

DRAFT February 18 2005

**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 25**

**[Docket No. 05-XX]**

**RIN 1557-AC86**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 345**

**RIN [\_\_\_\_-XX##]**

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## **Community Reinvestment Act Regulations**

**FEDERAL BANKING AGENCIES:** Office of the Comptroller of the Currency, Treasury (OCC); and Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Joint notice of proposed rulemaking.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) (collectively, “agencies”) are issuing this notice of proposed rulemaking that would revise certain provisions of our rules implementing the Community Reinvestment Act (CRA). We plan to take this action in response to public comments received by the agencies, the Board of Governors of the Federal Reserve System (Board), and the Office of Thrift Supervision (OTS) on a February 2004 inter-agency CRA proposal (69 FR 5789) and by the FDIC on its August 2004 CRA proposal (69 FR 51611). The current proposal would address regulatory burden imposed on some smaller banks by revising the eligibility requirements for CRA evaluation under the lending, investment, and service tests. Specifically, the proposal would provide a simplified lending test and a flexible new community development test for small banks with an asset size between \$250 million and \$1 billion. Holding company affiliation would not be a factor in determining which CRA evaluation standards applied to a bank. In addition, the proposal would revise the term “community development” to include certain community development activities, including affordable housing, in underserved rural areas and designated disaster areas.

**DATES:** Comments on this proposed rule must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

### **ADDRESSES:**

*FDIC: Comments:* You may submit comments by any of the following methods:

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*Agency Web site:* <http://www.FDIC.gov/regulations/laws/federal/propose.html>.

*Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments/Legal ESS, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

*Hand Delivered/Courier:* The guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

*E-mail:* [comments@FDIC.gov](mailto:comments@FDIC.gov). Include RIN number 3064-AC50 in the subject line of the message.

*Public Inspection:* Comments may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW., Washington, DC, between 9 a.m. and 4:30 p.m. on business days.

*Instructions:* Submissions received must include the agency name and Regulatory Information Number (RIN) for this rulemaking. Comments received will be posted without change to <http://www.FDIC.gov/regulations/laws/federal/propose.html>, including any personal information provided.

*OCC:* You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Web Site:* [\_\_\_\_\_]
- *E-mail address:* [\_\_\_\_\_]
- *Fax:* [\_\_\_\_\_]
- *Mail:* [\_\_\_\_\_] Washington, DC [\_\_\_\_\_].
- *Hand Delivery/Courier:* [\_\_\_\_\_] Washington, DC [\_\_\_\_\_].

*Instructions:* All submissions received must include the agency name ([ ]) and docket number or Regulatory Information Number (RIN) for this notice of proposed rulemaking. In general, [ ] will enter all comments received into the docket without change, including any business or personal information that you provide. You may review comments and other related materials by any of the following methods:

- *Viewing Comments Personally:* You may personally inspect and photocopy comments at [ ] Washington, DC. You can make an appointment to inspect comments by calling [ ].
- *Viewing Comments Electronically:* You may request e-mail or CD-ROM copies of comments that the [ ] has received by contacting [ ].
- *Docket:* You may also request available background documents and project summaries using the methods described above.

**FOR FURTHER INFORMATION CONTACT:** *FDIC:* Richard M. Schwartz, Counsel, Legal Division, (202) 898-7424; Susan van den Toorn, Counsel, Legal Division, (202) 898-8707; or Robert W. Mooney, Chief, CRA and Fair Lending Policy Section, Division of Supervision and Consumer Protection, (202) 898-3911; Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

*OCC:* [ ], Washington, DC [ ].

**SUPPLEMENTARY INFORMATION:**

**Background**

Advance Notice of Proposed Rulemaking. In 1995, when the OCC, the Board, the OTS, and the FDIC (collectively, “federal banking and thrift agencies” or “four agencies”) adopted major amendments to regulations implementing the Community Reinvestment Act, they

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committed to reviewing the amended regulations in 2002 for their effectiveness in placing performance over process, promoting consistency in evaluations, and eliminating unnecessary burden. 60 FR 22156, 22177 (May 4, 1995). The review was initiated in July 2001 with the publication in the Federal Register of an advance notice of proposed rulemaking (66 FR 37602 (July 19, 2001)). The federal banking and thrift agencies indicated that they would determine whether and, if so, how the regulations should be amended to better evaluate financial institutions' performance under CRA, consistent with the Act's authority, mandate, and intent. The four agencies solicited comment on the fundamental issue of whether any change to the regulations would be beneficial or warranted, and on eight discrete aspects of the regulations. About 400 comment letters were received, most from banks and thrifts of varying sizes and their trade associations ("financial institutions") and local and national nonprofit community advocacy and community development organizations ("community organizations").

The comments reflected a consensus that certain fundamental elements of the regulations are sound, but demonstrated a disagreement over the need and reasons for change. Community organizations advocated that the regulations needed to be changed to reflect developments in the industry and marketplace; financial institutions were concerned principally with reducing burden consistent with maintaining or improving the regulations' effectiveness. In reviewing these comments, the federal banking and thrift agencies were particularly mindful of the need to balance the desire to make changes that might "fine tune" the regulations, with the need to avoid unnecessary and costly disruption to reasonable CRA policies and procedures that the industry has put into place under the current rules.

Joint Agency Regulatory Proposal to Address Small Institution Regulatory Burden and Illegal or Predatory Lending Practices. In February 2004, the federal banking and thrift agencies issued identical proposals to amend their respective CRA regulations to increase the limit on the asset

size of institutions classified as “small institutions” that are eligible for streamlined CRA evaluations and exempt from CRA data reporting obligations. 69 FR 5729 (February 6, 2004). Under the current rule, a “small institution” is an institution that has less than \$250 million in assets and is either independent or a member of a holding company with less than \$1 billion in assets. The four agencies proposed to re-define a “small institution” as one with fewer than \$500 million in assets. The holding company criterion would have been eliminated under the proposal.

The commenters were deeply split on the proposal. A majority of over 250 community bank commenters, and all of the trade associations commenting on behalf of community banks, urged the federal banking and thrift federal banking agencies to extend the proposed burden relief to all institutions under \$2 billion, or at least to all institutions under \$1 billion; a few favored the proposed \$500 million threshold. Virtually every one of over 250 community group commenters strongly opposed changing the definition of “small institution” or exempting any more institutions from the three-part test (lending, services, and investments). These commenters urged that the threshold not be changed so that community development activities continue to be evaluated, as they are today, in banks with \$250 million or more in assets.

The federal banking and thrift agencies also proposed to revise and clarify the regulations that evidence of certain abusive and illegal credit practices will adversely affect an agency’s evaluation of a bank’s CRA performance, including evidence of a pattern or practice of extending home mortgage or consumer loans based predominantly on the foreclosure or liquidation value of the collateral by the institution, where the borrower cannot be expected to be able to make the payments required under the terms of the loan. The proposal clarified that a bank’s evaluation will be adversely affected by such abusive or illegal credit practices regardless of whether the practices involve loans in the bank’s assessment area(s) or in any other location or

geography. It also provided that a bank's CRA evaluation can be adversely affected by evidence of such practices by any affiliate, if any loans of that affiliate have been considered in the institution's CRA evaluation.

While commenters differed in their reaction to many aspects of the proposal, many commenters including community organizations and financial institutions opposed – as either inadequate or inappropriate – the provision that evidence of collateral-based mortgage lending would adversely affect a bank's CRA evaluation.

Recent OTS Rulemaking. On August 18, 2004, the OTS published a final rule that expanded the category of “small savings associations” subject to OTS CRA regulations to those under \$1 billion, regardless of holding-company affiliation. The OTS announced that it was taking this action on July 16, 2004, and that same day, the OCC and the Board announced separately that they would not proceed with their respective proposals. The Board formally withdrew its proposal. The OCC did not formally withdraw its proposal, but did not adopt it.

On November 24, 2004, the OTS issued another proposed rulemaking to revise the definition of “community development” to permit consideration of such activities in underserved non-metropolitan areas, and to solicit comment on the appropriate consideration of such community development activities in any areas affected by natural disasters or major community disruptions. The OTS further solicited comment on providing substantial flexibility in the way that CRA ratings are assigned for institutions subject to the lending, investment, and service tests (savings associations with assets of \$1 billion or more). Under the OTS proposal, 50% or more of a large savings association's CRA rating would be based on lending, and the remaining percentage would be based on any other type or types of CRA activity (services or investments) that the association elects to have evaluated. The OTS also asked for comment on whether it should eliminate the Investment Test entirely.

FDIC Proposal. On August 20, 2004, the FDIC issued a new proposal on the CRA evaluation of banks defined as “small.” The FDIC’s new proposal would expand the category of “small banks” to those under \$1 billion, regardless of any holding-company size or affiliation. For small banks with assets between \$250 million and \$1 billion, the FDIC proposal would add to the five performance criteria of the current streamlined small bank test a new sixth criterion taking into account a bank’s record of community development lending, investments, or services “based on the opportunities in the market and the bank’s own strategic strengths.” While these community development activities would not be a separately rated test, the FDIC requested comment on whether it should apply a separate community development test in addition to the existing streamlined performance criteria and on what weighting the community development test would have in assigning an overall performance rating. The FDIC also proposed to expand the definition of “community development” to include activities that benefit rural areas and individuals in rural areas.

The FDIC’s proposal generated approximately 11,500 comment letters. These comments were sent by a wide spectrum of commenters, including over 4,000 from community bankers, over 1,500 from various community organizations, and over 5,000 from individuals. As with the February 2004 inter-agency proposal, the commenters were deeply divided on the issues presented in the August proposal. Nearly all of the comments received from bankers and banking organizations supported a change in the small bank dollar threshold, primarily as a way to reduce administrative burden. Bankers were mixed on the community development performance criterion. Some supported a community development criterion as an effective compromise, while others opposed the criterion altogether on one of two grounds: 1) community development lending and investments are already part of the loan-to-deposit performance

criterion assessing the level of lending activity<sup>1</sup> or 2) community development activities should be based on an overall subjective assessment, not an artificial test. Most of the banking commenters opposed making the community development test a separate test.

Community groups almost universally opposed any increase in the small bank threshold. These commenters asserted that the burden argument made by banks did not justify a change. This group also uniformly opposed the community development performance criterion on the ground that permitting banks to choose one or more lending, investment and service activities would lead to cut backs in investments and services currently required under the large bank test. The community group commenters generally supported a separate community development test.

Commenters were mixed on the addition of “rural” to the definition of “community development.” Some supported the proposal because it would permit CRA credit for such rural-based activities as funding local water projects, school construction, or rehabilitation of a Main Street retail district in rural areas lacking sufficient financial resources. Many commenters were concerned that the mere inclusion of the phrase “individuals who reside in rural areas” would permit banks to get CRA credit for loans, investments or services to middle-class or wealthy individuals.

## **Discussion**

The CRA requires the federal banking and thrift agencies to assess the record of each insured depository institution in meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with safe and sound operation of the institution and to take that record into account when the agency evaluates an application by the institution for a deposit facility.<sup>2</sup>

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<sup>1</sup> Some commenters also noted that, under existing regulations, small banks can elect to be evaluated under the large bank lending, investment and service tests.

<sup>2</sup> 12 U.S.C. 2903.

The OCC and the FDIC (or, “agencies”) continue to believe that it is both worthwhile and possible to improve the CRA rules in ways that reduce unnecessary burden while at the same time maintaining and improving the effective implementation of the CRA. Moreover, we believe that it is important to take steps at this time to develop and propose rules to achieve these goals, and to work toward achieving standards that ultimately can apply on a uniform basis to all banks subject to the CRA. Therefore, the agencies request comment on proposed regulatory revisions that balance the objective of providing meaningful regulatory relief for additional community banks with the objectives of preserving and encouraging meaningful CRA activities by those same banks.

As noted above, commenters were divided on the merits of that portion of the February 2004 and August 2004 proposals that would have increased the limit on the size of banks that would be eligible for treatment as a “small bank.” The comments in favor of the proposal focused on the potential regulatory relief for insured institutions, while those opposed expressed concern that the proposal would result in decreased community development activities in areas that are particularly in need of credit and investment, notably rural areas.

In light of these comments, the agencies request comment on this revised proposal. The new proposal addresses both the comments from community banks and comments from community organizations. It responds to community banks concerned about the reduction of undue regulatory burden by extending eligibility for streamlined lending evaluations and the exemption from data reporting to banks under \$1 billion without regard to holding company assets. It addresses the concerns of community organizations that urged the federal banking and thrift agencies to continue to evaluate community development participation, by providing that the community development records of banks between \$250 million and \$1 billion would be separately evaluated and rated, but provides a more streamlined basis than the current rule for

doing so. It responds to suggestions from both community banks and community organizations that the definition of “community development” is too confined by proposing a more flexible approach to the types of community development activities that would be considered, and by expanding the definition of community development activities in underserved rural areas and designated disaster areas. In short, the new proposal tries to strike a balance between burden reduction for community banks and effective evaluation of community development by those banks.

The key differences between this proposal and the February 2004 interagency proposal are three-fold. First, as with the FDIC’s August 2004 proposal, the new proposal would raise the threshold for a “small bank” to banks with assets of less than \$1 billion, not \$500 million, regardless of any holding company size or affiliation. Unlike the prior proposals, the new proposal would provide an adjustment of the threshold for inflation, based on changes to the Consumer Price Index.

Second, the new proposal would add a flexible new community development test that would be separately rated in CRA examinations for banks with at least \$250 million and less than \$1 billion in assets (these banks will be referred to as “intermediate small banks”). Ratings for intermediate small banks would be based on a rating on this community development test and on a separate rating for the streamlined small bank lending test. An intermediate small bank would not be eligible for an overall rating of “satisfactory” unless it received ratings of “satisfactory” on both the lending and community development tests.

Third, the definition of “community development” would be expanded to encompass: 1) affordable housing for individuals in underserved rural areas and designated disaster areas (in addition to low- and moderate-income individuals) and 2) community development activities that revitalize or stabilize underserved rural areas and designated disaster areas (in addition to low-

and moderate-income areas).<sup>3</sup> The current definition of “community development,” which hinges on targeting low- or moderate-income people or census tracts, has been criticized by community banks and community organizations alike for needlessly excluding rural areas that often do not have census tracts that meet the definition of “low- or moderate-income.” Indeed, about 60% of non-metropolitan counties lack such low- and moderate-income tracts. As a result, many rural areas in need of community development activities are not in low- or moderate-income tracts.

The current definition of “community development” also does not explicitly provide that it encompasses activities in areas affected by disasters. For example, there has been unnecessary uncertainty about the CRA treatment of bank revitalization activities in areas affected by natural disasters such as hurricanes or in, for example, the commercial and residential areas surrounding the site of the World Trade Center. Affordable housing for individuals in underserved rural areas and in designated disaster areas, and activities that promote the revitalization and stabilization of such areas, such as for infrastructure improvements, community services, and small business development, are fully consistent with the goals and objectives of the CRA because these projects can benefit the entire community, including, but not limited to, low- and moderate-income individuals or neighborhoods.

#### *Size Threshold*

Under the proposal, intermediate small banks would no longer have to report originations and purchases of small business, small farm, and community development loans. This change would account for most of the cost savings and paperwork burden reduction for intermediate small banks.

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<sup>3</sup> This represents a change from the FDIC’s August 2004 proposal. In that proposal, FDIC proposed amending the prong of the definition of community development relating to community services. See, 12 CFR 345.12(g)(2).

The proposal also would adjust the asset size for small and intermediate small banks on an ongoing basis, based on changes to the Consumer Price Index. Using an index to adjust dollar figures for the effects of inflation is commonplace, and is used in other federal lending regulations, such as the Home Mortgage Disclosure Act. 12 U.S.C. 2801 et seq.

*Community Development Test for Intermediate Small Banks*

As stated above, comments were mixed on the FDIC's inquiry as to whether the community development test should be separated from the current small bank test. Many industry commenters preferred to have a community development criterion, which would permit a bank to engage one or more community development activities, and opposed a separate community development test. On the other hand, many community organizations and others expressed concern that the criterion was overly flexible and would result in a narrow focus that would ignore a broad range of community needs, including investments.

The OCC and the FDIC believe that the proposal for a separate community development rating presents an appropriate focus on community development activities for intermediate small banks and makes transparent the weight that community development performance receives in the overall rating. Under the proposed community development test for these "intermediate" small banks, community development loans, qualified investments and community development services would be evaluated together, resulting in a single rating for community development performance. While the lending test for small banks permits consideration of community development lending and qualified investments "as appropriate," such activities by an intermediate small bank generally would be considered under the community development test. An intermediate small bank's rating for community development would play a significant role in the bank's overall rating, as would its rating on the separate test of the bank's lending. To ensure that community development performance and retail lending

are appropriately weighted under the proposal, and given the flexibility that would be available to satisfy the community development test through a variety of activities, an intermediate small bank would have to achieve a rating of at least satisfactory on both tests to be assigned an overall rating of satisfactory.

The number and amount of community development loans, the number and amount of qualified investments, and the provision of community development services, by an intermediate small bank, and the bank's responsiveness through such activities to community development lending, investment, and services needs, would be evaluated in the context of the bank's capacities, business strategy, the needs of the relevant community, and the number and types of opportunities for community development activities. The agencies intend that the proposed community development test would be applied flexibly, to permit a bank to apply its resources strategically to the types of community development activities (loans, investments, and services) that are most responsive to helping to meet community needs, even when those activities are not necessarily innovative, complex, or new.

As noted in the February 2004 proposal, some community banks face intense competition for a limited supply of qualified investments that are safe and sound and yield an acceptable return. Competition for scarce investments also may result in "churning," or the repeated purchase and sale, of the same pool of investments. To "fill the silo" of investments for purposes of the CRA investment test, these banks may have made or purchased investments that may not be meaningful or responsive to the needs of their community, whereas additional lending or provision of services by the bank could have been more responsive to local community development needs. The OCC and the FDIC recognize that these constraints may affect the investment performance of particular banks, and believe that a more flexible community development test for intermediate small banks provides a better framework to evaluate a bank's

capacity, the types of investments that are reasonably available in a bank's community, and how a bank fosters community development goals in its assessment areas.

As part of the proposed community development test for intermediate small banks, the OCC and the FDIC also anticipate that examiners would use their discretion, using performance context, to assign appropriate weight in a bank's current period rating to prior-period outstanding investments that reflect a substantial financial commitment or outlay by the bank designed to have a multi-year impact, in addition to investments made during the current examination cycle.

In providing this flexibility for intermediate small banks, it is not the intention of the agencies to permit a bank to simply ignore one or more categories of community development. Nor would the proposal prescribe any required threshold proportion of community development loans, qualified investments, and community development services for these banks. Instead, the OCC and the FDIC would expect that a bank will appropriately assess the needs in its community, engage in different types of community development activities based on those needs and the bank's capacities, and that it will take reasonable steps to apply its community development resources strategically to meet those needs.

Under the proposal, retail banking services provided by intermediate small banks would no longer be evaluated in a separate service test. Instead, services for low- and moderate-income people would be taken into account in the community development test. Under that test, the agencies would consider bank services intended primarily to benefit low- and moderate-income people, such as low-cost bank accounts and banking services such as low-cost remittance services.

Giving banks more flexibility on how to apply their community development resources to respond to community needs through a more strategic use of loans, investments, and services is

intended to reduce burden and make the evaluation of community banks' community development records more effective.

*Community Development Definition*

The regulations' present definition of "community development" has been criticized by community banks and community organizations alike for failing to recognize the unique community development needs of certain rural areas. The definition covers four categories of activities, three of which (affordable housing, community services, economic development) are defined in terms of the activity's targeting of low- and moderate-income people or small businesses or farms, and one of which (revitalization and stabilization activities) is defined in terms of its targeting of low- or moderate-income census tracts. The OCC and the FDIC propose to amend two of the categories—affordable housing and revitalization and stabilization activities—by adding references to individuals in "underserved rural areas" and in "designated disaster areas."<sup>4</sup>

In response to the FDIC's August 2004 proposal to revise the definition of "community development" to include the provision of affordable housing to individuals in rural areas (in addition to low- and moderate-income individuals under the current rule), several commenters noted that the provision of affordable housing was critical in certain rural areas. Some community organizations serving rural areas commented that the CRA process should promote affordable housing in rural areas across the country.

As described in the "Request for Comments" discussion below, the OCC and the FDIC seek comment on a variety of approaches to identifying the community development needs of rural areas. The approach reflected in the proposed amendments is based on the premise that the provision of *affordable* housing -- in addition to activities that revitalize and stabilize

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<sup>4</sup> Staff interpretations of "affordable housing" and "revitalization and stabilization" can be found in Interagency Questions and Answers Regarding Community Reinvestment, 66 FR 36620, 36625-26 (July 12, 2001) (Q&A \_\_.12(h)(1)-1, \_\_.12(h)(4)-1).

underserved rural areas -- may meet a critical need of individuals in certain underserved rural areas, even if those individuals may not meet the technical requirements of the definition of “low- or moderate-income” in the current regulation. The proposed amendment would clarify that bank support of affordable housing that benefits individuals in need of affordable housing in underserved rural areas will qualify as a community development activity.

With respect to the current definition covering revitalization and stabilization activities, this category does not address revitalization and stabilization activities in most rural counties, since most rural counties do not have any low- or moderate-income census tracts.<sup>5</sup> Under the CRA regulation, a tract’s income classification derives from its relationship to the median family income of the state’s rural, or non-metropolitan areas as a whole, which could be relatively low and declining. Community banks and community organizations have said that that tract-income limitation has made the definition of “community development” ineffective in addressing the needs of rural areas that do not have low- or moderate-income tracts, but are in decline, have been designated for redevelopment, or need revitalizing or stabilizing. This aspect of the proposed amendment to the definition of “community development” is designed to recognize the benefits of activities that revitalize and stabilize underserved rural areas that do not meet the technical definition of “low- or moderate-income” census tracts. Such activities might include, depending upon the circumstances, state or local infrastructure bonds and loans to construct healthcare facilities. They would not include, however, activities that benefit primarily

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<sup>5</sup> Under the definition of “low- or moderate-income” census tract in the CRA regulations, 57 percent of non-metropolitan counties have no low- or moderate-income tracts, compared to 13 percent of metropolitan counties. The reason for this disparity is that rural census tracts are drawn over relatively large geographic areas, often having relatively heterogeneous populations that, when averaged, tend toward the middle. This leads to a concentration of 72 percent of rural census tracts in the middle-income category, which leaves a small share (15 percent) in the low- and moderate-income categories. Moreover, because most rural counties have relatively few census tracts, the relatively few *low- or moderate-income* rural census tracts are distributed unevenly among rural counties. As would be expected, they also appear to be distributed unevenly among bank CRA assessment areas. About 42 percent of non-metropolitan assessment areas reported by large banks in 2003, compared to 14 percent of the metropolitan assessment areas they reported, lacked such tracts. (The regulation requires large banks to report their assessment areas; the assessment areas of small banks are not required to be reported.)

higher-income individuals in underserved rural areas or rural areas that are not underserved. In evaluating the responsiveness of community development activities in underserved rural areas, examiners would give significant weight to factors such as the extent to which low- and moderate-income individuals benefited from the activities.

Under the revised community development definition, a “designated disaster area” is an area that has received an official designation as a disaster area.

#### *Effect of Certain Credit Practices on CRA Evaluations*

The OCC and the FDIC again propose to revise the regulations to address the impact on a bank’s CRA rating of evidence of discrimination or other illegal credit practices. The regulations would provide that evidence of discrimination, or evidence of credit practices that violate an applicable law, rule or regulation, will adversely affect an agency’s evaluation of a bank’s CRA performance. The regulations also would be revised to include an illustrative list of such practices, including evidence of discrimination against applicants on a prohibited basis in violation of, for example, the Equal Credit Opportunity or Fair Housing Acts; evidence of illegal referral practices in violation of section 8 of the Real Estate Settlement Procedures Act; evidence of violations of the Truth in Lending Act concerning a consumer’s right to rescind a credit transaction secured by a principal residence; evidence of violations of the Home Ownership and Equity Protection Act; and evidence of unfair or deceptive credit practices in violation of section 5 of the Federal Trade Commission Act.<sup>6</sup> We believe that specifying examples of violations that give rise to adverse CRA consequences in the CRA regulations, rather than solely in interagency guidance on the regulations, will improve the usefulness of the regulations and provide critical information in primary compliance source material.

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<sup>6</sup> Evidence of credit practices that violate other laws, rules or regulations, including a federal banking agency regulation or a state law, if applicable, also may adversely affect a bank’s CRA evaluation.

Under the proposal, a bank's evaluation will be adversely affected by such practices regardless of whether the practices involve loans in the bank's assessment area(s) or in any other location or geography. In addition, a bank's CRA evaluation also can be adversely affected by evidence of such practices by any affiliate, if any loans of that affiliate have been considered in the CRA evaluation pursuant to \_\_.22(c)(1) and (2).

In response to comments on the February 2004 proposal, the agencies do not propose to include in the CRA regulations a provision that evidence of collateral-based lending also can adversely affect an agency's evaluation of a bank's CRA performance.

### **Request for Comments**

The OCC and the FDIC welcome comments on any aspect of this proposal, particularly, those issues noted below.

- The agencies invite comment on whether other approaches would be more appropriate to addressing the CRA burdens and obligations of banks with less than \$1 billion in assets. Is there another appropriate asset threshold to use when defining intermediate small banks, and, if so, why?
- We seek comment on the proposal to adjust the asset size for small and intermediate small banks on an ongoing basis, based on changes to the Consumer Price Index.
- Under the proposal, banks with assets between \$250 million and \$1 billion will no longer be required to report data on small business, small farm, and community development lending. The agencies seek comment specifically addressing whether and how the public has used the loan information that has been reported to date by such intermediate small banks (for example, by reference to specific studies on bank lending patterns that used the data), and whether other sources of data about this lending can be used for such purposes going forward.

- Does the proposal provide more flexibility in how an intermediate small bank may apply its community development resources through a more strategic use of loans, investments and services? Does the proposal to permit examiners to use performance context to give consideration in a current-period rating, to prior-period outstanding investments that reflect a substantial financial commitment by the bank, also provide more flexibility for intermediate small banks?
- Does the proposal to evaluate all community development activities of intermediate small banks under one test have the potential to make the evaluations of those banks' community development performance more effective than under the current regulation?
- Should the community development test for intermediate small banks be separately rated as proposed? If so, should an intermediate small bank be required to achieve a rating of at least "satisfactory" under both the small bank lending and community development tests to achieve an overall "satisfactory" CRA rating? Should the bank's community development test performance be weighted equally with its lending test performance in assigning an overall CRA rating? Would other ratings floors or weights be appropriate to provide greater flexibility in certain circumstances? If so, under what circumstances?
- The agencies seek comment on whether the existing definition of "community development" provides sufficient recognition for community services to individuals residing in underserved rural areas and designated disaster areas and, if not, how to encourage the provision of such services to persons in underserved rural areas and designated disaster areas that have the greatest need.<sup>7</sup>

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<sup>7</sup> The FDIC's August NPR added individuals in rural communities to the community services category. Comments were mixed in response to this part of that proposal. Some commenters expressed the concern that a broader definition would permit consideration of activities that benefit middle- and upper-income individuals. On the other hand, others stated that the regulations should recognize that some rural communities lack financial resources for economic and infrastructure improvement such as school construction, revitalizing Main Street, and maintaining or improving water and sewer systems. Banks are frequently called upon to help meet these needs. In light of these

- We also seek comment on the merits of the proposed treatment of the definition of “community development” in underserved rural and designated disaster areas and invites suggestions for alternatives.
- We seek comment on the proper way to define “rural.” Should we adopt a definition and, if so, which one? For example, should all areas outside a metropolitan area be considered “rural?” Alternatively, should the federal banking agencies define rural consistent with the definition employed by the Census Bureau? The Census Bureau defines any territory or population not meeting its criteria for “urban” to be “rural.” Are there other definitions the federal banking agencies should consider?
- We also seek comment on the proper way to define “underserved” when used in connection with rural areas. Should we adopt a definition and, if so, which one? For example, should the term refer solely to those rural areas showing signs of economic distress or lack of investment? If so, what indicia should the federal banking agencies use to identify such rural areas? Should we use criteria from other federal programs, such as the Community Development Financial Institutions Fund (CDFI) rules? Indicators used by the CDFI Fund to define “investment areas” include counties with (a) unemployment rates one-and-a-half times the national average, (b) poverty rates of 20% or more, or (c) population loss of 10 percent or more between the previous and most recent census, or a net migration loss of 5 percent or more over the 5 year period preceding the most recent census.

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comments, this proposal would not change the definition of community development regarding community services provided to low- and moderate- income individuals. Rather, the proposal recognizes that activities that revitalize and stabilize underserved individuals may also include many activities that benefit rural residents. We also seek comment on whether the definition of “community development” should be amended to explicitly include community services targeted to individuals in underserved rural and designated disaster areas.

- Should “underserved rural area” be defined in the regulation to also encompass those rural areas that have been targeted by a governmental agency for redevelopment, without regard to median income characteristics of the area?
- Should “underserved rural area” be limited to low- and moderate-income areas, without regard to whether those areas show signs of economic distress, lack of investment, or are targeted for redevelopment by a governmental agency? If so, should the OCC and the FDIC adopt a different method than currently exists in the regulation for determining when a rural area is low- or moderate-income? For example, under the current regulations, the area must be a low- or moderate-income census tract, which the regulations define as a tract with median family income that does not exceed 80% of the statewide non-metropolitan median family income. Would raising the low- and moderate income threshold in non-metropolitan communities from 80% of non-metropolitan median family income to some higher figure, such as 85%, 90% or 100%, more appropriately identify underserved rural areas?  
  
Alternatively, would identifying another measure of median income instead of the non-metropolitan median income, such as the statewide median income, more appropriately define low- and moderate-income for purposes of defining underserved rural areas by reference to low- and moderate-income characteristics?
- As proposed, the definition of “community development” would encompass affordable housing for people who do not meet the regulatory definition of “low- or moderate-income” if, and only if, they reside in underserved rural areas. The agencies seek comment on whether the current regulatory definition of “low- or moderate-income individual” is unduly restrictive for purposes of identifying individuals in rural areas who need affordable housing. If so, in what ways?

### **Solicitation of Comments on Use of Plain Language**

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106-102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the agencies to use plain language in all proposed and final rules published after January 1, 2000. We invite your comments on how to make the proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposal clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposal contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

### **Community Bank Comment Request**

In addition, we invite your comments on the impact of this proposal on community banks. The agencies recognize that community banks operate with more limited resources than larger institutions and may present a different risk profile. Thus, the agencies specifically request comments on the impact of the proposal on community banks' current resources and available personnel with the requisite expertise, and whether the goals of the proposal could be achieved, for community banks, through an alternative approach.

### **Regulatory Flexibility Act**

Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. The OCC and the FDIC have reviewed the impact of this proposed rule on small banks and certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The SBA has defined "small entities" for banking purposes as a bank or savings institution with less than \$150 million in assets. See 13 CFR 121.201. This proposed rule primarily affects banks with assets of at least \$250 million and under \$1 billion. The proposed amendments decrease the regulatory burden for banks within that asset range by relieving them of certain reporting and recordkeeping requirements applicable to larger institutions.

The proposal to eliminate the \$1 billion holding company threshold as a factor in determining whether banks will be subject to the streamlined CRA examination or the more in-depth CRA examination applicable to larger institutions will impact a limited number of small banks which are affiliated with holding companies with assets over \$1 billion. The FDIC estimates that only 110 of approximately 5,300 FDIC-regulated banks had assets of under \$150 million and were affiliated with a holding company with over \$1 billion in assets. The OCC estimates that only 36 of 1,988 OCC-regulated banks met these criteria. Because so few small banks will be affected by the proposed revisions to Parts 25 and 345, a regulatory flexibility analysis is not required.

#### **Executive Order 12866**

The OCC has determined that this proposed rule is not a significant regulatory action under Executive Order 12866.

### **Unfunded Mandates Reform Act of 1995**

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 rule likely to result in a Federal mandate that may result in the 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. The OCC has determined that the proposal will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, the proposal 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, the agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

*FDIC:* The FDIC has obtained OMB-approval for the paperwork burden associated with its CRA regulation at 12 CFR Part 345 under OMB information collection (IC) 3064-0092. The change in burden to IC 3064-0092 associated with the proposal to raise the threshold for small banks from those with under \$250 million in assets to those with under \$1 billion in assets was submitted to and approved by OMB in connection with a similar proposal published by the FDIC in August 2004 (69 FR 51611, August 20, 2004). The current interagency proposal would not, if adopted as final, result in any added change in burden to IC 3064-0092. Therefore, the FDIC is

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not required to make a submission to OMB under the Paperwork Reduction Act at this time.

Nevertheless, the FDIC joins the Board and the OCC in seeking additional comment on the paperwork burden associated with the current proposal.

*OCC:* The OCC has obtained OMB approval for the paperwork burden associated with its CRA regulation at 12 CFR Part 25 under OMB IC 1557-0160. . . .

Comments are invited on:

- (1) Whether the collections of information contained in the Draft Guidance are necessary for the proper performance of each agency's functions, including whether the information has practical utility;
- (2) What would be an accurate estimate of the burden of the proposed information collections;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected;
- (4) Ways to minimize the burden of the information collections on respondents, including the use of automated collection techniques or other forms of information technology; and
- (5) Estimates of capital or start-up costs and costs of operation, maintenance, and purchases of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the information collections should be modified prior to submission, as necessary, to OMB for review and approval of. All comments will become a matter of public record.

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Comments should be addressed to:

*FDIC*: Leneta G. Gregorie, Counsel, Legal Division, Room MB-3082, 550 17<sup>th</sup> Street, N.W., Washington, DC 20429. All comments should refer to the title of the proposed collection. You may submit comments by any of the following methods:

- Agency Web site: <http://www.FDIC.gov/regulations/laws/federal/propose.html>. Follow the instructions for submitting comments.
- E-mail: [comments@FDIC.gov](mailto:comments@FDIC.gov).
- Mail: Leneta G. Gregorie, Counsel, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429.
- Hand Delivered/Courier: The guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.
- Public Inspection: Comments may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW, Washington, DC, between 9:00 a.m. and 4:30 p.m. on business days.

Instructions: Comments received will be posted without change to

<http://www.FDIC.gov/regulations/laws/federal/propose.html>, including any personal information provided.

*OCC*:

*Title of Information Collection*:

*FDIC*: Community Reinvestment – 12 CFR 345

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*OCC:*

*Frequency of Response:* Annual.

*Affected Public:*

*FDIC:* State nonmember banks.

*OCC:* National banks.

*Abstract:* This Paperwork Reduction Act section estimates the burden that would be associated with the regulations if the agencies were to change the definition of “small institution” as proposed, that is, increase the asset threshold from at least \$250 million and less than \$1 billion and eliminate any consideration of holding-company size. The two proposed changes, if adopted, would make small \_\_\_\_\_ insured depository institutions that do not now have that status. That estimate is based on data for FDIC-, and OCC-regulated institutions that filed Call Reports on June 30, 2004. Those data also underlie the estimated paperwork burden that would be associated with regulations if the proposal were to be adopted by the agencies. The proposed change to amend the intermediate small bank performance standards to incorporate a separate community development test would have no impact on paperwork burden because the evaluation is based on information prepared by examiners.

*Estimated Paperwork Burden Under the Proposal:*

*FDIC*

*Number of Respondents:* 5,296

*Estimated Time Per Response:* Small business and small farm loan register, 219 hours;

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Consumer loan data, 326 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.

*Total Estimated Annual Burden: 193,975 hours.*

*OCC:*

### **Executive Order 13132**

The OCC has determined that this proposal does not have any Federalism implications, as required by Executive Order 13132.

### **List of Subjects**

#### *12 CFR Part 25*

Community development, Credit, Investments, National banks, Reporting and recordkeeping requirements.

#### *12 CFR Part 345*

Banks, Banking, Community development, Credit Investments, Reporting and recordkeeping requirements.

### **Department of the Treasury**

### **Office of the Comptroller of the Currency**

### **12 CFR CHAPTER I**

#### *Authority and Issuance*

For the reasons discussed in the joint preamble, part 25 of chapter I of title 12 of the Code of Federal Regulations is amended as follows:

**PART 25 – COMMUNITY REINVESTMENT ACT AND INTERSTATE  
DEPOSIT PRODUCTION REGULATIONS**

1. The authority citation for part 25 continues to read as follows:

**Authority:** 12 U.S.C. 21, 22, 26, 27, 30, 36, 93a, 161, 215, 215a, 481, 1814, 1816, 1828(c), 1835a, 2901 through 2907, and 3101 through 3111.

2. In § 25.12, revise paragraphs (g)(1), (g)(4), and (u) to read as follows:

**§ 25.12 Definitions.**

\* \* \* \* \*

(g) Community development means:

(1) Affordable housing (including multifamily rental housing) for low- or moderate-income individuals, individuals in underserved rural areas, or individuals located in designated disaster areas;

\* \* \* \* \*

(4) Activities that revitalize or stabilize low- or moderate-income geographies, underserved rural areas, or designated disaster areas.

\* \* \* \* \*

(u) Small bank. (1) Definition. Small bank means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than \$1 billion. Intermediate small bank means a small bank with assets of at least \$250 million and less than \$1 billion as of December 31 of both of the prior two calendar years.

(2) Adjustment. The dollar figures in paragraph (u)(1) of this section shall be adjusted annually and published by the OCC, based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each twelve-month period ending in November, with rounding to the nearest million.

\* \* \* \* \*

3. Revise § 25.26 to read as follows:

**§ 25.26 Small bank performance standards.**

(a) Performance criteria. (1) Small banks with assets of less than \$250 million. The OCC evaluates the record of a small bank that is not, or that was not during the prior calendar year, an intermediate small bank, of helping to meet the credit needs of its assessment area(s) pursuant to the criteria set forth in paragraph (b) of this section.

(2) Intermediate small banks. The OCC evaluates the record of a small bank that is, or that was during the prior calendar year, an intermediate small bank, of helping to meet the credit needs of its assessment area(s) pursuant to the criteria set forth in paragraphs (b) and (c) of this section.

(b) Lending test. A small bank's lending performance is evaluated pursuant to the following criteria:

- (1) The bank's loan-to-deposit ratio, adjusted for seasonal variation, 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 bank's assessment area(s);
- (3) The bank'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 bank's loans; and
- (5) The bank'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).

(c) Community development test. An intermediate small bank's community development performance also is evaluated pursuant to the following criteria:

- (1) The number and amount of community development loans;
- (2) The number and amount of qualified investments;
- (3) The extent to which the bank provides community development services; and
- (4) The bank's responsiveness through such activities to community development lending, investment, and services needs.

\* \* \* \* \*

3. Revise § 25.28, paragraph (c) to read as follows:

**§ 25.28 Assigned ratings.**

\* \* \* \* \*

(c) Effect of evidence of discriminatory or other illegal credit practices.

(1) The OCC's evaluation of a bank's CRA performance is adversely affected by evidence of discriminatory or other illegal credit practices in any geography by the bank or in any assessment area by any affiliate whose loans have been considered as part of the bank's lending performance. In connection with any type of lending activity described in § 25.22(a), evidence of discriminatory or other credit practices that violate an applicable law, rule or regulation includes, but is not limited to:

- (A) Discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act;
- (B) Violations of the Home Ownership and Equity Protection Act;
- (C) Violations of section 5 of the Federal Trade Commission Act;
- (D) Violations of section 8 of the Real Estate Settlement Procedures Act; and

- (E) Violations of the Truth in Lending Act provisions regarding a consumer's right of rescission.

(2) In determining the effect of evidence of practices described in paragraph (c)(1) of this section on the bank's assigned rating, the OCC considers the nature, extent, and strength of the evidence of the practices; the policies and procedures that the bank (or affiliate, as applicable) has in place to prevent the practices; any corrective action that the bank (or affiliate, as applicable) has taken or has committed to take, including voluntary corrective action resulting from self-assessment; and any other relevant information.

\* \* \* \* \*

- 4. In Appendix A to part 25, revise paragraph (d) to read as follows:

**Appendix A to Part 25—Ratings**

\* \* \* \* \*

(d) Banks evaluated under the small bank performance standards. (1) Lending test ratings. (i) Eligibility for a satisfactory lending test rating. The OCC rates a small bank's lending performance "satisfactory" if, in general, the bank demonstrates:

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

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

(C) 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 bank's assessment area(s);

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

(E) A reasonable geographic distribution of loans given the bank's assessment area(s).

(ii) Eligibility for an "outstanding" lending test rating. A small bank that meets each of the standards for a "satisfactory" rating under this paragraph and exceeds some or all of those standards may warrant consideration for a lending test rating of "outstanding."

(iii) Needs to improve or substantial noncompliance ratings. A small bank may also receive a lending test rating of "needs to improve" or "substantial noncompliance" depending on the degree to which its performance has failed to meet the standard for a "satisfactory" rating.

(2) Community development test ratings for intermediate small banks. (i) Eligibility for a satisfactory community development test rating. The OCC rates an intermediate small bank's community development performance "satisfactory" if the bank demonstrates adequate responsiveness to the community development needs of its assessment area(s) or a broader statewide or regional area that includes the bank's assessment area(s) through community development loans, qualified investments, and community development services. The adequacy of the bank's response will depend on its capacity for such community development activities, its assessment area's need for such community development activities, and the availability of such opportunities for community development in the bank's assessment area(s).

(ii) Eligibility for an outstanding community development test rating. The OCC rates an intermediate small bank's community development performance "outstanding" if the bank demonstrates excellent responsiveness to community development needs in its assessment

area(s) through community development loans, qualified investments, and community development services, as appropriate, considering the bank's capacity and the need and availability of such opportunities for community development in the bank's assessment area(s).

(iii) Needs to improve or substantial noncompliance ratings. An intermediate small bank may also receive a community development test 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.

(3) Overall rating. (i) Eligibility for a satisfactory overall rating. No intermediate small bank may receive an assigned overall rating of "satisfactory" unless it receives a rating of at least "satisfactory" on both the lending test and the community development test.

(ii) Eligibility for an outstanding overall rating. (A) An intermediate small bank that receives an "outstanding" rating on one test and at least "satisfactory" on the other test may receive an assigned overall rating of "outstanding."

(B) A small bank that is not an intermediate small bank that meets each of the standards for a "satisfactory" rating under the lending test and exceeds some or all of those standards may warrant consideration for an overall rating of "outstanding." In assessing whether a bank's performance is "outstanding," the OCC considers the extent to which the bank exceeds each of the performance standards for a "satisfactory" rating and its performance in making qualified investments and its performance in providing branches and other services and delivery systems that enhance credit availability in its assessment area(s).

(iii) Needs to improve or substantial noncompliance overall ratings. A small bank may also 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.

\* \* \* \* \*

**Federal Deposit Insurance Corporation**

12 CFR Chapter III

**Authority and Issuance**

For the reasons set forth in the joint preamble, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend part 345 of chapter III of title 12 of the Code of Federal Regulations to read as follows:

**PART 345—COMMUNITY REINVESTMENT**

1. The authority citation for part 345 continues to read as follows:

**Authority:** 12 U.S.C. 1814-1817, 1819-1820, 1828, 1831u and 2901-2907, 3103-3104, and 3108(a).

2. In § 345.12, revise paragraphs (g)(1), (g)(4), and (u) to read as follows:

**§ 345.12 Definitions.**

\* \* \* \* \*

(g) Community development means:

(1) Affordable housing (including multifamily rental housing) for low- or moderate-income individuals, individuals in underserved rural areas, or individuals located in designated disaster areas;

\* \* \* \* \*

(4) Activities that revitalize or stabilize low- or moderate-income geographies, underserved rural areas, or designated disaster areas.

\* \* \* \* \*

(u) Small bank. (1) Definition. Small bank means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than \$1 billion. Intermediate small bank means a small bank with assets of at least \$250 million and less than \$1 billion as of December 31 of both of the prior two calendar years.

(2) Adjustment. The dollar figures in paragraph (u)(1) of this section shall be adjusted annually and published by the FDIC, based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each twelve-month period ending in November, with rounding to the nearest million.

\* \* \* \* \*

3. Revise § 345.26 to read as follows:

**§ 345.26 Small bank performance standards.**

(a) Performance criteria. (1) Small banks with assets of less than \$250 million. The FDIC evaluates the record of a small bank that is not, or that was not during the prior calendar year, an intermediate small bank, of helping to meet the credit needs of its assessment area(s) pursuant to the criteria set forth in paragraph (b) of this section.

(2) Intermediate small banks. The FDIC evaluates the record of a small bank that is, or that was during the prior calendar year, an intermediate small bank, of helping to meet the credit needs of its assessment area(s) pursuant to the criteria set forth in paragraphs (b) and (c) of this section.

(b) Lending test. A small bank's lending performance is evaluated pursuant to the following criteria:

- (1) The bank's loan-to-deposit ratio, adjusted for seasonal variation, 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 bank's assessment area(s);
- (3) The bank'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 bank's loans; and
- (5) The bank'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).

(c) Community development test. An intermediate small bank's community development performance also is evaluated pursuant to the following criteria:

- (1) The number and amount of community development loans;
- (2) The number and amount of qualified investments;
- (3) The extent to which the bank provides community development services; and
- (4) The bank's responsiveness through such activities to community development lending, investment, and services needs.

\* \* \* \* \*

3. Revise § 345.28(c) to read as follows:

**§ 345.28 Assigned ratings.**

\* \* \* \* \*

(c) Effect of evidence of discriminatory or other illegal credit practices. (1) The FDIC's evaluation of a bank's CRA performance is adversely affected by evidence of discriminatory or other illegal credit practices in any geography by the bank or in any

assessment area by any affiliate whose loans have been considered as part of the bank's lending performance. In connection with any type of lending activity described in § 345.22(a), evidence of discriminatory or other credit practices that violate an applicable law, rule or regulation includes, but is not limited to:

- (A) Discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act;
- (B) Violations of the Home Ownership and Equity Protection Act;
- (C) Violations of section 5 of the Federal Trade Commission Act;
- (D) Violations of section 8 of the Real Estate Settlement Procedures Act; and
- (E) Violations of the Truth in Lending Act provisions regarding a consumer's right of rescission.

(2) In determining the effect of evidence of practices described in paragraph (c)(1) of this section on the bank's assigned rating, the FDIC considers the nature, extent, and strength of the evidence of the practices; the policies and procedures that the bank (or affiliate, as applicable) has in place to prevent the practices; any corrective action that the bank (or affiliate, as applicable) has taken or has committed to take, including voluntary corrective action resulting from self-assessment; and any other relevant information.

\* \* \* \* \*

4. In Appendix A to part 345, revise paragraph (d) to read as follows:

**Appendix A to Part 345—Ratings**

\* \* \* \* \*

(d) Banks evaluated under the small bank performance standards. (1) Lending test ratings. (i) Eligibility for a satisfactory lending test rating. The FDIC rates a small bank's lending performance "satisfactory" if, in general, the bank demonstrates:

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

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

(C) 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 bank's assessment area(s);

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

(E) A reasonable geographic distribution of loans given the bank's assessment area(s).

(ii) Eligibility for an "outstanding" lending test rating. A small bank that meets each of the standards for a "satisfactory" rating under this paragraph and exceeds some or all of those standards may warrant consideration for a lending test rating of "outstanding."

(iii) Needs to improve or substantial noncompliance ratings. A small bank may also receive a lending test rating of "needs to improve" or "substantial noncompliance" depending on the degree to which its performance has failed to meet the standard for a "satisfactory" rating.

(2) Community development test ratings for intermediate small banks. (i) Eligibility for a satisfactory community development test rating. The FDIC rates an intermediate small bank's community development performance "satisfactory" if the bank demonstrates adequate responsiveness to the community development needs of its assessment area(s) or a broader

statewide or regional area that includes the bank's assessment area(s) through community development loans, qualified investments, and community development services. The adequacy of the bank's response will depend on its capacity for such community development activities, its assessment area's need for such community development activities, and the availability of such opportunities for community development in the bank's assessment area(s).

(ii) Eligibility for an outstanding community development test rating. The FDIC rates an intermediate small bank's community development performance "outstanding" if the bank demonstrates excellent responsiveness to community development needs in its assessment area(s) through community development loans, qualified investments, and community development services, as appropriate, considering the bank's capacity and the need and availability of such opportunities for community development in the bank's assessment area(s).

(iii) Needs to improve or substantial noncompliance ratings. An intermediate small bank may also receive a community development test 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.

(3) Overall rating. (i) Eligibility for a satisfactory overall rating. No intermediate small bank may receive an assigned overall rating of "satisfactory" unless it receives a rating of at least "satisfactory" on both the lending test and the community development test.

(ii) Eligibility for an outstanding overall rating. (A) An intermediate small bank that receives an "outstanding" rating on one test and at least "satisfactory" on the other test may receive an assigned overall rating of "outstanding."

(B) A small bank that is not an intermediate small bank that meets each of the standards for a "satisfactory" rating under the lending test and exceeds some or all of those standards may warrant consideration for an overall rating of "outstanding." In assessing whether a bank's

performance is “outstanding,” the FDIC considers the extent to which the bank exceeds each of the performance standards for a “satisfactory” rating and its performance in making qualified investments and its performance in providing branches and other services and delivery systems that enhance credit availability in its assessment area(s).

(iii) Needs to improve or substantial noncompliance overall ratings. A small bank may also 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.

\* \* \* \* \*

**[THIS SIGNATURE PAGE PERTAINS TO THE JOINT NOTICE OF PROPOSED  
RULEMAKING ENTITLED “COMMUNITY REINVESTMENT ACT  
REGULATIONS.”]**

DRAFT February 18 2005

Dated: Month ##, 2005

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**Julie L. Williams,**

Acting Comptroller of the Currency

**[THIS SIGNATURE PAGE PERTAINS TO THE JOINT NOTICE OF PROPOSED  
RULEMAKING ENTITLED “COMMUNITY REINVESTMENT ACT  
REGULATIONS.”]**

By order of the Board of Directors.

Dated at Washington, D.C., this XXth day of Month, 2005.

FEDERAL DEPOSIT INSURANCE CORPORATION

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Robert E. Feldman

Executive Secretary

(SEAL)

BILLING CODES:

OCC: 4810-33-P (34%)

FDIC: 6714-01-P (33%)