DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 7, 145 and 160

[Docket ID OCC–2020–0003]

RIN 1557–AE74

Activities and Operations of National Banks and Federal Savings Associations

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency is issuing a notice of proposed rulemaking to revise and reorganize its regulations relating to the activities and operations of national banks and Federal savings associations. This proposal would clarify and codify recent OCC interpretations, integrate certain regulations for national banks and Federal savings associations, and update or eliminate outdated regulatory requirements that no longer reflect the modern financial system.

DATES: Comments must be received on or before August 3, 2020.

ADDRESSES: Commenters are encouraged to submit comments through the Federal eRulemaking Portal or email, if possible. Please use the title ''Activities and Operations of National Banks and Federal Savings Associations'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—Regulations.gov Classic or Regulations.gov Beta Regulations.gov Classic:* Go to *https://www.regulations.gov/.* Enter ''Docket ID OCC 2020–0003'' in the Search Box and click ''Search.'' Click on ''Comment Now'' to submit public comments. For help with submitting effective comments please click on ''View Commenter's Checklist.'' Click on the ''Help'' tab on the *Regulations.gov* home page to get information on using *Regulations.gov*, including instructions for submitting public comments.

Regulations.gov Beta: Go to *https://beta.regulations.gov/* or click ''Visit New *Regulations.gov Site*'' from the *Regulations.gov* classic homepage. Enter ''Docket ID OCC–2020–0003'' in the Search Box and click ''Search.'' Public comments can be submitted via the ''Comment'' box below the displayed document information or click on the document title and click the ''Comment'' box on the top-left side of the screen. For help with submitting effective comments please click on ''Commenter's Checklist.'' For assistance with the *Regulations.gov* Beta site please call (877)–378–5457 (toll free) or (703) 454–9859 Monday–Friday, 9 a.m.–5 p.m. ET or email to *regulations@erulemakinghelpdesk.com.*

- *Email: regs.comments@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''Docket ID OCC–2020–0003'' in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- *Viewing Comments Electronically—Regulations.gov Classic or Regulations.gov Beta:Regulations.gov Classic:* Go to *https://www.regulations.gov/.* Enter ''Docket ID OCC–2020–0003'' in the Search box and click ''Search.'' Click on ''Open Docket Folder'' on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on ''View all documents and comments in this docket'' and then using the filtering tools on the left side of the screen. Click on the ''Help'' tab on the *Regulations.gov* home page to get information on using *Regulations.gov.* The docket may be viewed after the close of the comment period in the same manner as during the comment period.

Regulations.gov Beta: Go to *https://beta.regulations.gov/* or click ''Visit New *Regulations.gov Site*'' from the *Regulations.gov* classic homepage. Enter ''Docket ID OCC–2020–0003'' in the Search Box and click ''Search.'' Click on the ''Comments'' tab. Comments can be viewed and filtered by clicking on the ''Sort By'' drop-down on the right side of the screen or the ''Refine Results'' options on the left side of the screen. Supporting Materials can be viewed by clicking on the ''Documents'' tab and filtered by clicking on the ''Sort By'' drop-down on the right side of the screen or the ''Refine Results'' options on the left side of the screen.'' For assistance with the *Regulations.gov* Beta site please call (877)–378–5457 (toll free) or (703) 454–9859 Monday–Friday, 9 a.m.–5 p.m. ET or email to *regulations@erulemakinghelpdesk.com.*

The docket may be viewed after the close of the comment period in the same manner as during the comment period.

FOR FURTHER INFORMATION CONTACT: Beth Kirby, Assistant Director, Valerie Song, Assistant Director, Heidi Thomas, Special Counsel, or Chris Rafferty, Attorney, Chief Counsel's Office, (202) 649–5490, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. For persons who are deaf or hearing impaired, TTY, (202) 649–5597.

SUPPLEMENTARY INFORMATION:

I. Background

The Office of the Comptroller of the Currency (OCC) periodically reviews its regulations to eliminate outdated or otherwise unnecessary regulatory provisions and, where possible, to clarify or revise requirements imposed on national banks and Federal savings associations. These reviews are in addition to the OCC's decennial review of its regulations as required by the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA).[1] These reviews also consider, where appropriate, opportunities to integrate rules that apply to national banks with similar rules that apply to Federal savings associations in light of the transfer to the OCC of all functions of the former Office of Thrift Supervision (OTS) relating to Federal savings association by Title III of the Dodd-

[1] Public Law 104–208 (1996), codified at 12 U.S.C. 3311(b). Section 2222 of EGRPRA requires that, at least once every 10 years, the OCC along with the other Federal banking agencies and the Federal Financial Institutions Examination Council (FFIEC) conduct a review of their regulations to identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions. Specifically, EGRPRA requires the agencies to categorize and publish their regulations for comment, eliminate unnecessary regulations to the extent that such action is appropriate, and submit a report to Congress summarizing their review. The agencies completed their second EGRPRA review on March 2017 and published their report in the **Federal Register**. 82 FR 15900 (March 30, 2017).

Frank Wall Street Reform and Consumer Protection Act.[2]

As part of this process, the OCC is proposing to revise and reorganize subparts A through D of 12 CFR part 7, Activities and Operations. Specifically, the OCC is proposing new regulations or updates to existing regulations to address developing issues and industry practices and to clarify OCC interpretive positions. For example, proposed revisions to subpart A include new regulations covering tax equity finance transactions, derivatives activities, and payment system memberships. Proposed revisions to subpart B address corporate governance issues, such as expanding the ability of national banks to choose corporate governance provisions under State or other law, clarifying permissible anti-takeover provisions, and adding provisions relating to capital stock-related activities of national banks. The OCC also is proposing to update and integrate rules relating to bank hours and closings in subpart C and to update rules relating to loan production and deposit production offices and remote service units in subpart D and move these sections to subpart A to improve the organization of part 7.[3] As a companion to this proposed rule, the OCC is separately issuing an Advance Notice of Proposed Rulemaking (ANPR), published elsewhere in this issue of the **Federal Register** as a separate document, that requests comment on subpart E of 12 CFR part 7 and 12 CFR part 155, the OCC's rules on electronic banking activities.

The OCC also is proposing more general changes throughout part 7 including removing outdated or superfluous regulations; consolidating related regulations into one section; and making various technical changes throughout part 7. In addition, the OCC is proposing to integrate a number of rules in part 7 to include Federal savings associations.

This proposed rule accompanies other OCC efforts to modernize OCC rules, remove unnecessary burden, and clarify requirements, including the proposed rule published in the **Federal Register** on April 2, 2020, which would amend requirements in 12 CFR part 5 for national banks and Federal savings associations that seek to engage in certain corporate transactions or activities.[4]

II. Description of the Proposed Rule

Subpart A—National Banks and Federal Savings Association Powers

Activities That are Part of, or Incidental to, the Business of Banking (New § 7.1000)

Section 7.5001 identifies the criteria that the OCC uses to determine whether an electronic activity is authorized for national banks as part of, or incidental to, the business of banking under 12 U.S.C. 24(Seventh) or other statutory authority. While this section details those criteria in the context of electronic activities, the OCC uses these same criteria to determine whether any activity is part of, or incidental to, the business of banking. To confirm the broader applicability of the criteria listed in § 7.5001, the OCC is proposing to remove the word ''electronic'' from this section and move § 7.5001 to subpart A of part 7 as new § 7.1000. As part of this move, the proposal would redesignate current § 7.1000 as § 7.1024. These proposed changes would better organize OCC rules and clarify that the criteria of this new § 7.1000 may apply to any potential national bank activity and not just those that are electronic in nature. The OCC believes that new § 7.1000 belongs at the beginning of part 7 because it provides the framework for all national bank powers that follow in subpart A.

The OCC also proposes a technical change to § 7.1000(c)(1). Specifically, the proposed rule would amend this provision to clarify that the four-factor test set forth in this section to determine activities authorized as part of the business of banking applies to activities not specifically included in 12 U.S.C. 24(Seventh) or other statutory authority. Activities that are specifically included in 12 U.S.C. 24(Seventh) or other statutory authority are by express statutory language within the business of banking. This clarification reflects the OCC's long-standing use of the four-factor test to determine whether an activity not expressly included in a statute is within the business of banking.[5]

National Bank Acting as Finder (§ 7.1002)

The OCC is proposing a technical change to its finder regulation at § 7.1002 and invites comment on the inclusion of Federal savings association finder activities in part 7. The OCC has long permitted a national bank to act as a finder to bring together buyers and sellers of financial and nonfinancial products and services.[6] The OCC's regulations include two separate rules relating to permissible national bank finder activities. Section 7.1002, which codifies OCC interpretive letters, provides that finder activities are part of the business of banking.[7] This section also describes permissible finder activities; provides an illustrative, non-exclusive list of permissible finder activities; clarifies that a national bank's finder authority does not allow it to engage in brokerage activities that have not been found to be permissible for national banks; and authorizes a national bank to advertise and accept fees for finder services unless otherwise prohibited by Federal law. Section 7.5002 provides that a national bank generally may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that is otherwise permissible. Section 7.5002(a)(1) clarifies that a national bank may act as electronic finders and includes a list of permissible electronic finder activities.[8]

The OCC is proposing to amend its regulations by adding a new paragraph (8) to § 7.1002(b) that would cross-reference the permissible electronic finder activities listed in § 7.5002(a)(1). This change would reference all examples of permissible finder activities for national banks in one rule.

While finder activities are part of the business of banking for a national bank, a Federal savings association may engage in a finder activity only to the extent that the activity is incidental to Federal savings association powers authorized under the Home Owners' Loan Act (HOLA) (12 U.S.C. 1461 *et seq*).[9] The former OTS determined that,

[2] Public Law 111–203, 124 Stat. 1376 (2010) (transferring to the OCC all functions of the former OTS relating to Federal savings associations).

[3] The OCC has separately proposed a rule that would amend 12 CFR 7.4001. *See* 84 FR 64229 (Nov. 21, 2019) (Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred). The OCC also has issued an interim final rule that amends 12 CFR 7.1001 and 7.1003. *See* 85 FR 31943 (May 28, 2020) (Director, Shareholder, and Member Meetings).

[4] 85 FR 18728.

[5] The Supreme Court has held that the business of banking is not limited to the enumerated powers listed in 12 U.S.C. 24(Seventh) but encompasses more broadly activities that are part of or incidental to the business of banking. *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258–60 (1995).

[6] *See, e.g.,* OCC Interpretive Letter No. 607 (Aug. 24, 1992).

[7] *See, e.g.,* OCC Interpretive Letter No. 824 (Feb. 27, 1998).

[8] The OCC's ANPR on National Bank and Federal Savings Association Use of Digital Technology, published elsewhere in this issue of the **Federal Register** as a separate document, also requests comment on whether to add more examples to the electronic finder activities list in 12 CFR 7.5002(a)(1).

[9] The OCC and the predecessor agencies previously responsible for the supervision of Federal savings associations ''have long recognized that federal savings associations possess 'incidental'

Continued

if certain factors are met, a Federal savings association may collect fees for referring customers to third parties [10] and may provide services and products to customers through a third-party discount program [11] as activities incidental to their statutorily enumerated powers. The OCC also has recognized Federal savings association finder authority in its Retail Nondeposit Investment Products Booklet of the Comptroller's Handbook.[12]

The OCC invites comment on whether it should add a separate provision to § 7.1002 to set forth Federal savings association finder authority. This provision could provide that a Federal savings association may engage in finder activities to the extent that those activities are incidental to Federal savings association powers expressly authorized under the HOLA. The OCC also could include in this provision a list of Federal savings association finder activities that the former OTS or the OCC have determined are permissible. This list could codify prior interpretations and include collecting fees for referring customers to third parties and providing services and products to customers through a third-party discount program. The OCC specifically requests comment on what other Federal savings association finder activities the OCC could add to this list.

Money Lent by a National Bank at Banking Offices or at Facilities Other Than Banking Offices (§ 7.1003)

Twelve U.S.C. 81 provides that a national bank must transact business in the place specified in its organization certificate and in any branches established or maintained in accordance with 12 U.S.C. 36. The OCC interprets 12 U.S.C. 81 to mean that money is deemed to be lent at a bank's main office unless there is a sufficient nexus tying the transaction to another location, in which case that location must be licensed as a branch office.

Twelve U.S.C. 36 and 12 CFR 5.30 define ''branch'' as a place of business established by the national bank where ''deposits are received, or checks paid, or money lent.'' Section 7.1003 provides that for purposes of what constitutes a branch within the meaning of 12 U.S.C. 36 and 12 CFR 5.30, ''money'' is deemed to be ''lent'' only at the place, if any, where the borrower in-person receives loan proceeds directly from bank funds either: (1) From the lending bank or its operating subsidiary or (2) at a facility that is established by the lending bank or its operating subsidiary. Section 7.1003(b) further provides that a borrower may receive loan proceeds directly from bank funds in person at a place that is not the bank's main office and is not licensed as a branch without violating 12 U.S.C. 36, 12 U.S.C. 81, and 12 CFR 5.30, provided that a third party is used to deliver the funds and the place is not established by the lending bank or its operating subsidiary. This paragraph defines a third party to include a person who satisfies the requirements of § 7.1012(c)(2) or one who customarily delivers loan proceeds directly from bank funds under accepted industry practice, such as an attorney or escrow agent at a real estate closing.

The OCC is proposing to amend § 7.1003 to incorporate an OCC interpretation that further clarifies when the OCC considers money to be lent at a location other than the main office. Specifically, proposed paragraph (c) would provide that a national bank operating subsidiary may distribute loan proceeds from its own funds or bank funds directly to the borrower in person at offices the operating subsidiary established without violating 12 U.S.C. 36, 12 U.S.C. 81, and 12 CFR 5.30 if the operating subsidiary provides similar services on substantially similar terms and conditions to customers of unaffiliated entities, including unaffiliated banks.[13] Based on Supreme Court precedent,[14] OCC interpretations have recognized that a facility must provide a convenience to bank customers that gives the bank a competitive advantage in obtaining customers for the facility to be considered a branch for purposes of 12 U.S.C. 36 and 12 CFR 5.30.[15] The OCC has found that a facility where members of the public, customers, and noncustomers alike receive substantially similar services on substantially similar terms is not a facility created to attract bank customers and thus the establishment of this type of facility offers no competitive advantage to the national bank.[16] Proposed paragraph (c) reflects this OCC precedent.

Establishment of a Loan Production Office by a National Bank (§ 7.1004)

Credit Decisions at Other Than Banking Offices of a National Bank (§ 7.1005)

Section 7.1004 provides that a national bank may use the services of persons not employed by the bank for originating loans. It also provides that an employee or agent of a national bank or its subsidiary may originate a loan at a site other than the main office or a branch office of the bank without violating the branching and place of business requirements of 12 U.S.C. 36 and 12 U.S.C. 81 if the loan is approved and made at the main office or a branch office of the bank or at an office of an operating subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank. Section 7.1005 provides that a national bank and its operating subsidiary may make a credit decision regarding a loan application at a site other than the main office or a branch office of the bank provided that ''money'' is not ''lent'' at those other sites within the meaning of § 7.1003.

OCC precedent has explained that the purpose of § 7.1004 is not to prescribe where certain activities must be performed but rather to help avoid violations of the branching laws by defining a ''safe harbor'' of loan origination activities that will not constitute branching.[17] Further, the OCC has stated that this section does not purport to address the outer limits of what is permissible nor establish any affirmative requirement for where loan production office (LPO)-originated loans must be approved or made.[18] The OCC has found that § 7.1004 should not be read to require loans originated at LPOs to be approved and made at a main or branch office, and that it is permissible for loans originated at an LPO to be approved at separate back office facilities not located on the premises of, or contiguous to, a main or branch office of the bank.[19] These OCC interpretations were codified in § 7.1005. When the OCC adopted § 7.1005, the agency noted that it was retaining § 7.1004 despite the potential tension between the two sections because § 7.1004 is a judicially recognized safe harbor permitting national banks to undertake certain

powers, *i.e.,* powers that are incident to the express powers of federal savings associations as set forth in the Home Owners' Loan Act.'' OTS Op. Acting Ch. Couns. at 3 (Mar. 25, 1994).

[10] OTS Op. Ch. Couns. (May 5, 2000).

[11] OTS Op. Ch. Couns. (Aug. 5, 2008).

[12] OCC, Comptroller's Handbook: Retail Nondeposit Investment Products Booklet at 9 (Jan. 2015).

[13] *See* Interpretive Letter No. 814 (Nov. 3, 1997).

[14] In *First National Bank in Plant City* v. *Dickinson,* the Supreme Court explained that because the purpose of 12 U.S.C. 36 is to maintain competitive equality, it is relevant in construing the term ''branch'' to consider whether the facility gives the bank an advantage in its competition for customers. *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122, 136–137 (1969).

[15] *See* OCC Interpretive Letter No. 635 (July 23, 1993). *See also* 61 FR 60342, 60347 (Nov. 27, 1996).

[16] *See* OCC Interpretive Letter No. 814 (Nov. 3, 1997).

[17] OCC Interpretive Letter No. 634 (July 23, 1993).

[18] *Id.;* OCC Interpretive Letter No. 667 (Oct. 12, 1994).

[19] OCC Interpretive Letter No. 667 (Oct. 12, 1994).

lending related activities without violating branching statutes, and that it did not view a lending related activity that falls outside the scope of § 7.1004, as with § 7.1005 regarding the making of credit decisions, as necessarily violating branching statutes.[20]

The OCC is proposing to amend § 7.1004 so that it reflects the broader permissibility provided by current § 7.1005, to describe the permitted activities as ''loan production activities,'' and to remove § 7.1005 to simplify and streamline its rules. As proposed, paragraph (a) of § 7.1004 would provide that a national bank or its operating subsidiary may engage in loan production activities at a site other than the main office or a branch office of the bank. The proposal would permit a national bank or its operating subsidiary to solicit loan customers, market loan products, assist persons in completing application forms and related documents to obtain a loan, originate and approve loans, make credit decisions regarding a loan application, and offer other lending-related services such as loan information and applications at a loan production office without violating 12 U.S.C. 36 and 12 U.S.C. 81, provided that ''money'' is not deemed to be ''lent'' at that site within the meaning of § 7.1003 and the site does not accept deposits or pay withdrawals. This description of activities is not intended to alter the description of ''money lent'' in § 7.1003 nor affect the scope of activities that are permissible for a national bank to perform at a non-branch location. Rather, the OCC is proposing this description to provide greater clarity to what activities a national bank may conduct at a loan production office. As a technical change, the OCC would redesignate former paragraph (a) as paragraph (b) and amend it to reference loan production activities instead of originating loans.

Loan Agreement Providing for a National Bank Share In Profits, Income, or Earnings or for Stock Warrants (§ 7.1006)

The OCC is proposing to amend § 7.1006 to include Federal savings associations. Section 7.1006 permits a national bank to take as consideration for a loan: (1) A share in the profit, income, or earnings from a business enterprise of a borrower or (2) a stock warrant issued by the business enterprise of a borrower provided the bank does not exercise the warrant. This arrangement is known as an ''equity kicker.'' Section 7.1006 further provides that the national bank may take the share or stock warrant in addition to, or in lieu of, interest. However, the national bank may not condition the borrower's ability to repay principal on the value of the profit, income, earnings of the business enterprise or upon the value of the warrant received.

The former OTS and its predecessor, the Federal Home Loan Bank Board, permitted a Federal savings association to take a share of profit, income, or earnings as consideration for a loan as not inconsistent with Federal savings association lending authority under HOLA [21] to maintain parity with the commercial lending practices of national banks.[22] In addition, the former OTS permitted a Federal savings association to acquire warrants as an incidental power of its authority to make secured loans for commercial, corporate, or business purposes under HOLA and applied the same restrictions on exercising those warrants as applied to national banks.[23] By amending § 7.1006 to include Federal savings associations, the proposed rule would codify these interpretations to clarify this authority and to better provide parity with national banks.

National Bank Holding Collateral Stock as Nominee (§ 7.1009)

Current § 7.1009 permits a national bank to transfer stock it has received as collateral for a loan into the bank's name as nominee.[24] The OCC believes this provision is unnecessary and is proposing to delete it. The OCC permits a bank to perfect its security interests in collateral under applicable State laws consistent with the Uniform Commercial Code.[25] In situations where a bank holds stock as collateral, typically one method to perfect that interest under State law is to list the bank as nominee on the stock certificate. However, recent versions of the Uniform Commercial Code [26] provide other potentially less burdensome methods to perfect an interest in securities collateral, for example, by obtaining control over a brokerage account holding the stock. Therefore, the OCC believes that § 7.1009 is not necessary. Removing this provision would streamline OCC regulations while not substantively changing the methods national banks may use to perfect their interests in stock or other securities obtained as collateral for loans, which continue to include being listed as nominee if permitted under State law.

Postal Services by National Banks and Federal Savings Associations (§ 7.1010)

Section 7.1010 provides that a national bank may operate a postal substation on banking premises and receive income from it. It describes the types of services permitted and states that a bank may advertise them to attract customers to the bank. It also requires the bank to operate the substation in accordance with the rules and regulations of the United States Postal Service (USPS) and to keep books and records on it, which are subject to inspection by the USPS, separate from those of other banking operations.

The OCC is proposing to amend § 7.1010 to also apply to Federal savings associations, consistent with the position taken in agency guidance.[27] The OCC also proposes to replace the words ''operate a postal substation'' with ''provide postal services'' because the term ''Postal substation'' is no longer used in USPS regulations. This change in terminology would clarify that national banks and Federal savings associations may offer a limited menu of postal services and are not required to operate full-service post offices.

National Bank Receipt of Stock From a Small Business Investment Company (§ 7.1015)

Fifteen U.S.C. 682(b)(1) permits a national bank to invest in one or more small business investment companies (SBICs) or in any entity established solely to invest in SBICs, provided that the total amount of all SBIC investments does not exceed five percent of the bank's capital and surplus.[28] Section 7.1015 provides that a national bank may purchase stock of a SBIC and receive benefits of such stock ownership. This section further provides that the receipt and retention of a dividend from a SBIC in the form of stock of a corporate borrower of the SBIC is not a purchase of stock within the meaning of 12 U.S.C. 24(Seventh).

The OCC is proposing to amend § 7.1015 to provide that a national bank

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[20] 61 FR 4849, 4851 (Feb. 9, 1996).

[21] 12 U.S.C. 1464(c)(2).

[22] Unpublished letter from Jordan Luke, Gen. Couns., Federal Home Loan Bank Board (Dec. 19, 1988), *available on Westlaw:* 1988 WL 1022319 (O.T.S.).

[23] *Id.*

[24] *See* 12 U.S.C. 24(Seventh).

[25] *See* OCC, Comptroller's Handbook: Asset-Based Lending at 21–22 (2017).

[26] Primarily Articles 8 and 9, which have been substantively adopted by all U.S. jurisdictions. *See https://www.uniformlaws.org/acts/ucc.*

[27] The former OTS previously concluded that Federal savings associations are authorized to operate a postal substation on premises. *See* OTS Op. Acting Ch. Couns., Mar. 25, 1994.

[28] National banks also may invest in SBICs pursuant to their community development investment authority *See* 12 U.S.C. 24(Eleventh) and 12 CFR part 24.

may invest in a SBIC or in any entity established solely to invest in SBICs, and that purchasing stock in a SBIC is one example of this type of investment. This amendment would more closely align § 7.1015 to 15 U.S.C. 682(b). In addition, the OCC is proposing to amend § 7.1015 to provide that a national bank's SBIC investments are subject to appropriate capital limitations.

Fifteen U.S.C. 682(b)(2) provides a Federal savings association with similar authority to invest in SBICs.[29] This authority is codified in OCC regulations at 12 CFR 160.30. To clarify this authority, the OCC is proposing to add a reference to Federal savings association SBIC authority in § 7.1015 and cross-reference to 12 CFR 160.30.

The OCC also is proposing to amend § 7.1015 to clarify that a national bank or Federal savings association may invest in a SBIC that is either (1) already organized and has obtained a license from the Small Business Administration, or (2) in the process of being organized. The OCC has previously interpreted this authority to permit a national bank to invest in a SBIC that is in the process of being organized.[30]

Letters of Credit and Independent Undertakings (§ 7.1016)

The OCC proposes to amend 12 CFR 7.1016, which provides that a national bank may issue letters of credit and other independent undertakings to customers, to include Federal savings associations. Section 7.1016 provides that a national bank entering into an independent undertaking should not expose itself to undue risk and also outlines certain safety and soundness considerations for these activities. Specifically, § 7.1016 provides that a national bank should consider at a minimum: (1) Whether the terms make clear the independence of the undertaking; (2) whether the amount of the undertaking is limited; (3) whether the undertaking is limited in duration or, if not, whether the bank has an ability to end the undertaking or demand cash collateral from the applicant; and (4) whether the undertaking will be collateralized or include a reimbursement right. Section 7.1016 also provides that certain undertakings require particular protections against credit, operational, and market risk and outlines the protections a bank should or must take in specific circumstances.[31] Section 7.1016 further provides that the national bank should possess operational expertise that is commensurate with the sophistication of its independent undertaking activities. Finally, § 7.1016 requires a bank to accurately reflect its undertakings in its records.

Pursuant to § 160.50, a Federal savings association may issue letters of credit and may issue other independent undertakings as are approved by the OCC, subject to the restrictions in § 160.120. Section 160.120 contains provisions that are largely similar to the provisions applicable to national banks in § 7.1016.[32] However, §§ 160.50 and 160.120 provide that, unless it is a letter of credit, a Federal savings association only may issue independent undertakings that have been approved by the OCC. The OTS explained when it updated its regulation that Federal savings associations were not traditionally involved in international banking transactions, which utilized these independent undertakings, as were national banks.[33] The OTS stated that the approval requirement provided ''the appropriate balance between giving thrifts greater flexibility to potentially engage in new types of transactions while at the same time ensuring that thrifts have properly evaluated the risks posed by a particular transaction consistent with prudent banking practice.'' [34]

The OCC is proposing to amend § 7.1016 to apply it to Federal savings associations, and to remove §§ 160.50 and 160.120, because of the similarities between the national bank and Federal savings association independent undertaking regulations. As a result, a Federal savings association would no longer be limited to issuing non-letter of credit independent undertakings approved by the OCC. The industry's rules of practice have improved since the former OTS promulgated the regulation in 1996. In addition, the operations of Federal savings associations have evolved over the past two decades and those Federal savings associations that issue independent undertakings are familiar with non-letters of credit independent undertakings and related supervisory expectations. Furthermore, the OCC expects national banks and Federal savings associations to have operational expertise commensurate with the sophistication of its letters of credit or independent undertaking activities.[35] The OCC believes that this expectation is sufficient to ensure that all OCC-supervised institutions properly evaluate the risks associated with these activities. For these reasons, the OCC finds that the OCC approval requirement for non-letter of credit independent undertakings issued by Federal savings associations is no longer necessary.

The OCC also is proposing to clarify that Federal branches and agencies of foreign banks may issue letters of credit and other independent undertakings, consistent with the conditions outlined in § 7.1016.[36] Finally, the OCC is proposing technical changes to the footnote to reflect updates to the laws and rules of practice cited.

National Bank Participation in Financial Literacy Programs (§ 7.1021)

Twelve CFR 7.1021 provides that a national bank may participate in a financial literacy program on the premises of, or at a facility used by, a school. Section 7.1021 also provides that the school premises or facility will not be considered a branch of the bank if: (1) The bank does not establish and operate the school premises or facility on which the financial literacy program is conducted; and (2) the principal purposes of the program is educational.

The OCC is proposing to amend § 7.1021 to clarify that the purpose of this section is whether the facilities or premises used for such a program would be considered a branch of the national bank under 12 U.S.C. 36. Facilities or premises are only considered to be branches of a national bank if they are established and operated by the national bank. The proposal also would provide that the OCC considers the establishment and operation in this

[29] As with national banks, Federal savings associations also may invest in SBICs pursuant to their community development investment authority. *See* 12 U.S.C. 1464(c)(4)(B) and 12 CFR 5.59 (Service corporations of Federal savings associations).

[30] *See* OCC Interpretive Letter No. 832 (June 18, 1998).

[31] Specifically, § 7.1016(b)(2) provides that: (1) If the undertaking is to honor by delivery of an item of value other than money, the bank should ensure that market fluctuations affecting the value of the item will not cause the bank to assume undue market risk; (2) if the undertaking provides for automatic renewal, the terms for renewal should be consistent with the bank's ability to make any necessary credit assessments prior to renewal; and (3) if a bank issues an undertaking for its own account, the underlying transaction for which it is issued must be within the bank's authority and must comply with any safety and soundness requirements applicable to that transaction.

[32] *See* 61 FR 50951, 50958 (Sept. 30, 1996).

[33] *Id.*

[34] *Id.*

[35] 12 CFR 7.1016(b)(3) and 12 CFR 160.120(b)(3).

[36] Section 4(b) of the International Banking Act, 12 U.S.C. 3102(b) (Pub. L. 95–369) provides that the operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location. *See also* 12 CFR 28.13.

context on a case by case basis, considering the facts and circumstances. However, the OCC has previously determined [37] that whether a financial literacy program is a branch under section 36 may be evaluated under the safe harbor test for messenger services established by third parties set forth in § 7.1012(c)(2) and that a premises or facility used for a school savings program is clearly established by a third party if it meets this safe harbor test. The proposal would codify this interpretation by providing that a premises is not a branch of the national bank if the safe harbor test in § 7.1012(c)(2) applicable to messenger services established by third parties is satisfied and that the factor discussed in § 7.1012(c)(2)(i), regarding whether the bank employs the person who provide the service, can be met if bank employee participation in the financial literacy program consists of managing the program or conducting or engaging in financial education activities provided the school or other community organization retains control over the program and over the premises or facilities at which the program is held. The OCC believes that this should provide clarity with respect to the meaning of ''establish and operate'' in § 7.1021.

Consistent with current practice, the OCC also is expanding the scope of financial literacy programs beyond schools to encompass other community-based organizations, such as non-profit organizations, that provide financial literacy programs. In addition, the OCC is moving the definition of financial literacy program to the beginning of the section to clarify that, while a financial literacy program is a program for which the primary purpose is educational, this is not a factor in determining whether the premises or facility is a branch for purposes of section 36.

The OCC is not adding Federal savings associations to this section because they are not subject to the branching requirements in section 36. However, the OCC notes that participation in financial literacy programs is a permissible activity for both national banks and Federal savings associations.

National Banks' Authority To Buy and Sell Exchange, Coin, And Bullion (§ 7.1022)

Federal Savings Associations, Prohibition on Industrial or Commercial Metal Dealing or Investing (§ 7.1023)

The OCC also is proposing a technical change to §§ 7.1022 and 7.1023. Section 7.1022 prohibits a national bank from acquiring or selling industrial or commercial metal for purposes of dealing or investing. Section 7.1022 excludes industrial and commercial metals from the national bank authority to ''buy and sell exchange, coin, and bullion.'' Section 7.1023 similarly prohibits a Federal savings association from dealing or investing in industrial or commercial metal. Both sections require a national bank and a Federal savings association to dispose of any industrial or commercial metal held as a result of dealing or investing in that metal as soon as practicable, but not later than one year from the effective date of the regulation. The OCC may grant up to four separate one-year extensions if the bank makes a good faith effort to dispose of the metal and the retention of the metal for an additional year is not inconsistent with the safe and sound operation of the bank. The OCC is proposing a technical change to both sections to replace the words ''one year from the effective date of this regulation'' with the actual effective date of that final rule, April 1, 2018.

Tax Equity Finance Transactions (New § 7.1025)

The OCC and the courts have long held that a national bank may use its 12 U.S.C. 24(Seventh) lending authority to engage in transactions that do not take the form of a traditional loan to accommodate the demands of the market, provided the transaction is the functional equivalent of a loan.[38] The OCC has interpreted this authority to permit a national bank to engage in tax equity finance (TEF) transactions.[39] Although the OCC has not previously addressed the permissibility of TEF transactions for a Federal savings association, OCC regulations authorize a Federal savings association to engage in loan equivalent transactions pursuant to 12 U.S.C. 1464,[40] and the former OTS permitted a Federal savings association to participate in certain transactions in order to receive tax credits and other tax benefits.[41] The OCC is proposing to codify and clarify these interpretations of 12 U.S.C. 24(Seventh) and 1464 in new § 7.1025.[42]

Proposed § 7.1025(a) would permit a national bank and Federal savings association to engage in a TEF transaction pursuant to 12 U.S.C. 24(Seventh) and 1464 if the transaction is the functional equivalent of a loan, as provided in proposed paragraph (c), and if a TEF transaction satisfies the requirements of proposed paragraph (d).

Proposed § 7.1025(b) would define a ''tax equity finance transaction'' as a transaction in which a national bank or Federal savings association provides equity financing to fund a project that generates tax credits and other tax benefits and the use of an equity-based structure allows the transfer of those credits to the bank or savings association. Paragraph (b) also would define ''capital and surplus'' by cross-referencing to its definition in the OCC's lending limit rule, 12 CFR 32.[43] As defined in the lending limit rule, for qualifying community banking organizations that have elected to use the community bank leverage ratio framework, as set forth under the OCC's Capital Adequacy Standards at 12 CFR part 3, ''capital and surplus'' means a qualifying community banking organization's tier 1 capital, as used under 12 CFR 3.12, plus a qualifying community banking organization's allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, as reported in the Consolidated Reports of Condition and Income (Call Report). For all other national banks and Federal savings associations, ''capital and surplus'' means a national bank's or savings association's tier 1 and tier 2 capital, calculated under the risk-based capital standards applicable to the institution as reported in the Call Report, plus the

[37] *See* OCC Interpretive Letter No. 839 (August 3, 1998).

[38] *See M & M Leasing Corp.* v. *Seattle First Nat'l Bank*, 563 F.2d 1377 (9th Cir. 1977), cert. denied, 436 U.S. 956 (1978). *See also* OCC Interpretive Letter No. 1048 (Dec. 21, 2005); Corporate Decision 99–07 (March 26, 1999); Corporate Decision 98–17 (March 27, 1998); Interpretive Letter No. 867 (June 1, 1999).

[39] *See* OCC Interpretive Letter No. 1048 (Dec. 21, 2005), OCC Interpretive Letter No. 1139 (Nov. 13, 2013), OCC Interpretive Letter No. 1141 (Apr. 22, 2014). *See* also 26 U.S.C. 48 (energy ITC) and 26 U.S.C. 45 (energy PTC). Internal Revenue Service (IRS) rules govern tax credit availability.

[40] 12 CFR 160.41 (Leasing).

[41] *See, e.g.,* OTS Op. Ch. Couns. (Feb. 9, 2004) (New Market Tax Credit Program) and OTS Op. Ch. Couns. (Nov. 10, 1994) (low-income housing tax credit partnership).

[42] A national bank or Federal savings association may be able to participate in TEF transactions under an alternative authority, including community development and public welfare investment authority under 12 U.S.C. 24(Eleventh) and 12 CFR 24.

[43] The OCC recently amended the definition of ''capital and surplus'' in 12 CFR 32.2 in its recent community bank leverage ratio rule. *See* 84 FR 61776 (November 13, 2019).

balance of a national bank's or Federal savings association's allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, not included in the bank's or savings association's tier 2 capital, for purposes of the calculation of risk-based capital, as reported in the national bank's or savings association's Call Report.

Under proposed paragraph (c), a TEF transaction would qualify as the functional equivalent of a loan if it meets eight requirements that derive from OCC interpretations. First, the TEF transaction structure must be necessary for making the tax credits and other tax benefits available to the national bank or Federal savings association. The OCC requests comment on whether national banks or Federal savings associations routinely obtain legal opinions regarding the availability of tax credits in connection with these types of finance transactions.

Second, the TEF transaction must be of limited tenure and not indefinite. Under this requirement, a national bank or Federal savings association would need to be able to achieve its targeted return in a reasonable time, and the TEF transaction would need to have a defined termination point. A national bank or Federal savings association could satisfy this requirement if the TEF transaction will terminate within a reasonable time of the transaction's initiation or if a project sponsor has an option to purchase a national bank's or Federal savings association's interest at or near fair market value. The national bank or Federal savings association cannot control whether it retains the interest indefinitely. The proposed rule would permit a national bank or Federal savings association to retain a limited investment interest if that interest is required by law to obtain continuing tax benefits from the TEF transaction.

Third, the tax benefits and other payments received by the national bank or Federal savings association from the TEF transaction must repay the investment and provide an implied rate of return. As a result of this proposed requirement, the national bank's or Federal savings association's underwriting could not place undue reliance on the value of any residual stake in the project and the proceeds of disposition following the expiration of the tax credits' compliance period.

Fourth, the national bank or Federal savings association must not rely on appreciation of value in the project or property rights underlying the project for repayment. As discussed in OCC Interpretive Letter 1139, wind turbines, solar panels, and other ancillary equipment are not considered real property under 12 U.S.C. 29, and acquisition of interests in real estate incidental to the provision of financing is not inconsistent with 12 U.S.C. 29.

Fifth, the national bank or Federal savings association must use underwriting and credit approval criteria and standards that are substantially equivalent to the underwriting and credit approval criteria and standards used for a traditional commercial loan. To comply with this requirement, the documents governing the TEF transaction should contain terms and conditions equivalent to those found in documents governing typical lending relationships and transactions.

Sixth, the national bank or Federal savings association must be a passive investor in the transaction and must be unable to direct the affairs of the project company. This means that the national bank or Federal savings association would not be able to direct day-to-day operations of the project. However, the OCC would not consider temporary management activities in the context of foreclosure or similar proceedings as violating this requirement.

Seventh, the national bank or Federal savings association must appropriately account for the transaction initially and on an ongoing basis and document contemporaneously its accounting assessment and conclusion. Although TEF transactions can be the functional equivalent of loans pursuant to a national bank's or Federal savings association's lending authority, the accounting treatment of tax equity investments may differ from being a loan.

Proposed paragraph (d) would provide that a national bank or Federal savings association only could engage in TEF transactions if it meets the following four additional requirements. First, the national bank or Federal savings association cannot control the sale of energy, if any, from the project. To satisfy this requirement, a national bank or Federal savings association could enter into a long-term contract with creditworthy counterparties to sell energy from the project, as articulated in OCC Interpretive Letter 1139, or have the project sponsor bear responsibility for selling generated power into the energy market so long as those sales are stabilized by a hedge contract that provides reasonable price and cash flow certainty, as articulated in OCC Interpretive Letter 1141.

Second, the national bank or Federal savings association must limit the total dollar amount of TEF transactions to no more than five percent of its capital and surplus unless the OCC determines, by written approval of a written request by the national bank or Federal savings association to exceed the five percent limit, that a higher aggregate limit will not pose an unreasonable risk to the national bank or Federal savings association and that the tax equity finance transactions in the national bank's or Federal savings association's portfolio will not be conducted in an unsafe or unsound manner. In no case may a bank's or FSA's total dollar amount of TEF transactions exceed fifteen percent of its capital and surplus. As provided for public welfare investments under 12 U.S.C. 24(Eleventh) and 12 CFR 24, a national bank is generally subject to a five percent aggregate investment limit and this limit encourages a national bank to maintain appropriate risk diversification.[44] The OCC specifically requests comment on whether the OCC should use an alternate measure when calculating the aggregate investment limit and whether the proposed five percent aggregate investment limit is appropriate.

Third, the national bank or Federal savings association has provided written notification to the OCC prior to engaging in each TEF transaction that includes its evaluation of the risks posed by the transaction.

Fourth, the national bank or Federal savings association can identify, measure, monitor, and control the associated risks of its tax equity finance transaction activities individually and as a whole on an ongoing basis to ensure that it conducts such activities in a safe and sound manner.

Proposed paragraph (e) would provide that the TEF transaction must be subject to the substantive legal requirements of a loan, including the lending limits prescribed by 12 U.S.C. 84, as implemented by 12 CFR 32, and, if the active investor or project sponsor of the transaction is an affiliate of the national bank or Federal savings association, the restrictions on transactions with affiliates prescribed by 12 U.S.C. 371c and 371c–1, as implemented by 12 CFR 223. If a national bank or Federal savings association is relying on its lending authority to participate in a TEF transaction, the TEF transaction would be subject to regulatory requirements applicable to loans, including any applicable legal lending limits and affiliate transaction restrictions to the extent applicable. However, the regulatory capital treatment of a national bank or Federal savings association's participation in a TEF transaction would be determined

[44] 12 U.S.C. 24(Eleventh); 12 CFR 24.4(a).

according to the regulatory capital rule (12 CFR part 3).

The OCC specifically requests comment on whether the final rule should prohibit a national bank or Federal savings association from entering into TEF transactions for projects involving residential installation TEF transactions not involving utility-scale standalone power-generation facilities. The OCC also requests comment on whether the final rule should permit national banks or Federal savings associations to invest in TEF transactions involving detached single-family residences, multi-family residences, or non-utility commercial buildings. Further, the OCC requests comment on whether national banks and Federal savings associations should have other contractual remedies available before entering into a TEF transaction. For example, should the final rule require national banks or Federal savings associations to have the option to replace the sponsor or manager of a project under certain conditions or be required to have indemnifications for breaches of tax representations or other legal risks? In the alternative, should a final rule require a project sponsor or the sponsor's parent to make or guarantee such an indemnification? The OCC also requests comment on whether national banks and Federal savings associations are currently participating in TEF transactions through fund-based structures, and, if not, whether national banks and Federal savings associations want to participate in TEF transactions through fund-based structures. Further, the OCC requests comment on whether there are additional issues related to fund-based structures and whether the final rule should include additional safeguards related to fund-based structures.

Payment System Memberships (New § 7.1026)

Section 7.1026 Payment System Memberships. The OCC has long recognized the authority of national banks to become members of payment systems.[45] Similarly, OTS precedent permits Federal savings associations to join payment systems.[46] In 2014, the OCC published a legal interpretive letter clarifying that national banks may join payment systems with approval from the OCC even when the national bank would be exposed to potentially open-ended liability as a member of the payment system.[47] This interpretive letter also outlined the approval process for this membership. In a subsequent interpretive letter, the OCC modified the process to remove the approval requirement.[48] To provide additional clarity to national banks, the OCC is proposing to add a new § 7.1026 to part 7 that would codify the current process for joining a payment system. The OCC also is proposing to apply this section to Federal savings associations to provide equal treatment to Federal savings associations. The OCC continues to support national banks and Federal savings associations performing their critical roles in payment systems—including as members and architects. The proposal reminds national banks and Federal savings associations of their responsibility for ensuring that payment system membership is conducted in a safe and sound manner.

Definitions. Proposed § 7.1026(a) would provide definitions for several terms used throughout the proposed new section. First, the proposal would define ''appropriate OCC supervisory office'' as the OCC office that is responsible for the supervision of a national bank or Federal savings association, as described in subpart A of 12 CFR part 4.

Second, because different payment systems may use different terminology, the OCC is proposing to define ''member'' to include a national bank or Federal savings association designated as a ''member,'' a ''participant,'' or other similar role by a payment system, including by a payment system that requires the national bank or Federal savings association to share in operational losses or maintain reserves with the payment system to offset potential liability for operational losses. The OCC requests comment on whether the definition of ''member'' should include national banks and Federal savings associations who are indirect members of a payment system.

Third, the rules of some payment systems may not place a cap on the operational liability of its members, but a member's operational liability may be capped in some other way. For example, a jurisdiction could have a law that does not permit open-ended liability. If that law applies to the payment system, it could effectively cap a member's operational liability. In other situations, a member may negotiate a separate agreement with a payment system that allows the member to limit its potential liability and, as a result, the risks of membership in that payment system. To address these situations, the OCC is proposing to define ''open-ended liability'' as liability for operational losses that is not capped under the rules of the payment system and includes indemnifications provided to third parties as a condition of membership in the payment system. For example, national banks and Federal savings associations may provide open-ended indemnifications to Federal Reserve Banks as a condition of membership in particular payment systems.[49] This proposed definition is consistent with the definition of open-ended liability in OCC Interpretive Letter 1140.

Fourth, although memberships in payment systems expose national banks and Federal savings associations to a variety of risks, OCC legal precedent only has addressed whether a national bank may assume open-ended liability for operational losses at the payment system. Thus, the OCC is proposing to define ''operational loss'' as a charge resulting from sources other than defaults by other members of the payment system. Examples of these operational losses would be losses that are due to: Employee misconduct, fraud, misjudgment, or human error; management failure; information systems failures; disruptions from internal or external events that result in the degradation or failure of services provided by the payment system; or payment or settlement delays, constrained liquidity, contagious disruptions, and resulting litigation. These examples are listed in OCC Interpretive Letter 1140.[50] The OCC requests comment as to whether these examples should be included in this definition. If these examples should be included, the OCC also requests comment as to whether the examples listed are appropriate and whether the list is sufficiently comprehensive or whether other examples should be included.

Finally, the OCC recognizes that payment systems transfer funds for a variety of purposes and in varying amounts. For example, wholesale payment systems typically process large dollar transfers while retail payment systems may process a higher volume of transactions at a lower average dollar figure.[51] The OCC proposes to define ''payment system'' in § 7.1026 to mean a ''financial market utility'' as defined

[45] *See, e.g.,* OCC Conditional Approval Letter No. 220 (Dec. 2, 1996); OCC Interpretive Letter No. 993 (May 16, 1997).

[46] *See, e.g.,* 12 CFR 145.17; OTS Op. Ch. Couns. (Sept. 15, 1995); OTS Op. Ch. Couns. (Dec. 22, 1995).

[47] OCC Interpretive Letter No. 1140 (Jan. 13, 2014).

[48] OCC Interpretive Letter No. 1157 (Nov. 12, 2017).

[49] *Id.*

[50] OCC Interpretive Letter No. 1140.

[51] FFIEC IT Examination Handbook, Retail Payment Systems at 2 (Apr. 2016).

in 12 U.S.C. 5462(6), wherever it operates. This definition would therefore include payment systems that operate either in the U.S. or in a foreign jurisdiction. Section 5462(6) provides that ''a financial market utility'' means ''any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person'' with certain exclusions.[52] but would exclude derivatives clearing organizations registered under the Commodity Exchange Act and clearing agencies registered under the Securities Exchange Act of 1934, and foreign organizations that would be considered a derivatives clearing organization or clearing agency were it operating in the United States. The OCC requests comment on whether to include a definition of payment system and, if so, whether this definition and the three exclusions listed are appropriate. The OCC also requests comment on whether the definition appropriately encompasses both foreign and domestic payment systems that national banks and Federal savings associations may join, including whether the proposed language properly excludes foreign equivalents of U.S.-registered derivatives clearing organizations and U.S.-registered clearing agencies.

Notice requirements. Proposed § 7.1026(c) would require a national bank or Federal savings association to provide written notice to the appropriate OCC supervisory office 30 days prior to joining a payment system that would expose it to open-ended liability. If the payment system does not expose the national bank or Federal savings association to open-ended liability, the proposed rule would require the national bank or Federal savings association instead to provide after-the-fact written notice within 30 days of becoming a member of the payment system. The OCC believes membership in a payment system that exposes members to open-ended liability creates additional risks for national banks and Federal savings associations. Thus, the OCC believes prior notice to the OCC is appropriate in these situations.[53]

Content of notice. Proposed § 7.1026(d) would provide that all notices filed under § 7.1026 must include representations that the national bank or Federal savings association has complied with the safety and soundness review required by proposed § 7.1026(e)(1) before joining the payment system and will comply with the safety and soundness review and the notification requirements in proposed § 7.1026(e)(2) and (e)(3) after joining the system. For after-the-fact notices pursuant to paragraph (c)(2), the proposed rule would require a national bank or Federal savings association to include a representation that either the rules of the payment system do not impose liability for operational losses on members or that the national bank's or Federal savings association's liability for operational losses is limited by the rules of the payment system to specific and appropriate limits that do not exceed the legal lending limit specified by 12 CFR part 32 or a lower limit established for the national bank or Federal savings association by the OCC.

Safety and soundness procedures. The OCC relies upon a number of resources to communicate in detail its safety and soundness guidance for national bank and Federal savings association memberships in payment systems.[54] At a minimum, the OCC believes a national bank or Federal savings association must be able to identify, evaluate, and control its risks from membership in a particular payment system both before joining the system and on an ongoing basis.[55] Proposed § 7.1026(e) would require as a prerequisite to joining a payment system and on a continual basis after joining that the national bank or Federal savings association: (1) Identify and evaluate the risks posed by membership in the payment system, taking into account whether the liability is limited, and (2) measure, monitor, and control those risks. To assist with these requirements in paragraph (e), national banks and Federal savings associations should review the standards outlined in OCC Interpretive Letter 1140 and OCC Banking Circular 235. The proposal also requires a national bank or Federal savings association to notify the appropriate OCC supervisory office if its ongoing risk management identifies a safety and soundness concern, such as a material change to the bank's or savings association's liability or indemnification responsibilities, as soon as that concern is identified and to take appropriate actions to remediate the risk. The OCC requests comment on whether to include any of the criteria outlined in OCC Interpretive Letter 1140 and OCC Banking Circular 235 related to the analysis of: (1) The payment system and its membership criteria and (2) criteria for an effective risk management program to the safety and soundness requirements in paragraph (e).

The OCC recognizes that a national bank's or Federal savings association's liability will vary from payment system to payment system. For example, the rules of some payment systems may expose members to open-ended liability for operational losses but, in reality, the national bank's or Federal savings association's liability is limited by separately negotiated agreements, controlling laws of the jurisdiction, or some other means. Therefore, the proposal also would permit a national bank or Federal savings association to consider its open-ended liability to a particular payment system to be limited for purposes of the review required by proposed § 7.1026(e)(1) and (2) if the

[52] Financial market utility ''does not include: designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), or national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, and swap execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), solely by reason of their providing facilities for comparison of data respecting the terms of settlement of securities or futures transactions effected on such exchange or by means of any electronic system operated or controlled by such entities, provided that the exclusions in this clause apply only with respect to the activities that require the entity to be so registered'' nor ''any broker, dealer, transfer agent, or investment company, or any futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator, solely by reason of functions performed by such institution as part of brokerage, dealing, transfer agency, or investment company activities, or solely by reason of acting on behalf of a financial market utility or a participant therein in connection with the furnishing by the financial market utility of services to its participants or the use of services of the financial market utility by its participants, provided that services performed by such institution do not constitute critical risk management or processing functions of the financial market utility.'' 12 U.S.C. 5462(6)(B).

[53] The proposed notice requirement would not apply to existing payment system memberships. However, as explained below, the proposed rule would require national banks and Federal savings associations to continuously inform the OCC of changes to bank operations that would affect the institution's risk profile. Thus, the OCC would be made aware of any payment system membership at a bank or savings association even though the specific timing and information required by this proposed rule would not apply to existing payment systems memberships.

[54] *See, e.g.,* FFIEC IT Examination Handbook on Retail Payment Systems (Apr. 2016); FFIEC IT Examination Handbook on Wholesale Payment Systems (July 2004); Comptroller's Handbook: Payment Systems and Funds Transfer Activities (March 1990); OCC Banking Circular 235 (May 10, 1989).

[55] For example, OCC Banking Circular 235 states ''Management of each national bank is responsible for assessing risk in each payment, clearing, and settlement system in which the bank participates. Management must adopt adequate policies, procedures, and controls with respect to these activities.'' The OCC applied this Banking Circular to Federal savings associations on Oct. 1, 2014.

bank or savings association obtains an independent legal opinion prior to joining the payment system. That legal opinion must describe how the payment system allocates liability for operational losses and conclude the potential liability for the national bank or Federal savings association is limited to specific and appropriate limits that do not exceed the legal lending limit specified by 12 CFR part 32 or a lower limit established for the national bank or Federal savings association by the OCC. This legal opinion would enable the OCC to verify that the liability of the national bank or Federal savings association is limited even though the rules of the payment system do not provide any limits. If there are material changes to the liability or indemnification requirements of the national bank or Federal savings association after the bank or savings association joins the payment system, it can no longer rely on that legal opinion to demonstrate that its liability is limited and must notify the OCC and remediate its risks as described in § 7.1026(e)(3).

Establishment and Operation of a Remote Service Unit by a National Bank (New § 7.1027/§ 7.4003)

Section 7.4003 provides that a bank can establish and operate a remote service unit (RSU) pursuant to 12 U.S.C. 24(Seventh). This section further states that an RSU does not constitute a branch under 12 U.S.C. 36(j) and is not subject to State geographic or operational restrictions or licensing laws. Section 7.4003 defines an RSU as an automated facility, operated by a customer of a bank, that conducts banking functions such as receiving deposits, paying withdrawals, or lending money. This section provides examples of an RSU, specifically listing an automated teller machine (ATMs), automated loan machine, automated device for receiving deposits, personal computer, telephone, and other similar electronic devices. Finally, this section notes that an RSU may be equipped with a telephone or tele-video device that allows contact with bank personnel.

The OCC has historically treated drop boxes as branches based on the 1969 Supreme Court case *First National Bank in Plant City, Florida* v. *Dickinson,* 396 U.S. 122 (1969) (*Plant City*). In *Plant City,* the Supreme Court ruled that a drop box operated by a national bank constituted a branch under 12 U.S.C. 36(j) because it was a place ''at which deposits are received.'' [56] However, in 1996, Congress amended the definition of ''branch'' in 12 U.S.C. 36(j) to provide that ''[t]he term 'branch,' as used in this section, does not include an automated teller machine or a remote service unit.'' [57] Thus, the holding in *Plant City* is legislatively overruled with respect to any banking facility that is an ATM or an RSU.

As noted, the current definition of ''RSU'' in § 7.4003 requires an RSU to be automated.[58] However, upon further consideration, the OCC believes that interpreting both the terms ATM and RSU to require automation leads to incongruous results whereby a non-automated facility such as a drop box is considered a branch whereas an automated facility such as an ATM is not, despite a drop box functioning less like a full branch than an ATM. Furthermore, the OCC finds that drop boxes have more in common with the types of devices already considered RSUs than with full-service branches and therefore are more appropriately classified as RSUs. Accordingly, the OCC is proposing to amend § 7.4003 to expand the definition of an RSU to include either an automated or unstaffed facility and to add drop boxes to the list of RSU examples. This would allow unstaffed facilities, such as drop boxes, to receive the same branching treatment as ATMs and other devices already classified as RSUs such as computers and automated loan machines. This amendment would provide national banks with a significant degree of flexibility and burden relief in the establishment of drop boxes. We note that if the OCC finalizes this amendment, it also will amend 12 CFR 5.30(d) to remove ''drop box'' from the definition of ''branch.'' Because the OCC is proposing changes to this definition in another rulemaking,[59] the OCC has not proposed this technical amendment in this proposed rule.

The OCC also is proposing to move § 7.4003 to subpart A of part 7 as new § 7.1027. This change would place it in the same subpart as other interpretations regarding branching and non-branching functions, thereby improving the organization of part 7.

Establishment and Operation of a Deposit Production Office by a National Bank (New § 7.1028/§ 7.4004)

Section 7.4004 provides that a national bank or its operating subsidiary may engage in deposit production activities at a site other than the main office or a branch of the bank, and further provides that a deposit production office (DPO) may solicit deposits, provide information about deposit products, and assist persons in completing application forms and related documents to open a deposit account. Section 7.4004 specifically states that a DPO is not a branch so long as the site does not receive deposits, pay withdrawals, or make loans. It further states that all deposit and withdrawal transactions of a bank customer using a DPO must be performed by the customer, either in person at the main office or a branch office of the bank or by mail, electronic transfer, or a similar method of transfer. Finally, this section states that a national bank may use the services of persons not employed by the bank in its deposit production activities. As with § 7.4003, the OCC is proposing to move § 7.4004 to subpart A of part 7 as new § 7.1028 to place it in the same subpart as other interpretations regarding branching and non-branching functions. This change would improve the organization of part 7. The OCC is proposing no other changes to this section except for a non-substantive change to its wording.

Combination of National Bank Loan Production Office, Deposit Production Office, and Remote Service Unit (New § 7.1029/§ 7.4005)

Section 7.4005 provides that a location at which a national bank operates a loan production office (LPO), a DPO, and an RSU is not a ''branch'' within the meaning of 12 U.S.C. 36(j) by virtue of that combination of operations because none of these locations individually constitutes a branch.

The OCC is proposing to add language regarding the extent of the permissible interaction between bank personnel and the RSU at a facility that combines a loan production office or a deposit production office with an RSU. The proposed addition provides that an RSU at a combined location must be primarily operated by the customer with at most delimited assistance from bank personnel. This language is based on published OCC precedent.[60]

As with §§ 7.4003 and 7.4004, the OCC also is proposing to move § 7.4005 to subpart A of part 7, as new § 7.1029.

[56] *Plant City,* 396 U.S. 122 at 137.

[57] Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), Public Law 104–208, 110 Stat. 3009, Section 2204 (1996).

[58] In 1997, the OCC issued an interpretive letter which explained that the OCC did not view a drop box to be an RSU because they are not automated. OCC Interpretive Letter No. 772 (March 6, 1997).

[59] *See* Articles of Association, Charters, and Bylaw Amendments (Forms), Comptroller's Licensing Manual (June 19, 2017).

[60] OCC Interpretive Letter No. 1165 (June 28, 2019).

This change would place this section in the same subpart as other interpretations regarding branching and non-branching functions. This change would improve the organization of part 7.

Permissible Derivatives Activities for National Banks (New § 7.1030)

Certain derivatives activities are permissible for national banks under 12 U.S.C. 24(Seventh). A national bank may engage in derivatives activities that reference certain rates or assets that are permissible for bank investment. In addition, a national bank may use derivatives to hedge the risks of its permissible banking activities. Finally, with prior notification to the bank's examiner-in-charge (EIC), a national bank may engage as a financial intermediary in customer-driven derivatives activities. Congress has recognized national banks' authority to engage in derivatives activities in various statutes.[61]

The OCC is proposing to issue a new § 7.1030 addressing derivatives activities permissible for national banks. This new section would incorporate and streamline the framework in OCC interpretive letters discussing bank-permissible derivatives activities. The proposed rule addresses five functional categories of permissible derivatives activities: (1) Derivatives referencing underlyings a national bank may purchase directly as an investment; (2) derivatives with any underlying to hedge the risks arising from bank-permissible activities; (3) derivatives with any underlying that are customer-driven, cash-settled and either perfectly-matched or portfolio-hedged; (4) derivatives with any underlying that are customer-driven and physically-settled by transitory title transfer; and (5) derivatives with any underlying that are customer-driven, physically-settled (other than by transitory title transfer), and physically-hedged.

The proposed rule also would include a requirement that a national bank provide written notice to its EIC prior to engaging in certain derivatives activities. This requirement would be consistent with prior OCC interpretations that have, in connection with affirming the permissibility of a derivatives activity in which a bank has sought to engage, directed the bank to notify its EIC of the details of the bank's business and management practices for performing that particular derivatives activity as a financial intermediary. As with all permissible activities within the business of banking, derivative activities are subject to all other applicable laws and regulations, as well as prudential safety and soundness standards.

The proposal is intended to describe the derivatives activities that are legally permissible for a national bank, including activities that require a bank to provide notice to the OCC prior to engaging in the activity. Providing this information in a regulation is expected to promote clarity and transparency and, ultimately, reduce compliance burden. These proposed changes also can help ensure consistent practices across institutions when a national bank seeks to commence or expand derivatives activities. OCC rules for Federal savings associations are currently set forth at 12 CFR 163.172. This rule provides that a Federal savings association may engage in a transaction involving a financial derivative provided that the savings association is authorized to invest in the assets underlying the derivative, the transaction is safe and sound, and the association's board of directors and management satisfy certain prudential requirements. It also states that, in general, a Federal savings association should engage in a financial derivative transaction only to reduce its risk exposure. Because Federal savings associations have different statutory authority for derivative activities, the OCC has not proposed to include Federal savings associations in § 7.1030. However, the OCC is considering moving § 163.172 to part 7 so that the derivative rules for both charters are located in the same part. This move would better organize OCC rules. The specifics of the proposal are discussed below.

Authority. Paragraph (a) of new § 7.1030 would specify that the section is issued pursuant to 12 U.S.C. 24 (Seventh). Paragraph (a) would further specify that a national bank may only engage in derivatives transactions in accordance with the requirements of this section.

Definitions. In paragraph (b), the proposed rule incorporates several terms that are commonly used in OCC derivatives interpretive letters. The proposed rule also defines certain terms for the first time to promote transparency and consistency among institutions.

- *Customer-driven.* The proposed rule would define ''customer-driven'' to mean a transaction entered into for a customer's valid and independent business purpose. This approach is consistent with OCC interpretive letters.[62] This focus on the customer recognizes that a number of derivatives activities are permissible for a national bank because the bank is acting as a financial intermediary for the customer. A customer-driven transaction would not include a transaction entered into for the purpose of speculating in derivative, currency, commodity, or security prices.[63] Similarly, a customer-driven transaction would not include a transaction the principal purpose of which is to deliver to a national bank assets that the national bank could not invest in directly.

- *Perfectly-matched.* OCC interpretive letters have permitted national banks to engage in various customer-driven, cash settled derivatives transactions if they are perfectly-matched. In determining that national banks may engage in perfectly-matched derivatives, the OCC found it material that the bank would be exposed only to credit risk.[64] OCC interpretive letters have typically used ''perfectly-matched'' to describe two back-to-back transactions in which all economic terms match and in which the bank's primary exposure is credit risk because the matched transactions offset one another's market risk.[65] The OCC proposes to incorporate a substantially similar definition into the rule, with certain clarifications. Specifically, the OCC proposes to define perfectly-matched to mean two back-to-back transactions that offset risk with respect to all economic terms (*e.g.,* amount, maturity, duration, and underlying). Consistent with OCC interpretive letters, this definition would allow transactions to be considered ''perfectly-matched'' despite a difference in price between two derivatives when that difference

[61] *See, e.g.,* 12 U.S.C. 84 (incorporating credit exposure from derivatives into the legal lending limit); Gramm-Leach-Bliley Act, Pub. L. 106–102, 113 Stat. 1338, section 206(a)(6) (defining ''identified banking product'' to include any swap agreement except an equity swap with a retail customer); 12 U.S.C. 371c (defining ''covered transaction'' between a bank and its affiliates to include a derivative transaction); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376, (Dodd-Frank Act) section 716 (15 U.S.C. 8305); Dodd-Frank Act section 731 (7 U.S.C. 6s); Dodd-Frank Act section 764 (15 U.S.C. 78o–10).

[62] *E.g.,* OCC Interpretive Letter No. 1160 (Aug. 22, 2018).

[63] OCC interpretations have specified that customer-driven derivatives transactions do not include transactions entered into for the purpose of speculating in the underlying commodity or security prices. *See e.g.,* OCC Interpretive Letter No. 1033 (Jun. 14, 2015); OCC Interpretive Letter No. 892 (September 13, 2000); OCC Interpretive Letter No. 684 (Aug. 4, 1995); OCC No-Objection Letter 90–1 (Feb. 16, 1990).

[64] *See e.g.,* OCC No-Objection Letter No. 87–5 (Jul. 20, 1987).

[65] *See e.g.,* OCC Interpretive Letter No. 1039 (Sept. 13, 2005).

reflects the bank's intermediation fee (in the form of a spread).[66]

• *Portfolio-hedged.* OCC interpretive letters have discussed the permissibility of portfolio hedging with respect to specified types of underlyings. These letters have typically used ''portfolio-hedged'' to describe the practice of hedging the net residual risk position in a portfolio of positions.[67] This method of hedging can reduce transactional costs and operational risks because fewer transactions need to be executed relative to perfectly-matched hedging (in which the bank must offset each transaction on an individual basis).[68] The OCC proposes to incorporate into the rule a substantially similar definition with certain clarifications. Specifically, the OCC proposes to define ''portfolio-hedged'' to mean that a portfolio of transactions is hedged based on net unmatched positions or exposures in the portfolio. The proposed definition refers to unmatched ''positions or exposures'' to clarify that hedging on a portfolio basis may involve hedging based on various risk exposures with different instruments in accordance with applicable policies and procedures and risk limits of the bank.

• *Physical hedging or physically-hedged.* The OCC has issued guidance recognizing that it is permissible for national banks to utilize physical positions, including physical positions in certain commodities, to hedge their customer-driven derivatives activities under certain conditions.[69] The OCC proposes to define ''physical hedging'' and ''physically-hedged'' to mean holding title to or acquiring ownership of an asset (for example, by warehouse receipt or book entry) to manage the risks arising out of permissible derivatives transactions. This definition is intended to be consistent with the description of commodities physical hedging activities that the OCC has identified as permissible in prior interpretive letters and in OCC Bulletin 2015–35. This definition would also apply to physical hedging of customer-driven derivatives referencing securities. As described further below, OCC interpretive letters have recognized the permissibility of physical hedging of customer-driven derivatives with securities (*i.e.,* taking ownership of the relevant security to hedge the customer-driven transaction), including securities that a national bank could not purchase as an investment under 12 CFR part 1.[70] In this context, consistent with prior OCC interpretations,[71] ''physical hedging'' involving securities would include taking ownership of a security, by book-entry or otherwise. Section 7.1030(e) of the proposed rule includes additional requirements applicable to physical hedging activities.[72]

• *Physical settlement or physically-settled.* OCC interpretive letters recognize the permissibility of physical settlement conducted as part of a national bank's derivatives financial intermediation activities in limited circumstances. Under existing interpretive letters and the proposed rule, engaging in physical settlement with respect to an underlying would entail providing a notice to the OCC.[73] The OCC proposes to define ''physical settlement'' and ''physically-settled'' to mean a transaction is settled by accepting title to or acquiring ownership of the underlying asset (whether a commodity, security, or emissions allowance). Physical settlement stands in contrast to cash-settled transactions. In cash-settled transactions, counterparties do not exchange the underlying assets. Rather, they exchange cash payments based on the price of the underlying. For purposes of the proposed rule, physical settlement includes transitory title transfer, which is discussed below.

• *Transitory title transfer.* OCC interpretive letters recognize the permissibility of settling a derivatives transaction by transitory title transfer of the underlying asset in limited circumstances. Transitory title transfer is a means of physical settlement in which a counterparty only briefly holds title to the underlying asset. Consistent with prior OCC interpretive letters,[74] the OCC proposes to define ''transitory title transfer'' to mean a transaction is settled by accepting and immediately relinquishing title to an asset. Transitory title transfer does not entail a bank taking physical possession of a commodity.[75]

• *Underlying.* OCC interpretive letters have long analyzed derivatives transactions based on the underlying reference asset, rate, obligation, index, etc. The OCC proposes to define ''underlying'' as the reference asset, rate, obligation, or index on which the payment obligation(s) between counterparties to a derivatives transaction is based.

The OCC specifically requests comment on whether the proposed definitions accurately reflect the terms used in OCC interpretive letters and whether any of these terms, in particular ''perfectly-matched'' and ''portfolio-hedged,'' would benefit from further clarification. Further, the OCC requests comment on whether national banks would be able to determine effectively which activities meet these definitions and, specifically, whether the OCC should elaborate on the characteristics of transactions that will be considered perfectly-matched or portfolio-hedged. The OCC requests comment on whether it should include a definition of the term ''derivative'' in the final rule and whether a definition of this term would be necessary to appropriately scope the proposed provision and whether any definition would be workable in practice. To the extent a definition of ''derivative'' is necessary, the OCC suggests that it be defined as follows:

A contract, agreement, swap, warrant, note, or option that is based, in whole or in part, on the value of, any interest in, or any quantitative measure or the occurrence of any event relating to, one or more commodities, securities, currencies, interest or other rates, indexes, or other assets, except a derivative does not include a:

(1) Retail forex transaction, as defined in 12 CFR 48.2;

(2) Security;

(3) Loan or loan participation;

(4) Deposit;

(5) Banker's acceptance; or

(6) Letter of credit.

The OCC requests comment on this possible definition.

Permissible Derivatives Activities Generally. The proposed rule would address five categories of permissible derivatives activities. These categories are discussed below.

[66] OCC Interpretive Letter No. 1110 (Jan. 30, 2009).

[67] *See e.g.,* OCC Interpretive Letter No. 1073 (Oct. 19, 2006); OCC Interpretive Letter No. 1060 (Apr. 26, 2006).

[68] *See e.g.,* OCC Interpretive Letter No. 1073; OCC Interpretive Letter No. 1060.

[69] OCC Bulletin 2015–35, Quantitative Limits on Physical Commodity Transactions (Aug. 4, 2015); *see also* OCC Interpretive Letter No. 1040 (Sept. 15, 2005); OCC Interpretive Letter No. 935 (May 14, 2002); OCC Interpretive Letter No. 684; OCC Interpretive Letter No. 632 (Jun. 30, 1993).

[70] *See, e.g.,* OCC Interpretive Letter No. 1090 (Oct. 25, 2007); OCC Interpretive Letter No. 1064 (Jul. 13, 2006); OCC Interpretive Letter No. 1018 (Feb. 10, 2005); OCC Interpretive Letter No. 935; OCC Interpretive Letter No. 892.

[71] *See, e.g.,* OCC Interpretive Letter No. 1090; OCC Interpretive Letter No. 1064; OCC Interpretive Letter No. 1018; OCC Interpretive Letter No. 935; OCC Interpretive Letter No. 892.

[72] *See* proposed rule § 7.1030(e).

[73] *See, e.g.,* OCC Interpretive Letter No. 1040; OCC Interpretive Letter No. 935; OCC Interpretive Letter No. 684; OCC Interpretive Letter No. 632.

[74] *See, e.g.,* OCC Interpretive Letter No. 962 (Apr. 21, 2003).

[75] *See, e.g.,* OCC Interpretive Letter No. 1073; OCC Interpretive Letter No. 1060; OCC Interpretive Letter No. 1025 (Apr. 25, 2005); OCC Interpretive Letter No. 962; OCC Interpretive Letter No. 684. *See also* 81 FR 96355 (Dec. 30, 2016) (explaining ''transitory title transfer typically does not entail physical possession of a commodity; the ownership occurs solely to facilitate the underlying transaction and lasts only for a moment in time.'').

• *Derivatives Referencing Underlyings in which a National Bank May Invest Directly.* OCC interpretive letters have recognized that national banks may engage in derivatives activities where the derivative references assets that a national bank could purchase directly as an investment.[76] For example, to manage its investment portfolio, a national bank may use derivatives tied to interest rates, foreign exchange and currency, credit, precious metals, and investment securities. Section 7.1030(c)(1) of the proposed rule would reflect this authority by specifying that a national bank may engage in derivatives transactions with payments based on underlyings that a national bank is permitted to purchase directly as an investment. Paragraph (c)(1) would address only derivatives on underlyings that a national bank would be permitted to purchase directly as principal. For example, an underlying that a national bank could hold only as a nonconforming investment under 12 CFR part 1 or only in satisfaction of debts previously contracted would not be a permissible underlying under this paragraph.

• *Hedging Bank-Permissible Activities with Derivatives.*

Under 12 U.S.C. 24 (Seventh), a national bank may engage in activities that are part of, or incidental to, the business of banking. Risk management activities, such as hedging risks arising from bank activities, are part of the business of banking.[77] Entering into deposit, loan, and other contracts with customers and engaging in other bank-permissible activities involve risks that a bank must manage as part of the business of banking. A bank must manage the risk of those activities to operate profitably and in a safe and sound manner.[78] A bank may engage in hedging activities to manage these risks.[79] The OCC has long recognized that a national bank may hedge its risk using derivatives on underlyings that a national bank would be permitted to invest in directly. For example, a national bank may use futures contracts on exchange, coin, or bullion to hedge activities conducted pursuant to a national bank's statutory authority to buy and sell exchange, coin, or bullion. Similarly, a national bank may use futures to hedge against the risk of loss due to the interest rate fluctuations inherent in bank loan operations, U.S. Treasury Bills, and certificates of deposit.

• *Hedging with Derivatives Referencing Underlyings in which a National Bank May Not Invest Directly.*

The OCC also has recognized that a national bank may hedge the risks of bank-permissible activities using derivatives on underlyings in which a national bank may not invest directly. For example, in OCC Interpretive Letter 896, the OCC recognized that a national bank may purchase cash-settled options on commodity futures contracts to hedge the risk of a commodity that served as collateral on an agricultural loan.[80] Similarly, the OCC has recognized that it is permissible for a trust bank to hedge the market risk associated with the fees it received from its investment advisory activities using equity derivatives.[81] Likewise, the OCC has determined that a national bank may purchase certain equity derivatives to hedge the risks of a deposit account that paid interest based, in part, upon changes in the Standard & Poor's 500 Composite Stock Index.[82] The OCC also has recognized that it is permissible for a national bank to use commodity derivatives to hedge commodity price risk associated with a production payment loan.[83]

The proposed rule would recognize a national bank's authority to hedge bank-permissible activities using derivatives on underlyings in which a bank could not invest directly. Section 7.1030(c)(2) of the proposed rule would provide that a national bank may engage in derivatives transactions with any underlying to hedge the risks arising from bank-permissible activities after providing notice to its EIC.[84]

• *Derivatives Financial Intermediation for Customers.*

OCC interpretive letters have long recognized that a national bank may act as a financial intermediary in customer-driven[85] derivatives transactions on a variety of reference assets as part of the business of banking.[86] These letters have recognized national banks' authority to enter into cash-settled, customer-driven derivatives transactions both on a perfectly-matched[87] and portfolio-hedged basis.[88] The OCC has explained that these derivatives activities ''are, at their essence, modern forms of financial intermediation'' because ''through intermediated exchanges of payments, banks facilitate the flow of funds within our economy and serve important financial risk management and other financial needs of bank customers.''[89]

[76] *See, e.g.,* OCC Interpretive Letter No. 494 (Dec. 20, 1989); OCC Interpretive Letter No. 422 (Apr. 11, 1988); OCC No Objection Letter No. 86–13 (Aug. 8, 1986). *See also,* ''Report to Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act'' at 86–90 (September 2016), *available at https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/pub-report-to-congress-sec-620-dodd-frank.pdf* (Section 620 Report).

[77] *See Decision of the Office of the Comptroller of the Currency on the Request by Chase Manhattan Bank, N.A. to Offer the Chase Market Index Investment Deposit* (1988) (MII Deposit); *Investment Company Institute* v. *Ludwig,* 884 F. Supp. 4 (D.D.C. 1995) (upholding Comptroller's decision that the hedged deposit in MII Deposit is a bank-permissible product that did not violate the Glass-Steagall Act).

[78] *See generally* MII Deposit; OCC Interpretive Letter No. 892.

[79] *See* OCC Interpretive Letter No. 896 (Aug. 21, 2000); OCC Interpretive Letter No. 892.

[80] *See* OCC Interpretive Letter No. 896.

[81] *See* OCC Interpretive Letter No. 1037 (Aug. 9, 2005).

[82] *See* MII Deposit.

[83] *See* OCC Interpretive Letter No. 1117 (May 19, 2009).

[84] In contrast, if a national bank engaged in hedging using derivatives on underlyings in which a national bank could invest directly, the bank would not need to provide notice under the proposed rule because this activity could be conducted under proposed rule § 7.1030(c)(1). *See* proposed rule § 7.1030(c)(1), (d).

[85] A ''customer-driven'' transaction is one entered into for a customer's valid and independent business purposes. *See, e.g.,* OCC Interpretive Letter No. 1160; OCC Interpretive Letter No. 892. This definition is addressed in § 7.1030(b) of the proposed rule.

[86] *See, e.g.,* OCC Interpretive Letter No. 937 (Jun. 27, 2002); OCC Interpretive Letter No. 892; No-Objection Letter 87–5.

[87] *See, e.g.,* OCC Interpretive Letter No. 1110 (longevity indexes); OCC Interpretive Letter No. 1101 (Jul. 7, 2008) (certain risk indexes); OCC Interpretive Letter No. 1089 (Oct. 15, 2007); (specific property indexes); OCC Interpretive Letter No. 1081 (May 15, 2007) (specific property indexes); OCC Interpretive Letter No. 1079 (Apr. 19, 2007) (inflation indexes); OCC Interpretive Letter No. 1065 (Jul. 24, 2006) (petroleum products, agricultural oils, grains and grain derivatives, seeds, fibers, foodstuffs, livestock/meat products, metals, wood products, plastics and fertilizer); OCC Interpretive Letter No. 1063 (Jun. 1, 2006) (hogs, lean hogs, pork bellies, lumber, corrugated cardboard, and polystyrene); OCC Interpretive Letter No. 1059 (Apr. 13, 2006) (old corrugated cardboard #11, polypropylene: injection molding (copoly), polypropylene: all grades, Dow Jones AIG Commodity Index); OCC Interpretive Letter No. 1056 (Mar. 29, 2006) (frozen concentrate orange juice, polypropylene); OCC Interpretive Letter No. 1039 (crude oil, natural gas, heating oil, natural gasoline, gasoline, unleaded gas, gasoil, diesel, jet fuel, jet-kerosene, residual fuel oil, naphtha, ethane, propane, butane, isobutane, crack spreads, lightends, liquefied petroleum gases, natural gas liquids, distillates, oil products, coal, emissions allowances, benzene, dairy, cattle, wheat, corn, soybeans, soybean meal, soybean oil, cocoa, coffee, cotton, orange juice, sugar, paper, rubber, steel, aluminum, zinc, lead, nickel, tin, cobalt, iridium, rhodium, freight, high density polyethylene (plastic), ethanol, methanol, newsprint, paper (linerboard), pulp (kraft), and recovered paper (newsprint)).

[88] *See, e.g.,* OCC Interpretive Letter No. 1073 (aluminum, nickel, lead, zinc, and tin); OCC Interpretive Letter No. 1060 (coal); OCC Interpretive Letter No. 1040 (emissions allowances); OCC Interpretive Letter No. 937 (electricity).

[89] OCC Interpretive Letter No. 1110; OCC Interpretive Letter No. 1101; OCC Interpretive Letter No. 1079.

The OCC has also recognized in this context the permissibility of physical settlement by transitory title transfer.[90] As described above, transitory title transfer is a particular means of physical settlement in which a counterparty only briefly holds title to the underlying asset. Transitory title transfer does not entail a bank taking physical possession of a commodity.[91] Further, the OCC has recognized that a national bank may engage in customer-driven financial intermediation derivatives activities that are physically-settled (other than by transitory title transfer) and to physically hedge those derivatives in certain circumstances.[92] OCC interpretive letters have explained that physical delivery can help to reduce the risk in customer-driven commodity derivatives transactions if the activity is conducted in accordance with safe and sound banking practices and would achieve a more accurate and precise hedge than a cash-settled transaction.[93] The OCC subsequently provided guidance on safe and sound practices with respect to physical hedges of commodity-linked financial transactions.[94]

The OCC proposes to incorporate and streamline the framework contained in its interpretive letters addressing derivatives financial intermediation activities in § 7.1030(c)(3) through (5).

First, under the proposed rule, a national bank may engage in customer-driven, cash-settled derivatives transactions on any underlying on a perfectly-matched or portfolio-hedged basis.

Second, the proposed rule would permit a national bank to engage in customer-driven, perfectly-matched or portfolio-hedged derivatives transactions on any underlying that is settled by transitory title transfer.

Third, the proposed rule would permit physically settled and physically hedged transactions that are either perfectly-matched or portfolio-hedged, provided that the national bank does not take physical delivery of any commodity by receipt of physical quantities of the commodity on bank premises and the physical hedging activities meet the requirements in paragraph (e) of the proposed rule. As discussed below, a national bank would need to provide a written notice to its EIC before engaging in financial intermediation activities with derivatives on underlyings in which a national bank could not invest directly.

Relative to prior OCC interpretations, the proposed rule would make fewer distinctions based on the particular underlying or how the national bank hedges its derivatives financial intermediation activity. While prior interpretations typically analyzed both the underlying and the bank's method for hedging the customer-driven derivative (*i.e.,* perfectly matched versus portfolio hedged), the proposal would permit customer-driven, cash-settled derivatives transactions on any underlying, whether perfectly-matched or portfolio-hedged. The OCC recognizes that financial intermediation in derivatives continues to evolve and that the markets for derivatives on underlyings that the OCC has not previously addressed may have sufficient liquidity and depth to allow a bank to conduct the activity as a financial intermediary. Similarly, the OCC recognizes that these same factors may allow a national bank to hedge its customer-driven derivatives activities in evolving ways—whether by portfolio hedging or physical hedging—consistent with conducting the activity as a financial intermediary.

As with any bank-permissible activity, safety and soundness standards apply to derivatives financial intermediation activities. The proposal would include additional requirements for physical hedging activities in § 7.1020(e). The OCC requests comment on whether the rule should reflect any additional standards regarding the underlyings that are permissible for financial intermediation in derivatives and how national banks may hedge these activities. For example, the OCC requests comment on whether the regulation should include additional language relating to the liquidity of the market for permissible customer-driven derivatives activities.

Notice requirement. OCC interpretations have often included a process in which the national bank provides notice to its EIC about the business and management practices the bank will employ in performing the derivatives activity as financial intermediation. Consistent with prior interpretive letters addressing derivatives hedging or financial intermediation activities, proposed § 7.1020(d) would require a national bank to provide written notice to its EIC prior to engaging in activity using derivatives referencing assets that a national bank could not invest in directly.

OCC Interpretive Letter 1160 contemplates that a bank would provide written notification to its EIC prior to commencing a derivatives financial intermediation business for a reference asset addressed in prior OCC interpretive letters. This process replaced the no-objection process that was typically included in prior OCC interpretive letters.[95] The proposal would require a national bank to provide a notice to its EIC prior to commencing a financial intermediation activity in derivatives on underlyings in which a national bank could not invest directly or expanding its financial intermediation activities to include a new category of underlyings.[96]

In addition, OCC interpretive letters have contemplated that a national bank would obtain a no-objection before engaging in hedging activities using derivatives on underlyings in which a national bank could not invest directly.[97] The OCC is not proposing to incorporate an EIC no-objection in connection with these hedging activities, and the proposal would instead create a regulatory requirement to provide notice to the national bank's EIC for these hedging activities recognized in § 7.1030(c)(2) through the proposed notice requirement in §§ 7.1030(d)(1)(i)–(ii). The OCC expects that transitioning from the no-objection process for derivatives hedging activities to the notice process will enhance prudential supervision of bank derivatives activities by ensuring that banks evaluate the risks of the activities both at inception and on an ongoing basis.

Under the proposed rule, the notice procedures and requirements in proposed § 7.1030(d)(2) would be the same for hedging activities and financial intermediation activities. The proposed rule would require the written notice to include information that is substantially similar to the information that is discussed in Interpretive Letter 1160. Specifically, the written notice must

[90] *See* OCC Interpretive Letter No. 1073 (aluminum, nickel, lead, zinc, and tin); OCC Interpretive Letter No. 1060 (coal); OCC Interpretive Letter No. 1025 (electricity); Interpretive Letter No. 962 (electricity). The term ''transitory title transfer'' means accepting and instantaneously relinquishing title to the commodity, as a party in a ''chain of title'' transfer. OCC Interpretive Letter No. 1025.

[91] *See, e.g.,* OCC Interpretive Letter No. 1060; OCC Interpretive Letter No. 684. *See also* 81 FR 96355 (Dec. 30, 2016) (explaining ''transitory title transfer typically does not entail physical possession of a commodity; the ownership occurs solely to facilitate the underlying transaction and lasts only for a moment in time.'').

[92] *See, e.g.,* OCC Interpretive Letter No. 1040; OCC Interpretive Letter 892; OCC Interpretive Letter No. 684.

[93] *E.g.,* OCC Interpretive Letter No. 684.

[94] *See* OCC Bulletin 2015–35.

[95] *See, e.g.,* OCC Interpretive Letter No. 1065.

[96] National banks that have provided notice to or received statements of no-objection from their EICs for particular derivatives activities consistent with the process in OCC interpretive letters would not be required to submit new notices for those activities.

[97] *See* OCC Interpretive Letter No. 896.

include a detailed description of the proposed activity, including the relevant underlying(s); the anticipated start date of activity; and a detailed description of the bank's risk management system (policies, processes, personnel, and control systems) for identifying, measuring, monitoring, and controlling the risks of the activity. The proposed rule does not include the requirement from Interpretive Letter 1160 that the bank submitting the notice identify an OCC interpretive letter confirming the permissibility of transactions involving the underlying and hedging activity. If the proposed rule is finalized, derivatives hedging and financial intermediation activities would be conducted pursuant to the regulation, without reference to prior OCC interpretations. Therefore, the OCC does not believe it would be necessary for a national bank to identify a prior OCC interpretation. The OCC believes that this framework could ultimately reduce the compliance burden associated with national bank derivatives activities.

The proposed prior notice does not impose a prior approval requirement. Rather, the notice is designed to make OCC supervisor aware of a bank's derivatives activities so that such activities can be appropriately scoped into OCC's ongoing supervision and oversight of the bank's safety and soundness. In addition, having awareness of bank's derivatives activities will enable the OCC to raise questions as to whether the derivatives activity can be conducted in a safe and sound manner, or whether the derivatives activity is within the scope of those legally authorized for a national bank, before the bank activities commence or at any time, as is the case with any other permissible bank activities.

Section 7.1030(d)(1) of the proposed rule would require a national bank to provide EIC notice prior to engaging in any of the derivatives hedging or financial intermediation activities described in § 7.1030(c)(2) through (5) for the first time. This notice requirement would apply, for example, if a bank has previously engaged in cash-settled derivatives with respect to a particular underlying as described in § 7.1030(c)(3) but seeks to begin physically settling transactions as described in § 7.1030(c)(4) or (5). Likewise, a national bank would need to provide notice prior to first engaging in derivatives hedging activities pursuant to § 7.1030(c)(2) or expanding the bank's derivatives hedging activities to include a new category of underlying. Under proposed § 7.1030(d)(2), the bank must submit written notice at least 30 days before the national bank commences the derivatives activity. The OCC specifically requests comment on whether it is sufficiently clear when a notice would be required and what would constitute a "new category of underlying." Prior OCC interpretations have addressed several categories of permissible underlyings for national bank derivatives transactions.[98] The OCC requests comments on whether the regulation text should list these categories. If the regulation were to list these categories, the OCC requests comment on whether the regulation should specify that any new derivatives activities not falling within one of the specified categories also requires notice.

The OCC believes that the proposed notice process will provide an efficient notice standard for national banks engaging in derivatives activities. The notice requirement is expected to enhance supervision by providing bank supervisors with comprehensive, up-to-date information on the activities in which the bank is engaged. This information will assist OCC supervisors by ensuring they have an opportunity to assess a bank's ability to engage in derivatives activities in a safe and sound manner prior to the bank commencing the activity and provide them ongoing information as those activities expand to new categories. The OCC believes this objective is particularly important in the case of derivatives hedging and financial intermediation activities because these activities continue to evolve.

The OCC specifically requests comment on whether the final rule should provide additional specificity regarding the notice process and whether any additional information should be included in the notice.

Additional requirements for physical hedging activities. The OCC has elaborated in interpretive letters and guidance on practices with respect to physical hedging with securities and commodities.[99] The OCC proposes to incorporate these practices into proposed § 7.1030(e) with certain modifications to promote consistency in the practices national banks employ with respect to physical hedging activities. Specifically, the OCC proposes to apply the framework in interpretive letters addressing physical hedging using securities to all physical hedging activities involving underlyings in which a national bank could not invest directly. Under the proposed rule, a national bank could engage in physical hedging only if: (1) The national bank holds the underlying solely to hedge risks arising from derivatives transactions originated by customers for the customers' valid and independent business purposes; (2) the physical hedging activities offer a cost-effective means to hedge risks arising from permissible banking activities; (3) the national bank does not take anticipatory or maintain residual positions in the underlying except as necessary for the orderly establishment or unwinding of a hedging position; and (4) the national bank does not acquire equity securities for hedging purposes that constitute more than five percent of a class of voting securities of any issuer.[100]

Consistent with OCC interpretive letters and guidance concerning physical hedging with commodities in which a national bank could not invest directly,[101] the proposed rule would impose additional requirements on physical hedging with commodities. Under the proposed rule, a national bank may engage in physical hedging with commodities only if the national bank's commodity position (including, as applicable, delivery point, purity, grade, chemical composition, weight, and size) is no more than five percent of the gross notional value of the national bank's derivatives that: (1) Are in that same particular commodity and (2) allow for physical settlement within 30 days. Title to commodities acquired and immediately sold in a transitory title transaction would not count against this five percent limit.[102] Consistent with OCC interpretive letters,[103] the proposed rule would permit physical hedging involving commodities only if the physical position more effectively reduces risk than a cash-settled hedge

[98] *See e.g., supra,* note 27.

[99] *See* OCC Bulletin 2015–35; OCC Interpretive Letter No. 935; OCC Interpretive Letter No. 892; OCC Interpretive Letter No. 684.

[100] Certain of the practices described in prior OCC interpretive letters are not included in the proposed rule text because they are generally-applicable safety and soundness standards that can be evaluated and addressed under other existing sources of law, including, as applicable, 12 U.S.C. 1818. For example, several interpretive letters discuss that a national bank should have appropriate risk management policies and procedures for its physical hedging activities. In addition, several interpretive letters have also specified that a bank may not engage in physical hedging activities for the purpose of speculating in security or commodity prices. As described above, customer-driven financial intermediation as defined in the proposal would not include activities entered into for the purpose of speculation.

[101] *See* OCC Bulletin 2015–35; OCC Interpretive Letter No. 684.

[102] Consistent with OCC Interpretive Letter No. 1040, this 5 percent limit would not apply to physical hedging using emissions allowances.

[103] *See* OCC Interpretive Letter No. 684; OCC Interpretive Letter No. 632.

involving the same commodity. As discussed above, a national bank may not take physical delivery of any commodity by receipt of physical quantities of the commodity on bank premises. The proposed rule would apply these requirements to physical hedging activities involving commodities due to the unique risks of physical commodity activities.[104]

Subpart B—National Bank Corporate Practices

Corporate Governance (§ 7.2000)

As noted, the OCC continually seeks to update its regulations to stay current with industry changes and technological advances, subject to Federal law and consistent with the safe and sound operation of the banking system. As part of this process, the OCC is proposing to update and modernize § 7.2000, which provides a regulatory framework for national bank corporate governance. As described by the OCC in various conditional approvals,[105] ''corporate governance procedures'' generally refer to requirements involving the operation and mechanics of the internal organization of a national bank, including relations among owners-investors, directors, and officers, and do not include requirements that relate to the banking powers or activities of a national bank or relationships between a national bank and customers or third parties. Examples of corporate governance procedures include, but are not limited to, share exchanges, anti-takeover provisions, and the use of blank check procedures in issuing preferred stock. The OCC issued § 7.2000 in 1996 to provide national banks with increased flexibility to structure their corporate governance procedures consistent with the particular needs of the bank while providing shareholders and others with adequate notice of the corporate standards on which a bank will rely.[106] The OCC has not substantively changed § 7.2000 since its adoption.[107]

Section 7.2000 currently provides that a national bank proposing to engage in a corporate governance procedure must comply with applicable Federal banking statutes and regulations and safe and sound banking practices. In addition, § 7.2000 provides that to the extent not inconsistent with applicable Federal banking statutes or regulations, or bank safety and soundness, a national bank may elect to follow the corporate governance procedures of the law of the State in which the main office of the bank is located, the law of the State in which the holding company of the bank is incorporated, Delaware General Corporation Law, or the Model Business Corporation Act. Further, § 7.2000 requires that a national bank designate in its bylaws the body of law selected for its corporate governance procedures. Finally, § 7.2000 describes the process for obtaining OCC staff positions on the ability of a national bank to engage in a particular corporate governance procedure.

The OCC is proposing to amend § 7.2000 to reduce burden, provide greater clarity, and modernize the national bank charter with respect to corporate governance provisions. These proposed amendments also would address anomalous results that may arise when a national bank eliminates its holding company. As a general matter, the OCC is proposing to change the term ''corporate governance procedure'' used in § 7.2000 to ''corporate governance provisions'' and to revise paragraph (a) of § 7.2000 accordingly. The OCC believes that ''corporate governance procedure'' may be construed too narrowly than intended and omit corporate governance practices that are not procedural in nature. Revised paragraph (a) would provide that the corporate governance provisions in a national bank's articles of association and bylaws and the bank's conduct of its corporate governance affairs must comply with applicable Federal banking statutes and regulations and safe and sound banking practices. The OCC does not intend this change to affect the application of prior OCC interpretations of corporate governance procedures to § 7.2000.

The proposal would preserve the current ability of a national bank to use the corporate governance provisions of the State in which the main office of the bank is located, the State in which the bank's holding company is located, the Delaware General Corporation Law, or the Model Business Corporation Act. The proposal, however, would increase flexibility in three ways. First, the proposal would revise paragraph (b) of § 7.2000 to authorize a national bank to elect the corporate governance provisions of the law of any State in which any branch of the bank is located in addition to the law of the State in which the bank's main office is located, to the extent not inconsistent with applicable Federal banking statutes or regulations or safety and soundness. Accordingly, a national bank would no longer be limited to using the corporate governance provisions of the State where its main office is located. For example, a national bank with its main office in State A and branches in State B and State C could elect to use the corporate governance provisions of the law of State A, State B, or State C.

Second, the proposal would revise paragraph (b) to authorize the national bank to use the law of the State where a holding company of the bank is incorporated. The proposal would expressly recognize the possibility that a national bank may be controlled by more than one holding company and that those holding companies may be incorporated by different States.

Third, the proposal would add a new paragraph (c) that would allow a national bank to continue to use the corporate governance provisions of the law of the State where its holding company is incorporated even if the holding company is later eliminated or no longer controls the bank, and the national bank is not located in that State. This change would remove an impediment to a national bank that may choose to eliminate its holding company or is no longer controlled by that holding company but wishes to retain longstanding and familiar corporate governance provisions.

The OCC seeks comment on whether a national bank also should be able to adopt a combination of corporate governance provisions from the laws of several different States where the national bank and any holding companies are located, thus potentially resulting in a national bank following corporate governance provisions that derive from a combination of States' laws, or whether a national bank should be limited to electing and using the corporate governance provisions of a single State. If the OCC permits a national bank to follow the corporate governance provisions from more than one State, the OCC seeks comment on how to ensure that shareholders and others are made aware of the provisions that the bank has chosen.

The OCC also requests comment on whether it should make, to the extent appropriate, similar revisions to the regulations pertaining to corporate governance provisions for Federal savings associations in 12 CFR 5.21 and 5.22, so that Federal savings associations may elect to use the corporate governance provisions of: (1) Any State in which the Federal savings association is located and (2) in the case of Federal stock savings associations,

[104] *See* Section 620 Report (describing the price risks and operational risks specific to physical commodities activities).

[105] *See e.g.,* OCC Conditional Approval No. 859 (June 13, 2008) and OCC Conditional Approval No. 696 (June 9, 2005).

[106] 61 FR 4849, 4854 (Feb. 9, 1996).

[107] Non-substantive amendments to § 7.2000 changed the address and telephone number of the OCC Communications Office. *See* 79 FR 15641 (March 21, 2014) and 80 FR 28345 (May 18, 2015).

the law of the State in which the association's former holding company was incorporated. In addition, the OCC requests comment on whether the final rule should change the term ''corporate governance procedures'' to ''corporate governance provisions'' in §§ 5.21 and 5.22 to be consistent with the change in terminology proposed for § 7.2000.

The proposal also would revise current paragraph (c) of § 7.2000 (proposed to be redesignated as § 7.2000(d)). Current paragraph (c) provides that the OCC considers requests for the OCC staff's position on the ability of a national bank to engage in a particular State corporate governance provision in accordance with the no-objection procedures set forth in OCC Banking Circular 205 or any subsequently published agency procedures, and that requests should demonstrate how the proposed practice is not inconsistent with applicable Federal statutes or regulations and is consistent with bank safety and soundness. The OCC issued Banking Circular 205 on July 26, 1985 and has not modified it since. However, a national bank also may request the views of the OCC on an interpretation of national banking statutes and regulations through an interpretive letter, which has been the more common approach since 1985. In order to update this paragraph, the proposal would remove the requirement that requests for the OCC's views on State corporate governance provisions use the no-objection procedure. The proposal also lists the information that a request must contain. This information, similar to what is set forth in OCC Banking Circular 205, would include: (1) The name of the bank; (2) citations to the State statutes or regulations involved; (3) a discussion whether a similarly situated State bank is subject to or may adopt the corporate governance provision; (4) identification of all Federal banking statutes or regulations that are on the same subject as, or otherwise have a bearing on, the subject of the proposed State corporate governance provision; and (5) an analysis of how the proposed corporate governance provision is not inconsistent with applicable Federal statutes or regulations nor with bank safety and soundness. The OCC notes that this provision would not preclude a national bank from seeking informal consultation with OCC staff. However, if the bank wants to receive a written response from OCC staff, it should follow the procedure in this proposed paragraph (d).

Finally, the OCC requests comment on whether it should revise the standard it uses to apply the requirement in § 7.2000 that the State corporate governance provision be ''not inconsistent with applicable Federal banking statutes or regulations'' to be more flexible. The OCC has historically viewed the standard as meaning that State corporate governance provisions may be used unless Federal law has a different standard than State law, in which case Federal law controls. That is, if Federal law addresses a particular corporate governance matter, then a national bank must follow Federal law on the matter and cannot supplement it with State law. However, the ''not inconsistent'' language could be interpreted in a more flexible manner. One could view a State provision that imposed higher or more stringent requirements as ''not inconsistent'' with Federal law because a bank can comply with both if it meets the State's higher requirement. Thus, the OCC could permit a bank to adopt a State corporate governance provision under § 7.2000 that imposed a higher or more stringent standard than Federal law, as long as in complying with the State provision the bank also would meet the requirements in Federal law. The OCC requests comment on whether this change in the interpretation of the ''not inconsistent'' standard would be helpful.

National Bank Adoption of Anti-Takeover Provisions (7.2001)

The OCC is proposing to add a new section § 7.2001 that would address the extent to which a national bank may include anti-takeover provisions in its articles of association or bylaws.[108] Anti-takeover provisions are examples of corporate governance procedures[109] covered by 12 CFR 7.2000. As discussed above, under current § 7.2000(b) a national bank may elect to follow the corporate governance procedures of specified State law to the extent it is (1) not inconsistent with applicable Federal banking statutes or regulation and (2) not inconsistent with bank safety and soundness.

The purpose of proposed § 7.2001 is to provide the OCC's views about the permissibility of several types of anti-takeover provisions. Specifically, proposed paragraph (a) of § 7.2001 would provide that a national bank may, pursuant to 12 CFR 7.2000(b), adopt anti-takeover provisions included in State corporate governance law if the provisions are not inconsistent with Federal banking statutes or regulations and not inconsistent with bank safety and soundness.

Proposed paragraph (b) would set forth the type of anti-takeover provisions in State corporate governance provisions that the OCC specifically has determined are not inconsistent with Federal banking statutes or regulations.[110] This list is not exclusive and the OCC may find that other State anti-takeover laws are not inconsistent with Federal banking statutes or regulations. A national bank could elect to follow these provisions, subject to the bank safety and soundness limitation discussed below.

Restrictions on business combinations with interested shareholders. These State provisions prohibit, or permit the corporation to prohibit in its certificate of incorporation or other governing document, the corporation from engaging in a business combination with an interested shareholder or any related entity for a specified period of time (*e.g.,* three years) from the date on which the shareholder first becomes an interested shareholder (subject to certain exceptions, such as board approval). An interested shareholder is one that owns an amount of stock specified in the State statute, *e.g.,* at least fifteen percent. Federal banking statutes and regulations do not address, directly or indirectly, this type of restriction for national banks. Although Federal banking statutes authorize national banks to engage in specified consolidations and mergers,[111] this authorization does not preclude a bank's shareholders from adopting a provision that limits the consolidations and mergers into which the bank would enter. Therefore, State restrictions on business combinations with interested shareholders are not inconsistent with Federal law.

Poison pills. A ''poison pill'' is a State statutory provision that provides, or that permits the corporation to provide in its certificate of incorporation or other governing document, that all shareholders, other than the hostile acquiror, have the right to purchase additional stock at a substantial discount upon the occurrence of a triggering event. Because no Federal banking statutes or regulations directly or indirectly address these shareholder

[108] OCC regulations currently include provisions addressing adoption of anti-takeover provisions by stock Federal savings associations. *See* 12 CFR 5.22(g)(7), (h) and (j)(2)(i)(A). The OCC is not proposing to amend those provisions.

[109] The proposed rule would change this terminology in § 7.2000 to ''corporate governance provisions.''

[110] Permitting the use of staggered boards is another anti-takeover provision. The proposed new section does not include staggered boards because they are now expressly permitted under the National Bank Act. 12 U.S.C. 71; 12 CFR 2024.

[111] *See* 12 U.S.C 215, 215a, 215a–1, 215a–3, and 215c.

purchase rights, State poison pill laws are not inconsistent with Federal law.[112]

Requiring all shareholder actions to be taken at a meeting. These State provisions provide, or permit the corporation to provide in its certificate of incorporation or other governing document, that all actions to be taken by shareholders must occur at a meeting and prohibit shareholders from taking action by written consent. Certain Federal banking statutes require shareholder approval to be taken at a meeting[113] while other sections require shareholder approval but do not specify a meeting.[114] There is no provision in Federal law authorizing national bank shareholders to take action by written consent in lieu of a meeting. Furthermore, nothing in Federal law precludes a national bank's articles of association from requiring a meeting for any action. Therefore, this type of State provision is not inconsistent with Federal law.

Limits on shareholders' authority to call special meetings. These State provisions provide, or permit the corporation to provide in its certificate of incorporation or other governing document, that only the board of directors, and not shareholders, have the right to call special meetings of the shareholders or, if shareholders have the right, require a high percentage of shareholders to call the meeting. Because Federal banking statutes or regulations do not address, directly or indirectly, the right of shareholders of a national bank to call special meetings, these type of State laws are not inconsistent with Federal law.

Shareholder removal of a director only for cause. These State provisions provide, or permit the corporation to provide in its certificate of incorporation or other governing document, that shareholders may remove a director only for cause, rather than both for cause and without cause. The National Bank Act and OCC regulations do not have a specific provision addressing director removal by shareholders. Removal only for cause is consistent with the OCC's model national bank Articles of Association, which provide for removal for cause and for failure to meet statutory director qualifications.[115] Therefore, State provisions requiring shareholder removal of a director only for cause are not inconsistent with Federal law.

Proposed paragraph (c) would set forth the type of anti-takeover provisions in State corporate governance provisions that the OCC has determined are inconsistent with Federal banking statutes or regulations. A national bank could not elect to follow these provisions. These provisions are set forth below.

Supermajority voting requirements. These State statutory provisions require, or permit the corporation to require in its certificate of incorporation or other governing document, that a supermajority of the shareholders approve specified matters. A requirement that a supermajority vote of shareholders must approve some transactions is inconsistent with Federal law when applied to transactions for which a Federal statute or regulation includes an express specific shareholder approval level. Certain provisions of the National Bank Act specify shareholder approval by a two-thirds vote[116] and other provisions require majority shareholder approval.[117] When a provision in the National Bank Act specifies the level of shareholder vote required for approval, it is inconsistent with Federal law to follow a State corporate governance provision that permits or requires a different level or an additional shareholder approval requirement for a subset of shareholders.

Restrictions on a shareholder's right to vote all the shares it owns. These State statutory provisions prohibit, or permit the corporation in its certificate of incorporation or other governing document to prohibit, a person from voting shares acquired that increase their percentage of ownership of the company's stock above a certain level. This type of provision is inconsistent with the National Bank Act, which expressly provides that each shareholder is entitled to one vote on each share of stock held by the shareholder on all matters other than elections for directors, where cumulative voting may be allowed if so provided in the articles of association.[118] A State corporate governance provision that interferes with this express right to vote is inconsistent with Federal law.

As indicated above, § 7.2000(b) permits a national bank to elect to follow a State corporate governance provision only if it is not inconsistent with Federal law and bank safety and soundness. Proposed paragraph (d) of § 7.2001 addresses the impact of bank safety and soundness on adoption of anti-takeover provisions.

Anti-takeover provisions could make it harder for a bank to be acquired by another bank or by investors or to raise capital by discouraging share purchases by a potential acquiror. Thus, when a bank is in a weak condition, anti-takeover provisions the OCC has determined are not inconsistent with Federal law nevertheless would be inconsistent with bank safety and soundness if they would impair the possibility of restoring the bank to sound condition. These provisions would then be impermissible.

Accordingly, proposed paragraph (d) would provide that any State corporate governance provision, including anti-takeover provisions, that would render more difficult or discourage an injection of capital by purchase of bank stock, a merger, the acquisition of the bank, a tender offer, a proxy contest, the assumption of control by a holder of a large block of the bank's stock, or the removal of the incumbent board of directors or management is inconsistent with bank safety and soundness if: (1) The bank is less than adequately capitalized (as defined in 12 CFR part 6); (2) the bank is in troubled condition (as defined in 12 CFR 5.51(c)(7)); (3) grounds for the appointment of a receiver under 12 U.S.C. 191 are present; or (4) the bank is otherwise in less than satisfactory condition, as determined by the OCC.

However, proposed paragraph (d) also provides that an anti-takeover provision is not inconsistent with bank safety and soundness if, at the time it adopts the provision, the national bank: (1) Is not subject to any of the foregoing conditions and (2) includes along with the provision a limitation that the provision is not effective if one or more of the foregoing conditions occur or if the OCC otherwise directs the bank not to follow the provision for supervisory reasons.

Proposed paragraph (e) provides for OCC case-by-case review of anti-takeover provisions. The OCC reviewed each type of State anti-takeover provision described in proposed paragraph (b) for consistency with Federal banking statutes and regulations only at a general level, without

[112] However, shareholders, including the hostile acquiror, should consider the implications under the Change in Bank Control Act or Bank Holding Company Act if a shareholder, or shareholders acting in concert, acquire sufficient shares to constitute "control."

[113] *See* 12 U.S.C. 71, 214a, 215, 215a, and 215a–2.

[114] *See* 12 U.S.C. 30, 51a, 57, and 59. However, 12 U.S.C. 21a provides that any action requiring approval of the stockholders be obtained by approval by a majority vote of the voting shares at a meeting, unless the statutory provision addressing the action requires greater level of approval.

[115] *See* Articles of Association, Charters, and Bylaw Amendments (Forms), Comptroller's Licensing Manual (June 19, 2017) (Model Articles of Association, Article Fourth, last paragraph).

[116] *See* 12 U.S.C. 30, 57, 59, 181, 214a, 215, 215a, and 215a–2.

[117] *See* 12 U.S.C. 21a and 51a.

[118] 12 U.S.C. 61.

reviewing the specific terms of a proposed provision to be adopted by a particular bank. While the OCC has concluded that the types of provisions set out in paragraph (b) are not inconsistent with Federal banking statutes and regulations in general, the specific provision a particular bank adopts may contain features that could change the result of the OCC's review. Similarly, some anti-takeover provisions may be inconsistent with bank safety and soundness for a particular national bank because of its individual circumstances, even if it is not subject to the conditions listed in proposed paragraph (d).

In order to address the need for individual determinations when appropriate, proposed paragraph (e) would provide that the OCC may determine that a State anti-takeover provision, as proposed or adopted by an individual national bank, is: (1) Inconsistent with Federal banking statutes or regulations, even if it is of a type included in paragraph (b) or (2) inconsistent with bank safety and soundness other than as provided in paragraph (d). The OCC could begin a case-by-case review on its own initiative. In addition, a bank that wishes the OCC to review the permissibility of the specific State anti-takeover provisions it has adopted or proposes to adopt may request the OCC's review, under the procedures set forth at 12 CFR 7.2000(d).

Finally, proposed paragraph (f) addresses the method a national bank, its shareholders, and its directors would use to adopt each anti-takeover provision. In general, the bank would follow the requirements for board of director and shareholder approval set out in the State corporate governance statute it is electing to follow. However, if the provision is included in the bank's articles of association, the bank's shareholders would be required to approve the amendment of the articles pursuant to 12 U.S.C. 21a, even if the State law does not require approval by the shareholders. Further, if the State corporate governance law requires the provision to be in the company's articles of incorporation, certificate of incorporation, or similar document, the national bank must include the provision in its articles of association. If the State corporate governance law does not require the provision to be in the company's articles of incorporation, certificate of incorporation, or similar document but allows it to be in the bylaws, then the national bank could include the provision in its articles of association or in its bylaws. However, if the State corporate governance law requires shareholder approval for changes to the corporation's bylaws, then the national bank must include the provision in its articles of association.

Director or Attorney as Proxy (§ 7.2002)

Twelve U.S.C. 61 prohibits an officer, clerk, teller, or bookkeeper of the bank from acting as proxy for shareholder voting. Section 7.2002 codifies this prohibition in OCC regulations, and provides that any person or group of persons, except the bank's officers, clerks, tellers, or bookkeepers, may be designated to act as proxy. The OCC is proposing to amend this section to clarify that the proxy referenced in the section is for shareholder voting, as provided in the statute. The OCC intends no substantive change with this amendment.

President as Director; Senior Executive Officer (§ 7.2012)

Twelve U.S.C. 76 provides that the president of the bank must be a member of the board and be chairman thereof, but that the board may designate a director in lieu of the president to be chairman, who must perform duties as assigned by the board. Section 7.2012 codifies this statutory requirement in the OCC's rules by providing that pursuant to 12 U.S.C. 76, the president of a national bank must be a member of the board of directors, but a director other than the president may be elected chairman of the board. This section further provides that a person other than the president may serve as the chief executive officer, and that this person is not required to be a director of the bank. When first proposing this rule, the OCC acknowledged that it was adding this second sentence to provide that a person other than the president or a director may serve as chief executive officer of a bank.[119]

The OCC is proposing two substantive changes to this section. First, the OCC is proposing that the person serving as, or in the function of, president of a national bank, regardless of title, must be a member of the board of directors. This change would align the regulation with the OCC's view that the bank officer positions in 12 U.S.C. 76 and other provisions of the National Bank Act refer to functions rather than required titles. If a national bank does not have an individual serving in the position of president but does have another officer serving the function of president, the individual serving in the function of president must be a member of the board of directors. The person serving the function of president is generally the individual appointed to oversee the national bank's day-to-day activities.[120] This change would provide national banks with flexibility in employee titles and management organization. The OCC notes that 12 U.S.C. 24(Fifth) provides national banks with the authority to set the duties of their officers. National banks should ensure that their employee titles do not create unnecessary confusion.

Second, the OCC is proposing to remove the provision in § 7.2012 that states that a person other than the president may serve as chief executive officer, and this person is not required to be a director of the bank. This provision is unnecessary. The position of chief executive officer is not referenced in statute and, as indicated above, national banks have discretion to set the duties of their officers. Further, this provision would conflict with the first proposed revision. Because function rather than title would govern under the proposal, a chief executive officer that serves the function of president would be required to be a member of the board.[121]

The OCC requests comment on whether the proposed changes would provide national banks with flexibility in their organization of management or introduce complexity given the current practices at national banks.

Indemnification of Institution-Affiliated Parties (§§ 7.2014, 145.121)

The OCC is proposing to amend and reorganize § 7.2014, Indemnification of institution-affiliate parties (by national banks), apply revised § 7.2014 to Federal savings associations, and remove § 145.121, Indemnification of directors, officers and employees (by Federal savings associations). Twelve CFR 7.2014 addresses indemnification of institution-affiliated parties (IAPs) by national banks in cases involving an administrative proceeding or civil action initiated by a Federal banking agency, as well as cases that do not involve a Federal banking agency. Under § 7.2014(a), a national bank only may make or agree to make indemnification payments to an IAP with respect to an administrative proceeding or civil action initiated by a Federal banking agency if those

[119] 60 FR 11924 (March 3, 1995). This rule was finalized in 1996. 61 FR 4849 (Feb. 9, 1996).

[120] *See* OCC, ''The Director's Book: Role of Directors for National Banks and Federal Savings Associations'' (July 2016), available at *www.OCC.gov* (Director's Book).

[121] The Director's Book uses the terms ''president'' and ''chief executive officer'' interchangeably to refer to the individual appointed by the board of directors to oversee the day-to-day activities of a national bank.

payments are reasonable and consistent with the requirements of 12 U.S.C. 1828(k) and the implementing regulations thereunder. Pursuant to section 1828(k), the Federal Deposit Insurance Corporation (FDIC) may prohibit, by regulation or order, any indemnification payment made with regard to an administrative proceeding or civil action instituted by the appropriate Federal banking agency that results in a final order under which the IAP: (1) Is assessed a civil money penalty; (2) is removed or prohibited from participating in conduct of the affairs of the insured depository institution; or (3) is required to take certain affirmative actions in regards to an insured depository institution.[122] Section 1828(k) defines ''indemnification payment'' to mean any payment (or any agreement to make any payment) by any insured depository institution to pay or reimburse an IAP for any liability or legal expense with regard to any administrative proceeding or civil action instituted by the appropriate Federal banking agency that results in a final order under which the IAP: (1) Is assessed a civil money penalty; (2) is removed or prohibited from participating in conduct of the affairs of the insured depository institution; or (3) is required to take certain affirmative actions in regards to an insured depository institution.[123] Section 7.2014(a) defines ''institution-affiliated party'' by reference to 12 U.S.C. 1813(u).

Section 7.2014(b)(1) permits a national bank to indemnify IAPs for damages and expenses, including the advancement of legal fees and expenses, in cases involving an administrative proceeding or civil action that is not initiated by a Federal banking agency in accordance with the law of the State in which the main office of the bank is located, the law of the State in which the bank's holding company is incorporated, or the relevant provisions of the Model Business Corporation Act or Delaware General Corporation Law, provided such payments are consistent with safe and sound banking practices.

Additionally, pursuant to § 7.2014(b)(2), a national bank may provide for the payment of reasonable premiums for insurance covering the expenses, legal fees, and liability of IAPs to the extent that these costs could be indemnified under administrative proceedings or civil actions not initiated by a Federal banking agency, as provided in § 7.2014(b)(1).

Twelve CFR 145.121 addresses indemnification of directors, officers and employees by Federal savings associations. Section 145.121(b) requires a Federal savings association to indemnify any person against whom an action is brought or threatened because that person is or was a director, officer, or employee of the association. This indemnification is subject to the requirements of § 145.121(c) and (g). Section 145.121(c) provides that indemnification only may be made available to the IAP if there is a final judgment on the merits in the IAP's favor; or, in the case of settlement, final judgment against the IAP, or final judgment in the IAP's favor other than on the merits, if a majority of the disinterested directors of the Federal savings association determine that the IAP was acting in good faith. It also provides that the association give the OCC at least 60 days' notice of its intention to indemnify an IAP and provides that the association may not indemnify the IAP if the OCC advises the savings association in writing that the OCC objects. Section 145.121(g) makes the indemnification subject to 12 U.S.C. 1821(k).

Pursuant to § 145.121(d), a Federal savings association may obtain insurance to protect it and its directors, officers, and employees from potential losses arising from claims for acts committed in their capacity as directors, officers, or employees. However, a Federal savings association may not obtain insurance that provides for payment of losses incurred as a consequence of willful or criminal misconduct.

Pursuant to § 145.121(e), if a majority of the directors of a Federal savings association conclude that, in connection with an action, a person may become entitled to indemnification, the directors may authorize payment of reasonable costs and expenses arising from the defense or settlement of the action. Before making advance payment of expenses, the savings association is required to obtain an agreement that the savings association will be repaid if the person on whose behalf payment is made is later determined not to be entitled to the indemnification.

Pursuant to § 145.121(f), an association that has a bylaw in effect relating to indemnification of its personnel must be governed solely by that bylaw, except that its authority to obtain insurance must be governed by § 145.121(d), which, as described above, authorizes the purchase of indemnification insurance unless the insurance pays for losses created by willful or criminal misconduct. Section 145.121(g) states that the indemnification provided for in § 145.121 for Federal savings associations is subject to and qualified by 12 U.S.C. 1821(k), which addresses personal liability for directors and officers in certain civil actions.

The OCC is proposing to add Federal savings associations to § 7.2014 so that both charters would be required to comply with § 7.2014. Because § 7.2014 applies to IAPs and not only officers, directors, and employees as does § 145.121, the scope of indemnification rules for Federal savings associations would be broader, applying also to certain Federal savings association controlling shareholders, independent contractors, consultants, and other persons identified in 12 U.S.C. 1813(u).

The OCC also is proposing changes to § 7.2014. First, the proposal would amend current § 7.2014(b)(1), redesignated in this proposal as § 7.2014(a) and retitled, to provide that State law on indemnification may apply to all administrative proceedings or civil actions for which an IAP can be indemnified, not just actions that are initiated by a person or entity not a Federal banking agency as under the current rule. This would clarify the application of State law on indemnification to actions initiated by Federal banking agencies. However, current § 7.2014(a), redesignated by this proposal as § 7.2014(b), would still apply. Specifically, under redesignated § 7.2014(b), with respect to proceedings or civil actions initiated by a Federal banking agency, a national bank or Federal savings association only may make or agree to make indemnification payments to an IAP that are reasonable and consistent with the requirements of section 1828(k) and implementing regulations thereunder.[124]

The OCC also is proposing a technical change to redesignated § 7.2014(a). As

[122] In prohibiting such payments, the FDIC may take into account several factors listed in the statute, such as whether there is a reasonable basis to believe the IAP has committed fraud, breached a fiduciary duty, or committed insider abuse; is substantially responsible for the insolvency of the depository institution; has violated any Federal or State banking law or regulation that has had a material effect on the financial condition of the institution; or was in a position of managerial or fiduciary responsibility. *See* 12 U.S.C. 1828(k)(2). The FDIC has forbidden certain indemnification payments by regulation. *See* 12 CFR 359.1(l)(1) (definition of ''prohibited indemnification payment''); 12 CFR 359.3 (forbidding prohibited indemnification payments, except as provided in part 359).

[123] *See* 12 U.S.C. 1828(k)(5)(A); *see also* 12 U.S.C. 1818(b)(6) (defining affirmative actions that an IAP may be required to take in regard to insured depository institutions for purposes of section 1828(k)(5)(A)).

[124] The OCC also proposes to move the cross-reference to the definition of IAP in redesignated § 7.2014(b) to redesignated paragraph (a) and to make stylistic changes to the wording of redesignated § 7.2014(b).

indicated above, the current rule states that in cases involving an administrative proceeding or civil action not initiated by a Federal banking agency, a national bank may indemnify an IAP in accordance with the law of the State in which the main office of the bank is located, the law of the State in which the bank's holding company is incorporated, or the relevant provisions of the Model Business Corporation Act or Delaware General Corporation Law, provided such payments are consistent with safe and sound banking practices. Because these sources of law are identical to the law a national bank may elect to follow pursuant to § 7.2000(b) or the law a Federal savings association may elect to follow pursuant to §§ 5.21 or 5.22, the OCC proposes to replace the language on sources of State law in this provision with a statement that the bank or savings association may indemnify an IAP for damages and expenses in accordance with the law of the State the bank or savings association has designated for its corporate governance under the provisions of §§ 7.2000, 5.21, or 5.22, as applicable.[125]

Second, the OCC is proposing to amend § 7.2014(b)(2), redesignated as § 7.2014(d) in the proposal, to allow a national bank or Federal savings association to provide for the payment of reasonable insurance premiums in connection with all actions involving an IAP that could be indemnified under § 7.2014, whether or not initiated by a Federal banking agency. The OCC believes this change would resolve confusion regarding how current § 7.2014(b)(2) is applied. This proposed change also would better align OCC regulations on the payment of insurance premiums with the FDIC's regulations and 12 U.S.C. 1828(k).[126]

Third, the OCC is proposing to add a new paragraph (c) that would require a national bank or Federal savings association, before advancing funds to an IAP under § 7.2014, to obtain a written agreement that the IAP will reimburse the bank for any portion of indemnification that the IAP is ultimately found not to be entitled to under 12 U.S.C. 1828(k) and implementing regulations, except to the extent the bank's expenses have been reimbursed by an insurance policy or fidelity bond.[127] This requirement is similar to the requirement in § 145.121(e) currently applicable to Federal savings associations and therefore would not impose any additional burdens on Federal savings associations. Further, FDIC regulations,[128] State law,[129] and the Model Business Corporation Act [130] contain similar requirements for IAPs to reimburse institutions for funds to which they are later found not to be entitled. As most national banks are subject to the FDIC's indemnification regulations or have elected under 12 CFR 7.2000(b) to follow State corporate law imposing reimbursement requirements for advancement of funds, the OCC believes that this proposed change would not impose any additional burden on national banks and would merely codify existing practices. This proposed change also will ensure that national banks, and Federal savings associations, do not provide indemnification to IAPs that is ultimately in contravention of the statutory limits of section 1828(k).

The OCC believes that proposed § 7.2014 incorporates the provisions of current § 145.121 that should be applicable to both national banks and Federal savings associations, while maintaining appropriate flexibility for both types of institutions. Specifically, the proposal would apply § 7.2014 to actions brought by a Federal banking agency and actions not brought by a Federal banking agency, as in § 145.121, while retaining the statutory limits of section 1828(k).[131] The proposal also includes the reimbursement agreement requirement, as in § 145.121(e). However, the proposed rule does not include the provision in § 145.121 that *requires* Federal savings associations to indemnify persons against whom an action is brought under certain circumstances, such as if they are successful on the merits of the action, nor [132] the provision requiring a board vote to authorize indemnification under certain circumstances.[133] In place of these requirements, proposed § 7.2014 would permit Federal savings associations to incorporate State law on indemnification. Because State law governing indemnification generally incorporates these aspects of current § 145.121, the OCC expects that Federal savings associations will continue to be subject to similar provisions governing indemnification as before. For example, State law generally requires mandatory indemnification if an employee is successful on the merits,[134] as well as a board vote authorizing indemnification in almost all circumstances.[135] Because national banks also may incorporate State indemnification law, they would be subject to these State indemnification provisions as well. The OCC specifically requests comment on whether, instead of relying on State law, the final rule should include the requirement from § 145.121 that, in the case of settlement, final judgment against the IAP, or final judgment in the IAP's favor other than on the merits, a majority of the disinterested directors determine that the IAP was acting in good faith before the instruction may indemnify the IAP.

The proposed rule also does not include the provision in § 145.121 that requires a 60-day prior notice to the OCC before making an indemnification.[136] The OCC is not proposing to retain this provision because it believes it is burdensome and unnecessary. However, the OCC requests comment on whether the final rule should include this prior notice requirement and, if so, what benefits prior approval would provide that would outweigh any additional regulatory burden.

[125] As explained *supra*, the OCC is proposing to amend § 7.2000 to also allow national banks to follow the corporate governance provisions of the law of any State in which any branch of the bank is located or where a holding company of the bank is incorporated even if the holding company is later eliminated or no longer controls the bank and the national bank is not located in that State. The OCC is requesting comment on making the same change to §§ 5.21 and 5.22.

[126] The FDIC's implementing regulations under section 1828(k), 12 CFR part 359, explicitly allow the payment of insurance premiums in anticipation of actions brought by a Federal banking agency, provided the insurance is not used to reimburse the cost of a judgment or civil monetary penalty. *See* 12 CFR 359.1(l)(2).

[127] National banks are required to purchase fidelity coverage by 12 CFR 7.2013.

[128] *See* 12 CFR 359.5(a)(4).

[129] *See, e.g.,* 8 Del. C. § 145(e); Utah Code § 16–10a–904; 805 Ill. Comp. Stat. 5/8.75(e); *see also* N.Y. Bus. Corp. Law § 725(a) (requiring repayment, but not explicitly requiring a written agreement).

[130] *See* Model Bus. Corp. Act § 8.53(a).

[131] Section 145.121(g) subjects and qualifies the indemnification provided for by current § 145.121 to 12 U.S.C. 1821(k). In contrast, current § 7.2014 explicitly subjects national bank indemnification to the restrictions of 12 U.S.C. 1828(k). Section 1828(k) directly addresses indemnification and is applicable to any insured depository institution. *See* 12 U.S.C. 1828(k)(5)(A). Section 1821(k) addresses personal liability for directors and officers and is also applicable to any insured depository institution. Both of these statutes apply, and will continue to apply to national banks and Federal savings associations but proposed § 7.2014 retains the citation to section 1828(k) as the more relevant citation for indemnification purposes.

[132] *See* § 145.121(b).

[133] *See* § 145.121(c)(1)(ii)(C)).

[134] *See, e.g.,* 8 Del. C. 145(c); New York BCL § 723(a); 805 ILCS 5/8.75(c); Model Bus. Corp. Act, § 8.52 (2016).

[135] *See, e.g.,* 8 Del. C. 145(d); New York BCL § 723(b); 805 ILCS 5/8.75(d); Model Bus. Corp. Act, §§ 8.53(c), 8.55 (2016).

[136] *See* § 145.121(c)(2)).

Restricting Transfer of Stock and Record Dates; Stock Certificates (§ 7.2016)

Facsimile Signatures on Bank Stock Certificates (§ 7.2017)

Lost Stock Certificates (§ 7.2018)

Sections 12 CFR 7.2016, 7.2017, and 7.2018 contain specific requirements related to national bank stock transfers and stock certificates. Many of these requirements are mandated by 12 U.S.C. 52. However, some of these requirements are outdated because national banks today rarely issue physical stock certificates.

Section 7.2016(a) states that, pursuant section 52, a national bank may impose conditions on the transfer of its stock reasonably calculated to simplify the work of the bank with respect to stock transfers, voting at shareholders' meetings, and related matters and to protect the bank against fraudulent transfers. Consistent with the statute, § 7.2016(b) allows a national bank to close its stock records for a reasonable period to ascertain shareholders for voting purposes. The board also may fix record dates, which should be reasonable in proximity to the date notice is given to shareholders of the meeting. Section 7.2017 states that the president and cashier of the bank, or other officers authorized by the bank's bylaws, shall sign each stock certificate. These signatures may be manual or facsimile and may be electronic. Each certificate also must be sealed with the seal of the bank.

To streamline OCC rules, the OCC is proposing to combine §§ 7.2016 and 7.2017 into one section, § 7.2016, that would apply to both stock transfers and stock certificate requirements. The OCC also is proposing to make OCC rules on stock certificates more flexible. As noted above, section 12 U.S.C. 52 requires certain officers of the association to sign every bank stock certificate and for it to be sealed with the seal of the association. However, banks now generally hold stock in ''book-entry'' form, which is not a format that supports signatures or stamps. Although section 52 places requirements on physical stock certificates, the OCC does not believe that the language of that section requires banks to actually issue stock in certificated form.

Notably, section 52 also states that ''[t]he capital stock of each association shall be . . . transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association.'' [137] This language allows banks to provide for book-entry transfer in their by-laws or articles of association, even if this type of transfer is incompatible with the use of signatures and seals. Therefore, the OCC is proposing to state that a national bank may prescribe the manner in which its stock shall be transferred in its by-laws or articles of association. The OCC also is proposing to specify that a national bank that does issue stock in certificate form must comply with the requirements of section 52, including: (1) The name and location of the bank; (2) name and holder of record of the stock; (3) the number and class of shares which the certificate represents; (4) if the bank issues more than one class of stock, the respective rights, preferences, privileges, voting rights, powers, restrictions, limitations, and qualifications of each class of stock issued (unless incorporated by reference to the articles of association); (5) signatures of the president and cashier of the bank, or such other officers as the bylaws of the bank provide; and (6) the seal of the bank. The OCC is proposing to continue allowing banks to meet the signature requirements of section 52 through the use of electronic means or by facsimiles, as is permitted by current § 7.2017.

Finally, the OCC is proposing to remove § 7.2018 as unnecessary. Section 7.2018 states that if the bank's articles of association or bylaws do not provide for replacing lost, stolen, or destroyed stock certificates, the bank may adopt procedures under 12 CFR 7.2000. Section 7.2000 generally permits national banks to adopt corporate governance procedures [138] in accordance with State law, to the extent not inconsistent with applicable Federal laws and regulations or with bank safety and soundness. Therefore, this provision is unnecessary.

Acquisition and Holding of Shares as Treasury Stock (§ 7.2020)

The OCC is proposing to remove 12 CFR 7.2020. Currently, § 7.2020 provides that a national bank may repurchase its outstanding shares and hold them as treasury stock as a capital reduction under 12 U.S.C. 59 if the repurchase and retention is for a ''legitimate corporate purpose'' and not for speculative purposes. The OCC issued § 7.2020 in 1996 as an exception to the provision in 12 U.S.C. 83 that prohibited a national bank from being the ''purchaser or holder'' of its own shares. However, in 2000, Congress amended section 83 to remove this prohibition.[139] Therefore, § 7.2020 is unnecessary. The OCC notes that removing § 7.2020 would not limit the OCC's authority over share repurchases. Share repurchases are considered reductions in capital and would continue to be subject to OCC and shareholder approval under 12 U.S.C. 59 and 12 CFR 5.46.

Capital Stock-Related Activities of a National Bank (New § 7.2025)

The OCC is proposing a new section, § 7.2025, that would codify various OCC interpretations of the National Bank Act involving capital stock issuances and repurchases. Specifically, proposed § 7.2025 would explain the shareholder approval requirements for the issuance of authorized common stock; the issuance, repurchase, and redemption of preferred stock pursuant to blank check procedures; and share repurchase programs. Generally, an increase or decrease in the amount of a national bank's common or preferred stock is a change in permanent capital subject to the notice and approval requirements of 12 CFR 5.46 and applicable law.[140] Proposed § 7.2025(a) sets forth the general requirements for changes in permanent capital. Paragraphs (b) through (d) of proposed § 7.2025 provide more specific requirements for shareholder approval of various types of issuances and repurchases. Section 7.2025(e) would identify certain permissible features for preferred stock.

Issuance of previously approved and authorized common stock. The issuance of common stock is governed by 12 U.S.C. 57, which provides that a national bank ''may, with the approval of the [OCC], and by a vote of shareholders owning two-thirds of the stock of such [bank], increase its capital stock to any sum.'' The OCC has interpreted 12 U.S.C. 57 to require a two-thirds shareholder vote to amend the articles of association to increase the number of authorized shares.[141] The OCC also has long interpreted section 57 to permit a national bank's board of directors to issue common stock without obtaining additional shareholder approval at the time of the issuance so long as the issuance does not exceed the amount of common stock previously

[137] *See* 12 U.S.C. 52, first paragraph.

[138] The proposed rule would change this terminology in § 7.2000 to ''corporate governance provisions.''

[139] Public Law 106–569, Title XII, section 1207(a), 114 Stat. 3034 (American Homeownership and Economic Opportunity Act of 2000).

[140] *See generally* 12 U.S.C. 51a, (preferred stock issuance), 57 (increase in capital), and 59 (reduction of capital).

[141] *See, e.g.,* Articles of Association, Charter, and Bylaw Amendments, Comptroller's Licensing Manual (June 2017), p. 3 (indicating that two-thirds of a national bank's shareholders must vote to increase or decrease the authorized number of common shares in the articles of association).

approved and authorized by shareholders.[142] Proposed 7.2025(b) would codify this interpretation. Specifically, paragraph (b) would provide that, in compliance with 12 U.S.C. 57, a national bank may issue common stock up to an amount previously approved and authorized in the national bank's articles of association by holders of two-thirds of the national bank's shares without obtaining additional shareholder approval for each subsequent issuance within the authorized amount.

Issuance, repurchase, and redemption of preferred stock pursuant to certain procedures. Twelve U.S.C. 51a requires a majority of shareholders vote to approve a national bank's issuance of preferred stock. However, the statute does not specify when in the process the bank must obtain shareholder approval. In OCC Interpretive Letter 921, the OCC determined that a national bank could adopt, subject to required shareholder approval, a provision in its articles of association or an amendment to its articles authorizing the bank's board of directors to issue preferred stock using blank check procedures (''blank check preferred stock'').[143] Blank check preferred stock refers to preferred stock for which the board is empowered to issue and determine the terms of authorized and unissued preferred stock. To be permissible, blank check preferred stock must be permitted by the corporate governance procedures adopted by the bank under § 7.2000.[144]

The OCC also determined that shareholders' adoption or approval of a blank check preferred stock article constitutes the shareholder action required by 12 U.S.C. 51a and 51b to issue and establish the terms of preferred stock. The subsequent issuance of the preferred stock within the authorized limits would not require additional shareholder approval. Interpretive Letter 921 did not specifically address blank check preferred procedures that include the authority, and the shareholder action required, to repurchase and redeem blank check preferred stock.

The redemption or repurchase of preferred stock is a reduction in capital. Twelve U.S.C. 59 requires the approval of two-thirds of shareholders for a national bank to reduce capital, but it does not specify when in the process the bank must obtain shareholder approval. In Interpretive Letter 1162, the OCC determined that the holders of two-thirds of a national bank's shares may approve in advance redemptions of blank check preferred stock by voting to amend the articles of association to authorize the issuance and redemption of blank check preferred shares.[145]

Proposed § 7.2025(c) would codify these interpretations and permit blank check procedures, if approved in advance by the bank's shareholders, that authorize the issuance, repurchase, and redemption of preferred stock without additional shareholder approval at the time of issuance, repurchase, or redemption, if certain conditions are met. Proposed paragraph (c) would provide that, subject to the requirements of 12 U.S.C. 51a, 51b, and 59, a national bank may adopt procedures to authorize the board of directors to issue, determine the terms of, repurchase, or redeem one or more series of preferred stock, if permitted by the corporate governance provisions adopted by the bank under 12 CFR 7.2000. This proposed provision further provides that, to satisfy the shareholder approval requirements of 12 U.S.C. 51a and 59, shareholders must approve the adoption of these procedures in advance through an amendment to the national bank's articles of association, and that any amendment that authorizes both the issuance and the repurchase and redemption of shares must be approved by holders of two-thirds of the national bank's shares.

Share repurchase programs. In Interpretive Letter 1162, the OCC determined that the shareholder approval requirement in 12 U.S.C. 59 may be satisfied by a two-thirds shareholder vote approving an amendment to the bank's articles of association authorizing the board of directors to implement share repurchase programs. A share repurchase program authorizes the board of directors to repurchase the national bank's common or preferred stock from time to time under board-determined parameters that can limit the frequency, type, aggregate limit, or purchase price of repurchases, without obtaining additional shareholder approval at the time the shares are repurchased. Proposed § 7.2025(d) would codify this interpretation by providing that, subject to the requirements of 12 U.S.C. 59, a national bank may establish a program for the repurchase, from time to time, of the national bank's common or preferred stock, if permitted by the corporate governance provisions adopted by the bank under 12 CFR 7.2000. Proposed paragraph (d) also provides that, to satisfy the shareholder approval requirement of 12 U.S.C. 59, the repurchase program must be approved in advance by the holders of two-thirds of the national bank's shares, including through an amendment to the national bank's articles of association that authorizes the board of directors to implement share repurchase programs from time to time under board-determined parameters that can limit the frequency, type, aggregate limit, or purchase price of repurchases.

Preferred stock features. Proposed § 7.2025(e) would clarify that a national bank may issue and maintain noncumulative preferred stock under 12 U.S.C. 51b. This provision would codify a longstanding OCC interpretation that section 51b, by its terms, describes limitations on the portion of the preferred stock dividend which may be cumulative. It does not require that preferred stock dividends must always be cumulative.[146] Specifically, proposed § 7.2025(e) would provide that a national bank's preferred stock may be cumulative or non-cumulative and may or may not have voting rights on one or more series.

Subpart C— National Bank and Federal Savings Association Operations

National Bank and Federal Savings Association Hours and Closings (§ 7.3000)

The OCC is proposing to amend § 7.3000, National bank hours and closings, to include Federal savings associations, to update it, and to make technical and clarifying changes.

Twelve U.S.C. 95(b)(1) specifically authorizes the Comptroller to designate a legal holiday because of emergency conditions occurring in any State or part of a State for national banks located in that State or affected area. Section 95(b)(1) also provides that when a State or State official authorized by law designates any day as a legal holiday for

[142] A previous version of § 5.46 (1981) provided that shareholder approval would not be required to increase common stock through the issuance of a class of common up to an amount previously approved by shareholders. Subsequent amendments to § 5.46, which the OCC intended to simplify 12 CFR part 5, omitted this language but did not change this interpretation.

[143] OCC Interpretive Letter No. 921 (Dec. 13, 2001).

[144] The proposed rule would change this terminology in § 7.2000 to ''corporate governance provisions.''

[145] OCC Interpretive Letter No. 1162 (July 6, 2018).

[146] In part, section 51b provides that preferred shareholders ''shall be entitled to receive such cumulative dividends . . . as may be provided in the articles of association . . . and no dividends shall be declared or paid on common stock until cumulative dividends on preferred stock have been paid in full. . . . '' The OCC has previously interpreted section 51a as providing national banks with broad authority to issue preferred stock, including preferred stock bearing noncumulative dividends, notwithstanding the language of section 51b. *See* OCC Letter from Martin Goodman, OCC Assoc. Ch. Couns. (Oct. 3, 1977).

ceremonial or emergency reasons, that day is a legal holiday and a national bank located in that State or affected part of the State may close or remain open unless the Comptroller directs otherwise by written order.

The OCC has implemented this statutory provision in 12 CFR 7.3000. Specifically, § 7.3000(b) provides that when the Comptroller, a State, or a legally authorized State official declares a day a legal holiday due to emergency conditions, a national bank may temporarily limit or suspend its operations at its affected offices. Alternatively, the bank may continue its operations, unless the Comptroller directs otherwise by written order. This rule provides that emergency conditions include natural disasters and civil and municipal emergencies, such as severe flooding or a power emergency declared by a local power company or government requesting that businesses in the affected area close. Section 7.3000(c) states that a State or a legally authorized State official may declare a day a legal holiday for ceremonial reasons and provides that when a State legal holiday is declared for ceremonial reasons, a national bank may choose to remain open or to close. Section 7.3000(d) provides that a national bank should assure that all liabilities or other obligations under the applicable law due to the bank's closing are satisfied, *e.g.,* notice to depositors about funds availability pursuant to 12 CFR 229.13(g)(4).

There is no equivalent statute or corresponding regulation for Federal savings associations. However, a former OTS regulation at 12 CFR 510.2(b) permitted the OTS to waive or relax any limitations pertaining to the operations of a Federal savings associations in any area affected by a determination by the President of the United States that a major disaster or emergency had occurred. Amending § 7.300 to include Federal savings associations would clarify for these institutions how a legal holiday is declared and the implications of a legal holiday declaration, as well as provide consistency between national bank and Federal savings association operations on legal holidays. We note that the Comptroller is directed under section 4 of the HOLA (12 U.S.C. 1463(a)(1)(A)) to provide for the ''safe and sound operation'' of Federal savings associations.[147] The OTS relied on this HOLA authority when it issued § 510.2(b) [148] and this proposed rule furthers that objective.

The OCC also is proposing a number of changes to clarify and update the emergency closing provisions of § 7.3000. First, the OCC is proposing to clarify that § 7.3000 also applies to Federal branches and agencies of foreign banks. Although current § 7.3000 applies to Federal branches and agencies pursuant to section 4(b) of the International Banking Act, 12 U.S.C. 3102(b), the OCC believes it is appropriate to specify this application in the rule.[149]

Second, the proposal would provide that the Comptroller may declare ''any day'' a legal holiday, instead of ''a day,'' to more accurately reflect the statutory language and to clarify that the Comptroller may declare more than one day due to the emergency condition as a legal holiday.

Third, the proposed rule would amend § 7.3000(b) to state that emergency conditions could be ''caused by acts of nature or of man.'' This amendment mirrors the language in 12 U.S.C. 95(b)(1) and would clarify the broad scope of possible emergency conditions that could justify a legal holiday.

Fourth, the proposal updates the types of emergency conditions listed in the rule to include disasters other than natural disasters, public health or safety emergencies, and cyber threats or other unauthorized intrusions, and updates the list of examples to include pandemics, terrorist attacks, and cyber-attacks on bank systems.

Fifth, the proposal provides that the Comptroller may issue a declaration of a legal holiday in anticipation of the emergency condition, in addition to at the time of the emergency or soon thereafter. This codifies the current practice of the Comptroller in most cases, which permits national banks, Federal savings associations, and Federal branches and agencies to better plan for the possible closing.

Sixth, the proposal provides that in the absence of a Comptroller declaration of a bank holiday, a national bank, Federal savings associations, or Federal branch or agency may choose to temporarily close offices in response to an emergency condition. The bank, savings associations, or branch or agency would need to notify the OCC of such temporary closure as soon as feasible. This provision would provide additional flexibility to OCC-regulated institutions during emergency conditions and would codify similar language currently included in the OCC's Licensing Manual.[150]

Seventh, the proposal clarifies in § 7.3000(c) that a State legal holiday may be for the entire State or part of the State, as indicated in 12 U.S.C. 95(b)(1).

Eighth, as provided in the statute, the proposal provides in § 7.3000(c) that the Comptroller may by written order direct the affected institution to close or remain open during a State legal holiday declared for ceremonial reasons, as with a State legal holiday declared due to an emergency.

Finally, the proposed rule adds a new paragraph, § 7.3000(e), to provide a definition of ''State'' that is consistent with the definition in 12 U.S.C. 95(b)(2).

In addition, the OCC is proposing a number of technical changes to § 7.3000. The proposal would replace the word ''country'' with ''United States'' in the phrase describing affected geographic area to make this phrase more precise; delete the superfluous citation to 12 U.S.C. 95 in § 7.3000(b); and delete the superfluous first sentence of current § 7.3000(c), which states that a State or a legally authorized State official may declare a day a legal holiday for ceremonial reasons.

In proposing these changes, the OCC is reorganizing § 7.3000(b) and (c) so that all provisions relating to Comptroller declared legal holidays for emergency conditions are in § 7.3000(b) and all provisions related to State declared legal holidays for emergency and ceremonial reasons are in § 7.3000(c). This reorganization more clearly sets forth the standards for Comptroller and State declared legal holidays and corresponds better with the statutory text.

Section 7.3000 also provides, in paragraph (a), that a national bank's board of directors should review its banking hours and, independently of any other bank, take appropriate actions to establishing a schedule of its banking hours. The OCC is proposing to update this provision by replacing ''banking hours'' with ''hours of operations for customers.'' Furthermore, the OCC is proposing to include Federal savings associations and Federal branches and agencies in this provision. Because Federal branches and agencies typically

[147] *See also* 12 U.S.C. 1(a) (charging the OCC with assuring the safety and soundness of institutions subject to its jurisdiction).

[148] *See* 54 FR 49411, at 49456 (Nov. 30, 1989).

[149] As indicated previously in this preamble, section 4(b) of the International Banking Act, 12 U.S.C. 3102(b), provides that the operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location. *See also* 12 CFR 28.13.

[150] *See* Comptroller's Licensing Manual, Branch Closings (June 2017).

do not have a board of directors, proposed § 7.3000(a) would provide that an equivalent person or committee for a Federal branch or agency should review that entity's operating hours and take appropriate action to establish a schedule of operating hours for customers.

Sharing National Bank or Federal Savings Association Space and Employees (§ 7.3001)

Section 7.3001 permits national banks and Federal savings associations to lease excess space on bank or savings association premises to other businesses, share space jointly held with other businesses, offer its services in space owned by or leased to other businesses, and share employees when sharing space. The OCC proposes to add a cross-reference to redesignated § 7.1024, National bank or Federal savings association ownership of property, in § 7.3001(a)(1) to clarify that the requirements of § 7.1024 apply to the sharing of office space and employees pursuant to § 7.3001.

General Technical Changes

In addition to the technical changes discussed above, the OCC proposes numerous technical changes throughout 12 CFR part 7. Specifically, the proposed rule would:

- Replace the word ''shall'' with ''must,'' ''will,'' or other appropriate language, which is the more current rule writing convention for imposing an obligation and is the recommended drafting style of the **Federal Register**;
- Uniformly capitalize the words ''State'' and ''Federal'' in conformance with **Federal Register** drafting style;
- Replace the term ''bank'' and ''savings association'' with ''national bank'' or ''Federal savings association,'' respectively, where appropriate;
- Clarify punctuation and update or conform spelling of various terms; and
- Conform paragraph heading style.

III. Request for Comments

The OCC requests comment on any aspect of this proposal, in addition to those specific requests noted in the **SUPLEMENTARY INFORMATION**. Further, the COVID 19 emergency has required banks in many cases to consider changes to the way they do business and may potentially result in longer term changes in industry practices. The OCC requests comment on whether it should consider other amendments to part 7 to address issues that may have arisen due to the COVID–19 pandemic. If so, please provide suggestions for specific amendments and not general requests for changes.[151]

IV. Regulatory Analyses

A. Paperwork Reduction Act

Certain provisions of the proposed rulemaking contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC reviewed the proposed rulemaking and determined that it revises certain information collection requirements previously cleared by OMB under OMB Control No. 1557–0204. The OCC has submitted the revised information collection to OMB for review under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB's implementing regulations (5 CFR 1320).

Current Actions

The information collection requirements are as follows:

- *Tax Equity Finance Transactions*—Written requests are required to increase the aggregate limit on tax equity finance transactions. Prior written notification to OCC is required for each tax equity finance transaction. § 7.1025.
- *Payment Systems*—Thirty (30) days advance written notice is required before joining a payment system that would expose the institution to open-end liability. An after-the-fact written notice must be filed within 30 days of becoming a member of a payment system that does not expose the institution to open-end liabilities with certain representations. Both notices must include safety and soundness representations. § 7.1026.
- *Derivatives Activities*—Thirty (30) days prior written notice is required before engaging in certain derivatives hedging activities, expanding derivatives hedging activities to include a new category of underlying, engaging in certain customer-driven financial intermediation derivatives activities, and expanding customer-driven financial intermediation derivatives activities to include a new category of underlying. § 7.1030.
- *State Corporate Governance*—Requests for OCC's staff position on the ability of national bank to engage in particular State corporate governance provision must include name, citations, discussion of similarly suited State banks, identification of Federal banking statutes and regulations, and analysis of consistency with statutes, regulations, and safety and soundness. § 7.2000.
- *Indemnification of institution-affiliated parties—Administrative proceeding or civil actions not initiated by a Federal banking agency*—A written agreement that an IAP will reimburse the institution for any portion of non-reimbursed indemnification that the IAP is found not entitled to is required before advancing funds to an IAP. Federal savings associations no longer required to provide OCC prior notice of indemnification. § 7.2014.
- *Issuing Stock in Certificate Form*—National banks must include certain information, signatures and seal when issuing stock in certificate form. § 7.2016.

Title of Information Collection: Bank Activities and Operations.

Frequency: Event generated.

Affected Public: Businesses or other for-profit.

Estimated number of respondents: 213.

Total estimated annual burden: 586 hours.

Comments are invited on:

a. Whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

b. The accuracy or the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the **ADDRESSES** section of this document. Written comments and

[151] As indicated previously in this Supplementary Information section, the OCC has issued an interim final rule that amends 12 CFR 7.1001 and 7.1003 to provide for remote participation at shareholder and board of director meetings to allow national banks to hold these meetings without violating social distancing restrictions imposed in response to the COVID–19 emergency. *See* 85 FR 31943 (May 28, 2020).

recommendations for the information collection should be sent within 60 days of publication of this notice of proposed rulemaking to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

B. Regulatory Flexibility Act

In general, the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires an agency, in connection with a proposed rule, to prepare an Initial Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the Small Business Administration for purposes of the RFA to include commercial banks and savings institutions with total assets of $600 million or less and trust companies with total assets of $41.5 million of less). However, under section 605(b) of the RFA, this analysis is not required if an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities and publishes its certification and a short explanatory statement in the **Federal Register** along with its rule.

The OCC currently supervises approximately 1,185 institutions (commercial banks, trust companies, Federal savings associations, and branches or agencies of foreign banks, collectively banks), of which 782 are small entities.[152] Because the rule applies to all OCC-supervised depository institutions, the proposed rule would affect all small OCC-supervised entities and thus, a substantial number of them. However, almost all of the provisions in the final rule clarify or codify existing requirements, loosen existing requirements, increase flexibility, or reduce burden. One provision in the proposed rule, § 7.2012, which would require a bank president to be a member of the bank's board of directors, could impose a new requirement on banks subject to the prior notice requirement for any change in directors pursuant to 12 CFR 5.51. However, the number of banks that are subject to this prior notice requirement that do not currently have a president serving on the board of directors is limited. As a result, the proposed rule, if implemented, would not impose new mandates on more than a limited number of banks. Therefore, the OCC believes the costs associated with the proposed rule, if any, would be minimal and thus the proposed rule would not have a significant economic impact on any small OCC-supervised entities. For these reasons, the OCC certifies that, if adopted, the proposed rule would not have a significant economic impact on a substantial number of small entities supervised by the OCC. Accordingly, an Initial Regulatory Flexibility Analysis is not required.

C. Unfunded Mandates Reform Act of 1995

The OCC has analyzed the proposed rule under the factors in the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501 *et seq.* Under this analysis the OCC considered whether the proposed rule includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year ($154 million as adjusted annually for inflation). The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

As discussed above, the proposed rule, if implemented, would not impose new mandates on more than a limited number of banks. Therefore, the OCC concludes that if implemented, the proposed rule would not result in an expenditure of $154 million or more annually by State, local, and tribal governments, or by the private sector. Therefore, the OCC finds that the proposed rule does not trigger the UMRA cost threshold. Accordingly, the OCC has not prepared the written statement described in section 202 of the UMRA.

E. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA), 12 U.S.C. 4802(a), in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, the OCC will consider, consistent with principles of safety and soundness and the public interest: (1) Any administrative burdens that the proposed rule would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of the proposed rule. The OCC requests comment on any administrative burdens that the proposed rule would place on depository institutions, including small depository institutions, and their customers, and the benefits of the proposed rule that the OCC should consider in determining the effective date and administrative compliance requirements for a final rule.

List of Subjects

12 CFR Part 7

Computer technology, Credit, Derivatives, Federal savings associations, Insurance, Investments, Metals, National banks, Reporting and recordkeeping requirements, Securities, Security bonds

12 CFR Part 145

Electronic funds transfers, Public deposits, Federal savings associations

12 CFR Part 160

Consumer protection, Investments, Manufactured homes, Mortgages, Reporting and recordkeeping requirements, Savings associations, Securities.

For the reasons set out in the preamble, the OCC proposes to amend 12 CFR chapter I as follows:

PART 7—ACTIVITIES AND OPERATIONS

■ 1. The authority citation for part 7 is revised to read as follows:

Authority: 12 U.S.C. 1 *et seq.,* 25b, 29, 71, 71a, 92, 92a, 93, 93a, 95(b)(1), 371, 371d, 481, 484, 1463, 1464, 1465, 1818, 1828(m), 3102(b), and 5412(b)(2)(B).

§ 7.1000 [Redesignated]

■ 2. Redesignate § 7.1000 as § 7.1024.

■ 3. Add § 7.1000 to read as follows:

§ 7.1000 Activities that are part of, or incidental to, the business of banking.

(a) *Purpose.* This section identifies the criteria that the Office of the Comptroller of the Currency (OCC) uses to determine whether an activity is authorized as part of, or incidental to, the business of banking under 12 U.S.C. 24(Seventh) or other statutory authority.

(b) *Restrictions and conditions on activities.* The OCC may determine that activities are permissible under 12 U.S.C. 24(Seventh) or other statutory authority only if they are subject to standards or conditions designed to provide that the activities function as intended and are conducted safely and soundly, in accordance with other applicable statutes, regulations, or supervisory policies.

[152] Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if it should classify an institution as a small entity. The OCC used December 31, 2018, to determine size because a ''financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* footnote 8 of the U.S. Small Business Administration's *Table of Size Standards.*

(c) *Activities that are part of the business of banking.*

(1) An activity is permissible for national banks as part of the business of banking if the activity is authorized under 12 U.S.C. 24(Seventh) or other statutory authority. In determining whether an activity that is not specifically included in 12 U.S.C. 24(Seventh) or other statutory authority is part of the business of banking, the OCC considers the following factors:

(i) Whether the activity is the functional equivalent to, or a logical outgrowth of, a recognized banking activity;

(ii) Whether the activity strengthens the bank by benefiting its customers or its business;

(iii) Whether the activity involves risks similar in nature to those already assumed by banks; and

(iv) Whether the activity is authorized for State-chartered banks.

(2) The weight accorded each factor set out in paragraph (c)(1) of this section depends on the facts and circumstances of each case.

(d) *Activities that are incidental to the business of banking.*

(1) An activity is authorized for a national bank as incidental to the business of banking if it is convenient or useful to an activity that is specifically authorized for national banks or to an activity that is otherwise part of the business of banking. In determining whether an activity is convenient or useful to such activities, the OCC considers the following factors:

(i) Whether the activity facilitates the production or delivery of a bank's products or services, enhances the bank's ability to sell or market its products or services, or improves the effectiveness or efficiency of the bank's operations, in light of risks presented, innovations, strategies, techniques and new technologies for producing and delivering financial products and services; and

(ii) Whether the activity enables the bank to use capacity acquired for its banking operations or otherwise avoid economic loss or waste.

(2) The weight accorded each factor set out in paragraph (d)(1) of this section depends on the facts and circumstances of each case.

■ 4. Amend § 7.1002 by:

■ a. Revising the heading in paragraph (a);

■ b. In paragraph (b)(6), removing the word "and";

■ c. In paragraph (b)(7)(ii), removing the period after "specific transaction" and adding in its place "; and"; and

d. Adding paragraph (b)(8).

The revision and addition reads as follows:

§ 7.1002 National bank acting as finder.

(a) *In general.* * * *

* * * * *

(b) * * *

(8) Acting as an electronic finder pursuant to § 7.5002(a)(1).

* * * * *

■ 5. Amend § 7.1003 by:

■ a. Revising the section heading;

■ b. Revising the paragraph heading in paragraph (a); and

■ c. Adding paragraph (c).

The revisions and addition read as follows:

§ 7.1003 Money lent at banking offices or at facilities other than banking offices.

(a) *In general.* * * *

* * * * *

(c) *Services on equivalent terms to those offered customers of unrelated banks.* An operating subsidiary owned by a national bank may distribute loan proceeds from its own funds or bank funds directly to the borrower in person at offices the operating subsidiary has established without violating 12 U.S.C. 36, 12 U.S.C. 81 and 12 CFR 5.30, provided that the operating subsidiary provides similar services on substantially similar terms and conditions to customers of unaffiliated entities including unaffiliated banks.

■ 6. Revise 7.1004 to read as follows:

§ 7.1004 Establishment of a loan production office by a national bank.

(a) *In general.* A national bank or its operating subsidiary may engage in loan production activities at a site other than the main office or a branch of the bank. A national bank or its operating subsidiary may solicit loan customers, market loan products, assist persons in completing application forms and related documents to obtain a loan, originate and approve loans, make credit decisions regarding a loan application, and offer other lending-related services such as loan information and applications at a loan production office without violating 12 U.S.C. 36 and 12 U.S.C. 81, provided that "money" is not deemed to be "lent" at that site within the meaning of § 7.1003 and the site does not accept deposits or pay withdrawals.

(b) *Services of other persons.* A national bank may use the services of, and compensate, persons not employed by the bank in its loan production activities.

§ 7.1005 [Removed and Reserved]

■ 7. Remove and reserve § 7.1005.

§ 7.1006 [Amended]

■ 8. Amend § 7.1006 by:

■ a. Revising the section heading by removing the words "national bank";

■ b. Adding the words "or Federal savings association" after the words "national bank" wherever it appears in the first and second sentences; and

■ c. Adding the words "or savings association" after the words "provided that the bank" in the second sentence.

§ 7.1009 [Removed and Reserved]

■ 9. Remove and reserve § 7.1009.

■ 10. Revise § 7.1010 to read as follows:

§ 7.1010 Postal services by national banks and Federal savings associations.

(a) *In general.* A national bank or Federal savings association may provide postal services and receive income from those services. The services performed are those permitted under applicable rules of the United States Postal Service. These may include meter stamping of letters and packages and the sale of related insurance. The national bank or Federal savings association may advertise, develop, and extend the services to attract customers to the institution.

(b) *Postal regulations.* A national bank or Federal savings association providing postal services must do so in accordance with the rules and regulations of the United States Postal Service. The national bank or Federal savings association must keep the books and records of the postal services separate from those of other banking operations. Under 39 U.S.C. 404 and any regulations issued under that statute, the United States Postal Service may inspect the books and records pertaining to the postal services.

§ 7.1012 [Amended]

■ 11. Amend § 7.1012 by:

■ a. In paragraph (c)(1), removing the words "pick up from, and deliver" and adding in its place the words "pick up from and deliver"; and

■ b. In paragraph (c)(2)(vi), removing the words "back office" and adding in its place the words "back-office".

■ 12. Revise § 7.1015 to read as follows:

§ 7.1015 National bank and Federal savings association investments in small business investment companies.

(a) *National banks.* A national bank may invest in a small business investment company (SBIC) or in any entity established solely to invest in SBICs, including purchasing the stock of a SBIC, subject to appropriate capital limitations (*see e.g.,* 15 U.S.C. 682(b)), and may receive the benefits of such stock ownership (*e.g.,* stock dividends). The receipt and retention of a dividend by a national bank from a SBIC in the form of stock of a corporate borrower of the SBIC is not a purchase of stock within the meaning of 12 U.S.C. 24(Seventh).

(b) *Federal savings associations.* Federal savings associations may invest in a SBIC or in any entity established solely to invest in SBICs as provided in 12 CFR 160.30.

(c) *Qualifying SBIC.* A national bank or Federal savings association may invest in a SBIC that is either (1) already organized and has obtained a license from the Small Business Administration, or (2) in the process of being organized.

■ 13. Amend § 7.1016 by:
■ a. Revising the section heading;
■ b. Revising paragraph (a);
■ c. In paragraph (b)(1) introductory text, removing the word ''banks'' wherever it appears and adding in its place the words ''national banks and Federal savings associations'';
■ d. Revising paragraph (b)(1)(iv);
■ e. In paragraph (b)(2)(ii), removing the word ''bank's'' and adding in its place the words ''national bank's or Federal savings association's'';
■ f. In paragraphs (b)(1)(iii)(B), (1)(iii)(C), (2)(i), (2)(iii), (3), and (4), removing the word ''bank'' and adding in its place the words ''national bank or Federal savings association'';
■ g. In paragraphs (b)(1)(iii)(B), (2)(iii) and (4), adding the words ''or savings association's'' after the word ''bank's''; and
■ h. In paragraph(b)(2)(i), adding the words ''or savings association'' after the word ''bank'' wherever it appears.

The revisions read as follows:

§ 7.1016 Independent undertakings issued by a national bank or Federal savings association to pay against documents.

(a) *In general.* A national bank or Federal savings association may issue and commit to issue letters of credit and other independent undertakings within the scope of applicable laws or rules of practice recognized by law.[1] Under such independent undertakings, the national bank's or Federal savings association's obligation to honor depends upon the presentation of specified documents and not upon nondocumentary conditions or resolution of questions of fact or law at issue between the applicant and the beneficiary. A national bank or Federal savings association may also confirm or otherwise undertake to honor or purchase specified documents upon their presentation under another person's independent undertaking within the scope of such laws or rules. As used in this section, the term national bank includes Federal branches and agencies of a foreign bank.

(b) * * * (1) * * *

* * * * *

(iv) The national bank or Federal savings association either should be fully collateralized or have a post-honor right of reimbursement from the applicant or from another issuer of an independent undertaking. Alternatively, if the national bank's or Federal savings association's undertaking is to purchase documents of title, securities, or other valuable documents, the bank or savings association should obtain a first priority right to realize on the documents if the bank or savings association is not otherwise to be reimbursed.

* * * * *

■ 14. Revise § 7.1021 to read as follows:

§ 7.1021 Financial literacy programs not branches of national banks

A financial literacy program is a program the principal purpose of which is to be educational for members of the community. The premises of, or a facility used by, a school or other organization at which a national bank participates in a financial literacy program is not a branch for purposes of 12 U.S.C. 36 provided the bank does not establish and operate the premises or facility. The OCC considers establishment and operation in this context on a case by case basis, considering the facts and circumstances. However, the premises or facility is not a branch of the national bank if the safe harbor test in 12 CFR 7.1012(c)(2) applicable to messenger services established by third parties is satisfied. The factor discussed in § 7.1012(c)(2)(i) can be met if bank employee participation in the financial literacy program consists of managing the program or conducting or engaging in financial education activities provided the school or other organization retains control over the program and over the premises or facilities at which the program is held.

§ 7.1022 [Amended]

■ 15. Amend § 7.1022 by:
■ a. In paragraph (d), removing the word ''shall'' and adding in its place the word ''may'' wherever it appears; and
■ b. In paragraph (e), removing the word ''shall'' and adding in its place the word ''must'' and removing the words ''the effective date of this regulation'' and adding in its place the words ''April 1, 2018''.

§ 7.1023 [Amended]

■ 16. Amend § 7.1023 by:
■ a. In paragraph (c), removing the word ''shall'' and adding in its place the word ''may'' and removing the words ''federal savings association'' and adding in its place the words ''Federal savings association''; and
■ b. In paragraph (d):
■ i. Removing the word ''shall'' and adding in its place the word ''must'';
■ ii. Removing the words ''the effective date of this regulation'' and adding in its place the words ''April 1, 2018''; and
■ iii. Removing the words ''federal savings association'' and adding in its place the words ''Federal savings association''.

§ 7.1024 [Amended]

■ 17. Amend redesignated § 7.1024 by:
■ a. In paragraphs (c)(2)(i) and(ii), and (d), removing the word ''shall'' and adding in its place the word ''must'' wherever it appears; and
■ b. In paragraph (e), removing the word ''shall'' and adding in its place the word ''may''.
■ 18. Add § 7.1025 to read as follows:

§ 7.1025 Tax equity finance transactions.

(a) *Tax equity finance transactions.* A national bank or Federal savings association may engage in a tax equity finance transaction pursuant to 12 U.S.C. 24(Seventh) and 1464 only if the transaction is the functional equivalent of a loan, as provided in paragraph (c) of this section, and the transaction satisfies applicable conditions in paragraph (d) of this section.

(b) *Definitions.* For purposes of this section:

(1) *Tax equity finance transaction* means a transaction in which a national bank or Federal savings association provides equity financing to fund a project that generates tax credits and other tax benefits and the use of an equity-based structure allows the transfer of those credits and other tax benefits to the national bank or Federal savings association.

(2) *Capital and surplus* has the same meaning that this term has in 12 CFR 32.2.

(c) *Functional equivalent of a loan.* A tax equity finance transaction is the functional equivalent of a loan if:

[1] Examples of such laws or rules of practice include: The applicable version of Article 5 of the Uniform Commercial Code (UCC) (1962, as amended 1990) or revised Article 5 of the UCC (as amended 1995); the Uniform Customs and Practice for Documentary Credits (International Chamber of Commerce (ICC) Publication No. 600 or any applicable prior version); the Supplements to UCP 500 & 600 for Electronic Presentation (eUCP v. 1.0, 1.1, & 2.0) (Supplements to the Uniform Customs and Practices for Documentary Credits for Electronic Presentation); International Standby Practices (ISP98) (ICC Publication No. 590); the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (adopted by the U.N. General Assembly in 1995 and signed by the U.S. in 1997); and the Uniform Rules for Bank-to-Bank Reimbursements Under Documentary Credits (ICC Publication No. 725).

(1) The structure of the transaction is necessary for making the tax credits and other tax benefits available to the national bank or Federal savings association;

(2) The transaction is of limited tenure and is not indefinite, such as a limited investment interest required by law to obtain continuing tax benefits;

(3) The tax benefits and other payments received by the national bank or Federal savings association from the transaction repay the investment and provide the implied rate of return;

(4) Consistent with paragraph (c)(3) of this section, the national bank or Federal savings association does not rely on appreciation of value in the project or property rights underlying the project for repayment;

(5) The national bank or Federal savings association uses underwriting and credit approval criteria and standards that are substantially equivalent to the underwriting and credit approval criteria and standards used for a traditional commercial loan;

(6) The national bank or Federal savings association is a passive investor in the transaction and is unable to direct the affairs of the project company; and

(7) The national bank or Federal savings association appropriately accounts for the transaction initially and on an ongoing basis and has documented contemporaneously its accounting assessment and conclusion.

(d) *Conditions on tax equity finance transactions.* A national bank or Federal savings association may engage in tax equity finance transactions only if:

(1) The national bank or Federal savings association cannot control the sale of energy, if any, from the project;

(2) The national bank or Federal savings association limits the total dollar amount of tax equity finance transactions undertaken pursuant to this section to no more than five percent of its capital and surplus, unless the OCC determines, by written approval of a written request by the national bank or Federal savings association to exceed the five percent limit, that a higher aggregate limit will not pose an unreasonable risk to the national bank or Federal savings association and that the tax equity finance transactions in the national bank's or Federal savings association's portfolio will not be conducted in an unsafe or unsound manner; provided, however, that in no case may a national bank or Federal savings association's total dollar amount of tax equity finance transactions undertaken pursuant to this section exceed 15 percent of its capital and surplus;

(3) The national bank or Federal savings association has provided written notification to the OCC prior to engaging in each tax equity finance transaction that includes its evaluation of the risks posed by the transaction; and

(4) The national bank or Federal savings association can identify, measure, monitor, and control the associated risks of its tax equity finance transaction activities individually and as a whole on an ongoing basis to ensure that such activities are conducted in a safe and sound manner.

(e) *Applicable legal requirements.* The transaction is subject to the substantive legal requirements of a loan, including the lending limits prescribed by 12 U.S.C. 84 and 12 U.S.C. 1464(u), as appropriate, as implemented by 12 CFR 32, and if the active investor or project sponsor of the transaction is an affiliate of the bank, to the restrictions on transactions with affiliates prescribed by 12 U.S.C. 371c and 371c–1, as implemented by 12 CFR 223.

■ 19. Add § 7.1026 to read as follows:

§ 7.1026 Payment systems memberships.

(a) *In general.* National banks and Federal savings associations may become members of payment systems, subject to the requirements of this section.

(b) *Definitions.* As used in this section:

(1) *Appropriate OCC supervisory office* means the OCC office that is responsible for the supervision of a national bank or Federal savings association, as described in subpart A of 12 CFR part 4;

(2) *Member* includes a national bank or Federal savings association designated as a ''member,'' or ''participant,'' or other similar role by a payment system, including by a payment system that requires the national bank or Federal savings association to share in operational losses or maintain a reserve with the payment system to offset potential liability for operational losses;

(3) *Open-ended liability* refers to liability for operational losses that is not capped under the rules of the payment system and includes indemnifications provided to third parties as a condition of membership in the payment system;

(4) *Operational loss* means a charge resulting from sources other than defaults by other members of the payment system; and

(5) *Payment system* means ''financial market utility'' as defined in 12 U.S.C. 5462(6), wherever operating, and includes both retail and wholesale payment systems. Payment system does not include a derivatives clearing organization registered under the Commodity Exchange Act, a clearing agency registered under the Securities Exchange Act of 1934, or foreign organization that would be considered a derivatives clearing organization or clearing agency were it operating in the United States.

(c) *Notice requirements.*

(1) *Prior notice required.* A national bank or Federal savings association must provide written notice to its appropriate OCC supervisory office at least 30 days prior to joining a payment system that exposes it to open-ended liability.

(2) *After-the-fact notice.* A national bank or Federal savings association must provide written notice to its appropriate OCC supervisory office within 30 days of joining a payment system that does not expose it to open-ended liability.

(d) *Content of notice.*

(1) *In general.* A notice required by paragraph (c) of this section must include representations that the national bank or Federal savings association:

(i) Has complied with the safety and soundness review requirements in paragraph (e)(1) of this section; and

(ii) Will comply with the safety and soundness review and notification requirements in paragraphs (e)(2) and (3) of this section.

(2) *Payment system limits on liability or no liability.* A notice filed under paragraph (c)(2) of this section also must include a representation that either:

(i) The rules of the payment system do not impose liability for operational losses on members; or

(ii) The national bank's or Federal savings association's liability for operational losses is limited by the rules of the payment system to specific and appropriate limits that do not exceed the lower of:

(A) the legal lending limit under 12 CFR 32; or

(B) the limit set for the bank or savings association by the OCC.

(e) *Safety and soundness procedures.*

(1) Prior to joining a payment system, a national bank or Federal savings association must:

(i) Identify and evaluate the risks posed by membership in the payment system, taking into account whether the liability of the bank or savings association is limited; and

(ii) Ensure that it can measure, monitor, and control the risks identified pursuant to paragraph (e)(1)(i) of this section.

(2) After joining a payment system, a national bank or Federal savings association must manage the risks of the payment system on an ongoing basis. This ongoing risk management must:

(i) Identify and evaluate the risks posed by membership in the payment system, taking into account whether the liability of the bank or savings association is limited; and

(ii) Measure, monitor, and control the risks identified pursuant to paragraph (e)(2)(i) of this section.

(3) If the national bank or Federal savings association identifies risks during the ongoing risk management required by paragraph (e)(2) of this section that raise safety and soundness concerns, such as a material change to the bank's liability or indemnification responsibilities, the national bank or Federal savings association must:

(i) Notify the appropriate OCC supervisory office as soon as the safety and soundness concern is identified; and

(ii) Take appropriate actions to remediate the risk.

(4) A national bank or Federal savings association that believes its open-ended liability is otherwise limited (*e.g.,* by negotiated agreements or laws of an appropriate jurisdiction) may consider its liability to be limited for purposes of the reviews required by paragraphs (e)(1) and (2) of this section so long as:

(i) Prior to joining the payment system, the bank or savings association obtains an independent legal opinion that:

(A) Describes how the payment system allocates liability for operational losses; and

(B) Concludes the potential liability for operational losses for the national bank or Federal savings association is in fact limited to specific and appropriate limits that do not exceed the lower of:

(*1*) The legal lending limit under 12 CFR 32; or

(*2*) The limit set for the bank or savings association by the OCC; and

(ii) There are no material changes to the liability or indemnification requirements of the bank or savings association since the issuance of the independent legal opinion.

■ 20. Add § 7.1027 to read as follows:

§ 7.1027 Establishment and operation of a remote service unit by a national bank.

A remote service unit (RSU) is an automated or unstaffed facility, operated by a customer of a bank with at most delimited assistance from bank personnel, that conducts banking functions such as receiving deposits, paying withdrawals, or lending money. A national bank may establish and operate an RSU pursuant to 12 U.S.C. 24(Seventh). An RSU includes an automated teller machine, automated loan machine, automated device for receiving deposits, personal computer, telephone, other similar electronic devices, and drop boxes. An RSU may be equipped with a telephone or tele-video device that allows contact with bank personnel. An RSU is not a ''branch'' within the meaning of 12 U.S.C. 36(j), and is not subject to State geographic or operational restrictions or licensing laws.

■ 21. Add § 7.1028 to read as follows:

§ 7.1028 Establishment and operation of a deposit production office by a national bank.

(a) *In general.* A national bank or its operating subsidiary may engage in deposit production activities at a site other than the main office or a branch of the bank. A national bank or its operating subsidiary may solicit deposits, provide information about deposit products, and assist persons in completing application forms and related documents to open a deposit account at a deposit production office (DPO). A DPO is not a branch within the meaning of 12 U.S.C. 36(j) and 12 CFR 5.30(d)(1) so long as it does not receive deposits, pay withdrawals, or make loans. All deposit and withdrawal transactions of a bank customer using a DPO must be performed by the customer, either in person at the main office or a branch office of the bank, or by mail, electronic transfer, or a similar method of transfer.

(b) *Services of other persons.* A national bank may use the services of, and compensate, persons not employed by the bank in its deposit production activities.

■ 22. Add § 7.1029 to read as follows:

§ 7.1029 Combination of national bank loan production office, deposit production office, and remote service unit.

A location at which a national bank operates a loan production office (LPO), a deposit production office (DPO), and a remote service unit (RSU) is not a ''branch'' within the meaning of 12 U.S.C. 36(j) by virtue of that combination. Since an LPO, DPO, or RSU is not, individually, a branch under 12 U.S.C. 36(j), any combination of these facilities at one location does not create a branch. The RSU at such a combined location must be primarily operated by the customer with at most delimited assistance from bank personnel.

■ 23. Add § 7.1030 to read as follows:

§ 7.1030 Permissible derivatives activities for national banks.

(a) *Authority.* This section is issued pursuant to 12 U.S.C. 24 (Seventh). A national bank may only engage in derivatives transactions in accordance with the requirements of this section.

(b) *Definitions.* For purposes of this section:

(1) *Customer-driven* means a transaction is entered into for a customer's valid and independent business purpose (and a customer-driven transaction does not include a transaction the principal purpose of which is to deliver to a national bank assets that the national bank could not invest in directly);

(2) *Perfectly-matched* means two back-to back derivatives transactions that offset risk with respect to all economic terms (*e.g.,* amount, maturity, duration, and underlying);

(3) *Portfolio-hedged* means a portfolio of derivatives transactions that are hedged based on net unmatched positions or exposures in the portfolio;

(4) *Physical hedging* or *physically-hedged* means holding title to or acquiring ownership of an asset (for example, by warehouse receipt or book-entry) solely to manage the risks arising out of permissible customer-driven derivatives transactions;

(5) *Physical settlement* or *physically-settled* means accepting title to or acquiring ownership of an asset;

(6) *Transitory title transfer* means accepting and immediately relinquishing title to an asset; and

(7) *Underlying* means the reference asset, rate, obligation, or index on which the payment obligation(s) between counterparties to a derivative transaction is based.

(c) *In general.* A national bank may engage in the following derivatives transactions after notice in accordance with paragraph (d) of this section, as applicable:

(1) Derivatives transactions with payments based on underlyings a national bank is permitted to purchase directly as an investment;

(2) Derivatives transactions with any underlying to hedge the risks arising from bank-permissible activities;

(3) Derivatives transactions as a financial intermediary with any underlying that are customer-driven, cash-settled, and either perfectly-matched or portfolio-hedged;

(4) Derivatives transactions as a financial intermediary with any underlying that are customer-driven, physically-settled by transitory title transfer, and either perfectly-matched or portfolio-hedged; and

(5) Derivatives transactions as a financial intermediary with any underlying that are customer-driven, physically-settled (other than by transitory title transfer), physically-hedged, and either perfectly-matched or portfolio-hedged, and provided that (i) the national bank does not take physical

delivery of any commodity by receipt of physical quantities of the commodity on bank premises and (ii) physical hedging activities meet the requirements of paragraph (e) of this section.

(d) *Notice procedure.* (1) A national bank must provide notice to its Examiner-in-Charge prior to engaging in any of the following with respect to derivatives transactions with payments based on underlyings that a national bank is not permitted to purchase directly as an investment:

(i) Engaging in derivatives hedging activities pursuant to paragraph (c)(2) of this section;

(ii) Expanding the bank's derivatives hedging activities pursuant to paragraph (c)(2) of this section to include a new category of underlying for derivatives transactions;

(iii) Engaging in customer-driven financial intermediation derivatives activities pursuant to paragraphs (c)(3), (4) or (5) of this section; and

(iv) Expanding the bank's customer-driven financial intermediation derivatives activities pursuant to paragraphs (c)(3), (4) or (5) of this section to include any new category of underlyings.

(2) The notice pursuant to paragraph (d)(1) of this section must be submitted in writing at least 30 days before the national bank commences the activity and include the following information:

(i) A detailed description of the proposed activity, including the relevant underlyings;

(ii) The anticipated start date of the activity; and

(iii) A detailed description of the bank's risk management system (policies, processes, personnel, and control systems) for identifying, measuring, monitoring, and controlling the risks of the activity.

(e) *Additional requirements for physical hedging activities.* (1) A national bank engaging in physical hedging activities pursuant to paragraph (c)(5) of this section must hold the underlying solely to hedge risks arising from derivatives transactions originated by customers for the customers' valid and independent business purposes.

(2) The physical hedging activities must offer a cost-effective means to hedge risks arising from permissible banking activities.

(3) The national bank must not take anticipatory or maintain residual positions in the underlying except as necessary for the orderly establishment or unwinding of a hedging position.

(4) The national bank must not acquire equity securities for hedging purposes that constitute more than 5 percent of a class of voting securities of any issuer.

(5) With respect to physical hedging involving commodities:

(i) A national bank's physical position in a particular physical commodity (including, as applicable, delivery point, purity, grade, chemical composition, weight, and size) must not be more that 5 percent of the gross notional value of the bank's derivatives that are in that particular physical commodity and allow for physical settlement within 30 days. Title to commodities acquired and immediately sold by a transitory title transfer does not count against the 5 percent limit; and

(ii) The physical position must more effectively reduce risk than a cash-settled hedge referencing the same commodity.

■ 24. Amend § 7.2000 by:
■ a. Revising the section heading;
■ b. Revising paragraph (a);
■ c. In paragraph (b):
■ i. Removing the word ''procedures'' wherever it appears and adding in its place the word ''provisions'';
■ ii. Removing the words ''the state in which the main office of the bank'' and adding in its place the words ''any State in which the main office or any branch of the bank'';
■ iii. Removing the words ''the state in which the holding company of the bank'' and adding in its place the words ''the State in which a holding company of the bank''; and
■ iv. Removing the word ''shall'' and adding in its place the word ''must'';
■ d. Redesignating paragraph (c) as paragraph (d) and revising it; and
■ e. Adding a new paragraph (c).

The addition and revisions are set forth below.

§ 7.2000 Corporate governance.

(a) *In general.* The corporate governance provisions in a national bank's articles of association and bylaws and the bank's conduct of its corporate governance affairs must comply with applicable Federal banking statutes and regulations and safe and sound banking practices.

* * * * *

(c) *Continued use of former holding company State.* A national bank that has elected to follow the corporate governance provisions of the law of the State in which its holding company is incorporated may continue to use those provisions even if the bank is no longer controlled by that holding company.

(d) *Request for OCC staff position.* A national bank may request the views of OCC staff on the permissibility of a national bank's adoption of a particular State corporate governance provision. Requests must include the following information:

(1) The name of the national bank;

(2) Citation to the State statutes or regulations involved;

(3) A discussion as to whether a similarly situated State bank is subject to or may adopt the corporate governance provision;

(4) Identification of all Federal banking statutes or regulations that are on the same subject as, or otherwise have a bearing on, the subject of the proposed State corporate governance provision; and

(5) An analysis of how the proposed practice is not inconsistent with applicable Federal statutes or regulations and is not inconsistent with bank safety and soundness.

■ 25. Add § 7.2001 to read as follows:

§ 7.2001 National bank adoption of anti-takeover provisions.

(a) *In general.* Pursuant to 12 CFR 7.2000(b), a national bank may adopt anti-takeover provisions included in State corporate governance law if the provisions are not inconsistent with Federal banking statutes or regulations and not inconsistent with bank safety and soundness.

(b) *State anti-takeover provisions that are not inconsistent with Federal banking statutes or regulations.* State anti-takeover provisions that are not inconsistent with Federal banking statues or regulations include the following:

(1) *Restriction on business combinations with interested shareholders.* State provisions that prohibit, or that permit the corporation to prohibit in its certificate of incorporation or other governing document, the corporation from engaging in a business combination with an interested shareholder or any related entity for a specified period of time from the date on which the shareholder first becomes an interested shareholder, subject to certain exceptions such as board approval. An interested shareholder is one that owns an amount of stock specified in the State provision.

(2) *Poison pill.* State provisions that provide, or that permit the corporation to provide in its certificate of incorporation or other governing document, that all the shareholders, other than the hostile acquiror, have the right to purchase additional stock at a substantial discount upon the occurrence of a triggering event.

(3) *Requiring all shareholder action to be taken at a meeting.* State provisions that provide, or that permit the corporation to provide in its certificate

of incorporation or other governing document, that all actions to be taken by shareholders must occur at a meeting and that shareholders may not take action by written consent.

(4) *Limits on shareholders' authority to call special meetings.* State provisions that provide, or that permit the corporation to provide in its certificate of incorporation or other governing document, that:

(i) Only the board of directors, and not the shareholders, have the right to call special meetings of the shareholders; or

(ii) If shareholders have the right to call special meetings, a high percentage of shareholders is needed to call the meeting.

(5) *Shareholder removal of a director only for cause.* State provisions that provide, or that permit the corporation to provide in its certificate of incorporation or other governing document, that shareholders may remove a director only for cause, and not both for cause and without cause.

(c) *State anti-takeover provisions that are inconsistent with Federal banking statutes or regulations.* The following State anti-takeover provisions are inconsistent with Federal banking statutes or regulations:

(1) *Supermajority voting requirements.* State provisions that require, or that permit the corporation to require in its certificate of incorporation or other governing document, a supermajority of the shareholders to approve specified matters are inconsistent when applied to matters for which Federal banking statutes or regulations specify the required level of shareholder approval.

(2) *Restrictions on a shareholder's right to vote all the shares it owns.* State provisions that prohibit, or that permit the corporation in its certificate of incorporation or other governing document to prohibit, a person from voting shares acquired that increase their percentage of ownership of the company's stock above a certain level are inconsistent when applied to shareholder votes governed by 12 U.S.C. 61.

(d) *Bank safety and soundness.* (1) *In general.* Except as provided in paragraph (d)(2) of this section, any State corporate governance provision, including anti-takeover provisions, that would render more difficult or discourage an injection of capital by purchase of bank stock, a merger, the acquisition of the bank, a tender offer, a proxy contest, the assumption of control by a holder of a large block of the bank's stock, or the removal of the incumbent board of directors or management is inconsistent with bank safety and soundness if:

(i) The bank is less than adequately capitalized (as defined in 12 CFR part 6);

(ii) The bank is in troubled condition (as defined in 12 CFR 5.51(c)(7));

(iii) Grounds for the appointment of a receiver under 12 U.S.C. 191 are present; or

(iv) The bank is otherwise in less than satisfactory condition, as determined by the OCC.

(2) *Exception.* Anti-takeover provisions are not inconsistent with bank safety and soundness if, at the time the bank adopts the provisions:

(i) The bank is not subject to any of the conditions in paragraph (d)(1) of this section; and

(ii) The bank includes, in its articles of association or its bylaws, as applicable pursuant to paragraph (f) of this section, a limitation that would make the provisions ineffective if:

(A) The conditions in paragraph (d)(1) of this section exist; or

(B) The OCC otherwise directs the bank not to follow the provision for supervisory reasons.

(e) *Case-by-case review.* (1) *OCC Determination.* Based on the substance of the provision or the individual circumstances of a national bank, the OCC may determine that a State anti-takeover provision, as proposed or adopted by a bank, is:

(i) Inconsistent with Federal banking statutes or regulations, notwithstanding paragraph (b) of this section; or

(ii) Inconsistent with bank safety and soundness other than as provided in paragraph (d) of this section.

(2) *Review.* The OCC may initiate a review, or a bank may request OCC review pursuant to 12 CFR 7.2000(d), of a State anti-takeover provision.

(f) *Method of adoption for anti-takeover provisions.* (1) *Board and shareholder approval.* A national bank must follow the provisions for approval by the board of directors and approval of shareholders for the adoption of an anti-takeover provision in the State corporate governance law it has elected to follow. However, if the provision is included in the bank's articles of association, the bank's shareholders must approve the amendment of the articles pursuant to 12 U.S.C. 21a, even if the State law does not require approval by the shareholders.

(2) *Documentation.* If the State corporate governance law requires the anti-takeover provision to be in the company's articles of incorporation, certificate of incorporation, or similar document, the national bank must include the provision in its articles of association. If the State corporate governance law does not require the provision to be in the company's articles of incorporation, certificate of incorporation, or similar document, but allows it to be in the bylaws, then the national bank must include the provision in either its articles of association or in its bylaws, provided, however, that if the State corporate governance law requires shareholder approval for changes to the corporation's bylaws, then the national bank must include the provision in its articles of association.

§ 7.2002 [Amended]

■ 26. Amend § 7.2002 by adding the words ''for shareholder voting'' after the word ''proxy'' wherever it appears.

■ 27. Amend § 7.2005 by:

■ a. Revising the heading in paragraph (a); and

■ b. Removing in paragraph (c)(3)(ii), the word ''shall'' and adding in its place the word ''must''.

The revision reads as follows:

§ 7.2005 Ownership of stock necessary to qualify as director.

(a) *In general.* * * *

* * * * *

§ 7.2006 [Amended]

■ 28. Amend § 7.2006 in the first sentence by removing the word ''shall'' and adding in its place the word ''must''.

§ 7.2008 [Amended]

■ 29. Amend § 7.2008 by:

■ a. In paragraph (a), removing the word ''state'' and adding in its place the word ''State''; and

■ b. In paragraph (b), removing the word ''shall'' and adding in its place the word ''must'' wherever it appears.

§ 7.2009 [Amended]

■ 30. Amend § 7.2009 by removing the word ''shall'' and adding in its place the word ''must''.

§ 7.2010 [Amended]

■ 31. Amend § 7.2010 in the first sentence by removing the word ''shall'' and adding in its place the word ''must''.

■ 32. Revise § 7.2012 to read as follows:

§ 7.2012 President as director.

Pursuant to 12 U.S.C. 76, the person serving as, or in the function of, president of a national bank, regardless of title, must be a member of the board of directors. A director other than the person serving as, or in the function of, president may be elected chairman of the board.

■ 33. Revise § 7.2014 to read as follows:

§ 7.2014 Indemnification of institution-affiliated parties.

(a) *Indemnification under State law.* Subject to the limitations of paragraph (b) of this section, a national bank or Federal savings association may indemnify an institution-affiliated party for damages and expenses, including the advancement of expenses and legal fees, in accordance with the law of the State the bank or savings association has designated for its corporate governance pursuant to § 7.2000(b) (for national banks), 12 CFR 5.21(j)(3)(iii) (for Federal mutual savings associations), or 12 CFR 5.22(j)(2)(iii) (for Federal Stock savings associations), provided such payments are consistent with safe and sound banking practices. The term ''institution-affiliated party'' has the same meaning as set forth at 12 U.S.C. 1813(u).

(b) *Administrative proceedings or civil actions initiated by Federal banking agencies.* With respect to an administrative proceeding or civil action initiated by any Federal banking agency, a national bank or Federal savings association may only make or agree to make indemnification payments to an institution-affiliated party that are reasonable and consistent with the requirements of 12 U.S.C. 1828(k) and the implementing regulations thereunder.

(c) *Written agreement required for advancement.* Before advancing funds to an institutional-affiliated party under this section, a national bank or Federal savings association must obtain a written agreement that the institution-affiliated party will reimburse the bank or savings association, as appropriate, for any portion of that indemnification that the institution-affiliated party is ultimately found not to be entitled to under 12 U.S.C. 1828(k) and the implementing regulations thereunder, except to the extent that the bank's or savings association's expenses have been reimbursed by an insurance policy or fidelity bond.

(d) *Insurance premiums.* A national bank or Federal savings association may provide for the payment of reasonable premiums for insurance covering the expenses, legal fees, and liability of institution-affiliated parties to the extent that the expenses, fees, or liability could be indemnified under this section.

■ 34. Amend § 7.2016 by:

■ a. Revising the section heading;

■ b. Redesignating paragraph (a) as paragraph (a)(1) and adding a paragraph heading to paragraph (a);

■ c. Redesignating paragraph (b) as paragraph (a)(2); and

■ d. Adding a new paragraph (b).

The revision and additions read as follows:

§ 7.2016 Restricting transfer of stock and record dates; stock certificates.

(a) *Restricting transfer of stock and record dates.*

(b) *Bank stock certificates.* (1) A national bank may prescribe the manner in which its stock must be transferred in its bylaws or articles of association. A bank issuing stock in certificated form must comply with the requirements of 12 U.S.C. 52, including as to:

(i) The name and location of the bank;

(ii) The name of the holder of record of the stock represented thereby;

(iii) The number and class of shares which the certificate represents;

(iv) If the bank issues more than one class of stock, the respective rights, preferences, privileges, voting rights, powers, restrictions, limitations, and qualifications of each class of stock issued (unless incorporated by reference to the articles of association);

(v) Signatures of the president and cashier of the bank, or such other officers as the bylaws of the bank provide; and

(vi) The seal of the bank.

(2) The requirements of paragraph (b)(1)(v) of this section may be met through the use of electronic means or by facsimile.

§§ 7.2017 through 7.2018 [Removed]

■ 35. Remove §§ 7.2017 through 7.2018.

§ 7.2020 [Removed]

■ 36. Remove § 7.2020.

§ 7.2022 [Amended]

■ 37. Amend § 7.2022 by removing the word ''state'' and adding in its place the word ''State''.

§ 7.2024 [Amended]

■ 38. Amend § 7.2024 paragraphs (a) and (c) by removing the word ''shall'' and adding in its place the word ''must'' wherever it appears.

■ 39. Add § 7.2025 to read as follows:

§ 7.2025 Capital stock-related activities of a national bank.

(a) *In general.* A national bank must obtain the necessary shareholder approval required by 12 U.S.C. 51a, 57, or 59 for any change in its permanent capital. An increase or decrease in the amount of a national bank's common or preferred stock is a change in permanent capital subject to the notice and approval requirements of 12 CFR 5.46 and applicable law. A national bank may obtain the required shareholder approval of changes in permanent capital, as provided in paragraphs (b), (c), and (d) of this section.

(b) *Issuance of previously approved and authorized common stock.* In compliance with 12 U.S.C. 57, a national bank may issue common stock up to an amount previously approved and authorized in the national bank's articles of association by holders of two-thirds of the national bank's shares without obtaining additional shareholder approval for each subsequent issuance within the authorized amount.

(c) *Issuance, Repurchase, and Redemption of Preferred Stock Pursuant to Certain Procedures.* Subject to the requirements of 12 U.S.C. 51a and 59, a national bank may adopt procedures to authorize the board of directors to issue, determine the terms of, repurchase, and redeem one or more series of preferred stock, if permitted by the corporate governance provisions adopted by the bank under 12 CFR 7.2000. To satisfy the shareholder approval requirements of 12 U.S.C. 51a and 59, the adoption of such procedures must be approved by shareholders in advance through an amendment to the national bank's articles of association. Any amendment to a national bank's articles of association that authorizes both the issuance and the repurchase and redemption of shares must be approved by holders of two-thirds of the national bank's shares.

(d) *Share repurchase programs.* Subject to the requirements of 12 U.S.C. 59, a national bank may establish a program for the repurchase, from time to time, of the national bank's common or preferred stock, if permitted by the corporate governance provisions adopted by the bank under 12 CFR 7.2000. To satisfy the shareholder approval requirement of 12 U.S.C. 59, the repurchase program must be approved in advance by the holders of two-thirds of the national bank's shares, including through an amendment to the national bank's articles of association that authorizes the board of directors to repurchase the national bank's common or preferred stock from time to time under board-determined parameters that can limit the frequency, type, aggregate limit, or purchase price of repurchases.

(e) *Preferred Stock Features.* A national bank's preferred stock may be cumulative or non-cumulative and may or may not have voting rights on one or more series.

■ 40. Revise the heading for subpart C of this part to read as follows:

Subpart C—National Bank and Federal Savings Association Operations

■ 41. Revise § 7.3000 to read as follows:

§ 7.3000 National bank and Federal savings association banking hours and closings.

(a) *Banking hours.* The board of directors of a national bank or Federal savings association, or an equivalent person or committee of a Federal branch or agency, should review its hours of operations for customers and, independently of any other bank, savings association, or Federal branch or agency, take appropriate action to establish a schedule of operating hours for customers.

(b) *Emergency closings declared by the Comptroller.* Pursuant to 12 U.S.C. 95(b)(1) and 1463(a)(1)(A), the Comptroller of the Currency (Comptroller), may declare any day a legal holiday if emergency conditions exist. That day is a legal holiday for national banks, Federal savings associations, and Federal branches or agencies in the affected geographic area (*i.e.,* throughout the United States, in a State, or in part of a State), and national banks, Federal savings associations, and Federal branches and agencies may temporarily limit or suspend operations at their affected offices, unless the Comptroller by written order directs otherwise. Emergency conditions may be caused by acts of nature or of man and may include natural and other disasters, public health or safety emergencies, civil and municipal emergencies, and cyber threats or other unauthorized intrusions (*e.g.,* severe flooding, a pandemic, terrorism, a cyber-attack on bank systems, or a power emergency declared by a local power company or government requesting that businesses in the affected area close). The Comptroller may issue a proclamation authorizing the emergency closing in anticipation of the emergency condition, at the time of the emergency condition, or soon thereafter. In the absence of a Comptroller declaration of a bank holiday, a national bank, Federal savings associations, or Federal branch or agency may choose to temporarily close offices in response to an emergency condition. The national bank, Federal savings associations, or Federal branch or agency should notify the OCC of such temporary closure as soon as feasible.

(c) *Emergency and ceremonial closings declared by a State or State official.* In the event a State or a legally authorized State official declares any day to be a legal holiday for emergency or ceremonial reasons in that State or part of the State, that same day is a legal holiday for national banks, Federal savings associations, and Federal branches or agencies or their offices in the affected geographic area. National banks, Federal savings associations, and Federal branches or agencies or their affected offices may close their affected offices or remain open on such a State-designated holiday, unless the Comptroller by written order directs otherwise.

(d) *Liability.* A national bank, Federal savings association, or Federal branch or agency should assure that all liabilities or other obligations under the applicable law due to its closing are satisfied.

(e) *Definition.* For the purpose of this subpart, the term ''State'' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, or any other territory or possession of the United States.

§ 7.3001 [Amended]

■ 42. Amend § 7.3001 by:

■ a. In paragraph (a)(1), removing the words ''Lease excess space'' and adding in its place the words ''Consistent with § 7.1024 of this title, lease excess space'';

■ b. In paragraph (c) introductory text, removing the word ''shall'' and adding in its place the word ''must''; and

■ c. In paragraph (c)(3), removing the word ''state'' and adding in its place the word ''State''.

§§ 7.4003 through 7.4005 [Removed]

■ 43. Remove §§ 7.4003 through 7.4005.

§ 7.4010 [Amended]

■ 44. Amend the section heading for § 7.4010 by removing the word ''state'' and adding in its place the word ''State''.

§ 7.5001 [Removed]

■ 45. Remove § 7.5001.

PART 145—FEDERAL SAVINGS ASSOCIATIONS—OPERATIONS

■ 46. The authority citation for part 145 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1828, 5412(b)(2)(B).

§ 145.121 [Removed]

■ 47. Remove § 145.121.

PART 160—LENDING AND INVESTMENT

■ 48. The authority citation for part 160 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, 1701j–3, 1828, 3803, 3806, 5412(b)(2)(B); 42 U.S.C. 4106.

§ 160.50 [Removed]

■ 49. Remove § 160.50.

§ 160.120 [Removed]

■ 50. Remove § 160.120.

Brian P. Brooks,

Acting Comptroller of the Currency.

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 7 and 155

[Docket ID OCC–2019–0028]

RIN 1557–AE74

National Bank and Federal Savings Association Digital Activities

AGENCY: Office of the Comptroller of the Currency.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is interested in making sure it is aware of and understands the evolution of financial services, so it ensures the federal banking system continues to serve consumers, businesses, and communities effectively. Further, national banks and Federal savings associations (banks) must have a regulatory and supervisory framework that enables banks to adapt to rapidly changing trends and technology developments in the financial marketplace to meet customers' evolving needs while continuing to operate in a safe and sound manner. The Office of the Comptroller of the Currency (OCC) is reviewing its regulations on bank digital activities to ensure that its regulations continue to evolve with developments in the industry. This advance notice of proposed rulemaking (ANPR) solicits public input as part of this review.

DATES: Comments must be received by August 3, 2020.

ADDRESSES: Commenters are encouraged to submit comments through the Federal eRulemaking Portal or email, if possible. Please use the title ''National Bank and Federal Savings Association Digital Activities'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—Regulations.gov Classic or Regulations.gov Beta: Regulations.gov Classic:* Go to *https://www.regulations.gov/.* Enter ''Docket ID OCC–2019–0028'' in the Search Box and