

**APPENDIX B**

**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-[\_\_]  
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 final rule.

**SUMMARY:** The OCC, Board, FDIC, and OTS (collectively, the agencies) are publishing final rules to implement the CRA sunshine provisions of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y). These provisions require

nongovernmental entities or persons (NGEPs), 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 (1) make the agreements available to the public and the appropriate agency and (2) file annual reports concerning the agreements with the appropriate agency. These provisions were contained in section 711 of the Gramm-Leach-Bliley Act.

The rule identifies the types of written agreements that are covered by section 48 (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.

**EFFECTIVE DATE:** This joint rule is effective April 1, 2001.

**FOR FURTHER INFORMATION CONTACT:**

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452-3585, James H. Mann, Senior Attorney (202) 452-2412, or Kathleen C. Ryan, Senior Attorney (202) 452-3667, Division of Consumer and Community Affairs; For users of Telecommunications Device for the Deaf (“TDD”) only, contact Janice Simms at (202) 452-4984; Board of Governors of the Federal Reserve System, 20<sup>th</sup> Street and Constitution Avenue, NW, Washington, DC 20551.

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

**SUPPLEMENTARY INFORMATION:** The contents of this preamble are listed in the following outline:

- I. Background
- II. Overview of Comments Received
- III. Detailed Explanation of Final Rule
  - A. Definition of Covered Agreement
  - B. Disclosure of Covered Agreements
  - C. Annual Reports

D. Effective Dates of Disclosure and Reporting Requirements

E. Compliance Provisions

F. Other Definitions and Rules of Construction

IV. Regulatory Flexibility Act Analysis

V. Executive Order 12866 Determination

VI. Paperwork Reduction Act

VII. Comments Regarding the Use of “Plain Language”

VIII. Unfunded Mandates Act of 1995

## **I. Background**

Section 711 of the GLB Act (Pub. L. No. 106-102, 113 Stat. 1338 (1999)) added a new section 48 to the Federal Deposit Insurance Act (12 U.S.C. 1831y) (FDI Act) entitled “CRA Sunshine Requirements.” Section 48 applies to written agreements that (1) are made in fulfillment of the Community Reinvestment Act of 1977 (CRA),<sup>1</sup> (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 48 does not, however, cover any agreement with a nongovernmental entity or person that has not had a CRA contact with an insured depository institution or affiliate or a banking agency, such

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<sup>1</sup> 12 U.S.C. 2901 et seq.

as agreements entered into by entities or persons that solicit charitable contributions or other funds without regard to the CRA. Under section 48, 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.

On May 19, 2000, the agencies published a joint notice of proposed rulemaking in the Federal Register (65 Federal Register 31,962 (2000)) to implement section 48. The joint notice requested comment on all aspects of the proposed rule and on a wide variety of specific topics identified in the **Supplementary Information** accompanying the proposal.

## **II. Overview of Comments Received**

The agencies collectively received more than 800 comments from the public on the proposed rule, although many commenters submitted copies of the same comments to each of the agencies. Comments were received from a wide variety of sources including members of Congress; state and local government officials; banks, savings associations and their holding companies and other affiliates; community-based and non-profit organizations, including national and regional associations whose membership is composed of such organizations; trade associations; other businesses; and individuals.

These comments addressed to some degree nearly all aspects of the proposed rule. A number of these comments are described in more detail in the description of the final rule below. This section provides a brief overview of the comments and is not intended to represent a detailed summary of all of the comments. The agencies have carefully reviewed and considered the information and views provided by all commenters.

Commenters generally requested additional guidance on the types of actions that would constitute a written arrangement or understanding between an insured depository institution or affiliate and a NGEF. Many commenters supported the proposed rule's definition of "fulfillment of the CRA," while others asserted that the proposed definition was too broad.<sup>2</sup> In this regard, a number of commenters expressed concern that the proposed rule could require the disclosure of, and reporting on, a wide range of agreements between banking organizations and NGEFs that are not directly related to or affected by the CRA. They also expressed concern that the proposed rule could discourage banking organizations from entering into agreements with NGEFs to provide loans, investments or banking services in their local communities.

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<sup>2</sup> The proposed rule generally defined "fulfillment of the CRA" by reference to the full list of factors that the agencies consider in evaluating the CRA performance of an insured depository institution or in acting on an application for a deposit facility under the CRA, as described in the lending, investment and service tests set forth in the CRA regulations jointly adopted by the agencies ("CRA Regulations"). See 12 CFR Part 25 (OCC); 12 CFR Part 228 (Board); 12 CFR Part 345 (FDIC); 12 CFR Part 563e (OTS).

Many commenters addressed the exemption included in the statute and the proposed rule for agreements that are entered into by an insured depository institution or affiliate with a NGEF that has not “commented on, testified about, or discussed with the institution, or otherwise contacted the institution, concerning the Community Reinvestment Act.”<sup>3</sup> Most commenters that addressed this issue requested that the agencies clarify the types of actions by a NGEF that would constitute a CRA contact as described in the statutory exemption. Some commenters recommended that the agencies define a CRA contact to include only CRA-related contacts by a NGEF with a Federal banking agency or discussions with an insured depository institution or affiliate about such contacts. Commenters also urged that the agencies clarify that certain types of discussions with an institution or affiliate, such as a general discussion by a NGEF with an institution concerning the eligibility of products or services for consideration under the CRA, were not CRA contacts (and were therefore exempt) within the meaning of the statute. Other commenters asserted that the statute did not allow the agencies to limit CRA contacts only to those that occur with a Federal banking agency and that Congress intended a CRA contact to encompass a broad range of CRA-related contacts including discussions by a NGEF with an insured depository institution or affiliate concerning the CRA.

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<sup>3</sup> See 12 U.S.C. 1831y(e)(1)(B)(iii).

A number of commenters also argued that a CRA contact must be with an appropriate official or representative of the insured depository institution or affiliate. A significant number of commenters also urged that a CRA contact be recognized only if the contact occurred within a specified period of time before the parties entered into the agreement. Some commenters expressed concern that, without these or other limitations, the statute or proposed rule would impose a substantial burden on persons claiming the exemption and make the exemption virtually meaningless. Other commenters asserted that the agencies lacked the authority to require that a CRA contact be temporally related to a CRA-related agreement.

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A number of commenters argued that the statute or the proposed rule imposed a substantial burden on persons who engage in discussions with banking organizations concerning the CRA or petition the Federal banking agencies for action related to the CRA. These commenters argued that these burdens could chill the public's exercise of free speech or right to petition the government as protected by the Constitution.

Commenters generally supported the provisions of the proposed rule that sought to streamline the disclosure and annual reporting obligations of the parties to a covered agreement to the extent consistent with the statute. For example, commenters widely supported the proposed rule's provisions giving insured depository institutions, affiliates and NGEPS flexibility in making covered

agreements available to the public and allowing insured depository institutions, affiliates and NGEPS that are party to a number of covered agreements the ability to file a single, consolidated annual report relating to all of the agreements.

Commenters also generally supported the provisions of the proposed rule that required a NGEPS to make its covered agreements available to an agency only upon request. Some commenters requested that insured depository institutions and affiliates also be permitted to make covered agreements available to the appropriate agency upon request, or that the agencies further streamline the agency disclosure obligations applicable to institutions and affiliates. Commenters requested that the agencies streamline the process for determining what information contained in a covered agreement may be withheld from public disclosure, such as by identifying categories of information that could be withheld from public disclosure without prior agency review.

Commenters overwhelmingly supported the proposed rule's provisions allowing NGEPS to use Federal tax forms and other reports to fulfill the reporting requirements of the rule. Comments were mixed concerning the proposed rule's provisions governing the reporting of specific purpose funds received by a NGEPS, with some commenters supporting this reporting method and others asserting that the method was burdensome or not authorized by the statute.

Commenters also supported the provisions of the rule that provided that a NGEPS is not required to file an annual report for any year in which NGEPS did not

receive funds under a covered agreement. Several commenters requested that the agencies provide a similar exemption from the annual reporting requirements to insured depository institutions and affiliates.

### **III. Detailed Explanation of Final Rule**

This section provides a more detailed discussion of the comments received on the proposal, the changes made by the agencies in response to comments, and the other provisions of the final rule. As with the proposal, the final rule uses the term “insured depository institution,” rather than “bank” or “savings association,” to facilitate compliance and consistency among the agencies’ rules. 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.

The final rule and the remaining portions of this preamble also refer to a “nongovernmental entity or person” as a “NGEP.” The final rule uses this term, rather than the term “person,” to avoid confusion over the scope of the rule. The term “nongovernmental entity or person” or “NGEP” is defined in section \_\_.11 of the rule generally to include any company or individual other than the Federal government; a state, local or tribal government; an insured depository institution or affiliate; or a representative of any of the foregoing.

The **Supplementary Information** accompanying the proposed rule included examples illustrating the scope and application of the proposed rule. Commenters generally favored having examples that provide additional guidance concerning the rule's provisions. Some commenters requested that the agencies clarify or amend certain examples, and commenters were divided on whether the agencies should incorporate all examples into the final rule.

The final rule includes examples illustrating some of the key provisions of the rule, including the definition of a "CRA communication," the scope of the exemptions for qualifying loan agreements, and the information required to be provided in the annual report of an NGEF. The examples included in the rule are part of the rule and compliance with an example, to the extent applicable, constitutes compliance with the rule. (See section \_\_.1(d).) The examples included in the rule illustrate only the scope and application of the particular topic addressed by the example and do not illustrate any other topic or issue that may arise under the rule.

The agencies also have included in this preamble examples that illustrate other provisions of the rule. The agencies have not included these other examples in the final rule because fewer questions appear to arise in connection with these provisions and, thus, including the examples in the rule could make the rule longer without providing a commensurate level of benefit. The agencies, however, have included these examples in the preamble to illustrate the manner in which the agencies expect to interpret the rule in these areas.

By operation of law, the regulations of the agencies implementing section 48 shall take effect on the first day of the calendar quarter which begins on or after the date on which the regulations are published in final form, which is April 1, 2001.<sup>4</sup>

The agencies requested comment on whether the rule should remain, as proposed, in a separate part of each agency's regulations or be incorporated into the agencies' existing CRA Regulations. Commenters generally favored keeping the rule separate from the CRA Regulations. In addition, section 48 amended the FDI Act, and not the CRA, and is independent of the CRA and the CRA Regulations. Accordingly, the final rule is promulgated as a new part to each agency's regulations. Section \_\_.1(c) of the final rule provides that nothing in the final rule affects in any way the CRA, the agencies' CRA Regulations, or any agency's interpretations or administration of the CRA or the CRA Regulations.

The following description applies to the rule of each agency. Since each agency's rule will be codified at a different part of the Code of Federal Regulations, the following description references the rule using only the section numbers used in the rule.

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<sup>4</sup> 12 USC 4802(b).

## **A. Definition of Covered Agreement**

Section \_\_.2 of the rule defines which agreements are covered by the rule and includes the Act's exemptions from the definition of a covered agreement for qualified loan agreements.

### **1. Covered Agreements**

The proposed rule defined 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 by the rule (see section \_\_.4);
- the parties to the agreement include (1) one or more insured depository institutions or affiliates of an insured depository institution, and (2) one or more NGEPs; and
- the agreement provides for the insured depository institution or affiliate to provide cash payments, grants, or other consideration (except 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 final rule retains these four criteria for coverage. The final rule also provides that, in order for an agreement to be covered, one of the NGEPs that is a party to the agreement must have had a CRA communication (as defined in section

\_\_\_\_.3) prior to the time the parties entered into the agreement. As noted above, section 48 specifically exempts from coverage any agreement entered into by an institution or affiliate with a NGEP who has not had a CRA communication. The agencies believe that structuring this statutory exemption as an affirmative requirement for coverage makes the rule easier to understand without affecting the scope of the rule. The scope of the exemption for agreements with a NGEP that has not had a CRA communication is discussed in detail below.

A covered 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. Section 48 and the rule apply only to written contracts, arrangements or understandings, and do not apply to oral contracts or agreements.

Some commenters requested that the agencies provide additional guidance concerning when written communications between a NGEP and an insured depository institution or affiliate would constitute a “contract, arrangement or understanding.” In addition, some commenters asserted that the rule should apply only to legally enforceable contracts, while comments were mixed on whether the rule should apply to unilateral lending or investment pledges made by an insured depository institution or affiliate in response to previous actions by a NGEP.

As noted above, section 48 by its terms applies not only to written contracts, but also to written arrangements and written understandings that are entered into by an insured depository institution or affiliate with a NGEP and that

otherwise meet the statutory criteria to be a covered agreement. For this reason, the agencies have not limited the final rule to legally binding written contracts. Other written agreements that do not constitute a legally binding contract, but that reflect a mutual arrangement or understanding between an insured depository institution or affiliate and a NGEF would be a covered agreement if they meet the other criteria set forth in the rule.<sup>5</sup> A written arrangement or understanding may be reflected by one or more documents.

The agencies have included three examples in the final rule that illustrate when a written arrangement or understanding would and would not exist. (See section \_\_.2(b).) Example 1 involves a NGEF that meets with an insured depository institution and states that the institution needs to make more community development investments in the NGEF's community. The NGEF and institution, however, do not reach an agreement concerning the community development investments the institution should make in the community, and the parties do not reach any mutual arrangement or understanding. The institution later unilaterally issues a press release that announces the institution has established a general goal of making \$100 million of community grants in low- and moderate-income neighborhoods in the institution's community over the next 5 years and does not identify the NGEF. Since there was no agreement or understanding between the institution and NGEF, and the institution acted unilaterally to establish its

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<sup>5</sup> 12 U.S.C. 1831y(a) and (e)(1).

investment goal, Example 1 states that the press release issued by the institution is not a written arrangement or understanding.

In Example 2, a NGEF meets with an insured depository institution and states that the institution needs to offer new loan programs in the NGEF's community. The NGEF and the insured depository institution reach a mutual understanding that the institution will provide \$10 million in additional loans in low- and moderate-income neighborhoods in the NGEF's community. The insured depository institution tells the NGEF that it will issue a press release announcing the program and subsequently issues a press release that incorporates the key terms of the mutual understanding between the institution and NGEF. The press release reflects the mutual arrangement or understanding between the NGEF and the insured depository institution and is, therefore, a written arrangement or understanding.

In Example 3, a NGEF sends a letter to an insured depository institution requesting that the institution provide a \$15,000 grant to the NGEF. The insured depository institution responds in writing and agrees to provide the grant to the NGEF in connection with its annual grant program. Since the exchange of letters reflects an understanding or arrangement between the insured depository institution and the NGEF, the agreement would be a covered agreement if it meets the other criteria set forth in the rule including, in particular, the requirement that the NGEF have had a CRA communication.

These examples are not exclusive and other written exchanges may or may not constitute a written arrangement or understanding depending on the facts and circumstances of the particular situation.

## 2. Loan Agreements that are Not Covered Agreements

Section 48(e)(1)(B) specifically exempts certain types of loan agreements from coverage even if they otherwise meet the definition of a covered agreement. Section \_\_.2(c) of the final rule implements these exemptions.

### a. Mortgage 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 48. This exemption is available for any mortgage loan, regardless of the identity of the borrower or the rate charged on the loan.

The agencies requested comment on what types of loans would qualify as a “mortgage loan” for purposes of this statutory exemption. A number of commenters addressed this issue, with the vast majority stating that the exemption should be available for any loan that is secured by real estate. A few commenters asserted that the agencies should define a mortgage loan to include any loan the proceeds of which are used for real estate-related purposes, even if the loan was not secured by real estate. Some commenters also contended that investments in

mortgage-backed securities or other types of real estate investments should be exempt under this provision.

The final rule provides that this statutory exemption is available to any individual loan that is secured by real estate. The real estate securing the loan may be used for residential or commercial purposes, and the loan does not need to have been obtained for purposes of purchasing or improving the real estate. Since section 48 specifically provides that this exemption is available only to mortgage loans, an agreement to make a real-estate related investment (including an investment in mortgage-backed securities) or to make a loan that is not secured by real estate is not exempt under this provision, although such agreements may be exempt from coverage under other provisions of the rule.

Section \_\_.2(d) of the final rule provides examples illustrating the rule's exemptions for qualifying loan agreements. The first example (Example 1) illustrates the exemption for any individual mortgage loan. In this example, an insured depository institution provides an organization with a \$1 million loan pursuant to a written agreement. The loan is secured by real estate that is owned or to-be-acquired by the organization. Accordingly, Example 1 states that the agreement is exempt from coverage regardless of the interest rate on the loan or whether the loan was made for purposes of re-lending.

b. Specific Contracts or Commitments for Qualifying Loans

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.”<sup>6</sup> 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 requested comment on whether this exemption covers only a specific commitment to make a qualifying loan or extension of credit (such as a loan commitment typically made in the course of providing a line of credit to a small business), or also would provide an exemption for a commitment to make multiple loans that meet the Act’s restrictions. The agencies also requested comment on whether the agencies should define when a loan is made at “substantially below market rates” or for purposes of re-lending. Most commenters that addressed these issues requested that the agencies provide additional guidance concerning the phrases “substantially below market rates” and “for purposes of re-lending,” and some of these commenters suggested definitions for these phrases. Comments were mixed on whether the exemption was available only to a specific contract or commitment for an individual loan or if it also would cover a general

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<sup>6</sup> 12 U.S.C. 1831y(e)(1)(B)(ii).

commitment by an insured depository institution to make multiple loans over a period of time.

After carefully reviewing the language and purposes of section 48 and the comments received, the agencies have determined that the exemption in section \_\_.2(c)(2) is available only with respect to a specific contract or commitment by an insured depository institution to make a single loan or extension of credit that meets the Act's market-rate and re-lending restrictions, and does not cover an agreement or commitment by an institution or affiliate to make multiple loans or extensions of credit. The agencies also have amended the rule to provide that a loan is made for "purposes of re-lending" only if the loan application or other loan documents indicate that the borrower intends or is authorized to use the borrowed funds to make a loan or extension of credit to one or more third parties.

The final rule retains the statute's restriction that the loan or extension of credit may not be made at a rate that is substantially below market rates. In determining whether a loan or extension of credit is made at "substantially below market rates," an institution should compare the rate charged on the loan or extension of credit to the rate the institution has or would charge a comparable borrower (e.g., a NGEF with similar financial resources and credit history) on a comparable type of transaction (e.g., a construction loan, permanent financing, small business loan, or unsecured consumer loan). Since the rates charged on particular types of loans vary over time and may vary depending on the location of the lender

and borrower, the agencies have not included in the rule a fixed formula for determining whether a loan or extension is made at “substantially below market rates.”

Examples 2, 3 and 4 in section \_\_.2(c) of the rule illustrate the scope and application of this exemption. In Example 2, an insured depository institution commits to provide a \$500,000 line of credit to a small business pursuant to a written agreement. The example provides that the loan is made at a rate within the range of rates offered by the institution to other similarly situated small businesses in the market and the loan documentation does not indicate that the borrower intends or is authorized to re-lend the borrowed funds. Accordingly, the example states that this commitment for an individual loan is exempt under section \_\_.2(c)(2) of the rule.

In Example 3, a small business obtains a \$75,000 small business loan, documented in writing, from an insured depository institution. The institution offers its borrowers small business loans that are guaranteed by the Small Business Administration (SBA) and the loan is made under this loan program. The loan documentation does not indicate that the borrower intends or is authorized to re-lend the funds to any third-party. Although the rate charged by the institution on the loan is well below that charged by the institution on commercial loans, the rate is within the range of rates that the institution would charge a similarly situated small business for a similar loan under the institution’s SBA loan program. Accordingly,

the example states that the loan is not made at substantially below market rates and is exempt from coverage under section \_\_.2(c)(2) of the rule.

Example 4 involves a bank holding company that enters into a written agreement with a community development organization. The agreement provides for the insured depository institutions owned by the bank holding company to make \$250 million in small business loans in their communities over the next 5 years. Since the agreement provides for the institutions to make multiple loans, the agreement is not a specific contract or commitment for a loan or extension of credit and, thus, is not exempt from coverage under section \_\_.2(c)(2) of the rule. The example notes, however, that each small business loan made pursuant to this general commitment would be exempt from coverage if the loan separately meets market rate and re-lending restrictions of the exemption.

To be entirely exempt from coverage under section \_\_.2(c)(1) or (2) of the rule, an agreement must be exclusively a loan, extension of credit or loan commitment that meets the requirements of the relevant exemption. The rule provides, however, that if an agreement includes a loan, extension of credit or loan commitment that, if documented separately, would meet the rule's requirements to be exempt and also provides for the insured depository institution or affiliate to provide other funds or resources, the exempt loan, extension of credit or loan commitment may be excluded for purpose of determining whether the agreement

meets the Act's dollar thresholds or is in fulfillment of the CRA. (See section \_\_.2(e).)<sup>7</sup>

### 3. CRA Communication

Section 48(e)(1)(B)(iii) provides a statutory exemption from the CRA Sunshine provisions for "any agreement entered into by an insured depository institution or affiliate with a [NGEP] who has not commented on, testified about, or discussed with the institution, or otherwise contacted the institution, concerning the Community Reinvestment Act of 1977." This exemption for agreements with persons who have not had a CRA contact was included in section \_\_.2(b)(2) of the proposed rule, which contained an exemption that restated the statutory language in section 48(e)(1)(B)(iii). Section \_\_.2(b)(2) also provided examples of actions that would constitute a CRA contact and other examples of actions that would not be considered a CRA contact.

The preamble invited comment on this aspect of the proposal, including comment on whether the agencies should provide a more detailed definition of the exemption and on several alternative approaches to defining CRA contact. Nearly all commenters requested that the agencies change the definition of CRA contact in the proposed rule to explain the breadth of the exemption, to provide additional

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<sup>7</sup> The agencies note, however, that if the other consideration would 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.

clarity regarding what constitutes a CRA contact, or to exempt specifically certain types of contacts. Many commenters underscored the importance of a rule that allowed persons to determine before entering into an agreement whether or not they have had a CRA contact and qualify for the exemption. While many commenters expressed concern about various aspects of the proposal on CRA contact, commenters were divided on how to address these concerns.

A significant number of commenters argued that the agencies should define a CRA contact to cover only providing CRA-related comments or testimony to an agency and discussions with an insured depository institution or affiliate about providing (or refraining from providing) such comments or testimony. There was also significant support for an alternative that would have excluded discussions with an insured depository institution or affiliate concerning whether particular loans, services, investment or community development activities are generally eligible for consideration by an agency under the CRA Regulations. Others argued that only conversations related specifically to the CRA performance record of an institution should be covered.

A significant number of commenters advocated exempting contacts that are incidental to ordinary business dealings, which were perceived as outside the intended scope of the statute. Others advocated exempting certain types of “routine inquiries,” such as inquiries about what an institution’s CRA rating is or about the CRA statute or rule.

Some commenters, on the other hand, supported a broad interpretation of CRA contact that would cover general discussions of the CRA. A small number of commenters supported a broad interpretation of CRA contact while also advocating that the agencies narrow other aspects of the definition of a covered agreement, such as the definition of fulfillment.

In addition to these issues regarding the scope of the exemption, many commenters urged the agencies to address other issues raised by the CRA contact definition. In particular, a number of commenters suggested that the agencies indicate who at the relevant institution or affiliate and who at the NGEF must have a CRA contact or have knowledge that a CRA contact has occurred, or require a temporal or other connection between the CRA contact and negotiation of a CRA agreement.

As explained more fully below, the final rule incorporates changes in three areas to address comments regarding the definition of CRA contact. In summary, in order to identify contacts that have a relationship to an agreement and to avoid imposing substantial burden on parties entitled to claim the exemption, the final rule adopts a definition of “CRA communication” that has three parts. First, the rule adds clarity regarding the type of communication that is considered to concern the CRA; second, the rule provides that the institution and the NGEF must have knowledge of the CRA communication and specifies who must have that

knowledge; third, the rule recognizes a temporal relationship between the communication and the agreement.

In addition, the final rule relocates and rewords the CRA communication provision from an exemption for NGEPs that have not had a CRA communication to a requirement in the definition of a covered agreement that the agreement be with a NGEP that has had a CRA communication. The final rule also refers to a CRA contact as a “CRA communication.” This relocation and rewording makes the final rule easier to read and understand and does not have any substantive effect.

a. Definition of CRA Communication.

In considering the scope of the exemption in section 48(e)(1)(B)(iii) for NGEPs that have not had a contact concerning the CRA, the agencies have carefully considered the words of the statute and the purpose of the exemption as well as the comments received by the agencies. The Conference Report for the Act indicates that this exemption was designed to provide an exemption from the requirements of the CRA Sunshine provisions for a wide range of organizations that solicit funds without regard to the CRA. The Conference Report lists as examples of the types of groups that might qualify for this exemption civil rights groups, community groups providing housing or other services in low-income neighborhoods, veterans groups, and community theater groups.<sup>8</sup>

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<sup>8</sup> See H.R. Conf. Rep. No. 106-434 at 179 (1999).

The final rule clarifies the definition of a CRA communication by adding specificity that was drawn from the examples published in the original proposal and in the preamble to the original proposal. Under the final rule, a CRA communication is defined to include any of the following five types of contacts:

- \* any written or oral comment or testimony provided to a Federal banking agency concerning the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution or any CRA affiliate;<sup>9</sup>

- \* any written comment submitted to the insured depository institution that discusses the adequacy of the performance under the CRA of the institution and that must be included in the institution's CRA public file;

- \* any discussion or other contact with an insured depository institution or any affiliate about providing or refraining from providing written or oral comments or testimony to any Federal banking agency concerning the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution or any CRA affiliate;

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<sup>9</sup> As discussed more fully below, a “CRA affiliate” is an affiliate of an insured depository institution whose activities are considered in evaluating the CRA performance of the institution. Accordingly, it is viewed as part of the insured depository institution for these purposes.

\* any discussion or other contact with an insured depository institution or any affiliate about providing or refraining from providing written comments that concern the adequacy of the institution's CRA performance and that must be included in the institution's CRA public file; and

\* any discussion or other contact with an insured depository institution or affiliate about the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate.

The first four types of contacts include contacts with a Federal banking agency or with an institution or affiliate about contacting a Federal banking agency, as well as written communications that, under existing rules, must be retained by an institution in its CRA public file. The final rule includes a fifth type of contact that relates to any discussion or other contact with an institution or affiliate about the adequacy of the institution's performance under the CRA.

In adopting this fifth type of contact, the agencies have carefully considered the suggestion of a number of commenters that CRA communications be limited to the first four types of agency contacts or to discussions with an institution regarding agency contacts. The agencies note that the exemption in section 48(e) for a NGEF that has not had a CRA communication, by its terms, is

available only if the NGEP has not "discussed with the institution, or otherwise contacted the institution, concerning the CRA." By its terms, the exemption appears to contemplate that, in order to qualify for the exemption, the NGEP not have had discussions or contacts "concerning the CRA." Contacts "concerning the CRA" would cover discussions that are not limited to discussions regarding providing testimony or comments to an agency.

In order to explain what type of contact is covered by the words "concerning the CRA," the final rule includes the fifth category for discussions or other contacts about the "adequacy" of the institution's performance under the CRA. This reference was included to indicate that a contact that is related to how well or how poorly an institution is fulfilling its obligation to help meet the credit needs of the institution's community as evaluated under the CRA is one of the types of contacts that would be most likely to influence a CRA agreement, and, consequently, would be a CRA communication that disqualifies a NGEP from claiming the exemption in section 48(e)(1)(B)(iii).

To help illustrate when a discussion or contact relates to the adequacy of an institution's CRA performance, the final rule contains several examples of contacts that would be covered and several examples of contacts that would be exempt.<sup>10</sup> These examples address only the content of a CRA communication and

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<sup>10</sup> Some commenters argued that the examples in the proposed rule were helpful in illustrating the scope of the CRA contact exemption and requested additional

assume that all other requirements regarding the communication (and agreement) are otherwise satisfied.

Three examples address contacts that are CRA communications and, consequently, would cause a written agreement involving the NGEF to be a covered agreement. In the first example, a NGEF files a written comment with a Federal banking agency in response to a general agency request for comments on an application to open a new branch. The comment filed by the NGEF states that the applicant insured depository institution has successfully addressed the credit needs of its community. In the second example, a NGEF states to an executive officer of an insured depository institution that the institution must improve its CRA performance. Both of these examples illustrate a contact in which the CRA performance record of the institution is specifically mentioned.

The statute does not require that a specific reference to the Community Reinvestment Act of 1977 be made in order to represent a CRA communication, and, in fact, a number of commenters indicated that discussions leading to agreements often do not include a specific reference to the CRA because the context of the negotiation makes clear that the agreement is intended to address

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examples. Other commenters argued that the examples would broadly discourage certain kinds of contacts and should be eliminated. Section \_\_.1(d) of the final rule states that the examples included in the rule are not exclusive, and the agencies believe that, on this basis, the examples are a useful illustration of the scope of the rule.

CRA performance. To illustrate this, an example of a CRA communication has been included that involves an oral discussion in which the NGEF claims that the institution needs to make more mortgage loans in low- and moderate-income neighborhoods. The connection with the CRA is indicated by the reference to the action requested, which involves activities that are often the focus of CRA performance evaluations, along with a statement indicating an obligation that the institution take this action, an obligation that is considered to arise out of CRA evaluations.

The final rule also includes several examples of contacts that are not considered to be CRA communications. One example involves a fund-raising letter sent by a NGEF to an insured depository institution and to other businesses in the community encouraging all businesses in the community to meet their obligation to make the community a better place to live by supporting the fund-raising efforts of the NGEF. This example illustrates that a fund-raising letter that is widely distributed in a way that does not imply an obligation under the CRA is not itself considered to be a CRA communication. Similarly, a contact by a NGEF with an insured depository institution to simply determine what rating the institution received at its most recent CRA performance examination would not, by itself, constitute a discussion concerning the adequacy of the institution's performance.

A number of commenters advocated clarifying that the definition of CRA communication would not include marketing efforts for products or services that might relate to CRA activities. The rule contains two examples that illustrate that general marketing efforts and general discussions regarding the eligibility of products and services for CRA consideration are not considered to be CRA communications unless the communication includes a discussion concerning the adequacy of the particular institution's CRA performance.

One example involves a discussion by a NGEF with an insured depository institution regarding whether particular loans, services, investments, community development activities or other activities are generally eligible for consideration by a Federal banking agency under the CRA, without any discussion of the adequacy of the CRA performance of the insured depository institution or affiliate.

Another example illustrates a situation in which the NGEF combines a general marketing discussion with a discussion of the eligibility of particular loans for consideration under the CRA, but without any discussion of the adequacy of the CRA performance record of the institution or obligation of the institution to take any action related to the CRA. In this example, the NGEF engages in the sale or purchase of loans in the secondary market and sends a general offering circular to financial institutions offering to sell or purchase a portfolio of loans. The NGEF then meets with the institution and discusses whether specific loans are generally

eligible for consideration under the CRA, including which loans are made in the institution's community, without discussing the CRA performance or obligations of the institution. The agencies believe that purchases and sales of loans in the secondary market are typically done in the manner illustrated in the example and, therefore, generally do not involve a CRA communication.

The final rule also retains two examples contained in the proposed rule regarding other matters. One illustrates that statements made at a widely attended conference on a general topic (but not a meeting or hearing regarding a specific institution, affiliate or transaction) are not considered to be CRA communications. Statements made at widely attended conferences on general topics are not likely to be effective in influencing CRA agreements and cannot be effectively monitored.

The other example illustrates that statements made in response to a direct request to the specific NGEF from a Federal banking agency (but not a general request for comment in connection with an application for approval of a transaction or an examination) are not considered to be CRA communications. Some commenters suggested that this example be deleted because it suggested a preference for statements made by NGEFs that have been directly contacted by a banking agency over NGEFs that provide information to the agency in the course of a general solicitation of public comment. The final rule retains the example because the agencies believe that it is important to the agencies' ability to meet their

statutory obligations under the CRA that the agencies obtain information regarding the credit needs of the community from sources that include NGEPs that may enter into agreements with insured depository institutions. In these circumstances, the contact results due to an action by the agency, not an attempt by the NGEp to influence the agency or obtain a CRA agreement. Imposing the rule's requirements on the NGEp in this context might discourage cooperation between NGEps and the agencies and impede the ability of the agencies to obtain useful information regarding the banking and credit needs of communities.

b. Knowledge of CRA Communications.

To define when a NGEp has had a CRA communication with an insured depository institution for purposes of the exemption provided in section 48(e)(1)(B)(iii), it is essential to know when a communication is “with the [insured depository] institution” and when it is by a NGEp. In other words, it is essential to know who speaks for the institution and for the NGEp. The statute is silent on this point.

A number of commenters suggested that the rule apply only to CRA communications that occur with designated officers of the insured depository institution or affiliate, such as the CRA compliance officer or persons that negotiate covered agreements. In circumstances where the individuals involved in or responsible for negotiating agreements do not know that a CRA communication has

occurred, commenters claimed that it would be difficult, if not impossible, for institutions and NGEPs to know whether they properly claimed the exemption or were, in fact, in violation of the CRA Sunshine provisions.

For example, casual conversations between a bank teller and a customer who is also an employee of a business consulting firm might involve CRA activities of the bank and meet a broad reading of the proposed definition of CRA contact. Commenters were concerned that, if so, the contact could cause a written agreement between the institution and business consulting firm to be a covered agreement even though the conversation had no influence over the agreement because officials of the institution and of the NGEp responsible for negotiating the agreement were not aware of the conversation.

To address this, a number of commenters urged the agencies to include a requirement that officers of the institution and of the NGEp responsible for negotiating agreements have knowledge of the CRA communication. Others suggested that contacts include only communications with executive officers and the CRA compliance officer of insured institutions and with senior officers of NGEps.

As noted above, the CRA Sunshine provisions do not indicate who a NGEp must contact at an insured depository institution or affiliate in order to have been considered to have made a CRA contact for purposes of the exemption in

section 48(e). The statute is also silent on who speaks for a NGEF that is an organization or company, rather than an individual.

The agencies believe that a CRA communication can only have an effect on an institution's willingness to enter into an agreement or on the terms of an agreement if the communication is with or is known to individuals at the organization who are either involved in negotiating the agreement or have authority or responsibility for such agreements. These are the individuals that speak for the institution and represent the institution in its decision making. Moreover, these are the individuals that are the most likely to have communications regarding the CRA that could lead to or affect the types of agreements that the CRA Sunshine provisions are intended to cover.

There is no evidence in the terms of the CRA Sunshine provisions or in the legislative history for those provisions that Congress intended to deny the exemption based on CRA contacts that are not known to the individuals that are involved with or have the authority to influence the negotiation of CRA agreements. In fact, the example referred to in the legislative history of the type of organization the exemption was designed to protect is a large youth organization with national membership.<sup>11</sup> Given the size, scope and nature of the organization, it is impossible to believe that members of that organization have not--at some time and in some

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<sup>11</sup> See H.R. Conf. Rep. No. 106-434 at 179 (1999); 145 Cong. Rec. S13887 (daily ed. Nov. 4, 1999).

capacity--had contacts with insured depository institutions regarding the CRA. Without a requirement in the rule that attributes CRA communications only to members of the organization that have authority or responsibility for negotiating agreements on behalf of that organization, this organization identified in the legislative history would not be able to claim the exemption.

Moreover, there would be significant burden imposed on both banking organizations and NGEPS if organizations and NGEPS are not entitled to rely on the exemption in section 48(e)(1)(B)(iii) because of a CRA communication between any employee at the organization with any member of a NGEPS. To assure that no unauthorized contacts occur and that agreements are properly exempt under section 48(e)(1)(B)(iii), a banking organization and NGEPS would be required to monitor all contacts by all employees and members of the organization and NGEPS. Even in organizations of only moderate size, this could entail tracking contacts by thousands of employees at a single banking organization. The burden from this monitoring effort is likely to be overwhelming with few benefits because few if any CRA communications that result in CRA agreements are likely to occur among individuals at the organization other than those individuals with authority and responsibility for these agreements.

For these reasons, the final rule modifies the proposed rule to require that, in order to be a CRA communication that disqualifies a NGEPS from the

exemption in section 48(e)(1)(B)(iii), specified individuals at the institution or affiliate and at the NGEF must have knowledge of the communication.

Under the final rule, an insured depository institution or affiliate is considered to have knowledge of a CRA communication with a NGEF if any of the following representatives of the institution or affiliate have knowledge of the contact with the NGEF:

- \* an employee who approves, directs, authorizes or negotiates the agreement with the NGEF;

- \* an employee who is designated with responsibility for compliance with the CRA and who knows that the institution or any affiliate of the institution is negotiating, intends to negotiate, or has been informed by the NGEF that it expects to request that the institution or affiliate negotiate an agreement with the NGEF; or

- \* an executive officer of the institution or affiliate and who knows that the institution or any affiliate of the institution is negotiating, intends to negotiate, or has been informed by the NGEF that it expects to request that the institution or affiliate negotiate an agreement with the NGEF.

In addition to contacts between an institution or affiliate and a NGEF, there are several types of CRA contacts that arise in the agency review process or the CRA examination process or that involve records that the institution is

responsible for maintaining. These contacts are of such importance that the institution is deemed by the final rule to have knowledge of the communication. In particular, an institution or affiliate is deemed under the final rule to have knowledge of any testimony provided to a Federal banking agency at a public meeting or hearing and of any written comment submitted to the insured depository institution that must be and has been included in the institution's CRA public file. An institution or affiliate is also considered under the final rule to have knowledge of any comment (written or oral) that has been made by a NGEF to a Federal banking agency if the comment is conveyed in writing by the agency to the insured depository institution or affiliate.

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The rule establishes a parallel knowledge requirement for a NGEF. A NGEF is considered to have knowledge of a CRA communication if any of the following have knowledge of the contact:

- \* a director, employee or member of the NGEF who approves, directs, authorizes or negotiates the agreement with the insured depository institution or affiliate;
- \* a person who functions as an executive officer of the NGEF and who knows that the NGEF is negotiating or intends to negotiate an agreement with the insured depository institution or affiliate; or
- \* where the NGEF is an individual, the individual.

For purposes of this requirement, an executive officer of an institution, affiliate or NGEF is defined as provided in Regulation O to include any person that participates or has authority to participate in the major policymaking functions of the institution, affiliate or NGEF, regardless of the person's title (see 12 CFR 215.2(e)). In addition, persons who serve as counsel to or agent for an insured depository institution or NGEF are considered to be acting for the insured depository institution or NGEF for purposes of receiving written comments or testimony from an agency.

Under the final rule, the designated individuals are not required personally to have had the CRA communication. Instead, a CRA communication is covered if the communication involved or is known to one of the designated individuals. The individuals identified in the rule at the insured depository institution or affiliate and at the NGEF are the individuals who either are involved in or are responsible for CRA agreements. A CRA communication with an employee of an insured depository institution, affiliate or NGEF that is not known to the individuals that negotiate an agreement or to a person with authority to intervene in the negotiation of an agreement is unlikely to influence the agreement in any way. The knowledge requirement also significantly reduces the burden on insured depository institutions, affiliates and NGEFs to monitor contacts of employees or members that play no role or have no influence in the negotiations or decisions regarding agreements.

c. Timing of CRA Communications.

A majority of commenters argued that the final rules should require a temporal relationship between the CRA communication and the agreement. These commenters contended that a communication that occurs long before or anytime after an agreement has been entered into does not influence the terms of an agreement or encourage an institution to enter into an agreement. Consequently, commenters argued that taking account of CRA communications that are distant in time from the date of an agreement would be contrary to the purpose of the exemption granted in section 48(e)(1)(B)(iii), which they argued was to exempt any agreement with an NGEP that has not attempted to use the CRA to negotiate the agreement. These commenters argued that only CRA communications that occur during some period prior to the date of the agreement be considered to be CRA contacts. Commenters suggested periods that varied from 30 days to 2 years prior to the agreement, with some arguing that only contacts that occur during the public comment period for an agency's review of a transaction or a CRA examination be considered.

Many commenters also contended that failure to adopt a temporal connection between a CRA communication and a covered agreement would forever disqualify a NGEP for the exemption based on one CRA communication, regardless of when it occurred, its influence on a written agreement or how circumstances may

have changed. They argued that this would significantly chill free speech and the right to provide comments to a Federal agency.

On the other hand, several commenters argued that section 48(e)(1)(B)(iii) by its terms does not provide any limitation on the timing of a CRA communication, and that the exemption is available only to a NGEP that has not had a CRA communication with an agency or insured depository institution at any time. These commenters believed that the agencies have no authority to adopt a temporal requirement.

The agencies have taken particular care in considering the views presented by commenters on this matter. A purpose of the CRA Sunshine provisions is to provide public disclosure of agreements that are in fulfillment of the CRA in order to allow the public and Congress to monitor how resources paid under these agreements are used.<sup>12</sup> The exemption in section 48(e)(1)(B)(iii) was included in order to provide relief from the reporting and disclosure provisions for agreements with NGEPs that have not had a discussion concerning the CRA. Thus, the agencies believe that the purposes of the exemption and of the CRA Sunshine provisions generally assume a connection between the CRA communication and the covered agreement.

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<sup>12</sup> See, e.g., 145 Cong. Rec. S13877-78 (daily ed. Nov. 4, 1999).

As a practical matter, in the case of agreements that are intended to be covered by the CRA Sunshine provisions, CRA communications normally occur during the period in which the agreement is discussed or negotiated, which is a relatively short period immediately before the agreement is reached. Indeed, it is during this negotiating period that communications regarding the CRA have the most effect on whether a CRA agreement will be reached and on what will be the purpose and the terms of the agreement.

This view was supported by commenters representing insured depository institutions as well as commenters representing NGEPS, most of whom indicated that CRA communications occurred regularly during the negotiation period for CRA agreements. This view is also consistent with one of the purposes of the CRA Sunshine provisions, which was to allow monitoring of agreements that result from contacts concerning the CRA.

The exemption provided in section 48(e)(1)(B)(iii) would, over time, become meaningless if the exemption is lost because of statements concerning the CRA that are made long before or after an agreement has been reached. Without a temporal relationship, all persons that potentially may have agreements with insured depository institutions or their affiliates regarding activities that receive favorable consideration under the CRA would likely feel compelled to maintain records that allow them to determine whether a CRA contact had ever been made by any person

in the organization in order to ensure that the NGEF is in compliance with the exemption and the CRA Sunshine provisions. This would represent a significant recordkeeping burden on persons, including businesses, community organizations and individuals, that the exemption was intended to benefit. For many of these organizations, this would mean tracking and reviewing contacts from numerous employees or members on a continuous and long-term basis.

This heavy burden is inconsistent with the purpose of the exemption. It is also inconsistent with the directive in the CRA Sunshine provision that the agencies prescribe regulations designed to ensure and monitor compliance with the CRA Sunshine provisions without imposing an undue burden on the parties.

The agencies believe that recognizing a temporal relationship is an effective and objective method for identifying CRA communications that are most likely to have influenced the shape or the existence of an agreement. Conversely, by not covering communications made at a time that is distant from or after the agreement, the final rule substantially reduces the potential that communications that are unrelated to an agreement will be covered without excluding communications that have the most direct effect on the agreement. Moreover, a temporal relationship focuses on the fact that in nearly all, if not all, cases CRA communications are made during the period in which the potential for an agreement

is discussed and the agreement is negotiated. Thus, a temporal relationship supports the purpose of the CRA Sunshine provisions, including the exemption in section 48(e)(1)(B)(iii), of identifying and exempting NGEPs that have not made CRA communications in an effort to obtain or negotiate a CRA agreement.

For these reasons, the final rule provides a time frame designed to recognize the connection between the communication and the agreement.

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To be deemed not to have had a CRA communication under section 48(e)(1)(B)(iii), a NGEF must not have had a CRA communication within 3 years prior to entering into the agreement in the case of oral or written communications with a Federal banking agency. The NGEF also must not have had within the 3 years prior to the agreement any written CRA communication with the relevant insured depository institution or any of its affiliates. In addition, the NGEF must not have had within the 3 years prior to the agreement any oral communication with the relevant insured depository institution or any of its affiliates about providing (or refraining from providing) comments or testimony to a Federal banking agency or comments to the institution's CRA public file where such communications occur in connection with a request to, or agreement by, the institution or affiliate to take any action that is in fulfillment of the CRA. Finally, the NGEF must not have had any other oral CRA communication with the relevant insured depository institution or any of its affiliates concerning the adequacy of the institution's CRA performance within one year prior to entering into the agreement.

The agencies selected the three year period for communications with an agency, certain types of discussions with an institution or affiliate about providing testimony or comments to an agency, and other written contacts with an institution or affiliate based on several considerations. In this regard, existing

regulations generally require an insured depository institution to maintain written comments in its CRA public file for a period of three years.<sup>13</sup> The agencies' examination schedules also generally call for the agencies to evaluate the CRA performance of large insured depository institutions every 3 years. Regulations issued by the Office of Management and Budget and applicable to Federal agencies also discourage any collection of information that would require regulated entities to retain records for more than three years.<sup>14</sup>

The agencies selected the one year period for oral communications with an insured depository or affiliate (other than those relating to agency comments or testimony under the circumstances described above) based on several other considerations. One consideration was that many commenters suggested a time period in the one year range. Also, a shorter time period for oral communications with an insured depository institution or affiliate recognizes that, as a practical matter, oral communications are harder to monitor and remember than written communications. The agencies believe, however, that insured depository institutions and affiliates are more likely to document and remember oral communications with a NGEP that concern providing comments or testimony to a Federal banking agency where such communications also involve a request to, or

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<sup>13</sup> See 12 CFR 25.43(a)(1) (OCC); 12 CFR 228.43(a)(1) (Board); 12 CFR 345.43(a)(1) (FDIC); and 12 CFR 563e.43(a)(1) (OTS).

<sup>14</sup> See 5 CFR 1320.5(d)(2)(iv).

agreement by, the institution or affiliate to take additional actions in fulfillment of the CRA. Accordingly, the agencies have included such oral communications in the three year period described above.

The agencies believe these time frames provide reasonable assurance that the communication and the agreement are not connected and would not impose an undue burden on the parties. Moreover, commenters indicated that where a CRA communication occurs it is most often occurs immediately before the parties enter into an agreement. This contact period is well within the time periods adopted by the rule.

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d. Additional Exemptions

A number of commenters requested that the Board exercise the authority granted by the CRA Sunshine provisions to provide exemptions for certain types of agreements that may involve a CRA communication.<sup>15</sup> In particular, commenters requested exemptions for law firms and consulting firms, trade associations, owners of real estate that enter into sale or lease agreements with banks, community development financial institutions (CDFIs), and participants in the secondary loan market such as government-sponsored enterprises.

The agencies believe that many of the concerns raised by these commenters are addressed by modifications made to the fulfillment, CRA communication and other sections of the rule. In addition, a wide range of agreements between insured depository institutions and affiliates and law firms will not be covered under the final rule because the definition of “nongovernmental entity or person” in the final rule excludes any person or entity that is acting as a representative of an insured depository institution or affiliate. (See section \_\_\_\_ .11.) Accordingly, many agreements between law firms and insured depository institutions and affiliates would not be considered covered agreements because the agreement provides that the law firm will be acting as a representative of the

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<sup>13</sup> See 12 U.S.C. 48(h)(3)(B).

institution or affiliate.

In order for agreements to be covered agreements, the NGEF must have had a CRA communication with an insured depository institution or affiliate that is a party to the agreement or an affiliate of a party to the agreement and the agreement must be made pursuant to, or in connection with, the fulfillment of the CRA, as described below. The agencies believe that most traditional consulting agreements that insured depository institutions and affiliates enter into will not meet both of these requirements.

CDFIs that are insured depository institutions or affiliates of insured depository institutions are not covered by the CRA Sunshine provisions to the extent that they have agreements with other insured depository institutions or affiliates.

CDFIs that are not insured depository institutions or affiliates thereof are considered NGEFs under the rule (see section \_\_.11.), and there appears to be no reason to provide a special exemption for this class of NGEFs. In light of the other changes and clarifications incorporated in the final rule, the Board also has not adopted any additional exceptions. The Board retains the authority to grant exemptions from the CRA communication provisions if experience in administering these provisions demonstrate that such action is appropriate.

4. Fulfillment of the CRA for purposes of the CRA Sunshine Provisions

The CRA Sunshine requirements of section 48 of the FDI Act apply only to covered agreements. To be a covered agreement, section 48(e)(1) requires that the agreement be made pursuant to, or in connection with, "the fulfillment of the Community Reinvestment Act." Section 48(e)(2) defines "fulfillment" for this purpose as "a list of factors that the appropriate Federal banking agency determines have a material impact on the agency's decision" to approve or disapprove an application for a deposit facility under section 803 of the CRA or to assign a rating to an insured depository institution under section 807 of the CRA.

In defining fulfillment for purposes of the CRA Sunshine provisions, the agencies proposed the lending, investment, and service activities enumerated in the agencies' CRA Regulations as the list of factors that have a material impact on the relevant agency decisions.<sup>16</sup> This list of factors is:

(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

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<sup>14</sup> 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).

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 a small insured depository institution, the lending and other activities described in the small insured depository institution performance standard of the CRA Regulations; and

(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.

The proposed rule also provided that an agreement was in fulfillment of the CRA if it called for any NGEP to provide or refrain from providing written or oral comments or testimony to any Federal banking agency concerning the

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.<sup>17</sup>

Some commenters suggested that this list of factors was too broad and covered normal business arrangements that were not intended to be covered by the CRA Sunshine provisions. In particular, commenters suggested that, by referring to a list of factors that includes all home mortgage loans wherever and to whomever made, the proposal could cover activities for which no CRA performance credit would ordinarily be granted to the lending institution.

A number of commenters also argued that the agencies should only consider an activity to be in fulfillment of CRA if the activity is itself “material” to the CRA performance rating of an insured depository institution or to an evaluation of its CRA performance in an application for a deposit facility. These commenters suggested, among other options, that an agreement be considered to be in fulfillment of CRA only if it involved loans in more than one of the assessment areas served by the insured depository institution, loans of significant amounts based on the size of

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<sup>15</sup> The CRA Regulations generally require the agencies to consider public comments and comments included in an institution’s CRA public file when evaluating an institution’s CRA performance. In addition, the CRA Regulations require the agencies to consider written or oral comments submitted to the agency when acting on applications for a deposit facility.

the institution, or activities that would change the CRA rating of the institution.

The CRA Sunshine statute specifically defines “fulfillment” to mean “a list of factors that the appropriate Federal banking agency determines have a material impact on the agency’s decision” to act on an application for a deposit facility or assign a CRA rating. Under the terms of the statute, the agency must identify factors that have a material impact. The statute determines the threshold of amounts of resources that are sufficient to trigger the CRA Sunshine requirements. For this reason, the agencies did not adopt the suggestion of commenters that the agencies modify the list of factors to include a measure of the size of an activity.

The agencies recognize, on the other hand, that the list of factors in the original proposal was very broad and could be read to cover activities that do not implicate the purposes of the CRA Sunshine provisions. To address this, the final rule has been amended to provide that performance of a listed activity, other than providing or refraining from providing CRA-related comments to an agency or providing comments that must be included in the institution's CRA public file, is considered to be in fulfillment of the CRA for purposes of the CRA Sunshine provisions only if the activity is of the type that is likely to receive favorable consideration by a Federal banking agency in evaluating the performance under the CRA of the insured depository institution that is a party or an affiliate of a party to the agreement.

This is intended as a general test that does not turn on whether or not the activity in fact receives credit at the next CRA performance examination or is considered as part of a review of CRA performance in a future application for a deposit facility. Instead, an insured depository institution or NGEF can make this judgment on the basis of general experience with the CRA performance review process for the particular type of insured depository institution. An insured depository institution is likely to receive favorable consideration for an activity if the activity (1) received favorable consideration at the institution's previous CRA performance examination, (2) would address a deficiency that an agency cited in the most recent public evaluation of the CRA performance of the institution, or (3) is of the type that is favorably considered by the agencies in reviewing the CRA performance of comparable insured depository institutions. For example, under item (3), an activity conducted by a small, wholesale or limited-purpose insured depository institution (as defined in the CRA Regulations) would likely receive favorable consideration if the agencies favorably consider such an activity when reviewing the CRA performance of other small, wholesale or limited-purpose institutions, respectively.

Home mortgage lending in low- and moderate-income neighborhoods in an insured depository institution's assessment area typically is considered favorably. On the other hand, home mortgage lending in middle- and upper-income

neighborhoods, while taken into account in determining the size and scope of an institution's lending activities under the CRA Regulations, generally does not receive favorable consideration. However, the context in which the insured depository institution operates may dictate otherwise. For example, this would be the case if the institution operates only in middle- and upper-income areas or makes loans only in high cost areas.

In focusing on activities that are likely to receive favorable consideration, the agencies recognize that there is a difference between the purpose of the CRA Regulations, which must broadly take account of the context in which an insured depository institution operates, and the purpose of the CRA Sunshine provisions. The agencies do not intend the list of factors under the CRA Sunshine provisions in any way to indicate any change in the information that the agencies review under the CRA Regulations or to affect in any way the manner in which examinations are conducted or CRA performance ratings given. Accordingly, section \_\_.4 specifically provides that the term “fulfillment of the CRA” is only defined for purposes of the CRA Sunshine regulation. In addition, as discussed above, section \_\_.1(c) provides that the final rule does not affect in any way the CRA, the CRA Regulations or any agency’s interpretations or administration of the CRA or CRA Regulations.

As noted above, the final rule also provides that the list of factors

representing fulfillment of the CRA for purposes of the CRA Sunshine provisions includes providing or refraining from providing oral or written comments or testimony to an agency concerning the performance under the CRA of an insured depository institution that is a party to an agreement or that is an affiliate of a party to an agreement. Providing or refraining from providing written comments concerning the performance under the CRA of an insured depository institution that is a party to an agreement or that is an affiliate of a party to an agreement where the comments must be included in the institution's CRA public file also is always a factor that represents fulfillment of the CRA. Providing oral or written comments or testimony to an agency concerning the adequacy of an institution's CRA performance or providing written comments that must be included in the institution's CRA public file are activities that are always considered to be in fulfillment of the CRA under the final rule, without regard to whether the communication comments favorably or unfavorably on the CRA performance of the institution.

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 avoid coverage under the Act by reaching an oral understanding, such as, for example, an 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.

Commenters generally supported the original proposal to exclude from the list of factors activities designed to ensure compliance with the 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.). Commenters generally agreed that inclusion of these activities in the list of factors could have an unintended and detrimental impact on compliance with and enforcement of the fair lending laws by, for example, discouraging agreements to hire "mystery shoppers" to test the institution's compliance with the fair lending laws or agreements to settle a fair lending complaint and improve fair lending performance. Accordingly, the list of factors has not been changed to include these or other activities.

#### 5. Value

An agreement is subject to the CRA Sunshine provisions 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 for under the agreement and does not require that these payments or loans actually be made to a party to the agreement.<sup>18</sup> The final rule follows the proposed rule in providing that 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, will be considered in determining whether an agreement meets the rule's dollar thresholds. However, the rule provides that 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 section \_\_.2(e)(2) of the rule and the discussion under section III.A.2.b. above concerning qualifying loans).

Under the final rule, 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 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

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<sup>16</sup> See 12 U.S.C. 1831y(e)(1)(A)(i).

may not coincide with the parties' fiscal years.

The final rule provides that the annual value of an agreement that does not have a fixed schedule of payments is considered to be the entire value of the agreement. (See section \_\_.2(e)(1).) Commenters were mixed in their view of how to determine the value of a multi-year agreement that does not specify when payments should be made. Some commenters believed that the annual value of these agreements should be determined by amortizing the total value over the life of the agreement, or by reference to actual disbursements, while others suggested that the entire value be credited to the first year of the agreement. The final rule credits the entire value of this type of agreement to the first year of the agreement. This approach is the easiest to calculate and is the least likely to cause an agreement unexpectedly to become a covered agreement.

The agencies requested comment on how to value 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. Commenters that addressed this issue suggested allowing the parties to estimate the value of the agreement in these cases or to assume that the agreement had no value.

In circumstances where an agreement does not specify the amount of payments, grants, loans or other consideration to be provided under the agreement,

the agencies believe that the parties must reasonably estimate the value of the agreement. The final rule allows insured depository institutions that choose to report a list of covered agreements to report the estimated value of the agreement at that time (see section III.B.3. below).

The following are examples of the value provisions of the rule. These examples, which are not included in the rule, illustrate only the application of the dollar thresholds of the rule, and assume that the agreement otherwise qualifies as a covered agreement.

Example 1: An insured depository institution enters into a written agreement with a small business investment company pursuant to which the institution will invest \$25,000 in the company. Since the agreement does not establish a schedule of payments, the entire \$25,000 is deemed to be provided in the first year. Accordingly, the agreement meets the dollar threshold criterion to be a covered 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 low- and moderate-income individuals during the next year. 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 value threshold criterion for a covered agreement under the proposed rule because the value of the agreement for purposes of the CRA Sunshine provisions does not depend on who receives payments or resources under the agreement.

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 rule if it were a separate agreement (see section \_\_\_\_\_.2(c)(2)). 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 NGEF 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 2001, \$8,000 in 2002, and \$11,000 in 2003. The agreement exceeds the dollar threshold criterion of the rule because the agreement provides for payments in excess of \$10,000 during 2003. 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.

## 6. Related Agreements Considered a Single Agreement

In two circumstances, section 48(e) 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.<sup>19</sup> The agencies received very few comments concerning the aggregation provisions of the proposed rule. Some commenters stated that the aggregation rules should be deleted or should apply only when necessary to prevent circumvention of the CRA Sunshine provisions. The agencies have retained the aggregation rules included in the final rule because the CRA Sunshine provisions require the aggregation of agreements in certain circumstances, and excluding the aggregation principles from the final rule would require institutions and NGEPs to consult both the statute and the rule to determine compliance with those provisions.

Other commenters requested clarification of certain aspects of the aggregation rules. Those matters are addressed below.

### a. Agreements entered into by the same parties

Under the final rule, 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

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<sup>19</sup> See 12 U.S.C.1831y(e)(1) and (2).

same NGEF 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 NGEF 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. The following examples illustrate this aggregation principle and assume that a CRA communication has occurred before each agreement.

Example 1: In November, 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 April of the next 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. 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 January of the following year, the institution and organization enter into a written agreement for the institution to make a \$5,000 CRA qualified investment in a 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 48(e)(1)(A)(ii) requires the aggregation of separate but “substantively related contracts” even where the contracts are entered into with different NGEPS.<sup>20</sup> 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

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<sup>18</sup> See 12 U.S.C. 1831y(e)(1)(A)(ii).

depository institution or any of its affiliates as “substantively related” if the contracts were negotiated in a coordinated 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 avoiding 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. The following examples illustrate this aggregation principle and assume that a CRA communication occurred before each contract.

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.

#### 7. Multiparty Agreements

The agencies requested comment on how the rule should apply in circumstances where a covered agreement involves several parties and a CRA communication has been made by or concerning only one of the parties. This issue arises where several NGEPS enter into a covered agreement with an insured depository institution and only one of the entities or persons has made a CRA communication or where a NGEPS has a CRA communication concerning one insured depository institution and subsequently enters into a covered agreement jointly with the institution and several other unaffiliated insured depository institutions. Several commenters indicated that the disclosure and reporting requirements of the rule should only apply to parties to a covered agreement that have engaged in a CRA communication.

The final rule provides that a NGEPS that is a party to a covered agreement that involves multiple NGEPS is not required to comply with the requirements of the rule if two requirements are met. (See section \_\_.3(d).) First, the NGEPS must not

have had a CRA communication concerning any insured depository institution or affiliate that is a party to, or an affiliate of a party to, the agreement. Second, no officer, employee or representative of the NGEF identified in section \_\_.3(b)(4) of the rule may have knowledge at the time the agreement is entered into that another NGEF that is a party to the agreement has had a CRA communication. Similarly, an insured depository institution or affiliate that is a party to a covered agreement that involves multiple insured depository institutions or affiliates is not subject to the disclosure and reporting requirements if (1) no NGEF that is a party to the agreement has had a CRA communication with or concerning the institution or affiliate, and (2) no officer or employee of the institution or affiliate identified in section \_\_.3(b)(3)(i) has knowledge that the NGEF has had a CRA communication with another insured depository institution or affiliate that is a party to the agreement. In the context of multiparty agreements, covering parties that have knowledge of a CRA communication by other parties to the agreement assures that parties do not avoid the requirements of the CRA Sunshine provisions by refraining from making a CRA communication because the party is aware that the communication has already been made by another party.

**B. Disclosure of Covered Agreements.**

Section 48(a) 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.<sup>21</sup> The disclosure requirements of section 48 apply only to covered agreements entered into after November 12, 1999.<sup>22</sup>

#### 1. Disclosure to the Public

Section \_\_\_\_ .6 of the final 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. A covered agreement must be made available during the entire term of the agreement and the 12 month period following expiration of the agreement, without regard to whether funds are paid or received under the agreement during the year in which a request for the agreement is made. A party may charge the requestor for the costs of copying and sending an agreement, so long as the fees are reasonable.

Commenters generally supported having maximum flexibility to make covered agreements available to the public and to charge requestors reasonable fees to cover the costs of making covered agreements available.<sup>23</sup> Accordingly, the final

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<sup>19</sup> 12 U.S.C. 1831y(a).

<sup>20</sup> The rule includes special transition provisions governing the disclosure of covered agreements entered into after November 12, 1999, but before the effective date of the rule. See section III.D below.

<sup>21</sup> Some commenters questioned whether a party to a covered agreement may also charge a requestor for the cost of searching its records for covered agreements. The final rule, like the provisions of the CRA Regulations governing the public availability of information in an insured depository institution's CRA public file,

rule does not prescribe any particular method a party must employ in making a covered agreement available to the public. The agencies expect that parties to covered agreements will employ methods of making agreements available that will not require requestors to go through unreasonable efforts to obtain the agreements. For example, a party may make a covered agreement available to any individual or entity by mailing it to the requestor. A party also may 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 at an office within that area. In addition, a party may choose to publish a list of its covered agreements and provide the full text of an agreement only to any individual or entity that requests a particular agreement identified in the list.

Several commenters requested clarification concerning how a party should comply with the statute's public disclosure requirement when a covered agreement consists of or involves multiple documents. For example, commenters questioned whether all of the supporting documentation relating to a loan or grant must be disclosed. The final rule follows the statute and requires only that the written contract, arrangement, or understanding be disclosed and does not require the disclosure or supporting documentation. When the covered agreement consists

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does not authorize the recovery of search costs. See 12 CFR 25.43 (OCC); 12 CFR 228.43 (Board); 12 CFR 345.43 (FDIC); 12 CFR 563e.43 (OTS).

of a single document, that document must be disclosed. When the covered agreement consists of or is reflected by multiple documents, the party may disclose all of the written documentation relating to the agreement or only those documents that set forth the primary terms of the agreement, including (1) the names and addresses of the parties to the agreement; (2) the amount of any payments, fees, loans, or other consideration to be made or provided by any party to the agreement; (3) any description of how the funds or other resources provided under the agreement are to be used; and (4) the term of the agreement (if the agreement establishes a term).

Several commenters requested that the rule establish a fixed period of time, such as 30 days, within which a party must respond to a request for a covered agreement. The final rule follows the text of section 48 and does not specify a time period for responding to public requests for an agreement. The agencies expect that the parties will promptly respond to requests from the public for covered agreements.

As with the proposed rule, the final rule gives discretion to an insured depository institution to fulfill its public disclosure obligation by placing a copy of a covered agreement in its CRA public file and making it available in accordance with the procedures set forth in the CRA Regulations relating to public files.

Several commenters recommended that affiliates of insured depository institutions

that are parties to covered agreement also be permitted to disclose a covered agreement to the public by placing it in the CRA public file of an affiliated insured depository institution. The final rule allows affiliates to fulfill their disclosure obligations in this manner so long as the affiliated insured depository institution then makes the agreement publicly available in accordance with the rules governing public disclosure of information in the CRA public file. When an affiliate relies on the CRA public file of an insured depository institution affiliate to fulfill the disclosure obligations of the rule, it must refer members of the public that request a copy of the affiliate's covered agreements to the affiliated insured depository institution.

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The proposed rule provided that the parties' obligation to make a covered agreement publicly available terminated 12 months after the end of the term of the agreement, and the agencies requested comment on whether this time period should be shorter or longer. Several commenters stated that the time period proposed was reasonable, while others advocated a shorter time period or no time period at all after the term of an agreement. In order to fulfill the purposes of section 48, the agencies believe that the parties to a covered agreement must make the agreement available to the public for a reasonable period of time. After reviewing the comments received, the final rule continues to require covered agreements to be available to the public for a period of 12 months after the term of the agreement.

## 2. Treatment of Confidential and Proprietary Information

Section 48(h)(2)(A) directs the agencies to ensure that their implementing regulations “do not impose undue burden on the parties [to a covered agreement] and that proprietary and confidential information is protected.”<sup>24</sup> This provision must be read in harmony with section 48(a), which requires that a covered agreement “shall be in its entirety fully disclosed, and the full text thereof made available . . . to the public.”<sup>25</sup> Other provisions of section 48 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.

The proposed rule provided that a party could withhold information contained in a covered agreement from public disclosure only if the party received a determination from the relevant supervisory agency that such information could be withheld by the agency under the Freedom of Information Act (5 U.S.C. 552) (FOIA). The agencies noted, moreover, that the Act’s directive that terms of covered agreements be made available to the public could require disclosure of some types of information that an agency might normally be able to withhold from disclosure under the FOIA.

The agencies requested comment on a number of issues associated with

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<sup>22</sup> 12 U.S.C. 1831y(h)(2)(A).

<sup>23</sup> 12 U.S.C. 1831y(a).

the disclosure of potentially confidential and proprietary information in covered agreements, including the likelihood that covered agreements would contain confidential and proprietary information, whether FOIA standards should be applied in determining whether information can be withheld, and whether alternative procedures could be adopted.

Commenters indicated that covered agreements may often contain information they ordinarily consider to be confidential or proprietary, such as information about new and innovative programs an insured depository institution is offering, underwriting standards for loans, competitive pricing information, or personal data that would otherwise be protected under applicable privacy rules. Some commenters expressed concern that the requirement to disclose publicly covered agreements could harm their competitive position or dissuade insured depository institutions and their affiliates from entering into agreements with NGEPs that are in fulfillment of the CRA.

Many commenters indicated that requesting a determination of whether information can be withheld from disclosure from the relevant supervisory agencies would be burdensome and time consuming. They suggested the agencies streamline the process for obtaining such determinations or, alternatively, provide a list of information that a party could withhold from disclosure without obtaining an agency determination. Many commenters expressed support for using the FOIA as the

standard for determining whether information can be withheld from public disclosure.

In light of the comments received, the agencies have revised the procedures for withholding information from public disclosure to clarify the process for determining whether information can be withheld from public disclosure and limit the circumstances in which the relevant supervisory agency is involved in making the determination. As discussed above, section 48 directs that certain information in covered agreements be disclosed. Accordingly, the final rule requires the disclosure of the following information contained in a covered agreement:

- The names and addresses of the parties to the agreement;
- The amount of any payments, fees, loans, or other consideration to be made or provided by any party to the agreement;
- Any description of how the funds or other resources provided under the agreement are to be used;
- The term of the agreement (if the agreement establishes a term); and
- Any other information that the relevant supervisory agency determines is not properly exempt from public disclosure.

The agencies anticipate making a determination that additional information in a covered agreement must be disclosed only in response to a specific request for such a determination. (See section \_\_.6(b)(4).) Any such request must be in writing and submitted to the relevant supervisory agency in accordance with its rules concerning the availability of information.<sup>26</sup>

The final rule allows a party to a covered agreement to withhold from public disclosure any information not described above if the party believes the relevant supervisory agency could withhold that information under The FOIA. There is no requirement that the party obtain a determination from the relevant supervisory agency that such information can be withheld. Standards the agencies use to determine whether they can withhold information in their records from public disclosure records are contained in subsection (b) of The FOIA (5 U.S.C. 552(b)).

With regard to the disclosure of information the agencies receive under the final rule, including copies of covered agreements and annual reports, section \_\_.8 provides that such information will be made available in accordance with The FOIA and the rules regarding the availability of information of the relevant supervisory agency.

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<sup>24</sup> See, 12 CFR Part 4 (OCC); 12 CFR Part 261 (Board); 12 CFR Part 309 (FDIC); 12 CFR Part 505 and 31 CFR Part 1 (OTS).

### 3. Filing of Covered Agreement with Agencies

Section 48(a) also requires each party to a covered agreement to make the agreement available to the appropriate agency. The proposed rule required each insured depository institution or affiliate that is a party to a covered agreement to file a complete copy of the agreement with each relevant supervisory agency within 30 days after entering into the agreement. NGEPs were obligated to file a covered agreement with a relevant supervisory agency within 30 days of receiving a request from the agency.

Some commenters requested that the agencies allow insured depository institutions and affiliates, like NGEPs, to make a covered agreement available to the relevant supervisory agency only upon an agency's request. Others suggested that the rule allow insured depository institutions and affiliates the option of filing with the agencies either copies of covered agreements or a list of their covered agreements. Commenters also suggested that the agencies allow insured depository institutions and affiliates to file covered agreements with the agencies on a periodic basis, such as once each quarter or once each year, rather than 30 days after entering into each agreement, or by placing agreements in an institution's CRA public file.

The agencies believe that it is important for the agencies to receive notice when parties enter into a covered agreement and to be able to gain prompt access to the covered agreement. Such notice and access allow the agencies to monitor

compliance by the parties with the disclosure and reporting requirements of section 48 and respond to requests from interested members of the public for copies of, or information related to, covered agreements. The agencies, however, have sought to streamline the agency disclosure obligations imposed on insured depository institutions and affiliates in a manner consistent with these principles.

In particular, the final rule allows an insured depository institution or affiliate to fulfill its agency disclosure obligation by filing, within 60 days after the end of each calendar quarter, either (1) a complete copy of each covered agreement entered into during the calendar quarter, or (2) a list of all covered agreements entered into during the calendar quarter. If the institution or affiliate elects to file a list of agreements with the agency, the list must provide the following information concerning each covered agreement entered into during the relevant calendar quarter:

- The name and address of each party to the agreement;
- The date the agreement was entered into;
- The estimated total value of all payments, fees, loans and other consideration to be provided by the institution or any affiliate under the agreement; and
- The date the agreement terminates.

An institution or affiliate that files a list of covered agreements with the relevant supervisory agency must provide any relevant supervisory agency a complete copy

of any covered agreement referenced in the list within 7 calendar days of receiving a request from the agency for the agreement. The rule allows an agency to request a copy of an agreement referenced in a list for up to 36 months after the term of the agreement. The final rule also continues to allow insured depository institutions and affiliates that are parties to the same covered agreement to file jointly the appropriate documents with each relevant supervisory agency.

NGEPs that are parties to covered agreements must make a complete copy of each agreement available to any relevant supervisory agency on the agency's request. The NGEP must provide the requesting agency with a copy of the agreement within 30 calendar days of the agency's request. As with disclosure to the public, a NGEP's obligation to make an agreement available to an agency terminates 12 months after the end of the agreement's term.

Whenever an insured depository institution, affiliate or NGEP files a copy of a covered agreement with an agency—either at the agency's request or, in the case of an institution or affiliate, as part of a quarterly filing—the institution, affiliate or NGEP must provide the agency with a complete copy of the agreement. If the party proposes to withhold information contained in the agreement, the party must also file a public version of the agreement that excludes such information and provide an explanation justifying the exclusions under the FOIA. The agencies will not keep information confidential under the FOIA that a party would be required to

disclose to the public under section 48. Accordingly, the parties may not propose to withhold, and the agencies will not withhold under the FOIA, the types of information in a covered agreement that a party must make publicly available under section \_\_\_\_.6(b)(3) of the rule.

#### 4. Relevant Supervisory Agency

The final rule continues to use the term “relevant supervisory agency” to identify the appropriate agency for a particular covered agreement. The agencies have moved the definition of this term from section \_\_\_\_.6 of the rule to the general definitions section (section \_\_\_\_.11) because the term is used in multiple sections of the rule. The agencies otherwise have made no substantive changes to the definition. Under the rule, the “relevant supervisory agency” for a covered agreement 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 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.

Under the definition, 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.

Several commenters expressed concern that requiring filings with multiple agencies under these circumstances could increase the burden of complying with the statute. Some commenters asserted that the rule should allow all filings to be made with one regulatory body, such as the Federal Financial Institutions Examinations Council, and asserted that such a procedure would reduce burden or help ensure the consistent review of confidential and proprietary information that may be contained in a covered agreement.

Section 48 directs that the “appropriate Federal banking agency” receive agreements and annual reports under the statute. The agencies continue to believe that the rule properly identifies the appropriate Federal banking agency for a covered agreement by ensuring 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.

### **C. Annual Reports**

The Act requires each NGEF, insured depository institution, or affiliate of an insured depository institution that is a party to a covered agreement to file a report at least annually concerning disbursement, receipt and use of funds under the covered agreement. Section \_\_.7 of the final rule implements these annual reporting requirements. The rule’s annual reporting obligations apply only to

covered agreements entered into on or after May 12, 2000.<sup>27</sup>

The proposed rule required each party to a covered agreement to file an annual report for the fiscal year that the agreement was entered into and each subsequent fiscal year during the term of the agreement. The proposal also provided that a NGEP did not have to file an annual report for any fiscal year during the term of a covered agreement if the NGEP did not receive any funds under the covered agreement in that year.

Commenters generally supported the reporting exception provided to NGEPs. Several commenters requested that the agencies also provide insured depository institutions and affiliates a similar exception from the annual reporting requirement for years in which an institution or affiliate does not make or receive payments, fees, or loans under a covered agreement.

Section 48 requires a NGEP that is a party to a covered agreement to file a report at least once a year providing “an accounting of the use of funds received pursuant to” the covered agreement during the preceding 12-month period.<sup>28</sup> The Act requires an insured depository institution or affiliate that is a party to a covered agreement to file an annual report concerning funds or other resources provided or received by the institution or affiliate under the agreement and any

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<sup>25</sup> The rule includes special transition provisions governing the filing of annual reports that relate to the fiscal year of any party to a covered agreement that ends prior to January 1, 2001. See section III.D below.

<sup>26</sup> See 12 U.S.C. 1831y(c)(1).

loans, investments, or services provided by any party under the agreement during the preceding 12-month period.<sup>29</sup>

In light of these requirements and the comments received, the final rule provides that a NGEP must file an annual report for each fiscal year in which the NGEP receives or uses funds or other resources under a covered agreement. Because the statute focuses on both the receipt and use of funds by a NGEP under a covered agreement, the agencies have modified the rule to require a NGEP to file an annual report for any fiscal year in which the NGEP uses funds received under a covered agreement, even if the funds were not received in that year. An insured depository institution or affiliate must file an annual report for a fiscal year if the institution or affiliate (1) made or received any payments, fees, or loans under a covered agreement during the fiscal year, or (2) has data that must be reported on loans, investments, and services provided by any party to the agreement during the fiscal year.

These requirements ensure that a party files an annual report for each year that the party has information that must be provided to the relevant supervisory agency, and that an annual report is not filed for any fiscal year where the relevant party has no information that must be reported. The agencies note that a NGEP must file an annual report for a fiscal year if it received or used any funds or other

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<sup>27</sup> See 12 U.S.C. 1831y(b).

resources under the covered agreement during the fiscal year, even if the amount of funds or resources received or used are less than the value thresholds discussed above for defining a covered agreement. Any annual report must be filed with each relevant supervisory agency for the covered agreement.

The following examples illustrate these reporting requirements:

Example 1: A savings association and a community development organization enter into a 3-year covered agreement pursuant to which the association will invest \$100,000 in the organization. The savings association in fact provides \$95,000 to the organization in the first year of the agreement and the remaining \$5,000 to the organization in the second year of the agreement, and the organization uses the funds in the fiscal years that they are received. The organization must file an annual report with the OTS for each of the first two fiscal years of the agreement because the organization received and used funds under the agreement in those years. The savings association also must file an annual report for each of the first fiscal two years of the agreement since it made payments in those years. Because the organization does not receive or use funds under the covered agreement during the third year of the agreement, the organization and savings association would not be required to file an annual report with the OTS for that year.

Example 2: A state nonmember bank enters into a covered agreement with a community organization to make \$1 million in community development

grants in the community over the next 5 years. The community organization will not receive any funds or other resources under the agreement (including under the grants as they are made), nor will it provide any services under the agreement. Both parties must make the covered agreement available to the public and the FDIC. In addition, the state nonmember bank must file an annual report for any year in which it makes payments 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 and uses no funds or resources under the agreement.

1. Annual Reports Filed by NGEPs

Section 48(c) requires each NGEP that is a party to a covered agreement to file a report at least annually with the appropriate banking agency providing an accounting of how the NGEP used any funds received under the covered agreement during the previous year. The proposed rule required the annual report filed by a NGEP to set forth (1) the name and mailing address of the NGEP, (2) information sufficient to identify the covered agreement for which the report is filed, such as by providing the names of the parties to the agreement and the date it was entered into or by providing a copy of the agreement, and (3) the amount of funds received by the NGEP under the covered agreement during the fiscal year. The final rule retains these information requirements.

a. Itemized List of Uses of Funds

Section 48(c) requires that the annual report of a NGEF provide a detailed, itemized accounting of how the NGEF used during the previous year any funds or resources received under the covered agreement. The proposed rule required the accounting to be provided in one of two ways--either a description of the specific purpose or purposes for which the funds were used, or an itemized list of the amount of general purpose funds used for pre-defined expense categories. The proposed rule required a NGEF to use the specific purpose reporting method for any funds or other resources that the NGEF received and allocated for a specific purpose. Under the specific purpose reporting method, the NGEF would provide in its annual report (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.

For funds or other resources that were used for general or unspecified purposes, the proposed rule required the NGEF to report the amount of funds used during the fiscal year for each category of expenses included in the detailed, itemized list set forth in section 48(c)(3). These categories required the NGEF to report the aggregate 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.

Commenters generally supported the itemized list and recommended that the agencies not use their statutory authority to expand the list of expense categories included in section 48(c)(3). The comments received concerning the proposed specific purpose reporting method were mixed. Some commenters supported the streamlined reporting procedures for specific purpose funds because they believed it would require the reporting of less information than the itemized list of expenses. Some commenters that supported this reporting method requested that the agencies provide NGEPS with the option of using the specific purpose reporting method or the detailed itemized list to report the use of specific purpose funds.

Several commenters opposed the specific purpose reporting method on the basis that section 48(c) does not provide for this type of reporting. In addition, some commenters expressed concern that the proposed rule's definition of specific purpose funds was too broad or unclear or requested additional guidance on when a NGEPS receives and uses funds or other resources for a specific purpose.

Section 48(c)(1) requires a NGEPS to provide annually "an accounting of the use of funds received pursuant to each [covered] agreement during the preceding 12-month period."<sup>30</sup> Section 48(c)(3) provides that this annual accounting "shall

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<sup>28</sup> 12 U.S.C. 1831y(c)(1).

include a detailed, itemized list of the uses to which such funds have been made, including compensation, administrative expenses, travel, entertainment, consulting and professional fees paid, and such other categories, as determined by regulation by the appropriate Federal banking agency.”<sup>31</sup> The final rule implements these requirements by providing that the annual report of an NGEF must provide a detailed, itemized list of how any funds or other resources received by the NGEF at any time under the covered agreement were used during the fiscal year using the categories of expenses included in section 48. Unlike the proposal, the list must disclose how the NGEF during the fiscal year used any funds or resources received under the covered agreement, including funds or resources that were received in a previous fiscal year but that were not used in that fiscal year. The agencies have modified the rule in this way to more closely track the provisions of section 48.

Under section 48 and the rule, the itemized list of expenses 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;

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<sup>29</sup> 12 U.S.C. 1831y(c)(3).

- Entertainment expenses;
- Payment of consulting and professional fees; and
- Other expenses and uses (specify expense or use).

The annual report may reflect the total amount of funds from all sources that the NGEF used during the fiscal year for the types of expenses listed above. The agencies may determine from this and other information included in the annual report the proportion of funds that the NGEF received under the covered agreement that were used for each category of expenses listed above. If a NGEF uses funds under a covered agreement for certain categories of expenses, such as “travel expenses,” the annual report need only reflect the amount used for that category.

The agencies also believe that it is appropriate and consistent with the statute to allow a NGEF, where possible, to provide a more detailed accounting of how it used funds received under a covered agreement. A more detailed accounting can be provided when a NGEF allocates and uses funds received under a covered agreement for a specific purpose that is more limited than the categories of expenses listed above, i.e., it is for a specific expense in one of the categories listed above.

A specific purpose would not include a general statement that funds were received, for example, for services rendered or to fund a general program or to fund a project that involved spending in multiple categories from the more detailed list.

Instead, as explained below, the final rule clarifies that this reporting option is available only if the NGEF allocated and used the funds received under the agreement for a purpose that is at least as specific and limited as a category of expenses in the itemized list, such as to purchase a computer or to fund a specific trip.

Accordingly, the final rule allows a NGEF that allocates and uses funds received under a covered agreement for a specific purpose to report how it used such funds by (1) using the detailed, itemized list, or (2) stating the amount received and used for the specific purpose and providing a brief description of the specific purpose. In the event a NGEF chooses to use the more specific reporting option, the NGEF must use the detailed, itemized list to report the use of any funds that were not allocated and used for a specific purpose.

The final rule includes examples illustrating these reporting provisions. (See section \_\_.7(d)(5).) The first example involves a NGEF that receives \$15,000 under a covered agreement and uses these funds to support its general operations during the fiscal year. In these circumstances, the NGEF's annual report must state that it received \$15,000 during the fiscal year under the agreement and provide the total amount of funds and resources that the NGEF used during the fiscal year for each category of expenses included in the detailed, itemized list (i.e., for compensation, administrative, travel and entertainment expenses, consulting and professional fees, and other expenses and uses).

The second example involves an organization that receives \$15,000 under a covered agreement and allocates and uses these funds during the fiscal year to purchase computer equipment to support its activities. Because the organization allocated and used the funds for a purpose that is more narrow and limited than the categories of expenses in the itemized list, the organization would have the option of reporting either the total amount it used during the year for each type of expense in the itemized list of expenses described above, or a statement that it used the \$15,000 to purchase computer equipment.

The third example involves a group that receives funds under a covered agreement and uses some of these funds during the fiscal year for a specific purpose (to fund a particular business trip) and some of the funds for other purposes. Since the group did not use all of the funds for a specific purpose, the group's annual report must provide the amount that the group used during the year for each category of expenses in the itemized list. The group also could report that it allocated and used a specified portion of the funds for the business trip and briefly describe the trip.

b. Use of Other Reports

As noted above, section 48(h)(2)(A) directs the agencies to ensure that their regulations implementing section 48 “do not impose an undue burden on the parties.”<sup>32</sup> The Conference Report for the Act also indicates that the agencies

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<sup>30</sup> 12 U.S.C. 1831y(h)(2)(A).

should allow reporting parties to use reports prepared for other purposes to fulfill the annual reporting requirements.<sup>33</sup> Accordingly, the final rule does not require that a NGEF's annual report be prepared on a special form or in a particular format. Instead, the final rule provides that a NGEF's annual report may consist of or incorporate reports or documents that the NGEF 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.

The preamble to the proposed rule indicated that the agencies had reviewed several tax forms commonly filed by tax-exempt nonprofit organizations and noted that Internal Revenue Service Return of Organization Exempt From Income Tax on Form 990 requires the filer to provide information that is at least as detailed, and in some cases more detailed, than the list of expenses required under section 48(c). Accordingly, the preamble to the proposed rule specifically indicated that NGEFs could use a completed Form 990 to provide the information required by the rule.

Commenters expressed overwhelming support for allowing NGEFs to use documents prepared for other purposes to fulfill the rule's reporting requirements. Commenters in particular praised the agencies for allowing NGEFs to use a Form 990 to fulfill their reporting obligations and many requested that the agencies

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<sup>31</sup> See H.R. Conf. Rep. No. 106-434 at 179 (1999).

incorporate this guidance in the text of the final rule. In response to these requests, the rule expressly allows a NGEP to use a Form 990 to provide the information required by the rule and includes an example illustrating how a NGEP could use a Form 990 to provide the expense information required by the rule. (See section \_\_.7(d)(3) and (d)(5)(i).)

Some commenters also requested that the agencies clarify whether a NGEP could use other tax forms, such as Short Form Return of Organization Exempt From Income Tax on Form 990EZ, to fulfill its annual reporting obligation. The final rule continues to provide that the annual report of a NGEP may consist of or incorporate any report or Federal or state tax form so long as the documents submitted, when taken as a whole, contain all of the information required by the rule. Accordingly, a NGEP could incorporate a copy of an IRS Form 990EZ in its annual report. However, unless the form contains all the information required by the rule, the NGEP must supplement the form with the additional information necessary to fulfill the rule's reporting requirements.

c. Consolidated Annual Reports Permitted

The proposed rule permitted a NGEP that is a party to 5 or more covered agreements to file a single consolidated report covering all of the NGEP's covered agreements. The agencies requested comment on whether consolidated reports should be permitted when a NGEP is party to 2 or more covered agreements. Commenters generally expressed support for permitting a NGEP to file

consolidated reports when it is a party to 2 or more agreements, and the final rule makes that change.

A NGEF's consolidated report must identify the NGEF filing the report and each agreement covered by the report. In addition, in order to facilitate the tracking of payments under covered agreements, the final rule requires that any consolidated annual report filed by a NGEF indicate the amount the NGEF received under each covered agreement included in the report during the fiscal year. 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. The rule includes an example of the type of information that must be included in a consolidated annual report filed by a NGEF. (See section \_\_.7(d)(5)(iv).)

## 2. Annual Reports Filed by Insured Depository Institutions and Affiliates

The annual reporting requirements for insured depository institutions and affiliates are largely specified in section 48(b) and the final rule, like the proposal, includes these requirements. 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) 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 NGEF 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 another party.

These informational requirements track those established by the statute.

The rule allows an insured depository institution and an affiliate that are parties to the same covered agreement to file a single, consolidated report for the agreement. The proposed rule also allowed 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. To reduce burden and in response to comments, the final rule allows insured depository institutions or affiliates that are

a party to 2 or more covered agreements to file a consolidated annual report.

The proposed rule would have permitted the consolidated report of an insured depository institution or affiliate to provide aggregate data on the amount of payments, fees and loans provided and received by the institution or affiliate under all agreements included in the report, and on the loans, investment and services provided by the other parties to all of the agreements included in the report. In order to facilitate the tracking of payments made by insured depository institutions and affiliates under covered agreements, the final rule requires that any consolidated report filed by an institution or affiliate state the amount of payments, fees, and loans provided by the institution or affiliate under each covered agreement included in the report. The final rule continues to allow a consolidated report to provide aggregate information concerning any payments, fees and loans received by the institution or affiliate under all of the agreements included in the report, and concerning any loans, investments and services provided by other parties to the agreements included in the report.

### 3. When and Where Must Annual Reports Be Filed

The final rule adopts the approach for filing annual reports taken in the proposed rule and provides that each party to a covered agreement generally must prepare and file an annual report with each 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. In order to provide maximum flexibility,

the final rule also permits a party to elect to use the calendar year as its fiscal year for purposes of the rule. Using a fiscal year reporting period permits a party to coordinate preparation of its annual reports with other documents or reports that typically are prepared on a fiscal year basis. Commenters generally supported this approach and the agencies have made no changes to the proposed rule.

As in the proposal, 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. Some commenters requested additional time to prepare and file annual reports. The agencies believe allowing 6 months for the filing of annual reports gives the parties to a covered agreement a reasonable amount of time to gather the information necessary from the previous fiscal year and prepare the report. In addition, the time period is similar to the time period that parties have to prepare tax forms and annual reports relating to the previous fiscal year. For example, IRS rules generally require an IRS Form 990 to be filed by the 15<sup>th</sup> day of the 5<sup>th</sup> month after the end of an organization's fiscal year.

Consistent with section 48(c)(2), the rule allows a NGEP to fulfill its filing requirement by providing its annual report to the insured depository institution or affiliate that is a party to the agreement. In response to comments, the agencies have revised the rule to allow a NGEP up to 6 months (rather than 5) after the end of its fiscal year to provide a copy of its annual report to the appropriate insured depository institution or affiliate. Any NGEP that uses this filing option must

instruct the institution or affiliate to file the report with all of the relevant supervisory agencies on behalf of the NGEF. An insured depository institution or affiliate that receives an annual report from a NGEF in this manner must forward it to the relevant supervisory agencies within 30 days. This procedure 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 NGEF may not.

#### **D. Effective Dates of Disclosure and Reporting Requirements**

As discussed above, the disclosure provisions of section 48 apply to all covered agreements entered into after November 12, 1999, and the annual reporting provisions apply to all covered agreements entered into on or after May 12, 2000.

##### **1. Agreements that are Amended or Renewed after Statutory Dates.**

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 in accordance with the rule's requirements if the agreement meets the criteria to be a covered agreement.

Example: An insured depository institution and a community organization entered into a written agreement in January 1999 that calls for the institution to place an ATM in the local community by January 2001. In September 2000, the parties entered 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, each party must disclose the modified agreement in accordance with the rule and the insured depository institution must file any annual reports required by the rule concerning the agreement. (The organization would not be required to file an annual report because it does not receive any funds or resources under the agreement.)

## 2. Transition Rules

Section \_\_\_\_.10 of the final rule contains special transition provisions governing the disclosure and reporting for covered agreements that were entered into after the dates set forth above, but before April 1, 2001, the effective date of the final rule.

### a. Disclosure to Public

The final rule provides that a covered agreement that was entered into after November 12, 1999, and that terminates before April 1, 2001, the effective date of the rule, must be made publicly available in accordance with the procedures in section \_\_\_\_.6 of the rule until April 1, 2002, one year after the effective date of the rule. The agencies believe this requirement provides the public with a reasonable opportunity to obtain copies of the agreements consistent with the requirements of section 48. Parties to such covered agreements are not required to make the agreements available to the public until the final rule becomes effective.

b. Disclosure to Relevant Supervisory Agency

The final rule requires a NGEF to make any covered agreement that was entered into after November 12, 1999, and that terminates prior to April 1, 2001, available to the relevant supervisory agency upon request until April 1, 2002. Insured depository institutions and affiliates that are a party to any such agreement must make the agreement available to the relevant supervisory agency by June 30, 2001, by providing the agency either a copy of the agreement or a list identifying the agreement in accordance with section \_\_.6(d) of the rule.

c. Annual Reporting

The final rule also includes a special transition rule for annual reports that relate to fiscal years that end on or before December 31, 2000. Under this provision, if an insured depository institution, affiliate or NGEF is a party to a covered agreement that was entered into between May 12, 2000, and December 31, 2000, and has a fiscal year that ends within that period, the institution, affiliate or NGEF must file an annual report concerning the covered agreement with the relevant supervisory agency by June 30, 2001, relating to that fiscal year.<sup>34</sup> The annual report must provide the information described in section \_\_.7 of the rule. For any fiscal year that ends after December 31, 2000, the party would follow the

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<sup>34</sup> A NGEF may comply with this requirement by providing a copy of the annual report by June 30, 2001, to an insured depository institution or affiliate that is a party to the agreement in accordance with section \_\_.7(f)(2).

reporting procedures in section \_\_\_\_.7 of the rule.

Example. On May 30, 2000, a NGEF and insured depository institution entered into a covered agreement for the institution to make a grant of \$30,000 in two \$15,000 installments. The first installment was made on June 15, 2000 and the second on December 15, 2000. The fiscal year of the NGEF ended on June 30, 2000. The NGEF is required to file an annual report for its fiscal year that ended June 30, 2000, no later than June 30, 2001. This report would reflect the June 15, 2000, payment received by the NGEF. Under section \_\_\_\_.7 of the rule, the NGEF would then file a second annual report by December 31, 2001, for its fiscal year ending June 30, 2001. This second annual report would reflect the December 15, 2000, payment

#### **E. Compliance Provisions**

The final rule makes no substantive changes to the compliance provisions that were proposed. Section 48(g) specifically provides that nothing in section 48 authorizes the agencies to enforce the provisions of any covered agreement. The proposed rule incorporated this provision and the final rule retains it. (See section \_\_\_\_.9(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 NGEFs are private matters between the parties and are not enforced by the agencies.

Some commenters objected that the compliance provisions in section

\_\_\_\_.9 (a) through (c) only apply to NGEPs and do not apply to insured depository institutions and affiliates. The agencies may enforce compliance by insured depository institutions and affiliates with the disclosure and reporting requirements of section 48 using the cease and desist and other enforcement powers granted in section 8 of the FDI Act.<sup>35</sup> 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 NGEPs that are parties to a covered agreement. Section 48(f) instead includes special compliance provisions applicable to NGEPs that are party to a covered agreement.<sup>36</sup>

Under these provisions, the material and willful failure of a NGEp to

comply with section 48 may cause the related covered agreement to be unenforceable. In particular, under the section 48(f)(1), if the appropriate agency determines that a NGEp has willfully failed to comply with section 48 in a material way, and the NGEp does not comply with the law after receiving notice and a reasonable period of time to correct the area of noncompliance, the agreement thereafter is unenforceable by operation of section 48.

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<sup>32</sup> See 12 U.S.C. 1818.

<sup>33</sup> Other Federal statutes outside the banking laws also may provide for penalties if an insured depository institution, affiliate, or NGEp fails to comply with the agency disclosure and reporting requirements of section 48 or includes false information in a filing made with an agency under section 48. See, e.g. 18 U.S.C. 1001.

Consistent with section 48(f)(3), the rule provides that inadvertent or de minimis errors in reports or other documents filed with an agency under the rule will not subject the filing party to any penalty. The rule requires the agencies to provide a NGEP written notice and an opportunity to respond before determining the NGEP has not complied with the rule, and allows the NGEP at least 90 days to correct a willful and material violation.

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 interpretation that is most consistent with the language and purpose of the Act. The agencies note that an alternative construction could encourage NGEPs 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 NGEP, the appropriate agency may assist the institution or affiliate in identifying a successor NGEP to assume the responsibilities of the NGEP under a covered agreement that has become unenforceable.

Section 48(f)(1)(B) 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, section 48 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.

## **F. Other Definitions and Rules of Construction**

### **1. Nongovernmental Entity or Person**

Section 48 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 “NGEP” instead of the phrase “nongovernmental entity or person.” Some commenters requested that the agencies exclude certain types of entities or organizations from the definition of NGEP, including government-sponsored enterprises, credit unions, and quasi-public entities.

The final rule adopts the definition of nongovernmental entity or person as proposed. The agencies believe this definition properly identifies those entities and persons that are not governmental entities and persons and, therefore, are within the meaning of the statutory term “nongovernmental entity or person.” Under the rule, a NGEP means 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 NGEF 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 not be considered a NGEF under the rule, unless the entity independently qualified for an exclusion.

The final rule also does not treat insured depository institutions and their affiliates as NGEFs. Section 48 draws a distinction between insured depository institutions and their affiliates, on one hand, and NGEFs on the other hand, and imposes separate obligations on these two groups.

## 2. Affiliate

The final rule adopts the term “affiliate” as proposed. The term is defined in the FDI Act by reference to the Bank Holding Company Act.<sup>37</sup> 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 final rule retains the special rule of construction that would apply in situations where an insured depository institution has filed an application with an

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<sup>34</sup> 12 U.S.C. 1813(w)(6); 12 U.S.C. 1841(k).

agency to become affiliated or merge with another entity. In such circumstances, a NGEF may have a CRA communication and enter into an agreement with the acquiring insured depository institution (or holding company thereof) concerning the adequacy of the CRA performance of the target institution. The agencies believe these types of contacts constitute a CRA communication under section 48 and that any agreement resulting from such communication is a covered agreement if it otherwise meets the requirements of section 48. 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 communication occurs. An example illustrating this point is provided in section \_\_\_\_3(c)(1)(iv) of the final rule.

### 3. 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.<sup>38</sup>

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<sup>35</sup> 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 5632.25(d)); and CRA strategic plans (12 CFR 25.27(c), 228.27(c), 245.27(c) and 563e.27(c)).

In these circumstances, the selected activities of the affiliate are viewed as activities of the insured depository institution. Accordingly, the proposed rule provided that a contact concerning this type of affiliate, referred to as a “CRA affiliate,” to be the equivalent of a contact concerning an insured depository institution. Similarly, the proposed rule provided that an agreement would be considered to be in fulfillment of the CRA if it concerned the performance of any of the activities in the list of factors performed by a “CRA affiliate” of an insured depository institution.

The agencies requested comment on the treatment of CRA affiliates and how agreements should be treated that relate to affiliates that are not CRA affiliates at the time an agreement is entered into, but become CRA affiliates during the term of an agreement. Commenters generally did not object to the definition of CRA affiliate or treating activities of such an affiliate as the activities of the insured depository institution for purposes of the CRA Sunshine provisions. However, several commenters objected to an existing agreement becoming a covered agreement during the term of an agreement as a result of the designation of an affiliate as a CRA affiliate.

In light of the comments, section \_\_.11(c) of the final 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 prior to the agreement. In addition, the rule provides that an insured depository

institution or affiliate may designate a company as a “CRA affiliate” at any time prior to the time a covered agreement is entered into by informing the NGEF that is a party to the agreement of such designation. Section \_\_.4(b) of the final 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. The agencies are of the view that an agreement that relates to an affiliate that is not a CRA affiliate at the time the parties enter into an agreement cannot become a covered agreement if the affiliate becomes a CRA affiliate during the term of the agreement.

Example 1: The director of a NGEF submits a written comment to a

Federal banking agency concerning the adequacy of the CRA lending performance of a mortgage company that is affiliated with an insured depository institution. One year later, the director of the NGEF negotiates an agreement with the mortgage company for it to provide \$100 million in mortgage loans in low- and moderate-income neighborhoods in the next year. 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. The agreement is in fulfillment of the CRA for purposes of section 48 and the NGEF has engaged in a CRA communication under

section \_\_.3(a)(1) because the selected activities of a CRA affiliate and contacts with an agency regarding a CRA affiliate are considered activities of and contacts concerning an insured depository institution. Accordingly, the agreement is a covered agreement.

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. Accordingly, the agreement is not a covered agreement.

#### 4. Term of agreement

Under the final 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 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 NGEF 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 NGEF to file an annual report for the next year.

#### **IV. Regulatory Flexibility Act Analysis**

**OCC:** [To be added]

**Board:** The Regulatory Flexibility Act (5 U.S.C. 604) requires an agency to publish a final regulatory flexibility analysis when promulgating a final rule that was subject to notice and comment, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Board believes that this rule will not have a significant economic impact on a substantial number of small state member banks, bank holding companies, affiliates of bank holding companies, and NGEFs that are a party to a covered agreement with any of the foregoing. This final rule restates the statutory requirements and includes provisions designed to reduce the regulatory burden on entities and persons of all sizes. The Board has prepared the following final regulatory flexibility analysis because the Gramm-Leach-Bliley Act imposes requirements that are new to the Board and those subject to the rule, and because the Board is unable at this time to estimate definitively the economic impact of compliance with the new requirements

of the rule.

### Need for and Objectives of Rule

As discussed above, this rule implements the CRA Sunshine provisions of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y), which was enacted by section 711 of the Gramm-Leach-Bliley Act (Pub. L. 106-102, 113 Stat. 1465 (1999)). The rule's objectives are to inform insured depository institutions, affiliates of insured depository institutions, and NGEPs on how to comply with section 48 by:

(1) identifying those agreements that are covered by section 48, including describing the circumstances in which an agreement is in fulfillment of the CRA;

(2) providing procedures for the disclosure of covered agreements to the public and the relevant supervisory agency; and

(3) providing procedures for preparing and filing annual reports relating to covered agreements with the relevant supervisory agency.

### New Compliance Requirements

The final rule contains new compliance requirements that require insured depository institutions, affiliates, and NGEPs 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 48 and apply regardless of the size of the insured depository institution, affiliate, or NGEF. The agencies have sought to reduce burden of complying with these requirements wherever possible and consistent with section 48.

### Comments on the Initial Regulatory Flexibility Analysis

Although few commenters addressed the initial regulatory flexibility analysis specifically, many commenters addressed the regulatory burdens associated with complying with the final rule. Many commenters noted that section 48 was broadly worded and commended the agencies' efforts to clarify which agreements are subject to section 48 and how a party to a covered agreement may comply with the statute's disclosure and reporting obligations. Many commenters, however, expressed concern that the scope of agreements that were covered by the proposed rule would result in coverage of a wide range of agreements between banking organizations and NGEFs that were not intended to be subject to the disclosure and reporting requirements of section 48. Many commenters also expressed concern that the statute and the rule would discourage banking organizations from entering into agreements with NGEFs to provide loans, investments or banking services in their local communities. Commenters also provided specific comments on the disclosure and annual reporting procedures of the proposed rule. These comments are discussed in detail in part III. Commenters generally supported granting the parties to covered agreements maximum flexibility in disclosing covered

agreements to the public and allowing the parties to charge reasonable fees for making covered agreements available. Some commenters requested clarification concerning how a party should comply with the public disclosure requirements when a covered agreement consists of multiple documents. Some commenters supported requiring the public disclosure period to terminate 12 months after the term of the agreement, as proposed, while others recommended a shorter time period or no time period at all after the term of the agreement.

Many commenters expressed concern that the procedures in the proposed rule for obtaining a determination from an agency that information in covered agreements may be withheld from public disclosure was vague and overly complicated. Commenters also expressed concern with the requirement that an insured depository institution and affiliate file each covered agreement with the relevant supervisory agency within 30 days of entering into the agreement.

Several commenters objected to the proposed rule's requirement that a NGEF that receives and uses funds or other resources for a specific purposes must follow reporting procedures that are different from the detailed, itemized list that is described in section 48, while others supported the proposal. Commenters also requested additional detail on the circumstances in which funds or other resources are received for a specific purpose. Commenters overwhelmingly supported the proposed rule's provisions allowing NGEFs to use Federal tax forms and other reports to fulfill the reporting requirements of the rule.

Several commenters requested that insured depository institutions and affiliates have an exception for filing annual reports for fiscal years in which they have no information to report. Some commenters also requested that a form be adopted for insured depository institutions and affiliates to use in filing annual reports. In addition, commenters generally supported the option of filing consolidated reports for NGEPs, insured depository institutions, and affiliates that are parties to two or more covered agreements.

#### Minimizing Impact on Small Institutions

Section 48 directs the Board and the other agencies to ensure that the rule does not impose an undue burden on the parties to covered agreements. The final rule includes several provisions that are designed to reduce the burden and minimize the impact of the rule on insured depository institutions, affiliates and NGEPs, including small institutions, affiliates and NGEPs. Many of the provisions of the proposed rule that were supported by commenters were retained in the final rule and other provisions were added in response to comments received by the Board and the other agencies.

The final rule gives parties to covered agreements flexibility in determining how to make a covered agreement available to the public. The rule permits an insured depository institution or affiliate to use the institution's CRA public file to disclose covered agreements to the public. Parties to covered agreements also may charge a requestor reasonable fees for the cost of copying and

mailing covered agreements. In response to comments received, the final rule provides a streamlined method parties may follow to determine whether information in a covered agreement can be withheld from public disclosure and additional guidance on the types of information that must be disclosed.

The rule requires a NGEF to file a covered agreement with a relevant supervisory agency only upon request of the agency. In addition, in response to comments, the final rule allows an insured depository institution or affiliate to make a covered agreement available to the relevant supervisory agency by either filing a copy of the covered agreement with the agency or filing with the agency a list that briefly describes the covered agreements to which the institution or affiliate is a party. These filings must be made 60 days after the end of the relevant calendar quarter. The final rule also permits two or more insured depository institutions and affiliates that are parties to the same covered agreement to file jointly the information that must be disclosed to the relevant supervisory agency.

The final rule provides exceptions to the annual reporting requirements for NGEFs and insured depository institutions and affiliates under certain circumstances. It also permits parties to covered agreements to file their annual reports on either a fiscal year or calendar year basis. The rule also allows an insured depository institution, affiliate, or NGEF that is a party to 2 or more covered agreements to prepare a single, consolidated annual report concerning all of the covered agreements.

NGEPs are permitted to incorporate into their annual reports other reports that have been prepared for other purposes, such as tax returns and financial statements, to fulfill the annual reporting requirement. The final rule also permits NGEPs that receive and use funds for a specific purpose either to provide a detailed, itemized list of the uses of funds by the NGEP or a brief description of the use and the amount of funds used for the specific purpose. NGEPs are permitted to file an annual report with the relevant supervisory agency by filing it directly with the agency or by filing it with the insured depository institution or affiliate that is a party to the covered agreement with instructions to forward the annual report to the relevant supervisory agency.

#### Entities and Persons Covered

The Board's final rule applies only to the following parties to covered agreements: (1) state member banks and subsidiaries of state member banks, (2) bank holding companies, (3) affiliates of bank holding companies, other than banks, savings associations and subsidiaries of banks and savings associations, and (4) NGEPs that enter into covered agreements with any company listed in (1) through (3). Section 48 does not authorize the Board to provide an exemption for covered agreements based on the size of the insured depository institution, affiliate or NGEP that enters into the agreement.

The Board requested estimates of the burden the proposed rule would impose on insured depository institutions and affiliates and NGEPs. One large bank

estimated that it was a party to over 500 agreements in 1999 that would have been considered covered agreements under the proposed rule. A national organization that promotes the availability of credit and capital in underserved communities commented that it and its 720 community organization members have negotiated 300 “CRA agreements” with insured depository institutions and their affiliates.

The agreements that trigger the disclosure and reporting requirements of the final rule 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. The Board believes that larger banking organizations and NGEPs are likely to be party to a higher proportion of covered agreements than smaller banking organizations and NGEPs. Although some commenters submitted estimates of the number of covered agreements they would be a party to under the proposed rule, the Board and the other agencies have modified the rule in several respects in order to clarify the types of agreements that are covered by section 48, and the types of agreements that are exempt from coverage. The Board does not believe it has received enough information at this time to estimate definitively the total number of insured depository institutions, affiliates or NGEPs that are parties to covered agreements.

**FDIC:** Subject to certain exceptions, the Regulatory Flexibility Act (5 U.S.C. 601-612) (RFA) requires an agency to prepare a final regulatory flexibility analysis in conjunction with its issuance of a final rule. If the agency certifies that

the rule will not have a significant economic impact on a substantial number of small entities, a final regulatory flexibility analysis is not required.<sup>39</sup> At the time of issuance of the proposed rule, the FDIC was unable to certify that the rule would not have a significant economic impact on a substantial number of small entities.

Although the final rule contains provisions designed to reduce the burden of regulatory compliance by all parties to covered agreements, the FDIC lacks sufficient information to certify that the final rule will not have a significant economic impact on a substantial number of small entities. Therefore, pursuant to section 604 of the RFA, the FDIC provides the following final regulatory flexibility analysis.

#### Need for and Objectives of the Rule

The final rule implements § 48 of the Federal Deposit Insurance Act (FDIA) addressing disclosure and reporting requirements for certain agreements related to the CRA. Section 48(h) requires the Federal banking agencies to publish regulations applicable to insured depository institutions, their affiliates, and NGEPS relating to:

- the types of agreements covered by the rule;
- the procedures for implementing the disclosure requirements

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<sup>37</sup> The RFA defines the term “small entity” in 5 U.S.C. 601 by reference to definitions published by the Small Business Administration (SBA). The SBA has defined a “small entity” for banking purposes as a national or commercial bank, savings institution or credit union with less than \$100 million in assets. See 13 CFR 121.201.

- related to agreements covered by the rule; and
- the procedures for implementing the annual reporting requirements related to agreements covered by the rule.

#### Small Entities to Which the Final Rule Will Apply

The final rule applies to all FDIC-insured state nonmember banks (and their affiliates), including those insured state nonmember banks with assets of under \$100 million. As of September 2000, 3,331 (of 5,130 total) FDIC-insured state nonmember banks had assets of under \$100 million. The final rule also applies to NGEPS that enter into covered agreements with insured depository institutions or their affiliates.

Section 48 does not authorize the FDIC to create exemptions for disclosure or reporting requirements based on the asset size of either an insured depository institution (or its affiliate) or a NGEPS; therefore, the FDIC did not establish alternative compliance standards for small entities.

Because agreements like those that will trigger the disclosure and reporting requirements of the final rule have not been previously disclosed or monitored by the FDIC, the FDIC lacks sufficient information to estimate the total number of insured state nonmember banks (or their affiliates) and NGEPS that may be parties to covered agreements.

#### Initial Regulatory Flexibility Analysis and related Burden Reduction Measures

In its initial regulatory flexibility analysis, the FDIC specifically

requested information on the likely significance of the economic impact the proposed rule would impose on state nonmember banks, their affiliates, and NGEPs who enter into covered agreements. Following publication of the proposed rule, the FDIC received approximately 200 comment letters. Although none of the commenters specifically responded to the questions raised in the initial regulatory flexibility section of the proposed rule, many commenters addressed the regulatory burdens associated with the disclosure and reporting requirements described in the proposed rule. They also requested clarification regarding the types of agreements that would be subject to the rule and advocated implementation of a more streamlined way to protect confidential or proprietary information from disclosure. (For a more complete discussion of the comments received, see the analysis contained in Part II of the Supplementary Information section of the preamble.)

Section 48 of the FDIA requires insured depository institutions, their affiliates, and NGEPs that are parties to covered agreements: (1) to make the agreements available to the public and to the relevant supervisory agency (as defined in the rule) and (2) to file an annual report related to covered agreements with the relevant supervisory agency.

Section 48(h)(2)(A) of the FDIA further requires the Federal banking agencies to prescribe implementing regulations that do not impose an undue burden on parties to covered agreements. In accordance with both this statutory mandate and with the comments received in response to the proposed rule, in the final rule,

the FDIC sought to minimize the burden on all parties to covered agreements - including small entities.

A brief description of some of the burden reduction measures related to the final rule's disclosure and reporting requirements follows. (For a more detailed discussion explanation of these and other burden reduction measures adopted in the final rule, see the analysis contained in Part III of the **Supplementary Information** section of the preamble.)

The rule minimizes burden in its disclosure requirements by offering parties to covered agreements flexibility in making these agreements available to public. No one single method of disclosure is prescribed. NGEPs need only disclose covered agreements when a request for the agreement is made. One way that insured depository institutions (or affiliates) may meet their agency disclosure obligations is by filing a quarterly list of covered agreements with the relevant supervisory agency, with the actual agreement to be provided upon the request of the agency. If two or more insured depository institutions or their affiliates are parties to a covered agreement, they are permitted to jointly disclose the agreements to the relevant supervisory agency. Further, an insured depository institution and its affiliates may use the institution's CRA public file as a disclosure mechanism. All parties to covered agreements are permitted to collect reasonable fees associated with the disclosure of these agreements. For clarity, the rule contains a list of items contained in a covered agreement that may not be withheld from disclosure, but it

allows parties to request an agency determination concerning whether other information properly may be withheld.

The rule minimizes burden in its reporting requirements by providing certain exceptions to the annual reporting requirement for both NGEPs and for insured depository institutions and their affiliates. Annual reports may be filed to reflect either a calendar year or fiscal year accounting system. A NGEp may use certain tax forms and other reports to satisfy its reporting requirement and also may meet its reporting obligations by filing the report with the insured depository institution (or affiliate) that is a party to the agreement. The rule permits consolidated annual reporting if insured depository institutions, their affiliates, or NGEps are parties to at least two covered agreements.

#### Reporting, Recordkeeping, and Other Compliance Requirements

The final rule contains disclosure and reporting requirements applicable to all FDIC-insured state nonmember banks, affiliates of state nonmember banks, and non-governmental entities or persons that are parties to covered agreements. Parties to covered agreements are required to make the agreements available to the public and to the relevant supervisory agency and to report annually to the relevant supervisory agency concerning the covered agreements. (For a more detailed explanation of the disclosure requirements of the final rule, see the explanation contained in Part III, B of the **Supplementary Information** section of the preamble. For a more detailed explanation of the

reporting requirements of the final rule, see the explanation contained in Part III, C of the **Supplementary Information** section of the preamble.)

The final rule does not establish specific recordkeeping procedures for parties to covered agreements. The FDIC anticipates that the parties will employ recordkeeping policies and practices sufficient to allow retrieval of covered agreements as necessary for compliance with the disclosure and annual reporting requirements of the final rule.

Although the final rule contains provisions to minimize the compliance burden on parties to covered agreements, it is possible that insured state nonmember banks (and their affiliates) and NGEPs may require professional skills in recognizing the existence of a covered agreement; and in compiling materials responsive to annual reporting requirements of the final rule.

**OTS:** The Regulatory Flexibility Act (5 U.S.C. 601-612) requires federal agencies to prepare a final regulatory flexibility analysis (RFA) with a final rule that was subject to notice and comment, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. OTS believes that this rule will not have a significant economic impact on a substantial number of small savings associations and their subsidiaries, savings and loan holding companies, affiliates of savings associations and savings and loan holding companies (other than bank holding companies, banks, and subsidiaries of bank holding companies and banks), or NGEPs that enter into covered agreements

with any of the foregoing because the burden imposed on small entities stems in large part from the GLB Act, rather than the final rule. This final rule restates the statutory requirements and includes clarifications designed to reduce the regulatory burden on savings associations, affiliates, and NGEPs of all sizes, as discussed below. OTS has prepared the following RFA because the GLB Act imposes requirements that are new to OTS, the thrift industry, and others, and because OTS is uncertain of the economic impact of compliance with the new requirements.

1. Statement of Need and Objectives

A description of the reasons why OTS is adopting this final rule and a statement of the objectives of, and legal basis for, the final rule, are contained in the Supplementary Information above.

2. Small Entities to Which the Final Rule Applies

OTS's final rule applies to the following types of entities if they are a party to a covered agreement:

- (1) Savings associations and their subsidiaries;
- (2) Savings and loan holding companies
- (3) Affiliates of savings associations and savings and loan holding companies, other than bank holding companies; banks; and subsidiaries of bank holding companies and banks; and
- (4) NGEPs that enter into covered agreements with any company listed in (1), (2), or (3).

The final rule would apply regardless of the size of the savings association, affiliate, or NGEF.

Small savings associations are generally defined, for Regulatory Flexibility Act purposes, as those with assets of \$100 million or less. 13 CFR 121.201, Division H (2000). As of the publication of the proposed rule, OTS calculated that of the approximately 1,100 savings associations, a maximum of 486 were small savings associations. OTS also calculated that these 486 savings associations held approximately 100 subordinate organizations that could possibly qualify as small entities. OTS further calculated that a maximum of 205 savings and loan holding companies could possibly qualify as small entities.<sup>40</sup>

The initial RFA (IRFA) published in the proposed rule explained that to date, parties to covered agreements have not had to disclose or report 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 did not have information about these agreements. OTS sought comments to enable it to make an accurate burden estimate including the number and size of savings

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<sup>38</sup> It is likely that the number of small SLHCs is significantly less than 205. In a recent notice of proposed rulemaking, OTS applied a newly promulgated Small Business Administration (SBA) standard for determining whether holding companies are small. OTS estimated there were 88 small SLHCs under the asset-based definition in the SBA's rule (*i.e.*, holding company structures holding assets of less than \$100 million), or 150 small SLHCs using the revenue-based definition in the SBA's rule. See Savings and Loan Holding Companies Notice of Significant Transactions or Activities and OTS Review of Capital Adequacy, 65 Fed. Reg. 64,392, 64,397 (October 27, 2000) (applying SBA rule 13 CFR 121.201).

associations, affiliates, and NGEPs that are parties to covered agreements, and the number of covered agreements that currently exist and would likely be entered into each year in the future.

OTS received many comments on the proposed rule addressing its potentially broad application. A few NGEPs specifically noted that three of the largest community advocacy organizations have 720, 1,200, and 3,600 members, respectively. Commenters noted that each of these members is a potential NGEF. Community advocacy organizations are just one of many types of NGEFs subject to the rule.

A substantial number of NGEFs commented that there were hundreds, if not thousands, of covered agreements. Commenters estimated that one large community advocacy organization alone had 300 covered agreements, including more than \$1 trillion in loans and investments for low- and moderate-income communities. Commenters estimated another community advocacy organization had a dozen agreements. A very large financial institution estimated that it had more than 500 covered agreements in effect in 1999. A federal savings association indicated that it entered into 42 covered agreements with 38 community groups during the first six months since the GLB Act was enacted. A local government indicated that it had \$1.3 billion in loans or grants in 60,000 separate transactions that potentially were covered, including 15,000 transactions with one large financial institution alone.

While this information provides anecdotal evidence that a potentially large number of savings associations, affiliates, and NGEPs of all sizes are parties to a potentially large number of covered agreements, it does not enable OTS to make a reliable estimate of the burden of the final rule.

### 3. Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

As described more fully elsewhere in the Supplementary Information above, the primary requirements of the final rule involve the disclosure and reporting of covered agreements. The final rule requires 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 also requires each savings association or affiliate that is a party to a covered agreement to provide a copy to each relevant supervisory agency (as defined in the rule) and requires each NGEp that is a party to provide a copy to each relevant supervisory agency upon request. The final rule also requires 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. Most of these requirements are mandated by section 48 of the FDI Act.

Savings associations, affiliates, and NGEPs may already have recordkeeping and other policies and practices that would already enable them to partly or fully meet the requirements of this final rule. To the extent that existing

practices and available resources are insufficient, parties to covered agreements would need professional skills to comply with this final rule. To disclose covered agreements, parties may need clerical and computer personnel. To prepare required reports and disclosures, parties may need personnel with these skills, as well as personnel skilled in financial, accounting, and legal matters. Some degree of personnel training may be necessary, such as to enable employees to determine when parties enter into covered agreements, and how to retain, record, redact, and compile information about agreements.

OTS cannot predict exactly how savings associations, affiliates, and NGEPS will comply with the final rule since the requirements are new. For example, OTS cannot assess the extent to which savings associations, affiliates, and NGEPS will avoid entering into covered agreements as a result of the final rule. A common concern expressed by commenters was that the statute and rule would have precisely this effect.

As discussed below, the final rule contains many provisions designed to minimize the compliance burden. These provisions are consistent with the directive in section 48(h)(2)(A) of the FDI Act that the Federal banking agencies ensure that the regulations prescribed do not impose an undue burden on the parties.

#### 4. Significant Issues Raised in Response to Initial Regulatory Flexibility Analysis and Changes Made to Minimize Burden

The issues raised by the commenters addressing burden in general are

described elsewhere in the Supplementary Information. Many NGEPs and insured depository institutions commented that the disclosure and reporting burdens would be heavy. The issues that were raised by commenters that specifically relate to the rule's impact on small businesses were the following:

- C Tracking and reporting on covered agreements would require many NGEPs, particularly small ones, to hire outside CPAs for the first time. One NGEF estimated that an additional 100,000 or more nonprofits would find it necessary to hire outside CPA firms, and that the paperwork, accounting, and bookkeeping costs would amount to at least \$3,000 annually for each nonprofit or \$300 million annually for all.
- C Disclosing and reporting covered agreements would require additional staff, both for NGEFs and insured depository institutions. One estimate was that a total of at least 5,000 additional bank employees would be needed. One financial institution indicated it would need at least one additional full-time employee. Several NGEFs indicated that nonprofits reliant on volunteers could least afford additional staff.

The proposed rule contained several provisions designed to avoid

undue burdens. The final rule contains additional provisions that should minimize the need for new accounting systems and additional staff.

With regard to the disclosure burden, the final rule:

- C Terminates the public disclosure requirement and the requirement for a NGEP to provide a copy to the relevant supervisory agencies upon request 12 months after the end of the term of the covered agreement.
- C Does not mandate any particular method for disclosing the agreement to the public.
- C Allows each party to charge reasonable copying and mailing fees when it discloses an agreement to the public.
- C Requires an NGEP to provide a copy to the relevant supervisory agencies only if the agency requests a copy.
- C Allows a savings association or affiliate to file with the relevant supervisory agencies a copy of a covered agreement 60 days after the end of each calendar quarter. (The proposed rule would have required filing 30 days after entering into the agreement.)
- C Allows a savings association or affiliate to elect to file a list of its covered agreements, rather than the actual

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agreement with the relevant supervisory agencies. It would be required to submit a complete copy of an agreement only upon a request from the agency. (The proposed rule would not have offered the option of a list.)

C Allows a savings association or affiliate to publicly disclose by placing a copy of the covered agreement in its CRA public file and the savings association making it available under the public file procedures. (The proposed rule would not have extended this option to affiliates.)

C Allows two or more insured depository institutions or affiliates that are parties to a covered agreement to jointly file with each relevant supervisory agency.

C Enhances the protections for proprietary and confidential information. (The final rule, unlike the proposed rule, permits the parties to redact information before making agreements publicly available without the need for prior agency review and approval. It also lists the specific information that parties may not redact to provide clearer guidance. Finally, it provides

procedures for parties to submit both redacted and unredacted copies to the agencies to facilitate release of information in accordance with FOIA and related safeguards.)

- C Contains transition provisions to ease compliance with disclosure requirements for agreements entered into prior to the effective date of the final rule. (The proposed rule had no transition provisions.)

With regard to the reporting burden, the final rule:

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- C Does not mandate any particular form for the annual report.
  - C Allows each party to report on its own fiscal year basis or on the calendar year.
  - C Exempts a NGEP from filing a report for a fiscal year if the NGEP does not receive any funds or resources during that year.
  - C Exempts an institution or affiliate from filing a report for a fiscal year if the institution or affiliate does not receive or provide any payments, fees, or loans during that year and has no data to report on loans, investments, and services provided by a party to the agreement. An

institution or affiliate has no data to report on another party's activities if it does not know of the information or the information is contained in another party's annual report. (The proposed rule would not have included this exemption.)

C Provides the option of special purpose reporting procedures rather than a detailed, itemized list for NGEPs that allocate and use funds or other resources under a covered agreement. (The proposed rule contained similar provisions but would have made special purpose reporting mandatory where applicable.)

C Allows a NGEP's report to consist of, or incorporate, reports prepared for other purposes, such as IRS Form 990 and financial statements. (The proposed rule contained similar provisions, but would not have specifically referred to IRS Form 990.)

C Permits a savings association, affiliate, or NGEP that is a party to two or more covered agreements to file a single consolidated annual report covering all its covered agreements, aggregating certain information. (The proposed rule only would have allowed

consolidated reporting for entities that are parties to five or more covered agreements.)

- C Allows a savings association and its affiliates that are parties to the same covered agreement to file a single consolidated report.
- C Allows a NGEF 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, allotting six months to do so. The institution must then forward the report to the relevant supervisory agency within 30 days.
- C Contains transition provisions to ease compliance with reporting requirements for agreements entered into prior to the effective date of the final rule. (The proposed rule had no transition provisions.)

The final rule also:

- C Clarifies, through examples, that a covered agreement (including a written pledge) must reflect a mutual arrangement or understanding.
- C Excludes an agreement from the definition of covered agreement if no NGEF that is a party has a CRA

communication. (The final rule’s definition of “CRA communication” is narrower than the proposed rule’s definition of “CRA contact” in three ways: (1) The types of communications that concern the CRA are somewhat clarified and narrowed; (2) CRA communications must be known about by particular employees and officers of the parties (in some instances, a depository institution or affiliate may be deemed to have knowledge); and (3) CRA communications must occur no earlier than *[one to three years]* prior to entering into the agreement depending on the type of CRA communication.)

C Does not subject a party to a multiparty agreement to the requirements of the rule if the party has not had a CRA communication and does not know about any CRA communication among other parties to the agreement. (The proposed rule would have had no comparable provision.)

C Clarifies that agreements that relate to activities of affiliates that are not CRA affiliates at the time a covered agreement is entered into are not covered.

C Implements the “fulfillment” provision to cover activities of the type that are likely to receive favorable consideration by a Federal banking agency in evaluating the performance under the CRA of the insured depository institution that is a party to the agreement or an affiliate of a party to the agreement. (The proposed rule would not have had implemented the provision in this manner.)

C Provides flexibility to the parties to determine the value of an agreement that does not specify the amount of payments, grants, loans, or other consideration.

C Excludes from the definition of covered agreement any individual loan secured by real estate.

C Excludes from the definition of covered agreement, specific contracts or commitments for a loan or extension of credit if certain requirements are met, provides flexibility to the parties to determine if the loans are “substantially below market rates,” and clarifies that the terms of the loan application and other loan documents establish whether the restriction against re-lending is satisfied.

C In determining whether an agreement that combines an exempt loan and other consideration is covered, the exempt loan may be excluded from consideration.

5. Significant Alternatives to the Final Rule

The requirements in the final rule parallel those in the GLB Act. The final rule clarifies the statutory requirements in some areas and restates the requirements in a more understandable manner in other areas. The final rule does not impose any requirements that differ substantially from the statute. Since the requirements are set by statute, OTS has only limited discretion to consider alternatives. To the extent that OTS does have discretion, it has exercised that discretion to minimize the burden as discussed above.

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 NGEPS from these requirements. OTS does not interpret the statute to permit such an exemption.

6. Duplicative, Overlapping, or Conflicting Federal Rules

This final rule does 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 final rule allows a NGEPS report to consist of, or incorporate, these existing reports. The final rule also allows insured depository

institutions and affiliates to use the CRA public file established under the CRA Regulations as a mechanism for disclosing agreements. The rule is not intended to otherwise affect the CRA.

OTS lacks sufficient information about the contents of covered agreements, however, to conclude whether the final requirements conflict with other Federal rules. One area of potential conflict on which comment was solicited was the rule's requirement to make a "complete copy" of a covered agreement available to the public and to the relevant supervisory agencies. OTS solicited 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 sought comment on any Federal rules that may duplicate, overlap, or conflict with the proposal.

Several commenters indicated that covered agreements are likely to contain proprietary and confidential information. Several commenters requested that the final rule accord full FOIA protections to information in covered agreements. As discussed above, the agencies have enhanced the procedures for protecting proprietary and confidential information in the final rule.

## **V. Executive Order 12866 Determination**

**OCC:** [To be provided]

**OTS:** OTS has determined that this final rule does not constitute a significant regulatory action for the purpose of Executive Order 12866. Reporting and disclosure are mandated by section 48 of the FDI Act. Most of the final rule's provisions closely follow the requirements of this section. OTS has exercised its discretion, to the extent possible, to minimize costs and burdens. While OTS acknowledges that the rule will impose costs on insured depository institutions, affiliates, and NGEPS by requiring these entities to disclose and report on covered agreements, OTS believes that the impact of the rule does not meet the thresholds of the Executive Order, and consequently OMB review is not necessary.

#### **VI. Paperwork Reduction Act**

The agencies may not conduct or sponsor, and an organization is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB control numbers are listed below:

OCC: 1557-0219

Board: 7100-[Add]

FDIC: 3064-0139

OTS: 1550-0105

The agencies sought comment on all aspects of the burden estimates for the information collections in the reporting and disclosure provisions of the proposed rule, including how burdensome it would be for NGEPS, insured

depository institutions, and affiliates of insured depository institutions to comply with the burden elements. Many commenters suggested, in response to specific proposed sections, that the disclosure and reporting requirements of the rule would impose significant burden on them. Several asserted that the agencies had underestimated the burden associated with complying with the rule.

Many commenters recommended changes in the procedures of the proposed rule for disclosing covered agreements to the public and the relevant supervisory agencies and for submitting annual reports relating to covered agreements. The agencies have addressed several of these concerns by amending the relevant provisions of the rule as discussed above.

The final rule contains four disclosure requirements and two reporting requirements for insured depository institutions and affiliates of insured depository institutions, as well as three disclosure requirements and one reporting requirement for NGEPs. Below is a brief summary of the paperwork burdens implemented by this final rule.

The final rule requires each NGEp, insured depository institution, and affiliate of an insured depository institution that is a party to a covered agreement to make the agreement available to the public upon request at any time during the term of the agreement and continuing until 12 months after the term of the agreement (§§ \_\_.6(b)(1) and \_\_.6(b)(5)).

A NGEp is required to disclose a covered agreement to the relevant

supervisory agency within 30 days of a request from the agency (§§ \_\_.6(c)(1)). An insured depository institution or affiliate that enters into a covered agreement must, within 60 days after the close of the relevant calendar quarter, provide to each relevant supervisory agency either (1) a complete copy of each agreement entered into during the calendar quarter (§§ \_\_.6(d)(1)(i)), or (2) a list of all covered agreements entered into during the calendar quarter (§§ \_\_.6(d)(1)(ii)). Some commenters felt that allowing insured depository institutions or affiliates to submit a list of their covered agreements would help to decrease burden on the organization. If an institution or affiliate submits a list of its agreement, the institution or affiliate must provide any relevant supervisory agency with a complete copy of any covered agreement referenced in the list within 7 calendar days of receiving a request from the agency (§§ \_\_.6(d)(2)). The obligation of an institution or affiliate to provide an agency with a copy of a covered agreement referenced in a list terminates 36 months after the term of the agreement.

The final rule also requires each NGEF that is a party to a covered agreement to file an annual report that relates to the agreement for each fiscal year that the NGEF receives or uses funds received under the agreement (§§ \_\_.7(b)). Each insured depository institution or affiliate that is a party to a covered agreement must file an annual report for each fiscal year that the institution or affiliate makes or receives payments under the agreement or has data to report on loans, investments or services provided under the agreement (§§ \_\_.7(b)). Annual reports

must be filed with each relevant supervisory agency for the covered agreement. The content requirements for the annual report for NGEPs, and insured depository institutions and affiliates of an insured depository institutions are contained in (§§ \_\_.7(d)) and (§§ \_\_.7(e)) respectively. The insured depository institution or affiliate must submit its annual report to the relevant supervisory agency within 6 months of the end of its fiscal year. A NGEP must, within 6 months of the end of its fiscal year, either file its annual report with each relevant supervisory agency directly or an insured depository institution or affiliate that is a party to the agreement with instructions for the institution or affiliate to file it with the relevant supervisory agency. The insured depository institution or affiliate must submit the annual report of a NGEP to each relevant supervisory agency within 30 days of receiving the report (§§ \_\_.7(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 identified in section \_\_.4 (fulfillment) of a CRA affiliate is required to notify each NGEP that is a party to the agreement that the agreement concerns a CRA affiliate (§§ \_\_.4(b)).

The estimated total annual reporting and disclosure burden of the final rule will depend on the number of covered agreements. The agencies specifically requested comment on the total number of NGEPs, 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 received few estimates from NGEPs, insured depository institutions and affiliates concerning the number of agreements to which they are parties that would be covered under the rule. One large bank estimated that it was a party to over 500 agreements in 1999 that would have been considered covered agreements under the proposed rule. A national organization that promotes the availability of credit and capital in underserved communities commented that it and its 720 community organization members have negotiated 300 “CRA agreements” with insured depository institutions and their affiliates.

The agreements that trigger the disclosure and reporting requirements of the final rule 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. The agencies believe that larger banking organizations and NGEPs are likely to be party to a higher proportion of covered agreements than smaller banking organizations and NGEPs. Although some commenters provided estimates on the number of covered agreements that might exist under the proposed rule, as noted above, the final rule clarifies in several important areas the types of agreements that are covered by section 48, and the types of agreements that are exempt from coverage.

Accordingly, the agencies do not believe they have received enough information at this time to definitively estimate the total number of insured

depository institutions, affiliates or NGEPs 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. Nevertheless, 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 each insured depository institution it regulates is involved, either as a party or as a source of funds, with two covered agreements. This would take into account that large banking organizations may be parties to substantially more covered agreements and many small banking organizations may be party to no covered agreements. In addition, the agencies have assumed that one NGEp is a party to each of these agreements. After the agencies have gained some experience with collecting information under the rule, they will re-examine the paperwork burden.

There are other requirements for NGEps, insured depository institutions, and affiliates of an insured depository institutions which are not considered to be paperwork requirements. These requirements are discussed in detail in the regulation text and earlier in this preamble.

**OCC:** OMB has reviewed and approved the collections of information contained in the rule under control number 1557-0219, in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). OMB clearance will expire on {DATE}.

The potential respondents include national banks and subsidiaries of

national banks, and NGEPs that are a party to a covered agreement with any of the foregoing.

Estimated number of financial institution respondents: [amount]

Estimated number of NGEp respondents: [amount].

Estimated average annual burden hours for financial institution respondents per agreement: 9 hours.

Estimated burden hours for NGEps per agreement: 6 hours.

Estimated total annual reporting and disclosure burden: [amount] hours.

**Board:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, appendix A.1), the Board approved the rule under the authority delegated to the Board by the OMB. The OMB control number is 7100-[add]. OMB clearance will expire on {DATE}.

The potential respondents are state member banks and subsidiaries of 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 NGEps that are a party to a covered agreement with any of the foregoing.

Estimated number of financial institution respondents: 994.

Estimated number of NGEp respondents: 994.

Estimated average annual burden hours for financial institution

respondents per agreement: 9 hours.

Estimated burden hours for NGEPs per agreement: 6 hours.

Estimated total annual reporting and disclosure burden: 29,820 hours.

**FDIC:** OMB has reviewed and approved the collections of information contained in the rule under control number 3064-0139, in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). OMB clearance will expire on {DATE}.

The potential respondents are insured nonmember banks, subsidiaries of insured nonmember banks, and NGEPs that are a party to a covered agreement with any of the foregoing.

Estimated number of financial institution respondents: [amount]

Estimated number of NGEp respondents: [amount].

Estimated average annual burden hours for financial institution respondents per agreement: 9 hours.

Estimated burden hours for NGEPs per agreement: 6 hours.

Estimated total annual reporting and disclosure burden: [amount] hours.

**OTS:** OMB has reviewed and approved the collections of information contained in the rule under control number 1550-0105, in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). OMB clearance will expire on {DATE}.

The potential respondents are savings associations and their subsidiaries, savings and loan holding companies, affiliates of savings associations and savings and loan holding companies other than bank holding companies, banks and subsidiaries of bank holding companies, and NGEPs that are a party to a covered agreement with any of the foregoing.

Estimated number of financial institution respondents: 1075

Estimated number of NGEp respondents: 1075.

Estimated average annual burden hours for financial institution respondents per agreement: 9 hours.

Estimated burden hours for NGEps respondents per agreement: 6 hours.

Estimated total annual reporting and disclosure burden: 25,800 hours.

The agencies have a continuing interest in the public's opinion regarding collections of information. Members of the public may submit comments, at any time, regarding any aspect of these collections of information. Comments may be sent to:

OCC: Jessie Dunaway, Clearance Officer, Office of the Comptroller of the Currency, 250 E Street, SW, Mailstop 8-4, Washington, DC 20219.

Board: Mary M. West, Federal Reserve Board Clearance Officer, Mailstop 97, Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551.

FDIC: Steven F. Hanft, Assistant Executive Secretary (Regulatory Analysis), Federal Deposit Insurance Corporation, Room F-4080, 550 17th Street, NW, Washington, DC 20429.

OTS: Dissemination Branch (1550-0106), Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552.

A copy of all comments should also be sent to the Office of Management and Budget, Paperwork Reduction Project (include OMB control number), Washington, DC 20503.

#### **VII. Comments Regarding the Use of “Plain Language”**

Section 722 of the Gramm-Leach-Bliley Act requires the agencies to use “plain language” in all final rules published after January 1, 2000. The agencies requested comments on whether the proposed rule meets the plain language standard, whether changes should be made to the organization or format of the rule and whether terms used in the rule are clear.

Some commenters recommended that agencies move the section that defines terms used in the rule to the front of the rule. The agencies believe that including the substantive provisions of the rule, including the key definitions of what agreements are “covered agreements” and “in fulfillment of the CRA,” at the front of the rule will assist users in rapidly identifying whether a particular agreement meets the requirements to be a covered agreement. Accordingly, the agencies have not moved the section including other definitions to the front of the rule. Some

commenters requested that the agencies clarify the scope of certain terms used in the proposed rule or examples included in the proposed rule or accompanying **Supplementary Information**. These comments are addressed in Part III of this preamble.

### **VIII. Unfunded Mandates Act of 1995**

**OCC:** [To be provided]

**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 final rule does not apply to state, local or tribal governments. Although the final rule applies to insured depository institutions, affiliates, and NGEPs, 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. Most of the final rule's provisions closely follow the requirements of section 711 of the GLB Act. Moreover, OTS has exercised its discretion, to the extent possible, to minimize costs and burdens. Therefore, OTS

has determined that this final 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, 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 associations.

**[Final Rules]**