

DEPARTMENT OF THE TREASURY**Office of the Comptroller of the Currency****12 CFR Part 35**

[Docket No. 00-11]

RIN 1557-AB85

FEDERAL RESERVE SYSTEM**12 CFR Part 207**

[Regulation G; Docket No. R-1069]

FEDERAL DEPOSIT INSURANCE CORPORATION**12 CFR Part 346**

RIN 3064-AC33

DEPARTMENT OF THE TREASURY**Office of Thrift Supervision****12 CFR Part 533**

[Docket No. 2000-44]

RIN 1550-AB32

Disclosure and Reporting of CRA-Related Agreements

AGENCIES: Office of the Comptroller of the Currency (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision (OTS).

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The OCC, Board, FDIC, and OTS (collectively, the agencies) are requesting comment on a proposed rule that implements provisions of the recently enacted Gramm-Leach-Bliley Act (the GLB Act or the Act). These provisions require nongovernmental entities or persons, insured depository institutions, and affiliates of insured depository institutions that are parties to certain agreements that are in fulfillment of the Community Reinvestment Act of 1977 to make the agreements available to the public and the appropriate agency and file annual reports concerning the agreements with the appropriate agency. These provisions are contained in section 711 of the Act and are codified as section 48 of the Federal Deposit Insurance Act (FDI Act).

The rule identifies the types of written agreements that are covered by section 711 of the GLB Act (referred to as covered agreements) and defines many of the terms used in the statute.

The rule also describes how the parties to a covered agreement must make the agreement available to the public and the appropriate agencies and explains the type of information that must be included in the annual report filed by a party to a covered agreement.

The agencies solicit comments on all aspects of the proposed rule, including the specific areas discussed below. The agencies will issue a final rule after considering comments received.

DATES: Comments must be received on or before July 21, 2000.

ADDRESSES:

OCC: Comments should be addressed to Communications Division, Office of the Comptroller of the Currency, 250 E Street, SW, Third floor, Washington, DC 20219, Attention: Docket No. 00-11. In addition, comments may be sent by facsimile transmission to fax number (202) 874-5274 or by Internet mail to regs.comments@occ.treas.gov. Comments will be available for public inspection and photocopying at the same location.

Board: Comments directed to the Board should refer to Docket No. R-1069 and may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW, Washington, DC 20551 or mailed electronically to regs.comments@federalreserve.gov. Comments addressed to Ms. Johnson also may be delivered to the Board's mailroom between 8:45 a.m. and 5:15 p.m. and, outside those hours, to the security control room. Both the mailroom and the security control room are accessible from the Eccles Building courtyard entrance, located on 20th Street between Constitution Avenue and C Street, NW. Members of the public may inspect comments in room MP-500 of the Martin Building between 9:00 a.m. and 5 p.m. on weekdays.

FDIC: Written comments should be addressed to Robert E. Feldman, Executive Secretary, Attention: Comments/OES, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429. Comments may be hand delivered to 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. (Fax number: (202) 898-3838). 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.

Comments may be submitted electronically over the Internet at www.fdic.gov. Further information

concerning this option may be found below at the "FDIC's Electronic Public Comment Site." Comments also may be mailed electronically to comments@fdic.gov.

OTS: Send comments to Manager, Dissemination Branch, Information Management & Services Division, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552, Attention Docket No. 2000-44. Hand deliver comments to Public Reference Room, 1700 G Street, NW, lower level, from 9 a.m. to 5 p.m. on business days. Send facsimile transmissions to FAX number (202) 906-7755 or (202) 906-6959 (if the comment is over 25 pages). Send e-mails to public.info@ots.treas.gov and include your name and telephone number. Interested persons may inspect comments at 1700 G Street, NW, from 10 a.m. until 4 p.m. on Tuesdays and Thursdays.

FOR FURTHER INFORMATION CONTACT:

OCC: Michael S. Bylsma, Director, Community and Consumer Law (202) 874-5750; or Karen O. Solomon, Director, Legislative and Regulatory Activities (202) 874-5090.

Board: Scott G. Alvarez, Associate General Counsel (202) 452-3583, Kieran J. Fallon, Senior Counsel (202) 452-5270, or Andrew Miller, Senior Attorney (202) 452-3428, Legal Division; Glenn E. Loney, Deputy Director (202) 452-3585, or James H. Mann, Attorney (202) 452-3667, Division of Consumer and Community Affairs; Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW, Washington, DC 20551. For users of Telecommunications Device for the Deaf ("TDD") only, contact Janice Simms at (202) 452-4984.

FDIC: Deanna S. Caldwell, Community Affairs Officer (202) 736-0141; A. Ann Johnson, Counsel, Regulation and Legislation Section (202) 898-3573; or Joan M. Bateman, Review Examiner (202) 736-0187.

OTS: Richard Bennett, Counsel (Banking and Finance), (202) 906-7409; Karen Osterloh, Assistant Chief Counsel, (202) 906-6639; or Richard R. Riese, Director, Compliance Policy, (202) 906-6134, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552.

SUPPLEMENTARY INFORMATION:**I. Executive Summary of Proposed Rule**

Section 711 of the GLB Act (Pub. L. 106-102, 113 Stat. 1338 (1999)) added a new section 48 to the FDI Act (12 U.S.C. 1831y) entitled "CRA Sunshine Requirements." Section 711 applies to written agreements that (1) are made in

fulfillment of the Community Reinvestment Act of 1977 (CRA),¹ (2) involve funds or other resources of an insured depository institution or affiliate with an aggregate value of more than \$10,000 in a year, or loans with an aggregate principal value of more than \$50,000 in a year, and (3) are entered into by an insured depository institution or affiliate of an insured depository institution and a nongovernmental entity or person. Section 711 does not, however, cover any agreement with a nongovernmental entity or person that has not had a CRA contact with the insured depository institution or affiliate or a banking agency, such as agreements entered into by entities or persons that solicit charitable contributions or other funds without regard to the CRA. Under section 711, the parties to a covered agreement must make the agreement available to the public and the appropriate agency. The parties also must file a report annually with the appropriate agency concerning the disbursement, receipt and use of funds or other resources under the agreement.

The proposed rule defines various terms necessary for determining which agreements are covered agreements and provides guidance for determining when a CRA contact has been made for purposes of identifying the parties whose agreements are covered by the rule. The proposed rule also describes the manner and scope of the Act's disclosure and annual reporting requirements.

Section 711 and the proposed rule apply only to agreements that are in writing. To be covered, a written agreement may be an understanding or agreement and need not be a legally binding contract.

Importantly, section 711 applies only to written agreements that are "made pursuant to, or in connection with, the fulfillment of the Community Reinvestment Act." Section 711 defines "fulfillment" of the CRA as a "list of factors" that the appropriate agency determines have a material impact on the agency's decision to approve or disapprove an application for a deposit facility under the CRA or to assign a CRA examination rating. The agencies propose to adopt for this purpose the list of factors identified by the agencies in the CRA regulations jointly issued by the agencies (CRA Regulations).² These factors include providing the types of loans considered in evaluating CRA

performance, providing community development services, making CRA qualified investments, fulfilling a CRA strategic plan, providing retail banking services as described in the CRA Regulations, and providing or refraining from providing comments or testimony to an agency concerning the CRA performance of an insured depository institution.

The GLB Act exempts specific types of agreements from coverage, even if these agreements would otherwise meet the definition of a covered agreement. In particular, the Act and the proposed rule do not apply to any individual mortgage loan. The Act and proposed rule also do not apply to any specific contract or commitment for any type of loan or extension of credit to individuals, businesses, farms or other entities if the funds are loaned at rates that are not substantially below market rates and the purpose of the loan or extension of credit does not include any re-lending of the borrowed funds to third parties.

In addition, as noted above, the Act exempts from coverage any agreement with a nongovernmental entity or person that has not commented on, testified about, or discussed with the insured depository institution, or otherwise contacted the institution, concerning the CRA. The proposed rule adopts the exemption as written in the statute and includes several examples of contacts that would be exempt under this provision as well as contacts that would not qualify for this exemption. An example of a contact that would qualify for this exemption is the dissemination of a similar fundraising letter to insured depository institutions and other businesses in the community encouraging all businesses in the community to meet their obligation to assist in making the community a better place to live and work. A CRA contact would be made, and a related agreement would not be exempt under this provision, if the entity or person had, for example, submitted comments to an agency concerning the CRA performance of the insured depository institution, contacted the institution or any affiliate about providing (or refraining from providing) CRA-related comments to an agency concerning the institution, or contacted the institution or any affiliate about the CRA performance of the institution.

The GLB Act requires those agreements that are covered by section 711, and that are not exempt, to be made available to the public and the appropriate agency. Section 711 provides that these disclosure obligations apply only to covered

agreements entered into after November 12, 1999. Section 711 also requires that the agencies' rules for ensuring compliance with the Act's requirements not impose undue burden on the parties. Accordingly, the rule proposes to require disclosure of covered agreements and to define the scope of annual reports in a manner that fulfills the requirements of section 711 while at the same time adopting simple procedures that reduce duplicative reporting and rely on existing reports prepared by the parties for their own use or to fulfill other requirements.

The rule proposes that each party to a covered agreement be allowed to fulfill the public disclosure requirement of section 711 by making the agreement available to any member of the public on request, and allows each party to recover reasonable copying and mailing costs in responding to these requests. An insured depository institution may fulfill its public disclosure obligation by placing a copy of the agreement in the institution's CRA public file and making it available in the same manner as other information in the CRA public file.

The proposed rule also requires that each insured depository institution or affiliate that enters into a covered agreement file a complete copy of the agreement with the appropriate agency within 30 days of entering into the agreement. To avoid duplication of efforts and reduce burden, the rule would allow a nongovernmental entity or person to fulfill its obligation to make a covered agreement available to the appropriate agency by providing a copy to the agency upon the agency's request.

In addition to making covered agreements available, the GLB Act requires that annual reports be filed regarding resources provided and used under the agreement. These annual reporting obligations apply only to covered agreements entered into on or after May 12, 2000. For nongovernmental entities or persons, the type of information required to be included in an annual report depends on how the entity or person used the funds or resources received under the covered agreement. If a nongovernmental entity or person allocates and uses the funds or resources received under a covered agreement for a specific purpose, the person's annual report would have to provide a description of the specific purpose and state the amount used for the specific purpose. If the entity or person uses the funds or resources received under the covered agreement for other or general purposes (e.g., general operating expenses), the rule proposes that the annual report provide

¹ 12 U.S.C. 2901 *et seq.*

² See 12 CFR 25.21–25.29 (OCC); 12 CFR 228.21–228.29 (Board); 12 CFR 345.21–345.29 (FDIC); 12 CFR 563e.21–563e.29 (OTS).

the detailed, itemized list described in section 711 of how such funds were used during the year. This list involves disclosure of the total amount of resources used by the person or entity for compensation of officers, directors, and employees; administrative expenses; travel expenses; entertainment expenses; consulting and professional fees; and other expenses or uses.

In keeping with section 711, the proposed rule includes a number of provisions designed to reduce the potential reporting burden of nongovernmental entities or persons. For example, the rule requires a nongovernmental entity or person to file an annual report only for a year in which the entity or person has received funds under a covered agreement. In addition, the annual report filed by a nongovernmental entity or person may consist of, or incorporate, a report that the entity or person has prepared for other purposes—such as a Federal or state tax return or annual financial statements—if the report provides the information required by the rule. To facilitate the use of reports that are prepared for other purposes, the rule would allow parties to file their annual reports on either a fiscal year or calendar year basis. If a nongovernmental entity or person is a party to five or more covered agreements, the entity or person may file a single, consolidated annual report relating to all of the agreements. Furthermore, a nongovernmental entity or person may fulfill its annual reporting requirements by sending its annual reports to the insured depository institution or affiliate that is a party to the agreement with a request that the institution or affiliate file the reports with the appropriate agency.

Under the GLB Act, the annual report filed by an insured depository institution or affiliate generally must include information on the amount, terms and conditions of any payments, fees, or loans provided by the institution or affiliate under the covered agreement, as well as payments, fees or loans received by the institution or affiliate under the agreement. The annual report of an insured depository institution or affiliate also must provide aggregate data on any loans, investments, or services provided under the covered agreement by each party to the agreement. The rule includes these requirements. The rule would allow an insured depository institution or affiliate that is a party to 5 or more covered agreements to file a single, consolidated annual report for all of the agreements. In addition, if an insured

depository institution and affiliate are parties to the same covered agreement, the institution and affiliate may file a consolidated annual report for the agreement.

Section 711 does not authorize any agency to enforce the provisions of any covered agreement, and the proposed rule adopts this provision. The GLB Act, however, provides that a covered agreement may become unenforceable if the appropriate agency determines that a nongovernmental entity or person that is a party to the agreement has willfully failed to comply in a material way with the Act's disclosure and reporting requirements and the entity or person, after receiving notice, fails to comply with the Act after a reasonable period of time. The proposed rule includes this provision and clarifies that, in these circumstances, the covered agreement becomes unenforceable only by the nongovernmental entity or person that has willfully and materially failed to comply with section 711.

The Act requires the agencies to consult and coordinate with each other in drafting the proposed rule to assure, to the extent possible, that the regulations of each agency are consistent and comparable. The agencies have gone beyond these requirements and have developed the proposed rule on an interagency basis. The agencies believe the adoption of a uniform rule should assist the public in complying with the requirements of the Act. Furthermore, as required by the Act, the agencies have sought to ensure that the proposed rule does not place an undue burden on the parties to covered agreements and protects proprietary and confidential information to the maximum extent consistent with the language and purpose of the Act.

The agencies request comment on all aspects of the proposed rule, including the specific provisions and issues highlighted in this preamble, and will incorporate comments received into the final rule as appropriate. The agencies recognize that insured depository institutions, affiliates, and nongovernmental entities and persons can not identify agreements that are covered by section 711 until, in particular, the agencies adopt the list of factors that are considered to be in "fulfillment" of the CRA. Accordingly, the agencies propose to act expeditiously to adopt a rule in final form following conclusion of the comment period. Once a final rule is adopted, the parties to covered agreements will be expected promptly to disclose any agreement that is covered by section 711 and was entered into after November 12, 1999, and file

an annual report for any covered agreement entered into on or after May 12, 2000, in accordance with the requirements of the final rule. The agencies request comment on how the parties to covered agreements entered into after these dates, but before issuance of the final rule, should be required to comply with the requirements of the final rule.

II. Detailed Explanation of Proposed Rule

This section provides a more detailed discussion of the proposed rule and includes examples that are designed to assist users in understanding the scope and application of the proposed rule. The examples included in the preamble are not exclusive. The agencies request comment on whether the examples included in the preamble are useful and whether additional examples would prove helpful. The proposed rule includes examples only of situations that would and would not constitute a CRA contact by a nongovernmental entity or person. These examples relating to CRA contact are part of the rule. The agencies request comment on whether examples illustrating other parts of the rule should be incorporated into the text of the regulation.

In keeping with the goal of consistency among the agencies' rules and to facilitate compliance, the proposed rule uses the term "insured depository institution" rather than "bank" or "savings association." As discussed below, the rule identifies the specific agency or agencies with whom a covered agreement and its related annual reports should be filed, and the agency or agencies that would be considered a relevant supervisory agency for a covered agreement.

For ease of reference, the rule and the remaining portions of this preamble refer to a "nongovernmental entity or person" as a "person."³ The terms "nongovernmental entity or person" and "person," as well as several other terms used in the rule, are defined in section _____.8 of the proposed rule. The rule generally defines a nongovernmental entity or person to mean any company or individual other than the Federal government, a state, local or tribal government, or an insured depository institution or affiliate. The agencies request comment on whether users would find it more helpful to have this section of definitions at the beginning of the rule.

The following description applies to each agency's proposed rule. Since the

³ The OTS rule, however, refers to a "nongovernmental entity or person" as a "NGEP."

rule of each agency will be codified at a different part of the Code of Federal Regulations, the following description references the proposed rule using only the proposed rule's section numbers.

A. Definition of Covered Agreement

Section _____.2 of the proposed rule defines which agreements are covered by the rule and the term "fulfillment of the CRA." The Act's exemptions from the definition of a covered agreement also are set forth in section _____.2.

1. Covered Agreements

The proposed rule defines a covered agreement as any contract, arrangement, or understanding that meets all of the following four criteria:

- The agreement is in writing;
- The agreement is made pursuant to, or in connection with, the fulfillment of the CRA, as defined in section _____.2(c) of the proposed rule;
- The parties to the agreement include (1) an insured depository institution or an affiliate of an insured depository institution, and (2) a person; and
- The agreement provides for the insured depository institution or affiliate to provide cash payments, grants, or other consideration (other than loans) having an aggregate value of more than \$10,000 in any calendar year, or to make loans in an aggregate principal amount of more than \$50,000 in any calendar year.

The proposed rule clarifies that an agreement may be a covered agreement even if the agreement is not legally binding on the parties. Under the proposed rule, an exchange of written correspondence reflecting a mutual agreement or a written agreement that lacks the consideration necessary for it to be a legally binding contract would constitute a covered agreement if the agreement meets the four criteria discussed above. Moreover, to be covered, an agreement may be with an insured depository institution or any affiliate of an insured depository institution, including a bank holding company or a nonbank affiliate.

The following examples illustrate when a written contract, arrangement or understanding may exist under the rule. The proposed rule does not attempt to specifically define what constitutes a "contract," "arrangement," or "understanding."

Example 1: An organization sends a letter to an insured depository institution requesting that the institution provide a \$15,000 grant to the organization. The insured depository institution responds in writing and agrees to provide the grant in connection with its annual grant program.

The exchange of letters constitutes a written understanding. This written understanding would be a covered agreement under the proposed rule if the agreement is made pursuant to, or in connection with, the fulfillment of the CRA and the agreement is not otherwise exempt under section _____.2(b).

Example 2: An organization issues a general, written solicitation for charitable contributions to businesses in its local community. An insured depository institution makes a \$20,000 charitable contribution by check to the organization in response to the solicitation. The insured depository institution does not have any written contract, arrangement or understanding with the organization concerning the donation. The general request for funds and the check are not themselves a contract, arrangement or understanding. Since there is no other written agreement between the insured depository institution and the organization, there is no covered agreement between the entities.

Example 3: A bank holding company unilaterally issues a press release announcing that its subsidiary banks have established a goal of making \$100 million of community development grants in low-and moderate-income (LMI) neighborhoods over the next 5 years. The unilateral pledge is not a contract, arrangement or understanding entered into with a person and, therefore, is not a covered agreement.

Example 4: An association of community groups and an affiliate of an insured depository institution orally agree that the affiliate will seek to make \$100,000 in grants available to the organization's constituent members over the next year. The oral agreement is not reduced to writing. Oral agreements are not within the scope of the statute and, accordingly, the agreement is not a covered agreement.

The agencies invite comment on whether the rule should define the terms "contract," "arrangement" and "understanding" and, if so, what those definitions should be. The agencies also request comment on whether any of the examples provided above should be modified or amended, and whether additional examples would be useful.

2. Exemptions for Certain Agreements

Section 711 specifically exempts certain types of agreements from coverage even if they otherwise meet the definition of a covered agreement. Section _____.2(b) of the proposed rule implements these exemptions.

a. Qualifying Loans

The first statutory exemption is for any individual mortgage loan. Under this exemption, any mortgage loan made by an insured depository institution or affiliate to any individual or entity is exempt from the requirements of section 711. This exemption is available for any mortgage loan, regardless of the identity of the borrower, the type of real estate

securing the loan, or the rate charged on the loan.

The statute also exempts from coverage "any specific contract or commitment for a loan or extension of credit to individuals, businesses, farms, or other entities if the funds are loaned at rates [that are] not substantially below market rates and if the purpose of the loan or extension of credit does not include any re-lending of the borrowed funds to other parties."⁴ Under the statute, this exemption is available for any type of loan to any individual or entity if the loan meets the market rate and re-lending restrictions of the statute.

The agencies request comment on the application of this exemption to agreements that involve a commitment to make one or more loans or extensions of credit that meet the market rate and re-lending restrictions of the statute. In particular, comment is requested on whether this exemption provides an exemption only for a specific commitment to make a loan or extension of credit. Under this interpretation, the exemption would be available for a commitment by an insured depository institution or affiliate to provide a specific loan or extension of credit to one or more individuals or entities that is on market terms and not for purposes of re-lending, such as a loan commitment typically made in the course of providing a line of credit to a small business. The agencies also request comment on whether this exemption includes an exemption for a commitment to make multiple loans that meet the Act's restrictions. Under this interpretation, a commitment to make any number or amount of loans that meet the Act's restrictions over a period of time would be exempt from coverage. The agencies request comment on which interpretation of the exemption is more consistent with the language and purposes of the Act.

To be entirely exempt under the proposed rule, an agreement must be exclusively a loan, extension of credit or loan commitment that meets the requirements of the exemption. However, as discussed further below, if an agreement includes a loan, extension of credit or loan commitment that meets the rule's requirements to be exempt and also provides for the insured depository institution or affiliate to provide other funds or resources, the value of the exempt loan, extension of credit or loan commitment may be excluded in determining whether the

⁴ 12 U.S.C. 1831y(e)(1)(B)(ii).

agreement is in fulfillment of the CRA and meets the Act's dollar thresholds.⁵

The following examples illustrate these provisions of the proposed rule:

Example 1: An insured depository institution provides a \$1 million mortgage loan to an organization pursuant to a written agreement. The agreement is an individual mortgage loan and is exempt from coverage under the rule, regardless of the interest rate on the loan or whether the purpose of the loan was for re-lending.

Example 2: An affiliate of an insured depository institution provides a \$500,000 working capital loan to a small business pursuant to a written agreement. The loan is made on market terms and the purposes of the loan do not include re-lending. The agreement is exempt from coverage under the rule.

Example 3: An insured depository institution enters into a written agreement with a community development organization to make \$250 million in small business loans in the community over the next five years. The loans would be made on market terms and not for purposes of re-lending. Each small business loan made by the insured depository institution pursuant to the agreement is exempt from coverage. The agreement by the insured depository institution with the association, however, is not a commitment to make a specific loan or extension of credit and would not be exempt under one interpretation of the exemption. This commitment to make loans would be exempt under the other interpretation of the exemption.

Example 4: A business organization receives a mortgage loan from an affiliate of an insured depository institution pursuant to a written agreement. The agreement also provides that the affiliate will make a \$12,000 investment in a local community development corporation the following month. The agreement is not an exempt agreement under the rule because it is not exclusively a mortgage loan. Although the mortgage loan may be excluded when considering if the agreement meets the Act's dollar thresholds, the agreement would meet these thresholds because it provides for the affiliate to make other payments in excess of \$10,000 in a calendar year.

The agencies request comment on these exemptions. In particular, comment is invited on whether a mortgage loan includes any loan secured by real estate, or only a loan that is secured by real estate and made for the purchase or improvement of the real estate or for the refinancing of such a loan. Comment also is invited on whether the agencies should define when loans are made at "substantially below market rates" and, if so, what that definition should be. For example,

⁵ The agencies note, however, that if the other consideration is provided to reduce the effective interest rate paid on the loan or extension of credit to a rate that is substantially below the market rate, the loan or extension of credit would not itself be exempt from coverage.

should the agencies provide that the relevant market rate for a loan is the rate that would be charged on a comparable transaction (e.g., a construction loan, permanent financing, a small business loan, or an unsecured consumer loan) with a comparable person (e.g., a person with similar financial resources and credit history) that is not a party to the agreement? In addition, should the agencies provide a formula for determining whether a loan bears a rate that is substantially below the market rate? Such a formula could provide, for example, that a rate is substantially below the market rate if it is more than a specified percentage (e.g., 10 percent) or number of basis points (e.g., 200 basis points) below the rate that would be charged in a comparable transaction.

The agencies also request comment on whether the rule should provide guidance on when a loan is made "for purposes of re-lending" and what constitutes "re-lending" under the rule. For example, should the rule provide that the purposes of a loan are determined by reference to the underlying loan documents or by whom the documents refer to as the lender?

b. Agreements With Persons Who Have Not Made a CRA Contact

Section 711 also exempts from coverage any agreement entered into by an insured depository institution or affiliate with a person who has not commented on, testified about, or discussed with the institution, or otherwise contacted the institution, concerning the CRA. This provision broadly exempts from all of the provisions of section 711 any agreement by an insured depository institution or affiliate with a person that has not had a contact concerning the CRA (CRA contact). The Conference Report for the Act indicates that a wide range of organizations that solicit funds without regard to the CRA may benefit from this exemption, including civil rights groups, community groups providing housing or other services in low-income neighborhoods, the American Legion, and community theater groups.⁶

The proposed rule adopts the exemptive language contained in section 711. In addition, the proposed rule provides examples of actions by a person that would constitute a CRA contact under the rule and examples of actions that would not constitute a CRA contact under the rule. These examples are intended to illustrate different types of actions that are or are not CRA contacts based on the wording and purpose of the exemption and the scope

of the statutory exemption. These examples are not exclusive. For ease of reference, the proposed rule divides the examples of actions that constitute a CRA contact into two categories: contacts with an agency and contacts with an insured depository institution or affiliate.

As discussed below, the agencies request comment on various aspects of this exemption. In particular, the agencies invite comment on whether the rule should provide a more detailed definition of the exemption. The agencies also request comment on whether the examples provided are appropriate and useful and, if so, whether other examples should be included or areas addressed with examples.

CRA Contact with an Agency. As a general matter, a person has made a CRA contact if the person submits written or oral comments or testimony to an agency concerning the record of performance or future performance under the CRA of an insured depository institution or CRA affiliate.⁷ If a person had this type of contact with an agency and subsequently enters into an agreement with the insured depository institution or any affiliate of the insured depository institution that meets the requirements of section 711, the agreement is not exempt.

"Comments" and "testimony" refer to any type of written submission or oral statement by a person to an agency. The terms include the submission of written materials to an agency in connection with an application by an insured depository institution or company for a deposit facility or an examination of an insured depository institution under the CRA, and oral statements made by a person to an agency during a public or private meeting held concerning a transaction or CRA examination.

The rule provides two examples of contacts with an agency that would *not* constitute a CRA contact. The first example involves a person that provides written or oral comments or testimony to an agency in response to a direct request by the agency for comments or testimony from that person. In such circumstances, the contact would result due to an action by the agency and imposing the rule's requirements on the person might impede the agency's ability to obtain necessary or useful information. This example of a direct request for comments or testimony does not apply, however, to comments or

⁷ As discussed further below, a contact concerning the performance of a "CRA affiliate" of an insured depository institution is considered to be a contact concerning the CRA performance of the insured depository institution.

⁶ See H.R. Conf. Rep. No. 106-434 at 179 (1999).

testimony that are provided in response to a general invitation by an agency for public comments (e.g., a *Federal Register* notification) in connection with a CRA performance evaluation or an application for a deposit facility.

The second example provides that a person does not make a CRA contact with an agency by making a statement concerning an insured depository institution at a widely attended conference or seminar on a general topic, even if representatives of an agency were in attendance at the conference or seminar when the statement was made. A public or private meeting or hearing relating to one or more insured depository institutions or a transaction to acquire a deposit facility is not considered a widely attended conference or seminar on a general topic.

CRA Contact with Insured Depository Institution or Affiliate. Contacts by a person with an insured depository institution or affiliate will not cause an agreement to become subject to the requirements of section 711 unless the contact is a CRA contact. The rule provides several examples of the types of contacts with an insured depository institution or affiliate that are CRA contacts and that would make the exemption unavailable.

The first example involves a contact with an insured depository institution or affiliate about providing (or refraining from providing) written or oral comments or testimony to an agency concerning the record of performance or future performance under the CRA of the insured depository institution.

The second example involves a contact with an insured depository institution or affiliate about providing (or refraining from providing) written comments to the institution that would have to be included in the institution's CRA public file. Under the agencies' CRA Regulations, a written comment generally must be placed in an institution's CRA public file if it specifically relates to the institution's performance in helping to meet community credit needs.⁸ Because this information is intended for consideration by the agencies in the course of a CRA examination or evaluation of an application for a deposit facility, the submission of comments for inclusion in an institution's CRA public file is considered a CRA contact.

The third example involves a contact with an insured depository institution

or affiliate concerning the CRA rating of the insured depository institution, or the CRA record of performance of the insured depository institution.

The fourth example involves a contact with an insured depository institution or affiliate concerning actions that should be taken to improve the CRA performance of the insured depository institution.

The fifth example involves a contact with an insured depository institution or affiliate concerning any obligation or responsibility that the insured depository institution may have to meet the banking needs of its community. In this example, the contact occurs while the insured depository institution or an affiliate of the institution has an application for a deposit facility pending before an agency or is undergoing a publicly announced CRA performance examination.

If a person has one of the contacts described above and subsequently enters into a covered agreement with the insured depository institution or any affiliate of the insured depository institution, the agreement is not exempt under the rule. The rule and the examples do not contemplate that a discussion or contact must include any particular words or phrases, such as "Community Reinvestment Act," "CRA" or "CRA rating" in order to be a CRA contact. Instead, the substance and context of the discussion or contact are the controlling factors.

Under the examples included in the rule, a person would *not* have a CRA contact by sending a similar fundraising letter to an insured depository institution or affiliate and other businesses in the community encouraging all businesses in the community to meet their obligation to assist in making the local community a better place to live and work. In addition, a person would not make a CRA contact by sending a general offering circular to financial institutions offering to sell a portfolio of loans and having discussions with a particular insured depository institution concerning the loan portfolio if no reference to the CRA or the institution's CRA performance is made in the offering circular or in the parties' discussions.⁹ A person also would not make a CRA contact with an insured depository institution or affiliate by making a statement concerning the institution or affiliate before a widely

attended conference or seminar on a general topic, even if representatives of the institution or affiliate were in attendance at the conference or seminar when the statement was made.

The agencies request comment on whether the rule should more specifically define the terms of the exemption for persons that have not made a CRA contact or more specifically define when a CRA contact has occurred and, if so, how a CRA contact should be defined. The agencies also request comment on the examples of a CRA contact included in the rule, including whether any of the examples should be amended or deleted or whether additional examples should be provided. For example, the agencies request comment on whether a CRA contact under the Act includes a general discussion about the CRA that does not involve any discussion of the performance of an insured depository institution under the CRA or obligation of the institution to serve the banking needs of its community.

In addition, the agencies request comment on whether the rule can and should be limited to exclude from the scope of CRA contacts discussions with an insured depository institution or affiliate concerning whether particular loans, services, investments or community development activities are generally eligible for consideration by an agency under the CRA Regulations. The marketing of products and services to insured depository institutions frequently may include a general statement of whether the product or service is eligible for credit under the CRA. If the rule were limited in this manner, then the situation described in section _____.2(b)(2)(iii)(D) of the rule would not be a CRA contact even if the offering circular included a statement that the loans included in the loan pool were of the type that could be considered by an agency under the CRA Regulations. A discussion of whether or how loans, services, investments or activities would impact a particular institution's CRA rating or performance would, however, continue to be considered a CRA contact.

The agencies also request comment on whether the rule can and should be limited to cover only contacts that involve providing CRA-related comments or testimony to an agency or discussions with an insured depository institution or affiliate about providing (or refraining from providing) such comments or testimony to an agency. If the rule was limited in this fashion, the actions described in section _____.2(b)(2)(ii)(B)(3), (4) and (5) would not constitute a CRA contact because

⁸ See 12 CFR 25.43(a)(1) (OCC); 12 CFR 228.43(a)(1) (Board); 12 CFR 345.43(a)(1) (FDIC); 12 CFR 563e.43(a)(1) (OTS).

⁹ A CRA contact would occur under the proposed rule, however, if the offering materials indicated that the loans in the mortgage pool would receive favorable consideration by the agencies under the CRA, or if the parties discussed how the transaction would improve the institution's CRA performance.

the person did not submit CRA-related comments or testimony to an agency or discuss with or contact the insured depository institution or any affiliate about providing (or refraining from providing) CRA-related comments or testimony to an agency.

Additionally, the agencies request comment on whether there should be a temporal relationship between a CRA contact and when an agreement is made. In this regard, under the proposed rule, a covered agreement entered into in 2001 between an insured depository institution and a person would not be exempt if the person had submitted a comment to an agency concerning the CRA performance of the institution several years earlier. Section 711, however, appears to have been intended to apply to agreements that result from, or were influenced by, a CRA contact. Where a CRA contact occurs a significant period of time before the negotiation of an agreement, however, there may be no link or influence between the CRA contact and the agreement. Furthermore, the passage of time may make it difficult for the parties to a covered agreement to determine or effectively track whether a CRA contact occurred at all.

For these reasons, the agencies specifically request comment on whether the rule should require that a CRA contact occur within a specified period, such as two years (or a shorter or longer period), before the parties entered into the agreement. Similarly, the agencies request comment on whether a CRA contact should include a contact that occurs after the parties enter into an agreement, such as within 90 days after the beginning of the term of the agreement, at any time during the term of the agreement, or some other period of time. For example, if a person provides comments or testimony to an agency concerning the CRA performance of an insured depository institution after entering into an agreement with the institution, would the person's actions suggest that the agreement and the comments or testimony were linked?

The agencies also request comment on how the rule and the exemption discussed above should apply in circumstances where a covered agreement involves several parties and a CRA contact has been made by or concerning only one of the parties. For example, how should the rule apply where several nongovernmental entities or persons enter into a covered agreement with an insured depository institution and only one of the entities or persons has made a CRA contact? Similarly, how should the rule apply

where a nongovernmental entity or person has a CRA contact concerning one insured depository institution and subsequently enters into a covered agreement jointly with the institution and several other unaffiliated insured depository institutions? In addition, how should the rule and exemption apply where a person has a CRA contact with an agency but the relevant insured depository institution or affiliate does not know the contact occurred?

c. Request for Comment on Additional Exemptions

The agencies recognize that the language of section 711 and, accordingly, the types of agreements captured under the proposed rule are broad. The agencies are concerned that, in light of this breadth, certain agreements that were not intended to be covered by the Act may be considered covered agreements under the proposed rule. For example, supervisory experience suggests that insured depository institutions enter into a wide variety of contracts in their normal day-to-day operations that, directly or indirectly, relate to activities considered by the agencies in connection with a CRA evaluation. During the negotiation of these contracts and as an incident to the underlying business transaction, the parties may discuss whether the activities contemplated by the contract are viewed favorably under the agencies' CRA Regulations, involve loans within the institution's CRA assessment area, or would otherwise improve the institution's CRA performance. These types of contacts would be CRA contacts under the proposed rule and a related business agreement would be covered if the agreement was in fulfillment of the CRA and met the other criteria to be a covered agreement.

The Act grants the Board the ability to determine, by regulation, that specific types of contacts are exempt and, consequently, that a related agreement is not covered by section 711. The agencies specifically invite comment on whether and how the Board should exercise its exemptive authority in this area, including whether there are particular types of CRA contacts that occur and that, given their context and purpose, do not implicate the concerns of the Act. For example, if the proposed definition of CRA contact is retained in the final rule, should the Board exercise its discretion in this area to provide an exemption for CRA contacts that occur in connection with the purchase of loans by an insured depository institution or affiliate on an arm's length basis in the secondary market even

where the negotiation of the agreement included a general discussion of the effect of the transaction on the CRA performance of the insured depository institution? Are there other types of contacts that occur in connection with the ordinary day-to-day business of an insured depository institution or affiliate that should be exempted from coverage because, for example, the CRA contact does not involve any coercive aspect or was initiated by the insured depository institution? If so, how could such an exemption or exemptions be framed narrowly to exclude only those types of contacts (and related agreements) that are not within the intended scope of the Act?

3. Fulfillment of the CRA

Under the GLB Act, a written agreement is a covered agreement only if it is "made pursuant to, or in connection with the fulfillment of the Community Reinvestment Act of 1977."¹⁰ The Act defines "fulfillment" of the CRA to mean "a list of factors that the appropriate Federal banking agency determines have a material impact on the agency's decision to (A) approve or disapprove an application for a deposit facility [under the CRA]; or (B) to assign a rating to an insured depository institution [under the CRA]."¹¹

The Conference Report for the GLB Act indicates that the list of factors should include "a full enumeration of the relevant factors that [an] agency reviews and considers in examining the performance of an insured financial institution in connection with the CRA, including any and all items a regulator would attach importance to in determining the evaluation under the [CRA] of the performance of a financial institution."¹² The agencies' CRA Regulations set forth the criteria that the agencies consider in evaluating the CRA performance of an insured depository institution for purposes of assigning a CRA rating to an institution and evaluating an application by an institution or company for a deposit facility under the CRA.¹³ These regulations permit the agencies to consider broadly the lending, investment and service activities of an insured depository institution in evaluating the institution's performance under the CRA.

For these reasons, the proposed rule would define the list of factors for purposes of section 711 generally by

¹⁰ 12 U.S.C. 1831y(e)(1)(A).

¹¹ *Id.* at 1831y(e)(2).

¹² H.R. Conf. Rep. No. 106-434 at 179 (1999).

¹³ See 12 CFR 25.21-25.29 (OCC); 12 CFR 228.21-228.29 (Board); 12 CFR 345.21-345.29 (FDIC); 12 CFR 563e.21-563e.29 (OTS).

reference to the criteria enumerated in Subpart B of the CRA Regulations jointly issued by the agencies. These criteria reflect the factors that the agencies previously have determined have a material impact on an agency's assignment of a CRA rating and assessment of the CRA factor in decisions to approve or disapprove an application for a deposit facility. These factors are summarized in the proposed rule as follows:

(1) Home purchase, home improvement, small business, small farm, community development, and consumer lending as described in the lending test portion of the CRA Regulations, including loan purchases, loan commitments, and letters of credit;

(2) Making investments, deposits, or grants, or acquiring membership shares that have as their primary purpose community development, as described in the investment test portion of the CRA Regulations;

(3) Delivering retail banking services, as described in the service test portion of the CRA Regulations;

(4) Providing community development services, as described in the service test portion of the CRA Regulations;

(5) For a wholesale or limited-purpose insured depository institution, community development lending, qualified investments, and community development services, as described in the community development test portion of the CRA Regulations for wholesale or limited-purpose insured depository institutions;

(6) For small insured depository institutions, the lending and other activities described in the small insured depository institution performance standard of the CRA Regulations;¹⁴

(7) For an insured depository institution whose CRA performance is evaluated on the basis of a strategic plan, any element of that plan as described in the strategic plan portion of the CRA Regulations;

(8) Providing or refraining from providing written or oral comments or testimony to any agency concerning the

record of performance or future performance under the CRA of an insured depository institution that is a party to the agreement or an affiliate of a party to the agreement; and

(9) Providing or refraining from providing written comments to an insured depository institution that is a party to the agreement or an affiliate of a party to the agreement that would have to be included in the institution's CRA public file.

An activity is within the factors enumerated in paragraphs (1) through (7) if it would be considered by the agencies under the relevant performance test or standard in the CRA Regulations.¹⁵ These activities may be conducted by an insured depository institution that is a party to the agreement or an affiliate of a party to the agreement.¹⁶ In addition, an agreement would be considered in fulfillment of the CRA if any of these activities is performed by a nongovernmental entity or person that is a party to the agreement and an insured depository institution receives favorable consideration for the activities under the CRA.

The proposed rule's list of factors also includes providing (or refraining from providing) CRA-related comments or testimony to an agency or written comments to an insured depository institution that must be included in the institution's CRA public file. The agencies' CRA Regulations generally require the agencies to consider comments received from the public or included in an insured depository institution's CRA public file when evaluating the CRA performance of the institution.¹⁷ The CRA Regulations also require an agency to consider written or oral comments submitted to the agency when acting on applications for a

deposit facility.¹⁸ Accordingly, such comments and testimony are among the factors that may have a material impact on an agency's decision to assign a CRA rating or evaluation under the CRA of an application for a deposit facility.

While the level of activity that will have a material effect on a CRA rating or an application decision varies with the circumstances involving the particular insured depository institution, the GLB Act by its terms requires that the agencies identify the list of *factors* that have a material impact on an agency's decision to assign a CRA rating or to approve an application for a deposit facility under the CRA. The Act does not appear to incorporate a quantitative threshold for the agencies to use in defining the list of factors that are material to such a decision. Instead, the GLB Act explicitly sets a threshold dollar level for the minimum amount of activities that must be performed in order for an agreement to be covered by section 711. As discussed below, these value thresholds are \$10,000 in cash payments, grants or other consideration and \$50,000 in loans. For these reasons, the proposed rule provides that an agreement is in fulfillment of the CRA if it pertains to a "factor" that the agencies determine is "material" to an institution's rating or application—such as the institution's lending—rather than to a level of performance that the agencies determine is material to the CRA evaluation of that insured depository institution.

The agencies request comment on this reading of section 711 and on whether the list of factors properly identifies the "factors" that are material to a CRA evaluation. The agencies also request comment on whether the agencies have interpreted the statutory mandate to identify the "list of factors that * * * have a material impact" on an agency's decision to assign a CRA rating and to approve or disapprove an application under the CRA in a manner consistent with the language and purposes of section 711. In particular, comment is invited on whether the proposed list of factors that are considered to be in fulfillment of the CRA can and should be expanded, restricted, or altered consistent with the language and purpose of the Act. For example, although the agencies consider an insured depository institution's lending in all geographic areas and to borrowers of all income ranges for certain purposes in evaluating the institution's CRA performance, can and should the rule's

¹⁴ The terms wholesale insured depository institution, limited-purpose insured depository institution, and small insured depository institution refer to a wholesale, limited-purpose or small bank or savings association as defined in Subpart A of the relevant agency's CRA Regulations. See 12 CFR 25.12(o), (t) and (w) (OCC); 12 CFR 228.12(o), (t), and (w) (Board); 12 CFR 345.12(o), (t), and (w) (FDIC); and 12 CFR 563e.12(n), (s), and (v) (OTS). An agreement that involves the performance of activities by a wholesale, limited-purpose or small insured depository institution is in fulfillment of the CRA only if the agreement involves the performance of one of the activities within the scope of the relevant performance test or standard for the particular type of institution.

¹⁵ Thus, for example, an agreement that relates to the consumer lending activities of an insured depository institution would be considered to be in fulfillment of the CRA if the institution's consumer lending activities were considered by the appropriate agency at the institution's most recent CRA examination. Under the CRA Regulations, an institution's consumer lending activities are considered in certain circumstances by an agency if such lending constitutes a substantial majority of the institution's business or the institution has elected to have its consumer lending activities considered by the appropriate agency. See 12 CFR 25.22(a) (OCC); 12 CFR 228.22(d) (Board); 12 CFR 345.22(a) (FDIC); 12 CFR 563.22(a) (OTS).

¹⁶ As discussed further below, a "CRA affiliate" of an insured depository institution is viewed as part of the insured depository institution. Accordingly, activities performed by a CRA affiliate of an insured depository institution are considered to be performed by the insured depository institution.

¹⁷ See 12 CFR 25.21(b)(6) and 25.43(a)(1) (OCC); 12 CFR 228.21(b)(6) and 228.43(a)(1) (Board); 12 CFR 345.21(b)(6) and 345.43(a)(1) (FDIC); 12 CFR 563e.21(b)(6) and 563e.43(a)(1) (OTS).

¹⁸ See 12 CFR 25.29(c) (OCC); 12 CFR 228.29(b) (Board); 12 CFR 345.29(c) (FDIC); 12 CFR 563e.29(c) (OTS).

list of factors focus on those types of lending (and other activities) that are reasonably likely to receive favorable consideration under the CRA Regulations, such as certain types of lending in LMI areas or to LMI borrowers?

The terms of a written agreement generally determine whether the contract, arrangement or understanding is in fulfillment of the CRA. However, the parties to a written agreement may not evade coverage under the Act by reaching an oral understanding that a party will submit (or refrain from submitting) oral or written CRA-related comments or testimony to an agency or written comments to an insured depository institution that would have to be included in the institution's CRA public file and excluding this understanding from the terms of the written agreement. In addition, if an agreement includes a loan, extension of credit or loan commitment that, if done separately, would be exempt from coverage and also provides for the insured depository institution or affiliate to provide other funds or resources, the parties may exclude the exempt loan, extension of credit or loan commitment when determining if the agreement is in fulfillment of the CRA.

The following are examples of agreements that would be in fulfillment of the CRA under the proposed rule. Unlike the examples of CRA contacts, these examples are not included in the proposed rule. Each example illustrates *only* the fulfillment criteria of the rule and assumes that the agreement meets the other requirements necessary to be considered a covered agreement. In this regard, even if an agreement is in fulfillment of the CRA, it may still be exempt from coverage under the rule if it is an exempt loan or loan commitment, or if the person that is a party to the agreement has not had a CRA contact.

Example 1: An insured depository institution enters into an agreement with a local business organization that provides for the institution to make \$500,000 in small business loans to third parties in the institution's assessment area in the next two years. The agreement is in fulfillment of the CRA because an institution's small business lending activity is considered as part of the lending test under the CRA Regulations. The agreement might still be exempt from coverage depending on the scope of the exemption for loan commitments.

Example 2: An insured depository institution enters into an agreement with a development corporation to invest \$1 million in a project the purpose of which is the revitalization of an LMI neighborhood within the institution's assessment area. The agreement is in fulfillment of the CRA

because the investment is a qualified investment under the CRA Regulations and would be considered as part of the investment test under the CRA Regulations.

Example 3: An insured depository institution enters into an agreement with a supermarket chain that provides for the institution to open a branch in certain of the chain's stores. The agreement is in fulfillment of the CRA because an institution's record of opening and closing branches is evaluated in the context of the distribution of its branches as part of the service test under the CRA Regulations.

Example 4: An insured depository institution enters into a written agreement with an organization to provide the organization with a \$25,000 donation to assist in covering the organization's general operating expenses. A representative of the organization orally agrees that, in return for the contribution, the organization will submit a comment to or testify before the appropriate agency in support of the institution's recently announced proposal to merge with another insured depository institution. The written agreement is in fulfillment of the CRA because the organization orally agreed in connection with the agreement to provide comments or testimony to an agency concerning the CRA record of performance of the institution.

The following are examples of agreements that would not be in fulfillment of the CRA under the proposed rule:

Example 5: An insured depository institution enters into an agreement with a local theater company for the institution to make a \$20,000 charitable donation to the company for each of the next five years. The agreement is not in fulfillment of the CRA because the donation does not have community development as its primary purpose and, thus, would not be considered a qualified investment under the CRA Regulations.

Example 6: An insured depository institution enters into an agreement with a neighborhood association to donate 100 hours of employee time to the organization's annual effort to clean up the neighborhood. The agreement is not in fulfillment of the CRA because the services are not considered community development services or other qualifying services under the CRA Regulations.

The agencies note that the proposed rule's list of factors does not include performance of activities designed to ensure compliance with Federal laws that prohibit discriminatory or other illegal credit practices, such as the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*) and the Fair Housing Act (42 U.S.C. 3601 *et seq.*). Although the agencies consider evidence of these practices in evaluating an insured depository institution's performance under the CRA, the agencies are concerned that including such activities in the list of factors could have an unintended and detrimental impact on

compliance and enforcement of the fair lending laws.¹⁹ The agencies specifically request comment on whether this view is correct, or whether the list of factors should be expanded to include activities designed to ensure compliance with the fair lending laws.

Comment also is solicited on whether the list of factors should be expanded to include other activities. For example, the proposed rule's list of factors does not specifically include the provision of advisory or consulting services concerning CRA-related activities. Should the rule include a reference to these or other activities?

4. Value

A written agreement is a covered agreement only if it calls for an insured depository institution or affiliate to provide to one or more persons cash payments, grants, or other consideration of more than \$10,000 in any calendar year, or to make loans that have an aggregate principal amount of more than \$50,000 in any calendar year. The statutory threshold is based on the total value of payments and loans provided under the agreement and does not require that these payments or loans be made to a party to the agreement.²⁰ Accordingly, under the proposed rule, all cash payments, grants, consideration or loans provided by an insured depository institution or affiliate under the agreement, including amounts provided to individuals or entities that are not parties to the agreement, would be considered in determining whether an agreement meets the rule's dollar thresholds. However, if an agreement includes a loan, extension of credit or loan commitment that, if done separately, would be exempt from coverage and also provides for the institution or affiliate to provide other funds or resources, the parties may exclude the exempt loan, extension of credit or loan commitment when determining if the agreement meets the dollar thresholds of the rule. See discussion under II.A.2.a. above concerning qualifying loans.

Under the proposal, an agreement that provides for payments to be made in any calendar year in excess of the dollar thresholds established by the statute is a covered agreement for its entire term. The agencies believe that using a calendar year period for these calculations should facilitate

¹⁹ For example, a requirement that an insured depository institution publicly disclose an agreement to use "mystery shoppers" to test the institution's compliance with the fair lending laws or to settle a fair lending complaint could deter the institution from entering into such agreements.

²⁰ See 12 U.S.C. 1831y(e)(1)(A)(i).

compliance with the rule by providing all parties to a covered agreement a uniform basis for determining whether the agreement is covered by the rule and because the terms of an agreement may not coincide with the parties' fiscal years. The agencies invite comment on whether another 12-month period would provide a more appropriate basis for these calculations.

The following are examples of the value provisions of the proposed rule. These examples illustrate only the application of the dollar thresholds of the proposed rule.

Example 1: An insured depository institution enters into an agreement with a small business investment company pursuant to which the institution will invest \$25,000 in the company. The agreement meets the dollar threshold criterion to be a covered agreement because the institution will provide more than \$10,000 in funds (other than loans) under the agreement.

Example 2: An insured depository institution and a community organization enter into a written agreement pursuant to which the institution will invest \$1 million in a state-sponsored investment fund that supports affordable housing initiatives for LMI individuals. The community organization will not receive any funds or other resources from the insured depository institution or its affiliates under the agreement. The agreement meets the dollar threshold criterion for a covered agreement under the proposed rule.

Example 3: An affiliate of an insured depository institution provides a \$100,000 loan to an association of small businesses pursuant to a written agreement. The loan is on market terms and not for purposes of re-lending. The agreement also provides for the affiliate to make a \$5,000 grant to the local chamber of commerce's small business incubator. Because the loan is made on market terms and not for purposes of re-lending, the loan would be an exempt agreement under the proposed rule if it were a separate agreement. Accordingly, the value of the loan may be excluded in determining the value of the agreement. After excluding the loan, the agreement would not meet the dollar criterion of the rule.

Example 4: An insured depository institution and a community development corporation enter into a written agreement that requires an affiliate of the insured depository institution to provide the organization with a grant of \$5,000 in 2000, \$8,000 in 2001, and \$11,000 in 2002. The agreement exceeds the dollar threshold criterion of the rule because the agreement provides for payments in excess of \$10,000 during 2002. Assuming the agreement meets the other requirements of the rule and is not otherwise exempt, the agreement is a covered agreement for its entire term.

The agencies request comment on how the dollar thresholds in the statute should be applied in situations where an agreement does not have a specific term or does not specify a timetable for

the disbursement of funds or resources under the agreement. For example, if an agreement provides that an insured depository institution will make \$40,000 in grants over a 5-year period, but does not specify the years in which the grants will be made, should the rule create a presumption that the entire sum (\$40,000) is provided in the first year of the agreement or assume that the value is paid in equal yearly installments of \$8,000? An alternative approach would rely on how the payments are actually made under the agreement. Under this alternative approach, if the payments under the agreement actually exceeded \$10,000 in a calendar year, the agreement would then become a covered agreement.

The agencies also invite comment on whether the rule should provide guidance on how to determine the value of an agreement that does not specify the amount of payments, grants, loans or other consideration to be provided under the agreement, such as an agreement for an insured depository institution to open a branch or to begin offering a new loan product.

5. Related Agreements Considered a Single Agreement

In two circumstances, section 711 of the GLB Act requires that separate agreements or contracts be aggregated for purposes of determining whether the agreements—taken as a whole—meet the definition of a covered agreement.²¹ Section _____.3 of the rule implements these requirements. If separate agreements are considered a single agreement under section _____.3, the combined agreement must still meet the criteria to be a covered agreement to be covered by the rule. Loans, extensions of credit and loan commitments that are specifically excluded from the definition of covered agreement under _____.2(b) of the rule are not required to be aggregated with other agreements.

a. Agreements Entered Into by the Same Parties

Section _____.3(a) provides that all written contracts, arrangements, or understandings that are entered into by an insured depository institution or affiliate of an insured depository institution will be considered to be part of a single agreement if the contracts, arrangements, or understandings are entered into with the same person within a 12-month period and each agreement is in fulfillment of the CRA. This aggregation rule applies to all written agreements entered into during the 12-month period by the same person

on the one hand, and any part of the same organization, including an insured depository institution and any of its affiliates, on the other hand.

Example 1: In April, an insured depository institution enters into a written agreement with Community Development Organization, Inc. pursuant to which the institution makes an \$8,000 investment in the organization. In November of the same year, an affiliate of the insured depository institution and Community Development Organization, Inc. enter into a written agreement under which the affiliate makes an additional \$8,000 investment in the organization. For purposes of this example, both investments are assumed to be qualified investments under the CRA Regulations and considered in the evaluation of the institution's CRA performance. The separate agreements must be aggregated under the rule and the combined agreement meets the \$10,000 dollar threshold of the rule. Accordingly, the agreements are jointly considered a covered agreement.

Example 2: In September, an insured depository institution orally agrees to donate \$15,000 of computer equipment to a local housing organization. In December, the institution and organization enter into a written agreement for the institution to make a \$5,000 CRA qualified investment in local housing project that is eligible for low-income housing tax credits. The agreements do not need to be aggregated under the rule because the September agreement was not in writing.

Example 3: In February, an insured depository institution enters into a written agreement with Partnership A for the institution to make a \$9,000 grant to Partnership A for the purpose of rehabilitating affordable-housing units. In August of the same year, an affiliate of the insured depository institution enters into a written agreement with Partnership A under which the affiliate makes a payment of \$9,000 so that its employees may have access to the child care center operated by Partnership A. The August agreement is not in fulfillment of the CRA. Accordingly, the two agreements would not be aggregated under the rule.

b. Substantively Related Contracts

Section 711 requires the aggregation of separate but "substantively related contracts" even where the contracts are entered into with different persons.²² Unlike the aggregation rule discussed above, the rule aggregating "substantively related contracts" applies only to separate, written contracts and does not apply to other types of written arrangements or understandings.

The rule defines written contracts entered into by an insured depository institution or any of its affiliates as "substantively related" if the contracts were negotiated in a coordinated

²¹ See 12 U.S.C. 1831y(e)(1) and (2).

²² See 12 U.S.C. 1831y(e)(1)(A)(ii).

fashion. The rule does not require that the separate contracts each be in fulfillment of the CRA or that the parties to the contracts (other than the banking organization) be the same. Thus, the rule prevents parties from evading the disclosure and reporting obligations of the statute by separating out from an agreement payments or grants that may not themselves be in fulfillment of the CRA.

Example 1: Two housing organizations jointly approach an insured depository institution to obtain funding. A representative of the insured depository institution meets with both organizations at the same time to discuss their funding needs. The institution enters into a written contract with one organization to provide it with \$9,000 for the purpose of rehabilitating affordable housing units. The institution enters into a separate written contract with the other organization to provide the organization with an unrestricted grant of \$9,000. Because the contracts were negotiated in a coordinated fashion, the contracts must be aggregated under the rule. When aggregated, the contracts would meet the statute's \$10,000 dollar threshold and each contract would be a covered agreement.

Example 2: A bank holding company announces its intention to acquire an insured depository institution. A Florida-based group and a California-based group independently approach the bank holding company to seek funding for specific projects and separately negotiate written contracts with the bank holding company. The contracts would not be aggregated under the rule, and each contract would be a covered agreement only if that contract on its own met the requirements of the rule.

The agencies request comment on the aggregation rules included in section _____.3, including the proposed definition of "substantively related contracts" and whether there are alternative definitions that would achieve the purposes of the statute. The agencies also request comment on how these aggregation rules should apply when a CRA contact has not occurred prior to one of the agreements or was made by only one of the persons that is a party to the agreements. For example, when a single person enters into two agreements with an insured depository institution during a 12-month period, but engages in a CRA contact between the first and second agreement, should the first agreement be excluded from aggregation because a CRA contact had not occurred at the time it was entered into? Alternatively, should the agreements be aggregated because a CRA contact occurred prior to the second agreement and the agreements otherwise meet the requirements for aggregation under the rule? Similarly, should substantively related contracts entered into by separate persons be aggregated

under the rule only if each person had engaged in a CRA contact?

6. CRA Affiliate Treated as Insured Depository Institution

The CRA Regulations provide that an insured depository institution, at its election, may request that an agency consider certain activities conducted by an affiliate in evaluating the CRA performance of the insured depository institution.²³ In these circumstances, the selected activities of the affiliate are viewed as activities of the insured depository institution.

The proposed rule generally considers a contact concerning this type of affiliate, referred to as a "CRA affiliate," of an insured depository institution to be the equivalent of a contact concerning an insured depository institution (*see* section _____.2(b)(2)). Similarly, an agreement is considered to be in fulfillment of the CRA if it concerns the performance of any of the activities listed in section _____.2(c) by a "CRA affiliate" of an insured depository institution (*see* section _____.2(c)).

The proposed rule defines a "CRA affiliate" as any company that is an affiliate of an insured depository institution and whose activities were considered by an agency in assessing the CRA performance of the institution at the institution's most recent CRA examination.²⁴ Under the rule, a company is considered a CRA affiliate only to the extent its activities were taken into account in the CRA evaluation of an affiliated insured depository institution.

Example 1: A person submits a written comment to an agency concerning the lending performance under the CRA of a mortgage company that is affiliated with an insured depository institution. The insured depository institution elected, in accordance with the agencies' CRA Regulations, to have the lending activities of the mortgage company considered in the institution's most recent CRA performance evaluation. The mortgage affiliate, therefore, is considered a CRA affiliate with respect to its lending activities. Accordingly, the agreement is in fulfillment of the CRA for purposes of section 711 and the person has engaged in a CRA contact under section _____.2(b)(2) because the selected activities of a CRA affiliate and contacts with an agency regarding a CRA affiliate are considered activities of and

²³ *See* CRA lending test (12 CFR 25.22(c), 228.22(c), 345.22(c) and 563e.22(c)); CRA investment test (12 CFR 25.23(c), 228.23(c), 345.23(c) and 563e.23(c)); CRA service test (12 CFR 25.24(c), 228.24(c), 345.24(c) and 563e.24(c)); CRA community development test for wholesale and limited-purpose institutions (12 CFR 25.25(d), 228.25(d), 345.25(d) and 563e.25(d)); and CRA strategic plans (12 CFR 25.27(c), 228.27(c), 245.27(c) and 563e.27(c)).

²⁴ *See* Proposed Rule, section _____.8(c).

contacts concerning an insured depository institution.

Example 2: An affiliate of an insured depository institution engages in mortgage lending and provides credit counseling services. The insured depository institution elected to have only the mortgage lending activities of the affiliate considered in its most recent CRA performance evaluation. The affiliate and a community group enter into an agreement that provides for the affiliate to provide credit counseling services in the local community. The agreement is not in fulfillment of the CRA because the affiliate is not considered a CRA affiliate with respect to its credit counseling activities.

To assist persons in complying with the rule, section _____.2(e) of the proposed rule requires that an insured depository institution or affiliate inform the other parties to a covered agreement if the agreement concerns the activities of a CRA affiliate. The institution or affiliate must provide this notification not later than the time the agreement is entered into if the affiliate is a CRA affiliate at that time.

Because the status of an affiliate of an insured depository institution may change, an agreement that concerns the activities of an affiliate may become a covered agreement *after* the date the parties enter into the agreement. For example, a person may enter into an agreement that concerns the lending activities of a newly formed affiliate. If an insured depository institution subsequently elects to have the lending activities of the new affiliate considered during its next CRA performance examination, the affiliate would become a CRA affiliate. In such circumstances, the proposed rule requires the insured depository institution or affiliate to inform the other parties to the agreement that the affiliate has become a CRA affiliate within a reasonable period of time after the change of status occurs.

Where an agreement concerns the activities of an affiliate that becomes a CRA affiliate, the agreement would be in fulfillment of the CRA only once the affiliate becomes a CRA affiliate. If the agreement met the other requirements of the rule, the agreement would become a covered agreement at that time. Section _____.2(e) clarifies that in these circumstances the parties to the agreement have no disclosure or reporting obligations under the rule until the agreement becomes a covered agreement. In applying the disclosure and reporting requirements of the rule, the agreement would be considered to have been entered into on the date it became a covered agreement.

The agencies request comment on the proposed rule's treatment of CRA affiliates, including whether the

requirement that an insured depository institution or affiliate inform the other parties when an agreement concerns a CRA affiliate is useful and practicable. The agencies also request comment on whether the rule should provide a similar notice procedure for agreements that involve an activity of an insured depository institution, such as consumer lending, that the institution elects for the first time to be considered under the CRA during the term of the agreement.²⁵ In addition, the agencies request comment on whether there is an appropriate and less burdensome way for the rule to determine whether an affiliate is a CRA affiliate at the time the parties enter into an agreement.

B. Disclosure of Covered Agreements

Section 711 requires that each party to a covered agreement fully disclose the agreement in its entirety and make the full text of the agreement available to the public and the appropriate agency with supervisory responsibility over the relevant insured depository institution.

1. Disclosure to the Public

The proposed rule requires that each party to a covered agreement make a complete copy of the agreement available to any member of the public upon request. The rule would permit an insured depository institution to fulfill its public disclosure obligation by placing a copy of a covered agreement in the institution's CRA public file and making it available in accordance with the procedures set forth in the CRA Regulations relating to public files.²⁶

A party may make a covered agreement available to any individual or entity that requests the agreement by mailing it to the requestor, and the proposal would specifically permit the party to charge the requestor for the costs of copying and mailing the agreement, so long as the fees are reasonable. The proposal does not otherwise specify or require a party to employ any particular method in responding to requests from the public for a covered agreement. For example, a party also could make an agreement available to an individual or entity with access to the Internet by posting the agreement on a publicly accessible website or to members of the public within a local geographic area by making the agreement available for inspection at an office within that area.

The proposed rule provides that a party's obligation to make a covered

agreement available to the public terminates 12 months after the end of the term of the covered agreement. The agencies believe that this time period would permit interested members of the public adequate time to obtain a covered agreement from the parties, while not placing an undue recordkeeping burden on the parties to covered agreements. Members of the public would continue to be able to obtain copies of a covered agreement from the relevant supervisory agency under the Freedom of Information Act (5 U.S.C. 552 *et seq.*) after this 12-month period.

The agencies request comment on all aspects of the proposed rule's public disclosure requirements. Comment is sought on whether the rule should include illustrative examples of how a party may make an agreement available to a member of the public and, if so, whether there are additional methods (other than those discussed above) that should be allowed for making an agreement available to the public. For example, should the rule explicitly allow a person to arrange for another entity or individual to make the person's covered agreements available to the public, or allow a party to recover reasonable fees for searching its records for a covered agreement? Comment also is requested on whether affiliates of insured depository institutions should be permitted to disclose an agreement to the public by placing the agreement in the CRA public file of an affiliated insured depository institution. In addition, comment is invited on whether it is reasonable, appropriate and consistent with the statute to rely on access to covered agreements through the agencies for public disclosure requests made more than 12 months after the term of the agreement and whether this period should be longer or shorter.

2. Filing of Covered Agreement by Insured Depository Institutions With Agencies

The rule requires each insured depository institution and affiliate that is a party to a covered agreement to provide a complete copy of the agreement to each relevant supervisory agency (as defined below) within 30 days after the parties enter into the agreement. If two or more insured depository institutions or affiliates are parties to the same agreement, the institutions and affiliates may jointly file a copy of the agreement with the relevant supervisory agencies.

3. Persons Must Make Covered Agreements Available to Agency

Section 711 requires each party to a covered agreement to make the agreement available to the appropriate agency. Because the relevant supervisory agencies would receive a copy of any covered agreement from the insured depository institution or affiliate that is a party to the agreement, the rule provides that a nongovernmental entity or person may fulfill its statutory obligation in this area by providing, upon request from the relevant supervisory agency, a complete copy of the agreement to the agency. The copy must be provided to the agency within 30 days of the agency's request. As with disclosure to the public, the rule provides that a person's obligation to make an agreement available to an agency terminates 12 months after the end of the term of the agreement.

The agencies believe this procedure will reduce regulatory burden and avoid duplicative filings. At the same time, this procedure requires persons to make copies of covered agreements available to the agencies consistent with the statute.

4. Relevant Supervisory Agency

The Act requires that parties to a covered agreement make the agreement available to, and file annual reports with, the appropriate Federal banking agency with supervisory responsibility over the relevant insured depository institution. The proposed rule uses the term "relevant supervisory agency" to identify the appropriate agency for a particular covered agreement. Under the rule, the "relevant supervisory agency" is—

- The OCC in the case where—
 - * The parties to the agreement include a national bank or subsidiary of a national bank; or
 - * A national bank or subsidiary or CRA affiliate of a national bank provides funds or resources under the agreement;
- The Board in the case where—
 - * The parties to the agreement include a state member bank, subsidiary of a state member bank, bank holding company, or subsidiary of a bank holding company (other than an insured depository institution or subsidiary thereof); or
 - * A state member bank or subsidiary or CRA affiliate of a state member bank provides funds or resources under the agreement;
- The FDIC in the case where—
 - * The parties to the agreement

²⁵ See footnote 15 above.

²⁶ See 12 CFR 25.43 (OCC); 12 CFR 228.43 (Board); 12 CFR 345.43 (FDIC); 12 CFR 563e.43 (OTS).

- include a state nonmember bank or subsidiary of a state nonmember bank; or
- * A state nonmember bank or subsidiary or CRA affiliate of a state nonmember bank provides funds or resources under the agreement; or
- The OTS in the case where—
- * The parties to the agreement include a savings association, subsidiary of a savings association, savings and loan holding company or subsidiary of a savings and loan holding company; or
- * A savings association or subsidiary or CRA affiliate of a savings association provides funds or resources under the agreement.

The agencies believe this definition will ensure that a covered agreement and its related annual reports are filed with the agency or agencies that have supervisory authority over the insured depository institution or affiliate that is involved with the agreement, either as a party or as a source of funds or resources paid under the agreement.

More than one agency may be the relevant supervisory agency with respect to a single covered agreement. For example, if a national bank, state nonmember bank, and a savings association provide funds pursuant to a covered agreement entered into by their parent bank holding company, the OCC, FDIC, OTS, and Board would each be a relevant supervisory agency for the agreement. The agencies solicit comment on the proposed rule's definition of "relevant supervisory agency," including whether there are alternative definitions that might reduce the filing burdens of parties while ensuring the appropriate agencies receive the filings contemplated by the Act.

5. Treatment of Confidential or Proprietary Information

Covered agreements may contain confidential or proprietary information the disclosure of which may cause competitive or other harm to one or more of the parties to the agreement. Section 711 of the Act directs the agencies to ensure that the implementing regulations "do not impose an undue burden on the parties [to a covered agreement] and that proprietary and confidential information is protected."²⁷ This provision must be read in harmony with other provisions of section 711 that require that a covered agreement "shall be in its entirety fully disclosed, and the full text thereof made available * * * to the public." Other provisions of section

711 require the reporting of the terms and value of covered agreements, the identity of the parties to the agreement, and the uses of funds and resources provided under covered agreements.

In light of these provisions, and in order to ensure the uniform disclosure of covered agreements under the Act by the parties and the agencies, the proposed rule would allow a party to a covered agreement to request a determination from the relevant supervisory agency whether the agency could withhold specific portions of the agreement from public disclosure. In considering these requests, the agencies will apply the procedures and standards of the Freedom of Information Act (5 U.S.C. 552 *et seq.*) (FOIA), which governs public access to all records of an agency, including documents filed with the agency by third parties. If the relevant supervisory agency determines that it could withhold specific portions of the covered agreement from public disclosure under FOIA, the proposed rule would permit the parties to the agreement to also withhold those specific portions of the agreement from any copies of the agreement directly made available to the public. A party could withhold from public disclosure only those limited portions of a covered agreement determined to be exempt from public disclosure under FOIA by the relevant supervisory agency.

In applying the standards under FOIA, the agencies note that section 711 may require disclosure of some types of information that an agency might normally be able to withhold from disclosure under FOIA. In light of the directive of section 711, the agencies may not be able to withhold under FOIA—or permit a party to withhold from public disclosure—many of the provisions contained in a covered agreement. For example, the agencies might not be able to permit a party to withhold the amount of payments or loans to be made under the agreement, the persons receiving such payments or loans, and the terms of any such payments or loans. It may be possible that only limited types of information could be withheld from public disclosure under the proposed rule. Such information might include, for example, individual account numbers or information detailing a particular institution's proprietary underwriting criteria.

The agencies welcome comment on whether covered agreements are likely to contain confidential or proprietary information the disclosure of which would harm the parties to the agreement given the definition of covered agreements. The agencies also request

comment on whether, and if so to what degree, such information may be withheld from public disclosure under section 711. If covered agreements typically contain particular types of information that may properly be withheld from public disclosure under section 711, should the rule specify these types of information and allow the parties to withhold this information without seeking prior agency review or in lieu of the agency review process? The agencies also invite comment on whether the proposed agency review process is useful and practicable and whether there are alternative or additional procedures that the agencies can and should implement under section 711 to protect confidential and proprietary information. The agencies also invite comment on whether the rule should specifically permit a party that has requested agency review of a covered agreement to delay disclosing the agreement to the public until the agency rules on the request.

6. Disclosure Limited to Covered Agreements Entered Into After November 12, 1999

The proposed rule's disclosure obligations apply only to covered agreements entered into after November 12, 1999, the effective date of section 711 of the GLB Act. Under the rule, a written modification, amendment, renewal, or extension of an agreement creates a new agreement. Thus, if an agreement entered into before November 12, 1999, is modified, amended, renewed or extended after that date, the parties must disclose the entire new agreement if it otherwise meets the criteria to be a covered agreement. Disclosure is not required if the pre-November 12, 1999, agreement expressly provided for the renewal or extension and established the terms of the agreement during the renewal or extension period.

Example: An insured depository institution and a community organization enter into a written agreement in January 1999 that calls for the institution to place an ATM in the local community by December 2000. In September 2000, the parties enter into a written modification of the agreement that calls for the institution to establish a full-service branch rather than an ATM. If the modified agreement meets the criteria to be a covered agreement, the modified agreement must be disclosed in accordance with the rule.

C. Annual Reports

The Act requires each person, insured depository institution, or affiliate of an insured depository institution that is a party to a covered agreement to file a report relating to the covered agreement.

²⁷ 12 U.S.C. 1831y(h)(2)(A).

These annual reporting obligations apply only to covered agreements entered into on or after May 12, 2000.²⁸

1. No Report Required by Person That Does Not Receive Funds or Resources

The proposed rule requires that each party to a covered agreement file an annual report for the fiscal years during the term of the agreement. The rule does not, however, require a nongovernmental entity or person to file an annual report with respect to a particular covered agreement for any fiscal year during which the person did not receive any funds under the covered agreement. The agencies believe that requiring an annual report in such circumstances would not further the purpose of the statute because the person would not have received any funds or resources under the agreement during the fiscal year. Under the proposed rule, however, each insured depository institution and affiliate that is a party to a covered agreement must file an annual report each year during the term of the agreement. The agencies request comment on whether this reporting exemption for persons is appropriate.

Example 1: A savings association and a community development organization that rehabilitates affordable housing in the association's assessment area enter into a covered agreement pursuant to which the association will invest \$100,000 in the organization over three years. The investment will be used to support a rehabilitation project that is expected to take three years to complete. If the savings association provides the full \$100,000 in the first year of the agreement, the organization must file an annual report with the OTS for the fiscal year in which it received the \$100,000. The organization is not required to file an annual report with the OTS for its subsequent fiscal years during the term of the agreement.

Example 2: A state non-member bank enters into a covered agreement with a community organization to make \$1 million in community development grants in the community over the next two years. The community organization will not receive any funds or other resources under the agreement (including under the grants as they are made). The agreement is a covered agreement and must be made available to the public and the FDIC. In addition, the state non-member bank must file annual reports concerning grants made and actions taken under the agreement. The community organization is not required, however, to file any annual reports concerning the agreement because the organization receives no funds or resources under the agreement.

Example 3: An insured depository institution and an organization enter into a

written agreement pursuant to which the institution commits to make \$10 million in small business loans in the local community over the next three years. The loans would be made at market rates and would not be for purposes of re-lending. The organization would not receive any funds or resources under the agreement, including under the loans as they are made. Even if a commitment by an insured depository institution to make multiple loans on market terms and not for purposes of re-lending is a covered agreement (see Part I.A.2 above), the organization would not have to file any annual report concerning the agreement because it would receive no funds or resources under the agreement. Under the proposed rule, the institution would have to file an annual report during the term of the agreement indicating the aggregate amount and number of loans made during the year under the agreement. Each individual loan made pursuant to the commitment would be exempt from coverage and, accordingly, each borrower would have no reporting obligation under the rule.

2. Contents of Annual Report Filed by Persons

Section 711 requires that the annual report filed by a nongovernmental entity or person provide a detailed, itemized accounting of how the person used any funds or resources received under the covered agreement during the previous year. The proposed rule would allow this detailed accounting to be provided in two ways: a description of the specific purpose or purposes for which the funds were used, or a segmentation of funds used for general purposes in a pre-defined list of expense categories.

a. Specific Purpose Funds and Resources

The first reporting method applies to funds or other resources that a person receives under a covered agreement and allocates and uses for a specific purpose. Specific purpose funds or resources are those that a person targets and uses for a distinct program, the purchase of a distinct asset, or the payment of a distinct expense. For example, a person would use this reporting method if, pursuant to the terms of the covered agreement or otherwise, the person specifically allocated and used the funds received under a covered agreement for a particular loan program, to purchase computers, to sponsor a particular seminar, or to pay the salary of a particular person. A specific purpose must be a purpose that is more limited than the categories of expenses enumerated below for the reporting of general purpose funds. In other words, funds or resources are not allocated or used for a specific purpose if they are allocated or used for general operational

expenses, to support the organization's general activities in the community, or to cover general compensation, administrative, travel, entertainment, consulting or professional expenses.

Under the proposed rule, funds or resources allocated and used for a specific purpose must be segregated in the annual report from funds used for general purposes. For funds received under a covered agreement and allocated and used for a specific purpose, a person's annual report must provide the following information: (1) A description of each specific purpose for which the funds or resources were used during the fiscal year; and (2) the amount of funds or resources used for each specific purpose during the fiscal year.

Example 1: An organization receives \$15,000 from an insured depository institution under a covered agreement. The organization allocates and uses the \$15,000 to sponsor a seminar on affordable housing initiatives. The organization's annual report for the fiscal year would report that it received \$15,000, that it used the \$15,000 to sponsor the seminar, and provide a brief description of the seminar.

Example 2: A community group receives \$50,000 from an insured depository institution under a covered agreement. During its fiscal year, the community group specifically allocates and uses \$45,000 of the funds to purchase computer equipment and the remaining \$5,000 is used for general operating expenses. The group's annual report for the fiscal year must state that the group received \$50,000 under the agreement during the fiscal year and that \$45,000 was used to purchase computer equipment. In addition, the annual report must provide the detailed, itemized list of expenses described below because some funds were used for general purposes.

b. All Other Funds and Resources

Funds or other resources received under a covered agreement may be used for general purposes or unspecified purposes. The second reporting method addresses funds or resources that are received under a covered agreement and that are not allocated and used for a specific purpose. Under this method, the reporting person must provide a detailed, itemized list of how the reporting person has used its funds during the fiscal year. This list must include, at a minimum, the amount of funds used during the fiscal year for—

- Compensation of officers, directors, and employees;
- Administrative expenses;
- Travel expenses;
- Entertainment expenses;
- Payment of consulting and professional fees; and
- Other expenses and uses.

The annual report may reflect the total amount of funds from all sources that

²⁸ See the discussion above concerning the treatment of agreements entered into prior to May 12, 2000, that are modified, amended, renewed, or extended after that date.

the person used during the fiscal year for the types of expenses listed above. The annual report must, however, specify the total amount of funds that the person received under the covered agreement and that were used for general or unspecified purposes. The agencies may determine from this information the proportion of general purpose funds received under the covered agreement that were used for each category of expenses listed above.

Example: In March, a person receives an unrestricted grant of \$15,000 under a covered agreement. The person includes the funds in its general operating budget and does not allocate and use the funds for a specific purpose. The person's annual report for the fiscal year must state that the person received \$15,000 of general purpose funds. The annual report also must indicate the total amount of funds and resources that the person used during the fiscal year for compensation, administrative expenses, travel expenses, entertainment expenses, consulting and professional fees, and other expenses and uses.

c. Use of Other Reports

As noted above, section 711 directs the agencies to ensure that regulations implementing that section "do not impose an undue burden on the parties." The legislative history also indicates that the agencies should allow reporting parties to use reports prepared for other purposes to fulfill the annual reporting requirements.²⁹ Accordingly, the proposed rule does not require that a person's annual report be prepared on a special form or in a particular format. Instead, the rule provides that a person's annual report may consist of or incorporate reports or documents that the person has prepared for public, internal or other purposes so long as the documents filed with the relevant supervisory agency contain all of the information required by the rule. For example, a person's annual report may consist of a Federal or state tax return, a report prepared for the person's members or shareholders, or the person's financial statements if such documents provide the information required by the rule.

In this regard, the agencies have reviewed several tax forms commonly filed by tax-exempt nonprofit organizations. Internal Revenue Form 990, which is the Federal tax return form for certain tax-exempt nonprofit organizations, requires the filing organization to provide information that is at least as detailed, and in some cases more detailed, than the list of expenses contained in section 711. In particular, Form 990 requires a tax-exempt

organization to separately state the amount that the organization spent during the tax year on compensation of officers, directors, trustees and key employees; salaries and wages of other employees; professional fundraising fees; accounting fees; legal fees; supplies; telephone; postage and shipping; occupancy; printing and publications; travel; conferences, conventions and meetings; and an itemized list of other uses. Since these categories of expenses include and are more specific than the list of expenses required to be provided for general purpose funds, a person may use a properly completed Form 990 to fulfill the rule's reporting requirements for general purpose funds. Other forms or reports also may be used, separately or in combination, to fulfill the rule's reporting requirements so long as they contain, in total, the information required by the rule.

d. Consolidated Annual Reports Permitted

The GLB Act requires the agencies to permit persons that are parties to a large number of covered agreements to file a consolidated annual report relating to all of the covered agreements.³⁰ Accordingly, section ____ .5 of the proposed rule permits a person that is a party to 5 or more covered agreements to file a single consolidated report covering all of the person's covered agreements. A person's consolidated report must identify the person filing the report and each agreement covered by the report. All other information required by the rule may be provided on an aggregate basis for all agreements covered by the annual report. Any consolidated report must be filed with all of the relevant supervisory agencies for the covered agreements included in the report.

Example: A community development organization is a party to six separate covered agreements with six unaffiliated insured depository institutions. Under each agreement, the organization receives \$15,000 to fund the rehabilitation of a specific low-income housing project identified in the agreement. The organization allocates and uses all of the funds for the specified purpose. If the organization elects to file a consolidated annual report, the consolidated report must (1) identify the organization and the six covered agreements, (2) state that the organization received \$90,000 under the agreements, and (3) state that the person allocated and used the \$90,000 to fund the rehabilitation project and provide a description of the project.

e. Specific Request for Comments

The agencies invite comment on all aspects of the proposed rule's annual reporting requirements for nongovernmental entities and persons. The agencies also specifically request comment on the following:

- Are the rule's reporting requirements for specific purpose funds and resources reasonable and appropriate? Would the proposed rule limit the burden associated with reporting funds or resources received for a specific purpose? Should the regulation provide additional guidance as to when a person has allocated and used funds or resources for a specific purpose or allow, rather than require, a person to use this reporting method when it allocates and uses funds for a specific purpose?

- Should the detailed, itemized list of uses contained in the proposed rule be expanded to include other categories of uses or expenses, such as grants or loans made, or services provided, to others?

- Are there additional information items that should be included in annual reports? For example, should a person be required to state in each annual report the aggregate amount of funds or resources that the person has received to date under the covered agreement?

- Should the agencies permit a person to file a consolidated annual report if the person is a party to 2 or more covered agreements?

- Where a covered agreement provides for an institution or affiliate to take several actions including making a specific loan that, if agreed to separately, would be exempt from coverage under the rule, can and should the agencies allow the person's annual report to exclude information concerning the loan that would otherwise be exempt under the rule?

- Are there additional ways that the agencies could reduce the reporting burden on persons consistent with the language and purposes of the Act? For example, should the agencies issue optional sample reporting forms that might be used by a person, insured depository institution or affiliate?

3. Contents of Annual Report of Insured Depository Institutions and Affiliates

The annual reporting requirements for insured depository institutions and affiliates are largely specified in section 711. The annual report for an insured depository institution or affiliate must identify the entity filing the report and identify the covered agreement to which the annual report relates. In addition, the annual report must provide—

- The aggregate amount of payments, fees and loans (listed separately)

²⁹ See H.R. Conf. Rep. No. 106-434 at 179 (1999).

³⁰ See 12 U.S.C. 1831y(h)(2)(B).

provided by the insured depository institution or affiliate under the agreement to any other party during the fiscal year;

- The aggregate amount of payments, fees and loans (listed separately) received by the insured depository institution or affiliate under the agreement from any other party during the fiscal year;

- A description of the terms and conditions of any payments, fees, or loans provided to, or received from, another party under the agreement; and

- The aggregate amount and number of loans, amount and number of investments, and amount of services provided under the covered agreement to any person that is *not* a party to the agreement—

- * By the insured depository institution or affiliate; and

- * By *any other* party to the agreement, unless such information is not known to the insured depository institution or affiliate or will be contained in an annual report filed by a person.

These informational requirements track those established by the statute.

The rule would allow an insured depository institution and an affiliate that are parties to the same covered agreement to file a single, consolidated report for the agreement. In addition, to reduce burden, the proposed rule would allow an insured depository institution or affiliate that is a party to 5 or more covered agreements to file a single consolidated report relating to all of the agreements.

The agencies request comment on whether an insured depository institution or affiliate should be permitted to file a consolidated report if it is a party to 2 or more covered agreements, and whether the rule can and should allow an insured depository institution or affiliate to not file an annual report for any fiscal year in which the institution or affiliate did not provide or receive any payments, fees or loans under the agreement. The agencies invite comment on whether the rule should provide additional guidance concerning the level of detail required to be provided in the annual report of an insured depository institution or affiliate, and whether there are additional ways the agencies could reduce the reporting burden of insured depository institutions and affiliates consistent with the Act. For example, are there ways the agencies could reduce the reporting burden for agreements that involve loans that are themselves exempt from coverage?

4. When and Where Must Annual Reports Be Filed

The proposed rule provides that each party to a covered agreement must prepare and file an annual report with the relevant supervisory agency for the fiscal year in which the party enters into the agreement and each subsequent fiscal year during the term of the covered agreement.³¹ The agencies have adopted a fiscal year reporting period to allow the parties to coordinate preparation of their annual reports with other documents or reports that typically are prepared on a fiscal year basis, such as income tax returns and financial statements. However, to provide parties with maximum flexibility, the rule also permits a party to elect to use the calendar year as their fiscal year for purposes of the rule.³² The agencies request comment on whether providing the option of fiscal year or calendar year reporting would reduce regulatory burden or whether the rule should require reporting on a calendar year basis. In addition, the agencies request comment on whether a person should be required to file an annual report after the end of a covered agreement's term if, by that time, the person has not completely used all the funds or resources received under the agreement.

Each party to a covered agreement must file its annual report for a fiscal year with each relevant supervisory agency within 6 months of the end of the party's fiscal year. Under section 711 and the rule, a person may fulfill this filing requirement by providing its annual report to the insured depository institution or affiliate that is a party to the agreement within 5 months of the end of the person's fiscal year with instructions for the institution or affiliate to file the report with all of the relevant supervisory agencies on behalf of the person. An insured depository institution or affiliate that receives an annual report from a person in this manner must forward it to the relevant supervisory agencies within 30 days.

This method of filing allows the annual reports of a person and an insured depository institution or affiliate that relate to the same covered agreement to be filed together. It also reduces the likelihood that annual

reports will be filed with the wrong agency because the insured depository institution or affiliate will know its relevant supervisory agency while the nongovernmental entity or person may not.

The agencies invite comment on the filing requirements of the rule. In particular, the agencies request comment on whether the 5- and 6-month filing windows will provide the parties sufficient time to prepare their annual reports and whether there are additional ways that the agencies might reduce the filing burdens of parties consistent with the Act.

D. Compliance Provisions

Section 711 specifically provides that nothing in that section authorizes the agencies to enforce the provisions of any covered agreement. The proposed rule incorporates this provision. (*See* section _____.7(e)) This is consistent with the long-standing policy of the agencies that CRA-related agreements entered into between insured depository institutions (or their affiliates) and persons are private matters between the parties and are not enforced by the agencies.

The agencies may enforce compliance by insured depository institutions and affiliates with the disclosure and reporting requirements of section 711 using the cease and desist and other enforcement powers granted in section 8 of the FDI Act.³³ Section 8 of the FDI Act, however, applies only to insured depository institutions, affiliates and institution-affiliated parties, as defined in the FDI Act. The provisions of section 8 of the FDI Act, therefore, generally do not apply to nongovernmental entities or persons that are parties to a covered agreement. Section 711 instead includes special compliance provisions applicable to nongovernmental entities or persons that are party to a covered agreement.³⁴

Under these provisions, the material and willful failure of a person to comply with section 711 may cause the related covered agreement to be unenforceable. In particular, under the Act, if the appropriate agency determines that a person has willfully failed to comply with section 711 in a material way, and the person does not comply with the law after receiving notice and a reasonable period of time, the agreement thereafter is unenforceable by operation of section 711. The Act specifically provides that inadvertent or *de minimis*

³¹ As discussed in I.L.C.1. above, the proposed rule would not require a nongovernmental entity or person to file an annual report during the term of a covered agreement if the entity or person did not receive any funds or resources under the agreement in that fiscal year.

³² *See* Proposed Rule section _____.8(f). The rule also provides that the "fiscal year" for an individual or entity that does not have a fiscal year is the calendar year.

³³ *See* 12 U.S.C. 1818.

³⁴ Other Federal statutes outside the banking laws also may provide for penalties if an insured depository institution, affiliate, or person fails to comply with the disclosure and reporting requirements of the Act. *See* 18 U.S.C. 1001.

reporting errors will not subject the filing party to any penalty. The rule requires the agencies to provide a person written notice and an opportunity to respond before determining the person has not complied with the rule, and allows the person at least 90 days to correct a willful and material violation. The agencies request comment on whether this written notice should be sent to all the parties to the agreement.

The rule also clarifies that, in these circumstances, the agreement becomes unenforceable only by the party that has willfully and materially failed to comply with the rule. Any other party to the agreement may continue to enforce the agreement against the noncomplying party. The agencies believe this construction is the most consistent reading of the language and purpose of the Act. The agencies note that an alternative construction could encourage persons to violate the statute in an attempt to avoid performance under a legally binding contract, thereby frustrating the purpose of the statute. If the insured depository institution or affiliate elects not to enforce the covered agreement against the noncomplying person, the appropriate agency may assist the institution or affiliate in identifying a successor person to assume the responsibilities of the person under a covered agreement that has become unenforceable.

Section 711 also provides that, if an individual diverts funds or resources received under a covered agreement for his or her personal financial gain and contrary to the purposes of the agreement, the appropriate agency may order the individual to disgorge the funds and/or prohibit the individual from being a party to any covered agreement for up to 10 years. As noted above, the Act specifically provides that it does not authorize the agencies to enforce any provision of a covered agreement. If, however, a court or other body of competent jurisdiction determines that an individual has diverted funds or resources for personal financial gain and contrary to the purposes of the agreement, the agencies may take one of the actions specified in the statute.

E. Other Definitions and Rule of Construction

Section _____.8 of the proposed rule defines other terms used in the rule. Because section 711 amended the FDI Act, the rule provides that the terms "insured depository institution," "control," "Federal banking agency" and "appropriate Federal banking

agency" have the same meaning as in the FDI Act.³⁵

1. "Person" and "Nongovernmental Entity or Person"

Section 711 of the GLB Act applies only to agreements entered into by a "nongovernmental entity or person" with an insured depository institution or affiliate. For ease of reference, the rule uses the term "person" instead of the phrase "nongovernmental entity or person." (The OTS rule, however, refers to a "nongovernmental entity or person" as a "NGEP.") As a general matter, the rule defines a "person" to mean any individual or entity other than the U.S. government, a state government, a unit of local government, an Indian tribe, or any department, agency, or instrumentality of such a governmental entity. A "person" does not include a federally chartered public corporation that receives federal funds appropriated specifically for that corporation. A nongovernmental entity that is affiliated with, or receives funding from, such a federally chartered public corporation, however, would be considered a "person" under the rule, unless the entity independently qualified for an exclusion.

The proposal also would not treat insured depository institutions and their affiliates as persons. Section 711 appears to draw a distinction between insured depository institutions (and their affiliates) and nongovernmental entities and persons and imposes separate obligations on insured depository institutions (and their affiliates) and nongovernmental entities or persons.

The agencies request comment on the proposed definition of "nongovernmental entity or person," including whether specific types of entities should be added or removed from the list of entities and individuals excluded from the definition of the term.

2. Affiliate and Control

The term "affiliate" is defined in the FDI Act by reference to the Bank Holding Company Act. Under the Bank Holding Company Act, an affiliate is any company that controls, is controlled by, or is under common control with another company. A company generally is considered to control another entity if

it owns or controls 25 percent or more of any class of the other entity's voting securities.

The proposed rule creates a special rule of construction that would apply in situations where an insured depository institution has filed an application with an agency to become affiliated or merge with another entity. In such circumstances, a person may have a CRA contact and enter into an agreement with the acquiring insured depository institution (or holding company thereof) concerning the CRA performance of the target institution. The agencies believe these types of contacts constitute a CRA contact under section 711 and that any agreement resulting from such contact is a covered agreement if it otherwise meets the requirements of section 711. Accordingly, the rule provides that an insured depository institution is deemed to be an affiliate of any company that would be under common control or merged with the institution pursuant to a transaction that is pending before an agency. This rule of construction applies only where the agency application is pending at both the time an agreement is entered into and the time when a triggering CRA contact occurs.

Example: A bank holding company files an application with the Board to acquire control of an additional insured depository institution. While the application is pending, an organization contacts the bank holding company to discuss perceived deficiencies in the CRA performance record of the insured depository institution to be acquired. The bank holding company and the organization enter into a written agreement that provides for the target institution to increase its level of community development grants by \$1 million per year for the next three years. The target institution would be considered an "affiliate" of the bank holding company under the proposed rule. Accordingly, the agreement would be a covered agreement because the organization had a CRA contact with the holding company concerning the CRA record of performance of an affiliated insured depository institution.

3. Term of agreement

Under the rule, the duration of a party's obligation to make a covered agreement publicly available and to file annual reports concerning the agreement is based on the term of the covered agreement. As a general matter, the term of an agreement ends on the agreement's termination date established by the parties. Agreements that do not establish a termination date are deemed for purposes of the proposed rule to terminate on the last date on which any party makes any payments or provides any loan or other

³⁵ The agencies note that the definition of "insured depository institution" in the FDI Act includes special-purpose insured depository institutions that are not subject to the CRA. *See, e.g.*, 12 CFR 228.11(c)(3). An agreement that relates to the activities of a special-purpose insured depository institution, however, would not be in fulfillment of the CRA and, thus, would not be a covered agreement under the rule.

resources under the agreement. The rule gives the agencies discretion, in appropriate circumstances, to determine that the term of such an agreement is a shorter or longer period. The appropriate agency could exercise this discretion, for example, where a one-time grant is made to a person late in a year with the clear expectation that the funds would be used in the next year. In such circumstances, the agency could require the person to file an annual report for the next year.

III. Placement of Proposed Rule

The agencies propose to implement section 711 by adding a new part to their regulations.³⁶ These new parts would be separate from the agencies' CRA Regulations. The agencies believe this placement is appropriate because section 711 of the GLB Act amended the FDI Act, and not the CRA, and is independent of the CRA and the CRA Regulations. The agencies note, however, that because section 711 concerns CRA-related agreements, the proposed rule includes several cross-references to the CRA Regulations. The agencies request comment on whether users would find it more convenient if the proposed rule was incorporated into the agencies' existing CRA Regulations and, if so, how the agencies could make clear that the rule does not in any way affect the CRA.

IV. Regulatory Flexibility Act Analysis

OCC: In accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a)), the OCC is publishing the following initial regulatory flexibility analysis with this proposed rulemaking.

The proposed rule would implement provisions of section 711 of the GLB Act. A description of the reasons why action by the OCC is being considered and a statement of the objectives of, and legal basis for, the proposed rule are contained in the **SUPPLEMENTARY INFORMATION**.

The proposed rule includes reporting requirements that would apply to all insured depository institutions, including national banks, affiliates of insured depository institutions, including national bank subsidiaries, and persons that enter into covered agreements (as defined by the proposed rule). The proposed rule requires insured depository institutions, affiliates, and persons that enter into a covered agreement to make the agreement available to members of the

public and to the appropriate agency, and to file an annual report with the appropriate agency concerning the disbursement and use of funds under the agreement.

These reporting provisions are required by section 711 of the GLB Act and apply regardless of the size of the insured depository institution, affiliate, or person. Section 711 does not authorize the OCC to provide an exemption for covered agreements based on the size of any entity within the scope of its provisions. The Act, however, directs the OCC and the other agencies to ensure that the proposed rule does not impose an undue burden on the parties to covered agreements. The proposed rule includes several provisions, described in detail in the **SUPPLEMENTARY INFORMATION** that are designed to limit the potential impact of the proposed rule on insured depository institutions, affiliates and persons or entities of any size. For example, the rule gives entities and persons flexibility in determining how to make a covered agreement available to the public. In addition, the proposed rule would allow persons to use reports that have been prepared for other purposes, such as tax returns and financial statements, to fulfill the annual reporting requirement. The rule also allows an insured depository institution, affiliate, or person that is a party to 5 or more covered agreements to prepare a single, consolidated annual report relating to all of the agreements.

As noted above, the proposed rule applies to insured depository institutions, affiliates, and persons that enter into covered agreements. These agreements are entered into by private parties, are not enforced by the OCC and, to date, have not been required to be disclosed to the OCC. In addition, the OCC and the other agencies have specifically requested comment on the scope of the proposed rule and will issue a final rule after review of public comments. Accordingly, the OCC cannot estimate at this time the total number of national banks or their subsidiaries that would be subject to the requirements of the rule and the number of such entities that would be considered small entities. Similarly, the OCC cannot estimate at this time the total number of persons that may enter into a covered agreement with these entities, and therefore be subject to the requirements of the rule.

The OCC specifically seeks comment on the likely burden that the proposed rule would impose on national banks and other entities within the OCC's supervisory jurisdiction that are subject

to it and on persons who enter into covered agreements with those entities.

Board: In accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a)), the Board must publish an initial regulatory flexibility analysis with this proposed rulemaking. The proposed rule would implement provisions of section 711 of the GLB Act. A description of the reasons why action by the Board is being considered and a statement of the objectives of, and legal basis for, the proposed rule are contained in the supplementary material provided above.

The proposed rule includes reporting requirements that would apply to all insured depository institutions, affiliates of insured depository institutions, and persons that enter into covered agreements (as defined by the proposed rule). The proposed rule requires insured depository institutions, affiliates, and persons that enter into a covered agreement to make the agreement available to members of the public and to the appropriate agency, and to file an annual report with the appropriate agency concerning the disbursement and use of funds under the agreement.

These reporting provisions are required by section 711 of the GLB Act and would apply regardless of the size of the insured depository institution, affiliate, or person. The Act does not authorize the Board to provide an exemption for covered agreements based on the size of the insured depository institution, affiliate or person that enters into the agreement.

The Act, however, directs the Board and the other agencies to ensure that the proposed rule does not impose an undue burden on the parties to covered agreements and the proposed rule includes several provisions that are designed to limit the potential impact of the proposed rule on insured depository institutions, affiliates and persons, including small institutions, affiliates and persons. For example, the rule gives entities and persons flexibility in determining how to make a covered agreement available to the public. In addition, the proposed rule would allow persons to use reports that have been prepared for other purposes, such as tax returns and financial statements, to fulfill the annual reporting requirement. The rule also allows insured depository institutions, affiliates, and persons that are a party to 5 or more covered agreements to prepare a single, consolidated annual report relating to all of the agreements.

As noted above, the proposed rule applies only to insured depository institutions, affiliates, and persons that

³⁶ See 12 CFR Part 35 (OCC); 12 CFR Part 207 (Board); 12 CFR Part 346 (FDIC); and 12 CFR Part 533 (OTS).

enter into covered agreements. These agreements are entered into by private parties, are not enforced by the Board and, to date, have not been required to be disclosed to the Board. In addition, the Board and the other agencies have specifically requested comment on the scope of the proposed rule and will issue a final rule after review of public comments. Accordingly, the Board cannot estimate at this time the total number of state member banks, bank holding companies, and nonbank subsidiaries of a bank holding company that would be subject to the requirements of the rule and the number of such entities that would be considered small entities. Similarly, the Board cannot estimate at this time the total number of persons that may enter into a covered agreement with the types of entities listed above and, thereby, be subject to the requirements of the rule or the number of such persons that would be considered small entities.

The Board specifically seeks comment on the likely burden that the proposed rule would impose on insured depository institutions and affiliates within the Board's supervisory jurisdiction and on persons who enter into covered agreements with such entities.

FDIC: Consistent with the Regulatory Flexibility Act (5 U.S.C. 601-612) (RFA), the FDIC is required to publish an initial regulatory flexibility analysis relating to the proposed rule. The proposed rule would implement provisions of section 711 of the GLB Act and would apply to all insured depository institutions, affiliates of insured depository institutions, and persons that enter into the types of covered agreements described in section 711 and in the proposed rule.

Material contained in the Supplementary Information section of this document contains statements about the legal basis for and objectives of the FDIC in proposing this rule. The GLB Act incorporates disclosure and reporting requirements applicable to all insured depository institutions, affiliates, and persons that enter into covered agreements. Insured depository institutions, affiliates, and persons must make the covered agreements available to the general public and to the appropriate supervisory agency. They must also file an annual report with the appropriate supervisory agency describing the disbursement, receipt, and use of the funds under the agreement. The GLB Act does not provide exemptions for the reporting or disclosure requirements based on the size of the insured depository institution, affiliate, or person; similarly

the GLB Act does not authorize the FDIC to provide for exemptions.

Because the GLB Act requires the agencies to ensure that the proposed rule does not impose an undue burden on the parties to a covered agreement, the proposed rule contains provisions that limit the potential impact on insured depository institutions, affiliates, and persons. For example, the proposed rule provides flexibility to entities and persons regarding the way a covered agreement is made available to the public. Insured depository institutions are permitted to disclose covered agreements to the public by placing it in their CRA public files, and parties may satisfy their obligation to make covered agreements available to the public, in part, by posting the agreement on a publicly available Internet website. Although the GLB Act states that parties to a covered agreement must make the agreement available to an agency, the proposed rule requires a person that is a party to an agreement to disclose the covered agreement to an agency upon the agency's request for a copy of the agreement. In addition, the proposed rule would allow persons to use reports that have been prepared for other purposes, such as tax returns and financial statements, to fulfill the annual reporting requirement. Recognizing that many tax returns and financial statements are based on fiscal year reporting periods, the proposed regulation permits either a fiscal or calendar year reporting period so that parties may coordinate their required annual report with other reports or filings. The rule also would permit insured depository institutions, affiliates, and persons that are parties to 5 or more covered agreements to file a single, consolidated report relating to all of the agreements and would allow insured depository institutions and affiliates that are parties to the same covered agreement to file a single consolidated report. Finally, the proposed rule does not require annual reports to be prepared on a special form or in a particular format. All of these provisions were developed to minimize the impact and burden the proposed rule would have on parties to a covered agreement.

Before passage of the GLB Act, parties to covered agreements were not required to disclose the agreements to the FDIC; therefore, at this time, the FDIC cannot estimate the total number of insured state non-member banks, affiliates of state non-member banks, or persons that would be subject to the requirements of the proposed rule. Similarly, the FDIC cannot predict which parties to covered

agreements may be classified as small businesses or entities. Although the FDIC and the other agencies have requested comment on the scope of the proposed rules, presently, the FDIC cannot determine whether the proposed rule would have a significant economic impact on a substantial number of small entities. The FDIC requests comment on the likely significance of the economic impact the proposed rule would impose on FDIC-supervised banks and affiliates and on persons who enter into a covered agreement.

OTS: The Regulatory Flexibility Act requires federal agencies to either prepare an initial regulatory flexibility analysis (IRFA) with a proposed rule or certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. OTS cannot, at this time, determine whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, OTS includes the following IRFA.

A description of the reasons why OTS is considering this action and a statement of the objectives of, and legal basis for, this proposed rule, are contained in the supplementary materials provided above.

A. Small Entities to Which the Proposed Rule Would Apply

The proposed rule would apply to the following types of entities if they are a party to a covered agreement: (1) Savings associations; (2) certain affiliates of savings associations;³⁷ and (3) nongovernmental entities or persons that enter into covered agreements with savings associations or affiliates of savings associations. The proposed rule would apply regardless of the size of the savings association, affiliate, or persons.

OTS is unable to estimate how many covered agreements exist, how many savings associations, affiliates of savings associations, or persons are parties to such covered agreements, or how many parties to covered agreements are "small businesses" or "small organizations" under the Regulatory Flexibility Act. To date, parties to such agreements have not had to disclose or report the agreements to OTS. Generally, neither OTS nor any other Federal agency is a party to covered agreements. Finally, OTS does not enforce such agreements. Thus, OTS does not have information about these agreements.

OTS has very limited information that would assist in an estimate. According

³⁷ OTS's rule applies to the following affiliates: savings and loan holding companies and companies that are controlled by savings associations or savings and loan holding companies.

to December 31, 1999 data, OTS calculates that of the approximately 1,100 savings associations, a maximum of 486 are small savings associations. Small savings associations are generally defined, for Regulatory Flexibility Act purposes, as those with assets under \$100 million. 13 CFR 121.201, Division H (1999). OTS also calculates that these 486 savings associations hold approximately 100 subordinate organizations that could possibly qualify as small entities. OTS further calculates that a maximum of 205 savings and loan holding companies could possibly qualify as small entities. OTS does not have data on how many of these subordinate organizations or holding companies may actually qualify as small entities. Nor does OTS have data on how many other affiliates of savings associations exist (*e.g.*, companies that are under common control with a savings association), how many of these affiliates are affiliates of small savings associations, or how many of these affiliates are themselves small entities. OTS does not know how many persons have entered into covered agreements with savings associations or affiliates of savings associations or how many of these persons are small entities.

OTS specifically seeks comment on the number and size of savings associations, affiliates of savings associations, and persons that are parties to covered agreements. OTS also seeks comment on how many covered agreements may currently exist and approximately how many will be entered into each year in the future.

B. Requirements of the Proposed Rule

As described more fully in the supplementary material provided above, the proposed rule contains new disclosure and reporting requirements. Most of the requirements are mandated by section 711 of the GLB Act. The GLB Act, however, directs the Federal banking agencies to ensure that the regulations prescribed by the agency do not impose an undue burden on the parties.

The primary requirements under the proposed rule involve disclosure and reporting of covered agreements. The proposal would require each party to a covered agreement to disclose the agreement to the public by making a complete copy available to any individual or entity upon request. It would also require each savings association or affiliate that is a party to the covered agreement to provide a copy to each relevant supervisory agency (as defined in the proposal) and would require each person that is a party to

provide a copy to each relevant supervisory agency upon request.

To minimize the disclosure burden, the proposal would:

- Terminate the public disclosure requirement and the requirement for a person to provide a copy to the relevant supervisory agencies upon request 12 months after the end of the term of the covered agreement;
- Not mandate any particular method for disclosing the agreement to the public;
- Allow each party to charge reasonable copying and mailing fees when it discloses an agreement to the public;
- Allow a savings association to publicly disclose by placing a copy of the covered agreement in its CRA public file and making it available under the public file procedures;
- Require a person to provide a copy to the relevant supervisory agencies only if the agency requests a copy; and
- Allow two or more insured depository institutions or affiliates that are parties to a covered agreement to jointly file with each relevant supervisory agency.

The proposal would require each party to a covered agreement to file an annual report with each relevant supervisory agency concerning the disbursement, receipt, and uses of funds or other resources under the covered agreement. To minimize the reporting burden, the proposal would:

- Not mandate any particular form for the annual report;
- Allow each party to report on its own fiscal year basis;
- Exempt a person from filing a report for a fiscal year if the person does not receive any funds or resources during that year;
- Provide simplified reporting procedures for persons that allocate and use funds or other resources under a covered agreement for a specific purpose;
- Allow a person's report to consist of, or incorporate, reports prepared for other purposes, such as tax forms and financial statements;
- Permit a savings association, affiliate, or person that is a party to five or more covered agreements to file a single consolidated annual report covering all of the covered agreements, aggregating certain information;
- Allow a savings association and its affiliates that are parties to the same covered agreement to file a single consolidated report; and
- Allow a person to file its report with the insured depository institution or affiliate that is a party to the agreement (rather than with the relevant supervisory agency).

It is possible that savings associations, affiliates, and persons have already established recordkeeping and other policies and practices that would already enable them to partly or fully meet the requirements of this proposed rule. To the extent that existing practices and available resources are insufficient, parties to covered agreements would need professional skills to comply with this proposed rule. To disclose covered agreements, parties may need clerical and computer personnel. To prepare required reports, parties may need personnel with these skills, as well as personnel skilled in financial and legal matters. Some degree of personnel training may be necessary, such as to enable employees to determine when they enter into covered agreements, and how to retain, record, and compile information about agreements to disclose and report them.

OTS does not have a practicable or reliable basis for quantifying the costs of this proposed rule, or of any alternatives to the rule. The requirements are too new for those subject to the law to have learned what the law requires and decide how to proceed. OTS cannot predict how savings associations, affiliates, and persons would comply with the proposed rule. For example, OTS cannot assess the extent to which savings associations, affiliates, and persons would avoid entering into covered agreements as a result of a final rule.

Rather than merely guess at the regulatory burden of this proposed rule, OTS solicits comment on these burdens and on ways to minimize the burdens, consistent with the GLB Act.

C. Significant Alternatives

The requirements in the proposed rule parallel those in the GLB Act. The proposed rule would clarify the statutory requirements in some areas and restate the requirements in a more understandable manner in other areas. It would not impose any substantially different requirements.

Congress has decided that "each" insured depository institution, affiliate, or person that is a party to a covered agreement must disclose and report the agreement. The GLB Act does not expressly authorize OTS to exempt small savings associations, affiliates, or persons from these requirements. OTS does not interpret the statute to permit such an exemption.

The supplementary material provided above describes and solicits comment on a number of alternatives that would reduce the regulatory burden. These include:

- Limiting the types of agreements that are covered by the rule (e.g., defining "CRA contacts," "fulfillment of CRA," and the calculation of value more narrowly, or defining the statutory exemptions for certain types of loans, extensions of credit and commitments more broadly);

- Simplifying the procedures for parties to delete proprietary and confidential information;

- Limiting which parties to an agreement must comply with the disclosure and reporting requirements in multi-party agreements (e.g., not applying the requirements to parties that have not made CRA contacts, have not been the subject of CRA contacts, or do not know that CRA contacts have occurred); and

- Providing more flexible reporting requirements (e.g., allowing parties to two or more agreements to use consolidated reporting procedures, permitting affiliated persons that are parties to the same covered agreement to file a consolidated report, allowing persons to elect to report on specific purpose funds or resources under the itemized reporting procedures, and exempting savings associations and affiliates from filing a report for a fiscal year if the savings association or affiliate has not had transactions to report).

OTS requests comment on whether these or other alternatives would reduce the burdens and whether any exceptions for small institutions would be appropriate.

D. Other Matters

These proposed requirements do not appear to duplicate or overlap with any other Federal rules. To the extent that required information is already contained in reports prepared for other purposes, the proposed rule allows a person's report to consist of, or incorporate, these existing reports.

OTS lacks sufficient information about the contents of covered agreements, however, to conclude whether the proposed requirements conflict with other Federal rules. One area of potential conflict is the rule's requirement to make a "complete copy" of a covered agreement available to the public and to the relevant supervisory agencies. OTS solicits specific comment on whether covered agreements contain information that savings associations, affiliates, or persons may be barred from disclosing under other Federal rules (e.g., private customer information), or may be permitted to refrain from disclosing to the public or a Federal banking agency under other Federal rules (e.g., proprietary information). OTS also generally seeks comment on

any Federal rules that may duplicate, overlap, or conflict with the proposal.

V. Executive Order 12866 Determination

OCC: The Comptroller of the Currency has determined that this proposed rule does not constitute a significant regulatory action for the purpose of Executive Order 12866. Reporting and disclosure are mandated by section 711 of the GLB Act. The proposed rule closely follows the requirements of that statute. As described in the **SUPPLEMENTARY INFORMATION**, however, the proposal also contains regulatory options designed to minimize costs and burdens, where feasible and consistent with the statute. The OCC invites national banks and the public to provide specific cost estimates and related data that would contribute to the accuracy of the OCC's evaluations of the costs of the requirements in the rule.

OTS: OTS has determined that this proposed rule does not constitute a significant regulatory action for the purpose of Executive Order 12866. Reporting and disclosure are mandated by section 711 of the GLB Act. Many of the proposed provisions closely follow the requirements of this section. OTS has exercised its discretion, to the extent possible, to propose regulatory options to minimize costs and burdens. Nevertheless, OTS acknowledges that the rule would impose costs on insured depository institutions, affiliates, and nongovernmental entities or persons by requiring these entities to disclose and report on agreements. Therefore, OTS invites the thrift industry and the public to provide any cost estimates and related data that they think would be useful to the agency in evaluating the overall costs of the rule.

VI. Paperwork Reduction Act

The information collection and reporting requirements of the proposed rule are described in II. above. In summary, the proposed rule requires persons, insured depository institutions, and affiliates of insured depository institutions that are parties to covered agreements (as defined by the proposed rule) to make the agreements available to the public and the relevant supervisory agencies and to file annual reports relating to the agreements with the relevant supervisory agencies. These reporting and disclosure requirements are required under Title VII of the GLB Act (Pub. L. 106-102, 113 Stat. 1465 (1999)), which adds new section 48 to the Federal Deposit Insurance Act (12 U.S.C. 1831y).

The proposed rule requires each person, insured depository institution,

and affiliate of an insured depository institution that is a party to a covered agreement to make a complete copy of the agreement available to the public on request at any time during the term of the agreement and 12 months after the term of the agreement (proposed _____.4(b)). Accordingly, each party must retain a copy of the agreement for that period. Any party to a covered agreement may request that the relevant supervisory agency determine whether certain portions of the agreement may be exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552 *et seq.*) prior to making the agreement available to the public (proposed _____.4(b)(1)(ii)).

An insured depository institution or affiliate of an insured depository institution that enters into a covered agreement must file a copy of the agreement with the supervisory agency within 30 days of entering into the agreement (proposed _____.4(c)(2)(i)). A person must make the agreement available to the relevant supervisory agency upon request (proposed _____.4(c)(1)).

The proposed rule also requires each person, insured depository institution, or affiliate of an insured depository institution that is a party to a covered agreement to file an annual report that relates to the agreement for each fiscal year during the term of the agreement with the relevant supervisory agency of the insured depository institution or affiliate that is a party to the agreement (proposed _____.5(b)). The annual report of a person must include (1) the name and address of the person filing the report, (2) the names of the parties to the agreement, and (3) the amount of funds or resources received during the fiscal year (proposed _____.5(d)). The annual report of an insured depository institution or affiliate must include (1) the name and principal place of business of the institution or affiliate, (2) sufficient information to identify the covered agreement for which the annual report is being filed, and (3) information on payments and other resources provided or received under the agreement (proposed _____.5(e)). The proposed rule allows a person to send its annual report either to the relevant supervisory agency of each insured depository institution or affiliate that is a party to the agreement or to an insured depository institution or affiliate that is a party to the agreement. The insured depository institution or affiliate must send the annual report of a person to the relevant supervisory agency within 30 days of receiving the report (proposed _____.5(f)(2)(ii)).

Finally, an insured depository institution or affiliate that is a party to a covered agreement that concerns the performance of any activity of a CRA affiliate (as defined in —.8(c)) is required to notify each person that is a party to the agreement that the agreement concerns a CRA affiliate (proposed —.2(d)).

The agencies request public comment on all aspects of the collections of information contained in this proposed rule, including how burdensome it would be for persons, insured depository institutions, and affiliates to comply with each of the reporting and disclosure requirements of the proposed rule.

The estimated total annual reporting and disclosure burden of the proposed rule will depend on the number of covered agreements. The agreements that trigger the disclosure and reporting requirements of the proposed rule, however, are entered into by private parties on a voluntary basis, are not enforced by the agencies and, to date, have not been required to be disclosed to the agencies. As a result, the agencies cannot accurately estimate at this time the total number of insured depository institutions, affiliates or persons that are parties to covered agreements or the total number of covered agreements that may be subject to the disclosure and reporting requirements of the rule. The agencies also are unable to identify a reasonable proxy for estimating the number of covered agreements. Solely for purposes of complying with the requirements of the Paperwork Reduction Act, each agency has computed the estimate of annual paperwork burden assuming that 50 percent of the insured depository institutions it regulates are parties to one covered agreement. In addition, the agencies have assumed that one person is a party to each of these agreements. The agencies specifically request comment on these assumptions, the total number of persons, insured depository institutions, and affiliates that may be parties to covered agreements, and the total number of covered agreements that may be subject to the disclosure and reporting requirements of the rule.

The agencies also invite comment on:

(1) Whether the collections of information contained in the notice of proposed rulemaking are necessary for the proper performance of each agency's functions, including whether the information has practical utility;

(2) The accuracy of each agency's 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.

The agencies will revisit these estimates when they have more information on the scope of the rule and the number of potential respondents and covered agreements. The revised estimates will also reflect all comments received concerning the burden estimates. Respondents/recordkeepers are not required to respond to these collections of information unless the agencies display a currently valid Office of Management and Budget (OMB) control number. The agencies are currently requesting their respective control numbers for these information collections from OMB.

OCC: The collection of information requirements contained in the Regulation will be submitted to the OMB in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). Comments on the collections of information should be sent to the Communications Division, Office of the Comptroller of the Currency, 250 E Street, SW, Third Floor, Attention: 1557—to be assigned, Washington, DC 20219, with a copy to the Office of Management and Budget, Paperwork Reduction Project (1557—to be assigned), Washington, DC 20503.

The potential respondents include national banks, subsidiaries of national banks, and nongovernmental entities or persons.

Estimated number of financial institution respondents: 1,200. Estimated number of nongovernmental entity or person respondents: 1,200.

Estimated average annual burden hours for all disclosure and reporting requirements of the proposed rule per financial institution respondent per agreement: 6 hours.

Estimated burden hours for all disclosure and reporting requirements of the proposed rule per nongovernmental entity or person per agreement: 4 hours.

Estimated total annual reporting and disclosure burden: 12,000 hours.

Board: In accordance with section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 35; 5 CFR 1320, appendix A.1), the Board reviewed the Regulation under the authority

delegated to the Board by the OMB. Comments on the collections of information should be sent to Mary M. West, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 97, Board of Governors of the Federal Reserve System, Washington, DC 20551, with a copy to the Office of Management and Budget, Paperwork Reduction Project (7100—to be assigned), Washington, DC 20503.

The potential respondents are state member banks, bank holding companies, affiliates of bank holding companies other than savings associations, national banks, insured nonmember banks, and subsidiaries of such associations and banks, and nongovernmental entities or persons.

Estimated number of financial institution respondents: 507.

Estimated number of nongovernmental entity or person respondents: 507.

Estimated average annual burden hours for all disclosure and reporting requirements of the proposed rule per financial institution respondent per agreement: 6 hours.

Estimated burden hours for all disclosure and reporting requirements of the proposed rule per nongovernmental entity or person per agreement: 4 hours.

Estimated total annual reporting and disclosure burden: 5,070 hours.

FDIC: The collections of information contained in the Regulation will be submitted to the OMB in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The FDIC will use any comments received to develop its new burden estimates. Comments on the collections of information should be sent to Steven F. Hanft, Assistant Executive Secretary (Regulatory Analysis), Federal Deposit Insurance Corporation, F-4080, 550 17th Street, NW, Washington, DC 20429, with a copy to the Office of Management and Budget, Paperwork Reduction Project (3064—to be assigned), Washington, DC 20503.

The potential respondents are insured nonmember banks, subsidiaries of insured nonmember banks, and nongovernmental entities or persons.

Estimated number of financial institution respondents: 2,850.

Estimated number of nongovernmental entity or person respondents: 2,850.

Estimated average annual burden hours for all disclosure and reporting requirements of the proposed rule per financial institution respondent per agreement: 6 hours.

Estimated burden hours for all disclosure and reporting requirements of the proposed rule per nongovernmental entity or person per agreement: 4 hours.

Estimated total annual reporting and disclosure burden: 28,500 hours.

OTS: The collection of information requirements contained in the Regulation will be submitted to the OMB in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The OTS will use any comments received to develop its new burden estimates. Comments on the collection of information should be sent to the Dissemination Branch (1550-to be assigned), Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552, with a copy to the Office of Management and Budget, Paperwork Reduction Project (1550-to be assigned), Washington, DC 20503.

The potential respondents are savings and loan holding companies, savings associations, companies controlled by savings and loan holding companies and savings associations, and nongovernmental entities or persons.

Estimated number of financial institution respondents: 552.

Estimated number of nongovernmental entity or person respondents: 552.

Estimated average annual burden hours for all disclosure and reporting requirements of the proposed rule per financial institution respondent per agreement: 6 hours.

Estimated burden hours for all disclosure and reporting requirements of the proposed rule per nongovernmental entity or person per agreement: 4 hours.

Estimated total annual reporting and disclosure burden: 5,520 hours.

VII. Solicitation of Comments Regarding the Use of "Plain Language"

Section 722 of the GLB Act requires the agencies to use "plain language" in all proposed and final rules published after January 1, 2000. The agencies invite comments about how to make the proposed rule easier to understand, including answers to the following questions:

(1) Have the agencies organized the material in an effective manner? If not, how could the material be better organized?

(2) Are the terms of the rule clearly stated? If not, how could the terms be more clearly stated?

(3) Does the rule contain technical language or jargon that is unclear? If so, which language requires clarification?

(4) Would a different format (with respect to the grouping and order of

sections and use of headings) make the rule easier to understand? If so, what changes to the format would make the rule easier to understand?

(5) Would increasing the number of sections (and making each section shorter) clarify the rule? If so, which portions of the rule should be changed in this respect?

(6) What additional changes would make the rule easier to understand?

The agencies also solicit comment about whether it would be appropriate and useful to include in the rule the examples discussed in this preamble. The agencies note that creating safe harbors in the rule may generate certain problems over time due to changes in technology or business practices. Are there alternatives that the agencies should consider to illustrate the terms in the rule?

VIII. FDIC's Electronic Public Comment Site

The FDIC has included a page on its web site to facilitate the submission of electronic comments in response to this general solicitation (the EPC site). The EPC site provides an alternative to the written letter and may be a more convenient way for you to submit your comments. Commenting through the EPC site will assist the FDIC to more accurately and efficiently analyze comments submitted electronically. If you submit your comments through the EPC site your comments will receive the same consideration that they would receive if submitted in hard copy to the FDIC's street address. Information provided through the EPC site will be used by the FDIC only to assist in its analysis of the proposed regulation. The FDIC will not use an individual's name or any other personal identifier of an individual to retrieve records or information submitted through the EPC site. Like comments submitted in hard copy to the FDIC's street address, EPC site comments will be made available in their entirety (including the commenter's name and address if the commenter chooses to provide them) for public inspection.

The EPC site will be available on the FDIC's home page at <http://www.fdic.gov>. You will be able to provide comments directly on any of the sections of the proposed regulation as well as the specific questions that have been asked in the preceding Supplementary Information section. You will also be able to view the regulation and Supplementary Information sections that related to your comments directly on the site. Because the GLB Act requires promulgation of this regulation, the FDIC encourages you

to provide written comments in the spaces provided. Written comments enable the FDIC to thoughtfully consider possible changes to the proposed regulation.

The FDIC is also interested in your feedback on the EPC site. We have provided a space for you to comment on the site itself. Answers to this question will help the FDIC evaluate the EPC site for use in future rulemaking.

At the conclusion of the EPC site you will have an opportunity to provide us with your name, indicate whether you are an individual, insured depository institution, financial holding company, community-based organization, trade association, government agency, or other, and provide the name of the organization you represent, if applicable. Whether you choose to respond to these questions is entirely up to you. Any responses received may help the FDIC to better understand the public comments it receives.

IX. Unfunded Mandates Act of 1995

OCC: Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditures 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 proposed rule would not apply to state, local or tribal governments. Although the proposed rule would apply to insured depository institutions, affiliates, and nongovernmental entities and persons, OCC is not required to assess the effects of its regulatory actions on the private sector to the extent such regulations incorporate requirements specifically set forth in law. 2 U.S.C. 1531. Many of the proposed provisions closely follow the requirements of Section 711 of the GLBA. Moreover, the proposal contains regulatory options designed to minimize costs and burdens. Therefore, the OCC has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

OTS: Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditures 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 proposed rule would not apply to state, local or tribal governments. Although the proposed rule would apply to insured depository institutions, affiliates, and nongovernmental entities and persons, *OTS* is not required to assess the effects of its regulatory actions on the private sector to the extent such regulations incorporate requirements specifically set forth in law. 2 U.S.C. 1531. Many of the proposed provisions closely follow the requirements of section 711 of the GLB Act. Moreover, *OTS* has exercised its discretion, to the extent possible, to propose regulatory options to minimize costs and burdens. Therefore, the *OTS* has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Accordingly, the *OTS* has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects

12 CFR Part 35

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

12 CFR Part 207

Banks, banking, Community development, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements.

12 CFR Part 346

Banks, banking, Community development, and Reporting and recordkeeping.

12 CFR Part 533

Administrative practice and procedure, Business and industry, Community development, Confidential business information, Credit, Freedom of information, Holding companies, Investments, Mortgages, Nonprofit organizations, Penalties, Reporting and

recordkeeping requirements, Savings association.

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons set out in the joint preamble, the OCC proposes to amend title 12, chapter I, of the Code of Federal Regulations by adding a new part 35 to read as follows:

PART 35—DISCLOSURE AND REPORTING OF CRA RELATED AGREEMENTS

Sec.

- 35.1 Purpose and scope.
- 35.2 Definition of covered agreement.
- 35.3 Related agreements considered a single agreement.
- 35.4 Disclosure of covered agreements.
- 35.5 Annual reports.
- 35.6 Release of information under FOIA.
- 35.7 Compliance provisions.
- 35.8 Other definitions and rules of construction.

Authority: 12 U.S.C. 1831y.

§ 35.1 Purpose and scope.

(a) *General*. This part implements section 711 of the Gramm-Leach-Bliley Act (12 U.S.C. 1831y). That section requires any nongovernmental entity or person, insured depository institution, and affiliate of an insured depository institution that enters into a covered agreement to:

- (1) Make the covered agreement available to the public and the appropriate Federal banking agency; and
- (2) File an annual report with the appropriate Federal banking agency concerning the covered agreement.

(b) The provisions of this part are enforced by the OCC with respect to national banks and their subsidiaries.

§ 35.2 Definition of covered agreement.

(a) *General definition*. A covered agreement is any contract, arrangement, or understanding (whether or not legally binding) that meets all of the following criteria:

- (1) The agreement is in writing.
- (2) The parties to the agreement include:
 - (i) An insured depository institution or an affiliate of an insured depository institution; and
 - (ii) A nongovernmental entity or person (referred to hereafter as a person).

(3) The agreement provides for the insured depository institution or any affiliate to:

- (i) Provide to one or more individuals or entities (whether or not parties to the

agreement) cash payments, grants, or other consideration (except loans) that have an aggregate value of more than \$10,000 in any calendar year; or

(ii) Make to one or more individuals or entities (whether or not parties to the agreement) loans that have an aggregate principal amount of more than \$50,000 in any calendar year.

(4) The agreement is made pursuant to, or in connection with, the fulfillment of the Community Reinvestment Act of 1977 (12 U.S.C. 2901 *et seq.*) (CRA), as defined in paragraph (c) of this section.

(b) *Agreements that are not covered agreements*— (1) *Certain loans*. A covered agreement does not include:

- (i) Any individual mortgage loan; or
- (ii) Any specific contract or commitment for a loan or extension of credit to individuals, businesses, farms, or other entities if:

(A) The funds are loaned at rates not substantially below market rates; and

(B) The purpose of the loan or extension of credit does not include any re-lending of the borrowed funds to third parties.

(2) *Agreements where there has not been a CRA contact*—(i) *General*. A covered agreement does not include any agreement entered into by an insured depository institution or affiliate of an insured depository institution with a person who has not commented on, testified about, or discussed with the institution, or otherwise contacted the institution, concerning the CRA.

(ii) *Examples of CRA contact*. The following are examples of CRA contacts. These examples are not exclusive and other actions by a person may also make the exemption in paragraph (b)(2)(i) of this section unavailable. If a person engages in any of the following actions and subsequently enters into an agreement with the insured depository institution or any affiliate of the institution, the agreement is not exempt under paragraph (b)(2)(i) of this section.

(A) *CRA contact with a Federal banking agency*. (1) The person submits a written comment to a Federal banking agency that discusses the record of performance or future performance under the CRA of an insured depository institution or any CRA affiliate of the institution.

(2) The person provides oral testimony or comments to a Federal banking agency concerning the record of performance or future performance under the CRA of an insured depository institution or any CRA affiliate of the institution.

(B) *CRA contact with insured depository institution or affiliate*. (1) The person has a discussion with, or otherwise contacts, an insured

depository institution or any affiliate of the institution about providing (or refraining from providing) written or oral comments or testimony to any Federal banking agency concerning the record of performance or future performance under the CRA of the institution or any CRA affiliate of the institution.

(2) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution about providing (or refraining from providing) written comments to the institution that must be included in the institution's CRA public file.

(3) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution concerning the CRA rating of the institution, or the CRA record of performance of the institution or any CRA affiliate of the institution.

(4) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution concerning actions that should be taken to improve the CRA performance of the institution or any CRA affiliate of the institution.

(5) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution concerning any obligation or responsibility that the institution or any CRA affiliate of the institution may have to meet the banking needs of its community and the discussion or contact occurs while the institution or any affiliate has an application for a deposit facility pending at a Federal banking agency or is undergoing a publicly announced CRA performance examination.

(iii) *Examples of actions that are not CRA contacts.* The following are examples of actions that are not CRA contacts. The actions described in these examples would not, by themselves, cause the exemption in paragraph (b)(2)(i) of this section to be unavailable. These examples are not exclusive.

(A) A person provides comments or testimony concerning an insured depository institution or affiliate to a Federal banking agency in response to a direct request by the agency for comments or testimony from that person. Direct requests for comments or testimony do not include a general invitation by a Federal banking agency for comments or testimony from the public in connection with a CRA performance evaluation of, or application for a deposit facility by, an insured depository institution or an application by a company to acquire an insured depository institution.

(B) A person makes a statement concerning an insured depository institution or affiliate at a widely attended conference or seminar regarding a general topic. A public or private meeting, public hearing, or other meeting regarding one or more specific institutions or affiliates or transactions involving an application for a deposit facility is not considered a widely attended conference or seminar.

(C) A person sends a similar fundraising letter to insured depository institutions and to other businesses in its community. The letter encourages all businesses in the community to meet their obligation to assist in making the local community a better place to live and work.

(D) A person sends a general offering circular to financial institutions offering to sell a portfolio of loans. An insured depository institution that receives the offering circular discusses with the person whether the loans are in the institution's local community. No reference to the CRA or the institution's CRA performance is made in the offering circular or in the discussions of the parties.

(c) *Fulfillment of the CRA—(1) General.* Fulfillment of the CRA means the list of factors that the Federal banking agencies have determined have a material impact on an agency's decision:

(i) To approve or disapprove an application for a deposit facility (as defined in section 803 of the CRA (12 U.S.C. 2902)); or

(ii) To assign a rating to an insured depository institution under section 807 of the CRA (12 U.S.C. 2906).

(2) *List of factors.* The list of factors referred to in paragraph (c)(1) of this section means the performance of any of the following activities by an insured depository institution or CRA affiliate that is a party to the agreement or that is an affiliate of a party to the agreement or by any person that is a party to the agreement:

(i) Providing or refraining from providing written or oral comments or testimony to any Federal banking agency concerning the record of performance or future performance under the CRA of an insured depository institution or CRA affiliate that is a party to the agreement or an affiliate of a party to the agreement or written comments that are required to be included in the CRA public file of any such insured depository institution;

(ii) Home-purchase, home-improvement, small business, small farm, community development, and consumer lending, as described in

§ 25.22, including loan purchases, loan commitments, and letters of credit;

(iii) Making investments, deposits, or grants, or acquiring membership shares, that have as their primary purpose community development, as described in § 25.23;

(iv) Delivering retail banking services, as described in § 25.24(d);

(v) Providing community development services, as described in § 25.24(e);

(vi) In the case of a wholesale or limited-purpose insured depository institution, community development lending, including originating and purchasing loans and making loan commitments and letters of credit, making qualified investments, or providing community development services, as described in § 25.25(c);

(vii) In the case of a small insured depository institution, any lending or other activity described in § 25.26(a); or

(viii) In the case of an insured depository institution that is evaluated on the basis of a strategic plan, any element of the strategic plan, as described in § 25.27(f).

(d) *Agreements relating to activities of CRA affiliates.* An insured depository institution or affiliate that is a party to a covered agreement that concerns the performance of any activity of a CRA affiliate described in paragraph (c) of this section must notify each person that is a party to the agreement that the agreement concerns a CRA affiliate. The insured depository institution or affiliate must provide this notice prior to the time the agreement is entered into if the affiliate is a CRA affiliate at that time, or within a reasonable time after the affiliate becomes a CRA affiliate if the affiliate is not a CRA affiliate at the time the agreement is entered into.

(e) *Disclosure and reporting of certain existing agreements that become covered agreements.* An agreement that concerns the performance of any activity described in paragraph (c) of this section by an affiliate may become a covered agreement after it is entered into if the affiliate subsequently becomes a CRA affiliate. In that event, the disclosure and reporting obligations under §§ 35.4 and 35.5 begin on the date that the agreement becomes a covered agreement and do not apply to the period prior to that date.

§ 35.3 Related agreements considered a single agreement.

The following rules must be applied in determining whether a written contract, arrangement, or understanding is a covered agreement under § 35.2.

(a) *Contracts, arrangements, or understandings entered into by same*

parties. All written contracts, arrangements, or understandings to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement if the contracts, arrangements, or understandings:

- (1) Are entered into with the same person;
- (2) Were entered into within the same 12-month period; and
- (3) Are each in fulfillment of the CRA.

(b) *Substantively related contracts.* All written contracts to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement, without regard to whether the other parties to the contracts are the same or whether each such contract is in fulfillment of the CRA, if the contracts were negotiated in a coordinated fashion and a person is a party to each contract.

§ 35.4 Disclosure of covered agreements.

(a) *Effective date.* This section applies only to covered agreements entered into after November 12, 1999.

(b) *Disclosure of covered agreements to the public—(1) Disclosure required.*

(i) Each person and each insured depository institution or affiliate that enters into a covered agreement must make a complete copy of the covered agreement available to any individual or entity upon request.

(ii) In disclosing a covered agreement to the public under paragraph (b)(1)(i) of this section, a person, insured depository institution, or affiliate may withhold from disclosure only those portions of an agreement that the relevant supervisory agency determines are exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552 *et seq.*).

(2) *Duration of obligation.* The obligation to disclose a covered agreement terminates 12 months after the end of the term of the agreement.

(3) *Reasonable copy and mailing fees.* Each person and each insured depository institution or affiliate may charge an individual or entity that requests a copy of a covered agreement a reasonable fee not to exceed the cost of copying and mailing the agreement.

(4) *Use of CRA public file by insured depository institution.* An insured depository institution may fulfill its obligation under this paragraph (b) by placing a copy of the covered agreement in the insured depository institution's CRA public file and making the agreement available in accordance with the procedures set forth in § 35.43.

(c) *Disclosure of covered agreements to the relevant supervisory agency—(1)*

Disclosure by person. Each person that is a party to a covered agreement must provide a complete copy of the agreement to the relevant supervisory agency within 30 days of receiving a request from the agency for the agreement. This obligation terminates 12 months after the end of the term of the covered agreement.

(2) *Disclosure by insured depository institution or affiliate—(i) Filing with the relevant supervisory agency.* Each insured depository institution or affiliate that is a party to a covered agreement must provide a copy of the agreement to each relevant supervisory agency within 30 days after the date the insured depository institution or affiliate enters into the agreement.

(ii) *Joint filings.* In the event that two or more insured depository institutions or affiliates are parties to a covered agreement, the insured depository institution(s) and affiliate(s) may jointly file a copy of the covered agreement with each relevant supervisory agency. Any joint filing must identify the insured depository institution(s) and affiliate(s) for whom the covered agreement is being filed.

(d) *Relevant supervisory agency.* For purposes of this section and § 35.5, the "relevant supervisory agency" for a covered agreement means the appropriate Federal banking agency for—

(1) Each insured depository institution (or subsidiary thereof) that is a party to the covered agreement;

(2) Each insured depository institution (or subsidiary thereof) or CRA affiliate that makes payments or loans or provides services that are subject to the covered agreement; and

(3) Any company (other than an insured depository institution or subsidiary thereof) that is a party to the covered agreement.

§ 35.5 Annual reports.

(a) *Effective date.* This section applies only to covered agreements entered into on or after May 12, 2000.

(b) *Annual report required.* Each person and each insured depository institution or affiliate that is a party to a covered agreement must file an annual report with each relevant supervisory agency concerning the disbursement, receipt, and uses of funds or other resources under the covered agreement.

(c) *Duration of reporting requirement—(1) General.* An annual report under this section must be filed with each relevant supervisory agency for:

(i) The fiscal year in which the parties enter into the covered agreement; and

(ii) Each fiscal year during the term of the covered agreement.

(2) *Exception for person that has not received any funds or resources.* A person is not required to file an annual report for a covered agreement for any fiscal year during the term of the agreement in which the person did not receive any funds or other resources under the agreement.

(d) *Annual reports filed by person—(1) General.* The annual report filed by a person under this section must include the following:

(i) The name and mailing address of the person filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The amount of funds or resources received under the covered agreement during the fiscal year; and

(iv) The information required by paragraphs (d)(2) and (d)(3) of this section concerning the use of funds received under the covered agreement.

(2) *Reporting for funds or resources allocated and used for a specific purpose.* For funds or other resources that the person received during the fiscal year under the covered agreement and allocated and used for a specific purpose during the fiscal year, the annual report must:

(i) Describe each specific purpose for which the funds or resources were used during the fiscal year; and (ii) State the amount of funds or resources used during the fiscal year for each specific purpose.

(3) *Funds or resources used for other purposes.* For all funds or resources that the person received during the fiscal year under the covered agreement and did not use for a specific purpose, the annual report must:

(i) State the amount received during the fiscal year; and

(ii) Provide a detailed, itemized list of how the funds or resources were used during the fiscal year, including the total amount used for:

(A) Compensation of officers, directors, and employees;

(B) Administrative expenses;

(C) Travel expenses;

(D) Entertainment expenses;

(E) Payment of consulting and professional fees; and

(F) Other expenses or uses.

(4) *Use of other reports.* The annual report filed by a person may consist of, or incorporate, a report prepared for any other purpose, such as an Internal Revenue Service form, a state tax form,

a report to members or shareholders, financial statements, or other report, so long as the annual report contains all of the information required by this paragraph (d).

(5) *Consolidated reports permitted.* A person that is a party to five or more covered agreements may file with each relevant supervisory agency a single consolidated annual report covering all the covered agreements. Any consolidated report must contain all the information required by this paragraph (d). The information required to be reported under paragraph (d)(1)(iii), (d)(2), and (d)(3) of this section may be reported on an aggregate basis for all covered agreements.

(e) *Annual report filed by insured depository institution or affiliate—(1) General.* The annual report filed by an insured depository institution or affiliate must include the following:

(i) The name and principal place of business of the insured depository institution or affiliate filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans provided by the insured depository institution or affiliate under the covered agreement to any other party to the agreement during the fiscal year;

(iv) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans received by the insured depository institution or affiliate under the covered agreement from any other party to the agreement during the fiscal year;

(v) A general description of the terms and conditions of any payments, fees, or loans reported under paragraphs (e)(1)(iii) and (iv) of this section, or, in the event such terms and conditions are set forth:

(A) In the covered agreement, a statement identifying the covered agreement and the date the agreement was filed with the relevant supervisory agency; or

(B) In a previous annual report filed by the insured depository institution or affiliate, a statement identifying the date the report was filed with the relevant supervisory agency; and

(vi) The aggregate amount and number of loans, aggregate amount and number of investments, and aggregate amount of services provided under the covered agreement to any individual or entity not a party to the agreement:

(A) By the insured depository institution or affiliate during its fiscal year; and

(B) By any other party to the agreement, unless such information is not known to the insured depository institution or affiliate filing the report or such information is or will be contained in the annual report filed by a person under paragraph (d) of this section.

(2) *Consolidated reports permitted—*

(i) *Party to large number of agreements.*

An insured depository institution or affiliate that is a party to five or more covered agreements may file a single consolidated annual report with each relevant supervisory agency covering all the covered agreements.

(ii) *Affiliated entities party to the same agreement.* An insured depository institution and its affiliates that are parties to the same covered agreement may file a single consolidated annual report relating to the agreement with each relevant supervisory agency for the covered agreement.

(iii) *Content of report.* Any consolidated annual report must contain all the information required by this paragraph (e). The amounts and data required to be reported under paragraph (e)(1)(iii), (iv), and (vi) of this section may be reported on an aggregate basis for all covered agreements.

(f) *Time and place of filing—(1) General.* Each party must file its annual report with each relevant supervisory agency for the covered agreement no later than six months following the end of the fiscal year covered by the report.

(2) *Alternative method of fulfilling annual reporting requirement for a person.* (i) A person may fulfill the filing requirements of this section by providing the following materials to an insured depository institution or affiliate that is a party to the agreement no later than five months following the end of the person's fiscal year:

(A) A copy of the person's annual report required under paragraph (d) of this section for the fiscal year; and

(B) Written instructions that the insured depository institution or affiliate promptly forward the annual report to the relevant supervisory agency or agencies on behalf of the person.

(ii) An insured depository institution or affiliate that receives an annual report from a person pursuant to paragraph (f)(2)(i) of this section must file the report with the relevant supervisory agency or agencies on behalf of the person within 30 days.

§ 35.6 Release of information under FOIA.

The OCC will make covered agreements and annual reports available

to the public in accordance with the Freedom of Information Act (5 U.S.C. 552 *et seq.*) and the OCC's Rules Regarding the Availability of Information (12 CFR part 4). A party to a covered agreement may request confidential treatment of proprietary and confidential information in a covered agreement or an annual report under those procedures.

§ 35.7 Compliance provisions.

(a) *Willful failure to comply with disclosure and reporting obligations.* (1) If the OCC determines that a person has willfully failed to comply in a material way with §§ 35.4 or 35.5, the OCC will notify the person in writing of that determination and provide the person a period of 90 days (or such longer period as the OCC finds to be reasonable under the circumstances) to comply.

(2) If the person does not comply within the time period established by the OCC, the agreement shall thereafter be unenforceable by that person by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y).

(3) The OCC may assist any insured depository institution or affiliate that is a party to a covered agreement that is unenforceable by a person by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y) in identifying a successor to assume the person's responsibilities under the agreement.

(b) *Diversion of funds.* If a court or other body of competent jurisdiction determines that funds or resources received under a covered agreement have been diverted contrary to the purposes of the covered agreement for an individual's personal financial gain, the OCC may take either or both of the following actions:

(1) Order the individual to disgorge the diverted funds or resources received under the agreement;

(2) Prohibit the individual from being a party to any covered agreement for a period not to exceed 10 years.

(c) *Notice and opportunity to respond.* Before making a determination under paragraph (a)(1) of this section, or taking any action under paragraph (b) of this section, the OCC will provide written notice and an opportunity to present information to the OCC concerning any relevant facts or circumstances relating to the matter.

(d) *Inadvertent or de minimis errors.* Inadvertent or de minimis errors in annual reports or other documents filed with the OCC under §§ 35.4 or 35.5 will not subject the reporting party to any penalty.

(e) *Enforcement of provisions in covered agreements.* No provision of this part shall be construed as authorizing the OCC to enforce the provisions of any covered agreement.

§ 35.8 Other definitions and rules of construction.

(a) *Affiliate.* "Affiliate" means:

(1) Any company that controls, is controlled by, or is under common control with another company; and

(2) For the purpose of determining whether an agreement is a covered agreement under § 35.2, an "affiliate" includes any company that would be under common control or merged with another company on consummation of any transaction pending before a Federal banking agency at the time:

(i) The parties enter into the agreement; and

(ii) The person that is a party to the agreement makes a CRA contact, as described in § 35.2(b)(2).

(b) *Control.* "Control" is defined in section 2(a) of the Bank Holding Company Act (12 U.S.C. 1841(a)).

(c) *CRA affiliate.* A "CRA affiliate" of an insured depository institution is any company that is an affiliate of an insured depository institution to the extent, and only to the extent, that the activities of the affiliate were considered by the appropriate Federal banking agency when evaluating the CRA performance of the institution at its most recent CRA examination.

(d) *CRA public file.* For purposes of this part, "CRA public file" means the public file maintained by an insured depository institution and described in § 25.43.

(e) *Federal banking agency; appropriate Federal banking agency.* The terms "Federal banking agency" and "appropriate Federal banking agency" have the same meanings as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(f) *Fiscal year.* (1) The fiscal year for a person that does not have a fiscal year shall be the calendar year;

(2) Any person, insured depository institution, or affiliate that has a fiscal year may elect to have the calendar year be its fiscal year for purposes of this part.

(g) *Insured depository institution.* "Insured depository institution" has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(h) *Nongovernmental entity or person.* (1) *General.* A "nongovernmental entity or person" is any partnership, association, trust, joint venture, joint stock company, corporation, limited liability corporation, company, firm,

society, other organization, or individual.

(2) *Exclusions.* A nongovernmental entity or person does not include:

(i) The United States government, a state government, a unit of local government (including a county, city, town, township, parish, village, or other general-purpose subdivision of a state) or an Indian tribe or tribal organization established under Federal, state or Indian tribal law (including the Department of Hawaiian Home Lands), or a department, agency, or instrumentality of any such entity;

(ii) A federally-chartered public corporation that receives federal funds appropriated specifically for that corporation;

(iii) An insured depository institution or affiliate of an insured depository institution; or

(iv) An officer, director, employee, or representative (acting in his or her capacity as an officer, director, employee, or representative) of an entity listed in paragraphs (h)(2)(i) through (iii) of this section.

(i) *Party.* The term "party" with respect to a covered agreement means each person and each insured depository institution or affiliate that entered into the agreement.

(j) *Person.* For purposes of this part, a "person" is any nongovernmental entity or person.

(k) *Term of agreement.* An agreement that does not by its terms establish a termination date is considered to terminate on the last date on which any party to the agreement makes any payment or provides any loan or other resources under the agreement, unless the appropriate Federal banking agency otherwise notifies each party in writing.

Dated: May 10, 2000.

John D. Hawke, Jr.,
Comptroller of the Currency.

Federal Reserve System

12 CFR Chapter II

Authority and Issuance

For the reasons set out in the joint preamble, Title 12, Chapter II, of the Code of Federal Regulations is proposed to be amended by adding a new part 207 to read as follows:

PART 207—DISCLOSURE AND REPORTING OF CRA-RELATED AGREEMENTS (REGULATION G)

Sec.

- 207.1 Purpose and scope of this part.
207.2 Definition of covered agreement.
207.3 Related agreements considered a single agreement.
207.4 Disclosure of covered agreements.

207.5 Annual reports.

207.6 Release of information under FOIA.

207.7 Compliance provisions.

207.8 Other definitions and rules of construction used in this part.

Authority: 12 U.S.C. 1831y.

§ 207.1 Purpose and scope of this part.

(a) *General.* This part implements section 711 of the Gramm-Leach-Bliley Act (12 U.S.C. 1831y). That section requires any nongovernmental entity or person, insured depository institution, and affiliate of an insured depository institution that enters into a covered agreement to—

(1) Make the covered agreement available to the public and the appropriate Federal banking agency; and

(2) File an annual report with the appropriate Federal banking agency concerning the covered agreement.

(b) The provisions of this part are enforced by the Board with respect to state member banks, bank holding companies, and affiliates of bank holding companies, other than banks, savings associations and subsidiaries of banks and savings associations.

§ 207.2 Definition of covered agreement.

(a) *General definition.* A covered agreement is any contract, arrangement, or understanding (whether or not legally binding) that meets all of the following criteria—

(1) The agreement is in writing.

(2) The parties to the agreement include—

(i) An insured depository institution or an affiliate of an insured depository institution; and

(ii) A nongovernmental entity or person (referred to hereafter as a person).

(3) The agreement provides for the insured depository institution or any affiliate to—

(i) Provide to one or more individuals or entities (whether or not parties to the agreement) cash payments, grants, or other consideration (except loans) that have an aggregate value of more than \$10,000 in any calendar year; or

(ii) Make to one or more individuals or entities (whether or not parties to the agreement) loans that have an aggregate principal amount of more than \$50,000 in any calendar year.

(4) The agreement is made pursuant to, or in connection with, the fulfillment of the Community Reinvestment Act of 1977 (12 U.S.C. 2901 *et seq.*) (CRA), as defined in paragraph (c) of this section.

(b) *Agreements that are not covered agreements*—(1) *Certain loans*. A covered agreement does not include—

(i) Any individual mortgage loan; or
(ii) Any specific contract or commitment for a loan or extension of credit to individuals, businesses, farms, or other entities if—

(A) The funds are loaned at rates not substantially below market rates; and

(B) The purpose of the loan or extension of credit does not include any re-lending of the borrowed funds to third parties.

(2) *Agreements where there has not been a CRA contact*. (i) *General*. A covered agreement does not include any agreement entered into by an insured depository institution or affiliate of an insured depository institution with a person who has not commented on, testified about, or discussed with the institution, or otherwise contacted the institution, concerning the CRA.

(ii) *Examples of CRA contact*. The following are examples of CRA contacts. These examples are not exclusive and other actions by a person may also make the exemption in paragraph (b)(2)(i) of this section unavailable. If a person engages in any of the following actions and subsequently enters into an agreement with the insured depository institution or any affiliate of the institution, the agreement is not exempt under paragraph (b)(2)(i) of this section.

(A) *CRA contact with a Federal banking agency*. (1) The person submits a written comment to a Federal banking agency that discusses the record of performance or future performance under the CRA of an insured depository institution or any CRA affiliate of the institution.

(2) The person provides oral testimony or comments to a Federal banking agency concerning the record of performance or future performance under the CRA of an insured depository institution or any CRA affiliate of the institution.

(B) *CRA contact with insured depository institution or affiliate*. (1) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution about providing (or refraining from providing) written or oral comments or testimony to any Federal banking agency concerning the record of performance or future performance under the CRA of the institution or any CRA affiliate of the institution.

(2) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution about providing (or refraining from providing) written

comments to the institution that must be included in the institution's CRA public file.

(3) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution concerning the CRA rating of the institution, or the CRA record of performance of the institution or any CRA affiliate of the institution.

(4) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution concerning actions that should be taken to improve the CRA performance of the institution or any CRA affiliate of the institution.

(5) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution concerning any obligation or responsibility that the institution or any CRA affiliate of the institution may have to meet the banking needs of its community and the discussion or contact occurs while the institution or any affiliate has an application for a deposit facility pending at a Federal banking agency or is undergoing a publicly announced CRA performance examination.

(iii) *Examples of actions that are not CRA contacts*. The following are examples of actions that are not CRA contacts. The actions described in these examples would not, by themselves, cause the exemption in paragraph (b)(2)(i) of this section to be unavailable. These examples are not exclusive.

(A) A person provides comments or testimony concerning an insured depository institution or affiliate to a Federal banking agency in response to a direct request by the agency for comments or testimony from that person. Direct requests for comments or testimony do not include a general invitation by a Federal banking agency for comments or testimony from the public in connection with a CRA performance evaluation of, or application for a deposit facility by, an insured depository institution or an application by a company to acquire an insured depository institution.

(B) A person makes a statement concerning an insured depository institution or affiliate at a widely attended conference or seminar regarding a general topic. A public or private meeting, public hearing, or other meeting regarding one or more specific institutions or affiliates or transactions involving an application for a deposit facility is not considered a widely attended conference or seminar.

(C) A person sends a similar fundraising letter to insured depository institutions and to other businesses in

its community. The letter encourages all businesses in the community to meet their obligation to assist in making the local community a better place to live and work.

(D) A person sends a general offering circular to financial institutions offering to sell a portfolio of loans. An insured depository institution that receives the offering circular discusses with the person whether the loans are in the institution's local community. No reference to the CRA or the institution's CRA performance is made in the offering circular or in the discussions of the parties.

(c) *Fulfillment of the CRA*—(1) *General*. Fulfillment of the CRA means the list of factors that the Federal banking agencies have determined have a material impact on an agency's decision—

(i) To approve or disapprove an application for a deposit facility (as defined in section 803 of the CRA (12 U.S.C. 2902)); or

(ii) To assign a rating to an insured depository institution under section 807 of the CRA (12 U.S.C. 2906).

(2) *List of factors*. The list of factors referred to in paragraph (c)(1) of this section means the performance of any of the following activities by an insured depository institution or CRA affiliate that is a party to the agreement or that is an affiliate of a party to the agreement or by any person that is a party to the agreement—

(i) Providing or refraining from providing written or oral comments or testimony to any Federal banking agency concerning the record of performance or future performance under the CRA of an insured depository institution or CRA affiliate that is a party to the agreement or an affiliate of a party to the agreement or written comments that are required to be included in the CRA public file of any such insured depository institution;

(ii) Home-purchase, home-improvement, small business, small farm, community development, and consumer lending, as described in § 228.22 of Regulation BB (12 CFR 228.22), including loan purchases, loan commitments, and letters of credit;

(iii) Making investments, deposits, or grants, or acquiring membership shares, that have as their primary purpose community development, as described in § 228.23 of Regulation BB (12 CFR 228.23);

(iv) Delivering retail banking services, as described in § 228.24(d) of Regulation BB (12 CFR 228.24(d));

(v) Providing community development services, as described in

§ 228.24(e) of Regulation BB (12 CFR 228.24(e));

(vi) In the case of a wholesale or limited-purpose insured depository institution, community development lending, including originating and purchasing loans and making loan commitments and letters of credit, making qualified investments, or providing community development services, as described in § 228.25(c) of Regulation BB (12 CFR 228.25(c));

(vii) In the case of a small insured depository institution, any lending or other activity described in § 228.26(a) of Regulation BB (12 CFR 228.26(a)); or

(viii) In the case of an insured depository institution that is evaluated on the basis of a strategic plan, any element of the strategic plan, as described in § 228.27(f) of Regulation BB (12 CFR 228.27(f)).

(d) *Agreements relating to activities of CRA affiliates.* An insured depository institution or affiliate that is a party to a covered agreement that concerns the performance of any activity of a CRA affiliate described in paragraph (c) of this section must notify each person that is a party to the agreement that the agreement concerns a CRA affiliate. The insured depository institution or affiliate must provide this notice prior to the time the agreement is entered into if the affiliate is a CRA affiliate at that time, or within a reasonable time after the affiliate becomes a CRA affiliate if the affiliate is not a CRA affiliate at the time the agreement is entered into.

(e) *Disclosure and reporting of certain existing agreements that become covered agreements.* An agreement that concerns the performance of any activity described in paragraph (c) of this section by an affiliate may become a covered agreement after it is entered into if the affiliate subsequently becomes a CRA affiliate. In that event, the disclosure and reporting obligations under §§ 207.4 and 207.5 begin on the date that the agreement becomes a covered agreement and do not apply to the period prior to that date.

§ 207.3 Related agreements considered a single agreement.

The following rules must be applied in determining whether a written contract, arrangement, or understanding is a covered agreement under § 207.2.

(a) *Contracts, arrangements, or understandings entered into by same parties.* All written contracts, arrangements, or understandings to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement if the contracts, arrangements, or understandings—

(1) Are entered into with the same person;

(2) Were entered into within the same 12-month period; and

(3) Are each in fulfillment of the CRA.

(b) *Substantively related contracts.*

All written contracts to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement, without regard to whether the other parties to the contracts are the same or whether each such contract is in fulfillment of the CRA, if the contracts were negotiated in a coordinated fashion and a person is a party to each contract.

§ 207.4 Disclosure of covered agreements.

(a) *Effective date.* This section applies only to covered agreements entered into after November 12, 1999.

(b) *Disclosure of covered agreements to the public—(1) Disclosure required.*

(i) Each person and each insured depository institution or affiliate that enters into a covered agreement must make a complete copy of the covered agreement available to any individual or entity upon request.

(ii) In disclosing a covered agreement to the public under paragraph (b)(1)(i) of this section, a person, insured depository institution, or affiliate may withhold from disclosure only those portions of an agreement that the relevant supervisory agency determines are exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552 *et seq.*).

(2) *Duration of obligation.* The obligation to disclose a covered agreement terminates 12 months after the end of the term of the agreement.

(3) *Reasonable copy and mailing fees.* Each person and each insured depository institution or affiliate may charge an individual or entity that requests a copy of a covered agreement a reasonable fee not to exceed the cost of copying and mailing the agreement.

(4) *Use of CRA public file by insured depository institution.* An insured depository institution may fulfill its obligation under this paragraph (b) by placing a copy of the covered agreement in the insured depository institution's CRA public file and making the agreement available in accordance with the procedures set forth in section § 228.43 of Regulation BB (12 CFR 228.43).

(c) *Disclosure of covered agreements to the relevant supervisory agency—(1) Disclosure by person.* Each person that is a party to a covered agreement must provide a complete copy of the agreement to the relevant supervisory agency within 30 days of receiving a

request from the agency for the agreement. This obligation terminates 12 months after the end of the term of the covered agreement.

(2) *Disclosure by insured depository institution or affiliate.* (i) *Filing with the relevant supervisory agency.* Each insured depository institution or affiliate that is a party to a covered agreement must provide a copy of the agreement to each relevant supervisory agency within 30 days after the date the insured depository institution or affiliate enters into the agreement.

(ii) *Joint filings.* In the event that two or more insured depository institutions or affiliates are parties to a covered agreement, the insured depository institution(s) and affiliate(s) may jointly file a copy of the covered agreement with each relevant supervisory agency. Any joint filing must identify the insured depository institution(s) and affiliate(s) for whom the covered agreement is being filed.

(d) *Relevant supervisory agency.* For purposes of this section and § 207.5, the "relevant supervisory agency" for a covered agreement means the appropriate Federal banking agency for—

(1) Each insured depository institution (or subsidiary thereof) that is a party to the covered agreement;

(2) Each insured depository institution (or subsidiary thereof) or CRA affiliate that makes payments or loans or provides services that are subject to the covered agreement; and

(3) Any company (other than an insured depository institution or subsidiary thereof) that is a party to the covered agreement.

§ 207.5 Annual reports.

(a) *Effective date.* This section applies only to covered agreements entered into on or after May 12, 2000.

(b) *Annual report required.* Each person and each insured depository institution or affiliate that is a party to a covered agreement must file an annual report with each relevant supervisory agency concerning the disbursement, receipt, and uses of funds or other resources under the covered agreement.

(c) *Duration of reporting requirement—(1) General.* An annual report under this section must be filed with each relevant supervisory agency for—

(i) The fiscal year in which the parties enter into the covered agreement; and

(ii) Each fiscal year during the term of the covered agreement.

(2) *Exception for person that has not received any funds or resources.* A person is not required to file an annual report for a covered agreement for any

fiscal year during the term of the agreement in which the person did not receive any funds or other resources under the agreement.

(d) *Annual reports filed by person—*
(1) *General.* The annual report filed by a person under this section must include the following—

(i) The name and mailing address of the person filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The amount of funds or resources received under the covered agreement during the fiscal year; and

(iv) The information required by paragraphs (d)(2) and (d)(3) of this section concerning the use of funds received under the covered agreement.

(2) *Reporting for funds or resources allocated and used for a specific purpose.* For funds or other resources that the person received during the fiscal year under the covered agreement and allocated and used for a specific purpose during the fiscal year, the annual report must—

(i) Describe each specific purpose for which the funds or resources were used during the fiscal year; and

(ii) State the amount of funds or resources used during the fiscal year for each specific purpose.

(3) *Funds or resources used for other purposes.* For all funds or resources that the person received during the fiscal year under the covered agreement and did not use for a specific purpose, the annual report must—

(i) State the amount received during the fiscal year; and

(ii) Provide a detailed, itemized list of how the funds or resources were used during the fiscal year, including the total amount used for—

(A) Compensation of officers, directors, and employees;

(B) Administrative expenses;

(C) Travel expenses;

(D) Entertainment expenses;

(E) Payment of consulting and professional fees; and

(F) Other expenses or uses.

(4) *Use of other reports.* The annual report filed by a person may consist of, or incorporate, a report prepared for any other purpose, such as an Internal Revenue Service form, a state tax form, a report to members or shareholders, financial statements, or other report, so long as the annual report contains all of the information required by this paragraph (d).

(5) *Consolidated reports permitted.* A person that is a party to five or more

covered agreements may file with each relevant supervisory agency a single consolidated annual report covering all the covered agreements. Any consolidated report must contain all the information required by this paragraph (d). The information required to be reported under paragraph (d)(1)(iii), (d)(2), and (d)(3) of this section may be reported on an aggregate basis for all covered agreements.

(e) *Annual report filed by insured depository institution or affiliate—*(1) *General.* The annual report filed by an insured depository institution or affiliate must include the following—

(i) The name and principal place of business of the insured depository institution or affiliate filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans provided by the insured depository institution or affiliate under the covered agreement to any other party to the agreement during the fiscal year;

(iv) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans received by the insured depository institution or affiliate under the covered agreement from any other party to the agreement during the fiscal year;

(v) A general description of the terms and conditions of any payments, fees, or loans reported under paragraphs (e)(1)(iii) and (iv) of this section, or, in the event such terms and conditions are set forth—

(A) In the covered agreement, a statement identifying the covered agreement and the date the agreement was filed with the relevant supervisory agency; or

(B) In a previous annual report filed by the insured depository institution or affiliate, a statement identifying the date the report was filed with the relevant supervisory agency; and

(vi) The aggregate amount and number of loans, aggregate amount and number of investments, and aggregate amount of services provided under the covered agreement to any individual or entity not a party to the agreement—

(A) By the insured depository institution or affiliate during its fiscal year; and

(B) By any other party to the agreement, unless such information is not known to the insured depository institution or affiliate filing the report or

such information is or will be contained in the annual report filed by a person under paragraph (d) of this section.

(2) *Consolidated reports permitted.* (i) *Party to large number of agreements.* An insured depository institution or affiliate that is a party to five or more covered agreements may file a single consolidated annual report with each relevant supervisory agency covering all the covered agreements.

(ii) *Affiliated entities party to the same agreement.* An insured depository institution and its affiliates that are parties to the same covered agreement may file a single consolidated annual report relating to the agreement with each relevant supervisory agency for the covered agreement.

(iii) *Content of report.* Any consolidated annual report must contain all the information required by this paragraph (e). The amounts and data required to be reported under paragraphs (e)(1)(iii), (iv), and (vi) of this section may be reported on an aggregate basis for all covered agreements.

(f) *Time and place of filing—*(1) *General.* Each party must file its annual report with each relevant supervisory agency for the covered agreement no later than six months following the end of the fiscal year covered by the report.

(2) *Alternative method of fulfilling annual reporting requirement for a person.* (i) A person may fulfill the filing requirements of this section by providing the following materials to an insured depository institution or affiliate that is a party to the agreement no later than five months following the end of the person's fiscal year—

(A) A copy of the person's annual report required under paragraph (d) of this section for the fiscal year; and

(B) Written instructions that the insured depository institution or affiliate promptly forward the annual report to the relevant supervisory agency or agencies on behalf of the person.

(ii) An insured depository institution or affiliate that receives an annual report from a person pursuant to paragraph (f)(2)(i) of this section must file the report with the relevant supervisory agency or agencies on behalf of the person within 30 days.

§ 207.6 Release of information under FOIA.

The Board will make covered agreements and annual reports available to the public in accordance with the Freedom of Information Act (5 U.S.C. 552 *et seq.*) and the Board's Rules Regarding the Availability of Information (12 CFR part 261). A party to a covered agreement may request

confidential treatment of proprietary and confidential information in a covered agreement or an annual report under those procedures.

§ 207.7 Compliance provisions.

(a) *Willful failure to comply with disclosure and reporting obligations.* (1) If the Board determines that a person has willfully failed to comply in a material way with §§ 207.4 or 207.5, the Board will notify the person in writing of that determination and provide the person a period of 90 days (or such longer period as the Board finds to be reasonable under the circumstances) to comply.

(2) If the person does not comply within the time period established by the Board, the agreement shall thereafter be unenforceable by that person by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y).

(3) The Board may assist any insured depository institution or affiliate that is a party to a covered agreement that is unenforceable by a person by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y) in identifying a successor to assume the person's responsibilities under the agreement.

(b) *Diversion of funds.* If a court or other body of competent jurisdiction determines that funds or resources received under a covered agreement have been diverted contrary to the purposes of the covered agreement for an individual's personal financial gain, the Board may take either or both of the following actions—

(1) Order the individual to disgorge the diverted funds or resources received under the agreement;

(2) Prohibit the individual from being a party to any covered agreement for a period not to exceed 10 years.

(c) *Notice and opportunity to respond.* Before making a determination under paragraph (a)(1) of this section, or taking any action under paragraph (b) of this section, the Board will provide written notice and an opportunity to present information to the Board concerning any relevant facts or circumstances relating to the matter.

(d) *Inadvertent or de minimis errors.* Inadvertent or de minimis errors in annual reports or other documents filed with the Board under §§ 207.4 or 207.5 will not subject the reporting party to any penalty.

(e) *Enforcement of provisions in covered agreements.* No provision of this part shall be construed as authorizing the Board to enforce the provisions of any covered agreement.

§ 207.8 Other definitions and rules of construction used in this part.

(a) *Affiliate.* "Affiliate" means—

(1) Any company that controls, is controlled by, or is under common control with another company; and

(2) For the purpose of determining whether an agreement is a covered agreement under § 207.2, an "affiliate" includes any company that would be under common control or merged with another company on consummation of any transaction pending before a Federal banking agency at the time—

(i) The parties enter into the agreement; and

(ii) The person that is a party to the agreement makes a CRA contact, as described in § 207.2(b)(2).

(b) *Control.* "Control" is defined in section 2(a) of the Bank Holding Company Act (12 U.S.C. 1841(a)).

(c) *CRA affiliate.* A "CRA affiliate" of an insured depository institution is any company that is an affiliate of an insured depository institution to the extent, and only to the extent, that the activities of the affiliate were considered by the appropriate Federal banking agency when evaluating the CRA performance of the institution at its most recent CRA examination.

(d) *CRA public file.* For purposes of this part, "CRA public file" means the public file maintained by an insured depository institution and described in § 228.43 of Regulation BB (12 CFR 228.43).

(e) *Federal banking agency; appropriate Federal banking agency.* The terms "Federal banking agency" and "appropriate Federal banking agency" have the same meanings as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(f) *Fiscal year.* (1) The fiscal year for a person that does not have a fiscal year shall be the calendar year;

(2) Any person, insured depository institution, or affiliate that has a fiscal year may elect to have the calendar year be its fiscal year for purposes of this part.

(g) *Insured depository institution.* "Insured depository institution" has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(h) *Nongovernmental entity or person—*(1) *General.* A "nongovernmental entity or person" is any partnership, association, trust, joint venture, joint stock company, corporation, limited liability corporation, company, firm, society, other organization, or individual.

(2) *Exclusions.* A nongovernmental entity or person does not include—

(i) The United States government, a state government, a unit of local government (including a county, city, town, township, parish, village, or other general-purpose subdivision of a state) or an Indian tribe or tribal organization established under Federal, state or Indian tribal law (including the Department of Hawaiian Home Lands), or a department, agency, or instrumentality of any such entity;

(ii) A federally-chartered public corporation that receives federal funds appropriated specifically for that corporation;

(iii) An insured depository institution or affiliate of an insured depository institution; or

(iv) An officer, director, employee, or representative (acting in his or her capacity as an officer, director, employee, or representative) of an entity listed in paragraphs (h)(2)(i) through (iii) of this section.

(i) *Party.* The term "party" with respect to a covered agreement means each person and each insured depository institution or affiliate that entered into the agreement.

(j) *Person.* For purposes of this part, a "person" is any nongovernmental entity or person.

(k) *Term of agreement.* An agreement that does not by its terms establish a termination date is considered to terminate on the last date on which any party to the agreement makes any payment or provides any loan or other resources under the agreement, unless the appropriate Federal banking agency otherwise notifies each party in writing.

By order of the Board of Governors of the Federal Reserve System, May 10, 2000.

Jennifer J. Johnson,
Secretary of the Board

Federal Deposit Insurance Corporation 12 CFR Chapter III

Authority and Issuance

For the reasons set out in the joint preamble, Title 12, Chapter III, of the Code of Federal Regulations is proposed to be amended by adding a new part 346 to read as follows:

PART 346—DISCLOSURE AND REPORTING OF CRA-RELATED AGREEMENTS

Sec.

- 346.1 Purpose and scope of this part.
- 346.2 Definition of covered agreement.
- 346.3 Related agreements considered a single agreement.
- 346.4 Disclosure of covered agreements.
- 346.5 Annual reports.
- 346.6 Release of information under FOIA.
- 346.7 Compliance provisions.

346.8 Other definitions and rules of construction used in this part.

Authority: 12 U.S.C. 1831y.

§ 346.1 Purpose and scope of this part.

(a) *General.* This part implements section 711 of the Gramm-Leach-Bliley Act, Pub. L. 106–102, section 711, 113 Stat. 1465 (1999) (12 U.S.C. 1831y). That section requires any nongovernmental entity or person, insured depository institution, and affiliate of an insured depository institution that enters into a covered agreement to:

(1) Make the covered agreement available to the public and the appropriate federal banking agency; and

(2) File an annual report with the appropriate federal banking agency concerning the covered agreement.

(b) The provisions of this part are enforced by the FDIC with respect to a state nonmember insured bank or a foreign bank having an insured branch.

§ 346.2 Definition of covered agreement.

(a) *General definition.* A covered agreement is any contract, arrangement, or understanding (whether or not legally binding) that meets all of the following criteria:

(1) The agreement is in writing.

(2) The parties to the agreement include:

(i) An insured depository institution or an affiliate of an insured depository institution; and

(ii) A nongovernmental entity or person (referred to hereafter as a person).

(3) The agreement provides for the insured depository institution or any affiliate to:

(i) Provide to one or more individuals or entities (whether or not parties to the agreement) cash payments, grants, or other consideration (except loans) that have an aggregate value of more than \$10,000 in any calendar year; or

(ii) Make to one or more individuals or entities (whether or not parties to the agreement) loans that have an aggregate principal amount of more than \$50,000 in any calendar year.

(4) The agreement is made pursuant to, or in connection with, the fulfillment of the Community Reinvestment Act of 1977 (12 U.S.C. 2901 *et seq.*) (CRA), as defined in paragraph (c) of this section.

(b) *Agreements that are not covered agreements*—(1) *Certain loans.* A covered agreement does not include:

(i) Any individual mortgage loan; or

(ii) Any specific contract or commitment for a loan or extension of credit to individuals, businesses, farms, or other entities if:

(A) The funds are loaned at rates not substantially below market rates; and

(B) The purpose of the loan or extension of credit does not include any re-lending of the borrowed funds to third parties.

(2) *Agreements where there has not been a CRA contact.* (i) *General.* A covered agreement does not include any agreement entered into by an insured depository institution or affiliate of an insured depository institution with a person who has not commented on, testified about, or discussed with the institution, or otherwise contacted the institution, concerning the CRA.

(ii) Examples of CRA contact. The following are examples of CRA contacts. These examples are not exclusive and other actions by a person may also make the exemption in paragraph (b)(2)(i) of this section unavailable. If a person engages in any of the following actions and subsequently enters into an agreement with the insured depository institution or any affiliate of the institution, the agreement is not exempt under paragraph (b)(2)(i) of this section.

(A) *CRA contact with a federal banking agency.* (1) The person submits a written comment to a federal banking agency that discusses the record of performance or future performance under the CRA of an insured depository institution or any CRA affiliate of the institution.

(2) The person provides oral testimony or comments to a federal banking agency concerning the record of performance or future performance under the CRA of an insured depository institution or any CRA affiliate of the institution.

(B) *CRA contact with insured depository institution or affiliate.* (1) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution about providing (or refraining from providing) written or oral comments or testimony to any federal banking agency concerning the record of performance or future performance under the CRA of the institution or any CRA affiliate of the institution.

(2) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution about providing (or refraining from providing) written comments to the institution that must be included in the institution's CRA public file.

(3) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution concerning the CRA rating of the institution, or the CRA record of performance of the institution or any CRA affiliate of the institution.

(4) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution concerning actions that should be taken to improve the CRA performance of the institution or any CRA affiliate of the institution.

(5) The person has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution concerning any obligation or responsibility that the institution or any CRA affiliate of the institution may have to meet the banking needs of its community and the discussion or contact occurs while the institution or any affiliate has an application for a deposit facility pending at a federal banking agency or is undergoing a publicly announced CRA performance examination.

(iii) *Examples of actions that are not CRA contacts.* The following are examples of actions that are not CRA contacts. The actions described in these examples would not, by themselves, cause the exemption in paragraph (b)(2)(i) of this section to be unavailable. These examples are not exclusive.

(A) A person provides comments or testimony concerning an insured depository institution or affiliate to a federal banking agency in response to a direct request by the agency for comments or testimony from that person. Direct requests for comments or testimony do not include a general invitation by a federal banking agency for comments or testimony from the public in connection with a CRA performance evaluation of, or application for a deposit facility by, an insured depository institution or an application by a company to acquire an insured depository institution.

(B) A person makes a statement concerning an insured depository institution or affiliate at a widely attended conference or seminar regarding a general topic. A public or private meeting, public hearing, or other meeting regarding one or more specific institutions or affiliates or transactions involving an application for a deposit facility is not considered a widely attended conference or seminar.

(C) A person sends a similar fundraising letter to insured depository institutions and to other businesses in its community. The letter encourages all businesses in the community to meet their obligation to assist in making the local community a better place to live and work.

(D) A person sends a general offering circular to financial institutions offering to sell a portfolio of loans. An insured depository institution that receives the offering circular discusses with the

person whether the loans are in the institution's local community. No reference to the CRA or the institution's CRA performance is made in the offering circular or in the discussions of the parties.

(c) *Fulfillment of the CRA*—(1) *General*. Fulfillment of the CRA means the list of factors that the federal banking agencies have determined have a material impact on an agency's decision:

(i) To approve or disapprove an application for a deposit facility (as defined in section 803 of the CRA (12 U.S.C. 2902)); or

(ii) To assign a rating to an insured depository institution under section 807 of the CRA (12 U.S.C. 2906).

(2) *List of factors*. The list of factors referred to in paragraph (c)(1) of this section means the performance of any of the following activities by an insured depository institution or CRA affiliate that is a party to the agreement or that is an affiliate of a party to the agreement or by any person that is a party to the agreement:

(i) Providing or refraining from providing written or oral comments or testimony to any federal banking agency concerning the record of performance or future performance under the CRA of an insured depository institution or CRA affiliate that is a party to the agreement or an affiliate of a party to the agreement or written comments that are required to be included in the CRA public file of any such insured depository institution;

(ii) Home-purchase, home-improvement, small business, small farm, community development, and consumer lending, as described in 12 CFR 345.22, including loan purchases, loan commitments, and letters of credit;

(iii) Making investments, deposits, or grants, or acquiring membership shares, that have as their primary purpose community development, as described in 12 CFR 345.23;

(iv) Delivering retail banking services, as described in 12 CFR 345.24(d);

(v) Providing community development services, as described in 12 CFR 345.24(e);

(vi) In the case of a wholesale or limited-purpose insured depository institution, community development lending, including originating and purchasing loans and making loan commitments and letters of credit, making qualified investments, or providing community development services, as described in 12 CFR 345.25(c);

(vii) In the case of a small insured depository institution, any lending or other activity described in 12 CFR 345.26(a); or

(viii) In the case of an insured depository institution that is evaluated on the basis of a strategic plan, any element of the strategic plan, as described in 12 CFR 345.27(f).

(d) *Agreements relating to activities of CRA affiliates*. An insured depository institution or affiliate that is a party to a covered agreement that concerns the performance of any activity of a CRA affiliate described in paragraph (c) of this section must notify each person that is a party to the agreement that the agreement concerns a CRA affiliate. The insured depository institution or affiliate must provide this notice prior to the time the agreement is entered into if the affiliate is a CRA affiliate at that time, or within a reasonable time after the affiliate becomes a CRA affiliate if the affiliate is not a CRA affiliate at the time the agreement is entered into.

(e) *Disclosure and reporting of certain existing agreements that become covered agreements*. An agreement that concerns the performance of any activity described in paragraph (c) of this section by an affiliate may become a covered agreement after it is entered into if the affiliate subsequently becomes a CRA affiliate. In that event, the disclosure and reporting obligations under §§ 346.4 and 346.5 begin on the date that the agreement becomes a covered agreement and do not apply to the period prior to that date.

§ 346.3 Related agreements considered a single agreement.

The following rules must be applied in determining whether a written contract, arrangement, or understanding is a covered agreement under § 346.2.

(a) *Contracts, arrangements, or understandings entered into by same parties*. All written contracts, arrangements, or understandings to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement if the contracts, arrangements, or understandings:

(1) Are entered into with the same person;

(2) Were entered into within the same 12-month period; and

(3) Are each in fulfillment of the CRA.

(b) *Substantively related contracts*. All written contracts to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement, without regard to whether the other parties to the contracts are the same or whether each such contract is in fulfillment of the CRA, if the contracts were negotiated in a coordinated fashion and a person is a party to each contract.

§ 346.4 Disclosure of covered agreements.

(a) *Effective date*. This section applies only to covered agreements entered into after November 12, 1999.

(b) *Disclosure of covered agreements to the public*—(1) *Disclosure required*.

(i) Each person and each insured depository institution or affiliate that enters into a covered agreement must make a complete copy of the covered agreement available to any individual or entity upon request.

(ii) In disclosing a covered agreement to the public under paragraph (b)(1)(i) of this section, a person, insured depository institution, or affiliate may withhold from disclosure only those portions of an agreement that the relevant supervisory agency determines are exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552 *et seq.*).

(2) *Duration of obligation*. The obligation to disclose a covered agreement terminates 12 months after the end of the term of the agreement.

(3) *Reasonable copy and mailing fees*. Each person and each insured depository institution or affiliate may charge an individual or entity that requests a copy of a covered agreement a reasonable fee not to exceed the cost of copying and mailing the agreement.

(4) *Use of CRA public file by insured depository institution*. An insured depository institution may fulfill its obligation under this paragraph (b) by placing a copy of the covered agreement in the insured depository institution's CRA public file and making the agreement available in accordance with the procedures set forth in 12 CFR 345.43.

(c) *Disclosure of covered agreements to the relevant supervisory agency*—(1) *Disclosure by person*. Each person that is a party to a covered agreement must provide a complete copy of the agreement to the relevant supervisory agency within 30 days of receiving a request from the agency for the agreement. This obligation terminates 12 months after the end of the term of the covered agreement.

(2) *Disclosure by insured depository institution or affiliate*. (i) *Filing with the relevant supervisory agency*. Each insured depository institution or affiliate that is a party to a covered agreement must provide a copy of the agreement to each relevant supervisory agency within 30 days after the date the insured depository institution or affiliate enters into the agreement.

(ii) *Joint filings*. In the event that two or more insured depository institutions or affiliates are parties to a covered agreement, the insured depository institution(s) and affiliate(s) may jointly

file a copy of the covered agreement with each relevant supervisory agency. Any joint filing must identify the insured depository institution(s) and affiliate(s) for whom the covered agreement is being filed.

(d) *Relevant supervisory agency.* For purposes of this section and § 346.5, the "relevant supervisory agency" for a covered agreement means the appropriate federal banking agency for:

(1) Each insured depository institution (or subsidiary thereof) that is a party to the covered agreement;

(2) Each insured depository institution (or subsidiary thereof) or CRA affiliate that makes payments or loans or provides services that are subject to the covered agreement; and

(3) Any company (other than an insured depository institution or subsidiary thereof) that is a party to the covered agreement.

§ 346.5 Annual reports.

(a) *Effective date.* This section applies only to covered agreements entered into on or after May 12, 2000.

(b) *Annual report required.* Each person and each insured depository institution or affiliate that is a party to a covered agreement must file an annual report with each relevant supervisory agency concerning the disbursement, receipt, and uses of funds or other resources under the covered agreement.

(c) *Duration of reporting requirement—(1) General.* An annual report under this section must be filed with each relevant supervisory agency for:

(i) The fiscal year in which the parties enter into the covered agreement; and
(ii) Each fiscal year during the term of the covered agreement.

(2) *Exception for person that has not received any funds or resources.* A person is not required to file an annual report for a covered agreement for any fiscal year during the term of the agreement in which the person did not receive any funds or other resources under the agreement.

(d) *Annual reports filed by person—(1) General.* The annual report filed by a person under this section must include the following:

(i) The name and mailing address of the person filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The amount of funds or resources received under the covered agreement during the fiscal year; and

(iv) The information required by paragraphs (d)(2) and (d)(3) of this section concerning the use of funds received under the covered agreement.

(2) *Reporting for funds or resources allocated and used for a specific purpose.* For funds or other resources that the person received during the fiscal year under the covered agreement and allocated and used for a specific purpose during the fiscal year, the annual report must:

(i) Describe each specific purpose for which the funds or resources were used during the fiscal year; and

(ii) State the amount of funds or resources used during the fiscal year for each specific purpose.

(3) *Funds or resources used for other purposes.* For all funds or resources that the person received during the fiscal year under the covered agreement and did not use for a specific purpose, the annual report must:

(i) State the amount received during the fiscal year; and

(ii) Provide a detailed, itemized list of how the funds or resources were used during the fiscal year, including the total amount used for:

(A) Compensation of officers, directors, and employees;

(B) Administrative expenses;

(C) Travel expenses;

(D) Entertainment expenses;

(E) Payment of consulting and professional fees; and

(F) Other expenses or uses.

(4) *Use of other reports.* The annual report filed by a person may consist of, or incorporate, a report prepared for any other purpose, such as an Internal Revenue Service form, a state tax form, a report to members or shareholders, financial statements, or other report, so long as the annual report contains all of the information required by this paragraph (d).

(5) *Consolidated reports permitted.* A person that is a party to five or more covered agreements may file with each relevant supervisory agency a single consolidated annual report covering all the covered agreements. Any consolidated report must contain all the information required by this paragraph (d). The information required to be reported under paragraphs (d)(1)(iii), (d)(2), and (d)(3) of this section may be reported on an aggregate basis for all covered agreements.

(e) *Annual report filed by insured depository institution or affiliate—(1) General.* The annual report filed by an insured depository institution or affiliate must include the following:

(i) The name and principal place of business of the insured depository institution or affiliate filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans provided by the insured depository institution or affiliate under the covered agreement to any other party to the agreement during the fiscal year;

(iv) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans received by the insured depository institution or affiliate under the covered agreement from any other party to the agreement during the fiscal year;

(v) A general description of the terms and conditions of any payments, fees, or loans reported under paragraphs (e)(1)(iii) and (iv) of this section, or, in the event such terms and conditions are set forth:

(A) In the covered agreement, a statement identifying the covered agreement and the date the agreement was filed with the relevant supervisory agency; or

(B) In a previous annual report filed by the insured depository institution or affiliate, a statement identifying the date the report was filed with the relevant supervisory agency; and

(vi) The aggregate amount and number of loans, aggregate amount and number of investments, and aggregate amount of services provided under the covered agreement to any individual or entity not a party to the agreement:

(A) By the insured depository institution or affiliate during its fiscal year; and

(B) By any other party to the agreement, unless such information is not known to the insured depository institution or affiliate filing the report or such information is or will be contained in the annual report filed by a person under paragraph (d) of this section.

(2) *Consolidated reports permitted.* (i) *Party to large number of agreements.* An insured depository institution or affiliate that is a party to five or more covered agreements may file a single consolidated annual report with each relevant supervisory agency covering all the covered agreements.

(ii) *Affiliated entities party to the same agreement.* An insured depository institution and its affiliates that are parties to the same covered agreement may file a single consolidated annual report relating to the agreement with each relevant supervisory agency for the covered agreement.

(iii) *Content of report.* Any consolidated annual report must contain all the information required by this paragraph (e). The amounts and data required to be reported under paragraphs (e)(1)(iii), (iv), and (vi) of this section may be reported on an aggregate basis for all covered agreements.

(f) *Time and place of filing—(1) General.* Each party must file its annual report with each relevant supervisory agency for the covered agreement no later than six months following the end of the fiscal year covered by the report.

(2) *Alternative method of fulfilling annual reporting requirement for a person.* (i) A person may fulfill the filing requirements of this section by providing the following materials to an insured depository institution or affiliate that is a party to the agreement no later than five months following the end of the person's fiscal year:

(A) A copy of the person's annual report required under paragraph (d) of this section for the fiscal year; and

(B) Written instructions that the insured depository institution or affiliate promptly forward the annual report to the relevant supervisory agency or agencies on behalf of the person.

(ii) An insured depository institution or affiliate that receives an annual report from a person pursuant to paragraph (f)(2)(i) of this section must file the report with the relevant supervisory agency or agencies on behalf of the person within 30 days.

§ 346.6 Release of information under FOIA.

The FDIC will make covered agreements and annual reports available to the public in accordance with the Freedom of Information Act (5 U.S.C. 552 *et seq.*) and the FDIC's rules regarding Disclosure of Information (12 CFR part 309). A party to a covered agreement may request confidential treatment of proprietary and confidential information in a covered agreement or an annual report under those procedures.

§ 346.7 Compliance provisions.

(a) *Willful failure to comply with disclosure and reporting obligations.* (1) If the FDIC determines that a person has willfully failed to comply in a material way with §§ 346.4 or 346.5, the FDIC will notify the person in writing of that determination and provide the person a period of 90 days (or such longer period as the FDIC finds to be reasonable under the circumstances) to comply.

(2) If the person does not comply within the time period established by the FDIC, the agreement shall thereafter

be unenforceable by that person by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y).

(3) The FDIC may assist any insured depository institution or affiliate that is a party to a covered agreement that is unenforceable by a person by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y) in identifying a successor to assume the person's responsibilities under the agreement.

(b) *Diversion of funds.* If a court or other body of competent jurisdiction determines that funds or resources received under a covered agreement have been diverted contrary to the purposes of the covered agreement for an individual's personal financial gain, the FDIC may take either or both of the following actions:

(1) Order the individual to disgorge the diverted funds or resources received under the agreement;

(2) Prohibit the individual from being a party to any covered agreement for a period not to exceed 10 years.

(c) *Notice and opportunity to respond.* Before making a determination under paragraph (a)(1) of this section, or taking any action under paragraph (b) of this section, the FDIC will provide written notice and an opportunity to present information to the FDIC concerning any relevant facts or circumstances relating to the matter.

(d) *Inadvertent or de minimis errors.* Inadvertent or de minimis errors in annual reports or other documents filed with the FDIC under §§ 346.4 or 346.5 will not subject the reporting party to any penalty.

(e) *Enforcement of provisions in covered agreements.* No provision of this part shall be construed as authorizing the FDIC to enforce the provisions of any covered agreement.

§ 346.8 Other definitions and rules of construction used in this part.

(a) *Affiliate.* "Affiliate" means:

(1) Any company that controls, is controlled by, or is under common control with another company; and

(2) For the purpose of determining whether an agreement is a covered agreement under § 346.2, an "affiliate" includes any company that would be under common control or merged with another company on consummation of any transaction pending before a federal banking agency at the time:

(i) The parties enter into the agreement; and

(ii) The person that is a party to the agreement makes a CRA contact, as described in § 346.2(b)(2).

(b) *Control.* "Control" is defined in section 2(a) of the Bank Holding Company Act (12 U.S.C. 1841(a)).

(c) *CRA affiliate.* A "CRA affiliate" of an insured depository institution is any company that is an affiliate of an insured depository institution to the extent, and only to the extent, that the activities of the affiliate were considered by the appropriate Federal banking agency when evaluating the CRA performance of the institution at its most recent CRA examination.

(d) *CRA public file.* For purposes of this part, "CRA public file" means the public file maintained by an insured depository institution and described in 12 CFR 345.43.

(e) *Federal banking agency; appropriate federal banking agency.* The terms "federal banking agency" and "appropriate federal banking agency" have the same meanings as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(f) *Fiscal year.* (1) The fiscal year for a person that does not have a fiscal year shall be the calendar year;

(2) Any person, insured depository institution, or affiliate that has a fiscal year may elect to have the calendar year be its fiscal year for purposes of this part.

(g) *Insured depository institution.* "Insured depository institution" has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(h) *Nongovernmental entity or person—(1) General.* A "nongovernmental entity or person" is any partnership, association, trust, joint venture, joint stock company, corporation, limited liability corporation, company, firm, society, other organization, or individual.

(2) *Exclusions.* A nongovernmental entity or person does not include:

(i) The United States government, a state government, a unit of local government (including a county, city, town, township, parish, village, or other general-purpose subdivision of a state) or an Indian tribe or tribal organization established under federal, state or Indian tribal law (including the Department of Hawaiian Home Lands), or a department, agency, or instrumentality of any such entity;

(ii) A federally-chartered public corporation that receives federal funds appropriated specifically for that corporation;

(iii) An insured depository institution or affiliate of an insured depository institution; or

(iv) An officer, director, employee, or representative (acting in his or her capacity as an officer, director,

employee, or representative) of an entity listed in paragraphs (h)(2)(i) through (iii) of this section.

(i) *Party*. The term "party" with respect to a covered agreement means each person and each insured depository institution or affiliate that entered into the agreement.

(j) *Person*. For purposes of this part, a "person" is any nongovernmental entity or person.

(k) *Term of agreement*. An agreement that does not by its terms establish a termination date is considered to terminate on the last date on which any party to the agreement makes any payment or provides any loan or other resources under the agreement, unless the appropriate federal banking agency otherwise notifies each party in writing.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, this 10th day of May, 2000.

Robert E. Feldman,
Executive Secretary.

Department of the Treasury

Office of Thrift Supervision

12 CFR Chapter V

Authority and Issuance

For the reasons set out in the joint preamble, OTS proposes to amend Title 12, Chapter V, of the Code of Federal Regulations by adding a new part 533 to read as follows:

PART 533—DISCLOSURE AND REPORTING OF CRA-RELATED AGREEMENTS

Sec.

533.1 Purpose and scope of this part.

533.2 Definition of covered agreement.

533.3 Related agreements considered a single agreement.

533.4 Disclosure of covered agreements.

533.5 Annual reports.

533.6 Release of information under FOIA.

533.7 Compliance provisions.

533.8 Other definitions and rules of construction used in this part.

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, and 1831y.

§ 533.1 Purpose and scope of this part.

(a) *General*. This part implements section 711 of the Gramm-Leach-Bliley Act (12 U.S.C. 1831y). That section requires any nongovernmental entity or person, insured depository institution, and affiliate of an insured depository institution that enters into a covered agreement to—

(1) Make the covered agreement available to the public and the appropriate Federal banking agency; and

(2) File an annual report with the appropriate Federal banking agency concerning the covered agreement.

(b) The provisions of this part are enforced by OTS with respect to savings associations, savings and loan holding companies, and companies that are controlled by savings associations or savings and loan holding companies.

§ 533.2 Definition of covered agreement.

(a) *General definition*. A covered agreement is any contract, arrangement, or understanding (whether or not legally binding) that meets all of the following criteria—

(1) The agreement is in writing.

(2) The parties to the agreement include—

(i) An insured depository institution or an affiliate of an insured depository institution; and

(ii) A nongovernmental entity or person (referred to as a NGEF).

(3) The agreement provides for the insured depository institution or any affiliate to—

(i) Provide to one or more individuals or entities (whether or not parties to the agreement) cash payments, grants, or other consideration (except loans) that have an aggregate value of more than \$10,000 in any calendar year; or

(ii) Make to one or more individuals or entities (whether or not parties to the agreement) loans that have an aggregate principal amount of more than \$50,000 in any calendar year.

(4) The agreement is made pursuant to, or in connection with, the fulfillment of the Community Reinvestment Act of 1977 (12 U.S.C. 2901 *et seq.*) (CRA), as defined in paragraph (c) of this section.

(b) *Agreements that are not covered agreements*. (1) *Certain loans*. A covered agreement does not include—

(i) Any individual mortgage loan; or

(ii) Any specific contract or commitment for a loan or extension of credit to individuals, businesses, farms, or other entities if—

(A) The funds are loaned at rates not substantially below market rates; and

(B) The purpose of the loan or extension of credit does not include any re-lending of the borrowed funds to third parties.

(2) *Agreements where there has not been a CRA contact*. (i) *General*. A covered agreement does not include any agreement entered into by an insured depository institution or affiliate of an insured depository institution with a NGEF who has not commented on, testified about, or discussed with the institution, or otherwise contacted the institution, concerning the CRA.

(ii) *Examples of CRA contact*. The following are examples of CRA contacts.

These examples are not exclusive and other actions by a NGEF may also make the exemption in paragraph (b)(2)(i) of this section unavailable. If a NGEF engages in any of the following actions and subsequently enters into an agreement with the insured depository institution or any affiliate of the institution, the agreement is not exempt under paragraph (b)(2)(i) of this section.

(A) *CRA contact with a Federal banking agency*. (1) The NGEF submits a written comment to a Federal banking agency that discusses the record of performance or future performance under the CRA of an insured depository institution or any CRA affiliate of the institution.

(2) The NGEF provides oral testimony or comments to a Federal banking agency concerning the record of performance or future performance under the CRA of an insured depository institution or any CRA affiliate of the institution.

(B) *CRA contact with insured depository institution or affiliate*. (1) The NGEF has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution about providing (or refraining from providing) written or oral comments or testimony to any Federal banking agency concerning the record of performance or future performance under the CRA of the institution or any CRA affiliate of the institution.

(2) The NGEF has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution about providing (or refraining from providing) written comments to the institution that must be included in the institution's CRA public file.

(3) The NGEF has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution concerning the CRA rating of the institution, or the CRA record of performance of the institution or any CRA affiliate of the institution.

(4) The NGEF has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution concerning actions that should be taken to improve the CRA performance of the institution or any CRA affiliate of the institution.

(5) The NGEF has a discussion with, or otherwise contacts, an insured depository institution or any affiliate of the institution concerning any obligation or responsibility that the institution or any CRA affiliate of the institution may have to meet the banking needs of its community and the discussion or contact occurs while the

institution or any affiliate has an application for a deposit facility pending at a Federal banking agency or is undergoing a publicly announced CRA performance examination.

(iii) *Examples of actions that are not CRA contacts.* The following are examples of actions that are not CRA contacts. The actions described in these examples would not, by themselves, cause the exemption in paragraph (b)(2)(i) of this section to be unavailable. These examples are not exclusive.

(A) A NGEF provides comments or testimony concerning an insured depository institution or affiliate to a Federal banking agency in response to a direct request by the agency for comments or testimony from that NGEF. Direct requests for comments or testimony do not include a general invitation by a Federal banking agency for comments or testimony from the public in connection with a CRA performance evaluation of, or application for a deposit facility by, an insured depository institution or an application by a company to acquire an insured depository institution.

(B) A NGEF makes a statement concerning an insured depository institution or affiliate at a widely attended conference or seminar regarding a general topic. A public or private meeting, public hearing, or other meeting regarding one or more specific institutions or affiliates or transactions involving an application for a deposit facility is not considered a widely attended conference or seminar.

(C) A NGEF sends a similar fundraising letter to insured depository institutions and to other businesses in its community. The letter encourages all businesses in the community to meet their obligation to assist in making the local community a better place to live and work.

(D) A NGEF sends a general offering circular to financial institutions offering to sell a portfolio of loans. An insured depository institution that receives the offering circular discusses with the NGEF whether the loans are in the institution's local community. No reference to the CRA or the institution's CRA performance is made in the offering circular or in the discussions of the parties.

(c) *Fulfillment of the CRA.* (1) *General.* Fulfillment of the CRA means the list of factors that the Federal banking agencies have determined have a material impact on an agency's decision—

(i) To approve or disapprove an application for a deposit facility (as defined in section 803 of the CRA (12 U.S.C. 2902)); or (ii) To assign a rating

to an insured depository institution under section 807 of the CRA (12 U.S.C. 2906).

(2) *List of factors.* The list of factors referred to in paragraph (c)(1) of this section means the performance of any of the following activities by an insured depository institution or CRA affiliate that is a party to the agreement or that is an affiliate of a party to the agreement or by any NGEF that is a party to the agreement—

(i) Providing or refraining from providing written or oral comments or testimony to any Federal banking agency concerning the record of performance or future performance under the CRA of an insured depository institution or CRA affiliate that is a party to the agreement or an affiliate of a party to the agreement or written comments that are required to be included in the CRA public file of any such insured depository institution;

(ii) Home-purchase, home-improvement, small business, small farm, community development, and consumer lending, as described in § 563e.22 of this chapter, including loan purchases, loan commitments, and letters of credit;

(iii) Making investments, deposits, or grants, or acquiring membership shares, that have as their primary purpose community development, as described in § 563e.23 of this chapter;

(iv) Delivering retail banking services, as described in § 563e.24(d) of this chapter;

(v) Providing community development services, as described in § 563e.24(e) of this chapter;

(vi) In the case of a wholesale or limited-purpose insured depository institution, community development lending, including originating and purchasing loans and making loan commitments and letters of credit, making qualified investments, or providing community development services, as described in § 563e.25(c) of this chapter;

(vii) In the case of a small insured depository institution, any lending or other activity described in § 563e.26(a) of this chapter; or

(viii) In the case of an insured depository institution that is evaluated on the basis of a strategic plan, any element of the strategic plan, as described in § 563e.27(f) of this chapter.

(d) *Agreements relating to activities of CRA affiliates.* An insured depository institution or affiliate that is a party to a covered agreement that concerns the performance of any activity of a CRA affiliate described in paragraph (c) of this section must notify each NGEF that is a party to the agreement that the

agreement concerns a CRA affiliate. The insured depository institution or affiliate must provide this notice prior to the time the agreement is entered into if the affiliate is a CRA affiliate at that time, or within a reasonable time after the affiliate becomes a CRA affiliate if the affiliate is not a CRA affiliate at the time the agreement is entered into.

(e) *Disclosure and reporting of certain existing agreements that become covered agreements.* An agreement that concerns the performance of any activity described in paragraph (c) of this section by an affiliate may become a covered agreement after it is entered into if the affiliate subsequently becomes a CRA affiliate. In that event, the disclosure and reporting obligations under §§ 533.4 and 533.5 begin on the date that the agreement becomes a covered agreement and do not apply to the period prior to that date.

§ 533.3 Related agreements considered a single agreement.

The following rules must be applied in determining whether a written contract, arrangement, or understanding is a covered agreement under § 533.2.

(a) *Contracts, arrangements, or understandings entered into by same parties.* All written contracts, arrangements, or understandings to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement if the contracts, arrangements, or understandings—

(1) Are entered into with the same NGEF;

(2) Were entered into within the same 12-month period; and

(3) Are each in fulfillment of the CRA.

(b) *Substantively related contracts.* All written contracts to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement, without regard to whether the other parties to the contracts are the same or whether each such contract is in fulfillment of the CRA, if the contracts were negotiated in a coordinated fashion and a NGEF is a party to each contract.

§ 533.4 Disclosure of covered agreements.

(a) *Effective date.* This section applies only to covered agreements entered into after November 12, 1999.

(b) *Disclosure of covered agreements to the public.* (1) *Disclosure required.* (i) Each NGEF and each insured depository institution or affiliate that enters into a covered agreement must make a complete copy of the covered agreement available to any individual or entity upon request.

(ii) In disclosing a covered agreement to the public under paragraph (b)(1)(i) of this section, a NGEF, insured depository institution, or affiliate may withhold from disclosure only those portions of an agreement that the relevant supervisory agency determines are exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552 *et seq.*).

(2) *Duration of obligation.* The obligation to disclose a covered agreement terminates 12 months after the end of the term of the agreement.

(3) *Reasonable copy and mailing fees.* Each NGEF and each insured depository institution or affiliate may charge an individual or entity that requests a copy of a covered agreement a reasonable fee not to exceed the cost of copying and mailing the agreement.

(4) *Use of CRA public file by insured depository institution.* An insured depository institution may fulfill its obligation under this paragraph (b) by placing a copy of the covered agreement in the insured depository institution's CRA public file and making the agreement available in accordance with the procedures set forth in § 563e.43 of this chapter.

(c) *Disclosure of covered agreements to the relevant supervisory agency.* (1) Disclosure by NGEF. Each NGEF that is a party to a covered agreement must provide a complete copy of the agreement to the relevant supervisory agency within 30 days of receiving a request from the agency for the agreement. This obligation terminates 12 months after the end of the term of the covered agreement.

(2) *Disclosure by insured depository institution or affiliate.* (i) *Filing with the relevant supervisory agency.* Each insured depository institution or affiliate that is a party to a covered agreement must provide a copy of the agreement to each relevant supervisory agency within 30 days after the date the insured depository institution or affiliate enters into the agreement.

(ii) *Joint filings.* In the event that two or more insured depository institutions or affiliates are parties to a covered agreement, the insured depository institution(s) and affiliate(s) may jointly file a copy of the covered agreement with each relevant supervisory agency. Any joint filing must identify the insured depository institution(s) and affiliate(s) for whom the covered agreement is being filed.

(d) *Relevant supervisory agency.* For purposes of this section and § 533.5, the relevant supervisory agency for a covered agreement means the appropriate Federal banking agency for—

(1) Each insured depository institution (or subsidiary thereof) that is a party to the covered agreement;

(2) Each insured depository institution (or subsidiary thereof) or CRA affiliate that makes payments or loans or provides services that are subject to the covered agreement; and

(3) Any company (other than an insured depository institution or subsidiary thereof) that is a party to the covered agreement.

§ 533.5 Annual reports.

(a) *Effective date.* This section applies only to covered agreements entered into on or after May 12, 2000.

(b) *Annual report required.* Each NGEF and each insured depository institution or affiliate that is a party to a covered agreement must file an annual report with each relevant supervisory agency concerning the disbursement, receipt, and uses of funds or other resources under the covered agreement.

(c) *Duration of reporting requirement.*

(1) *General.* An annual report under this section must be filed with each relevant supervisory agency for—

(i) The fiscal year in which the parties enter into the covered agreement; and

(ii) Each fiscal year during the term of the covered agreement.

(2) *Exception for NGEF that has not received any funds or resources.* A NGEF is not required to file an annual report for a covered agreement for any fiscal year during the term of the agreement in which the NGEF did not receive any funds or other resources under the agreement.

(d) *Annual reports filed by NGEF.* (1) *General.* The annual report filed by a NGEF under this section must include the following—

(i) The name and mailing address of the NGEF filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The amount of funds or resources received under the covered agreement during the fiscal year; and

(iv) The information required by paragraphs (d)(2) and (d)(3) of this section concerning the use of funds received under the covered agreement.

(2) *Reporting for funds or resources allocated and used for a specific purpose.* For funds or other resources that the NGEF received during the fiscal year under the covered agreement and allocated and used for a specific purpose during the fiscal year, the annual report must—

(i) Describe each specific purpose for which the funds or resources were used during the fiscal year; and

(ii) State the amount of funds or resources used during the fiscal year for each specific purpose.

(3) *Reporting for funds or resources used for other purposes.* For all funds or resources that the NGEF received during the fiscal year under the covered agreement and did not use for a specific purpose, the annual report must—

(i) State the amount received during the fiscal year; and

(ii) Provide a detailed, itemized list of how the funds or resources were used during the fiscal year, including the total amount used for—

(A) Compensation of officers,

directors, and employees;

(B) Administrative expenses;

(C) Travel expenses;

(D) Entertainment expenses;

(E) Payment of consulting and professional fees; and

(F) Other expenses or uses.

(4) *Use of other reports.* The annual report filed by a NGEF may consist of, or incorporate, a report prepared for any other purpose, such as an Internal Revenue Service form, a state tax form, a report to members or shareholders, financial statements, or other report, so long as the annual report contains all of the information required by this paragraph (d).

(5) *Consolidated reports permitted.* A NGEF that is a party to five or more covered agreements may file with each relevant supervisory agency a single consolidated annual report covering all the covered agreements. Any consolidated report must contain all the information required by this paragraph (d). The information required to be reported under paragraphs (d)(1)(iii), (d)(2), and (d)(3) of this section may be reported on an aggregate basis for all covered agreements.

(e) *Annual report filed by insured depository institution or affiliate.* (1) *General.* The annual report filed by an insured depository institution or affiliate must include the following—

(i) The name and principal place of business of the insured depository institution or affiliate filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans provided by the insured depository institution or affiliate under the covered agreement to

any other party to the agreement during the fiscal year;

(iv) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans received by the insured depository institution or affiliate under the covered agreement from any other party to the agreement during the fiscal year;

(v) A general description of the terms and conditions of any payments, fees, or loans reported under paragraphs (e)(1)(iii) and (e)(1)(iv) of this section, or, in the event such terms and conditions are set forth—

(A) In the covered agreement, a statement identifying the covered agreement and the date the agreement was filed with the relevant supervisory agency; or

(B) In a previous annual report filed by the insured depository institution or affiliate, a statement identifying the date the report was filed with the relevant supervisory agency; and

(vi) The aggregate amount and number of loans, aggregate amount and number of investments, and aggregate amount of services provided under the covered agreement to any individual or entity not a party to the agreement—

(A) By the insured depository institution or affiliate during its fiscal year; and

(B) By any other party to the agreement, unless such information is not known to the insured depository institution or affiliate filing the report or such information is or will be contained in the annual report filed by a NGEF under paragraph (d) of this section.

(2) *Consolidated reports permitted.* (i) *Party to large number of agreements.* An insured depository institution or affiliate that is a party to five or more covered agreements may file a single consolidated annual report with each relevant supervisory agency covering all the covered agreements.

(ii) *Affiliated entities party to the same agreement.* An insured depository institution and its affiliates that are parties to the same covered agreement may file a single consolidated annual report relating to the agreement with each relevant supervisory agency for the covered agreement.

(iii) *Content of report.* Any consolidated annual report must contain all the information required by this paragraph (e). The amounts and data required to be reported under paragraphs (e)(1)(iii), (e)(1)(iv), and (e)(1)(vi) of this section may be reported on an aggregate basis for all covered agreements.

(f) *Time and place of filing.* (1) General. Each party must file its annual report with each relevant supervisory

agency for the covered agreement no later than six months following the end of the fiscal year covered by the report.

(2) *Alternative method of fulfilling annual reporting requirement for a NGEF.* (i) A NGEF may fulfill the filing requirements of this section by providing the following materials to an insured depository institution or affiliate that is a party to the agreement no later than five months following the end of the NGEF's fiscal year—

(A) A copy of the NGEF's annual report required under paragraph (d) of this section for the fiscal year; and

(B) Written instructions that the insured depository institution or affiliate promptly forward the annual report to the relevant supervisory agency or agencies on behalf of the NGEF.

(ii) An insured depository institution or affiliate that receives an annual report from a NGEF pursuant to paragraph (f)(2)(i) of this section must file the report with the relevant supervisory agency or agencies on behalf of the NGEF within 30 days.

§ 533.6 Release of information under FOIA.

OTS will make covered agreements and annual reports available to the public in accordance with the Freedom of Information Act (5 U.S.C. 552 *et seq.*), OTS's rules (part 505 of this chapter), and the Department of Treasury's rules (31 CFR part 1). A party to a covered agreement may request confidential treatment of proprietary and confidential information in a covered agreement or an annual report under those procedures.

§ 533.7 Compliance provisions.

(a) *Willful failure to comply with disclosure and reporting obligations.* (1) If OTS determines that a NGEF has willfully failed to comply in a material way with §§ 533.4 or 533.5, OTS will notify the NGEF in writing of that determination and provide the NGEF a period of 90 days (or such longer period as OTS finds to be reasonable under the circumstances) to comply.

(2) If the NGEF does not comply within the time period established by OTS, the agreement shall thereafter be unenforceable by that NGEF by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y).

(3) OTS may assist any insured depository institution or affiliate that is a party to a covered agreement that is unenforceable by a NGEF by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y) in identifying a successor to assume the

NGEF's responsibilities under the agreement.

(b) *Diversion of funds.* If a court or other body of competent jurisdiction determines that funds or resources received under a covered agreement have been diverted contrary to the purposes of the covered agreement for an individual's personal financial gain, OTS may take either or both of the following actions—

(1) Order the individual to disgorge the diverted funds or resources received under the agreement;

(2) Prohibit the individual from being a party to any covered agreement for a period not to exceed 10 years.

(c) *Notice and opportunity to respond.* Before making a determination under paragraph (a)(1) of this section, or taking any action under paragraph (b) of this section, OTS will provide written notice and an opportunity to present information to OTS concerning any relevant facts or circumstances relating to the matter.

(d) *Inadvertent or de minimis errors.* Inadvertent or *de minimis* errors in annual reports or other documents filed with OTS under §§ 533.4 or 533.5 will not subject the reporting party to any penalty.

(e) *Enforcement of provisions in covered agreements.* No provision of this part shall be construed as authorizing OTS to enforce the provisions of any covered agreement.

§ 533.8 Other definitions and rules of construction used in this part.

(a) *Affiliate.* *Affiliate* means—

(1) Any company that controls, is controlled by, or is under common control with another company; and

(2) For the purpose of determining whether an agreement is a covered agreement under § 533.2, an *affiliate* includes any company that would be under common control or merged with another company on consummation of any transaction pending before a Federal banking agency at the time—

(i) The parties enter into the agreement; and

(ii) The NGEF that is a party to the agreement makes a CRA contact, as described in § 533.2(b)(2).

(b) *Control.* *Control* is defined in section 2(a) of the Bank Holding Company Act (12 U.S.C. 1841(a)).

(c) *CRA affiliate.* A *CRA affiliate* of an insured depository institution is any company that is an affiliate of an insured depository institution to the extent, and only to the extent, that the activities of the affiliate were considered by the appropriate Federal banking agency when evaluating the CRA performance of the institution at its most recent CRA examination.

(d) *CRA public file*. For purposes of this part, *CRA public file* means the public file maintained by an insured depository institution and described in § 563e.43 of this chapter.

(e) *Federal banking agency; appropriate Federal banking agency*. The terms *Federal banking agency* and *appropriate Federal banking agency* have the same meanings as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(f) *Fiscal year*. (1) The fiscal year for a NGEF that does not have a fiscal year shall be the calendar year;

(2) Any NGEF, insured depository institution, or affiliate that has a fiscal year may elect to have the calendar year be its fiscal year for purposes of this part.

(g) *Insured depository institution*. *Insured depository institution* has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(h) *Nongovernmental entity or person*. (1) *General*. A *nongovernmental entity or person* or *NGEF* is any partnership,

association, trust, joint venture, joint stock company, corporation, limited liability corporation, company, firm, society, other organization, or individual.

(2) *Exclusions*. A nongovernmental entity or person does not include—

(i) The United States government, a state government, a unit of local government (including a county, city, town, township, parish, village, or other general-purpose subdivision of a state) or an Indian tribe or tribal organization established under Federal, state or Indian tribal law (including the Department of Hawaiian Home Lands), or a department, agency, or instrumentality of any such entity;

(ii) A federally-chartered public corporation that receives federal funds appropriated specifically for that corporation;

(iii) An insured depository institution or affiliate of an insured depository institution; or

(iv) An officer, director, employee, or representative (acting in his or her capacity as an officer, director,

employee, or representative) of an entity listed in paragraphs (h)(2)(i), (h)(2)(ii), or (h)(2)(iii) of this section.

(i) *Party*. The term *party* with respect to a covered agreement means each NGEF and each insured depository institution or affiliate that entered into the agreement.

(j) *Term of agreement*. An agreement that does not by its terms establish a termination date is considered to terminate on the last date on which any party to the agreement makes any payment or provides any loan or other resources under the agreement, unless the appropriate Federal banking agency otherwise notifies each party in writing.

Dated: May 10, 2000.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

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