



April 6, 2004

Via Electronic Mail

Communications Division
Public Information Room
Mailstop 1-5
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219
Docket No. 04-06

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 200551
Re: Docket No. R-1181

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

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: No. 2004-04

Re: Community Reinvestment Act Regulations (69 Fed. Reg. 5729; February 6, 2004)

Dear Sir/Madam:

The Office of Advocacy of the U.S. Small Business Administration submits this comment letter in response to the above-referenced proposed rule. We commend the promulgating agencies for issuing a proposed rule that is well received by the affected small entities for providing burden reduction, and we urge the agencies to improve their implementation of the Regulatory Flexibility Act by providing a fact-based analysis on why the rule would not significantly impact a substantial number of small entities. These comments reflect opinions that small entities have voiced to the Office of Advocacy.

Advocacy Background

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the Regulatory Flexibility Act (RFA) requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.¹ On August 13, 2002, President George W. Bush enhanced Advocacy's RFA mandate when he signed Executive Order 13272, which directs Federal agencies to implement policies protecting small entities when writing new rules and regulations. Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy.² Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.³

The Proposed Rule

On February 6, 2004, the Office of the Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision (collectively, the agencies) published a joint proposed rule to amend the Community Reinvestment Act (CRA) regulations. Prior to publishing the proposed rule, the agencies published an advanced notice of proposed rulemaking to seek public input on changes to the CRA regulations. The proposed rule is based on the comments that the agencies received.

The proposed rule amends the definition of "small institution" to mean an institution with total assets of less than \$500 million, without regard to any holding company assets; increases the number of institutions that are eligible for evaluation under the small institution performance standards, while slightly reducing the portion of the nation's bank and thrift assets subject to evaluation under the large retail institution performance standards; and addresses abusive lending practices by providing that evidence that an institution or any of an institution's affiliates has engaged in specified discriminatory, illegal, or abusive credit practices in connection with certain loans will adversely affect the institution's CRA performance. The purpose of the proposal is to reduce unwarranted regulatory burdens and to better address abusive lending practices.

RFA Compliance in the Proposal

Pursuant to section 605 of the RFA, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities in lieu of preparing an IRFA. The agency, however, must provide a factual basis for the certification.⁴ Advocacy recommends that agencies perform a preliminary economic analysis to determine whether certification is appropriate or if an IRFA should be performed.⁵ The information gathered through the preliminary economic analysis will provide the factual

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

² Id.

³ Id.

⁴ See, 5 USC § 605.

⁵ *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, Chapter 1, available on Advocacy's website, <http://www.sba.gov/advo/laws/rfaguide.pdf>.

basis for the certification statement. Advocacy regularly advises agencies that a factual basis should at a minimum identify the small entities affected by the rule, describe the impact on those entities, and explain the agency's reasoning in support of the certification. Advocacy encourages the agencies to review comments from small entities to determine whether the final rule can be certified or if analysis of the rule's impact is required. Advocacy is available to assist the agencies in their analysis of the rule's impacts on small entities.

Other Issues

In the preamble, the agencies state that the small banks have stated that it is too difficult to get an outstanding rating from a CRA examiner.⁶ This issue was not addressed in the proposed rule. It is Advocacy's understanding that the agencies are considering changing the procedures for the examination process. Advocacy encourages the agencies to consider appropriate changes to improve the procedures so that the CRA examination process is not so daunting. Advocacy further encourages the agencies to publish the proposed changes to the examination process for public comments.

Conclusion

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule and to provide the information on those impacts to the public for comment. We recommend that the agencies revise their respective certifications to include a meaningful factual basis that provides an analysis to support the conclusion of no significant economic impact

Please note that Section 3(c) of E.O. 13272 requires agencies to respond to Advocacy's written comments in an explanation or discussion of the final rule that is published in the Federal Register. The Office of Advocacy is available to work with the agencies to ensure compliance with the RFA. Thank you for the opportunity to comment on this important proposal. If you have any questions, please feel free to contact the Office of Advocacy at (202) 205-6533.

Sincerely,

/s/

Thomas M. Sullivan
Chief Counsel for Advocacy

/s/

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation
& Banking

cc: Dr. John Graham, Administrator, Office of Information and Regulatory Affairs

⁶ Fed. Reg. at 5737.