DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

[Docket ID: OCC–2009–0007]

RIN 1557–AD25

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 225

[Regulations H and Y; Docket No. R–1361]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 325

RIN 3064–AD42

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 567

[No. OTS–2009–0007]

RIN 1550–AC34

Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance; Capital—Residential Mortgage Loans Modified Pursuant to the Making Home Affordable Program

AGENCIES: Office of the Comptroller of the Currency, Department of the Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; and Office of Thrift Supervision, Department of the Treasury.

ACTION: Interim final rule with request for public comment.

SUMMARY: To support and facilitate the timely implementation and acceptance of the Making Home Affordable Program (Program) announced by the U.S. Department of the Treasury (Treasury) and to promote the stability of banks, savings associations, bank holding companies (collectively, banking organizations) and the financial system, the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS) (collectively, the agencies) have adopted this interim final rule (interim final rule or rule). The rule provides that mortgage loans modified under the Program will retain the risk weight assigned to the loan prior to the modification, so long as the loan continues to meet other applicable prudential criteria.

DATES: The interim final rule is effective June 30, 2009. Comments must be received by July 30, 2009.

ADDRESSES: Comments should be directed to:

OCC: Because paper mail in the Washington, DC area and at the agencies is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or e-mail, if possible. Please use the title ''Risk-Based Capital Guidelines—Residential Mortgage Loans Modified Pursuant to the Making Home Affordable Program'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—''Regulations.gov'':* Go to *http://www.regulations.gov.* Under the ''More Search Options'' tab click next to the ''Advanced Docket Search'' option where indicated, select ''Comptroller of the Currency'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OCC–2009–0007'' to submit or view public comments and to view supporting and related materials for this interim final rule. The ''How to Use This Site'' link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- *E-mail: regs.comments@occ.treas.gov.*
- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.
- *Fax:* (202) 874–5274.
- *Hand Delivery/Courier:* 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''Docket Number OCC–2009–0007'' in your comment. In general, the OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this

interim final rule by any of the following methods:

• *Viewing Comments Electronically:* Go to *http://www.regulations.gov,* under the ''More Search Options'' tab click next to the ''Advanced Document Search'' option where indicated, select ''Comptroller of the Currency'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OCC–2009–0007'' to view public comments for this rulemaking action.

• *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

• *Docket:* You may also view or request available background documents and project summaries using the methods described above.

Board: You may submit comments, identified by Docket No. R–1361, by any of the following methods:

• *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.

• *FAX:* (202) 452–3819 or (202) 452–3102.

• *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Street, NW.) between 9 a.m. and 5 p.m. on weekdays.

FDIC: You may submit by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

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

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

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

• *E-mail: comments@FDIC.gov.*

Instructions: Comments submitted must include ''FDIC'' and ''RIN 3064–AD42.'' Comments received will be posted without change to *http://www.FDIC.gov/regulations/laws/federal/propose.html*, including any personal information provided.

OTS: You may submit comments, identified by OTS–2009–0007, by any of the following methods:

• *Federal eRulemaking Portal:* ''Regulations.gov'': Go to *http://www.regulations.gov.* Under the ''more Search Options'' tab click next to the ''Advanced Docket Search'' option where indicated, select ''Office of Thrift Supervision'' from the agency drop down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OTS–2009–0007'' to submit or view public comments and to view supporting and related materials for this proposed rulemaking. The ''How to Use This Site'' link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

• *Mail:* Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: OTS–2009–0007.

• *Facsimile:* (202) 906–6518.

• *Hand Delivery/Courier:* Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, Attention: OTS–2009–0007.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change, including any personal information provided. Comments, including attachments and other supporting materials received are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

• *Viewing Comments Electronically:* Go to *http://www.regulations.gov*, under the ''More Search Options'' tab click next to the ''Advanced Document Search'' option where indicated, select ''Office of Thrift Supervision'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OTS–2009–0007'' to view public comments for this notice of proposed rulemaking action.

• *Viewing Comments On-Site:* You may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–6518. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

FOR FURTHER INFORMATION CONTACT:

OCC: Margot Schwadron, Senior Risk Expert, Capital Policy Division, (202) 874–6022, or Carl Kaminski, Senior Attorney, or Ron Shimabukuro, Senior Counsel, Legislative and Regulatory Activities Division, (202) 874–5090, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Barbara J. Bouchard, Associate Director, (202) 452–3072, or William Tiernay, Senior Supervisory Financial Analyst, (202) 872–7579, Division of Banking Supervision and Regulation; or April Snyder, Counsel, (202) 452–3099, or Benjamin W. McDonough, Senior Attorney, (202) 452–2036, Legal Division. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (202) 263–4869.

FDIC: Ryan Sheller, Senior Capital Markets Specialist, (202) 898–6614, Capital Markets Branch, Division of Supervision and Consumer Protection; or Mark Handzlik, Senior Attorney, (202) 898–3990, or Michael Phillips, Counsel, (202) 898–3581, Supervision Branch, Legal Division.

OTS: Teresa A. Scott, Senior Policy Analyst, (202) 906–6478, Capital Risk, or Marvin Shaw, Senior Attorney, (202) 906–6639, Legislation and Regulation Division, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: On March 4, 2009, Treasury announced guidelines under the Program to promote sustainable loan modifications for homeowners at risk of losing their homes due to foreclosure.[1] The Program provides a detailed framework for servicers to modify mortgages on owner-occupied residential properties and offers financial incentives to lenders and servicers that participate in the Program.[2] The Program also provides financial incentives for homeowners whose mortgages are modified pursuant to Program guidelines to remain current on their mortgages after modification.[3] Taken together, these incentives should help responsible homeowners remain in their homes and avoid foreclosure, which in turn should help ease the current downward pressures on house prices and the costs that families, communities, and the economy incur from unnecessary foreclosures.

Under the Program, Treasury will partner with lenders and loan services to offer at-risk homeowners loan modifications under which the homeowners may obtain more affordable monthly mortgage payments. The Program applies to a spectrum of outstanding loans, some of which meet all of the prudential criteria under the agencies' general risk-based capital rules and receive a 50 percent risk weight and some of which otherwise receive a 100 percent risk weight under the agencies' general risk-based capital rules.[4] Servicers who elect to participate in the Program are required to modify all eligible loans [5] in accordance with the Program guidelines unless explicitly prohibited by the governing pooling and servicing agreement and/or other lender servicing agreements. The Program guidelines require the lender to first reduce payments on eligible first-lien loans to an amount representing no greater than a 38 percent initial front-end debt-to-income ratio.[6] Treasury then will match further reductions in monthly payments with the lender dollar-for-dollar to achieve a 31 percent front-end debt-to-income ratio.[7] Borrowers whose back-end debt-to-income ratio exceeds 55 percent must agree to work with a foreclosure prevention counselor approved by the Department of Housing and Urban Development.[8]

In addition to the incentives for lenders, servicers are eligible for other incentive payments to encourage participation in the Program; borrowers can likewise receive incentive payments for remaining current on their monthly payments. Servicers will receive an up-front servicer incentive payment of $1,000 for each eligible first-lien modification. Lenders and servicers are eligible for one-time incentive payments of $1,500 and $500, respectively, for early modifications of first-lien mortgages—that is, modifications made while a borrower is still current on mortgage payments but at risk of imminent default. To encourage ongoing performance of modified loans, servicers also will receive ''Pay for Success'' incentive payments of up to $1,000 per year for up to three years for first-lien mortgages as long as borrowers remain in the program. Borrowers can likewise receive ''Pay for Performance Success'' incentive payments that reduce the principal balance on their first-lien mortgage up to $1,000 per year for up to five years in exchange for remaining current on monthly payments on their modified first-lien mortgages. Lenders also may receive a home price depreciation reserve payment to offset any losses if a modified loan subsequently defaults.

For second-lien mortgages, lenders are eligible to receive incentive payments based on the difference between the interest rate on the modified first-lien mortgage and the reduced interest rate (either 1 percent or 2 percent) on the second-lien mortgage following modification.[9] Services may receive a one-time $500 incentive payment for successful second-lien modifications, as well as additional incentive payments of up to $250 per year for up to three years for second-lien mortgages as long as both the modified first-lien and second-lien mortgages remain current. A borrower also may receive incentive payments of up to $250 dollars per year for a modified second-lien mortgage loan for up to five years for remaining current on the loan, which amounts will be paid to reduce the unpaid principal of the first-lien mortgage. However, second-lien modification incentives only will be paid with respect to a given property if the first-lien mortgage on the property also is modified under the Program.[10]

Treatment Under Risk-Based Capital Rules

Under the agencies' general risk-based capital rules, loans that are fully secured by first liens on one-to-four family residential properties, either owner-occupied or rented, and that meet certain prudential criteria (qualifying mortgage loans) are risk-weighted at 50 percent. If a banking organization holds both a first-lien and a junior-lien mortgage on the same property, and no other party holds an intervening lien, the loans are treated as a single loan secured by a first-lien mortgage and risk-weighted at 50 percent if the two loans, when aggregated, meet the conditions to be a qualifying mortgage loan.[11] Other junior-lien mortgage loans are risk-weighted at 100 percent.[12]

In general, to qualify for a 50 percent risk weight, a mortgage loan must have been made in accordance with prudent underwriting standards and may not be 90 days or more past due or carried in nonaccrual status. Mortgage loans that do not qualify for a 50 percent risk weight are assigned a 100 percent risk

[1] Further details about the Program, including Program terms and borrower eligibility criteria, are available at *http://www.makinghomeaffordable.gov*.

[2] For ease of reference, the term servicer refers both to servicers that service loans held by other entities and to lenders who service loans that they hold themselves. The term lender refers to the beneficial owner or owners of the mortgage.

[3] The Program also provides incentives for refinancing certain mortgage loans owned or guaranteed by Fannie Mae or Freddie Mac. This interim rule does not cover such loans.

[4] *See* 12 CFR part 3, Appendix A, sections 3(a)(3)(iii) and 3(a)(4) (OCC); 12 CFR parts 208 and 225, Appendix A, sections III.C.3. and III.C.4. (Board); 12 CFR part 325, Appendix A, section II.C (FDIC); and 12 CFR 567.1 and 567.6 (OTS).

[5] For a mortgage to be eligible for the Program, the property securing the mortgage loan must be a one-to-four family owner occupied property that is the primary residence of the mortgagee, not vacant, and not condemned. The mortgage also must have an unpaid principal balance (prior to capitalization of arrearages) at or below the Federal National Mortgage Association conforming loan limit for the type of property.

[6] A front-end debt-to-income ratio measures how much of the borrower's gross (pretax) monthly income is represented by the borrower's required payment on the first-lien mortgage, including real estate taxes and insurance.

[7] To qualify for the Treasury match, servicers must follow an established sequence of actions (capitalize arrearages, reduce interest rate, extend term or amortization period, and then defer principal) to reduce the front-end ratio on the loan from 38 percent to 31 percent, but may reduce principal on the loan at any stage during the modification sequence to meet affordability targets.

[8] A back-end debt-to-income ratio measures how much of a borrower's gross (pretax) monthly income would go toward monthly mortgage and nonmortgage debt service obligations.

[9] Participating servicers will be required to follow certain steps in modifying amortizing second-lien mortgages, including reducing the interest rate to 1 percent. Lenders may receive an incentive payment from Treasury equal to half of the difference between (i) the interest rate on the first lien as modified and (ii) 1 percent, subject to a floor.

[10] In some cases when appropriately tailored to the borrower, servicers also may choose to accept a lump-sum payment from Treasury to extinguish some or all of a second-lien mortgage under a pre-set formula.

[11] *See* 12 CFR part 3, Appendix A, section 3(a)(3)(iii) (OCC); 12 CFR parts 208 and 225, Appendix A, section III.C.3. (Board); 12 CFR part 325, Appendix A, section II.C (FDIC); and 12 CFR 567.1 (OTS).

[12] *See* 12 CFR part 3, Appendix A, section 3(a)(3)(iii) (OCC); 12 CFR parts 208 and 225, Appendix A, section III.C.4. (Board); 12 CFR part 325, Appendix A, section II.C. (FDIC); and 12 CFR 567.6(1)(iv) (OTS).

weight. Under the OCC's general risk-based capital rules for national banks, ''not restructured'' is listed among the criteria that mortgage loans must meet in order to receive a 50 percent risk weight.[13] Under the Board's general risk-based capital rules for bank holding companies and state member banks, mortgage loans must be ''performing in accordance with their original terms'' in order to receive a 50 percent risk weight.[14] Generally, mortgage loans that have been modified are considered to have been restructured (OCC), or are not considered to be performing in accordance with their original terms (Board). Therefore, under the OCC's and Board's current general risk-based capital rules, such loans must be risk weighted at 100 percent.

Under the FDIC's general risk-based capital rules, a state nonmember bank may assign a 50 percent risk weight to any modified mortgage loan, so long as the loan, as modified, is not 90 days or more past due or in nonaccrual status and meets other applicable criteria for a 50 percent risk weight.[15] Under the OTS's general risk-based capital rules, a savings bank may assign a 50 percent risk weight to any modified residential mortgage loan, so long as the loan, as modified, is not 90 days or more past due and meets other applicable criteria for a 50 percent risk weight.[16] Thus, the revisions provided under this interim final rule relative to the FDIC's and OTS's risk-based capital rules are clarifying in nature.

After carefully considering the specific features of the Program, the agencies have adopted this interim final rule to provide that mortgage loans modified under the Program will retain the risk weight appropriate to the mortgage loan prior to the modification, as long as other applicable prudential criteria remain satisfied. Accordingly, under the interim final rule, a qualifying mortgage loan appropriately risk weighted at 50 percent before modification under the Program would continue to be risk weighted at 50 percent after modification, and a mortgage loan risk weighted at 100 percent prior to modification under the Program would continue to be risk weighted at 100 percent after modification. Consistent with the agencies' current treatment, if a mortgage loan were to become 90 days or more past due or carried in nonaccrual status or otherwise restructured after being modified under the Program, the loan would be assigned a risk weight of 100 percent. Also consistent with current practice, the agencies intend to continue to allow past due and nonaccrual loans that receive a 100 percent risk weight to return to a 50 percent risk weight under certain circumstances, including after demonstration of a sustained period of repayment performance.

If a banking organization holds both a qualifying first-lien mortgage loan and a second-lien mortgage loan on the same property, with no intervening lien, and both loans are modified under the Program, the banking organization may continue to apply the risk weights appropriate to the loans prior to the modification, as long as other prudential criteria remain satisfied. Additionally, in certain circumstances under the general risk-based capital rules (as with, for example, a direct credit substitute or recourse obligation), a banking organization is permitted to look through an exposure to the risk weight of a residential mortgage loan underlying that exposure. In these cases, the banking organization would follow the capital treatment provided in this interim final rule in the event that the underlying residential mortgage loan has been modified pursuant to the Program.

The agencies believe that treating mortgage loans modified under the Program in the manner described above is appropriate in light of the special and unique incentive features of the Program and the fact that the Program is offered by the U.S. government in order to achieve the public policy objective of promoting sustainable loan modifications for homeowners at risk of foreclosure in a way that balances the interests of borrowers, servicers, and lenders. As previously described, the Program requires that a borrower's front-end debt-to-income ratio on a first-lien mortgage modified under the Program be reduced to no greater than 31 percent—which should improve the borrower's ability to repay the modified loan—and, importantly, provides for Treasury to match reductions in monthly payments dollar-for-dollar to reduce the borrower's front-end debt-to-income ratio from 38 percent to 31 percent. In addition, as described above, the Program provides material financial incentives for servicers and lenders to take actions to reduce the likelihood of defaults, as well as to servicers and borrowers designed to help borrowers remain current on modified loans. The structure and amount of these cash payments meaningfully align the financial incentives of servicers, lenders, and borrowers to encourage and increase the likelihood of participating borrowers remaining current on their mortgages. Each of these incentives is important to the agencies' determination with respect to the appropriate regulatory capital treatment of mortgage loans modified under the Program.

For the reasons discussed above, the agencies have adopted this interim final rule.

The agencies seek comment on all aspects of this interim final rule.

Regulatory Analysis

Administrative Procedure Act

Pursuant to sections 553(b) and (d) of the Administrative Procedure Act,[17] the agencies find that there is good cause for issuing this interim final rule and making the rule effective immediately upon publication, and that it is impracticable, unnecessary, or contrary to the public interest to issue a notice of proposed rulemaking and provide an opportunity to comment before the effective date. The agencies have adopted the rule in light of, and to help address, the continuing stressed conditions in the housing and financial markets and the continuing unusual and urgent needs of homeowners. The rule will allow banking organizations to continue to risk weight loans modified under the Program at their pre-modification risk weights, thereby promoting stability in the banking and financial markets and promoting sustainable modifications of mortgages on owner-occupied residential properties. The agencies believe it is important to address immediately the risk-based capital treatment of mortgage loans modified under the Program in order to facilitate timely implementation and acceptance of the Program. The agencies note again that the Program has already been adopted and is in effect. The agencies are soliciting comment on all aspects of the rule and will make such changes that they consider appropriate or necessary after review of any comments received.

Riegle Community Development and Regulatory Improvement Act

Section 302 of Riegle Community Development and Regulatory Improvement Act generally requires that regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions take effect on the first day of a calendar quarter unless the relevant agency finds good cause that the

[13] 12 CFR part 3, Appendix A, section 3(a)(3)(iii) (OCC).

[14] 12 CFR parts 208 and 225, Appendix A, section III.C.3. (Board).

[15] 12 CFR Part 325, Appendix A, section II.C. (FDIC)

[16] 12 CFR 567.1 (OTS).

[17] *See* 5 U.S.C. 553(b) and (d).

regulations should become effective sooner and publishes its finding with the rule.[18] For the reasons discussed above, the agencies find good cause for making this interim final rule effective immediately. In addition, making the rule effective immediately will allow affected insured depository institutions and bank holding companies to take advantage of the rule in calculating their risk-based capital ratios at the end of the second quarter 2009. If banking organizations are required to hold residential mortgage loans modified pursuant to the Program at a 100 percent risk weight, the resulting risk-based capital requirements could be excessive in light of the risks associated with those assets. This interim final rule will ensure that banking organizations maintain appropriate risk-based capital levels with respect to modified residential mortgage loans in calculating their risk-based capital ratios for the second quarter 2009.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities.[19] Under regulations issued by the Small Business Administration,[20] a small entity includes a commercial bank, bank holding company, or savings association with assets of $175 million or less (a small banking organization). As of December 31, 2008, there were approximately 2,586 small bank holding companies, 394 small savings associations, 850 small national banks, 432 small State member banks, and 3,116 small State nonmember banks. As a general matter, the Board's general risk-based capital rules apply only to a bank holding company that has consolidated assets of $500 million or more. Therefore, the changes to the Board's capital adequacy guidelines for bank holding companies will not affect small bank holding companies.

This rulemaking does not involve the issuance of a notice of proposed rulemaking and, therefore, the requirements of the RFA do not apply. However, the agencies note that the rule does not impose any additional obligations, restrictions, burdens, or reporting, recordkeeping or compliance requirements on banks or savings associations, including small banking organizations, nor does it duplicate, overlap or conflict with other Federal rules. The rule also will benefit small banking organizations that are subject to the agencies' general risk-based capital rules by allowing mortgage loans modified under the Program to retain the risk weight assigned to the loan prior to the modification. Further, the agencies are requesting public comment on this rule and will modify the rule as appropriate after reviewing the comments.

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), the agencies have reviewed the interim final rule to assess any information collections. There are no collections of information as defined by the Paperwork Reduction Act in the final rule.

OCC/OTS Executive Order 12866

Executive Order 12866 requires Federal agencies to prepare a regulatory impact analysis for agency actions that are found to be "significant regulatory actions." Significant regulatory actions include, among other things, rulemakings that "have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." The OCC and the OTS each determined that its portion of the interim final rule is not a significant regulatory action under Executive Order 12866.

OCC/OTS Unfunded Mandates Reform Act of 1995 Determination

The Unfunded Mandates Reform Act of 1995 [21] (UMRA) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any one year. If a budgetary impact statement is required, section 205 of the UMRA also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC and the OTS each have determined that its interim 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, neither the OCC nor the OTS has prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Solicitation of Comments on Use of Plain Language

Section 722 of the GLBA required the agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies invite comment on how to make this proposed rule easier to understand. For example:

- Have the agencies organized the material to suit your needs? If not, how could they present the rule more clearly?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?
- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would achieve that?
- Is this section format adequate? If not, which of the sections should be changed and how?
- What other changes can the agencies incorporate to make the regulation easier to understand?

List of Subjects

12 CFR Part 3

Administrative practice and procedure, Banks, Banking, Capital, National banks, Reporting and recordkeeping requirements, Risk.

12 CFR Part 208

Confidential business information, Crime, Currency, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Risk.

12 CFR Part 225

Administrative practice and Procedure, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

12 CFR Part 325

Administrative practice and procedure, Banks, Banking, Capital adequacy, Reporting and recordkeeping requirements, Savings associations, State nonmember banks.

12 CFR Part 567

Capital, Reporting and recordkeeping requirements, Risk, Savings associations.

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[18] *See* 12 U.S.C. 4802(b)(1). Other exceptions to this calendar-quarter requirement also exist that are not relevant here.

[19] *See* 5 U.S.C. 603(a).

[20] *See* 13 CFR 121.201.

[21] *See* Public Law 104–4.

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

■ For the reasons stated in the common preamble, the Office of the Comptroller of the Currency amends Part 3 of chapter I of Title 12, Code of Federal Regulations as follows:

PART 3—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

■ 1. The authority citation for part 3 continues to read as follows:

Authority: 12 U.S.C. 93a, 161, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, and 3909.

■ 2. In appendix A to part 3, in section 3, revise paragraph (a)(3)(iii) to read as follows:

Appendix A to Part 3—Risk-Based Capital Guidelines

Section 3. Risk Categories/Weights for On-Balance Sheet Assets and Off-Balance Sheet Items

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(a) * * *

(3) * * *

(iii) Loans secured by first mortgages on one-to-four family residential properties, either owner occupied or rented, provided that such loans are not otherwise 90 days or more past due, or on nonaccrual or restructured. It is presumed that such loans will meet the prudent underwriting standards. For the purposes of the risk-based capital guidelines, a loan modified solely pursuant to the U.S. Department of Treasury's Making Home Affordable Program will not be considered to have been restructured.

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Board of Governors of the Federal Reserve System

12 CFR Chapter II

Authority and Issuance

■ For the reasons stated in the common preamble, the Board of Governors of Federal Reserve System amends parts 208 and 225 of Chapter II of title 12 of the Code of Federal Regulations as follows:

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)

■ 3. The authority citation for part 208 continues to read as follows:

Authority : 12 U.S.C. 24, 36, 92a, 93a, 248(a), 248(c), 321–338a, 371d, 461, 481–486, 601, 611, 1814, 1816, 1818, 1820(d)(9), 1833(j), 1828(o), 1831, 1831o, 1831p–1, 1831r–1, 1831w, 1831x, 1835a, 1882, 2901–2907, 3105, 3310, 3331–3351, and 3905–3909; 15 U.S.C. 78b, 78I(b), 78l(i), 780–4(c)(5), 78q, 78q–1, and 78w, 1681s, 1681w, 6801, and 6805; 31 U.S.C. 5318; 42 U.S.C. 4012a, 4104a, 4104b, 4106 and 4128.

■ 4. In appendix A to part 208, revise Section III. C.3., to read as follows:

Appendix A to Part 208–Capital Adequacy Guidelines for State Member Banks: Risk-Based Measure

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III. * * *

C. * * *

3. *Category 3: 50 percent.* This category includes loans fully secured by first liens [41] on 1- to 4-family residential properties, either owner-occupied or rented, or on multifamily residential properties,[42] that meet certain criteria.[43] Loans included in this category must have been made in accordance with prudent underwriting standards; [44] be performing in accordance with their original terms; and not be 90 days or more past due or carried in nonaccrual status. For purposes of this 50 percent risk weight category, a loan modified solely pursuant to the U. S. Department of Treasury's Making Home Affordable Program will be considered to be performing in accordance with its original terms. The following additional criteria must also be applied to a loan secured by a multifamily residential property that is included in this category: all principal and interest payments on the loan must have been made on time for at least the year preceding placement in this category, or in the case where the existing property owner is refinancing a loan on that property, all principal and interest payments on the loan being refinanced must have been made on time for at least the year preceding placement in this category; amortization of the principal and interest must occur over a period of not more than 30 years and the minimum original maturity for repayment of principal must not be less than 7 years; and the annual net operating income (before debt service) generated by the property during its most recent fiscal year must not be less than 120 percent of the loan's current annual debt service (115 percent if the loan is based on a floating interest rate) or, in the case of a cooperative or other not-for-profit housing project, the property must generate sufficient cash flow to provide comparable protection to the institution. Also included in this category are privately-issued mortgage-backed securities provided that

(1) The structure of the security meets the criteria described in section III(B)(3) above;

(2) If the security is backed by a pool of conventional mortgages, on 1- to 4-family residential or multifamily residential properties each underlying mortgage meets the criteria described above in this section for eligibility for the 50 percent risk category at the time the pool is originated;

(3) If the security is backed by privately issued mortgage-backed securities, each underlying security qualifies for the 50 percent risk category; and

(4) If the security is backed by a pool of multifamily residential mortgages, principal and interest payments on the security are not 30 days or more past due.

Privately-issued mortgage-backed securities that do not meet these criteria or that do not qualify for a lower risk weight are generally assigned to the 100 percent risk category.

Also assigned to this category are *revenue* (non-general obligation) bonds or similar obligations, including loans and leases, that are obligations of states or other political subdivisions of the U.S. (for example, municipal revenue bonds) or other countries of the OECD-based group, but for which the government entity is committed to repay the debt with revenues from the specific projects financed, rather than from general tax funds.

Credit equivalent amounts of derivative contracts involving standard risk obligors (that is, obligors whose loans or debt securities would be assigned to the 100 percent risk category) are included in the 50 percent category, unless they are backed by collateral or guarantees that allow them to be placed in a lower risk category.

The instructions to the Call Report also discuss the treatment of loans, including multifamily housing loans, that are sold

[41] If a bank holds the first and junior lien(s) on a residential property and no other party holds an intervening lien, the transaction is treated as a single loan secured by a first lien for the purposes of determining the loan-to-value ratio and assigning a risk weight.

[42] Loans that qualify as loans secured by 1-to 4-family residential properties or multifamily residential properties are listed in the instructions to the commercial bank Call Report. In addition, for risk-based capital purposes, loans secured by 1- to 4-family residential properties include loans to builders with substantial project equity for the construction of 1- to 4-family residences that have been presold under firm contracts to purchasers who have obtained firm commitments for permanent qualifying mortgage loans and have made substantial earnest money deposits. Such loans to builders will be considered prudently underwritten only if the bank has obtained sufficient documentation that the buyer of the home intends to purchase the home (*i.e.,* has a legally binding written sales contract) and has the ability to obtain a mortgage loan sufficient to purchase the home (*i.e.,* has a firm written commitment for permanent financing of the home upon completion).

[43] Residential property loans that do not meet all the specified criteria or that are made for the purpose of speculative property development are placed in the 100 percent risk category.

[44] Prudent underwriting standards include a conservative ratio of the current loan balance to the value of the property. In the case of a loan secured by multifamily residential property, the loan-to-value ratio is not conservative if it exceeds 80 percent (75 percent if the loan is based on a floating interest rate). Prudent underwriting standards also dictate that a loan-to-value ratio used in the case of originating a loan to acquire a property would not be deemed conservative unless the value is based on the lower of the acquisition cost of the property or appraised (or if appropriate, evaluated) value. Otherwise, the loan-to-value ratio generally would be based upon the value of the property as determined by the most current appraisal, or if appropriate, the most current evaluation. All appraisals must be made in a manner consistent with the Federal banking agencies' real estate appraisal regulations and guidelines and with the bank's own appraisal guidelines.

subject to a pro rata loss sharing arrangement. Such an arrangement should be treated by the selling bank as sold (and excluded from balance sheet assets) to the extent that the sales agreement provides for the purchaser of the loan to share in any loss incurred on the loan on a pro rata basis with the selling bank. In such a transaction, from the standpoint of the selling bank, the portion of the loan that is treated as sold is not subject to the risk-based capital standards. In connection with sales of multifamily housing loans in which the purchaser of a loan shares in any loss incurred on the loan with the selling institution on other than a pro rata basis, these other loss sharing arrangements are taken into account for purposes of determining the extent to which such loans are treated by the selling bank as sold (and excluded from balance sheet assets) under the risk-based capital framework in the same as prescribed for reporting purposes in the instructions to the Call Report.

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

■ 5. The authority for part 225 continues to read as follows:

Authority : 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p-1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3907, and 3909; 15 U.S.C. 1681s, 1681w, 6801 and 6805.

■ 6. In appendix A to part 225, revise section III.C.3., to read as follows:

Appendix A to Part 225–Capital Adequacy Guidelines for Bank Holding Companies: Risk-Based Measure

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III. * * *

C. * * *

3. *Category 3: 50 percent.* This category includes loans fully secured by first liens [48] on 1- to 4-family residential properties, either owner-occupied or rented, or on multifamily residential properties,[49] that meet certain criteria.[50] Loans included in this category must have been made in accordance with prudent underwriting standards;[51] be performing in accordance with their original terms; and not be 90 days or more past due or carried in nonaccrual status. For purposes of this 50 percent risk weight category, a loan modified or restructured solely pursuant to the U.S. Department of Treasury's Making Home Affordable Program will be considered to be performing in accordance with its original terms. The following additional criteria must also be applied to a loan secured by a multifamily residential property that is included in this category: all principal and interest payments on the loan must have been made on time for at least the year preceding placement in this category, or in the case where the existing property owner is refinancing a loan on that property, all principal and interest payments on the loan being refinanced must have been made on time for at least the year preceding placement in this category; amortization of the principal and interest must occur over a period of not more than 30 years and the minimum original maturity for repayment of principal must not be less than 7 years; and the annual net operating income (before debt service) generated by the property during its most recent fiscal year must not be less than 120 percent of the loan's current annual debt service (115 percent if the loan is based on a floating interest rate) or, in the case of a cooperative or other not-for-profit housing project, the property must generate sufficient cash flow to provide comparable protection to the institution. Also included in this category are privately-issued mortgage-backed securities provided that:

(1) The structure of the security meets the criteria described in section III(B)(3) above;

(2) if the security is backed by a pool of conventional mortgages, on 1- to 4-family residential or multifamily residential properties, each underlying mortgage meets the criteria described above in this section for eligibility for the 50 percent risk category at the time the pool is originated;

(3) If the security is backed by privately-issued mortgage-backed securities, each underlying security qualifies for the 50 percent risk category; and

(4) If the security is backed by a pool of multifamily residential mortgages, principal and interest payments on the security are not 30 days or more past due. Privately-issued mortgage-backed securities that do not meet these criteria or that do not qualify for a lower risk weight are generally assigned to the 100 percent risk category.

Also assigned to this category are *revenue* (non-general obligation) bonds or similar obligations, including loans and leases, that are obligations of states or other political subdivisions of the U.S. (for example, municipal revenue bonds) or other countries of the OECD-based group, but for which the government entity is committed to repay the debt with revenues from the specific projects financed, rather than from general tax funds.

Credit equivalent amounts of derivative contracts involving standard risk obligors (that is, obligors whose loans or debt securities would be assigned to the 100 percent risk category) are included in the 50 percent category, unless they are backed by collateral or guarantees that allow them to be placed in a lower risk category.

* * * * *

[48] If a banking organization holds the first and junior lien(s) on a residential property and no other party holds an intervening lien, the transaction is treated as a single loan secured by a first lien for the purposes of determining the loan-to-value ratio and assigning a risk weight.

[49] Loans that qualify as loans secured by 1- to 4-family residential properties or multifamily residential properties are listed in the instructions to the FR Y–9C Report. In addition, for risk-based capital purposes, loans secured by 1- to 4-family residential properties include loans to builders with substantial project equity for the construction of 1- to 4-family residences that have been presold under firm contracts to purchasers who have obtained firm commitments for permanent qualifying mortgage loans and have made substantial earnest money deposits. Such loans to builders will be considered prudently underwritten only if the bank holding company has obtained sufficient documentation that the buyer of the home intends to purchase the home (*i.e.,* has a legally binding written sales contract) and has the ability to obtain a mortgage loan sufficient to purchase the home (*i.e.,* has a firm written commitment for permanent financing of the home upon completion).

[50] Residential property loans that do not meet all the specified criteria or that are made for the purpose of speculative property development are placed in the 100 percent risk category.

[51] Prudent underwriting standards include a conservative ratio of the current loan balance to the value of the property. In the case of a loan secured by multifamily residential property, the loan-to-value ratio is not conservative if it exceeds 80 percent (75 percent if the loan is based on a floating interest rate). Prudent underwriting standards also dictate that a loan-to-value ratio used in the case of originating a loan to acquire a property would not be deemed conservative unless the value is based on the lower of the acquisition cost of the property or appraised (or if appropriate, evaluated) value. Otherwise, the loan-to-value ratio generally would be based upon the value of the property as determined by the most current appraisal, or if appropriate, the most current evaluation. All appraisals must be made in a manner consistent with the Federal banking agencies' real estate appraisal regulations and guidelines and with the banking organization's own appraisal guidelines.

* * * * *

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority for Issuance

■ For the reasons stated in the common preamble, the Federal Deposit Insurance Corporation amends Part 325 of Chapter III of Title 12, Code of the Federal Regulations as follows:

PART 325—CAPITAL MAINTENANCE

■ 7. The authority citation for part 325 continues to read as follows:

Authority: 12 U.S.C. 1814(a), 1815(b), 1816, 1818(a), 1818(b), 1815, 1818(a), 1818(b), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1835, 3907, 3909, 4808; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790, (12 U.S.C. 1831n, note); Pub. L. 102–242, 105 Stat. 2236, 2355, 2386 (12 U.S.C. 1828 note).

■ 8. Amend Appendix A to part 325 by revising footnote 39 to read as follows:

Appendix A to Part 325—Statement of Policy on Risk Based Capital

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II * * *

C. * * *

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[39] This category would also include a first-lien residential mortgage loan on a one-to-four family property that was appropriately assigned a 50 percent risk weight pursuant to this section immediately prior to modification under the Making Home Affordable Program established by the U.S. Department of Treasury, so long as the loan, as modified, is not 90 days or more past due or in nonaccrual status and meets other applicable criteria for a 50 percent risk

weight. In addition, real estate loans that do not meet all of the specified criteria or that are made for the purpose of property development are placed in the 100 percent risk category.

Department of the Treasury

Office of Thrift Supervision

12 CFR Chapter V

■ For reasons set forth in the common preamble, the Office of Thrift Supervision amends part 567 of Chapter V of title 12 of the Code of Federal Regulations as follows:

PART 567—CAPITAL

■ 9. The authority citation for part 567 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1828 (note).

■ 10. Section 576.1 is amended by adding paragraph (4) to the definition *Qualifying mortgage loan* to read as follows:

§ 576.1 Definitions.

* * * * *

Qualifying mortgage loan.

* * * * *

(4) A loan that meets the requirements of this section prior to modification under the U.S. Department of Treasury's Making Home Affordable Program may be included as a *qualifying mortgage loan,* so long as the loan is not 90 days or more past due.

* * * * *

Dated: June 15, 2009.

John C. Dugan,

Comptroller of Currency.

By order of the Board of Governors of the Federal Reserve System, June 24, 2009.

Jennifer J. Johnson,

Secretary of the Board.

Dated at Washington DC, this 23rd day of June 2009.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

Dated: June 17, 2009.

By the Office of the Thrift Supervision.

John E. Bowman,

Acting Director.

[FR Doc. E9–15507 Filed 6–29–09; 8:45 am]

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