



# RESCINDED

OCC 2003-47

**Subject: Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; and Real Estate Lending and Appraisals**

**Date: December 18, 2003**

**To: Chief Executive Officers of All National Banks, Federal Branches and Agencies, Department and Division Heads, and All Examining Personnel**

## Description: Final Rule

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The revisions to parts 5 and 7 implement several sections of the American Homeownership and Economic Opportunity Act of 2000 (AHEOA), which enables national banks to undertake certain corporate organizational changes more efficiently than under previous law, and also provides for more modern corporate governance mechanisms for national banks. The sections of AHEOA implemented by the final rule are:

- Section 1204, which permits national banks to reorganize directly to become subsidiaries of a holding company;
- Section 1205, which increases the maximum term of service for national bank directors, permits a national bank to adopt bylaws allowing for staggered terms for directors in accordance with OCC regulations and permits national banks to apply for permission to have more than 25 directors; and
- Section 1206, which permits national banks to merge with one or more of their nonbank affiliates, subject to OCC approval.

The final rule also includes amendments to several other OCC regulations. The final rule revises several provisions of the corporate procedures and the bank activities regulations to make clarifying changes or updates based on recent developments in the law. It amends the fiduciary activities rules to modify the required timing of valuation for certain collective investment funds. Finally, it revises a provision of the real estate lending rules, which address the OCC's authority with respect to real estate lending for national banks, to conform with a change that was made to the underlying statute.

For further information, contact Andra Shuster, counsel, Legislative and Regulatory Activities Division at (202) 874-5090.

Julie L. Williams  
First Senior Deputy Comptroller and Chief Counsel

## Related Links

- [68 FR 70122](#)

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Parts 3, 5, 6, 7, 9, 28, and 34**

[Docket No. 03–24]

RIN 1557–AB97

**Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals****AGENCY:** Office of the Comptroller of the Currency, Treasury.**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is publishing a final rule implementing authority provided to national banks by sections 1204, 1205, and 1206 of the American Homeownership and Economic Opportunity Act of 2000 (AHEOA). Section 1204 permits national banks to reorganize directly to be controlled by a holding company. Section 1205 increases the maximum term of service for national bank directors, permits the OCC to adopt regulations allowing for staggered terms for directors, and permits national banks to apply for permission to have more than 25 directors. Section 1206 permits national banks to merge with one or more of their nonbank affiliates, subject to OCC approval. In addition, the rule amends parts 5, 7, 9, and 34, for other purposes and makes several technical corrections.

**EFFECTIVE DATE:** January 16, 2004.

**FOR FURTHER INFORMATION CONTACT:** For questions concerning 12 CFR 5.20, contact Richard Cleva, Senior Counsel, Bank Activities and Structure Division, (202) 874–5300; or Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090. For questions concerning 12 CFR 5.32, contact Mark Ginsberg, Senior Licensing Analyst, Licensing Policy and Systems Division, (202) 874–5060; or Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090. For questions concerning 12 CFR 5.33, contact Crystal Maddox, Senior Licensing Analyst, Licensing Policy and Systems Division, (202) 874–5060; Richard Cleva, Senior Counsel, Bank Activities and Structure Division, (202) 874–5300; or Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090. For questions concerning 12 CFR 7.2024, contact Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090. For questions concerning 12 CFR 34.3, contact Mark

Tenhundfeld, Assistant Director, or Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090. For questions concerning 12 CFR 9.18, contact Beth Kirby, Special Counsel, Securities and Corporate Practices Division, (202) 874–5210.

**SUPPLEMENTARY INFORMATION:** On February 7, 2003, the OCC published a notice of proposed rulemaking in the *Federal Register* (68 FR 6363) to implement the AHEOA and clarify our visitorial powers regulations (NPRM). In addition, we proposed to amend (1) 12 CFR part 5 concerning limited-purpose banks, factors to be considered in business combinations, and operating subsidiary activities eligible for after-the-fact notice requirements; (2) 12 CFR part 7 concerning national banks' ability to provide tax advice; (3) 12 CFR part 9 concerning the valuation of collective investment funds; and (4) 12 CFR part 34 to update regulatory text to conform to a statutory change. Various technical changes to correct citations or footnote numbering were also part of the NPRM.

The OCC received a total of 55 comments on the NPRM. Of this number, 34 addressed the parts of the proposal that implemented the AHEOA provisions and amended 12 CFR parts 5, 7, 9, and 34. These comments included two from bank holding companies, four from banking trade associations, one from a community trade association, one from a non-profit consumer group, one from a bank supervisors' trade association, and 25 from state bank supervisors' offices. While many of the commenters supported the proposed changes, many offered suggestions for changes. For the reasons discussed below, we have adopted the provisions of the NPRM with a number of changes in response to the comments received to clarify certain provisions.

Many of the comments we received on the proposal also addressed the revision to our visitorial powers regulation. A number of these comments contained thoughtful and detailed arguments that we will address in a rulemaking to be published separately in the *Federal Register*.

**I. Amendments Implementing the AHEOA****A. Background**

The National Bank Consolidation and Merger Act (12 U.S.C. 215 *et seq.*) (Merger Act) permits consolidations and mergers involving national banks. Pursuant to 12 U.S.C. 215 and 215a, national banks or state banks<sup>1</sup> may,

<sup>1</sup> The term "state bank" is defined by the statute to include state-chartered banks, banking

with OCC approval, merge or consolidate with a national bank located in the same state, resulting in a national bank. National banks also may merge or consolidate with Federal thrifts under 12 U.S.C. 215c, resulting in either a national bank or Federal thrift. Pursuant to 12 U.S.C. 215a–1, an insured national bank may merge or consolidate with an insured bank located in a different state.

Prior to the enactment of the AHEOA on December 27, 2000,<sup>2</sup> the Merger Act did not address mergers or consolidations involving a national bank and its nonbank affiliates. However, section 1206<sup>3</sup> of the AHEOA amended the Merger Act to permit national banks to merge with one or more of their nonbank affiliates with the approval of the OCC (Section 1206 Merger).

Other provisions of the AHEOA liberalize statutory reorganization and corporate governance requirements for national banks. Section 1204<sup>4</sup> amends the Merger Act to expedite the procedures that a national bank may use when it reorganizes to become a subsidiary of a holding company. Section 1205<sup>5</sup> of the AHEOA liberalizes the requirements governing the number and length of service of national bank directors.

This final rule contains amendments to 12 CFR parts 5 and 7 to implement these changes made by the AHEOA.

**B. Description of the Proposal, Comments Received, and Final Rule****1. Reorganization into a Holding Company Subsidiary—New § 5.32**

Pursuant to section 1204 of the AHEOA, a national bank, with the OCC's approval and the affirmative vote of shareholders holding at least two-thirds of the bank's outstanding capital stock, may reorganize to become a subsidiary of a bank holding company or a company that will become a bank holding company through the reorganization.

Proposed new § 5.32 implemented this provision. Paragraph (a) stated the authority for engaging in section 1204 transactions. Paragraph (b) repeated the scope of the statute and provided that § 5.32 applies to a reorganization of a

associations, trust companies, savings banks (other than mutual savings banks), and other banking institutions engaged in the business of receiving deposits. 12 U.S.C. 215b. This section also contains other definitions.

<sup>2</sup> Pub. L. 106–569, 114 Stat. 2944.

<sup>3</sup> Pub. L. 106–569, sec. 1206, 114 Stat. 2944, 3034 (codified at 12 U.S.C. 215a–3).

<sup>4</sup> Pub. L. 106–569, sec. 1204, 114 Stat. 2944, 3033 (codified at 12 U.S.C. 215a–2).

<sup>5</sup> Pub. L. 106–569, sec. 1205, 114 Stat. 2944, 3033–3034 (amending 12 U.S.C. 71 and 71a).

national bank into a subsidiary of a bank holding company or of a company that will become a bank holding company through the reorganization. In order to clarify the types of entities that would be covered under this section, we have added a sentence at the end of paragraph (b) that states that, for purposes of § 5.32, “bank holding company” means *any* company that owns or controls a national bank, or will own or control one as a result of the reorganization. Thus, the term “bank holding company” is not limited to companies that would be bank holding companies under the definition of the term in the Bank Holding Company Act of 1956 (BHCA).

Pursuant to proposed § 5.32(c), a national bank must submit an application to, and obtain approval from, the OCC prior to participating in a section 1204 reorganization. Paragraph (d) described the procedural requirements for this type of transaction. In accordance with proposed § 5.32(d)(1), the application is deemed approved by the OCC as of the 30th day after the OCC receives it, unless the OCC otherwise notifies the applicant national bank. Approval of applications under § 5.32 is subject to the condition that the bank give the OCC 60 days’ prior notice of any material change in its business plan or any material change from the proposed changes described in the bank’s plan of reorganization. A few commenters recommended that the OCC give national banks notice that an application has been received and is complete to verify that the application is in process and to ensure that all parties know when the 30-day time period starts to run. We have not revised the proposal in response to this suggestion, however, because our standard application procedure includes sending out an acknowledgment letter that will provide the information the commenters requested.

These same commenters also suggested that the OCC provide banks with guidance regarding the type of changes to the business plan that would be material. The OCC has developed a policy addressing the circumstances that constitute a “significant deviation” from a national bank’s existing business plan or operations and circumstances under which we will impose a written condition requiring a bank to provide notice of any significant deviation. This “OCC Significant Deviation Policy” is posted on our website as a sample to the Charters Booklet of the Comptroller’s

Licensing Manual.<sup>6</sup> We expect that this policy will provide the guidance commenters are seeking with respect to the changes we think should prompt the notice required by § 5.32. In order to make the final rule consistent with this Policy, we have changed the references to “material change” in the proposal to “significant deviation.”

Paragraph (d)(2) of proposed § 5.32 implemented the statutory requirements that apply to the content of the reorganization plan. The plan must: (1) Specify how the reorganization is to be carried out; (2) be approved by a majority of the national bank’s board of directors; (3) specify the amount and type of consideration that the bank holding company will provide for the stock of the bank, the date on which the shareholders’ rights to participate in the exchange are to be determined, and the procedure for carrying out the exchange; (4) be submitted to the shareholders of the reorganizing bank at a meeting called in accordance with the procedures outlined in section 3 of the Merger Act;<sup>7</sup> and (5) where applicable, describe any changes to the bank’s business plan resulting from the reorganization. Consistent with section 3 of the Merger Act, the proposal also required that at least two-thirds of the bank’s shareholders approve a reorganization.

Paragraph (d)(3) of proposed § 5.32 provided that the OCC will review the financial and managerial resources and future prospects of the national bank when considering a section 1204 reorganization.

<sup>6</sup> This policy can be found on the OCC’s Web site at <http://www.occ.treas.gov/corpbk/forms/SigDevPolicy8-03.pdf>. The policy defines a significant deviation from a bank’s business plan or operations to include, but not be limited to, a material deviation or material change in the bank’s: (1) Projected growth, such as planning significant growth in a product or service; (2) strategy or philosophy, such as significantly reducing the emphasis of its targeted niche (for example, small business lending) in favor of significant expansion of another area (for example, funding large commercial real estate projects); (3) lines of business, such as initiating a new program for sub-prime lending; (4) funding sources such as shifting from core deposits to brokered deposits; (5) scope of activities, such as establishing transactional Internet banking or entering new, untested markets; (6) stock benefit plans for de novo banks, including the introduction of plans that were not previously reviewed during the chartering process with no objection by the OCC; and (7) relationships with a parent company or affiliate, such as a shift to significant reliance on a parent or affiliate as a funding source or provider of back office support.

<sup>7</sup> Section 3 of the Merger Act, 12 U.S.C. 215a(a)(2), provides generally that a shareholders’ meeting will be called by the bank’s directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in a newspaper of general circulation where the bank is located and after sending notice to each shareholder of record by certified or registered mail at least 10 days prior to the meeting.

Proposed § 5.32(e) provided dissenters’ rights protections for section 1204 reorganizations. As provided in the Merger Act, this paragraph would permit any shareholder who has voted against the reorganization at a meeting or given notice in writing at or prior to the meeting to receive the value of his or her shares by providing a written request to the bank within 30 days after the consummation of the reorganization.

Section 5.32(f) of the proposal stated that § 5.32 does not affect the applicability of the BHCA to a transaction covered under § 5.32(b); applicants must indicate in their § 5.32 applications the status of any BHCA application they are required to file with the Board of Governors of the Federal Reserve System.

Proposed paragraph (g) of § 5.32 stated that the OCC’s approval of a § 5.32 application will expire if a national bank has not completed the reorganization within one year of the date of such approval. A commenter suggested that the OCC incorporate flexibility into this provision for complicated transactions that may take longer than one year to complete by permitting banks to apply for a waiver of this restriction. We do not think it is necessary to amend the regulation to establish a formal waiver process, but we will evaluate the need for an extension of the standard time frame on a case-by-case basis in accordance with 5.13(g).<sup>8</sup>

Finally, proposed paragraph (h)(1) stated that applicants shall inform shareholders of all material aspects of a reorganization and comply with applicable requirements in the Federal securities laws and the OCC’s securities regulations in 12 CFR part 11. Proposed paragraph (h)(2) stated that applicants that are not subject to registration requirements under the Securities Exchange Act of 1934 shall submit proxy materials or information statements used in connection with a reorganization to the appropriate OCC district office no later than when such materials are sent to shareholders.

We received no comments regarding proposed § 5.32 other than those we have discussed. Accordingly, we are adopting this provision as proposed with the changes just described.

## 2. Section 1206 Mergers—Revised § 5.33

Section 1206 of the AHEOA provided new authority for a national bank to merge with one or more of its nonbank affiliates, subject to the OCC’s approval.

<sup>8</sup> This section provides that the OCC generally does not grant extensions unless the delay is beyond the control of the applicant.

Current § 5.33 sets forth application and notice procedures for national banks entering into business combinations, such as mergers or consolidations, with other national banks or state-chartered banks, as well as OCC review and approval standards for such transactions. The proposal contained amendments to § 5.33 to include Section 1206 Mergers within its scope.

The proposal added new application and prior OCC approval requirements for Section 1206 Mergers at the end of redesignated § 5.33(c). These requirements are similar to those for mergers of a national bank or state bank into a national bank under 12 U.S.C. 215a.

A number of new definitions were added to § 5.33(d) in order to implement section 1206. Current § 5.33(d) defines only the terms “business combination,” “business reorganization,” “home state,” and “interim bank.” The proposal amended the definition of “business combination” to include Section 1206 Mergers, but left the definitions of the other three terms unchanged.

Proposed § 5.33(d)(1) added a definition of “bank” and defined it as any national bank or state bank. This definition was added because the term is used in the definition for “nonbank affiliate.”

Proposed § 5.33(d)(4) defined the term “company” to mean a corporation, limited liability company, partnership, business trust, association, or similar organization. This term was proposed to be added because it is used in the definition of “nonbank affiliate” and “control.”

Proposed § 5.33(d)(5) defined “control,” which is used in the definition of “nonbank affiliate.” Under the proposal, for business combinations under § 5.33(g)(4) and (5), a company or shareholder would be deemed to control another company if (1) the company or shareholder directly or indirectly, or acting through one or more other persons, owns, controls, or has power to vote 25 per cent or more of any class of voting securities of the other company; or (2) the company or shareholder controls in any manner the election of a majority of the directors or trustees of the other company.

Because section 1206 provides merger authority for entities previously not included within the scope of § 5.33, the proposal added the definition of “nonbank affiliate” to describe the entities that are covered by section 1206. Proposed § 5.33(d)(8) defined “nonbank affiliate” of a national bank as any company that controls, is controlled by, or is under common control with the

national bank. Banks and Federal savings associations were not included as “affiliates” because mergers with such entities are governed by statutes with other than section 1206. Nonbank subsidiaries would be considered to be nonbank affiliates for purposes of § 5.33.

Section 5.33(e)(3)(ii) currently requires that, if as a result of a business combination, a national bank obtains control of a new subsidiary, the bank must provide the same information regarding the new subsidiary’s activities that would be required if the applicant were establishing a new subsidiary under either 12 CFR 5.34 (which addresses operating subsidiaries) or 12 CFR 5.39 (which addresses financial subsidiaries). The current rule contains an exception if the subsidiary was a subsidiary of a national bank. The proposal modified this provision to take into account the fact that the bank may now merge with a nonbank affiliate that has a subsidiary.

Section 5.33(f) sets forth exceptions to the rules that generally govern the OCC’s application procedures, such as requirements for the publication of notice or for hearings. Pursuant to § 5.33(f)(1), a national bank applicant that is subject to specific statutory notice requirements for business combinations is not subject to § 5.8(a), (b), or (c), which requires, and prescribes the timing and contents of, public notice. Instead, a national bank applicant must follow the notice requirements in the applicable statute.

A national bank applicant in a Section 1206 Merger *resulting in a national bank* would be required to follow the notice requirements of 12 U.S.C. 215a. A national bank applicant in a Section 1206 Merger *resulting in a nonbank affiliate* would be required to follow the notice requirements of 12 U.S.C. 214a. We proposed to amend § 5.33(f)(1) by adding references to the special procedures to be followed in Section 1206 Mergers. We did not receive any comments on the foregoing provisions and, therefore, we adopt them as proposed.

In addition, we proposed to state in § 5.33(f)(1) that §§ 5.10 (regarding public comments) and 5.11 (regarding requests for hearings) are not applicable as a general rule to Section 1206 Mergers. However, we also reserved the discretion to determine that some or all of the provisions in § 5.10 and § 5.11 apply in a Section 1206 Merger if an application presents significant and novel policy, supervisory, or legal issues.

A few commenters urged the OCC to make the provisions in §§ 5.10 and 5.11 applicable to all Section 1206 Mergers

either because this type of merger is unprecedented and likely to raise many important issues or because these mergers would result in arbitrary or uneven application of the Community Reinvestment Act (CRA)<sup>9</sup> and fair lending laws. For several reasons we decline to adopt the commenters’ suggestion to impose a notice requirement in every Section 1206 Merger. First, if an insured national bank is involved in the merger, FDIC approval is required under the Bank Merger Act.<sup>10</sup> That approval requires publication of notice and provides for public comment. Second, where the national bank involved in the merger is uninsured, such as a trust bank, the OCC may determine on a case-by-case basis that an application presents significant and novel policy, supervisory, or legal issues and that public notice is, therefore, warranted. This standard covers the situations identified by commenters as appropriate for notice and hearings. Evaluating the need for public notice, or a hearing, on a case-by-case basis also avoids unnecessary burdens. In addition, we note that CRA is not applicable to transactions where no deposit facility is being acquired. Therefore, we decline the commenters’ suggestion to impose a notice requirement in every Section 1206 Merger.

Finally, we proposed to make two technical changes to paragraph (f)(1). The reference to paragraph (g) for mergers or consolidations with a Federal savings association would be amended to refer more specifically to paragraph (g)(2) and the reference to a resulting state bank in the parenthetical following this reference would be corrected to refer to a national bank. No comments were received on these provisions. For the reasons discussed above, we adopt § 5.33(f) as proposed.

The proposal also added a new § 5.33(g)(4) to address Section 1206 Mergers of national banks with their nonbank affiliates when the resulting entity is a national bank. Section 5.33(g)(4)(i) stated that a national bank may enter into this type of Section 1206 Merger when the law of the state or other jurisdiction under which the nonbank affiliate is organized allows the nonbank affiliate to engage in such mergers. This section also required a national bank to obtain the OCC’s approval.

One commenter suggested that we modify the regulation to specify that a merger between an insured national bank and its nonbank affiliate must

<sup>9</sup> 12 U.S.C. 2901 *et seq.*

<sup>10</sup> 12 U.S.C. 1828(c).

receive prior approval by the FDIC. As noted above, if the national bank involved is insured, the transaction is also subject to approval by the FDIC under the Bank Merger Act. For purposes of clarification, we have added this language to the final rule. In addition, we have also added language stating that in determining whether to approve a merger under this section, the OCC will consider the purpose of the transaction, its impact on the safety and soundness of the bank, and any effect on the bank's customers. The OCC may deny the merger if it would have a negative effect on any of these factors.

A few commenters questioned the OCC's decision to condition the merger of a nonbank affiliate on whether the law of the state or other jurisdiction under which the affiliate is organized permits the affiliate to participate in such a merger. These commenters contended that there is no such requirement in the statute and that this condition encourages states to discriminate against national banks by enacting laws that prohibit this type of merger. One commenter suggested that this requirement be revised to permit the merger where the state's law permits a merger between the nonbank affiliate and any other body corporate. We believe the language of the proposal as drafted already achieves this result. The proposal required only that the state statute permit such a merger. As long as this is the case, the state statute providing merger authority need not specifically mention national banks. For these reasons, the state law provision is retained in the final rule.

Proposed § 5.33(g)(4)(ii) stated that a national bank entering into such a merger must follow the procedures and requirements contained in 12 U.S.C. 215a (which addresses the merger of state banks into national banks), as if the nonbank entity were a state bank. The proposal applied the procedures and requirements in 12 U.S.C. 215a because section 215a addresses the same issues that arise in a Section 1206 Merger and its requirements are familiar to national banks. In addition, we believe that these procedures and requirements impose the least amount of burden on the participants consistent with our supervisory objectives in reviewing the proposed transactions. We received no comments on this provision and, therefore, adopt it as proposed.

Proposed § 5.33(g)(4)(iii) stated that a nonbank affiliate entering into such a merger is to follow the procedures in the law of the state or other jurisdiction under which the nonbank entity is organized. Two commenters disagreed with the use of state law procedures for

mergers of a nonbank affiliate into a national bank. One commenter contended that there is no such requirement in the statute and that it has the effect of requiring the national bank to follow both state and Federal law, which may be in conflict. We note, however, that in a merger of a state bank into a national bank, the state bank follows the procedures for mergers in state law. Proposed § 5.33(g)(4)(iii) simply treats nonbank affiliates the same as state banks by requiring them to follow the procedures contained in the law of the state in which they are incorporated. We believe that this similarity of treatment is appropriate and, therefore, have adopted this provision as proposed.

Proposed § 5.33(g)(4)(iv) stated that the rights of dissenting shareholders and appraisal of dissenters' shares of stock in the nonbank entity shall be determined in accordance with the laws of the state or other jurisdiction under which the nonbank entity is organized. We received no comments suggesting changes to this section of the proposed rule and have, therefore, adopted it as proposed.

Proposed § 5.33(g)(4)(v) of the proposal stated that the corporate existence of each institution participating in the merger shall be continued in the resulting national bank, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating institutions shall be transferred to the resulting national bank in the same manner and to the same extent as in a merger between a national bank and a state bank under 12 U.S.C. 215a, as if the nonbank affiliate were a state bank. A few commenters suggested that this provision state that a national bank resulting from a merger with a nonbank affiliate may not exercise any power or engage in any activity that would not be permissible for a national bank under applicable provisions of Federal law other than section 215a-3. We note that this language is already set forth specifically in the statute at 12 U.S.C. 215a-3(b)(2). In addition, current § 5.33(e)(5) states that the OCC generally requires a national bank to discontinue nonconforming activities within a reasonable time following a business combination. This provision would be applicable to transactions under § 5.33(g)(4). Because the statute and our rules already address this point, we believe no further clarification is required, and we have adopted the provision as proposed.

The proposal also added a new § 5.33(g)(5), which addressed section 1206 Mergers of uninsured national

banks with their nonbank affiliates when the resulting entity is a nonbank affiliate. The proposal limited this type of section 1206 Merger to national banks that are not insured banks (as defined in 12 U.S.C. 1813(h)). Prior to the enactment of section 1206, there was no efficient way for a national bank to cease its deposit-taking business, surrender its charter, and combine its business with that of an affiliate because no statutory provisions addressed this type of transaction. The section 1206 authority allows this transaction to take place in a merger and therefore allows the OCC to establish the procedures necessary when an uninsured national bank wishes to surrender its national charter but continue conducting lines of business that are authorized for the nonbank affiliate.

Proposed § 5.33(g)(5)(i) stated that this type of section 1206 Merger may be entered into when the law of the state or other jurisdiction under which the nonbank affiliate is organized allows such mergers. It also provided that an uninsured national bank must obtain the OCC's approval for the transaction. As was done in § 5.33(g)(4)(i), we have added language to the final rule in § 5.33(g)(5)(i) stating that the OCC will consider the purpose of the transaction, its impact on the safety and soundness of the bank, and any effect on the bank's customers. The OCC may deny the merger if it would have a negative effect on any of these factors.

Proposed § 5.33(g)(5)(ii) stated that a national bank entering into such a merger shall follow the procedures and requirements contained in 12 U.S.C. 214a (which addresses the merger of national banks into state banks), as if the nonbank entity were a state bank. Section 5.33(g)(5)(iii) stated that a nonbank affiliate entering into such a merger shall follow the procedures and requirements in the law of the state or other jurisdiction under which the nonbank entity is organized. Section 5.33(g)(5)(iv) of the proposal stated that dissenting national bank shareholders may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 214a as if the nonbank affiliate were a state bank. That section also stated that the OCC may conduct an appraisal or reappraisal of dissenters' shares of stock in a national bank involved in a merger with a nonbank affiliate that results in a nonbank affiliate if all parties agree that the determination is final and binding on each party and agree on how the OCC's expenses relating to the appraisal will be divided among the parties and paid to the OCC. The proposal provided that rights of

dissenting shareholders and appraisal of dissenters' shares of stock in the nonbank entity shall be determined in accordance with the laws of the state or other jurisdiction under which the nonbank entity is organized. We received no comments on these provisions and adopt them as proposed.

Proposed § 5.33(g)(5)(v) stated that the corporate existence of each entity participating in the merger shall be continued in the resulting nonbank affiliate, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating national bank shall be transferred to the resulting nonbank affiliate as set forth in 12 U.S.C. 214b, in the same manner and to the same extent as in a merger between a national bank and a state bank under 12 U.S.C. 214a, as if the nonbank affiliate were a state bank. A number of commenters suggested that we clarify that where the surviving entity is a nonbank affiliate, it does not succeed to any of the powers of the national bank, and that the national bank and its powers cease to exist. We agree that a national bank ceases to exist following consummation of a section 1206 Merger and that a surviving nonbank affiliate will not be permitted to exercise powers of the former national bank except to the extent permitted under state law or other law applicable to the resulting nonbank affiliate. The wording of the regulation does not say otherwise, however and in our view it is important to be clear that the surviving nonbank affiliate does enjoy corporate succession to the corporate rights, franchises, property, appointments, liabilities, and other interests of the former national bank. This is the same result as when a national bank merges into a state bank under 12 U.S.C. 214a and 214b. We do not believe that any change to the regulation is necessary by virtue of these comments and adopt this provision as proposed.

Finally, the proposal added a new paragraph (j)(1)(iv) to § 5.33 that permits applications for certain transactions under § 5.33(g)(4) to receive streamlined treatment. In order to qualify for such treatment, the acquiring bank must be an eligible bank, the resulting national bank must be well capitalized immediately following consummation of the transaction, the applicants in a pre-filing communication must request and obtain approval from the appropriate district office to use the streamlined application, and the total assets acquired in the transaction must not exceed 10 percent of the total assets of the acquiring national bank, as reported in the bank's Consolidated

Report of Condition and Income filed for the quarter immediately preceding the filing of the application. We received no comments on this provision and adopt it as proposed.

### 3. National Bank Directors—§ 7.2024 (new)

Section 1205 of the AHEOA amended section 5145 of the Revised Statutes of the United States (12 U.S.C. 71) and section 31 of the Banking Act of 1933 (12 U.S.C. 71a) regarding national bank directors. Section 1205 increases the maximum term a director may serve from one to not more than three years and permits a national bank to adopt bylaws that provide for staggering the terms of its directors in accordance with the OCC's regulations. In addition, this section permits the OCC to exempt a national bank from the otherwise applicable requirement that it have no more than 25 directors.

The proposal added a new § 7.2024 conforming the OCC's rules to these provisions. Pursuant to proposed § 7.2024(a), national banks may adopt bylaws that provide for staggering the terms of their directors. Proposed § 7.2024(b) increased the permissible maximum term of national bank directors from one year to three years. Finally, paragraph (c) provided that a national bank may increase the size of its board of directors above the statutory limit of 25 provided that the bank satisfies the notice requirements set out in that section. We received two comments on this provision, both of which supported the proposal. Accordingly, we adopt it as proposed.

## II. Additional Changes to Parts 5, 7, 9, and 34

### A. Part 5 Amendments

The final rule also revised three other provisions in part 5 of our regulations. Section 5.20 of our regulations contains the requirements that govern the organization of a national bank. The proposal amended § 5.20(e)(1) to provide that the newly organized bank may be a special purpose national bank that limits its activities to fiduciary activities or to any other activities within the business of banking. The purpose of this proposed change was to clarify that a limited purpose national bank may exist with respect to activities other than fiduciary activities, provided the activities in question are part of the business of banking. Some commenters expressed concern that this provision was too broad and that the expansion of the limited purpose charter had the potential to exclude from state oversight entities conducting activities only

loosely related to banking. We agree that it is appropriate to provide further clarification of the scope of activities permissible for a limited purpose national bank, and we have amended this provision to require limited purpose national banks to conduct at least one of the following core banking functions: (1) Receiving deposits; (2) paying checks; or (3) lending money. These functions are based on 12 U.S.C. 36, which identifies activities that cause a facility to be considered a bank branch.

Section 5.33(e) of our regulations contains a listing of factors the OCC considers in evaluating applications for business combinations. These factors are based upon the factors set forth in the Bank Merger Act and the CRA. As part of the USA PATRIOT Act,<sup>11</sup> Congress amended the Bank Merger Act by adding a factor to be considered in evaluating merger transactions. This factor requires the responsible agencies to consider the effectiveness of any insured depository institution involved in a proposed merger in combating money laundering activities.<sup>12</sup> The proposal conformed our regulations with the statute by adding the factor at § 5.33(e)(1)(v).

Finally, current § 5.34(e)(5)(iv) permits certain national banks to acquire or establish an operating subsidiary or perform a new activity in an existing operating subsidiary by providing after-the-fact notice to the OCC if the operating subsidiary conducts certain activities listed in § 5.34(e)(5)(v). That list currently includes the underwriting of credit-related insurance consistent with section 302 of the Gramm-Leach-Bliley Act. Since the list was last revised, the OCC has determined, in Corporate Decision 2001-10 (April 23, 2001) and Corporate Decision 2000-16 (August 29, 2000), that credit-related reinsurance products satisfy GLBA section 302's statutory requirements and are "authorized products." The proposal therefore amended 12 CFR 5.34(e)(5)(v)(L) to add reinsuring of credit-related insurance to the list of activities eligible for after-the-fact notice requirements.

We received no comments on these proposed changes to §§ 5.33(e) or 5.34(e) and therefore adopt these changes as proposed.

<sup>11</sup> Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001).

<sup>12</sup> The FDIC recently updated its Statement of Policy on Bank Merger Transactions to include this new factor at 67 FR 48178 (July 23, 2002). This update only provides the new provision. The complete Policy Statement as it existed before this update may be found at 63 FR 44761 (August 20, 1998).

### B. Part 7 Amendment

As corporate transactions have become more sophisticated, an integral part of financial and transactional advice with respect to mergers and other corporate restructurings inevitably involves providing advice on the tax implications of those transactions. Recently amended § 5.34(e)(5)(v)(J) and (K) permit national banks to provide tax planning services and to provide financial and transactional advice on structuring, arranging, and executing financial transactions, including mergers, acquisitions, and divestitures. Providing tax planning services encompasses tax consulting in order for a bank to be able to offer comprehensive services in this area. Accordingly, the proposal deleted as outdated the prohibition against serving as an expert tax consultant that currently appears at § 7.1008.<sup>13</sup> We received no comments regarding this change, and therefore adopt it as proposed.

### C. Part 9 Amendment

Currently, 12 CFR 9.18(b)(4)(i) requires valuation of collective investment funds at least every three months. However, certain funds are only required to be valued once a year. Those funds must be “(a)(2) funds” (*i.e.*, funds that may be held pursuant to 12 CFR 9.18(a)(2) that are primarily invested in real estate or other assets that are not readily marketable). A growing number of collective investment funds, including (a)(1) funds, however, are comprised of a mix of assets that are readily marketable and assets that are not readily marketable. Those funds do not qualify for the one-year valuation because they are not (a)(2) funds primarily invested in real estate or other assets that are not readily marketable. However, a one-year valuation may be appropriate for assets in those funds that are not readily marketable. Thus, we proposed to amend the regulation to require quarterly valuation of readily marketable assets in all collective investment funds, including (a)(1) funds. Assets that are not readily marketable must be valued at least once a year regardless of whether the assets are in (a)(1) or (a)(2) funds or whether the funds’ assets are primarily invested in real estate or other assets that are not readily marketable. For purposes of an admission or withdrawal date, this

provision does not negate the need to provide a current value at the time of such admission or withdrawal. We received no comments regarding this change, and therefore adopt it as proposed.

### D. Part 34 Amendment

Section 34.3 restates the comprehensive authority vested in the OCC by 12 U.S.C. 371 to regulate real estate lending by national banks. Section 371 authorizes national banks to engage in real estate lending subject to 12 U.S.C. 1828(o) (real estate lending safety and soundness standards) and “such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.” The cross-reference to 12 U.S.C. 1828(o) was added to the statute in 1991, but the text of the regulation was never revised to reflect it. Thus, the proposal updated the regulation to reflect that change to the underlying statute. Other portions of the regulation remain unchanged.<sup>14</sup> We received no comments regarding this change, and therefore adopt it as proposed.

### III. Technical Amendments

The proposal contained the following technical amendments:

- 12 CFR part 3, appendix A, section 3(a)(2)(ix) currently cross-references a definition of “General obligation of a State or political subdivision” but contains the wrong regulatory citation for that definition. The definition in question has been moved from 12 CFR 1.3(g) to 12 CFR 1.2(b). The proposed revision corrected the citation. Also in part 3 appendix A, section 4(a)(11)(ii), the references to section 4(a)(8)(i) and (ii) were corrected to refer to section 4(a)(9)(i) and (ii), respectively.
- The citations to FDIC regulations in current 12 CFR 6.4(c)(1)(i) and (ii) are incorrect. The proposal amended the citations to correct them.
- Current 12 CFR 7.1016(a) contains a footnote reference and accompanying footnote text. The footnote reference number is 30, but should be 1. The proposal made this change.
- Current 12 CFR 9.20(b) contains a reference to SEC rules 17 CFR 240.17Ad-1 through 240.17Ad-16. A new rule, at 17 CFR 240.17Ad-17, has been added, so the proposal changed the reference to 240.17Ad-16 to reflect the addition.
- Current 12 CFR 28.16(e), dealing with uninsured deposit notices, makes a

reference to an FDIC regulation, 12 CFR 346.7, which was removed in 1998. The proposal corrected this citation to refer to the current rule for uninsured deposit notices, which can now be found at 12 CFR 347.207.

We received no comments regarding these changes, and therefore adopt them as proposed.

### IV. Regulatory Analysis

#### CDRI Act Delayed Effective Date

This final rule takes effect 30 days after the date of its publication in the **Federal Register**, consistent with the delayed effective date requirement of the Administrative Procedure Act. *See* 5 U.S.C. 553(d). Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act), 12 U.S.C. 4802(b), provides that regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions may not take effect before the first day of the quarter following publication unless the agency finds that there is good cause to make the rule effective at an earlier date. The regulations in this final rule provide procedures to be used by national banks wishing to take advantage of the new transactions or corporate governance options permitted by the AHEOA. The regulations make it easier for national banks to exercise this new statutory authority. Accordingly, the OCC finds that there is good cause to dispense with the requirements of the CDRI Act.

#### Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

Pursuant to section 605(b) of the RFA, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed. The amendments to the OCC’s regulations relating to the AHOEA are permissive provisions that will be used only by banks that wish to take advantage of the new transactions, procedures, or corporate governance options permitted by the statute as implemented by the regulations. 12 CFR 5.33(g)(5) reduces burden by implementing a simpler way to

<sup>13</sup> National banks engaged in providing the services permitted by 12 CFR 5.34(e)(5)(v)(J) and (K) must comply with applicable regulations of the Internal Revenue Service (IRS) governing the provision of such services. Information about the IRS regulations may be obtained at [www.irs.treas.gov](http://www.irs.treas.gov).

<sup>14</sup> We have proposed additional changes to part 34 in a separate rulemaking that invites comment on changes to the provisions governing preemption. *See* 68 FR 46119 (Aug. 5, 2003). The comment period for that rulemaking closed October 6, 2003.

accomplish a merger of a national bank into one of its nonbank affiliates. The amendments simply provide the OCC's implementation of the AHEOA or make other technical changes to the rules to correct existing errors or clarify various points. They do not impose any new requirements or burdens. As such, they will not result in any adverse economic impact.

#### *Executive Order 12866*

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

#### *Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that this final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

#### *Paperwork Reduction Act*

The OCC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The information collection requirements in this final rule are contained in §§ 5.32, 5.33, and 7.2024.

OMB has reviewed and approved the information collection requirements under OMB Control Number 1557-0014, in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Comptroller's Corporate Manual (Manual) explains the OCC's policies and procedures for the formation of a new national bank, entry into the national banking system by other institutions, and corporate expansion and structural changes by existing national banks. The Manual embodies all required procedures, forms, and regulations regarding OCC corporate decisions.

The information collection requirements imposed by §§ 5.32 and 5.33 are contained in the Business Combinations booklet in the Manual and are part of the total requirement.

The respondents are national banks.

*Estimated number of respondents:* 270.

*Estimated number of responses:* 270.

*Average hours per response:* 24.

*Estimated total burden hours:* 5,580.

The information collection requirements imposed by § 7.2024 are included in the Corporate Organization booklet in the Manual, along with several other corporate requirements.

The respondents are national banks.

*Estimated number of respondents:* 1,000.

*Estimated number of responses:* 1,000.

*Average hours per response:* .5 hour.

*Estimated total burden hours:* 500 hours.

The burden estimates represent total burden for national banks' compliance with the information collection requirements associated with corporate organization matters and business combination activities.

#### *Executive Order 13132*

Executive Order 13132 (Order) requires Federal agencies, including the OCC, to certify their compliance with that Order when they transmit to the Office of Management and Budget any draft final regulation that has Federalism implications. Under the Order, a regulation has Federalism implications if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." In the case of a regulation that has Federalism implications and that preempts state law, the Order imposes certain consultation requirements with state and local officials; requires publication in the preamble of a Federalism summary impact statement; and requires the OCC to make available to the Director of the Office of Management and Budget any written communications submitted by state and local officials. By the terms of the Order, these requirements apply to the extent that they are practicable and permitted by law and, to that extent, must be satisfied before the OCC promulgates a final regulation. In the opinion of the OCC, this final rule does not have Federalism implications.

## List of Subjects

### *12 CFR Part 3*

Administrative practice and procedure, National banks, Reporting and recordkeeping requirements.

### *12 CFR Part 5*

Administrative practice and procedure, National banks, Reporting and recordkeeping requirements, Securities.

### *12 CFR Part 6*

National banks.

### *12 CFR Part 7*

Credit, Insurance, Investments, National banks, Reporting and recordkeeping requirements, Securities, Surety bonds.

### *12 CFR Part 9*

Estates, Investments, National banks, Reporting and recordkeeping requirements, Trusts and trustees.

### *12 CFR Part 28*

Foreign banking, National banks, Reporting and recordkeeping requirements.

### *12 CFR Part 34*

Mortgages, National banks, Reporting and recordkeeping requirements.

## Authority and Issuance

■ For the reasons set forth in the preamble, the OCC amends parts 3, 5, 6, 7, 9, 28, and 34 of chapter I of title 12 of the Code of Federal Regulations as follows:

### **PART 3—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES**

■ 1. The authority citation for part 3 continues to read as follows:

**Authority:** 12 U.S.C. 93a, 161, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, and 3909.

### **Appendix A to Part 3—[Amended]**

■ 2. In appendix A to part 3:

■ a. In section 3, amend paragraph (a)(2)(ix) by removing "12 CFR 1.3(g)" and adding in its place "12 CFR 1.2(b)"; and

■ b. In section 4, amend paragraph (a)(11)(ii) by removing, "section (4)(a)(8)(i) and (ii)" and adding in its place "section (4)(a)(9)(i) and (ii)".

\* \* \* \* \*

### **PART 5—RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES**

■ 3. The authority citation for part 5 is revised to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 93a; 215a–2; 215a–3; and section 5136A of the Revised Statutes (12 U.S.C. 24a).

**Subpart B—Initial Activities**

■ 4. In § 5.20, add new second and third sentences to paragraph (e)(1) to read as follows:

**§ 5.20 Organizing a bank.**

\* \* \* \* \*

(e) *Statutory requirements*—(1) *General.* \* \* \* The bank may be a special purpose bank that limits its activities to fiduciary activities or to any other activities within the business of banking. A special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: receiving deposits; paying checks; or lending money. \* \* \*

\* \* \* \* \*

**Subpart C—Expansion of Activities**

■ 5. Add a new § 5.32 to Subpart C to read as follows:

**§ 5.32 Expedited procedures for certain reorganizations.**

(a) *Authority.* 12 U.S.C. 93a and 215a–2.

(b) *Scope.* This section prescribes the procedures for OCC review and approval of a national bank’s reorganization to become a subsidiary of a bank holding company or a company that will, upon consummation of such reorganization, become a bank holding company. For purposes of this section, a “bank holding company” means any company that owns or controls a national bank, or will own or control one as a result of the reorganization.

(c) *Licensing requirements.* A national bank shall submit an application to, and obtain approval from, the OCC prior to participating in a reorganization described in paragraph (b) of this section.

(d) *Procedures*—(1) *General.* An application filed in accordance with this section shall be deemed approved on the 30th day after the OCC receives the application, unless the OCC notifies the bank otherwise. Approval is subject to the condition that the bank provide the OCC with 60 days’ prior notice of any significant deviation from the bank’s business plan or any significant deviation from the proposed changes to the bank’s business plan described in the bank’s plan of reorganization.

(2) *Reorganization plan.* The application must include a reorganization plan that:

(i) Specifies the manner in which the reorganization shall be carried out;

(ii) Is approved by a majority of the entire board of directors of the national bank;

(iii) Specifies:

(A) The amount and type of consideration that the bank holding company will provide to the shareholders of the reorganizing bank for their shares of stock of the bank;

(B) The date as of which the rights of each shareholder to participate in that exchange will be determined; and

(C) The manner in which the exchange will be carried out;

(iv) Is submitted to the shareholders of the reorganizing bank at a meeting to be held at the call of the directors in accordance with the procedures prescribed in connection with a merger of a national bank under section 3 of the National Bank Consolidation and Merger Act, 12 U.S.C. 215a(a)(2); and

(v) Describes any changes to the bank’s business plan resulting from the reorganization.

(3) *Financial and managerial resources and future prospects.* In reviewing an application under this section, the OCC will consider the impact of the proposed affiliation on the financial and managerial resources and future prospects of the national bank.

(e) *Rights of dissenting shareholders.* Any shareholder of a bank who has voted against an approved reorganization at the meeting referred to in paragraph (d)(2)(iv) of this section, or who has given notice of dissent in writing to the presiding officer at or prior to that meeting, is entitled to receive the value of his or her shares by providing a written request to the bank within 30 days after the consummation of the reorganization, as provided by section 3 of the National Bank Consolidation and Merger Act, 12 U.S.C. 215a(b) and (c), for the merger of a national bank.

(f) *Approval under the Bank Holding Company Act.* This section does not affect the applicability of the Bank Holding Company Act of 1956. Applicants shall indicate in their application the status of any application required to be filed with the Board of Governors of the Federal Reserve System.

(g) *Expiration of approval.* Approval expires if a national bank has not completed the reorganization within one year of the date of approval.

(h) *Adequacy of disclosure.* (1) An applicant shall inform shareholders of all material aspects of a reorganization and comply with applicable requirements of the Federal securities laws, including the OCC’s securities regulations at 12 CFR part 11.

(2) Any applicant not subject to the registration provisions of the Securities Exchange Act of 1934 shall submit the proxy materials or information statements it uses in connection with the reorganization to the appropriate district office no later than when the materials are sent to the shareholders.

■ 6. In § 5.33:

- a. revise paragraph (a);
- b. paragraph (b) is redesignated as paragraph (c), paragraph (c) is redesignated as paragraph (b), newly redesignated paragraph (b) is revised and a sentence is added at the end of newly redesignated paragraph (c);
- c. paragraphs (d)(1), (d)(2), (d)(3), and (d)(4) are redesignated as paragraphs (d)(2), (d)(3), (d)(6), and (d)(7), respectively; revise newly designated paragraph (d)(2); and add new paragraphs (d)(1), (d)(4), (d)(5), and (d)(8);
- d. add new paragraph (e)(1)(v);
- e. revise paragraph (e)(3)(ii);
- f. revise the second sentence of paragraph (f)(1) and add two new sentences at the end of the paragraph;
- g. add new paragraphs (g)(4) and (g)(5);
- h. at the end of paragraph (j)(1)(ii), remove the term “or”;
- i. at the end of paragraph (j)(1)(iii), remove “,” and add “; or”; and
- j. add new paragraph (j)(1)(iv) to read as follows:

**§ 5.33 Business combinations.**

(a) *Authority.* 12 U.S.C. 24(Seventh), 93a, 181, 214a, 214b, 215, 215a, 215a–1, 215a–3, 215c, 1815(d)(3), 1828(c), 1831u, and 2903.

(b) *Scope.* This section sets forth the provisions governing business combinations and the standards for:

(1) OCC review and approval of an application for a business combination between a national bank and another depository institution resulting in a national bank or between a national bank and one of its nonbank affiliates; and

(2) Requirements of notices and other procedures for national banks involved in other combinations with depository institutions.

(c) *Licensing requirements.* \* \* \* A national bank shall submit an application and obtain prior OCC approval for any merger between the national bank and one or more of its nonbank affiliates.

(d) *Definitions.* (1) *Bank* means any national bank or any state bank.

(2) *Business combination* means any merger or consolidation between a national bank and one or more depository institutions in which the resulting institution is a national bank, the acquisition by a national bank of all,

or substantially all, of the assets of another depository institution, the assumption by a national bank of deposit liabilities of another depository institution, or a merger between a national bank and one or more of its nonbank affiliates.

\* \* \* \* \*

(4) *Company* means a corporation, limited liability company, partnership, business trust, association, or similar organization.

(5) For business combinations under § 5.33(g)(4) and (5), a company or shareholder is deemed to *control* another company if:

(i) Such company or shareholder, directly or indirectly, or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the other company, or

(ii) Such company or shareholder controls in any manner the election of a majority of the directors or trustees of the other company. No company shall be deemed to own or control another company by virtue of its ownership or control of shares in a fiduciary capacity.

\* \* \* \* \*

(8) *Nonbank affiliate* of a national bank means any company (other than a bank or Federal savings association) that controls, is controlled by, or is under common control with the national bank.

(e) \* \* \*

(1) \* \* \*

(v) *Money laundering*. The OCC considers the effectiveness of any insured depository institution involved in the business combination in combating money laundering activities, including in overseas branches.

\* \* \* \* \*

(3) \* \* \*

(ii) An applicant proposing to acquire, through a business combination, a subsidiary of any entity other than a national bank must provide the same information and analysis of the subsidiary's activities that would be required if the applicant were establishing the subsidiary pursuant to §§ 5.34 or 5.39.

\* \* \* \* \*

(f) *Exceptions to rules of general applicability*—(1) *National bank applicant*. \* \* \* A national bank applicant shall follow, as applicable, the public notice requirements contained in 12 U.S.C. 1828(c)(3) (business combinations), 12 U.S.C. 215(a) (consolidation under a national bank charter), 12 U.S.C. 215a(a)(2) (merger under a national bank charter), paragraph (g)(2) of this section (merger or consolidation with a Federal savings association resulting in a national bank),

paragraph (g)(4) of this section (merger with a nonbank affiliate under a national bank charter), and paragraph (g)(5) of this section (merger with nonbank affiliate not under national bank charter). Sections 5.10 and 5.11 do not apply to mergers of a national bank with its nonbank affiliate. However, if the OCC concludes that an application presents significant and novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.10 and 5.11 apply.

\* \* \* \* \*

(g) \* \* \*

(4) *Mergers of a national bank with its nonbank affiliates under 12 U.S.C. 215a-3 resulting in a national bank*. (i)

With the approval of the OCC, a national bank may merge with one or more of its nonbank affiliates, with the national bank as the resulting institution, in accordance with the provisions of this paragraph, provided that the law of the state or other jurisdiction under which the nonbank affiliate is organized allows the nonbank affiliate to engage in such mergers. The transaction is also subject to approval by the FDIC under the Bank Merger Act, 12 U.S.C. 1828(c). In determining whether to approve the merger, the OCC shall consider the purpose of the transaction, its impact on the safety and soundness of the bank, and any effect on the bank's customers, and may deny the merger if it would have a negative effect in any such respect.

(ii) A national bank entering into the merger shall follow the procedures of 12 U.S.C. 215a as if the nonbank affiliate were a state bank, except as otherwise provided herein.

(iii) A nonbank affiliate entering into the merger shall follow the procedures for such mergers set out in the law of the state or other jurisdiction under which the nonbank affiliate is organized.

(iv) The rights of dissenting shareholders and appraisal of dissenters' shares of stock in the nonbank affiliate entering into the merger shall be determined in the manner prescribed by the law of the state or other jurisdiction under which the nonbank affiliate is organized.

(v) The corporate existence of each institution participating in the merger shall be continued in the resulting national bank, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating institutions shall be transferred to the resulting national bank, as set forth in 12 U.S.C. 215a(a), (e), and (f) in the same manner and to the same extent as in a merger between

a national bank and a state bank under 12 U.S.C. 215a(a), as if the nonbank affiliate were a state bank.

(5) *Mergers of an uninsured national bank with its nonbank affiliates under 12 U.S.C. 215a-3 resulting in a nonbank affiliate*. (i) With the approval of the OCC, a national bank that is not an insured bank as defined in 12 U.S.C. 1813(h) may merge with one or more of its nonbank affiliates, with the nonbank affiliate as the resulting entity, in accordance with the provisions of this paragraph, provided that the law of the state or other jurisdiction under which the nonbank affiliate is organized allows the nonbank affiliate to engage in such mergers. In determining whether to approve the merger, the OCC shall consider the purpose of the transaction, its impact on the safety and soundness of the bank, and any effect on the bank's customers, and may deny the merger if it would have a negative effect in any such respect.

(ii) A national bank entering into the merger shall follow the procedures of 12 U.S.C. 214a, as if the nonbank affiliate were a state bank, except as otherwise provided in this section.

(iii) A nonbank affiliate entering into the merger shall follow the procedures for such mergers set out in the law of the state or other jurisdiction under which the nonbank affiliate is organized.

(iv) (A) National bank shareholders who dissent from an approved plan to merge may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 214a as if the nonbank affiliate were a state bank. The OCC may conduct an appraisal or reappraisal of dissenters' shares of stock in a national bank involved in the merger if all parties agree that the determination is final and binding on each party and agree on how the total expenses of the OCC in making the appraisal will be divided among the parties and paid to the OCC.

(B) The rights of dissenting shareholders and appraisal of dissenters' shares of stock in the nonbank affiliate involved in the merger shall be determined in the manner prescribed by the law of the state or other jurisdiction under which the nonbank affiliate is organized.

(v) The corporate existence of each entity participating in the merger shall be continued in the resulting nonbank affiliate, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating national bank shall be transferred to the resulting nonbank affiliate as set forth in 12 U.S.C. 214b, in the same manner and

to the same extent as in a merger between a national bank and a state bank under 12 U.S.C. 214a, as if the nonbank affiliate were a state bank.

\* \* \* \* \*

(j) \* \* \*

(1) \* \* \*

(iv) In the case of a transaction under paragraph (g)(4) of this section, the acquiring bank is an eligible bank, the resulting national bank will be well capitalized immediately following consummation of the transaction, the applicants in a pre-filing communication request and obtain approval from the appropriate district office to use the streamlined application, and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank, as reported in the bank's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application.

\* \* \* \* \*

■ 7. In 5.34, revise paragraph (e)(5)(v)(L) to read as follows:

**§ 5.34 Operating subsidiaries.**

\* \* \* \* \*

(e) \* \* \*

(5) \* \* \*

(v) \* \* \*

(L) Underwriting and reinsuring credit related insurance to the extent permitted under section 302 of the GLBA (15 U.S.C. 6712);

\* \* \* \* \*

**PART 6—PROMPT CORRECTIVE ACTION**

■ 8. The authority citation for part 6 continues to read as follows:

Authority: 12 U.S.C. 93a, 1831o.

**Subpart A—Capital Categories**

■ 9. In § 6.4, revise paragraphs (c)(1)(i) and (ii) to read as follows:

**§ 6.4 Capital measures and capital category definitions.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) Maintains the pledge of assets required under 12 CFR 347.210; and

(ii) Maintains the eligible assets prescribed under 12 CFR 347.211 at 108 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

\* \* \* \* \*

**PART 7—BANK ACTIVITIES AND OPERATIONS**

■ 10. Revise the authority citation for part 7 to read as follows:

Authority: 12 U.S.C. 1 *et seq.*, 71, 71a, 92, 92a, 93, 93a, 481, 484, 1818.

**Subpart A—Bank Powers**

■ 11. Revise § 7.1008 to read as follows:

**§ 7.1008 Preparing income tax returns for customers or public.**

A national bank may assist its customers in preparing their tax returns, either gratuitously or for a fee.

**§ 7.1016 [Amended]**

■ 12. In § 7.1016(a), redesignate footnote 30 as footnote 1.

**Subpart B—Corporate Practices**

■ 13. Add a new § 7.2024 to read as follows:

**§ 7.2024 Staggered terms for national bank directors and size of bank board.**

(a) *Staggered terms.* Any national bank may adopt bylaws that provide for staggering the terms of its directors. National banks shall provide the OCC with copies of any bylaws so amended.

(b) *Maximum term.* Any national bank director may hold office for a term that does not exceed three years.

(c) *Number of directors.* A national bank's board of directors shall consist of no fewer than 5 and no more than 25 members. A national bank may, after notice to the OCC, increase the size of its board of directors above the 25 member limit. A national bank seeking to increase the number of its directors must notify the OCC any time the proposed size would exceed 25 directors. The bank's notice shall specify the reason(s) for the increase in the size of the board of directors beyond the statutory limit.

**PART 9—FIDUCIARY ACTIVITIES OF NATIONAL BANKS**

■ 15. The authority citation for part 9 continues to read as follows:

Authority: 12 U.S.C. 24 (Seventh), 92a, and 93a; 15 U.S.C. 78q, 78q-1, and 78w.

■ 16. In § 9.18, revise paragraph (b)(4)(i) to read as follows:

**§ 9.18 Collective investment funds.**

\* \* \* \* \*

(b) \* \* \*

(4) *Valuation*—(i) *Frequency of valuation.* A bank administering a collective investment fund shall determine the value of the fund's readily marketable assets at least once

every three months. A bank shall determine the value of the fund's assets that are not readily marketable at least once a year.

\* \* \* \* \*

■ 17. In § 9.20, amend paragraph (b), by removing the term "240.17Ad-16" and adding in its place the term "240.17Ad-17."

**PART 28—INTERNATIONAL BANKING ACTIVITIES**

■ 18. The authority citation for part 28 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.*, 24 (Seventh), 93a, 161, 602, 1818, 3101 *et seq.*, and 3901 *et seq.*

**Subpart B—Federal Branches and Agencies of Foreign Banks**

■ 19. In § 28.16, amend paragraph (e), by removing the term "12 CFR 346.7" and adding in its place the term "12 CFR 347.207."

**PART 34—REAL ESTATE LENDING AND APPRAISALS**

**Subpart A—General**

■ 20. The authority citation for part 34 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.*, 29, 93a, 371, 1701j-3, 1828(o), and 3331 *et seq.*

■ 21. Revise § 34.3 to read as follows:

**§ 34.3 General rule.**

A national bank may make, arrange, purchase, or sell loans or extensions of credit, or interests therein, that are secured by liens on, or interests in, real estate (real estate loans), subject to 12 U.S.C. 1828(o) and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

Dated: October 17, 2003.

John D. Hawke, Jr.,

Comptroller of the Currency.

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