

COMPTROLLER'S LICENSING MANUAL

# Subsidiaries and Equity Investments



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# Introduction

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National banks and federal savings associations (FSA) develop, and offer through various subsidiaries and other business entities, a wide range of products and services designed to increase profitability, improve service to customers, and respond to technological innovations and competition. For national banks, these entities include operating subsidiaries, financial subsidiaries, and bank service companies. For FSAs, these include operating subsidiaries, service corporations, and bank service companies. Banks may also make equity investments in other business entities that perform bank-permissible activities. National banks may make these investments through their other equity investment authority, and FSAs may do so through their pass-through investment authority. Throughout this booklet, national banks and FSAs are referred to collectively as banks or bank, except when it is necessary to distinguish between the two.

This booklet

- describes the various types of subsidiaries and other business entities that banks may establish or acquire and the activities in which such entities may engage.
- describes the various equity investments that banks can make.
- provides detailed guidance on permissible and incidental activities<sup>1</sup> and conditions for establishing and operating these entities or investments.
- provides information on the statutory and regulatory factors that the Office of the Comptroller of the Currency (OCC) considers when reviewing and processing applications or notices.
- provides guidance on specific requirements for insurance, electronic, and fiduciary activities.

This booklet provides a glossary and hyperlinks to filing samples and other booklets in the *Comptroller's Licensing Manual*, as well as other information applicants may use in order to file to establish various subsidiaries or make an equity investment.

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<sup>1</sup> Appendixes A and B set out precedent for national banks. Appendixes C, D, and E set out precedents for FSAs. Permissible activities for national banks and FSAs can differ because the statutory and regulatory frameworks authorizing and implementing activities for these institutions are different.

# Key Policies

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## Common Types of Subsidiaries and Equity Investments

### Operating Subsidiaries

Banks may establish or acquire operating subsidiaries. Operating subsidiaries may only conduct activities that the parent bank may conduct. Operating subsidiaries in which banks may invest include corporations, limited liability companies (LLC), limited partnerships, and similar entities if all of the following conditions apply:

- The bank has the ability to control the management and operations of the subsidiary, and no other person or entity exercises effective operating control over the subsidiary or has the ability to influence the subsidiary's operations to an extent equal to or greater than that of the bank.
- The parent bank owns and controls more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary, or the parent bank otherwise controls the operating subsidiary, and no party controls a percentage of the voting (or similar) interest of the operating subsidiary greater than the bank's interest.
- The operating subsidiary is consolidated with the bank under U.S. generally accepted accounting principles (GAAP).

The OCC may, at any time, limit a bank's investment in an operating subsidiary or may limit or refuse to permit any activities in an operating subsidiary for supervisory, legal, or safety and soundness reasons.

To establish or acquire an operating subsidiary, or to engage in an additional activity in an existing operating subsidiary, a national bank generally must file with the OCC an application or an after-the-fact notice. An FSA generally must file an application or a notice; the after-the-fact notice procedure is not available to FSAs.

### Service Corporations

FSAs may establish or acquire service corporations pursuant to 12 USC 1464(c)(4)(B). A service corporation may be organized as a corporation, or may be organized in any other form that provides the same protections as the corporate form of organization, including limited liability. An FSA need not have any minimum percentage ownership interest or have control of a service corporation to designate an entity as a service corporation.

Service corporations may engage in a broader range of activities than FSAs may conduct directly. The list of activities previously found permissible for service corporations is in 12 CFR 5.59(f). In addition, an FSA may request OCC approval for a service corporation to engage in any other activity reasonably related to the activities of financial institutions. An FSA's aggregate investment in service corporations is limited, as described in the "Service Corporations—FSA" section of this booklet. There are also limitations regarding the state in

which a first-tier service corporation may be located and regarding the entities that may invest in a first-tier service corporation.

The OCC may, at any time, limit an FSA's investment in a service corporation or may limit or refuse to permit any activities in a service corporation for supervisory, legal, or safety and soundness reasons.

An FSA generally must file an application or notice with the OCC to acquire or establish a service corporation or to commence a new activity in an existing service corporation that the FSA controls.

## Bank Service Companies

Banks may establish or acquire bank service companies. A bank service company is a corporation or LLC organized to provide services authorized by the Bank Service Company Act. All of the stockholders or members of a bank service company must be insured depository institutions.

The OCC may, at any time, limit a bank's investment in a bank service company or may limit or refuse to permit any activities in any bank service company for which a bank is the principal investor for supervisory, legal, or safety and soundness reasons.

A bank generally is required to submit a notice to, and receive prior approval from, the OCC to invest in the equity of a bank service company or to perform new activities in an existing bank service company. A bank is not required, however, to submit a notice or application under the bank service company regulation to invest in a bank service company if the bank service company will provide only the services listed in 12 CFR 5.35(f)(3) and the bank service company will provide services only for depository institutions. Also, a bank may, with the approval of the Board of Governors of the Federal Reserve System (Federal Reserve Board), invest in the equity of a bank service company that provides other services that the Federal Reserve Board has determined to be permissible for a bank holding company under 12 USC 1843(c)(8).

## Financial Subsidiaries

A national bank may acquire a financial subsidiary or engage in certain activities through a financial subsidiary. A financial subsidiary is any company that is controlled by one or more insured depository institutions, *other than a subsidiary that* (i) engages solely in activities that national banks may engage in directly and that are conducted subject to the same terms and conditions that govern the conduct of these activities by national banks; or (ii) a national bank is specifically authorized to control by the express terms of a federal statute (other than section 5136A of the Revised Statutes) and not by implication or interpretation, such as by section 25 of the Federal Reserve Act (12 USC 601–604a), section 25A of the Federal Reserve Act (12 USC 611–631), or the Bank Service Company Act (12 USC 1861 et seq.).

## Non-Controlling Investments

National banks may make non-controlling equity investments directly or through an operating subsidiary in certain types of entities when the investment is part of, or incidental to, the business of banking. Investments of this type are permitted pursuant to a national bank's powers under 12 USC 24(Seventh) and 12 CFR 5.36(e). A national bank may not make a non-controlling investment if it is unable to make certain representations and certifications described in more detail in the "Non-Controlling Equity Investments—National Bank" section of this booklet. A national bank is required either to file an application to make a non-controlling investment or to file an after-the-fact notice regarding the investment, depending on the condition of the national bank and the nature of the activity.

## Pass-Through Investments

Pursuant to 12 CFR 160.32, FSAs are permitted to make pass-through investments directly or through an operating subsidiary in entities that engage only in activities in which an FSA may engage, subject to the requirements and filing procedures of 12 CFR 5.58. An FSA may not make a pass-through investment through a service corporation. The investment may be in a corporation, LLC, limited partnership, trust, or similar business entity. An FSA may not make a pass-through investment if it is unable to make certain representations and certifications described in more detail in the "Pass-Through Investments—FSA" section of this booklet.

An FSA generally must file an application or an after-the-fact notice to make a pass-through investment. Under certain circumstances, however, an FSA may make a pass-through investment without providing an application or an after-the-fact notice.

## Examination and Supervision

Operating subsidiaries and service corporations are subject to OCC examination and supervision to the same extent as the parent bank, except when federal law or regulation specifically provides otherwise, such as when the activity is subject to functional regulation limitations and requirements. The Gramm–Leach–Bliley Act (GLBA) codified the concept of "functional regulation," which recognizes the roles of the U.S. Securities and Exchange Commission (SEC), the Commodities Futures Trading Commission (CFTC), and state insurance commissioners as the regulators of certain securities, commodities, and insurance activities, respectively.

Bank service companies are subject to examination and supervision by the federal banking agency that supervises the insured depository institution that is the principal investor in the company.<sup>2</sup> Additionally, a bank service company's services are subject to examination and supervision to the same extent as if the depository institution itself performed the services on its own premises. The services may be subject to functional regulation limitations and

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<sup>2</sup> The appropriate federal banking agency of the principal investor may authorize any other federal banking agency that supervises any other investor to make such an examination (12 USC 1867(a)).

requirements to the extent that the bank service company performing the services meets the GLBA definition of a functionally regulated affiliate or subsidiary.

The GLBA imposes limits on the OCC's authority to examine, require reports from, impose capital requirements on, require funds from, and take direct or indirect actions against functionally regulated affiliates and subsidiaries. The Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank Act) modified or removed many, but not all, of these limits, restoring much of the authority the OCC had over functionally regulated affiliates and subsidiaries before the GLBA.<sup>3</sup> Refer to the “[Retail Nondeposit Investment Products](#)” and the “[Bank Supervision Process](#)” booklets of the *Comptroller's Handbook* for further discussion on functional regulation.

Financial subsidiaries of national banks are also subject to examination and supervision by the OCC, subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act and section 115 of the GLBA.

The OCC may direct the bank or other entity to take appropriate remedial action if it determines that the creation or operation of the subsidiary violates a law, regulation, or written condition; is unsafe or unsound; or threatens the safety and soundness of the bank. Such action may include disposing of, or liquidating all or part of, the entity or discontinuing specific activities. National banks may refer to the “[Related Organizations](#)” booklet of the *Comptroller's Handbook* and FSAs may refer to section 730, “[Related Organizations](#),” of the *Office of Thrift Supervision (OTS) Examination Handbook* for further discussion of the OCC's examination and supervision of subsidiaries and other related organizations.

## Offshore Subsidiaries

An offshore subsidiary is a subsidiary that maintains records offshore, or that is organized under laws other than those of the 50 states in the United States, the District of Columbia, or any other U.S. territory or possession. Foreign law may limit OCC supervisory authority over offshore subsidiaries of banks. Banks that establish or acquire an offshore subsidiary through the application or notice process are asked to make certain representations or commitments to ensure that the OCC has access to those subsidiaries' books and records and the authority to examine, supervise, and regulate those subsidiaries. The representations may include the following:

- The subsidiaries' books and records (or duplicate copies of any books and records the originals of which are required to be maintained in [name of country] under applicable law) will be maintained at facilities of the bank in the United States, and the bank and the subsidiaries will ensure prompt OCC access to all books and records.
- If the OCC is unable to access the subsidiaries' books and records, or examine, supervise, or regulate the subsidiaries to its satisfaction, resulting in an OCC bank directive to cease operations through the subsidiary, the bank will do so within the time period specified by the OCC.

<sup>3</sup> See Dodd–Frank Act, Public Law 11-203, 124 Stat. 1376 (2010); 12 USC 1844; 12 USC 1831v.

An applicant unable to make any of these representations or commitments should contact the appropriate Director for District Licensing for further guidance.

## Undercapitalized Banks

Although undercapitalized banks generally are not encouraged to engage in any type of expansionary activities, the OCC may approve an application from an undercapitalized bank to establish a subsidiary or to make an investment, or approve the entity to engage in a new activity, if the OCC determines that

- the bank has submitted an acceptable capital restoration plan, as required by 12 USC 1831o(e)(2).
- the bank is implementing the plan.
- the proposed filing is consistent with and will further the plan's achievement.

# Application Process

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## Provisions Applicable to Subsidiary and Equity Filings Generally

### Multiple Transactions

The OCC does not require a separate application for operating subsidiaries, service corporations, financial subsidiaries, bank service companies, non-controlling investments, or pass-through investments when the entity is

- retained in a merging or converting institution.
- established together with an application for a new national bank or FSA charter. (See the “[Charters](#)” booklet of the *Comptroller’s Licensing Manual* for more information.)

In these situations, the OCC considers the entity or the investment along with the primary filing and, if appropriate, may request a legal opinion on the relevant entity’s activities. The review period runs concurrently with the OCC’s processing and decision on the merger, conversion, or charter application. The OCC includes its decision on the filing and any appropriate conditions in the decision letter for the merger, conversion, or charter.

### Publication

Generally, the OCC does not require public notice for filings covered by this booklet unless the application presents significant and novel policy, supervisory, or legal issues and a public notice is beneficial. (See the “[Public Notice and Comments](#)” booklet of the *Comptroller’s Licensing Manual*, “Additional Public Notice” section, for more information.)

### Published Precedents

To locate published precedents of OCC action, see the OCC’s monthly publication “[Interpretations and Actions](#)” on occ.gov, or the Commerce Clearing House (CCH) *Federal Banking Law Reporter*.

### Insurance Activities

Banks may conduct certain insurance activities in the bank, through a subsidiary, or through certain investments. National banks may sell general forms of insurance as an agent, engage in certain title insurance activities, sell credit-related insurance as an agent, or provide as principal (underwrite or reinsure) credit-related insurance. An operating subsidiary may reinsure private mortgage insurance on loans originated, purchased, or serviced by the bank, its subsidiaries, or its affiliates. Insurance sales activities should be conducted in accordance with the operational standards and customer safeguards described in OCC issuances. (National banks should see the “[Insurance Activities](#)” booklet of the *Comptroller’s Handbook* and FSAs should see [section 720, “Insurance,”](#) of the *OTS Examination*

*Handbook*. National banks and FSAs should also see the “[Retail Nondeposit Investment Products](#)” booklet of the *Comptroller’s Handbook* and 12 CFR 14.)

FSAs and their operating subsidiaries may sell credit-related insurance on an agency basis without geographic restriction. FSAs may underwrite credit insurance through operating subsidiaries, if such insurance is issued in connection with loans made by the FSAs or their subsidiaries. FSAs may conduct such activities through service corporations. FSAs may sell title insurance on an agency basis, make pass-through investments in title insurance agencies, and engage in title insurance brokerage or agency through service corporations. FSAs may reinsure credit insurance through operating subsidiaries and through service corporations. FSA service corporations may, with prior OCC approval, engage in mortgage reinsurance activities. Also, FSA service corporations may, with prior OCC approval, perform insurance brokerage or agency for liability, casualty, automobile, life, health, accident, or title insurance.

If an application addressed by this booklet relates to the initial affiliation of a bank with a company engaged in insurance activities (including a broker dealer selling annuities considered insurance products under state law), the bank must describe the type of insurance activity in which the company is engaged and has present plans to conduct. The bank must list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state in which the company holds a resident license or charter, as applicable.

## Hart–Scott–Rodino Antitrust Improvements Act of 1976

Based on interpretations of the Federal Trade Commission (FTC) and U.S. Department of Justice (DOJ), acquisition transactions, including those of certain subsidiaries, may be subject to notification and waiting-period requirements under the Hart–Scott–Rodino Antitrust Improvements Act (HSR) if the transactions exceed certain threshold tests. These transactions include the acquisition of financial subsidiaries, whether on a stand-alone basis or as part of a Bank Merger Act (BMA) application. Transactions involving operating subsidiary, service corporation, or bank service company acquisitions that are part of a BMA application are exempt from the HSR provided that the entities acquired are already held by the target bank. An acquisition of an operating subsidiary, service corporation, or bank service company triggering the threshold tests of the HSR is subject to the HSR unless it is exempt under any of the relevant statutes specified in the HSR.

When acquiring a subsidiary, the bank must determine the HSR’s applicability to the proposed transaction and, if required, submit a notification to the FTC and the DOJ at least 30 days before the planned consummation date. The HSR authorizes the assessment of civil money penalties for failure to comply with its provisions.

## Conditions

The OCC may conditionally approve an application or certain notices after reviewing the filing and considering the relevant factors, and impose conditions for the activities of

subsidiaries or entities in which an investment is made. These conditions are considered “conditions imposed in writing” within the meaning of 12 USC 1818. The OCC may impose conditions to protect the safety and soundness of the bank, prevent conflicts of interest, provide customer protection, or provide for other supervisory or policy considerations.

## Operating Subsidiaries—National Bank and FSA

OCC regulations state that banks may invest in qualifying operating subsidiaries. Qualifying operating subsidiaries include a corporation, LLC, limited partnership, or similar entity if all of the following apply:

- The bank has the ability to control the management and operations of the operating subsidiary.
- No other party exercises effective operating control or has the ability to influence the subsidiary’s operations to an extent equal to or greater than the bank.
- The bank owns and controls more than 50 percent of the voting interest of the operating subsidiary (or the parent bank otherwise controls the operating subsidiary, and no other party controls a percentage of the voting interest of the operating subsidiary greater than the bank’s interest).
- The operating subsidiary is consolidated with the bank under GAAP.

An operating subsidiary may only conduct activities that the bank has the authority to engage in directly.

## Decision Criteria

In considering whether to approve a bank’s investment in an operating subsidiary, the OCC considers whether

- the operating subsidiary’s proposed activity is legally permissible for the parent bank.
- the bank has the ability to control the management and operations of the operating subsidiary, and no other person or entity has the ability to control the management or operations.
- the activity of the operating subsidiary is consistent with safe and sound banking practices and does not endanger the safety and soundness of the parent.
- the bank’s performance of the activity through the operating subsidiary is not in contravention of OCC policy.

The OCC’s approval expires if the bank has not established or acquired the operating subsidiary, or commenced the new activity in an existing operating subsidiary, within 12 months after the date of approval, unless the OCC shortens or extends the time period.

## Consolidated Financial Statements

Consolidated financial statements combine the assets, liabilities, revenues, and expenses of the operating subsidiary with those of the reporting bank. Banks should account for ownership interests in accordance with GAAP. National banks may refer to the “Accounting” section in the “[Related Organizations](#)” booklet of the *Comptroller’s Handbook* and FSAs may refer to section 730, “[Related Organizations](#),” of the *OTS Examination Handbook* for more information.

Generally, the bank combines pertinent financial data of the parent bank and its operating subsidiaries to conform to applicable statutory limitations, unless otherwise provided by statute or regulation. For example, the combined exposure of the bank and all of its operating subsidiaries to a single borrower may not exceed the bank’s lending limit. As noted, exceptions apply and banks should review the applicable statutes or regulations regarding when and if consolidated financial statements are required.

## Applicability of Law

All laws and regulations apply to bank operating subsidiaries just as they apply to the parent bank, unless otherwise specifically provided for by federal statute (including 12 USC 25b and 1465 with respect to the application of state law), regulation, or published OCC policy.

## Grandfathered Operating Subsidiaries

Notwithstanding the requirements for a qualifying operating subsidiary under 12 CFR 5.34(e)(2) and 5.38(e)(2), and unless otherwise notified by the OCC with respect to a particular operating subsidiary, an entity that a bank lawfully acquired or established as an operating subsidiary before April 24, 2008 (for national banks) or May 18, 2015 (for FSAs), may continue to operate as an operating subsidiary under 12 CFR 5.34 and 5.38, respectively, if the bank and the operating subsidiary were, and continue to be, conducting authorized activities in compliance with the standards and requirements applicable when the bank established or acquired the operating subsidiary.

## Operating Subsidiaries—National Bank

### Application

Except as described in the “After-the-Fact Notice” and “No Application or Notice Required” sections on the following pages, a national bank must first submit an application to, and receive prior approval from, the OCC to establish or acquire an operating subsidiary, or to perform a new activity in an existing operating subsidiary.<sup>4</sup> The OCC may require the applicant to submit a legal analysis if the proposal is novel or unusually complex, or if it raises substantial unresolved legal issues. In such cases, the OCC encourages applicants to

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<sup>4</sup> See 12 CFR 5.34.

arrange a pre-filing meeting with the appropriate Director for District Licensing. Additionally, any national bank subject to supervisory concerns should provide financial information to support the proposed transaction (for example, capital or strategic plan, cost projections, business plan, and pro forma financial projections).

When filing an application, the national bank should provide the information included on the [Operating Subsidiary Application](#) form.

## After-The-Fact Notice

A national bank meeting certain criteria may file an after-the-fact notice for specific activities listed in the “activities eligible for notice” section of 12 CFR 5.34(e)(5)(v). The after-the-fact notice category contains commonly accepted banking-related activities that the OCC has approved previously for operating subsidiaries. Under this process, a national bank files a written notice with the OCC before, or within 10 days after, establishing or acquiring the operating subsidiary or commencing a new activity in an existing operating subsidiary, and need not seek prior OCC approval. The OCC’s published guidelines for operating subsidiaries (see [appendix A](#)) list those activities eligible for the after-the-fact notice and describe the requirements and limitations for activities eligible for the notice process.

To qualify for the notice process, the national bank must

- be “well capitalized” and “well managed” (see [Glossary](#)),
- be establishing, acquiring, or commencing a new activity in an operating subsidiary that is a corporation, LLC, or limited partnership,
- have control or effective operating control of the entity,
- hold more than 50 percent of the voting, or equivalent, interests in the subsidiary, and
- be required under GAAP to consolidate its financial statements with those of the operating subsidiary.

Any national bank filing an after-the-fact notice under this section is deemed to have represented that the operating subsidiary will conduct the activity in a manner consistent with OCC guidance and under the same terms and conditions as would be applicable if the activity were conducted directly by the national bank.

When filing an after-the-fact notice, the national bank should provide the information included on the [Operating Subsidiary—National Bank After-the-Fact Notice](#) form.

## No Application or Notice Required

The OCC does not require an application or notice for a national bank to acquire or establish an operating subsidiary, provided that the national bank is “well capitalized” and “well managed” (see [Glossary](#)) and all of the following requirements are met:<sup>5</sup>

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<sup>5</sup> 12 CFR 5.34(e)(5)(vi).

- Activities of the new operating subsidiary are limited to those activities previously reported by the national bank in connection with the prior establishment or acquisition of an operating subsidiary.
- Activities in which the new operating subsidiary will engage continue to be legally permissible.
- Activities of the new operating subsidiary will be conducted in accordance with any conditions imposed by the OCC in approving the conduct of these activities for any prior operating subsidiary of the national bank and according to the OCC's published guidelines for operating subsidiaries (see [appendix A](#)).
- The operating subsidiary is a corporation, LLC, or limited partnership.
- The bank has the ability to control the management and operations of the subsidiary, and no other person or entity exercises effective operating control over the subsidiary or has the ability to influence the subsidiary's operations to an extent equal to or greater than that of the bank.
- The parent bank owns and controls more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary, or the parent bank otherwise controls the operating subsidiary and no party controls a percentage of the voting (or similar) interest of the operating subsidiary greater than the bank's interest.
- The operating subsidiary is consolidated with the national bank under GAAP.

## Partnership or Joint Venture

A national bank's operating subsidiary may be a general or limited partner in a partnership or a member of a joint venture. If a national bank proposes to enter such an arrangement through an operating subsidiary, with the operating subsidiary being either a limited or a general partner or member, the national bank must file with the OCC and receive approval for the operating subsidiary's activity. The operating subsidiary must be operated appropriately to minimize the risk of liability passing through the operating subsidiary to the national bank.

Whenever an operating subsidiary joins a partnership or joint venture, the operating subsidiary should control the conduct of the business, possess a veto power, or be able to withdraw from the transaction to ensure that the partnership or joint venture will perform only activities that are authorized for the bank.

## Fiduciary Powers

If an operating subsidiary of a national bank proposes to accept traditional fiduciary appointments for which fiduciary powers are needed, such as acting as a trustee or an executor, then both the national bank and the operating subsidiary must have fiduciary powers. Operating subsidiaries that engage in fiduciary activities generally are either a national bank limited to the activities of a trust company or a state trust company. If a limited purpose national bank is proposed, the OCC processes the charter application together with the operating subsidiary application.

If an operating subsidiary of a national bank proposes to exercise investment discretion on behalf of its customers or to provide investment advice for a fee, the operating subsidiary need not have fiduciary powers if the operating subsidiary

- is registered under the Investment Advisers Act of 1940 (Advisers Act), or
- is registered or has filed a notice under the applicable provisions of the Securities Exchange Act of 1934 as a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer; and the operating subsidiary's performance of investment advisory services is solely incidental to the conduct of its business as broker or dealer, and no special compensation is made to the operating subsidiary for those advisory services. To determine whether the operating subsidiary's performance of investment advisory services is solely incidental to the conduct of its business as a broker or dealer, and no special compensation is made to the operating subsidiary for those advisory services, the OCC considers the commission structure and other specific facts. National banks should refer to OCC [Interpretive Letter No. 769](#) (January 28, 1997).

## Electronic Activities

A national bank or its operating subsidiary may conduct certain activities using electronic technologies, provided the activities are part of, or incidental to, the business of banking.

To determine if an electronic activity is part of the business of banking, the OCC considers whether the activity

- is the functional equivalent of, or a logical outgrowth of, a recognized banking activity.
- strengthens the national bank by benefiting its customers or its business.
- involves the types of risks similar to those already assumed by national banks.
- is authorized for state-chartered banks or savings associations.

To determine if an electronic activity is incidental to the business of banking, the OCC considers whether the activity

- facilitates the production or delivery of a national bank's products or services.
- enhances the national bank's ability to sell or market its products or services.
- improves the effectiveness or efficiency of the national bank's operations in light of risks presented, innovations, strategies, techniques, and new technologies for producing and delivering financial products and services.
- enables the national bank to use capacity acquired for its banking operations or otherwise avoid economic waste or loss.

The weight accorded each of the factors considered in determining if an electronic activity is part of, or incidental to, the business of banking depends on the facts and circumstances of each case.

The national bank, or its operating subsidiary, should conduct these electronic activities in a manner consistent with safety and soundness standards and OCC guidance. In addition, the OCC may require the national bank or its operating subsidiary to notify all potential technology-related vendors in writing of the OCC's examination and regulatory authority. The OCC also may require that all final technology-related vendor contracts stipulate that the performance of services provided by the vendors to the operating subsidiary is subject to the OCC's examination and regulatory authority.

## Locations

A national bank proposing to establish, acquire, or operate an operating subsidiary at a location at which the operating subsidiary will perform branching functions may need approval for a branch office at that location, if it has not already been authorized as a branch. A separate application is not necessary, but a request for branch authorization should accompany the operating subsidiary application. There are no geographical restrictions for operating subsidiaries performing permissible activities other than core branching functions. (See the "[Branches and Relocations](#)" booklet of the *Comptroller's Licensing Manual* for more information on branching functions.)

## Annual Reporting Requirement

The OCC requires that a national bank file an annual report to identify its operating subsidiaries that do business directly with consumers in the United States and are not functionally regulated as defined in section 5(c)(5) of the Bank Holding Company Act of 1956 (BHCA), as amended (12 USC 1844(c)(5)). An operating subsidiary does business directly with consumers if it provides products or services to individuals to be used primarily for personal, family, or household purposes.

The national bank must submit an annual report on its operating subsidiaries to the OCC on or before January 31 each year, containing information as of December 31 for the prior year. This report may be filed electronically via the [National BankNet](#) secure mailbox or by attaching the report to an e-mail. For specific guidance on filing this report, refer to OCC [Bulletin 2004-55](#), "Annual Report on Operating Subsidiaries: Final Rule."

## Operating Subsidiaries—FSA

### Application

An FSA generally must first submit an application to the OCC to establish or acquire an operating subsidiary, or to perform a new activity in an existing operating subsidiary.<sup>6</sup> The OCC may require the applicant to submit a legal analysis if the proposal is novel or unusually complex, or if it raises substantial unresolved legal issues. In such cases, the OCC encourages applicants to arrange a prefiling meeting with the appropriate Director for District

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<sup>6</sup> See 12 CFR 5.38.

Licensing. Additionally, any FSA subject to supervisory concerns should provide financial information to support the proposed transaction (for example, capital or strategic plan, cost projections, business plan and pro forma financial projections).

When filing an application, the FSA should provide the information included on the [Operating Subsidiary Application](#) form.

## Expedited Review

An application is eligible for the expedited review process if all the following requirements are met:

- The FSA owning the operating subsidiary is “well capitalized” and “well managed” (see [Glossary](#)).
- The proposed or existing operating subsidiary is a corporation, LLC, or limited partnership.
- The FSA has the ability to control the management and operations of the subsidiary by holding voting interests sufficient to control the subsidiary’s board and to select and terminate senior management, and no other person or entity has the ability to control the management or operations of the subsidiary.
- The FSA holds more than 50 percent of the voting or equivalent interests in the operating subsidiary, and in the case of an LLC or a limited partnership, the FSA is the sole general partner or sole managing member, provided that no other partners or members have the ability to bind the partnership or LLC.
- The FSA is required under GAAP to consolidate its financial statements with those of the operating subsidiary.
- The proposed activity is listed in the “activities eligible for expedited review section” of 12 CFR 5.38(e)(5)(v).

Under this process, an FSA’s application to establish or acquire the operating subsidiary, or commence a new activity in an existing operating subsidiary, that meets the requirements listed above is deemed approved as of the 30th day after the filing is received by the OCC, unless the OCC notifies the FSA that the filing is not eligible for expedited review or extends the review period under 12 CFR 5.13(a)(2). [Appendix C](#) discusses in more detail those operating subsidiary activities eligible for the expedited review process. Any FSA filing for expedited review under this section is deemed to have represented that the operating subsidiary will conduct the activity in a manner consistent with OCC guidance and under the same terms and conditions as would be applicable if the activity were conducted directly by the FSA.

## Standard Review

If an application does not qualify for expedited review, the filing is processed under the standard review process and the application must receive prior written approval from the OCC to establish or acquire an operating subsidiary, or to perform a new activity in an existing operating subsidiary.

## Exceptions

The regulation requires an FSA to file an operating subsidiary application only when such a filing is required by 12 USC 1828(m). The statute provides that the filing requirement does not apply to any federal savings bank that was chartered before October 15, 1982, as a savings bank under state law, or a savings association that acquired its principal assets from an institution that was chartered before October 15, 1982, under state law.

In addition, the filing requirement under 12 USC 1828(m) does not apply when an FSA proposes to establish or acquire an insured depository institution.

## Fiduciary Powers

If an operating subsidiary of an FSA proposes to accept traditional fiduciary appointments for which fiduciary powers are needed, such as acting as a trustee or an executor, then both the FSA and the operating subsidiary must have fiduciary powers. Operating subsidiaries that engage in fiduciary activities generally are either a national bank limited to the activities of a trust company, or a state trust company. If a limited purpose national bank is proposed, the OCC processes the charter application together with the operating subsidiary application.

If an operating subsidiary of an FSA proposes to exercise investment discretion on behalf of its customers or to provide investment advice for a fee, but not accept traditional fiduciary appointments, the operating subsidiary is not required to have fiduciary powers, but the FSA must have OCC approval to exercise fiduciary powers, unless the operating subsidiary is registered under the Advisers Act.

## Service Corporations—FSA

Section 5(c)(4)(B) of the Home Owners' Loan Act (HOLA) authorizes FSAs to invest in service corporations. There is no similar authority for national banks. Service corporations may engage in any of the permissible activities listed in 12 CFR 5.59(f). In addition, an FSA may request OCC approval for a service corporation to engage in any other activity reasonably related to the activities of financial institutions. The OCC may require the applicant to submit a legal analysis if the proposal is novel or unusually complex, or if the proposal raises substantial unresolved legal issues. In such cases, the OCC encourages the applicant to arrange a pre-filing meeting with the appropriate Director for District Licensing. Additionally, any FSA subject to supervisory concerns should provide financial information to support the proposed transaction (for example, capital or strategic plan, cost projections, business plan and pro forma financial projections).

A service corporation may be organized as a corporation, LLC, limited partnership, or any other form that provides the same protections as the corporate form of organization. While an FSA's investment in service corporations is subject to certain limits, the assets of an FSA's service corporation are not subject to the investment limitations applicable under section 5(c) of the HOLA. An FSA is not required to have any minimum percentage ownership interest or have control of a service corporation in order to designate an entity as a service corporation.

Generally, an FSA may invest up to 3 percent of its assets in the capital stock, obligations, and other securities of service corporations. Any investment that would cause an FSA's investment in service corporations, in the aggregate, to exceed 2 percent of assets, or any investment made while the FSA's investments in service corporations exceeds 2 percent of assets, must serve primarily community, inner city, or community and economic development or public welfare purposes consistent with 12 CFR 24.6. An FSA must designate the investments serving those purposes.

In accordance with 12 USC 1467a(m)(5) (the Qualified Thrift Lender Test), an FSA may decide whether to consolidate the assets of a particular service corporation for purposes of calculating qualified thrift investments. If a service corporation's assets are not consolidated with the assets of the FSA for that purpose, the FSA's investment in the service corporation is considered in calculating the FSA's qualified thrift investments.

In considering whether to approve an FSA's investment in a service corporation, the OCC considers whether

- the service corporation's proposed activity is legally permissible.
- the service corporation's proposed activity is consistent with safe and sound banking practices and does not endanger the safety and soundness of the parent FSA.
- the FSA's aggregate outstanding investments in service corporations are within the limits set forth in 12 CFR 5.59(g).
- investments in the capital stock, obligations, or other securities of a first-tier service corporation are available only to savings associations located in the same state in which the FSA has its home office; these restrictions do not apply to lower-tier service corporations.
- the FSA's performance of the activity through the service corporation is not in contravention of OCC policy.

## Failure to Comply

If a service corporation fails to comply with any of the requirements of 12 CFR 5.59, the FSA must notify the appropriate Director for District Licensing. If the FSA is unable to comply with the requirements within 90 days of failing to meet such requirements, it must dispose of its investment in the service corporation unless the OCC otherwise advises.

## Application

An FSA generally must first submit an application to establish or acquire a service corporation, or to perform a new activity in an existing service corporation.<sup>7</sup> When filing an application, the FSA should provide the information included in the [Service Corporation Application](#) form.

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<sup>7</sup> See 12 CFR 5.59.

## Expedited Review

To qualify for the expedited review process, the FSA that is filing the service corporation application must be “well capitalized” and “well managed” (see [Glossary](#)) and the service corporation must engage only in one or more of the activities listed in 12 CFR 5.59(f). Under this process, an FSA’s application to establish or acquire a service corporation, or commence a new activity in an existing service corporation, that meets the requirements is deemed approved as of the 30th day after the filing is received by the OCC, unless the OCC notifies the FSA that the filing is not eligible for expedited review or extends the review period under 12 CFR 5.13(a)(2). [Appendix D](#) discusses in more detail those service corporation activities eligible for the expedited review process. Any FSA filing for expedited review under this section is deemed to have represented that the service corporation will conduct the activity in a manner consistent with OCC guidance and under the same terms and conditions as would be applicable if the activity were conducted directly by the FSA.

## Standard Review

If an application does not qualify for expedited review, the filing is processed under the standard review process and the application must receive prior written approval from the OCC to establish or acquire a service corporation, or to perform a new activity in an existing service corporation.

## Exceptions

The regulation requires an FSA to file a service corporation application only when such a filing is required by 12 USC 1828(m). The statute provides that the filing requirement does not apply to any federal savings bank that was chartered prior to October 15, 1982, as a savings bank under state law, or a savings association that acquired its principal assets from an institution that was chartered prior to October 15, 1982, under state law.

In addition, the filing requirement under 12 USC 1828(m) does not apply when an FSA proposes to establish or acquire an insured depository institution.

## Redesignation—FSA

An FSA that proposes to redesignate a service corporation as an operating subsidiary, or an operating subsidiary as a service corporation, must submit a notification to the OCC at least 30 days before the redesignation date.<sup>8</sup> The FSA should file the [Subsidiary Redesignation Notice](#) form.

The OCC may require an application if the redesignation presents policy, supervisory, or legal issues. If the OCC requires an application, the OCC’s standard operating subsidiary or service corporation application review process applies.

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<sup>8</sup> 12 CFR 5.59(h)(4).

## Bank Service Company—National Bank and FSA

A bank service company is a corporation whose capital stock is owned by one or more insured depository institutions or by an LLC whose members are insured depository institutions. The Bank Service Company Act authorizes banks and savings associations to invest in bank service companies. If the bank service company has both national and state-chartered insured depository institution shareholders or members, the activities conducted must be permissible for each investing institution. When two or more banks wish to invest in the same bank service company, one filing on behalf of all of the individual investors may be made as long as the other banks are identified. If there is more than one investing bank, the bank with the largest dollar amount invested is deemed to be the principal investor (see [Glossary](#)). A bank may not invest more than 10 percent of its capital and surplus in any bank service company, and the bank's total investment in all bank service companies may not exceed 5 percent of the bank's total assets.

A bank intending to make an investment in a bank service company, or to perform a new activity in a bank service company, generally must submit a notice to, and receive approval from, the OCC. A bank that intends to invest in a bank service company that provides only certain clerical or data-processing services only for depository institutions, however, is not required to provide notice to the OCC.<sup>9</sup> The OCC does not require a filing if a bank invests in the capital stock or equity of a bank service company that provides any service (other than deposit taking) at any geographical location that the Federal Reserve Board has determined by regulation to be permissible for a bank holding company. In such cases, however, the bank must obtain the approval of the Federal Reserve Board.

### Filing Process

A bank that files a notice seeking OCC approval to make an investment in a bank service company, or to perform a new activity in a bank service company, should provide the information included on the [Bank Service Company Notice](#) form.

#### Expedited Review

To qualify for the expedited review process, a bank making an investment must be “well capitalized” and “well managed” (see [Glossary](#)) and the bank service company must engage only in activities that are permissible for the bank service company. The permissible activities are contained in 12 USC 1864 and the implementing regulations, 12 CFR 5.34(e)(5)(v) for national banks and 12 CFR 5.38(e)(5)(v) for FSAs.

Under this process, a notice that meets the requirements is deemed approved as of the 30th day after the filing is received by the OCC, unless the OCC notifies the bank that the filing is not eligible for expedited review or extends the review period under 12 CFR 5.13(a)(2). Any

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<sup>9</sup> Notwithstanding this exception from the bank service company filing requirement, an FSA that proposes to own 25 percent or more of the stock of a such bank service company must file a notice with the OCC, pursuant to 12 USC 1828(m).

bank making an investment under the expedited review process is deemed to have agreed that the bank service company will conduct the activity in a manner consistent with OCC guidance.

### **Standard Review**

If a notice does not qualify for expedited review, the filing will be processed under the standard review process and the OCC will make a final decision regarding the proposed investment within 60 days of the date it receives the filing. If the OCC fails to make a decision within that time, the investment is deemed to be approved, unless the OCC notifies the bank of significant supervisory or compliance concerns or legal or policy issues.

### **No Notice Required**

No filing is required for a bank service company that provides the following services only for depository institutions:<sup>10</sup>

- Check and deposit posting and sorting.
- Computation and posting of interest and other credits and charges.
- Preparation and mailing of checks, statements, notices, and similar items.
- Any other clerical, bookkeeping, accounting, statistical, or similar function.

## **Decision Criteria**

In considering whether to grant approval for the investment in a bank service company, the OCC considers whether

- the proposed activity is legally permissible.
- the activity is consistent with safe and sound banking practices.
- the bank's performance of the activity is not in contravention of OCC policy.

The OCC may, at any time, limit a bank's investment in a bank service company or may limit or refuse to permit any activities in any bank service company for which a bank is the principal investor for supervisory, legal, or safety and soundness reasons.

## **Financial Subsidiaries—National Bank**

A national bank may, directly or indirectly, acquire control of or hold an equity interest in a financial subsidiary, or commence a new activity in an existing financial subsidiary upon notice to the OCC. As authorized by the GLBA, a financial subsidiary is a corporation, LLC, or similar entity, controlled by one or more insured depository institutions. A financial subsidiary may conduct activities that are permissible for national banks in addition to those that are "financial in nature" or incidental to financial activities. Financial subsidiaries are national bank subsidiaries that are not operating subsidiaries (that is, operating subsidiaries

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<sup>10</sup> FSAs may be required to file under 12 USC 1828(m). Refer to 12 CFR 5.58(f)(2).

engage only in activities the national bank may engage in directly under the same terms and conditions applicable to national banks) or subsidiaries that national banks otherwise are specifically authorized to control by the express terms of a federal statute. For a national bank to own an interest in a financial subsidiary, the bank and the financial subsidiary must meet certain requirements and comply with specified safeguards. There is no similar authority for FSAs.

## Qualifications

A national bank may control or hold an interest in a financial subsidiary only if

- the national bank and each depository institution affiliate of the national bank, which includes any uninsured national trust bank, are “well capitalized” and “well managed” (see [Glossary](#)).
- the national bank and each insured depository institution affiliate received a rating of “satisfactory” or better at its most recent Community Reinvestment Act (CRA) examination. A national bank may not apply to commence any additional expanded financial activity, or to directly or indirectly acquire control of a company engaged in such activity, if it or any of its insured depository institution affiliates received a less than “satisfactory” CRA rating on its most recent CRA examination before the national bank would file its notice. National banks that have not yet received a CRA rating, or special purpose national banks that are not CRA rated, may submit a notice if they meet all of the other qualifications and safeguards.
- the aggregate consolidated total assets of all financial subsidiaries of the national bank do not exceed the lesser of 45 percent of the consolidated total assets of the parent bank or \$50 billion (or such greater amount as is determined according to an indexing mechanism jointly established by regulation by the Secretary of the Treasury and the Federal Reserve Board).
- the national bank has at least one issue of outstanding eligible debt (see [Glossary](#)) that meets such standards of creditworthiness or other criteria as the Secretary of the Treasury and the Federal Reserve Board may jointly establish if the national bank is one of the 100 largest insured banks. The eligible debt requirement does not apply if the financial subsidiary is engaged solely in activities in an agency capacity.

## Activities

A financial subsidiary may engage in the following:

- Lending, exchanging, transferring, investing for others, or safeguarding money or securities.
- Engaging as agent or broker in any state to insure, guarantee, or indemnify against loss, harm, damage, illness, disability, death, or defects in title, or to provide annuities as agent or broker.

- Providing financial, investment, or economic advisory services, including advising an investment company as defined in section 3 of the Investment Company Act, 15 USC 80a-3.
- Issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly.
- Underwriting, dealing in, or making a market in securities.
- Engaging in any activity the Federal Reserve Board has determined, by order or regulation in effect on November 12, 1999, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto (subject to the same terms and conditions contained in the order or regulation, unless the order or regulation is modified by the Federal Reserve Board).
- Engaging in the United States in any activity that a bank holding company may engage in outside the United States and that the Federal Reserve Board has determined, under regulations prescribed or interpretations issued pursuant to the BHCA as in effect on November 11, 1999, to be usual for the transaction of banking or other financial operations abroad.
- Activities that the Secretary of the Treasury, in consultation with the Federal Reserve Board, determines to be financial in nature or incidental to a financial activity.
- Activities that may be conducted by an operating subsidiary pursuant to 12 CFR 5.34.

## Exceptions

There are certain activities a financial subsidiary cannot engage in as principal:<sup>11</sup>

- Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability or death, or defects in title, except to the extent permitted under the GLBA (certain types of insurance underwriting and reinsurance the OCC permitted before January 1, 1999, are grandfathered), or providing or issuing annuities the income of which is subject to tax treatment under section 72 of the Internal Revenue Code.
- Real estate development or real estate investment, unless otherwise expressly authorized by law.
- Activities authorized for bank holding companies by section 4(k)(4)(H) or (I) of the BHCA (certain merchant banking investments), 12 USC 1843(k)(4)(H) or (I).

## Safeguards

A national bank is required to meet certain safety and soundness requirements when engaging in activities through a financial subsidiary. Specifically, a national bank establishing a financial subsidiary must do the following:<sup>12</sup>

- For regulatory capital purposes, deduct the aggregate amount of its outstanding equity investment, including retained earnings, in its financial subsidiaries from its total assets

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<sup>11</sup> 12 CFR 5.39(f).

<sup>12</sup> 12 CFR 5.39(h).

and tangible equity and deduct such investment from its regulatory capital as provided by 12 CFR 3.22(a)(7).

- Not consolidate its assets and liabilities with those of its financial subsidiary or subsidiaries.
- Ensure that any published financial statements of the national bank, in addition to providing information prepared in accordance with GAAP, separately present financial information for the national bank in a manner reflecting the capital adjustments previously described.
- Have reasonable policies and procedures to preserve the separate corporate identity and limited liability of the national bank and its financial subsidiaries.
- Have procedures for identifying and managing operational and financial risk within the national bank and the financial subsidiary that adequately protect the national bank from those risks.
- Except for certain insurance subsidiaries, apply sections 23A and 23B of the Federal Reserve Act, as implemented by Regulation W (12 CFR 223), to transactions with a financial subsidiary in the following manner:
  - A financial subsidiary is deemed to be an affiliate and is not deemed to be a subsidiary of the national bank.
  - Any purchase of, or investment in, the securities of a financial subsidiary of a national bank by an affiliate of the national bank is considered to be a purchase of, or investment in, such securities by the national bank.
  - Any extension of credit by an affiliate of a national bank to a financial subsidiary of the national bank is considered an extension of credit by the national bank to the financial subsidiary if the extension of credit is treated as capital of the financial subsidiary under applicable law.
  - Any other extension of credit by an affiliate of the national bank to its financial subsidiary is considered an extension of credit by the national bank to the financial subsidiary if the Federal Reserve Board determines that such treatment is necessary or appropriate to prevent evasions of the Federal Reserve Act or the GLBA.
- Deem the financial subsidiary a subsidiary of a bank holding company and not a subsidiary of the national bank for purposes of the anti-tying prohibitions.<sup>13</sup>

## Failure to Continue to Meet Qualifications

The national bank and its affiliated depository institutions must continue to satisfy the qualification requirements and safeguards following the national bank's acquisition of, control of, or acquisition of an interest in a financial subsidiary. A national bank failing to continue to satisfy these requirements is subject to the following procedures and requirements:

- The OCC must give written notice to the national bank (and, in the case of an affiliated depository institution, to that depository institution's appropriate federal banking agency) outlining how or why the bank or its affiliated depository institution does not continue to

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<sup>13</sup> 12 USC 1972 and 12 CFR 225.7

meet the qualification and safeguard requirements. The national bank is deemed to have received the notice three business days after the OCC mails the letter.

- The national bank must execute an agreement, no later than 45 days after the receipt of the notice, with the OCC to comply with the qualification and safeguard requirements, unless the OCC grants the national bank additional time.
- The OCC may impose limitations on the conduct or activities of the national bank or any subsidiary of the national bank as the OCC determines appropriate under the circumstances.
- The OCC may require the national bank to divest control of a financial subsidiary if the national bank does not correct the conditions within 180 days after receipt of the letter.

A national bank no longer meeting the eligible debt qualification, if applicable, may not directly or through a subsidiary purchase or acquire any additional equity capital of any financial subsidiary until the bank again meets the qualification.

## Filing Process

The GLBA requires OCC approval of financial subsidiaries to be based only on specific statutory factors. The OCC considers financial subsidiary notices to be approved upon receipt of the national bank's submission of a notice with the appropriate certifications that it meets the required criteria. There are two options for filing a notice to acquire control of, or hold an interest in, a financial subsidiary, or to commence a new activity in an existing financial subsidiary.

### Certification With Subsequent Notice

The national bank should provide the information included on the [Financial Subsidiary Certification](#) form. After completing the formal certification, whenever the national bank seeks OCC approval to acquire or hold an interest in any financial subsidiary, the national bank must file a written [Financial Subsidiary Notice](#) with the appropriate Director for District Licensing when the financial subsidiary commences operations.

### Combined Certification and Notice

As a second option, a national bank may provide the information included on the combined [Financial Subsidiary Certification and Notice](#) form with the appropriate Director for District Licensing at least five business days before acquiring control of, or an interest in, a financial subsidiary, or before starting a new activity in an existing financial subsidiary.

## Equity Investments—National Bank

Pursuant to 12 USC 24(Seventh) and other statutes, national banks are permitted to make various types of equity investments. The OCC may review such equity investments on a case-by-case basis. Equity investments must comply with 12 CFR 44 (the Volcker rule), as applicable.

## Other Statutory Subsidiaries

A national bank may make a controlling or non-controlling equity investment in the following statutory subsidiaries without prior approval of the OCC:

- An agricultural credit corporation. A national bank may purchase stock of a corporation organized to make loans to farmers and ranchers for agricultural purposes for its own account. Such equity investments in agricultural credit corporations are authorized under 12 USC 24(Seventh) and are limited to 20 percent of the unimpaired capital and surplus of the bank, unless it owns at least 80 percent of the stock of the agricultural credit corporation. This requires an after-the-fact notice.
- A bankers' bank. A national bank may invest up to 10 percent of its capital and surplus in an insured bankers' bank or in the holding company of such a bank, provided that it does not own more than 5 percent of any class of voting securities.
- A safe deposit corporation. Investment in a safe deposit corporation organized under state law may not exceed 15 percent of the national bank's unimpaired, paid-in capital and 15 percent of its unimpaired surplus.
- A corporation authorized to be created by Title IX of the Housing and Urban Development Act of 1968, 42 USC 3931 et seq.
- A partnership, limited partnership, or joint venture formed pursuant to section 907(a) or 907(c) of the Housing and Urban Development Act of 1968, 42 USC 3937(a) or 3937(c).
- A state housing corporation. A national bank may make an equity investment in any state housing corporation incorporated in the state in which the bank is located, provided that its investments do not exceed 5 percent of its unimpaired, paid-in capital stock plus 5 percent of its unimpaired surplus fund.
- A small business investment company (SBIC). A national bank may purchase SBIC stock provided that the aggregate amount of such investments does not exceed 5 percent of the bank's capital and surplus.
- A community development corporation or other community and economic development entity. A national bank may make investments directly or indirectly, each of which is designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families, or other areas targeted by a government entity for redevelopment, or if the investment would receive consideration under 12 CFR 25.23 (the CRA regulation) as a "qualified investment." Such equity and debt investments are authorized under 12 USC 24(Eleventh) and the implementing regulation, 12 CFR 24. A bank may not make an investment that would expose the bank to unlimited liability. In no case may a bank's aggregate outstanding public welfare investments exceed 15 percent of its capital and surplus. Generally, an eligible bank, with aggregate public welfare investments less than 5 percent of its capital and surplus, may provide an after-the-fact notice to the Deputy Comptroller for Community Affairs. All other bank investments require the OCC's prior written approval. See the OCC's [Public Welfare Investments Web Resource Directory](#), and contact the Community Affairs Division at (202) 649-6420 or [CommunityAffairs@occ.treas.gov](mailto:CommunityAffairs@occ.treas.gov) for more information.
- A bank premises corporation. A national bank may invest in its bank premises or in a corporation holding the national bank's premises. Such equity investments in bank premises corporations have been characterized as statutory subsidiaries and not operating

subsidiaries. These equity investments do not require prior approval unless the investment exceeds the limitation for investing in bank premises. See the “[Bank Premises and Equipment](#)” booklet of the *Comptroller’s Handbook*.

- A rural business investment company (RBIC). A national bank may invest in an RBIC provided that the investments do not exceed 5 percent of the bank’s capital and surplus, pursuant to 7 USC 2009cc-9.
- Any other equity investment that may be authorized by statute after February 12, 1990, if not covered by other applicable OCC regulation. This requires an after-the-fact notice.

## Filing Process

Generally, a national bank must provide a written notice to the appropriate Director for District Licensing within 10 days of making an equity investment in a statutory subsidiary. The written notice must include a description and the amount of the national bank’s investment. The OCC reserves the right to require additional information as necessary.

## Non-Controlling Equity Investments—National Bank

National banks also may make non-controlling equity investments directly or through an operating subsidiary in certain types of entities when the investment is part of, or incidental to, the business of banking. Investments of this type are permitted under a national bank’s powers under 12 USC 24(Seventh) and 12 CFR 5.36(e). Refer to [appendix B](#) of this booklet for a summary of non-controlling investments approved by published OCC precedent.

A national bank may not make a non-controlling investment if it is unable to make the following representations and certifications:

- The activities of the entity or enterprise in which the investment is made are limited to activities that are part of, or incidental to, the business of banking, or are otherwise authorized for a national bank.
- The national bank is able to prevent the enterprise from engaging in activities not meeting the foregoing standard, or is able to withdraw its investment.
- The investment is convenient or useful to the national bank in carrying out its business and not a mere passive investment unrelated to the national bank’s banking business.
- The national bank’s loss exposure is limited, as a legal matter, and the bank does not have open-ended liability for the obligations of the enterprise.
- The entity in which the national bank is investing agrees to be subject to OCC supervision and examination.

## Filing Process

### After-the-Fact Notice

A qualifying national bank may submit an after-the-fact notice for the non-controlling investment. A qualifying national bank is one that is “well managed” and “well capitalized”

(see [Glossary](#)) at the time of the investment. The entities' proposed activity must be an activity listed under 12 CFR 5.34(e)(5)(v) or an activity that is substantively the same as those contained in a published OCC precedent approving a non-controlling investment, provided the activities will be conducted under the same terms and conditions as stated in the precedent.

The notice may be filed with the appropriate Director for District Licensing no later than 10 days after making the investment. The OCC considers these notices to be approved upon receipt of the national bank's submission. The national bank should submit the information included on the [After-the-Fact Notice, Other Equity Investments](#) form.

## Application

If the national bank is not "well managed" and "well capitalized" at the time of the investment or the proposed activity is not listed in 12 CFR 5.34(e)(5)(v) or published OCC precedent, the national bank must submit a non-controlling investment application and receive prior approval for the investment. The national bank should submit the information included on the [Other Equity Investments Application](#) form.

## Pass-Through Investments—FSA

Pursuant to 12 CFR 160.32, FSAs are permitted to make pass-through investments directly or through an operating subsidiary in entities that engage only in activities in which an FSA may engage, subject to the requirements and filing procedures of 12 CFR 5.58. The investment may be in a corporation, LLC, partnership, trust, or similar business entity. [Appendix E](#) lists pass-through investments that have been approved by published precedent issued by predecessor regulators of FSAs.<sup>14</sup>

An FSA may not make a pass-through investment if it is unable to make the following representations and certifications:

- The activities of the entity or enterprise in which the investment is made must be limited to activities that are permissible for an FSA.
- The FSA is able to prevent the enterprise from engaging in activities not meeting the foregoing standard or is able to withdraw its investment.
- The investment is convenient or useful to the FSA in carrying out its business and not a mere passive investment unrelated to the banking business.
- The FSA's loss exposure is limited, as a legal matter, and the FSA does not have open-ended liability for the obligations of the enterprise.
- The entity in which the FSA is investing agrees to be subject to OCC supervision and examination.

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<sup>14</sup> The predecessor regulators of FSAs were the OTS and its predecessor, the Federal Home Loan Bank Board (FHLBB).

## Filing Process

### After-the-Fact Notice

A qualifying FSA may submit an after-the-fact notice for the pass-through investment. A qualifying FSA is one that is “well managed” and “well capitalized” (see [Glossary](#)) at the time of the investment. The entity’s proposed activity must be an activity listed under 12 CFR 5.38(e)(5)(v) or an activity that is substantively the same as those contained in a published OCC precedent or former OTS nonrescinded precedent approving a pass-through investment, provided the activities will be conducted under the same terms and conditions as stated in the precedent. Refer to [appendix E](#) of this booklet for a summary of pass-through investments approved by published precedent.

The notice may be filed with the appropriate Director for District Licensing no later than 10 days after making the investment. The OCC considers these notices to be approved upon receipt of the bank’s submission. The bank should provide the information included on the [After-the-Fact Notice](#) form.

### Application

If the FSA is not “well managed” or “well capitalized” at the time of the investment, or the proposed activity is not listed in 12 CFR 5.38(e)(5)(v) or published OCC or nonrescinded OTS precedent, the FSA must submit a pass-through investment application and receive prior approval for the investment. The FSA should provide the information included on the [Pass-Through Investments Application](#) form.

### No Application or Notice Required

An FSA may make a pass-through investment without notice or application if all of the following conditions are met:

- The investment is in an investment company the portfolio of which consists exclusively of assets that the FSA may hold directly.
- The investment does not result in more than 10 percent of the FSA’s total capital being invested in one company.
- The book value of the FSA’s aggregate pass-through investments does not exceed 25 percent of its total capital after making the investment.
- The investment would not give the FSA direct or indirect control of the company.
- The FSA’s liability is limited to the amount of the investment.

## 12 USC 1828(m) Investments

With limited exceptions, 12 USC 1828(m) requires an FSA to submit an application or provide notice to the OCC before it establishes or acquires any subsidiary or engages in a new activity through an existing subsidiary. The filing requirements for operating subsidiaries and service corporations (12 CFR 5.38 and 5.59, respectively) address the

12 USC 1828(m) filing requirements in most cases. There are circumstances, however, under which an FSA may establish or acquire a subsidiary that does not meet the definition of either an operating subsidiary or a service corporation.<sup>15</sup> In such situations, the FSA must submit an application under 12 USC 1828(m) at least 30 days before making the investment and obtain prior OCC approval.<sup>16</sup>

When filing an application, the FSA should provide the information included on the [12 USC 1828\(m\) Investment Application](#) form.

## Other Equity Investments—FSA

FSAs are authorized to make additional types of investments under the HOLA. For example, section 5(c)(3)(A) of the HOLA authorizes FSAs to make certain investments related to community development.<sup>17</sup>

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<sup>15</sup> For example, under 12 CFR 5.58, an FSA may acquire a controlling interest in a pass-through investment.

<sup>16</sup> 12 CFR 5.58(f)(2).

<sup>17</sup> Refer to [OTS Opinion of the Chief Counsel \(May 10, 1995\)](#).

# Appendix A: Operating Subsidiary Guidelines— National Banks

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## Introduction

These guidelines describe activities of national banks that the OCC has determined may be performed in an operating subsidiary under the after-the-fact notice or expedited review procedures available in the OCC’s operating subsidiary regulations.<sup>18</sup> The citations given in the guidelines for each of the activities listed provide examples of OCC approvals.<sup>19</sup> Such activities must comply with 12 CFR 44 (the Volcker rule). An operating subsidiary must conduct these activities pursuant to the same authorization, terms, and conditions that apply to the conduct of such activities by its parent national bank, unless otherwise specifically provided by statute, regulation, or published OCC policy.<sup>20</sup> For example, these activities must be conducted in accordance with other applicable statutes and regulations, including, but not limited to, the federal securities laws and the Volcker rule, 12 CFR 44, unless the national bank and its operating subsidiary are otherwise exempt from the Volcker rule.<sup>21</sup> The Volcker rule generally prohibits, subject to certain exceptions, a banking entity from engaging in proprietary trading and from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a hedge fund or private equity fund.

## Operating Subsidiary Activities—National Banks [5.34(e)(5)(v)]

**(A) Holding and managing assets acquired by the parent bank, including investment assets and property acquired by the bank through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted.**

National banks and their operating subsidiaries may hold and manage assets acquired by the parent bank or the operating subsidiary, including investment assets and property acquired in satisfaction of debts previously contracted (DPC).

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<sup>18</sup> 12 CFR 5.34(e)(5)(ii) and (v).

<sup>19</sup> The Application Process section of this “Subsidiaries and Equity Investments” booklet provides further information on the requirements governing the use of the after-the-fact notice procedure or expedited review. With respect to offshore subsidiaries, see the “Offshore Subsidiaries” section of this booklet.

<sup>20</sup> 12 CFR 5.34(e)(3).

<sup>21</sup> See 12 USC 1851(h)(1) (exempting certain institutions from the Volcker rule, including institutions that do not have and are not controlled by a company that has (i) more than \$10,000,000,000 in total consolidated assets; and (ii) total trading assets and trading liabilities, as reported on the most recent applicable regulatory filing by the institution, that are more than 5 percent of total consolidated assets).

### *Investment Assets*

National banks and their operating subsidiaries may own, hold, and manage all or part of the parent bank's investment securities portfolio in accordance with the bank's investment guidelines. Such activity is permissible as part of, or incidental to, the business of banking. Moreover, a national bank or its operating subsidiary "may purchase for its own account investment securities under such limitations and restrictions as the OCC may by regulation prescribe."<sup>22</sup> The OCC's Investment Securities Regulations at 12 CFR 1 prescribe limitations and restrictions on the purchase of an investment security by a national bank for its own account. These restrictions similarly apply to a national bank's operating subsidiary. Limits on securities activities in 12 CFR 1 generally are applied to the bank and the operating subsidiary combined.

### *DPC Property*

12 USC 29 governs the treatment of real property taken in satisfaction of DPC. National banks should consult 12 CFR 34, subpart E, "Other Real Estate Owned," for specific information on the treatment of DPC real estate. In addition, national banks are authorized to take other property in satisfaction of DPC under 12 USC 24(Seventh), for sale to reduce the bank's losses on the underlying debts. A national bank may take appropriate steps to preserve the property's value for sale. For example, if a national bank takes corporate stock in satisfaction of DPC, it has the implied power to operate the corporation's business, particularly when the resale value depends on its uninterrupted operation, provided that the purpose of operating the corporation's business is not to speculate on its future value.

Generally, real property must be disposed of within five years and cannot be used for speculation. Transfer of the DPC assets to the operating subsidiary does not alter the limitations on the bank's holding period for that asset. The property need not have been collateral for the loan in question. The OCC may extend that period up to five additional years if the bank has made a good faith attempt to dispose of the real estate within the five-year period or its disposal within that period would be detrimental to the bank.

A national bank also may hold securities in satisfaction of DPC for five years. This holding period also may be extended up to an additional five years upon a clearly convincing demonstration of why an additional holding period is needed.<sup>23</sup>

Operating subsidiaries established by the notice procedure to engage in DPC activity also may enter into arrangements as a general or limited partner with depository or nondepository co-lenders to engage in the orderly acquisition, management, and disposition of DPC assets

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<sup>22</sup> 12 USC 24(Seventh).

<sup>23</sup> 12 CFR 1.7 clarifies how a national bank must treat securities held in satisfaction of DPC and provides for the five-year holding period with limited extensions. It also requires national banks to account for those holdings in accordance with GAAP and states that they may not be taken for speculative purposes.

stemming from the parent bank's loans.<sup>24</sup> DPC partnership activity must be conducted as follows:

1. The partnership must be limited to the acquisition, management, and disposition of the DPC assets;
2. Partners are limited to co-lenders and their agents;
3. DPC assets must be disposed of promptly within the previously described guidelines; and
4. The bank must maintain at its headquarters office and make available to OCC examiners current information on all DPC assets activities of its operating subsidiary, including the name and location of each operating subsidiary, each partnership and relevant agreement, and each DPC asset being held pending disposition.

National banks establishing operating subsidiaries that will engage in debt-equity swap transactions<sup>25</sup> must follow the standard processing procedures in 12 CFR 5.34.

**(B) Providing services to or for the bank or its affiliates, including accounting, auditing, appraising, advertising and public relations, and financial advice and consulting.**

National banks and their operating subsidiaries may provide internal operational services for the parent bank, its holding company, and their subsidiaries.<sup>26</sup> These services generally relate to the day-to-day operations of those entities. Real estate appraisal services are covered at 12 CFR 5.34(e)(5)(v)(V).

National banks and their operating subsidiaries may provide advice, opinions, research, analyses, reports, and other information and opinion on any financial matter to any affiliate of the operating subsidiary.

**(C) Making loans or other extensions of credit, and selling money orders, savings bonds, and traveler's checks.**

*Making Loans or Other Extensions of Credit*

National banks and their operating subsidiaries possess broad authority to engage in lending and lending-related activities. Subject to safety and soundness guidelines, they may originate loans (including asset-based lending) or other extensions of credit for the bank's or operating subsidiary's account. These activities are permitted for any type of loan, or interest therein, including, among other things, consumer loans, accounts receivable, credit card loans,

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<sup>24</sup> Interpretive Letter No. 397 (September 15, 1987), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,621.

<sup>25</sup> No Objection Letter No. 87-10 (November 27, 1987), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 84,039; No Objection Letter No. 88-7 (May 20, 1988), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 84,047.

<sup>26</sup> Interpretive Letter No. 811 (December 18, 1997); Interpretive Letter No. 513 (June 18, 1990), *reprinted in* [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,215.

commercial loans, residential mortgage loans, and commercial real estate loans. For purposes of this section, however, only lending activities that (1) are well-established activities previously approved by the OCC; and (2) do not raise significant policy or supervisory issues qualify for after-the-fact notice filings under 12 CFR 5. For example, derivatives transactions, including credit derivatives that are extensions of credit under 12 CFR 32.2(q), generally do not qualify for the after-the-fact notice procedure. Also, any bank that considers establishing a real estate investment trust (REIT) as an operating subsidiary is strongly encouraged to consult first with the OCC to determine if an application is required.

Lending may be subject to geographic restrictions under the McFadden Act. Real estate loans and certain other types of loans are also subject to certain additional restrictions, discussed as follows.

### *Personal and Commercial Loans*

National banks and their operating subsidiaries are authorized expressly to lend money on personal security.<sup>27</sup> They may also discount, purchase, and negotiate drafts, bills of exchange, and other evidences of debt. The general power to make personal and commercial loans essentially is unrestricted.

### *Real Estate Loans and Related Activities*

National banks may make real estate loans pursuant to 12 USC 371. The standards for real estate-related lending and associated activities for national banks are provided at 12 CFR 34. Real estate lending may be performed for the account of the bank, or the operating subsidiary.<sup>28</sup> National banks and their operating subsidiaries may make (or participate in), arrange, purchase, or sell loans or extensions of credit (or interests therein) secured by liens or interests in residential or commercial real estate (including acquisition, development, and construction loans) without any special quantitative limit aside from the general lending limit, subject to applicable restrictions and requirements of the OCC's regulations in 12 CFR 34 and accompanying "[Interagency Guidelines for Real Estate Lending Policies](#)." National banks and their operating subsidiaries may also perform various activities that are closely related to the lending function, such as gathering census tract information, auditing loan portfolios, preparing loan documentation, performing flood insurance services, and inspecting real property.<sup>29</sup>

The authority to make such loans includes structuring them as "participating loans," when a portion of the interest, but not the principal, is contingent on the success of the borrower's enterprise. The lender, however, may not take an ownership interest in the underlying real

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<sup>27</sup> 12 USC 24(Seventh).

<sup>28</sup> Interpretive Letter No. 389 (July 7, 1987), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,613.

<sup>29</sup> See, e.g., Conditional Approval No. 322 (July 30, 1999); Conditional Approval No. 276 (May 8, 1998).

estate.<sup>30</sup> Certain permissible services (including lending, functions involved in loan brokerage, preparation of loan documentation, performing flood insurance services, inspecting real property, and others) qualify as “settlement services” under the Real Estate Settlement Procedures Act (RESPA). As such, referrals of these services among the bank and its lending affiliates are subject to the restrictions relating to “affiliated business arrangements” (ABA) as defined in RESPA. For additional information and guidance, refer to section (V) of this appendix, “Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the operating subsidiary, parent bank, or other financial institutions.”

### *Other Lending-Related Activities*

In addition to direct lending activities, national banks and their operating subsidiaries also may engage in lending-related activities on behalf of third parties that are part of or incidental to banking, such as conducting a general mortgage banking business and providing loan brokerage services. For example, national banks and their operating subsidiaries may provide real estate asset management and advisory services, furnish debt collection services, set fees, offer credit reporting services, arrange for the placement of equity interests in commercial real estate between borrowers and investors,<sup>31</sup> market and sell mortgage loans in the secondary market, provide customer service support for a credit card business, negotiate and close loans for third-party lenders, arrange loan commitments from third parties, act as document custodians of residential mortgage loan documents for third parties, assist state and local governments in placing funds made available through mortgage revenue bonds, and engage in merchant processing activities.<sup>32</sup> Activities undertaken for third parties, such as brokerage or servicing activities, may be conducted at any location without regard to branching restrictions.

### *Selling Money Orders, Savings Bonds, or Traveler’s Checks*

National banks and their operating subsidiaries generally may sell these instruments without regard to where the bank’s branch offices are or could be located. In addition, 12 CFR 7.1014, allows bonded agents to sell money orders on behalf of the bank or its operating subsidiary at nonbanking locations. See section (Y) of this appendix.

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<sup>30</sup> 12 CFR 7.1006; Interpretive Letter No. 620 (July 15, 1992), *reprinted in* [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,502; Interpretive Letter No. 389, *supra*; Interpretive Letter No. 244 (January 26, 1982), *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,408; and Interpretive Letter No. 204 (June 17, 1981), *reprinted in* [1981-82 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,285.

<sup>31</sup> Subject to the conditions in Interpretive Letter No. 271, *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,408.

<sup>32</sup> Interpretive Letter No. 389, *supra*; Interpretive Letter No. 387 (June 22, 1987), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,611; Interpretive Letter No. 271, *supra*; S. rep. No. 536, 97th Cong., 2d Sess. 60 (1982); Interpretive Letter No. 944 (August 12, 2002). See also Letter from J. Michael Shepherd, Senior Deputy Comptroller (November 19, 1990); Letter from Karen J. Wilson, Deputy Comptroller (March 13, 1990); Letter from Karen J. Wilson, Deputy Comptroller (November 29, 1989) and Letter from Emory W. Rushton, Acting Deputy Comptroller (December 19, 1986).

### **(D) Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein.**

National banks and their operating subsidiaries may, subject to safety and soundness considerations, engage in purchasing (including factoring), selling, servicing, or warehousing loans or other extensions of credit for the national bank's or operating subsidiary's account or for the account of others. These activities are permitted for any type of loan, or interest therein, including, among other things, consumer loans, accounts receivable, credit card loans, commercial loans, residential mortgage loans, and commercial real estate loans. Most such loans and activities are subject to the same general authorities and limitations as apply to the origination of loans. See section (C) of this appendix.

The OCC interprets the general lending authority of 12 USC 24(Seventh) as permitting national banks and their operating subsidiaries to act as agent in selling, warehousing, or servicing mortgage and other loans.<sup>33</sup> Warehousing loans generally involves holding loans that are closed and awaiting sale or delivery to an investor. National banks and their operating subsidiaries may engage in mortgage collateral warehousing for third parties, which involves the receipt, verification, and storage of loan documentation for lenders.<sup>34</sup> In addition, they may provide warehousing services to extend credit to the loan originator in exchange for an assignment of the loans.

### **(E) Providing courier services between financial institutions.**

National banks and their operating subsidiaries may transport items pertaining to banking operations between the offices of the bank, the bank, and its affiliated financial institutions; the bank and nonaffiliated financial institutions; offices of nonaffiliated financial institutions; offices of noncustomers of the bank; and between noncustomers of the bank and their financial institutions.<sup>35</sup> National banks may provide courier services for financial institutions under the following circumstances:

- For the bank itself: transportation of items related solely to the internal operations of the bank.<sup>36</sup> This includes transportation of cash between bank offices or for the restocking of the bank's automated teller machines.<sup>37</sup>

<sup>33</sup> Conditional Approval No. 338 (November 10, 1999); Conditional Approval No. 264 (December 29, 1997); Conditional Approval No. 243 (May 9, 1997).

<sup>34</sup> Letter from Michael Patriarca, Deputy Comptroller (May 28, 1986).

<sup>35</sup> Corporate Decision No. 2003-9 (June 25, 2003).

<sup>36</sup> Letter from Peter Liebesman, Assistant Director, Legal Advisory Services Division (March 7, 1983).

<sup>37</sup> 12 CFR 5.34(e)(5)(v)(E); Corporate Decision No. 2003-9 (June 25, 2003); Interpretive Letter No. 513 (June 18, 1990), *reprinted in* [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,215; No Objection Letter No. 89-04 (July 11, 1989), *reprinted in* [1989-90 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 83,061; Letter from Richard V. Fitzgerald, Director, Legal Advisory Services Division (May 22, 1981).

- For the bank itself and for its affiliated financial institutions: transportation of items related to banking transactions, such as checks, data-processing materials, and interoffice mail.<sup>38</sup>
- For the bank and affiliated and nonaffiliated financial institutions: transportation of cash and documents related to banking, such as checks, commercial paper, non-negotiable instruments, audit and accounting media, and other business records.<sup>39</sup>

A courier service performing the previously mentioned functions pursuant to the after-the-fact notice procedure must not constitute a branch of any bank—that is, the service must not constitute branching transactions (the receipt of deposits, payment of withdrawals, or disbursement of loan proceeds) with its customers. If the service does constitute a branch, branching approval must be sought under the procedures set forth in 12 CFR 5.30.

### **(F) Providing management consulting, operational advice, and services for other financial institutions.**

National banks and their operating subsidiaries may gather information and provide advice to any unaffiliated depository institution, in the form of information or opinions about its management and operation, and provide other services tailored to the management and operational needs of a depository institution customer. National banks traditionally have performed those activities in their correspondent relationships, under which they act on behalf of other banks in conducting the banking business. See also section (S) of this appendix, “Offering correspondent services to the extent permitted by published OCC precedent for national banks.” Operating subsidiaries may provide a broad range of services to other depository institutions under this authority.<sup>40</sup> Services offered pursuant to this authority must be those that reflect and incorporate the unique nature of the banking business.<sup>41</sup>

Any actions taken or decisions made by a depository institution customer, based on services provided by the operating subsidiary, must be a function of the management or board of directors of the customer, with the operating subsidiary refraining from engaging in a management role or exercising any form of operating control over the customer.<sup>42</sup>

<sup>38</sup> Letter from Thomas G. DeShazo, Deputy Comptroller (April 26, 1974).

<sup>39</sup> Corporate Decision No. 2003-9 (June 25, 2003); Interpretive Letter No. 513 (June 18, 1990), *reprinted in* [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,215; No Objection Letter No. 89-04 (July 11, 1989), *reprinted in* [1989-90 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 83,061; Letter from Richard V. Fitzgerald, Director, Legal Advisory Services Division (May 22, 1981).

<sup>40</sup> Interpretive Letter No. 811, *supra*; Letter from Emory Rushton, Deputy Comptroller (February 16, 1988); Interpretive Letter No. 137 (December 27, 1979), *reprinted in* [1981-82 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,218; Letter from John Shockey, Deputy Chief Counsel (April 12, 1976); Letter from H. Joe Selby, Deputy Comptroller (October 2, 1975); Letter from Thomas G. DeShazo, Deputy Comptroller (August 22, 1975).

<sup>41</sup> Interpretive Letter No. 137, *supra*.

<sup>42</sup> Letter from Emory Rushton, Deputy Comptroller (February 16, 1988).

### **(G) Providing check guaranty, verification, and payment services.**

National banks and their operating subsidiaries may agree to “guarantee” or “verify” the checks that will be drawn on the bank by its customers.<sup>43</sup> In essence, the national bank or the operating subsidiary agrees with its customers to extend credit, if necessary, to honor the checks. They may also provide check-cashing services to the general public without regard to where the national bank’s branch offices are or could be located.

### **(H) For the bank or its affiliates, providing data-processing, data warehousing and data transmission products, services, and related activities and facilities, including associated equipment and technology.**

National banks and their operating subsidiaries may collect, process, transcribe, analyze, and store banking, financial, and economic data for themselves and their customers as part of the business of banking.<sup>44</sup> Permissible processing of eligible data includes provision of data-processing services, data transmission services, facilities (including equipment, technology, and personnel), databases, and advice. It also includes providing access to such services, facilities, databases, and advice. Economic data include anything of value in banking and financial decisions.<sup>45</sup>

In addition to the processing of banking, financial, or economic data, national banks and their subsidiaries may, as activities incidental to the business of banking, provide limited amounts of nonfinancial information processing to their customers to enhance marketability or use of a banking service.<sup>46</sup> For example, a national bank selling home banking services can also provide customers with access to nonbanking services “to increase the customer base for and the usage of” the home banking service.<sup>47</sup> Banks and their subsidiaries that engage in financial or nonfinancial data processing are expected to be familiar with all applicable supervisory standards and guidance.<sup>48</sup>

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<sup>43</sup> 12 USC 24(Seventh).

<sup>44</sup> 12 CFR 7.5006; Interpretive Letter No. 928, (December 24, 2001); Corporate Decision No. 2000-08 (June 1, 2000); Interpretive Letter No. 811, *supra*; Letter from Emory Rushton, Deputy Comptroller (February 16, 1988); Interpretive Letter No. 137, *supra*.

<sup>45</sup> Interpretive Letter No. 928, *supra*; Corporate Decision No. 2000-08, *supra*; Conditional Approval No. 361 (March 3, 2000); Interpretive Letter No. 856 (March 5, 1999).

<sup>46</sup> Conditional Approval No. 369 (February 25, 2000); Interpretive Letter No. 742, (August 19, 1996), *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-106.

<sup>47</sup> Interpretive Letter No. 611, (November 23, 1992), *reprinted in* [1992-93 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,449.

<sup>48</sup> For example, [OCC Alert 2001-04](#), “Network Security Vulnerabilities” (April 24, 2001); [OCC Bulletin 2000-14](#), “Infrastructure Threats—Intrusion Risks: Message to Bankers and Examiners” (May 15, 2000); *Federal Financial Institutions Examination Council (FFIEC) Information Technology Examination Handbook*, “Outsourcing Technology Services” booklet.

**(I) Acting as investment adviser (including an adviser with investment discretion) or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and mortgage or real estate investment trusts, furnishing economic forecasts or other economic information, providing investment advice related to futures and options on futures, and providing consumer financial counseling.**

National banks and their operating subsidiaries may provide investment and financial advisory services and financial counseling as part of banking powers authorized under 12 USC 24(Seventh) or, in the case of activities that are fiduciary in nature, pursuant to their fiduciary powers under 12 USC 92a.<sup>49</sup>

Advisory activities may be provided to individuals, corporations, institutional investors, correspondent financial institutions, pension and other retirement plans, and others.<sup>50</sup> Those activities include individualized investment advice, business advisory services, financial advice, financial planning, investment recommendations, and analyses of economic trends.<sup>51</sup> Various administrative and shareholder functions also are incidental to the provision of advisory services, including, but not limited to, recordkeeping, accounting, and other services.<sup>52</sup> Operating subsidiaries seeking to engage in different advisory activities should consult other sections of these guidelines, as applicable, for the scope of permissible activities. Any bank with an operating subsidiary engaging in these activities should do so in accordance with safe and sound banking practices, which are discussed in the “[Retail Nondeposit Investment Products](#)” booklet and “Asset Management” series of the *Comptroller’s Handbook*.)

Depending on the advisory services offered, the operating subsidiary may need to register with the SEC as an investment adviser under the Advisers Act and comply with any

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<sup>49</sup> 12 CFR 9.2(e); Interpretive Letter No. 769 (January 28, 1997), *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-133; Interpretive Letter No. 648 (May 4, 1994), *reprinted in* [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,557; Interpretive Letter No. 367 (August 19, 1986), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,537; *Interpretive Letter No. 329 (March 4, 1985)*, *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,499; *Decision of the Comptroller of the Currency Concerning an Application by American National Bank of Austin, Texas, to Establish an Operating Subsidiary to Provide Investment Advice (American National Decision)* (September 23, 1983), *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,732.

<sup>50</sup> Interpretive Letter No. 298 (July 23, 1984), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,468; *American National Decision*, *supra*.

<sup>51</sup> Interpretive Letter No. 516 (July 12, 1990), *reprinted in* [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,220; Interpretive Letter No. 367, *supra*; Letter from Judith A. Walter, Senior Deputy Comptroller for National Operations, dated July 17, 1986; *American National Decision*, *supra*.

<sup>52</sup> Interpretive Letter No. 647 (April 15, 1994), *reprinted in* [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,558; Interpretive Letter No. 386 (June 19, 1987), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,610.

applicable state laws.<sup>53</sup> Banks are excluded specifically from the definition of investment adviser under the Advisers Act, unless they advise registered investment companies. Bank operating subsidiaries are fully subject to the Advisers Act.<sup>54</sup>

### *Adviser With Investment Discretion*

Investment discretion means, with respect to an account, the sole or shared authority (whether or not that authority is exercised) to determine what securities or other assets to purchase or sell on behalf of the account. A bank that delegates its authority over investments and a bank that receives delegated authority over investments are both deemed to have investment discretion.<sup>55</sup> If an operating subsidiary proposes to accept fiduciary appointments for which fiduciary powers are required, such as acting as trustee or executor, then the national bank must have fiduciary powers under 12 USC 92a and the subsidiary also must have its own fiduciary powers under the law applicable to the subsidiary.<sup>56</sup> Unless the subsidiary is a registered investment adviser, if an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the national bank must have prior OCC approval to exercise fiduciary powers pursuant to 12 CFR 5.26 and 12 CFR 9.<sup>57</sup>

### *Financial Adviser or Counselor to Governmental Entities or Instrumentalities, Businesses, or Individuals*

#### **To Governmental Entities or Instrumentalities**

National banks and their operating subsidiaries may advise state, local, and foreign governments on financing projects and assist them in the marketing of their securities. National banks may provide such advice pursuant to their incidental powers.<sup>58</sup>

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<sup>53</sup> Interpretive Letter No. 403 (December 9, 1987), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,627; Interpretive Letter No. 367, *supra*.

<sup>54</sup> 15 USC 80b-2(a)(11).

<sup>55</sup> 12 CFR 9.2(i); Interpretive Letter No. 850 (January 27, 1999).

<sup>56</sup> 12 CFR 5.34(e)(5)(vii)(A).

<sup>57</sup> 12 CFR 5.34(e)(5)(vii)(B). See also 12 CFR 9.101; Interpretive Letter No. 769, *supra*.

<sup>58</sup> 12 USC 24(Seventh); Interpretive Letter No. 122 (August 1, 1979), *reprinted in* [1981-82 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,203. See also *The Bank of Tokyo, Ltd.*, 76 Federal Reserve Bulletin 654 (1990); *The Bank of Nova Scotia*, 74 Federal Reserve Bulletin 249 (1988).

## To Businesses or Individuals

National banks and their operating subsidiaries may provide financial advice, financial planning, and counseling to businesses and consumers in a variety of contexts,<sup>59</sup> including advice and counseling on employee benefits and human resources<sup>60</sup> and financial planning.<sup>61</sup> Financial planning services generally include collecting and analyzing a customer's financial data; identifying a customer's financial goals and objectives; preparing a comprehensive financial plan consisting of recommendations on how to achieve the identified financial goals and objectives; and evaluating personal, banking, financial, and related economic data and implementation of the financial plan, that is, purchasing the relevant products or services.<sup>62</sup> A comprehensive financial plan may contain tax planning and financial advice and may recommend the purchase or sale of specific investments or securities.<sup>63</sup> A national bank financial planner may also use financial plans to make other recommendations, such as the consolidation of loans and purchase of life insurance.<sup>64</sup>

### *Advising Registered Investment Companies*

National banks and their operating subsidiaries may act as an investment adviser to an investment company as part of banking powers authorized under 12 USC 24(Seventh), or pursuant to their fiduciary powers under 12 USC 92a.<sup>65</sup> Various administrative and shareholder functions may be provided in connection with the provision of investment advisory services, including, but not limited to, record keeping, accounting, and other

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<sup>59</sup> Interpretive Letter No. 769, *supra*.

<sup>60</sup> Conditional Approval No. 384 (April 25, 2000); Corporate Decision No. 99-43 (November 29, 1999); Corporate Decision No. 98-51 (November 30, 1998); Corporate Decision No. 98-13 (February 9, 1998).

<sup>61</sup> Interpretive Letter No. 677 (June 28, 1995), *reprinted in* [1994-95 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625; Interpretive Letter No. 611, *supra*; Interpretive Letter No. 403, *supra*; Interpretive Letter No. 386, *supra*; Interpretive Letter No. 353 (July 30, 1985), *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,523.

<sup>62</sup> See Interpretive Letter No. 653 (December 22, 1994), *reprinted in* [1994-95 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,601; Interpretive Letter No. 516, *supra*; No Objection Letter No. 90-1 (February 16 1990), *reprinted in* [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,095; Interpretive Letter No. 386, *supra*; Letter from Justin T. Watson, Deputy Comptroller of the Currency (January 15, 1975).

<sup>63</sup> Interpretive Letter No. 367, *supra*; *American National Decision*, *supra*; Letter from David H. Baris, Regional Counsel (February 11, 1980); Interpretive Letter No. 137, *supra*; Letter from Justin T. Watson, Deputy Comptroller of the Currency (January 15, 1975).

<sup>64</sup> See, e.g., Interpretive Letter No. 386, *supra*; Interpretive Letter No. 367, *supra*.

<sup>65</sup> Conditional Approval No. 270 (January 21, 1998); Conditional Approval Letter No. 164 (December 9, 1994); Interpretive Letter No. 648, *supra*; Interpretive Letter No. 647, *supra*; Interpretive Letter No. 622 (April 9, 1993), *reprinted in* [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,504; Interpretive Letter No. 403, *supra*; *Board of Governors of the Federal Reserve System v. Investment Company Institute*, 450 U.S. 46 (1981); *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 821 F.2d 810 (D.C. Cir. 1987), cert. denied, 484 U.S. 1005 (1988).

services.<sup>66</sup> Further, operating subsidiaries may sponsor, organize, manage, and act as investment advisers to closed-end investment companies.<sup>67</sup> Banks and their operating subsidiaries advising registered investment companies must comply with the restrictions in sections 23A and 23B of the Federal Reserve Act, 12 USC 371c and 371c-1.<sup>68</sup>

The Investment Company Act of 1940 governs the formation, operation, and registration with the SEC of investment companies.<sup>69</sup> Serving as an investment adviser to an investment company is defined in section 2(a)(20) of the Investment Company Act of 1940 and includes furnishing advice to the investment company on the desirability of investing in, purchasing, or selling securities.<sup>70</sup>

Investment advisers to investment companies must register with the SEC under the Advisers Act, unless an exemption is available.<sup>71</sup> Banks specifically are excluded from the definition of investment adviser under the Advisers Act, unless they advise registered investment companies. Bank operating subsidiaries are fully subject to the Advisers Act.<sup>72</sup> Operating subsidiaries also must comply with any applicable state laws.

### *Advising Mortgage or Real Estate Investment Trusts*

National banks and their operating subsidiaries may provide investment advice and manage a portfolio of real estate loans and equity investments held or proposed to be held by a mortgage trust or REIT. Furnishing real estate asset management and advisory services, including servicing, advice, and recommendations for loan participations and mortgages and for real estate held, falls under the financial and investment advisory authority of banks in 12 USC 24(Seventh), and a national bank may act as an advisory company for a mortgage trust or REIT.<sup>73</sup>

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<sup>66</sup> Interpretive Letter No. 647, *supra*; Interpretive Letter No. 386, *supra*; Interpretive Letter No. 332 (March 8, 1985), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,502.

<sup>67</sup> Conditional Approval Letter No. 164 (December 9, 1994); 12 CFR 225.28(b)(6)(i).

<sup>68</sup> 12 CFR 223.2(a)(6) (Regulation W).

<sup>69</sup> 15 USC 80a-1 et seq.

<sup>70</sup> 15 USC 80a-2(a)(20).

<sup>71</sup> 15 USC 80b-1 et seq.

<sup>72</sup> 15 USC 80b-2(a)(11).

<sup>73</sup> Interpretive Letter No. 389, *supra*.

### *Furnishing Economic Information*

National banks and their operating subsidiaries may provide advisory services about financial and investment planning and advice on general economic, business, and financial outlooks and general trends in the stock and bond markets.<sup>74</sup>

### *Providing Investment Advice Related to Futures and Options*

National banks and their operating subsidiaries may advise customers in transactions involving financial and commodity futures.<sup>75</sup> Operating subsidiaries also may provide advice on futures and options on futures contracts as an introducing broker (IB) or a commodity-trading advisor (CTA). An operating subsidiary, acting as an IB, is engaged in soliciting or in accepting orders (in more than a clerical capacity) to purchase and sell any commodities futures or options.

An IB does not extend credit or accept any money, securities, or property to margin, guarantee, or secure any trades or contracts that result or may result from the solicitation or acceptance of orders. Alternatively, an operating subsidiary, acting as a CTA, advises others, through publications, writings, electronic media, or other direct communication or by the regular issuance of analyses and reports, on the value or advisability of trading in any contract on commodities futures or options on commodities futures.<sup>76</sup> An operating subsidiary, acting as a futures commission merchant (FCM), also may provide advice in connection with its FCM activities.

### *Providing Consumer Financial Counseling*

National banks and their operating subsidiaries may provide financial advice to individuals directly or through the use of written materials, computer programs, seminars, or other methods. Providing financial advice includes advising persons on financial matters and marketing by-products of the bank's financial advisory capabilities.<sup>77</sup>

<sup>74</sup> Letter from Michael A. Mancusi, Senior Deputy Comptroller (May 30, 1985); Letter from David L. Chew, Senior Deputy Comptroller (August 7, 1984); *American National Decision*, supra.

<sup>75</sup> See, e.g., Interpretive Letter No. 365 (August 11, 1986). "Financial futures" include those futures contracts and options on futures contracts relating to assets that a national bank may purchase for its own account; that is, U.S. securities and U.S. government agency securities; domestic and Eurodollar money market instruments; bank certificates of deposit; foreign currencies; and gold, silver, platinum, and palladium. "Commodity futures" include futures contracts and options on futures contracts for all other financial equities and nonfinancial assets (agricultural, petroleum, and metals).

<sup>76</sup> Interpretive Letter No. 507 (May 5, 1990), reprinted in [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,205; Interpretive Letter No. 494 (December 20, 1989), reprinted in [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,083; Interpretive Letter No. 422 (April 11, 1988), reprinted in [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,646; Interpretive Letter No. 380 (December 29, 1986), reprinted in [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,604; Interpretive Letter No. 365 (August 11, 1986), reprinted in [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,535.

<sup>77</sup> See "Activities Permissible For National Banks and Federal Savings Associations," Consulting and Financial Advice, (2017 edition); Interpretive Letter No. 137, supra; Interpretive Letter No. 367, supra.

**(J) Providing tax planning and preparation services.**

National banks and their operating subsidiaries may assist customers in tax planning and preparing and filing their tax returns, including by electronic means, either gratuitously or for a reasonable fee.<sup>78</sup> They are not restricted to serving only their existing customers for other services.<sup>79</sup> As a logical extension of these activities, national banks and their operating subsidiaries may refer customers to a service that represents taxpayers before the Internal Revenue Service.<sup>80</sup> They may also provide tax planning services to other banks as a correspondent service.<sup>81</sup> However, they may not engage in the practice of law.<sup>82</sup>

**(K) Providing financial and transactional advice and assistance, including advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings.***Mergers, Acquisitions, Divestitures, Joint Ventures, Leveraged Buyouts, and Capital Restructurings*

National banks and their operating subsidiaries may furnish advice on financing the sale, acquisition, or capitalization of a business and other merchant banking transactions and the related activity of acting as an intermediary to arrange third-party financing through loans or the private placement of debt or equity interests. Acting as agent for a customer in the private placement of the customer's securities is permitted under 12 USC 24(Seventh). In conducting private placement activity, the operating subsidiary must comply with applicable securities laws.<sup>83</sup>

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<sup>78</sup> 12 CFR 7.1008; Interpretive Letter No. 545 (March 6, 1991), [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,257; Interpretive Letter No. 611, *supra*.

<sup>79</sup> Letter from Alan Priest, Senior Attorney, Legal Advisory Services Division (October 24, 1984).

<sup>80</sup> Interpretive Letter No. 437 (July 27, 1988), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,661.

<sup>81</sup> Letter from David H. Baris, Regional Counsel (February 11, 1980).

<sup>82</sup> Letter from David H. Baris, *supra*.

<sup>83</sup> See, e.g., 15 USC 78c(a)(4)(B)(vii); Corporate Decision No. 2000-02 (February 25, 2000); Trust Interpretation No. 256 (July 9, 1990), *reprinted in* [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,227; Letter from J. Michael Shepherd, Senior Deputy Comptroller (June 20, 1988); No Objection Letter No. 87-4 (May 19, 1987), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 84,033; *Securities Industry Assn. v. Board of Governors of the Federal Reserve System*, 807 F.2d 1052 (D.C. Cir 1987), cert. denied, 483 U.S. 1005 (1987).

*Providing Advice and Assistance in Structuring, Arranging, and Executing Exchange, Coin, and Bullion Transactions, and Derivatives*

### **Exchange, Coin, and Bullion Transactions**

National banks are expressly authorized to engage in the business of “buying and selling exchange, coin, and bullion.”<sup>84</sup> Pursuant to this authority, a national bank and its operating subsidiary may buy and sell physical metal in the form of exchange, coin, or bullion; however, a national bank and its operating subsidiary may not deal or invest in a metal (or alloy), including copper, in a form primarily suited to industrial or commercial use (industrial or commercial metal).<sup>85</sup> National banks and their operating subsidiaries may also provide customers advice and assistance in structuring, arranging, and executing exchange, coin, and bullion transactions.<sup>86</sup>

### **Derivatives**

National banks and their operating subsidiaries may engage in a wide variety of derivative transactions. However, the range of operating subsidiary derivative activities that are eligible for notice procedures (rather than application procedures) is limited to advisory and assistance activities, as explained below.

Generally, national banks may trade, deal in, and purchase and sell for their own accounts derivative instruments whose reference rates, instruments, and commodities are themselves permissible investments for national banks.<sup>87</sup> Bank-permissible derivatives may reference, for example, interest rates, U.S. Treasury securities, mortgage-backed securities guaranteed by the U.S. government, domestic and Eurodollar money market instruments, bank certificates of deposit, foreign currencies, and various metals.<sup>88</sup>

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<sup>84</sup> 12 USC 24(Seventh).

<sup>85</sup> 12 CFR 7.1022 and 7.1023; OCC, “Industrial and Commercial Metals,” 81 Fed. Reg. 96353 (December 30, 2016) (final rule); Interpretive Letter No. 693 (November 14, 1995), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-008 (superseded by 81 Fed. Reg. 96353, *supra*).

<sup>86</sup> See, e.g., Interpretive Letter No. 494 (December 20, 1989), *reprinted in* [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,083.

<sup>87</sup> See, e.g., Interpretive Letter No. 693 (November 14, 1995), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-008; Interpretive Letter No. 494, *supra*.

<sup>88</sup> *Id.*

National banks and their operating subsidiaries may also engage in certain customer-driven derivative transactions (for example, perfectly matched swaps) as part of a financial intermediation business, provided they meet certain conditions and have controls in place to conduct the activity on a safe and sound basis.<sup>89</sup> Prior to engaging in a derivatives financial intermediation business for a reference asset that is addressed in prior OCC interpretive letters, the bank should: (i) provide written notification to its examiner-in-charge; and (ii) evaluate the risks posed by the activities to ensure that it can identify, measure, monitor, and control the associated risks. Additionally, the bank should monitor the risks of its derivatives activities on an ongoing basis to ensure each activity is conducted in a safe and sound manner.<sup>90</sup>

Under notice procedures, operating subsidiary derivative activities in this section (K) are limited to providing advice and assistance to customers in connection with structuring, arranging, and executing such derivative transactions.<sup>91</sup> To conduct broader derivative activities in an operating subsidiary, a national bank generally must file an application under 12 CFR 5.34. National banks should consult with the OCC, however, to determine whether a notice procedure may still be available when a proposed operating subsidiary will engage in derivative activities only as an incident to activities conducted by the proposed operating subsidiary that are eligible for notice procedures under 12 CFR 5.34 (for example, hedging risk in connection with mortgage operations otherwise eligible for notice procedures).

Derivative activities must comply with applicable regulations, including for example, the Volcker rule and regulations issued under Title VII of the Dodd–Frank Act. Title VII sets forth a comprehensive regulatory regime for swaps markets, including enhanced requirements for registered market intermediaries such as swap dealers.

### *Arranging Commercial Real Estate Equity Financing*

National banks and their operating subsidiaries may act as an intermediary to arrange for the placement of equity interests in commercial or investment real estate, generally on behalf of owners and developers, to finance the development of the property under the lending and financing authority of national banks in 12 USC 371 and 12 USC 24(Seventh) and their authority to arrange for private placements of all types of investments pursuant to the incidental powers of a national bank to carry on the business of banking granted in 12 USC 24(Seventh).<sup>92</sup>

<sup>89</sup> See, e.g., Interpretive Letter No. 1081 (May 15, 2007), *reprinted in* [2007-08 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-613 (property indices); Interpretive Letter No. 1079 (April 19, 2007), *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-611 (inflation indices); Interpretive Letter No. 1073 (October 19, 2006); Interpretive Letter No. 1065 (July 24, 2006) (petroleum products, agricultural oils, grains and grain derivatives, seeds, fibers, foodstuffs, livestock and meat products, metals, wood products, plastics and fertilizer).

<sup>90</sup> See Interpretive Letter No. 1160, *supra*.

<sup>91</sup> See, e.g., Interpretive Letter No. 365 (August 11, 1986), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,535.

<sup>92</sup> Interpretive Letter No. 271, *supra*; Interpretive Letter No. 387, *supra*.

Neither the operating subsidiary nor any affiliate should acquire an equity interest in any project financed by the private placement or to have a role in the development, management, or syndication of the project. The fee received by the operating subsidiary may not be based on the profits earned from the project. The operating subsidiary may not become a general real estate broker, nor list or advertise properties for sale. The operating subsidiary should deal solely with sophisticated institutional investors. If the operating subsidiary or the parent national bank engages in any lending for this activity, it should be limited to traditional debt financing, but may include taking interests as permitted by 12 CFR 7.1006.

**(L) Underwriting and reinsuring credit-related insurance to the extent permitted under section 302 of the GLBA (15 USC 6712).**

National banks and their operating subsidiaries may continue to underwrite and reinsure any credit-related insurance products being provided by national banks as of January 1, 1999, or that were authorized in writing by the OCC as of that date.<sup>93</sup>

Credit-related insurance products guarantee or secure payment of an outstanding obligation in a credit transaction in the event that the borrower is unable to pay. Credit-related insurance products often are sold in conjunction with installment loans, automobile loans, credit cards, and residential mortgages. There are various types of credit-related products, including credit life insurance, credit disability insurance (also known as credit accident and health insurance), and mortgage life and disability insurance.<sup>94</sup> For example, a credit life insurance product on a relatively small decreasing balance installment loan typically will pay off the balance due on the loan if the borrower dies before the loan is repaid. Similarly, if an insured debtor becomes disabled or is killed accidentally, a credit accident and health insurance product policy may pay the policy premiums during the period of disability or pay off the loan or both. The precise terms of credit-related insurance products may vary based on the terms and conditions of a particular loan.<sup>95</sup>

Credit-related insurance products provide benefits for both the borrower and the lender by easing the financial burden on each in the event of unforeseen circumstances, such as death, disability, or unemployment. Credit-related insurance exists as a unique kind of insurance product that is an integral part of certain credit transactions. Hence, underwriting credit-risk insurance products serves as a risk management tool linked to the credit function of lending institutions.

The OCC has established the authority of national banks and their subsidiaries to sell as agent and underwrite credit-related insurance products as part of, or incidental to, the

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<sup>93</sup> See 15 USC 6712; Corporate Decision No. 2001-10 (April 23, 2001); Corporate Decision No. 2000-16 (August 29, 2000); Interpretive Letter No. 886 (March 27, 2000).

<sup>94</sup> See 12 CFR 2.2(b).

<sup>95</sup> Certain other insurance arrangements could also be considered credit-related when the existence of the insurance is integral to the borrower's ability to repay a loan if specified events occur.

business of banking through a long line of precedents.<sup>96</sup> The OCC has concluded that national banks and their subsidiaries may underwrite credit-related insurance products in connection with loans by the bank itself and by lenders other than the bank.<sup>97</sup>

Before January 1, 1999, the OCC had “determined in writing” that national banks and their subsidiaries may provide credit-related insurance products as principal in connection with loans made by a financial institution lender other than the bank itself.<sup>98</sup>

**(M) Leasing of personal property and acting as an agent or adviser in leases for others.**

This activity includes

- leases in which the bank may invest pursuant to 12 USC 24(Seventh).
- leases in which the bank may invest pursuant to 12 USC 24(Tenth).
- acting as agent, broker, or adviser in leases for others.

The notice process for any leasing activity under this paragraph is not available if the notice involves the direct or indirect acquisition by the bank of any low-quality asset from an affiliate in connection with a transaction subject to this section. For purposes of this section (M), the terms “low-quality asset” and “affiliate” have the same meaning as provided in section 23A of the Federal Reserve Act, 12 USC 371c.

Pursuant to 12 USC 24(Seventh) and 12 USC 24(Tenth), national banks and their operating subsidiaries may act as lessors and engage in the financing of full-payout, net leases for personal property, subject to the requirements of 12 CFR 23. Section 24(Seventh) leases have long been authorized on the grounds that they are the functional equivalent of loans. Section 24(Seventh) leases are permitted for both tangible and intangible personal property and are subject to specific restrictions set forth in subparts A and C of 12 CFR 23, including a limitation on reliance on residual value. Part 23 requires national banks and their subsidiaries to receive prior OCC approval for certain activities and should be consulted to determine whether a separate filing under that part is needed.

<sup>96</sup> See, e.g., Corporate Decision No. 98-28 (May 11, 1998); Corporate Decision No. 97-92 (October 17, 1997); Interpretive Letter No. 283 (March 16, 1984), *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447; Interpretive Letter No. 277 (December 21, 1983), *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,441; 12 CFR 2; *IBAA v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980). See also Interpretive Letter No. 338 (May 2, 1985), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,508; *American Insurance Association v. Clarke*, 656 F. Supp. 404 (D.D.C. 1987), *aff'd*, 865 F.2d 278 (D.C. Cir. 1989).

<sup>97</sup> Corporate Decision No. 97-92 (Oct. 17, 1997).

<sup>98</sup> Before January 1, 1999, the OCC had also determined in writing that national banks and their subsidiaries may provide as principal other insurance products, including safe deposit box liability insurance and self-insurance of business risks. See Corporate Decision No. 97-92 (October 17, 1997); Interpretive Letter No. 845 (October 20, 1998), *reprinted in* [1998-99 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-300. Underwriting and reinsuring credit-related insurance, however, are the only insurance underwriting activities that qualify for the notice procedures under 12 CFR 5.34(e)(5)(v)(L).

Section 24(Tenth) leases are authorized pursuant to express statutory authority and are subject to specific restrictions set forth in subparts A and B of 12 CFR 23, including a 10 percent-of-assets limitation on the aggregate book value of section 24(Tenth) leases and a minimum lease term of 90 days.

In addition, the authority conferred by section 24(Tenth) is limited to the leasing of *tangible* personal property. Tangible personal property includes such items as vehicles, manufactured homes, machinery, equipment, and furniture. Unlike section 24(Seventh) leases, section 24(Tenth) leases are *not* viewed as a form of lending. Whether property is considered personal property depends on state law. Both types of leases are also subject to lending limits and affiliate-transactions restrictions.

National banks and their subsidiaries generally have not been authorized to engage in the lease financing of real property,<sup>99</sup> but may do so when the real estate lease is incidental to a personal property leasing transaction.<sup>100</sup> They may, however, engage in the “placement of real estate lease transactions, specifically, locating investors as potential lessors to a potential lessee and brokering the debt portion of any such lease.”<sup>101</sup>

To establish a leasing relationship with a lessee, banks and subsidiaries may acquire property to be leased by purchasing specific property based on a legally binding commitment to lease or a legally binding written agreement, indemnifying the bank against loss from the acquisition of the leased property. Banks and their subsidiaries may also acquire property to be leased in the absence of a commitment to lease or indemnification agreement if the bank satisfies certain conditions (set forth in 12 CFR 23.4), demonstrating that the acquisition of property is not speculative. Finally, banks may acquire leases by purchasing them from another lessor, but in the case of section 24(Seventh) leases, the residual value requirement must be met at the time of the lease purchase(s). Thus, if a national bank or its operating subsidiary purchases an existing section 24(Seventh) lease, that lease must be a “conforming lease” (as defined in 12 CFR 23) at the time of its acquisition.

National banks and their operating subsidiaries may also provide certain lease-related services to third parties to the extent that they are incidental to the business of banking. National banks are expressly authorized to act as finder or similar agent or broker.<sup>102</sup> In addition, the OCC has opined that national banks and their operating subsidiaries may

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<sup>99</sup> Interpretive Letter No. 556 (August 6, 1991), *reprinted in* [1991-92 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,306; Letter from Frank Maguire, Acting Senior Deputy Comptroller (May 20, 1993).

<sup>100</sup> 12 CFR 23; see also Interpretive Letter No. 770 (February 10, 1997), *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-134; Conditional Approval No. 295 (December 3, 1998); Corporate Decision No. 98-35 (June 10, 1998).

<sup>101</sup> Letter from Wallace S. Nathan, District Counsel (October 28, 1985).

<sup>102</sup> 12 CFR 7.1002; see also Letter from Sue E. Auerbach, Senior Attorney (August 19, 1996).

provide lease consulting services (including financial advice); management, brokerage, and finder services; and lease servicing for third parties.<sup>103</sup>

A special category of leasing activities is permitted by 12 CFR 7.1000(d)(1). National banks and their operating subsidiaries may purchase or construct municipal buildings, such as schools or similar public facilities, for lease to a municipality or other public authority.<sup>104</sup>

Upon expiration of the lease, the lessee must become the owner of the building or facility. The bank lessor must be repaid entirely by the payments from the lessee.

## **(N) Providing securities brokerage or acting as a futures commission merchant, and providing related credit and other related services.**

### *Providing Securities Brokerage*

National banks and their operating subsidiaries may provide brokerage services, related securities credit, advisory services, and administrative services as part of or incidental to the business of banking. The specific language of 12 USC 24(Seventh) recognizes that a national bank may purchase and sell “securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account.” Such activities must comply with applicable law, including, for example, the broker dealer registration requirement in the federal securities laws.<sup>105</sup>

Securities brokerage services involve the buying and selling of a wide variety of financial investment products as agent upon the order and for the account of customers. Such investment products include annuities, shares of mutual funds, units in unit investment trusts, and equity and fixed income securities, sold on an agency basis. In addition, an integral part of the brokerage business is advertising and marketing services and products to attract customers.<sup>106</sup>

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<sup>103</sup> Interpretive Letter No. 567 (October 29, 1991) *reprinted in* [1991-92 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,337; Letter from Wallace Nathan, District Counsel (October 28, 1985); Letter from Peter Liebesman, Assistant Director, Legal Advisory Services Division (June 15, 1981).

<sup>104</sup> Interpretive Letter No. 847 (October 28, 1998), *reprinted in* [1998-99 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-302.

<sup>105</sup> The Securities Exchange Act of 1934 imposes rules and registration requirements on entities that act as securities broker dealers. The GLBA amended the Securities Exchange Act by replacing what had been a blanket exemption for banks from broker-dealer registration requirements with specific exceptions. These specific exceptions authorize banks to engage in limited securities activities without being considered broker-dealers. The GLBA’s specific securities activities registration exceptions apply only to bank activities. Bank subsidiaries that are broker-dealers must register with the SEC. See 15 USC 78c(a)(4)-(6).

<sup>106</sup> Conditional Approval Letter No. 164 (December 9, 1994); Interpretive Letter No. 648, *supra*; Interpretive Letter No. 647, *supra*; Interpretive Letter No. 622, *supra*; *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 468 U.S. 207 (1984); *Securities Industry Association v. Comptroller of the Currency*, 577 F. Supp. 252 (D.D.C. 1983), *aff’d per curiam*, 758 F.2d 739 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986) (brokerage issue).

Brokerage services include buying and selling securities in the secondary market as “riskless principal.” A riskless principal transaction involves the operating subsidiary purchasing or selling a security upon the order of a customer, while conducting a simultaneous offsetting sale or purchase of a security upon the order of another customer.<sup>107</sup> Operating subsidiaries also may act as agent for a customer in the private placement of the customer’s securities as described more fully under section (K) of this appendix.

Related securities credit offered by an operating subsidiary as part of its securities brokerage services involves the extension or maintenance of credit to customers for the purchase or carrying of securities. This activity must be consistent with 12 USC 36 and 12 CFR 7.1004.<sup>108</sup>

The Federal Reserve Board’s regulations on margin loans are applicable to banks and other non-broker-dealer operating subsidiaries of banks under Regulation U<sup>109</sup> and to brokers under Regulation T.<sup>110</sup> Operating subsidiaries providing securities brokerage services may furnish other related activities, including investment advisory and administrative services. Various administrative and shareholder functions are incidental to the provision of the brokerage services, including, but not limited to, record keeping, accounting, and other services.<sup>111</sup>

Operating subsidiaries established to engage in these activities may conduct them in a partnership structure. For example, an operating subsidiary of a national bank may enter into a general partnership arrangement or joint venture with one or more subsidiaries or affiliates of an investment bank, provided that certain conditions relating to partnership issues are met.<sup>112</sup>

Banks with operating subsidiaries that engage in these activities should do so in accordance with safe and sound banking practices, which are discussed in the “[Retail Nondeposit Investment Products](#)” booklet of the *Comptroller’s Handbook*. Banks and their operating

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<sup>107</sup> Interpretive Letter No. 626 (July 7, 1993), *reprinted in* [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,508; Interpretive Letter No. 371 (June 13, 1986), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,541.

<sup>108</sup> *Clarke v. Securities Industry Assn.*, 479 U.S. 388 (1987) (branching issue); Interpretive Letter No. 403, *supra*; American National Decision, *supra*.

<sup>109</sup> 12 CFR 221.

<sup>110</sup> 12 CFR 220.

<sup>111</sup> Interpretive Letter No. 647, *supra*; Interpretive Letter No. 386, *supra*; Interpretive Letter No. 332 (March 8, 1985), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,502.

<sup>112</sup> Interpretive Letter No. 889 (April 24, 2000); Interpretive Letter No. 622, *supra*; Interpretive Letter No. 516, *supra*; Interpretive Letter No. 411 (January 20, 1988), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,635; Interpretive Letter No. 289 (May 15, 1984), *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,453.

subsidiaries advising registered investment companies must comply with the restrictions in sections 23A and 23B of the Federal Reserve Act and Regulation W.

### *Acting as Futures Commission Merchant*

National banks and their operating subsidiaries may act as FCMs.<sup>113</sup> An FCM operating subsidiary typically solicits or accepts orders to purchase or sell financial or agricultural futures contracts and options on such contracts on major exchanges and may also solicit or accept orders to purchase or sell swaps and options on swaps.<sup>114</sup> An FCM may extend credit or accept any money, securities, or property, to margin, guarantee, or secure any trades or contracts resulting from the solicitation or acceptance of orders. An FCM may act as intermediary between a customer and exchange members that actually execute or clear trades. Alternatively, an FCM may be a member of an exchange and serve as a clearing member. Operating subsidiaries may also offer advisory services, including financial and market analysis, strategy development, research, and discretionary funds management in connection with their FCM activities.<sup>115</sup>

National bank operating subsidiaries that join futures exchanges and clearinghouses may file a notice to engage in these activities if they can comply with certain restrictions.<sup>116</sup> A national bank's FCM may not join any exchange or clearing association under notice procedures that requires the bank or any other of its subsidiaries to guarantee or otherwise become liable for trades executed or cleared by the FCM, other than those trades executed or cleared by the bank and any of its affiliates or other operating subsidiaries. Moreover, a national bank's FCM may not become a clearing member of any exchange or clearing association that requires the bank to also become a member of that exchange or clearing association, unless the bank obtains a waiver of that requirement. Finally, a national bank may not guarantee or assume responsibility for any liability of its FCM other than those trades executed and/or cleared for and on behalf of the bank and any of its affiliates or other operating subsidiaries.

A national bank establishing an operating subsidiary to engage in the activities described in this section may file a notice only if its loans to, and investments in, its FCM (and its partnership interests) in the aggregate do not exceed its legal lending limit at the time of the loan or investment. A national bank may not make investments of equity capital in its FCM (or its partnership interest) that exceed the lending limit without the OCC's prior written

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<sup>113</sup> See, e.g., Interpretive Letter No. 356 (January 7, 1986); Interpretive Letter No. 357 (February 26, 1986).

<sup>114</sup> "Financial futures" include those futures contracts and options on futures contracts relating to assets that a national bank may purchase for its own account; that is, U.S. securities and U.S. government agency securities; domestic and Eurodollar money market instruments; bank certificates of deposit, foreign currencies; and gold, silver, platinum and palladium. "Commodity futures" include futures contracts and options on futures contracts for all other financial equities and nonfinancial (agricultural, petroleum, and metals) assets.

<sup>115</sup> Interpretive Letter No. 507, *supra*; Interpretive Letter No. 494, *supra*; Interpretive Letter No. 422, *supra*; Interpretive Letter No. 380, *supra*; Interpretive Letter No. 365, *supra*.

<sup>116</sup> Interpretive Letter No. 929, *supra*.

consent. To calculate the lending limit, a national bank's investment in its FCM is deemed unsecured. A national bank may, however, lend its FCM (and its partnership interest) in the aggregate an additional 10 percent of its unimpaired capital and surplus, if secured by readily marketable collateral as provided in 12 USC 84.

**(O) Underwriting and dealing, including making a market, in bank permissible securities and purchasing and selling asset-backed obligations as principal.**

National banks and their operating subsidiaries may underwrite and deal in Type I and Type II securities, subject to safety and soundness considerations and, in the case of Type II securities, certain investment limits.<sup>117</sup>

Specifically, they may underwrite and deal in Type I securities, which include (1) obligations of the United States, a department or agency of the United States, and general obligations of states and their political subdivisions; (2) obligations of certain quasi-governmental corporations, such as the Federal National Mortgage Association (Fannie Mae) and the Government National Mortgage Association (Ginnie Mae); (3) other obligations (such as qualified Canadian government obligations) specifically listed in 12 USC 24(Seventh); and (4) other securities the OCC determines to be eligible Type I securities under 12 USC 24(Seventh). There is no investment limit for national banks underwriting and dealing in these securities.<sup>118</sup> A well-capitalized national bank may underwrite and deal in municipal revenue bonds without limit.<sup>119</sup>

National banks and their operating subsidiaries also may underwrite and deal in Type II securities, which include (1) obligations of certain international and multilateral development banks, such as the International Bank for Reconstruction and Development (World Bank); (2) obligations issued by any state or political subdivision for housing, university, or dormitory purposes; (3) other obligations listed specifically in 12 USC 24(Seventh); and (4) other securities the OCC determines to be eligible as Type II securities, subject to a limitation that the obligations of any single issuer may not exceed 10 percent of the bank's capital and surplus.<sup>120</sup>

National banks and their operating subsidiaries may securitize and sell assets that they hold as part of their banking business. The amount of securitized loans and obligations that may be sold is not limited to a specific percentage of the bank's capital and surplus.<sup>121</sup>

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<sup>117</sup> See 12 CFR 1.3; 12 CFR 1.5. See also footnote 105, supra, regarding broker-dealer registration requirements in the federal securities laws.

<sup>118</sup> 12 USC 24(Seventh); 12 CFR 1.2(j); and 12 CFR 1.3(a).

<sup>119</sup> 12 USC 24(Seventh); 12 CFR 1.2(j)(4).

<sup>120</sup> 12 USC 24(Seventh); 12 CFR 1.2(k); 12 CFR 1.3(b); and 12 CFR 1.3(d).

<sup>121</sup> 12 CFR 1.3(g). Asset securitization must comply with 12 CFR 43, as applicable.

The operating subsidiary should provide the OCC with evidence that it has developed suitable policies and internal controls to permit the safe and sound conduct of the proposed activity. The operating subsidiary also should coordinate its trading positions with those of the bank itself.<sup>122</sup>

**(P) Acting as an insurance agent or broker, including title insurance to the extent permitted under section 303 of the GLBA (15 USC 6713).**

*Sales Pursuant to 12 USC 92*

National banks generally may sell insurance pursuant to 12 USC 92 (section 92) in the same nationwide market as is generally available to licensed insurance agencies in the state where the bank agency operates.<sup>123</sup> National banks may sell insurance to customers wherever the customers are located.<sup>124</sup> National banks may sell insurance directly or through an operating subsidiary if the national bank is located and doing business in a place of 5,000 or less in population.<sup>125</sup> Any area designated by the U.S. Census Bureau as a “place” is a place of 5,000 for purposes of section 92.<sup>126</sup> National banks and their subsidiaries with insurance agencies may rely on OCC opinions to establish satellite offices outside the place of 5,000 (including satellite offices in states outside the state where the insurance business is located) to solicit and sell insurance in the same manner generally permissible for state insurance agencies.<sup>127</sup> National trust companies may sell insurance from a trust office that is located in a place of 5,000 if the office performs core fiduciary functions (accepting fiduciary appointments, executing trust documents, and making decisions regarding the investment and distribution of fiduciary assets).<sup>128</sup>

*Sales of Credit-Related Insurance as Agent Under 12 USC 24(Seventh)*

National banks and their subsidiaries may engage in various credit-related insurance agency activities under 12 USC 24(Seventh). This law authorizes national banks to engage in the “business of banking,” and to exercise “all such incidental powers as shall be necessary to

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<sup>122</sup> Letter from Jimmy F. Barton, Deputy Comptroller (July 25, 1991).

<sup>123</sup> 103 Interpretive Letter No. 753 (November 4, 1996), *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,107.

<sup>124</sup> See *NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995); *Independent Insurance Agents of America, Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993); *Shawmut Bank Connecticut v. Googins*, 965 F. Supp. 304 (D. Conn. 1997).

<sup>125</sup> 12 USC 92; Conditional Approval No. 384 (April 25, 2000); Corporate Decision No. 99-44 (September 10, 1999); Corporate Decision No. 97-24 (April 15, 1997). See Interpretive Letter No. 819 (January 20, 1998).

<sup>126</sup> Interpretive Letter No. 823 (February 27, 1998).

<sup>127</sup> Interpretive Letter No. 882 (February 22, 2000); Interpretive Letter No. 864 (May 19, 1999); Interpretive Letter No. 873 (December 1, 1999); Interpretive Letter No. 844 (October 20, 1998).

<sup>128</sup> Interpretive Letter No. 877 (December 13, 1999).

carry on the business of banking.” Although an insurance product sold under this authority could also be sold under 12 USC 92, there are no geographic “place of 5,000” limits under 12 USC 24(Seventh).

Pursuant to 12 USC 24(Seventh), national banks and their subsidiaries may sell credit-related insurance products, including the following:

- Credit life insurance (as defined in 12 CFR 2.2(b)).<sup>129</sup>
- Involuntary employment insurance (protects the bank if the borrower becomes involuntarily unemployed).<sup>130</sup>
- Vendors single interest insurance<sup>131</sup> and vendors double interest insurance<sup>132</sup> (insures the bank or the bank and the borrower, respectively, against loss or damage to personal property pledged as loan collateral).
- Mechanical breakdown insurance (protects a loan customer against most major mechanical failures of collateral securing a loan during the loan’s life).<sup>133</sup>
- Vehicle service contracts (protect the value of loan collateral from mechanical breakdown for term of the contract).<sup>134</sup>

### *Title Insurance*

A national bank may not underwrite or sell title insurance unless the national bank falls within one of the following exceptions:

(1) National banks and their operating subsidiaries may sell title insurance as agents in a state to the same extent as permitted for state banks.<sup>135</sup>

(2) A national bank and its operating subsidiaries may continue to conduct title insurance activities, including underwriting, in which the national bank or operating subsidiary were lawfully engaged before November 12, 1999, subject to some exceptions if affiliates are providing insurance as principal.<sup>136</sup>

<sup>129</sup> See Interpretive Letter No. 283 (March 16, 1984), *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447; 12 CFR 2; *IBAA v Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980).

<sup>130</sup> See Interpretive Letter No. 283, *supra*.

<sup>131</sup> See Interpretive Letter No. 283, *supra*.

<sup>132</sup> Letter from William B. Glidden, Assistant Director, Legal Advisory Services Division (June 3, 1986).

<sup>133</sup> Letter from William B. Glidden, Assistant Director, Legal Advisory Services Division (June 17, 1993).

<sup>134</sup> Interpretive Letter No. 724 (April 22, 1996), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,039; Interpretive Letter No. 671 (July 10, 1995), *reprinted in* [1994-95 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,619.

<sup>135</sup> 15 USC 6713.

<sup>136</sup> 15 USC 6713.

If, however, a state law in effect before November 12, 1999, prohibits all persons in a state from selling or underwriting title insurance, a national bank may not sell title insurance.

**(Q) Reinsuring mortgage insurance on loans originated, purchased, or serviced by the bank, its subsidiaries, or its affiliates, provided that if the operating subsidiary enters into a quota share agreement, the operating subsidiary assumes less than 50 percent of the aggregate insured risk covered by the quota share agreement.**

National banks may reinsure mortgage insurance on loans originated, purchased, or serviced by the national bank, its subsidiaries, or its affiliates.<sup>137</sup> Mortgage insurance protects an investor holding a mortgage loan against default by the mortgagor.

Under an “excess loss” arrangement, the primary insurer pays, and is solely responsible for, claims arising out of a given book of business up to a predetermined percentage, after which the reinsurer is obligated to reimburse the primary insurer’s claims up to another predetermined percentage. Thereafter, the primary insurer is solely responsible for claims in excess of the reinsurer’s tier of losses on a given book. A quota share agreement is an agreement under which the reinsurer is liable to the primary insurance underwriter for an agreed-upon percentage of every claim arising out of the covered book of business ceded by the primary insurance underwriter to the reinsurer. Quota share arrangements have involved the assumption of less than 50 percent of the aggregate insured risk covered by the quota share agreement.

A national bank’s captive mortgage reinsurance subsidiary may enter into a mortgage reinsurance agreement with a Cayman Island segregated portfolio company to reinsure private mortgage insurance on loans originated or purchased by the bank or one of its affiliates.<sup>138</sup> National banks may participate in a mortgage reinsurance exchange in which the exchange will provide for the reinsurance of private mortgage insurance on loans originated or purchased by participating lenders.<sup>139</sup>

**(R) Acting as a finder pursuant to 12 CFR 7.1002 to the extent permitted by published OCC precedent.**

*General*

The OCC has long recognized the finder function as a permissible banking activity that includes identifying potential parties, making inquiries as to interest, introducing or arranging contacts or meetings between interested parties, acting as an intermediary between interested parties, and bringing the parties together for transactions that the parties themselves negotiate

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<sup>137</sup> Corporate Decision No. 99-37 (October 29, 1999); Corporate Decision No. 99-36 (October 29, 1999); Corporate Decision No. 99-32 (September 20, 1999); Corporate Decision No. 99-26 (September 2, 1999).

<sup>138</sup> Interpretive Letter No. 862 (June 7, 1999).

<sup>139</sup> Interpretive Letter No. 828 (April 6, 1998).

and consummate.<sup>140</sup> As a finder, national banks and their operating subsidiaries may convey information about available products or services to potential markets for them,<sup>141</sup> arrange for third-party providers to offer reduced rates to those customers referred by the bank,<sup>142</sup> communicate to the seller an offer to purchase or a request for information,<sup>143</sup> provide certain administrative, clerical, and recordkeeping functions,<sup>144</sup> supply financial information to one party about the other, and act as a conduit in conveying information from one party to another.<sup>145</sup>

### *Acting as a Website Host*

The OCC has determined that website hosting is a form of finder activity. A national bank may establish, register, and host a commercially enabled website in the name of the retailer.<sup>146</sup> The bank may store the data representing the retailer's online catalog and provide periodic reports to the retailer of site-related activities.<sup>147</sup> The bank may also provide associated payments and deposit services resulting from web-based transactions.<sup>148</sup> A national bank also may host a website for a government agency, where the site will allow the public, consumers, and other agencies to access or purchase services, information forums, and products from the agency.<sup>149</sup>

A national bank, in the exercise of the finder authority, may establish hyperlinks between its home page and the Internet home pages of third-party providers so that bank customers will be able to access those nonbank websites from the bank site.<sup>150</sup> The OCC also has permitted national banks, as a form of finder activity, to operate a "virtual mall." A virtual mall provides a collection of links to websites of third-party vendors. The collection of links,

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<sup>140</sup> 12 CFR 7.1002(b); Conditional Approval No. 221 (December 4, 1996); Interpretive Letter No. 741, *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-105; Interpretive Letter No. 653, *supra*.

<sup>141</sup> Interpretive Letter No. 741, *supra*; Interpretive Letter No. 630, *reprinted in* [1993-94 Transfer Binder] Fed. Banking Law. Rep. (CCH) ¶ 83,513.

<sup>142</sup> Conditional Approval No. 347 (January 29, 2000).

<sup>143</sup> Interpretive Letter No. 824 (February 27, 1998); Letter from James M. Kane, District Counsel (October 24, 1985); Letter from F.H. Ellis, Chief National Bank Examiner (October 6, 1970).

<sup>144</sup> Interpretive Letter No. 850, *supra*; Corporate Decision No. 98-13 (February 9, 1998); Interpretive Letter No. 607, *reprinted in* [1992-93 Transfer Binder] Fed. Banking L. Rep. ¶ 83,445.

<sup>145</sup> Letter from Elizabeth H. Corey, Attorney (May 18, 1989); Letter from John M. Miller, Acting Deputy Chief Counsel (July 26, 1977).

<sup>146</sup> 12 CFR 7.5002(a)(1)(i).

<sup>147</sup> Corporate Decision No. 2001-18 (July 3, 2001); Corporate Decision No. 2000-08 (June 1, 2000).

<sup>148</sup> Interpretive Letter No. 875, *supra*; Interpretive Letter No. 856, *supra*.

<sup>149</sup> Conditional Approval No. 361 (March 3, 2000); 12 CFR 7.5002(a)(1)(iv)(B).

<sup>150</sup> 12 CFR 7.5002(a)(1)(iii); Conditional Approval No. 347, *supra*; Conditional Approval No. 221, *supra*.

organized by product type and made available to bank customers, enables the customers to shop for a range of financial and nonfinancial products and services via the links.<sup>151</sup>

In addition, the OCC has determined that, as a finder, a national bank may establish an Internet site that will function as an electronic central facility enabling businesses to negotiate and organize among themselves aggregate buying, selling, or financing efforts, and for other collaborative efforts.<sup>152</sup>

Incidental to its offering of commercially engaged website hosting, a national bank may provide web design services to its merchant customers.<sup>153</sup>

### *Acting as Finder for Insurance*

National banks and their operating subsidiaries may provide finder services in connection with insurance products and services. To identify permissible national bank finder activities in the insurance context (as an alternative to 12 USC 92 authority), the OCC considers (1) the scope of the proposed activities; (2) the existence or absence of another insurance agent or broker in the arrangement; (3) whether the bank has a contractual relationship with an insurance company for selling its products, and if so, the nature of the relationship; and (4) the bank's compensation arrangement for the proposed activities. For example, national banks may participate in sharing arrangements with other banks whereby they combine their efforts to use the services of a group of independent agencies that would solicit and sell insurance services to bank customers on site, sharing pro rata in referred business.<sup>154</sup>

### *Acting as Finder for Investment Advisory Services*

National banks and their operating subsidiaries may act as finder by referring bank customers to investment advisors.<sup>155</sup>

### *Acting as Finder for Marketing of Trust Services*

National banks and their operating subsidiaries, as well as other individuals and institutions, including registered investment advisors, savings associations, savings banks, credit unions, financial planners, benefit consultants, independent insurance agents and brokers, certified public accountants, and attorneys may refer trust business to a national bank pursuant to written agreements.<sup>156</sup>

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<sup>151</sup> 12 CFR 7.5002(a)(1)(ii); Conditional Approval No. 369 (February 25, 2000); Interpretive Letter No. 875, *supra*.

<sup>152</sup> 12 CFR 7.5002(a)(1)(v); Conditional Approval No. 369, *supra*.

<sup>153</sup> Interpretive Letter No. 875, *supra*.

<sup>154</sup> Interpretive Letter No. 824, *supra*; Conditional Approval No. 99-38 (October 29, 1999).

<sup>155</sup> Interpretive Letter No. 850, *supra*.

<sup>156</sup> Interpretive Letter No. 607, *supra*.

**(S) Offering correspondent services to the extent permitted by published OCC precedent for national banks.**

National banks have traditionally performed for their affiliates and other financial institutions an array of activities called correspondent services. The OCC has long permitted national banks and their operating subsidiaries to offer these correspondent services as part of the business of banking.<sup>157</sup> A national bank may perform as a correspondent service for its affiliates and other financial institutions any service it may perform for itself.<sup>158</sup> Examples of correspondent services include providing computer networking packages and related hardware; data processing services and the sale of software that performs data processing functions; document control and record keeping; financial and consulting services; flood hazard determinations; security consulting services; loan collection and repossession services; and vault cash.

**(T) Acting as agent or broker in the sale of fixed or variable annuities.**

National banks and their operating subsidiaries may sell fixed and variable annuities without regard to the “place of 5,000” restriction in 12 USC 92 on the sale of insurance products.<sup>159</sup> Variable annuities are securities subject to requirements under the federal securities laws.<sup>160</sup>

**(U) Offering debt cancellation or debt suspension agreements.**

National banks and their operating subsidiaries are authorized to enter into debt cancellation agreements under which a bank agrees to cancel all or part of a customer’s obligation to repay an extension of credit from that bank upon the occurrence of a specified event under the standards set forth in OCC regulations.<sup>161</sup> Under those regulations, a national bank and its operating subsidiaries also are authorized to enter into debt suspension agreements under which a bank agrees to suspend all or part of a customer’s obligation to repay an extension of credit from that bank upon the occurrence of a specified event. The agreement may be separate from or part of other loan documents. Debt suspension agreements do not include loan payment deferral arrangements in which the triggering event is the borrower’s unilateral

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<sup>157</sup> Interpretive Letter No. 875, *supra*; Interpretive Letter No 811, *supra*; Corporate Decision No. 97-79 (July 11, 1997).

<sup>158</sup> 12 CFR 7.5007; Interpretive Letter No. 868 (August 16, 1999); Interpretive Letter No. 854 (February 25, 1999); Interpretive Letter No. 467, *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,691.

<sup>159</sup> *Texas Bankers Ass’n v. Bomer*, 1997 U.S. Dist. LEXIS 13422 (W.D. Tex. August 7, 1997); *Nationsbank v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995). See Conditional Approval No. 311 (April 29, 1999); Interpretive Letter No. 749 (September 13, 1996).

<sup>160</sup> See, e.g., 15 USC 78c(a)(4)-(6).

<sup>161</sup> 12 CFR 37; Interpretive Letter No. 640 (January 7, 1994), *reprinted in* [1993-94 Transfer Binder] Fed. Banking. L. Rep. (CCH) ¶ 83,527.

election to defer repayment or the bank’s unilateral decision to allow a deferral of repayment.<sup>162</sup>

**(V) Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the operating subsidiary, parent bank, or other financial institutions.**

*Closing, Escrow, and Related Services*

National banks and their operating subsidiaries may conduct loan closing, settlement, and escrow services for themselves and for other lenders.<sup>163</sup> Such services may include receipt and assembly of real estate settlement and loan documents, obtaining signatures for such documents, receipt as escrow agent of loan funds, payoff of prior mortgages and liens, payment of prorated taxes and utility bills, disbursement of net loan proceeds to the seller, and recording of mortgage deeds and other documents.

Closing and escrow services for loans made by the bank and its subsidiaries should be conducted in accordance with OCC rules regarding the origination and making of loans at banking and other than banking offices.<sup>164</sup> In particular, when services include the disbursement of loan proceeds, closings should occur either at a main or branch office of the bank or at the office of an unaffiliated entity, such as a lawyer’s office or other location that is not owned by the bank or any of its affiliates.

*Appraisal and Evaluation Services*

Federally regulated institutions must obtain appraisals prepared by a certified or licensed appraiser in connection with federally related transactions. A federally related transaction is any real estate-related financial transaction made on or after August 9, 1990, by a regulated institution that requires the services of an appraiser.

Title 12 CFR 34, subpart C, sets forth when appraisals are required and the standards that appraisals must meet. Certain real estate-related financial transactions are exempt from the appraisal requirements of 12 CFR 34 but require an evaluation to be prepared in accordance with safe and sound banking practices, which are discussed in the [“Frequently Asked Questions on the Appraisal Regulations and the Interagency Appraisal and Evaluation Guidelines”](#)<sup>165</sup> and the [“Interagency Appraisal and Evaluation Guidelines.”](#)<sup>166</sup> Banks and

<sup>162</sup> 12 CFR 37; Interpretive Letter No. 827 (April 3, 1998).

<sup>163</sup> See, e.g., Conditional Approval No. 322, *supra*; Corporate Decision No. 99-06 (January 29, 1999); Conditional Approval No. 276, *supra*.

<sup>164</sup> 12 CFR 7.1003, 7.1004, and 7.1005.

<sup>165</sup> [OCC Bulletin 2018-39](#), “Frequently Asked Questions on the Appraisal Regulations and the Interagency Appraisal and Evaluation Guidelines” (October 16, 2018).

<sup>166</sup> [OCC Bulletin 2010-42](#), “Sound Practices for Appraisals and Evaluations: Interagency Appraisal and Evaluation Guidelines” (December 10, 2010).

operating subsidiaries should consult the guidelines for specific information about the regulatory standards for appraisals and evaluations. National banks and their operating subsidiaries may offer appraisal and evaluation services for the subsidiary, parent bank, or other financial institutions.<sup>167</sup>

### *Affiliated Business Arrangements and Compliance With RESPA*

Some permissible services qualify as settlement services under RESPA, which prohibits persons from giving or receiving any fee, kickback, or thing of value for the referral of real estate settlement services.<sup>168</sup> RESPA, however, permits persons or entities to enter into ABAs and share in the income of the ABA in proportion to their ownership interest in the ABA under specified conditions. ABAs may include operating subsidiaries that provide such services and otherwise meet the ABA requirements. Banks and ABAs should ensure compliance with all of the requirements of RESPA. There are requirements that apply specifically to the ABA relationship, including that no lender may require a consumer to purchase settlement services from a particular provider as a condition of obtaining a loan, except as otherwise provided; the party making the referral must make certain disclosures; and the compensation restrictions must be followed (i.e., the only thing of value that is received from the arrangement, other than payments separately permitted by RESPA, is a return on the ownership interest or franchise relationship).<sup>169</sup>

There are guidelines for determining whether an ABA is a bona fide provider of settlement services and thus is not a sham or shell entity organized to circumvent RESPA's restrictions on payment of fees or other compensation for the referral of real estate settlement services business.<sup>170</sup> These guidelines list a variety of factors that are to be taken into account in determining whether an ABA is bona fide, though conformance to the guidelines does not necessarily require conformance to each of the factors. The factors include, among others, the adequacy of the entity's initial capital and net worth; whether the entity is staffed by its own employees; whether the entity manages its own business affairs; whether it has its own office separate from an office of one of its parents or, if not, whether it pays a general market value rent for the facility; whether it provides substantial services and incurs the risks and rewards of any comparable enterprise, or whether it contracts work out; whether it competes in the marketplace for business; and whether it sends business exclusively to one of the settlement service providers that created it, or to a number of entities. A full discussion and explanation of these guidelines is in HUD's "RESPA Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements," 61 Fed. Reg. 29258 (June 7, 1996). See also [OCC Bulletin 2005-27](#).

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<sup>167</sup> Conditional Approval No. 276, *supra*; Interpretive Letter No. 467, *supra*.

<sup>168</sup> 12 USC 2607(a).

<sup>169</sup> 12 USC 2607 (c)(4); 12 CFR 1024.15(b).

<sup>170</sup> The guidelines were issued by the U.S. Department of Housing and Urban Development (HUD) in a 1996 policy statement. Although interpretive authority has transferred from HUD to the Consumer Financial Protection Bureau (CFPB), pursuant to the Dodd-Frank Act, the CFPB continues to apply the guidelines. See 76 Fed. Reg. 43569-70 (July 21, 2011).

**(W) Acting as a transfer or fiscal agent.**

National banks may act as transfer agents. A transfer agent acts on behalf of an issuer of securities or on behalf of itself as an issuer of securities and performs the following functions: (1) countersigning securities upon issuance, (2) monitoring the issuance of securities to prevent unauthorized issuance, (3) registering the transfer of securities, (4) exchanging or converting securities, and/or (5) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates. A national bank or national bank operating subsidiary must register with the OCC if it performs transfer agent functions for any security registered under section 12 of the Exchange Act or any security that would be required to be registered under section 12 of the Exchange Act except for the exemption from registration for registered investment company securities and certain insurance company securities.<sup>171</sup> National banks without trust powers may perform transfer agent functions only for their own securities or for securities of affiliates.

National banks and operating subsidiaries may act as fiscal agents for the collection and remittance of funds as part of the business of banking.<sup>172</sup>

**(X) Acting as a digital certification authority to the extent permitted by published OCC precedent for national banks, subject to the terms and conditions contained in that precedent.**

National banks and their operating subsidiaries may act as a digital certification authority (CA), issuing digital certificates and acting as a repository of public keys and certificate information.<sup>173</sup> In addition, they may hold in escrow keys that are used for encryption.<sup>174</sup> Such certification and escrow activities do not require trust powers under 12 USC 92a. National banks and their operating subsidiaries engaging in these activities may also provide connected data-processing services and may sell or rent equipment, including specialized, limited-purpose software and hardware to be used in connection with the CA and repository services and other digital signature or data security systems. They may also provide and sell software generating public/private key pairs for subscribers and software enabling subscribers to create or receive messages with digital signatures, verify digital signatures with public keys, and confirm that the messages were properly signed. They may also provide consulting or advisory services to help customers, including other banks, to implement digital signature systems.<sup>175</sup>

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<sup>171</sup> See Securities Exchange Act 17A(c); 12 CFR 9.20(a).

<sup>172</sup> See Interpretive Letter No. 731 (July 1, 1996), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-048; Conditional Approval No. 361 (March 3, 2000); Conditional Approval No. 324 (August 17, 1999).

<sup>173</sup> 12 CFR 7.5005; Conditional Approval Letter No. 339 (November 16, 1999); Conditional Approval Letter No. 267 (January 12, 1998).

<sup>174</sup> *Id.*

<sup>175</sup> 12 CFR 7.5007; Conditional Approval Letter No. 339, *supra*; Conditional Approval Letter No. 267, *supra*.

CA activities must be undertaken in conformity with OCC precedent<sup>176</sup> and OCC guidance.<sup>177</sup>

**(Y) Providing or selling public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, promotional and advertising material, postage stamps, and Electronic Benefits Transfer (EBT) script, and similar media, to the extent permitted by published OCC precedent for national banks, subject to the terms and conditions contained in that precedent.**

National banks and their operating subsidiaries may provide or sell a variety of alternate media, including public transportation tickets or passes, event and attraction tickets, merchant gift certificates, prepaid telephone cards, and EBT script.<sup>178</sup> Because they have also long been permitted to provide or sell through traditional means advertising and promotional material,<sup>179</sup> postage stamps,<sup>180</sup> traveler's checks,<sup>181</sup> money orders,<sup>182</sup> and credit and debit cards,<sup>183</sup> these items may also be provided electronically, such as through ATMs.<sup>184</sup> For any items that are sold through an ATM, a printed receipt complying with the requirements of CFPB Regulation E, 12 CFR 1005, must be provided.<sup>185</sup>

**(Z) Providing data-processing, and data-transmission services, facilities (including equipment, technology, and personnel), databases, advice and access to such services, facilities, databases, and advice, for the parent bank and for others, pursuant to 12 CFR 7.5006 to the extent permitted by published OCC precedent for national banks.**

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<sup>176</sup> To date, OCC precedent has addressed the use of digital certificates in closed systems only, i.e., proprietary networks not connected to the Internet.

<sup>177</sup> See [OCC Bulletin 1999-20](#), "Certification Authority Systems: Guidance for Bankers and Examiners" (May 4, 1999).

<sup>178</sup> 12 CFR 5.34(e)(5)(v)(Y); Interpretive Letter No. 718 (March 14, 1996), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-033; Conditional Approval No. 285 (August 14, 1998); Interpretive Letter No. 854, *supra*; Interpretive Letter No. 890 (May 15, 2000).

<sup>179</sup> Interpretive Letter No. 316 (December 4, 1984), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,486.

<sup>180</sup> 12 CFR 7.1010; Interpretive Letter No. 890, *supra*.

<sup>181</sup> Letter of John G. Heimann, Comptroller of the Currency (November 10, 1977), *reprinted in* [1978-79 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,067; Interpretive Letter No. 890, *supra*; see No Objection Letter No. 89-02 (April 17, 1989), *reprinted in* [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,014; *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 438 (1st Cir. 1972). See also section (C) in this appendix.

<sup>182</sup> 12 CFR 7.1014; Interpretive Letter No. 890, *supra*. See also section (C) in this appendix.

<sup>183</sup> Former Interpretive Ruling 7.7378, 12 CFR 7.7378; Interpretive Letter No. 718, *supra*.

<sup>184</sup> Interpretive Letter No. 718, *supra*.

<sup>185</sup> *Id.*

National banks and their operating subsidiaries may provide or sell electronic data-processing and data-transmission services, databases, and facilities.<sup>186</sup> They may also provide advice and consulting services for such activities and facilities, pursuant to 12 CFR 7.5006 and consistent with published OCC precedent.<sup>187</sup>

**(AA) Providing bill presentment, billing, collection, and claims processing services.**

National banks and their operating subsidiaries may provide bill presentment, billing,<sup>188</sup> collection,<sup>189</sup> and claims processing services.<sup>190</sup>

**(BB) Providing safekeeping for personal information or valuable confidential trade or business information, such as encryption keys, to the extent permitted by published OCC precedent for national banks.<sup>191</sup>**

**(CC) Providing payroll processing.<sup>192</sup>**

**(DD) Providing branch management services.<sup>193</sup>**

**(EE) Providing merchant processing services except when the activity involves the use of third parties to solicit or underwrite merchants.<sup>194</sup>**

**(FF) Performing administrative tasks involved in benefits administration.<sup>195</sup>**

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<sup>186</sup> Corporate Decision No. 2003-6 (March 17, 2003); Interpretive Letter No. 516, *supra*.

<sup>187</sup> 12 CFR 7.5006; Corporate Decision No. 2002-11 (June 28, 2002).

<sup>188</sup> Corporate Decision No. 2005-02, *supra*; Interpretive Letter No. 928, *supra*; Interpretive Letter No. 712 (February 29, 1996), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-027.

<sup>189</sup> Interpretive Letter No. 731, *supra*; Corporate Decision No. 98-13, *supra*.

<sup>190</sup> Corporate Decision No. 98-13, *supra*; Interpretive Letter No. 712, *supra*.

<sup>191</sup> 12 CFR 7.5002(a)(4); Interpretive Letter No. 928, *supra*; Conditional Approval No. 479 (July 27, 2001); Conditional Approval No. 267, *supra*; see Corporate Decision No. 97-92, *supra*.

<sup>192</sup> Corporate Decision No. 2002-02 (January 9, 2002); Conditional Approval No. 435 (December 18, 2000); Conditional Approval No. 384, *supra*.

<sup>193</sup> 12 CFR 5.34(e)(5)(v)(DD).

<sup>194</sup> 12 CFR 5.34(e)(5)(v)(EE); Corporate Decision No. 99-35 (October 20, 1999); Interpretive Letter No. 856, *supra*; Interpretive Letter No. 689 (August 9, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-004; see Letter of Chief Counsel Julie L. Williams (July 6, 1997).

<sup>195</sup> 12 CFR 5.34(e)(5)(v)(FF); Corporate Decision No. 2002-02, *supra*; Conditional Approval No. 435, *supra*; Conditional Approval No. 384, *supra*.

# Appendix B: Non-Controlling Investment Guidelines—National Banks

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## Introduction

National banks and their operating subsidiaries are permitted to make a non-controlling investment, or hold a minority interest, in certain enterprises. The OCC regulation provides for an after-the-fact notice process if the enterprise is engaged in an activity permissible for after-the-fact notice under the OCC’s operating subsidiary regulation or if the activity is substantively the same as that contained in published OCC precedent on non-controlling investments.<sup>196</sup> The activities of the enterprise must generally be conducted pursuant to the same authorization, terms, and conditions that apply to the conduct of such activities by a national bank, unless otherwise specifically provided by statute, regulation, or published OCC policy.<sup>197</sup>

The following is a summary of non-controlling investments or minority interests approved by published OCC precedent.<sup>198</sup>

## Non-Controlling Investment Activities

### Lending

- **Appraisal services:** Providing appraisals of the value of collateral before creditors make a mortgage loan.<sup>199</sup>
- **Automobile loans:** Providing automobile loans.<sup>200</sup>
- **Commercial real estate loans:** Originating and selling commercial real estate loans.<sup>201</sup>
- **Credit card banking:** Making, purchasing, selling, servicing, or warehousing credit card accounts.<sup>202</sup>

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<sup>196</sup> 12 CFR 5.36(e).

<sup>197</sup> See 12 CFR 5.34(e)(3) and 5.36(e).

<sup>198</sup> The narrative section of this booklet provides further information on the requirements governing the use of the after-the-fact notice procedure. The “Operating Subsidiary Guidelines” (appendix A to this booklet) provide information on activities permissible for after-the-fact notice under the operating subsidiary regulation. 12 CFR 5.34(e)(5)(v).

<sup>199</sup> Conditional Approval No. 276 (May 8, 1998).

<sup>200</sup> Conditional Approval No. 321 (July 28, 1999).

<sup>201</sup> Conditional Approval No. 215 (September 11, 1996).

<sup>202</sup> Interpretive Letter No. 852 (December 11, 1998); Conditional Approval No. 269 (January 13, 1998).

- **Credit reporting:** Engaging in credit reporting activities, including operation of a credit-reporting bureau.<sup>203</sup>
- **Credit reporting services:** Providing credit reporting services in connection with the origination of loans.<sup>204</sup>
- **Data processing for mortgage rights:** Providing data-processing services that facilitate the transfer of mortgage servicing rights, mortgage ownership, and the release of mortgage rights through an electronic “book-entry” system to register and track mortgage rights.<sup>205</sup>
- **Escrow services:** Engaging in escrow services.<sup>206</sup>
- **Home equity lines of credit:** Loans for personal, family, or household purposes (for example, consumer loans). Providing home equity lines of credit, such as home improvement loans secured by second liens on family homes.<sup>207</sup>

## Loan Closing Activities

- **Loan closing services:**
  - Conducting loan closing services for both the bank and for other lenders. Loan closing services may include the disbursement of loan proceeds.<sup>208</sup>
  - Conducting loan closing services as an ABA as defined by, and in accordance with, RESPA.<sup>209</sup>
- **Loan document preparation:** Preparing loan documents that describe the rights and duties of the creditor and the borrower.<sup>210</sup>
- **Loan origination and servicing activities:**
  - Engaging in loan origination and servicing activities, as well as commercial mortgage loan brokerage services.<sup>211</sup>

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<sup>203</sup> Conditional Approval No. 322 (July 30, 1999).

<sup>204</sup> Conditional Approval No. 336 (November 2, 1999).

<sup>205</sup> Conditional Approval No. 333 (October 19, 1999).

<sup>206</sup> Conditional Approval No. 308 (April 8, 1999).

<sup>207</sup> Interpretive Letter No. 694 (December 13, 1995), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-009; Conditional Approval No. 264 (December 29, 1997).

<sup>208</sup> Conditional Approval No. 322 (July 30, 1999).

<sup>209</sup> Conditional Approval No. 243 (May 9, 1997). The ABA’s structure, operating agreement and activities must be consistent with HUD guidelines. See also section (V) of appendix A of this booklet, “Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the subsidiary, parent bank, or other financial institutions.”

<sup>210</sup> Conditional Approval No. 276 (May 8, 1998); Conditional Approval No. 322 (July 30, 1999).

<sup>211</sup> Conditional Approval No. 293 (November 24, 1998).

- Engaging in loan origination and servicing activities that qualify the bank to receive a share of the new markets tax credits awarded the entity in which the bank is investing.<sup>212</sup>
- **Loans secured by residential real estate:** Originating and selling residential real estate mortgage loans.<sup>213</sup>
- **Mortgage banking activities:** Buying, selling, and otherwise dealing in mortgages.<sup>214</sup>
- **Real estate tax services:** Providing complete real estate tax services, including, for example, procuring state and local tax bills, reporting such information to the servicers in time for establishing escrow accounts and paying tax bills, and data processing and administration services for escrows, taxes, and delinquencies.<sup>215</sup>
- **Real property conveyed as security for DPC:** Acquiring, managing, and selling real property conveyed to the bank as security for or in satisfaction of DPC.<sup>216</sup>
- **Student loans:** Originating and marketing student loans.<sup>217</sup>

## Leasing

- **Equipment and personal property leasing:** Engaging in equipment and personal property leasing, including aircraft leasing.<sup>218</sup>
- **Leasing/selling excess capacity:** Providing back-up call answering for a hotline to persons who are not bank customers if there is good faith excess capacity.<sup>219</sup>
- **Point-of-sale terminals:** Leasing point-of-sale terminals.<sup>220</sup>
- **Prime auto leasing:** Engaging in the origination, purchase, and securitization of prime auto leases.<sup>221</sup>

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<sup>212</sup> Interpretive Letter No. 996 (July 6, 2004), *reprinted in* [2003-04 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-522.

<sup>213</sup> Interpretive Letter No. 853 (February 16, 1999); Conditional Approval No. 225 (November 25, 1996).

<sup>214</sup> Interpretive Letter No. 711 (February 23, 1996), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-026; Conditional Approval No. 338 (November 10, 1999); Conditional Approval No. 243 (May 9, 1997); Conditional Approval No. 241 (May 1, 1997); Conditional Approval No. 318 (July 21, 1999).

<sup>215</sup> Conditional Approval No. 276 (May 8, 1998).

<sup>216</sup> Interpretive Letter No. 735 (July 15, 1996), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-052; Interpretive Letter No. 657 (March 31, 1995), *reprinted in* [1994-95 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,605.

<sup>217</sup> Conditional Approval No. 216 (September 11, 1996); Interpretive Letter No. 692, *supra*.

<sup>218</sup> Interpretive Letter No. 887 (April 30, 2000). See also Conditional Approval No. 316 (June 30, 1999); *M&M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382-83 (9th Cir. 1977), cert. denied, 436 U.S. 956 (1978); OCC Corporate Decision No. 97-54 (June 26, 1997); Conditional Approval No. 281 (July 30, 1998); Conditional Approval No. 295 (December 3, 1998).

<sup>219</sup> Conditional Approval No. 361 (March 3, 2000).

<sup>220</sup> Conditional Approval No. 269 (January 13, 1998).

<sup>221</sup> Interpretive Letter No. 898 (July 14, 1998).

## Payment Services

- **Cash management:** Providing cash management services.<sup>222</sup>
- **Check cashing and processing:** Engaging in check cashing through sales and leases of check cashing machines to third parties.<sup>223</sup>
- **Check certification:** Providing check guarantee and verification services.<sup>224</sup>

## Data Processing and Correspondent Services

- **Analyzing customer information:** Analyzing customer information to determine potential needs and including brochures in statements about the availability of nonbanking products from vendors.<sup>225</sup>
- **Electronic imaging services:** Providing electronic imaging services to financial institutions. Electronic imaging systems use digital technology to capture, index, store, and retrieve electronic images of paper documents.<sup>226</sup>
- **Internet merchant hosting services:** Providing Internet merchant hosting services to other financial institutions for resale to their merchants.<sup>227</sup>
- **Medical claims processing:** Engaging in medical claims processing, including using electronic data interchange facilities, billing, and facilitating payment through funds transfer and credit card processing.<sup>228</sup>
- **Merchant processing services:** Providing merchant credit and debit card processing services. Merchant processing generally involves verifying credit and debit card authorizations at the time of purchase, processing card transactions, settlement of card transactions, and depositing funds in merchants' accounts.<sup>229</sup>
- **Payment and information processing services:** Providing payment and information processing services. The entity may provide electronic data processing and data

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<sup>222</sup> Interpretive Letter No. 756 (November 5, 1996), *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-120. See also Conditional Approval No. 324 (August 17, 1999).

<sup>223</sup> Conditional Approval No. 307 (March 19, 1999).

<sup>224</sup> Conditional Approval No. 287 (September 4, 1998).

<sup>225</sup> Conditional Approval No. 265 (December 29, 1997).

<sup>226</sup> Interpretive Letter No. 805 (October 9, 1997). See also Conditional Approval No. 658 (October 13, 2004).

<sup>227</sup> Interpretive Letter No. 875 (October 31, 1999).

<sup>228</sup> Interpretive Letter No. 836 (March 12, 1996), *reprinted in* [1998-99 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-290.

<sup>229</sup> Interpretive Letter No. 813 (October 14, 1997). See also Conditional Approval No. 289 (October 2, 1998); Conditional Approval No. 248 (June 27, 1997); Interpretive Letter No. 720 (January 26, 1996), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,035; Interpretive Letter No. 731 (July 1, 1996), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,048; Interpretive Letter No. 689 (August 9, 1995), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,004; Conditional Approval No. 265 (December 29, 1997); Conditional Approval No. 255 (September 25, 1997).

interchange facilities to assist health care providers in communicating billing and payment-related information to insurance carriers responsible for providing medical benefits. Non-controlling investments also may provide lockbox services. In addition, non-controlling investments may provide ATM and point-of-sale-related services to depository institutions.<sup>230</sup>

- **Payroll processing services:** Offering payroll processing services by traditional as well as electronic means to commercial customers. Payroll processing services may include payroll computations, deductions and tax escrow account management, and processing salary payments to employees either by direct deposit or by check preparation.<sup>231</sup>
- **Processing of banking, financial, or economic data:** Collecting, transcribing, processing, analyzing, and storing banking, financial, or related economic data for customers as part of the business of banking.<sup>232</sup>

## Consulting and Financial Advice

- **Consumer financial advice:** Providing financial advice to bank consumers, including advice regarding acquisitions and dispositions of businesses.<sup>233</sup>
- **Investment advice:** Providing investment advice as part of or incidental to the business of banking.<sup>234</sup>

## Finder Activities

- **Acting as finder for government agencies:** Hosting websites for government agencies and providing an electronic communications pathway for product ordering and payment as a finder activity.<sup>235</sup>
- **Acting as finder for insurance activities:** Bringing together a potential purchaser of insurance and the seller of insurance by making inquiries as to interest, introducing or arranging meetings of interested parties, and otherwise bringing parties together for a transaction that the parties themselves negotiate and consummate.<sup>236</sup>

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<sup>230</sup> Conditional Approval No. 282 (July 31, 1998); Interpretive Letter No. 705 (October 25, 1995), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-020.

<sup>231</sup> Interpretive Letter No. 771 (February 24, 1997), *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-135.

<sup>232</sup> Conditional Approval No. 361 (March 3, 2000); Interpretive Letter No. 516 (July 12, 1990), *reprinted in* [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,220.

<sup>233</sup> Interpretive Letter No. 871 (October 14, 1999).

<sup>234</sup> Interpretive Letter No. 871, *supra*. See also Interpretive Letter No. 851 (December 8, 1998); Conditional Approval No. 270 (January 21, 1998); Conditional Approval No. 300 (January 13, 1999); Conditional Approval No. 241 (May 1, 1997).

<sup>235</sup> Interpretive Letter No. 883 (March 3, 2000).

<sup>236</sup> Conditional Approval No. 612 (November 21, 2003).

- **Acting as finder for Internet vendors:** Providing bank customers links to nonbanking, third-party vendors' websites.<sup>237</sup>
- **Acting as finder for like-kind exchanges:** Providing finder services for the owners of investment property.<sup>238</sup>
- **Acting as finder for merchants through the Internet:** Hosting merchants' commercial websites, bringing potential customers and merchants together for a transaction that the parties themselves negotiate and consummate.<sup>239</sup>
- **Acting as finder for real estate transactions:** Acting as a finder and bringing together parties wishing to finance the purchase, construction, development, or placement of real estate equity interests, and securities related to real estate.<sup>240</sup>

## Real Estate-Related Activities

- **Appraisal services:** Performing real estate appraisals for the bank and for other lenders.<sup>241</sup>
- **Property for bank premises:** Acquiring property for bank premises if (1) the aggregate amount of the investment is less than or equal to the national bank's capital stock; or (2) the aggregate amount of the investment is less than or equal to 150 percent of the national bank's capital and surplus, and the national bank is "well capitalized" (see [Glossary](#)) and has a CAMELS rating of 1 or 2, provided that the bank provides the OCC with notice 30 days after this investment. Prior OCC approval is required for investments in bank premises that do not meet the above criteria.<sup>242</sup>
- **Real estate tax and management services:** Engaging in real estate reporting and management services in connection with certain loans made by the bank or its lending affiliates. A national bank also may hold a non-controlling interest in an entity that provides real estate tax services that ensure that real estate taxes are paid on time.<sup>243</sup>
- **Title abstracting services:** Engaging in residential and commercial title abstracting services; that is, the preparation of reports of chains of title drawn from public records, but without interpretations, conclusions, or expressions of opinion as to the validity of title.<sup>244</sup>

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<sup>237</sup> Conditional Approval No. 221 (December 4, 1996). See also Conditional Approval No. 361 (March 3, 2000); Conditional Approval No. 369 (February 25, 2000).

<sup>238</sup> Conditional Approval No. 322 (July 30, 1999).

<sup>239</sup> Interpretive Letter No. 875, *supra*; Conditional Approval No. 369, *supra*.

<sup>240</sup> Conditional Approval No. 241 (May 1, 1997).

<sup>241</sup> Conditional Approval No. 322 (July 30, 1999).

<sup>242</sup> Conditional Approval No. 298 (December 15, 1998).

<sup>243</sup> Conditional Approval No. 317 (July 19, 1999); Conditional Approval No. 276 (May 8, 1998).

<sup>244</sup> Conditional Approval No. 308 (April 8, 1999).

- **Title insurance and loan closing services:** Providing title insurance and engaging in loan closing management activities.<sup>245</sup>

## Support Services

- **Agent for deposit placement:** Acting as agent and placing customers' funds in foreign currency time deposits with foreign banks.<sup>246</sup>
- **Employee benefit and payroll services:** Providing employee benefit services and payroll services to financial institutions and nonfinancial companies.<sup>247</sup>
- **Professional employer organization:** Marketing human resources and employee-related administrative services to small and medium-sized customers.<sup>248</sup>

## Fiduciary Activities

- **Trust bank stock:** Holding interests in trust banks.<sup>249</sup>

## Insurance and Annuities Activities

- **Insurance agency:** Holding an interest in a general insurance agency.<sup>250</sup>
- **Insurance company products and investment funds hedging:** Holding interests through subsidiaries in various insurance company products and investment funds containing bank-ineligible securities to hedge, on a dollar-for-dollar basis, the subsidiary's obligations to make payments to employees under nonqualified deferred compensation plans.<sup>251</sup>
- **Marketing and consulting services to insurance agencies:** Providing marketing and consulting services to insurance agencies.<sup>252</sup>
- **Place of 5,000 satellite offices:** An insurance agency located in a "place of 5,000" may solicit and sell insurance in the same manner permissible for state-licensed insurance agencies generally and as authorized by the agency's state insurance license. In

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<sup>245</sup> Conditional Approval No. 327 (September 14, 1999); Interpretive Letter No. 842 (September 28, 1998); Conditional Approval No. 276 (May 8, 1998).

<sup>246</sup> Interpretive Letter No. 778 (March 20, 1997).

<sup>247</sup> Interpretive Letter No. 909 (May 2, 2001); Interpretive Letter No. 994 (June 14, 2004).

<sup>248</sup> Conditional Approval No. 456 (March 10, 2001).

<sup>249</sup> Interpretive Letter No. 697 (November 15, 1995), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-016. See also Interpretive Letter No. 815 (December 2, 1997); Interpretive Letter No. 831 (June 8, 1998).

<sup>250</sup> Interpretive Letter No. 819 (January 20, 1998); Conditional Approval No. 236 (April 3, 1997).

<sup>251</sup> Interpretive Letter No. 878 (December 22, 1999).

<sup>252</sup> Conditional Approval No. 302 (January 21, 1999).

particular, an insurance agency may sell insurance through satellite offices, in addition to the agency's "place of 5,000" location, as permitted under state law.<sup>253</sup>

- **Scope of market:** Holding an interest in an LLC that does business as an insurance agency or broker, including acting as agent in the sale of disability and life insurance.<sup>254</sup>
- **Title insurance:** Selling title insurance as agent.<sup>255</sup>
- **Title insurance and annuity sales:** Acting as insurance agent, owning an interest in a title insurance agency, and engaging in annuity sales as an agent.<sup>256</sup>
- **Reinsurance of credit life, credit accidental death, and credit disability insurance:** Reinsuring mortgage life, mortgage accidental death, and mortgage disability insurance on loans originated by lenders with an ownership interest in the investment entity.<sup>257</sup>
- **Reinsurance of private mortgage insurance:** Reinsuring mortgage insurance on loans originated, purchased, or serviced by lenders with an ownership interest in the investment entity.<sup>258</sup>
- **Professional liability insurance:** Incidental purchase of securities by a bank of an insurance carrier when purchase of the securities is necessary to obtain professional liability insurance.<sup>259</sup>

## Securities Activities

- **Business trusts:** Having interests in certificates of participation in business trusts created to hold and manage a substantial portion of the bank's investment securities portfolio.<sup>260</sup>
- **Clearinghouse membership:** Purchasing a share in a clearinghouse to enable participation in permissible exchange and clearinghouse activities.<sup>261</sup>
- **Investment funds management:** Holding limited equity interests in certain private investment funds for which a national bank serves as investment manager.<sup>262</sup>
- **Investment portfolio management:** Providing investment portfolio management.<sup>263</sup>

<sup>253</sup> See Interpretive Letter No. 873 (December 1, 1999). See also Interpretive Letter No. 882 (February 22, 2000); Interpretive Letter No. 864 (May 19, 1999); Interpretive Letter No. 844 (October 20, 1998).

<sup>254</sup> Conditional Approval No. 242 (May 7, 1997). See also Conditional Approval No. 303 (February 16, 1999).

<sup>255</sup> Conditional Approval No. 371 (March 20, 2000).

<sup>256</sup> Conditional Approval No. 574 (January 27, 2003).

<sup>257</sup> Interpretive Letter No. 835 (July 31, 1998).

<sup>258</sup> Interpretive Letter No. 985 (January 14, 2004).

<sup>259</sup> Interpretive Letter No. 965 (February 24, 2003).

<sup>260</sup> Interpretive Letter No. 745 (August 27, 1996), *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-110.

<sup>261</sup> Interpretive Letter No. 929 (February 11, 2002).

<sup>262</sup> Interpretive Letter No. 940 (May 24, 2002).

<sup>263</sup> Conditional Approval No. 289 (October 2, 1998).

- **Investment advisory company:** Providing investment advisory services through a company that owns limited equity interests in investment funds to which it provides services.<sup>264</sup>
- **Principal in bank-eligible securities:** Investing and trading as principal in bank-eligible securities.<sup>265</sup>
- **Private placement of securities:** Arranging private placements of debt and equity securities for bank customers.<sup>266</sup>
- **Riskless principal:** Buying and selling securities on an agency or riskless principal basis.<sup>267</sup>
- **Rural business investment companies:** Having an interest in, or making loans to, an RBIC that will engage in activities permissible under 7 USC 2009cc-9.
- **Securities brokerage:** Providing full-service securities brokerage services (investment advisory services and brokerage services) to the bank's customers.<sup>268</sup>
- **Small business investment companies:** Having an interest in, and making loans to, an SBIC that will make loans and invest in securities permissible under the Small Business Investment Company Act of 1958.<sup>269</sup>
- **Warrants for common stock:** Having an interest in a subsidiary that holds warrants of acquired shares of common stock.<sup>270</sup>

## Technology and Electronic Activities

- **Internet banking powers:** Offering Internet home banking services.<sup>271</sup>
- **Commercial website hosting services:** Providing a package of Internet-based services that include hosting merchants' websites on its server; providing an electronic pathway for product ordering and payment; maintaining merchants' data associated with the websites on its server; providing reports on transactions, website hits, and sales data; and

<sup>264</sup> Interpretive Letter No. 897 (October 23, 2000).

<sup>265</sup> Interpretive Letter No. 889, supra; Interpretive Letter No. 652 (September 13, 1994), *reprinted in* [1994 Transfer Binder] Fed. Banking L. Reg. (CCH) ¶ 83,600.

<sup>266</sup> Interpretive Letter No. 871, supra.

<sup>267</sup> Interpretive Letter No. 889, supra; Interpretive Letter No. 622 (April 9, 1993), *reprinted in* [1993-94 Transfer Binder] Fed. Banking L. Reg. (CCH) ¶ 83,504; Interpretive Letter No. 626 (July 7, 1993), *reprinted in* [1993-94 Transfer Binder] Fed. Banking L. Reg. (CCH) ¶ 83,508; Interpretive Letter No. 371 (June 13, 1986), *reprinted in* [1984-87 Transfer Binder] Fed. Banking L. Reg. (CCH) ¶ 85,541.

<sup>268</sup> Interpretive Letter No. 871, supra; *Securities Industry Association v. Comptroller of the Currency*, 577 F. Supp. 252 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 468 U.S. 207 (1984). See also Conditional Approval No. 303 (February 16, 1999).

<sup>269</sup> Conditional Approval No. 305 (March 15, 1999). See also Interpretive Letter No. 832 (June 18, 1998).

<sup>270</sup> Conditional Approval No. 319 (July 26, 1999).

<sup>271</sup> Conditional Approval No. 289 (October 2, 1998).

- payment processing.<sup>272</sup>
- **Hyperlinks between bank websites and third-party sites:** Establishing hyperlinks between the bank's home pages and the Internet pages of third-party providers so that bank customers can access those nonbank sites from the bank site.<sup>273</sup>
  - **Research and development:** Engaging in research and development to establish identity certification services.<sup>274</sup>
  - **Trade finance:** Facilitating trade financing between U.S. exporters and Latin American importers by arranging financing, obtaining credit insurance, and acting as escrow agent.<sup>275</sup>
  - **Virtual malls:** Operating a "virtual mall," that provides a collection of links to websites of third-party vendors and merchants organized by product type and made available to bank customers. The virtual mall allows bank customers to shop for a range of financial and nonfinancial products and services via the links to the sites, and can electronically confirm payment authorization before shipping goods.<sup>276</sup>
  - **Web design and development services:** Providing web design and development services to the bank's merchant customers.<sup>277</sup>

## Electronic Bill Payments

- **Electronic bill payment and presentment services:** Offering electronic bill payment and presentment services over the Internet.<sup>278</sup>
- **Electronic interbank switch:** Holding an interest in a switch to support electronic bill presentment services over the Internet.<sup>279</sup>
- **Electronic bill payment, money transfer, and related data processing:** Holding an interest in an LLC that offers electronic bill payment, transfer of money, and related data processing for these services.<sup>280</sup>

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<sup>272</sup> Conditional Approval No. 361 (March 3, 2000).

<sup>273</sup> Conditional Approval No. 221 (December 4, 1996).

<sup>274</sup> Conditional Approval No. 301 (January 15, 1999).

<sup>275</sup> Conditional Approval No. 436 (December 19, 2000).

<sup>276</sup> Interpretive Letter No. 875, *supra*.

<sup>277</sup> Interpretive Letter No. 875, *supra*. See also Interpretive Letter No. 883, *supra*; Conditional Approval No. 220 (December 2, 1996); Corporate Decision No. 98-39 (March 27, 1998).

<sup>278</sup> Conditional Approval No. 304 (March 5, 1999). See also Conditional Approval No. 289 (October 2, 1998).

<sup>279</sup> Conditional Approval No. 332 (October 18, 1999).

<sup>280</sup> Conditional Approval No. 389 (May 19, 2000).

## Stored Value

- **Stored value card systems:** Designing, installing, and supporting stored value card systems at universities and other institutions.<sup>281</sup>
- **Creation, sale, and redemption of stored value cards:** Providing closed stored value card systems and engaging in the development, marketing, delivery, and maintenance of stored value and information systems.<sup>282</sup>
- **Stored value system:** Providing an electronic payments system that enables non-depositor customers to store prepaid value on a card but is maintained in a central database.<sup>283</sup>

## Electronic Data Interchange (EDI) Services

- **EDI services:** Holding interests in companies that allow businesses to send and receive payments, invoices, and orders worldwide. Specifically, these companies may design and develop a network for electronic transfer of funds and financial information, along with the development and marketing of related software.<sup>284</sup>
- **Electronic funds transfer (EFT) network:** Engaging in a broad range of EFT-related activities, including operating the networks, data processing, and providing consulting services to depository institutions.<sup>285</sup>
- **Operation of an electronic toll collection system:** Using modern technology in serving as a government fiscal agent.<sup>286</sup>
- **Dispensing prepaid alternative media:** Dispensing alternative media through ATMs, including event tickets, vouchers, and gift certificates.<sup>287</sup>

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<sup>281</sup> Interpretive Letter No. 737 (August 19, 1996), *reprinted in* [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-101.

<sup>282</sup> Interpretive Letter No. 855 (March 1, 1999).

<sup>283</sup> Conditional Approval No. 568 (December 31, 2002).

<sup>284</sup> Interpretive Letter No. 732 (May 10, 1996), *reprinted in* [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-049.

<sup>285</sup> Interpretive Letter No. 854 (February 25, 1999); Interpretive Letter No. 890 (May 15, 2000); Interpretive Letter No. 993 (May 16, 1997); CRA Decision Letter No. 122 (June 23, 2004).

<sup>286</sup> Conditional Approval No. 361 (March 3, 2000).

<sup>287</sup> Conditional Approval No. 285 (August 14, 1998).

## Digital Certification

- **Digital certification:** Acting as a CA to enable subscribers to generate digital signatures that verify the identity of a sender of an electronic message.<sup>288</sup>
- **Multiple bank certification authority network system:** Establishing an entity to support a multiple-bank CA network system. The central entity acts as the root CA for the sub-CA banks and establishes business rules so that customers of any sub-CAs can quickly and easily obtain verification of a certificate issued by any other CA bank in the system.<sup>289</sup>

## Internet Access Service

- **Internet access service:** Establishing and operating an electronic distribution channel for providing electronic financial services to customers of participating financial institutions.<sup>290</sup>
- **Internet access and sale of excess capacity:** Providing back-up call answering for a hotline to persons who are not bank customers if there is good faith excess capacity.<sup>291</sup>

## Software Development and Production

- **Software development, distribution and support:** Providing services and technology to facilitate secure electronic payments over the Internet.<sup>292</sup>

## Other

- **Interest in airplane:** Owning a non-controlling interest in an LLC that owns and operates a single small airplane for use in the conduct of the bank's business.<sup>293</sup>
- **ATM sales/leases to third parties:** Selling and leasing ATMs, as well as their proprietary software and hardware, to enable check cashing services.<sup>294</sup>
- **Interest in a bankers' bank:** Owning a non-controlling interest in an institution organized as a bankers' bank, not otherwise authorized under 12 USC 27(b).<sup>295</sup>

<sup>288</sup> Conditional Approval No. 339 (November 16, 1999); Conditional Approval No. 301 (January 15, 1999); CRA Decision Letter No. 122 (June 23, 2004); Corporate Decision No. 2002-4 (February 18, 2002).

<sup>289</sup> Conditional Approval No. 339 (November 16, 1999).

<sup>290</sup> Conditional Approval No. 221 (December 4, 1996).

<sup>291</sup> Conditional Approval No. 361 (March 3, 2000).

<sup>292</sup> Interpretive Letter No. 868 (August 16, 1999); Interpretive Letter No. 677 (June 28, 1995), *reprinted in* [1994-95 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,625. See also Interpretive Letter No. 756, *supra*; Conditional Approval No. 254 (August 21, 1997); Conditional Approval No. 289 (October 2, 1998).

<sup>293</sup> Interpretive Letter No. 943 (July 24, 2002).

<sup>294</sup> Conditional Approval No. 307 (March 19, 1999).

<sup>295</sup> Interpretive Letter No. 970 (June 25, 2003).

## Appendix C: Operating Subsidiary Guidelines— FSAs

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### Introduction

These guidelines describe activities of FSAs that the OCC or a predecessor regulator of FSAs has determined may be performed in an operating subsidiary under the expedited review procedures available in the OCC’s operating subsidiary regulations, provided the activity is conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by an FSA.<sup>296</sup> Activities recognized in these guidelines as permissible for FSA subsidiaries under applicable OCC or predecessor regulator precedent must also be conducted in accordance with other applicable statutes and regulations, including, but not limited to, the federal securities laws and the Volcker rule, 12 CFR 44, unless the FSA and its operating subsidiary are otherwise exempt from the Volcker rule.<sup>297</sup> The Volcker rule generally prohibits, subject to certain exceptions, a banking entity from engaging in proprietary trading and from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a hedge fund or private equity fund.

### Operating Subsidiary Activities—FSAs [12 CFR 5.38(e)(5)(v)]

**(A) Holding and managing assets acquired by the parent FSA or its operating subsidiaries, including investment assets and property acquired through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted.**

FSAs and their operating subsidiaries may hold and manage assets acquired by the parent FSA or the operating subsidiary, including investment assets and property acquired in satisfaction of debts previously contracted.

An operating subsidiary of an FSA, subject to conditions, may manage the parent savings association’s securities investment portfolio, including holding legal title to assets in the portfolio located in the U.S.<sup>298</sup>

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<sup>296</sup> 12 CFR 5.38.

<sup>297</sup> See 12 USC 1851(h)(1) (exempting certain institutions from the Volcker rule, including institutions that do not have and are not controlled by a company that has (i) more than \$10,000,000,000 in total consolidated assets; and (ii) total trading assets and trading liabilities, as reported on the most recent applicable regulatory filing by the institution, that are more than 5 percent of total consolidated assets).

<sup>298</sup> OTS Opinion No. 94-15 (July 6, 1994).

An FSA's foreign operating subsidiary may hold financial assets that its parent is authorized to invest in directly, and may manage the association's investment portfolio, subject to conditions.<sup>299</sup>

FSAs and their operating subsidiaries may invest in and hold mortgage loans and mortgage-backed securities.<sup>300</sup>

FSAs and their operating subsidiaries may hold assets consisting of federal funds, federal agency securities, and mortgage-backed securities.<sup>301</sup>

FSAs and their operating subsidiaries may hold investment grade corporate bonds and municipal bonds, automobile loans, and securities of an affiliate.<sup>302</sup>

FSAs and their operating subsidiaries may purchase auction rate securities (ARS), including municipal ARS and student loan-backed ARS, and auction rate preferred securities, from current and former customers and hold them for up to 120 days from the date of purchase, subject to conditions.<sup>303</sup>

First-tier operating subsidiaries of an FSA may hold the stock of second-tier subsidiaries, and second-tier operating subsidiaries may engage in mortgage loan origination and servicing activities, which are permissible activities for FSAs.<sup>304</sup> A second-tier subsidiary may hold a subordinated interest in a pool of securitized mortgage loans, which is a permissible activity for FSAs.<sup>305</sup>

An operating subsidiary of an FSA may facilitate the securitization of automobile loans held by the parent FSA.<sup>306</sup>

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<sup>299</sup> OTS Order No. 2001-01 (January 5, 2001); OTS Order No. 2000-11 (February 4, 2000); OTS Memorandum of the Chief Counsel (January 14, 2000); OTS Opinion of the Acting Chief Counsel (July 6, 1994). The conditions related to, among other things, consenting to U.S. jurisdiction and the applicability of U.S. laws, termination of operations, and documenting adequate oversight and internal controls.

<sup>300</sup> 12 USC 1464(c)(1); 12 CFR 160.30; OCC Conditional Approval #1029 (May 2012); OTS Order No. 2002-40 (September 6, 2002).

<sup>301</sup> 12 USC 1464(c)(1); 12 CFR 160.30; OTS Order No. 2002-06 (February 20, 2002).

<sup>302</sup> 12 USC 1464(c)(1), (c)(2)(D), (c)(3)(B); 12 CFR 160.30; 12 CFR 160.40; 12 CFR 160.42; OTS Order No. 2010-58 (September 20, 2010).

<sup>303</sup> OCC Interpretive Letter No. 1135 (January 20, 2012).

<sup>304</sup> OTS Order No. 2004-19 (April 22, 2004).

<sup>305</sup> OTS Order No. 2004-23 (April 30, 2004).

<sup>306</sup> OTS Order No. 2001-71 (November 19, 2001).

**(B) Providing services to or for the FSA or its affiliates, including accounting, auditing, appraising, advertising and public relations, and financial advice and consulting.**

FSAs and their operating subsidiaries may provide payroll processing services if the services are performed primarily for the savings association, other depository institutions, or persons with whom the association or subsidiary has an established relationship.<sup>307</sup>

FSAs and their operating subsidiaries may provide messenger services to facilitate customer transactions.<sup>308</sup>

FSAs and their operating subsidiaries may service credit cards for the association and an affiliated financial institution.<sup>309</sup>

Operating subsidiaries of FSAs may oversee and manage service operations, such as customer service support for retail banking and call center support, that are integral to the parent FSA's operations.<sup>310</sup>

FSAs and their operating subsidiaries may engage in back-office processing of mortgage documents; development and execution of marketing campaigns; ordering relevant documents such as appraisals and credit reports; preparing loan packages for underwriting and decision making by the lender; and delivering loan closing packages to the escrow or closing agent.<sup>311</sup>

FSAs and their operating subsidiaries may provide correspondent services.<sup>312</sup>

**(C) Making loans or other extensions of credit, and selling money orders and traveler's checks.**

FSAs and their operating subsidiaries possess broad authority to engage in lending and lending-related activities. Under the HOLA,<sup>313</sup> and subject to certain statutory limits and safety and soundness guidelines, FSAs and their operating subsidiaries may originate loans and extensions of credit, or interests therein, including, but not limited to, residential real

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<sup>307</sup> OTS Opinion of the Chief Counsel (October 1, 1998).

<sup>308</sup> OTS Memorandum of the Deputy Chief Counsel (November 20, 1992).

<sup>309</sup> OTS Order No. 2006-13 (March 30, 2006).

<sup>310</sup> OTS Order No. 2008-11 (April 28, 2008).

<sup>311</sup> OTS Order No. 2005-31 (August 24, 2005).

<sup>312</sup> FHLBB Letter from Deputy General Counsel (January 13, 1984).

<sup>313</sup> 12 USC 1461 *et seq.*

estate loans;<sup>314</sup> nonresidential real estate loans;<sup>315</sup> commercial loans, including loans for corporate, business or agricultural purposes;<sup>316</sup> consumer loans;<sup>317</sup> credit card loans;<sup>318</sup> education loans;<sup>319</sup> home improvement loans and manufactured home loans;<sup>320</sup> construction loans;<sup>321</sup> loans to business development credit corporations;<sup>322</sup> and account loans.<sup>323</sup>

FSAs and their operating subsidiaries may make unlimited residential real property loans and may also make, subject to aggregate limits, nonresidential real property loans pursuant to 12 USC 1464. The standards for real estate lending by FSAs and their operating subsidiaries are set forth at 12 CFR 160.100 and 160.101. FSAs and their operating subsidiaries may make, participate in, arrange, purchase, or sell loans or extensions of credit secured by liens or interests in residential or commercial real estate.

FSAs and their operating subsidiaries may engage in mortgage loan origination activities.<sup>324</sup> FSAs and their operating subsidiaries may engage in the activities of residential mortgage lending and home equity lines of credit, and may hold mortgage lending licenses.<sup>325</sup> FSAs and their operating subsidiaries may engage in structured lending as part of their authority under the HOLA to engage in mortgage lending and secured and unsecured lending.<sup>326</sup>

FSAs and their operating subsidiaries may make loans to financial institutions, brokers, and dealers, provided the loans are secured by assets in which an FSA may invest directly.<sup>327</sup>

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<sup>314</sup> 12 USC 1464(c)(1)(B).

<sup>315</sup> 12 USC 1464(c)(2)(B).

<sup>316</sup> 12 USC 1464(c)(2)(A).

<sup>317</sup> 12 USC 1464(c)(2)(D).

<sup>318</sup> 12 USC 1464(c)(1)(T); OTS Order No. 96-88 (August 29, 1996).

<sup>319</sup> 12 USC 1464(c)(1)(U).

<sup>320</sup> 12 USC 1464(c)(1)(J).

<sup>321</sup> 12 USC 1646(c)(3)(C).

<sup>322</sup> 12 USC 1464(c)(4)(A).

<sup>323</sup> 12 USC 1464(c)(1)(A) (loans on the security of the FSA's savings accounts and loans related to transaction accounts).

<sup>324</sup> OTS Order No. 2004-33 (June 15, 2004); OTS Order No. 2004-23 (April 30, 2004); OTS Order No. 2004-19 (April 22, 2004).

<sup>325</sup> OTS Order No. 2009-54 (October 21, 2009).

<sup>326</sup> OTS Order No. 2007-22 (May 29, 2007).

<sup>327</sup> 12 USC 1464(c)(1)(L).

FSAs and their operating subsidiaries may make commercial and consumer loans.<sup>328</sup> FSAs and their operating subsidiaries may underwrite, fund, and service automobile loans for other financial institutions.<sup>329</sup>

An FSA's wholly owned operating subsidiary that is a federally chartered, insured depository institution may operate as a credit card bank and may also, on a limited basis, make community development loans other than credit card loans to benefit low- and moderate-income borrowers.<sup>330</sup>

FSAs and their operating subsidiaries may engage in funds transfer services; issue, collect, and process cashier's checks;<sup>331</sup> and issue traveler's checks.<sup>332</sup>

**(D) Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein.**

FSAs and their operating subsidiaries may engage in mortgage loan servicing activities.<sup>333</sup>

**(E) Providing management consulting, operational advice, and services for other financial institutions.**

FSAs and their operating subsidiaries may provide ministerial, non-discretionary support services as agent for a trust company without obtaining prior approval to exercise trust powers.<sup>334</sup>

FSAs and their operating subsidiaries may underwrite, fund, and service automobile loans for other financial institutions.<sup>335</sup>

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<sup>328</sup> 12 USC 1464(c)(2)(A), (c)(2)(D); OTS Order No. 2002-47 (October 24, 2002) (short-term commercial and consumer loans to businesses and individuals to purchase insurance).

<sup>329</sup> OTS Order No. 2003-40 (August 26, 2003).

<sup>330</sup> OTS Order No. 2005-52 (November 28, 2005).

<sup>331</sup> 12 CFR 145.17; FHLBB Opinion of the General Counsel (July 29, 1981).

<sup>332</sup> FHLBB Opinions of the Deputy General Counsel (March 16, 1988 and February 1, 1982) and FHLBB Opinion of the General Counsel (November 24, 1965).

<sup>333</sup> OTS Order No. 2004-19 (April 22, 2004).

<sup>334</sup> OTS Opinion of the Chief Counsel (October 17, 1995).

<sup>335</sup> OTS Order No. 2003-40 (August 26, 2003).

**(F) Providing check payment services.**

FSAs and their operating subsidiaries may engage in check cashing and activities that are incidental to check cashing.<sup>336</sup>

FSAs and their operating subsidiaries may provide funds transfer services.<sup>337</sup>

**(G) Acting as investment adviser (including an adviser with investment discretion) or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and mortgage or real estate investment trusts.**

FSAs and their operating subsidiaries may provide investment advisory services, financial advisory services, and financial counseling services.<sup>338</sup> FSAs and their operating subsidiaries that are authorized by the OCC to engage in fiduciary activities may also act as investment advisers or provide investment advice to customers through trust department operations.<sup>339</sup>

Operating subsidiaries may need to register with the SEC as an investment adviser and comply with applicable state laws depending on the nature of the investment activities conducted. FSAs are excluded from the definition of investment adviser under the Advisers Act unless they advise registered investment companies.<sup>340</sup>

**(H) Providing financial and transactional advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings.**

FSAs and their subsidiaries may engage in financial consulting and advisory services for other financial institutions and the general public.<sup>341</sup> Depending on the nature of the activity, operating subsidiaries may be required to register under the Advisers Act.

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<sup>336</sup> OTS Order No. 2004-39 (July 30, 2004).

<sup>337</sup> 12 CFR 145.17.

<sup>338</sup> 12 CFR 5.38(e)(5)(v)(G); OCC Conditional Approval #1198 (July 2018).

<sup>339</sup> 12 USC 1464(n); 12 CFR 150.30(j); OTS Opinion of the Acting Chief Counsel (December 30, 1993); OTS Order No. 2011-31 (April 21, 2011); OTS Order No. 2004-61 (December 27, 2004); OTS Order No. 2002-10 (March 19, 2002).

<sup>340</sup> 15 USC 80b-2(a)(11).

<sup>341</sup> OTS Opinion of the Chief Counsel (May 10, 1995).

FSAs and their operating subsidiaries may provide foreign currency exchange services to customers.<sup>342</sup> FSAs and their operating subsidiaries may also act as principal in providing foreign exchange forward contracts to commercial customers.<sup>343</sup>

FSAs and their operating subsidiaries may also provide customers advice and assistance in structuring, arranging, and executing exchange, coin, and bullion transactions.<sup>344</sup>

FSAs and their operating subsidiaries are authorized to invest in derivatives to the extent they are authorized to invest in the underlying assets.<sup>345</sup>

Derivative activities must comply with applicable regulations, including for example, the Volcker rule and regulations issued under Title VII of the Dodd–Frank Act.

### **(I) Underwriting and reinsuring credit life and disability insurance.**

FSAs and their operating subsidiaries may underwrite or reinsure credit insurance, provided that such insurance is issued in connection with loans made by the FSA or the FSA's subsidiaries or serviced by the FSA.<sup>346</sup> FSAs generally conduct insurance activities through a subsidiary for safety and soundness reasons rather than directly in the FSA.<sup>347</sup> FSAs and their operating subsidiaries should consult with legal counsel regarding the application of state insurance law.

### **(J) Leasing of personal property.**

#### *Finance Leasing*

FSAs and their operating subsidiaries may engage in finance leasing activities that are the functional equivalent of loans made under their general lending authorities, including residential, commercial, business, corporate, or agricultural loans, and nonresidential real estate loans and consumer loans.<sup>348</sup> Such financing leases are subject to the same investment limitations as loans made under those authorities and other conditions set forth in OCC regulations.<sup>349</sup>

<sup>342</sup> OTS Opinion of the Chief Counsel (April 3, 2000); OTS Opinion of the Chief Counsel (August 11, 1995).

<sup>343</sup> OTS Opinion of the Chief Counsel (April 3, 2000).

<sup>344</sup> See, e.g., OTS Opinion of the Chief Counsel (March 6, 2006).

<sup>345</sup> 12 CFR 163.172.

<sup>346</sup> OTS Opinion of the Chief Counsel (January 10, 1995); OTS Order No. 2002-24 (June 14, 2002).

<sup>347</sup> FSAs may also conduct underwriting and reinsurance activities through service corporations, subject to the prior approval of the OCC.

<sup>348</sup> 12 USC 1464(c)(1)(B), (c)(2)(A), (c)(2)(B) and (c)(2)(D); see also 12 CFR 160.30 and 160.41.

<sup>349</sup> 12 CFR 160.41.

### *General Leasing*

FSAs and their operating subsidiaries may also invest in tangible personal property, including vehicles, manufactured homes, machinery, equipment, or furniture for the purpose of leasing such property. Investments in tangible personal property for general leasing purposes are subject to a limit of 10 percent of the assets of the association.<sup>350</sup> Leases made under the general leasing authority are not required to be the functional equivalent of loans.

#### **(K) Providing securities brokerage.**

FSAs and their operating subsidiaries may provide securities brokerage services to customers.<sup>351</sup> FSAs and their operating subsidiaries may provide clearing and related services, including settlement services, custodial services, and margin lending.<sup>352</sup>

FSAs may perform securities brokerage activities without registering as brokers or dealers with the SEC on the same terms and under the same conditions that national banks are exempted from registration.<sup>353</sup> However, FSA subsidiaries are required to register with the SEC as broker dealers.

#### **(L) Underwriting and dealing, including making a market, in savings association permissible securities and purchasing and selling as principal, asset backed obligations.**

FSAs and their operating subsidiaries may underwrite and deal in (including brokerage or warehousing) securities that are permissible for the savings association to invest in under section 5(c) of the HOLA, and may purchase and sell as principal other permissible asset backed obligations.<sup>354</sup>

FSAs and their operating subsidiaries may underwrite and deal in, without limitation, obligations of the United States government or obligations fully guaranteed as to principal and interest by the U.S.<sup>355</sup>

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<sup>350</sup> 12 USC 1464(c)(2)(C); 12 CFR 160.30 and 160.41.

<sup>351</sup> 12 CFR 5.38(e)(5)(v)(K); OTS Order No. 2009-10 (February 9, 2009).

<sup>352</sup> OTS Opinion of the Chief Counsel (November 28, 2006); OTS Order No. 2006-45 (November 28, 2006).

<sup>353</sup> 15 USC 78c(a)(4)-(6).

<sup>354</sup> 12 USC 1464(c); 12 CFR 5.38(e)(5)(v)(L); OTS Order No. 2006-23 (June 1, 2006); OTS Order No. 2001-01 (January 5, 2001); OTS Order No. 2000-11 (February 4, 2000).

<sup>355</sup> 12 USC 1464(c)(1)(C); 12 CFR 160.30. The OCC may establish limits on investments if the association's concentration in that investment presents safety and soundness concerns.

FSAs and their operating subsidiaries may underwrite and deal in, without limitation, Federal Home Loan Bank stock and bonds or in the stock of the Federal National Mortgage Association (Fannie Mae).<sup>356</sup>

FSAs and their operating subsidiaries may underwrite and deal in, without limitation, investments in Federal Home Loan Mortgage Corporation (Freddie Mac) instruments.<sup>357</sup>

FSAs and their operating subsidiaries may underwrite and deal in, without limitation, obligations or securities issued, or fully guaranteed as to principal and interest, by Fannie Mae, the Government National Mortgage Association (Ginnie Mae), or any agency of the U.S.<sup>358</sup>

FSAs and their operating subsidiaries may without limitation underwrite and deal in securities issued by states and their political subdivisions: (1) general obligation bonds; (2) municipal revenue bonds; and (3) municipal notes.<sup>359</sup> FSAs and their subsidiaries may not invest more than 10 percent of capital in state or municipal non-general obligation securities of any one issuer.<sup>360</sup>

FSAs and their operating subsidiaries may own, sell, underwrite, and deal in mortgage-backed securities and other permissible asset-backed securities.<sup>361</sup> Eligibility to invest and the aggregate limit on investments depend on the type of asset securitized. There is no aggregate limit for mortgage-backed securities.<sup>362</sup>

FSAs and their operating subsidiaries may underwrite and deal in commercial paper subject to certain requirements and limits.<sup>363</sup> These investments are subject to the aggregate limit of 35 percent of total assets, which applies to investments in commercial paper, corporate debt securities, and consumer loans. Amounts in excess of 30 percent are subject to additional conditions.<sup>364</sup>

Total investments in the commercial paper and corporate debt securities of any one issuer, or issued by any one person or entity affiliated with the issuer, together with loans, must not exceed the lending limit.<sup>365</sup>

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<sup>356</sup> 12 USC 1464(c)(1)(D); 12 CFR 160.30.

<sup>357</sup> 12 USC 1464(c)(1)(E); 12 CFR 160.30.

<sup>358</sup> 12 USC 1464(c)(1)(F); 12 CFR 160.30.

<sup>359</sup> 12 USC 1464(c)(1)(H).

<sup>360</sup> 12 USC 1464(c)(1)(H); 12 CFR 160.30; OTS Opinion of the Chief Counsel (October 29, 2001).

<sup>361</sup> OTS Opinion of the Chief Counsel (September 14, 2004); OTS Order No. 2002-06 (February 20, 2002).

<sup>362</sup> 12 USC 1464(c)(1)(R); OTS Opinion of the Chief Counsel (September 14, 2004); 12 CFR 160.30.

<sup>363</sup> 12 USC 1464(c)(1)(D); 12 CFR 160.30 and 12 CFR 160.40.

<sup>364</sup> 12 USC 1464(c)(1)(D).

<sup>365</sup> 12 CFR 160.43(a)(3).

**(M) Acting as an insurance agent or broker for credit life, disability, and unemployment insurance; single property interest insurance; and title insurance.**

FSAs and their operating subsidiaries may engage in certain insurance agency activities or provide brokerage services for various types of credit-related insurance.<sup>366</sup>

FSAs and their operating subsidiaries may sell credit-related insurance, on an agency basis, without geographic restriction.<sup>367</sup> FSAs and their operating subsidiaries may sell credit-related insurance that includes death and disability, unemployment, single property interest, and title insurance. FSAs and their operating subsidiaries must comply with applicable state insurance laws.

**(N) Offering correspondent services to the extent permitted by published OCC precedent for FSAs.**

FSAs and their operating subsidiaries may provide correspondent services to other institutions. Generally, an FSA is permitted to provide any services that it would be authorized to generate in-house for itself in the course of its regular business, including check clearing, help with bill collections, participation in large loans, legal advice, help in building securities portfolios, counseling as to personnel policies, staff training, help in site selection, auditing, and the provision of electronic data processing.<sup>368</sup>

**(O) Acting as agent or broker in the sale of fixed annuities.**

FSAs and their operating subsidiaries may sell fixed annuities on an agency basis without geographic restriction. FSAs and operating subsidiaries selling insurance are subject to applicable state insurance laws.<sup>369</sup>

**(P) Offering debt cancellation or debt suspension agreements.**

FSAs and their operating subsidiaries may enter into agreements that result in cancellation of debt upon the death, disability, or other loss experienced by a borrower.<sup>370</sup>

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<sup>366</sup> 12 CFR 5.38(e)(5)(v)(M).

<sup>367</sup> See, e.g., OTS Opinion of the Chief Counsel (February 12, 1996); OTS Opinion of the Chief Counsel (October 17, 1994).

<sup>368</sup> See 47 Fed. Reg. 17468 (April 23, 1982).

<sup>369</sup> OTS Opinion of the Chief Counsel (October 17, 1994) and OTS Opinion of the Acting Chief Counsel (September 15, 1993).

<sup>370</sup> OTS Opinion of the Chief Counsel (December 18, 1995).

**(Q) Providing escrow services.**

FSAs and their operating subsidiaries may provide escrow services in connection with real estate loans and real estate transactions.<sup>371</sup>

FSAs and their operating subsidiaries may establish commercial escrow accounts.<sup>372</sup>

FSAs and their operating subsidiaries may also act as document custodian of residential mortgage loan documents for third parties without obtaining authorization to perform trust services.<sup>373</sup>

**(R) Acting as a transfer agent.**

FSAs and their operating subsidiaries may act as transfer agents. A transfer agent acts on behalf of an issuer of securities, or on behalf of itself as an issuer of securities, and performs the following functions: (1) countersigning securities upon issuance; (2) monitoring the issuance of securities to prevent unauthorized issuance; (3) registering the transfer of securities; (4) exchanging or converting securities; or (5) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates.<sup>374</sup>

An FSA or operating subsidiary must register with the OCC if it performs transfer agent functions for any security registered under section 12 of the Exchange Act or any security that would be required to be registered under section 12 of the Exchange Act except for the exemption from registration for registered investment company securities and certain insurance company securities.<sup>375</sup>

**(S) Providing or selling postage stamps.**

FSAs and their operating subsidiaries may offer postal services from their retail offices and may receive income from such operations. Permissible activities include the following: (1) selling stamps and other postal supplies; (2) accepting matter for mailing; (3) selling related insurance; (4) accepting registered mail; and (5) issuing money orders. An FSA or operating subsidiary offering postal services must observe the appropriate rules and regulations of the United States Postal Service.<sup>376</sup>

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<sup>371</sup> 61 Fed. Reg. 50951 (September 30, 1996).

<sup>372</sup> OTS Opinion of the Chief Counsel (August 19, 1998).

<sup>373</sup> OTS Opinion of the Chief Counsel (January 31, 1994).

<sup>374</sup> See 15 USC 78c(a)(25).

<sup>375</sup> 12 USC 78q-1(c); 12 CFR 9.20(a).

<sup>376</sup> OTS Opinion of the Acting Chief Counsel (March 25, 1994).

## Appendix D: Service Corporation Guidelines—FSAs

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### Introduction

These guidelines describe activities of FSAs that the OCC has determined may be performed in a service corporation in accordance with the OCC’s service corporation regulations.<sup>377</sup> FSAs may invest up to 3 percent of assets in service corporations, provided that any amount exceeding 2 percent of assets must serve primarily community, inner-city, or community development purposes.

An FSA’s direct investment in a service corporation is subject to geographic and ownership restrictions. If any institution wants to directly investment in an entity under service corporation authority, the entity must be incorporated in the state of the home office of the investing institution. Also, no entity other than a savings association may invest in the service corporation. This is commonly referred to as a “first-tier” service corporation investment. These ownership and geographic restrictions do not apply to lower-tier entities (such as joint ventures, corporations, or partnerships) that may be owned by service corporations.<sup>378</sup>

Subject to the prior filing guidelines, and as detailed under the provisions of 12 CFR 5.59(h), a service corporation may engage in a specified listing of activities. From time to time, the predecessor regulators of FSAs codified decisions and determinations in interpretive opinions, or otherwise, regarding the permissibility of activities that had been made in response to applications.<sup>379</sup> This regulation, and its predecessor regulations,<sup>380</sup> reflect such codifications. In addition to the authorized activities designated in the regulation, an FSA may request OCC approval for a service corporation to engage in any other activity reasonably related to the activities of financial institutions. The activities listed below are not intended to be an exhaustive account of activities deemed permissible for service corporations.

### Service Corporation Activities—FSAs [12 CFR 5.59(f)]

**(1) Any activity that all FSAs may conduct directly.**

**(2) Business and professional services if limited to financial documents, financial clients, or generally finance-related:**

- (i) Accounting or internal audit;
- (ii) Advertising, market research and other marketing;

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<sup>377</sup> 12 CFR 5.59.

<sup>378</sup> See, e.g., FHLBB Opinion of the Associate General Counsel (July 15, 1983).

<sup>379</sup> The OTS described this process of periodically reviewing and updating the list of authorized activities for service corporations in the preamble to a proposed rule in 1996. See *Subsidiaries and Equity Investments*, 61 Fed. Reg. 29976 (June 13, 1996).

<sup>380</sup> See 12 CFR 559.4 (1996) and 12 CFR 545.74(c)(1995).

- (iii) Clerical;
- (iv) Consulting;
- (v) Courier;
- (vi) Data processing;
- (vii) Data storage facilities operation and related services;
- (viii) Office supplies, furniture, and equipment purchasing and distribution;
- (ix) Personnel benefit program development or administration;
- (x) Printing and selling forms that require Magnetic Ink Character Recognition (MICR) encoding;
- (xi) Relocation of personnel;
- (xii) Research studies and surveys;
- (xiii) Software development and systems integration; and
- (xiv) Remote service unit operation, leasing, ownership, or establishment.

**(3) Credit-related activities.**

- (i) Abstracting;
- (ii) Acquiring and leasing personal property;
- (iii) Appraising;
- (iv) Collection agency;
- (v) Credit analysis;
- (vi) Check or credit card guaranty and verification;
- (vii) Escrow agent or trustee (under deeds of trust, including executing and delivery of conveyances, reconveyances, and transfers of title); and
- (viii) Loan inspection.

**(4) Consumer services.**

- (i) Financial advice or consulting;
- (ii) Foreign currency exchange;
- (iii) Home ownership consulting;
- (iv) Income tax preparation;
- (v) Postal services;
- (vi) Stored value instrument sales;
- (vii) Welfare benefit distribution;
- (viii) Check printing and related services; and
- (ix) Remote service unit operation, leasing, ownership, or establishment.

A service corporation of an FSA may (1) provide risk management services, which involves consulting with clients about financial subjects, in connection with its insurance agency and brokerage business, and (2) consult in the areas of employee and executive benefits and retirement and estate planning, because these areas are finance-related and involve planning with respect to income and expenditures, including taxes.<sup>381</sup>

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<sup>381</sup> OTS Order No. 2003-57 (November 21, 2003).

FSA service corporations may sell medical discount cards issued by a third party to customers of the association and others, engage in the processing of account receivables and payables for medical service providers, and engage in certain collection activities.<sup>382</sup>

**(5) Real estate-related services.**

- (i) Acquiring real estate for prompt development or subdivision, for construction or improvements, for resale or leasing to others for such construction, or for use as manufactured home sites, in accordance with a prudent program of property development;
- (ii) Acquiring improved real estate or manufactured homes to be held for rental or resale, for remodeling, renovating or demolishing and rebuilding for resale or rental, or to be used for offices and related facilities of a stockholder of the service corporation;
- (iii) Maintaining and managing real estate; and
- (iv) Real estate brokerage for property owned by a savings association that owns capital stock of the service corporation, or a lower-tier service corporation in which the service corporation invests.

A service corporation of an FSA may engage in mortgage loan origination and title insurance services.<sup>383</sup>

**(6) Securities activities, liquidity management, and coins.**

- (i) Execution of transactions in securities on an agency or riskless principal basis solely upon the order and for the account of customer or the provision of investment advice. The service corporation must register with the SEC and state securities regulators, as required by applicable federal and state law and regulations;
- (ii) Liquidity management;
- (iii) Issuing notes, bonds, debentures, or other obligations or securities; and
- (iv) Purchase or sale of coins issued by the U.S. Treasury.

A service corporation of an FSA may engage in securities activities on an agency or riskless principal basis and provide investment advice.<sup>384</sup> A riskless principal transaction occurs when a dealer receives an order on behalf of a customer and contemporaneously sells the security to a customer. The service corporation must comply with any federal or state laws requiring registration for securities activities.

FSA service corporations may engage in securities brokerage and activities incident thereto, margin lending, and options trading activities not conducted on an “as principal” basis.<sup>385</sup>

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<sup>382</sup> OTS Order No. 2002-15 (June 3, 2002).

<sup>383</sup> OTS Order No. 2002-61 (December 10, 2002).

<sup>384</sup> 12 CFR 5.59(f)(6); OTS Order No. 96-107 (November 12, 1996).

<sup>385</sup> OTS Order No. 2007-53 (November 7, 2007); OTS Order No. 2003-53 (October 17, 2003); OTS Order No. 96-107 (November 12, 1996).

FSA service corporations may engage in securities brokerage, dealing, and underwriting activities, and also may engage in dealing in whole loans, certificates of deposits, and interest rate futures.<sup>386</sup>

FSA service corporations may underwrite investment grade corporate debt securities, and establish a corporate bond trading desk to provide new issue and secondary investment grade corporate debt securities to institutional investors.<sup>387</sup>

FSA service corporations may engage in investment advisory services.<sup>388</sup>

A service corporation of an FSA may issue notes, bonds, debentures, or other obligations or securities.<sup>389</sup> FSA service corporations may underwrite and deal in municipal securities.<sup>390</sup>

A service corporation of an FSA may purchase or sell coins issued by the U.S. Treasury.<sup>391</sup>

### **(7) Investments.**

- (i) Tax-exempt bonds used to finance residential real property for family units;
- (ii) Tax-exempt obligations of public housing agencies used to finance housing projects with rental assistance subsidies;
- (iii) Small business investment companies (SBIC) and new market venture capital companies licensed by the U.S. Small Business Administration;
- (iv) Rural business investment companies (RBIC) licensed by the U.S. Department of Agriculture; and
- (v) Investing in savings accounts of an investing thrift.

FSA service corporations are authorized to invest in tax-exempt bonds and tax-exempt obligations of public housing agencies to finance residential housing projects.<sup>392</sup>

FSA service corporations are authorized to invest in SBICs and RBICs.<sup>393</sup> An SBIC is a type of privately owned investment company that is licensed by the Small Business Administration to help meet the financing needs of small businesses. An RBIC is a type of privately owned investment company that is licensed by the U.S. Department of Agriculture to help meet the business and development needs of rural communities.

<sup>386</sup> OTS Order No. 2001-66 (October 29, 2001).

<sup>387</sup> OTS Order No. 2003-31 (August 1, 2003).

<sup>388</sup> OTS Order No. 2000-32 (March 27, 2000).

<sup>389</sup> 12 CFR 5.59(f)(6).

<sup>390</sup> OTS Opinion of the Chief Counsel (June 19, 2001).

<sup>391</sup> 12 CFR 5.59(f)(6).

<sup>392</sup> 12 CFR 5.59(f)(7).

<sup>393</sup> OTS Order No. 2000-24 (February 28, 2000).

**(8) Community development investments. Community and economic development or public welfare investments that are permissible under 12 CFR 24.**

FSA service corporations are authorized to make certain community development and public welfare investments.<sup>394</sup> An FSA's investments in community development organizations (e.g., community development corporations and community development financial institutions) may qualify as service corporation investments if those entities are engaged in activities permissible for service corporations and meet geographic and ownership restrictions. The geographic and ownership restrictions do not apply to lower-tier entities owned by service corporations.

FSA service corporations may conduct certain community development activities identified in former regulation 12 CFR 563e.12(g)(1)–(4) (2001).<sup>395</sup>

FSA service corporations may make investments in community development financial institutions.<sup>396</sup>

**(9) Charitable activities. Establishing or acquiring a corporation that is recognized by the Internal Revenue Service as organized for charitable purposes under 26 USC 501(c)(3) of the Internal Revenue Code.**

FSA service corporations may make reasonable charitable contributions, either directly or through charitable foundations established by them.<sup>397</sup> The service corporation must be exclusively engaged in activities designed to promote the well-being of the communities in which the owners of the service corporation operate.

**(10) Activities conducted as agent. Activities conducted on behalf of a customer on other than an “as principal” basis.**

A service corporation of an FSA may engage in insurance agency activities for casualty, automobile, life, health, and accident insurance.<sup>398</sup>

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<sup>394</sup> 12 CFR 5.59(f)(8); see, e.g., [OTS Opinion of the Chief Counsel \(December 26, 1991\)](#).

<sup>395</sup> [OTS Order No. 2001-70 \(November 2, 2001\)](#). The activities identified in the predecessor regulation were affordable housing; community services targeted to low- or moderate-income persons; activities that promote economic development by financing businesses or farms that meet the Small Business Administration's size eligibility standards or have gross annual revenue of \$1 million or less; and activities that revitalize or stabilize low- or moderate-income geographies.

<sup>396</sup> OTS Order No. 96-101 (October 18, 1996) and OTS Order No. 96-73 (June 24, 1996).

<sup>397</sup> 12 CFR 5.59(f)(9); see, e.g., [OTS Opinion of the Chief Counsel \(November 12, 1992\)](#).

<sup>398</sup> OTS Order No. 2003-21 (June 6, 2003).

**(11) Incidental activities. Activities reasonably incident to those listed in paragraphs (f)(1) through (f)(10) of this section if the service corporation engages in those activities.**

An FSA may request OCC approval for a service corporation to engage in any other activity reasonably related to the activities of financial institutions.<sup>399</sup>

A service corporation of an FSA may engage in insurance claims adjustment, including third-party administration for self-insured clients, because these activities are similar to activities that savings associations regularly engage in.<sup>400</sup>

A service corporation of an FSA also may reinsure private mortgage insurance issued by third parties for loans originated or purchased by the association, its mortgage lending subsidiaries, or its mortgage lending affiliates.<sup>401</sup>

A service corporation of an FSA may reinsure life and disability insurance underwritten in connection with loans originated by the savings association.<sup>402</sup>

A service corporation of an FSA may engage in structured settlements as an activity that is reasonably related to the activities of financial institutions such as making loans, providing liquidity, and serving as a financial intermediary.<sup>403</sup>

FSA service corporations may engage in the business of viatical financing as reasonably related to the activities of financial institutions.<sup>404</sup>

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<sup>399</sup> 12 CFR 5.59(e)(3).

<sup>400</sup> OTS Order No. 2003-57 (November 21, 2003).

<sup>401</sup> See e.g., OTS Order No. 2004-14 (April 6, 2004); OTS Order No. 2003-10 (April 4, 2003); OTS Order No. 2002-48 (October 24, 2002); OTS Order No. 2002-29 (August 5, 2002).

<sup>402</sup> OTS Order No. 2002-12 (April 8, 2002).

<sup>403</sup> OTS Order No. 2009-19 (April 8, 2009).

<sup>404</sup> OTS Order No. 97-49 (May 20, 1997).

## Appendix E: Pass-Through Investments Guidelines—FSAs

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FSAs and their operating subsidiaries are permitted to make pass-through investments in an entity that engages only in activities that an FSA may conduct directly, provided the investment meets certain requirements.<sup>405</sup> When making such an investment, the FSA must comply with all the statutes and regulations that would apply if the savings association were engaging in the activity directly. Pass-through investments are subject to certain requirements and filing procedures. An OCC regulation<sup>406</sup> provides for a notice procedure if the entity in which the investment is being made is engaged in an activity that is eligible for expedited review under the OCC’s FSA operating subsidiary regulation<sup>407</sup> or if the activity is substantively the same as that contained in OCC or OTS published precedent on pass-through investments. In addition, under the notice procedure, the FSA is required to provide certain certifications and descriptions.<sup>408</sup> Pass-through investments that do not qualify for the notice procedure require an application.<sup>409</sup>

The authority of FSAs to make pass-through investments in entities that engage only in activities that are permissible for FSAs was codified in 1996.<sup>410</sup> Examples of some FSA pass-through investments that have been permitted subsequent to the 1996 codification follow.<sup>411</sup>

An FSA may make a pass-through investment in a mortgage banking company.<sup>412</sup>

An FSA may make a pass-through investment in an association captive insurance company that provides reinsurance of private mortgage guaranty insurance on residential mortgage loans originated or purchased by participating lenders and their mortgage banking subsidiaries and affiliates.<sup>413</sup>

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<sup>405</sup> See 12 CFR 160.32.

<sup>406</sup> 12 CFR 5.58(e)(1), (2).

<sup>407</sup> 12 CFR 5.38(e)(5)(v).

<sup>408</sup> 12 CFR 5.58(e)(3)–(7).

<sup>409</sup> 12 CFR 5.58(f).

<sup>410</sup> 61 Fed. Reg. 66561 (December 18, 1996), codified as 12 CFR 560.32. Prior to such codification, legal opinions were issued by predecessor regulators of FSAs authorizing particular types of pass-through investments. See, e.g., OTS Opinion of the Chief Counsel (September 15, 1995) and OTS Opinion of the Chief Counsel (December 13, 1993).

<sup>411</sup> The original regulation contained a “safe harbor” provision; only investments that did not meet the safe harbor conditions were required to file a notice or application.

<sup>412</sup> OTS Order No. 2007-35 (August 15, 2007).

<sup>413</sup> OTS Opinion of the Chief Counsel, P-2004-2 (May 13, 2004).

An FSA may make a pass-through investment in a title insurance agency because the association has incidental authority to sell, as agent or broker, title insurance.<sup>414</sup>

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<sup>414</sup> OTS Opinion of the Chief Counsel, P-2006-5 (June 23, 2006).

## Glossary

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**Bank service company:** A corporation, an LLC, or similar entity organized to provide services authorized by the Bank Service Company Act, 12 USC 1861 through 1867, all of whose capital stock is owned by one or more insured depository institutions in the case of a corporation, or all of the members of which are one or more insured depository institutions in the case of an LLC.

**Depository institution:** Any bank or savings association. For bank service company purposes, a depository institution is defined as an insured bank, a savings association, a financial institution subject to examination by the appropriate federal banking regulator or the National Credit Union Administration (NCUA) Board, or a financial institution whose accounts or deposits are insured or guaranteed under state law and eligible to be insured by the Federal Deposit Insurance Corporation or the NCUA Board.

**Depository institution affiliate:** For purposes of investing in a financial subsidiary, any bank or savings association that qualifies as an affiliate under section 2 of the BHCA, 12 USC 1841.

**Eligible debt for a financial subsidiary:** Unsecured long-term debt that is

- not supported by any form of credit enhancement, including a guaranty or standby letter of credit; and
- not held in whole or in any significant part by any affiliate, officer, director, principal shareholder, or employee of the bank or any other person acting on behalf of or with funds from the bank or an affiliate of the bank.

**Financial subsidiary:** A corporation, LLC, or similar entity, controlled by one or more insured depository institutions, conducting activities that are financial in nature or incidental to financial activities. Financial subsidiaries do not include operating subsidiaries, bank service companies, or statutory subsidiaries.

**Functionally regulated affiliate (FRA):** A bank affiliate, including a bank subsidiary, whose primary regulator is the SEC, state insurance commissioners, or the CFTC. An FRA does not include a depository institution's holding company. FRAs include SEC-registered securities broker-dealers, SEC- or state-registered investment advisers, SEC-registered investment companies, state-supervised insurance companies and agencies, and entities subject to regulation by, or registration with, the CFTC.

**Insured depository institution:** Any bank or savings association, the deposits of which are insured by the Federal Deposit Insurance Corporation.

**Investing:** Investing in a bank service company includes making any advance of funds to a bank service company, whether by the purchase of stock, the making of a loan, or otherwise, except a payment for rent earned, goods sold and delivered, or services rendered before the payment was made.

**Limited liability company or a similar entity:** An unincorporated business entity organized under state law, providing its members limited liability. It does not include a limited partnership.

**Long-term debt for a financial subsidiary:** Any debt obligation with an initial maturity of 360 days or more.

**Offshore subsidiary:** A subsidiary that will maintain records offshore, or that is organized under laws other than those of the 50 states in the United States, the District of Columbia, or any other territory or possession of the United States.

**Operating subsidiary:** A separate corporation, LLC, or similar entity, in which a bank maintains more than a 50 percent voting or similar type of controlling interest, or otherwise controls the subsidiary, and no other party controls more than 50 percent of the voting (or similar type of controlling) interest of the subsidiary. An operating subsidiary of a national bank may engage in activities that are part of, or incidental to, the business of banking, or are otherwise authorized for a national bank, under 12 USC 24(Seventh), or in other activities authorized for national banks or their subsidiaries under other statutes. (An operating subsidiary does not include statutory subsidiaries or a subsidiary in which the bank acquired shares, in good faith, through foreclosure on collateral, by compromise of a doubtful claim, or to avoid a loss in connection with a DPC.)

**Principal investor:** The principal investor of a bank service company is the insured depository institution that has made the largest equity investment. When two or more insured depository institutions have equal amounts invested, the bank service company must designate one of them as its principal investor.

**Undercapitalized bank:** A bank that has capital at the levels described in 12 CFR 6.4(c)(3).

**Well capitalized bank:** A bank that has capital at the levels described in 12 CFR 6.4(c)(1).

**Well managed bank:** Unless otherwise determined in writing by the OCC, a bank that

- has a composite CAMELS rating of 1 or 2, and for financial subsidiaries at least a management rating of 2; or
- if it has not been examined, a bank that has and uses managerial resources that OCC Bank Supervision staff determines to be satisfactory.

## Abbreviations

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ABA	affiliated business arrangement
ARS	auction rate securities
ATM	automated teller machine
BHCA	Bank Holding Company Act
BMA	Bank Merger Act
CA	certification authority
CCH	Commerce Clearing House
CFPB	Consumer Financial Protection Bureau
CFR	Code of Federal Regulations
CFTC	Commodities Futures Trading Commission
CRA	Community Reinvestment Act
CTA	commodity trading advisor
DOJ	Department of Justice
DPC	debts previously contracted
EBT	electronic benefits transfer
EDI	electronic data interchange
EFT	electronic funds transfer
FCM	futures commission merchant
FHLBB	Federal Home Loan Bank Board
FRA	functionally regulated affiliate
FSA	federal savings association
FTC	Federal Trade Commission
GAAP	U.S. generally accepted accounting principles
GLBA	Gramm–Leach–Bliley Act
HOLA	Home Owners’ Loan Act
HSR	Hart–Scott–Rodino Antitrust Improvements Act
HUD	U.S. Department of Housing and Urban Development
LLC	limited liability company
NB	national bank
NCUA	National Credit Union Administration
OCC	Office of the Comptroller of the Currency
OTS	Office of Thrift Supervision
RBIC	rural business investment company
REIT	real estate investment trust
RESPA	Real Estate Settlement Procedures Act
SBIC	small business investment company
SEC	Securities and Exchange Commission
USC	United States Code

## References

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In this section, “NB” denotes that the referenced law, regulation, or issuance applies to national banks, and “FSA” denotes that the reference applies to federal savings associations. If there is no designation, the reference applies to both national banks and federal savings associations.

### **Affiliate Transactions, Sections 23A and 23B of the Federal Reserve Act**

Law 12 USC 371c, 371c-1 (NB)  
12 USC 1468 (FSA)

Regulation 12 CFR 223

*Comptroller’s Handbook*, “[Related Organizations](#)” (NB)  
*OTS Examination Handbook*, [section 730](#), “[Related Organizations](#)” (FSA)

### **Agricultural Credit Corporations**

Law 12 USC 24(Seventh) (NB)

### **Bank Holding Company Act of 1956**

Law 12 USC 1841–1850

### **Bank Merger Act**

Law 12 USC 1828(c)

### **Bank Ownership of Property**

Law 12 USC 29 (NB)  
Regulation 12 CFR 7.1000

### **Bank Service Company**

Law 12 USC 1861–1867  
Regulation 12 CFR 5.35, 12 CFR 225, subpart C

### **Branches**

Law 12 USC 36 (NB)  
12 USC 1464(m), 1464(r) (FSA)

Regulation 12 CFR 5.30 (NB)  
12 CFR 5.31 (FSA)

### **Business of Banking**

Law 12 USC 24(Seventh) (NB)

### **Capital**

Law 12 USC 51a–60, 1464(s), 1464(t), 3907  
Regulation 12 CFR 3, 6

**Community Development Corporation or Other Community and  
Economic Development Entity**

Law	12 USC 24(Eleventh) (NB) 12 USC 1464(c)(3)(A) (FSA)
Regulation	12 CFR 24 (NB) 12 CFR 5.59, 160.30 and 160.36 (FSA)

**Data Processing**

Law	12 USC 1863
Regulation	12 CFR 7.5006

**Debt Cancellation Contracts**

Regulation	12 CFR 37
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**Decisions**

Regulation	12 CFR 5.13
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**Dodd–Frank Act**

Law	Public Law 11-203, 124 Stat. 1376 (2010) (codified at scattered sections of the U.S. Code)
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**Electronic Banking Activities**

Regulation	12 CFR 7.5000–7.5010 (NB) 12 CFR 155 (FSA)
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*FFIEC Information Technology Examination Handbook*

**Eligible Activities—Notice Procedures (NB)**

Regulation	12 CFR 5.34(e)(5)(v), 5.36(e)
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**Eligible Activities—Expedited Review (FSA)**

Regulation	12 CFR 5.38(e)(5)(v), 5.58(e)
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**Examination Authority**

Law	12 USC 481, 484, 1463, 1464(d), 1820(b), 1831v, 1867(c)
Regulation	12 CFR 7.4000

**Exchange, Coin, and Bullion**

Law	12 USC 24(Seventh) (NB)
Regulation	12 CFR 7.1022 (NB) 12 CFR 7.1023 (FSA)

**Federal Deposit Insurance Act**

Law	12 USC 1811 et seq.
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**Fees**

Regulation	12 CFR 8
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**Fiduciary Powers**

Law	12 USC 92a (NB) 12 USC 1464(n) (FSA)
Regulation	12 CFR 5.26, 9 (NB) 12 CFR 5.26, 150 (FSA)

**Financial Activities**

Law	12 USC 24a (NB)
Regulation	12 CFR 5.39 (NB)

**Financial Subsidiaries**

Law	12 USC 24a (NB)
Regulation	12 CFR 5.39 (NB)

**Finder**

Regulation	12 CFR 7.1002 (NB)
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**Freedom of Information Act Request**

Law	5 USC 552
Regulation	12 CFR 4, subpart B

**Gramm–Leach–Bliley Act**

Law	12 USC 24a (section 121) 12 USC 1820a (section 115) 15 USC 78c(a)(4) (section 201) 15 USC 6712 (section 302) 15 USC 78c(a)(5) (section 202) 15 USC 6713 (section 303) 15 USC 6801–6803 (sections 501–503)
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**Hart–Scott–Rodino Antitrust Improvements Act of 1976**

Law	15 USC 18a
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**Home Owners’ Loan Act**

Law	12 USC 1464 <i>et seq.</i> (FSA)
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**Insurance**

Law	12 USC 92 (NB) 15 USC 6712, 6713 (NB)
Regulation	12 CFR 2 (NB), 12 CFR 14
	<i>Comptroller’s Handbook</i> , “ <a href="#">Insurance Activities</a> ” (NB)
	<i>OTS Examination Handbook</i> , <a href="#">section 720</a> , “ <a href="#">Insurance</a> ” (FSA)

**Investment Advisers Act of 1940**

Law	15 USC 80b-1–21
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**Investment Company Act**

Law	15 USC 80a-1–64
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**Investment Discretion**

Regulation 12 CFR 9.2(i) (NB)  
 12 CFR 150.40 (FSA)  
*Comptroller's Handbook*, "[Retail Nondeposit Investment Products](#)" and Asset Management series

**Investment in Bank Premises**

Law 12 USC 371d (NB)  
 Regulation 12 CFR 5.37, 7.1000

**Leasing**

Law 12 USC 24(Tenth) (NB)  
 1464(c)(2)(C) (FSA)  
 Regulation 12 CFR 23 (NB), 160.41 (FSA)

**Legal Lending Limit**

Law 12 USC 84 (NB)  
 1464(u) (FSA)  
 Regulation 12 CFR 32

**Operating Subsidiaries**

Law 12 USC 24(Seventh) (NB)  
 1828(m) (FSA)  
 Regulation 12 CFR 5.34 (NB)  
 12 CFR 5.38 (FSA)

*Comptroller's Handbook*, "[Related Organizations](#)" (NB)  
[OCC Bulletin 2004-55](#), "Annual Report on Operating Subsidiaries: Final Rule" (NB)  
*OTS Examination Handbook*, [section 730](#), "[Related Organizations](#)" (FSA)

**Other Equity Investments**

Law 12 USC 24(Seventh) (NB)  
 12 USC 1464(c) (FSA)  
 Regulation 12 CFR 5.36 (NB), 5.58 (FSA)  
*Comptroller's Handbook*, "[Related Organizations](#)" (NB)

**Nonconforming Assets**

Law 12 USC 35 (NB)

**Pass-Through Investments (FSA)**

Law 12 USC 1464(c)  
 Regulation 12 CFR 5.58, 160.32(a) and (b)

**Privacy**

Law 15 USC 6801–6827  
 Regulation 12 CFR 30, appendix B

**Real Estate Settlement Procedures Act**

Law 12 USC 2601 *et seq.*

**Related Organizations**

*Comptroller's Handbook*, "[Related Organizations](#)" (NB)

*OTS Examination Handbook*, [section 730, "Related Organizations"](#) (FSA)

**Safe Deposit Subsidiary**

Law 12 USC 24(Seventh) (NB)

**Savings Association Eligible to Be Acquired**

Law 12 USC 1823

Regulation 12 CFR 5.36

**Securities Exchange Act of 1934**

Laws 15 USC 78a–78mm

**Self-Dealing**

Laws 12 USC 375a, 375b, 376, 1828(z)

Regulations 12 CFR 9, 31 (NB), 215, 12 CFR 150 (FSA)

*Comptroller's Handbook*, "[Insider Activities](#)" and "[Conflicts of Interest](#)"

**Service Corporations**

Law 12 USC 1464(c)(4)(B) (FSA)

Regulation 12 CFR 5.59 (FSA)

*OTS Examination Handbook*, [section 730, "Related Organizations"](#) (FSA)

**Small Business Investment Company**

Law 15 USC 682(b)

Regulation 12 CFR 7.1015 (NB)

13 CFR 107

**State Law**

Regulation 12 CFR 7.4010

**Transactions with Affiliates, Sections 23A and 23B of the Federal Reserve Act**

Law 12 USC 371c, 371c-1 (NB)

12 USC 1468 (FSA)

Regulation 12 CFR 223

*Comptroller's Handbook*, "[Related Organizations](#)" (NB)

*OTS Examination Handbook*, [section 730, "Related Organizations"](#) (FSA)

**Volcker Rule**

Law 12 USC 1851

Regulation 12 CFR 44

## Table of Updates Since Publication

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Date of Last Publication: October 2017	
Reason	Affected pages
Added appendixes C, D, and E to include precedent for FSAs	76–94
Added and updated footnotes and other references to reflect current statutes, regulations, and OCC guidance	8, 22, 31, 39, 44–46, 53, 59, 61