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Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

August 13, 2012

This is in response to your Freedom of Information Act request dated July 22, 2012, received in my office on July 27, 2012.

You requested a copy of the OCC's response to the November 9, 2011 letter from Senator Tim Johnson, Chairman of the Senate Committee on Banking, Housing and Urban Affairs.

Your request has been granted. Materials relevant to your request are enclosed.

Sincerely yours,

Rosalyn Settles

Rosalyn Settles
Freedom of Information Act Specialist
Disclosure Services

#2012-00636-F



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

December 5, 2011

The Honorable Tim Johnson
Chairman
Committee on Banking, Housing and Urban Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Johnson:

Thank you for your November 9, 2011 letter regarding the implementation by the Office of the Comptroller of the Currency (OCC) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). We appreciate the opportunity to respond and share with you information concerning our regulatory work, which currently includes a comprehensive review of all national bank and Federal savings association regulations with a view toward streamlining and reducing unnecessary burden, as well as other regulatory projects to implement specific provisions of the Dodd-Frank Act. Detailed answers to your questions are set forth in the attachment that follows.

If you have further questions or need additional information, please contact me or Robert Garsson, Deputy Comptroller for Public Affairs, at 202-874-4880.

Sincerely,

John Walsh
Acting Comptroller of the Currency

Enclosures:

1. Guide to OCC Rulemaking Procedures
2. Letter dated November 29, 2011, from John Walsh, Acting Comptroller of the Currency, to Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget

December 5, 2011

OCC Responses to Questions from Chairman Johnson

1. *Provide a detailed description of your agency's rulemaking process, including the variety of economic impact factors considered in your rulemaking. Please note to what degree you consider the benefits from your rulemaking, including providing certainty to the marketplace and preventing catastrophic costs from a financial crisis. Also describe any difficulties you may have in quantifying benefits and costs, as well as any challenges you may face in collecting the data necessary to conduct economic analysis of your rulemaking.*

The OCC takes seriously the need to understand how its rules affect the public and private sectors and the economy as a whole. As part of this effort, the OCC conducts several types of economic impact assessments for all proposed and final rules. This includes any analysis required by the Unfunded Mandates Reform Act (UMRA), the Congressional Review Act (CRA), and the Regulatory Flexibility Act (RFA).¹ Specifically, under UMRA, the OCC assesses whether a proposed or final rule includes a "Federal mandate" that may result in the expenditure by state, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (adjusted for inflation). If this threshold is met, the OCC prepares a more detailed economic assessment of the rule's anticipated costs and benefits. Under the CRA, the OCC determines, among other things, whether a final rule is likely to result in a \$100 million or more annual effect on the economy. Under the RFA, the OCC determines if a proposed or final rule is likely to have a "significant economic impact on a substantial number of small entities."

In preparing cost-benefit studies, the OCC refers to the Office of Management and Budget's Circular A-4. This document provides guidance to Federal agencies on the development of regulatory analyses under Executive Order 12866 and, although the OCC is not subject to this Executive Order, we use Circular A-4 as a best practices guide in preparing our analyses. These analyses typically include an assessment of a rule's benefits, along with cost-benefit comparisons of scenarios in which the rule does not apply and those in which one or more plausible alternatives to the rule apply.

In order to assess costs and benefits, the OCC examines data from national bank Quarterly Reports of Condition and Income (Call Reports) or Thrift Financial Reports (TFRs).² It also estimates costs or benefits that are likely to result from complying with the rule, including those that affect the amount of regulatory capital an institution must hold. In addition, the OCC considers broader economic factors such as the potential impact of the rule on lending, domestic and international competition, and economic growth.

The costs associated with a rule can be difficult to quantify with precision, as are some types of benefits. In particular, some benefits are qualitative in nature and inherently difficult to quantify. For example, a new rule might reduce the impact of moral hazard or require additional financial

¹ UMRA: 2 U.S.C. 1501 *et seq.*; CRA: 5 U.S.C. 801 *et seq.*; and RFA: 5 U.S.C. 601 *et seq.*

² In 2012, TFRs will be eliminated and all national banks and Federal thrifts will file Call Reports

disclosures that enhance market discipline. Other rules may provide predictability to the marketplace and thereby enhance its stability. In these situations, the OCC enumerates the qualitative benefits in its analysis but does not attribute to them a specific dollar value.

One challenge the OCC faces is collecting data where a rule affects balance sheet or income statement items that are not captured in Call Reports or TFRs. In these cases, the OCC may consider data from credible industry or media reports and academic literature and consult with OCC subject matter experts. The OCC also considers any public comments it receives that present cost-benefit information. Through the appropriate use of these various data sources, the OCC is able to perform the required economic assessment.

The OCC recently revised its Guide to OCC Rulemaking Procedures, which contains a detailed and comprehensive description of its entire rulemaking process. Among other things, the Guide describes the various steps the OCC takes at each point in the rulemaking process and seeks to ensure that the OCC complies with rulemaking requirements imposed by relevant statutes and Executive Orders. It also promotes the integrity of the OCC's rulemaking process by ensuring accountability and appropriate documentation of decision-making. We are including a copy of the Guide with this letter.

2. Provide your agency's current and future plans to regularly review and, when appropriate, modify regulations to improve their effectiveness while reducing compliance burdens. Please include a description of actions your agency has taken, or plans to take, to streamline regulations - for example, the CFPB's "Know Before You Owe" effort drastically simplifies mortgage and student loan disclosure requirements. Also note statutory impediments, if any, that prevent your agency from streamlining any duplicative or inefficient rules under your purview.

Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) transferred to the OCC all the functions of the Office of Thrift Supervision (OTS) and the Director of the OTS related to Federal saving associations, as well as OTS rulemaking authority related to both state and Federal savings associations. In connection with this transfer, the OCC has undertaken a comprehensive review of national bank and Federal thrift regulations to make them more effective by combining them where possible, reducing duplication, and eliminating unnecessary requirements. As part of this review, we have committed to seek public comment about ways to improve each rule as we prepare the final, integrated rulebook. In addition, the OCC is subject to a decennial regulatory review requirement unique to the Federal banking agencies, pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA).³ The OCC and the other banking agencies completed the last EGRPRA review over a period that ended December 2006, and, as the statute requires, we will complete the next EGRPRA review not later than 2016.

The OCC recently sent a letter to Mr. Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, providing additional information about the OCC's efforts to increase regulatory effectiveness and reduce regulatory burden. A copy of that letter is included as part of this response.

³ 12 U.S.C. 3311.

3. Provide details of how your agency encourages public participation in the rulemaking process, including through administrative procedures, public accessibility, and informal supervisory policies and procedures.

The OCC encourages the public to participate in the rulemaking process through its compliance with the Administrative Procedure Act (APA)⁴ and its use of various forms of media to make the public aware of its rulemaking initiatives. Consistent with the APA, the OCC publishes for comment in the *Federal Register* a notice of each proposed rulemaking (NPR). Each NPR is accompanied by a news release intended to increase awareness of the proposed rule and comment process. In addition to being distributed to reporters and media outlets, these news releases are posted to the OCC's web site and featured on its home page (www.occ.gov). In addition, every news release is distributed to the nearly 13,000 subscribers to our e-mail subscription service. Each news release is also distributed via Twitter and the OCC's official Facebook page and through OCC syndicated news feeds.

For each NPR, the OCC generally provides the public with at least a 60 day comment period and details the numerous channels through which comments can be submitted, including by hard copy or electronically, either to the OCC's web site or through the Federal government's e-rulemaking portal. The OCC solicits comments on a wide variety of issues raised by each proposal, including on any regulatory burden associated with a proposal. The agency values all public feedback and carefully considers all the comments it receives as it formulates a final rule.

In addition, the OCC has, from time to time, issued an Advance Notice of Proposed Rulemaking (ANPR) to invite public comment in advance of formulating a proposed rulemaking. An ANPR can be helpful to the OCC in obtaining information from interested parties relevant to a potential rulemaking and can assist the OCC in understanding different perspectives on a matter that is likely to be the subject of a future rulemaking.

The OCC is also carrying on the work of two advisory committees established by the OTS: the Mutual Savings Association Advisory Committee (MSAAC) and the Minority Depository Institutions Advisory Committee (MDIAC). These committees will provide the OCC with insight into the unique challenges facing these groups so that these concerns can be factored into the rulemakings that will affect them.

4. Provide details of how your agency addresses the unique challenges facing smaller institutions when dealing with regulatory compliance, including any related advisory committees your agency may have or other opportunities for small institutions to be heard by your agency. Please also detail how your agency responds to concerns raised by small institutions.

As part of its rulemaking process, the OCC carefully considers concerns raised by small institutions in a number of ways. The RFA generally requires the OCC to review proposed regulations for their impact on small entities and, in certain cases, to consider less burdensome alternatives. After conducting this review, the OCC is required either to prepare an Initial

⁴ 5 U.S.C. 551 *et seq.*

Regulatory Flexibility Analysis or to certify that the proposed rule will not have a "significant economic impact on a substantial number of small entities." The OCC follows similar procedures when promulgating a final rule.

The OCC's organizational structure also distinguishes between the supervision of small and large institutions, which allows the OCC to focus on the unique challenges facing community institutions. For example, the OCC's Community Bank Supervision program, which is managed separately from its Large Bank Supervision program, is built around its local field offices, with approximately 75% of OCC examination staff dedicated to supervising these community institutions. These examiners are based in over 60 cities throughout the United States in close proximity to the banks they supervise.

The primary responsibility for the supervision of individual community banks is delegated to the local Assistant Deputy Comptroller (ADC). This structure ensures that community banks receive the benefits of highly trained bank examiners with local knowledge and experience, along with the resources and specialized expertise that a nationwide organization can provide. While OCC bank supervision policies and procedures establish a common framework and set of expectations, examiners are taught to tailor the supervision of each community bank to its individual risk profile, business model and management strategies. As a result, the OCC's ADCs are given considerable decision-making authority, reflecting their experience, expertise and "on the ground" knowledge of the institutions they supervise.

The OCC recognizes the importance of communicating regularly with community banks outside of the supervision process, in order to clarify its expectations for smaller institutions, discuss emerging issues of interest to community bankers, and respond to their concerns. The OCC participates in numerous industry-sponsored events and hosts a variety of outreach activities, such as Meet the Comptroller events, the Washington Visits program, chief executive officer roundtables, and teleconferences on topical issues. These events provide many opportunities for constructive exchanges at the national and local level. In addition, as noted above, the OCC is carrying on the work of the MSAAC and the MDIAC, which will provide formal mechanisms for the OCC to hear the concerns particular to these subsets of the smaller institutions we regulate.

5. Describe how regulatory interagency coordination has improved since the creation of the FSOC. Provide specifics of how coordination has helped, either formally or informally, in your rulemaking process.

The OCC and the other Federal banking agencies have a history of coordination in issuing regulations and guidance. In many instances, Congress has required the agencies to conduct these activities jointly; in others, the agencies have recognized that it is appropriate to do so to avoid inequities and opportunities for regulatory arbitrage. The FSOC provides a broader forum for coordination and the sharing of information among all the U.S. financial institution regulatory agencies. The relationships among the regulators that the FSOC has established facilitate more informal coordination and consultation as agencies work on the many rulemakings that the agencies individually and jointly must undertake to implement Dodd-Frank.

For example, OCC staff members – ranging from senior deputy comptrollers to staff members – are in frequent contact with their counterparts at the other banking agencies and, increasingly, with the other financial sector regulators with whom they share implementation responsibilities for the Dodd-Frank Act. These less formal interactions provide multiple channels for facilitating consistent and comparable regulations, as appropriate in light of the structure and activities of the institutions under the agencies' respective jurisdictions.

Moreover, in certain instances – with respect to the Dodd-Frank Act's Volcker Rule and the rule on credit risk retention, both of which are to be implemented by multiple agencies – the statute assigns the Secretary of the Treasury, in his capacity as Chairperson of the FSOC, responsibility for coordinating the issuance of interagency regulations. The agencies' proposal to implement the Volcker Rule, published in October of this year, was issued jointly by all but one of the participating agencies. The proposed rule on credit risk retention was issued jointly by all the agencies that have implementation responsibilities for that statutory provision, even though joint action by all of the participating agencies on each element of the statute was not required.

GUIDE TO OCC RULEMAKING PROCEDURES

A STAFF MANUAL

**OFFICE OF THE COMPTROLLER OF THE CURRENCY
DECEMBER 1, 2011**

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A STAFF MANUAL

INTRODUCTION AND OVERVIEW

PURPOSES

The OCC's Policies and Procedures Manual (PPM) describes the processes that the OCC uses for the internal review and approval of significant documents, including rulemaking documents.¹ This Rulemaking Manual (Manual) supplements the PPM by describing in detail the procedures that the OCC uses to develop and issue regulations.²

The purposes of the procedures set forth in this Manual are as follows:

- To facilitate the effective and efficient development and issuance of the OCC's regulations;
- To ensure that the OCC complies with the rulemaking requirements imposed by statutes such as the Administrative Procedure Act (APA) and the Regulatory Flexibility Act (Reg Flex Act) and by the executive orders that apply to various aspects of the rulemaking process, as well as with the applicable substantive requirements of the Federal banking laws;
- To promote coordination among the various OCC departments involved in the rulemaking process;
- To use an approach to rulemaking that:
 - ensures the opportunity for timely, substantive input into the rulemaking process by the Comptroller, the Executive Committee, and senior OCC officials, consistent with PPM 1000-10; and
 - makes full use of the range of cross-disciplinary expertise available from OCC staff resources; and
- To promote the integrity of the OCC's rulemaking processes by ensuring accountability in those processes and appropriate documentation of decision-making.

¹ See "Internal OCC Review Processes for Policymaking, Rulemaking, and Other Significant Documents," PPM 1000-10 (REV) (April 26, 2005).

² This Manual is intended to serve as a guide for internal OCC processes and does not create any rights for third-parties.

OVERVIEW OF THE RULEMAKING PROCESS

An OCC rulemaking typically begins with the development and issuance of a notice of proposed rulemaking (NPRM). The NPRM contains the text of proposed additions or amendments to our rules and a preamble (referred to in the *Federal Register* as the Supplemental Information section) that explains the policy and legal bases for the proposed changes, their purpose, and the effect the changes would have on the institutions we supervise as well as any required regulatory analysis. The OCC publishes the NPRM in the *Federal Register* and invites public comment on it, usually for a period of no less than 60 days. After analysis and resolution of any issues raised by the commenters or by OCC staff, a final rule is prepared and published in the *Federal Register*. A rulemaking also may begin with an advance notice of proposed rulemaking (ANPR) that precedes the NPRM. An ANPR typically is used to solicit general comments and public input in an issue area that may be the subject of future agency rulemaking.

The process for developing and issuing final rules typically comprises four phases. The first phase, the project initiation phase, will vary depending upon the circumstances prompting the rulemaking. In many cases, the rulemaking is not discretionary. It may be required by statute or undertaken pursuant to interagency agreement, or specific initiative directed by the Comptroller. In those cases, the project initiation phase consists primarily of identifying the key OCC departments to be involved in developing the rule and the individuals on the rulemaking working group. When a rulemaking is undertaken on a discretionary basis to carry out the responsibilities of the agency or further the purposes and objectives of the National Bank Act, the Home Owners' Loan Act or other statutes administered by the OCC, a staff working group, under the sponsorship of one or more members of the Executive Committee develops an idea for a rulemaking by preparing materials describing proposed changes to the OCC's regulations, and the issues and consequences associated with adopting such changes. Executive Committee members and senior staff have the opportunity to review the materials and provide views about the desirability, scope, and content of the rulemaking project.

In the second phase of the project, a staff working group drafts an NPRM and supporting materials. The supporting materials typically include a Reviewers' Memorandum, circulated to the Comptroller, the Executive Committee, and other senior OCC officials with the Gold Border draft of the NPRM, which describes significant issues in the rulemaking, notes how the staff draft addresses them, and solicits input on the result. This Gold Border review may result in revisions to the draft NPRM, which are identified and explained in the Red Border memorandum that ultimately is provided to the Comptroller, together with a revised NPRM, for review and signature.³

In the third phase of the rulemaking, after the conclusion of the public comment period for the NPRM, the working group reviews comments and identifies and addresses significant issues raised by the commenters, consults with the Comptroller and senior OCC officials on how to proceed, and revises the proposed regulation accordingly. There is another Gold Border review process for the draft final rule, with a similar opportunity for review and comment by the Comptroller, the Executive Committee, and other senior OCC officials. Again, changes resulting from the Gold Border review are identified and explained in the Red Border package that is presented to the Comptroller for signature.

³ The Gold and Red Border processes are described in detail in PPM 1000-10.

In the fourth and final phase of the project, documentation for the rulemaking is assembled, filed, and retained for the OCC's records.

Management of the Rulemaking Process

Rulemaking projects ordinarily are managed by the Legislative and Regulatory Activities Division (LRA) in the Law Department. LRA assigns an attorney – referred to in this Manual as the project manager – typically to lead the staff working group and manage the project. The project manager works closely with the LRA Assistant Director and Director to plan work, establish deadlines, and facilitate communication between the working group and senior OCC officials when, for example, issues require resolution before work on the project can proceed to the next step. The members of the working group may include supervisory, examination, licensing, or policy staff, as well as lawyers from other units in the Law Department, depending on the subject matter of the rulemaking project. Working groups are assembled with the goal of drawing on and using to maximum advantage the OCC staff resources having substantive expertise to contribute to the project. Executive Committee members have the opportunity to determine the units or staff members reporting to them that should participate in a rulemaking.

The project manager is responsible for leading and facilitating the identification and resolution of issues that arise in connection with the rulemaking, for preparing draft documents, and for ensuring that the OCC complies with the various rulemaking statutes and executive orders that apply to our rulemakings. The project manager relies on the expertise of working group members, but also is responsible for the substantive accuracy of the project documents. This means that the project manager should be, or become, as substantively knowledgeable about the area covered by the regulation as is feasible during the rulemaking process. The project manager also is responsible for coordinating any required economic analyses with the Policy Analysis Division (PAD).

The project manager is responsible for ensuring appropriate review of project documents within the Law Department – including review and clearance, as appropriate, by the Assistant Director and Director of LRA, the Deputy Chief Counsel, and the Chief Counsel, and by other senior officials of the OCC.

The project manager works closely with the LRA Regulatory Specialist, who is responsible for certain aspects of the OCC's compliance with the applicable statutes and executive orders, including the Paperwork Reduction Act (PRA), and for reviewing documents to ensure that they conform to *Federal Register* requirements. The Regulatory Specialist also serves as the OCC's liaison to the *Federal Register* and to the Office of Management and Budget (OMB) during the process of obtaining a major rule determination and PRA clearance, if necessary.

Finally, together with the Regulatory Specialist, the project manager ensures that all aspects of the rulemaking process are appropriately documented and that LRA records for the rulemaking are complete. All records relating to the rulemaking process are kept in accordance with Record Retention Act. See 44 U.S.C. § 3101.

Interagency Rulemakings

The OCC conducts rulemakings individually or together with other Federal agencies, often the other Federal banking agencies (the Federal Reserve Board and the FDIC). Interagency rulemakings are usually prepared by interagency working groups. The OCC is represented on these groups by such staff members as the Chief Counsel or other Executive Committee sponsor of the rulemaking may determine. The Chief Counsel or other Executive Committee sponsor typically will designate one staff member to serve as the lead OCC representative on the interagency group. In these cases, the project manager's responsibilities are adapted consistent with the purposes of the rulemaking and the roles assigned to other OCC staff members.

Contents of the Manual

This manual is organized into four chapters, one for each phase of the rulemaking process described in the Overview. Each chapter sets forth the procedures used in that phase of the rulemaking. Each chapter also contains a section entitled "Practice Tips," which provides guidance on common practical or technical questions that routinely arise in rulemakings. Finally, each chapter contains a "References" section that directs the project manager and other users to primary and authoritative secondary sources of standards or information pertaining to that phase of the rulemaking.

The "References" section may list both external and internal sources. External sources include, for example, the manuals, handbooks, or websites of Federal agencies such as the OMB or the Small Business Administration (SBA) that administer statutes or executive orders that apply to OCC rulemakings. Internal sources include OCC memoranda concerning those statutes and executive orders or other administrative law issues and sample work products of the type discussed in the Manual. These resources are available electronically in a shared electronic folder maintained by LRA. References are provided so that participants in each rulemaking need not repeat analysis that has been done before or search for sources of information that have previously been identified. Attorneys working on rulemaking projects are, however, responsible for ensuring that the research on a legal issue is current and that the analysis and forms provided are suitable for the particular project at hand. Prior memoranda and sample work product cannot substitute for consulting the primary sources – statutes and executive orders – and authoritative secondary sources directly.

Appended to the Manual is an "Attorney Checklist" that lists the procedures described here and details additional steps necessary to ensure that the procedures are successfully completed. The Checklist is intended to serve both as a reminder and guide to the project manager about what procedures are necessary and, when completed, as documentation that those procedures have been followed.

The procedures described in the Manual are those ordinarily used in rulemaking projects, subject to such exceptions as the Comptroller or the Executive Committee may direct. Adherence to these procedures should have the effect of improving the standardization, and therefore the transparency and predictability, of the OCC's rulemaking processes. They should facilitate, not replace, the exercise of judgment by the project manager and other staff working group members, however. It remains essential that staff members approach each rulemaking project individually and retain the flexibility to seek appropriate adjustment in procedures that do not suit the particular project.

CHAPTER I – INITIATING A RULEMAKING PROJECT

Each OCC rulemaking is sponsored, or co-sponsored, by the Chief Counsel, as the Law Department has responsibility for the legal sufficiency of the OCC's rulemakings. In rulemakings co-sponsored by the Chief Counsel together with another Executive Committee member, the Executive Committee-level review procedures and clearances described in this Manual either are conducted jointly by the co-sponsors or otherwise as the co-sponsors may direct.

This chapter describes the steps needed to begin a rulemaking project.

PROCEDURES

The OCC undertakes rulemaking in different types of circumstances: in many cases, we are required to do so by statutory directive or a rulemaking may be undertaken pursuant to an interagency agreement, typically among principals of the Federal banking agencies, or because a specific regulatory initiative is directed by the Comptroller. In other cases, we undertake a rulemaking on a discretionary basis to carry out the responsibilities of the Office or the purposes and objectives of the National Bank Act and/or the Home Owners' Loan Act. Most OCC rulemakings fall into the first category. Any additional steps needed in the case of discretionary rulemakings are specifically described in the procedures that follow.

1. Prepare a Project Initiation Memorandum for Discretionary Rulemakings

For discretionary rulemaking projects, the project manager prepares a project initiation memorandum for the signature of the Chief Counsel and Executive Committee co-sponsor, if applicable, and distributes the memorandum to the Executive Committee. The purpose of the memorandum is to solicit the views of the Comptroller, the Executive Committee, and other key OCC staff about undertaking the rulemaking project. The memorandum describes the purpose of the rulemaking and identifies the major substantive issues likely to be involved. It also identifies the units within the OCC that will likely have an interest in the rulemaking. The project initiation memorandum also may contain a preliminary timeline targeting completion dates for the principal parts of the process. A project initiation memorandum is not necessary if the rulemaking is mandated by statute or already agreed to or directed by the Comptroller.

2. Establish a Working Group

In consultation with senior Law Department managers as appropriate, the project manager must ensure the participation of units or staff members with expertise helpful to the project. In the case of discretionary rulemaking projects, the initiation, scope and direction of the rulemaking are subject to the views expressed by the Comptroller and other members of the Executive Committee in response to the project initiation memorandum.

The working group thus typically consists of the project manager, other attorneys within the Law Department, and staff from each OCC unit with expertise pertaining to the project. The working group members lend subject area expertise to the rulemaking project, including the identification and recommended resolution of substantive issues, make drafting recommendations, and review and comment on draft documents.

- **Note on Interagency Rulemakings.** Congress often requires banking agencies to write regulations necessary to implement new legislation jointly or in consultation with one another. Sometimes the banking agencies are required to consult or coordinate with other agencies, such as the Securities and Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC), or Federal Housing Finance Agency (FHFA). In such cases, interagency working groups are usually established. The OCC's representation on these interagency groups typically is determined in consultation with the Chief Counsel, who may designate a lead OCC representative who communicates the agency's position on issues that arise. If the LRA project manager is not the lead OCC representative, the project manager supports the lead and other participating OCC staff in preparing the draft rulemaking documents and internal OCC memoranda or, if the OCC does not have the primary drafting responsibility, in communicating OCC comments on drafts to the interagency working group and comments prepared by another agency internally to OCC staff.
- Members of the interagency working group should set specific timetables and deadlines for the rulemaking process. Members should strive to resolve all issues or disagreements among the agencies through working group meetings, conference calls, or written communication. If disagreements cannot be resolved at the working group level, the project manager should present the issue(s) to the Chief Counsel or other appropriate Executive Committee member for the issue to be resolved by the agencies' senior management or principals.

3. Identify and Address the Issues

Convene Working Group Meetings. The project manager convenes an initial working group meeting to discuss the objectives of the rulemaking, discuss the contributions of the respective members of the group, and establish appropriate time frames. The project manager schedules subsequent meetings of the working group as needed to discuss and reach a recommended resolution of the substantive issues presented by the rulemaking.

Input From Senior OCC Management. OCC staff uses several methods to obtain input from senior OCC management in resolving significant issues that may arise in the rulemaking.

- *A group or subcommittee* of the OCC's Executive Committee may review and resolve issues pertaining to specific rulemakings. For example, to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (Dodd-Frank Act), the OCC formed the Financial Reform Oversight Group (FROG).
- The project manager, in consultation with the working group, may prepare *an issues memorandum* to seek senior management guidance on issues of significance in the rulemaking. The issues memorandum typically is more specific than the project initiation memorandum. It describes one or more proposed approaches to preparing the regulation, identifies and discusses major issues, and presents the working group's recommendations for resolving these issues. Upon completion, the Chief Counsel and Executive Committee co-sponsor, if applicable, sign the issues memorandum and it is distributed to the Comptroller and the Executive Committee. In appropriate circumstances, the matter may be scheduled for discussion by the Regulatory Policy, Legal, and External Affairs Subcommittee (RPLEA) of the Executive Committee.

- The project manager or Law Department management may conduct direct meetings with the Comptroller, Executive Committee members, or other senior OCC staff with expertise related to the rulemaking, e.g., the project manager facilitates input from senior management, as needed, by ensuring that arrangements are made to obtain input in a timely fashion and by preparing any internal memoranda, coordinating briefings, or assembling any information necessary for senior managers to make informed judgments on the issues.
- **Note on Interagency Rulemakings.** Interagency rulemakings are often initiated without project initiation memoranda and the pacing of the interagency work may not allow time for the preparation of an issues memorandum. Nonetheless, these rulemakings frequently raise significant policy issues requiring guidance from senior OCC management, and it is essential that senior OCC management have the opportunity to provide that guidance before issues are resolved at the staff level by the interagency working group.

Address Comments Raised during the Issues Memorandum Review Process. The project manager collects reviewers' comments. Comments that raise significant substantive issues are discussed by the working group and brought to the attention of the Deputy Chief Counsel, the Chief Counsel, and senior OCC officials with expertise on the rulemaking, if applicable.

4. Contact the Policy Analysis Division

At this stage in the rulemaking, the project manager should contact the Director of the OCC's PAD to discuss the rule and request the assignment of an economist to the project. PAD will perform the economic analysis necessary to complete the regulatory analysis section of the preamble. This analysis is discussed in the next chapter.

PRACTICE TIPS

- All documents created for a rulemaking should be maintained in a separate directory in the project manager's g:\ drive. Documents should be clearly labeled and, if there are multiple versions of a document, the date should appear in the document name.
- The LRA Assistant Director and Director review the project initiation memorandum prior to distribution, and there may be other reviewers as well depending on the content of the rulemaking and the OCC units participating in it. Clearance by the Deputy Chief Counsel and the Chief Counsel is required for project initiation memoranda initiated by the Law Department.
- After the Chief Counsel and Executive Committee co-sponsor, if applicable, sign the project initiation memorandum or the issues memorandum, the project manager circulates the document for simultaneous review by the Comptroller and the Executive Committee. Copies of these and other rulemaking documents also are usually given to members of the working group, Law Department Division Directors, District Counsel, and any other reviewers who have a particular interest in the project.
- All rulemaking documents circulated to the Executive Committee for review must contain a tracking number for internal routing purposes. The number must be obtained before the document circulates. A staff member in the Comptroller's Office assigns the

tracking number. This tracking number is the same for all subsequent documents circulated for review that relate to the rulemaking project, except for the leading designation "IN" (for project initiation memo), "IS" (for issues memo), and "GB" (for Gold Border).

- Ordinarily, the project manager should request comments on the project initiation memorandum and the issues memorandum (and other rulemaking documents) within 2 weeks from the date of circulation. If review must be expedited, the attorney prepares a brief cover memorandum explaining the reason that expedited review is needed.
- The project manager retains copies of responses from Executive Committee members to all circulated documents for inclusion in the rulemaking file.

REFERENCES

- Sample project initiation and issues memoranda may be found on the LRA g:\ drive at g:\ADMIN LAW FILES BY TOPIC.

Chapter II – Preparing a Notice of Proposed Rulemaking

The rulemaking process usually begins with the issuance of a NPRM, which sets out and describes the proposed amendments to the OCC's regulations. In some instances, the OCC also may issue an ANPR before issuing the NPRM. An ANPR typically does not include regulatory text but usually contains a general discussion about the nature of the problem or issue to be addressed and solicits suggestions about how to approach it. For example, an ANPR may be used when the OCC wishes to solicit views about how to approach rulemaking in a new area not currently covered by our rules, or about which of two or more alternative approaches to regulating in a particular area would be more effective.

PROCEDURES

1. Develop and Draft the Proposal

The project manager schedules OCC staff working group meetings as necessary to discuss the content of the proposal. In consultation with the working group, the project manager prepares a draft NPRM. The NPRM consists of two parts: the proposed regulatory text and the preamble to these textual changes.

The project manager ensures that the NPRM conforms to applicable substantive legal requirements and the requirements of the APA. For example, in the early stages of a project, it may be necessary to consider whether the rulemaking falls within any exceptions to the APA's general requirement for notice and comment. At this stage of the project, consideration may also be given to whether the rulemaking warrants an enhanced opportunity for notice and comment, such as a public meeting or hearing. As a technical matter, the style of the NPRM also must be consistent with the drafting requirements contained in the *Federal Register* Document Drafting Handbook.

The regulatory text contains the proposed amendments to the OCC's regulations. The preamble explains the legal basis and supervisory reasons for the changes and describes their anticipated effect on national banks and/or savings associations. The preamble may contain questions or requests for comment on specific substantive issues. In addition, the preamble contains the required regulatory analysis of the proposal and requests comment on the proposal's effect on community banks and savings associations and the extent to which the proposal is consistent with plain language standards as required by section 722 of the Gramm-Leach-Bliley Act.

In general, the OCC requests comment on an NPRM for 60 days. The project manager discusses any shorter comment period with the Assistant Director and, as necessary, with senior Law Department management.

2. Ensure Compliance with Applicable Statutes and Executive Orders

The preamble to the proposal contains a section entitled "Regulatory Analysis" that describes how the OCC is complying or will comply with the requirements of the various statutes (in addition to the Federal banking laws) and executive orders that apply to our rulemakings.

The OCC conducts analyses in the following areas: the Paperwork Reduction Act (PRA), the Regulatory Flexibility Act (Reg Flex Act), the Unfunded Mandates Reform Act (UMRA), section 722 of the Gramm-Leach-Bliley Act, 12 U.S.C. § 4809 (plain language), and the Congressional Review Act (CRA) (enacted as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA)).⁴ These statutes require the OCC to determine the effect, or impact, a rulemaking will have according to the various standards they set forth. With the exception of the PRA and section 722 of the Gramm-Leach-Bliley Act, these determinations described in this paragraph are made by the Director of PAD in consultation with the Chief Counsel's Office, as appropriate. The project manager's requests for economic analyses, the analyses that PAD provides, and the determinations of the Director of PAD are documented in, and coordinated through, an exchange of memoranda that is described at Step 3, below. As described in the following discussion, the OCC's conclusions concerning the statutes also are documented through statements in the preamble to the NPRM, as well as in the rulemaking file. As the required regulatory analyses focus on the economic impact of the rule, they are an important component of the rulemaking process and should be carefully and comprehensively completed.

The Paperwork Reduction Act

The PRA generally provides that the OCC may not conduct a "collection of information" unless it receives approval from OMB, which indicates that the collection meets the policy criteria of the PRA and OMB's implementing regulations. A "collection of information" means obtaining, causing to be obtained, or soliciting information, or requiring that information to be obtained through identical questions or by identical reporting, recordkeeping, or disclosure requirements on at least 10 persons (including entities such as national banks and savings associations).⁵ An information collection is subject to the requirements of the PRA without regard to whether it is mandatory, voluntary, or required to obtain or retain a benefit.⁶

To comply with the PRA, the OCC must demonstrate that the collection is the least burdensome necessary to obtain the information, does not duplicate available information, maximizes

⁴ Pursuant to section 315 of the Dodd-Frank Act, which amended the definition of "independent agency" to include the OCC, the OCC is no longer subject to E.O. 12866. As a result, the OCC is not required to determine whether the rule is a "significant regulatory action" nor submit a Notice of Proposed Regulatory Action (NOPRA) for each rulemaking to the Office of Information and Regulatory Affairs (OIRA) of the OMB. In addition, pursuant to section 315, the OCC is no longer subject to E.O. 13132 and therefore is not required to follow that executive order's "Fundamental Federalism Principles" and "Federalism Policymaking Criteria" in developing any regulation that has Federalism implications.

⁵ The Congressional Review Act is applicable only to final and interim final rules and is discussed in Chapter III.

⁶ Although this Manual addresses the PRA only in the context of rulemaking, it is important to note that an information collection is subject to the requirements of the PRA whenever the OCC request information, regardless of whether it appears in a regulation, in guidance, or in any other type of OCC issuance, or any other form such as oral or electronic.

practical utility, and minimizes costs to the agency without shifting disproportionate costs or burdens to the public. In order to obtain OMB approval of an information collection contained in a rulemaking, the OCC must submit a clearance package to OMB that, in general, describes the information collection(s) in the proposal and estimates the amount of paperwork burden the collection imposes. The preamble also must contain this same information.

The project manager, together with the LRA Regulatory Specialist, identifies any provisions in the proposal that may impose paperwork burden. If the rule imposes paperwork burden, then the preamble must identify which sections impose the burden and estimate the average burden hours per respondent, the number of respondents, and the start-up cost (if any) of complying with the rule. The project manager and the LRA Regulatory Specialist, in consultation with client and other departments within OCC, develop this information. If the regulation imposes no paperwork burden, no PRA analysis needs to be included in the preamble.

If an ANPR contains regulatory text, the project manager reviews the ANPR under the PRA, but an OMB clearance package is not required. The preamble to the ANPR may request comments on paperwork burden issues.

- **Note on Interagency Rulemakings.** The OCC prepares its own PRA analysis for rulemakings conducted jointly or in coordination with other agencies. To ensure consistency to the greatest extent practicable, however, the Regulatory Specialist consults and coordinates with the other agencies in preparing the PRA material for inclusion in the preamble to the proposed rule.

To obtain OMB clearance under the PRA, the Regulatory Specialist submits a clearance package to OMB, in consultation with the project manager, the working group or client staff, and the LRA Assistant Director. This package is submitted via OMB's ROCIS System. It includes a supporting statement, citation to the NPRM, any applicable form or instrument, and citations to any relevant regulations and statutes. OMB has 60 days from the publication of the NPRM to either approve or file public comments on the paperwork collection contained in the NPRM. OMB also must provide at least 30 days for public comment during this 60-day period. The OCC must include any OMB comments in its rulemaking file.

The project manager should follow the procedures below to ensure compliance with the PRA and to complete the estimation of paperwork burden:

- Coordinate with the Regulatory Specialist to identify the paperwork imposed by the proposed rule;
- As necessary, meet with appropriate OCC staff to evaluate the costs of the paperwork burden imposed by the proposed rule;
- If an interagency rule, ensure that the OCC has consulted and coordinated with the other participating agencies in identifying and estimating paperwork burden;
- Ensure that the PRA paperwork burden determination and analysis comport with any economic analysis of the proposal conducted by PAD;

- If there are differences consult with PAD and the Regulatory Specialist to ensure proper coordination; and
 - If differences remain, adequately explain such differences in the rulemaking file;
- Ensure that the Regulatory Specialist submits a PRA clearance package to OMB; and
- If necessary, ensure that the preamble to the proposed rule contains the necessary description of paperwork burden and request for comments regarding this burden.

The Regulatory Flexibility Act (Reg Flex Act)

With certain exceptions, the Reg Flex Act generally requires the OCC to review proposed regulations for their impact on small entities and, in certain cases, to consider less burdensome alternatives. After conducting this review, the OCC is required either to prepare and publish a Regulatory Flexibility Analysis or to certify that a Regulatory Flexibility Analysis is not required because the proposed rule will not have a "significant economic impact on a substantial number of small entities."⁷ Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking (Aug. 13, 2002), outlines the procedures each agency must establish to comply with the Reg Flex Act.⁸

SBA regulations currently define small entities to include banks and savings associations with total assets of \$175 million or less.⁹ The Reg Flex Act does not define the term "significant economic impact," nor does SBA guidance provide a bright-line definition. The SBA has said that "[s]ignificance should not be viewed in absolute terms, but should be seen as relative to the size of the business, the size of the competitor's business, and the impact the regulation has on larger competitors."¹⁰ The SBA guidance, cited in the margin and in the References section of this chapter, provides examples of measures that may be useful for determining the significance of the economic impact of a rule. Similarly, neither the Reg Flex Act nor the SBA guidance defines what comprises a "substantial number" of small entities. The SBA guidance, however, discusses considerations that the SBA's Office of Advocacy views as appropriately influencing an agency's determination in that regard.

The Reg Flex Act does not apply to ANPRs (provided that they do not contain proposed regulatory text) and regulations not required to be issued pursuant to the APA's notice and

⁷ 5 U.S.C. § 605(b).

⁸ E.O. 13272 states that each agency shall: establish procedures to promote compliance with the Reg Flex Act; review draft rules to assess the potential impact on small entities; issue procedures to ensure that this impact is properly considered; notify the SBA's Chief Counsel for Advocacy of draft rules that are covered by the Reg Flex Act. SBA notification shall be made when (a) an agency submits a draft rule to OMB/OIRA under E.O. 12866, or (b) if no OMB/OIRA submission is required, at a reasonable time prior to rule publication. The agency must give consideration to any SBA comments and respond to these comments in the explanation of the final rule.

⁹ See 13 C.F.R. 121.201 (Sector 52, Subsector 552). This dollar figure is adjusted periodically for inflation.

¹⁰ SBA Office of Advocacy, A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act (Implementing the President's Small Business Agenda and Executive Order 13272) at 17 (May 2003).

comment procedures. Thus, the Reg Flex Act does not apply if the agency finds, for good cause, that notice and comment are not required.

The Reg Flex Act permits the OCC to decide not to prepare a Regulatory Flexibility Analysis if the Comptroller certifies that the regulation "will not, if promulgated, have a significant economic impact on a substantial number of small entities."¹¹ In analyzing whether the rule is eligible for this certification, the PAD, identifies the number of small banks and savings associations that would be subject to the proposed requirements and the actions that small banks and savings associations would have to take in order to comply with them.

The Director of PAD, in consultation with the Chief Counsel's Office, determines whether the regulation is eligible for certification. If the regulation is eligible for certification, the project manager prepares and includes in the preamble to the proposal a certification substantially similar to the following:

The OCC certifies that this regulation, if adopted, will not have a significant economic impact on a substantial number of small entities. Accordingly, a Regulatory Flexibility Analysis is not required.

This statement is followed by a brief explanation of the factual basis for the certification. The SBA's Office of Advocacy interprets this "factual basis" requirement to mean that, at a minimum, a certification should contain a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification. Therefore, a certification should state more than simply that the agency has found that the proposed or final rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to E.O. 13272, if the rule is not eligible for certification, the Regulatory Specialist, in consultation with the project manager and the Assistant Director, notifies the SBA's Chief Counsel for Advocacy of the draft proposed rule "at a reasonable time" prior to its publication. The OCC also must give "appropriate consideration" to any comments provided by SBA regarding such a proposed rule and include in the preamble to the final rule the OCC's response to the SBA's written comments. However, such a response is not required if the Comptroller certifies that the public interest would not be served by doing so.

The project manager then completes the following steps:

Prepare an Initial Regulatory Flexibility Analysis (IRFA). If the proposal is not eligible for certification, that is, if it is likely to have a significant economic impact on a substantial number of small entities, the project manager prepares an IRFA in consultation with PAD. The Reg Flex Act requires that the IRFA include:

- A description of the reasons why the proposal is under consideration;
- A succinct statement of the objectives of, and the legal basis for, the proposed rule;

¹¹ 5 U.S.C. § 605(b) (Reg Flex Act certification provision).

- A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to such requirements and the type of professional skills necessary for preparation of the report or record;
- An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule; and
- A description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities, including a discussion of significant alternatives such as:
 - The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
 - The clarification, consolidation or simplification of compliance and reporting requirements for small entities;
 - The use of performance standards rather than design standards; and
 - The exemption from the rule, or any part of the rule, for small entities.

Transmit a complete copy of the IRFA to Advocacy for review. The OCC should not publish the NPRM in the *Federal Register* until we receive the results from Advocacy of their review. We should indicate to Advocacy in our submission any deadlines we have for the publication of the NPRM.¹²

Make the IRFA available to the public. The IRFA must be made available to the public. This can be done by publishing the complete IRFA in the preamble to the NPRM or by including in the preamble a summary of the IRFA and a statement describing how copies of the complete analysis may be obtained from the OCC.

- **Note on Interagency Rulemakings.** The OCC independently determines the applicability of the Reg Flex Act and the eligibility of a rulemaking for certification under the Act for rulemakings conducted jointly or in coordination with other agencies. To ensure consistency to the greatest extent practicable, however, the project manager and the Regulatory Specialist consult and coordinate with the other agencies in preparing material pertaining to the Reg Flex Act for inclusion in the preamble to the proposed rule.

¹² Pursuant to 5 U.S.C. 609(b) of the RFA, this requirement only applies to "covered agencies," defined in 609(d) as the EPA and OSHA. However, the OCC complies with this requirement and SBA encourages agencies to do so.

Unfunded Mandates Reform Act (UMRA)

Consistent with the UMRA,¹³ the OCC assesses the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector other than to the extent a proposed regulation incorporates requirements specifically set forth in law. The UMRA does not apply to ANPRs.

UMRA provides that agencies must prepare a written statement containing certain information and analysis specified in the statute if a proposed rule contains 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 in any one year. As a general matter, a Federal mandate is any provision in legislation, statute, or rule that would impose an enforceable duty on the private sector. However, pursuant to section 201 of the UMRA¹⁴, a regulation does not impose a mandate to the extent it incorporates requirements "specifically set forth in the law." A summary of the written statement must be contained in any NPRM or Final Rule.

The Director of PAD, in consultation with the Chief Counsel's Office, as appropriate, determines whether the requirements of the UMRA are triggered. If so, then the UMRA requires that the preamble contain a budgetary impact statement.¹⁵ The OCC then also must identify and consider a reasonable number of regulatory alternatives before promulgating the rule. In such a case, PAD prepares the economic analysis required for the budgetary impact statement, and the project manager and PAD (together with the working group, as appropriate) work in coordination to develop regulatory alternatives.

If the \$100 million threshold is not exceeded, the project manager prepares and includes in the preamble to the proposal a statement to that effect together with a brief reason supporting that conclusion.

- **Note on Interagency Rulemakings.** The OCC independently determines whether the UMRA requires the preparation of a budgetary impact statement. The UMRA does not apply to the Federal Reserve Board and the FDIC.

¹³ 2 U.S.C. 1501 *et seq.*

¹⁴ 2 U.S.C. 1531.

¹⁵ Section 202(a), 2 U.S.C. § 1532, requires this written statement to include: (1) the legal authority for the rule; (2) a qualitative and quantitative cost-benefit assessment of the Federal mandate (including the costs and benefits to State, local, and tribal governments or the private sector and the available Federal resources to fund this mandate, as well as the effect of the Federal mandate on health, safety, and the natural environment); (3) feasible estimates of future compliance costs and any disproportionate budgetary effects on various governmental or private sectors; (4) a description of the macro-economic effects of the mandate, if feasible; and (5) a description of any required agency consultation with elected representatives of the affected State, local, and tribal governments. In addition, section 205 of the UMRA, 2 U.S.C. § 1535, requires an agency to identify and consider a reasonable number of regulatory alternatives and select the least costly, most cost-effective or least burdensome alternative for, as applicable, State, local, tribal governments, and the private sector that achieves the objectives of the rule.

3. Coordinate Economic Analysis with PAD

The Director of PAD, in consultation with the Chief Counsel's Office, as appropriate, makes the determinations required pursuant to the Reg Flex Act and the UMRA. PAD prepares the economic analyses necessary to support those determinations. The project manager works with PAD to provide legal support for this analysis. To facilitate PAD's work in this regard, during the development of the NPRM, the project manager sends a memorandum to the Director of PAD requesting PAD's economic analysis of the proposed rule and the determinations of the Director of PAD pursuant to the Reg Flex Act and the UMRA. PAD's analysis will be used to complete the regulatory analysis section of the preamble. This memorandum should include a description of these laws, a summary of the draft proposal, and a description of those sections of the proposal that will impact national banks and savings associations, identifying any mandates in the proposed rule. The attorney also should attach a draft of the NPRM. This memorandum should be sent to PAD no later than the distribution of the Gold Border package. It should request that PAD provide the project manager with their written response no later than the Gold Border comment due date. For more complex rulemakings, the memorandum to PAD should be sent at an earlier date. These determinations and analysis typically are set forth in a memorandum that PAD provides to the project manager.

- If the substance of a rule changes following receipt of PAD's analysis, the project attorney must request PAD to revise the analysis based on the changes and provide an updated analysis memorandum, approved by the Director of PAD, as soon as possible.
- The project manager must ensure that this updated analysis memorandum, in a suitable form, adequately reviews the costs associated with the revisions to the proposed rule, and contains the economic analyses necessary to support determinations required pursuant to the Reg Flex Act, and UMRA.

The project manager must review the UMRA and PRA analyses, bring any discrepancies between the two to the attention of PAD and the Regulatory Specialist, and ensure that the rulemaking file contains an adequate explanation of any differences.

The project manager retains copies of memoranda sent to and received from PAD for the rulemaking file.

PAD has developed additional procedures to facilitate the development and coordination of economic analyses. Among other things, these procedures note that PAD may refer to OMB Circular A-4 in preparing certain economic analyses. Project managers should familiarize themselves with these procedures, a copy of which is attached as Appendix I.

4. Prepare and Distribute a Gold Border Package

The OCC uses the Gold Border process to ensure that the Comptroller and other senior OCC officials have an opportunity to review and comment on significant agency documents, including rulemaking documents, and to facilitate that process on an efficient basis. When the draft *Federal Register* document for the proposed rule is finished, the project manager prepares a Gold Border package for clearance and circulation.

The Gold Border package consists of the draft *Federal Register* document containing the NPRM, the Gold Border Reviewers' Memorandum (Gold Border Memo), and the Gold Border cover sheet.

Gold Border Memo. The Gold Border memorandum is a memorandum, usually prepared for the signature of the Chief Counsel and Executive Committee co-sponsor, if applicable, to those individuals who will be reviewing the Gold Border package (Gold Border Reviewers). It typically contains a summary of the most significant provisions of the proposal, a description of any major issues presented by the NPRM, and recommendations for resolving those issues. If staff views differ with respect to resolution of significant issues, the differences and the reasons for them are explained. The Gold Border memorandum also may seek input on any other issues that have arisen during the drafting process.

Gold Border Cover Sheet. The Gold Border cover sheet provides a vehicle for distributing the Gold Border package. The cover sheet, which for hard copy distribution is printed on gold paper, contains a very brief summary of the proposed rule.

The cover sheet indicates a due date for comments, usually two weeks after the distribution date. If a shorter review period is necessary, the cover sheet should highlight the shorter deadline and explain the circumstances warranting the need for expedited review unless otherwise directed by the Chief Counsel. Gold Border reviewers for rulemakings always include the Comptroller, the members of the Executive Committee, the Director of PAD, the Deputy Comptroller for Public Affairs, the Director for Congressional Liaison, the Director for Press Relations, the Director of Public Affairs (Operations), the District Deputy Comptrollers, Deputy Chief Counsels, Law Department Division Directors, and District Counsels. Particular Deputy Comptrollers and other reviewers may be added depending on the content of the proposal. Courtesy copies of the package may be provided to OCC staff working group members or other interested staff.

The Gold Border reviewers are asked to return the cover sheet, with any comments on the draft, to the project manager.

- **Note on Interagency Rulemakings.** The timing of the distribution of the Gold Border package is especially important in interagency rulemakings. Each of the Federal banking agencies (and other agencies with which the OCC may be required to consult on rulemakings) has a different process for review and clearance of rulemaking documents. It is essential that OCC senior management have an opportunity to review and comment on a rulemaking document in a time frame that permits the project manager and other OCC staff to communicate their views to the interagency staff working on the projects. Timing of the Gold Border package should be discussed with the Assistant Director, the Director, and senior OCC management as needed.
- If agency staff on the interagency working group cannot reach agreement on a substantive or procedural aspect of the rulemaking, the gold border package should explain this disagreement and summarize the OCC position. If interagency staff is unable to resolve the disagreement, the project manager should raise the issue(s) with the Chief Counsel or other appropriate Executive Committee member for the issue to be resolved by the agencies' senior management or principals.

5. Review and Address Gold Border Comments

The project manager prepares a brief summary of significant Gold Border comments. The summary is circulated to the OCC working group, LRA managers, the Deputy Chief Counsel, and the Chief Counsel and Executive Committee co-sponsor, if applicable, for simultaneous review. If necessary, the project manager initiates an OCC and/or interagency working group meeting to discuss significant, substantive Gold Border comments. As appropriate, the project manager discusses comments with the Chief Counsel and makes recommendations about how to address the comments. The project manager ensures that Gold Border reviewers are made aware of how their comments have been addressed. This may occur informally through discussion between the Chief Counsel and Executive Committee co-sponsor, if applicable, and the members of the Executive Committee or through staff-to-staff communications, depending on the nature of the issue. The project manager retains copies of the Gold Border comments for the rulemaking file. If there are significant changes to the NPRM based on the Gold Border package, the project manager should request PAD, by memorandum, to review their regulatory analysis in light of these changes.

6. Prepare and Distribute Red Border Package

Once any issues raised by Gold Border commenters (or, in the case of an interagency rulemaking, by other agencies) have been resolved, the project manager revises the NPRM and prepares the Red Border package. This package consists of the revised draft NPRM, the Red Border Decision Memorandum, and the Red Border cover sheet.

- **Note on Interagency Rulemakings.** The project manager also incorporates comments received from the other agencies where the OCC is the lead drafting agency. If another agency is drafting the rule, the project manager should review this draft to make sure that OCC Gold Border reviewers' comments have been incorporated.

Red Border Decision Memorandum. The Red Border Decision Memorandum is prepared for the signature of the Chief Counsel and Executive Committee co-sponsor, if applicable, for transmittal to the Comptroller. The memorandum briefly summarizes the major provisions of the rule and highlights any significant changes from the Gold Border version of the draft NPRM. The memorandum also may indicate how comments sent by Executive Committee members during the Gold Border process have been addressed.

Red Border Cover Sheet. The Red Border cover sheet transmits, and contains a brief description of, the proposed rule. Use the OCC template for this form.

When the Red Border materials are complete and the Chief Counsel and Executive Committee co-sponsor, if applicable, have signed the Red Border memorandum and cover sheet, the package is sent to the Comptroller for signature. The project manager alerts reviewers and staff participants in the rulemaking that the package has been sent to the Comptroller to sign. Because the time between transmittal to the Comptroller and signature is usually fairly short, the project manager need not distribute copies of the Red Border package to reviewers and staff participants except upon request. The project manager provides copies of the signed NPRM Red Border package to reviewers and staff participants.

- **Note on Interagency Rulemakings.** Sometimes, there is interagency negotiation on the language of a rulemaking document late in the process of its review and approval. The project manager facilitates communication among the agencies and ensures that the OCC's position on issues on which there is disagreement is reflected in the documents or that the issue is brought to the attention of the Chief Counsel, and Executive Committee co-sponsor, if applicable, other senior OCC managers, or the Comptroller for resolution.

Coordinate with Public Affairs. The Director of Public Affairs (Operations) will have been alerted to the progress of the rulemaking project through receipt of the Gold Border package. Well ahead of the date on which the NPRM will be released, the project manager consults with Public Affairs (Operations) about whether that office will need materials describing or explaining the NPRM. As needed, the project manager assists in the drafting of a press release and prepares a Q & A document or talking points for use by Public Affairs. If the rulemaking is expected to generate significant interest, the project manager consults with the Chief Counsel, Executive Committee co-sponsor, if applicable, and other senior OCC managers about the need for similar materials for distribution to other OCC staff members, including Congressional Liaison, EICs, or District Deputy Comptrollers and their staffs.

- **Note on Interagency Rulemakings.** The participating agencies ordinarily issue a joint press release (if any release is issued) for interagency rulemakings. Public Affairs coordinates the drafting and release of the press statement with the other agencies. However, the draft interagency press release should be reviewed by the project manager and LRA management, as appropriate, prior to release.

7. **Coordinate Publication and Distribution of the NPRM**

After the Red Border package has been signed by the Comptroller, the project manager coordinates the publication and distribution of the NPRM by taking the following steps.

Submission to and Publication in the Federal Register. The Comptroller's Office returns the Red Border package to the project manager after the Comptroller has signed and dated the Red Border cover sheet (indicating the Comptroller's decision) and signature page. LRA's Regulatory Specialist then coordinates submission of the document to the *Federal Register*, which is done both electronically and by paper copy. The project manager provides the Regulatory Specialist with an electronic copy of the signed version of the NPRM. The Regulatory Specialist notifies, and provides an electronic copy to, reviewers and staff who have participated in the rulemaking. The Regulatory Specialist includes a copy of the submission for inclusion in the rulemaking file.

- Before the document is sent to the *Federal Register*, the project manager obtains the Chief Counsel's prior approval to publish in the *Federal Register*. This can be done via email.
- The paper submission to the *Federal Register* consists of the original NPRM, with the original signature of the Comptroller and two certified copies of the NPRM.

The Regulatory Specialist coordinates any revisions requested by the *Federal Register* and clears all substantive revisions with the project attorney.

Upon publication in the *Federal Register*, the Regulatory Specialist notifies interested parties and distributes the *Federal Register* version of the NPRM via email.

The project manager proofreads the *Federal Register* version to locate any printing errors. If any *Federal Register* errors are noted, the Regulatory Specialist, in consultation with the project manager and LRA management, notifies the *Federal Register* and arranges for a correction to be printed. If the OCC is responsible for the error, the project manager prepares a correction document revising the NPRM and circulates it on Red Border for the signature of the Comptroller and subsequent publication in the *Federal Register*. The Chief Counsel may act under delegated authority to approve technical revisions to a *Federal Register* document.¹⁶

Preparation and Distribution of the OCC Bulletin. At the conclusion of the Red Border process, the project manager prepares an OCC Bulletin, which is the document the OCC uses to transmit a rulemaking document to national banks, Federal savings associations, and OCC staff. This document informs the reader that the document was published in the *Federal Register*, summarizes the major points of the NPRM, and includes an attached copy of the *Federal Register* document. The project manager should prepare a draft of the bulletin in accordance with the OCC's Style Manual and send a draft of this bulletin to Communications for review. After Communications has reviewed the bulletin, the project manager circulates the document on a Green Border.

After the NPRM is published in the *Federal Register*, the project manager provides Communications with an electronic copy of the final *Federal Register* document and the final Bulletin, along with the hard copy of the Bulletin signed by the Chief Counsel and Executive Committee co-sponsor, if applicable. Communications handles the distribution of the Bulletin and attached *Federal Register* document.

¹⁶ See "Delegation of Authority – Federal Register Materials" from the Comptroller of the Currency to the First Senior Deputy Comptroller and Chief Counsel, dated January 5, 2009.

Practice Tips

Drafting the NPRM

- It is usually best to draft the regulatory text first – before the preamble – since the preamble should describe and explain the text. A section-by-section format for the preamble is helpful to provide a clear explanation of the regulatory text.
- The project manager should verify the statutory authority citation for the OCC rule and use as the base for all amendments the latest version of the rule. The most current information can be found using the e-CFR.
- Specific questions for commenters about the rulemaking set forth in the preamble should be numbered, and the preamble should request commenters to respond to these questions by number. This will allow the OCC to more easily review, summarize and organize public comments, especially in rulemakings for which we expect a large number of comment letters.
- Consult with the Regulatory Specialist to ensure compliance with *Federal Register* drafting requirements, which are set forth in the *Federal Register* Document Drafting Handbook, which may be found at <http://www.archives.gov/federal-register/write/handbook/ddh.pdf>. The *Federal Register* handbook also refers to the GPO's Style manual, which may be found at <http://www.gpoaccess.gov/stylemanual/browse.html>.
- Use plain language drafting techniques, as appropriate. Consult the REFERENCES section of this chapter for plain language resources.
- The project manager should consult with LRA staff for examples of recent proposed rules that could serve as a template.

Ex Parte Communications¹⁷

- OCC staff are not prohibited from meeting with outside parties, engaging in discussions with those parties, or accepting documents from those parties before the NPRM is issued, but those actions raise issues of transparency and fairness of the rulemaking process. OCC policy is that such discussions, and any documents received, that involve substantive issues of the merits of the possible rulemaking must be documented for inclusion in the rulemaking file. This rule also applies after an ANPR is issued. See "Procedures, 1. Review and Summarize Public Comments, Note on Meetings with Outside Parties" in Chapter III for more information on OCC policy regarding such communications.

¹⁷ The APA defines an *ex parte* contact as an "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 5 U.S.C. § 551(14). Requests for status reports on a rulemaking (and responses by agency staff to such requests) are not *ex parte* communications under this definition. *Id.*

Ensuring compliance with applicable statutes

- The list of statutes and executive orders described in the **PROCEDURES** section is not necessarily exclusive. Consult with the Assistant Director early in the drafting process to be sure other laws, e.g., the Federal Advisory Committee Act, do not apply or require special procedures. Check references and Web sites to ensure that the information you have is the most current available.
- Agency certifications and Final Regulatory Flexibility Analyses (FRFAs) under the Reg Flex Act for final rules are subject to judicial review. Deficient certifications and FRFAs invite unnecessary litigation risk and could result in a final rule being remanded back to the OCC for additional Reg Flex analysis.
- Perform, or coordinate, the analyses required under the statutes concurrently with the drafting of the *Federal Register* document so that they can be included in the Gold Border package for review, if possible.

The OMB clearance process under the PRA

- The OMB clearance process for PRA can affect the timing of publication of the NPRM and present unexpected delays. Coordinate with the LRA Regulatory Specialist on this as early as feasible in the drafting process.

Preparation and distribution of the Gold Border package

- Insert the tracking number on the Gold Border cover sheet, with the initial designation "GB." Contact the Comptroller's Office, ext. 4880, for the number, if a number has not previously been assigned to the project.
- Confirm that comments have been received from all Gold Border Reviewers at the end of the Gold Border comment period. If an Executive Committee member has not commented, contact his or her executive assistant to ascertain whether the EC member plans to comment and the likely timing of the comment.

Preparation and distribution of the Red Border package

- When the Red Border rulemaking document contains important changes to the version that circulated on Gold Border, it is often helpful to prepare a redlined version of the NPRM, marked to show changes to the Gold Border version, to facilitate review of the Red Border package by the Comptroller.
- The Comptroller's Office assigns the Red Border a log number, which they should insert on the cover sheet. The package must have a log number before it is given to the Comptroller. The log number is different from the tracking number referred to above.
- The Comptroller needs to sign only one copy of the *Federal Register* document. If the signature page is returned with the date line blank, check with the Comptroller's office as to the date it was signed and insert that date. The *Federal Register* does not accept an auto-penned document.

- Two copies are certified by stamping them with the certification stamp. The stamped copies are signed by the Regulatory Specialist, or an OCC manager who supervises this staff member (e.g., the Assistant Director, the Director, etc.).

REFERENCES

- National Archives and Records Administration, Office of the *Federal Register*, *Federal Register Document Drafting Handbook*, available at <http://www.archives.gov/federal-register/write/handbook/ddh.pdf>.
- The GPO's Style Manual, available at <http://www.gpoaccess.gov/stylemanual/browse.html>.
- The OCC's Style Manual (revised 2011) is available on the OCC's intranet site at <http://occnet.occ/OCCnet/publicaffairs/style.pdf>.
- Plain language resource materials are available at <http://www.plainlanguage.gov/resources/index.cfm>.
- Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 *et. seq.* See also 5 C.F.R. Part 1320 (OMB implementing regulations for PRA); Office of Information and Regulatory Affairs, Office of Management and Budget, The Paperwork Reduction Act of 1995: Implementing Guidance for OMB Review of Agency Information Collection (draft, August 16, 1999) (unpublished, available from LRA Regulatory Specialist).
- Regulatory Flexibility Act, 5 U.S.C. § 600 *et. seq.* Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking" (August 13, 2002). See also SBA Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act (2003), available at www.sba.gov/advo/laws/rfaguide.pdf.
- Administrative Procedure Act, 5 U.S.C. §§ 553-559.
- Unfunded Mandates Act of 1995, Pub. Law 104-4, 2 U.S.C. § 1501.
- Gramm-Leach-Bliley Act, Pub. Law 106-102, 12 U.S.C. § 4809.
- Executive Orders are available at: <http://www.archives.gov/federal-register/executive-orders/disposition.html>.
- United States Attorney General's Manual on the Administrative Procedure Act (1947), available at <http://www.oalj.dol.gov/public/apa/refrnc/agtc.htm>. Other administrative law resource materials available at <http://www.oalj.dol.gov/libapa.htm>.
- OCC's independent regulatory authority: 12 U.S.C. § 1 (cross-referencing 12 U.S.C. § 1462a(b)(3)).
- Sample documents, including sample gold border comment summary, sample economic analyses, sample IRFA, may be found on the LRA g:\ drive at g:\ADMIN LAW FILES BY TOPIC.
- Templates for gold border and red border cover sheets are available in the "OCC Forms" section of Word.
- CFR List of Subjects, available on the LRA g:\ drive at g:\OCC Rulemaking Procedures\CFR LIST OF SUBJECTS.doc.
- "Internal OCC Review Processes for Policymaking, Rulemaking, and Other Significant Documents," PPM 1000-10 (REV) (April 26, 2005).
- OCC memoranda on various topics of administrative law may be found on the LRA g:\ drive at g:\ADMIN LAW FILES BY TOPIC.

CHAPTER III – PREPARING A FINAL RULE

PROCEDURES

The procedures for preparing a final rule are similar to those that the OCC uses for preparing a proposal. Accordingly, this chapter highlights the aspects of the final rule process that are different from the NPRM process and cross-references the NPRM procedures in Chapter II where appropriate.

1. Review and Summarize Public Comments

Periodically while the comment period is open, and at the end of the comment period, the project manager obtains copies of public comment letters sent to the OCC in response to our request for comments in the NPRM. Shortly after the comment period has closed, the project manager prepares a summary of the public comments on the NPRM. The format for the summary is determined by the subject matter and complexity of the proposal; however, it is often helpful to categorize the comments by subject matter or CFR cite. The comment summary also indicates the type or identity of commenters raising significant issues.

- In some rulemakings, other agencies may submit comment letters to the OCC. The OCC typically addresses these comment letters in the preamble. In cases where agencies disagree with the OCC's approach in the proposal, the OCC typically seeks to contact the agency to obtain further information about their comment. Any such communication should be documented in the rulemaking file. (See "Note on Meetings with Outside Parties," below.)

The project manager circulates the comment summary simultaneously to OCC staff, interagency staff if applicable, and OCC managers. Copies of the letters typically are not provided for review, unless a reviewer asks for them.

The project manager is responsible for reviewing the docket and ensuring that comment letters are accurately posted to OADR COMMENTS by Communications staff and to www.regulations.gov by LRA staff. See "Practice Tips - Docket Management: Public Comments" for specific instructions.

- **Note on Interagency Rulemakings.** In an interagency rulemaking, each agency prepares its own summary of the comments it received. These comment summaries are shared with the other agencies.
- **Note on Meetings with Outside Parties.** Meetings or other discussions between OCC officials and national banks or other interested parties during the pendency of a rulemaking are not prohibited under the APA. However, such communications could cause questions to be raised about the transparency and fairness of the OCC's rulemaking processes. To avoid even the appearance of unfairness in this regard, the OCC applies the following policies:
 - Due to the time demands placed on OCC resources by such meetings, OCC staff generally try to limit meetings to those involving national banks or Federal savings associations. National banks, Federal savings associations or their

representatives, or other parties, wishing to arrange an in-person meeting will be asked to submit an outline of the points they wish to present at the meeting. This outline is not an agenda of topics but rather should summarize the points the parties intend to make at the meeting. The outline, together with documentation of the meeting prepared by an OCC staff member, will be made a part of the public record, for example, through posting together with other comments on regulations.gov. A summary of the discussion need not be prepared by OCC staff if materials submitted by the party and included in the rulemaking file are sufficiently comprehensive.

- o OCC staff will inform the external party that such a summary and/or materials will be made a part of the public comment file and that they should identify any confidential business or proprietary information in the material.
- o Informational discussions, including explanations of the published proposal, information about status or timing of the rulemaking, or a private party's cursory expressions of opinion unaccompanied by reasoned support, need not be documented.¹⁸

2. Develop and Draft the Final Rule

The project manager convenes or requests meetings as necessary to discuss and develop recommended responses to issues raised by the commenters, including meetings with the OCC or interagency working group and with the Chief Counsel, Executive Committee co-sponsor, if applicable, and other OCC senior managers. Based on the input received, the project manager drafts the regulatory text and preamble for the final rule. In some cases – particularly where the resolution of a legal issue is crucial to the content of the final rule – consideration should be given to developing a memorandum that clearly sets forth and explains the legal basis for the final rule. The project manager should consult with senior Law Department managers, including the Chief Counsel, before undertaking to prepare such a memorandum.

The project manager also ensures that any outstanding legal issues, or issues arising as a result of OCC (or interagency) staff review and discussion, are resolved. This includes any administrative law issues, such as whether a provision to be included in the final rule is a "logical outgrowth" of the proposal under the applicable APA case law. The APA also contains a few express requirements that apply to final rules, including that the final rule document contain a statement of the basis and purpose of the rule and that its effective date be delayed, subject to certain exceptions.

The project manager ensures that the final rule complies with any applicable delayed effective date requirements. With certain exceptions, the APA requires that final rules take effect no earlier than 30 days after the date of publication in the *Federal Register*. In addition, with exceptions that parallel those in the APA, the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act) requires rules that impose additional reporting, disclosure, or other new requirements to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form. The APA delayed effective date operates as a "floor," i.e., the effective date of a final rule usually can be no earlier than 30

¹⁸ OCC policy is that *ex parte* discussions that occur before an NPRM is issued require similar documentation that eventually will be included in the rulemaking file. See "Practice Tips, Drafting the NPRM," Chapter II.

days after publication and, if the rule is covered by the CDRI Act, the effective date will be 30 days plus the number of days until the first day of the calendar quarter following publication.

The OCC may cause a final rule to take effect sooner than the effective dates prescribed by the APA and CDRI Act upon a finding of "good cause" to do so, provided the basis for the finding is published in the preamble to the final rule.

The regulatory text consists of the amendatory text contained in the proposal with edits based on the public comments received. The preamble usually includes a summary of the proposed rule; the number of comments received, usually grouped by type of interested party; a summary of the comments received and the OCC's (or interagency) response to the comments; and a description of the final rule, usually in section-by-section format, that highlights any changes from the proposal. The preamble also includes the required regulatory analyses.

- Each public comment letter received need not be separately addressed in the preamble. The APA requires that the preamble to the final rule address significant issues concerning the proposal raised by the comment letters. Comment letters that address the same point(s) may be summarized as a group.

3. Ensure Compliance with Applicable Statutes and Executive Orders

The project manager works with the PAD, the Regulatory Specialist, and the working group to finalize the regulatory analyses for the final rule. The project manager should do these analyses concurrently with the drafting of the Gold Border package, if possible.

The PRA

Refer to Chapter II for a discussion of the requirements of the PRA. The PRA and OMB's implementing regulations prescribe particular requirements for information collections contained in final rules.

If the information collection contained in the NPRM remains unchanged in the final rule, the project manager includes in the preamble a statement that the final rule contains a collection of information; that the information collection was submitted to and approved by OMB; whether public comments were received on the information collection and, if so, how they were addressed. The preamble to the final rule includes the OMB control number assigned to the collection and indicates that failure to display the OMB control number has legal significance.

If the information collection contained in the NPRM has changed in the final rule, the Regulatory Specialist makes a revised submission to OMB on or before the date the final rule is published. The preamble to the final rule states that the final rule contains a collection of information; that the information collection was submitted to and approved by OMB at the proposed rule stage and was assigned a particular OMB control number; and that failure to display the OMB control number has legal significance. The preamble also states how the collection has changed; whether public comments were received on the information collection and, if so, how they were addressed; and what the new burden estimates are.

In addition, the preamble indicates that the rule has been resubmitted to OMB for review. It notes that the provisions that do not contain PRA requirements can go into effect but that the effective date of the final rule's information collection requirements are stayed until the OCC receives OMB approval. OMB has up to 60 days to complete its review and provide approval. When approval is received, the OCC must publish a notice in the *Federal Register* and include the OMB control number and statement of legal consequences.

If OMB has filed comments on the collection of information aspects of the NPRM, the OCC must resubmit the revised collection for review at the final stage of rulemaking. The preamble to the final rule must explain how any collection of information contained in the final rule responds to comments received from OMB, as well as any comments from the public. The OCC must explain any substantive or material change to the rule.

The Reg Flex Act

Even if the OCC has certified that an NPRM would not result in a final rule having a significant economic impact on a substantial number of small entities, the OCC may conclude that changes made in the final rule cause it to be likely to have such an impact.¹⁹ In such a case, the OCC must determine whether preparation of a Reg Flex Act analysis for the final rule is required. Chapter II, *supra*, discusses how this determination is made.

If the OCC concludes that the final rule will not have a significant economic impact on a substantial number of small entities, the preamble to the final rule includes a certification statement, as described in Chapter II, with a brief reason why the certification is appropriate.

¹⁹ Likewise, changes made in the final rule could result in the OCC concluding that an NPRM that did have a significant economic impact on a substantial number of small entities now, in final form, does not cross that threshold.

Agency certifications under the Reg Flex Act in final rules are subject to judicial review. Deficient certifications invite unnecessary litigation risk and may result in a final rule being remanded back to the OCC for additional Reg Flex analysis.

In the case of a regulation for which an IRFA was prepared, or for which a Final Regulatory Flexibility Analysis (FRFA) is otherwise required, the project manager prepares the FRFA, in consultation with PAD and the Regulatory Specialist. The project manager includes in the preamble a summary of the FRFA, together with a statement describing how copies of the complete analysis may be obtained, or the text of the complete FRFA. The complete analysis must be transmitted to the SBA's Office of Advocacy and made available to the public. As with agency Reg Flex Act certifications, FRFAs are subject to judicial review.

Pursuant to E.O. 13272, if the final rule is not eligible for certification under the Reg Flex Act, the Regulatory Specialist, in consultation with the project manager and the Assistant Director, notifies the SBA's Chief Counsel for Advocacy of the draft final rule "at a reasonable time" prior to its publication.

- Executive Order 13272 requires the OCC to "give every appropriate consideration" to comments provided by the SBA's Office of Advocacy on rules for which no Reg Flex Act certification has been provided and to respond in the preamble to the final regulation to questions raised by Advocacy.

Small Bank/Federal Savings Association Compliance Guide. For any final rule which is determined to have a significant impact on a substantial number of small entities and for which a FRFA is prepared, the SBREFA requires the OCC to publish one or more small business compliance guides to assist small entities in complying with the rule. This work need not be completed by the time the final rule is issued, but the project manager typically will begin work on the guide promptly after issuance of the final rule.

Congressional Review Act /Small Business Regulatory Enforcement Fairness Act

The Congressional Review Act, adopted as part of the SBREFA, generally provides a mechanism for Congressional review of agency regulations by requiring agencies to report to Congress and the General Accountability Office (GAO) when they issue a final rule and by establishing time frames within which Congress may act to disapprove a rule. To comply with the Congressional Review Act, the OCC must submit a Report to Congress and the GAO. The procedures for compliance with the Congressional Review Act are described at Step 9, below. As part of this Report, the OCC must state whether the rule is a "major rule" for Congressional Review Act purposes and must indicate whether the OCC prepared an analysis of costs and benefits.

The Congressional Review Act defines "major rule" to mean any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the OMB finds has resulted in or is likely to result in: (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. (5 U.S.C.

§ 804(2)(A)). In general, if a final rule is a "major rule," it may not take effect until the later of: (1) 60 days after the filing of the required reports to Congress or publication of the rule in the *Federal Register*, whichever is later; or (2) the date the rule would otherwise take effect unless a joint resolution of disapproval is enacted.

In order to determine whether the final rule is a major rule for purposes of the Report to Congress, the OCC must submit a request to OIRA for a major rule determination.

- Prior to this OIRA submission, LRA requests the Director of PAD's determination as to whether the rule is a "major rule" under this definition. This request should be made at the same time LRA requests the Director of PAD's determination under the Reg Flex Act and UMRA. (See Step 4, below.)
- This OIRA submission may be made via email, using the "Request for Major Rule Determination" form available on the LRA g:\ drive at g:\OCC Rulemaking Procedures. The submission is made by the Regulatory Specialist.
- The project manager must ensure that OIRA's decision has been received prior to submission of the final rule to the *Federal Register*, and must plan this submission accordingly.

Unfunded Mandates Act

The project manager updates the discussion of the UMRA in the preamble to the final rule based on new or updated analyses received from PAD, if any.

4. Coordinate Economic Analysis with PAD

The Director of PAD, in consultation with the Chief Counsel's Office, as appropriate, makes the determinations required pursuant to the Reg Flex Act, Congressional Review Act, and UMRA. PAD prepares the economic analyses necessary to support those determinations. Prior to distribution of the Gold Border package, the project manager sends a memorandum to PAD requesting an updated analysis of the final rule pursuant to the Reg Flex Act and the UMRA and a major rule determination under the Congressional Review Act. This memorandum indicates the differences between the proposed rule and the draft final rule and discusses any comments received relating to the applicable statutes and executive orders. The project manager sends this memorandum to PAD no later than the time of the distribution of the Gold Border package, requesting that PAD provide the project manager with its written response no later than the Gold Border comment due date. Whenever possible, particularly in the case of complex rulemakings, the memorandum to PAD should be sent at the earliest possible date.

- If the substance of a rule changes following receipt of PAD's revised analysis, the project attorney must request PAD to revise the analysis based on the changes and provide an updated analysis memorandum, approved by the Director of PAD, as soon as possible.
- The project manager must ensure that this updated analysis memorandum, in suitable form, adequately reviews the costs associated with the revisions to the proposed rule, and

contains the economic analyses necessary to support determinations required pursuant to the Reg Flex Act, Congressional Review Act, and UMRA.

5. Prepare and Distribute the Gold Border Package

The Gold Border package for the final rule consists of the same types of documents as the Gold Border package for the NPRM: draft final rule (regulatory text and preamble), the Gold Border Memorandum, and the Gold Border cover sheet. The distribution and review process are the same as for the Gold Border package for an NPRM. *See* Chapter II.

Gold Border Memorandum. The Gold Border memorandum contains a summary of the most significant provisions of the draft final rule, notes any changes made to the proposed rule, and describes any remaining issues raised by the public comments or by OCC (or interagency) staff.

Gold Border Cover Sheet. *See* the discussion of the Gold Border cover sheet in Chapter II.

6. Review and Address Gold Border Comments

The procedures for reviewing Gold Border comments are the same as for the NPRM. *See* Chapter II.

7. Prepare and Distribute the Red Border Package

The procedures for preparing and distributing the Red Border package are the same as for the NPRM. *See* Chapter II.

8. Coordinate Publication and Distribution of the Final Rule

For the most part, the procedures for publication and distribution of the final rule are the same as discussed in Chapter II for the NPRM. However, an additional step is required to comply with the Congressional Review Act once the final rule has been signed by the Comptroller.

9. Congressional Review Act/Small Business Regulatory Enforcement Fairness Act

The Congressional Review Act/SBREFA generally provides a mechanism for Congressional review of agency regulations by requiring agencies to report to Congress and the GAO when they issue final rules and by establishing time frames within which Congress may act to disapprove a rule.

- The project manager prepares the Report to Congress with the assistance of the Regulatory Specialist and **delivers the Report in person to the Speaker's Office and the President of the Senate's Office at the Capitol and obtains a signed receipt with the date, time, signature, and printed name of the receiving party at the respective offices.** This receipt is then included in the official file by the Regulatory Specialist. The Regulatory Specialist e-mails the report to the GAO on the same day. Delivery of this Report starts the clock for the Congressional review process. Accordingly, the project manager ensures that it is filed in a timely manner, usually on the same day as a final rule is published in the *Federal Register*.

- Three to four business days after delivery of the report, the project manager checks www.thomas.loc.gov to see if it has been officially received as reported in the Congressional Record for both the House and the Senate. If not, consult with LRA managers to determine appropriate follow-up.
- See Appendix III for specific procedures for filing this Report, and the LRA g:/ drive at g:\OCC Rulemaking Procedures for sample documents and forms.

10. Examiner View/OCC Supervisory Guidance Update

If the final rule amends an existing, or creates a new, possible violation of law, the project manager must provide the cite and a brief description of the revised/new violation to LRA's Examiner View (EV) Coordinator. The EV Coordinator will provide this new information to EV staff so that they may appropriately update EV.

- This information should be provided to the LRA EV Coordinator prior to the effective date of the new/revised violation.

In addition, the project manager must notify appropriate policy and/or supervisory staff of the final rule for any necessary revisions to OCC supervisory guidance. In most cases, this staff will be a member of the rulemaking working group.

PRACTICE TIPS**Docket Management – Public Comments**

- Once the comment period has begun, the Project Attorney (or designee) must confirm that Regulations.Gov contains the rulemaking docket and is uploading comment letters to the correct docket.
- The project manager is responsible for reviewing the public comment process for the project docket to ensure public comments are accurately posted to O:\FR COMMENTS by Communications staff and to www.regulations.gov by LRA staff. After the close of the comment period, the project manager must compare both of these comment repositories for consistency and ensure that comments have been processed appropriately.
- Electronic copies of comments e-mailed to regs.comments@occ.treas.gov are directed to LRA.COMMENTPROCESSING@occ.treas.gov. The project manager must review or request that support staff or a regulatory specialist review the LRA.COMMENTPROCESSING@occ.treas.gov mailbox to ensure that there is not a backlog of e-mailed comments that have not been processed according to Appendix II: Comment Management Instructions.
- The project manager must ensure electronic copies of comments that are sent directly to www.regulations.gov are processed and provided to Communications as specified in Appendix II: Comment Management Instructions.
- The Communications Division scans and e-mails to LRA support staff public comments that are faxed or otherwise received by OCC in paper format. These comments are subsequently processed by LRA support staff or a regulatory specialist as specified in Appendix II: Comment Management Instructions.
- For a paper comment received directly by LRA, the project manager will ensure that the paper comment is scanned and uploaded to www.regulations.gov and that the paper comment is sent via interoffice mail to the Communications Division.
- LRA support staff will identify likely form letter public comments and consult with the project manager regarding where these comments should reside (e.g., network drive or e-mail folder). The project manager is responsible for managing the identification of duplicate comment letters, using specialized software if necessary,²⁰ and consulting with management regarding resources necessary for reviewing customized form letters ("near duplicates" form letters). These comments are subsequently processed by LRA support staff or a regulatory specialist following Appendix II: Comment Management Instructions.
- The project manager will consult with LRA management regarding public comments that are received in non-written form (e.g., audio, video, physical objects).

²⁰ LRA is currently using DiscoverText software, which is available at www.discovertext.com.

Preparing and distributing the Gold Border package

- The project manager should insert the tracking number on the Gold Border cover sheet, with the initial designation "GB." Contact the Comptroller's Office, x4880, for the number. This number differs from the number provided for the NPRM.
- The project manager should prepare a redlined version of the final rule, showing changes made to the NPRM.

REFERENCES

- See REFERENCES section of Chapter II.
- For the procedural steps required to file the report to Congress pursuant to the Congressional Review Act, 5 U.S.C. § 804, *et seq.*, see Appendix III, and the Congressional Review Act memorandum on the LRA g:\ drive at g:\OCC Rulemaking Procedures.
- Sample documents including sample final rules, comment summaries, economic analyses, and FRFAs are available on the g:\ drive at g:\OCC Rulemaking Procedures.
- Templates for Red and Gold Borders are available in the "OCC Forms" section in the OCC's Word application. The project manager should consult with LRA staff for examples of recent final rules that could serve as a template.
- For effective date requirements, see § 302 of the Riegle Community Development and Regulatory Improvement Act of 1994, P.L. 103-325, 12 U.S.C. § 4802.
- For guidance on the Congressional Review Act, see Presidential Memorandum "Guidance for Implementing the Congressional Review Act", March 30, 1999 available on the LRA g:\ drive at g:\OCC Rulemaking Procedures.

CHAPTER IV – CLOSING THE RULEMAKING PROJECT: DOCUMENTATION AND RECORDKEEPING

The project manager is responsible for ensuring that a rulemaking project is closed in an orderly fashion and that the OCC's records reflect compliance with rulemaking procedures. LRA maintains a rulemaking file for each OCC rulemaking that contains significant documents in the rulemaking. Inclusion of a document in the rulemaking file does not determine whether it may, or must, be made public or be produced in response to a request under the Freedom of Information Act, a demand made during discovery in a litigated case, or other demand for information of the OCC. Such determinations are made on a case-specific basis in consultation with the Litigation Division, the Administrative and Internal Law Division, or the Communications Division, as appropriate.

PROCEDURES

1. Complete the Rulemaking Checklist

A rulemaking checklist is maintained for each rulemaking. The checklist contains the key steps in the rulemaking process. The project manager indicates on the checklist the date on which each step is completed. At the conclusion of a rulemaking project, the project manager transmits the checklist to the Regulatory Specialist for inclusion in the rulemaking file. The checklist is maintained in the rulemaking file.

2. Complete the Rulemaking File

The Regulatory Specialist is responsible for maintaining and keeping the rulemaking file for each rulemaking. Upon completion of the rulemaking, the project manager works with the Regulatory Specialist to ensure that the key rulemaking documents are included in the file. Once the rulemaking file is complete, the Regulatory Specialist uploads the file to CCORe. The rulemaking file contains the following documents:

- Any project initiation memorandum;
- Any issues memorandum;
- Memoranda submitted to PAD requesting economic analysis of the proposed and final rules, and memoranda received from PAD containing such analysis;
- If separately prepared, any regulatory impact analysis, initial or final regulatory flexibility analysis, or similar analysis conducted pursuant to a requirement in a statute or executive order;
- The Gold Border Reviewers' Memorandum, cover sheet, and the Gold Border draft of the proposed and final rules;
- The Red Border Memorandum, cover sheet, and the Red Border draft of the proposed and final rules;
- The proposed and final rules as submitted to the *Federal Register*;
- Any correspondence to or from OMB regarding the proposed or final rule, including e-mails;
- Any correspondence, other than a comment letter, to or from any other Federal agency, State or local government official, or associations or representatives of State or local government officials;

- The proposed and final rules as published in the *Federal Register*;
- The report to Congress and delivery receipts (for final rules only);
- A list of public comments received during the rulemaking;
- Any comment summaries prepared in connection with the rulemaking;
- Any public comments filed by OMB under the PRA regarding collections of information contained in the rule (the Regulatory Specialist maintains a separate file for the PRA filing documents);
- The press release, if any;
- The OCC Bulletin; and
- The rulemaking checklist;

3. File Completion Form

Once the rulemaking file is complete, the Regulatory Specialist completes and signs the Regulatory Specialist File Completion Form, in which he or she indicates that he or she has reviewed the rulemaking checklist and all relevant checklist items have been completed and that the agency rulemaking file is complete. See Appendix IV or the LRA g:\ drive at g:\OCC Rulemaking Procedures.

Appendix I

Policy Analysis Division, Economics Department

Standard procedures for economic analysis of proposed rules¹ (Revised 10/18/11)

1. Legislative and Regulatory Activities (LRA) project attorney contacts the Policy Analysis Division (PAD) Director to discuss the rule and/or provide PAD with documentation (e.g., an issues memorandum for OCC discretionary rulemakings) and request assignment of PAD staff to the project.
2. PAD Director² reviews the LRA request and assigns the task to a PAD staff member. The extent of PAD staff involvement in the rulemaking process after the PAD Director assigns staff to the project -- but before the LRA project attorney provides a formal request for analysis -- will vary based on, among other things, the circumstances prompting the rulemaking.
3. LRA project attorney sends assigned PAD staff and the PAD Director a draft rule and a memo requesting economic analysis that, among other things, identifies mandates in the rule.
4. If necessary, PAD staff requests copies of background or supporting material that LRA may have collected as part of the rule-writing process from the LRA project attorney.³
5. PAD staff prepares a preliminary impact assessment that:⁴
 - a. Describes the rule and its requirements;
 - b. Identifies the institutions that will be affected by the rule;
 - c. Estimates the likely impact of the rule; and,
 - d. Assesses the likely impact on small institutions in accordance with the requirements of the Regulatory Flexibility Act (RFA).
6. PAD staff determines if the estimated costs of the rule will:
 - a. Result in expenditures of \$100 million or more annually by state, local, and tribal governments, or by the private sector as required by the Unfunded Mandates Reform Act of 1995 (UMRA);⁵ and,
 - b. Have a significant economic impact on a substantial number of small entities (pursuant to the RFA).
7. PAD staff then completes the following tasks as necessary:

¹ The procedures in this document apply to requests for analysis that the PAD Director receives after September 15, 2011.

² We use "PAD Director" to refer to the director or the director's designee.

³ If the rulemaking began with an advance noticed of proposed rulemaking (ANPR), LRA should provide PAD staff with any comment summaries prepared by staff in LRA or at another agency (provided the other agency sends LRA staff a copy of the summary).

⁴ For guidance on preparing an analysis of a significant rule, see step 8 and OMB Circular A-4.

⁵ In these procedures, we refer to rules with cost estimates at or above the criteria described in this step as "significant" and rules with estimated costs below the criteria as "not significant."

- i. If 6(a) and 6(b) are false, then skip to step 10.
 - a. If 6(a) is true, then complete steps 8 and 10.
 - b. If 6(a) and (b) are true, then complete steps 8 through 10.
 - c. If 6(b) is true, then complete steps 9 and 10.
- 8. If the PAD staff preliminary analysis concludes that the impact of the rule is significant (i.e., above the UMRA threshold) then:
 - a. PAD staff prepares a full cost-benefit analysis that, at a minimum, includes the elements in a cost assessment of a proposed rule that is not significant and adds the following elements:
 - i. A statement of the need for the proposed regulatory action (for guidance, see Circular A-4, pages 1-6),
 - ii. A qualitative or quantitative assessment of the benefits of the proposed rule (for suggestions regarding methods for treating non-monetized benefits and costs, see Circular A-4 pages 26-28),
 - iii. A comparison to the baseline, which is the state of the world in the absence of the proposed rule, and
 - iv. A comparison to one or more plausible alternatives to the proposed rule (for suggested alternative regulatory approaches, see Circular A-4, pages 7-9).⁶
 - b. PAD staff sends the draft to the PAD director for comment and upon approval from PAD director,
 - c. PAD staff circulates the draft assessment memo for comments and suggestions to the LRA project attorney and the subject matter expert(s).⁷
- 9. If the preliminary assessment is that the rule will have a significant economic impact on a substantial number of small entities, PAD staff will:
 - a. Consult with the project attorney if PAD staff is not already aware of alternatives for small entities evaluated by LRA staff (before the request for analysis was sent to PAD); and,
 - b. Prepare analysis necessary to comply with the RFA; or,
 - c. If additional information is required, prepare questions that LRA may include in the proposed rule to solicit input for analysis of the impact of the final rule on small entities.⁸

⁶ If possible, when rulemakings are required by statute, the baseline or one of the alternatives should include the statutory requirements but exclude mandates in the rule that are not required by statute. Analysis of the statutory requirements will be useful when preparing analysis of the final rule to comply with the Congressional Review Act (CRA).

⁷ The subject matter expert is staff or management in the OCC department most closely related to the implementation of the rule. In some cases, the PAD Director may opt to review the draft assessment memo before PAD staff circulates it to staff in other divisions.

⁸ For guidance on the RFA, PAD staff may refer to the Small Business Administrations, Office of Advocacy's *Guide for Government Agencies*.

10. After incorporating comments (if any) PAD staff sends a draft final memo to the PAD Director, and the PAD Director either:
 - a. Approves and distributes the memo;⁹ or,
 - b. Directs PAD staff to revise the memo and then resubmit it to the Director for approval and distribution.
11. As circumstances warrant, LRA (either the project attorney or a manager) will inform PAD staff and the PAD Director of significant changes made to the draft rule that PAD used to prepare the analysis memorandum and shall request an updated and revised memorandum. After consulting with the PAD Director, PAD staff will prepare an updated analysis memorandum for the Director's review and approval.
12. LRA will ensure that this updated analysis memorandum, in a suitable form, adequately reviews the costs associated with the revisions to the proposed rule and contains the economic analysis necessary to support the required determinations under the RFA and UMRA.

Standard procedures for economic analysis of final rules

1. LRA project attorney contacts the PAD Director (and staff that drafted the analysis memo for the NPRM) and provides documentation (e.g., a comment summary and/or the draft final rule).¹⁰
2. See procedures for proposed rules. Repeat steps 3 through 5 for the draft final rule and incorporate analysis required by the Congressional Review Act (CRA) and relevant information (if any) obtained from the public and/or regulated entities.
 - a. If the draft final rule does not exceed any of the thresholds listed in the CRA or the UMRA, and it does not have a significant economic impact on a substantial number of small entities, repeat step 10.
 - b. If the draft final rule does not exceed any of the thresholds listed in the CRA or the UMRA and it does have a significant economic impact on a substantial number of small entities, repeat steps 9 and 10.
 - c. Otherwise, repeat steps 8 through 10 incorporating relevant information obtained from the public and/or regulated entities.
3. If necessary, repeat step 11.

⁹ The PAD Director sends the analysis memo to the LRA project attorney with a copy to (a) at least one LRA manager and (b) LRA staff responsible for preparing estimates required by the Paperwork Reduction Act (PRA).

¹⁰ If necessary, the PAD director will inform the project attorney if there are any changes to PAD staff assigned to the project.

Appendix II

Comment Management Instructions

1. Check LRA.COMMENTPROCESSING@occ.treas.gov inbox for new comments.
2. Delete spam.
3. Highlight all new comments.
4. Click ADOBE PDF in toolbar.
5. Click "Convert Selected Messages."
6. Click "Create New PDF."
7. Save File in any location (it can be deleted at the end of this process).
8. In PDF file, highlight one comment letter at a time, go to File->Save Files from Portfolio.
9. Save files in G:\Comment Letters\DOCKET\.
10. Delete file from PDF portfolio.
11. Repeat steps 8-10 until all comment letters have been processed.
 - a. If it is obvious that certain comment letters are form letters, then multiple comments can be highlighted and saved to G:\Comment Letters\DOCKET\NAME OF FORM LETTER.
 - b. If the email is saved to a form letter folder, make certain that the files are numbered.
12. Mark email as read and/or delete email.
13. Upload comments to FDMS (only upload one example of each identical duplicate form letter and list a count of the form letters in the title of each form comment letter type in the FDMS entry).
 - a. Instructions for one document at a time:
 - i. On FDMS inbox page (the default start page) click on the appropriate docket.
 - ii. Click on "Add Document" in top right corner of the page.
 - iii. Fill in all the required information and submitter name, organization, city, and state if possible.
 - iv. Upload comment.
 - v. Post comments that do not include confidential business information, customer account information, or other sensitive information. Refer comments not posted to the project manager for review and direction on whether to post.
 - b. Instructions for multiple documents:
 - i. On FDMS inbox page (the default start page) locate appropriate docket and bulk import image. It is the image at the far right of an arrow pointing to a file folder.
 - ii. Add the saved comment letters.
 - iii. Fill out comment names.

- iv. On FDMS inbox page (the default start page) click on the appropriate docket.
- v. Go through comments and fill in all the required information and submitter name, organization, city, and state, if possible.
- vi. Only post comments that do not include confidential business information, customer account information, or other sensitive information. Refer comments containing such information to the project manager for review and direction on whether to post.
- c. Move files to G:\Comment Letters\DOCKET\Processed.

14. Check FDMS website for new comments:

- a. On inbox page (the default start page) change search parameters to "Documents" "assigned to me" "created" Within the past "6" "days" with a status of "Nonpublic."
 - i. If you have not checked comments within that time frame, then expand to the necessary number of days.
- b. Check all documents to be exported.
- c. Click export.
- d. Click "Download Export File."
- e. Open file with "WinZip."
- f. Extract files to G:\Comment Letters\DOCKET\Processed.
- g. Rename file to reflect the submitter.
- h. Email files to Communications staff.

Only post comments that do not include confidential business information, customer account information, or other sensitive information. Refer comments containing such information to the project manager for review.

Appendix III

Procedures for Preparing a Report to Congress

1. Fill out the Report to Congress form, save, and name the file REPORTTOCONGRESS [RIN number].pdf (the RIN number can be found at the top of the published Federal Register document). The LRA Regulatory Specialist is the submitter of the report-- you need to put this on the form if it's not there already.
2. Prepare a short summary of the final rule in MS Word. The summary of the rule from the Federal Register document may be used for this purpose. Save and name this file REPORTTOCONGRESSSUMM [RIN number].doc.
3. Prepare the attached transmittal letter for the Report to Congress and name the file REPORTTOCONGRESSTRANSMITTAL [RIN number].doc. The transmittal letter will go out under the LRA Regulatory Specialist's name.
4. E-mail the three files from steps 1, 2, and 3 above to the LRA Regulatory Specialist, who will review the Report to Congress form, summary, and the transmittal letter. He/she will work with the project manager to make any necessary changes.
5. When all is in order, the LRA Regulatory Specialist will sign **three originals** of the Report to Congress and 3 transmittal letters (one **original** for the President of the Senate, one **original** for the Speaker of the House, and one **original** for GAO).
6. The LRA Regulatory Specialist will return the signed originals to the project manager.
7. The project manager must fill out the attached Receipt for Submission of a Federal Rule Under the Congressional Review Act.
8. Assemble the Report to Congress package in the following order from top to bottom: receipt for submission, transmittal letter, **original signed** Report to Congress Form, summary of rule, and a copy of the final rule as published in the *Federal Register*.
9. Make a copy of each assembled package for the rulemaking file and provide the copies to the LRA Regulatory Specialist.
10. The project manager will give the LRA Regulatory Specialist the **original** package addressed to GAO. The Regulatory Specialist will scan and e-mail the report to GAO.
11. **The project manager must deliver the Report to Congress in person to the Speaker's Office and the President of the Senate's office at the Capitol and receive a signed receipt with the date, time, signature, and printed name of the receiving party at the respective offices.**
12. Three to 4 business days after you have delivered the Report to Congress, start checking to see if it has been officially received as reported in the Congressional Record online for both the HOUSE and the SENATE using a term and date-range search at this link:

<http://thomas.loc.gov/home/r108query.html> (Note: this link is only going to be good for the 108th Congress, when a new Congress is installed, the link will change. Check <http://thomas.loc.gov/home/thomas.html> for updated links.) Please note that there can be a significant delay between delivery of the documents and publication in the Congressional Record. In some cases, it may be necessary to call the Committees or the House and Senate clerks to confirm official receipt.

Appendix IV

Regulatory Specialist File Completion Form

Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

TITLE OF RULEMAKING: _____

CFR PARTS: _____ **RIN:** _____

PUBLICATION DATE OF FINAL RULE: _____

**I HAVE REVIEWED THAT ATTACHED RULEMAKING CHECKLIST FOR THIS RULEMAKING. ALL
RELEVANT CHECKLIST ACTIONS HAVE BEEN COMPLETED AND THE AGENCY RULEMAKING FILE
IS COMPLETE.**

_____ **[SIGNATURE]**

[INSERT NAME]
LRA REGULATORY SPECIALIST

Date: _____

Appendix V

LRA RULEMAKING CHECKLIST

TITLE OF RULEMAKING: _____

CFR PARTS: _____

RIN: _____

PROJECT MANAGER: _____

Working Group Members:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

ACTION	DATE	INITIALS	COMMENTS
I. Project Initiation			
• Project initiation memo prepared, if necessary			
• Issues memo prepared, and circulated, if necessary			
• First working group meeting held, if necessary			
• Policy Analysis Division (PAD) contacted			
II. Proposed Rule (NPRM)			
• Proposed rule drafted and circulated to working group for review			
• Gold border memo and cover sheet prepared			
• Gold border package signed and approved for distribution by Chief Counsel, and Executive Committee co-sponsor, if applicable <input type="checkbox"/> Gold border number: _____			
• Gold border package distributed to reviewers <input type="checkbox"/> Comments due on _____ <input type="checkbox"/> Comments received from all reviewers <input type="checkbox"/> Electronic version of Gold Border package sent to Comptroller's Office			
• Memo sent to PAD requesting economic analysis pursuant to Reg Flex Act and Unfunded Mandates Reform Act			
• Memo received from PAD containing economic analysis pursuant to Reg Flex Act and Unfunded Mandates Reform Act			
• Paperwork Reduction Act (PRA) analysis prepared <input type="checkbox"/> Preamble language drafted <input type="checkbox"/> Documentation of our analysis (information about how decisions were reached, who was consulted, and their views) included in file			
• Reg Flex Act analysis prepared <input type="checkbox"/> If not exempt, certification of no significant impact drafted OR <input type="checkbox"/> SBA notified, and Initial Reg Flex analysis (IRFA) sent to SBA for review <input type="checkbox"/> Preamble language drafted <input type="checkbox"/> Documentation of our analysis included in file			

ACTION	DATE	INITIALS	COMMENTS
<ul style="list-style-type: none"> Unfunded Mandates Reform Act analysis prepared <ul style="list-style-type: none"> <input type="checkbox"/> Budgetary impact statement prepared, if necessary <input type="checkbox"/> Preamble language drafted <input type="checkbox"/> Documentation of our analysis included in file 			
<ul style="list-style-type: none"> Final version of NPRM prepared and circulated for review 			
<ul style="list-style-type: none"> Red border memo and cover sheet prepared 			
<ul style="list-style-type: none"> PAD contacted, via memo, to review economic analysis if substantive changes made to NPRM based on Gold Border comments 			
<ul style="list-style-type: none"> Public Relations notified of upcoming publication <ul style="list-style-type: none"> <input type="checkbox"/> Draft press release and/or Q&As, if necessary 			
<ul style="list-style-type: none"> Red Border package approved by Chief Counsel, and Executive Committee co-sponsor, if applicable 			
<ul style="list-style-type: none"> Red border package sent to Comptroller for signature 			
<ul style="list-style-type: none"> SBA's comments on IRFA pursuant to Reg Flex Act, received and incorporated into NPRM before publication, if applicable 			
<ul style="list-style-type: none"> Comptroller's signature obtained 			
<ul style="list-style-type: none"> PRA clearance package submitted to OMB, if applicable, on or before date published in <i>Federal Register</i> 			
<ul style="list-style-type: none"> Chief Counsel's approval to send to <i>Federal Register</i> obtained 			
<ul style="list-style-type: none"> Final NPRM sent to <i>Federal Register</i> 			
<ul style="list-style-type: none"> Document published in <i>Federal Register</i> Comment period ends on _____ 			
<ul style="list-style-type: none"> <i>Federal Register</i> version of NPRM distributed to OCC interested parties 			
<ul style="list-style-type: none"> OCC Bulletin prepared and sent to Communications for review <ul style="list-style-type: none"> <input type="checkbox"/> Draft distributed on green border 			
<ul style="list-style-type: none"> OCC Bulletin signed by Chief Counsel, and Executive Committee co-sponsor, if applicable 			

ACTION	DATE	INITIALS	COMMENTS
<ul style="list-style-type: none"> Electronic copy of <i>Federal Register</i> document and final OCC Bulletin and hard copy of Green Border cover sheet (with reviewers' initials) and Bulletin signed by Chief Counsel and Executive Committee co-sponsor, if applicable, sent to Communications 			
<ul style="list-style-type: none"> Final OCC Bulletin distributed by Communications 			
<ul style="list-style-type: none"> <i>Federal Register</i> version of NPRM proofread and <i>Federal Register</i> is notified of any errors 			
<ul style="list-style-type: none"> Regulations.Gov checked to confirm rulemaking docket exists and is uploading comment letters to the correct docket. 			
III. FINAL RULE			
<ul style="list-style-type: none"> The O:\ Drive (O:\FR COMMENTS) and www.regulations.gov compared and reviewed for consistency <ul style="list-style-type: none"> <input type="checkbox"/> All comments processed appropriately 			
<ul style="list-style-type: none"> Public comments reviewed and comment summary prepared <ul style="list-style-type: none"> <input type="checkbox"/> Comment summary sent to Chief Counsel, Executive Committee co-sponsor, if applicable, and working group for review 			
<ul style="list-style-type: none"> Final rule drafted and circulated for review 			
<ul style="list-style-type: none"> Gold Border memo and cover sheet prepared 			
<ul style="list-style-type: none"> Gold Border package signed and approved for distribution by Chief Counsel, and Executive Committee co-sponsor, if applicable <ul style="list-style-type: none"> <input type="checkbox"/> Gold Border number: _____ 			
<ul style="list-style-type: none"> Gold border package distributed to reviewers <ul style="list-style-type: none"> <input type="checkbox"/> Comments due on _____ <input type="checkbox"/> Comments received from all Gold Border Reviewers 			
<ul style="list-style-type: none"> Electronic version of Gold Border package sent to Comptroller's Office 			
<ul style="list-style-type: none"> OMB PRA comments/approval received, if applicable 			
<ul style="list-style-type: none"> Memo to PAD requesting economic analysis of final rule pursuant to Reg Flex Act, Unfunded Mandates Reform Act and Congressional Review Act (CRA)/Small Business Regulatory Enforcement Fairness Act (SBREFA) prepared and sent 			

ACTION	DATE	INITIALS	COMMENTS
• Memo received from PAD containing economic analysis pursuant to the Reg Flex Act, Unfunded Mandates Act, and CRA/SBREFA			
• PRA analysis prepared if information collection in rule has changed or to reflect OMB comments <input type="checkbox"/> Preamble language updated, if necessary			
• Reg Flex Act analysis updated, if necessary <input type="checkbox"/> Certification of no significant impact drafted OR <input type="checkbox"/> Final Reg Flex analysis (FRFA) sent to SBA for review <input type="checkbox"/> Preamble language updated, if necessary			
• Unfunded Mandates Reform Act analysis updated <input type="checkbox"/> Preamble language updated, if necessary			
• CRA/SBREFA analysis prepared			
• Final version of final rule prepared and circulated to working group for review			
• Red Border memo and cover sheet prepared			
• PAD contacted, via memo, to review economic analysis if substantive changes made to final rule based on Gold Border comments			
• Public Relations notified of upcoming publication <input type="checkbox"/> Draft press release and/or Q&As, if necessary			
• Red Board package approved by Chief Counsel and Executive Committee co-sponsor, if applicable			
• SBA's comments on FRFA pursuant to Reg Flex Act received and incorporated into final rule before publication, if applicable			
• Red Border package sent to Comptroller for signature			
• Comptroller's signature obtained			
• PRA clearance package submitted to OMB, if applicable, on or before date rule published in <i>Federal Register</i>			
• OCC Bulletin prepared and sent to Communications for review <input type="checkbox"/> Draft distributed on green border			

ACTION	DATE	INITIALS	COMMENTS
• Chief Counsel's approval to send rule to <i>Federal Register</i> obtained			
• Final rule sent to <i>Federal Register</i>			
• Document published in the <i>Federal Register</i> on ____ <input type="checkbox"/> Effective Date _____			
• Report to Congress prepared and hand-delivered by project manager or Regulatory Specialist to: <input type="checkbox"/> Senate Banking Committee via Appointments Desk (delivery receipt obtained and placed in official rulemaking file) <input type="checkbox"/> House Financial Services Committee via the Speaker's Office (delivery receipt obtained and placed in official rulemaking file) <input type="checkbox"/> GAO (fax receipt obtained and placed in official rulemaking file)			
• <i>Federal Register</i> version of rule distributed to OCC interested parties			
• OCC Bulletin signed by Chief Counsel and Executive Committee co-sponsor, if applicable			
• Electronic copy of <i>Federal Register</i> document and final OCC Bulletin and hard copy of Green Border cover sheet (with reviewers' initials) and Bulletin signed by Chief Counsel and Executive Committee co-sponsor, if applicable, sent to Communications			
• OCC Bulletin distributed by Communications			
• Published version of final rule proofread and <i>Federal Register</i> notified of any errors			
• Small bank compliance guide prepared pursuant to Reg Flex Act, if necessary			
• Summary of new or amended violation of law, with cite(s) sent to Examiner View (EV) Coordinator prior to effective date			
• Appropriate Policy/Supervisions staff notified of final rule for any necessary revisions to OCC supervisory guidance.			
• Congressional Record checked to confirm Senate and House receipt of Report to Congress			

IV. Project Closing			
<ul style="list-style-type: none"> • Rulemaking checklist provided to Regulatory Specialist <ul style="list-style-type: none"> □ Regulatory Specialist signs-off on completeness check 			
<ul style="list-style-type: none"> • Lotus Notes entry closed 			
<ul style="list-style-type: none"> • Official rulemaking file organized and closed 			
<ul style="list-style-type: none"> • Regulatory Specialist uploads rulemaking file to CCORe. 			



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

November 29, 2011

Mr. Cass Sunstein
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Mr. Sunstein:

I am writing to follow up on our conversation about the ongoing efforts of the Office of the Comptroller of the Currency (OCC) to increase regulatory effectiveness and reduce regulatory burden, consistent with the goals of Executive Order 13563. This letter highlights key aspects of our work in this regard. Most importantly, the OCC currently is reviewing all of its regulations for the purpose of integrating the rules governing Federal savings associations into the rules for national banks. As part of this comprehensive review program, we plan to seek public comment about ways to improve each of our rules to promote efficiency and reduce burden as we prepare the final, integrated rulebook. In addition, although Executive Order 13563 does not apply to the OCC by its terms, our agency is subject to a statutory requirement unique to the Federal banking agencies, pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPA)¹ that imposes regulation review requirements similar in scope and purpose to those in the Executive Order. We completed the last review over a period that ended December 2006, and, as the statute requires, we will complete the next EGRPA review not later than 2016.

The OCC recognizes the importance of reviewing its rules to reduce unnecessary regulatory burden and is addressing that goal on a number of fronts. For example, Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act² (Dodd-Frank Act) transferred to the OCC all the functions of the Office of Thrift Supervision (OTS) and the Director of the OTS related to Federal saving associations, as well as OTS rulemaking authority related to both state and Federal savings associations. In connection with this transfer, the OCC has undertaken a comprehensive review of both OCC and OTS regulations to make them more effective by combining them where possible, reducing duplication, and eliminating unnecessary requirements.

¹ Pub. L. No. 104-208, § 2222, 110 Stat. 3009, 3009-414 (Sept. 30, 1996), codified at 12 U.S.C. § 3311.

² Pub. L. No. 111-203 (July 21, 2010).

On May 26, 2011, in a *Federal Register* publication, we proposed revisions to OCC and OTS rules that relate to internal agency functions and operations and that implement certain provisions of the Dodd-Frank Act.³ As the proposal stated, this issuance was part of the OCC's review of national bank and savings association regulations "to determine what changes [were] needed to facilitate a smooth regulatory transition."⁴ The final rule was published on July 21, 2011,⁵ the date on which OTS functions officially transferred to the OCC.

Shortly thereafter, in order to facilitate the OCC's administration and enforcement of the OTS rules and to make appropriate changes to these rules to reflect the OCC's supervision of Federal savings associations, the OCC republished as its own the former OTS regulations with nomenclature and other minor changes.⁶ Recognizing this republication as the next, but not the final, step in the OCC's integration process, the republication notice stated that, going forward:

[T]he OCC will consider more comprehensive substantive amendments, as necessary, to the Republished Regulations. For example, we may propose to repeal or combine provisions in cases where OCC and former OTS rules are substantively identical or substantially overlap. In addition, we may propose to repeal or modify OCC or former OTS rules where differences in regulatory approach are not required by statute or warranted by features unique to either the national bank or Federal savings association charter. This substantive review also will provide an opportunity for the OCC to ask for comments suggesting revisions to the rules for both national banks and Federal savings associations that would remove provisions that are "outmoded, ineffective, insufficient, or excessively burdensome," consistent with the goals outlined in [Executive Order 13563].⁷

Consistent with this statement, OCC staff is currently undertaking a substantive review of all national bank and Federal savings association regulations in an effort to consolidate, where statutorily permissible and consistent with safety and soundness, two distinct sets of regulations (those of national banks and those of savings associations) into a single, streamlined set. In this effort, the OCC is also specifically seeking to identify regulations that are "outmoded, ineffective, insufficient, or excessively burdensome." We will then publish, as one or more Notices of Proposed Rulemaking, revised rules on which industry and the public can comment. After careful consideration of these comments, the OCC will issue a final rule.

As noted above, the OCC also is subject to EGRPRA, which requires the Federal Financial Institutions Examination Council (FFIEC) and each Federal banking agency to review its regulations every 10 years. The purpose of this review is to identify outdated or otherwise unnecessary regulatory requirements. This joint exercise provides the banking agencies with the opportunity to consider how to streamline the regulatory process for the financial institutions we regulate.

³ 76 Fed. Reg. 30557 (May 26, 2011).

⁴ *Id.*, at 30558.

⁵ 76 Fed. Reg. 43549 (July 21, 2011).

⁶ 76 Fed. Reg. 48950 (Aug. 9, 2011).

⁷ *Id.*, at 48951.

The OCC and the other Federal banking agencies began their most recent EGRPRA review in June 2003. Over a three-year period ending in December 2006, the agencies received public comments on over 130 regulations, carefully analyzed these comments, and proposed changes to their regulations, all with the goal of eliminating burden where possible. A final report was submitted to Congress on July 31, 2007. The next EGRPRA review is due to be completed in 2016. At the conclusion of the EGRPRA review, the final report will be submitted to Congress and made available to the public.

The OCC encourages and considers public comments concerning the impact of the rules we issue. We undertake analyses of costs and benefits consistent with the requirements of several statutes. Under the Paperwork Reduction Act,⁸ the OCC assesses the anticipated cost of any paperwork associated with its regulatory provisions. Under the Congressional Review Act,⁹ the OCC provides to Congress and others any cost-benefit or other impact analyses prepared as part of a final rulemaking. Under the Regulatory Flexibility Act,¹⁰ the OCC conducts an analysis of any rule likely to have a significant economic impact on a substantial number of small entities. This includes, of course, small community banks.

In addition, the OCC's ongoing work with the other Federal financial regulatory agencies helps avoid duplication and promotes consistency in regulatory and supervisory approaches. As you know, the OCC participates in the Financial Stability Oversight Council and the FFIEC. In addition to these principal-level contacts, OCC staff – ranging from senior deputy comptrollers to staff members participating in interagency working groups – are in frequent contact with their counterparts at the other banking agencies and, increasingly, with the other financial sector regulators with whom we share implementation responsibilities for the Dodd-Frank Act. These less formal interactions provide multiple channels for coordinating efforts to facilitate consistent and comparable regulation, as appropriate in light of the structure and activities of the institutions under our respective jurisdictions.

As another way of gaining insight into how our regulations and other actions affect the Federal savings associations that were transferred to our supervision effective in July 2011, the OCC is carrying on the work of two advisory committees that the OTS had administered, the Mutual Savings Association Advisory Committee (MSAAC) and the Minority Depository Institutions Advisory Committee (MDIAC). With respect to the MSAAC, the OCC believes it is necessary and in the public interest for it to study the needs of and challenges facing mutual savings associations. With respect to the MDIAC, the OCC seeks to preserve the present number of minority depository institutions and to encourage the creation of new ones.¹¹

⁸ 44 U.S.C. § 3501 *et seq.*

⁹ 5 U.S.C. § 801 *et seq.*

¹⁰ 5 U.S.C. § 601 *et seq.*

¹¹ With respect to both committees, the OCC is currently seeking nominations for persons to serve as committee members. Notices seeking nominations were published in the Federal Register. See 76 Fed. Reg. 71437 (Nov. 17, 2011) and 76 Fed. Reg. 71438 (Nov. 17, 2011).

Consistent with the Administrative Procedure Act (APA),¹² the OCC strongly encourages the public to participate in the rulemaking process. The OCC generally provides the public with at least a 60 day comment period for each proposed rulemaking and details numerous channels through which comments can be submitted. The OCC solicits comments on the regulatory burden associated with a proposal and encourages feedback on how any burden could be reduced. The agency values this feedback and carefully considers all the comments we receive as we formulate a final rule.

Finally, apart from any statutorily mandated regulatory review, the OCC has a longstanding and demonstrated commitment to regulation review. For example, during the mid-1990s (and prior to the enactment of EGRPRA), the OCC engaged in a three-year, top-to-bottom review of all of its regulations in a successful effort to streamline its regulatory process.¹³ Consistent with this agency culture, the OCC views the integration of the national bank and savings association rules discussed above, along with all of its other interactions with the public, industry, and other agencies, as opportunities to inform its decisions to achieve rules that are both effective and efficient.

We appreciate the opportunity to share with you our on-going regulatory review efforts. Please do not hesitate to contact me if you have any questions.

Sincerely,



John Walsh

Acting Comptroller of the Currency

¹² 5 U.S.C. § 551 *et seq.*

¹³ Since this time, the overwhelming majority of the regulations that the OCC has issued have been promulgated in response to an explicit congressional mandate. In these situations, the agency's discretion is limited by the parameters that Congress sets forth.