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The Office of Thrift Supervision (OTS) has adopted a revised formula to bring the assessments on savings institutions under its supervision more in line with the actual cost of regulating them.

The new formula reduces the degree to which some thrifts, in effect, currently subsidize the cost of regulating other thrifts. Since the agency receives no tax dollars, it relies on assessments on the industry to fund its operations. The new formula is effective for the first semi-annual assessment of 1999.

In the aggregate, the new assessment schedule will result in lower assessments for healthy, well-managed, traditional thrifts that do not have large, complex operations reflected in substantial amounts of off-balance sheet activities. Assessments will rise for some thrifts that engage in significant levels of administering trusts, servicing loans for others, or that have large amounts of off-balance-sheet contingent liabilities, such as recourse obligations or direct credit substitutes. Assessments will also increase for institutions that receive an exam rating of 3. Institutions rated 4 or 5 also will be charged a premium, as under the current rate schedule. OTS' analysis of its allocation of supervisory resources has shown that thrifts with such large, complex operations or lower performance ratings require significantly more supervisory review than comparably sized institutions.

Overall, OTS estimates that over 90 percent of the thrifts it supervises will pay the same or a lower assessment under the new schedule. In particular, existing healthy, traditional, small institutions will benefit from a special provision ensuring their assessment will not be greater than it would have been under the prior schedule.

The new assessment formula will be based on three components: a thrift's size, its condition, and the complexity of its operations.

Asset Size – OTS' current assessment schedule incorporates a sliding scale formula that reflects economies of scale by decreasing rates as an institution's assets increase. The new size component retains this economies of scale approach, but also builds some of OTS' fixed supervisory costs into the base assessment level. These costs, including the costs of drafting regulations and policies and basic examination costs, do not vary depending upon an institution's size, condition, or complexity. The new rule assesses existing small savings institutions that have never had assets over \$100 million and that remain under this threshold using a size component that is the lesser of the amount calculated under the new schedule or the current rate schedule. New thrifts will pay assessments based entirely on the new formula.

Complexity – Currently, the higher examination and supervisory costs for large, complex

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activities involving certain off-balance sheet assets are shared by all institutions, whether or not they engage in these activities. In effect, institutions with minimal or no off-balance sheet assets have subsidized the cost of supervising the others. Under the new formula, OTS will charge a higher assessment for thrifts that administer more than \$1 billion in trust assets, or service more than \$1 billion of loans or others, or have more than \$1 billion of recourse obligations or direct credit substitutes. In response to comments received on the proposed assessment rule published August 14, 1998, OTS has modified the rule to provide different assessment rates for the different types of activities. Thrifts will be assessed .0015 percent of amounts over the \$1 billion threshold for trust activities; .0030 percent for recourse obligations and direct credit substitutes over a \$1 billion threshold; .0010 percent for servicing others on assets of \$1-to-\$10 billion, and .0005 percent on servicing over \$10 billion. The hourly rate OTS currently charges for trust examinations will be retained only for those institutions with smaller trust operations not subject to this new complexity component for trust operations.

Condition – OTS rates the condition of its institutions on a scale of one to five, with one being the best. Institutions with a rating of 4 or 5 will continue to pay a 5-percent premium over the asset-based assessment because they require more supervision. For the first time, 3-rated thrifts will pay a 25-percent premium in line with the additional supervision they require.

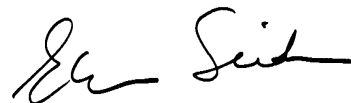
Since assessments are based on consolidated assets, a thrift that owns a subsidiary thrift will be charged on the basis of the combined assets of both. This recognizes the economies of scale in the supervision and assessment of consolidated companies through the decreased assessment rates for larger associations. This discount, however, will not apply to sister thrifts owned by a multiple savings and loan holding company.

The final rule was published in the November 30, 1998, edition of the Federal Register, Vol. 63, No. 229, pp. 65663-65673.

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Office of Thrift Supervision

Attachment

By order of the Board of Governors of the Federal Reserve System, November 23, 1998.

Jennifer J. Johnson,

Secretary of the Board.

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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 502

[No. 98-118]

RIN 1550-AB20

Assessments and Fees

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is amending its regulations to more equitably impose assessments on savings associations. OTS's experience has shown that the current assessment structure may cause some savings associations to pay assessments over or under OTS's costs of supervising those savings associations. The final rule is designed to correlate OTS's assessments on savings associations more closely with the costs associated with supervising those associations. At the same time, the final rule establishes a regulatory structure that allows OTS to keep its assessment rates as low as possible while providing OTS the resources essential to effectively supervise the industry. The rule also clarifies certain other matters involving assessments and other fees, and revises the entire assessment and fee regulation using a plain language format.

EFFECTIVE DATE: January 1, 1999.

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SUPPLEMENTARY INFORMATION:

I. Background

OTS is charged with the mission of examining, regulating, and providing for the safe and sound operation of savings associations.¹ Under 12 U.S.C. 1467,

OTS funds these operations through assessments on savings associations and through other fees, as necessary and appropriate. This section authorizes the Director of OTS to assess examination costs against savings associations and their affiliates, and to recover the agency's direct and indirect expenses, as the Director deems necessary or appropriate.

Recently, OTS analyzed its operating costs and compared these costs to its assessments on savings associations under its current regulation. OTS found that its assessments could be more closely correlated to its costs in certain respects. For these reasons, on August 14, 1998, OTS proposed to amend its assessment regulation.² The proposed rule based assessments on three components: the savings association's asset size, its condition, and its complexity. The proposed rule also streamlined and clarified OTS's regulation concerning fees, and clarified administrative matters.

Today, OTS is issuing a final assessments rule. Briefly, this final rule is substantially identical to the proposal, but with certain changes to the complexity component. OTS limits its trust examinations fee to those associations not subject to the complexity component's coverage of trust assets. Additionally, OTS has decided to adopt a structure that will permit OTS to use one or more different assessment rates for each of the different activities covered by the complexity component. Currently, for trust assets and recourse obligations and direct credit substitutes, OTS will use flat rates. In contrast, for loans serviced for others, OTS will initially use two rates to reflect economies of scale in examining these activities. Additionally, the final rule clarifies which assets and activities are covered by each of the three categories within the complexity component. The final rule is described more specifically below.

II. General Discussion of Comments

The comment period on the proposed rule closed on October 13, 1998. OTS received thirteen comments from eight savings associations, four trade associations, and one holding company. The comments were mixed, with most commenters supporting some parts of the proposal while opposing others. Several commenters opposed the complexity component as proposed, but expressed no opinions on other aspects of the proposal. One commenter supported the proposal, but suggested alternatives. One commenter discussed

the proposal but did not take a position. All others had mixed reactions.

In the proposed rule, OTS indicated that it has two goals with respect to the assessment rule. First, OTS wants to establish an assessment structure that keeps assessment rates as low as possible while providing the resources essential to effective supervision of a changing industry. One commenter opposed the proposal to the extent that it would result in an overall increase in assessments. The final rule adopted today is designed to correlate OTS assessments to the costs of supervision of the thrift industry. As the industry's size, condition, and complexity change in the future, OTS's costs will also change. The final rule will enable OTS's revenues to move along with these changes in its supervisory expenses. OTS believes the approach in the final rule is appropriate and should not result in overcharging the thrift industry.

As its second goal, OTS wants to more closely tailor assessments with OTS's supervisory costs. To do so, OTS used statistical analyses of examiner hours to correlate its proposed assessments with supervisory costs. Two commenters supported basing assessments on examination costs, while one opposed this method, believing examiner hours are excessive. Examiner hours are the main component of OTS's supervisory expenses that vary with the size, condition, or other attributes of thrift institutions. As such, they are a useful standard for evaluating consistency between an assessment schedule and actual supervision. OTS has not found, and no one has proposed, a better alternative. OTS, therefore, will continue to base its assessments on its statistical analyses of examination costs.

Commenters specifically argued that OTS did not provide empirical evidence supporting its assertions regarding examination time and costs. One commenter noted that OTS did not provide details regarding the actual supervision costs, the structure of the quantitative model used to analyze costs, or the variables in the model.

While OTS studied examination costs and examination hours devoted to different tasks, it did not publish these studies in the **Federal Register** because they are too voluminous. Instead, OTS provided adequate details through other means. First, OTS summarized its findings in the notice of proposed rulemaking. In addition, OTS placed a paper providing background analysis in the public comment file. This paper has been available for inspection in the OTS public reading room. Moreover, the Principal Financial Economist who conducted the studies was listed as an

¹ 12 U.S.C. 1463(a).

² 63 FR 43642 (Aug. 14, 1998).

contact person in the proposed rule. Finally, OTS's financial statements, including information about OTS's expenses, are available on OTS's web site.

Several commenters noted that the proposed assessments rule would place OTS-regulated institutions at a competitive disadvantage with regard to national banks and other entities. For example, these commenters pointed out that the Office of the Comptroller of the Currency (OCC), which regulates national banks, does not impose a complexity component, charges a lower condition premium for 4- and 5-rated institutions, and does not charge for trust examinations. Commenters argued that the proposed complexity component would discourage thrifts from engaging in the certain activities, particularly where profit margins are low, as in the loan servicing field. Other commenters predicted that new or existing institutions may reconsider their charter choice.

Competitive disparities are inevitable in any assessment structure. Savings associations compete with many institutions that are subject to differing assessments structures and other entities that are not subject to any assessments. For example, thrifts compete with credit unions, and with state chartered commercial and savings banks who do not pay Federal assessments. Thrifts also compete with entities that are not regulated by a federal banking agency, such as mutual funds.

Moreover, eliminating the aspects of this rule that are different from the OCC assessments model would not eliminate all competitive inequities. Rather, such a change would merely move a competitive disparity from one thrift to another. For example, if OTS were to eliminate the assessment on trust activities or on loan servicing, it would necessarily transfer the costs of supervising those activities from the institutions that cause them to other savings associations. These other institutions would be forced to bear these costs while, at the same time, they are trying to compete with other institutions who do not have to cover such costs. OTS sees no benefit in such an approach. OTS's goal in amending its assessment regulation is to more closely tailor its assessments to its costs, which this regulation does. OTS believes this is the most equitable approach.

One commenter encouraged OTS to meet with the OCC to discuss the disparities between the assessments for thrifts and national banks. Specifically, this commenter urged OTS to evaluate the merits of the complexity component

with the OCC before implementing the proposed rule. This commenter encouraged OTS to work toward a uniform regulation with the OCC. Another commenter noted that section 303(a)(2) of the Riegle Community Development Act requires OTS to work toward uniform regulation with the other federal banking agencies.³

OTS considered the OCC's assessment structure in developing its proposed and final rules, just as the OCC considered the OTS structure in adding a surcharge on its assessments for national banks requiring additional supervisory resources.⁴ However, because the thrift industry and the national bank industry differ in certain respects, identical rules are not necessarily the most equitable. For example, thrifts concentrate on mortgage lending operations, such as mortgage servicing, more than national banks. As a result, an assessment that does not cover mortgage loan servicing would have a more inequitable impact on institutions in the thrift industry than in the banking industry. OTS's system will reduce the cross-subsidies between thrifts. While this system is different than the OCC's, OTS believes it is more equitable for the thrift industry.

III. Description of the Final Rule

A. Size Component

OTS proposed to base the first component of the assessment calculation on asset size, as reported in the Thrift Financial Report (TFR). Like the current regulation, the size component would use marginal assessment rates that decline as asset size increases. Second, OTS would incorporate some fixed costs into the assessment rate schedule via an explicit charge. Commenters generally supported the size component, and one noted that this method is easy to understand and to plan for. Specific comments regarding the size component are discussed below.

1. Declining Rate Schedule

The proposed assessment structure uses assessment rates that decline as asset size increases because OTS realizes economies of scale in supervising and regulating larger savings associations. Because OTS's experience indicated that the current marginal assessment rates are no longer consistent with existing economies of scale, the projected marginal rates in the preamble to the proposed rule differed

from the rates OTS had been using for assessments. Four commenters supported this system of declining rates.

Like the current rule, the proposed graduated schedule included seven asset size classes. The highest class included institutions with over \$35 billion in assets. One commenter urged OTS to add more asset size classes. This commenter believed that the largest asset size category, \$35 billion and larger, denies economies of scale to the largest institutions.⁵ Another commenter suggested that OTS reexamine whether the proposed asset size categories are appropriate.

OTS considered altering the asset size categories in its assessments regulation, but declines to amend them at this time. There currently are not enough savings institutions significantly over \$35 billion in size to justify a new, larger, size category. OTS believes the seven asset size categories, along with an adjustable marginal assessment rate for each category, will permit OTS to appropriately recognize existing economies of scale in the size component. If those economies of scale change over time, OTS can incorporate those changes by adjusting the rates, for each appropriate class, accordingly.

2. Fixed Charge

OTS proposed to incorporate fixed supervision costs into the assessment rate schedule via an explicit charge assessed on all savings associations. Two commenters supported this proposal.⁶ One commenter, however, suggested that OTS should include a lower fixed cost in the schedule to cover only the "basic" cost of examination and impose the fixed cost of other activities (e.g., rule drafting) directly on those institutions that are affected by the specific regulatory activity.

The commenter's proposed alternative would impose excessive and unnecessary administrative burdens on

⁵ Alternatively, the commenter proposed that OTS base assessments on a per hour charge for examiners' actual time at each institution. While this method would correlate assessments with OTS's supervisory costs, it would also result in fluctuating and unpredictable assessments. OTS does not always examine thrifts at regular intervals. Some are examined more or less frequently in response to marketplace or other events. Currently, for example, OTS is conducting Year 2000 examinations, which are a temporary cost. OTS believes that the final assessments rule offers savings associations a measure of predictability as to the amount due at the time of each assessment. This will aid both institutions and the agency in the budgetary process. Further, this assessment scheme is simpler and less burdensome for the agency to administer.

⁶ Three commenters argued that the fixed charge could be burdensome to small institutions. These comments are discussed below in connection with the alternate fee calculation for small institutions.

³ 12 U.S.C. 4803(a)(2). This statute required Federal banking agencies to work jointly toward uniform regulations in common areas.

⁴ See 62 FR 54147 n.5 (Oct. 21, 1997).

OTS. It would be impractical administratively to charge each affected institution for specific supervision costs on a rule by rule or policy by policy basis. It is impossible to determine all the thrifts affected by any rule or policy. It would also increase OTS's costs and create uncertainty over the assessments that thrifts would pay from one year to the next. Accordingly, OTS declines to adopt the commenter's alternative proposal. The final rule continues to incorporate the fixed cost aspect of the size component, as proposed.

3. Alternate Calculation for Certain Small Institutions

OTS recognized that the size component could have a disproportionate impact on the smallest savings associations—those with less than \$100 million in assets. Accordingly, OTS proposed to base the size component for certain qualifying savings associations on the lesser of the new size component or the assessment calculated under the current general assessment table. This grandfather provision would not be available to savings associations formed after this rule's effective date, or to institutions whose assets have exceeded \$100 million at the end of any quarter. Three commenters supported the grandfather provision.

Three commenters suggested modifications to the grandfather provisions. These commenters suggested that institutions with less than \$100 million in assets should qualify for the grandfather provision, even if they had more than \$100 million in assets at the end of a prior quarter. Another commenter believed that institutions should qualify for the grandfather clause if their asset size is \$150 million or less.

These suggested approaches would have little effect. For the January 1999 assessment, the size component for institutions with over \$67.5 million in assets will be lower under the new assessment schedule than under the existing general assessment schedule. Thus, even if these institutions qualified for the special treatment afforded small institutions, OTS would use the new size component to compute their assessment, rather than the grandfather provision. Institutions under \$67.5 million in assets will find little difference between the two assessments. OTS acknowledges that if supervisory expenses increase in the future, this may no longer be true. However, if OTS needs to increase its rates, it will consider the effects of an increase on small institutions before increasing the

marginal rates under the size component.

Finally, one commenter urged that institutions that become savings associations after the rule's effective date should qualify for the small institution exemption. In proposing the small institution exemption, OTS was concerned that the new size component would impose undue burdens on existing savings associations, which may not be in a position to absorb the new burden. It is not necessary to minimize the potential burden of a changing regulatory structure for newly created institutions because those institutions will be able to plan for and take into account the new assessment schedule as they make their initial business decisions.

4. Assessment Rates

In its proposed rulemaking, OTS included a chart indicating the base assessment amounts and marginal assessment rates it was considering for the initial size component. OTS, however, also indicated that these amounts and rates could change depending on changes to the final rule. For example, OTS noted that if it were to decide against imposing a complexity component, it would charge higher rates under the size component.

As discussed below, OTS has adopted different assessment rates for the activities within the complexity component. As a result, the rates for the initial size component are different than those listed in the notice of proposed rulemaking. The rates OTS will apply for the January 31, 1999 semi-annual assessment are set forth in a Thrift Bulletin issued simultaneously with this rulemaking and available on OTS's web site.

B. Condition Component

Under the second component of the assessment calculation, OTS proposed to impose an additional 25% premium on the size component for 3-rated institutions and to continue its current 50% premium on 4- and 5-rated institutions. Commenters addressing the condition component generally favored it. One commenter, however, opposed the 25% surcharge, arguing that OTS's examination rating system is arbitrary and may pressure examiners to generate income through the rating system.

The CAMELS rating system that OTS uses was developed jointly by all of the Federal banking regulators in an effort to establish a uniform rating system using standard criteria and definitions for rating in six different ratings areas. The CAMELS rating system, with its correlation to increased supervisory

attention, is well suited to distinguish between savings associations whose performance is consonant with safe and sound operations (1- and 2-rated institutions), those whose performance is flawed in certain respects (3-rated institutions), and those whose performance is poor or unsatisfactory (4- and 5-rated institutions). Over the years, this rating system has proven to be an effective supervisory tool for evaluating the soundness of financial institutions on a uniform basis and for identifying those institutions requiring special supervisory attention or concerns.⁷

Moreover, OTS does not believe that the surcharge for 3-rated thrifts will place pressure on examiners to generate income. OTS's experience with its surcharge for 4- and 5-rated thrifts has shown no pressure to lower ratings to generate revenue. On the contrary, the number of 4- and 5-rated savings associations has steadily decreased since OTS began imposing a premium for lower rated associations. For example, there were 203 institutions rated 4 or 5 in 1992, which dropped to 101 in 1993, and plummeted to only 18 by June 1998.

Two commenters were concerned that the condition component would take capital away from struggling institutions. While OTS agrees with these commenters' concerns, its analyses demonstrate that examiners devote substantially more hours to 3-rated institutions than 1- or 2-rated institutions, although not as many hours as 4- and 5-rated institutions. In other words, 3-rated institutions cause OTS to incur extra supervisory costs. OTS must, therefore, pass along those costs either to 3-rated associations or to other institutions. Passing the costs to 4- and 5-rated institutions would worsen their condition. Passing the costs to 1- and 2-rated institutions would unfairly burden them. OTS believes the 25% surcharge for three-rated institutions in the condition component is the most fair and appropriate solution overall, and therefore adopts it as proposed.

To alleviate some of the burden on 3-rated institutions, one commenter suggested a sliding scale within the 3-rated category. Under this alternative, some institutions would not incur a full 25% premium. OTS considered the commenter's suggestion, but believes that it would be impossible to administer fairly. OTS does not assign "high" and "low" three-ratings and does not track its examiners' hours on this basis. Accordingly, OTS declines to adopt this suggestion.

⁷ See 61 FR 67021 (Dec. 19, 1996) (Uniform Financial Institutions Rating System).

C. Complexity Component

OTS proposed to include a new complexity component in its assessment regulation. This component would impose an assessment based on a percentage of the value of certain complex assets or activities that require OTS to expend supervisory resources beyond those at institutions of similar size and condition. OTS proposed that the complexity component cover loans serviced for others, trust assets, and recourse obligations and direct credit substitutes, to the extent that any of these categories exceed \$1 billion. OTS solicited comments on whether commercial loans and non-residential real estate loans should also be included in the basis for the complexity component.

The complexity component drew the most public comment. One commenter agreed that the component was logical, and another supported the complexity component for larger institutions with complex operations but not for local community institutions that make consumer and commercial loans. Ten others opposed at least one aspect of the proposed complexity component. As detailed below, OTS adopts much of the complexity component as proposed, but makes certain changes and clarifications in response to the comments.

1. Assets or Activities Subject to the Complexity Component

(a) *Loan serviced for others.* The proposed rule would include loans serviced for others as part of the base for the complexity component. Three commenters asked how OTS would interpret "loans serviced for others." Loans serviced for others, as clarified in the final rule, means the principal amount of loans serviced for others, as currently reported in the TFR on line SI390.⁸ This definition is familiar to all thrifts that service loans for others because they routinely use it in completing TFRs. OTS, therefore, believes this is the most appropriate definition to use.

Four commenters noted that loans serviced for others are reflected on the balance sheet under some circumstances (i.e., mortgage servicing rights and asset backed securities), and are therefore covered by the size component. At the

same time, these assets would also be covered by the complexity component. Commenters urged OTS to either remove the asset from the complexity component base or from the size component base.

OTS's statistical analyses of examiner hours showed that institutions that service loans for others require more examiner hours than institutions of similar size and condition without such activities. Thus, even to the extent that some assets related to these activities are also covered by the size component, the analyses demonstrates that the size component alone does not cover the supervisory costs for such activities.⁹

One commenter observed that there could also be inconsistent counting on an industry-wide basis. For example, loans included under one association's size component could also be covered by another association's complexity component as loans serviced for others. By contrast, if an originator retained both the loans and the servicing, the loans would be included in the originator's size component, but the servicing would not be assessed under the complexity component. This commenter questioned why OTS should collect more revenue in the first instance than in the second.

When loans are split into their components and spread between institutions, it is appropriate to assess under different components to correlate to OTS's costs. Separating loans from their servicing increases OTS's supervisory workload because both the loans and the loan servicing require OTS's review, sometimes by different groups of examiners. To the extent that loan servicing for others exceeds \$1 billion, OTS has found that this activity increases OTS's examination costs independently of an institution's size and condition.

Finally, one commenter noted that complex assets are often supported by other related on-balance sheet assets (e.g., fixed assets to generate cash flow) and that these related assets are also assessed under the size component. Such fixed assets are not included in the complexity component, so they are not assessed twice. Rather, they are included only in the size component, as are all fixed assets. OTS sees no reason

to treat these assets differently than the fixed assets that support any lines of business.

Two commenters suggested that mortgage loans serviced for government sponsored entities (GSEs) should be excluded from the complexity component because GSEs already supervise their servicers. GSEs, however, do not always examine servicing for the same purposes as OTS, so OTS oversight is also necessary. The complexity component is based on, and reflects, OTS's examination costs. If OTS did not assess for those costs through the complexity component, the same costs would necessarily be imposed on other savings associations.

One commenter urged OTS to distinguish between loan servicing and subservicing. This commenter argued that subservicing does not raise the same safety and soundness concerns that servicing does, and that subservicing should therefore be excluded from the complexity component. In this rulemaking, OTS is seeking to correlate assessments with its costs of supervision rather than with the safety and soundness of activities. Nevertheless, OTS did consider this concern about subservicing. The agency's workload analyses are based on TFRs, which do not distinguish between servicing and subservicing. Therefore, the agency's statistical analysis cannot separate examination time spent on subservicing specifically. However, the agency's experience is that supervising loan servicing and subservicing are quite similar and require substantially the same amount of examiner time. With both servicing and subservicing, examiners look at the quality of operations, and they analyze future expected income and costs.

Subservicing may require slightly less examiner time than servicing. However, this is counterbalanced by the fact that direct servicing is assessed under the size component because a small percentage of the loan value does appear on the balance sheet as a servicing asset. Thus, while subservicing may require slightly less examining than direct servicing, subservicing is assessed less under this rule than direct servicing.

Current information demonstrates that subservicing should be covered by the complexity component. OTS will monitor the amount of its time examiners spend on subservicing. If, over time, OTS determines that subservicing requires less examination than direct servicing, OTS may partially or wholly exclude subservicing from assessments.

(b) *Trust assets administered by the association.*

⁸This definition covers loans and securities that a savings association or its consolidated subsidiary services but does not own. It excludes loans and securities for which the savings association or its consolidated subsidiary owns the servicing rights but for which it has subcontracted subservicing to a third party. It also excludes loans and securities serviced for a savings association by its consolidated subsidiary or a subsidiary depository institution.

⁹OTS recognizes that servicing rights are covered by the size component. However, the value of those rights, within the size component, is a very small percentage of the loan size. For example, in June 1998, no thrift reported servicing rights assets over 2.25% of loans serviced for others. Therefore, even to the extent that loan servicing is counted in two components, the amount counted twice is very small. Because the amount involved is so small, OTS does not believe that the deduction of these amounts is warranted.

The proposed rule would include an assessment under the complexity component on trust assets administered by a savings association. For purposes of this rule, OTS uses the trust assets identified in Line SI350 of the TFR. This covers assets in both discretionary and nondiscretionary accounts.

Two commenters pointed out that OTS currently charges an hourly examination fee for trust examinations. Commenters argued that this fee in addition to the complexity component's assessment of trust assets would be too burdensome. One, a state-chartered trust company, noted that it is subject to both state and OTS charges for trust examinations.¹⁰ Another commenter argued that OTS should impose only a trust examination fee and should not impose any complexity component on trust assets.

OTS agrees that coverage of trust assets under the complexity component, when combined with the trust examination fee, is duplicative. OTS will not assess both against the same institution. Under the final rule, the complexity component will only apply when trust assets administered by an association exceed \$1 billion. The trust examination fee, on the other hand, as set forth in a Thrift Bulletin issued today, will apply only to trust examinations of savings associations that administer \$1 billion or less in trust assets. The final rule, at §§ 502.5(c) and 502.50(a), states that trust examination fees do not apply to associations that administer more than \$1 billion in trust assets. This approach should alleviate concerns about overly burdensome assessments on savings associations that administer trust assets. At the same time, it will keep assessments and fees correlated to OTS's costs of supervising associations that administer trust assets.

(c) Recourse obligations and direct credit substitutes.

The proposed rule would impose an assessment, as part of the complexity component, on off-balance sheet activities that are recourse obligations and direct credit substitutes, if those activities exceed \$1 billion. One commenter asked OTS to clarify what this assessment covers. For purposes of this rule, OTS uses the same definitions

for recourse obligations and direct credit substitutes that OTS uses for the TFR line CC455. This definition includes the full value of assets covered, fully or partially, by a savings association's recourse obligations or direct credit substitutes. The final rule, at § 502.25(a)(3), contains this clarification. Generally, recourse obligations are arrangements by which an association retains credit risk on assets that it sells to a third party. Direct credit substitutes are arrangements by which an association assumes credit risk on assets that another institution sells to a third party.

One commenter specifically requested that OTS clarify its use of the phrase "off-balance sheet assets." This commenter noted that that some off-balance sheet assets, such as routine interest rate swaps, require less OTS oversight than other types, such as complex hedging strategies. The complexity component would not be assessed against all off-balance sheet activities, but only those identified in the regulation. To avoid confusion with other types of off-balance sheet activities, however, OTS has revised the rule text to delete the phrase "off-balance sheet assets."

Another commenter observed that some direct credit substitutes and recourse obligations are also on-balance sheet assets, and are subject to assessment twice, under the size and the complexity components. However, these items have an independent significant effect on OTS's costs. OTS's statistical analyses of examiner hours showed that institutions with recourse obligations or direct credit substitutes require more examiner hours than institutions of similar size and condition without such activities. Thus, even to the extent that some recourse obligations and direct credit substitutes are covered by the size component, the analysis demonstrates that the size component alone does not cover the supervisory costs for such activities.

(d) Commercial and non-residential real estate loans.

OTS asked for comment whether commercial and non-residential real estate loans should be included in the complexity component. The four commenters addressing this question advocated excluding these loan types from the complexity component's coverage. One pointed out that while these are more complex than other loans, they have higher balances and produce economies of scale in the examination process. Another commenter believed that all on-balance sheet assets should be subject to the same assessment rate no matter their

complexity. Finally, one commenter believed that commercial and non-residential mortgages should not be included in the complexity component without sound empirical evidence that this lending entails more examination costs.¹¹

OTS has decided against including commercial loans and non-residential real estate loans in the complexity component. OTS wishes to encourage thrifts to diversify their operations where they can do so safely and soundly. Additionally, commercial and non-residential real estate lending is currently a relatively minor part of the industry's overall activities. However, OTS will continue to collect empirical data on this lending activity. If in the future, OTS determines that its costs of supervision warrant the addition of commercial and non-residential loans to the complexity component, it will propose appropriate revisions to the assessment rule.

(e) Loans sold with servicing released.

OTS considered including another type of asset in the complexity component—loans sold with servicing released. Some savings associations originate large volumes of loans and immediately sell the loans and the servicing. Because the originators sell these loans quickly, only a portion of the loans appear on the savings association's September or March TFR and are subject to assessment under the size component. These associations, however, can incur serious risks to their safety and soundness and significant compliance obligations in producing and selling large volumes of these loans. As a consequence, examiners must expend considerable amounts of time examining these operations.

The final rule does not specifically address loans sold with servicing released. However, if OTS determines that a particular savings association is taking on additional risks with this type of activity, thus requiring OTS to incur extraordinary expenses to examine and supervise the activity, the agency may impose a fee under §§ 502.5(c) and 502.60(c).¹² If in the future, the risks

¹¹ One commenter believed that commercial and non-residential mortgage loans only require extra supervisory efforts if they suffer from credit problems. This commenter argued that OTS's extra costs for such credit problem would be covered by the condition component and that covering the costs in the complexity component is unnecessary. OTS agrees that credit risk is a part of commercial lending, but it does not follow that savings associations exposed to some credit risk are necessarily rated a 3, 4, or 5. Thus, the condition component may not apply to associations with commercial loans that require extra supervision.

¹² One commenter opposed proposed §§ 502.5(c) and 502.60, arguing that the condition component

¹⁰ This commenter felt that, while state and federal agencies acknowledge the desirability of working together, they generally do not coordinate trust examinations. The commenter would prefer to see a proposal aimed at finding remedies for these inefficiencies. OTS agrees that regulators should avoid duplicative examinations when possible. As a policy matter, OTS makes every effort to coordinate examinations with state regulators, but it is not always possible to do so. OTS will continue its efforts to coordinate examinations where appropriate.

from this activity become more commonplace or more severe, OTS may consider amending this rule to specifically cover the activity.

2. \$1 Billion Threshold

OTS proposed to assess the complexity component only when assets included in each category of complex assets (trust assets, loans serviced for others, and recourse obligations and direct credit substitutes) exceed \$1 billion. OTS solicited comments on this proposed \$1 billion threshold. One commenter believed the \$1 billion proposed threshold is reasonable, while another thought it is too high. One commenter opined that complex assets require less supervisory attention in larger institutions than in smaller institutions. This commenter argued that the complexity component should apply when complex assets exceed a specified percentage of assets.

OTS's statistical analyses found that a \$1 billion threshold is better correlated with the agency's examination workload than a percentage-of-assets threshold. Additionally, a threshold based on a percentage of assets would be more difficult to administer, and would be more uncertain for thrifts. For these reasons, OTS adopts the \$1 billion threshold as proposed.

3. Assessment Rates for Complexity Component

OTS proposed to use the same assessment rate for all assets subject to the complexity component. The preamble to the proposed rule indicated that OTS expected to apply a flat rate of 0.0015% to all complex assets that exceed the \$1 billion thresholds.

Several commenters questioned whether all complex assets warrant the same assessment rate. Commenters argued that different off-balance sheet assets may require differing levels of supervision.

In response to these comments, OTS reviewed its cost statistics. OTS found that loans serviced for others, trust

should cover all extraordinary expenses. OTS continues to believe that the most appropriate treatment of extraordinary expenses is to charge the institution that causes OTS to incur the expenses. Contrary to the commenter's assertion, OTS does not always incur such costs in examining 3-, 4- or 5-rated institutions. Rather, extraordinary fees may be appropriate for recovering supervisory costs from any institution that poses an extraordinary burden, or requires OTS to obtain expert advice in areas beyond those that OTS normally encounters. Such costs might, for example, include the cost of an interpreter where numerous documents are in a foreign language. OTS might also assess a fee for extraordinary expenses if assets are nominally transferred to an affiliate to avoid assessments, but the savings association retains the risks and responsibilities of those assets. For these reasons, OTS adopts §§ 502.5(c) and 502.60(e) as proposed.

assets, and recourse obligations and direct credit substitutes do not all have identical effects on examination hours. More specifically, OTS found that recourse obligations and direct credit substitutes have a greater effect on examiner hours than trust assets administered by a savings association, which, in turn, have a greater effect on examiner hours than loans serviced for others. OTS therefore believes different assessment rates should apply to the different activities within the complexity component. Initially, OTS will assess trust assets at a rate of 0.0015%, and recourse obligations and direct credit substitutes at 0.0030%. For loans serviced for others, OTS will use two different assessment rates to recognize economies of scale, as discussed immediately below.

OTS proposed no upper limit on the complexity component, but requested comment on whether there should be a cap on this component. Five commenters discussed economies of scale in administering or supervising complex activities. One thought a cap of \$3 billion would avoid penalizing thrifts who have achieved economies of scale in their operations. Three favored a declining marginal assessment rate as asset size increases, and one of these suggested a flat fee together with a declining assessment rate. The fifth commenter did not suggest a specific method for addressing economies of scale. In addition, two commenters suggested some unspecified cap on the complexity component.

In response to comments, OTS reviewed its data, focusing on the extent to which economies of scale affect examiner workload for complex activities. The analysis demonstrates that OTS may realize some economies of scale in supervising loans serviced for others for portfolios above \$10 billion.

OTS's experience with the examination of trust assets, recourse obligations and direct credit substitutes, on the other hand, does not support a conclusion that the economies of scale for these activities should be reflected in the assessment rates. Therefore, the agency continues to use a flat rate for each of these activities above the \$1 billion threshold. OTS will continue to collect and analyze data concerning these activities to determine whether it should recognize economies of scale in the future.

Therefore, OTS has revised § 502.25 to indicate that it may establish one or more assessment rates for activities under the complexity component. OTS will set forth all assessment rates for the complexity component in a Thrift Bulletin and will revise these rates

periodically. Initially, OTS will use the following rates:

Complexity component category	Assessment rate (percent)
Loans serviced for others, over \$1 billion, up to \$10 billion	0.0010
Loans serviced for others, over \$10 billion	0.0005
Trust assets administered	0.0015
Recourse obligations and direct credit substitutes	0.0030

D. Consolidation

OTS solicited comments on how it should assess savings associations that own depository institutions or non-depository institutions, or multiple savings associations owned by one holding company. Four commenters favored consolidating thrifts that own thrifts for assessment purposes, while one opposed this approach. One commenter opposed aggregating off-balance sheet activities of a thrift's consolidated subsidiary with the parent's off-balance sheet activities, believing that the parent-subsidiary structure insulates the thrift from risk. Two commenters thought OTS should adjust assessments to reflect economies of scale in supervising institutions within the same family structure. Finally, two commenters believed that non-lead thrifts owned by a multiple savings and loan holding company should get a discount on their assessments.

OTS will continue to include consolidated depository institution or other regulated subsidiaries in the assessment calculations for parent thrifts on the same basis as all other consolidated subsidiaries. This will incorporate economies of scale into the assessment of consolidated companies through the decreased assessment rates for larger associations. OTS believes recognizing these economies of scale is appropriate because it reflects OTS's costs of supervising consolidated entities. OTS will not, at this time, incorporate any discount for a non-lead thrift owned by a multiple savings and loan holding company, but will continue its practice of treating the sister thrifts as separate corporations. Because sister thrifts do not necessarily operate as one company, and can have very different operations and different types or amounts of risk, OTS does not realize the same economies of scale as it does with one larger thrift.

E. Other Matters

1. Semi-annual Assessment

Unlike the current rule, which provides for quarterly or semi-annual

assessments, the proposed rule would collect all assessments on a semi-annual basis. Three commenters supported the semi-annual assessment, and none opposed it. OTS believes that a semi-annual assessment will impose the least burden on the thrift industry and the agency. Accordingly, the final rule requires semi-annual assessments.

One commenter requested that OTS clarify whether the complexity component would be imposed on a semiannual basis. The proposed rule stated, at § 502.10, "OTS determines your semiannual assessment by totaling three components: your size, your condition and the complexity of your business." OTS calculates each component semiannually.

2. Publication of Assessment Schedules

The size component would use a chart to identify base assessment amounts for total assets at certain levels, and would impose marginal rates on assets above those levels. This is similar to the treatment under existing part 502. However, unlike the existing regulation, the proposed rule would not include specific base assessment amounts or marginal rates in the regulatory text. Rather, OTS proposed to publish the specific base amounts and marginal rates in publicly available Thrift Bulletins and on its web site. Similarly, OTS proposed to publish the assessment rate for the complexity component in the Thrift Bulletin and on its web site.

Three commenters agreed that this approach is reasonable. These commenters argued that this system eliminates delays, is more flexible, and will make rates more easily available. One commenter, however, argued that OTS should not increase the assessment rate schedule without publishing a proposal in the **Federal Register** for notice and comment. This commenter, however, would not object to the current system where the regulation reflects higher assessment levels that are subject to a reduction in a Thrift Bulletin. This commenter also argued that OTS may be required to publish a new proposal if the rates in the final regulation differ significantly from the proposal.

OTS currently publishes assessment rates in a Thrift Bulletin, under the authority in existing § 502.6 to set rates lower than those published in its regulation. Thus, since the early 1990s, thrift have been charged assessments that are different from those included in the regulation. Having outdated rates in the regulation has caused confusion. For this reason, OTS does not want to codify rates in a regulation that will quickly become obsolete.

Additionally, OTS's goals in this rulemaking are to keep its rates as low as it can while still providing OTS with essential resources, and to more closely tailor its rates to its costs. With actual rates in a Thrift Bulletin rather than in a regulation, OTS can readily revise the rates to lower them when it is appropriate, and can more readily align them to changes in OTS's costs of supervising the thrift industry. The industry has received an opportunity to comment on the structure through this rulemaking. Conducting new rulemakings for adjustments in rates would impede the agency's ability to adjust its rates to reflect increases in its supervisory workload, and thus could impair its ability to regulate the industry. For these reasons, OTS will announce the rates in Thrift Bulletins.

3. Refund and Proration of Assessments

In the proposed rule, OTS clarified the existing regulation and incorporated OTS's long-standing practice by stating that it will not refund or prorate assessments, even if an entity ceases to be a savings association. Further, OTS stated that it would not increase or decrease assessments based on events that occur after the date of the TFR upon which the assessment is based, except for errors in the TFR. One commenter believed that this approach avoids burden.

OTS believes that changing assessments for events after the relevant TFR date complicates the assessment process without adding any benefit. Accordingly, OTS adopts proposed § 502.40 without amendment. At the same time, however, assessments must be calculated accurately and should not be based on errors in the TFR. Therefore, consistent with its current practice, OTS will, where necessary, continue to adjust assessment to reflect corrections to errors contained in the TFR.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 et. seq., applies to this rulemaking. Accordingly, OTS included in its notice of proposed rulemaking an initial regulatory flexibility analysis (IRFA). With this final rule, OTS includes the following final regulatory flexibility analysis, as required by section 604(a) of the Regulatory Flexibility Act, 5 U.S.C. 604(a). In the IRFA, OTS solicited comments on all aspects of the IRFA, including any significant impacts the proposed rule would have on small entities. OTS received no comments on its IRFA. However, OTS did receive comments discussing small savings associations

and the proposed rule's special size component calculation for qualifying associations. These comments are discussed earlier in this preamble.

Reasons for rulemaking. OTS is issuing this final rule to revise its current assessments system to match assessments more closely with OTS's costs. As described in this preamble and in the notice of proposed rulemaking, OTS has found that, under its prior assessment system, OTS's costs of supervising some institutions are higher or lower than those associations pay in assessments. OTS believes it is inappropriate for some savings associations to subsidize the costs of others. Therefore, OTS is attempting, through this rule, to more closely associate its costs with assessments.

Objectives of and legal basis for the final rule. OTS has two primary objectives for this final rule: (1) establishing an assessment structure that keeps the agency's rates as low as possible, and (2) more closely tailoring rates to the agency's increased costs in supervising certain types of institutions. The Director of OTS is authorized by statute to impose assessments.¹³

Effect of the final rule on small savings associations. This final rule could affect small savings associations through its condition, size, or complexity components. The rule will have no effect on small businesses or small organizations other than small savings associations, and will not affect small governmental jurisdictions. Small savings associations are generally defined, for Regulatory Flexibility Act purposes, as those with assets under \$100 million.¹⁴

The condition component will affect small savings associations. As discussed earlier in this preamble and in the notice of proposed rulemaking, the condition component imposes an assessment equal to 25% of an association's size component for each 3-rated association, regardless of its size. Currently, there are 43 savings associations that are 3-rated and that have assets under \$100 million. The smallest of these has assets of approximately \$5 million, and the largest has approximately \$100 million. Their assessments will increase due to the condition component by approximately \$422 and \$5464 annually, respectively. Other 3-rated small savings associations will see their assessments increase, depending on their size. The largest increase will be \$5792 for a thrift with \$69 million in assets. (Thrifts between \$69 million and

¹³ 12 U.S.C. 1462a, 1463, 1467, 1467a.

¹⁴ 13 CFR 121.201 Division H (1998).

\$100 million will realize a smaller asset-based assessment under the new rule, while thrifts below \$69 million will see no change in their asset-based assessment. Because the condition component is a percentage of the asset-based assessment, it will be greater for a \$69 million thrift than for a \$100 million thrift.)

As discussed more fully in the notice of proposed rulemaking, 3-rated savings associations require more supervisory attention than 1- or 2-rated associations. OTS therefore has three alternatives: impose extra assessments on all 3-rated associations; require institutions not rated 3 to subsidize the extra supervisory costs of 3-rated institutions; or require some but not all 3-rated institutions to cover those costs. OTS believes it is most equitable to match assessments with OTS's supervisory costs, and therefore adopts a condition component for 3-rated associations. Furthermore, OTS believes that requiring 3-rated institutions to pay for their extra supervisory costs will provide an incentive for those institutions to improve their condition and their ratings. OTS believes that the condition component best accomplishes OTS's objective of closely tailoring assessment rates to OTS's increased costs in supervising 3-rated institutions while keeping assessment rates as low as possible.

OTS believes the size component will not have a significant economic impact on a small number of small entities. OTS specifically designed this rule to allow qualifying savings associations, generally those with assets under \$100 million, to choose between calculating their size components under either the old regulation or the new regulation. These institutions can therefore avoid any increases in their size components.

If an institution increases above \$100 million in assets then shrinks below \$100 million, or for savings associations that are not yet formed, this choice would not be available. OTS cannot predict the number of savings associations that will exceed then shrink below \$100 million in assets, and cannot predict the number of savings associations that will be formed in the future. Likewise, OTS cannot predict the economic impact of the final rule on such institutions. That is because OTS's assessment rates will vary in the future, as OTS's supervisory costs change.

OTS considered, as an alternative to the size component with protection for small institutions, leaving its assessment system unchanged. OTS believes this alternative would not meet OTS's objective of closely tailoring assessment rates to OTS's increased

supervisory costs while keeping assessment rates as low as possible, while minimizing significant economic impacts on small savings associations.

The complexity component applies only to savings associations that have more than \$1 billion in certain activities, mostly off balance sheet. For Regulatory Flexibility Act purposes, a small savings association is generally defined as one having less than \$100 million in assets on its balance sheet. There are five savings associations that have less than \$100 million in balance sheet assets that are subject to the complexity component. OTS believes that a regulatory flexibility analysis is not necessary regarding the complexity component for two reasons. First, OTS believes that five savings associations is not a substantial number of small savings associations. Second, for purposes of the regulatory flexibility analysis regarding the complexity component, OTS defines a small savings association as one with less than \$100 million in assets including off-balance sheet assets. OTS received no public comments on this definition of small savings association. The Regulatory Flexibility Act is designed to protect the interests of small businesses, while the complexity component only affects savings associations with assets or activities in excess of \$1 billion. OTS does not believe that institutions whose activities involve more than \$1 billion in off-balance sheet assets need any particular protection from the complexity component.

In any event, OTS considered alternatives to the complexity component. OTS considered using no such component, and considered including different complex assets in the component, such as commercial and non-residential mortgage loans. With no complexity component, less complex thrifts would have to subsidize OTS's costs of supervising complex institutions. OTS believes the complexity component best accomplishes OTS's objective of tailoring assessments to match OTS's supervisory costs and keeping assessments as low as possible, while minimizing significant economic impacts on small savings associations.

Other matters. The final rule imposes no reporting, recordkeeping, or other compliance requirements. Assessments will continue to be based on Thrift Financial Reports that savings associations are otherwise required to file with OTS, and OTS will continue to collect assessments by its current procedures. Therefore, the final rule will impose no new or additional

reporting, recordkeeping, or compliance requirements.

Finally, there are no federal rules that duplicate, overlap, or conflict with this rule.

V. Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. This final rule will not result in expenditures by state, local, or tribal governments or by the private sector of \$100 million or more. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

VI. Paperwork Reduction Act of 1995

This final rule contains no new information collection requirements. The information collection requirements in § 502.70 are the same as those in the prior assessments regulation, 12 CFR 502.3 (1998), which the Office of Management and Budget has previously received and approved in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under OMB Control No. 1550-0053.

VII. Executive Order 12866

The Director of OTS has determined that this final rule does not constitute a "significant regulatory action" for purposes of Executive Order 12866.

List of Subjects in 12 CFR Part 502

Assessments, Federal home loan banks, Reporting and recordkeeping requirements, Savings associations.

Accordingly, the Office of Thrift Supervision amends chapter V, title 12, Code of Federal Regulations, by revising part 502 to read as follows:

PART 502—ASSESSMENTS AND FEES

Sec.

502.5 Who must pay assessments and fees?

Subpart A—Assessments

502.10 How does OTS calculate my assessment?

502.15 How does OTS determine my size component?

502.20 How does OTS determine my condition component?

- 502.25 How does OTS determine my complexity component?
- 502.30 When must I pay my assessment?
- 502.35 How must I pay my assessment?
- 502.40 Can I get a refund or proration of my assessment?
- 502.45 What if I do not pay my assessment on time?

Subpart B—Fees

- 502.50 What fees does OTS charge?
- 502.55 Where can I find OTS's fee schedule?
- 502.60 When will OTS adjust, add, waive, or eliminate a fee?
- 502.65 When is an application fee due?
- 502.70 How must I pay an application fee?
- 502.75 What if I do not pay my fees on time?

Authority: 12 U.S.C. 1462a, 1463, 1467, 1467a.

§ 502.5 Who must pay assessments and fees?

(a) *Authority.* Section 9 of the HOLA, 12 U.S.C. 1467, authorizes the Director to charge assessments to recover the costs of examining savings associations and their affiliates, to charge fees to recover the costs of processing applications and other filings, and to charge fees to cover OTS's direct and indirect expenses in regulating savings associations and their affiliates.

(b) *Assessments.* If you are a savings association that OTS regulates on the

last day of January or on the last day of July of each year, you must pay a semi-annual assessment due on that day. Subpart A of this part describes OTS's assessment procedures and requirements.

(c) *Fees.* Whether or not you are a savings association, if you make any filings with OTS or use OTS services, the Director may require you to pay a fee to cover the costs of processing your submission or providing those services. The filings for which the Director may charge a fee include notices, applications, and securities filings. Among the services for which the Director may charge a fee are publications, seminars, certifications for official copies of agency documents, and records or services requested by other agencies. The Director also assesses fees for examining and investigating savings associations that administer trust assets of \$1 billion or less, and affiliates of savings associations. If you are a savings association and you or any of your affiliates cause OTS to incur extraordinary expenses related to your examination, investigation, regulation, or supervision, the Director may charge you a fee to fund those expenses. Subpart B of this part describes OTS's fee procedures and requirements.

Subpart A—Assessments

§ 502.10 How does OTS calculate my assessment?

OTS determines your semi-annual assessment by totaling three components: your size, your condition, and the complexity of your business. For the size and complexity components, OTS uses the September 30 Thrift Financial Report to determine amounts due at the January 31 assessment; and the March 31 Thrift Financial Report to determine amounts due at the July 31 assessment. For purposes of this subpart, total assets are your total assets as reported on Thrift Financial Reports filed with OTS. For the condition component, OTS uses the most recent composite rating, as defined in 12 CFR Part 516, of which you have been notified in writing before an assessment's due date.

§ 502.15 How does OTS determine my size component?

(a) *General.* (1) Unless you are a qualifying savings association under paragraph (b) of this section, OTS uses the following chart to calculate your size component:

If your total assets are:		Your size component is:		
Over—	But not over—	This amount— Base assessment amount	Plus— Marginal rate	Of assets over— Class floor
Column A	Column B	Column C	Column D	Column E
0	\$67 million	C1	D1	0.
\$67 million	215 million	C2	D2	\$67 million.
215 million	1 billion	C3	D3	215 million.
1 billion	6.03 billion	C4	D4	1 billion.
6.03 billion	18 billion	C5	D5	6.03 billion.
18 billion	35 billion	C6	D6	18 billion.
35 billion	C7	D7	35 billion.

(2) To calculate your size component, find the row in Columns A and B that describes your total assets. Reading across in that same row, find your base assessment amount in Column C, your marginal rate in Column D, and your class floor in Column E. Calculate how much your total assets exceed your Column E class floor. Multiply this number by your Column D marginal rate. Add this number to your Column C base assessment amount. The total is your size component. OTS will establish the base assessment amounts and the marginal rates in columns C and D in a Thrift Bulletin.

(b) *Special size component calculation for qualifying savings associations.* If you meet all of the

criteria set forth in paragraph (b)(1) of this section, you are a qualifying savings association and OTS will calculate your size component in accordance with paragraph (b)(2) of this section.

(1) *Criteria for qualifying savings association status.* (i) You were a savings association as of January 1, 1999.

(ii) Your total assets have never exceeded \$100 million at the end of any quarter.

(2) *Size component for qualifying savings associations.* If you are a qualifying savings association, your size component is the lesser of:

- (i) Your size component calculated under paragraph (a) of this section; or
- (ii) Your assessment calculated using the general assessment table at 12 CFR

502.1(c) as contained in the 12 CFR, parts 500 to 599, edition revised as of January 1, 1998, as implemented in Thrift Bulletin 48-9, dated December 21, 1992.

§ 502.20 How does OTS determine my condition component?

OTS uses the following chart to determine your condition component:

If your composite rating is:	Then your condition component is:
1 or 2	zero.
3	25 percent of your size component.
4 or 5	50 percent of your size component.

§ 502.25 How does OTS determine my complexity component?

If your portfolio exceeds any of the thresholds in paragraph (a) of this section, OTS will calculate your complexity component according to paragraph (c) of this section. If your portfolio does not exceed any of the thresholds in paragraph (a) of this section, your complexity component is zero.

(a) *Thresholds for complexity component.* OTS uses three separate thresholds in calculating your complexity component. You exceed a threshold if you have more than \$1 billion in any of the following:

(1) Trust assets you administer.
 (2) The outstanding principal balance of assets covered, fully or partially, by your recourse obligations or direct credit substitutes.

(3) The principal amount of loans that you service for others.

(b) *Assessment rates.* OTS will establish one or more assessment rates for each of the types of activities listed in paragraph (a) of this section. OTS will publish those assessment rates in a Thrift Bulletin.

(c) *Calculation of complexity component.* OTS separately considers each of the thresholds in paragraph (a) of this section in calculating your complexity component. OTS first calculates the amount by which you exceed any of those thresholds. OTS multiplies the amount by which you exceed any threshold in paragraph (a) of this section by the applicable assessment rate(s) under paragraph (b) of this section. OTS then totals the results. This total is your complexity component.

§ 502.30 When must I pay my assessment?

OTS will bill you semiannually for your assessments. Assessments are due January 31 and July 31 of each year. At least seven days before your assessment is due, the Director will mail you a notice that indicates the amount of your assessment, explains how OTS calculated the amount, and specifies when payment is due.

§ 502.35 How must I pay my assessment?

(a) *Debit at Federal Home Loan Banks.* If you are a member of a Federal Home Loan Bank, you must maintain a demand deposit account at your Federal Home Loan Bank with sufficient funds to pay your assessment when due. OTS will notify your Federal Home Loan Bank of the amount of your assessment. OTS will debit your account for your assessments.

(b) *Direct billing.* If you are not a member of a Federal Home Loan Bank,

OTS will directly debit an account you must maintain at your association.

§ 502.40 Can I get a refund or proration of my assessment?

OTS will not refund or prorate your assessment, even if you cease to be a savings association. If you are a savings association for whom a conservator or receiver has been appointed, you must continue to pay assessments in accordance with this part. OTS will not increase or decrease your assessment based on events that occur after the date of the Thrift Financial Report upon which your assessment is based.

§ 502.45 What if I do not pay my assessment on time?

The Director will charge interest on delinquent assessments. Interest will accrue at a rate (that OTS will determine quarterly) equal to 150 percent of the average of the bond-equivalent rates of 13-week Treasury bills auctioned during the preceding calendar quarter. Assessments under this subpart A are delinquent if you do not pay them when required by § 502.30.

Subpart B—Fees**§ 502.50 What fees does OTS charge?**

(a) The Director assesses fees for examining or investigating savings associations that administer trust assets of \$1 billion or less, and savings association affiliates. "Affiliate" has the meaning in 12 U.S.C. 1462(9), except that, for this part only, "affiliate" does not include any entity that is consolidated with a savings association on the Consolidated Statement of the Thrift Financial Report.

(b) The Director assesses fees for processing notices, applications, securities filings, and requests, and for providing other services.

§ 502.55 Where can I find OTS's fee schedule?

OTS will periodically publish a schedule of its fees in a Thrift Bulletin. OTS will publish these fees at least thirty days before they are effective.

§ 502.60 When will OTS adjust, add, waive, or eliminate a fee?

Under unusual circumstances, the Director may deem it necessary or appropriate to adjust, add, waive, or eliminate a fee. For example, the Director may:

(a) Reduce any fee to adjust for any inequities, efficiencies, or changed procedures that OTS projects will reduce its applications processing costs but that OTS did not consider in determining its fees;

(b) Reduce or waive any fee if OTS determines that the fee would unduly or

unjustifiably discourage particular types of applications or applications for particular categories of transactions;

(c) Add a fee for a new type of application;

(d) Increase a fee for an application that presents unusual or particularly complex issues of law or policy or otherwise causes the agency to incur unusually high processing costs; or

(e) Charge a fee to recover extraordinary expenses related to examination, investigation, regulation, or supervision of savings associations or their affiliates.

§ 502.65 When is an application fee due?

(a) You must pay the application fee when you file an application. OTS will not process your application if you do not include the required fee.

(b) If OTS cannot complete its review of your application because the application is materially deficient and it refuses to accept your application for processing, you must pay a new application fee upon filing a revised application.

(c) If a transaction involves multiple applications, you must pay the appropriate fee for each application, unless OTS specifies otherwise by Thrift Bulletin.

§ 502.70 How must I pay an application fee?

You must pay an application fee to the Office of Thrift Supervision. You must include a statement of the fee and how you calculated the fee.

§ 502.75 What if I do not pay my fees on time?

(a) *Interest.* An examination or investigation fee is delinquent if OTS does not receive the fee within 30 days of the date specified in a bill. The Director will charge interest on a delinquent examination or investigation fee. Interest will accrue at a rate (that OTS will determine quarterly) equal to 150 percent of the average of the bond-equivalent rates of 13-week Treasury bills auctioned during the preceding calendar quarter.

(b) *Failure to pay.* If your holding company, affiliate, or subsidiary fails to pay any examination or investigation fee within 60 days of the date specified in a bill, the Director may assess that fee, with interest, against you and collect it from you. If any such entity is a holding company, affiliate, or subsidiary of more than one savings association, the Director may assess the fee against and collect it from each savings association as the Director may prescribe.

Dated: November 20, 1998.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 545, 555, and 559

[No. 98-119]

RIN 1550-AB00

Electronic Operations

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is issuing a final rule that streamlines and updates its regulations relating to electronic operations. Under this rule, Federal savings associations may engage in prudent innovation through the use of emerging technology. The rule permits Federal savings associations to use, or participate with others to use, electronic means or facilities to perform any function, or provide any product or service, as part of an authorized activity. The rule also requires each savings association (state- or federally-chartered) to notify OTS 30 days before it establishes a transactional web site. Savings associations that present supervisory or compliance concerns may be subject to additional procedural requirements. Finally, the rule includes a conforming change to OTS's service corporation regulation, reflecting a recent statutory change.

EFFECTIVE DATE: January 1, 1999.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

A. Advance Notice of Proposed Rulemaking

On April 2, 1997, OTS published an advance notice of proposed rulemaking (ANPR) seeking comment on all aspects of banking affected by electronic

operations.¹ The ANPR was designed to elicit information to enhance OTS's understanding of new electronic banking technologies and the impact of these technologies on the regulation of Federal savings associations.² The ANPR asked a series of questions concerning the types of restrictions or requirements OTS should impose on electronic operations, including Internet banking.

B. Notice of Proposed Rulemaking

Based on the comments received on the ANPR, on October 3, 1997, OTS published a notice of proposed rulemaking (NPR) to streamline and update its regulations relating to electronic operations.³ The NPR proposed to amend OTS's electronic-related regulations to address advances in technology and to permit prudent innovation through the use of emerging technology by Federal savings associations. In crafting the proposed rule, OTS was guided by two broad principles suggested by commenters on the ANPR:

- The public and insured depository institutions will be best served if statutory and regulatory restrictions are kept to a minimum. The premature imposition of restrictive operational standards could impede the development of improved financial services.

- Federal savings associations should be permitted to compete effectively with other regulated financial institutions and unregulated firms offering financial and related services.

Consistent with these principles, OTS proposed a broad enabling regulation designed to allow Federal savings associations to engage in any activity through electronic means that they may conduct through more traditional delivery mechanisms. OTS proposed to eliminate three existing regulations: § 545.138 (Data-Processing Services), § 545.141 (Remote Services Units), and § 545.142 (Home Banking Services). The elimination of these sections would not take away the authority to engage in any activities described in these sections.

OTS made the proposal to enhance the ability of Federal savings associations to serve as financial intermediaries and to permit Federal savings associations to utilize fully their capacities and by-products generated in providing financial services. The proposal was consistent with the

principles established in the Administration's electronic commerce policy statement.⁴ The NPR noted, however, that OTS would continue to gain additional experience with electronic technology and might issue more specific guidance regulating particular elements of electronic operations.⁵

C. Comments on NPR—General Discussion

The comment period on the NPR closed on December 2, 1997. OTS received nine comment letters on the NPR from five Federal savings associations, two trade associations, and two technology firms.

All of the commenters recognized the need for the agency to revise or remove its existing regulations in this area. Seven commenters supported the proposal's overall flexible regulatory approach, while suggesting modifications or clarifications to particular aspects of the rule. Two commenters argued that for even greater flexibility the agency should not issue any new electronic banking regulations. These two commenters suggested the agency rely entirely on flexible guidelines and advisories as technology evolves. OTS has addressed specific comments on the NPR below.

D. Supplemental Notice of Proposed Rulemaking

One commenter on the NPR argued that OTS should establish a procedure to review and approve new products or services, in order to protect the safety and soundness of the industry. Another urged OTS not to require a Federal savings association to obtain OTS's prior approval before adopting new technologies "unless absolutely necessary to ensure industry-wide safety and soundness." After considering these comments, OTS concluded that safety and soundness and compliance considerations warranted the agency receiving advance notice of industry use of one developing technology—transactional web sites. Such web sites allow savings association customers to use the Internet to conduct a wide variety of financial transactions. They may, however, also pose particular security, compliance, and privacy risks.

Accordingly, on August 13, 1998, OTS issued a supplemental notice of proposed rulemaking (Supplemental NPR) seeking comment on additional proposed rules that would require each savings association to notify OTS before

¹ 62 FR 15626 (April 2, 1997).

² See 62 FR at 15631 and 15633.

³ 62 FR 51817 (October 3, 1997). The NPR contains a summary of the comments received on the ANPR.

⁴ See "Framework for Global Electronic Commerce" (July 1, 1997).

⁵ 62 FR at 51820.