

## PART 509—RULES OF PRACTICE AND PROCEDURE IN ADJUDICATORY PROCEEDINGS

■ 1. The authority citation for part 509 continues to read as follows:

**Authority:** 5 U.S.C. 504, 554–557; 12 U.S.C. 1464, 1467, 1467a, 1468, 1817(j), 1818, 3349, 4717; 15 U.S.C. 78(l), 78o–5, 78u–2; 28 U.S.C. 2461 note; 31 U.S.C. 5321; 42 U.S.C. 4012a.

■ 2. Revise § 509.100(a) of subpart B to read as follows:

### Subpart B—Local Rules

#### § 509.100 Scope.

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(a) Proceedings under section 10(a)(2)(D) of the HOLA (12 U.S.C. 1467a(a)(2)(D)) to determine whether any person directly or indirectly exercises a controlling influence over the management or policies of a savings association or any other company, except to the extent the Director exercises his or her discretion to commence a proceeding of the kind identified in subpart C of this part;

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■ 3. Amend part 509 by adding a new Subpart C to read as follows:

### Subpart C—Special Rules

Sec.

509.200 Scope.

509.201 Definitions.

509.202 Commencement of proceedings and contents of notice.

509.203 Answer, consequences of failure to answer, and consent.

509.204 Hearing Procedure.

#### § 509.200 Scope.

The rules and procedures in subpart C of this part and those rules and procedures in subparts A and B of this part that are identified in subpart C of this part shall apply to any proceedings under section 10(a)(2)(D) of the HOLA (12 U.S.C. 1467a(a)(2)(D)) to determine for purposes of section 10 of the HOLA, other than subsections (c), (d), (f), (h)(2), (m), (n), (q) and (s), whether any company that owns at least one percent but no more than 10 percent of the outstanding shares of a savings association or savings and loan holding company directly or indirectly exercises a controlling influence over the management or policies of such savings association or savings and loan holding company.

#### § 509.201 Definitions.

The definitions contained in § 509.3 of this part shall apply to this subpart.

#### § 509.202 Commencement of proceedings and contents of notice.

(a) *Commencement of proceedings.* The Director commences a proceeding by issuing a notice and having it served on the respondent in the manner provided for service by the Director in § 509.11 of this part;

(b) *Contents of notice.* The notice must set forth: (1) The legal authority for the proceeding and for the Office's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing the Office is entitled to issue an Order finding, for purposes of section 10 of the HOLA, other than subsections (c), (d), (f), (h)(2), (m), (n), (q) and (s), the respondent to be directly or indirectly exercising a controlling influence over the management or policies of a savings association or savings and loan holding company;

(3) A proposed Order;

(4) A statement that the respondent must file an answer and, if it so desires, request a hearing within 20 days of service of the notice; and

(5) The time and place of the hearing if one is properly requested by the respondent.

#### § 509.203 Answer, consequences of failure to answer, and consent.

(a) *Content of answer.* (1) An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes a prayer for relief or proposed Order.

(2) If a respondent does not contest the allegations in a notice, the respondent may file an answer that contains only a statement that the respondent consents to the entry of the proposed Order. At any time thereafter, the proposed Order may be issued as a final Order.

(b) *Default.* Failure of a respondent to file an answer within the time provided constitutes a waiver of its right to appear and contest the allegations in the notice. If a timely answer is not filed, a default Order may be entered. A respondent that believes that there was

good cause for it to not file an answer within the time allowed may request that the Office exercise its discretion to vacate such a default Order. A default Order based upon a respondent's failure to answer is deemed to be a final Order issued upon consent.

#### § 509.204 Hearing Procedure.

(a) (1) The Director shall preside at the hearing and enter the final decision of the agency, provided that no party seeks discovery or proffers any oral testimony;

(2) Respondents shall provide two copies of any pleadings and other filings to the Office of the Chief Counsel, Business Transactions Division. The Office of the Chief Counsel, Business Transactions Division shall serve in the manner provided in § 509.11 of this part, each respondent separately represented with a copy of any pleading or other filing made by the Office.

(b) If any party seeks discovery or proffers any oral testimony, the procedures in subparts A and B of this part shall apply from that time until the conclusion of the proceeding.

Dated: February 24, 2005.

By the Office of Thrift Supervision.

**James E. Gilleran,**

*Director.*

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## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

#### 12 CFR Part 563e

[No. 2005–09]

RIN 1550–AB48

#### Community Reinvestment Act—Assigned Ratings

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

**ACTION:** Final rule.

**SUMMARY:** In this final rule, OTS is making changes to its Community Reinvestment Act (CRA) regulations to reduce burden, provide greater flexibility to meet community needs, and restore the focus of CRA to lending. Specifically, OTS is providing additional flexibility to each savings association evaluated under the large retail institution test to determine the combination of lending, investment, and service it will use to meet the credit needs of the local communities in which it is chartered, consistent with safe and sound operations.

**DATES:** This rule is effective on April 1, 2005.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

On November 24, 2004, OTS published a notice of proposed rulemaking (NPR) proposing changes to, and soliciting comment on, its CRA regulations in two areas: (1) the definition of “community development” and (2) the assignment of ratings. (69 FR 68257) OTS indicated that it was considering addressing these areas to reduce burden to the extent consistent with the safe and sound supervision of the industry and provide institutions with more flexibility to make their own determinations about how best to serve their communities.

The proposal was designed to further the CRA burden reduction OTS began in its final rule published in the **Federal Register** on August 18, 2004 (69 FR 51155), which revised the definition of “small savings association” (2004 Final Rule). It was also crafted to increase the burden reductions in the interim final rule published in the **Federal Register** on November 24, 2004 (69 FR 68239) as part of OTS’s review of regulations under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA) (EGRPRA Interim Final Rule).

In this final rule, OTS is adopting changes to the way it assigns CRA ratings. OTS is deferring action, however, on revising the definition of “community development.” OTS notes that the Federal Deposit Insurance Corporation (FDIC) has also issued a proposal to expand the definition of “community development.” 69 FR 51611 (August 20, 2004). OTS is deferring action on this portion of its proposal to allow for further opportunities for consideration of, and coordination on, these and other proposals. Accordingly, the remainder of this Supplementary Information section is limited to addressing the assignment of ratings.

**II. The Way CRA Works**

**A. The CRA Statute**

CRA is a statute addressed to the credit needs of communities. The statute clearly states that the purpose of CRA is “to require each appropriate Federal financial supervisory agency to

use its authority when examining financial institutions to encourage such institutions to help meet *the credit needs* of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.” 12 U.S.C. 2901(b) (emphasis added). Congress further provided that the written evaluations of CRA performance are to evaluate “the institution’s record of meeting *the credit needs* of its entire community, including low and moderate-income neighborhoods.” 12 U.S.C. 2906(a)(1) (emphasis added).

The legislation’s chief sponsor, Senator William Proxmire, indicated the lending focus to CRA when he explained the purpose of the provision authorizing the federal banking agencies to evaluate how well institutions meet *the credit needs* of the areas which they are primarily chartered to serve. He stated, “The provision is intended to eliminate the practice of *redlining* by lending institutions.” 123 Cong. Rec. S8932 (daily ed. June 6, 1977) (emphasis added).

**B. The Original CRA Rule**

The four federal banking agencies (the Agencies) implemented the CRA through joint final regulations published in 1978. 43 FR 47144 (October 12, 1978) (1978 rule). These regulations specified twelve factors that the Agencies would consider in assessing an institution’s record of performance in helping to meet the credit needs of its community.

Several of the twelve factors focused on the institution’s lending. However, some factors focused on the institution’s services and investments. For example, one service-focused factor was “the institution’s record of opening and closing offices and providing services at offices.” 43 FR 47154 (promulgating 12 CFR 563e.7(g)). One investment-focused factor was “the institution’s participation, including investments, in local community development and redevelopment projects or programs.” 43 FR 47154 (promulgating 12 CFR 563e.7(h)).

While the factors covered lending, investment, and service among other aspects of the institution’s performance, the factors did not mandate any particular level of performance on any particular factor or factors. Indeed, as indicated in the preamble to the 1978 rule, the Agencies considered, but specifically rejected, giving specific weights or imposing a scoring system on the factors. The preamble explained, “[T]he Agencies believe that specific weights or scoring systems would not adequately address the diversity of institutions and communities [and]

would prevent rather than encourage thoughtful response to community needs.” 43 FR 47145.

**C. Experience With the 1978 Rule**

The experience with the 1978 rule was summarized in the preamble to the Agencies’ 1995 CRA rule. 60 FR 22156 (May 4, 1995) (1995 rule). It stated:

The CRA has come to play an increasingly important role in improving access to credit in communities—both rural and urban—across the country. Under the impetus of the CRA, many banks and thrifts opened new branches, provided expanded services, and made substantial commitments to increase lending to all segments of society.

Despite these successes, the CRA examination system has been criticized. Financial institutions have indicated that policy guidance from the agencies on the CRA is unclear and that examination standards are applied inconsistently. Financial institutions have also stated that the CRA examination process encourages them to generate excessive paperwork at the expense of providing loans, services, and investments to their communities.

Community, consumer, and other groups have agreed with the industry that there are inconsistencies in CRA evaluations and that current examinations overemphasize process and underemphasize performance. Community and consumer groups also have criticized the agencies for failing aggressively to penalize banks and thrifts for poor performance.

Noting that the CRA examination process could be improved, President Clinton requested in July 1993 that the Federal financial supervisory agencies reform the CRA regulatory system. The President asked the agencies to consult with the banking and thrift industries, Congressional leaders, and leaders of community-based organizations across the country to develop new CRA regulations and examination procedures that “replace paperwork and uncertainty with greater performance, clarity, and objectivity.”

Specifically, the President asked the agencies to refocus the CRA examination system on more objective, performance-based assessment standards that minimize compliance burden while stimulating improved performance. He also asked the agencies to develop a well-trained corps of examiners who would specialize in CRA examinations. The President requested that the agencies promote consistency and evenhandedness, improve CRA performance evaluations, and institute more effective sanctions against institutions with consistently poor performance.

60 FR 22156-57.

**D. The 1995 Rule and Subsequent Guidance**

The experience with the 1978 rule led the Agencies to replace it in 1995 with a rule designed to emphasize performance rather than process, promote consistency in evaluations, and eliminate unnecessary burden. 60 FR 22156. Among other things, it

established a large retail institution test comprised of three tests: one for lending, one for investment, and one for service.

OTS has previously summarized how the performance of large retail institutions has been assessed under the lending, investment, and service tests under the 1995 rule. *See, e.g.*, 69 FR 68258; 66 FR 37602 (July 19, 2001) (2001 Joint ANPR); 69 FR 5729 (February 6, 2004) (2004 Joint NPR). In sum, under OTS's CRA rule at 12 CFR 563e.28(b), OTS assigns ratings to savings associations assessed under the large retail institution test in accordance with the following three rating principles:

(1) A savings association that receives an "outstanding rating on the lending test receives an assigned rating of at least "satisfactory";

(2) A savings association that receives an "outstanding" rating on both the service test and the investment test and a rating of at least "high satisfactory" on the lending test receives an assigned rating of "outstanding"; and

(3) No savings association may receive an assigned rating of "satisfactory" or higher unless it receives a rating of at least "low satisfactory" on the lending test.

Interagency Questions and Answers Regarding Community Reinvestment, 66 FR 36620 (July 12, 2001), developed jointly by the Agencies, address how the Agencies weigh performance under the

lending, investment, and service tests for large retail institutions to come up with one overall Composite Rating. Q&A 28(a)-3, 66 FR 36639, provides:

A rating of "outstanding," "high satisfactory," "low satisfactory," "needs to improve," or "substantial noncompliance," based on a judgment supported by facts and data, will be assigned under each performance test. Points will then be assigned to each rating as described in the first matrix set forth below. A large retail institution's overall rating under the lending, investment and service tests will then be calculated in accordance with the second matrix set forth below, which incorporates the rating principles in the regulation.

The Q&A then sets forth the following Component Test Rating chart (66 FR 36639):

POINTS ASSIGNED FOR PERFORMANCE UNDER LENDING, INVESTMENT AND SERVICE TESTS

	Lending	Service	Investment
Outstanding .....	12	6	6
High Satisfactory .....	9	4	4
Low Satisfactory .....	6	3	3
Needs to Improve .....	3	1	1
Substantial Noncompliance .....	0	0	0

This chart is followed by the following Composite Rating matrix (66 FR 36639-40):

COMPOSITE RATING POINT REQUIREMENTS  
[Add points from three tests]

Rating	Total points
Outstanding .....	20 or over.
Satisfactory .....	11 through 19.
Needs to Improve .....	5 through 10.
Substantial Noncompliance ..	0 through 4.

**Note:** There is one exception to the Composite Rating matrix. An institution may not receive a rating of "satisfactory" unless it receives at least "low satisfactory" on the lending test. Therefore, the total points are capped at three times the lending test score.

As reflected in the Component Test Rating chart, lending receives approximately 50 percent weight, service receives approximately 25 percent weight, and investment receives approximately 25 percent weight. OTS applies the tests in a performance context that considers several factors specified in § 563e.21(b) of OTS's CRA rule.

As discussed in the preamble to the 2004 NPR, 69 FR 68260-61, the CRA regulation has been implemented to give some consideration to the unique statutory and regulatory structure of savings associations. This structure includes the qualified thrift lender test. 12 U.S.C. 1467a(m). It also includes

lending and investment limits, such as on commercial loans and community development investments. 12 U.S.C. 1464(c)(2)(A), (c)(3)(A), and 1831e; 12 CFR 560.30 and 560.36. Because of these differences between savings associations and other financial institutions, the preamble to the 1995 CRA rule indicated that a savings association could receive at least a "low satisfactory" rating on the investment test without making qualified investments, depending upon its lending performance. 60 FR 22156, 22163 (May 4, 1995). Similarly, the 2001 interagency CRA Qs&As indicate that a savings association that has made few or no qualified investments due to its limited investment authority may still receive a low satisfactory rating under the investment test if it has a strong lending record. Q&A 21(b)(4), 66 FR 36631. In 2002, OTS issued examiner guidance further clarifying this policy.

III. OTS's Proposal and Solicitation of Comments

While the CRA rule, as interpreted, provides some flexibility, OTS solicited comment in the 2004 NPR on providing additional flexibility in the way it assigns CRA ratings. OTS explained that the purpose would be to reduce burden while encouraging large retail savings associations to focus their community reinvestment efforts on the types of activities the communities they serve

need, consistent with safe and sound operations. Rather than mandating changes to the weights assigned to lending, investment, and service under the large retail institution test from the fixed 50 percent lending, 25 percent service, 25 percent investment formula currently applied, OTS solicited comment on providing flexibility in those weights. 69 FR 68261-63.

OTS explained that this approach would serve to clarify and build upon existing guidance. But for greater burden reduction, OTS also solicited comment on providing each savings association evaluated under the large retail institution test a choice, at its option, on the weight given to lending, investment, and service in assessing its performance. Consistent with the traditional and appropriate emphasis on lending, OTS would not allow less than a 50 percent weight to lending. The remaining 50 percent, however, would weigh lending, investment, or service, or some combination thereof, based on the savings association's election. As a result, each savings association could choose to have OTS weigh lending anywhere from 50 to 100 percent for that association's overall performance assessment, service anywhere from 0 to 50 percent, and investment anywhere from 0 to 50 percent. 69 FR 68262.

OTS explained that under this approach, as under the existing Component Test Rating chart, OTS

would continue to allocate a total of 24 possible points among the three tests. OTS would allocate 12 of these possible points to lending. OTS would allocate the remaining 12 possible points to lending, service, investment, or some combination thereof based on the savings association's weight election. For each test, the savings association would receive a percentage of the possible points it chose to have OTS allocate to that test, with the percentage varying depending on the rating it would receive on that test. 69 FR 68262-63. For any component rating of "outstanding," the association would receive 100 percent of the possible points allocated to that test, 75 percent for a "high satisfactory," 50 percent for a "low satisfactory," 25 percent for a "needs to improve," and 0 percent (*i.e.*, no points) for a "significant noncompliance." These percentages correspond to the current point allocation on the lending test of 12 points for "outstanding," nine points for "high satisfactory," six points for "low satisfactory," three points for "needs to improve," and no points for "substantial noncompliance."

The preamble set out the method for creating a Component Test Rating chart for any possible weight combinations a savings association might select. It also set out an alternative Composite Rating matrix that would apply to any alternative weight combination selected. As with the current Composite Rating matrix, which would remain applicable to standard weights, the alternative Composite Rating matrix contained a note indicating that an institution may not receive a rating of "satisfactory" unless it receives at least "low satisfactory" rating on the lending test and, therefore, the total points are capped at three times the lending test score. 69 FR 68262-63.

OTS explained that continuing to include this note to the Composite Rating matrix, which is the same note as is contained in the Composite Rating matrix used since 1995, would have certain implications. For example, a savings association opting to allocate equal weight to lending as to the combination of services and investments could not receive a rating of "satisfactory" overall if it received a "needs to improve" or "substantial noncompliance" rating on its lending. 69 FR 68263.

The preamble also provided several examples of possible weights for illustrative purposes, including the applicable Component Test Rating chart for each of those examples.

The preamble indicated that if OTS were to offer this type of flexibility, a

savings association evaluated under the large retail institution test could elect weights, much in the same way as it elects consideration of other components of the CRA examination that are left to the institution's option. These include whether OTS will consider as part of its examination lending by an affiliate or consortium, or investments or services by an affiliate. *See* 12 CFR 563e.22(c)-(d), 563e.23(c), and 563e.24(c). The Preliminary Examination Response Kit (PERK) currently contains optional questions permitting the savings association to elect to have information on such activities considered by providing relevant data and information pertaining to those activities. *See* PERK 008L (12/2004), "Community Reinvestment Act Information—Large Institutions." Likewise, the PERK could be revised to provide an opportunity for a savings association to answer an optional question in which the association could specify alternative weights for lending, service, and investment. Through this process, a savings association could make a new weight election at the start of each CRA examination. A savings association that did not make an election through the PERK would be evaluated under the existing matrix contained in Q&A 28(a)-3. 69 FR 68263-64.

OTS also explained that conforming changes could be made to OTS's CRA rule. In particular, additional text could be added to § 563e.28 indicating that a savings association could, at its option, elect to have its rating assigned under alternative weights of lending, service, and investment (so long as at least 50 percent weight is given to lending). To the extent of any inconsistency between the three rating principles in § 563e.28(b) and the Composite Rating generated from the savings association's election of alternative weights, the standards set forth under the applicable matrix would govern. Thus, for example, the principle referring to ratings on the service test and investment test would not apply to a savings association that chose not to have OTS give weight to either or both of those factors. 69 FR 68264.

OTS explained that providing flexibility for a savings association to elect alternative weights would supplement the use of the performance context factors and serve many of the same functions. OTS already evaluates a savings association's performance in the context of factors such as the savings association's product offerings and business strategy, its institutional capacity and constraints, information about lending, investment, and service

opportunities in the savings association's assessment area(s), and demographic and other relevant data pertaining to a savings association's assessment area. *See* 12 CFR 563e.21(b). Likewise, providing weight alternatives would enable the savings association to have its performance evaluated in a manner most appropriately tailored to the lending, investment, and service opportunities in its assessment area(s), demographic and other relevant data pertaining to its assessment area(s), its product offerings and business strategy, and its institutional capacity and constraints. This approach would be designed to encourage large retail savings associations to focus their community reinvestment efforts on the types of activities the communities they serve need, consistent with safe and sound operations.

#### IV. The Comments

##### A. Overview

OTS received approximately 4,200 comments. The vast majority (about 4,000) came from consumer and community organizations and representatives (Consumer Comments). These included community development advocates, Community Development Corporations, Community Development Financial Institutions, housing authorities, consumer protection and civil rights organizations, faith-based organizations, and educators, as well as a large number of individuals whose personal or professional interest in CRA was not indicated. Most of these comments were form letters; some organizations submitted multiple letters. These comments opposed the proposal, though a significant number did not address the portion of the proposal on assigned ratings. OTS also received several comments from members of Congress as well as state and local officials, also opposed to the proposal, including the portion on assigned ratings.

In contrast, OTS received a couple of hundred comments from financial institutions and industry trade associations (Financial Institution Comments). Almost all of these supported the proposal, including the portion on assigned ratings. Many of these also were form letters; some institutions submitted multiple letters. Given that of the nearly 900 savings associations OTS regulates, only about 100 are large and would be directly affected by the proposed changes to the assignment of ratings, OTS considers the level of support significant.

A summary of comments received on the portion of the proposal addressing

the assignment of ratings follows. Comments on the portion of the proposal addressing the definition of "community development" are not summarized in this **SUPPLEMENTARY INFORMATION** section since, as explained in Part I of this **SUPPLEMENTARY INFORMATION** section, OTS is deferring action on that aspect of the proposal.

#### *B. Commenters Opposing Proposal*

The Consumer Comments, in opposing the proposal, stated that CRA examinations have been very useful in encouraging investment in housing and services for low-income people. Generally, they predicted that if the proposal were finalized, it would result in a decrease in services and investments by large thrifts. Some of the main arguments presented were:

- OTS should not allow large thrifts to "design their own watered-down CRA exams." If OTS were to permit this, it would fail in its responsibility to enforce CRA.
- Thrifts would opt to receive a CRA rating based 100 percent on lending performance, leading to a decrease in services and investments by savings associations. For example, allowing thrifts to eliminate the investment test would mean that they would not have to finance affordable rental housing through Low Income Housing Tax Credits or small businesses through equity investments. Allowing thrifts to eliminate the service test would mean that they would not have to place or maintain branches in low- and moderate-income communities and could ignore the need for remittances and other low-cost banking services.
- CRA has been effective because the Agencies have issued regulations in a careful and uniform manner. OTS acted alone in making the streamlined examination for small institutions available to institutions between \$250 million and \$1 billion in assets without regard to holding company size. They asserted that OTS was again acting unilaterally and without the benefit of interagency debate, this time to weaken the examination requirements for institutions over \$1 billion in assets.

The Consumer Comments elaborated in various ways on these arguments:

- Some emphasized the harmful national impact they expect the proposal would have if finalized. One commenter estimated that the large thrifts impacted by the proposal control 87 percent of thrift assets and that thrifts with assets over \$1 billion hold CRA investments of \$1.3 billion. It projected that the assigned ratings proposal would reduce the level of CRA investments by more than 50 percent. It indicated that

if other regulators followed suit, the impact would be even more dramatic.

- Some argued that large institutions have substantial room for improvement on their CRA performance and criticized OTS's oversight of large institutions. One reported performing a sampling of thrifts from which it concluded that a sizeable minority of thrifts does not engage in community development lending at all. It speculated that, but for the investment test, these thrifts would offer no community development financing. Another provided data from which it concluded that large institutions proportionally offer fewer full service offices in low-or moderate-income (LMI) communities than smaller institutions in certain service areas. Some expressed concern that because the current rules give equal consideration to purchased loans and directly originated loans under the lending test, an institution that would elect to base its rating 100 percent on lending could receive an "outstanding" or "satisfactory" rating without any direct presence in LMI markets, further noting that the same loans can be bought several times by numerous institutions to boost their perceived CRA performance.

- Some asserted that the change was unnecessary, since OTS has already established a mechanism to account for the home loan focus of thrifts through their ability to concentrate on community development lending. One further concluded that the Home Owners' Loan Act's investment limits do not disadvantage thrifts under the investment component because even thrifts that receive "outstanding" ratings on investments have investment levels below the investment limits.

- Some recommended alternative ways OTS could change CRA performance evaluations. One suggested that OTS could revise the current structure of the investment test to award more points for difficult investments that require patient capital or earn below market rates of interest. It also argued that the service test should be made more rigorous by requiring data disclosures on the number and percentage of checking and savings accounts for LMI borrowers and communities and use it as a straightforward measure of responsiveness to deposit needs.

Many Consumer Comments also addressed an issue covered in the EGRPRA interim final rule. They asserted that it would reduce vital opportunities for community groups and thrifts to meet with OTS to discuss CRA and anti-predatory lending matters when thrifts are merging because it

would allow OTS the discretion to hold only one meeting, instead of two. Since this issue pertains to a separate rulemaking, it is not further discussed in this Supplementary Information section.

Comments from elected officials included one from 28 members of the House of Representatives (including 13 members of the Committee on Financial Services), who filed a joint letter urging OTS to withdraw the proposal. They called upon OTS to continue to fully evaluate all large retail institutions on their lending, service, and investment performance. They expressed concern that permitting institutions to choose whether to provide services to, or make investments in, the communities in which they are located will encourage them to concentrate on whatever is "easiest" to do, regardless of the communities' needs. They recommended that OTS instead expand the range of appropriate activities that qualify for CRA credit, such as remittances under the service test, and complex housing investments under the investment test. Several Representatives and a Senator wrote separately to voice their opposition to the proposal, raising similar concerns.

Several state and local government officials also wrote to oppose the proposal, citing similar reasons. These included a joint comment letter from 45 mayors and another from 50 members of the New York State legislature.

A few financial institutions and one industry trade association also opposed the proposal (or various aspects of it), explaining that the current rule strikes the appropriate balance between regulatory burden and compliance under the CRA. They expressed particular concern about the lack of uniformity among regulators. One industry trade group supported the "spirit" of the proposal and the goal of increasing flexibility, but opposed the proposal based on this lack of uniformity. It asserted that the lack of uniformity would increase regulatory costs and burdens, particularly at institutions that have multiple charters, necessitate revisions to the interagency CRA Qs&As, introduce artificial distinctions between the activities conducted by institutions with different charters, and hinder the ability to compare CRA performance among institutions.

One large holding company with both thrift and bank subsidiaries argued that providing a choice of weights would decrease an institution's ability to internally monitor its performance and would make comparisons among institutions more difficult through the

lack of uniformity. A couple of other financial institutions that are not chartered by OTS and not subject to its version of the CRA rule also opposed the proposal.

### C. Commenters Supporting Proposal

Most financial institutions and industry trade groups commenting, on the other hand, strongly supported the proposal and praised OTS's efforts to innovate. They explained that the proposal would inject flexibility into the CRA process, allow thrifts to better serve their communities by allowing them to focus resources where they are most needed, and eliminate unnecessary regulatory burden.

Some explained how the assigned ratings changes would be consistent with CRA. They pointed out that the primary focus of the CRA is on the provision of credit, as reflected in the wording of the statute itself, and pointed out that the CRA statute itself does not mandate the service and investment tests. Some cited legislative history to further support a lending focus.

Some of the main arguments presented were:

- The weights in the current CRA rule are inappropriate. The 50 percent weight for lending is too low for traditional thrifts and forces depository institutions into other activities where they may not have sufficient expertise. The 25 percent weight for investments forces institutions to seek out risky or complex investments and other investments beyond their expertise.

- The way ratings are currently assigned is not sufficiently flexible. The current service test does not offer sufficient flexibility to thrifts that do not offer transaction-based accounts. CRA does not adequately accommodate institutions that exclusively employ alternative, non-branch delivery systems as their primary distribution channel. The proposal would be consistent with CRA by allowing OTS to give due consideration to the unique factors applicable to each depository institution, taking into account regional differences, and the varied business models and product offerings.

Several Financial Institution Comments addressed the specific questions that OTS had also included in the preamble to highlight particular aspects of the proposal:

- Several trade associations projected that allowing alternative weights would increase the importance of lending and increase the provision of credit to the community, consistent with the CRA statute.

- Some projected that allowing alternative weights would not change the level of lending, investment, and service in the community. Some reasoned that community banks of all sizes are committed to meeting the needs of their communities through community service—not because it is necessary to satisfy CRA compliance requirements—but because it is good business. Several argued that, notwithstanding the fears expressed by consumer commenters, it is extremely unlikely that any large institution would adopt a matrix based solely on lending. One form letter submitted by many financial institutions asserted that community banks would not change the way they do business or reduce the volume of loans, but what they could do, particularly those in rural areas, would be to stop investing in statewide or regional projects that actually take resources away from the institution's local community.

- Several supported continuing to require at least a 50 percent weight for lending, as being consistent with the purposes of the CRA, though one opposed this requirement in the interest of greater flexibility. A few trade associations commented that they did not think it would be necessary for OTS to otherwise impose restrictions on the weight choices, since doing so would reduce the rule's flexibility. A few Financial Institutions Comments specifically encouraged OTS to provide examples as guidance, as in the proposal.

- A couple supported continuing to require that an institution must receive at least a "low satisfactory" rating in lending to receive an overall "satisfactory" rating. They indicated that this requirement is consistent with the emphasis on returning to the core requirements of the CRA, *i.e.*, the institution's record of helping to meet the *credit* needs of the entire community.

- None preferred eliminating the investment test to the alternative weight proposal. Several specifically opposed the elimination of the investment test as an alternative, noting that the alternative weights proposal would provide flexibility to all large retail savings associations, including those that may wish to make investments and have their performance evaluated under the investment test. One argued that eliminating the investment test would reduce the variety of mechanisms available to institutions to meet their CRA responsibilities. As a result, this change would actually decrease the flexibility that institutions have to serve their communities.

- Some trade associations suggested that concerns about uniformity were overstated, noting that the Agencies are not required to have uniform rules on CRA. One benefit of departing from uniformity might prove to be that differences produce successful and innovative solutions to community reinvestment issues. Others favored obtaining greater uniformity by having the other regulators adopt OTS's approach.

### V. Today's Final Rule

Having carefully considered the comments, OTS has decided to provide additional flexibility in assigning CRA ratings to encourage large retail savings associations to focus their community reinvestment efforts on the types of activities the communities they serve need, consistent with safe and sound operations. The final rule revises the manner in which ratings are assigned to reduce burden and restore the focus of CRA to lending.

As discussed in Part II.A. of this **SUPPLEMENTARY INFORMATION** section, the statutory language and legislative history of CRA confirm its appropriate lending focus. Given OTS's responsibility to evaluate an institution's performance in meeting *credit needs*, we believe it is appropriate to allow institutions to be evaluated with greater emphasis on *lending* than at present. At the same time, in recognition of the value to communities of investments and services, OTS is not mandating any decrease in the emphasis given to investments or services in an evaluation. In fact, today's final rule provides flexibility for savings associations evaluated under the large retail institution test to opt to be evaluated with the same or greater emphasis given to either investments or services than at present. Savings associations that do not want alternative weights do not have to do anything differently, as today's final rule contains no mandatory changes in the way savings associations are evaluated.

#### A. Regulatory Changes

The final rule adds a new paragraph to OTS's CRA rule (12 CFR 563e.28(d)) to reflect that savings associations subject to the large retail institution test may elect alternative weights for the lending, investment, and service components. In keeping with the proposal, a savings association may elect alternative weights for lending, service, and investment, so long as lending receives no less than 50 percent weight and, of course, the weights total 100 percent.

The requirement that lending receive 50 percent weight is not codified in the current CRA rule, only in implementing materials. Accordingly, OTS is continuing that approach with respect to the requirement that any alternative weights selected accord a minimum of 50 percent weight to lending. OTS will incorporate that specification and other technical details for implementing alternative weights into guidance that it will issue separately.

OTS believes that a minimum of 50 percent weight to lending is appropriate for purposes of the large retail institution test, consistent with the traditional and appropriate emphasis on lending. OTS notes, however, that savings associations that may wish to place a different emphasis on their CRA efforts might consider submitting a strategic plan under § 563e.27 of OTS's CRA rule. While that regulation provides that a savings association, other than a wholesale or limited purpose institution, generally is to address all three performance categories (lending, investments, and services) and emphasize lending and lending-related activities, it also indicates that a different emphasis is possible. The regulation states, "[A] different emphasis, including a focus on one or more performance categories, may be appropriate if responsive to the characteristics and credit needs of its assessment areas(s), considering public comment and the savings association's capacity and constraints, products offerings, and business strategy." 12 CFR 563e.27(f)(1)(ii).

New § 563e.28(d) further provides that the principles in § 563e.28(b) will not apply to the extent of any inconsistency with alternative weights selected. Thus, for example, the principle in § 563e.28(b)(2) stating that a savings association that receives an "outstanding" rating on both the service test and the investment test and a rating of at least "high satisfactory" on the lending test will receive an assigned rating of "outstanding" will not apply to a savings association that chooses not to have OTS give weight to services and investments. (Likewise, the CRA Qs&As will not apply to savings associations regulated by OTS to the extent of any inconsistency with today's final rule or any implementing guidance.)

OTS is also making a conforming change to § 563e.21(a)(1) of its CRA rule to avoid any misimpression that OTS will continue to always apply all three components of the large retail institution test to savings associations assessed under that test. Under today's final rule, OTS will continue to apply the lending test to all savings

associations evaluated under the large retail institution test. But whether OTS will apply the investment and service tests will depend upon whether the savings association elects optional weights and whether those weights entail consideration of these tests. Accordingly, OTS is revising § 563e.21(a)(1) to indicate that OTS applies the lending, investment, and service tests to the extent consistent with § 563e.28(d), the provision allowing savings associations to elect alternative weights. If no weight is selected for service and/or investment, OTS will not rate that component or components.

OTS is not making any change to the performance context regulation. However, OTS examiners will take the weights selected into consideration as part of each savings association's performance context. All else being equal, a savings association that opts for OTS to give greater weight to any particular component than would apply under standard weights will be expected to exhibit stronger performance on that component than it would under standard weights in order to receive the same rating. At the same time, a savings association that opts for OTS to give lesser weight to any particular component than would apply under standard weights will not be expected to exhibit performance as strong on that component as it would under standard weights in order to receive the same rating. The performance context is sufficiently flexible, without regulatory change, for OTS examiners to take into consideration differences in weight allocations that different savings associations may elect as part of existing performance context factors such as institutional capacity. See 12 CFR 563e.21(b).

For savings associations that do not elect alternative weights for lending, service, and investment, OTS will continue to apply the Component Test Rating chart in Part II.D. of this **SUPPLEMENTARY INFORMATION** section to assign component ratings that reflect the institution's lending, investment, and service performance and calculate the composite rating using the Composite Rating matrix in Part II.D. of this **SUPPLEMENTARY INFORMATION** section. These are the same Component Test Rating chart and Composite Rating matrix as have been in place since 1995. For savings associations that elect alternative weights, OTS will issue separate guidance detailing the methodology for assigning ratings.

OTS has considered that providing flexibility to savings associations to choose alternative weights will decrease

uniformity if the other Federal banking agencies do not provide the same type of flexibility for the institutions they regulate. However, OTS does not anticipate that this decrease in uniformity will cause significant complications. For example, if a thrift and a bank are under the same holding company and both institutions want to continue to have the same weight allocations used in their examinations by their respective regulators, the thrift can simply refrain from opting for an alternative weight allocation.

#### *B. Using Existing Procedures*

A savings association evaluated under the large retail institution test will be able to elect weights, much in the same way as it may currently elect consideration of other activities under CRA, such as lending by an affiliate or consortium, or investments or services by an affiliate, as discussed in Part III of this **SUPPLEMENTARY INFORMATION** section. This has proven to be a simple and efficient procedure. OTS intends to revise the PERK package shortly to provide a specific optional question soliciting the institution's alternative weight designation, if any, just as there are currently optional questions for lending by an affiliate or consortium, or investments or services by an affiliate. Any necessary updates to examination procedures will also be made.

Savings associations that wish to opt for an alternative weight for lending, service, and investment, will be able to do so *effective with examinations beginning the second quarter of 2005*. Until the PERK is revised, savings associations with examinations noticed for the second quarter of 2005 or thereafter may still elect alternative weights through their responses to the existing PERK information requests. PERK 008L (12/2004), "Community Reinvestment Act Information—Large Institutions," already provides that an institution is welcome to provide information not listed in the PERK relevant to demonstrating the institution's performance.

By enabling savings associations to elect optional weights through the PERK, CRA examinations will become more efficient. Savings associations that opt for no weight to the investment test and/or service test will not have to provide information pertaining to that component or components as part of the CRA examination and OTS examiners will not have to evaluate such information, except as the information may relate to the performance context.



### C. Anticipated Effect on Community Development

Commenters have furnished little evidence on the proposal's effect on community development. The proposal's opponents predict that allowing alternative weights will result in a decrease in services and investments by large thrifts, and that this decrease will have an adverse impact on community development. These predictions are speculative. Supporters make contrary predictions that large savings associations will continue to provide community development services and investments and are extremely unlikely to adopt a matrix based solely on lending.

Rather than rely on such predictions by opponents or supporters of the proposal, we have focused on the common-sense economic principle that allowing a savings association greater freedom to specialize in those things at which it is relatively more efficient should result in more, not less, *real* community development being delivered. Part of the idea behind allowing alternative weights is to not force a savings association to provide a service or make an investment that it cannot do efficiently—or that may not even be a central part of its business plan—and to encourage it to engage in activities at which it is relatively more efficient (*i.e.*, where the savings association has a comparative advantage). By encouraging each savings association to meet its community development obligations through activities at which it excels, OTS anticipates gains in economic efficiency deriving from specialization. And these gains, in turn, will result in more effective, not less effective, community development.

This added flexibility—permitting a savings association to focus its community reinvestment efforts on activities that it does well—also serves the important goal of helping to assure that the savings association meets its community reinvestment obligations in a manner consistent with safe and sound operations. Common-sense dictates that experience and expertise contribute to safe and sound operations.

## VI. Regulatory Analysis

### A. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995, OTS may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. This collection of information

is currently approved under OMB Control Number 1550-0012. This final rule does not change the collection of information.

### B. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS certifies that the final rule will not have a significant economic impact on a substantial number of small entities and will not impose any additional paperwork or regulatory reporting requirements. This final rule relates only to the treatment of savings associations under the retail test mandated only for large institutions.

### C. Executive Order 12866 Determination

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

### D. Unfunded Mandates Reform Act of 1995 Determination

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

### List of Subjects in 12 CFR Part 563e

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

### Office of Thrift Supervision

#### 12 CFR Chapter V

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

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

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

■ 2. Revise § 563e.21(a)(1) to read as follows:

#### § 563e.21 Performance tests, standards, and ratings, in general.

(a) \* \* \*

(1) *Lending, investment, and service tests.* The OTS applies the lending, investment, and service tests, as provided in §§ 563e.22 through 563e.24, in evaluating the performance of a savings association, except as provided in paragraphs (a)(2), (a)(3), and (a)(4) of this section, and to the extent consistent with § 563e.28(d).

\* \* \* \* \*

■ 3. Amend § 563e.28 by:

■ a. Removing “paragraphs (b) and (c) of this section” in paragraph (a) and by adding in lieu thereof “paragraphs (b), (c), and (d) of this section”; and

■ b. Adding a new paragraph (d) to read as follows:

#### § 563e.28 Assigned Ratings.

\* \* \* \* \*

(d) *Savings associations electing alternative weights of lending, investment, and service.* A savings association subject to the lending, investment, and service tests may elect alternative weights for lending, service, and investment. The principles in paragraph (b) of this section do not apply to the extent of any inconsistency with the alternative weights selected.

Dated: February 24, 2005.

By the Office of Thrift Supervision.

**James E. Gilleran,**

*Director.*

[FR Doc. 05-4016 Filed 3-1-05; 8:45 am]

BILLING CODE 6720-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2004-19202; Directorate Identifier 2004-NM-95-AD; Amendment 39-13989; AD 2005-05-01]

RIN 2120-AA64

#### Airworthiness Directives; Boeing Model 757 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain Boeing Model 757 series airplanes. This AD requires identification of the part number for the cable assembly for the lower anti-collision light, and related