

# RESCINDED

Office of Thrift Supervision  
Department of the Treasury

November 26, 2002

*Transmittal*

## **TR-306**

Federal Register, Vol. 67,

This rescission does not change the applicability of the conveyed document. To determine the applicability of the conveyed document, refer to the original issuer of the document.



Number TR-306

The attached interim final rule that amends the annual independent audit requirements for small thrifts that voluntarily obtain independent audits was published in the Federal Register on November 25, 2002. This change will make OTS's requirements more consistent with the other federal banking agencies and will avoid the potential burden that could result from other regulatory action.

# Rules and Regulations

Federal Register

Vol. 67, No. 227

Monday, November 25, 2002

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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## DEPARTMENT OF AGRICULTURE

### Rural Business-Cooperative Service

#### 7 CFR Chapters XVIII and XLII

#### Policy Statement for Direct Final Rulemaking

**AGENCY:** Rural Business-Cooperative Service, USDA.

**ACTION:** Policy statement.

**SUMMARY:** The Rural Business-Cooperative Service (RBS) is implementing a new rulemaking procedure to expedite making noncontroversial changes to its regulations. Rules that RBS judges to be noncontroversial and unlikely to result in adverse comments will be published as "direct final" rules. "Adverse comments" are those comments that suggest a rule should not be adopted or suggest that a change should be made to the rule. Each direct final rule will advise the public that no adverse comments are anticipated, and that, unless written adverse comments or written notice of intent to submit adverse comments is received within 30 days from the date the direct final rule is published in the **Federal Register**, the rule will be effective 45 days from the date the direct final rule is published in the **Federal Register**. At the same time, RBS may publish a document in the proposed rules section of the same issue of the **Federal Register** proposing approval of and soliciting comments on the same action contained in the direct final rule. If adverse comments or notice of intent to file adverse comments are received by RBS, the direct final rule will be withdrawn prior to the effective date. RBS will address the comments received in response to the direct final rule in a subsequent final rule. This new policy should expedite promulgation of non-controversial rules by reducing the time that would be required to develop,

review, clear, and publish separate proposed and final rules.

**FOR FURTHER INFORMATION CONTACT:**

Pandor H. Hadjy, Assistant Deputy Administrator, Business Programs, RBS, U.S. Department of Agriculture, Room 5050-S, 1400 Independence Avenue, SW., STOP 3220, Washington, DC 20250-3220; Telephone: 202-720-9693; Facsimile: 202-690-0097; E-mail: [pandor.hadjy@usda.gov](mailto:pandor.hadjy@usda.gov).

**SUPPLEMENTARY INFORMATION:** RBS is committed to improving the efficiency of its regulatory process. In pursuit of this goal, we plan to employ the rulemaking procedure known as "direct final rulemaking" to promulgate some RBS rules.

#### The Direct Final Rule Process

Rules that RBS judges to be noncontroversial and unlikely to result in adverse comments will be published in the **Federal Register** as direct final rules. At the same time, RBS may publish a document in the proposed rules section of the same issue of the **Federal Register** proposing approval of and soliciting comments on the same action contained in the direct final rule. Each direct final rule will advise the public that no adverse comments are anticipated, and that, unless adverse comments are received within 30 days, the direct final rule will be effective 45 days from the date the direct final rule is published in the **Federal Register**. "Adverse comments" are comments that suggest that the rule should not be adopted or that suggest that a change should be made to the rule. A comment expressing support for the rule as published will not be considered adverse. Further, a comment suggesting that requirements in the rule should or should not be employed by RBS in other programs or situations outside the scope of the direct final rule will not be considered adverse. If RBS receives written adverse comments or written notice of intent to submit adverse comments within 30 days of the publication of a direct final rule, a document withdrawing the direct final rule prior to its effective date will be published in the **Federal Register** stating that adverse comments were received. If RBS concurrently published a notice of proposed rulemaking RBS will address the comments received in response to the direct final rule in a subsequent final rule on the related

proposed rule. In such cases, RBS will not institute a second comment period on the action.

In accordance with rulemaking provisions of the Administrative Procedure Act (5 U.S.C. 533), the direct final rulemaking procedure gives the public general notice of RBS' intent to adopt a new rule and gives interested persons an opportunity to participate in the rulemaking process through submission of and consideration by RBS of comments. The major feature of the direct final rulemaking process is that if RBS receives no written adverse comments and no written notice of intent to submit adverse comments within the comment period specified, RBS will publish a document in the **Federal Register** stating that no adverse comments were received regarding the direct final rule and confirming that the direct final rule is effective on the date in the direct final rule.

#### Determining When To Use Direct Final Rulemaking

Not all RBS rules are good candidates for the direct final rulemaking. RBS intends to use the direct final rulemaking procedure only for rules that we consider non-controversial and unlikely to generate adverse comments. The decision whether to use the direct final rulemaking process for a particular action will be based on RBS' experience with similar actions.

Dated: October 31, 2002.

**John Rosso,**

*Administrator, Rural Business-Cooperative Service.*

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## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

#### 12 CFR Part 562

[No. 2002-54]

RIN 1550-AB54

#### Regulatory Reporting Standards: Qualifications for Independent Public Accountants Performing Audit Services for Voluntary Audit Filers

**AGENCY:** Office of Thrift Supervision, Treasury.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** The Office of Thrift Supervision (OTS) is adopting an interim final rule that amends its annual independent audit requirements for small, non-public, highly rated savings associations that voluntarily obtain independent audits. This change will make OTS's requirements more consistent with those of the other federal banking agencies and will avoid the potential regulatory burden that could otherwise result from other regulatory action.

**DATES:** This interim rule is effective November 25, 2002. Written comments must be received by December 26, 2002.

**ADDRESSES:**

*Mail:* Send comments to Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: No. 2002-54.

*Delivery:* Hand deliver comments to the Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, No. 2002-54.

*Facsimiles:* Send facsimile transmissions to FAX Number (202) 906-6518, Attention: Regulations Comments, No. 2002-54.

*E-Mail:* Send e-mails to [regs.comments@ots.treas.gov](mailto:regs.comments@ots.treas.gov), Attention: No. 2002-54, and include your name and telephone number.

*Availability of comments:* OTS will post comments and the related index on the OTS Internet Site at <http://www.ots.treas.gov>. In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906-5922, send an e-mail to [public.info@ots.treas.gov](mailto:public.info@ots.treas.gov), or send a facsimile transmission to (202) 906-7755. (Please identify the materials you would like to inspect to assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the business day after the date we receive a request.

**FOR FURTHER INFORMATION CONTACT:**

Christine Smith, Project Manager, (202) 906-5740, Examination Policy Division, or Teresa A. Scott, Counsel (Banking & Finance), (202) 906-6478, Regulations and Legislation Division, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:**

**I. Background and Changes**

Savings associations that are publicly traded,<sup>1</sup> have assets of \$500 million or more,<sup>2</sup> or have a 3, 4, or 5 CAMEL rating<sup>3</sup> must obtain and file an annual independent audit. Small, non-public, 1- or 2-rated savings associations are not required to obtain an independent audit. Currently, OTS regulations require that public accountants conducting these independent audits (whether required or voluntary) follow the SEC independence rules, including those governing outsourcing of non-audit services. 12 CFR 562.4(d) and (e) (2002).

In 1994 when OTS originally promulgated §§ 562.4(d) and (e), OTS believed that the SEC independence rules provided an appropriate standard for assessing auditor independence and that this standard would not unduly burden small, non-public, highly rated savings associations that file voluntary audits with OTS.<sup>4</sup> Because recent statutory changes intended to reach publicly traded institutions would indirectly affect these voluntary filers, OTS has reexamined the use of this standard.

On July 30, 2002, Congress passed the Sarbanes-Oxley Act of 2002.<sup>5</sup> Title II of that act sets forth standards for auditor independence. Specifically, section 201(g)(5) prohibits a registered public accountant from performing an audit for a public company contemporaneously with providing that company with delineated non-audit services, including internal audit outsourcing services. This congressional mandate would affect a change in the SEC independence rules.

If OTS rules remain unchanged, a savings association that obtains a voluntary audit may not use its external auditors to perform non-auditing services.<sup>6</sup> Although OTS encourages

non-publicly held savings associations that voluntarily file audits with the agency to follow the prohibition from Sarbanes-Oxley, OTS is concerned that an absolute prohibition in this manner may be unnecessarily detrimental to some voluntary filers. Specifically, OTS believes that small institutions with less complex operations and limited staff, may, in some instances, use their independent public accountant to perform both an external audit and some or all of an audit client's non-audit activities consistent with the OTS's safety and soundness objectives. Some of these institutions may not have access to a full range of qualified public accountants such that they could engage both an external auditor and a different outside firm to perform non-audit functions. Other institutions may reasonably have determined that the costs of having a full time in-house staff to perform those services exceed the benefits.

Moreover, none of the other banking agencies require that institutions that file voluntary audits follow the SEC independence rules. Requiring savings associations to do so may place these savings associations at an unnecessary competitive disadvantage as these requirements became more restrictive. Therefore, OTS is amending its regulation to eliminate the requirement that institutions voluntarily filing audits comply with the SEC independence rules.<sup>7</sup>

On the other hand, OTS continues to believe that auditor independence is important to the safety and soundness of all institutions and thus OTS is retaining the requirement that institutions filing voluntary audits comply with the AICPA Professional Conduct Code, including those sections that address independence. Further, OTS may monitor voluntary audit filers' non-audit outsourcing to ensure that institutions are properly preserving the independence between the two functions. OTS believes that this approach is the most effective means of maintaining comparability and consistency with the other banking agencies. This approach also reduces regulatory burden on savings associations filing voluntary audits consistent with safe and sound regulation.

<sup>7</sup> OTS understands that passage of the Sarbanes-Oxley Act may place increased responsibilities on small publicly held savings associations, including the prohibitions against outsourcing internal non-audit services to the association's external auditor. Nothing in this rule affects those requirements.

<sup>1</sup> 17 U.S.C. 78m (West 2002). Generally, federally-chartered publicly traded savings associations file annual audits with OTS, while generally publicly traded federally-chartered thrift holding companies file audits with the Securities and Exchange Commission (SEC).

<sup>2</sup> 12 CFR 363.2 (2002). These institutions file annual audits with the Federal Deposit Insurance Corporation and OTS.

<sup>3</sup> 12 CFR 562.4(b). These savings associations file annual audits with OTS.

<sup>4</sup> The SEC modified its independence rules in December 2000. The modified rules, although more restrictive than those in effect in 1994, continued to provide an appropriate standard for savings associations that file audits voluntarily. However, see discussion below concerning changes required by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 201, 116 Stat. 745 (2002).

<sup>5</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 201, 116 Stat. 745 (2002).

<sup>6</sup> These services include bookkeeping, financial information systems design, appraisal, valuation, and actuarial services, and internal audit outsourcing services. For a complete list of prohibited activities, see *id.* at § 201.

**II. Justification for Interim Rule**

*A. Notice and Comment Requirement*

Section 553 of the Administrative Procedure Act (APA) permits an agency to issue rules without prior notice and comment if the agency finds good cause and explains its finding when it publishes the rule. 5 U.S.C. 553(b)(B). A finding that notice and comment are impracticable, unnecessary, or contrary to the public interest constitutes good cause.

As discussed more fully above, OTS has examined the legislative changes made by the Sarbanes-Oxley Act and the potential impact of any implementing regulations on small, non-public savings associations. OTS believes that the interaction of these changes with OTS's current regulations on voluntary audits could significantly increase the regulatory burden on these small thrifts. Small, non-public banks and non-depository institutions are not covered by the new independence rules. Small, non-public, highly rated thrifts do not pose any greater risks.

Elimination of the regulatory requirement decreases burden on the industry and permits certain savings associations more flexibility in accessing the marketplace in search of non-audit services that may be performed by outside entities. The change also aligns OTS regulations more closely to those of the other banking agencies. Accordingly, OTS concludes that public notice and comment on these changes in advance of implementation are unnecessary and contrary to the public interest. Nonetheless, OTS invites comments on this interim rule during the 60-day period following its publication. In developing a final rule, OTS will consider all public comments it receives within that period.

*B. Effective Date Requirement*

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRIA), 12 U.S.C. 4802, requires that new OTS regulations and amendments to existing regulations take effect on the first day of a calendar quarter that begins on or after the date of publication of the rule. This delayed effective date provision applies only if the rule imposes additional reporting, disclosure, or other new requirements on insured depository institutions.

As a related matter, section 553(d) of the APA states that a rule must not be

made effective before 30 days after its publication. 5 U.S.C. 553(b)(B). This APA provision does not apply, however, if the rule grants or recognizes an exemption or relieves a restriction.

OTS concludes that neither CDRIA nor the APA precludes the publication of this rule with an immediate effective date. This rule makes only burden reducing amendments to OTS rules and relieves current requirements on independence and non-audit outsourcing activities.

**II. Findings and Certifications**

*A. Executive Order 12866*

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

*B. Regulatory Flexibility Act*

Under the Regulatory Flexibility Act, OTS must either provide an Initial Regulatory Flexibility Analysis (IRFA) with this interim rule, or certify that the rule would not have a significant economic impact on a substantial number of small entities. Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS certifies that this interim rule will not have a significant economic impact on a substantial number of small entities. It removes a requirement that could, if left unchecked, inadvertently lead to potential additional regulatory burden. The interim rule, which is written in plain language, reduces regulatory burden.

*C. Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995<sup>8</sup> (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. OTS has determined that this interim rule will not result in expenditures by state, local, or tribal governments, or by the

<sup>8</sup> Pub. L. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. Chs. 17A, 25).

private sector, of \$100 million or more in any one year. Accordingly, section 202 of the Unfunded Mandates Act does not require the OTS to prepare a budgetary impact statement for this rule.

*D. Paperwork Reduction Act*

The OTS has determined that this interim final rule does not involve a change to collections of information previously approved under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

**List of Subjects in 12 CFR Part 562**

Accounting, Reporting and recordkeeping requirements, Savings associations.

For the reasons set out in the preamble, the Office of Thrift Supervision amends part 562 of chapter V, title 12, of the Code of Federal Regulations as follows:

**PART 562—REGULATORY REPORTING STANDARDS**

1. The authority citation for part 562 continues to read as follows:

**Authority:** 12 U.S.C. 1463

2. Amend § 562.4 by revising paragraphs (d)(3) and (e) to read as follows:

**§ 562.4 Audit of savings associations and savings association holding companies.**

\* \* \* \* \*

(d) \* \* \*

(3)(i) Is in compliance with the American Institute of Certified Public Accountants' (AICPA) Code of Professional Conduct; and

(ii) Meets the independence requirements and interpretations of the Securities and Exchange Commission and its staff; and

\* \* \* \* \*

(e) *Voluntary audits.* When a savings association, savings and loan holding company, or affiliate (as defined by 12 CFR 563.41(b)(1)) obtains an independent audit voluntarily, it must be performed by an independent public accountant who satisfies the requirements of paragraphs (d)(1), (d)(2), and (d)(3)(i) of this section.

Dated: November 18, 2002.

By the Office of Thrift Supervision.

**James Gilleran,**

*Director.*

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