

compromising bank safety and soundness.

II. Description of the Proposal

Definitions (§ 24.2)

The proposal adds a new definition of “community and economic development entity.” The new definition of “community development entity” replaces the current definition of “community development corporation.” A community development corporation is defined in the current regulation as a corporation established by one or more insured financial institutions (with or without other investors) “to make one or more investments that meet the requirements of § 24.3.”⁴ The proposal defines a community and economic development entity (CDE) as an entity—such as a national bank community development subsidiary, community development financial institution, limited liability company, or limited partnership—that makes investments or conducts activities that primarily benefit low- and moderate-income individuals or areas or other areas targeted for redevelopment.

The proposed definition of CDE better reflects the scope of 12 U.S.C. 24 (Eleventh), which permits a national bank to “make [public welfare] investments directly or by purchasing interests in an entity primarily engaged in making such investments.” 12 U.S.C. 24 (Eleventh) (emphasis added). The language of the statute does not restrict the entities in which a national bank may invest to a particular form of organization, provided the investing bank is not exposed to unlimited liability. Nor does the legislative history suggest that any such restriction was intended. Accordingly, the OCC has interpreted section 24 (Eleventh) broadly, permitting a national bank to invest in a variety of entities that make public welfare investments themselves or that use a national bank’s investment to support other types of public welfare activities.⁵ The proposed definition of CDE is consistent with this long-standing interpretation of the statute.

⁴ 12 CFR 24.2(c). Current § 24.3 sets forth the criteria for a public welfare investment, including that the investment primarily benefits low- and moderate-income individuals or areas or other areas targeted for redevelopment, and that the bank demonstrates non-bank community support for the investment.

⁵ The annual OCC Directory of National Bank Community Development Investments lists numerous public welfare activities conducted by CDEs, such as the development of affordable housing, job creation, and commercial revitalization. For the most recent examples of such activities, see “National Bank Community Development Investments, 2001 Directory.”

Public Welfare Investments (§ 24.3)

Section 24 (Eleventh) authorizes national banks to make investments “designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as through the provision of housing, services, or jobs).” Current § 24.3 implements this authority by providing that a national bank may make an investment under part 24 if two conditions are met. The first, set forth in current § 24.3(a), requires that the investment primarily benefit low- and moderate-income individuals, low- and moderate-income areas, or other areas targeted for redevelopment⁶ by providing or supporting one or more of four enumerated public welfare activities.⁷ The second condition, set forth in current § 24.3(b), requires the bank to demonstrate non-bank community support for, or participation in, the investment.⁸ The proposal simplifies the text of the first condition and deletes the second.

Under proposed § 24.3, a national bank may make a part 24 investment if the investment primarily benefits low- and moderate-income individuals or areas or other areas targeted for redevelopment by governmental entities.⁹ The proposal deletes the four enumerated public welfare activities set forth in current § 24.3(a)(1)–(4). The list

⁶ Under the current regulation, redevelopment areas are those targeted for redevelopment by “local, State, tribal or Federal government (including Federal enterprise communities and Federal empowerment zones) * * *” 12 CFR 24.3(a).

⁷ These include affordable housing, equity or debt financing for small businesses, area revitalization or stabilization, and “other activities, services, or facilities that primarily promote the public welfare.” 12 CFR 24.3(a).

⁸ The current rule permits banks to demonstrate community support by, for example, having non-bank community representatives as members of the board of directors of a CDE or on a separate advisory board for the bank’s community development activities; formation of formal business relationships between the bank and a community organization; contractual agreements with community partners to provide services in connection with the proposed investment; joint ventures with local small businesses; and financing for the proposed investment from the public sector or community development organizations or the receipt of Federal low-income housing tax credits by the project in which the investment is made. 12 CFR 24.3(b).

⁹ Because the purposes and requirements of section 24 (Eleventh) and the Community Reinvestment Act are different, a part 24 investment does not necessarily qualify for consideration under the Community Reinvestment Act. For example, the Community Reinvestment Act limits the areas in which a bank may invest based on location and income levels, whereas part 24 places no geographic restrictions on a bank’s public welfare investment and permits a bank to make an investment in an area that is not low- or moderate-income (provided the area has been targeted for redevelopment).

is merely illustrative of the types of investments a national bank may make under this part. It appears unnecessary in light of § 24.6, which sets forth examples of public welfare investments a national bank may make under this part (see the discussion that follows of proposed changes to § 24.6, including additional examples of permissible investments).

The OCC is also proposing to delete the community support demonstration requirement set forth in current § 24.3(b) because it is not required by statute or the comparable rules that apply to other financial institutions that have Federal statutory investment authority similar to section 24 (Eleventh)¹⁰ and may limit a bank’s flexibility in making public welfare investments by hinging the permissibility of the investment on factors other than the nature and purpose of the investment. Moreover, the OCC’s experience in implementing part 24 suggests that investments that otherwise meet the requirements of part 24 will receive the support of the communities benefited.

Investment Limits (§ 24.4)

Section 24.4 of the current rule implements the investment limits imposed by 12 U.S.C. 24 (Eleventh). Under both the regulation and the statute, a national bank’s aggregate public welfare investments may not exceed 5 percent of its capital and surplus, unless the bank is at least adequately capitalized and the OCC determines that a higher amount will pose no significant risk to the deposit insurance fund. In no case, however, may a bank’s aggregate outstanding part 24 investments exceed 10 percent of its capital and surplus.

The proposal amends § 24.4 to clarify that a bank should follow generally accepted accounting principles (GAAP) when calculating the aggregate amount of its part 24 investments, unless otherwise directed or permitted in writing by the OCC for prudential or safety and soundness reasons. Those reasons could exist, for example, if GAAP accounting permits a financially weak bank to increase investments in an unprofitable CDE.

Public Welfare Self-Certification and Prior Approval Procedures (§ 24.5)

Currently, an eligible national bank may make qualifying public welfare investments without prior notification

¹⁰ We note that the Federal Reserve Board’s community development regulation (12 CFR 208.22) implements nearly identical statutory authority (12 U.S.C. 338a) and does not require the demonstration of community support for an investment.