$2.28 would result in a 2004 base fee of $2.32 per bale. The formula in the Act provides for the use of the percentage change in the implicit price deflator of the gross national product (as indexed for the most recent 12-month period for which statistics are available). However, gross *national* product has been replaced by gross *domestic* product by the Department of Commerce as a more appropriate measure for the short-term monitoring and analysis of the U.S. economy.

The number of bales to be classed by the United States Department of Agriculture from the 2004 crop is estimated at 17,662,245 bales. The 2004 base fee was decreased 15 percent based on the estimated number of bales to be classed (1 percent for every 100,000 bales or portion thereof above the base of 12,500,000, limited to a maximum adjustment of 15 percent). This percentage factor amounts to a 35 cents per bale reduction and was subtracted from the 2004 base fee of $2.32 per bale, resulting in a fee of $1.97 per bale.

With a fee of $1.97 per bale, the projected operating reserve would be 32.37 percent. The Act specifies that the Secretary shall not establish a fee which, when combined with other sources of revenue, will result in a projected operating reserve of more than 25 percent. Accordingly, the fee of $1.97 must be reduced by 32 cents per bale, to $1.65 per bale, to provide an ending accumulated operating reserve for the fiscal year of not more than 25 percent of the projected cost of operating the program. This would establish the 2004 season fee at $1.65 per bale.

Accordingly, § 28.909, paragraph (b) is revised to reflect the increase of the HVI classification fee from $1.45 to $1.65 per bale.

As provided for in the Uniform Cotton Classing Fees Act of 1987, as amended, a 5 cent per bale discount would continue to be applied to voluntary centralized billing and collecting agents as specified in § 28.909(c).

Growers or their designated agents receiving classification data would continue to incur no additional fees if only one method of receiving classification data was requested. The fee for each additional method of receiving classification data in § 28.910 would remain at 5 cents per bale, and it would be applicable even if the same method were requested. The fee in § 28.910(b) for an owner receiving classification data from the central database would remain at 5 cents per bale, and the minimum charge of $5.00 for services provided per, monthly billing period would remain the same. The provisions of § 28.910(c) concerning the fee for new classification memoranda issued from the central database for the business convenience of an owner without reclassification of the cotton will remain the same.

The fee for review classification in § 28.911 would be increased from $1.45 to $1.65 per bale.

The fee for returning samples after classification in § 28.911 would remain at 40 cents per sample.

List of Subjects in 7 CFR Part 28

Administrative practice and procedure, Cotton, Cotton samples, Grades, Market news, Reporting and record keeping requirements, Standards, Staples, Testing, Warehouses.

■ For the reasons set forth in the preamble, 7 CFR part 28 is amended as follows:

PART 28—[AMENDED]

■ 1. The authority citation for 7 CFR part 28, subpart D, continues to read as follows:

Authority: 7 U.S.C. 471–476.

■ 2. In § 28.909, paragraph (b) is revised to read as follows:

§ 28.909 Costs.

* * * * *

(b) The cost of High Volume Instrument (HVI) cotton classification service to producers is $1.65 per bale.

* * * * *

■ 3. In § 28.911, the last sentence of paragraph (a) is revise to read as follows:

§ 28.911 Review classification.

(a) * * * The fee for review classification is $1.65 per bale.

* * * * *

Dated: May 25, 2004.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 04–12138 Filed 5–27–04; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 502

[No. 2004–29]

RIN 1550–AB47

Assessments and Fees

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is amending its rules on assessments and fees. The final rule replaces examination fees for savings and loan holding companies (SLHCs) with semi-annual assessments. OTS will charge a base assessment amount, and will add up to three additional components to this base amount. These assessments are based upon a combination of factors that have proven relevant to the on- and off-site supervisory costs OTS incurs: A SLHC's asset size, its risk or complexity, its organizational form, and its condition. OTS will compute the assessments for conglomerates using this same formula, except that the risk/complexity component will be triple the risk/complexity component charged to a complex or higher risk holding company of the same asset size. OTS also has amended its rules governing the calculation of semi-annual assessments for savings associations to eliminate the alternative calculation for the asset size component.

DATES: *Effective Date:* This final rule is effective July 1, 2004.

FOR FURTHER INFORMATION CONTACT: Linda Duzick, Financial Analyst, Affiliates and Holding Company Supervision, (202) 906–6565; or Karen Osterloh, Special Counsel, Regulations and Legislation Division, Chief Counsel's Office, (202) 906–6639; Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

The Home Owners' Loan Act (HOLA) authorizes the OTS Director to assess fees against institutions that OTS supervises, including savings associations and SLHCs, to fund OTS's direct and indirect expenses as the Director deems necessary or appropriate.[1] OTS also may assess savings associations and affiliates of savings associations for the costs of conducting examinations.[2]

OTS regulations implementing this authority are found at 12 CFR part 502. Under these rules, OTS charges each savings association a semi-annual assessment, which includes a size component, a condition component, and a complexity component. In addition, OTS charges an examination fee for thrifts that have trust assets that are under the $1 billion complexity component threshold. OTS charges SLHCs and other thrift affiliates fees for investigating and examining their

[1] 12 U.S.C. 1467(k). *See also* 12 U.S.C. 1462a, 1463, 1467, 1467a.

[2] 12 U.S.C. 1467(a) and (b) and 1467a(b)(4). *See also* 12 U.S.C. 1467(d) (trust examinations of savings associations).

operations. These examination-related fees are assessed at an hourly rate for examiner time spent preparing for and conducting the examination.

II. Description of the Proposed Rule

On February 10, 2004, OTS proposed to revise the assessment rules for SLHCs and savings associations.[3] OTS proposed to eliminate most examination fees for SLHCs and instead charge semi-annual assessments. Under the proposed rule, the semi-annual SLHC assessment was made up of a base assessment amount, and up to three additional components. The three components were based on the risk or complexity and size of the SLHC's business, its organizational form, and its condition. In addition, OTS indicated that it was considering assessing certain large and complex SLHC enterprises (conglomerates) under a separate assessment procedure and solicited comments on these assessment procedures. OTS also proposed to revise the assessment procedures for savings associations by eliminating the alternative calculation for the asset size component currently available to small ''qualifying savings associations.'' OTS stated that it intended to implement these proposed changes in the July 2004 semi-annual assessment.

The comment period closed on March 26, 2004. OTS received 15 comments from eight SLHCs or representatives of SLHCs, five depository institutions, four trade associations, and the Conference of State Bank Supervisors. Several depository institutions and their SLHCs submitted joint comments. These comments are addressed below.

III. Request for Additional Rulemaking Procedures

A. Re-Proposal of the Assessments Rule

Commenters observed that OTS proposed to place many important details regarding the computation of SLHC assessments in a thrift bulletin rather than in rule text. Because the thrift bulletin was not finalized when the proposed rule was issued, some commenters argued that SLHCs did not have enough detail to understand the impact of the rule. Commenters requested that OTS treat the proposed rule as an advance notice of proposed rulemaking and re-propose a new rule providing greater specificity regarding the computation of SLHC assessments.

To obtain meaningful public participation, a notice of proposed rulemaking must fairly apprise interested persons of the issues in the rulemaking. In the proposed rule and the accompanying preamble, OTS provided a significant amount of information regarding the computation of proposed assessment amounts. Specifically, OTS:

- Provided the likely amount of the semi-annual base charge.
- Set out proposed schedules for computing the risk/complexity component for Category I and II SLHCs at all asset size levels. OTS also explained how it classifies SLHCs as Category I or II, indicated how many SLHCs currently fall in each category, and stated that any SLHC could obtain its classification by contacting its Regional Office.
- Indicated that OTS intended to assess an additional 50 percent assessment on section 10(l) SLHCs[4] under the organizational form component. OTS also requested comment on an additional adjustment under the organizational form component for SLHCs that control trust-only depository institutions, and the appropriate amount of this adjustment.
- Stated the condition component will apply to SLHCs rated ''unsatisfactory'' and proposed an additional 100 percent assessment for these SLHCs.

The preamble provided numerous examples and charts demonstrating how OTS would calculate the assessment for SLHCs with various characteristics.

OTS acknowledged that the proposed assessment amounts in the preamble were subject to change depending on the content of the final rule.[5] This alerted the public that the assessments rule, like any proposed rule, might be revised as a result of comments received in the rulemaking process.[6]

Under the circumstances, OTS was as informative as possible about potential assessments. In light of the few revisions to the computations under the final assessments rule, OTS has not materially altered the proposed computation nor revised the amount of the proposed assessment for most SLHCs. Accordingly, OTS concludes that a further round of rulemaking is not required.

Commenters argued that the proposed assessment for conglomerates was deficient because OTS did not clearly describe which SLHCs would be subject to the separate assessment procedures, or how OTS would calculate the proposed assessment for these SLHCs. Commenters encouraged OTS to review the comments, draft a more definitive proposal on this issue, and seek further public comment.

OTS agrees that the preamble was less specific with regard to the assessment for conglomerates. However, even here, OTS provided a considerable amount of information. Specifically, the preamble described conglomerates that would be subject to the assessment and included references to OTS Holding Company Handbook sections that described these entities with greater specificity; cited various computational methods that were under consideration, including a specific reference to the type of charge imposed under today's final rule (*i.e.*, a charge that is a multiple of the Category II SLHC assessment schedule); stated that the assessment for these conglomerates would be significantly in excess of the amounts prescribed for other SLHCs under the rule; and noted that OTS retained the ability to exercise its authority under 12 CFR 502.60(e) to recover extraordinary expenses related to the examination, investigation, regulation or supervision of conglomerates and their affiliates.

OTS believes that the assessment procedure for conglomerates prescribed under the final rule is a logical outgrowth of this proposal. Accordingly, OTS concludes that a further round of rulemaking is not required to finalize the rule on conglomerates.

B. Future Adjustments in Thrift Bulletins

Other commenters asserted that the proposed process for making *future* adjustments to assessments through thrift bulletins violates the APA. Commenters argued that all future changes, including revisions to the base assessment amount, the application of an organizational form component to new types of SLHCs, and changes to applicable rates under the risk/complexity component, must be subject to notice and comment rulemaking.

[3] 69 FR 6201.

[4] Section 10(l) of the HOLA permits a state savings bank (or state cooperative bank) to elect to be treated as a savings association for the purposes of regulating the holding company. By making such an election, the holding company is regulated by OTS as a SLHC for purposes of section 10 of the HOLA, rather than by the Federal Reserve Board as a bank holding company. However, another appropriate federal banking regulator and the appropriate State regulator, not OTS, continue to be the primary regulators of the subsidiary state bank or cooperative bank.

[5] *See, e.g.*, 69 FR at 6203, fn. 7.

[6] The Administrative Procedure Act (APA) does not require a new round of rulemaking whenever an agency alters a proposed rule. Indeed, a final rule *must* differ from the proposal if the record evidence warrants the change. As the D.C. Circuit has stated: ''A contrary rule [that a final rule may not change the proposed rule] would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary.'' *International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615, 632, n. 51 (D.C. Cir. 1973).

OTS disagrees that all future changes, no matter how insignificant, must be subject to notice and comment rulemaking. However, it has made several revisions to the text of the final rule in response to these commenters. The final rule specifically:

- States that the base semi-annual assessment amount is $3,000 and permits OTS to periodically revise this amount in a thrift bulletin to reflect changes for inflation based on a readily available index, such as the Gross Domestic Product Implicit Price Deflator.
- Indicates that section 10(l) SLHCs are subject to the organizational form component, and states that the amount of the adjustment for these SLHCs is 25 percent.

The final rule on the risk/complexity component has been revised to clarify some issues, but is substantially unchanged. The final rule text continues to explain how the risk/complexity component is calculated and is accompanied by a chart that sets out the applicable asset size ranges. Like the proposed rule, the final rule does not set out the marginal rates applicable to each asset range. Rather, the final rule states that the marginal rates will be established in a thrift bulletin. As noted above, the preamble included proposed marginal rates for Category I and II SLHCs for all asset levels. OTS will charge these same marginal rates under the assessment schedules published today in the related thrift bulletin.

This is the same structure that OTS uses to compute the asset size component of the savings association semi-annual assessment. In the 11 semi-annual assessment cycles since it established the asset size component for savings associations, OTS has adjusted the rates for the asset size component only three times.[7] The three revisions did not change the basic formula that OTS uses to calculate the size component and did not materially alter the relationships between the marginal rates applicable to the various asset size categories. Rather, the adjustments merely made routine corrections and refinements of the original methodology designed solely to adjust the original marginal rate schedules to reflect inflation. All of the revisions were based on inflationary indices published by the Bureau of Labor Statistics. OTS anticipates that future adjustments to the risk/complexity component for SLHC assessments will be similar in character. However, to the extent that any future revisions significantly change the way OTS computes the risk/complexity component, OTS anticipates that it will publish the revision for notice and comment before applying the revision.

IV. SLHC Assessments

A. Increased Charges

Most commenters observed that SLHC charges would increase substantially under the proposed rule and objected to the magnitude of the increases. Commenters cited increases for various types of SLHC that ranged from 125 percent to 1400 percent. Commenters asserted that these increases were significantly out of proportion to the examination work performed by OTS. One noted that its increase exceeded the fees charged by the thrift's external auditors. Commenters predicted that these higher fees would drive some enterprises out of business, cause some institutions to change charters, or discourage savings associations from maintaining structural flexibility by setting up SLHCs to meet their future needs. Commenters urged OTS to look more critically at cumulative costs assessed on the industry and reassess the allocation of these costs.

OTS acknowledges that the supervision charges for many SLHCs will rise under the final rule. This was an expected outcome since OTS was not fully recovering the entire cost of supervising SLHCs. OTS must maintain sufficient resources to provide quality supervisory services and must, to the extent possible, recover the cost of these resources from the appropriate regulated entities.

In the past, OTS recovered SLHC supervision costs based only on on-site examiner hours. As SLHCs have become more complex in both structure and nature of operations, OTS staff has increasingly spent more off-site time addressing supervisory issues affecting the SLHC industry as a whole, and monitoring the condition and activities of individual SLHCs. Thus, OTS's comprehensive SLHC supervision process has become much more than an on-site review of records and interaction with SLHC representatives.

Current examination fees do not reflect off-site supervisory efforts and, thus, do not capture a significant portion of the resources OTS devotes to comprehensive supervision of SLHCs. As a result, past examination charges significantly understated the amount of OTS resources engaged in SLHC supervision and, thus, did not nearly cover the actual costs of this supervision. Until now, OTS avoided imposing the costs of SLHC regulation on other regulated entities by using its reserves, improving the efficiency of its operations, and undertaking various cost-cutting measures. These measures alone no longer suffice to allow OTS to ensure that it can continue to provide quality supervision of the thrift industry, SLHCs, and other affiliates.

OTS is aware that, for some SLHCs, the percentage increases in annual assessment charges appear to be substantial. However, cost comparisons of the prior examination fee to assessments under the proposed rules ignore the significant expenses incurred by OTS in the supervision of SLHCs—expenses that must properly be assessed against SLHCs. In addition, examination time varies from year to year and simply looking at the prior examination bill as a point of comparison can distort the picture.

A few SLHCs claimed that their annual assessments would increase 1200 to 1400 percent over their current examination charges. Based on its analysis of the impact of the proposed rule, OTS has concluded that percentage increases of this scale typically occur at SLHCs with low dollar assessments, where the imposition of the base assessment ($3,000 semi-annually) significantly exceeds the prior examination hours approach. OTS recognizes that the percentage increase may be high for some, but we believe that the change in approach is warranted to accurately assess for the total cost of SLHC supervision—whether the work is performed on- or off-site. The charges reflect OTS's attempt to tailor assessments more closely to the actual costs of their supervision. The magnitude of the cited increases to a great degree underscores the fact that previous OTS charges were substantially understated vis a vis actual supervisory costs.

To mitigate the impact of the cost increases to all or a part of the industry, commenters suggested that OTS gradually phase-in the final assessments rule for all SLHCs or for certain types of SLHCs. Commenters also urged OTS to phase-in certain components of the final rule, such as the section 10(l) organizational form component. Commenters also requested that OTS grandfather existing SLHCs from assessments under all or a portion of the final rule.

While OTS cannot fully accommodate these suggestions without potentially compromising the resources needed to regulate SLHCs, it does agree that a phase-in would be appropriate. The final assessment rule will result in higher annual fees for certain SLHCs, but OTS firmly believes the final rule

[7] *See* TB–48–17 (Dec. 1, 2000); TB–48–18 (Nov. 29, 2001); and TB–48–20 (Dec. 2, 2003).

provides for a fair and equitable recovery of our supervisory costs from supervised entities. OTS understands that SLHCs need the ability to budget for planned expenditures. Therefore, to mitigate the impact of these changes, OTS will phase in the final rule according to the following assessment schedule:

Semi-annual assessment billing date	Percent of final rule
July 1, 2004	25
January 1, 2005	50
July 1, 2005	100

B. Elimination of Examination Fees

Several commenters urged OTS to continue to base assessments on examiner time and to charge for both on- and off-site hours. They noted that OTS could also recover future increases to supervisory expenses by adjusting the hourly rate. Commenters acknowledged that tracking and charging for actual hours involves inefficiency and expense. However, they observed that many professions charge by the hour and do not find tracking hours overly burdensome. Commenters also suggested various alternatives. For example, one commenter urged OTS to develop formulae similar to those used by manufacturing and other companies for specified tasks.

OTS has three goals with respect to the assessments rule: (1) Keep charges as low as possible while providing the agency with the resources essential to effectively supervise a changing industry; (2) tailor charges to accurately reflect the agency's costs of supervising institutions and their affiliates; and (3) provide institutions and their affiliates with consistent and predictable assessments to facilitate financial planning.

While assessments based on actual hours would serve the first two OTS goals, such a system would fail to provide transparency and predictability to the industry regarding costs. The current system can result in sharp fluctuations or unexpected examination billings. As conditions and activities at the SLHC change from year-to-year, OTS adjusts the scope of its examinations to conduct its work in a risk-focused manner. Examiners do not spend the same amount of time at a particular SLHC during each examination. OTS believes that the recovery of supervisory costs based on regular assessments offers a measure of predictability as to the assessment amount and will aid SLHCs in their budget process.

OTS notes that, until 1989, savings associations paid fees to the Federal Home Loan Banks to cover the costs of examinations by Federal Home Loan Bank System employees. *See* 55 FR 34519, at 34520 (Aug. 23, 1990). This system was also based on a per hour charge, but was abandoned after OTS was created. Since then, OTS has assessed savings associations using a structure conceptually similar to the assessments proposed for SLHCs. Based on OTS experience with thrifts, OTS believes that the proposed assessment structure for SLHCs is practicable and viable and will serve all of the goals of this rulemaking.

By contrast, OTS is not convinced that it can use on-site and off-site hours without generating a significant number of disputes over inherently supervisory decisions regarding the amount of on- and off-site time devoted to particular SLHCs from year to year. In 2003, OTS tracked both on-site and off-site hours in the manner proposed by commenters. OTS issued a thrift bulletin stating that we would bill SLHCs directly for these on- and off-site services. Thrift Bulletin 48–19 (Sept. 23, 2003). Following the publication of Thrift Bulletin 48–19, various members of the industry contacted OTS to discuss the proposed examination charges. In addition, as bills were sent out using this approach, excessive time was devoted to explaining and defending off-site hours. OTS also conducted an analysis of off-site examination time records and collected input from staff on the process of collecting and tracking off-site examination time and properly allocating overhead associated with the supervision of SLHCs. Based on the industry and staff feedback, OTS determined that the administrative burden of collecting and billing off-site hours outweighed the cost-recovery benefit, and abandoned this cost-recovery method. OTS regional management already are asked to mediate disputes regarding the number of on-site examination hours charged in examination billings. OTS anticipates that imposing direct charges for off-site hours would generate significantly more inquiries.

Finally, OTS believes that the proposed change will better support our risk-focused examination and supervisory processes and encourage efforts to perform exam related SLHC work off premise, when possible. With SLHC assessment fees set at fixed rates based on a variety of critical factors, staff will be encouraged to conduct its SLHC supervision in the most effective and efficient manner. With fixed assessments, staff will not feel undue pressure to expand or restrict on-site examination time due to concerns about the potential examination charges.[8] Accordingly, OTS has decided to replace the current examination billing structure with the assessment rate structure included in the proposed rule.

Commenters asked OTS to clarify whether it would cease charging fees for all SLHC general examinations. For example, one commenter asked OTS to clarify whether it intends to charge for special examinations, such as information technology examinations.

Under the final rule, OTS will cease charging fees for regularly scheduled general examinations of SLHCs. OTS will continue to charge for extraordinary examinations, such as eligibility examinations conducted in connection with an application and specialty examinations, including information technology examinations. OTS may also continue to charge additional fees under 12 CFR 502.60(e) when staff is required to spend an inordinate amount of supervisory time as a result of an extraordinary event or circumstances.

Accordingly, the final rule continues to state that OTS may impose fees for examining and investigating savings association affiliates. Additionally, if OTS incurs any extraordinary expenses related to the examination, investigation, regulation, or supervision of a savings association or its affiliate, the Director may charge a fee to fund those expenses. *See* 12 CFR 502.5(c), 502.50, and 502.60(e).

C. Assessments of Specific Types of SLHCs

Commenters argued that the proposed rule did not tailor OTS charges to accurately reflect the actual cost of supervision of certain types of SLHCs. As a result, commenters asserted that these SLHCs will pay more than their fair share of OTS costs. Commenters urged OTS to specifically consider the availability of information from other state and federal regulators, and to address the application of the rules to various types of holding companies, including large, diverse SLHCs and shell SLHCs.

[8] One commenter predicted that the new process would lead to unproductive and unnecessary staff work because OTS staff would spend more time than necessary during examinations without time records to monitor the examination. OTS does not believe that the commenter's assertions are accurate. OTS has based savings association assessments on a set formula for many years. In 2003, OTS conducted its first Annual Thrift Satisfaction Survey to solicit feedback about our regulatory processes. One of the broad themes that emerged from the responses was that we have introduced many examination enhancements to improve efficiency. Nonetheless, OTS will continue to monitor examination time spent on supervisory activities for thrifts, SLHCs, affiliates, and service providers to ensure the most efficient and effective utilization of supervisory resources.

1. Shell SLHCs

Several commenters argued that the proposed rule requires shell SLHCs to pay more than their fair share of OTS costs. These commenters observed that shell SLHCs conduct few activities beyond the thrift, and that the management and boards of shell SLHCs and the subsidiary thrifts are usually identical. Commenters asserted that OTS expends little effort on the SLHC examination and reviews most SLHC activities in conjunction with the thrift safety and soundness examination. Commenters provided examples of some shell SLHC charges that would increase significantly over current examination fees, and argued that these increases would discourage institutions from anticipating future needs or maintaining structural flexibility by setting up SLHCs.

To address this issue, some commenters asked OTS to adjust the base assessment charge for shell SLHCs. Commenters asserted that this charge is contrary to the rest of the rule, which adjusts the assessment to reflect the complexity of the organization. The commenters urged OTS to eliminate the base assessment charge, or provide a negative adjustment to the base assessment under the organizational form component.

The final rule continues to impose the base assessment charge. The base charge reflects the base expense OTS incurs in supervising every holding company structure, regardless of organizational form, relative risk or complexity, or the identity of its board or management. The charge reflects OTS's estimate of the costs of conducting on- and off-site supervision of a small, low risk, noncomplex SLHC. The base assessment charge includes the costs of conducting an on-site examination using the abbreviated holding company examination program,[9] conducting off-site activities in preparation for such an examination,[10] performing off-site monitoring between examinations for such an SLHC,[11] and preparing supervisory guidance for SLHCs. OTS also recovers a portion of its operating costs, such as the cost of OTS facilities and examination support personnel allocated to these activities.[12]

Other commenters urged OTS to deduct thrift assets from consolidated SLHC assets under the risk/complexity component. These commenters noted that the operations of shell SLHCs and their subsidiary savings associations are largely identical and that OTS already has reviewed thrift operations and charged for the savings association examination.

OTS believes that the rule already takes shell SLHCs into account under the risk/complexity component and declines to make any further adjustments. OTS generally considers a SLHC to be a shell if it holds minimal debt that can be easily serviced by its own resources and engages only in limited activities (*e.g.*, the investment of cash from dividends or proceeds of stock sales in liquid interest-bearing instruments as opposed to highly leveraged instruments). These SLHCs will typically be classified as a Category I SLHC, unless the SLHC's unique circumstances warrant Category II classification.

The proposed assessment schedule included two adjustments designed to reflect the fact that non-complex low risk SLHCs require less supervisory resources. First, the proposed schedule did not charge any amount for the first $150 million of consolidated assets. As a result, the risk/complexity component for approximately 150 of the 400 Category I SLHCs is zero. Second, the marginal rates used in the Category I schedule are substantially lower than the marginal rates used in the Category II schedule. Thus, under the proposed schedules, the risk/complexity components for the remaining 250 Category I SLHCs are significantly less than the risk/complexity components for similarly sized Category II SLHCs. For example, a Category I SLHC with consolidated assets of $250 million will be charged an additional $750 above the base assessment. A Category II SLHC of the same size will be assessed an additional $4,000. OTS believes that these two adjustments take into account the characteristics of shell SLHCs under the risk/complexity component. OTS has not made further adjustments to this component to address shell SLHCs.

2. Regulation by Other Federal and State Regulators

Several commenters argued that the proposed rule ignores the functional regulatory framework developed in the Gramm-Leach-Bliley Act (GLBA), which was designed to avoid duplicative and overlapping oversight by defining and distinguishing the roles of the various regulators. Commenters asserted that, to the extent that OTS uses examination reports and other information provided by other federal and state regulators, OTS examination costs are reduced. Without an adjustment to reflect this fact, commenters claimed that the proposed rule requires these SLHCs to pay more than their fair share. A commenter noted that it is difficult to see how so much more time would be needed during the examination process, unless OTS examiners planned to duplicate some of the efforts of these regulators. Commenters urged OTS to revise the proposed rule to reflect the availability of this information, and proposed various revisions to the risk/complexity component and organizational form component.

OTS fully supports the concept of functional regulation set out in the GLBA. Since well before the GLBA, OTS has long sought to coordinate regulatory activities with relevant supervisors. Our goal is to leverage off of the work of other regulators to the maximum extent possible, while ensuring that we fully meet our statutory and regulatory responsibilities. In no way are our supervisory efforts designed to or intended to replicate the work of other responsible supervisors.

An OTS SLHC examination includes a review of the entire corporate enterprise, including the consolidated, top-tier SLHC and all subsidiaries of the SLHC. As a general rule, OTS has a broad grant of authority to examine each registered SLHC and each subsidiary of a SLHC, as the Director prescribes. However, under the GLBA, which included new provisions designed to avoid regulatory duplication, OTS must follow certain procedures when it seeks to obtain information about or examine functionally regulated subsidiaries of SLHCs. These procedures address OTS's acquisition and reliance on reports and data prepared by the entity's primary regulator and establish conditions on examining functionally regulated subsidiaries of SLHCs. The GLBA does not restrict OTS's ability to examine the SLHC.

OTS recognizes and respects the role of fellow regulators, and makes every effort to coordinate examination and supervisory efforts with other regulators. While the reports and other materials provided by functional regulators are helpful in the supervision of SLHCs, other functional regulators generally do not focus on the primary

[9] *See* Holding Company Handbook, Section 720, Abbreviated Holding Company Examination Program.

[10] This would include, for example, the costs of completing pre-examination procedures and the risk classification for a low risk, noncomplex, SLHC. See Holding Company Handbook, Section 710 Holding Company Administrative Program.

[11] These costs would include the costs to review and analyze basic reports filed by the savings association and SLHC (*e.g.*, Schedule HC of the Thrift Financial Report (TFR), the SLHC's quarterly and annual H–(b)11 reports, and relevant private sector information).

[12] Several commenters argued that the application of the base assessment amount to multiple top-tier SLHCs in certain circumstances was inappropriate. These comments are addressed below.

area of OTS's statutory responsibility—the financial and operational condition of the entire SLHC enterprise. Inherent in the OTS SLHC examination approach is the identification of significant risks, internal control weakness, risk management deficiencies or other financial or operational issues especially as they relate to the current and prospective effect that holding company enterprises have on the subsidiary insured savings association or other regulated entities in the corporate family.

OTS agrees that reports of the other functional regulators often provide helpful insights into certain aspects of SLHC operations. Furthermore, OTS does reflect the role of other regulators in determining the appropriate risk/complexity category. For example, when there is another lead consolidated regulator, OTS may classify an enterprise that is otherwise a conglomerate in Category II.[13] This decision depends on the roles and responsibilities of the lead consolidated regulator and the scope of their examination and other supervisory factors.

Nonetheless, to obtain this information, OTS examiners take extra steps to communicate and coordinate with the other regulators. Such efforts take additional time and cause OTS to incur additional expense. As a result of these efforts and in some cases the differing goals of the other regulators, OTS does not believe that these reports alone will always meaningfully reduce the effort and time expended by OTS examiners in the review of an enterprise as a whole. When they do, OTS will reflect the reduced supervisory effort required in determining the appropriate risk/complexity category. Accordingly, OTS has not revised the proposed rule since this factor is already reflected in the proposed approach.

3. Large, Diverse SLHCs

Several commenters argued that the proposed rule would assess large, diverse SLHCs more than their fair share of examination costs. Commenters noted many large diversified SLHCs are insurance companies or securities firms, and that information about their condition should be readily available from other regulators. For the reasons set forth immediately above, OTS has concluded that the risk/complexity classification adequately reflects the availability of this information and the degree to which that information contributes to fulfilling OTS's supervisory objectives for SLHCs.

Commenters also noted that large or diversified SLHCs have substantial consolidated assets. Because thrift assets will reflect only a small proportion of consolidated assets, the commenters argued that any assessment based on consolidated assets would not bear a reasonable connection to OTS examination costs.[14]

OTS is not persuaded by this argument. OTS's supervisory approach is designed to evaluate the condition of the entire holding company enterprise so that OTS may ensure that the thrift and other regulated entities will not be harmed by the affiliation. To realistically evaluate the risks presented by a SLHC, OTS must understand the activities and operations of the holding company enterprise. OTS has found that the costs of making these types of determinations increase as the size of the holding company enterprise increases. To reflect this fact, OTS bases the amount of each SLHC assessment, in part, on total consolidated holding company assets under the risk/complexity component. This component recognizes that there are economies of scale in such analyses, particularly in the supervision of larger structures. Accordingly, the marginal rates established under the proposed schedules decline significantly as asset size increases.

D. Computation of Assessment

For most SLHCs, the method for computing assessment under the final rule is substantially unchanged from the proposal. OTS will charge semi-annual assessments on the responsible SLHCs in each holding company structure. This semi-annual SLHC assessment will be made up of a base assessment amount and up to three additional components. The three components are based on the risk or complexity of the SLHC's business, its organizational form, and its condition. OTS will compute the assessments for conglomerates using this same formula, except that the risk/complexity component will be triple the risk/complexity component for a complex or higher risk SLHC of the same asset size. The final rule and comments received on the proposed computations are discussed below.

1. Responsible SLHCs—§ 502.26(b)(1)

In most cases, OTS performs only one examination of each SLHC structure, even though the examination may include a review of multiple tiers of direct and indirect thrift ownership. Because our SLHC examination and supervisory efforts consider the entire holding company structure, OTS did not propose to assess intermediate-level SLHCs. Instead, OTS proposed to assess the top-tier SLHCs in every SLHC structure. The top-tier SLHC was defined as the highest level of ownership by a registered SLHC in the holding company structure.[15]

The preamble noted that two or more SLHCs may own a controlling interest in a savings association. This occurs, for example, where two companies each directly owns 50 percent of the savings association's voting stock. Where there are two or more distinct controlling interests in a savings association, OTS examines each ownership structure separately. Under these circumstances, the preamble indicated that OTS would impose a semi-annual assessment on the top-tier SLHC in each ownership path.

Commenters urged OTS to take into account unique organizational structures in determining which entity in the chain of ownership should be assessed. Some commenters argued that OTS should assess only one SLHC in each holding company structure. One commenter, for example, reported that its holding company structure includes multiple top-tier SLHCs and asserted that the proposed rule would result in multiple assessments even though all financial reporting is consolidated and all operations dovetail.

In response to an OTS request for comment, several commenters argued that OTS should not assess multiple top-tier family trusts that own controlling interests in intermediate-tier SLHCs. These commenters argued that

[13] *See* discussion of European Union regulation at Section III.D.4. of this preamble.

[14] Commenters urged various revisions to the proposed fee structure. For example, commenters urged OTS to assess solely on examiner time, to revise the risk/complexity component to eliminate the use of consolidated assets, or assess large diversified SLHCs based on formulae for specified tasks similar to those used by manufacturing and other companies.

[15] As a related matter, one commenter observed that some holding company structures include industrial loan companies (ILC) that are affiliated with savings associations. The commenter presented an example where a holding company directly owns both a savings association and an ILC. The ILC has no direct or indirect interest in the savings association. The commenter asked for clarification whether OTS intended to assert supervisory jurisdiction over the ILC.

A company that owns or controls a savings association and an ILC is a SLHC subject to OTS jurisdiction under 12 U.S.C. 1467a, unless it also owns a bank. (In this latter case, the company would be a bank holding company subject to the jurisdiction of the FRB. 12 U.S.C. 1843.) An ILC owned by a SLHC would remain subject to the primary supervisory jurisdiction of FDIC and the state regulator. The OTS assessments rule has no impact on the ILC except that the ILC assets would be included in the SLHC consolidated assets and would increase the amount of the SLHC assessment.

the majority of OTS supervisory efforts in such structures are expended in the review of the operations of the intermediate-tier SLHC. By contrast, the top-tier family trusts usually are shells that conduct no activities and that require little OTS oversight.

Under the final rule, OTS has retained the ability to address the issues raised by the comments on a case-by-case basis. The final rule now uses the term responsible holding company to indicate which SLHC will be subject to the assessment. The responsible holding company generally is the registered holding company at the highest level of ownership in a holding company structure, but OTS may designate another SLHC in the holding company structure for assessment.

OTS anticipates that it will designate another SLHC within an ownership structure only in rare instances. For example, OTS may designate an intermediate tier SLHC in a holding company structure where there are multiple top-tier SLHCs that are closely held family trusts, the trusts conduct no activities and essentially hold only passive investments in the intermediate-tier SLHC, and thrift assets are not consolidated onto the balance sheet of the trusts. Under these instances, substantially all of OTS supervisory efforts will be directed at the intermediate tier SLHC. If OTS were to assess each family trust in such a structure, it would, in essence, recover a base assessment amount for each trust. As noted above, the base assessment amount was designed to reflect the base expense incurred by OTS with respect to every holding company structure. Under such circumstances, the combined charges to multiple family trusts would bear little relationship to actual OTS examination, supervision, or regulatory efforts.

In addition, OTS has found that some top-tier SLHCs are organized outside of the United States and do not use U.S. GAAP or U.S. SAP [16] to compute their total assets. By contrast, a lower-tier SLHC may be organized in the United States and may use U.S. GAAP or U.S. SAP. When such companies have a foreign regulator that performs a review equivalent to OTS's approach, a lower or intermediate tier's reported assets may more accurately reflect OTS's costs of supervising the structure.

Accordingly, the final rule indicates that OTS may designate an intermediate-tier SLHC as the responsible holding company, if the assessment of this entity would more accurately reflect OTS's costs of supervision and there are multiple top-tier holding companies in the holding company structure, the top-tier holding company is organized outside of the United States and is subject to the consolidated review of a foreign regulator, or other circumstances indicate that the assessment of the top-tier holding company would be inappropriate.

2. Base Assessment Amount—§ 502.26(a)(1)

OTS proposed to include a base assessment charge in each SLHC assessment. The base assessment charge includes the costs of conducting an on-site examination using the abbreviated holding company examination program, conducting off-site activities in preparation for such an examination, performing off-site monitoring between examinations for such SLHCs, and preparing general SLHC supervisory guidance. OTS also recovers a portion of its operating costs, such as the cost of OTS facilities and examination support personnel allocated to these activities. The proposed rule indicated that OTS would establish the amount of the base assessment component in a thrift bulletin.

OTS initially estimated that the base assessment charge would be $3,000 for each semi-annual assessment or $6,000 per year. As discussed above, OTS has revised the final rule to include the amount of the base assessment in the text of the rule and to permit OTS to periodically revise this amount in a thrift bulletin to reflect changes for inflation based on an index, such as the Gross Domestic Product Implicit Price Deflator.

3. Risk/Complexity Component—§ 502.27

The first component of the semi-annual SLHC assessment is the risk/complexity component. OTS proposed to compute this component using separate schedules that set out charges based on OTS holding company risk/complexity classifications and total consolidated holding company assets.

Several commenters argued that this component improperly linked complexity and risk. These commenters asserted that the proposed rule did not adequately explain how complexity impacts on risk or oversimplified the relationship between risk and complexity.

While the proposed rule described this component as the ''risk and complexity component,'' OTS did not assert that there is a link between complexity of an SLHC and its overall risk profile. Rather, these two matters are separate, albeit sometimes overlapping, considerations. The purpose of the holding company risk/complexity categories is to identify those SLHCs that require a more intensive supervisory approach. Such supervision may consume more OTS resources either if the SLHC has a complex structure or presents a high risk profile. Stated differently, OTS will classify an SLHC as Category I only if its structure is not complex and it has a low risk profile. If an SLHC has a complex structure or a high risk profile complex, OTS will assign the SLHC to Category II.

a. Risk/complexity classification.

Commenters argued that the proposed rule did not adequately explain how OTS classifies SLHCs as Category I or II. The proposed rule specifically stated that holding company risk/complexity classifications reflect OTS's assessment of five factors: (1) The SLHC's financial condition; (2) financial independence; (3) operational independence; (4) reputational risk; and (5) management experience. The proposed rule text also referred readers to the OTS Holding Company Handbook, which fully describes OTS's risk/complexity classification methods.[17]

Because the risk/complexity classification system previously was used only for internal purposes, OTS provided additional information regarding the application of this system. Specifically, OTS reported that approximately 80 percent of SLHCs were classified as Category I when the proposed rule was published,[18] and indicated that regional staff would inform individual SLHCs of their risk/complexity classification upon request. Accordingly, OTS believes that the proposed rule adequately described the proposed risk/complexity classification system and its application.

Several commenters asked for guidance regarding OTS's application of various aspects of the risk/complexity classification system,[19] especially how

[16] *See* discussion at Section IV.D.3.b., below for a discussion of SAP.

[17] Holding Company Handbook, Section 100, Supervisory Approach, and Section 710, Administrative Program.

[18] A commenter argued that OTS should not designate a specific number or percentage of SLHCs as Category I or II. The statement in the preamble merely reflected OTS's current assessment of existing SLHCs. OTS has no preset notions regarding what number or percentage of SLHCs should fall in each category. Rather, OTS assesses the risk imposed by each SLHC and the level of oversight required based solely on the particular characteristics of the company.

[19] For example, one commenter observed that a simple shell SLHC could conclude that it is complex, because it would fail the financial and operational independence components of the classification system. As described in the OTS

OTS applies those aspects of the classification system that require subjective judgment.

A certain amount of subjective judgment is inherent in assigning an SLHC to a risk/complexity category. OTS must make considered decisions regarding the current and prospective risks posed by an SLHC in its evaluation of each factor and in its overall assignment of a category. These supervisory judgments simply cannot be reduced to a precise set of hard and fast rules, since an individual SLHC may present particularly egregious or mitigating characteristics that could not be reflected in such a mathematical formula.[20]

The proposed rule text listed the factors that OTS considers when assigning SLHCs to Category I or II. In addition, the preamble set out various considerations that guided OTS's assessment of each of these factors.[21] These considerations were derived from the classification checklist that provides guidelines for staff to use in determining the appropriate classification.[22] The checklist is set up in a series of yes and no questions, and is designed so that the more ''yes'' responses that are assigned, the more indicative that the SLHC is high risk or complex.[23] The risk/complexity classification system has been used internally for over two years. OTS staff has had time to understand the approach and review all SLHCs using the classification criteria. Senior management in the Regional Offices and in Washington review these classifications to ensure accuracy and consistent classification of similar SLHCs. In addition, as with other supervisory determinations, SLHCs may appeal their holding company classification as described further in section VI. of this preamble.

One commenter urged OTS to base all classifications solely on actual performance, as determined by examination ratings. OTS has not made this change. The OTS risk/complexity classification system distinguishes low risk or noncomplex SLHCs from SLHCs that have complex operations or exhibit a higher risk profile. The purpose of this system is to identify those SLHCs that will require more OTS resources. Under the examination rating system, many Category II SLHCs will receive above average or satisfactory ratings because they effectively manage their higher risks and because the complexity of their organization does not raise supervisory issues. Notwithstanding the assigned rating, the examination and continuing supervision of Category II SLHCs will consume significant OTS resources, which would not be recovered if the classification were based solely on examination ratings. While OTS agrees that an unsatisfactorily rated SLHC, in any category, will also consume greater supervisory resources, OTS believes that it has adequately considered these issues under the condition component.[24]

Finally, one commenter alleged that the proposed rule is contrary to ongoing OTS efforts to reduce regulatory burden on the industry because SLHCs will incur costs to clarify their category. The assessment rule does not impose any classification burdens on SLHCs. Instead, the rule requires OTS to keep all SLHCs apprised of their current category. Specifically, the rule states that OTS will use the most recent risk/complexity classification assigned by OTS of which the SLHC has been notified in writing before an assessment due date. An SLHC's classification is ''unpublished OTS information,'' which remains the property of OTS following the notification. An SLHC may not disclose its risk/complexity classification, except as permitted under 12 CFR 510.5.

b. Use of consolidated assets.

Several commenters objected to a charge that is based upon a consolidated holding company's assets. As discussed above, some commenters argued that using total consolidated assets will unfairly burden large or diversified SLHCs. Other commenters noted that consolidated SLHC assets include the subsidiary savings association's assets, which are already assessed in the semi-annual thrift assessment. To eliminate this ''double-counting,'' commenters urged OTS to deduct thrift assets from the consolidated SLHC assets.

The final rule continues to use consolidated assets. In OTS's experience, there is a direct correlation between the size of the responsible SLHC and the resources required to properly supervise the holding company structure. OTS does not agree that the final rule inappropriately double counts thrift assets. The risk/complexity component schedules do not assess any charge for the first $150 million of assets for Category I SLHCs. For all SLHCs, the marginal rates in the schedules are a small fraction of the marginal rates applicable to savings associations under the asset size component of their assessment. For example, the marginal rate applicable to an SLHC at $1 billion in consolidated holding company assets is 0.0000005 (Category I SLHC) and 0.000002250 (Category II SLHC). By contrast, the marginal rate for a savings association beginning with $1 billion in assets is .00007142.

The proposed rule defined consolidated holding company assets as the total assets reported on Schedule HC of the TFR. If Schedule HC is not available, OTS indicated that it would use total assets reported on financial statements filed with the H–(b)11 Annual/Current Report.

One insurance company observed that all SLHCs do not prepare consolidated financial statements in accordance with GAAP. The commenter noted that non-public insurance companies prepare financial statements only under SAP, which require the use of the equity method for subsidiaries and do not require consolidated statements. The commenter encouraged OTS to accept data from these financial statements for the purposes of the assessments rule.

SLHCs that underwrite insurance must file financial statements with state insurance departments using SAP. While many of these insurance underwriters are publicly traded and must also prepare and file GAAP statements with the SEC, mutual or closely held insurance underwriters typically prepare only SAP statements. While there are major differences

Holding Company Handbook and the preamble to the proposed rule, OTS reviews whether the subsidiary savings association and other affiliates that are regulated financial entities are financially or operationally dependent on the SLHC. The final rule text clarifies this matter at 12 CFR 502.27(b).

[20] Moreover, under the OTS holding company classification system, a negative finding with regard to one factor may be sufficient to place an SLHC in Category II, or may have no impact on the overall classification. For example, if an SLHC's financial condition is such that it there is a greater incentive to try and boost earnings or cash flow from the thrift, OTS may place the SLHC in Category II regardless of its determinations regarding other factors.

[21] *See* 69 FR at 6203–04.

[22] *See* Holding Company Handbook, Section 710, Holding Company Administrative Program, pp. 5–10.

[23] A commenter specifically recommended placing large complex organizations with debt ratings in the two highest ratings categories in Category I. The commenter asserted that OTS examiners consider downgrades in debt ratings, but do not consider when an SLHC receives a high debt rating from a major ratings agency. For insurance companies, the commenter asserted that the highest claims paying rating is a good indication of financial strength. OTS agrees that positive factors should be considered. OTS's beginning presumption in the application of the checklist is that an SLHC is an Category I, unless a pattern of indicators of higher risk (*e.g.*, a significant downgrade in debt ratings) or complexity are present.

[24] One commenter suggested that OTS should adjust the risk/complexity component or organizational form component to address whether a company is a private, public, or mutual organization. In OTS's experience, these factors do not appreciably affect the amount of OTS resources devoted to the supervision of SLHCs. Accordingly, the final rule does not reflect these factors.

between GAAP and SAP,[25] OTS does not believe that these differences will result in significantly different assessments under the final rule. OTS believes that the costs of preparing a separate set of GAAP financial statements solely for the purposes of the assessments rule would impose unnecessary expenses on these SLHCs and would be contrary to OTS's ongoing regulatory burden reduction efforts.

It is not necessary to revise the rule to specifically permit the use of SAP statements. The rule defines total consolidated assets as the total assets as reported on the TFR or the financial statements filed with the H–(b)11 Annual/Current Report. The instructions to Schedule HC of the TFR permits savings associations to submit data for holding companies based on SAP financial statements if the SLHC is an insurance company and does not prepare financial statements for external use in conformity with GAAP. The H–(b)11 Annual/Current Report also permits SAP financial statements under these circumstances.

c. Schedules for Category I and II SLHCs.

The preamble to the proposed rule included charts indicating the applicable marginal rates under the risk/complexity component for Category I and II SLHCs with consolidated assets of varying levels. The rates OTS will use for the July 2004 semi-annual assessment are the same. These rates are set out in a thrift bulletin that has been issued simultaneously with this final rule and is available on OTS's web site.

4. Conglomerates (Category III) [26]

The proposed rule indicated that OTS intended to assess conglomerates under separate assessment procedures, and requested comment on various approaches. In this final rule, OTS has decided to compute the assessments for conglomerates using this same formula, except that the risk/complexity component will be triple the risk/complexity component of a Category II SLHC of the same asset size. Commenters raised the following issues with respect to conglomerates.

a. Definition of conglomerate.

Several commenters argued that OTS failed to clearly describe which SLHCs would be subject to the conglomerate assessment procedures. The preamble to the proposed rule described conglomerates as a limited, select number of large and particularly complex enterprises that are made up of a number of different companies, or legal entities that operate in diversified fields. Unlike traditional SLHCs, these conglomerates are often highly integrated and are managed with less regard for separate corporate existence and with more focus on product lines or geographic areas. OTS examines and supervises these SLHCs along functional or centralized lines in order to match the SLHC's business practices. OTS's supervision of these entities often involves increased planning and off-site monitoring; a more formalized supervisory process that focuses OTS's efforts on major risk areas and evaluates the enterprise across business lines; and substantial coordination with other domestic and foreign regulators. *See* Holding Company Handbook, Section 940, Large and Complex Enterprises (Conglomerates).

OTS believes that this description from the preamble sufficiently describes conglomerates that may be subject to the final rule. In the final rule, OTS has refined this description and included a definition of conglomerate. Specifically, the final rule states that a conglomerate is a SLHC that: (1) Is one of the most complex or highest risk holding companies under the holding company risk/complexity classification system (*i.e.,* is significantly more complex or higher risk than a holding company enterprise classified as Category II); (2) is made up of a number of different companies or legal enterprises that offer products from more than one financial sector (*e.g.,* insurance, securities and banking) or operate in diversified fields; and (3) generally manages these companies and enterprises along functional lines, rather than as separate legal entities. These SLHC structures are examined under the procedures set forth in OTS Holding Company Handbook, Section 940.

One commenter urged OTS to specifically address complex internationally active organizations that fall within the definition of conglomerates in the European Union (EU) Directive issued December 16, 2002. This EU Directive defines a conglomerate as a group of companies under common control that engage predominantly in financial activities (banking, insurance, and securities). Conglomerates must have a significant interest in insurance and at least one other financial activity (banking or securities) to fall within the scope of the EU Directive. In addition, the ratio of aggregate assets of all financial sector entities to total consolidated assets of the conglomerate should exceed 40 percent.

The EU is seeking to ensure that financial conglomerates domiciled outside EU member countries are subject to an equivalent level of supervision by foreign supervisors. As the consolidated supervisor of a number of financial conglomerates active in the EU, OTS is seeking equivalency status under the EU Directive. The EU has not yet determined whether OTS, or any United States regulator, will be recognized as an equivalent regulator, and decisions are not expected until later this year. Until such recognition is granted or denied, OTS cannot predict the level of supervisory activity that may be required for any SLHC that meets the EU definition and believes that it may be premature to specifically include all of these entities as conglomerates for the purposes of this rule. OTS may revisit this issue once the EU issues its determinations.

One commenter feared that SLHCs will incur costs to clarify whether they are conglomerates within the scope of the rule and that the imposition of these costs would be contrary to ongoing OTS efforts to reduce regulatory burden on the industry. OTS currently classifies fewer than five SLHCs as conglomerates. These organizations are aware of their classification as conglomerates. Nonetheless, the final rule ensures that no SLHC will be subject to undue regulatory burden. The final rule specifically states that OTS will notify a SLHC in writing of its risk/complexity classification before an assessment's due date.

b. Computation of assessment.

To ensure that the costs of supervision for conglomerates are not subsidized by other SLHCs, the preamble stated that OTS would assess conglomerates under separate assessment procedures. OTS stated that it was considering various approaches to calculating assessments for complex conglomerates including: (1) A set charge or flat fee; (2) a variable charge that is based upon a percentage of the total holding company assets or some other financial measure (OTS indicated that the applicable percentage may vary as the size of holding company assets (or other financial measure) increases or may represent a multiple of the Category II SLHC assessment schedule); (3) an additional charge for complex multinational conglomerates with activities that require a high degree of coordination with other regulators (see *e.g.,* Holding Company Handbook, Section 940A, Financial Activities in the European Union); or (4) a fee structure that combines some of the

[25] These differences are described in Holding Company Handbook, Section 930, Insurance Holding Companies, Appendix B, State Regulation.

[26] OTS has decided to refer to conglomerates as a new category. Thus, conglomerates are considered Category III.

elements listed above. The agency requested comment on these possible calculations and any alternative methods for calculating semi-annual assessments for complex conglomerates.

Few commenters specifically addressed the assessment formulae. Commenters generally restated arguments, addressed above, promoting the use of actual examiner hours, discouraging reliance on consolidated assets for large SLHCs, and promoting adjustments to reflect the availability of information from state, federal, and international regulators.

OTS selected one of the methods suggested in the preamble of the proposed rule. Under the final rule, OTS will base conglomerate assessments on a multiple of the Category II SLHC assessment. Specifically, OTS will compute the assessments for conglomerates using a risk/complexity component that is triple the risk/complexity component of a Category II SLHC of the same asset size. OTS believes that it is appropriate to assess a multiple of the Category II SLHC risk/complexity component because the examination and regulation of conglomerates consume a disproportionate amount of agency resources vis a vis other SLHCs. Conglomerates are composed of a number of different companies and enterprises that operate in diversified fields and are managed on functional lines. As a result, conclusions based on the oversight of individual entities within the conglomerate may be incomplete unless viewed in the context of other related entities or centralized functions.

To match these business practices, OTS reviews conglomerate operations along functional or centralized lines. Such supervision requires OTS to analyze more areas than it addresses with respect to the typical Category II SLHCs. For example, OTS must understand very complex organizational structures, review a broader scope of intra-group relationships and transactions, address risk concentrations across company lines, and analyze group-wide capital adequacy, including capital adequacy relative to the needs of each major business sector and the parent company's own capital adequacy. Moreover, because of the diversity and complexity of the businesses in which these conglomerates engage, often unregulated, these SLHCs are more likely to present OTS with novel legal and policy issues that require the attention of highly experienced regulatory personnel with specialized knowledge and intensive review by senior management within OTS. In addition, as the consolidated regulator of a conglomerate, OTS must coordinate closely with all interested regulators, which may include foreign financial regulators.

To reflect this consumption of a greater proportion of OTS resources, OTS will calculate the semi-annual assessment for a conglomerate at triple the risk/complexity component for a Category II SLHC of the same asset size. However, OTS will closely monitor the supervisory resources allocated to conglomerate supervision and may bill individual conglomerates for extraordinary expenses in instances where the cost of OTS's supervisory efforts significantly exceed the conglomerate assessment calculated under this rule.

One commenter observed that OTS has expended substantial regulatory effort seeking equivalency determinations from the EU as the consolidated regulator for certain large internationally active conglomerates. The commenter argued that OTS must ensure that these internationally active conglomerates bear these costs. Another commenter urged OTS to adjust the assessment imposed on conglomerates whenever the enterprise conducts activities in the EU.

OTS current practice is to directly recover the costs of its efforts before the EU from the SLHC for which it seeks recognition as an equivalent regulator. See 12 CFR 502.60(e), which permits OTS to recover extraordinary expenses related to the examination, investigation, regulation, or supervision of savings associations and their affiliates. Rather than attempt to craft an adjustment that would apply to all semi-annual assessments to account for extraordinary, nonrecurring events that impose costs beyond OTS supervisory expectations, OTS believes that it is more appropriate to continue to recover these expenses on a case-by-case basis.

5. Organizational Form Component—§ 502.28

OTS-regulated SLHCs may take a variety of organizational forms, including stock holding companies, mutual holding companies, and trust holding companies. For example, OTS regulates certain holding companies under section 10(l) of the HOLA. In addition, certain SLHCs own thrifts that operate as trust-only institutions and do not accept insured deposits from the public.

To recognize that OTS may incur different supervisory costs to properly supervise SLHCs with particular organizational forms, the proposed rule permitted OTS to modify the amount of the assessment charged by applying an organizational form component. The amount of the organizational form component was computed by adding the base assessment to the risk/complexity component, and multiplying this total by a factor (positive or negative) established for the particular organizational form.

a. Section 10(l) SLHCs.

OTS indicated that it was considering applying a 50 percent increase for section 10(l) SLHCs. Several commenters opposed this adjustment. Commenters questioned whether examinations of section 10(l) SLHCs are more burdensome since the Federal Deposit Insurance Corporation (FDIC) and state regulators examine these institutions and provide a great deal of information to OTS. Commenters urged OTS to rely to the fullest extent possible on the primary federal and state regulators to provide supervisory information to evaluate section 10(l) SLHCs, and to work closely with these regulators to expand examination and information sharing protocols. Commenters asserted that these steps would eliminate any need for a section 10(l) SLHC charge.

OTS regulation of section 10(l) holding companies presents many challenges. OTS's primary regulatory goal for section 10(l) holding companies is the same as its goal for SLHCs—to understand how holding company operations may affect the operations of the subsidiary depository institution. When OTS examines a SLHC that controls a savings association, it already has a thorough knowledge of thrift operations because it has examined the thrift. As a result, OTS can focus its primary efforts on understanding the operations of the SLHC. When it undertakes the examination of a section 10(l) holding company, however, OTS has little direct information on the operations of the state subsidiary depository institution and must undertake additional steps to understand those operations.

As commenters point out, a great deal of information about the subsidiary depository institution is available to OTS from other regulators. OTS relies to the fullest extent possible on state regulators and FDIC to provide relevant supervisory information needed to evaluate the depository institution. While the information provided by state and federal regulators includes helpful information regarding the operations of the subsidiary institution, OTS must take additional steps—steps that are not required with respect to SLHCs with only savings association subsidiaries—

to come to a complete understanding of the depository institution's operations. For example, OTS must obtain information from other regulators, review and analyze this information, consult with these regulators regarding areas of concern, and formulate joint strategies where corrective action is necessary. OTS continues to believe that an adjustment under the organizational form component is necessary to account for these additional activities.[27]

Commenters asserted that the proposed 50 percent increase was excessive. These commenters suggested that OTS reduce the multipliers to 15 or 20 percent. OTS has reconsidered the proposed amount of the additional assessment and has reduced the size of the organizational form component for section 10(l) SLHCs to 25 percent. OTS believes that this amount more adequately reflects the additional efforts that it must undertake with respect to these entities.

The proposed rule permitted OTS to establish the amount of the factor (positive or negative) applicable to particular organizational forms in a thrift bulletin. For the reasons set out above, OTS has revised the final rule to specifically state that OTS will apply the organizational form component to section 10(l) SLHCs, and will compute the assessment for section 10(l) SLHCs by adding the base assessment to the risk/complexity component, and multiplying this amount times 125 percent.

b. SLHCs that control trust-only institutions.

OTS specifically requested comments on whether it should include a negative adjustment under the organizational form component for SLHCs that control trust-only savings associations that do not accept insured deposits from the public. Several commenters supported this change. These commenters argued assessments should be lower because these SLHCs typically are: (1) Insurance companies and securities firms that are subject to significant regulation by the states, the SEC, and other regulatory authorities; and (2) large, diversified SLHCs whose assessments are based on consolidated assets and may already be overstated. For the reasons set forth above, OTS has concluded that it is not necessary to adjust SLHC assessments to reflect these two factors.

Commenters also observed that trust-only institutions do not pose the same risks, complexity, or public policy concerns as other insured depository institutions. The primary objective of the SLHC examination is to examine the areas of the SLHC enterprise that pose risks to the thrift subsidiary. Even where a thrift has virtually no insured deposits, making the prospect of a loss to the insurance fund unlikely, OTS examiners still review all relevant SLHC operations. For example, examiners must review whether the enterprise is operated in a manner that the thrift can survive the collapse of its parent. Because the possible loss to the insurance fund does not affect the scope of the SLHC examination, the final rule does not include a negative adjustment for SLHCs that hold trust-only institutions. Accordingly, OTS does not believe that additional adjustments are necessary to account for these SLHCs.

6. Condition Component—§ 502.29

OTS proposed to charge a condition component if the most recent examination rating assigned to the top-tier SLHC (or the most recent examination rating assigned to any SLHC directly or indirectly controlled by the top-tier SLHC) was ''unsatisfactory.'' The proposed amount of the condition component was 100 percent of the sum of the base assessment, risk/complexity component, and organizational form component. OTS received no comments on this aspect of the proposed rule.[28] This component is adopted with only minor changes to clarify the rule and to reflect changes to terminology.

E. Payment and Collection of Assessments—§§ 502.30–502.45

OTS proposed to bill SLHCs using the same procedures it uses to bill the semi-annual assessments from savings associations. No commenters addressed the proposed procedures. The proposed procedures are adopted without change.

V. Savings Association Assessments

Under part 502, OTS charges each savings association a semi-annual assessment. OTS determines the semi-annual assessment totaling three components:

- An asset size component. OTS applies an assessment rate to the total asset size of the institution, as reported on the TFR. OTS currently provides a reduced assessment for certain qualifying savings associations under an alternate asset size component. To be eligible for this calculation, a savings association must have been a savings association as of January 1, 1999, and its total assets must not exceed $100 million at the end of the current or any previous quarter. The asset size component for qualifying thrifts is calculated under pre-1998 assessment tables.
- A condition component based on the thrift's composite rating in its most recent safety and soundness examination.
- A complexity component applied to trust assets administered by the thrift, recourse obligations and direct credit substitutes held by the thrift, and loans serviced by the thrift for others.

OTS proposed to eliminate the reduced assessment for qualifying savings associations under the alternative asset size component. Commenters generally supported this change, but suggested modifications. Several commenters urged OTS to ease the regulatory burden on qualifying savings associations by phasing in the higher rates over time.

OTS adopted the alternative asset size component in 1998. At that time, it was concerned that the asset size component could impose undue burdens on small savings associations that might not be in a position to absorb the increased costs. Qualifying savings associations have now had the benefit of the alternative calculation through 11 semi-annual assessment cycles. OTS believes that this time period has provided sufficient protection to small institutions. In light of the extra burdens that have been imposed on non-qualifying savings association through these 11 cycles,[29] OTS does not believe that it is equitable to extend the adjustment period with an additional phase-in period.

Other commenters urged OTS to retain the alternative asset size component for qualifying trust-only savings associations. These commenters noted that these thrifts are already subject to a complexity component for trust assets. Therefore, commenters asserted that other savings associations do not carry an additional costs burden for qualifying trust-only savings associations.

[27] OTS is also responsible for ensuring that the state subsidiary depository institution complies with a number of requirements applicable under section 10 of the HOLA. For example, a state savings bank (or a cooperative bank) that is deemed to be a savings association for purposes of section 10 of the HOLA must comply with section 10(d) of the HOLA, which subjects it to additional transactions with affiliate restrictions under section 11 of the HOLA. 12 U.S.C. 1468. In addition, section 10(f) of the HOLA requires the subsidiary insured institution to file advance notices of dividend declarations with OTS. OTS must also ensure that the state savings bank (or a cooperative bank) meets the requirements of a qualified thrift lender. *See* 12 U.S.C. 1467a(l)(2).

[28] As a related matter, some commenters suggested that OTS include adjustments under the organizational form component to reflect SLHC examination ratings. OTS believes that this issue is adequately addressed under the condition component.

[29] These burdens were discussed in the proposed rule at 69 FR at 6207.

Trust assets administered by a savings association are not included as assets on the balance sheet of the thrift. As a result, the asset size component of the thrift semi-annual assessment does not address OTS supervisory efforts expended in the review of these assets. Rather, OTS recovers the costs of supervising savings associations that administer trust assets in one of two ways. For savings associations that administer more than $1 billion of trust assets, OTS collects additional amounts under the complexity component of the semi-annual thrift assessment.[30] For savings associations that administer trust assets of $1 billion or less, OTS collects an examination fee, which is based on examiner hours.[31] Since neither the asset size component nor the alternative asset size component were designed to recover the costs related to the review of trust activities, OTS does not agree that qualifying savings associations administering trust assets carry additional costs relative to their costs of supervision, and has not retained the alternative size component for these thrifts.

VI. Review and Appeal of Assessments

One commenter urged OTS to outline the avenues of review and appeal of assessments and the component elements of assessments. OTS intends to address review and appeal of assessments under the procedures set out in TB 68—Supervisory Review, Appeal and Reconsideration Process and Ombudsman Matters (July 15, 1996). Thrift Bulletin 68 describes an existing process for review and appeal of OTS supervisory decisions and examination findings. While on its face this thrift bulletin states that it applies to savings association appeals, OTS has applied these processes to SLHC appeals of other supervisory issues. OTS intends to apply these processes to appeals of such supervisory determinations as the categorization of a SLHC as Category I or II or a conglomerate and the assignment of examination ratings and is clarifying TB 68 accordingly. OTS will not entertain any requests for refund, reduction or proration of assessments, other than for computational errors.[32] While OTS will address computational errors in assessments through these procedures, it anticipates that most errors will first be addressed through informal contacts with the agency.

[30] 12 CFR 502.25(a)(1).

[31] 12 CFR 502.50(a).

[32] *See* 12 CFR 502.40(a).

VII. Executive Order 12866

The Director of OTS has determined that this final rule does not constitute a ''significant regulatory action'' for the purposes of Executive Order 12866.

VIII. Regulatory Flexibility Act Analysis

Under section 605(b) of the Regulatory Flexibility Act of 1980,[33] OTS has evaluated the impact that the final rule will have on small businesses, small organizations, and small governmental jurisdictions. OTS published an initial regulatory flexibility analysis (IRFA) with the proposed rule. No commenters addressed the IRFA. Accordingly, OTS has prepared the following final regulatory flexibility analysis (FRFA).

A. Legal Basis for the Rule; Objectives of the Rule

The HOLA authorizes the Director to assess fees against savings associations and holding companies to fund OTS's direct and indirect expenses as the Director deems necessary or appropriate.[34] OTS also may assess savings associations and affiliates of savings associations for the costs of conducting examinations.[35]

OTS regulations implementing this authority are located at 12 CFR part 502. Under these rules, OTS currently charges each savings association a semi-annual assessment, which includes a size component, a condition component, and a complexity component. In addition, OTS charges an examination fee for thrifts that have trust assets that are under the $1 billion complexity component threshold. OTS also charges SLHCs and other thrift affiliates fees for investigating and examining their operations. These examination-related fees are assessed at an hourly rate for examiner time spent preparing for and conducting the examination.

The final rule seeks to more accurately apportion the cost of OTS supervision among savings associations, SLHCs, and other affiliates. The agency has three primary goals: (1) Keep charges as low as possible while providing the agency with the resources essential to effectively supervise a changing industry; (2) tailor its charges to accurately reflect the agency's costs of supervising institutions and their affiliates; and (3) provide institutions and their affiliates with consistent and predictable assessments to facilitate financial planning.

[33] 5 U.S.C. 605(b).

[34] 12 U.S.C. 1467(k). *See also* 12 U.S.C. 1462a, 1463, 1467, 1467a.

[35] 12 U.S.C. 1467(a) and (b) and 1467a(b)(4). *See also* 12 U.S.C. 1467(d) (trust examinations of savings associations).

B. Impact of the Rule

The final rule affects small savings associations and small SLHCs. It does not affect other small businesses, small organizations, or small governmental jurisdictions. OTS addresses the impact of the rule on small savings associations and small SLHCs below. OTS has considered various alternatives to the final rule to reduce the impact of the rule on small savings associations and small SLHCs. These alternatives are also discussed below.

1. Effect on Small SLHCs

a. Size standard for small SLHCs

The Small Business Administration (SBA) prescribes size standards for various economic activities and industries using the North American Industry Classification System (NAICS).[36] Under the SBA's standards, companies that are primarily engaged in holding securities of (or other equity interests in) depository institutions for the purpose of controlling those companies are addressed at NAICS Codes 551111 and 551112 (Office of Bank Holding Companies and Offices of Other Holding Companies). Companies within this group are considered to be small if they have annual receipts of $6 million or less. Companies that are primarily engaged in holding the securities of depository institutions and operating these entities are classified under NAICS Codes 522110–522190. Companies classified in this group are considered to be small if their total assets are less than 50 million. In this FRFA, OTS analyzes the impact of the final rule using both the $150 million asset size standard and the $6 million annual receipts standard.

b. Impact on small SLHCs.

The final rule replaces examination fees for SLHCs with semi-annual assessments on each responsible SLHC. OTS imposes a base assessment amount, and adds up to three components to this base amount. The three components are based on the risk or complexity of the SLHC's business, its organizational form, and its condition. No small SLHC is subject to the alternative assessment on conglomerate enterprises.

OTS calculates that there are 944 OTS-regulated SLHCs, including many intermediate holding companies within a single ownership structure. The final rule charges semi-annual assessments only on the responsible SLHC in each holding company structure. There are

[36] 13 CFR part 121.

508 responsible SLHCs. Of these 508 responsible SLHCs, 162 have total consolidated assets of less than $150 million and are considered to be small under the asset size standard. OTS estimates that 103 responsible SLHCs have annual receipts of $6 million or less and are small under the annual receipts standard.[37]

The final assessment rule affects all of these small SLHCs in varying degrees. The impact of the rule will be phased-in in three stages. OTS will assess 25 percent of the full assessment amount for the July 1, 2004 semi-annual assessment, 50 percent of the full assessment amount for the January 1, 2005 semi-annual assessment and the full assessment amount for the July 1, 2005 semi-annual assessment. The fully phased-in impact of the rule is set out below:

Base assessment charge. The base assessment charge affects all small SLHCs. Under the final rule, these small SLHCs will be assessed a charge of $3,000 for each semi-annual assessment (or $6,000 per year).

Risk/complexity component. OTS does not impose any additional charge on small Category I SLHCs under the recently published schedules for the risk/complexity component. Small Category II SLHCs, however, will be assessed an additional semi-annual charge of $1,000 to $3,000 (or $2,000 to $6,000 per year) under these schedules, depending on total consolidated assets.

There are 152 small Category I SLHCs and ten small Category II SLHCs under the asset size standard. OTS estimates that there are 96 small Category I SLHCs and seven small Category II SLHCs under the annual receipts standard.[38]

Organizational form component. The organizational form component applies only to section 10(l) SLHCs. For small section 10(l) holding companies that are Category I SLHCs, this component increases the semi-annual assessment by an additional 25 percent or $750 ($1,500 per year).[39] For small section 10(l) holding companies that are Category II SLHCs, this component also increases the semi-annual assessment by 25 percent. The increase to the semi-annual assessment for these SLHCs under this component will range from $1,000 to $1,500 ($2,000 to $3,000 per year).[40] The actual amount of the increase will depend upon total consolidated SLHC assets.

OTS regulates 45 section 10(l) SLHCs. Twelve of these section 10(l) SLHCs are small under the asset size standard. Of these 12 small section 10(l) SLHCs, 11 are Category I and one is Category II. OTS estimates that eight section 10(l) SLHCs are small under the annual receipts standard, and that seven of these small SLHCs are Category I and that one of these SLHCs is Category II.

Condition component. The final rule imposes an additional charge on SLHCs that are rated ''unsatisfactory.'' For these small SLHCs, the condition component increases the assessment by 100 percent. Applying the asset size standard, only six small SLHCs are rated unsatisfactory. Under the annual receipts standard, only four small SLHCs are rated unsatisfactory.[41]

The following chart summarizesthe impact of the final rule on the semi-annual assessment for small SLHCs:

	Number of small SLHCs	A	B	C	D
		Base assessment amount [42]	Risk/complexity component [43]	Organizational form component [44]	Total semi-annual assessment [45]
Small Category I SLHCs that are not section 10(1) SLHCs.	141 (asset size standard). 89 (receipts standard)	$3,000	$0	N/A	$3,000
Small Category II SLHCs that are not section 10(1) SLHCs.	9 (asset size standard) 6 (receipts standard)	3,000	3,000 (Maximum)	N/A	6,000 (Maximum)
Small Category I SLHCs that are section 10(1) SLHCs.	11 (asset size standard) 7 (receipts standard)	3,000	0	750	3,750
Small Category II SLHCs that are section 10(1) SLHCs.	1 (asset size standard) 1 (receipts standard)	3,000	3,000 (Maximum)	1,500 (Maximum)	7,500 (Maximum)

As noted above, for the SLHCs that are rated unsatisfactory, the amount of the semi-annual assessment is doubled. This will affect six SLHCs under the asset size standard and four SLHCs under the receipts standard.

The amounts charged under the new assessments rule for SLHCs will be offset by the elimination of the periodic SLHC examination fees. Although the amount of this offset will vary from SLHC-to-SLHC, OTS estimates that the average examination for a small SLHC is conducted every 18 months, and consumes approximately 39 examiner hours. At the current OTS billing rate of $145 per hour, OTS estimates that the average small SLHC will avoid on-site examination charges of $5,655 or an annualized charge of $3,770 per year.

[37] OTS has used December 2003 financial data for the purposes of this FRFA. OTS electronically collects information on total consolidated assets held by most SLHCs. However, it does not electronically collect annual receipts data. OTS has estimated the number of small SLHCs under the annual receipts standard by analyzing actual trailing 12-month revenues reported for 277 publicly traded SLHCs for the fiscal/calendar year ending December 31, 2003. Source: SNLDataSource. Using total revenue figures, OTS has concluded that approximately 20.2 percent of the 508 holding company structures are small under the annual receipts standard.

[38] OTS does not electronically collect annual receipts data for SLHCs. OTS has estimated the number of small Category I and II SLHCs, small section 10(l) SLHCs, and small unsatisfactorily rated SLHCs under the annual revenues standard by applying the proportion of small SLHCs in these categories under the asset size standard.

[39] The additional semi-annual organizational charge of $750 is 25 percent times the total of the base assessment component ($3,000) plus the risk/complexity component for Category I SLHCs ($0).

[40] This $1,000 to $1,500 range for the semi-annual organizational form component is 25 percent times the total of the base charge ($3,000) plus the risk/complexity component for a Category II SLHC. As noted above, the risk/complexity component for a Category II SLHC will range from $1,000 to 3,000.

[41] OTS cannot provide a more specific breakdown regarding the impact of the condition component on each of these small SLHCs because such information may result in the public disclosure of sensitive and privileged supervisory rating information for specific SLHCs. See 12 CFR 510.5.

[42] OTS has imposed a $3,000 base semi-annual assessment amount for all SLHCs.

[43] Amounts in Column B are from the published schedules for the risk/complexity component.

[44] Amounts in Column C are 25 percent of the total of Column A + Column B.

[45] Amounts in Column D equal Column A + Column B + Column C.

In any event, OTS has considered alternatives to the final assessment rule. OTS considered, for example, assessing all SLHCs the same base assessment amount; computing the semi-annual assessment amount for all SLHCs using the same asset-based assessment schedule; and continuing to assess only on-site examination and off-site examination related fees rather than semi-annual assessments.

OTS does not believe that the first two alternatives will further the goal of tailoring OTS charges more closely to the costs of supervising various types of SLHCs, and could result in some SLHCs subsidizing the increased costs of supervising others.[46] For the reasons set forth at Section III.B.2. of the preamble, OTS further believes that continuing to assess examination fees will not provide SLHCs with consistency and predictability of assessments to facilitate financial planning.

Although no commenter specifically addressed the IRFA, several commenters raised issues of concern to small SLHCs. Several argued that charges for all SLHCs, including small SLHCs, would increase substantially under the final rule. OTS acknowledges that the supervision charges for many SLHCs will rise under the final rule. This was an expected outcome because OTS was not fully recovering the entire costs of SLHC supervision. To mitigate the impact of these increases, however, OTS will phase in the assessment in three stages. See discussion at Section III.B.1.

Several commenters urged OTS to reduce assessments of shell SLHCs, which include many small SLHCs. For the reasons stated in Section III.C.1. of this preamble, OTS believes that the proposed assessment computation already included appropriate adjustments designed to address shell SLHCs. However, to mitigate the impact of the rule on top-tier family trusts, which include many small shell SLHCs, OTS has retained the ability to designate an intermediate tier SLHC in the holding company structure as the responsible SLHC under the rule. OTS will make this designation where there are multiple top-tier SLHCs in a holding company structure, the top-tier SLHCs are closely held family trusts, the trusts conduct no activities and essentially hold only passive investments, and the thrift assets are not consolidated onto the balance sheets of the trusts. As a result of these changes, such top-tier family trusts will not be subject to multiple assessments that would not reflect OTS examination, supervision or regulatory efforts. See discussion at Section III.D.1.

Finally, several commenters urged OTS to eliminate or reduce the organizational form component applicable to section 10(1) SLHCs, including small section 10(1) SLHCs. For the reasons discussed at Section III.D.5., OTS continues to believe that an organizational form component for section 10(1) SLHCs is appropriate. However, OTS has reduced the amount of the multiplier used under this component from 50 percent to 25 percent.

2. Effect on Small Savings Associations

This final rule affects small savings associations by eliminating the alternative calculation of the size component currently available to certain small savings associations. To be eligible for this calculation, a savings association must have been a savings association as of January 1, 1999, and its total assets must not exceed $100 million at the end of the current or any previous quarter.

Small savings associations are defined as institutions with assets under $150 million.[47] OTS estimates that approximately 281 small savings associations would have taken advantage of the alternative size calculation during the July 2004 semi-annual assessment.

Under the alternate calculation, the asset size component for a qualifying savings association is its assessment calculated under pre-1998 assessment schedules, rather than the current assessment schedules. Unlike the pre-1998 assessment schedules, the current assessment schedules use rates that have been adjusted for inflation and include a base charge for certain fixed costs that are the same or nearly the same for all institutions. Because the amount of the size component varies with the size of the institution, the impact of this change on small thrifts will vary. Using the most recent assessment table published in TB 48–20 for the January 2004 semi-annual assessment, the asset size component computed under the standard method and the alternative methods for institutions of various selected sizes is illustrated by the following chart:

IMPACT OF THE ALTERNATIVE SIZE COMPUTATION ON INSTITUTIONS OF SELECTED SIZES

Asset size	Asset size component computed under TB 48–20 schedules	Alternative asset size component computation	Net reduction of assessment
$0 Million	$2,042	$0	$2,042
$35 Million	7,898	6,046	1,852
$67 Million	13,252	11,575	1,677
$100 Million	16,935	15,993	942

Approximately 12 of the 281 small savings associations are currently rated ''3'' and are subject to an additional assessment under the condition component. This additional assessment is equal to 50 percent of the size component. For these 12 thrifts, the overall benefit of the alternative size calculation is 150 percent of the amount in the final column of the chart. Thus, the overall semi-annual benefit from the alternative size calculation for any individual 3-rated savings association would have ranged from $1,413 to $3,063, depending on the institution's asset size. Two small savings associations are rated ''4'' or ''5'' and are subject to an additional assessment under the condition component that is equal to 100 percent of the size component. For these two institutions, the overall benefit of the alternative size calculation is 200 percent of the figure in the final column of the chart. The overall semi-annual benefit from the alternative size calculation for any individual 4-or 5-rated savings

[46] Moreover, OTS believes that requiring unsatisfactory-rated SLHCs to pay for their extra supervisory costs will provide an added incentive for those SLHCs to promptly address the supervisory concerns that could adversely impact the depository subsidiary and to take other actions to improve their ratings.

[47] 13 CFR 121.201.

association will range from $1,884 to $4,084, depending on the institution's asset size.[48]

OTS considered various alternatives to the final rule. For example, it considered retaining the alternative asset size component for qualifying savings associations, prescribing a separate asset size schedule for smaller institutions with a lower base assessment rate or lower rates for smaller institutions, or phasing out the alternative schedule over time. Although no commenter specifically addressed the IRFA, several supported a gradual phase-out of the alternative schedule.

OTS's assessment regulation, to the maximum extent possible, attempts to tailor rates and charges to the agency's costs of supervising particular institutions. While it may have been appropriate to provide qualifying savings associations with an initial period to adjust to the assessment regulation originally adopted in 1998, it is not equitable to continue to require non-qualifying savings associations to carry the cost burdens for qualifying savings associations. Non-qualifying savings associations, which include many small savings associations,[49] have carried an extra burden for qualifying institutions for five years. This burden has not remained static, but rather has increased over the five-year period.[50] OTS believes that all institutions, even small institutions, should be able to plan for, adjust to, and carry the burden of inflation-related and cost changes reflected in OTS's assessments schedule. Accordingly, OTS does not believe that it is appropriate to compel other institutions to continue to carry an increased burden.

Some commenters urged OTS to retain the alternative size component for qualifying small trust-only institutions. For the reasons set forth in Section V., OTS does not agree that qualifying savings associations administering trust assets carry additional costs relative to their cost of supervision, and has not retained the alternative size component for these thrifts.

C. Other Matters

The final rule imposes no reporting, recordkeeping, or other compliance requirements. The current savings association assessment and the new SLHC assessment will be based on information contained in TFRs or in H–(b)11 Current/Annual Report, which savings associations and their SLHCs otherwise must file with OTS. While state-regulated depository institutions held by section 10(l) SLHCs do not file TFRs, they are still expected to submit holding company asset size information to OTS in the format of Schedule HC. OTS is working on a means to collect this information electronically from section 10(l) SLHCs.

OTS will continue to use its current collection procedures for savings associations and will use similar procedures for billing and collecting semi-annual assessments from SLHCs.

No federal rules duplicate, overlap, or conflict with this final rule.

VIII. Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (Unfunded Mandates Act), requires an agency to prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. OTS has determined that the final rule will not result in expenditures by state, local, or tribal governments or by the private sector of $100 million or more. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects in 12 CFR Part 502

Assessments, Federal home loan banks, Reporting and recordkeeping requirements, Savings associations.

■ Accordingly, the Office of Thrift Supervision amends part 502, chapter V, title 12, Code of Federal Regulations as set forth below.

PART 502—ASSESSMENTS AND FEES

■ 1. The authority citation for part 502 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1467, 1467a.

■ 2. In § 502.5, revise paragraphs (b) and (c) to read as follows:

§ 502.5 Who must pay assessments and fees?

(b) *Assessments.* If you are a savings association or a responsible savings and loan holding company, and OTS regulates you on the last day of January or on the last day of July of each year, you must pay a semi-annual assessment due on that day. Subpart A of this part describes OTS's assessment procedures and requirements.

(c) *Fees.* If you make a filing with OTS or use OTS services, the Director may require you to pay a fee to cover the costs of processing your submission or providing those services. The Director may charge a fee for any filing including notices, applications, and securities filings. The Director may charge a fee for any service including publications, seminars, certifications for official copies of agency documents, and records or services requested by other agencies. The Director also assesses fees for examining and investigating savings associations that administer trust assets of $1 billion or less, and savings association affiliates. If OTS incurs extraordinary expenses related to examination, investigation, regulation, or supervision of a savings association or its affiliate, the Director may charge the savings association or the affiliate a fee to fund those expenses. Subpart B of this part describes OTS's fee procedures and requirements.

■ 3. Revise part 502, subpart A to read as follows:

Subpart A—Assessments

Savings Associations—Calculation of Assessments

§ 502.10 How does OTS calculate the semi-annual assessment for savings associations?

(a) If you are a savings association, OTS determines your semi-annual assessment by totaling three components: your size, your condition, and the complexity of your business. OTS determines the amounts of each component under §§ 502.15 through 502.25 of this part.

(b) OTS uses the September 30 Thrift Financial Report to determine amounts due at the January 31 assessment; and the March 31 Thrift Financial Report to determine amounts due at the July 31 assessment. For purposes of §§ 502.10 through 502.25 of this part, total assets are your total assets as reported on Thrift Financial Reports filed with OTS.

§ 502.15 How does OTS determine my size component?

(a) *Chart.* If you are a savings association, OTS uses the following chart to calculate your size component:

[48] *See* 12 CFR 502.20. OTS cannot provide a more specific breakdown regarding the impact of the condition component on each of these small savings associations because such information may result in the public disclosure of sensitive and privileged supervisory rating information for specific institutions. *See* 12 CFR 510.5.

[49] OTS estimates that 194 of the 475 institutions with assets under $150 million are not qualifying savings associations.

[50] *See* discussion at 69 FR at 6207.

If your total assets are: . . .		Your size component is:		
Over— *	But not over—	This amount—Base assessment amount	Plus—Marginal rate	Of assets over—Class floor
Column A	Column B	Column C	Column D	Column E
0	$67 million	C1	D1	0.
$67 million	215 million	C2	D2	$67 million.
215 million	1 billion	C3	D3	215 million.
1 billion	6.03 billion	C4	D4	1 billion.
6.03 billion	18 billion	C5	D5	6.03 billion.
18 billion	35 billion	C6	D6	18 billion.
35 billion		C7	D7	35 billion.

(b) *Calculation.* To calculate your size component, find the row in Columns A and B that describes your total assets. Reading across in that same row, find your base assessment amount in Column C, your marginal rate in Column D, and your class floor in Column E. Calculate how much your total assets exceed your Column E class floor. Multiply this number by your Column D marginal rate. Add this number to your Column C base assessment amount. The total is your size component. OTS will establish the base assessment amounts and the marginal rates in columns C and D in a Thrift Bulletin.

§ 502.20 How does OTS determine my condition component?

(a) If you are a savings association, OTS uses the following chart to determine your condition component:

If your composite rating is:	Then your condition component is:
1 or 2	Zero.
3	50 percent of your size component.
4 or 5	100 percent of your size component.

(b) For the purposes of this section, OTS uses the most recent composite rating, as defined in 12 CFR part 516, of which you have been notified in writing before an assessment's due date.

§ 502.25 How does OTS determine my complexity component?

If you are a savings association and your portfolio exceeds any of the thresholds in paragraph (a) of this section, OTS will calculate your complexity component according to paragraph (c) of this section. If your portfolio does not exceed any of the thresholds in paragraph (a) of this section, your complexity component is zero.

(a) *Thresholds for complexity component.* OTS uses three separate thresholds in calculating your complexity component. You exceed a threshold if you have more than $1 billion in any of the following:

(1) Trust assets that you administer.

(2) The outstanding principal balances of assets that are covered, fully or partially, by your recourse obligations or direct credit substitutes.

(3) The principal amount of loans that you service for others.

(b) *Assessment rates.* OTS will establish one or more assessment rates for each of the types of activities listed in paragraph (a) of this section. OTS will publish those assessment rates in a Thrift Bulletin.

(c) *Calculation of complexity component.* OTS separately considers each of the thresholds in paragraph (a) of this section in calculating your complexity component. OTS first calculates the amount by which you exceed any of those thresholds. OTS multiplies the amount by which you exceed any thresholds in paragraph (a) of this section by the applicable assessment rate(s) under paragraph (b) of this section. OTS then totals the results. This total is your complexity component.

Savings and Loan Holding Companies—Calculation of Assessments

§ 502.26 How does OTS calculate the semi-annual assessment for savings and loan holding companies?

(a) OTS calculates the semi-annual assessment savings and loan holding companies as follows:

(1) OTS will assess a base assessment amount of $3,000 on responsible savings and loan holding companies. The base assessment amount reflects OTS's estimate of the base costs of conducting on- and off-site supervision of a noncomplex, low risk savings and loan holding company structure. OTS will periodically revise this amount to reflect changes in inflation based on a readily available index. OTS will establish the revised amount of the base assessment in a Thrift Bulletin.

(2) OTS will add three components to the base assessment amount to compute the amount of the semi-annual assessment for responsible savings and loan holding companies: a component based on the risk or complexity of the savings and loan holding company's business, a component based on its organizational form, and a component based on its condition. OTS determines the amount of each component under §§ 502.27 through 502.29 of this part.

(b) For purposes of the semi-annual assessment of savings and loan holding companies:

(1) The *responsible holding company* is the registered holding company at the highest level of ownership in a holding company structure, unless OTS designates another savings and loan holding company in the holding company structure. OTS may designate an intermediate-tier holding company if the assessment of this entity would more accurately reflect OTS costs of supervising the holding company structure and:

(i) There are multiple top-tier holding companies in the holding company structure;

(ii) The top-tier holding company is organized outside of the United States, and is subject to the consolidated review of a foreign regulator; or

(iii) Other circumstances indicate that the assessment of the top-tier holding company is inappropriate.

(2) *Total consolidated holding company assets* are the total assets as reported on the Thrift Financial Report, Schedule HC. If Schedule HC is unavailable, OTS will use total assets reported on report H–(b)11. OTS uses information contained in the September 30 Schedule HC or report H–(b)11 to determine amounts due at the January 31 assessment; and the March 31 Schedule HC or report H–(b)11 to determine amounts due at the July 31 assessment.

§ 502.27 How does OTS determine the risk/complexity component for a savings and loan holding company?

(a) OTS computes the risk/complexity component for responsible savings and loan holding companies using schedules that set out charges based on OTS holding company risk/complexity classifications and total consolidated holding company assets. OTS will establish these schedules in a Thrift Bulletin.

(b) For the purposes of this section, the holding company risk/complexity classification is the most recent risk/complexity classification of which OTS notified the savings and loan holding company in writing before an assessment's due date.

(1) OTS classifies holding companies as Category I (low risk, noncomplex holding company); Category II (complex or high risk holding company); or Category III (conglomerate).

(2) The OTS holding company risk/complexity classifications reflect OTS's assessment of a holding company's financial condition, financial independence of the savings association and other affiliates that are regulated financial entities, operational independence of the savings association and other affiliates that are regulated financial entities, reputational risks raised by affiliation with the holding company, and management experience of the holding company, savings association, and affiliates. The OTS holding company risk/complexity classification system is more fully described in the OTS Holding Company Handbook.

(3) A conglomerate is a holding company that: (i) is one of the most complex or highest risk holding companies under the holding company risk/complexity classification system; (ii) is made up of a number of different companies or legal enterprises that offer products from more than one financial sector (*e.g.*, insurance, securities, and banking) or operate in diversified fields; and (iii) generally manages these companies and enterprises along functional lines, rather than as separate legal entities.

(c) OTS uses the following chart to compute the risk/complexity component under this section. OTS will establish the amounts in column C and D in the Thrift Bulletin for each holding company risk/complexity classification. The amounts established for column C and D that are applicable to conglomerates will be three times the amounts established for column C and D for complex or higher risk holding company enterprises of the same asset size.

If your total consolidated assets are . . .		Your risk/complexity component is . . .		
Over . . .	But not over . . .	This amount . . .	Plus—this marginal rate . . .	Of assets over . . .
Column A	Column B	Column C	Column D	Column E
$0	$150 Million	C1	D1	$0
150 Million	250 Million	C2	D2	150 Million
250 Million	500 Million	C3	D3	250 Million
500 Million	1 Billion	C4	D4	500 Million
1 Billion	5 Billion	C5	D5	1 Billion
5 Billion	50 Billion	C6	D6	5 Billion
50 Billion	100 Billion	C7	D7	50 Billion
100 Billion	300 Billion	C8	D8	100 Billion
Over 300 Billion		C9	D9	300 Billion

(d) To compute your risk/complexity component, find the row in the appropriate schedule that describes your total consolidated assets by referring to the amounts in Columns A and B. In that row, calculate how much your total consolidated assets exceed the class floor (Column E); multiply this number by your marginal rate (Column D); and add the product to the amount in Column C. The total is your risk/complexity component.

§ 502.28 How does OTS determine the organizational form component for a savings and loan holding company?

OTS will include an organizational form component if you are a responsible savings and loan holding company that OTS regulates under section 10(l) of the HOLA. OTS will compute your organizational form component by adding the base assessment to your risk/complexity component, and multiplying this amount by 25 percent.

§ 502.29 How does OTS determine the condition component for a savings and loan holding company?

(a) If the most recent examination rating assigned to the responsible savings and loan holding company (or the most recent examination rating assigned to any savings and loan holding company in the holding company structure) is ''unsatisfactory,'' OTS will assess a charge under the condition component. The amount of the condition component is equal to 100 percent of the sum of the base assessment amount, the risk/complexity component, and any organizational form component.

(b) For the purposes of this section, examination ratings are the ratings that OTS assigns under the OTS holding company rating system. OTS uses the most recent rating of which the savings and loan holding company has been notified in writing before an assessment's due date.

Payment of Assessments

§ 502.30 When must I pay my assessment?

OTS will bill you semi-annually for your assessments. Assessments are due January 31 and July 31 of each year, unless that date is a Saturday, Sunday, or Federal holiday. If the due date is a Saturday, Sunday or Federal holiday, your assessment is due on the first day preceding the due date that is not a Saturday, Sunday or Federal holiday. At least seven days before your assessment is due, the Director will mail you a notice that indicates the amount of your assessment, explains how OTS calculated the amount, and specifies when payment is due.

§ 502.35 How do I pay my assessment?

(a) *Savings associations.* (1) If you are a member of a Federal Home Loan Bank that offers demand deposit accounts which permit direct debits, you must maintain a demand deposit account at your Federal Home Loan Bank with

sufficient funds to pay your assessment when due. OTS will notify your Federal Home Loan Bank of the amount of your assessment. OTS will debit your account for your assessments.

(2) If paragraph (a)(1) of this section does not apply to you, OTS will directly debit an account you must maintain at your association.

(b) *Savings and loan holding companies.* You may establish an account at an insured depository institution and authorize OTS to debit the account for your semi-annual assessment. If you do not establish an account and maintain funds in the account sufficient to pay the semi-annual assessment when due, OTS may charge you a fee to cover its administrative costs of collecting and billing your assessment. This fee is in addition to interest on delinquent assessments charged under § 502.45 of this part. OTS will establish the amount of the administrative fee and publish the amount of the fee in a Thrift Bulletin.

§ 502.40 Will OTS refund or prorate my assessment?

(a) OTS will not refund or prorate your assessment, even if you cease to be a savings association or a savings and loan holding company.

(b) If a conservator or receiver has been appointed, you must continue to pay assessments in accordance with this part. OTS will not increase or decrease your assessment based on events that occur after the date of the Thrift Financial Report or H–(b)11 Annual/Current Report upon which your assessment is based.

§ 502.45 What will happen if I do not pay my assessment on time.

(a) Your assessment is delinquent if you do not pay it on the date it is due under § 502.30 of this part. The Director will charge interest on delinquent assessments. Interest will accrue at a rate (that OTS will determine quarterly) equal to 150 percent of the average of the bond-equivalent rates of 13-week Treasury bills auctioned during the calendar quarter preceding the assessment.

(b) If a savings and loan holding company fails to pay an assessment within 60 days of the date it is due under § 502.30 of this part, the Director may assess and collect the assessment with interest from a subsidiary savings association. If a savings and loan holding company controls more than one savings association, the Director may assess and collect the assessment from each savings association as the Director may prescribe.

■ 4. Revise § 502.50 to read as follows:

§ 502.50 What fees does OTS charge?

(a) The Director assesses fees for examining or investigating savings associations that administer trust assets of $1 billion or less, and saving association affiliates. Because OTS recovers the ordinary costs of examining and investigating savings and loan holding companies through the semi-annual assessment under §§ 502.25 through 502.29 of this part, the Director will not generally charge an examination fee to a savings and loan holding company. ''Affiliate'' has the meaning in 12 U.S.C. 1462(9), except that, for this part only, ''affiliate'' does not include any entity that is consolidated with a savings association on the Consolidated Statement of Condition of the Thrift Financial Report.

(b) The Director assesses fees for processing notices, applications, securities filings, and requests, and for providing other services.

■ 5. Revise § 502.75(b) to read as follows

§ 502.75 What will happen if I do not pay my fees on time?

* * * * *

(b) *Failure to pay.* If you are a savings association and your holding company, affiliate, or subsidiary fails to pay any fee within 60 days of the date specified in a bill, the Director may assess and collect that fee, with interest, from you. If the holding company, affiliate, or subsidiary is related to more than one savings association, the Director may assess the fee against and collect it from each savings association as the Director may prescribe.

Dated: May 28, 2004.

By the Office of Thrift Supervision.

James Gilleran,

Director.

[FR Doc. 04–12128 Filed 5–27–04; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–17725; Airspace Docket No. 04–ACE–37]

Modification of Class E Airspace; Wahoo, NE

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action amends Title 14 Code of Federal Regulations, part 71 (14 CFR 71) by revising the Class E airspace area at Wahoo, NE. A review of the Class E airspace area extending upward from 700 feet above the surface at Wahoo, NE revealed it does not reflect the current Wahoo Municipal Airport airport reference point (ARP) and is not in compliance with established airspace criteria. This airspace area is enlarged and modified to conform to FAA Orders.

DATES This direct final rule is effective on 0901 UTC, September 30, 2004. Comments for inclusion in the Rules Docket must be received on or before July 28, 2004.

ADDRESSES: Send comments on this proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2004–17725/Airspace Docket No. 04–ACE–37, at the beginning of your comments. You may also submit comments on the Internet at *http://dms.dot.gov*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

FOR FURTHER INFORMATION CONTACT: Brenda Mumper, Air Traffic Division, Airspace Branch, ACE–520A, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2524.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR 71 modifies the Class E airspace area extending upward from 700 feet above the surface at Wahoo, NE. An examination of controlled airspace for Wahoo, NE revealed that the Wahoo Municipal Airport ARP used in the legal descriptions for this Class E airspace area is incorrect and that the airspace area does not comply with airspace requirements for diverse departures as set forth in FAA Order 7400.2E, Procedures for Handling Airspace Matters. The examination also identified a discrepancy in the bearing from the Wahoo nondirectional radio beacon (NDB) used in the Class E airspace legal description. The legal description was not in compliance with FAA Order 8260.19C, Flight Procedures and Airspace. The limit of the Class E airspace area extension should be defined as a distance from the Wahoo NDB and the bearing corrected.