

# Rules and Regulations

Federal Register

Vol. 68, No. 173

Monday, September 8, 2003

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## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

#### 12 CFR Part 562

[No. 2003-45]

RIN 1550-AB54

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

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

**ACTION:** Final rule.

**SUMMARY:** The Office of Thrift Supervision (OTS) is adopting as final an interim final rule that amended its annual independent audit requirements for small, non-public, highly rated savings associations that voluntarily obtain independent audits. This change made OTS's requirements more consistent with those of the other federal banking agencies and avoided the potential regulatory burden from imposing unnecessary additional restrictions.

**EFFECTIVE DATE:** September 8, 2003.

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

#### SUPPLEMENTARY INFORMATION:

##### Background

Savings associations that are publicly traded,<sup>1</sup> have assets of \$500 million or

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

On July 30, 2002, Congress passed the Sarbanes-Oxley Act of 2002.<sup>4</sup> Title II of that act sets forth standards for auditor independence. The standards include section 201(g)(5), which prohibits a registered public accountant from performing an audit for a public company contemporaneously with providing that company with delineated non-audit services, including internal audit outsourcing services. This congressional mandate affected a change in the SEC independence rules.

As reflected in the interim final rule, OTS believed that if its rules remained unchanged, a savings association obtaining a voluntary audit may not use its external auditors to perform non-auditing services.<sup>5</sup> Although OTS encourages non-publicly held savings associations that voluntarily file audits with the agency to follow the prohibition from Sarbanes-Oxley, OTS was concerned that an absolute prohibition in this manner may be unnecessarily detrimental to some voluntary filers. Specifically, OTS believed that small institutions with less complex operations and limited staff, may, in some instances, use their independent public accountant to perform both an external audit and some or all of an audit client's non-audit activities consistent with the OTS's safety and soundness objectives. Some of these institutions may not have access to a full range of qualified public accountants such that they could engage

both an external auditor and a different outside firm to perform non-audit functions. Other institutions may reasonably have determined that the costs of having a full time in-house staff to perform those services exceed the benefits.

Since OTS issued the interim rule, the SEC, based on provisions from the Sarbanes-Oxley Act, added new provisions to its independence rules, including ones governing prohibited non-audit services (such as the prohibition on internal audit outsourcing), pre-approval requirements, auditor partner rotation, auditor reports to the audit committee, and conflict of interest. Without the OTS rule change, voluntary filers would also be subject to these SEC provisions on independence. The OTS is equally concerned that these additional SEC independence rules may unnecessarily burden voluntary filers.

Moreover, none of the other banking agencies require that institutions that file voluntary audits follow the SEC independence rules. OTS believed that requiring savings associations to do so might place these savings associations at an unnecessary competitive disadvantage as these requirements became more restrictive.

For all of these reasons, OTS is finalizing its interim rule that amended its regulation to eliminate the requirement that institutions voluntarily filing audits comply with the SEC independence rules while retaining the requirement that institutions filing voluntary audits comply with the AICPA Professional Conduct Code, including those sections that address independence.<sup>6</sup>

#### Discussion of Comments

OTS received two public comments, both from trade associations. Both trade associations strongly supported the interim rule, noting that the rule change encourages voluntary filers to continue to file audits with the OTS. Moreover, the commenters heralded the fact that the same rule that applies to smaller banks by other federal banking regulators would now apply to smaller savings associations.

<sup>6</sup> OTS understands that passage of the Sarbanes-Oxley Act may place increased responsibilities on small publicly held savings associations, including the prohibitions against outsourcing internal non-audit services to the association's external auditor. Nothing in this rule affects those requirements.

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

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

<sup>4</sup> Sarbanes-Oxley Act of 2002, Pub. L. 107-204, section 201, 116 Stat. 745 (2002).

<sup>5</sup> These services include bookkeeping, financial information systems design, appraisal, valuation, and actuarial services, and internal audit outsourcing services. For a complete list of prohibited activities, see *id.* at section 201.

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