an investment are low- and moderate-income individuals or areas. The commenter asserted that such an interpretation would be inconsistent with the flexibility afforded by the § 24.3 public welfare investment

standard, which also permits investments in areas targeted by a governmental entity for redevelopment or investments that would be considered “qualified investments” under § 25.23 of the OCC's Community Reinvestment Act (CRA) regulations. The commenter encouraged the OCC to clarify that the HERA changes to part 24 provide national banks with additional flexibility to make community development investments.

We agree that § 24.6 serves as a non-exclusive list of examples that illustrate how a national bank may permissibly use its authority to make public welfare investments. The list cannot, and does not, restrict the express authorization in § 24.3, which, as the commenter noted, permits investments in areas targeted by a governmental entity for redevelopment or investments that would be considered “qualified investments” under § 25.23 of the CRA regulations. Moreover, to provide guidance to national banks and OCC bank examiners, the OCC provides detailed information about part 24 public welfare investments on its Web site at <http://www.occ.gov/cdd/pt24toppage.htm>. If, after reviewing § 24.6 and OCC's Web site, a national bank is still uncertain about whether a particular investment is permissible, the bank also may submit a prior approval request under § 24.5 and receive from the OCC a permissibility determination. Accordingly, the OCC has concluded that the list in § 24.6 need not include an example of each type of investment that part 24 and the statute permit.

Accordingly, the OCC has determined that it is appropriate to adopt as final the interim final rule as originally published on August 11, 2008.

Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (Pub. L. 96-354, Sept. 19, 1980) (RFA) applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b).⁹ Pursuant to the Administrative Procedure Act (APA) at 5 U.S.C. 553(b)(B), general notice and an opportunity for public comment are not required prior to the issuance of a final rule when an agency, for good cause, finds that “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”¹⁰

For the reasons set forth in the interim final rule,¹¹ the OCC determined for good cause that the APA did not require general notice and public comment on

⁴ 73 FR 22216 (Apr. 24, 2008).

⁵ Public Law 110-289, § 2503, 122 Stat. 2654, 2857-58 (July 30, 2008).

⁶ *Id.* (emphasis added).

⁷ 73 FR 46532 (Aug. 11, 2008).

⁸ Two commenters objected to a separate and unrelated HERA provision that places restrictions on down payment assistance programs. The OCC is not authorized to implement this provision, and it was not the subject of this rulemaking action.

⁹ 5 U.S.C. 601(2).

¹⁰ 5 U.S.C. 553(b)(B).

¹¹ 73 FR 46534 (Aug. 11, 2008).

the interim final rule and, therefore, did not publish a general notice of proposed rulemaking. Thus, the RFA, pursuant to 5 U.S.C. 601(2), does not apply to this final rule.

Executive Order 12866

The OCC has concluded that this final rule is not a significant regulatory action under Executive Order 12866. The changes made by this final rule will not have an annual effect on the economy of \$100 million or more within the meaning of Executive Order 12866. The OCC further concludes that this final rule does not meet any of the other standards for a significant regulatory action set forth in Executive Order 12866.

Unfunded Mandates Reform Act of 1995 Determinations

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any final rule for

which a general notice of proposed rulemaking was published. As discussed above, the OCC determined for good cause that the APA did not require general notice and public comment on the interim final rule and, therefore, the OCC did not publish a general notice of proposed rulemaking. Accordingly, the final rule is not subject to section 202 of the Unfunded Mandates Act.

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), the OCC has reviewed the final rule and determined that it contains no collections of information as defined by the Paperwork Reduction Act.

Lists of Subjects in 12 CFR Part 24

Community development, Credit, Investments, Low and moderate income housing, National banks, Reporting and recordkeeping requirements, Rural areas, Small businesses.

■ For the reasons set forth in the preamble, under the authority at 12 U.S.C. 24(Eleventh), 93a, 481 and 1818, the interim rule amending 12 CFR part 24, which was published at 73 FR 46532 on August 11, 2008, is adopted as final with the following change:

PART 24—COMMUNITY AND ECONOMIC DEVELOPMENT ENTITIES, COMMUNITY DEVELOPMENT PROJECTS, AND OTHER PUBLIC WELFARE INVESTMENTS

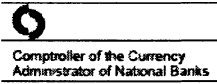
■ 1. The authority citation for part 24 continues to read as follows:

Authority: 12 U.S.C. 24(Eleventh), 93a, 481 and 1818.

■ 2. Appendix 1 to Part 24 is revised to read as follows:

APPENDIX 1 TO PART 24—CD-1—NATIONAL BANK COMMUNITY DEVELOPMENT (PART 24) INVESTMENTS

BILLING CODE 4810-33-P



CD-1 – National Bank Community Development (Part 24) Investments

For Official Use Only

OMB Number
1557-0194

A national bank or national bank subsidiary may make an investment directly or indirectly designed primarily to promote the public welfare under the community development investment authority in 12 USC 24(Eleventh) and its implementing regulation 12 CFR 24 (Part 24). Part 24 contains the OCC standards for determining whether an investment is designed to promote the public welfare and procedures that apply to those investments. National banks must submit the completed form to provide an after-the-fact notice or to request prior approval of a public welfare investment to the Community Affairs Department, Office of the Comptroller of the Currency, Washington, DC 20219. Please contact the Community Affairs Department at (202) 874-4930 or CommunityAffairs@occ.treas.gov for more information.

PLEASE PROVIDE THE FOLLOWING INFORMATION ABOUT THE INVESTING BANK.

Bank name:	Mailing address (<i>street or P.O. box</i>):
Bank charter number:	City, State, ZIP Code:
Telephone number:	Fax number:
E-mail address:	URL:

CONTACT FOR INFORMATION:

Name of bank contact responsible for form's information:	Name of bank contact responsible for CD investment (if different):
Mailing address (<i>street or P.O. box</i>):	Mailing address (<i>street or P.O. box</i>):
City, State, ZIP Code:	City, State, ZIP Code:
Telephone number:	Telephone number:
Fax number:	Fax number:
E-mail address:	E-mail address:

PLEASE INDICATE THE PROCESS THE BANK REQUESTS BY CHECKING THE APPROPRIATE BOX, BELOW.

- After-the-fact notice (12 CFR 24.5(a)) - complete sections 1 and 2.
- Prior approval (12 CFR 24.5(b)) - complete section 2.

Section 1 – After-The-Fact Notice Only (12 CFR 24.5(a))

A bank may provide an after-the-fact notice of its Part 24 investment if the bank responds affirmatively to all of the following requirements.

The bank is "well-capitalized," as defined in 12 CFR 24.2(i).

Yes No

The bank has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System.

Yes No

The bank's most recent Community Reinvestment Act rating is satisfactory or outstanding.

Yes No

The bank is not under a cease and desist order, consent order, formal written agreement, or Prompt Corrective Action directive.

Yes No

Including this investment, the bank's aggregate outstanding investments and commitments under Part 24 do not exceed 5 percent of its capital and surplus, unless the OCC has provided written approval of a written request by the bank allowing the bank to provide after-the-fact notices for investments that would raise the aggregate amount of the bank's Part 24 investments beyond 5 percent of its capital and surplus.

Yes No

The investment does not involve properties carried on the bank's books as "other real estate owned."

Yes No

The OCC has not determined, in published guidance, that the investment is inappropriate for the after-the-fact notification.

Yes No

Has the bank responded affirmatively to all of the above requirements in order to provide an after-the-fact notice of its Part 24 investment? [The OCC may have provided written notification that the bank may submit Part 24 after-the-fact notices. If so, please provide the date or a copy of the OCC's written notification.]

Yes (The bank may make an investment authorized by 12 USC 24(Eleventh) and this part and notify the OCC within 10 working days by submitting a completed after-the-fact notice.)

No (The bank must seek prior OCC approval of its investment and submit a completed investment proposal before making the investment.)

(To complete the after-the-fact notice process or to request prior OCC approval, please proceed to section 2 of this form.)

Section 2 — All Requests

1. Please indicate how the bank's investment is consistent with Part 24 requirements for public welfare investments, under 12 CFR 24.3.

a. Check at least one of the following that applies to the bank's investment:

The investment primarily benefits low- and moderate-income individuals.

The investment primarily benefits low- and moderate-income areas.

The investment primarily benefits other areas targeted by a governmental entity for redevelopment.

The investment would receive consideration under 12 CFR 25.23 as a "qualified investment" for purposes of the Community Reinvestment Act.

2. Please indicate how the bank's investment is consistent with Part 24 requirements for investment limits under 12 CFR 24.4 by responding to the following questions.

a. Dollar amount of the bank's investment that is the subject of this submission: _____.

b. Percentage of the bank's capital and surplus represented by the bank's investment that is the subject of this submission: _____%.

c. Percentage of the bank's capital and surplus represented by the aggregate outstanding Part 24 investments and commitments, including this investment: _____%.

d. Does this investment expose the bank to unlimited liability?

Yes (This investment cannot be made under Part 24.)

No

3. Please attach a brief description of the bank's investment. (See 12 CFR 24.5(a)(3)(i) and (b)(2)(i)). Include the following information in the description.

a. The name of the community and economic development entity (CEDE) into which the bank's investment has been (or will be) made.

b. The type of bank investment (equity, debt, or other).

c. The activity or activities of the CEDE in which the bank has invested (or will invest). (See examples of qualifying investment activities described in 12 CFR 24.6 (a), (b), (c), and (d).)

d. How the investment is structured so that it does not expose the bank to unlimited liability, such as by describing the structure of the CEDE (e.g., CDC subsidiary, multi-bank CDC, multi-investor CDC, limited partnership, limited liability company, community development bank, community development financial institution, community development entity, community development venture capital fund, community development lending consortia, community development closed-end mutual funds, non-diversified closed-end investment companies, or any other CEDE) and by providing any other relevant information.

e. The geographic area served by the CEDE.

f. The total funding or other support by community development partners involved in the project (e.g., government or public agencies, nonprofits, other investors), if known.

- g. Supplemental information (e.g., prospectus, annual report, Web address that contains information about the CEDE in which the investment is or will be made), if available

4. Evidence of qualification is readily available for examination purposes.

The bank maintains information concerning this investment in a form readily accessible and available for examination that supports the certifications contained in this form and demonstrates that the investment meets the standards set out in 12 CFR 24.3, including, where applicable, the criteria of 12 CFR 25.23.

Yes No

5. Certification

The undersigned hereby certifies that the foregoing information in this form is accurate and complete. It is further certified that the undersigned is authorized to file this form on Part 24 investments for the bank.

Name: _____

Title: _____

Signature: _____

Date: _____

THE SPACE BELOW MAY BE USED TO DESCRIBE THE BANK'S CD INVESTMENT AS REQUESTED IN SECTION 2, QUESTION 3.

CD-1 (Rev 02/09)

Dated: March 31, 2009.

John C. Dugan,

Comptroller of the Currency.

[FR Doc. E9-7861 Filed 4-6-09; 8:45 am]

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