September 23, 2003

Ms. Jennifer Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington D.C. 20551

Attention: Docket No. R-1151

Office of the Comptroller of the Currency
250 E Street, SW
Mailstop 1-5
Washington D.C. 20219

Attention: Docket No. 03-10

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

Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington D.C. 20552

Attention: 2003-20

Re: Regulatory Publication and Review Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996
68 FR 35589 (June 16, 2003)

Dear Sir or Madam:

America's Community Bankers ("ACB")[1] is pleased to comment on the federal banking agencies' (the "agencies")[2] review of regulatory burden imposed on insured depository institutions.[3] Required by section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA"),[4] the agencies are reviewing and identifying outdated, unnecessary, and unduly burdensome regulatory requirements. This comment letter responds to the request for comments for two of the first substantive areas identified for review: "Applications and Reporting" and "Powers and Activities."

[1] America's Community Bankers represents the nation's community banks. ACB members, whose aggregate assets total more than $1 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.
[2] Federal Deposit Insurance Corporation ("FDIC"), Federal Reserve Board (the "Board"), Office of the Comptroller of the Currency ("OCC"), and the Office of Thrift Supervision ("OTS").
[3] 68 Fed. Reg. 35589 (June 16, 2003).
[4] Pub. L. 104-208, Sept. 30, 1996.

ACB Position

ACB strongly supports efforts to reduce regulatory burden of insured depository institutions. Reviewing and eliminating unnecessary regulations will free up funds for community banks to invest in their communities and better serve their customers' financial needs. Moreover, reducing regulatory burden will enable insured depository institutions to compete with less regulated or unregulated financial service providers. Any reduction in regulatory burden should not be done at the expense of safety and soundness.

Generally, ACB suggests the following regulatory changes:

- Eliminate unnecessary applications for well performing banks;
- Streamline the OTS holding company application;
- Publish a list of approved and denied activities;
- Institute and encourage electronic filing; and
- Modernize Call Reports and Thrift Financial Reports.

In addition, we urge the agencies to consider submitting the following suggested legislative changes for Congressional action:

- Ease restrictions on interstate banking and branching;
- Exempt well-capitalized savings associations from dividend notice requirements;
- Expand federal savings association business lending authority;
- Increase commercial real estate lending authority for savings associations;
- Update the Bank Service Company Act;
- Update community development investment authority;
- Eliminate the loan-to-one-borrower residential housing exception; and
- Provide equitable treatment for institutions offering fiduciary services.

Applications and Reporting: Suggested Regulatory Changes

In addition to a number of specific suggested changes in the applications area, ACB generally supports the development and implementation of as streamlined and uniform process as possible. We suggest that the agencies revise their procedures to provide what are now routine applications will instead be handled as after-the-fact notice filings. This may be restricted to institutions that have composite ratings of 1 or 2, are well managed, and have satisfactory CRA ratings. These applications are invariably approved, and eliminating them in favor of after-the-fact notice filings will reduce costs and regulatory burden for the agencies and the affected institutions alike. Examples of applications that can be replaced by notice filings include applications relating to the establishment of branches in states where the applicant already has a branch, relocation of branches not involving branch closures, and applications relating to the establishment of subsidiaries of all kinds. The following are specific suggestions that we believe would create more streamlined and efficient process.

Eliminate Unnecessary Applications for Well Performing Banks. ACB believes that applications of a routine nature should be eliminated or replaced with expedited notification requirements for institutions with sound capital positions, a CAMELS rating of 1 or 2, and, where appropriate, a satisfactory or outstanding CRA rating. Specifically, a notice requirement should replace applications for:

- Branch applications;[5]
- Assisted acquisitions; and
- Well-performing institutions seeking to engage in certain new activities through a subsidiary.[6]

The agencies routinely approve applications submitted by strong institutions. Instituting a notice requirement would expedite the ability of well-managed insured depository institutions to offer services to additional communities and would enhance competition. The institution would not have to expend the resources or the time on the full application process unless a problem is found with the application or the institution.

In addition, we request the agencies to shorten the application processing time for any activities that would still require regulatory approval. Furthermore, applications for transactions that are reviewed by other regulators should be waived or a process developed to expedite the review process. For example, current law requires all state savings associations to give the FDIC and the OTS 30 days notice prior to establishing or acquiring a subsidiary or conducting a new activity in an existing subsidiary.[7] ACB supports eliminating the requirement that state savings associations provide this notice to the FDIC. It is duplicative and unnecessary for safety and soundness purposes.

As part of the review of the rules applicable to applications, we strongly recommend the agencies to evaluate which applications can be delegated to the applicable regional office for action. In particular, we urge the OTS to amend the rules governing mutual holding companies to provide that applications for routine matters may be submitted to and approved by the appropriate regional office.

Applications. The OTS regulations governing applications were revised and updated in 1997. Many of the requirements were amended to conform as much as possible to the requirements of the other agencies. One example of a requirement that we believe should be reviewed again is the section establishing meeting procedures.[8] We suggest that the agency reconsider this section and conform it to the application meeting requirements established by the other agencies. This subpart provides that OTS will grant an informal meeting, followed by a formal meeting with the parties interested in an application if the procedures in the regulation are followed. We believe that this series of meetings is sometimes requested to delay the consideration of applications.

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[5] See 12 CFR §§ 5.30(b), 208.6(a)(2), 545.92, 303.42(a).
[6] See 12 C.F.R. §§ 5.34(b), 208.76, 303.120, 559.11.
[7] 12 U.S.C. 1828(m)(1)(A).
[8] 12CFR 516, subpart D

We urge the OTS to amend this section to provide that informal and formal meetings are not, in fact, automatically granted but will be granted, if appropriate.

Applications for federal deposit insurance. ACB understands and appreciates the need for the FDIC to have a stringent process in place for applications to be submitted by applicants seeking deposit insurance. We have two suggestions in connection with applications for deposit insurance that we believe can be in place without sacrificing the safety and soundness of the deposit insurance funds or introducing risk to the funds. The first is with regard to deposit insurance applications submitted by credit unions that are converting to a savings association charter. We urge the FDIC to reconsider requiring that the federally insured converting credit union be treated as a de novo. This includes having an eight percent capital requirement for a three-year period. We point out that these converting credit unions are ongoing financial institutions with the same management after conversion. They are not really de novo institutions.

The other area is an OTS requirement that trust only savings associations are required to have deposit insurance. These types of institutions do not accept deposits and we believe that it is unnecessary for them to have to obtain deposit insurance.

Streamlining the OTS Holding Company Application Process. In general, the OTS H(e) application is filed when one savings association or holding company (the "applicant") intends to acquire another savings association or holding company (the "association"). There are situations in which the H(e) application is the only appropriate application, however, its requirements do not fit the circumstances. As a result, there are certain items in the H(e) application that may be unnecessary or overly burdensome depending on the situation.

For example, this may occurs when: the applicant is a large institution; the applicant is well-known to the OTS; having been registered as a savings and loan holding company for more than three years; or the proposed transaction is simply an internal reorganization of an existing institutional structure.

In order to facilitate the process for both the applicant and the regulators, we suggest that the process be amended and streamlined when one of these situations occur.

- The OTS holding company application regulation requires publication of the notice of the application "in the business section" of the newspaper.[9] This requirement differs from the requirement in the OTS regulations promulgated under authority Bank Merger Act.[10] We suggest that these requirements should be consistent. The statutory provisions governing applications by holding companies do not require publication of notice in the business section of the newspaper.[11] Compliance with this publication can be costly in major metropolitan areas. Newspapers have separate business sections and advertising space is expensive. We suggest that the requirements for publication should conform to those applicable to bank mergers.

[9] 12 CFR 574.6(d)(1)
[10] 12 CFR 563.22(e)(1)
[11] Home Owners' Loan Act Section 10(e), 12 U.S.C. 1467a(e). *See also* 12 U.S.C. 1817(j)(2)(D)) (Change in Bank Control Act likewise does not require publication in the business section).

- The requirements for the initial date of publication also differ. In fact, the publication requirements for H(e) applications generally are inconsistent with the requirements for Bank Merger Act applications. For example, for H(e)1-S applications involving an interim savings association and for H(e)(3) applications (which involve a merger of a previously non-affiliated existing savings association and an existing subsidiary of the holding company), the publication of notice must follow the regulations under the Bank Merger Act in addition to following the different requirements for publication of notices related to other holding company applications. In order to facilitate this process, we recommend that the OTS make these requirements consistent.

- Item 110.20(d) requires a list of affiliated persons and affiliates that are not controlling shareholders, officers, director, or companies listed on the organizational chart. This requirement is burdensome because it requires the applicant to list: spouses and members of the immediate family of officers and directors; and officers who have been excluded by the board of directors from participating in major policy making functions. Instead we propose that the list be limited to those affiliated persons (as defined in 12 C.F.R. § 561.5) who are officers participating in major policy-making functions of applicant, at least if the stock of the applicant is publicly held and no shareholder (including spouses and members of the immediate family of the shareholder) owns or controls more than 10 percent of the outstanding shares of any class of securities of the applicant.

- Item 110.40 requires detailed information on current or proposed ownership of the applicant and entities to be acquired. In the case of an internal reorganization, it may be more efficient to streamline this item because no new entities are involved.

- Item 210.20 requires information about the applicant's business. In order to expedite the process and eliminate information that is already known or readily available to the OTS in other reported materials, we suggest limiting or eliminating this requirement if: the application is for approval of an internal reorganization; or applicant is well-known to the OTS.

- Item 210.50 requests information on all commercial activities of the applicant or its affiliates as well as information on any commercial entity stock holdings of five percent or more held by the applicant or its affiliates. This item is unnecessary if the applicant is well known to the regulators because the information would be readily known and/or available to the regulators in other reported materials.

- As with Item 110.20(d), Item 220.30 requires a list of affiliated persons and affiliates that are not controlling shareholders, officers, director, or companies listed on the organizational chart. We believe that this item is overly broad because it requires the applicant to list the following persons: spouses and members of the immediate family of officers and directors; and officers who have been excluded by the board of directors from participating in major policy making functions. We suggest that the list be limited to those affiliated persons (as defined in 12 C.F.R. § 561.5) who are officers participating in major policy-making functions of the applicant.

- Item 410.10(c) requires information on management officials. We suggest that this requirement be narrowed to apply only to officers who have been not been excluded by the board of directors from participating in major policy making functions.

- Item 410.20 requires an applicant to submit a report on Form 1623, an OTS fingerprint card and the Applicant Certification in Form 1606 for any director or senior executive officer of an applicant and for any director or senior executive officer of a target holding company or a subsidiary savings association who has served in such capacity for less than a one year period on the date of filing of the application and who has not previously submitted such information to the OTS. We request that this requirement be reconsidered for holding companies whose directors are elected by shareholders, if the shares of the company's stock are publicly held and widely traded.
- Item 510.10 requires a detailed description of future prospects of the entities in the resulting corporate structure. When the acquisition involves an internal reorganization, we believe a streamlined response is appropriate.
- In addition, Item 510.10(a)(1) states that the applicant should consider economic conditions "in the respective industry and geographic areas" where the entities operate. This requirement appears to be unnecessarily burdensome in the following circumstances: the OTS is familiar with the applicant and is familiar with the industry and geographic areas where the applicant operates; the application is for approval of an internal reorganization; or the application is for approval of an acquisition of a savings association that operates in only a relatively small geographic area.
- Item 620.10 requires a general description of requirements under the Community Reinvestment Act. When the acquisition involves an internal reorganization, we suggest that a streamlined response.
- Items 720.10 and 720.30 request a list of all offices, agencies, mobile facilities of the resulting institution, and a list of all location changes, closings and branch applications, respectively. These lists are overly burdensome for an applicant that owns a large savings institution, and unnecessary for a savings association that is well known to the OTS. As an alternative, we propose that the list be limited to those locations affected by the transaction.

OTS Change of Control and Merger Rules. ACB suggests that the agency undertake a review of these regulations. Currently, there are provisions that are not consistent with the regulations of the other agencies. In particular, the regulations should be made as similar as possible to those of the interagency Bank Merger Act implementing regulations. A specific example is in 12 CFR 563.22(c), which requires the OTS to approve a bulk transfer not in the ordinary course of business. The regional offices have discretion to determine what is in the ordinary course of business. We suggest that this provision be consistent with the requirements of the other agencies.

Mutual Holding Company Regulations. Several years ago the OTS began approving mutual holding companies with multiple tiers. We urge the OTS to consider permitting the middle tier entity of a multiple mutual holding company to be a state-charted entity. Currently the middle tier entity is required to be an OTS chartered federal entity. While there is no specific authority for multiple tier holding companies, the OTS has shown regulatory flexibility in permitting such mutual holding companies for a number of reasons. We suggest that such intermediate mutual holding companies should be state chartered. This would encourage mutual holding companies by permitting them to take full advantage of state limited liability and indemnification laws available to fully converting institutions, and also would facilitate state mutual holding companies converting to federal charter without the cost and expense of shareholder approval to change from state to federal stock mutual holding companies.

In 2002, the OTS issued a final regulation that made a number of amendments to the mutual to stock conversion regulations as well as the mutual holding company regulations. The amendments appeared to raise the limit for stock based plans formed in connection with mutual holding company reorganizations and stock offerings-and thereafter-to 25 percent of stock outstanding. However, the rules are unclear as to how this may be accomplished, and what percent may be composed of stock option plan and management recognition plan (MRP) stock.

The agency made this change with a goal of granting parity to mutual holding companies and savings associations so that the mutual holding companies will not undertake full conversions in order to create larger stock plans. We suggest that the OTS should permit mutual holding companies to issue total stock option plan and MRP stock in the same amounts as if they had fully converted-that is double the currently permissible amounts, or at least clarify that stock option plan and MRP stock can constitute 25 percent together of the 49 percent maximum stock mutual holding companies are permitted to issue, even if it has not all been actually issued. Further, the language in the preamble to the final rule "excludes" tax qualified ESOPs. The implications of the exclusion are unclear; in any case, similar flexibility should be provided. The same actions should be taken for implementing similar stock plans in connection with so-called "no-stock" mutual holding company reorganizations.

In the situation of a mutual holding company that undertakes a second step conversion, we request that OTS regulations be clarified to state that the mutual holding company also gets three years of anti-takeover protection when it conducts a second step conversion. Such a clarification was made for mutual institutions forming a mutual holding company in the recent amendments to the conversion regulations. The theory of giving the three-year protection is that the agency believes that mutual holding companies need three years of anti-takeover protection in order to deploy conversion proceeds and adjust to managing an institution in the mutual holding company environment without interference. We believe that the same reasoning is true for mutual holding companies undertaking a second step conversion.

<u>Regulation of Mutual Institutions</u>. The OTS has issued guidance and stated in preamble to regulations that mutual savings associations are permitted to establish phantom stock type plans. However, no guidance or advice has been issued to address the regulatory implications of such plans. For example, questions such as how is the "stock" valued, what are permissible amounts that can be granted to officers and directors individually or as a group, what are vesting periods. We suggest that the OTS work with the industry to develop best practices in the area. Issues in the areas of tax, ERISA and accounting, as well as regulatory items need to be addressed.

<u>Mutual to Stock Conversion Regulations</u>. In a mutual to stock conversion and simultaneous holding company formation, we request that the OTS reconsider its requirement that 50 percent of the conversion proceeds be retained by a newly formed shell holding company. In other contexts, the idea of placing large amount of savings association capital outside the institution

would be deemed unsafe and unsound without a business plan for such capital. We request that the OTS send a positive signal that it will be flexible on this issue, and deemphasize a 50 percent "rule".

We strongly urge the OTS to consider developing a streamlined application process for small, noncomplex savings associations that wish to convert to stock form or to form a mutual holding company. The Securities and Exchange Commission has such a project underway.

Merger Conversions. We strongly urge the OTS and FDIC to work together to develop and issue a fully synchronized and consistent policy regarding merger conversion of small institutions. Recent examples highlighted the business uncertainty and potential regulatory arbitrage created by conflicting polices regarding such transactions, and when permitted, permissible features of such transactions such as depositor payouts.

Also, the OTS has taken its policy of carefully reviewing transactions of greater than $25 million in assets as a de facto moratorium on all merger conversions. Mutual institutions with less than $50 million in assets should have the flexibility to be acquired. Requiring such institutions to undertake a costly mutual to stock conversion under circumstances where the company's stock will in all likelihood be illiquid and unable to maintain listing on the NASDAQ for three years as OTS requires does not seem practical. Some small institutions realize that they have no little or no ability to maintain a competitive profile or business plan in an extremely competitive financial services marketplace, and thus, should be allowed the option to merge.

Publish a List of Approved and Denied Activities. In an effort to minimize the number of applications filed and letters requested by institutions seeking to engage in new activities, we suggest that the agencies publish, on their websites and in the *Federal Register*, on a regular basis, a list of powers and activities that have been approved and those that have been denied. The ability to review already approved activities may save institutions time and resources in preparing applications or requests.

Institute and Encourage Electronic Filing. The use of technology provides additional opportunities to ease regulatory compliance. Specifically, ACB strongly urges the agencies to enable financial institutions to submit applications electronically. The OCC currently permits a limited variety of applications to be submitted over the Internet.

Modernize Call Reports and Thrift Financial Reports. The FDIC should reduce the cost of Call Report preparation by only including items necessary for supervisory purposes and industry peer group analysis. To achieve this goal, the FDIC should evaluate how the industry uses Call Report data for internal purposes and should explain how the Call Report items are used for supervisory and other purposes as a check on whether reported items are needed. While it is appropriate for the FDIC to use Call Report data for conducting peer group and trend analysis, the agencies should identify what alternative data sources could be used for satisfying this objective.

ACB supports the development of a Call Report filing system that will be accessible in real time. Currently, the FDIC, the Federal Reserve, and the OCC are overhauling the procedures and data systems used to file Call Reports to create an online, real time central data repository that will enable banks and regulators to prepare, publish and exchange financial information more efficiently. Ultimately, Call Report data are expected to be released earlier, enabling bankers, regulators and investors to respond more quickly and more accurately to business environments and risks.

Currently, the OTS is not participating in the interagency working group. There should be parity in the reporting requirements and processing among the banking regulators, and ACB encourages the OTS to join the current interagency project or modernize the Thrift Financial Report independently.

Applications and Reporting: Suggested Legislative Changes

Ease Restrictions on Interstate Banking and Branching. Currently, national and state banks may engage in de novo interstate branching only if expressly permitted by state law.[12] Because we believe that banks should enjoy the same flexible branching authority available to savings associations, we recommend that this restriction be eliminated. States' authority to prohibit an out-of-state bank or bank holding company from acquiring an in-state bank that has not existed for at least five years should also be eliminated.

Exempt Well-Capitalized Savings Associations From Dividend Notice Restrictions. Current law requires savings associations and savings and loan holding companies to notify the OTS 30 days prior to declaring a dividend. This notice requirement is designed to allow the OTS to consider whether the dividend will impair the safety and soundness of the savings association.[13] We believe that the notice period imposes a compliance burden without a regulatory benefit when applied to well-capitalized institutions.

As a result, ACB supports exempting from the requirement savings associations that are well-capitalized and will remain well-capitalized after the payment of a dividend. This will allow well-capitalized savings associations to conduct routine business without regularly conferring with the OTS.

Powers and Activities: Suggested Regulatory Changes

Application of the Interest Rate Exportation Doctrine to Institutions with Multi-State Branches: The guidance provided by the OTS, OCC, and FDIC regarding the use of the interest rate exportation doctrine by banking institutions with multi-state branches is inconsistent and difficult to apply in practice. ACB recommends that the banking agencies provide consistent guidance on this matter.

A summary of past guidance is helpful to identify the relevant issues. Former OTS Chief Counsel Harris Weinstein addressed this issue in an Interpretive Letter dated December 24, 1992. Mr. Weinstein opined that a savings association may always use the exportation doctrine

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[12] 12 U.S.C. §§ 36(g)(1), 1828(d)(4)(A).
[13] 12 U.S.C. 1467a(f).

to export interest rates from the state in which its home office is located, regardless of the contacts (or lack of contacts) that any particular loan has with the savings association's home office or other offices in its home state. The letter also states that if a loan is "booked" in a branch office, the savings association can use the exportation doctrine to make loans at the interest rate allowed by the state in which that branch office is located. To identify the branch office at which a loan is "booked," the letter provides that a combination of all of four actions would be relevant: a loan is "booked" in a branch office if the loan is underwritten, approved, processed, *and* funds are disbursed in the branch office.

The guidance of the OCC and the FDIC issued several years later takes a different approach. In OCC Interpretive Letter #822 (February 17, 1998), the OCC Chief Counsel opined that a multi-state bank may charge interest at its home state rate *unless* all three of the following actions occur at a branch office in another state: the loan is approved, credit is extended (i.e., the approval of the loan is first communicated to the borrower at this branch office in the other state), and funds are disbursed to the borrower. These three factors are similar, but not identical to the four OTS factors. If all of these three factors are present at the branch in another state, then the exportation doctrine is applied based on the branch state's interest rates. If only one or two of these factors is present at the branch, then the exportation doctrine is applied on the basis of the branch state's interest rates as long as the loan has a clear nexus to the branch state. The determination whether a loan has such a clear nexus is fact-intensive, and is not susceptible to simple "bright line" tests. The FDIC provided similar guidance in FDIC General Counsel Opinion No. 11 (May 18, 1998).

The difficulty with applying this guidance is that the location where these factors occur may be practically impossible to pinpoint and may change from one loan transaction to the next. For example, today most loans are processed, underwritten, and approved to a varying degree by automated systems with little, if any, involvement by any individual person. Certain loans may be automatically approved by a computerized system according to underwriting guidelines that were embedded in the system by a team of underwriters, programmers and managers prior to receipt of the loan application. The location where such a loan is approved is difficult to determine. Trying to determine where the programs and criteria for the automated underwriting system were created or approved is not very helpful because these systems are complex and likely involved multiple team members in various locations designing, approving, and updating the systems.

Other loans may require an individual person or a chain of people to complete the underwriting and approval. Although the other attributes of the location of such loans may be the same as loans that are automatically approved by a computerized system, the location of approval may vary from one loan to the next, depending on whether an individual person made the decision on the loan and, if so, exactly which individual person made this final decision.

Likewise, where credit is extended, which is considered by the banking agencies to be where the approval of the loan is communicated, may vary from one loan to the next. If a loan officer picks up the phone and calls the borrowers to congratulate them on their loan approval before the formal commitment letter is sent out from another office, there could be an issue raised as to whether the approval was communicated by the loan officer or through the commitment letter. If these two communications originated in two different states, it is unclear where this function took place.

Finally, the factor of loan disbursement raises similar issues. For example, for the convenience of borrowers, many lines of credit may be disbursed by means of a credit card, checks, ATMs and direct withdrawals at a branch. The diversity of opportunities for disbursement raises issues as to the identification of the location where the loan funds are disbursed, as multiple disbursements may be made over a period of time in multiple states and even overseas. Tracing the funds back to a disbursement account at the financial institution does little to clarify the location of disbursement because that account is many times a central clearing account that is not tied to a specific branch location.

For these reasons, at the time when a loan program is designed and the content of the loan forms is determined, it can be quite difficult to predict the location of credit approval, extension and disbursement in advance. Certainty as to the accuracy of prediction is essential, however. Loans must be eligible for securitization and sale to investors who demand assurances as to the enforceability of the loans according to their terms. If the location of the loans were not fixed with certainty, then the loans might be exposed to severe penalties according to the laws of some states. Therefore, a simplification and clarification of regulatory guidance would be helpful to ensure no applicable state laws are violated.

Because of the inconsistencies in the guidance offered by the agencies, the ACB recommends that the agencies should make it clear that an institution may always use its home state rates, regardless of the contacts (or lack of contacts) between the home state and the loan.

Second, for cases where the rates of a state other than the home state will be used, the agencies should clarify the factors that should be considered to identify the appropriate state. These new factors should be more easily determined than the factors used today.

Third, we recommend that the agencies set forth these new factors in a joint proposed rule, providing notice and the opportunity for public comment.

Fourth, with regard to a related matter, the OCC Chief Counsel has also opined that an operating subsidiary of a national bank may use the interest rate exportation doctrine to the same extent as the national bank itself. But neither the FDIC nor the OTS has formally addressed this issue. The ACB recommends that the three agencies should provide guidance on this issue that is consistent with OCC opinion.

Fifth, while the three banking agencies have issued regulations or interpretations that adopt the same standard for defining what is considered "interest" for purposes of the exportation doctrine, they should review their interpretations to ensure consistency. For example, although the OCC has defined prepayment fees as interest, the OTS has not addressed this issue.

<u>Consumer Lending Limits for Savings Associations.</u> Savings Associations are developing business strategies that necessitate that the limits on some consumer loans be more flexible. We urge the OTS to review the statutory requirements of the Home Owner's Loan Act to determine

whether the agency can provide additional flexibility in the consumer lending area without an amendment to the statute.

Management Interlocks Act. The OTS is the only federal banking agency that takes the position that the Management Interlocks Act applies to trust-only institutions. The other federal banking agencies have indicated that the act does not apply to trust companies. We believe that there is no compelling supervisory reason for the OTS to have this interpretation. We urge the agency to reconsider this view.

Powers and Activities: Suggested Legislative Changes

Expand Federal Savings Association Business Lending Authority. We strongly believe that federal savings associations should be granted full small business lending authority and that the lending limit on other business loans should be increased to 20 percent of assets. Currently, section 5(c)(2)(A) of the Home Owners' Loan Act limits the commercial lending authority of federal savings associations to twenty percent of total assets, provided that amounts exceeding ten percent of total assets may be used only for small business loans.

Expanding the business lending authority of federal savings associations would help increase small business access to credit, particularly in smaller communities where the number of financial institutions is limited. Expanded authority would enable savings associations to make more loans to small- and medium-sized businesses and would enhance their role as community lenders.

Increase Commercial Real Estate Lending Authority. Savings associations regulated by the OTS are not permitted to hold loans secured by non-residential real property in amounts exceeding 400 percent of the association's capital, unless permitted by the OTS.[14] In practice, such exceptions have been rare.

We believe that institutions with expertise in non-residential real property lending should be permitted to have loan concentrations exceeding the statutory limit, as consistent with prudent operating practices. Specifically, the current statutory limit should be increased and/or the OTS should establish practical guidelines for non-residential real property lending at levels exceeding 400 percent of capital.

Update the Bank Service Company Act. The Bank Service Company Act ("BSCA")[15] permits national and state banks to invest in companies that may provide clerical, administrative and other services closely related to banking to depository institutions. We believe that the BSCA and the Home Owners' Loan Act should be amended to provide parallel investment ability for banks and savings associations to participate in both bank service companies and savings association service corporations.

[14] 12 U.S.C. 1464(c)(2)(B)(i).
[15] 12 U.S.C. 1861 *et seq*.

Update Community Development Investment Authority. ACB supports authorizing federal savings associations to invest in community development entities to the same extent as national banks.

National banks and state member banks are specifically authorized by statute to make direct equity investments in entities such as community development corporations ("CDCs").[16] However, there is no parallel statutory authority for federal savings associations. Consequently, a savings association that wants to invest in a CDC must do so through a service corporation. This is may be problematic because many savings associations do not have a service corporation, which limits their ability to fully serve their low-and moderate-income communities.

Eliminate the Loan-to-One-Borrower Residential Housing Exception. A statutory exception to the general lending limit is contained in Section 1464(u)(2) of the Home Owners' Loan Act permits that federal savings associations to lend one borrower the lesser of $30 million or 30 percent of capital for residential development. However, the purchase price of each single family dwelling may not exceed $500,000. We believe the $30 million/30 percent of capital limit is sufficient to prevent concentrated lending to one housing developer and that the per-unit cap is an excessive regulatory detail that frustrates the goal of advancing residential development. Accordingly, ACB believes that the $500,000 per unit limit should be eliminated or indexed with inflation.

Provide Equitable Treatment for Institutions Offering Fiduciary Services. ACB strongly believes that new exemptions to the broker-dealer registration requirements of the Securities Exchange Act of 1934 should apply to all insured depository institutions.

Title II of the Gramm-Leach-Bliley Act[17] removed the blanket broker-dealer registration exemption previously provided to banks under the Securities Exchange Act of 1934.[18] In its place are fifteen "safe harbors" for traditional trust activities and other services performed by financial institutions. To implement the new safe harbors, the Securities and Exchange Commission issued an interim final rule in 2001 that extended the safe harbors to savings associations and savings banks.[19] We believe that the final rule should include this equitable treatment for savings associations and that it should not impose unnecessary burdens on community banks engaged in fiduciary activities.

Similarly, we believe that the Investment Advisers Act of 1940 ("IAA") and its implementing regulations burden savings associations unnecessarily. Section 202(a)(11) of the IAA specifically exempts banks and bank holding companies from the definition of an "investment adviser." Savings associations and savings banks, however, do not enjoy this same exemption and must therefore register as an investment adviser with the SEC. The disparity is further compounded

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[16] 12 U.S.C. §§ 24, 338(a). A CDC is a corporation established by one or more insured depository institutions, sometimes in concert with other investors, to benefit low- and moderate-income individuals or areas, or other areas targeted for redevelopment by the local, state, or federal government.

[17] Pub. L. No. 106-102 113 Stat. 1338 (1999).
[18] 15 U.S.C. 78c(a)(4)–(5).
[19] 66 Fed. Reg. 27760 (May 18, 2001).

because the Investment Company Act of 1940 (“ICA”) excludes both banks and savings associations from the definition of an “investment company.”[20] To remedy this inconsistency, the Investment Advisers Act should be amended to exclude savings associations from the definition of “investment adviser.”

We strongly urge the OTS to work with the industry and the Congress to have this statutory change passed into law. There is no safety and soundness reason for the different treatment of banks and savings associations, particularly because these entities are subject to substantially similar examination and supervision processes.

Conclusion

ACB reiterates our commitment to reducing unnecessary regulatory burden on community banks and we stand ready to work with the agencies to ensure that regulations imposed on insured depository institutions are effective without being unduly burdensome.

Thank you for the opportunity to comment on this important matter. Should you have any questions, please contact the undersigned at 202-857-3121 or via e-mail at cbahin@acbankers.org, or Krista Shonk at 202-857-3187 or via e-mail at kshonk@acbankers.org.

Sincerely,

Charlotte M. Bahin
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[20] 15 U.S.C. 80a-3.