

**DEPARTMENT OF TREASURY**  
**Office of the Comptroller of the Currency**  
12 CFR Part 3  
Docket ID OCC-2018-0026  
RIN 1557 - AE48

**FEDERAL RESERVE SYSTEM**  
12 CFR Part 217  
Regulation Q; Docket No. R-1621  
RIN 7100 - AF15

**FEDERAL DEPOSIT INSURANCE CORPORATION**  
12 CFR Part 324  
RIN 3064 - AE90

**Regulatory Capital Treatment for High Volatility Commercial Real Estate (HVCRE) Exposures**

**AGENCY:** Office of the Comptroller of the Currency, Treasury; the Board of Governors of the Federal Reserve System; and the Federal Deposit Insurance Corporation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (collectively, the agencies) are proposing to amend the regulatory capital rule to revise the definition of “high volatility commercial real estate (HVCRE) exposure” to conform to the statutory definition of “high volatility commercial real estate acquisition, development, or construction (HVCRE ADC) loan,” in accordance with section 214 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA). Additionally, to facilitate the consistent application of the revised HVCRE exposure definition, the agencies propose to interpret certain terms in the revised HVCRE exposure definition generally consistent with their usage in other relevant regulations or the instructions to the Consolidated Reports of Condition and Income (Call Report), where applicable, and

request comment on whether any other terms in the revised definition would also require interpretation.

**DATES:** Comments must be received by 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*.

**ADDRESSES:** Comments should be directed to:

OCC: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title “**Regulatory Capital Treatment for High Volatility Commercial (HVCRE) Exposures**” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- **Federal eRulemaking Portal—“regulations.gov”:** Go to *www.regulations.gov*. Enter “Docket ID OCC-2018-0026” in the Search Box and click “Search.” Click on “Comment Now” to submit public comments.
- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting public comments.
- **E-mail:** *regs.comments@occ.treas.gov*.
- **Mail:** Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street, SW, suite 3E-218, Washington, DC 20219.
- **Hand Delivery/Courier:** 400 7th Street, SW, suite 3E-218, Washington, DC 20219.
- **Fax:** (571) 465-4326.

*Instructions:* You must include “OCC” as the agency name and “Docket ID OCC-2018-0026” in your comment. In general, the OCC will enter all comments received into the docket and publish them on the Regulations.gov website without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- **Viewing Comments Electronically:** Go to *www.regulations.gov*. Enter “Docket ID OCC-2018-0026” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen and then “Comments.” Comments can be filtered by clicking on “View All” and then using the filtering tools on the left side of the screen.
- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov. Supporting materials may be viewed by clicking on “Open Docket Folder” and then clicking on “Supporting Documents.” The docket may be viewed after the close of the comment period in the same manner as during the comment period.
- **Viewing Comments Personally:** You may personally inspect comments at the OCC, 400 7th Street, SW, Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by

calling (202) 649-6700 or, for persons who are hearing impaired, TTY, (202) 649-5597.

Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

Board: You may submit comments, identified by Docket No. R-1621; RIN 7100-AF-15, by any of the following methods:

- **Agency Web Site:** <http://www.federalreserve.gov>. Follow the instructions for submitting comments at

<http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- **E-mail:** [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include docket number and RIN in the subject line of the message.

- **FAX:** (202) 452-3819 or (202) 452-3102.

- **Mail:** Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. All public comments will be made available on the Board's web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 3515, 1801 K Street NW (between 18th and 19th Streets NW), between 9:00 a.m. and 5:00 p.m. on weekdays.

FDIC: You may submit comments, identified by RIN 3064-AE90, by any of the following methods:

- **Agency Web Site:** <http://www.FDIC.gov/regulations/laws/federal/propose.html>.

Follow instructions for submitting comments on the Agency web site.

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

- **Hand Delivered/Courier:** Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

- **E-mail:** [comments@FDIC.gov](mailto:comments@FDIC.gov). Include RIN 3064-AE90 on the subject line of the message.

- **Public Inspection:** All comments received must include the agency name and RIN 3064-AE90 for this rulemaking. All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal/>, including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E-1002, Arlington, VA 22226 by telephone at (877) 275-3342 or (703) 562-2200.

**FOR FURTHER INFORMATION CONTACT:**

*OCC:* Mark Ginsberg, Senior Risk Expert (202) 649-6983; or Benjamin Pegg, Risk Expert (202) 649-7146, Capital and Regulatory Policy; or Carl Kaminski, Special Counsel, or Rima Kundnani, Attorney, Chief Counsel's Office, (202) 649-5490, for persons who are hearing impaired, TTY, (202) 649-5597, Office of the Comptroller of the Currency, 400 7th Street, SW, Washington, DC 20219.

*Board:* Constance M. Horsley, Deputy Associate Director, (202) 452-5239; Elizabeth MacDonald, Manager, (202) 475-6216; Andrew Willis, Senior Supervisory Financial Analyst, (202) 912-4323; Matthew McQueeney, Supervisory Financial Analyst (202) 452-2942; Sean Healey, Supervisory Financial Analyst, (202) 912-4611, Division of Supervision and Regulation; or Benjamin McDonough, Assistant General Counsel (202) 452-2036; David Alexander, Counsel, (202) 452-2877; Mary Watkins, Attorney (202) 452-3722, Legal Division, Board of Governors of the Federal Reserve System, 20th and C Streets, NW, Washington, DC 20551. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (202) 263-4869.

*FDIC:* Benedetto Bosco, Chief, Capital Policy Section; [bbosco@fdic.gov](mailto:bbosco@fdic.gov); David Riley, Senior Policy Analyst, Capital Policy Section; [dariley@fdic.gov](mailto:dariley@fdic.gov); Stephanie Lorek, Senior Policy Analyst, [slorek@fdic.gov](mailto:slorek@fdic.gov); Michael Maloney, Senior Policy Analyst, [mmaloney@fdic.gov](mailto:mmaloney@fdic.gov); [regulatorycapital@fdic.gov](mailto:regulatorycapital@fdic.gov); Capital Markets Branch, Division of Risk Management Supervision, (202) 898-6888; Beverlea S. Gardner, Senior Examination Specialist, [bgardner@fdic.gov](mailto:bgardner@fdic.gov), Policy and Program Development; Michael Phillips, Acting Supervisory Counsel, [mphillips@fdic.gov](mailto:mphillips@fdic.gov); Catherine Wood, Counsel, [cawood@fdic.gov](mailto:cawood@fdic.gov); or Alexander Bonander, Attorney, [abonander@fdic.gov](mailto:abonander@fdic.gov); Supervision and Legislation Branch, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.

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## **I. Background and Summary of Proposal**

In 2013, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) (collectively, the agencies) adopted a revised regulatory capital rule (capital rule) that, among other things, addressed weaknesses in the regulatory framework that became apparent in the financial crisis of 2007-08.<sup>1</sup> The capital rule strengthened the capital requirements applicable to banking organizations<sup>2</sup> supervised by the agencies by improving both the quality and quantity of regulatory capital and increasing risk-sensitivity. To better capture the risk of certain kinds of real estate exposures, the capital rule defines a “high volatility commercial real estate (HVCRE) exposure” as a credit facility that, prior to conversion to permanent financing, finances or has financed the acquisition, development, or construction (ADC) of real property. The HVCRE exposure definition generally excludes ADC credit facilities that finance one- to-four family residential properties, community development, or agricultural land exposures, and commercial real estate projects where the borrower meets certain contributed capital requirements and other prudential criteria.<sup>3</sup> HVCRE exposures were observed to have

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<sup>1</sup> The Board and OCC issued a joint final rule on October 11, 2013 (78 FR 62018) and the FDIC issued a substantially identical interim final rule on September 10, 2013 (78 FR 55340). On April 14, 2014 (79 FR 20754), the FDIC adopted the interim final rule as a final rule with no substantive changes.

<sup>2</sup> Banking organizations subject to the agencies’ capital rule include national banks, state member banks, insured state nonmember banks, savings associations, and top-tier bank holding companies and savings and loan holding companies domiciled in the United States not subject to the Board’s Small Bank Holding Company and Savings and Loan Holding Company Policy Statement (12 CFR part 225, appendix C), excluding certain savings and loan holding companies that are substantially engaged in insurance underwriting or commercial activities or that are estate trusts, and bank holding companies and savings and loan holding companies that are employee stock ownership plans.

<sup>3</sup> See 12 CFR 217.2 (Board); 12 CFR 3.2 (OCC); 12 CFR 324.2 (FDIC).



increased risk characteristics relative to other credit exposures,<sup>4</sup> and thus were assigned a heightened risk weight of 150 percent under the capital rule.

On May 24, 2018, EGRRCPA became law. Section 214 of EGRRCPA<sup>5</sup> amends

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<sup>4</sup> See 12 CFR part 217 (Board); 12 CFR part 3 (OCC); 12 CFR part 324 (FDIC).

<sup>5</sup> Pub. L. No. 115-174, 132 Stat. 1296 (2018). Section 214 of EGRRCPA adds a new Section 51 to the FDI Act, stating that the appropriate Federal banking agencies may only require a depository institution to assign a heightened risk weight to a high volatility commercial real estate (HVCRE) exposure (as such term is defined under 12 CFR 324.2, as of October 11, 2017, or if a successor regulation is in effect as of the date of the enactment of this section, such term or any successor term contained in such successor regulation) under any risk-based capital requirement if such exposure is an HVCRE ADC loan.

HVCRE ADC Loan is defined for the purposes of section 51 and with respect to a depository institution, as a credit facility secured by land or improved real property that, prior to being reclassified by the depository institution as a non-HVCRE ADC loan pursuant to subsection (d)—(A) primarily finances, has financed, or refinances the acquisition, development, or construction of real property; (B) has the purpose of providing financing to acquire, develop, or improve such real property into income-producing real property; and (C) is dependent upon future income or sales proceeds from, or refinancing of, such real property for the repayment of such credit facility;

It does not include a credit facility financing—(A) the acquisition, development, or construction of properties that are—(i) one- to four-family residential properties; (ii) real property that would qualify as an investment in community development; (iii) agricultural land; (B) the acquisition or refinance of existing income-producing real property secured by a mortgage on such property, if the cash flow being generated by the real property is sufficient to support the debt service and expenses of the real property, in accordance with the institution’s applicable loan underwriting criteria for permanent financings; (C) improvements to existing income-producing improved real property secured by a mortgage on such property, if the cash flow being generated by the real property is sufficient to support the debt service and expenses of the real property, in accordance with the institution’s applicable loan underwriting criteria for permanent financings; or (D) commercial real property projects in which—(i) the loan-to-value ratio is less than or equal to the applicable maximum supervisory loan-to-value ratio as determined by the appropriate Federal banking agency; (ii) the borrower has contributed capital of at least 15 percent of the real property’s appraised, ‘as completed’ value to the project in the form of—(I) cash; (II) unencumbered readily marketable assets; (III) paid development expenses out-of-pocket; or (IV) contributed real property or improvements; and (iii) the borrower contributed the minimum amount of capital described under clause (ii) before the depository institution advances funds (other than the advance of a nominal sum made in order to secure the depository institution’s lien against the real property)

the Federal Deposit Insurance Act (FDI Act)<sup>6</sup> by adding a new section 51 to provide a statutory definition of a high volatility commercial real estate acquisition, development, or construction (HVCRE ADC) loan. The statute states the agencies may only require a depository institution to assign a heightened risk weight to an HVCRE exposure, as defined under the capital rule, if such exposure is an HVCRE ADC loan under EGRRCPA. The statutory HVCRE ADC loan definition excludes any loan made prior to January 1, 2015. Section 214 was effective upon enactment of the statute.<sup>7</sup>

The agencies issued an interagency statement on July 6, 2018 (interagency statement) that provided information on rules and associated reporting requirements that the agencies jointly administer and that EGRRCPA immediately affected.<sup>8</sup> With respect

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under the credit facility, and such minimum amount of capital contributed by the borrower is contractually required to remain in the project until the credit facility has been reclassified by the depository institution as a non-HVCRE ADC loan under subsection (d); Further, it does not include any loan made prior to January 1, 2015; and does not include a credit facility reclassified as a non-HVCRE ADC loan under subsection (d).

Value of Contributed Real Property. The value of any real property contributed by a borrower as a capital contribution shall be the appraised value of the property as determined under standards prescribed pursuant to section 1110 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3339), in connection with the extension of the credit facility or loan to such borrower.

<sup>6</sup> See 12 U.S.C. 1811 et seq.

<sup>7</sup> On October 27, 2017, the agencies issued a proposal, titled, Simplifications to the Capital Rule Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996. 82 FR 49984 (October 27, 2017). In connection with that proposal, the agencies requested comment on a definition, “high volatility acquisition, development, or construction (HVADC) exposure,” that would have replaced HVCRE in the capital rule. In light of section 214 of EGRRCPA, the agencies will take no further action regarding the HVADC aspect of the proposal. Other aspects of the October 2017 proposal, including simplifications to regulatory capital adjustments and deductions, are still under consideration.

<sup>8</sup> Board, FDIC, and OCC, *Interagency statement regarding the impact of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA)*,

to section 214, the interagency statement provides that institutions may use available information to reasonably estimate and report only HVCRE ADC loans in their Consolidated Reports of Condition and Income (Call Report)<sup>9</sup> and may refine these estimates in good faith as they obtain additional information. The interagency statement also states that institutions will not be required to amend previously filed regulatory reports as these estimates are adjusted. As an alternative to reporting HVCRE ADC loans, the interagency statement indicates that an institution may continue to report and risk-weight HVCRE exposures in a manner consistent with the current instructions to the Call Report, until the agencies take further action. Further, to avoid the regulatory burden associated with different definitions for HVCRE exposures within a single organization, the interagency statement confirms that the Board will not take action to require a bank holding company, savings and loan holding company, or intermediate holding company of a foreign bank to estimate and report HVCRE on the FR Y-9C<sup>10</sup> consistent with the existing regulatory reporting requirements and reporting form instructions if the holding company reports HVCRE in the same manner as its subsidiary institution(s).

In accordance with section 214 of EGRRCPA, the agencies are proposing to revise the HVCRE exposure definition in section 2 of the capital rule to conform to the statutory definition of an HVCRE ADC loan.<sup>11</sup> The revised definition of an HVCRE

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<https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20180706a1.pdf>. (last visited August 21, 2018).

<sup>9</sup> OMB Control Nos.: OCC, 1557–0081; Board, 7100–0036; and FDIC, 3064–0052.

<sup>10</sup> Consolidated Financial Statements for Holding Companies, OMB Control No.: Board, 7100-0128.

<sup>11</sup> See 12 CFR 217.2 (Board); 12 CFR 3.2 (OCC); 12 CFR 324.2 (FDIC).

exposure would be applicable to the calculation of risk-weighted assets under both the standardized approach and the internal ratings-based (“advanced approaches”) approach.<sup>12</sup> A banking organization that calculates its risk-weighted assets under the advanced approaches of the capital rule would refer to the definition of an HVCRE exposure in section 2 of the capital rule for purposes of identifying wholesale exposure categories and wholesale exposure subcategories.<sup>13</sup> Other than the definition change, no change to the calculation of risk-weighted assets is being proposed. Loans that meet the revised definition of an HVCRE exposure would receive a 150 percent risk weight under the capital rule’s standardized approach.<sup>14</sup>

Section 214 excludes from the statutory definition of HVCRE ADC loan any loan made prior to January 1, 2015.<sup>15</sup> Unless a lower risk weight would apply, banking organizations may apply a 100 percent risk weight to ADC loans originated prior to January 1, 2015, that were classified as an HVCRE exposure under the superseded HVCRE exposure definition provided the loans are not past due 90 days or more or on nonaccrual. For ADC exposures issued on or after January 1, 2015, banking organizations would follow the interagency statement that permits them to either apply the statute on a best efforts basis or classify HVCRE exposures according to the superseded definition until the final rule is effective.

*Question 1: The agencies invite comment as to whether the final rule should*

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<sup>12</sup> See 12 CFR 217 subparts D and E (Board); 12 CFR 3 subparts D and E (OCC); 12 CFR 324 subparts D and E (FDIC).

<sup>13</sup> See 12 CFR 217.131 (Board); 12 CFR 3.131 (OCC); 12 CFR 324.131 (FDIC).

<sup>14</sup> See 12 CFR 217.32(j) (Board); 12 CFR 3.32(j) (OCC); 12 CFR 324.32(j) (FDIC).

<sup>15</sup> On January 1, 2015, the heightened risk weight for HVCRE exposures became effective for all banking organizations.

*require reevaluation of ADC loans originated on or after January 1, 2015 under the revised HVCRE exposure definition. What are the advantages and disadvantages of requiring reevaluation? What alternative treatments, if any, should the agencies consider?*

By its terms, the statutory definition of an HVCRE ADC loan applies to depository institutions. The Board has considered the statutory definition of HVCRE ADC loan and the appropriateness of applying the definition to holding companies in addition to depository institutions. The application of separate definitions for HVCRE ADC loans at the depository institution and for HVCRE exposures at the holding company levels within an organization could result in undue burden without contributing meaningfully to any regulatory objective. Accordingly, the proposal would apply the revised definition of an HVCRE exposure to all Board-regulated institutions that are subject to the Board's capital rule, including bank holding companies, savings and loan holding companies, and intermediate holding companies of foreign banking organizations. The Board would make conforming changes to the instructions for regulatory reports for holding companies that are Board-regulated institutions, including to Schedule HC-R, Part II of the FR Y-9C. Similarly, the agencies would make conforming changes to the Call Report instructions.

## **II. Proposed Rule**

The agencies are revising the definition of an HVCRE exposure in the capital rule to conform to the statutory definition of an HVCRE ADC loan. Additionally, to facilitate the consistent application of the revised HVCRE exposure definition, the agencies propose to interpret terms not defined in the statutory definition of an HVCRE ADC loan.

The agencies would generally look to substantially similar or the same terms in the agencies' regulations or the Call Report instructions.

#### **A. Revised Scope of an HVCRE Exposure**

Section 214 of EGRRCPA defines an HVCRE ADC loan as “a credit facility secured by land or improved real property.”<sup>16</sup> While the statute does not define “a credit facility secured by land or improved real property,” the Call Report instructions provide a definition for a “loan secured by real estate.” To ensure consistent reporting and because the two terms appear substantially similar, the agencies interpret the term “credit facility secured by land or improved real property” for the purpose of the revised HVCRE exposure definition in a manner that is consistent with the current Call Report definition for “a loan secured by real estate.” To meet the Call Report definition of “a loan is secured by real estate,” the estimated value of the real estate collateral at origination (after deducting all senior liens held by others) is greater than 50 percent of the principal amount of the loan at origination.<sup>17</sup> As a result, the agencies intend to interpret a “credit facility secured by land or improved real property” as a facility that meets this collateral criterion.

Section 214 of EGRRCPA provides that a credit facility that is secured by land or improved real property is required to meet three criteria before being classified as an HVCRE ADC loan. First, the credit facility must primarily finance or refinance the

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<sup>16</sup> See *supra* fn. 6.

<sup>17</sup> See Federal Financial Institutions Examination Council, Instructions for Preparation of Consolidated Reports of Condition and Income: FFIEC 031 and FFIEC 041, GLOSSARY A-58 (2018); and FFIEC 051, GLOSSARY A-74 (2018).

acquisition, development, or construction of real property. Second, the purpose of the credit facility must be to provide financing to acquire, develop, or improve such real property into income-producing real property. Finally, the repayment of the credit facility must depend upon future income or sales proceeds from, or refinancing of, such real property. The proposal will incorporate these criteria into the revised definition of an HVCRE exposure. Under the proposal, the determination of whether or not a loan is considered an HVCRE exposure under the revised definition would be made once, at the loan's origination.

In addition, the agencies' propose to interpret that other land loans (generally loans secured by vacant land except land known to be used for agricultural purposes) would be included in the scope of the revised HVCRE exposure definition. This approach would be consistent with the Call Report's inclusion of other land loans with construction and development loans.

*Question 2: The agencies request comment on whether the terms "secured by land or improved real property," "primarily finances," and "income-producing real property" are clear or whether further discussion or interpretation would be needed. The agencies also request comment on whether their proposed interpretations of these terms are appropriate and whether loans secured by vacant land except agricultural land should be included in the scope of the revised HVCRE exposure definition.*

## **B. Exclusions from an HVCRE Exposure**

A loan secured by land or improved real property that meets the three criteria for the revised HVCRE exposure categorization may be excluded from a heightened risk weight if it meets one or more of the following statutory exclusions:

## 1. One- to Four-Family Residential Properties

Consistent with section 214, the revised definition of an HVCRE exposure would exclude credit facilities financing the acquisition, development, or construction of properties that are one- to four-family residential properties. The agencies are generally aligning the scope of exposures that finance acquisition, development, or construction of one- to four-family residential properties under the capital rule with the definition of a one- to four-family residential property provided in the codified interagency real estate lending standards.<sup>18</sup> The interagency real estate lending standards define a one- to four-family residential property as a property containing fewer than five individual dwelling units, including manufactured homes permanently affixed to the underlying property (when deemed to be real property under state law). The interagency real estate lending standards further state that the construction of condominiums and cooperatives are multifamily construction. Accordingly, loans to finance the construction of condominiums and cooperatives would generally not be included in the scope of the one- to four-family residential properties exclusion under the revised HVCRE exposure definition.<sup>19</sup> Additionally, the agencies are proposing that credit facilities for the purpose

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<sup>18</sup> See Board, OCC, and FDIC, *Interagency Guidelines For Real Estate Lending Policies* (real estate lending standards), 12 CFR Part 208 Appendix C (Board); 12 CFR part 34 Appendix A (OCC); 12 CFR part 365 Appendix A (FDIC).

<sup>19</sup> As an alternative to the interagency real estate lending standards, the agencies considered alignment with the definition of a one- to-four family residential property in the Call Report instructions for purposes of the HVCRE exposure exclusion. However, the Call Report's usage of the one- to-four family residential property definition – as a category of permanent financings – as well as the Call Report's distinct additional definition for “residential construction loans” are for different reporting purposes. See Call Report instructions for Schedule RC-C, Part I, Item 1.c (“Loans secured by 1-4 family residential properties”) and Item 1.a.(1) (“1-4 family residential construction loans”).



of the acquisition, development, or construction of properties that are one- to four-family residential properties would include both loans to construct one- to four-family residential structures and loans that combine the land acquisition, development, or construction of one- to four-family structures, including lot development loans.

However, loans used solely to acquire undeveloped land would not be within the scope of one- to four-family residential properties exclusion regardless of how the land is zoned.

*Question 3: The agencies invite comment on whether their proposed interpretations of the scope of the one- to four-family residential properties exclusion for purposes of the revised HVCRE exposure definition are appropriate and clear, including which types of townhomes, condominiums, cooperatives, and mobile home-related loans are excluded.*

*The agencies also invite comment on whether it is appropriate to include one- to four-family lot development loans within the scope of this exclusion.*

## **2. Community Development Investment**

Consistent with section 214, the revised HVCRE exposure definition will exclude loans financing the acquisition, development, or construction of real property that would qualify as an investment in community development. For purposes of this exclusion, the proposal refers to the agencies' Community Reinvestment Act (CRA) regulations and the definition of community development investment in these regulations.<sup>20</sup> Accordingly, this exclusion would apply to credit facilities that finance the acquisition, development, or construction of real property projects for which the primary purpose is community development, as defined by the agencies' CRA regulations, which generally includes

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<sup>20</sup> 12 CFR part 24 (OCC); 12 CFR part 345 (FDIC); 12 CFR part 228 (Board).

affordable housing, community services targeted to low- and moderate-income individuals, and various forms of economic development and small business financing. Under the agencies' CRA regulations, loans have to be evaluated to determine whether they meet the criteria for community development. For example, an ADC loan that is conditionally taken out with U.S. Small Business Administration section 504 financing would have to be evaluated against the criteria for community development in order to determine if the loan would qualify for this exclusion.

*Question 4: The agencies invite comment on whether the proposed interpretation of the term "community development" in the revised definition of HVCRE exposure is appropriate and clear, or whether it requires further discussion or interpretation.*

### **3. Agricultural Land**

Consistent with section 214, the revised HVCRE exposure definition will exclude credit facilities financing the acquisition, development, or construction of agricultural land. The Call Report instructions include a definition for "farmland," which excludes loans for farm property construction and land development purposes. As used in the Call Report, the term "farmland" includes all land known to be used or usable for agricultural purposes. To ensure consistent reporting, the agencies propose that "agricultural land" for the purpose of the revised HVCRE exposure definition would have the same meaning as "farmland," as used in the Call Report instructions.<sup>21</sup>

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<sup>21</sup> For the definition of loans secured by farmland, refer to the Call Report Instructions for Schedule RC-C, Part I, Item 1.b.

*Question 5: The agencies invite comment on whether their proposed interpretation of the term “agricultural land” in the revised definition of an HVCRE exposure is appropriate and clear, or whether it requires further discussion or interpretation.*

#### **4. Loans on Existing Income-Producing Properties that Qualify as Permanent Financings**

In addition to the exclusions described above, the revised HVCRE exposure definition will exclude additional categories of exposures. Consistent with the statutory definition of an HVCRE ADC loan in section 214, the revised HVCRE exposure definition will exclude credit facilities for the acquisition or refinance of existing income-producing real property secured by a mortgage on such property, so long as the cash flow generated by the real property covers the debt service and expenses of the property in accordance with a depository institution’s underwriting criteria for permanent loans. The revised HVCRE exposure definition similarly excludes credit facilities financing improvements to existing income-producing real property secured by a mortgage on such property. The agencies may review the reasonableness of a depository institution’s underwriting criteria for permanent loans through the regular supervisory process.

*Question 6: The agencies invite comment on whether the term “permanent financings” in the revised definition of an HVCRE exposure is clear or whether further discussion or interpretation would be appropriate.*

#### **5. Certain Commercial Real Property Projects**

Consistent with section 214, the revised definition of an HVCRE exposure will exclude certain commercial real property projects that have been underwritten in accordance with supervisory underwriting standards, and when the borrower has

contributed a specified amount of capital to the project. In order to qualify for this exclusion from the revised HVCRE exposure definition, a credit facility that finances a commercial real property project will be required to meet four distinct criteria. First, the loan-to-value ratio is less than or equal to the applicable supervisory maximum. Under the interagency real estate lending standards, maximum loan-to-value ratios vary from 65 to 85 percent, depending on the applicable loan category.<sup>22</sup> Second, the borrower has contributed capital of at least 15 percent of the real property's appraised "as completed" value to the project. Third, the 15 percent amount is contributed prior to the institution's advance of funds other than a nominal sum to secure the depository institution's lien on the real property. Fourth, the 15 percent amount of contributed capital is contractually required to remain in the project until the loan can be reclassified as a non-HVCRE exposure. Each of the four proposed criteria aligns with the corresponding statutory criterion under section 214 for exclusion from the statutory definition of an HVCRE ADC loan. The proposed interpretations of terms relevant to the four criteria for exclusion of a credit facility that finances a commercial real property project are discussed in further detail below.

#### **a. Contributed Capital**

Under section 214, cash, unencumbered readily marketable assets, paid development expenses out-of-pocket, and contributed real property or improvements count as forms of capital for purposes of the capital contribution criteria. The proposal will incorporate these forms of capital into the revised definition of an HVCRE exposure. The agencies consider costs incurred by the project and paid by the borrower prior to the

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<sup>22</sup> See supra fn. 17.

advance of funds by the banking organization as paid development expenses out-of-pocket.

The statute provides that the value of contributed real property means the appraised value of real property contributed by the borrower as determined under the standards prescribed by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3339). The proposal will incorporate this criterion into the revised definition of an HVCRE exposure. The agencies would reduce the value of the real property that counts towards the 15 percent contributed capital requirement by the aggregate amount of any liens on the real property securing the HVCRE exposure.

*Question 7: The agencies invite comment on whether their proposed interpretation of the 15 percent contributed capital exclusion is appropriate and clear or whether further discussion or interpretation would be appropriate. What other issues, if any, relating to the contributed capital exclusion require interpretation? What issues are there relating to the contribution of cash, unencumbered readily marketable assets, real property or improvements that require interpretation? What expenses should or should not qualify as development expenses and are there any other issues relating to paid development expenses that would require interpretation? The agencies also invite comment on whether it is appropriate and clear that the cross-collateralization of land in a project would not be included as contributed real property for purposes of the contributed capital exclusion.*

#### **b. “As Completed” Value Appraisal**

Under the revised HVCRE exposure definition, the 15 percent capital contribution will be required to be calculated using the real property’s appraised “as completed” value.

However, an “as completed” value appraisal may not always be available, such as in the case of purchasing raw land without plans for development in the near term, which would typically have an “as is” value appraisal. Therefore, the agencies would permit the use of an “as is” appraisal, where applicable, for purposes of the 15 percent capital contribution. In addition, the agencies’ regulations permit the use of an evaluation in place of an “as completed” value appraisal for a commercial real estate transaction under \$500,000 that is not secured by a single one-to-four family residential property.<sup>23</sup> The agencies note that section 214 does not distinguish between credit exposures based on size; however, the agencies’ appraisal regulations permit the use of evaluations under certain circumstances. The agencies thus would allow the use of an evaluation to replace the “as completed” appraised value, for purposes of the revised HVCRE exposure definition, for transactions under \$500,000 that are not secured by a single one- to four-family residential property and for certain transactions with values of less than \$400,000 involving real property or an interest in real property that is located in a rural area.<sup>24</sup>

*Question 8: The agencies invite comment on whether the proposed interpretation on the required use of an as-completed value appraisal for purposes of the contributed capital exclusion is appropriate and clear and whether there are additional issues relating to the appraisal requirement for purposes of the contributed capital exclusion that need interpretation.*

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<sup>23</sup> 83 FR 15019 (April 9, 2018).

<sup>24</sup> Section 103 of EGRRCPA provides an exclusion to the appraisal requirements for certain transactions with values of less than \$400,000 involving real property or an interest in real property that is located in a rural area. This exclusion was effective upon EGRRCPA’s enactment.

### **c. Project**

Under the revised HVCRE exposure definition, when considering whether a credit facility is excluded as a “certain commercial real property project” as described above, the 15 percent capital contribution calculation and the “as completed” value appraisal are measured in relation to a “project.” The agencies recognize that some credit facilities for the acquisition, development, or construction of real property may have multiple phases as part of a larger construction or development project. The agencies are proposing that in the case of a project with multiple phases or stages, in order for a loan financing a phase or stage to be eligible for the contributed capital exclusion, the phase or stage must have its own appraised “as completed” value or an appropriate evaluation in order for it to be deemed a separate “project” for purposes of the 15 percent capital contribution calculation.

*Question 9: The agencies invite comment on whether their proposed interpretation of the term “project” is appropriate and clear, and whether the term “project” requires further discussion or interpretation.*

### **6. Reclassification as a Non-HVCRE Exposure**

Consistent with section 214, under the proposal, a banking organization may reclassify an HVCRE exposure as a non-HVCRE exposure when the substantial completion of the development or construction on the real property has occurred and the cash flow generated by the property covers the debt service and expenses on that property in accordance with the banking organization’s loan underwriting standards for permanent financings.

*Question 10: The agencies invite comment on whether additional terms included in the text of section 214 of the statute that are not discussed above are ambiguous or need interpretation? The agencies invite comment on what, if any, operational challenges would banking organizations generally expect when determining whether an HVCRE exposure under the proposed revised definition can be reclassified as a non-HVCRE exposure?*

*Question 11: The agencies invite comment on the potential advantages and disadvantages of incorporating the agencies' interpretations of the terms used in the revised HVCRE exposure definition into the rule text or in another published format. What type of information should be included? What, if any, additional aspects of the revised HVCRE exposure definition, or its application and usage, should be included?*

### **III. Regulatory Analyses**

#### **A. Paperwork Reduction Act**

Certain provisions of the proposed rule contain “collection of information” requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521). In accordance with the requirements of the PRA, the agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB control number for the OCC is 1557-0318, Board is 7100-0313, and FDIC is 3064-0153. These information collections will be extended for three years, with revision. The information collection requirements contained in this proposed rulemaking have been submitted by the OCC and FDIC to OMB for review and approval under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB’s



implementing regulations (5 CFR 1320). The Board reviewed the proposed rule under the authority delegated to the Board by OMB.

Comments are invited on:

a. Whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

b. The accuracy or the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the ADDRESSES section of this document. A copy of the comments may also be submitted to the OMB desk officer for the agencies by mail to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503; facsimile to (202) 395-6974; or e-mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov), Attention, Federal Banking Agencies Desk Officer.

*Information Collection Proposed to be Revised*

*Title of Information Collection:* Recordkeeping and Disclosure Requirements Associated with Capital Adequacy.

*Frequency:* Quarterly, annual.

*Affected Public:* Businesses or other for-profit.

*Respondents:*

OCC: National banks and federal savings associations.

Board: State member banks (SMBs), bank holding companies (BHCs), U.S. intermediate holding companies (IHCs), savings and loan holding companies (SLHCs), and global systemically important bank holding companies (G-SIBs).

FDIC: State nonmember banks and state savings associations.

*Current Actions:* The proposal would amend the regulatory capital rule to conform the definition of HVCRE exposure to the statutory definition of HVCRE ADC loan. Because the agencies' regulatory capital rules require respondents to disclose and keep a record of their amount of HVCRE exposures, this definitional change revises respondents' disclosure and recordkeeping requirements associated with the agencies' regulatory capital rules. This amendment, however, will not result in changes to the burden. In an effort to be consistent across the agencies, the agencies are applying a conforming methodology for calculating the burden estimates. The agencies are also updating the number of respondents based on the current number of supervised entities. The agencies believe that any changes to the information collections associated with the proposed rule are the result of the conforming methodology and updates to the respondent count, and not the result of the proposed rule changes.

*PRA Burden Estimates*

## **OCC**

*OMB control number:* 1557-0318.

*Estimated number of respondents:* 1,365 (of which 18 are advanced approaches institutions).

*Estimated average hours per response:*

### ***Minimum Capital Ratios (1,365 institutions affected)***

Recordkeeping (Ongoing) – 16.

### ***Standardized Approach (1,365 institutions affected for ongoing)***

Recordkeeping (Initial setup) – 122.

Recordkeeping (Ongoing) – 20.

Disclosure (Initial setup) – 226.25.

Disclosure (Ongoing quarterly) – 131.25.

### ***Advanced Approach (18 institutions affected for ongoing)***

Recordkeeping (Initial setup) – 460.

Recordkeeping (Ongoing) – 540.77.

Recordkeeping (Ongoing quarterly) – 20.

Disclosure (Initial setup) – 280.

Disclosure (Ongoing) – 5.78.

Disclosure (Ongoing quarterly) – 35.

*Estimated annual burden hours:* 1,088 hours initial setup, 64,513 hours for ongoing.

## **Board**

*Agency form number:* FR Q.

*OMB control number:* 7100-0313.

*Estimated number of respondents:* 1,431 (of which 17 are advanced approaches institutions).

*Estimated average hours per response:*

***Minimum Capital Ratios (1,431 institutions affected for ongoing)***

Recordkeeping (Ongoing) – 16.

***Standardized Approach (1,431 institutions affected for ongoing)***

Recordkeeping (Initial setup) – 122.

Recordkeeping (Ongoing) – 20.

Disclosure (Initial setup) – 226.25.

Disclosure (Ongoing quarterly) – 131.25.

***Advanced Approach (17 institutions affected)***

Recordkeeping (Initial setup) – 460.

Recordkeeping (Ongoing) – 540.77.

Recordkeeping (Ongoing quarterly) – 20.

Disclosure (Initial setup) – 280.

Disclosure (Ongoing) – 5.78.

Disclosure (Ongoing quarterly) – 35.

Disclosure (Table 13 quarterly) – 5.

***Risk-based Capital Surcharge for GSIBs (21 institutions affected)***

Recordkeeping (Ongoing) – 0.5.

*Estimated annual burden hours:* 1,088 hours initial setup, 78,183 hours for ongoing.

## **FDIC**

*OMB control number:* 3064-0153.

*Estimated number of respondents:* 3,604 (of which 2 are advanced approaches institutions).

*Estimated average hours per response:*

### ***Minimum Capital Ratios (3,604 institutions affected)***

Recordkeeping (Ongoing) – 16.

### ***Standardized Approach (3,604 institutions affected for ongoing)***

Recordkeeping (Initial setup) – 122.

Recordkeeping (Ongoing) – 20.

Disclosure (Initial setup) – 226.25.

Disclosure (Ongoing quarterly) – 131.25.

### ***Advanced Approach (2 institutions affected for ongoing)***

Recordkeeping (Initial setup) – 460.

Recordkeeping (Ongoing) – 540.77.

Recordkeeping (Ongoing quarterly) – 20.

Disclosure (Initial setup) – 280.

Disclosure (Ongoing) – 5.78.

Disclosure (Ongoing quarterly) – 35.

*Estimated annual burden hours:* 1,088 hours initial setup, 131,802 hours for ongoing.

The proposed rule will also require changes to the Call Reports (FFIEC 031, FFIEC 041, and FFIEC 051; OMB Nos. 1557-0081 (OCC), 7100-0036 (Board), and 3064-0052 (FDIC)) and Risk-Based Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework (FFIEC 101; OMB Nos. 1557-0239 (OCC), 7100-0319 (Board), and 3064-0159 (FDIC)), and Consolidated Financial Statements for Holding Companies (FR Y-9C; OMB No. 7100-0128), which will be addressed in separate *Federal Register* notices.

## **B. Regulatory Flexibility Act Analysis**

*OCC:* The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, (RFA), requires an agency, in connection with a proposed rule, to prepare an Initial Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the SBA for purposes of the RFA to include commercial banks and savings institutions with total assets of \$550 million or less and trust companies with total assets of \$38.5 million or less) or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities.

As of June 30, 2018, the OCC supervises 886 small entities.<sup>25</sup>

Currently, 211 small OCC-supervised institutions hold HVCRE loans and thus will be directly impacted by the proposed rule. Therefore, the proposed rule potentially

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<sup>25</sup> The OCC calculated the number of small entities using the SBA's size thresholds for commercial banks and savings institutions, and trust companies, which are \$550 million and \$38.5 million, respectively. Consistent with the General Principles of Affiliation, 13 CFR 121.103(a), the OCC counted the assets of affiliated financial institutions when determining whether to classify a national bank or Federal savings association as a small entity.

affects a substantial number of small entities. However, the OCC does not find that the impact of this proposal would be economically significant.

Therefore, the OCC certifies that the proposed rule would not have a significant economic impact on a substantial number of OCC-supervised small entities.

*Board:* The RFA requires an agency to either provide an initial regulatory flexibility analysis with a proposal or certify that the proposal will not have a significant impact on a substantial number of small entities. Under regulations issued by the SBA, a small entity includes a bank, bank holding company, or savings and loan holding company with assets of \$550 million or less (small banking organization).<sup>26</sup> As of June 30, 2018, there were approximately 3,304 small bank holding companies, 216 small savings and loan holding companies, and 535 small SMBs.

The Board has considered the potential impact of the proposed rule on small entities in accordance with the RFA. Based on the Board's analysis, and for the reasons stated below, the Board believes that this proposed rule will not have a significant economic impact on a substantial of number of small entities. Nevertheless, the Board is providing an initial regulatory flexibility analysis with respect to this proposed rule. A final regulatory flexibility analysis will be conducted after comments received during the public comment period have been considered. The Board welcomes comment on all aspects of its analysis. In particular, the Board requests that commenters describe the

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<sup>26</sup> See 13 CFR 121.201. Effective July 14, 2014, the SBA revised the size standards for banking organizations to \$550 million in assets from \$500 million in assets. 79 FR 33647 (June 12, 2014).

nature of any impact on small entities and provide empirical data to illustrate and support the extent of the impact.

As discussed in the Supplemental Information, the proposal would revise the definition of HVCRE exposure to conform to the statutory definition of “high volatility commercial real estate acquisition, development, or construction (HVCRE ADC) loan,” in accordance with section 214 of EGRRCPA. To facilitate the consistent application of the revised HVCRE exposure definition, the proposal also provides that the Board would generally look to substantially similar terms in relevant regulations or the Call Report instructions for interpretation of undefined terms used in section 214, where applicable.

For purposes of the standardized approach, loans that meet the revised definition of an HVCRE exposure would receive a 150 percent risk weight under the capital rule’s standardized approach. A banking organization that calculates its risk-weighted assets under the advanced approaches of the capital rule would refer to the definition of an HVCRE exposure in section 2 of the capital rule for purposes of identifying wholesale exposure categories and wholesale exposure subcategories. Based upon data reported on the FR Y-9C and on Call Report information, as of June 30, 2018, about 14 percent of state member banks, bank holding companies, and savings and loan holding companies report holdings of HVCRE exposures.

The proposal would apply to all state member banks, as well as all bank holding companies and savings and loan holding companies that are subject to the Board’s capital rule. Certain bank holding companies, and savings and loan holding companies are excluded from the application of the Board’s capital rule. In general, the Board’s capital rule only applies to bank holding companies and savings and loan holding



companies that are not subject to the Board's Small Bank Holding Company and Small Savings and Loan Holding Company Policy Statement, which applies to bank holding companies and savings and loan holding companies with less than \$3 billion in total assets that also meet certain additional criteria.<sup>27</sup> Thus, most bank holding companies and savings and loan holding companies that would be subject to the proposed rule exceed the \$550 million asset threshold at which a banking organization would qualify as a small banking organization.

The agencies anticipate updating the relevant reporting forms at a later date to the extent necessary to align with the capital rule. Given that the proposed rule does not impact the recordkeeping and reporting requirements that affected small banking organizations are currently subject to, there would be no change to the information that small banking organizations must track and report.

The Board does not believe that the proposed rule duplicates, overlaps, or conflicts with any other Federal rules. In addition, there are no significant alternatives to the proposed rule. In light of the foregoing, the Board does not believe that the proposed rule, if adopted in final form, would have a significant economic impact on a substantial number of small entities.

*FDIC:* The RFA generally requires that, in connection with a proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the proposed rule on small

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<sup>27</sup> See 12 CFR 217.1(c)(1)(ii) and (iii); 12 CFR part 225, appendix C; 12 CFR 238.9.

entities.<sup>28</sup> However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBA has defined “small entities” to include banking organizations with total assets of less than or equal to \$550 million that are independently owned and operated or owned by a holding company with less than or equal to \$550 million in total assets.<sup>29</sup> For the reasons described below and under section 605(b) of the RFA, the FDIC certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

The FDIC supervises 3,604 depository institutions,<sup>30</sup> of which 2,804 are considered small entities for the purposes of RFA.<sup>31</sup> According to recent data, 2,472 small, FDIC-supervised institutions report holding some volume of acquisition, development, and construction loans, while 770 report holding some volume of HVCRE loans. Therefore, the FDIC estimates that the proposed rule is likely to affect a substantial number, 770 (27.5 percent), of small, FDIC-supervised institutions.<sup>32</sup>

This proposal would remove certain loans from the definition of an HVCRE exposure and therefore, would reduce the risk weight from 150 percent to 100 percent on some of the HVCRE loans held in portfolio by small FDIC-supervised institutions,

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<sup>28</sup> 5 U.S.C. 601 et seq.

<sup>29</sup> The SBA defines a small commercial bank to have \$550 million or less in total assets. See 13 CFR 121.201 (as amended, effective December 2, 2014). The SBA requires agencies to “consider assets of affiliated and acquired financial institutions reported in the previous four quarters.” See 13 CFR 121.104. Therefore, the FDIC utilizes merger-adjusted and affiliated assets, averaged over the previous four quarters, to identify whether a bank is a “small entity” for the purposes of RFA.

<sup>30</sup> FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).

<sup>31</sup> FDIC Call Report, March 31st, 2018.

<sup>32</sup> Id.

resulting in a modest reduction in their risk-based capital requirements. Assuming all HVCRE loans reported by small, FDIC-supervised institutions were weighted at 100 percent and that covered institutions would maintain the same ratio of risk-based capital to risk-weighted assets after the proposal goes into effect, the maximum potential effect of the proposed rule would result in an estimated decline of \$183 million (0.8 percent) in required risk-based capital for small, FDIC-insured institutions, or \$237,000 per institution.<sup>33</sup>

The proposed rule could pose some administrative costs for covered institutions. It is likely that covered institutions who hold some volume of HVCRE loans will incur some costs to evaluate their portfolios to determine if they are excluded from the proposed definition of HVCRE. It is difficult to accurately estimate the costs associated with evaluating each institution's portfolio of HVCRE because it depends on the characteristics of each institution's portfolio, the resources each institution has to manage these assets, and the labor decisions of senior management at each institution. However, the FDIC assumes that each institution will require 40 hours of labor on average to complete the review. Assuming an hourly cost of \$75.82,<sup>34</sup> that amounts to \$3,033 per institution or \$2,335,410 for all small, FDIC-supervised institutions. These

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<sup>33</sup> Id.

<sup>34</sup> Estimated total hourly compensation of Financial Analysts in the Depository Credit Intermediation sector as of March 2018. The estimate includes the May 2017 90th percentile hourly wage rate reported by the Bureau of Labor Statistics, National Industry-Specific Occupational Employment, and Wage Estimates. This wage rate has been adjusted for changes in the Consumer Price Index for all Urban Consumers between May 2017 and March 2018 (2.28 percent) and grossed up by 55.03 percent to account for non-monetary compensation as reported by the March 2018 Employer Costs for Employee Compensation Data.

administrative costs amount to 0.15 percent of average non-interest expense for small, FDIC-supervised institutions directly affected by the proposed rule.<sup>35</sup>

The proposed rule is likely to reduce capital requirements for some loans currently classified as an HVCRE exposure, which could increase the volume of lending by small, FDIC-supervised institutions. The FDIC believes that this effect will likely be small given that the proposed amendments only affect a subset of HVCRE loans, which represent a small portion of total assets for small FDIC-supervised institutions. Finally, reductions in required capital could make institutions more vulnerable in the event of an economically stressful scenario. Since the changes affect only a narrowly defined segment of institutions' loan portfolios, the FDIC believes any increase in risk resulting from the changes is unlikely to be material.

Based on this supporting information, the FDIC does not believe that the rule will have a significant economic impact on a substantial number of small entities.

The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, how long would it take for small institutions to review their HVCRE portfolios to identify loans that qualify for a lower risk weight? Also, would this rule have any significant effects on small entities that the FDIC has not identified?

### **C. Plain Language**

Section 722 of the Gramm-Leach-Bliley Act<sup>36</sup> requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1,

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<sup>35</sup> FDIC Call Report, March 31st, 2018.

2000. The agencies have sought to present the proposed rule in a simple and straightforward manner, and invite comment on the use of plain language. For example:

- Have the agencies organized the material to suit your needs? If not, how could they present the proposed rule more clearly?

- Are the requirements in the proposed rule clearly stated? If not, how could the proposed rule be more clearly stated?

- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?

- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would achieve that?

- Would more, but shorter, sections be better? If so, which sections should be changed?"

- What other changes can the agencies incorporate to make the regulation easier to understand?

#### **D. OCC Unfunded Mandates Reform Act of 1995 Determination**

The OCC analyzed the proposed rule under the factors set forth in the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532). Under this analysis, the OCC considered whether the proposed rule includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private

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<sup>36</sup> Pub. L. 106-102, section 722, 113 Stat. 1338, 1471 (1999).

sector, of \$100 million or more in any one year (adjusted for inflation). The OCC has determined that this proposed rule would not result in expenditures by State, local, and Tribal governments, or the private sector, of \$100 million or more in any one year. Accordingly, the OCC has not prepared a written statement to accompany this proposal.

### **E. Riegle Community Development and Regulatory Improvement Act of 1994**

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),<sup>37</sup> in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally 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.<sup>38</sup>

The agencies note that comment on these matters has been solicited in other sections of this Supplementary Information section, and that the requirements of

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<sup>37</sup> 12 U.S.C. 4802(a).

<sup>38</sup> Id.

RCDRIA will be considered as part of the overall rulemaking process. In addition, the agencies also invite any other comments that further will inform the agencies' consideration of RCDRIA.

**List of Subjects**

**12 CFR Part 3**

Administrative practice and procedure, Banks, Banking, Capital adequacy, Capital requirements, Asset Risk-weighting methodologies, Reporting and recordkeeping requirements, National banks, Federal savings associations, Risk.

**12 CFR Part 217**

Administrative practice and procedure, Banks, Banking, Capital adequacy, Capital requirements, Asset Risk-weighting methodologies, Reporting and recordkeeping requirements, Holding companies, State member banks, Risk.

**12 CFR Part 324**

Administrative practice and procedure, Banks, Banking, Capital adequacy, Capital requirements, Asset Risk-weighting methodologies, Reporting and recordkeeping requirements, State savings associations, State non-member banks, Risk.

**Office of the Comptroller of the Currency**

For the reasons set out in the joint preamble, the OCC proposes to amend 12 CFR part 3 as follows.

**PART 3 – CAPITAL ADEQUACY STANDARDS**

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## **PART 3 – CAPITAL ADEQUACY STANDARDS**

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

AUTHORITY: 12 U.S.C. 93a, 161, 1462, 1462a, 1463, 1464, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, 3909, and 5412(b)(2)(B).

2. Revise § 3.2 by revising the definition of a “high volatility commercial real estate (HVCRE) exposure” as follows:

### **§3.2 Definitions.**

\* \* \* \* \*

*High volatility commercial real estate (HVCRE) exposure* means:

(1) A credit facility secured by land or improved real property that, prior to being reclassified by the depository institution as a non-HVCRE exposure pursuant to paragraph (6) of this definition—

(i) Primarily finances, has financed, or refinances the acquisition, development, or construction of real property;

(ii) Has the purpose of providing financing to acquire, develop, or improve such real property into income-producing real property; and

(iii) Is dependent upon future income or sales proceeds from, or refinancing of, such real property for the repayment of such credit facility;

(2) Does not include a credit facility financing—

(i) The acquisition, development, or construction of properties that are—

(A) One- to four-family residential properties;



(B) Real property that would qualify as an investment in community development; or

(C) Agricultural land;

(ii) The acquisition or refinance of existing income-producing real property secured by a mortgage on such property, if the cash flow being generated by the real property is sufficient to support the debt service and expenses of the real property, in accordance with the national bank's or Federal savings association's applicable loan underwriting criteria for permanent financings;

(iii) Improvements to existing income-producing improved real property secured by a mortgage on such property, if the cash flow being generated by the real property is sufficient to support the debt service and expenses of the real property, in accordance with the national bank's or Federal savings association's applicable loan underwriting criteria for permanent financings; or

(iv) Commercial real property projects in which—

(A) The loan-to-value ratio is less than or equal to the applicable maximum supervisory loan-to-value ratio as determined by the OCC;

(B) The borrower has contributed capital of at least 15 percent of the real property's appraised, 'as completed' value to the project in the form of—

(1) Cash;

(2) Unencumbered readily marketable assets;

(3) Paid development expenses out-of-pocket; or

(4) Contributed real property or improvements; and

(C) The borrower contributed the minimum amount of capital described under paragraph (2)(i)(B) of this definition before the FDIC-supervised institution advances funds (other than the advance of a nominal sum made in order to secure the national bank's or Federal savings association's lien against the real property) under the credit facility, and such minimum amount of capital contributed by the borrower is contractually required to remain in the project until the HVCRE exposure has been reclassified by the national bank or Federal savings association as a non-HVCRE exposure under paragraph (6) of this definition;

(3) Does not include any loan made prior to January 1, 2015; and

(4) Does not include a credit facility reclassified as a non-HVCRE exposure under paragraph (6) of this definition.

(5) *Value Of Contributed Real Property.*—For the purposes of this HVCRE exposure definition, the value of any real property contributed by a borrower as a capital contribution shall be the appraised value of the property as determined under standards prescribed pursuant to section 1110 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ([12 U.S.C. 3339](#)), in connection with the extension of the credit facility or loan to such borrower.

(6) *Reclassification As A Non-HVCRE exposure.*—For purposes of this HVCRE exposure definition and with respect to a credit facility and a national bank or Federal savings association, a national bank or Federal savings association may reclassify an HVCRE exposure as a non-HVCRE exposure upon—

(i) The substantial completion of the development or construction of the real property being financed by the credit facility; and

(ii) Cash flow being generated by the real property being sufficient to support the debt service and expenses of the real property, in accordance with the national bank's or Federal savings association's applicable loan underwriting criteria for permanent financings.

\* \* \* \* \*

### **Board of Governors of the Federal Reserve System**

For the reasons set out in the joint preamble, part 217 of chapter II of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

### **PART 217—CAPITAL ADEQUACY OF BANK HOLDING COMPANIES, SAVINGS AND LOAN HOLDING COMPANIES, AND STATE MEMBER BANKS (REGULATION Q).**

\* \* \* \* \*

#### **Subpart A—General Provisions**

3. The authority citation for part 217 continues to read as follows:

**Authority:** 12 U.S.C. 248(a), 321–338a, 481–486, 1462a, 1467a, 1818, 1828, 1831n, 1831o, 1831p–l, 1831w, 1835, 1844(b), 1851, 3904, 3906–3909, 4808, 5365, 5368, 5371.

4. Section 217.2 is amended by revising the definition of a “high volatility commercial real estate (HVCRE) exposure” as follows:

#### **§217.2 Definitions.**

\* \* \* \* \*

*High volatility commercial real estate (HVCRE) exposure* means:

(1) A credit facility secured by land or improved real property that, prior to being reclassified by the Board-regulated institution as a non-HVCRE exposure pursuant to paragraph (6) of this definition—

(A) Primarily finances, has financed, or refinances the acquisition, development, or construction of real property;

(B) Has the purpose of providing financing to acquire, develop, or improve such real property into income-producing real property; and

(C) Is dependent upon future income or sales proceeds from, or refinancing of, such real property for the repayment of such credit facility; provided that:

(2) An HVCRE exposure does not include a credit facility financing—

(A) The acquisition, development, or construction of properties that are—

(i) One- to four-family residential properties;

(ii) Real property that would qualify as an investment in community development;

or

(iii) Agricultural land;

(B) The acquisition or refinance of existing income-producing real property secured by a mortgage on such property, if the cash flow being generated by the real property is sufficient to support the debt service and expenses of the real property, in

accordance with the Board-regulated institution's applicable loan underwriting criteria for permanent financings;

(C) Improvements to existing income-producing improved real property secured by a mortgage on such property, if the cash flow being generated by the real property is sufficient to support the debt service and expenses of the real property, in accordance with the Board-regulated institution's applicable loan underwriting criteria for permanent financings; or

(D) Commercial real property projects in which—

(i) The loan-to-value ratio is less than or equal to the applicable maximum supervisory loan-to-value ratio as determined by the Board;

(ii) The borrower has contributed capital of at least 15 percent of the real property's appraised, 'as completed' value to the project in the form of—

(I) Cash;

(II) Unencumbered readily marketable assets;

(III) Paid development expenses out-of-pocket; or

(IV) Contributed real property or improvements; and

(iii) The borrower contributed the minimum amount of capital described under paragraph (2)(D)(ii) of this definition before the Board-regulated institution advances funds (other than the advance of a nominal sum made in order to secure the Board-regulated institution's lien against the real property) under the credit facility, and such minimum amount of capital contributed by the borrower is contractually required to

remain in the project until the HVCRE exposure has been reclassified by the Board-regulated institution as a non-HVCRE exposure under paragraph (6) of this definition;

(3) An HVCRE exposure does not include any loan made prior to January 1, 2015;

(4) An HVCRE exposure does not include a credit facility reclassified as a non-HVCRE exposure under paragraph (6).

(5) Value of contributed real property.—For the purposes of this definition of HVCRE exposure, the value of any real property contributed by a borrower as a capital contribution is the appraised value of the property as determined under standards prescribed pursuant to section 1110 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ([12 U.S.C. 3339](#)), in connection with the extension of the credit facility or loan to such borrower.

(6) Reclassification as a non-HVCRE exposure.—For purposes of this definition of HVCRE exposure and with respect to a credit facility and an Board-regulated institution, an Board-regulated institution may reclassify an HVCRE exposure as a non-HVCRE exposure upon—

(A) The substantial completion of the development or construction of the real property being financed by the credit facility; and

(B) Cash flow being generated by the real property being sufficient to support the debt service and expenses of the real property, in accordance with the Board-regulated institution's applicable loan underwriting criteria for permanent financings.

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## **12 CFR Part 324**

### **Federal Deposit Insurance Corporation**

For the reasons set out in the joint preamble, the FDIC proposes to amend 12 CFR part 324 as follows.

## **PART 324 – CAPITAL ADEQUACY OF FDIC-SUPERVISED INSTITUTIONS**

### **Subpart A—General Provisions**

5. The authority citation for part 324 continues to read as follows:

**Authority:** 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; 5371; 5412; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note); Pub. L. 111–203, 124 Stat. 1376, 1887 (15 U.S.C. 78o–7 note).

6. Section 324.2 is amended by revising the definition of a “high volatility commercial real estate (HVCRE) exposure” as follows:

#### **§324.2 Definitions.**

\* \* \* \* \*

*High volatility commercial real estate (HVCRE) exposure* means:

(1) A credit facility secured by land or improved real property that, prior to being reclassified by the FDIC-supervised institution as a non-HVCRE exposure pursuant to paragraph (6) of this definition —

(A) Primarily finances, has financed, or refinances the acquisition, development, or construction of real property;

(B) Has the purpose of providing financing to acquire, develop, or improve such real property into income-producing real property; and

(C) Is dependent upon future income or sales proceeds from, or refinancing of, such real property for the repayment of such credit facility; provided that:

(2) An HVCRE exposure does not include a credit facility financing—

(A) The acquisition, development, or construction of properties that are—

(i) One- to four-family residential properties;

(ii) Real property that would qualify as an investment in community development;

or

(iii) Agricultural land;

(B) The acquisition or refinance of existing income-producing real property secured by a mortgage on such property, if the cash flow being generated by the real property is sufficient to support the debt service and expenses of the real property, in accordance with the FDIC-supervised institution's applicable loan underwriting criteria for permanent financings;



(C) Improvements to existing income-producing improved real property secured by a mortgage on such property, if the cash flow being generated by the real property is sufficient to support the debt service and expenses of the real property, in accordance with the FDIC-supervised institution's applicable loan underwriting criteria for permanent financings; or

(D) Commercial real property projects in which—

(i) The loan-to-value ratio is less than or equal to the applicable maximum supervisory loan-to-value ratio as determined by the FDIC;

(ii) The borrower has contributed capital of at least 15 percent of the real property's appraised, 'as completed' value to the project in the form of—

(I) Cash;

(II) Unencumbered readily marketable assets;

(III) Paid development expenses out-of-pocket; or

(IV) Contributed real property or improvements; and

(iii) The borrower contributed the minimum amount of capital described under paragraph (2)(D)(ii) of this definition before the FDIC-supervised institution advances funds (other than the advance of a nominal sum made in order to secure the FDIC-supervised institution's lien against the real property) under the credit facility, and such minimum amount of capital contributed by the borrower is contractually required to remain in the project until the HVCRE exposure has been reclassified by the FDIC-supervised institution as a non-HVCRE exposure under paragraph (6) of this definition;

(3) An HVCRE exposure does not include any loan made prior to January 1, 2015;

(4) An HVCRE exposure does not include a credit facility reclassified as a non-HVCRE exposure under paragraph (6).

(5) Value Of contributed real property.—For the purposes of this definition of HVCRE exposure, the value of any real property contributed by a borrower as a capital contribution is the appraised value of the property as determined under standards prescribed pursuant to section 1110 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3339), in connection with the extension of the credit facility or loan to such borrower.

(6) Reclassification as a non-HVCRE exposure.—For purposes of this definition of HVCRE exposure and with respect to a credit facility and an FDIC-supervised institution, an FDIC-supervised institution may reclassify an HVCRE exposure as a non-HVCRE exposure upon—

(A) The substantial completion of the development or construction of the real property being financed by the credit facility; and

(B) Cash flow being generated by the real property being sufficient to support the debt service and expenses of the real property, in accordance with the FDIC-supervised institution's applicable loan underwriting criteria for permanent financings.

\* \* \* \* \*



[THIS SIGNATURE PAGE RELATES TO THE JOINT NOTICE OF PROPOSED RULEMAKING TITLED “REGULATORY CAPITAL TREATMENT FOR HIGH VOLATILITY COMMERCIAL REAL ESTATE (HVCRE) EXPOSURES.”]

Dated:

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**Joseph M. Otting**  
*Comptroller of the Currency*

[THIS SIGNATURE PAGE RELATES TO THE JOINT NOTICE OF PROPOSED RULEMAKING TITLED “REGULATORY CAPITAL TREATMENT FOR HIGH VOLATILITY COMMERCIAL REAL ESTATE (HVCRE) EXPOSURES.”]

By order of the Board of Governors of the Federal Reserve System, September 18, 2018.

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**Ann E. Misback,**  
*Secretary of the Board.*

[THIS SIGNATURE PAGE RELATES TO THE JOINT NOTICE OF PROPOSED RULEMAKING TITLED “REGULATORY CAPITAL TREATMENT FOR HIGH VOLATILITY COMMERCIAL REAL ESTATE (HVCRE) EXPOSURES.”]

Dated at Washington, D.C. this \_\_ of \_\_\_\_\_, 2018.

By order of the Board of Directors.  
Federal Deposit Insurance Corporation.

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**Robert E. Feldman,**  
*Executive Secretary.*