

the affiliate's activity is integral to the institution's business. Many industry commenters opposed consideration of affiliate lending except at the institution's option on the ground that consideration without the institution's consent may be equivalent to extending CRA coverage to affiliates that may not be subject to the statute. Some community and consumer groups supported consideration of affiliate activity and urged that the regulatory language be strengthened to require the agencies to take affiliate lending into account under certain circumstances. In the final rule, affiliate lending is considered only at the election of the institution, except with regard to the lending activity criterion, where, as described earlier, it will provide context for the assessment in order to discourage an institution from inappropriately influencing an evaluation of its CRA performance by conducting activities that would be viewed unfavorably in an affiliate. The agencies also received comments that the phrase "integral to the institution's business" in the proposal was unclear. The final rule does not use this phrase.

The other limitations on consideration of affiliate lending contained in the 1994 proposal have been retained in the final rule. However, the limitation against double-counting of loans has been modified to clarify that an institution can count as a purchase a loan originated by an affiliate, or count as an origination a loan sold to an affiliate, provided the same loans are not sold several times to inflate their value for CRA purposes.

The agencies have added language to the final rule to clarify that affiliate lending is not considered in evaluating the proportion of total lending made within an institution's assessment area(s). The agencies also wish to clarify that if an institution elects to have the lending activities of its affiliates considered in the evaluation of the institution's lending, the geographies served by the affiliate's lending activities do not affect the institution's delineation of assessment area(s).

Furthermore, the final rule would not change the existing supervisory authority of the agencies over institutions and their affiliates. Therefore, although lending by affiliates may be treated as lending by an institution, this treatment for CRA purposes will not permit a regulatory agency to examine any institution or its affiliate if it does not otherwise have such authority.

Direct and indirect lending. Many consumer and community groups expressed concern that the 1994

proposal did not adequately emphasize direct lending by the institution as compared to indirect lending carried out through consortia and third parties. Other commenters, particularly from the industry, urged a return to the provisions of the 1993 proposal that would have treated direct and indirect lending as interchangeable. The final rule clarifies that loans originated or purchased by third parties and consortia in which an institution participates or invests may only be considered if they qualify as community development loans and may only be considered under the community development lending criterion. Indirect loans will not affect an institution's performance under the other four lending test criteria. Under the final rule, direct lending performance is an essential element of an institution's CRA performance.

Some commenters requested clarification whether an institution is required to participate directly in making or funding each loan that is made through a consortium or third party in order for the loan to be considered under the community development lending criterion of the lending test. An institution need not directly participate in the making or funding of consortia- and third party-loans for the loans to be considered (subject to the constraints set out in the rule) under the community development lending criterion, provided the loans meet the definition of community development loan. Loans originated directly on the books of the institution or purchased by the institution are considered to have been made directly by the institution, even if the institution originated or purchased the loans as a result of its participation in a loan consortium.

Investment Test

The 1994 proposal would have focused on the dollar amount of an institution's qualified investments, the innovativeness and complexity of the qualified investments and their responsiveness to the credit and economic development needs of the community. The 1994 proposal also would have clarified that the investment test considers all qualified investments benefitting a broader statewide or regional area that included an institution's assessment area. Most of the comments on the investment test concerned the definition of qualified investment and have been discussed earlier in the preamble.

Limited investment authority. One group of commenters representing institutions with statutory constraints on their authority to make this type of

investment maintained that reliance on an investment test in assigning a CRA rating could unfairly stigmatize their CRA performance. As previously discussed, the final rule has modified the performance context for CRA evaluations to account for financial institutions with limited investment authority. These modifications would permit an institution with limited authority to make investments to receive a low satisfactory rating under the investment test, although it has made few or no qualified investments, if the institution has a strong lending record, thereby preventing potential anomalies in the CRA performance ratings.

Disposition of branch premises. To implement the statutory requirement in 12 U.S.C. 2907(a), the final rule specifies that a donation, sale on favorable terms or rent-free occupancy of a branch (in whole or in part) in a predominantly minority neighborhood to any minority- or women-owned depository institution is a qualifying investment. Similar disposition of branch premises to a financial institution with a primary mission of promoting community development is also a qualified investment.

Service Test

Compared to the 1993 proposal, the service test in the 1994 proposal would have reduced the significance in the CRA performance evaluation of an institution's full service, "brick and mortar" branch structure by elevating the consideration given to alternative systems for delivering retail banking services (e.g., ATMs, mobile branches, loan production offices, or banking-by-telephone or banking-by-computer). In this regard, the provision of retail banking services would have been evaluated on the basis of an institution's: (1) Distribution of branches and ATMs among low-, moderate-, middle-, and upper-income areas; (2) record of opening and closing branches and ATMs; (3) range of services to low-, moderate-, middle-, and upper-income areas; and (4) efforts to make alternative delivery systems responsive to the needs of low- and moderate-income areas and individuals. In addition, the extent to which an institution provided innovative and responsive community development services would also have been considered under the service test. The final rule retains the essential structure and elements of the test as proposed but makes some modifications.

Relative weight of branches and alternative delivery systems. The overwhelming majority of community and consumer group commenters stated