

consideration only of the direct impact on small entities.<sup>60</sup> The Small Business Administration (SBA) has said: "The courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates them," that is, when it directly applies to them.<sup>61</sup> Since the proposed approach would directly apply to only a limited number of large banking organizations, it would appear that the Agencies may certify that the issuance of this ANPR would not have significant economic impact on a substantial number of small entities.

Do the potential advantages of the A-IRB approach, as measured by the specific capital requirements on lower-risk loans, create a competitive inequality for small institutions, which are effectively precluded from adopting the A-IRB due to stringent qualification standards? Conversely, would small institutions that remain on the general risk-based capital rules be at a competitive advantage from specific capital requirements on higher risk assets vis-à-vis advanced approach institutions? How might the Agencies estimate the effect on credit availability to small businesses or retail customers of general banks?

#### *C. Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (UMRA) requires preparation of a written budgetary impact statement before promulgation of any rule likely to result in a "Federal mandate" that "may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year."<sup>62</sup> A "Federal mandate" includes any regulation "that would impose an enforceable duty upon the private sector. \* \* \*" If a budgetary impact statement is required, the UMRA further requires the agency to identify and consider a reasonable number of

regulatory alternatives before promulgating the rule in question. The UMRA applies to the OCC and the OTS, but not the Board or the FDIC.

The OCC and the OTS have asked for comments and information from core and opt-in banks on compliance costs and, generally, on alternative regulatory approaches, for purposes of evaluating what actions they need to take in order to comply with E.O. 12866. That same information (with cost information adjusted annually for inflation) is relevant to those agencies' determination of whether a budgetary impact statement is necessary pursuant to the UMRA. Commenters are therefore asked to be mindful of the UMRA requirements when they provide information about compliance costs and in suggesting alternatives to the approach described in this ANPR.

#### *D. Paperwork Reduction Act*

Each of the Agencies is subject to the Paperwork Reduction Act of 1995 (PRA).<sup>63</sup> The PRA requires burden estimates that will likely be based on some of the same information that is necessary to prepare an economic analysis under E.O. 12866 or an estimate of private sector expenditures pursuant to the UMRA.

In particular, an agency may not "conduct or sponsor" a collection of information without conducting an analysis that includes an estimate of the "burden" imposed by the collection. A collection of information includes, essentially, the eliciting of identical information—whether through questions, recordkeeping requirements, or reporting requirements—from ten or more persons. "Burden" means the "time, effort, or financial resources expended by persons to generate, maintain, or provide information" to the agency. The rulemaking initiated by this ANPR will likely impose requirements, either in the regulations themselves or as part of interagency implementation guidance, that are covered by the PRA. In order to estimate burden, the Agencies will need to know, for example, the cost—in terms of time and money—that mandatory and opt-in banks would have to expend to develop and maintain the systems, procedures, and personnel that compliance with the rules would require. With this in mind, to assist in their analysis of the treatment of retail portfolios and other exposures, the Agencies intend to request from U.S. institutions additional quantitative data for which confidential treatment may be requested in

accordance with the Agencies' applicable rules.

While it will be difficult to identify those requirements with precision before a proposed rule is issued, this notice and the draft supervisory guidance published elsewhere in today's **Federal Register** generally describes aspects of the Agencies' implementation of the New Accord where new reporting and recordkeeping requirements would be likely. Commenters are asked to provide any estimates they can reasonably derive about the time, effort, and financial resources that will be required to provide the Agencies with the requisite plans, reports, and records that are described in this notice and in the supervisory guidance. Commenters also are requested to identify any activities that will be conducted as a result from the capital and methodological standards in the framework presented in this ANPR that would impose new recordkeeping or reporting burden. Commenters should specify whether certain capital and methodological standards would necessitate the acquisition or development of new compliance/ information systems or the significant modification of existing compliance/information systems.

#### *List of Acronyms*

ABCP Asset-Backed Commercial Paper  
 ADC Acquisition, Development, and Construction  
 AFS Available-for-Sale (securities)  
 AIG Accord Implementation Group  
 A-IRB Advanced Internal Ratings-Based (approach for credit risk)  
 ALLL Allowance for Loan and Lease Losses  
 AMA Advanced Measurement Approach (for operational risk)  
 ANPR Advance Notice of Proposed Rulemaking  
 BIS Bank for International Settlements  
 BSC Basel Committee on Banking Supervision  
 CCF Credit Conversion Factor  
 CDC Community Development Corporations  
 CEDE Community and Economic Development Entity  
 CF Commodities Finance  
 CRE Commercial Real Estate  
 CRM Credit Risk Mitigation  
 EAD Exposure at Default  
 EL Expected Loss  
 FFIEC Federal Financial Institutions Examination Council  
 FMI Future Margin Income  
 GAAP Generally Accepted Accounting Principles  
 HVCRE High Volatility Commercial Real Estate  
 IMF International Monetary Fund

<sup>60</sup> With respect to banks, the Small Business Administration (SBA) has defined a small entity to be a bank with total assets of \$150 million or less. 13 CFR § 121.201.

<sup>61</sup> SBA Office of Advocacy, A Guide for Government Agencies, "How to Comply with the Regulatory Flexibility Act (May 2003), at 20 (emphasis added). See also *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 340–43 (D.C. Cir. 1985) ("[W]e conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule.") (emphasis added) (construing language in the RFA that was unchanged by subsequent statutory amendments).

<sup>62</sup> The Unfunded Mandates Reform Act is codified at 2 U.S.C. 1532 *et seq.*

<sup>63</sup> 44 U.S.C. § 3501 *et seq.*