Center for Regulatory Effectiveness

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December 15, 2008

Ms. Frances Garcia
Inspector General
U.S. Government Accountability Office
441 G St., NW
Washington, DC 20548

RE: Protecting Small Financial Institutions: The Need for IG Review of GAO's Compliance with the Congressional Review Act

Dear Ms. Garcia:

The Center for Regulatory Effectiveness ("CRE"), in its role as a regulatory watchdog focusing on agency compliance which the "good government" laws that regulate the regulatory process, has made extensive use GAO's high quality and insightful reports. Unfortunately, the GAO failed to adhere to their statutory mandate in preparing the Congressional Review Act ("CRA") report for the major rule implementing the Unlawful Internet Gambling Enforcement Act ("UIGEA") [GAO-09-212R]. As discussed below, the GAO report did not adhere to minimum requirement for such reports set forth in the CRA and such failure threatens material harm to small businesses, particularly small depository financial institutions including banks and credit unions.

CRA Report Requirements

The CRA requires that the Comptroller General provide a report on each major rule to the committees of jurisdiction in each House of Congress. Such reports "shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B)." [5 USC § 801(a)(2)(A), Emphasis added.] Thus, the CRA report is required to include an assessment of the agency's compliance with:

> "(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;
> (iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and
> (iv) any other relevant information or requirements under any other Act and any relevant Executive orders." [5 USC § 801(a)(1)(B)]

GAO's Failure to Assess and Provide Relevant Information on Agency Compliance with the Regulatory Flexibility Act

GAO's report failed to assess and provide Congress with relevant information concerning actions by the agencies **and the US Small Business Administration's Office of Advocacy** under 5 USC § 603 (Initial Regulatory Flexibility Analysis). The GAO report did not discuss the agencies' § 603 analysis even though

the SBA's Office of Advocacy, the agency statutorily charged with oversight of the Regulatory Flexibility Act, informed the agencies that they "have not analyzed properly the full economic impact of the proposal on small entities as required by the Regulatory Flexibility Act (RFA)."[1]

The SBA's comments to the agencies also recommended that they "prepare and publish for public comment a revised IRFA to determine the full economic impact on small entities; identify duplicative, overlapping or conflicting regulations; and consider significant alternatives to meet its objective while minimizing the impact on small entities before going forward with the final rule."[2]

Congress relies on GAO's CRA report to know if agencies have inadequately complied with specific procedural requirements to protect small businesses. Particularly during this financial crisis it seems incomprehensible that GAO did not consider SBA's determination that the agencies had not properly complied with their § 603 statutory requirements for determining the rule's impacts on small banks and other depository institutions to be "relevant" or otherwise worthy of discussion. This lapse is even more difficult to understand since CRE provided GAO with specific information and documentation on SBA's assessment that the agencies had not properly complied with § 603. CRE's letter to GAO is attached.

GAO's Failure to Assess and Provide Relevant Information on Agency False Assertion Regarding the Paperwork Reduction Act

GAO's CRA report includes discussion of agency compliance with the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520. GAO's report on the UIGEA, however, did not address a false, materially significant statement made by the agencies in the final rule regarding their authority under the PRA. Specifically, the final rule stated, "The collection of information contained in the Treasury's final rule has been reviewed and approved by OMB in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d))."[3]

The above statement in the final rule is false. OMB did not approve the collection of information. Instead, OMB explicitly informed the Treasury Department that approval under the PRA was being withheld. OMB informed the Department that, in providing a control number, "This OMB action is not an approval to conduct or sponsor an information collection under the Paperwork Reduction Act of 1995. ... OMB is withholding approval at this time." A copy of OMB's statement to the Department is included in Attachment 1 to CRE letter to GAO of November 21st.

Instead to calling Congress' attention to Treasury's false claim of legal authority to collect the information contained in the final rule, the GAO report simply stated that "Treasury submitted the information collection requirements to OMB and is currently awaiting approval...." By not informing Congress that Treasury made a false assertion of legal authority under the PRA in the final rule, GAO materially failed in their CRA duties to inform Congress regarding agency compliance with relevant laws.

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[1] http://www.sba.gov/advo/laws/comments/frs07_1212.html.

[2] Ibid.

[3] 73 Fed. Reg. 69403, col.3, November 18, 2008.

Recommended Actions

The nation's financial institutions are in crisis. The UIGEA has been determined by the Office of Management and Budget to be a major rulemaking under the CRA and also to be an economically significant regulatory action under Executive Order 12866. The Treasury Department believes the final rule would impose compliance costs that "will exceed $100 million in the first year"[4] Despite the economic importance of the rule, the agencies did not comply with two statutes designed to protect the interests of financial institutions and other businesses, one these laws being specifically intended to protect small businesses. Thus, it is required by law for GAO's CRA report to inform Congress of the rulemaking deficiencies.

Since GAO's report did not comply with the requirements of the CRA, as detailed above, it is incumbent on GAO's Inspector General, the watchdog's watchdog, to:

1. Perform a supplementary CRA analysis of the UIGEA final rule;

2. Initiate a review into GAO's compliance with CRA requirements with respect to the UIGEA rulemaking; and

3. Provide GAO with recommendations for improving their review of major rules under the CRA.

Sincerely,

/s/
Jim Tozzi
Member, Board of Advisors

Attachment

cc: Mr. Gene L. Dodaro, Acting Comptroller General, General Accountability Office
Mr. Sandy K. Baruah. Acting Administrator, U.S. Small Business Administration
The Honorable Barney Frank, Chairman, House Committee on Financial Services
The Honorable Christopher J. Dodd, Chairman, Senate Committee on Banking, Housing and Urban Affairs

[4] 73 Fed. Reg. 69397, col.2, November 18, 2008.

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November 21, 2008

Mr. Michael R. Volpe
Assistant General Counsel
U.S. Government Accountability Office
Room 7182
441 G St., NW
Washington, DC 20548

RE: Congressional Review Act: UIGEA Rule

Dear Mr. Volpe:

GAO has already or will soon receive from the Treasury Department their report to GAO under the Congressional Review Act for the Major Rule implementing the Unlawful Internet Gambling Enforcement Act (UIGEA). I am writing with to three specific deficiencies in the UIGEA rule directly relate to GAO's review of the rule under the Congressional Review Act:

1. **PRA: Incorrect Assertion of OMB Approval**. The Final Rule states that "The collection of information contained in the Treasury's final rule has been reviewed and approved by OMB in accordance with the requirements of the Paperwork Reduction Act." As documented in Attachment 1, as of today, Treasury's ICR remains under OMB review. Moreover, as documented in the attachment, OMB explicitly withheld approval of the information collection request. It should also be noted that the agencies failed to account for many of the paperwork mandates contained in the rule, as detailed in Attachment 2.

2. **Regulatory Flexibility Act: SBA Determined Lack of Compliance**. As documented in Attachment 3, the Small Business Administration's Office of Advocacy informed the agencies that they "have not analyzed properly the full economic impact of the proposal on small entities as required by the Regulatory Flexibility Act (RFA)" and advised the agencies to "prepare and publish for public comment a revised IRFA to determine the full economic impact on small entities...."

3. **Executive Order 12866: Failure to Conduct Analyses for a Significant Regulatory Action**. While the agencies, belatedly – after the close of public comments – determined that the rule was economically significant under EO12866, they did not perform the analyses specified in OMB Circular A-4 that apply to such regulatory actions.

I strongly urge you to inform Congress of these deficiencies as part of GAO's CRA report to Congress.

Sincerely,

/s/
Jim Tozzi
Member, Board of Advisors

Attachment

ATTACHMENT 1

procedures suggest that the participant conduct due diligence on that customer similar to what is contemplated for new customers. Commenters also suggested that the final rule provide more guidance on the due diligence that would be deemed sufficient.[136] In response to these comments, the final rule provides detailed steps that a participant can choose to take to conduct reasonable risk-based due diligence as contemplated by the final rule's examples.

The proposed rule's designated payment system examples also suggested including as a term of commercial customer agreements that the customer may not engage in restricted transactions through the participant's facilities. Numerous commenters stated that such a requirement to modify existing agreements would be unduly burdensome.[137] In addition, commenters noted that typical customer agreements already include a prohibition against unlawful transactions, so modifying the

established a compliance date for the final rule 12 months from its publication. This longer period will give small entities more time to establish and implement policies and procedures reasonably designed to identify and block or otherwise prevent restricted transactions, and may thereby reduce small entities' costs of complying with the rule.

Commenters also recommended some significant alternatives to approaches adopted in the proposed rule that the Agencies have not adopted in the final rule. Some of these suggestions may have reduced the burden imposed by the rule on some small entities, but were rejected by the Agencies for factual, policy, or legal reasons. For example, the final rule does not contemplate that any government entity will create, publish, and maintain a list of unlawful Internet gambling businesses. Several commenters indicated that such a list would assist financial institutions in identifying Internet gambling operations.[140] After carefully considering this issue, including the

constitute policies and procedures reasonably designed to prevent or prohibit restricted transactions. Accordingly, the Agencies have determined that blanket exemptions for the ACH, check, and wire-transfer systems would not be appropriate given the standard for an exemption set forth in section 5364(b)(3) of the Act.

E. Paperwork Reduction Act Analysis

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board has reviewed the final rule. The collection of information contained in the Treasury's final rule has been reviewed and approved by OMB in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). The Agencies may not conduct or sponsor, and an organization is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers are 1505–0204 for the Treasury and 7100–0317 for the Board.

Office of Information and Regulatory Affairs (OIRA)

Information Collections under Review

November 21, 2008

Note: "**" denotes recently received

Department of Treasury

AGENCY: TREAS-DO OMB CONTROL NUMBER: 1505-0204

RECEIVED DATE: 11/12/2008 ICR REFERENCE NUMBER: 200811-1505-002

TITLE: Prohibition on Funding of Unlawful Internet Gambling

ANNUAL BURDENS TO THE PUBLIC:

	RESPONSES	HOURS	COST (DOLLARS)
PREVIOUS	0	0	0
REQUESTED	9,148	589,520	0

NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION

Date 02/01/2008

Department of the Treasury
Departmental Offices
FOR CERTIFYING OFFICIAL: Michael Duffy
FOR CLEARANCE OFFICER: Robert Dahl

In accordance with the Paperwork Reduction Act, OMB has taken action on your request received 09/11/2007

ACTION REQUESTED: New collection (Request for a new OMB Control Number)
TYPE OF REVIEW REQUESTED: Regular
ICR REFERENCE NUMBER: 200709-1505-001
AGENCY ICR TRACKING NUMBER:
TITLE: Prohibition on Funding of Unlawful Internet Gambling

OMB ACTION: Comment filed on proposed rule
OMB Number: 1505-0204

EXPIRATION DATE: Not Applicable DISCONTINUE DATE:

COMMENT: OMB files this comment in accordance with 5 CFR 1320.11(c). This OMB action is not an approval to conduct or sponsor an information collection under the Paperwork Reduction Act of 1995. This action has no effect on any current approvals. If OMB has assigned this ICR a new OMB Control Number, the OMB Control Number will not apfear in the active inventory. For future submissions of this information collection, reference the OMB Control Number provided. Pursuant to 5 CFR 1320.11(c), OMB files this comment on this information collection request (ICR). In accordance with 5 CFR 1320, OMB is withholding approval at this time. Prior to publication of the final rule, the agency should provide a summary of any comments related to the information collection and their response, including any changes made to the ICR as a result of comments.

OMB Authorizing Official:

Kevin F. Neyland
Deputy Administrator,
Office Of Information And Regulatory Affairs

UIGEA Recordkeeping Requirements

▸ Automated Clearing House (ACH) Systems

- Due Diligence: Domestic. Develop due diligence procedures to prevent origination and/or receipt of "restricted" transactions. Examples of such procedures include:
  - Screening potential commercial customers to ascertain the nature of their business; and
  - Including as a term in commercial customer agreements a prohibition on restricted transactions, which requires legal research to define the term appropriately for firms based in various states and tribal areas.
- Sanctions Against Customers Believed to be Engaging in Restricted Transactions. Develop procedures specifying actions to be taken against customers believed to have originated or received a restricted transaction. Examples of acceptable sanction procedures include determining:
  - When fines should be imposed;
  - When the customer should not be allowed to originate ACH debit transactions; and
  - The circumstances under which the account should be closed.
- Due Diligence: Foreign-Originated ACH Debit Transaction. Develop due diligence procedures to prevent a foreign sender (non-US banks, third-party payments processors) from originating an ACH debit transaction. An example of acceptable due diligence is:
  - Including in agreements with foreign senders a requirement that the foreign bank and/or other overseas payment processors "have reasonably designed policies and procedures in place to ensure that the relationship will not be used to process restricted transactions."
- Sanctions Against Foreign Banks Originating a Restricted Debit Transaction. Develop procedures specifying actions to be taken against foreign senders believed to have originated a restricted ACH debit transaction. Examples of acceptable sanction procedures include determining:
  - When ACH services to the foreign sender should be denied; and
  - The circumstances under which the cross-border arrangements with the foreign sender should be terminated.

- Preventing ACH Credit Transactions to Foreign Institutions. Develop policies and procedures to prevent crediting a foreign bank for a restricted transaction. The policies should address:

  – When ACH credit transactions for the foreign bank or through the foreign gateway operator should be denied; and

  – The circumstances under which the cross-border arrangements with the foreign bank should be terminated.

- **Card Systems**

  - Due Diligence. Card system operators and banks are to develop policies and procedures in establishing or maintaining a merchant relationship designed to ensure that the merchant will not receive restricted transactions through the card system. Examples of such policies include:

    – Screening potential merchant customers to ascertain the nature of their business; and

    – Including as a term of the merchant customer agreement that the merchant may not receive restricted transactions through the card system which requires which requires legal research to define the term appropriately for customers based in various states and tribal areas.

  - Identifying and Blocking Restricted Transactions. Develop procedures to identify and block restricted transactions. An example of an acceptable procedure is:

    – Establishing transaction codes and merchant/business category codes that are required to accompany the authorization request for a transaction and creating the operational functionality to enable the card system or the card issuer to identify and deny authorization for a restricted transaction.

  - Monitoring/Testing Procedures. Develop procedures for ongoing monitoring and/or testing to detect potential restricted transactions. Examples of acceptable proceudres include:

    – Conducting testing to ascertain whether transaction authorization requests are coded correctly;

    – Monitoring of web sites to detect unauthorized use of the relevant card system, including its trademark; and

  - Monitoring and analyzing payment patterns to detect suspicious payment volumes from a merchant customer.

- Sanctions Against Merchant Customers. Develop procedures specifying actions to be taken against merchant customers by card systems and/or issuing banks if they become aware that the merchant has received restricted transactions. Examples of such procedures include determining:

  - When fines should be imposed; and

  - When access to the card system should be denied.

- **Check Systems/Banks**

  - Due Diligence: Domestic. Banks are to develop due diligence procedures in establishing and/or maintaining a customer relationship to prevent the customer from receiving restricted transactions. Examples of such procedures include:

    - Screening potential commercial customers to ascertain the nature of their business; and

    - Including as a term of the commercial customer agreement that the customer may not deposit checks that constitute restricted transactions.

  - Sanctions Against Customers. Develop procedures specifying actions to be taken against customers depositing checks that constitute a restricted transaction. Examples of such procedures include determining:

    - When checks for deposit should be refused; and

    - The circumstances under which the account should be closed.

  - Due Diligence: Foreign Banks. Banks are to develop due diligence procedures in establishing and/or maintaining a correspondent relations with foreign banks to prevent the foreign institutions from sending checks which are part of a restricted transaction to the domestic depository institution for collection. An accpetable example of such a procedure is:

    - Negotiating with foreign banks to include as a term in agreements with them the requirement that the foreign bank have reasonably designed policies and procedures in place to ensure that the correspondent relationship will not be used to process restricted transactions.

- Sanctions Against Foreign Banks. Develop procedures specifying actions to be taken against foreign banks found to have sent checks to the domestic institution for collection. Examples of such sanctions include determining:
  - When check collection services for the foreign bank should be denied; and
  - The circumstances under which the correspondent account should be closed.

- **Money Transmitting Businesses**

  - Due Diligence. Money transmitting businesses are to develop due diligence procedures in establishing and/or maintaining commercial subscriber relationships to ensure that they will not receive restricted transactions using such techniques as:
    - Screening potential commercial subscribers to ascertain the nature of their business; and
    - Including as a term of the commercial subscriber agreement that the subscriber may not receive restricted transactions.
  - Monitoring/Testing Procedures. Develop procedures for ongoing monitoring and/or testing to detect potential restricted transactions such as
    - Monitoring and analyzing payment patterns to detect suspicious payment volumes to any recipient; or
    - Monitoring web sites to detect unauthorized use of the relevant money transmitting business, including their trademarks.
  - Sanctions Against Fund Recipients. Develop procedures specifying actions to be taken against recipients of restricted transactions. Examples of such sanctions include determining:
    - When fines should be imposed;
    - When access should be denied; and
    - The circumstances under which an account should be closed.

- **Wire Transfer Systems**

  - Due Diligence. The beneficiary bank of a wire transfer are to develop due diligence procedures in establishing and/or maintaining commercial customer relationship to

ensure that the customer does not receive restricted transactions using such techniques as:

  - Screening potential commercial subscribers to ascertain the nature of their business; and

  - Including as a term of the commercial customer agreement a prohibition against the customer receiving restricted transactions which requires legal research to define the term appropriately for firms based in various states and tribal areas.

- Sanctions Against Commercial Customers. Develop procedures specifying actions to be taken against commercial customers receiving restricted transactions. Examples of such sanctions include determining:

  - When access to the wire transfer system should be denied; and

  - The circumstances under which an account should be closed.

- Preventing Restricted Foreign Transactions. A bank sending/crediting funds to a foreign bank shall have procedures to identify and block restricted transactions. These procedures shall include sanctions against foreign banks such as determining:

  - When wire transfer services for the foreign bank should be denied; and

  - The circumstances under which the correspondent account should be closed.

ATTACHMENT 3

December 12, 2007

The Honorable Jennifer Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Valerie Abend
Deputy Assistant Secretary for Critical Infrastructure Protection and Compliance Policy
Department of Treasury
Office of Critical Infrastructure Protection and Compliance Policy
Room 1327
Main Treasury Building
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Prohibition on Funding of Unlawful Internet Gambling Act of 2006
Federal Reserve: Docket Number R-1298
Treas-DO: Docket Number Treas-DO-2007-0015

Dear Ms. Johnson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment to the proposed rulemaking on the Prohibition on Funding of Unlawful Internet Gambling. The Office of Advocacy believes that Department of Treasury and the Federal Reserve System (hereinafter "the agencies") have not analyzed properly the full economic impact of the proposal on small entities as required by the Regulatory Flexibility Act (RFA). Advocacy recommends that the agencies prepare a revised initial regulatory flexibility analysis (IRFA) to address the concerns presented below.

Advocacy Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration.

Section 612 of the RFA requires Advocacy to monitor agency compliance with the Act, as amended by the Small Business Regulatory Enforcement Fairness Act.[1]

On August 13, 2002, President George W. Bush enhanced Advocacy's RFA mandate when he signed Executive Order 13272, which directs Federal agencies to implement policies protecting small entities when writing new rules and regulations. Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

The Proposed Rule

On October 4, 2007, the agencies published a proposed rule entitled *Prohibition on Funding of Unlawful Internet Gambling* to implement applicable provisions of the Unlawful Internet Gambling Enforcement Act of 2006 (the ''Act''). [2] In accordance with the requirements of the Act, the proposed rule designates certain payment systems that could be used in connection with unlawful Internet gambling transactions restricted by the Act. The proposed rule requires participants in designated payment systems to establish policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit transactions in connection with unlawful Internet gambling. As required by the Act, the proposed rule also exempts certain participants in designated payment systems from the requirements to establish such policies and procedures because the Agencies believe it is not reasonably practical for those participants to identify and block or otherwise prevent or prohibit unlawful Internet gambling transactions restricted by the Act. Finally, the proposed rule describes the types of policies and procedures that nonexempt participants in each type of designated payment system may adopt in order to comply with the Act and includes non-exclusive examples of policies and procedures which would be deemed to be reasonably designed to prevent or prohibit unlawful Internet gambling transactions restricted by the Act. The proposed rule does not specify which gambling activities or transactions are legal or illegal because the Act itself defers to underlying State and Federal gambling laws in that regard and determinations under those laws may depend on the facts of specific activities or transactions (such as the location of the parties).

Requirements of the RFA

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Pursuant to the RFA, the agency is required to prepare an initial regulatory flexibility analysis (IRFA) to assess the economic impact of a proposed action on small entities. Under Section 601(3) of the RFA "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act. The IRFA must include: (1) a description of the impact of the proposed rule on small

[1] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).
[2] 72 Federal Register 56680.

entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities.[3] In preparing its IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.[4] The RFA requires the agency to publish the IRFA or a summary of the IRFA in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule.[5]

Pursuant to section 605(a), an agency may prepare a certification in lieu of an IRFA if the head of the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. A certification must be supported by a factual basis.

The Agencies' Compliance with the RFA

The agencies prepared an IRFA for the proposed rule and solicited comments from the public regarding the information in the IRFA. Advocacy, however, is concerned that the IRFA may not comply with the RFA.

The Agencies Fail to Provide Sufficient Information About the Economic Impact of the Proposed Rule

The purpose of an IRFA is to describe the impact of the proposal on small entities. Although the IRFA submitted by the agencies identifies types of small businesses that are affected by the proposal, it fails to provide information about the nature of the impact as required by the RFA. Instead, the agencies state that they do not have sufficient information and request that the information be provided by the public.

Advocacy appreciates the fact that the agencies may need to obtain information and commends the agencies for soliciting additional information from the public. However, Advocacy is concerned that the agencies are not providing all available information in the proposal. In the Supporting Statement for Recordkeeping Requirements associated with Regulation GG submitted to the Office of Management and Budget, the Federal Reserve stated that the total cost to the public is $19, 899,325. This estimate was based on an assumption that 30 percent of the work would be provided by clerical staff at $25 per hour; 45 percent would be performed by managerial or technical staff at $55 per hour, 15 percent would be performed by senior management at $100 an hour, and 10 per cent would be

[3] 5 USC § 603.
[4] 5 USC § 607.
[5] 5 USC § 603.

performed by legal counsel at $144.[6] This information was found under the reporting forms section on the Federal Reserve's website but it is not in the preamble of the proposed rule. If the agencies provided this information to the public in the IRFA, the public would be able to provide the agencies with meaningful comments about whether the assumptions about the costs are correct for small entities.

Moreover, Advocacy questions whether the projected paperwork costs are the only costs involved. In the statement, the Federal Reserve states that the estimate does not include large money-transmitting businesses because they already have systems in place. It states that smaller firms acting as agents in these large systems may be able to rely on the large system's policies and not need to establish their own policies and procedures. Will smaller firms incur legal fees in determining whether the proposed rule applies to them? If the rules do apply, will those firms incur costs to develop policies and to train their employees on the policies? These are a few of the questions that the agencies may want to consider in determining the economic impact of this regulation on small entities.

Alternatives

In addition, as noted above, the RFA requires agencies to consider less burdensome alternatives that still meet the statutory objectives. Instead of considering alternatives and providing a discussion about the economic impact of the potential alternatives, the agencies state that:

> "Other than noted above, the agencies are unaware of any significant alternatives to the proposed rule that accomplish the stated objectives of the Act and that minimize any significant economic impact of the proposed rule on small entities. The Agencies request comment on additional ways to reduce regulatory burden associated with this proposed rule."

It is unfortunate that the agencies do not put forward a meaningful discussion of alternatives in their proposal. Simply soliciting information about alternatives from small entities does not relieve the agencies of their obligation to consider less burdensome alternatives as part of the IRFA (in the proposed rule).

One alternative that the agencies may want to consider is exempting small money transmitters from the proposed rulemaking. The National Money Transmitters Association (NMTA) has informed Advocacy that the existing customer agreements and contracts with counterparties already include clauses prohibiting network use for unlawful transactions. As such, transmitting funds for an unlawful gambling activity would breach the contract. Moreover, a money transmitting business is similar to a wire transfer system in that both types of businesses operate as send agents, not financial institutions. Since a wire transfer system is exempt, the money transmitting businesses should also be exempt.

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[6] The Supporting Statement for Recordkeeping Requirements associated with regulation GG can be found at http://www.federalreserve.gov/reportforms/review.cfm. The information regarding the paperwork burden is on pages 5-6 of that statement.

Identification of Duplicative, Overlapping, or Conflicting Federal Rules

As noted above, the RFA also requires an agency to identify duplicative, overlapping, or conflicting federal rules. In this proposal, the agencies sought comment on whether there are statutes or regulations that would duplicate, overlap, or conflict with the proposed law. The RFA places the duty to identify existing regulations on agencies, not small entities. Shifting that obligation to small entities usurps the purpose of the RFA.

Conclusion

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule, to provide the information on those impacts to the public for comment, and to consider less burdensome alternatives. Advocacy encourages the agencies to prepare and publish for public comment a revised IRFA to determine the full economic impact on small entities; identify duplicative, overlapping or conflicting regulations; and consider significant alternatives to meet its objective while minimizing the impact on small entities before going forward with the final rule.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. Advocacy is available to assist the agencies in their RFA compliance. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Jennifer A. Smith
Assistant Chief Counsel for
Economic Regulation and Banking

cc: The Honorable Susan E. Dudley, Administrator
Office of Information and Regulatory Affairs, OMB