



# RESCINDED

Office of the Comptroller of the Currency  
Administration of National Banks  
US Department of the Treasury

OCC 2007-23

**Subject: Regulatory Review Amendments**  
**Date: July 12, 2007**

**To: Chief Executive Officers of All National  
Banks, Department and Division Heads, All  
Examining Personnel, and Other Interested  
Parties**

## Description: Proposed Rule

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national banking system, to ensure that national banks can compete effectively in the financial services marketplace, and to foster fairness and integrity in national banks' dealings with their customers without imposing regulatory burden unnecessary to the achievement of those objectives. The OCC's review of regulations is consistent with the Economic Growth and Regulatory Paperwork Reduction Act of 1996.<sup>1</sup>

Specifically, the OCC is proposing amendments to a variety of regulations that would: (1) provide additional flexibility with respect to certain aspects of national banks' structure and activities; (2) streamline procedures required in connection with particular types of changes in structure and the conduct of certain activities; (3) incorporate into OCC rules interpretive opinions that the OCC has previously published; (4) harmonize the OCC's rules with rules issued by other federal agencies that apply to national banks; (5) eliminate inconsistencies in certain of OCC rules; (6) update OCC rules to reflect recent statutory changes; and (7) make technical and conforming amendments to OCC rules to improve their clarity and consistency.

The most significant of these amendments include the following:

- Amendments to part 1, which pertain to investment securities, to provide the OCC with additional flexibility in administering part 1 as investment products evolve, codify existing precedent, and clarify applicable standards;
- Amendments to part 5, which governs national banks' corporate activities, to:
  - Codify prior OCC interpretive opinions recognizing that national bank operating subsidiaries may take the form of limited partnerships;
  - Update the standards the OCC uses to determine that a national bank exercises control over its operating subsidiary so the standards reflect FASB changes in relevant accounting principles;
  - Clarify when a national bank may file an after-the-fact notice to establish or acquire an operating subsidiary and when the bank must file an application; and
  - Expand the list of operating subsidiary activities eligible for after-the-fact notice;
- Amendments to part 5 to eliminate multiple, repetitive applications when a national bank opens an intermittent branch to provide branch banking services for one or more limited periods of time each year at a specified site during a specified recurring event, such as during a college registration period or a state fair;
- Amendments to part 7, which pertains to national banks' activities and operations, to provide national banks greater flexibility to facilitate customers' financial transactions by issuing financial guarantees that are reasonably ascertainable in amount and comply with applicable law;
- Amendments to part 7, to codify OCC electronic banking precedent and adapt the OCC's rules to certain current developments;

- Amendments to part 16, the OCC's securities offering disclosure rules, to eliminate unnecessary filing requirements and to clarify the exemptions from the OCC's registration requirements for certain transactions;
- Amendments to part 34, which pertains to real estate lending and appraisals, to provide national banks with additional flexibility in the indices that determine adjustments to interest rates in adjustable rate mortgages (ARMs).

OCC management also proposes to make certain technical and conforming amendments to OCC rules, including:

- Changes to part 4 (the OCC's organizational rules) and part 5 (corporate application requirements for national banks) to reflect the OCC's current organizational structure;
- Changes to conform the OCC's regulations – parts 5 (corporate activities), 23 (leasing), 31 (extensions of credit to insiders and transactions with affiliates), and 32 (lending limits) – to Regulation W issued by the Board of Governors of the Federal Reserve System (Federal Reserve Board)<sup>2</sup>, which governs transactions between Federal Reserve member banks and their affiliates and implements sections 23A and 23B of the Federal Reserve Act;<sup>3</sup>
- Amendments to part 9 (fiduciary activities of national banks) and part 12 (securities Exchange Act disclosure rules) to reflect changes in certain regulations adopted by the Securities and Exchange Commission (SEC);
- Amendments to part 31 to remove an obsolete interpretation relating to loans to two parties secured by both affiliate-issued securities and non-affiliate collateral;
- Amendments to various provisions in OCC rules to implement section 8 of the 2000 District of Columbia Omnibus Authorization Act,<sup>4</sup> which removed the OCC as the appropriate federal banking agency for financial institutions established under the Code of Law for the District of Columbia (DC banks) and substituted the FDIC or the Federal Reserve Board, as appropriate to the bank's charter type; and
- Amendments to conform our regulations to the changes made by the Financial Services Regulatory Relief Act of 2006 (FSRRA)<sup>5</sup>, which was enacted on October 13, 2006 (FSRRA), including:
  - Amendments to part 5 that simplify a national bank's authority to pay a dividend and that remove the geographic limits with respect to bank service companies;
  - Amendments to the OCC's Change in Bank Control Act (CBCA) regulation, § 5.50, that (1) provide that a CBCA notice must include information on the future prospects of the national bank to be acquired, (2) permit the OCC to consider the future prospects of the bank as a basis to issue a notice of disapproval, and (3) permit the OCC to impose conditions on its action not to disapprove a CBCA notice;
  - Amendments to part 7 that permit national banks to choose whether to provide for cumulative voting in the election of their directors;
  - Amendments to part 19 that reflect changes to the OCC's enforcement authority with respect to institution-affiliated parties; and
  - Amendments to part 24 (community development investments) that implement section 305 of the FSRRA.

The proposed rule was published in the *Federal Register* on July 3, 2007.

The comment period ends on September 4, 2007. For further information, contact Stuart E. Feldstein, Assistant Director, or Heidi M. Thomas, Special Counsel, in the Legislative and Regulatory Activities Division at (202) 874-5090.

For information regarding specific amendments such as licensing/corporate applications-related amendments, you can contact Colleen Coughlin, Senior Licensing Analyst, at (202) 874-4465 or Jan Kalmus, NBE-Senior Licensing Analyst, at (202) 874-4608, in the Licensing Activities Division. For electronic banking-related amendments, contact Aida Plaza Carter, Director, Bank Information Technology, at (202) 874-4593.

Also, you can mail queries for any of the above to the Office of the Comptroller of the Currency, 250 E Street SW, Washington, DC 20219.

Julie L. Williams  
First Senior Deputy Comptroller and Chief Counsel

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<sup>1</sup> Pub. L. 104-208, 22 Stat. 1110 Stat. 309-394, 3009-314-315 (Sept. 30, 1996), codified at 12 USC 3311

<sup>2</sup> 12 CFR 223.

<sup>3</sup> 12 USC 371c and 371c-1.

<sup>4</sup> Pub. L. 108-386, 118 Stat. 2228 (2004).

<sup>5</sup> Pub. L. 109-351, 120 Stat. 1966 (2006).

#### Related Links

- [Proposed Rule 72 FR 36550](#)



# Federal Register

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**Tuesday,  
July 3, 2007**

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**Part II**

## **Department of the Treasury**

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**Office of the Comptroller of the  
Currency**

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**12 CFR Parts 1, 2, et al.  
Regulatory Review Amendments;  
Proposed Rule**

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency**

**12 CFR Parts 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, 16, 19, 21, 22, 23, 24, 26, 27, 28, 31, 32, 34, 37, and 40**

[Docket ID OCC–2007–0008]

RIN 1557–AC79

**Regulatory Review Amendments**

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is proposing to revise its rules in order to reduce unnecessary regulatory burden, to update certain rules, and to make certain technical, clarifying, and conforming changes to its regulations. This proposal results from the OCC's most recent review of its regulations to ensure that they effectively advance our mission to promote the safety and soundness of the national banking system, ensure that national banks can compete effectively in the financial services marketplace, and foster fairness and integrity in national banks' dealings with their customers, without imposing regulatory burden unnecessary to the achievement of those objectives. The proposal also furthers the purposes of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, which, among other provisions, directs the OCC, to identify and, if appropriate, eliminate regulations that are outdated, unnecessary, or unduly burdensome.

**DATES:** Comments must be received by September 4, 2007.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Federal eRulemaking Portal*—“Regulations.gov”: Go to <http://www.regulations.gov>, select “Comptroller of the Currency” from the agency drop-down menu, then click “Submit.” In the “Docket ID” column, select “OCC–2007–0008” to submit or view public comments and to view supporting and related materials for this notice of proposed rulemaking. The “User Tips” link at the top of the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

- *E-mail:* [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).

- *Fax:* (202) 874–4448.

- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 1–5, Washington, DC 20219.

- *Hand Delivery/Courier:* 250 E Street, SW., Attn: Public Information Room, Mail Stop 1–5, Washington, DC 20219.

*Instructions:* You must include “OCC” as the agency name and “Docket Number OCC–2007–0008” in your comment. In general, OCC will enter all comments received into the docket and publish them on Regulations.gov without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials by any of the following methods:

- *Viewing Comments Electronically:* Go to <http://www.regulations.gov>, select “Comptroller of the Currency” from the agency drop-down menu, then click “Submit.” In the “Docket ID” column, select “OCC–2007–0008” to view public comments for this notice of proposed rulemaking.

- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC. You can make an appointment to inspect comments by calling (202) 874–5043.

- *Docket:* You may also view or request available background documents and project summaries using the methods described above.

**FOR FURTHER INFORMATION CONTACT:**

Stuart E. Feldstein, Assistant Director, Legislative and Regulatory Activities, (202) 874–5090 and Heidi Thomas, Special Counsel, Legislative and Regulatory Activities, (202) 874–5090, Office of the Comptroller of the Currency, 250 E Street SW., Washington, DC 20219. In addition, you may also contact the following OCC staff for further information regarding specific amendments: licensing/corporate applications-related amendments: Colleen Coughlin, Senior Licensing Analyst, Licensing Activities Division, (202) 874–4465, Jan Kalmus, NBE-Senior Licensing Analyst, 202–874–4608, and Yoo Jin Na, Licensing Analyst, Licensing Activities Division, 202–874–4604; electronic banking-related amendments: Aida Plaza Carter,

Director, Bank Information Technology, (202) 874–4593, Office of the Comptroller of the Currency, 250 E Street SW., Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:****Introduction**

The OCC seeks to ensure that our regulations effectively advance our mission to promote the safety and soundness of the national banking system, ensure that national banks can compete effectively in the financial services marketplace, and foster fairness and integrity in national banks' dealings with their customers, without imposing regulatory burden unnecessary to the achievement of those objectives. Unnecessary regulatory burden not only imposes costs on banks that may translate into higher prices for consumers, but also can hamper competition and lead to inefficient use of resources.

The OCC regularly reviews its regulations to identify opportunities to streamline regulations or regulatory processes. This proposal results from our most recent review. Moreover, the proposal furthers the purposes of section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA),<sup>1</sup> which directs the OCC, along with the other agencies that are members of the Federal Financial Institutions Examination Council, to identify regulations that are outdated, unnecessary, or unduly burdensome, and to eliminate them if appropriate.<sup>2</sup> Finally, the proposal revises certain of our regulations to conform with the statutory changes made by the Financial Services Regulatory Relief Act of 2006 (FSRRA), which was enacted on October 13, 2006.<sup>3</sup>

To reduce or eliminate unnecessary regulatory burden, the OCC is proposing amendments to a variety of regulations that would: (1) Provide additional flexibility with respect to certain aspects of national banks' structure and activities; (2) streamline procedures required in connection with particular types of changes in structure and the

<sup>1</sup> See EGRPRA, Pub. L. 104–208, § 2222, 110 Stat. 3009–394, 3009–314–315 (Sept. 30, 1996), *codified at* 12 U.S.C. 3311.

<sup>2</sup> Pursuant to EGRPRA's regulatory review requirement, the OCC, together with the Board of Governors of the Federal Reserve System (Federal Reserve Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS), has published six notices seeking comment on ways to reduce unnecessary regulatory burden and has conducted outreach meetings with bankers and consumer groups. For additional information about the agencies' EGRPRA review, see <http://www.EGRPRA.gov>.

<sup>3</sup> Pub. L. 109–351, 120 Stat. 1966 (Oct. 13, 2006).

conduct of certain activities; (3) incorporate into our rules interpretive opinions that the OCC has previously published; (4) harmonize the OCC's rules with rules issued by other Federal agencies that apply to national banks; (5) eliminate inconsistencies in certain of our rules; (6) update our rules to reflect recent statutory changes; and (7) make technical and conforming amendments to our rules to improve their clarity and consistency.

The most significant of these amendments include the following:

- Amendments to part 1, which pertain to investment securities, to provide the OCC with additional flexibility in administering part 1 as investment products evolve, codify existing precedent, and clarify applicable standards.
- Amendments to part 5, which governs national banks' corporate activities, to:
  - Codify prior OCC interpretive opinions recognizing that national bank operating subsidiaries may take the form of limited partnerships;
  - Update the standards the OCC uses to determine that a national bank exercises control over its operating subsidiary to address changes in relevant accounting principles;
  - Clarify when a national bank may file an after-the-fact notice to establish or acquire an operating subsidiary and when the bank must file an application; and
  - Expand the list of operating subsidiary activities eligible for after-the-fact notice.
- Amendments to part 5 to eliminate multiple, repetitive applications when a national bank opens an intermittent branch to provide branch banking services for one or more limited periods of time each year at a specified site during a specified recurring event, such as during a college registration period or a State fair.
- Amendments to part 7, which pertains to national banks' activities and operations, to provide national banks greater flexibility to facilitate customers' financial transactions by issuing financial guarantees, provided the guarantees are reasonably ascertainable in amount and comply with applicable law.
- Amendments to part 7, to codify OCC electronic banking precedent and adapt the OCC's rules to certain current developments.
- Amendments to part 16, the OCC's securities offering disclosure rules, to eliminate unnecessary filing requirements and clarify the exemptions to the OCC's registration requirements for certain transactions.

- Amendments to part 34, which pertains to real estate lending and appraisals, to provide national banks with additional flexibility in selecting indices from which adjustments to interest rates in adjustable rate mortgages (ARMs) are derived.

We also propose to make certain technical and conforming amendments to our rules, including:

- Changes to part 4 (the OCC's organizational rules) and part 5 (corporate application requirements for national banks) to reflect the OCC's most current organizational structure.
- Changes to conform the OCC's regulations—at parts 5 (corporate activities), 23 (leasing), 31 (extensions of credit to insiders and transactions with affiliates), and 32 (lending limits)—to Regulation W issued by the Board of Governors of the Federal Reserve System (Federal Reserve Board),<sup>4</sup> which governs transactions between Federal Reserve member banks and their affiliates and implements sections 23A and 23B of the Federal Reserve Act.<sup>5</sup>
- Amendments to part 9 (fiduciary activities of national banks) and part 12 (Securities Exchange Act disclosure rules) to reflect changes in certain regulations adopted by the Securities and Exchange Commission (SEC).
- Amendments to part 31 to remove an obsolete interpretation relating to loans to third parties secured by both affiliate-issued securities and nonaffiliate collateral.
- Amendments to parts 1, 2, 3, 5, 10, 11, 16, 19, 21, 22, 26, 27, 28, and 40 to implement section 8 of the 2004 District of Columbia Omnibus Authorization Act,<sup>6</sup> which removed the OCC as the appropriate Federal banking agency for financial institutions established under the Code of Law for the District of Columbia (DC banks) and substituted the FDIC or the Federal Reserve Board, as appropriate to the bank's charter type.<sup>7</sup>
- Amendments to conform our regulations to the changes made by the FSRRA, including:

<sup>4</sup> 12 CFR part 223.

<sup>5</sup> 12 U.S.C. 371c and 371c-1.

<sup>6</sup> Pub. L. 108-386, 118 Stat. 2228 (2004) (the DC Bank Act). The DC Bank Act took effect on October 30, 2004.

<sup>7</sup> Under the DC Bank Act, the FDIC is the appropriate Federal banking agency for an insured bank chartered under District of Columbia law that is not a member of the Federal Reserve System, and the Federal Reserve Board is the appropriate Federal banking agency for a bank chartered under District of Columbia law that is a member of the Federal Reserve System, whether or not insured. Thus, while DC banks are no longer covered by these OCC regulations, they are subject to comparable regulatory regimes administered by the FDIC or the Federal Reserve Board.

- Amendments to part 5 that simplify a national bank's authority to pay a dividend and that remove the geographic limits with respect to bank service companies;

- Amendments to the OCC's Change in Bank Control Act (CBCA) regulation, § 5.50, that (1) Provide that a CBCA notice must include information on the future prospects of the national bank to be acquired, (2) permit the OCC to consider the future prospects of the bank as a basis to issue a notice of disapproval, and (3) permit the OCC to impose conditions on its action not to disapprove a CBCA notice;

- Amendments to part 7 that permit national banks to choose whether to provide for cumulative voting in the election of their directors;

- Amendments to part 19 that reflect changes to the OCC's enforcement authority with respect to institution-affiliated parties; and

- Amendments to part 24 (community development investments) that implement section 305 of the FSRRA.

Set forth below is a detailed section-by-section description of the proposed changes. For ease of reference, the changes are presented in the numerical order of the parts of the OCC's rules that we propose to amend.

## Section-by-Section Description of Proposed Changes

### Part 1—Investment Securities

Part 1 of our regulations (12 CFR part 1) prescribes the standards under which national banks may purchase, sell, deal in, underwrite, and hold securities, consistent with the National Bank Act (12 U.S.C. 24 (Seventh)) and safe and sound banking practices. The proposed amendments to this part clarify the applicable standards by codifying existing precedent and provide the OCC with additional flexibility to administer part 1 as investment products evolve.

#### Authority, Purpose, and Scope (§ 1.1)

National banking law explicitly authorizes the OCC to determine the types of investment securities a national bank may purchase.<sup>8</sup> Part 1 currently provides a general definition of the term "investment security," describes several categories, or types, of permissible investment securities, and prescribes such limitations as apply to a national bank's investment in each type. The proposal complements these specifics by adding a provision recognizing that the OCC also may determine, on a case-by-case basis, that a national bank may

<sup>8</sup> 12 U.S.C. 24 (Seventh).

acquire an investment security that is not set out as one of the generic types of securities listed in the regulation, provided the bank's investment is consistent with section 24 (Seventh) and with safe and sound banking practices. In making that determination, the OCC will consider all relevant factors, including an evaluation of the risk characteristics of the particular instrument in comparison with the risk characteristics of investments that the OCC has previously authorized, as well as the bank's ability effectively to manage such risks. In approving such an investment, the OCC may impose limits or conditions as appropriate under the circumstances for safety and soundness considerations.

In addition, this proposal removes the now-obsolete reference to DC banks from the scope of part 1 (§ 1.1(c)), thus eliminating the applicability of part 1 to DC banks.

#### *Pooled Investments (§ 1.3(h))*

Current § 1.3(h) allows a national bank to purchase and sell shares in an investment company provided that the portfolio of the investment company is limited to investment securities authorized in part 1. However, markets increasingly are offering securitized, pooled investment vehicles that hold bank-permissible assets not limited to investment securities. For example, a bank may seek to purchase investment grade shares in an investment company where the underlying assets are loans. In that case, the bank's risk exposure is comparable to, or lower than, its exposure when it purchases shares of identically rated and marketable pooled vehicles composed of part 1 investment securities.

Recent OCC precedents permit a national bank to purchase shares in investment vehicles where the underlying assets are not limited to permissible investment securities so long as the underlying assets otherwise are bank permissible.<sup>9</sup> This proposal codifies the precedents by amending § 1.3(h) to clarify that banks have the authority to invest in entities holding pooled assets, provided that the underlying assets are those that a national bank may purchase and sell for its own account. Specifically, this proposal deletes the phrase "under this part" both times it appears in § 1.3(h) and revises the heading to read "Pooled investments." Investments made under the proposed § 1.3(h) must meet certain

credit quality and marketability standards generally applicable to investment securities.

#### *Securities Held Based on Estimates of Obligor's Performance (§ 1.3(i))*

Part 1 defines an investment security in terms of both asset quality and marketability.<sup>10</sup> Section 1.2(f) further defines a "marketable" security as one that is: (1) Registered under the Securities Act of 1933 (Securities Act),<sup>11</sup> (2) a municipal revenue bond exempt from registration under the Securities Act, (3) offered or sold pursuant to Securities and Exchange Commission (SEC) Rule 144A<sup>12</sup> and rated investment grade or the credit equivalent, or (4) "can be sold with reasonable promptness at a price that corresponds reasonably to its fair value."<sup>13</sup>

Section 1.3(i), in contrast, articulates different asset quality and marketability standards. That section permits a national bank to treat a debt security as an investment security "if the bank concludes, on the basis of estimates that the bank reasonably believes are reliable, that the obligor will be able to satisfy its obligations under that security," and the bank believes that the security may be sold with reasonable promptness at a price that corresponds reasonably to its fair value.<sup>14</sup> The standard of marketability in the "reliable estimates" provision differs from, and is more restrictive than, the marketability definition in § 1.2(f), in that it does not contain all of the elements of the definition in § 1.2(f). This proposal harmonizes these marketability standards by amending § 1.3 to reflect the same standard as in § 1.2.

#### **Part 2—Sales of Credit Life Insurance**

Part 2 sets forth the principles and standards that apply to a national bank's provision of credit life insurance and the limitations that apply to the receipt of income from those sales by certain individuals and entities associated with the bank. This proposed rule removes DC banks from the definition of "bank" set forth in § 2.2(a).

#### **Part 3—Minimum Capital Ratios; Issuance of Directives**

Part 3 establishes the minimum capital ratios that apply to national banks, sets out in appendices the rules governing the computation of those ratios, and provides procedures for the

issuance of individual minimum capital requirements and capital directives. The current rule provides that local currency claims on, or unconditionally guaranteed by, non-OECD central governments receive a zero percent risk weight to the extent the bank has local currency liabilities in that country. We propose to remove the current restriction on the location of the offsetting liability. Thus, the proposal would provide a zero percent risk weight to the extent the bank has liabilities in that currency. This would align the rule more closely with foreign exchange risk.

This proposal also removes DC banks from the definition of "bank" in § 3.2(b). Pursuant to the DC Bank Act, DC banks will be subject to the regulatory capital requirements prescribed either by the FDIC or the Federal Reserve Board, depending on whether the bank is a member of the Federal Reserve System.

#### **Part 4—Organization and Functions, Availability and Release of Information, Contracting Outreach Program, Post-Employment Restrictions for Senior Examiners**

The proposal updates § 4.4 to reflect the fact that, under the OCC's current organizational structure, the Large Bank Supervision Department supervises the largest national banks. It also amends § 4.5 by updating OCC district office addresses and the geographical coverage of those offices resulting from the OCC's district office reorganization.

#### **Part 5—Rules, Policies, and Procedures for Corporate Activities**

Part 5 establishes rules, policies, and procedures for national banks' corporate activities and corporate structure. It also contains procedural requirements for the filing of corporate applications, including the circumstances under which applications or notices are required, and the required content of the filing. A description of our amendments to part 5 is set forth below, with substantive amendments presented first, followed by technical or conforming amendments.

#### *Fiduciary Powers (§ 5.26)*

The OCC's current rule requires a national bank filing an application for approval to offer fiduciary services to provide an opinion of counsel that the proposed fiduciary activities do not violate applicable Federal or State law. Our experience has been, however, that an opinion of counsel often is not necessary to enable the OCC to conclude that the proposed fiduciary activities are permissible. Moreover, an opinion of counsel currently is not required for

<sup>9</sup> See, e.g., Interpretive Letter No. 911 (June 4, 2001) (national bank may purchase interests in loan fund either pursuant to lending authority or as securities on the basis of reliable estimates of the issuer).

<sup>10</sup> 12 CFR 1.2(e).

<sup>11</sup> 15 U.S.C. 77a, *et seq.*

<sup>12</sup> 17 CFR 230.144A.

<sup>13</sup> 12 CFR 1.2(f).

<sup>14</sup> See 12 CFR 1.3(i)(1).

expedited applications filed by “eligible banks.”<sup>15</sup> Accordingly, the proposal eliminates the requirement for an opinion of counsel with respect to all applications to exercise fiduciary activities, unless the OCC specifically requests an opinion. We note that the removal of the requirement to provide the OCC with an opinion of counsel does not relieve the bank of its responsibility to ensure that its fiduciary activities comport with applicable Federal and State law.

#### *Establishment, Acquisition, and Relocation of a Branch—Intermittent Branches (§ 5.30)*

Section 5.30 describes the procedures and standards governing OCC review and approval of a national bank’s application to establish a new branch or to relocate a branch. It is unclear under the current regulation whether a bank must refile an application under § 5.30 each year to operate branches on a recurring basis at the same location or event (such as an annual State fair or at a specific college campus during registration periods) even where all of the facts relevant to the branch application remain the same as those previously approved. As a result, some banks have filed for approval of such branches each time the bank seeks to operate the branch.

We therefore propose to eliminate these subsequent applications for recurring, temporary branches that serve the same site at regular intervals.<sup>16</sup> Accordingly, the proposal adds to § 5.30 the new term, “intermittent branch,” which is defined to mean a branch that provides branch banking services, where legally permissible under the national bank branching statute,<sup>17</sup> for one or more limited periods of time each year at a specified site during a specified recurring event. Under the proposal, if the OCC grants a national bank approval to operate an intermittent branch, no further application or notice to the OCC is required. This proposal

<sup>15</sup> An “eligible bank” is a national bank that is well capitalized, has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System, has a CRA rating of “Outstanding” or “Satisfactory,” and is not subject to a cease and desist order, consent order, formal written agreement, or prompt corrective action directive. 12 CFR 5.3(g).

<sup>16</sup> The definition of “mobile branch” in current § 5.30 specifies that such a branch may provide services at irregular times and locations, such as at county fairs, sporting events or during school registration periods. However, a mobile branch may not have a single permanent site and travels to various public locations. Therefore, this type of branch differs from the intermittent branch recognized in this proposal, which would have only one recurring temporary location.

<sup>17</sup> 12 U.S.C. 36.

does not affect the legal requirements prescribing the conditions under which a national bank may establish or retain branches pursuant to the national bank branching statute at 12 U.S.C. 36.

#### *Operating Subsidiaries (§ 5.34)*

Section 5.34 of the OCC’s rules authorizes national banks to establish or acquire operating subsidiaries as a vehicle to exercise their powers to conduct the business of banking.<sup>18</sup>

We propose to make several changes to § 5.34 to update the standards for determining whether a subsidiary is controlled by the parent bank in light of changes in accounting standards, to clarify the type of entity that may qualify as an operating subsidiary, and to modify the standards under which transactions to establish or acquire operating subsidiaries qualify for after-the-fact notice procedures rather than the filing of an application. None of the proposed revisions alters the fundamental characteristics of an operating subsidiary, that is, that an operating subsidiary may conduct only bank-permissible activities and conducts those activities pursuant to the same “authorization, terms and conditions” as apply to the parent bank. Moreover, while the proposal revises the standards applicable to the use of after-the-fact notice procedures, it does not materially alter the licensing framework currently in place for operating subsidiaries. These changes will enhance OCC’s ability to conduct appropriate review of proposed operating subsidiaries.

*Qualifying standards.* Under current § 5.34(e)(2), an entity qualifies as an operating subsidiary only if the parent bank “controls” the subsidiary. The rule provides for two alternative means of establishing control. First, a national bank controls an operating subsidiary if the bank owns more than 50 percent of the voting interest (or similar type of controlling interest) in the subsidiary.

<sup>18</sup> The statutory authority underlying § 5.34 is 12 U.S.C. 24(Seventh), which authorizes national banks to exercise “all such incidental powers as shall be necessary to carry on the business of banking.” See *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251, 258 n.2 (1995) (*VALIC*) (the Comptroller may exercise reasonable discretion to determine what activities are part of the “business of banking” authorized pursuant to 12 U.S.C. 24 (Seventh)). Congress has recognized the operating subsidiary as a means through which national banks conduct the business of banking. See 12 U.S.C. 24a(g); see also *Watters v. Wachovia Bank, N.A.*, No. 05–13542 at 11–13, 15 n.12, 2007 WL 1119539 at \*11 and 12, 13 n.12 (U.S. Apr. 17, 2007) (discussing national banks’ authority to conduct their banking business through operating subsidiaries and noting “Congress’ formal recognition that national banks have the incidental power to do business through operating subsidiaries.”).

Second, control may be established if the parent bank “otherwise controls” the operating subsidiary and no other party controls more than 50 percent of the voting interest (or similar type of controlling interest) in the subsidiary.

The proposal revises the current standard to provide that a national bank may invest in an operating subsidiary if it satisfies the following two requirements: (1) The bank has the ability to *control* the management and operations of the subsidiary by owning more than 50 percent of the voting interest in the subsidiary, or otherwise; *and* (2) the operating subsidiary is consolidated with the bank under Generally Accepted Accounting Principles (GAAP).

The first requirement relating to the ability to *control* the subsidiary refines the current standard by tying qualification as an operating subsidiary more closely to the bank’s control of the business activities of the subsidiary, a factor that better reflects the status of the operating subsidiary as a vehicle used by the bank to exercise its powers to engage in the business of banking. The proposed revision would not affect a national bank’s ability to control a subsidiary by holding a majority of voting interests in the subsidiary.

The second element of the proposed qualification standard would reflect recent changes to GAAP that change the test for determining whether consolidation is appropriate as an accounting matter. The OCC historically has considered whether an entity is consolidated with the parent bank for accounting and other purposes as an element in determining whether that entity is an operating subsidiary under OCC regulations and has long provided for that result in the application of regulatory standards. Since as early as 1971, the OCC has directed national banks to consolidate their book figures with those of the operating subsidiary for the “purpose of applying applicable statutory or regulatory limitations

\* \* \*<sup>19</sup> In addition, at the time we adopted current § 5.34(e)(2), GAAP generally required a parent company to consolidate the financial statements of a subsidiary entity (that is, the parent company was deemed under GAAP to have a “controlling financial interest” in the subsidiary) if the parent held a majority of the voting interests in the subsidiary entity. This GAAP standard for consolidation influenced the OCC’s adoption of the majority of voting (or similar controlling) interests standard as one of the measures of control in the current rule. The control standard

<sup>19</sup> 36 FR 17015 (August 26, 1971).



assured consolidation under the prior GAAP standard.

Since our adoption of the regulatory control standards in § 5.34(e)(2), the GAAP standard for consolidation has changed. In December 2003, the Financial Accounting Standards Board (FASB) issued an accounting interpretation that revised the criteria for determining when an entity must consolidate another entity for financial reporting purposes.<sup>20</sup> In issuing FIN 46R, FASB recognized that the application of the voting interest requirement to certain types of entities may not identify the party with a controlling financial interest because the controlling financial interest may be achieved through arrangements that do not involve voting interests. FIN 46R addresses this issue by providing, generally, that the party that holds the majority of the entity's risks or rewards, rather than voting interests, is the primary beneficiary and must consolidate the entity. FIN 46R became effective at different times, ranging from December, 2003 to January 1, 2005, depending on the type of entity and the date it was created. To assure conformance with these new GAAP standards, the OCC proposes to preclude a national bank from treating as an operating subsidiary an entity that it controls through majority ownership, but which is held under an arrangement where another party reaps most of the financial rewards from the subsidiary's operations.

*Form of operating subsidiary.* Current § 5.34(e)(2) permits national banks to conduct activities through operating subsidiaries organized in a variety of forms, including as a corporation or limited liability company. In recent years, national banks have sought to hold limited partnerships as operating subsidiaries as states have amended their limited liability company and limited partnership laws to provide more structural flexibility. The OCC has recognized this and previously permitted a limited partnership to qualify as an operating subsidiary where the parent bank exercised "all economic and management control over the activities" of the partnership.<sup>21</sup>

Nothing about the limited partnership structure should necessarily disqualify such an entity as an operating subsidiary, provided the other requirements of the rule are satisfied. These requirements include the

limitation of the subsidiary's activities to those that are bank-permissible, the application to the subsidiary of the same substantive standards and requirements as apply to the parent bank, and the requirement that the bank "control" the subsidiary.

In order to clarify that a limited partnership is a permissible form of operating subsidiary, the proposal expressly recognizes that a bank may invest in an operating subsidiary organized as a limited partnership, provided it satisfies the other requirements of § 5.34.

*After-the-fact notice procedures.* Current § 5.34(e)(5) provides that a well capitalized and well managed national bank may establish or acquire an operating subsidiary, or conduct a new activity in an existing operating subsidiary, by providing the OCC written notice within 10 days after doing so if the activity to be conducted in the subsidiary is specified in the rule as eligible for notice processing. The proposal revises this after-the-fact notice procedure to take account of the proposed changes to § 5.34(e)(2) discussed above. Thus, a national bank seeking to hold a limited partnership as an operating subsidiary would qualify for the after-the-fact notice procedure only in the limited circumstance where the bank controls, directly or indirectly, all of the ownership interests in the limited partnership (and the other requirements of § 5.34 are satisfied). This change would allow the OCC to review through the full application process more complex arrangements involving limited partnerships.

The proposal also would revise the notice procedure criteria for control when the subsidiary is a corporation or a limited liability company. In those cases, the proposal would permit the bank to use the after-the-fact notice procedure when it meets all the requirements for a notice not relevant to control, the financial statements of the bank and subsidiary are consolidated under GAAP, and the bank has the ability to control the management and operations of the subsidiary by holding: (i) More than 50% of the voting interests in the subsidiary; or (ii) voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management. These control arrangements are the most suitable for the after-the-fact notice procedures because the OCC generally is familiar with these structural arrangements and they do not ordinarily present unusual safety and soundness concerns. Other arrangements will be

reviewed under the full application process.

The proposal also adds to the list of activities eligible for after-the-fact notice activities that the OCC has approved since part 5 was comprehensively revised in 1996. These activities are:

- Providing data processing, and data transmission services, facilities (including equipment, technology, and personnel), data bases, advice and access to such services, facilities, data bases and advice, for the parent bank and for others, pursuant to 12 CFR 7.5006, to the extent permitted by published OCC precedent. Currently, only data processing activity provided to the bank itself or its affiliates qualifies for after-the-fact notice treatment under § 5.34(e)(5)(v)(H).

- Providing bill presentment, billing, collection, and claims-processing services.<sup>22</sup>
- Providing safekeeping for personal information or valuable confidential trade or business information, such as encryption keys, to the extent permitted by published OCC precedent.<sup>23</sup>
- Payroll processing.<sup>24</sup>
- Branch management services.<sup>25</sup>
- Merchant processing except when the activity involves the use of third parties to solicit or underwrite merchants.<sup>26</sup>

- Administrative tasks involved in benefits administration.<sup>27</sup>

Because the OCC has previously found these activities to be permissible for a national bank and its subsidiaries, and that they generally pose low safety and soundness risks, we are proposing that after-the-fact notices be permissible when operating subsidiaries undertake to engage in these activities.

In addition to these activities, the proposal provides that an activity is eligible for the after-the-fact notice if it has been approved for a non-controlling investment by a national bank or its operating subsidiary pursuant to 12 CFR 5.36(e)(2). The after-the-fact procedure is only available if the activity will be conducted in accordance with the same terms and conditions applicable to the activity covered by the precedent as well as with any other restrictions that would be imposed due to its status as an operating subsidiary.

<sup>22</sup> See OCC Interpretive Letter No. 712 (Feb. 29, 1996).

<sup>23</sup> See 12 CFR 7.5002(a)(4).

<sup>24</sup> See Conditional Approval No. 384 (April 25, 2000) and Corporate Decision No. 2002-2 (Jan. 9, 2002).

<sup>25</sup> See Conditional Approval No. 612 (Dec. 21, 2003).

<sup>26</sup> See Conditional Approvals Nos. 582 (March 12, 2003) and 583 (March 12, 2003).

<sup>27</sup> See Corporate Decision No. 98-13 (Feb. 9, 1998).

<sup>20</sup> FASB Interpretation No. 46 (revised), *Consolidation of Variable Interest Entities* (December 2003) (FIN 46R).

<sup>21</sup> See Corporate Decision No. 2004-16 (Sept. 10, 2004).

*Application procedures.* Current § 5.34(e)(5)(i) sets forth the rules for when a national bank must file an operating subsidiary application. The OCC is proposing to modify these rules to make them consistent with the proposed changes to the qualifying subsidiary and after-the-fact notice provisions of § 5.34 discussed previously. In particular, the proposal would require the bank to describe in full detail structural arrangements where control is based on a factor other than bank ownership of more than 50 percent of the voting interest of the subsidiary. Finally, the proposal makes conforming changes to § 5.34(e)(5)(vi), which sets forth the circumstances under which an application or notice is waived, to reflect the changes discussed above. The OCC specifically requests comment on how it should treat operating subsidiaries that were lawfully established prior to the date of the proposal.

#### *Bank Service Companies (§ 5.35)*

Section 602 of the FSRRA amends the Bank Service Company Act<sup>28</sup> to repeal the geographic limits that prohibited a bank service company from performing services for persons other than depository institutions in any State except the State where its shareholders and members are located. Section 602 retains the requirements that the services and the location at which these services are provided must be otherwise permissible for all depository institution shareholders or members and that Federal Reserve Board approval be obtained before a bank service company engages in activities that are only authorized under the Bank Holding Company Act. Section 602 also permits savings associations to invest in bank service companies under the same rules that apply to banks.

The proposal amends 12 CFR 5.35 to reflect this change in the statutory geographic restrictions on the operations of bank service companies. It also changes “insured bank” to “insured institution” throughout the section, where relevant, to reflect the fact that savings associations now may invest in bank service companies.

#### *Other Equity Investments (§ 5.36)*

Section 5.36(e) provides an expedited process for OCC review of a non-controlling investment by a national bank. Under this section, a national bank may make, directly or through an operating subsidiary, certain non-controlling investments in entities by filing an after-the-fact written notice in

which the bank certifies, among other things, that it is well capitalized and well managed and will account for its investment under the equity or cost method of accounting.<sup>29</sup> This section currently does not, however, provide a procedure for a national bank to follow when it cannot provide the certifications needed for after-the-fact notice.

*Representations concerning accounting treatment.* Current § 5.36(e)(5) requires a national bank to certify in its notice that it will account for its non-controlling investment under the equity or cost method of accounting. The OCC had adopted this requirement because an investment accounted for in this manner was not previously considered under then current GAAP standards to be controlled by the parent bank and, accordingly, the parent bank did not consolidate the investment on its books. Thus, the unconsolidated entity could be considered a non-controlling investment and not an operating subsidiary. However, as we have noted, under FIN 46R this assumption is no longer valid in all cases, and an investment previously accounted for using the equity or cost method today may in some instances result in consolidation of the investment with the bank, depending on which party holds the majority of risks or rewards.

To address this issue, the proposal removes the requirement that a bank certify in its notice that it will account for its non-controlling investment under the equity or cost method of accounting. The proposal also removes as unnecessary the requirement in current § 5.36(e)(7) that a bank certify that its loss exposure related to the non-controlling investment is limited as an accounting matter. The proposal retains the requirement in paragraph (e)(7) that the bank certify that as a legal matter its loss exposure is limited and that it does not have open-ended liability for the obligations of the enterprise.

*Application procedure.* Current § 5.36 permits use of the after-the-fact notice procedure only when the bank can make the representations and certifications required by that section.<sup>30</sup> The rule

<sup>29</sup> Under the equity method, the carrying value of the bank's investment is originally recorded at cost but subsequently adjusted periodically to reflect the bank's proportionate share of the entity's earnings and losses and decreased by the amount of any cash dividends or similar distributions received from the entity.

<sup>30</sup> Section 5.36(e) currently requires that a written after-the-fact notice contain the following 8 elements, set out in numbered paragraphs, as follows: (1) A description of the proposed investment; (2) identification of the regulatory provision or prior precedent that has authorized an

provides no procedure for a national bank to follow when it cannot provide all of the required representations and certifications. We propose to revise § 5.36(f) to establish an application procedure that a national bank may use to seek approval for non-controlling investments that do not qualify for after-the-fact notice either because the bank is not well capitalized or well managed or because the proposed activity does not qualify for after-the-fact notice under the standards set forth in the rule. However, a national bank would not be required to file either an application or notice under this section if the investment is authorized by a separate provision of the OCC regulations, such as 12 CFR part 1 (investment securities) or part 24 (public welfare investments). In these cases, a national bank would follow the procedures required by these provisions.

If the bank is unable to make the representation in paragraph (e)(2), the bank's application must explain why the activity is a permissible activity for a national bank and why the bank should be permitted to hold a non-controlling investment in an enterprise engaged in that activity. In addition, the application must provide the representations and certifications required pursuant to the after-the-fact notice procedure, to the extent possible. A bank may not make a non-controlling investment in an entity if the bank cannot provide the representations or information that the rule requires (other than those in paragraphs (e)(2) or (e)(3) pertaining to the bank's level of capital, its rating for management, or to the OCC's prior determination that the investment is permissible).

This application requirement would fill the gap in the current rule for investments where a national bank cannot meet all of the after-the-fact notice requirements. The use of an application procedure provides certainty to the applicant and also permits the OCC to ensure that all non-controlling investments comport with appropriate supervisory requirements.

activity that is substantively the same as the proposed activity; (3) certification that the bank is well capitalized and well managed; (4) a statement of how the bank can control the activities of the enterprise in which it is investing or ensure its ability to withdraw its investment; (5) the accounting certification, described in text, that this rule proposes to remove; (6) a description of how the investment relates to the bank's business; (7) certification that the bank's loss exposure is limited as a legal and accounting matter (the certification pertaining to accounting is proposed to be removed); and (8) certification that the enterprise in which the bank is investing agrees to be subject to OCC examination and supervision, subject to limits provided elsewhere in Federal law.

<sup>28</sup> 12 U.S.C. 1861 *et seq.*

This proposal also makes two conforming changes to § 5.36(b), scope. First, it amends the scope section to provide that § 5.36 governs the procedures for applications in addition to notices. Currently, the scope section only applies to notices. Second, it removes the last sentence of § 5.36(b), which currently states that other investments authorized under § 5.36 may be reviewed on a case-by-case basis. Because the proposal amends § 5.36 to include an application process, this sentence is unnecessary and could create confusion once the proposal is finalized.

*DPC assets.* The proposal also makes two changes to expedite non-controlling investments involving assets acquired through foreclosure or otherwise in good faith to compromise a doubtful claim or in the ordinary course of collecting a debt previously contracted (DPC assets). Under the current rule, a national bank making a non-controlling investment in an entity that holds or manages DPC assets for the bank must meet all of the requirements in § 5.36, including the required certifications. However, under the current operating subsidiary rules, a national bank investing in an operating subsidiary engaged in the same activity need only file a written notice within 10 days after acquiring or establishing the subsidiary or commencing the activity. These procedural differences can be disruptive in workouts involving a jointly-held entity to resolve loans with multiple lenders where each lender will hold minority interests in the joint venture. The proposal harmonizes these provisions by providing that a national bank making a non-controlling investment in an entity that holds or manages DPC assets for the bank need only file a simplified written notice with the appropriate district office<sup>31</sup> no later than 10 days after making the non-controlling investment. The notice must contain a complete description of the bank's investment in the enterprise and the activities conducted, a description of how the bank plans to divest the non-controlling investment or the DPC assets within the statutory time frames, and a representation and undertaking that the bank will conduct the activities in accordance with OCC policies contained

<sup>31</sup> Part 5 defines "appropriate district office" as the Licensing Department for all national bank subsidiaries of those holding companies assigned to the Washington, DC, licensing unit; the appropriate OCC district office for all national bank subsidiaries of certain holding companies assigned to a district office licensing unit; the OCC's district office where the national bank's supervisory office is located for all other banks; or the licensing unit in the Northeastern District Office for Federal branches and agencies of foreign banks. 12 CFR 5.3.

in guidance issued by the OCC regarding the activities.

The proposal also would amend § 5.36 to clarify that an application or notice is not required when a national bank acquires a non-controlling investment in shares of a company through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted. This change would conform this section with § 5.34, which provides that a subsidiary in which the bank has acquired, in good faith, shares through foreclosure on collateral, by way of compromise of a doubtful claim, or to avoid a loss in connection with a debt previously contracted is not an operating subsidiary for purposes of § 5.34 and, therefore, no application or notice is required.

#### *Changes in Permanent Capital (§ 5.46)*

The proposal streamlines the application process for a national bank seeking OCC approval of a change in its permanent capital. The OCC's rules at § 5.46(i)(1) and (2) currently require a national bank to submit an application and obtain prior approval for a change in permanent capital. Under the expedited review procedures in § 5.46(i)(2), the application of an eligible bank is deemed approved within 30 days of receipt, unless the OCC notifies the applicant otherwise. The proposal amends § 5.46(i)(2) to change the expedited review period from 30 days to 15 days.

The proposal also simplifies the certification process for a national bank that increases its permanent capital. Section 5.46 currently requires a national bank that increases permanent capital to submit a letter of notification to the OCC in order to receive a certification of the increase as required by 12 U.S.C. 57.<sup>32</sup> Under the proposal, a national bank seeking to increase permanent capital continues to be required to send a notice to the OCC, but the bank would no longer receive a paper certification from the OCC. The OCC would deem the transaction approved and certified by operation of law seven days after our receipt of the bank's notice. If this proposal is adopted in final form, the OCC will provide updated notification and certification

<sup>32</sup> Section 57 provides that increases to permanent capital are not effective until the bank provides notice to the OCC and the OCC certifies the amount of the increase and approves it. The precise terms of the bank's notification and the OCC's approval vary slightly depending on whether the increase to permanent capital occurs through the declaration of a stock dividend or otherwise. See 12 U.S.C. 57.

procedures for increases in permanent capital in the Capital and Dividends Booklet of the *Comptroller's Licensing Manual* and on E-Corp (the OCC's electronic filing system).

#### *Change in Bank Control (§ 5.50)*

Section 5.50 sets forth the OCC's procedures for change in bank control transactions. Under this rule, any person seeking to acquire control of a national bank, *i.e.*, acquire the power, directly or indirectly, to direct the management or policies, or to vote 25 percent or more of a class of voting securities of a national bank, must provide 60 days prior written notice of the proposed acquisition to the OCC, with certain exceptions. Currently, the OCC has the burden of proof in establishing that a group of persons are acting in concert and will control, as a group, the bank after the acquisition of shares. When a member of a family acquires stock in a national bank in which other family members own or control substantial interests, the OCC frequently will review potential control issues by requesting additional documentation from, and making additional inquiries of, the family members. These additional steps can delay the notice process and increase the burden associated with the transaction for these individuals.

The proposal amends § 5.50(f)(2) to establish a rebuttable presumption that immediate family members are acting in concert when acquiring shares of a bank. The proposal also amends § 5.50(d) to define immediate family as a person's spouse, father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, children, stepchildren, grandparent, grandchildren, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, and the spouse of any of the foregoing. Establishing a clear, but rebuttable, presumption provides notice to prospective investors of their filing obligations and reduces delays in processing the notice associated with repeat requests for information. In addition, this amendment would conform our regulations to the procedures regarding control by family members in these transactions set forth in OTS and Federal Reserve Board regulations. If the proposal is adopted in final form, we would amend the *Comptroller's Licensing Manual* to address the process by which an applicant can rebut this presumption.<sup>33</sup>

<sup>33</sup> See 12 CFR 574.4 (OTS) and 12 CFR 225.41(b)(3) and 225.41(d) (Federal Reserve Board).

Section 705 of the FSRRRA amends the CBCA to allow the OCC, and the other Federal banking agencies, to extend the time period for considering a CBCA notice so that the agency may consider the acquiring party's business plans and the future prospects of the institution and use that information in determining whether to disapprove the notice. The proposal amends § 5.50(f) of our regulations to implement this amendment by providing that the CBCA notice must include information on the future prospects of the institution and that the OCC may consider the future prospects of the institution as a basis to issue a notice of disapproval.

Sections 702 and 716 of the FSRRRA amend the Federal Deposit Insurance Act (FDI Act) to provide that the OCC, and the other Federal banking agencies, may enforce under 12 U.S.C. 1818 the terms of: (1) Conditions imposed in writing by the agency on a depository institution, including a national bank, or an institution-affiliated party in connection with an application, notice, or other request, and (2) written agreements between the agency and the institution or the institution-affiliated party. The amendment also clarifies that a condition imposed by a banking agency in connection with the nondisapproval of a notice, e.g., a notice under the CBCA, can be enforced under the FDI Act. Accordingly, the proposal amends § 5.50(f) to provide that the OCC may impose conditions on its nondisapproval of a CBCA notice to assure satisfaction of the relevant statutory criteria for nondisapproval of the notice.

#### Technical and Conforming Amendments to Part 5

The proposal makes the following conforming and technical changes to part 5.

*Definition of national bank (§ 5.3(j)).* This proposed change removes the reference to DC banks from the definition of "national bank" found in § 5.3(j). DC banks are no longer subject to the OCC's rules, policies, and procedures for corporate activities and transactions, including the OCC's filing requirements.

*Filing required (§ 5.4).* The proposal replaces the terms "Licensing Manager" with "Director for District Licensing" and replaces "Bank Organization and Structure" with the term "Licensing Department." This reflects the OCC's current organizational structure.

*Decisions (§ 5.13).* Section 5.13 sets forth the procedures for OCC decisions on corporate filings. Paragraph (c) of § 5.13 requires a filing with the OCC to contain all required information. The

OCC may require additional information if necessary to evaluate the application, and may deem a filing abandoned if the information required or requested is not furnished within the time period specified by the OCC. The OCC also may return an application that it deems materially deficient when filed, and the proposal amends § 5.13(c) to specifically define "materially deficient" to mean filings that lack sufficient information for the OCC to make a determination under the applicable statutory or regulatory criteria. Examples of material deficiencies that could cause the OCC to return a filing include failure to provide answers to all questions or failure to provide required financial information.

Paragraph (f) of this section provides that an applicant may appeal an OCC decision to the Deputy Comptroller for Licensing or to the OCC Ombudsman. In some cases, however, the Deputy Comptroller for Licensing is the deciding official for OCC licensing decisions or has personal and substantial involvement in the decision-making process. Accordingly, we are amending this paragraph to provide that an appeal may be referred instead to the Chief Counsel when the Deputy Comptroller for Licensing was the deciding official of the matter appealed, or was involved personally and substantially in the matter.

In addition, the proposal replaces the title "Deputy Comptroller for Bank Organization and Structure" with the title "Deputy Comptroller for Licensing." This reflects the OCC's current organizational structure.

*Organizing a bank (§ 5.20).* Section 5.20 sets forth the procedures and requirements governing OCC review and approval of an application to establish a national bank. Paragraph (i)(5) of this section requires a proposed national bank to be established as a legal entity before the OCC grants final approval. As currently drafted, our regulations may be read to imply that organizers must receive OCC preliminary approval before they may raise capital, which is not OCC policy.<sup>34</sup>

Therefore, this proposal amends § 5.20(i)(5) to make clear that OCC preliminary approval is not required prior to a securities offering by a proposed national bank, provided that the proposed national bank has filed articles of association, an organization certificate and a charter application that is completed and the bank complies with the OCC's securities offering

regulations set forth in Part 16. These requirements are explained in greater detail in the *Comptroller's Licensing Manual*.

This proposal also makes a change to paragraph (i)(3) of section 5.20, which requires the organizing group to designate a spokesperson to represent the group in its contacts with the OCC. The proposal would amend this section by replacing the term "spokesperson" with the term "contact person" each time that term appears in order to align the wording of this section with the terminology used on the Interagency Charter and Deposit Application and in the "Charters" booklet of the *Comptroller's Licensing Manual*.

*Business combinations (§ 5.33).* Section 5.33 contains the provisions governing business combinations involving national banks. Section 5.33(e)(1) sets forth factors used by the OCC in evaluating applications for "business combinations," including factors required pursuant to the Bank Merger Act (BMA)<sup>35</sup> and the Community Reinvestment Act of 1977 (CRA).<sup>36</sup> As currently worded, this section could be read incorrectly to imply that the BMA and CRA apply to all business combinations even though these laws do not apply to certain business combinations, such as the merger of two uninsured national banks. The proposal revises the wording of § 5.33(e)(1) to make it clear that the OCC considers the factors under the BMA and the CRA for transactions that are subject to those laws. The factors as set out in the current rule are substantively unchanged.

Section 5.33 also requires a national bank with one or more classes of securities subject to the registration provisions of sections 12(b) or 12(g) of the Securities Exchange Act of 1934 (the Exchange Act)<sup>37</sup> to file preliminary proxy materials or information statements with both the OCC's Director of Securities and Corporate Practices Division in Washington, DC and the appropriate district office. The proposal streamlines the OCC's filing process by eliminating the requirement in § 5.33(e)(8)(ii) that a registered national bank also file proxy materials with the district office. This change is consistent with the instructions in the OCC's Business Combinations Booklet of the *Comptroller's Licensing Manual*.

Section 5.33(g)(2)(ii) provides the rules for a national bank consolidation and merger with a Federal savings association when the resulting

<sup>34</sup> The Comptroller's Licensing Manual permits organizers of a national bank to raise capital prior to preliminary OCC approval. See *Comptroller's Licensing Manual*, Charters, pgs. 20–21, March 2007.

<sup>35</sup> 12 U.S.C. 1828(c).

<sup>36</sup> 12 U.S.C. 2901 *et seq.*

<sup>37</sup> 15 U.S.C. 781(b) or 781(g).

institution is a national bank. This proposal removes the reference to merger transactions in paragraph (g)(2)(ii), which provides for appraisal or reappraisal of dissenters' shares, because there are no dissenters' rights for national bank shareholders in a merger between a national bank and a Federal savings association when the resulting institution is a national bank. In addition, the proposal corrects a statutory citation in paragraph (g)(3)(i).

The proposal also makes clarifying changes to § 5.33(h), which sets forth the standards, requirements, and procedures that apply to mergers between insured banks with different home States pursuant to 12 U.S.C. 1831u. Although this paragraph references the standards, requirements, and procedures applicable to transactions that result in a national bank, it currently does not do so for transactions that result in a State bank. The proposal adds a reference in this paragraph to 12 U.S.C. 214a, 214b, and 214c to cover these transactions. The proposal also amends § 5.33(h) to include a reference to 12 U.S.C. 1831u to clarify that an interstate, single-branch acquisition is treated as the acquisition of a bank only for purposes of determining compliance with the Riegle-Neal Act.<sup>38</sup> This change would eliminate any implication in this paragraph that the procedures of 12 U.S.C. 215 or 215a were intended to apply to branch acquisitions.

Finally the proposal specifies that the definitions set forth in § 5.33(d) are only applicable to § 5.33, and revises the headings of paragraphs (g), (g)(1) and (g)(3) to conform to the heading format used in other paragraphs in the regulation.

**Financial subsidiaries (§ 5.39).** Section 5.39 sets forth authorized activities, approval procedures, and conditions for a national bank engaging in activities through a financial subsidiary. The proposal would make a number of technical changes to § 5.39 to conform this section to the Federal Reserve Board's Regulation W, which governs transactions between Federal Reserve member banks and their affiliates and implements sections 23A and 23B of the Federal Reserve Act.<sup>39</sup>

In general, under sections 23A and 23B and Regulation W, a financial subsidiary of a national bank is treated as an affiliate of the bank. Regulation W, however, excepts from its definition of a financial subsidiary a subsidiary that would be a financial subsidiary only

because it is engaged in insurance sales as agent or broker in a manner not permitted to a national bank. Such a financial subsidiary is not an affiliate for Regulation W purposes (unless it falls into another category of affiliate). This proposal would add a cross-reference to Regulation W in the definition of "affiliate" at § 5.39(d)(1) and amend § 5.39(h)(5) to reflect this exception in Regulation W's definition of financial subsidiary.

In addition, this proposal updates § 5.39(h)(5), which describes how sections 23A and 23B apply to financial subsidiaries, by conforming these provisions to Regulation W. Specifically, in addition to adding a cross-reference to Regulation W in § 5.39(h)(5), the proposal amends § 5.39(h)(5)(iii) to state that a bank's purchase of, or investment in, a security issued by a financial subsidiary of the bank must be valued at the greater of: (a) The total amount of consideration given (including liabilities assumed) by the bank, reduced to reflect amortization of the security to the extent consistent with GAAP, or (b) the carrying value of the security (adjusted so as not to reflect the bank's *pro rata* portion of any earnings retained or losses incurred by the financial subsidiary after the bank's acquisition of the security). This proposal also adds a new reference to the requirement in Regulation W that any extension of credit to a financial subsidiary of a bank by an affiliate of the bank is treated as an extension of credit by the bank to the financial subsidiary if the extension of credit is treated as capital of the financial subsidiary under any Federal or State law, regulation, or interpretation applicable to the subsidiary.

**Change in bank control (§ 5.50).** Twelve U.S.C. 1817(j) provides the standards and procedures for a change in control of insured depository institutions. As we have discussed, § 5.50 of our rules implements section 1817(j) in the case of a change in control of a national bank.<sup>40</sup> Section 5.50, however, does not include one of the procedures required by section 1817(j) relating to changes in management officials following a change in control. This omission may be misleading to banks that consult our rule to ascertain what change in control procedures apply. Specifically, section 1817(j)(12) provides that whenever a change in control occurs, the bank will promptly report to the appropriate Federal banking agency any changes or replacements of its chief executive

officer or of any director occurring in the next 12-month period, including in this report a statement of the past and current business and professional affiliations of the new chief executive officer or director. This proposal would add a new paragraph to § 5.50(h) to codify this statutory requirement in order to provide clearer notice for national banks of their reporting obligation under section 1817(j)(12).

**Earnings limitations under 12 U.S.C. 60 (§ 5.64).** Section 302 of the FSRRA amends 12 U.S.C. 60 to simplify dividend calculations and provide a national bank more flexibility to pay dividends as deemed appropriate by its board of directors. The proposal amends § 5.46 (governing changes in permanent capital) and § 5.64 (governing dividend earnings limitations) to conform to the new language of section 60. In addition, the OCC is codifying and clarifying the interpretation of 12 U.S.C. 60 contained in Interpretive Letter No. 816, issued December 22, 1997.

Prior to its amendment by FSRRA, section 60 provided that a national bank could only declare a dividend if its surplus fund was at least equal to its common capital or, in accordance with a computation prescribed by the statute, it transferred 10 percent of its net income to surplus. Historically, stock was assigned a par value equivalent to its estimated market value and the purpose of the transfer requirement was to provide an additional cushion. This requirement is obsolete under modern securities underwriting practices because stock is issued with a nominal par value and most of the proceeds received are credited to the issuer's surplus account. Section 302 of the FSRRA eliminates this requirement and makes other minor changes to clarify and simplify dividend calculations.

The proposal makes conforming changes to § 5.64 (earnings limitation under 12 U.S.C. 60) and § 5.46 (changes in permanent capital) by eliminating references to the surplus fund requirement. The proposal also reorganizes and renumbers § 5.64 and adds new paragraphs (a) and (c)(2). New paragraph (a) adds several defined terms to make the description of the national bank dividend calculation clearer. The terms are: current year, current year minus one, current year minus two, current year minus three, and current year minus four. New paragraph (c)(2) codifies Interpretive Letter No. 816, which discussed the treatment of dividends in excess of a single year's current net income and concluded that a national bank may offset certain excess dividends against retained net income from each of the prior two years.

<sup>38</sup> Pub. L. 103-328, 108 Stat. 2338 (Sept. 29, 1994).

<sup>39</sup> 12 U.S.C. 371c and 371c-1.

<sup>40</sup> Section 5.50 covers uninsured national banks as well as insured national banks.

The proposal also clarifies how to calculate permissible dividends applying the carry-back interpretation described in Interpretive Letter No. 816. The proposal is intended to eliminate confusion by providing that excess dividends may be offset by retained net income in the two years immediately preceding the year in which the excess occurred.

Specifically, paragraph (c)(2)(i) describes how to calculate permissible dividends for the current year if a bank has declared a dividend in excess of net income in the first or second years immediately preceding the current year. For example, when the excess dividend occurs in current year minus one, the excess is offset by retained net income first in current year minus three and then in current year minus two. When the excess dividend occurs in current year minus two, the excess is offset by retained net income first in current year minus four and then in current year minus three. This paragraph limits the availability of offsets to a maximum of four years prior to the current year, consistent with the carry-back concept in Interpretive Letter No. 816. The Interpretive Letter was not intended to permit a bank to restate retroactively its dividend paying capacity beyond the four-year period prior to the current year.

Paragraph (c)(2)(ii) clarifies that if a bank still has excess dividends remaining even after permissible offsets have been applied in accordance with paragraph (c)(2)(i), the bank must use the remaining excess dividend amount in calculating its dividend paying capacity. Paragraph (c)(2)(iii) also clarifies that the carry-back applies only to retained net loss that results from dividends declared in excess of a single year's net income, not any other type of current earnings deficit. As part of the reorganization of § 5.64, information on how to request a waiver of the dividend limitation was moved to new paragraph (c)(3) to make it easier to locate.

The proposal also makes a technical amendment to 12 CFR 5.46, governing changes in permanent capital, to reflect that, as amended by the FSRRA, section 60 no longer requires transfers to the surplus fund as a condition of declaring a dividend.

### Part 7—Bank Activities and Operations

#### *National Bank as Guarantor or Surety* (§ 7.1017)

Section 7.1017 of the OCC's rules currently provides that a national bank may act as guarantor or surety when it has a substantial interest in the performance of the transaction or when

the transaction is for the benefit of a customer and the bank obtains from that customer a segregated deposit account sufficient to cover the amount of the bank's potential liability. The proposed rule adds a new subsection authorizing national banks to issue guarantees under additional circumstances, provided the guaranty is financial in nature, reasonably ascertainable in amount, and complies with applicable law.

A financial guaranty or suretyship is essentially a promise to pay if the primary obligor defaults on its obligation. A guarantor or surety that makes good on its promise is entitled to reimbursement by the primary obligor. National banks have authority to "promise to pay" or "guarantee" the obligations of their customers through bankers' acceptances and letters of credit. In these transactions, the bank substitutes its credit for that of its customer and participates in exchanges of payments as a financial intermediary. These activities involve the core banking powers of both lending and acting as financial intermediary.<sup>41</sup>

In approving various types of guarantees in the past, and in approving a number of arrangements that are functionally similar to guarantees, the OCC has emphasized that banks must be able to respond to the evolving needs of their customers, provided always that such guarantees be issued and managed in a safe and sound manner.<sup>42</sup> Most recently, the OCC approved a national bank's membership in a Group Self Insurance Plan (GSIP) organized by a consortium of banks to provide workers' compensation insurance in which each member was required to become joint and severally liable for the group's obligations.<sup>43</sup> Permitting national banks to exercise their broad authority to act as guarantor or surety benefits customers by giving banks greater ability to facilitate customers' financial transactions and by providing banks

with greater flexibility to provide financial services in evolving markets.<sup>44</sup>

For all of these reasons, the OCC concludes that acting as a guarantor or surety is permissible for a national bank, provided the customer's obligation, and the guaranty or surety are financial in nature, reasonably ascertainable in amount, and otherwise consistent with applicable law.

The proposed requirement that the guaranty or surety be "reasonably ascertainable" is intended to ensure that the issuing bank can determine the extent of its exposure and engage in the activity in a safe and sound manner. Similarly, the statement that the guaranty or surety must be "consistent with applicable law" simply recognizes that other provisions of law may be applicable to particular transactions. These other provisions of law include, among others, limitations on the amount of loans and extensions of credit a national bank may lend to a borrower (12 CFR part 32), limitations on transactions between a bank and its affiliates (sections 23A and 23B of the Federal Reserve Act), and limitations on transactions that would constitute "insurance" as principal pursuant to section 302 of Gramm-Leach-Bliley Act.<sup>45</sup>

The OCC is considering whether to provide guidance on risks and risk management in connection with the issuance of guarantees by national banks. For example, one of the primary distinctions between guarantees and letters of credit is that letters of credit are structured in such a way that the bank does not face any uncertainty on its obligation to pay on the letter of credit despite the possibility of defenses and disputes between the primary parties to the underlying transaction. Guarantees, on the other hand, may be subject to different transactional and legal risks than letters of credit. We invite comment on the nature and extent of those differences.

#### Cumulative Voting in Election of Directors

Prior to FSRRA, national banking law imposed mandatory cumulative voting requirements on all national banks. Section 301 of the FSRRA amends section 5144 of the Revised Statutes of the United States (12 U.S.C. 61) to provide that a national bank may state in its articles of association whether to provide for cumulative voting in the election of its directors. Section 301 is consistent with the Model Business

<sup>41</sup> See OCC Interpretive Letter No. 937 (June 27, 2002).

<sup>42</sup> See, e.g., OCC Interpretive Letter No. 177 (Jan. 14, 1981) (national bank guaranty/reimbursement of third-party payors in connection with direct deposit pension fund program was permissible; a contrary holding "would directly inhibit the growth and development of direct deposit programs."); OCC Interpretive Letter No. 1010 (Sept. 7, 2004) (national bank may issue financial warranties on the investment advice and asset allocation services provided by the bank in the creation and operation of a mutual fund).

<sup>43</sup> The OCC determined that the GSIP's cross-liability aspect could be viewed as a guaranty. Noting that membership in the GSIP would benefit the bank, the OCC determined the guaranty was not solely for another party's benefit. Therefore, the bank had a substantial interest of its own in the transaction. OCC Interpretive Letter No. 1022 (Feb. 15, 2005).

<sup>44</sup> See VALIC, 513 U.S. 251 (1995).

<sup>45</sup> Pub. L. 106-102, 113 Stat. 1338, 1407 (Nov. 12, 1999), codified at 15 U.S.C. 6712.

Corporation Act and most States' corporate codes, which provide that cumulative voting is optional. Our proposal amends 12 CFR 7.2006 to incorporate this change.

#### Electronic Banking-Related Amendments

Twelve CFR part 7, Subpart E contains OCC regulations relating to various electronic activities. In 2002, the OCC undertook revisions to part 7 to address the ways in which technological developments were affecting the business of banking. The proposal includes several additions to this regulation.

*Electronic Letters of Credit.* Section 7.1016 permits national banks to issue letters of credit within the scope of applicable laws or rules of practice recognized by law, and includes an illustrative footnote that cites examples of these laws and practices. Section 7.5002 permits a national bank to perform, provide or deliver through electronic means and facilities any activity, function, product, or service that a bank is otherwise authorized to perform, provide, or deliver, if the electronic activity is subject to standards or conditions designed to provide that the activity functions as intended, is conducted safely and soundly, and accords with other applicable statutes, regulations, or supervisory policies and guidance of the OCC. Section 7.5002 includes a list of permissible electronic activities that currently does not include electronic letters of credit. Because the OCC has determined that a national bank may issue an electronic letter of credit in a safe and sound manner in accordance with applicable laws and OCC guidance and policies, the OCC is proposing to amend § 7.5002 by adding the issuance of electronic letters of credit within the scope of § 7.1016 to the list of banking activities that a national bank can conduct by electronic means and facilities. The OCC also is proposing to amend the footnote in § 7.1016 to include a reference to the International Chamber of Commerce supplement to UCP 500 for Electronic Presentation (eUCP) (the uniform customs and practices for documentary credits for electronic presentations) as a law that supports electronic letters of credits.

*Incidental Electronic Activities.* Currently, 12 CFR 7.5001(d) sets forth the standards that the OCC uses to determine whether an electronic activity is incidental to, though not part of, the business of banking because the activity is convenient or useful to the conduct of the business of banking. The OCC has already codified in its regulations two

incidental electronic activities: the sale of excess electronic capacity and by-products (§ 7.5004) and incidental non-financial data processing (§ 7.5006). We propose to amend § 7.5001(d) to add other examples of electronic incidental activities that we have since approved for national banks. These activities are: web site development where incidental to other electronic banking services;<sup>46</sup> Internet access and e-mail provided on a non-profit basis as a promotional activity;<sup>47</sup> advisory and consulting services on electronic activities where the services are incidental to customer use of electronic banking services;<sup>48</sup> and the sale of equipment that is convenient or useful to customers' use of related electronic banking services, such as specialized terminals for scanning checks that will be deposited electronically by wholesale customers of banks under the Check Clearing for the 21st Century Act, Pub. L. 108-100 (12 U.S.C. 5001-5018).<sup>49</sup> This list is illustrative and not exclusive, and the OCC may determine in the future that activities not on this list are permissible pursuant to this authority.

*Software That Is Part of the Business of Banking.* Currently, OCC regulations list software acquired or developed by the bank for banking purposes or to support its banking business as an example of an electronic by-product that a national bank can sell to others as a permissible "incidental" activity.<sup>50</sup> This proposal also expands § 7.5006 to address, as "part of the business of banking," the sale of software that performs services or functions that a national bank can perform directly, thereby codifying previous OCC interpretations.<sup>51</sup> We note that software that is part of the business of banking can be sold without regard to any other banking product or service, whereas software that is incidental must be shown to be convenient or useful to another activity that is authorized for national banks.<sup>52</sup>

The OCC also recognizes that national banks' use of technology is constantly evolving and therefore we regularly review our regulations with the goal of revising them in ways that facilitate the use of that technology consistent with

safety and soundness. Commenters are invited to identify any other areas of subpart E that should be revised to recognize the evolving role of technology.

#### Part 9—Fiduciary Activities of National Banks

In response to recent amendments made by the SEC to its rules and forms under section 17A of the Exchange Act, the OCC is proposing to amend its transfer agent rule at § 9.20 to clarify the procedures applicable to national bank transfer agents. Under the SEC's amended rules, all transfer agents, including national bank transfer agents, are required to file annual reports electronically with the SEC through the SEC's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system. In addition, nonbank transfer agents now must file registration and withdrawal forms electronically with the SEC through the EDGAR system. The SEC's amended rules do not require national bank transfer agents to file registration or withdrawal forms with the SEC electronically or otherwise. The OCC is revising its transfer agent rules to make this clear.

Currently, § 9.20(a) of the OCC's rules cross-references to the SEC's rules with respect to registration. This cross-reference may make it appear that national bank transfer agents also are subject to the requirement to file registration and withdrawal forms through the SEC's EDGAR system. To avoid confusion regarding electronic filing, the proposal replaces the cross-reference in § 9.20(a) to the SEC's transfer agent registration and withdrawal rules with specific procedures for filing applications for registration, amending registrations, and withdrawals from registration. This amendment will not result in any substantive changes for national bank transfer agents. National bank transfer agents will continue to file applications for registration, amendments to registration and withdrawals from registration as previously required.

The proposed rule also would make conforming changes to § 9.20(b) to reflect the SEC's revision and renumbering of its transfer agent rules. Specifically, we are removing the specific citations to the SEC's rules in favor of a more general reference. The proposed amendment makes no substantive changes to § 9.20(b). This change will, however, avoid the need for the OCC to revise our regulation each time the SEC makes changes to its transfer agent rules.

<sup>46</sup> See OCC Corporate Decision No. 2002-13, July 31, 2002.

<sup>47</sup> See OCC Conditional Approval No. 612, Nov. 21, 2003.

<sup>48</sup> See OCC Corporate Decision No. 2002-11, June 28, 2002.

<sup>49</sup> See OCC Interpretive Letter No. 1036, Aug. 10, 2005.

<sup>50</sup> 12 CFR 7.5004.

<sup>51</sup> See, e.g., Corporate Decision 2003-6, March 17, 2003.

<sup>52</sup> See 12 CFR 7.5001(c) and 7.5001(d).

**Part 10—Municipal Securities Dealers**

This proposal amends § 10.1(a) to eliminate the application of part 10 to DC banks.

**Part 11—Securities Exchange Act Disclosure Rules**

Part 11 addresses the rules, regulations, and filing requirements that apply to national banks with one or more classes of securities subject to the registration provisions of sections 12(b) and (g) of the Exchange Act (15 U.S.C. 78l(b) & (g)). This proposal amends § 11.1(a) to remove DC banks from the scope of part 11, consistent with the DC Bank Act.

**Part 12—Recordkeeping and Confirmation Requirements for Securities Transactions**

Section 12.7(a)(4) requires bank officers and employees who make investment recommendations or decisions for customers to report their personal transactions in securities to the bank within *ten business days* after the end of the calendar quarter. The OCC modeled this reporting requirement on SEC Rule 17j-1 (17 CFR 270.17j-1), issued pursuant to the Investment Company Act of 1940, which, at the time of the most recent revision to this OCC requirement in 1996, required “access persons” to report their personal transactions in securities within ten days after the end of the calendar quarter.<sup>53</sup> However, in July 2004 the SEC amended Rule 17j-1 to expand this ten-day deadline to 30 days.<sup>54</sup>

To conform part 12 with the current SEC filing deadline in SEC Rule 17j-1, this proposal amends § 12.7(a)(4) by replacing the 10-business day filing deadline for reporting personal transactions in securities with the deadline specified in SEC rule 17j-1. This will enable bank employees that are subject to SEC Rule 17j-1 and to the OCC’s securities recordkeeping and confirmation regulation to file by the same deadline, thereby eliminating employee confusion as well as the regulatory burden associated with complying with two separate filing deadlines.

<sup>53</sup> See 61 FR 63958 (Dec. 2, 1996). The OCC’s reporting requirement under 12 CFR 12.7(a)(4) is a separate requirement from any applicable requirements under SEC Rule 17j-1. However, an “access person” required to file a report with a national bank pursuant to SEC Rule 17j-1 need not file a separate report under the OCC’s reporting requirement if the required information is the same. See 12 CFR 12.7(d). The SEC rule defines “access person” as including directors, officers, and certain employees of the investment adviser. 17 CFR 270.17j-1(a)(1).

<sup>54</sup> See 69 FR 41696 (July 9, 2004).

**Part 16—Securities Offering Disclosure Rules**

Part 16 governs offers and sales of bank securities by issuers, underwriters, and dealers.

*Definitions (§ 16.2)*

The proposal eliminates DC banks from the definition of “bank” in § 16.2(b).

*Sales of Nonconvertible Debt (§ 16.6)*

Section 16.6(a)(3) requires bank debt issued under § 16.6 to be in a minimum denomination of \$250,000 and requires that each note or debenture to show on its face that it cannot be exchanged for notes or debentures in smaller denominations. However, this legend requirement cannot be satisfied “and would serve no purpose” if the bank is using a paperless book entry form, which has become the more current form of issuance used by banks and other securities issuers. This proposal would amend § 16.6(a)(3) to provide that this legend requirement only applies to debt issued in certificate form. All other requirements of § 16.6, including the requirement of minimum denominations of \$250,000, will continue to apply to all bank sales of nonconvertible debt, whether issued in certificate or book entry form.

*Nonpublic Offerings (§ 16.7)*

Part 16 provides that, absent an available exemption, no person may offer and sell a security issued by a national bank without meeting the registration and prospectus delivery requirements of part 16. Part 16 generally incorporates by reference the definitions, registration and prospectus delivery requirements of the Securities Act and SEC implementing rules, including Regulation D under the Securities Act.<sup>55</sup> Section 16.7(a) of the OCC’s nonpublic offering regulation provides that the OCC will deem offers and sales of bank-issued securities to be exempt from the registration and prospectus requirements of part 16 if they meet certain requirements, including filing with the OCC a notice on Form D that meets the requirements of Regulation D.<sup>56</sup>

Form D requires the issuer to disclose basic information concerning the identity of the issuer and the offering, including the exemption being claimed and information regarding the offering price, number of investors, expenses, and use of proceeds. However, the OCC does not use the information in the Form D for any supervisory or other

particular purpose, and the OCC does not treat the requirement to file a Form D as a condition to the availability of an exemption under part 16. Furthermore, the SEC adopted Form D for reasons that do not directly apply to the OCC.<sup>57</sup> Therefore, we propose to eliminate the requirement to file a Form D.

*Securities Offered and Sold in Bank Holding Company Dissolution (New § 16.9)*

The OCC’s current securities offering disclosure rules, at part 16, have resulted in some confusion as to whether offers and sales of bank-issued securities in connection with the dissolution of the bank’s holding company are exempt from the § 16.3 registration statement and prospectus requirements. The proposal would resolve the uncertainty by codifying specific requirements that apply in order for the offer and sale of bank securities in a bank holding company dissolution to be exempt from the § 16.3 registration statement and prospectus requirements.

Specifically, the proposal adds a new § 16.9 that would expressly exempt from the § 16.3 registration statement and prospectus requirements offers and sales of bank-issued securities in connection with the dissolution of the holding company of the bank if those transactions satisfy the following requirements: (1) The offer and sale of bank-issued securities occurs solely as part of a dissolution in which the security holders exchange their shares of stock in a holding company that had no significant assets other than securities of the bank, for bank stock; (2) the security holders receive, after the dissolution, substantially the same proportional share of interests in the bank as they held in the holding company; (3) the rights and interests of the security holders in the bank are substantially the same as those in the holding company prior to the transaction; and (4) the bank has substantially the same assets and liabilities as the holding company had on a consolidated basis prior to the transaction.

These proposed requirements parallel the conditions that must be satisfied in order for securities issued in connection with an acquisition by a holding

<sup>57</sup> Specifically, Form D serves a useful purpose for the SEC in creating a uniform State notification form for purposes of the States’ Uniform Limited Offering Exemption, which is inapplicable to national banks. In addition, the SEC uses the information in the forms to conduct economic and other analyses of the private placement market in general. The OCC does not use the information in the Form D for this purpose. See Sec. Act. Release No. 33-6339, 46 FR 41,791 (Aug. 18, 1981).

<sup>55</sup> 17 CFR 230.501 *et seq.*

<sup>56</sup> 17 CFR 230.503.



company of a bank (pursuant § 3(a) of the Bank Holding Company Act of 1956) to be eligible for exemption from the registration requirements of § 3(a)(12) of the Securities Act, and are equally appropriate in the reverse context where bank-issued securities are offered and sold in connection with the dissolution of the bank's holding company.

From a shareholder protection standpoint, the rationale for not requiring a registration statement for the formation of a shell holding company—that the interests of the bank and company shareholders are essentially the same—would apply equally to dissolution of a shell holding company. The business rationale—reduction of costs of dissolution of a holding company if a bank decides it does not need the flexibility of a holding company structure—also is similar.

The proposal also makes conforming amendments to part 16 by deleting the current cross-reference in § 16.5(a) to section 3(a)(12) of the Exchange Act and adding a reference to new § 16.9 in the listing of exempt securities under § 16.5.

#### *Removal of Current and Periodic Report Filing (§ 16.20)*

State banks and national banks are both subject to the Exchange Act's periodic and current reporting requirements if they have one or more classes of securities subject to the registration provisions of section 12(g) of the Exchange Act.<sup>58</sup> Pursuant to that statute, banks having a class of equity securities held by 500 or more owners of record are required to register that class of securities under § 12(g) of the Exchange Act.<sup>59</sup> Once registered, a bank becomes subject to the periodic and current reporting requirements of the Exchange Act.

Section 16.20 of the OCC's regulations imposes periodic and current reporting requirements for national banks that file registration statements with the OCC for the public offering of their securities. Pursuant to § 16.20, a national bank must file periodic and current reports after the registration statement becomes effective, even if the bank is not otherwise required to register its securities under the Exchange Act. This periodic and current reporting requirement was based on that imposed by section 15(d) of the Exchange Act on other entities filing Securities Act registration statements with the SEC.<sup>60</sup> The OCC adopted this periodic and

current reporting requirement to ensure that potential purchasers in a bank's public offering had access to updated information necessary for their investment decisions, in the same manner as investors in other companies.

The periodic and current reporting requirements of § 16.20 applies to national banks until the securities to which the national bank's registration statement relates are held of record by fewer than 300 persons. The FDIC and the Federal Reserve Board have not imposed a comparable obligation on State banks. Instead, a State bank that conducts public offerings of their securities are subject to Exchange Act periodic and current reporting requirements only if the bank has more than 500 shareholders.

We propose to eliminate § 16.20 in order to reduce regulatory burden with respect to small national banks that file registration statements with the OCC for the public offering of their securities. Thus, only a national bank that has 500 or more shareholders of record would be subject to the Exchange Act periodic and current reporting requirements.<sup>61</sup> We also make a conforming change to § 16.6, by deleting the reference to § 16.20 in that section.

This proposal would not significantly diminish financial information about the banks that will be available to investors, since updated financial information, including the bank's most recent balance sheet and statement of income filed with the OCC as part of the bank's most recent Consolidated Report of Condition (Call Report), will still be publicly available to investors. This proposal also will have no effect on the requirement under the OCC's Exchange Act disclosure rule at 12 CFR part 11 that a national bank whose securities are registered under section 12(b) or 12(g) of the Exchange Act must file current and periodic reports that conform to section 13 of the Exchange Act.

#### **Part 19—Rules of Practice and Procedure**

The FSRRA made several changes affecting the OCC's exercise of its enforcement authority pursuant to section 8 of the FDI Act.<sup>62</sup> Section 303 of the FSRRA changes the procedures for issuing orders of suspension, removal or prohibition against institution-affiliated parties (IAPs) of national banks. Previously, section 8(e)(4) of the FDI Act required that, following proceedings before an administrative law judge, the

determination whether to issue such orders would be made by the Federal Reserve Board. Section 303 of the FSRRA repeals that requirement, so that the OCC now has the authority to issue such orders, as it does with respect to other types of orders resulting from an OCC-initiated enforcement action. The proposal amends § 19.100 of the OCC's rules, pertaining to OCC adjudications, to reflect the change in the law.

Section 8(g) of the FDI Act pertains to the suspension, removal, or prohibition of an IAP when the IAP is the subject of an information, indictment, or complaint involving certain crimes set forth in the statute or when the IAP has been convicted of such a crime.<sup>63</sup> Section 708 of the FSRRA revises the statutory grounds that warrant suspension, removal or prohibition of an IAP from further participation in the conduct of the affairs of a depository institution, including a national bank, in such a case. Section 708 also clarifies that, if grounds exist, an appropriate Federal banking agency, including the OCC, may suspend or prohibit the IAP from participating in the affairs of any depository institution, and not only the institution with which the party is, or was last, affiliated. The amendment further clarifies that this authority applies even if the IAP is no longer associated with the depository institution at which the offense allegedly occurred or if the depository institution with which the IAP was affiliated no longer exists. The proposal amends §§ 19.110 and 19.111 of our rules to conform to these amendments. The proposal also updates the titles of OCC officials referenced in §§ 19.111 and 19.112.

Finally, the proposed rule eliminates the applicability of part 19 to DC banks by deleting a reference to DC banks in the definition of "institution" in § 19.3(g). The proposal also deletes a reference to DC banks in the scope section (§ 19.241) of subpart P, which relates to the removal, suspension, and debarment of accountants from performing audit services.

#### **Part 21—Minimum Security Devices and Procedures, Reports of Suspicious Activities, and Bank Secrecy Act Compliance Program**

Part 21 consists of three subparts. Subpart A requires each bank to adopt appropriate security procedures to discourage robberies, burglaries, and larcenies and to assist in identifying and apprehending persons who such acts. Subpart B ensures that national banks file a Suspicious Activity Report when

<sup>58</sup> See Exchange Act Section 12(i), 15 U.S.C. 78l(i), 12 CFR part 335, and 12 CFR part 11.

<sup>59</sup> Section 12(g) of the Exchange Act also requires a bank to have more than \$ 1 million of assets.

<sup>60</sup> 59 FR 54789 (Nov. 2, 1994).

<sup>61</sup> See Exchange Act Section 12(i), 15 U.S.C. 78l(i) and 12 CFR part 11.

<sup>62</sup> 12 U.S.C. 1818.

<sup>63</sup> *Id.* at 1818(g).

they detect a known or suspected violation of Federal law or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act. Subpart C requires that all national banks establish and maintain procedures reasonably designed to assure and monitor their compliance with the requirements of the Bank Secrecy Act and its implementing regulations.

This proposed rule removes references to DC banks in the scope section of part 21 to clarify that part 21 no longer applies to DC banks.

#### **Part 22—Loans in Areas Having Special Flood Hazards**

Part 22 applies to loans secured by buildings or mobile homes located or to be located in areas subject to special flood hazards. It implements the requirements of the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973. This proposal eliminates the applicability of part 22 to DC banks by removing DC banks from the definition of “bank” in § 22.2(b).

#### **Part 23—Leasing**

Part 23 contains the standards for personal property lease financing transactions authorized for national banks. Section 23.6 applies the lending limits of 12 U.S.C. 84 or, if the lessee is an affiliate of the bank, the restrictions on transactions with affiliates prescribed by 12 U.S.C. 371c and 371c–1 to these lease transactions. This proposal would add to § 23.6 cross-references to the Federal Reserve Board’s Regulation W, 12 CFR part 223, which implements 12 U.S.C. 371c and 371c–1. This is necessary because Regulation W contains new provisions that do not appear in 12 U.S.C. 371c and 371c–1. In addition Regulation W contains a definition of the term “affiliate” that is broader than the definition that appears in § 371c and § 371c–1. With these cross-references to Regulation W, these rules will more clearly reflect whether the requirements of 12 U.S.C. 84 or of Regulation W apply to a particular lease transaction.

#### **Part 24—Community Development Investments**

Prior to its amendment by the FSRRA, 12 U.S.C. 24(Eleventh) authorized a national bank to “make investments designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as by providing housing, services, or jobs)” (the public welfare test). A national bank could “make such investments directly or by

purchasing interests in an entity primarily engaged in making such investments.”

The FSRRA narrowed the grant of authority in section 24(Eleventh) by providing that a national bank may “make investments, directly or indirectly, each of which promotes the public welfare by benefiting primarily low- and moderate-income communities or families (such as by providing housing, services, or jobs).”<sup>64</sup> The FSRRA also revised section 24(Eleventh) to state explicitly that the authority to make public welfare investments applies to investments made by a national bank directly and by its subsidiaries.<sup>65</sup>

The FSRRA also raised the maximum aggregate outstanding investment limit under section 24(Eleventh) from 10 to 15 percent of the bank’s unimpaired capital and surplus.

The proposal revises part 24, which implements section 24(Eleventh) to conform to the statutory changes.

#### *Definition of “Community and Economic Development Entity” (CEDE) § 24.2(c)*

The definition of a CEDE in proposed § 24.2(c) implements the FSRRA change to the public welfare test. Proposed paragraph (c) defines a CEDE as “an entity that makes investments or conducts activities that promote the public welfare by benefiting primarily low- and moderate-income areas or individuals’.

#### *Definition of “Benefiting Primarily Low- and Moderate-Income Areas or Individuals” (§ 24.2(g))*

12 U.S.C. 24(Eleventh) authorizes a national bank and its subsidiaries to make investments that promote the public welfare by “benefiting primarily” low- and moderate-income areas or individuals. The proposal defines “benefiting primarily low and moderate-income areas or individuals” when used to describe an investment to mean that: (1) A majority (more than 50 percent) of the investment benefits low- and moderate-income areas or individuals; or (2) the express, primary purpose of the investment (evidenced, for example, by government eligibility requirements) is to benefit “low- and moderate-income

areas or individuals.” This proposed definition is consistent with the way in which the OCC and the other Federal banking agencies have construed the concept of “primary” in the phrase “primary purpose” for community development activities pursuant to the CRA rules.<sup>66</sup>

#### *Public Welfare Investments (§§ 24.3, 24.1)*

Section 24.3 contains the authorization to make investments pursuant to section 24(Eleventh). The proposal revises the authorizing language to conform with the changes made by the FSRRA. Here and elsewhere in the proposal where the “benefiting primarily” standard appears, the phrases “low- and moderate-income individuals” and “low- and moderate income areas” are retained to describe the beneficiaries of national banks’ section 24(Eleventh) investments since the statutory language underlying those phrases was not revised by the FSRRA.<sup>67</sup> The proposal also adds a new section 24.1(e) to clarify that investments made, or written commitments to make investments entered into, before the enactment of the FSRRA continue to be subject to the statutes and regulations in effect prior to October 13, 2006.<sup>68</sup>

#### *Investment Limits (§ 24.4)*

The proposed revisions to § 24.4(a) implement the statutory change to the aggregate investment limit in section 24(Eleventh) from 10 to 15 percent of unimpaired capital and surplus.

This proposal also modifies the procedure that applies when a national bank requests OCC approval to exceed the investment limit. The current rule permits a national bank’s aggregate outstanding investments to exceed 5 percent of its capital and surplus if the bank is well capitalized and the OCC determines, by written approval of a bank’s proposed investment pursuant to the procedures set out at § 24.5(b), that

<sup>66</sup> See Interagency Questions and Answers Regarding Community Reinvestment, Q&A §§ .12(i) and 563e.12(h) “ 7, 66 FR 36620, 36627 (July 12, 2001) (explaining “primary purpose” for community development activities in the context of the CRA rules).

<sup>67</sup> We also note that the OCC has consistently used the term “areas” interchangeably with “communities” and the term “individuals” interchangeably with “families.”

<sup>68</sup> See 152 Cong. Rec. H7586 (daily ed. Sept. 29, 2006) (colloquy between Chairman Oxley of the House Financial Services Committee and Ranking Member Frank) (explaining that the revised standard in section 24(Eleventh) applies prospectively only and does not affect investments made, or written commitments to make investments that were entered into, prior to the enactment of the new standard).

<sup>64</sup> We note that on February 27, 2007, the U.S. House of Representatives passed legislation that would reinstate the wording of the former grant of authority to national banks to make community development investments. See H.R. 1066, the Depository Institution Community Development Investments Enhancement Act. The enactment of legislation further amending section 24(Eleventh) may affect the content or timing of the OCC’s issuance of final rules revising part 24.

<sup>65</sup> FSRRA, section 305, 120 Stat. at 1970–71.

a higher amount will pose no significant risk to the deposit insurance fund. Section 24.5(b) describes the application process that is required for the OCC's prior approval of an investment when a bank does not satisfy the requirements for using an after-the-fact notice. Thus, the investment limits provision in current § 24.4(a) requires a national bank to submit a request to exceed the 5 percent limit together with a specific investment proposal, and to use the prior approval procedures for that investment proposal.

This particular prior approval procedure is not required by the statute and the OCC has determined that the burden it imposes is not warranted in view of the low level of risk generally presented by the types of investments authorized pursuant to section 24(Eleventh). Accordingly, the proposal removes the requirement that a national bank submit a specific investment proposal for prior approval under § 24.5(b) when it also seeks approval to exceed the 5 percent investment limit. Under the proposed simpler procedure, the bank would submit a written request to the OCC to exceed the 5 percent limit and would not be required to tie this request to a specific investment proposal. If the OCC provides written approval of the request, the bank may make investments above the 5 percent limit. However, as is the case for investments below the 5 percent limit, for each investment above the limit the bank would submit either an after-the-fact notice under § 24.5(a) if it satisfies the requirements for after-the-fact notice, or an application under § 25.4(b) if it does not. These revisions facilitate national banks' ability to plan their investment activity while enabling the OCC to monitor the bank's use of the part 24 authority on a case-by-case basis. Thus, proposed § 24.4(a) permits a national bank's aggregate outstanding investments to exceed 5 percent of its capital and surplus, provided that the bank is at least adequately capitalized and the OCC determines, by written approval of a written request submitted by the bank, that a higher amount of investment will pose no significant risk to the deposit insurance fund.

#### *Examples of Qualifying Public Welfare Investments (§ 24.6)*

Current § 24.6 contains examples of qualifying public welfare investments. The proposal revises § 24.6 as necessary to reflect the revision to the language of the statutory standard effected by section 305 of the FSRRA. The proposal also makes conforming amendments to § 24.6 to clarify that the examples of qualifying public investments include

investments that benefit primarily low- and moderate-income areas or individuals and that: (1) Finance minority- and women-owned small businesses; (2) provide technical assistance for minority- and women-owned small businesses; or (3) are made in minority- and women-owned depository institutions. The OCC expects these qualifying investments to be made in minority- and women-owned entities that conform to the ownership and control, profit and loss taking, and senior management representation requirements of the CRA's provision governing operation of branch facilities by minorities and women (*see* 12 U.S.C. 2907(b)(1)–(3)). In addition, the proposal revises references to investments in “targeted redevelopment areas,” which, after FSRRA, would be permissible only if they promote the public welfare by benefiting primarily low- and moderate-income areas or individuals. Finally, the proposal amends § 24.6(d)(1) to include investments that provide financial literacy as an additional example of a qualifying public welfare investment.

#### Technical Amendments

The proposal also revises several sections of part 24 to eliminate language that is inconsistent or unnecessary in light of the revised statutory standard for community development investments and to make technical changes, including:

- A revision to § 24.2(f) to update a cross-reference to the definitions of “low-income” and “moderate-income” in § 25.12. The revision to § 24.2(f) does not result in any substantive change to the definition of “low- and moderate-income.”
- Technical amendments to § 24.5 to reflect an address change for sending certain notices, letters, and proposals to the OCC. These materials are proposed to be sent to the OCC's Community Affairs Department; the current regulation directs the materials to the Director, Community Development Division. Technical amendments to paragraphs (a)(2) and (b)(1) would permit national banks to submit after-the-fact notices and investment proposals needing prior approval via e-mail, fax, or electronically through National BankNet, rather than mailing the submissions. A technical amendment is proposed for paragraph (a)(1) to correct the format of a citation to 12 U.S.C. 24(Eleventh).

- Proposed § 24.6 would make a technical amendment to paragraph (b)(2) by removing the phrase “low- or moderate-income” and replacing it with “low- and moderate-income,” which is

consistent with how that phrase appears throughout part 24. In addition, a conforming technical amendment is proposed for paragraph (d)(3) that would permit other public welfare investments, including investments of a type determined by the OCC to be permissible under the proposed revisions to part 24. Grandfathered investments that are subject to statutes and regulations in effect prior to October 13, 2006 would not be affected. These terms are familiar to national banks and correspond to similar terms in existing part 24 and the part 25 CRA regulations. Therefore, this proposal makes no change to the use of the terms “areas” and “individuals” in part 24.

The proposal also revises Appendix 1 to part 24, the CD–1 National Bank Community Development (Part 24) Investments Form, to reflect the proposed changes to the regulation.

#### **Part 26—Management Officials Interlocks**

Part 26 implements the provisions of the Depository Institution Management Interlocks Act (Interlocks Act)<sup>69</sup> which generally prohibits a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anticompetitive effect. Section 610 of the FSRRA raised the asset-size amount from \$20 million to \$50 million for small banks that are exempt under certain provisions of the Interlocks Act. Because the OCC's current substantive rules implementing the Interlocks Act were issued together with the other Federal banking agencies, the OCC has implemented this FSRRA provision through a separate rulemaking conducted jointly with those agencies.<sup>70</sup>

However, this proposal amends part 26 by deleting the reference to DC banks in the scope section, § 26.1(c), deleting the definition of “District bank” in § 26.2(i), and deleting the reference to DC banks in the enforcement section, § 26.8.

#### **Part 27—Fair Housing Home Loan Data System**

Part 27 applies to activities of national banks and their subsidiaries that make home loans for the purpose of purchasing, construction-permanent financing, or refinancing of residential real property. The proposed rule would remove DC banks from the scope of part

<sup>69</sup> 12 U.S.C. 3201 *et seq.*

<sup>70</sup> The OCC and the other Federal banking agencies recently issued an interim final rule with request for comments amending their management interlocks rules to implement this change. *See* 72 FR 1274 (Jan. 11, 2007).

27 in § 27.1(a) and the definition of “bank” in § 27.2(c).

#### Part 28—International Banking Activities

This proposal makes a technical change to the definition of “limited Federal branch” in 12 CFR 28.11(s). Currently, this regulation defines a limited foreign branch as a Federal branch or agency that, pursuant to an agreement between the parent foreign bank and the FRB, may receive only those deposits permissible for an Edge corporation to receive. However, this agreement is not required for a foreign bank to operate a limited Federal branch in the United States. Therefore, we are removing the unnecessary reference to this agreement from this definition. This change, however, does not in any manner affect the requirement in § 28.11(s) that a limited Federal branch licensed by the OCC may accept only those deposits that are permissible for an Edge corporation.

We also are proposing a technical change to part 28 with respect to the expedited time periods for processing applications by eligible foreign banks to establish or relocate an interstate Federal branch or agency. Current 12 CFR 28.12(e)(3) provides that an application by an eligible foreign bank to establish and operate a *de novo* interstate Federal branch or agency is conditionally approved as of the 30th day after the OCC receives the application unless the OCC notifies the bank otherwise. However, the OCC is finding that the expedited process in the current regulation is not allowing sufficient time for the 30-day comment period to expire and for consideration of the comments received. As a result, the OCC is routinely notifying the eligible banks that the time period is extended. The proposal amends § 28.12(e) to provide that all expedited approvals to establish or relocate a Federal branch or agency are approved as of the 15th day after the close of the applicable public comment period, or the 45th day after the filing is received by the OCC, whichever is later, unless the OCC notifies the bank otherwise. These are the same time frames that would apply under 12 CFR 5.20(f)(5) if a national bank were engaging in a similar transaction.

The proposal also would eliminate the applicability to DC banks of subpart C of part 28, which implements the International Lending Supervision Act of 1988 (12 U.S.C. 3901 *et seq.*). Specifically, the proposal would eliminate the references to DC banks in the scope section, § 28.50(c), and in the

definition of “banking institution”, § 28.51(a).

#### Part 31—Extensions of Credit to Insiders and Transactions With Affiliates

Sections 23A and 23B of the Federal Reserve Act, as implemented by the Federal Reserve Board’s Regulation W, impose quantitative and qualitative limitations on a bank’s transactions with its “affiliates.” Appendix A to part 31 of the OCC’s rules contains two interpretations of section 23A pertaining to a national bank’s transactions with an affiliate. One of these interpretations provides that a loan to an unaffiliated third party that is collateralized by securities issued by an affiliate is not a “covered transaction” (that is, a transaction to which the requirements of section 23A apply) so long as: the borrower provides additional collateral that meets or exceeds the collateral requirements of § 23A (*i.e.*, up to 130% of the loan); and the loan proceeds are not used to purchase the affiliate-issued securities or otherwise used for the benefit of, or transferred to, any affiliate. The Federal Reserve Board’s Regulation W, which was issued subsequent to the OCC’s adoption of these interpretations, treats this transaction differently. Accordingly, we are proposing to remove our interpretation on that issue from Appendix A to part 31.

In addition, we have made minor changes to section 2 of Appendix A to part 31 to reflect the applicability of 12 U.S.C. 371c, 371c–1, and their implementing regulation, Regulation W, to deposits between affiliated banks. Furthermore, we have added an exception to this provision in order to clarify that a national bank may make or receive a deposit if a party other than the depository can legally offer and does post the collateral.

The proposal also removes the reference to 12 U.S.C. 1972(2)(G), which was repealed by section 601 of the FSRRA, in the authority section of part 31 as well as in § 31.1.

Finally, the proposal makes a technical amendment to Appendix B to part 31. This appendix compares the requirements of part 31 and part 32. However, it currently contains an inaccurate description of part 32 relating to exclusions to the definition of “loans or extensions of credit.” The proposal removes this inaccuracy.

#### Part 32—Lending Limits

Part 32 sets forth the lending limits that are applicable to a national bank. Section 32.1(c)(1) excludes from the scope of part 32’s coverage loans made by a national bank and its domestic

operating subsidiaries to a bank “affiliate,” as that term is defined in section 23A(b)(1) of the Federal Reserve Act. After the OCC adopted part 32 in its current form, the Gramm-Leach-Bliley Act<sup>71</sup> authorized a national bank (as well as insured State member banks) to hold financial subsidiaries and provided generally that financial subsidiaries would be treated as “affiliates” for purposes of sections 23A and 23B of the Federal Reserve Act. This treatment appears in the statute at section 23A(e). Accordingly, the Federal Reserve Board’s Regulation W generally defines as “affiliates” financial subsidiaries established pursuant to the authorization in the Gramm-Leach-Bliley Act.

This proposal adds to § 32.1(c)(1) cross-references to section 23A(e) and to § 223.2(a) of the Federal Reserve Board’s Regulation W. This change would directly cite the specific statute that defines an affiliate to include a financial subsidiary as well as the implementing provision of Regulation W. This amendment to § 32.1 would make clear that a bank’s loan to its financial subsidiary is not covered by the lending limit and that, instead, Regulation W applies to such a loan.<sup>72</sup> The amendment also serves more generally to reflect the fact that Regulation W contains a definition of the term “affiliate” that is broader than the definition that appears in § 371c.

#### Part 34—Real Estate Lending and Appraisals

Under current § 34.22, if a national bank makes an adjustable rate mortgage (ARM) loan, the loan documents must specify an index to which a change in the interest rate will be linked. Section 34.22 describes the requirements that generally apply to such an index. This proposal amends § 34.22 to provide

<sup>71</sup> See Pub. L. 106–102, Section 121, 113 Stat. 1338, 1373–81 (Nov. 12, 1999).

<sup>72</sup> However, subsidiaries that are financial subsidiaries solely because they sell insurance as agent or broker in a manner not permitted to the parent bank are not considered “affiliates” under Regulation W (*see* 12 CFR 223.3(p)(2)(i)) (unless the subsidiary is an affiliate for reasons other than its status as a financial subsidiary under the Gramm-Leach-Bliley Act). Loans to such subsidiaries are not subject to the lending limit for the same reason that the lending limit does not apply to loans to companies that meet the general definition of “affiliate” in § 371c(b)(1) but are excepted from § 371c by another provision, *e.g.*, operating subsidiaries or companies engaged solely in holding the premises of the bank (*see* section 371c(b)(2)). The OCC does not apply the lending limit to loans to any financial subsidiary since it is not necessary given that another statutory scheme—the affiliate transaction restrictions—is generally applicable. This reason applies even where a specific exemption—such as for the entities described in 12 CFR 223.3(p)(2)(i)—causes the affiliate transaction restrictions to be inapplicable.

national banks with additional flexibility with respect to the indices upon which ARM rates may be based. Specifically, the amendment permits national banks to use a combination of indices to which changes in the interest rate will be linked, in addition to a single index. The amendment also permits a national bank to use an index other than one already permissible under the rule, if the bank files a notice with the OCC and the OCC does not notify the bank within 30 days that the notice raises supervisory concerns or significant issues of law or policy. If the OCC notifies the bank about such issues or concerns, the bank may not proceed unless it has obtained the OCC's written approval. The approval could include any restrictions or conditions necessary to address the issues or concerns the OCC has identified.

#### **Part 37—Debt Cancellation Contracts and Debt Suspension Agreements**

On September 19, 2002, the OCC published a final rule in the **Federal Register** that added a new 12 CFR part 37, which establishes standards governing DCCs and DSAs.<sup>73</sup> In the last sentence of § 37.7(a), the cross-reference to standards in § 37.6 is incorrect. The rule should say § 37.6(d), not § 37.6(b). This amendment corrects that error.

#### **Part 40—Privacy of Consumer Financial Information**

Part 40 governs the treatment of nonpublic personal information about consumers by financial institutions. Pursuant to the DC Bank Act, the proposal would amend the scope section, § 40.1(b), to eliminate the applicability of part 40 to DC banks.

#### **Request for Comments**

The OCC welcomes comments on any aspect of this proposal, particularly those issues specifically noted in this preamble.

#### **Solicitation of Comments on Use of Plain Language**

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106-102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. We invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If

not, how could the regulation be more clearly stated?

- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

#### **Community Bank Comment Request**

In addition, we invite your comments on the impact of this proposal on community banks. The OCC recognizes that community banks operate with more limited resources than larger institutions and may present a different risk profile. Thus, the OCC specifically requests comments on the impact of this proposal on community banks' current resources and available personnel with the requisite expertise, and whether the goals of the proposal could be achieved, for community banks, through an alternative approach.

#### **Regulatory Analysis**

##### *Regulatory Flexibility Act*

Pursuant to § 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.

We have estimated that the economic costs associated with the changes made by this proposal will not be significant and that the majority of banks affected by these costs will be those with assets greater than \$250 million. Therefore, pursuant to Section 605(b) of the RFA, the OCC hereby certifies that this proposal will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

##### *Executive Order 12866*

The OCC has determined that this proposal is not a significant regulatory action under Executive Order 12866. We have concluded that the changes made by this rule will not have an annual effect on the economy of \$100 million or more. The OCC further concludes that this proposal does not meet any of the other standards for a significant

regulatory action set forth in Executive Order 12866.

##### *Paperwork Reduction Act*

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Agencies may not conduct or sponsor, and the 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 contained in this notice of proposed rulemaking have been submitted to OMB for review and approval under existing OMB control numbers 1557-0014 (Comptroller's Licensing Manual), 1557-0120 (Securities Offering Disclosure Rules), 1557-0194 (Community and Economic Development Entities, Community Development Projects, and Other Public Welfare Investments), and 1557-0190 (Real Estate Lending and Appraisals).

The OCC is proposing to revise part 5 to reflect organizational restructuring, and to simplify, clarify and make conforming and technical corrections to corporate application procedures and standards. The PRA burden in part 5 is currently approved under OMB Control No. 1557-0014, which also covers the *Comptroller's Licensing Manual*. Therefore, we submitted the entire information collection to OMB for review. The numbers below reflect the total burden under part 5 and the *Comptroller's Licensing Manual* following adoption of the rule and the review of the entire information collection to ensure accuracy of the estimates.

*Title of Information Collection:*  
*Comptroller's Licensing Manual.*

*OMB Number:* 1557-0014.

*Estimated Number of Respondents:*  
5,894.

*Estimated Number of Responses:*  
5,894.

*Average Hours Per Response:* 2.98 hours.

*Total Estimated Annual Burden:*  
17,572 hours.

*Affected Public:* National banks.

*Estimated Net Burden Change:* - 7,975 hours.

The OCC is proposing to revise part 16 to delete the public and periodic requirements in 12 CFR 16.20 and the requirement to submit to the OCC a Form D required in 12 CFR 16(a)(3). The PRA burden in part 16 is currently approved under OMB Control No. 1557-0120. Therefore, we submitted the entire information collection for review. The numbers below reflect the entire burden for part 16 following adoption of the rule and the review of the entire

<sup>73</sup> 67 FR 58962.

information collection to ensure accuracy of the estimates.

*Title of Information Collection:*

Securities Offering Disclosure Rules—12 CFR Part 16.

*OMB Number:* 1557–0120.

*Estimated Number of Respondents:* 48.

*Estimated Number of Responses:* 48.

*Average Hours Per Response:* 10.63.

*Total Estimated Annual Burden:* 510.

*Affected Public:* National banks.

*Estimated Net Burden*

*Change:* – 4,823 hours.

The OCC is proposing to revise part 24 to incorporate changes made by the FSRRA to community development investment authority. The OCC is also proposing to revise its community development investment form contained in Appendix 1 to Part 24. The PRA burden for part 24 is currently approved under OMB Control No. 1557–0194. Therefore, the OCC submitted the entire information collection for review. The numbers below reflect the entire burden for part 24 following adoption of the rule and the review of the entire information collection to ensure accuracy of the estimates.

*Title of Information Collection:*

Community and Economic Development Entities, Community Development Projects—Part 24.

*OMB Number:* 1557–0194.

*Estimated Number of Respondents:* 400.

*Estimated Number of Responses:* 400.

*Average Hours Per Response:* 1.475 hours.

*Total Estimated Annual Burden:* 590 hours.

*Affected Public:* National banks.

*Estimated Net Burden Change:* + 219 hours.

The OCC is proposing to revise part 34 to provide national banks with additional flexibility with respect to the indices upon which ARM rates may be based. The PRA burden for part 34 is currently approved under OMB Control No. 1557–0190. Therefore, the OCC submitted the entire information collection for review. The numbers below reflect the entire burden for part 34 following adoption of the rule and the review of the entire information collection to ensure accuracy of the estimates.

*Title of Information Collection:* Real Estate Lending and Appraisals—12 CFR Part 34.

*OMB Number:* 1557–0190.

*Estimated Number of Respondents:* 1,800.

*Estimated Number of Responses:* 1,800.

*Average Hours Per Response:* 57.

*Total Estimated Annual Burden:* 102,650 hours.

*Affected Public:* National banks.

*Estimated Net Burden Change:*

– 12,900 hours.

The information collection requirements enable the OCC to ensure that the proposed transactions are permissible under law and regulation and are consistent with safe and sound banking practices.

Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the Agencies' functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used;

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

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

(e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

Comments on these burden estimates should be submitted using one of the methods outlined in the **ADDRESSES** caption set forth above, and a copy should also be sent to OCC Desk Officer, 1557–0014, 1557–0120, 1557–0194, or 1557–0190 by mail to U.S. Office of Management and Budget, 725 17th Street, NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974. You may request additional information or copies of the collections and supporting documentation submitted to OMB by contacting: Mary H. Gottlieb or Camille Y. Dickerson, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

*Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 .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 proposed 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 proposal is not subject to Section 202 of the Unfunded Mandates Act.

**List of Subjects**

*12 CFR Part 1*

Banks, Banking, National banks, Reporting and recordkeeping requirements, Securities.

*12 CFR Part 2*

Credit life insurance, National banks.

*12 CFR Part 3*

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

*12 CFR Part 4*

Administrative practice and procedure, Freedom of information, Individuals with disabilities, Minority businesses, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Women.

*12 CFR Part 5*

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

*12 CFR Part 7*

Bank Activities and Operations.

*12 CFR Part 9*

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

*12 CFR Part 10*

National banks, Reporting and recordkeeping requirements, Securities.

*12 CFR Part 11*

Confidential business information, National banks, Reporting and recordkeeping requirements, Securities.

*12 CFR Part 12*

National banks, Reporting and recordkeeping requirements, Securities.

*12 CFR Part 16*

National banks, Reporting and recordkeeping requirements, Securities.

*12 CFR Part 19*

Administrative practice and procedure, Crime, Equal access to justice, Investigations, National banks, Penalties, Securities.

12 CFR Part 21

Crime, Currency, National banks, Reporting and recordkeeping requirements, Security measures.

12 CFR Part 22

Flood insurance, Mortgages, National banks, Reporting and recordkeeping requirements.

12 CFR Part 23

National banks

12 CFR Part 24

Community development, Credit investments, Low and moderate income housing, National banks, Reporting and recordkeeping requirements, Rural areas, Small businesses

12 CFR Part 26

Antitrust, Holding companies, National banks.

12 CFR Part 27

Civil rights, Credit, Fair housing, Mortgages, National banks, Reporting and recordkeeping requirements.

12 CFR Part 28

Foreign banking, National banks, Reporting and recordkeeping requirements.

12 CFR Part 31

Credit, National banks, Reporting and recordkeeping requirements

12 CFR Part 32

National banks, Reporting and recordkeeping requirements

12 CFR Part 34

Mortgages, National banks, Reporting and recordkeeping requirements

12 CFR Part 37

Banks, banking, Consumer protection, National banks, Reporting and recordkeeping requirements.

12 CFR Part 40

Banks, Banking, Consumer protection, National banks, Privacy, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, chapter I of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1—INVESTMENT SECURITIES

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

Authority: 12 U.S.C. 1 et seq., 24 (Seventh), and 93a.

2. Amend § 1.1 by:

- a. Revising the heading of § 1.1;
b. Revising the first sentence of paragraph (c); and
c. Adding a new paragraph (d).
The additions and revisions read as follows:

§ 1.1 Authority, purpose, scope, and reservation of authority.

\* \* \* \* \*

(c) Scope. The standards set forth apply to national banks and federal branches of foreign banks. \* \* \*

(d) Reservation of authority. The OCC may determine, on a case-by-case basis, that a national bank may acquire an investment security other than an investment security of a type set forth in this part, provided the OCC determines that the bank's investment is consistent with section 24 (Seventh) and with safe and sound banking practices. The OCC will consider all relevant factors, including the risk characteristics of the particular investment in comparison with the risk characteristics of investments that the OCC has previously authorized, and the bank's ability effectively to manage such risks. The OCC may impose limits or conditions in connection with approval of an investment security under this subsection.

3. Amend § 1.3 by:

a. In paragraph (h), removing the heading "Investment company shares" and in its place add the heading "Pooled investments";

b. In paragraph (h)(1)(i), removing the phrase "under this part";

c. In paragraph (h)(2), removing the phrase "under this part";

d. Adding a new paragraph (h)(3) to read as follows; and

e. In paragraph (i)(1), adding the phrase "the security is marketable and" after the word "if" and removing the phrase ", and the bank believes that the security may be sold with reasonable promptness at a price that corresponds reasonably to its fair value".

The addition reads as follows:

§ 1.3 Limitations on dealing in, underwriting, and purchase and sale of securities.

\* \* \* \* \*

(h) \* \* \*
(3) Investments made under § 1.3(h) must be:

(i) Marketable and rated investment grade or the credit equivalent of a security rated investment grade, or

(ii) Satisfy the requirements of § 1.3(i).

\* \* \* \* \*

PART 2—SALES OF CREDIT LIFE INSURANCE

4. The authority citation for part 2 continues to read as follows:

Authority: 12 U.S.C. 24 (Seventh), 93a, and 1818(n).

5. In § 2.2 revise paragraph (a) to read as follows:

§ 2.2 Definitions.

(a) Bank means a national banking association.

\* \* \* \* \*

PART 3—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

6. 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.

7. In § 3.2, revise paragraph (b) to read as follows:

§ 3.2 Definitions.

\* \* \* \* \*

(b) Bank means a national banking association.

\* \* \* \* \*

8. In Appendix A of part 3, revise the first sentence of section 3(a)(1)(v) to read as follows:

Appendix A to Part 3—Risk-Based Capital Guidelines

\* \* \* \* \*

Section 3. Risk Categories/Weights for On-Balance Sheet Assets and Off-Balance Sheet Items

\* \* \* \* \*

(a) \* \* \*

(1) \* \* \*

(v) That portion of local currency claims on, or unconditionally guaranteed by, central governments of non-OECD countries, to the extent the bank has liabilities in that currency. \* \* \*

\* \* \* \* \*

PART 4—ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS

9. The authority citation for part 4 is revised to read as follows:

Authority: 12 U.S.C. 93a. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552; E.O. 12600 (3 CFR 1987 Comp., p. 235). Subpart C also issued under 5 U.S.C. 301, 552; 12 U.S.C. 161, 481, 482, 484(a), 1442, 1817(a)(2) and (3), 1818(u) and (v), 1820(d)(6), 1920(k), 1821(c), 1821(o), 1821(t), 1831m, 1831p-1, 1831o, 1867, 1951 et seq., 2601 et seq., 2801 et seq., 2901 et seq., 3101 et seq., 3401 et seq.; 15 U.S.C. 77uu(b), 78q(c)(3); 18 U.S.C. 641, 1905, 1906; 29 U.S.C. 1204; 31 U.S.C. 9701; 42 U.S.C. 3601; 44 U.S.C. 3506, 3510. Subpart D also issued under 12 U.S.C. 1833e.

10. In § 4.4, revise the second sentence to read as follows:

**§ 4.4 Washington office.**

\* \* \* The Washington office directs OCC policy, oversees OCC operations,

and is responsible for the direct supervision of certain national banks, including the largest national banks (through its Large Bank Supervision Department) and other national banks requiring special supervision. \* \* \*

11. In § 4.5(a), revise the table to read as follows:

**§ 4.5 District and field offices.**

(a) \* \* \*

District	Office address	Geographical composition
Northeastern District .....	Office of the Comptroller of the Currency, 340 Madison Avenue, 5th Floor, New York, NY 10017-2613.	Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, eastern Ohio, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Vermont, the Virgin Islands, Virginia, and West Virginia.
Central District .....	Office of the Comptroller of the Currency, One Financial Place, Suite 2700, 440 South LaSalle Street, Chicago, IL 60605.	Illinois, Indiana, eastern Iowa, northern Kentucky, Michigan, Minnesota, eastern Missouri, North Dakota, Ohio (except for eastern Ohio), and Wisconsin.
Southern District .....	Office of the Comptroller of the Currency, 500 North Akard Street, Suite 1600, Dallas, TX 75201.	Alabama, Arkansas, Florida, Georgia, southern Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee, and Texas.
Western District .....	Office of the Comptroller of the Currency, 1225 17th Street, Suite 300, Denver, CO 80202.	Alaska, Arizona, California, Colorado, Hawaii, Idaho, western Iowa, Kansas, western Missouri, Montana, Nebraska, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington, Wyoming, and Guam.

\* \* \* \* \*

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

12. The authority citation for part 5 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*; 93a; 215a-2; 215a-3, 481, and section 5136A of the Revised Statutes (12 U.S.C. 24a).

**§ 5.3 [Amended]**

13. In § 5.3 remove paragraph (j) and redesignate paragraphs (k) and (l) as paragraphs (j) and (k), respectively.

**§ 5.4 [Amended]**

14. Amend § 5.4(d) by:  
 a. Removing “Licensing Manager” in the first sentence and adding in its place “Director for District Licensing”; and  
 b. Removing the phrase “Bank Organization and Structure Department” in the second sentence and adding in its place the phrase “Licensing Department”.

15. Amend § 5.13 by:  
 a. In paragraph (c), adding two sentences at the end of the paragraph;  
 b. In paragraph (f):  
 i. Removing the phrase “Deputy Comptroller for Bank Organization and Structure” in the first sentence and adding in its place the phrase “Deputy Comptroller for Licensing”; and  
 ii. Adding a sentence after the first sentence.  
 The additions read as follows:

**§ 5.13 Decisions.**

\* \* \* \* \*  
 (c) \* \* \* The OCC may return an application without a decision if it finds

the filing to be materially deficient. A filing is materially deficient if it lacks sufficient information for the OCC to make a determination under the applicable statutory or regulatory criteria.

\* \* \* \* \*

(f) \* \* \* In the event the Deputy Comptroller for Licensing was the deciding official of the matter appealed, or was involved personally and substantially in the matter, the appeal may be referred instead to the Chief Counsel. \* \* \*

\* \* \* \* \*

16. Amend § 5.20 by:  
 a. In paragraph (i)(3), removing the term “spokesperson” wherever it appears and in its place adding the term “contact person”; and  
 b. In paragraph (i)(5) by:  
 i. Revising the heading; and  
 ii. Adding a sentence after the second sentence of paragraph (i)(5)(i); and  
 iii. Redesignating paragraphs (i)(5)(ii) and (i)(5)(iii) as paragraphs (i)(5)(iii) and (i)(5)(iv), respectively; and  
 iv. Redesignating the last sentence of paragraph (i)(5)(i) as new paragraph (i)(5)(ii).

The addition and revision read as follows:

**§ 5.20 Organizing a bank.**

(i) \* \* \*  
 (5) Activities.  
 (i) \* \* \* A proposed national bank may offer and sell securities prior to OCC preliminary approval of the proposed national bank’s charter application, provided that the proposed national bank has filed articles of association and an organization

certificate, and a charter application that is completed and the bank complies with the OCC’s securities offering regulations, 12 CFR part 16. \* \* \*

17. Amend § 5.26 as follows:  
 a. Remove paragraph (e)(2)(i)(B);  
 b. Redesignate paragraphs (e)(2)(i)(C), (e)(2)(i)(D), (e)(2)(i)(E), as paragraphs (e)(2)(i)(B), (e)(2)(i)(C), (e)(2)(i)(D), respectively;  
 c. At the end of newly redesignated paragraph (e)(2)(i)(C), remove the word “and”;  
 d. At the end of newly redesignated paragraph (e)(2)(i)(D), remove the period and add in its place the phrase “; and”;  
 e. Add a new paragraph (e)(2)(i)(E) to read as follows;

f. In paragraph (e)(3), remove the designation “(i)” for paragraph (e)(3)(i); and  
 g. Remove paragraph (e)(3)(ii) in its entirety.

The addition reads as follows:

**§ 5.26 Fiduciary powers.**

\* \* \* \* \*

(e) \* \* \*  
 (2) \* \* \*  
 (i) \* \* \*

(E) If requested by the OCC, an opinion of counsel that the proposed activities do not violate applicable Federal or State law, including citations to applicable law.

\* \* \* \* \*

18. Amend § 5.30 as follows:  
 a. In paragraph (d)(1)(i), add “intermittent facility,” after “temporary facility,”;  
 b. Redesignate paragraphs (d)(3) through (d)(5) as paragraphs (d)(4) through (d)(6), respectively; and add a new paragraph (d)(3);



c. Redesignate paragraphs (f)(4) and (f)(5) as paragraphs (f)(5) and (f)(6), respectively, and add a new paragraph (f)(4) to read as follows.

The additions read as follows:

§ 5.30 Establishment, acquisition, and relocation of a branch.

\* \* \* \* \*

(d) \* \* \*

(3) Intermittent branch means a branch that is operated for one or more limited periods of time to provide branch banking services at a specified recurring event, on the grounds or premises where the event is held or at a fixed site adjacent to the grounds or premises where the event is held, and exclusively during the occurrence of the event. Examples of an intermittent branch include the operation of a branch on the campus of, or at a fixed site adjacent to the campus of, a specific college during school registration periods; or the operation of a branch during a State fair on State fairgrounds or at a fixed site adjacent to the fairgrounds.

\* \* \* \* \*

(f) \* \* \*

(4) Intermittent branches. Prior to operating an intermittent branch, a national bank shall file a branch application and publish notice in accordance with § 5.8, both of which shall identify the event at which the branch will be operated; designate a location for operation of the branch which shall be on the grounds or premises at which the event is held or on a fixed site adjacent to those grounds or premises; and specify the approximate time period during which the event will be held and during which the branch will operate, including whether operation of the branch will be on an annual or otherwise recurring basis. If the branch is approved, then the bank need not obtain approval each time it seeks to operate the branch in accordance with the original application and approval.

\* \* \* \* \*

19. Amend § 5.33 to read as follows:

- a. Add introductory text at the beginning of paragraph (d);
b. Remove the introductory text in paragraph (e)(1);
c. Redesignate paragraphs (e)(1)(i)(A) and (e)(1)(i)(B) as paragraphs (e)(1)(i)(A)(1) and (e)(1)(i)(A)(2), respectively, and paragraphs (e)(1)(i) through (e)(1)(iii) as paragraphs (e)(1)(i)(A) through (e)(1)(i)(C), respectively; paragraph (e)(1)(iv) as paragraph (e)(1)(ii); and paragraph (e)(1)(v) as paragraph (e)(1)(iii);
d. Add paragraph (e)(1)(i) introductory text;

e. Revise redesignated paragraph (e)(1)(ii);

f. Remove the phrase “, and with the appropriate district office” from the first sentence of paragraph (e)(8)(ii);

g. Revise the headings of paragraphs (g), (g)(1) and (g)(3);

h. Remove the phrase “or merger” in paragraph (g)(2)(ii);

i. Remove the phrase “12 U.S.C. 214c” in paragraph (g)(3)(i) and add in its place “12 U.S.C. 214b”; and

j. Revise paragraph (h).

The additions and revisions read as follows:

§ 5.33 Business combinations.

\* \* \* \* \*

(d) Definitions.—For purposes of this § 5.33: \* \* \*

(e) Policy.—(1) Factors.—(i) Bank Merger Act. When the OCC evaluates an application for a business combination under the Bank Merger Act, the OCC considers the following factors: \* \* \*

(ii) Community Reinvestment Act. When the OCC evaluates an application for a business combination under the Community Reinvestment Act, the OCC considers the performance of the applicant and the other depository institutions involved in the business combination in helping to meet the credit needs of the relevant communities, including low- and moderate-income neighborhoods, consistent with safe and sound banking practices.

\* \* \* \* \*

(g) Provisions governing consolidations and mergers with different types of entities.—(1) Consolidations and mergers under 12 U.S.C. 215 or 215a of a national bank with other national banks and State banks as defined in 12 U.S.C. 215b(1) resulting in a national bank. \* \* \*

(3) Consolidation or merger of a national bank resulting in a State bank as defined in 12 U.S.C. 214(a) under 12 U.S.C. 214a or a Federal savings association under 12 U.S.C. 215c. \* \* \*

(h) Interstate combinations under 12 U.S.C. 1831u. A business combination between insured banks with different home States under the authority of 12 U.S.C. 1831u must satisfy the standards and requirements and comply with the procedures of 12 U.S.C. 1831u and either 12 U.S.C. 215, 215a, and 215a–1, as applicable, if the resulting bank is a national bank, or 12 U.S.C. 214a, 214b, and 214c if the resulting bank is a State bank. For purposes of 12 U.S.C. 1831u, the acquisition of a branch without the acquisition of all or substantially all of

the assets of a bank is treated as the acquisition of a bank whose home State is the State in which the branch is located.

\* \* \* \* \*

20. Amend § 5.34 as follows:

a. Amend paragraph (e)(2) by:

i. Redesignating paragraphs (e)(2)(i) and (e)(2)(ii) as paragraphs (e)(2)(ii)(A) and (e)(2)(ii)(B), respectively;

ii. Redesignating the first sentence of paragraph (e)(2) introductory text as paragraph (e)(2)(i) and revising it; and

iii. Redesignating the second sentence of paragraph (e)(2) introductory text as paragraph (e)(2)(ii) introductory text, republishing it for reader reference;

b. Amend paragraph (e)(5) by:

i. Revising paragraph (e)(5)(i);
ii. Removing paragraph (e)(5)(iv);
iii. Redesignating paragraphs (e)(5)(ii) and (e)(5)(iii) as paragraphs (e)(5)(iii) and (e)(5)(iv);
iv. Removing the word “and” at the end of paragraph (e)(5)(v)(X), and the period at the end of paragraph (e)(5)(v)(Y) and adding in its place “; and”;

v. Revising paragraph (e)(5)(vi) introductory text;

vi. Removing the word “and” at the end of paragraph (e)(5)(vi)(B);

vii. Replacing the period with a semicolon and adding the word “and” at the end of (e)(5)(vi)(C); and

viii. Adding new paragraphs (e)(5)(ii), (e)(5)(v)(CC), (e)(5)(v)(AA), (e)(5)(v)(BB), (e)(5)(v)(ZZ), (e)(5)(v)(DD), (e)(5)(v)(EE), (e)(5)(v)(FF), (e)(5)(v)(GG), and (e)(5)(vi)(D).

The additions and revisions read as follows:

§ 5.34 Operating subsidiaries.

\* \* \* \* \*

(e) \* \* \*

(2) Qualifying subsidiaries. (i) An operating subsidiary in which a national bank may invest includes a corporation, limited liability company, limited partnership, or similar entity if:

(A) The bank has the ability to control the management and operations of the subsidiary by owning more than 50 percent of the voting interest in the subsidiary, or otherwise; and

(B) The operating subsidiary is consolidated with the bank under Generally Accepted Accounting Principles (GAAP).

(ii) However, the following subsidiaries are not operating subsidiaries subject to this section:

\* \* \*

(5) Procedures.—(i) Notice required.

(A) Except for operating subsidiaries subject to the application procedures set forth in paragraph (e)(5)(ii) of this section or exempt from notice or

application procedures under paragraph (e)(5)(vi) of this section, a national bank that is "well capitalized" and "well managed" may establish or acquire an operating subsidiary, or perform a new activity in an existing operating subsidiary, by providing the appropriate district office written notice within 10 days after acquiring or establishing the subsidiary, or commencing the new activity, if:

(1) The activity is listed in paragraph (e)(5)(v) of this section;

(2) The entity is a corporation or a limited liability company, or it is a limited partnership and the bank controls, directly or indirectly, all of the ownership interests in the limited partnership;

(3) If the entity is not organized in the form of a limited partnership, the bank has the ability to control the management and operations of the subsidiary by holding:

(i) More than 50 percent of the voting interests in the subsidiary, or

(ii) Voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management; and

(4) The financial statements of the bank and the subsidiary are consolidated under Generally Accepted Accounting Principles.

(B) The written notice must include a complete description of the bank's investment in the subsidiary and of the activity conducted and a representation and undertaking that the activity will be conducted in accordance with OCC policies contained in guidance issued by the OCC regarding the activity. To the extent that the notice relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity in which the company is engaged and has present plans to conduct. The bank also must list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable. Any bank receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(ii) *Application required.* (A) Except where the operating subsidiary is exempt from notice or application requirements under paragraph (e)(5)(vi) of this section, or subject to the notice procedures in paragraph (e)(5)(i), a national bank must first submit an application to, and receive approval from, the OCC with respect to the

establishment or acquisition of an operating subsidiary, or the performance of a new activity in an existing operating subsidiary.

(B) The application must explain, as appropriate, how the bank "controls" the enterprise, describing in full detail structural arrangements where control is based on factors other than bank ownership of more than 50 percent of the voting interest of the subsidiary. The application also must include a complete description of the bank's investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the bank and the subsidiary, and other information necessary to adequately describe the proposal. To the extent that the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity in which the company is engaged and has present plans to conduct. The bank must also list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state where the company holds a resident license or charter, as applicable. The application must state whether the operating subsidiary will conduct any activity at a location other than the main office or a previously approved branch of the bank. The OCC may require an applicant to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In these cases, the OCC encourages applicants to have a pre-filing meeting with the OCC. Any bank receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

\* \* \* \* \*

(v) \* \* \*  
(Z) Providing data processing, and data transmission services, facilities (including equipment, technology, and personnel), data bases, advice and access to such services, facilities, data bases and advice, for the parent bank and for others, pursuant to 12 CFR 7.5006 to the extent permitted by published OCC precedent;

(AA) Providing bill presentment, billing, collection, and claims-processing services;

(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;

(CC) Providing payroll processing;  
(DD) Providing branch management services;

(EE) Providing merchant processing services except when the activity involves the use of third parties to solicit or underwrite merchants;

(FF) Performing administrative tasks involved in benefits administration; and

(GG) Performing an activity approved in published OCC precedent for a non-controlling investment by a national bank or its operating subsidiary pursuant to 12 CFR 5.36(e)(2), provided the activity is conducted in accordance with the same terms and conditions applicable to the activity covered by the precedent as well as with any other restrictions that would be imposed due to its status as an operating subsidiary.

(vi) *No application or notice required.* A national bank may acquire or establish an operating subsidiary, or engage in the performance of a new activity in an existing operating subsidiary, without filing an application or providing notice to the OCC, if the bank is well managed and adequately capitalized or well capitalized and the:  
\* \* \*

(D) The standards set forth in paragraphs (e)(5)(i)(A)(2), (3), and (4) of this section are satisfied.

\* \* \* \* \*

21. Amend § 5.35 as follows:

a. In paragraph (d)(1) remove "insured banks" each time it appears and add in its place "insured depository institutions";

b. In paragraph (d)(3) add ", except when such term appears in connection with the term 'insured depository institution'" after "means";

c. Redesignate paragraphs (d)(4) and (d)(5) as paragraphs (d)(5) and (d)(6), respectively;

d. Add new paragraph (d)(4);

e. In newly redesignated paragraph (d)(6):

i. Remove "insured bank" and add in its place "insured depository institution";

ii. Remove "insured banks" and add in its place "insured depository institutions"; and

iii. Remove "banks as its principal investor" and add in its place "insured depository institutions as its principal investor";

f. Add the word "and" at the end of paragraph (g)(3);

g. Revise paragraph (g)(4);

h. Revise the heading in paragraph (i); and

i. Remove paragraphs (g)(5) and (i)(2) and the paragraph designation for paragraph (i)(1).

The additions and revisions read as follows:

**§ 5.35 Bank service companies.**

\* \* \* \*

(d) \* \* \*

(4) *Insured depository institution*, for purposes of this section, has the same meaning as in section 3 of the Federal Deposit Insurance Act.

\* \* \* \*

(g) \* \* \*

(4) Information demonstrating that the bank service company will perform only those services that each insured depository institution shareholder or member is authorized to perform under applicable Federal or State law and will perform such services only at locations in a State in which each such shareholder or member is authorized to perform such services unless performing services that are authorized by the Federal Reserve Board under the authority of 12 U.S.C. 1865(b).

\* \* \* \*

(i) *Investment limitations.* \* \* \*

22. Add § 5.36 as follows:

a. Add “application or” before

“notice” in paragraph (b);

b. Remove the last sentence of paragraph (b);

c. Revise paragraph (e) introductory text;

d. Remove paragraph (e)(5);

e. Redesignate paragraphs (e)(6) through (e)(8) as paragraphs (e)(5) through (e)(7), respectively, and paragraphs (f) and (g) as paragraphs (h) and (i), respectively;

f. Revise redesignated paragraph (e)(6);

g. Add new paragraphs (f) and (g) to read as follows:

**§ 5.36 Other equity investments.**

\* \* \* \*

(e) *Non-controlling investments; notice procedure.* Unless the procedures governing a national bank’s non-controlling investment are prescribed by OCC rules implementing a separate legal authorization of the investment and except as provided in paragraphs (f) and (g) of this section, a national bank may make a non-controlling investment, directly or through its operating subsidiary, in an enterprise that engages in the activities described in paragraph (e)(2) of this section by filing a written notice. The bank must file this written notice with the appropriate district office no later than 10 days after making the investment. The written notice must:

\* \* \* \*

(6) Certify that the bank’s loss exposure is limited as a legal matter and that the bank does not have unlimited liability for the obligations of the enterprise; and

\* \* \* \*

(f) *Non-controlling investment; application procedure.* Unless the procedures governing a national bank’s non-controlling investment are prescribed by OCC rules implementing a separate legal authorization of the investment, a national bank must file an application and obtain prior approval before making or acquiring, either directly or through an operating subsidiary, a non-controlling investment in an enterprise if the non-controlling investment does not qualify for the notice procedure set forth in paragraph (e) because the bank is unable to make the representations set forth in paragraph (e)(2) or (e)(3) of this section. The application must include the information required in paragraphs (e)(1) and (e)(4) through (e)(7) of this section and (e)(2) or (e)(3), as appropriate. If the bank is unable to make the representation set forth in paragraph (e)(2) of this section, the bank’s application must explain why the activity in which the enterprise engages is a permissible activity for a national bank and why the applicant should be permitted to hold a non-controlling investment in an enterprise engaged in that activity. A bank may not make a non-controlling investment if it is unable to make the representations and provide the information specified in paragraphs (e)(1) and (e)(4) through (e)(7) of this section.

(g) *Non-controlling investments in entities holding assets in satisfaction of debts previously contracted.* Certain non-controlling investments may be eligible for expedited treatment where the bank’s investment is in an entity holding assets in satisfaction of debts previously contracted or the bank acquires shares of a company in satisfaction of debts previously contracted.

(1) *Notice required.* A national bank that is well capitalized and well managed may acquire a non-controlling investment, directly or through its operating subsidiary, in an enterprise that engages in the activities of holding and managing assets acquired by the parent bank through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted, by filing a written notice in accordance with this paragraph (g)(i). The activities of the enterprise must be conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a national bank. The bank must file the written notice with the appropriate district office no later than 10 days after making the non-controlling investment. This notice must include a complete

description of the bank’s investment in the enterprise and the activities conducted, a description of how the bank plans to divest the non-controlling investment or the underlying assets within applicable statutory time frames, and a representation and undertaking that the bank will conduct the activities in accordance with OCC policies contained in guidance issued by the OCC regarding the activities. Any national bank receiving approval under this paragraph (g)(i) is deemed to have agreed that the enterprise will conduct the activity in a manner consistent with published OCC guidance.

(2) *No notice or application required.* A national bank is not required to file a notice or application under this § 5.36 if it acquires a non-controlling investment in shares of a company through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted.

\* \* \* \*

23. Amend § 5.39 as follows:

a. Amend paragraph (d) by adding the phrase “, as implemented by Regulation W, 12 CFR part 223” before “as applicable” in paragraph (d)(1);

b. Revise paragraph (h) by:

i. Removing the word “Sections” at the beginning of paragraph (h)(5) and adding in its place the phrase “Except for a subsidiary of a bank that is considered a financial subsidiary under paragraph (a)(6) of this section solely because the subsidiary engages in the sale of insurance as agent or broker in a manner that is not permitted for national banks, sections”;

ii. Adding the phrase “, as implemented by Regulation W, 12 CFR part 223,” before the word “apply” in paragraph (h)(5);

iii. Revising paragraph (h)(5)(iii);

iv. Redesignating paragraph (h)(5)(v) as paragraph (h)(5)(vi) and adding in redesignated paragraph (h)(5)(vi) the word “other” after the word “Any”; and

v. Adding paragraph (h)(5)(v).

The additions and revisions read as follows:

**§ 5.39 Financial subsidiaries.**

\* \* \* \*

(h) \* \* \*

(5) \* \* \*

(iii) A bank’s purchase of or investment in a security issued by a financial subsidiary of the bank must be valued at the greater of:

(A) The total amount of consideration given (including liabilities assumed) by the bank, reduced to reflect amortization of the security to the extent consistent with GAAP, or

(B) The carrying value of the security (adjusted so as not to reflect the bank's *pro rata* portion of any earnings retained or losses incurred by the financial subsidiary after the bank's acquisition of the security).

\* \* \* \* \*

(v) Any extension of credit to a financial subsidiary of a bank by an affiliate of the bank is treated as an extension of credit by the bank to the financial subsidiary if the extension of credit is treated as capital of the financial subsidiary under any Federal or State law, regulation, or interpretation applicable to the subsidiary.

\* \* \* \* \*

24. Amend § 5.46 as follows:

a. Remove the phrase "letter of notification" wherever it appears and replace it with the word "notice";

b. Revise paragraph (e)(3)(iii);

c. Amend the first sentence of paragraph (i)(2) by removing the number "30" and replacing it with the number "15"; and

d. Remove the phrase "in order to obtain a certification from the OCC" in the first sentence in paragraph (i)(3).

The revision reads as follows:

**§ 5.46 Changes in permanent capital.**

\* \* \* \* \*

(e) \* \* \*

(3) \* \* \*

(iii) The amount transferred from undivided profits; and

\* \* \* \* \*

25. Amend § 5.50 by:

a. Revising paragraph (a);

b. Redesignating paragraphs (d)(4) through (d)(6) as paragraphs (d)(5) through (d)(7), respectively;

c. Adding a new paragraph (d)(4);

d. Redesignating paragraphs (f)(2)(ii) through (f)(2)(v) as paragraphs (f)(2)(iii) through (f)(2)(vi), respectively;

e. Adding a new paragraph (f)(2)(ii);

f. Removing the phrase "paragraph (f)(2)(ii)" in newly redesignated paragraph (f)(2)(vi) and adding in its place "paragraphs (f)(2)(ii) and (iii)";

g. Adding the phrase "information regarding the future prospects of the institution," after "detailed financial information," in paragraph (f)(3)(i)(A);

h. Redesignating paragraphs (f)(4) and (f)(5) as paragraphs (f)(5) and (f)(6), respectively;

i. Adding a new paragraph (f)(4);

j. Removing the phrase "The financial condition of any acquiring person" and adding in its place "Either the financial condition of any acquiring person or the future prospects of the institution" in newly redesignated paragraph (f)(5)(iii);

k. Redesignating paragraph (h) as paragraph (i); and

l. Adding a new paragraph (h).

The additions and revisions read as follows:

**§ 5.50 Change in bank control; reporting of stock loans.**

(a) *Authority.* 12 U.S.C. 93a, 1817(j), and 12 U.S.C. 1831aa.

\* \* \* \* \*

(d) \* \* \*

(4) Immediate family includes a person's spouse, father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, children, stepchildren, grandparent, grandchildren, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, and the spouse of any of the foregoing.

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(ii) The OCC presumes, unless rebutted, that a person is acting in concert with his or her immediate family.

\* \* \* \* \*

(4) *Conditional actions.* The OCC may impose conditions on its action not to disapprove a notice to assure satisfaction of the relevant statutory criteria for non-objection to a notice.

\* \* \* \* \*

(h) *Reporting requirement.* After the consummation of the change in control, the national bank shall notify the OCC in writing of any changes or replacements of its chief executive officer or of any director occurring during the 12-month period beginning on the date of consummation. This notice must be filed within 10 days of such change or replacement and must include a statement of the past and current business and professional affiliations of the new chief executive officers or directors.

\* \* \* \* \*

26. Revise § 5.64 to read as follows:

**§ 5.64 Earnings limitation under 12 U.S.C. 60.**

(a) *Definitions.* As used in this section, the term "current year" means the calendar year in which a national bank declared, or proposes to declare, a dividend. The term "current year minus one" means the year immediately preceding the current year. The term "current year minus two" means the year that is two years prior to the current year. The term "current year minus three" means the year that is three years prior to the current year. The term "current year minus four" means the year that is four years prior to the current year.

(b) *Dividends from undivided profits.* Subject to 12 U.S.C. 56 and this subpart,

the directors of a national bank may declare and pay dividends of so much of the undivided profits as they judge to be expedient.

(c) *Earnings limitations under 12 U.S.C. 60.*—(1) *General rule.* For purposes of 12 U.S.C. 60, unless approved by the OCC in accordance with paragraph (c)(3) of this section, a national bank may not declare a dividend if the total amount of all dividends (common and preferred), including the proposed dividend, declared by the national bank in any current year exceeds the total of the national bank's net income for the current year to date, combined with its retained net income of current year minus one and current year minus two, less the sum of any transfers required by the OCC and any transfers required to be made to a fund for the retirement of any preferred stock.

(2) *Excess dividends in prior periods.*

(i) If in current year minus one or current year minus two the bank declared dividends in excess of that year's net income, the excess shall not reduce retained net income for the three-year period specified in paragraph (c)(1) of this section, provided that the amount of excess dividends can be offset by retained net income in current year minus three or current year minus four. If the bank declared dividends in excess of net income in current year minus one, the excess is offset by retained net income in current year minus three and then by retained net income in current year minus two. If the bank declared dividends in excess of net income in current year minus two, the excess is first offset by retained net income in current year minus four and then by retained net income in current year minus three.

(ii) If the bank's retained net income in current year minus three and current year minus four was insufficient to offset the full amount of the excess dividends declared, as calculated in accordance with paragraph (c)(2)(i) of this section, then the amount that is not offset will reduce the retained net income available to pay dividends in the current year.

(iii) The calculation in paragraph (c)(2) of this section shall apply only to retained net loss that results from dividends declared in excess of a single year's net income and does not apply to other types of current earnings deficits.

(3) *Prior approval required.* A national bank may declare a dividend in excess of the amount described in paragraph (c) of this section, provided that the dividend is approved by the OCC. A national bank shall submit a request for prior approval of a dividend under 12

U.S.C. 60 to the appropriate district office.

(d) *Surplus surplus*. Any amount in capital surplus in excess of capital stock (referred to as “surplus surplus”) may be transferred to undivided profits and available as dividends, provided:

(1) The bank can demonstrate that the amount came from earnings in prior periods, excluding the effect of any stock dividend; and

(2) The board of directors of the bank approves the transfer of the amount from capital surplus to undivided profits.

## PART 7—BANK ACTIVITIES AND OPERATIONS

27. The authority citation for part 7 continues to read as follows:

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

### § 7.1016 [Amended]

28. Amend footnote 1 to part 7 by adding “Supplement to UCP 500 for Electronic Presentation (eUCP) (available from ICC Publishing, Inc., 212/206–1150; <http://www.iccwbo.org>);” before “the International Standby Practices (ISP98) (ICC Publication No. 590)”.

29. Amend § 7.1017 by:

a. Redesignating the introductory text, paragraph (a), paragraph (b) introductory text, paragraphs (b)(1) through (b)(3), and paragraphs (b)(2)(i) through (b)(2)(iv) as paragraph (a) introductory text, paragraph (a)(1), paragraph (a)(2) introductory text, paragraphs (a)(2)(i) through (a)(2)(iii), and paragraphs (a)(2)(ii)(A) through (a)(2)(ii)(D), respectively; and

b. Adding a new paragraph (b) to read as follows:

### § 7.1017 National bank as guarantor or surety on indemnity bond.

\* \* \* \* \*

(b) In addition to the foregoing, a national bank may guarantee financial obligations of a customer, subsidiary or affiliate, provided the amount of the bank’s obligation is reasonably ascertainable and otherwise consistent with applicable law.

30. In § 7.2006, revise the second sentence to read as follows:

### § 7.2006 Cumulative voting in election of directors.

\* \* \* If permitted by the national bank’s articles of association, the shareholder may cast all these votes for one candidate or distribute the votes among as many candidates as the shareholder chooses. \* \* \*

31. In § 7.5001, add a new paragraph (d)(3) to read as follows:

### § 7.5001 Electronic activities that are part of, or incidental to, the business of banking.

\* \* \* \* \*

(d) \* \* \*

(3) In addition to the electronic activities specifically permitted in § 7.5004 (sale of excess electronic capacity and by-products) and § 7.5006 (incidental non-financial data processing), the OCC has determined that the following electronic activities are incidental to the business of banking, pursuant to this section. This list of activities is illustrative and not exclusive; the OCC may determine that other activities are permissible pursuant to this authority.

(i) Web site development where incidental to other banking services;

(ii) Internet access and e-mail provided on a non-profit basis as a promotional activity;

(iii) Advisory and consulting services on electronic activities where the services are incidental to customer use of electronic banking services; and

(iv) Sale of equipment that is convenient or useful to customer’s use of related electronic banking services, such as specialized terminals for scanning checks that will be deposited electronically by wholesale customers of banks under the Check Clearing for the 21st Century Act, Public Law 108–100 (12 U.S.C. 5001–5018) (the Check 21 Act).

32. Amend § 7.5002 by:

a. Removing the word “and” at the end of paragraph (a)(3),

b. Removing the period at the end of paragraph (a)(4) and adding in its place the “; and”; and

c. Adding a new paragraph (a)(5) to read as follows:

### § 7.5002 Furnishing of products and services by electronic means and facilities.

(a) \* \* \*

(5) Issuing electronic letters of credit within the scope of 12 CFR 7.1016.

\* \* \* \* \*

33. In § 7.5006, add a new paragraph (c) as follows:

### § 7.5006 Data processing.

\* \* \* \* \*

(c) *Software for performance of authorized banking functions*. A national bank may produce, market, or sell software that performs services or functions that the bank could perform directly, as part of the business of banking.

## PART 9—FIDUCIARY ACTIVITIES OF NATIONAL BANKS

34. 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.

35. Revise § 9.20 to read as follows:

### § 9.20 Transfer agents.

(a)(1) *Registration*. An application for registration under Section 17A(c) of the Securities Exchange Act of 1934 of a transfer agent for which the OCC is the appropriate regulatory agency, as defined in section 3(a)(34)(B) of the Securities Exchange Act of 1934, shall be filed with the OCC on FFIEC Form TA–1, in accordance with the instructions contained therein. Registration shall become effective 30 days after the date an application on Form TA–1 is filed unless the OCC accelerates, denies, or postpones such registration in accordance with section 17A(c) of the Securities Exchange Act of 1934.

(2) *Amendments to registration*. Within 60 days following the date on which any information reported on Form TA–1 becomes inaccurate, misleading, or incomplete, the registrant shall file an amendment on FFIEC Form TA–1 correcting the inaccurate, misleading, or incomplete information. The filing of an amendment to an application for registration as a transfer agent under this section, which registration has not become effective, shall postpone the effective date of the registration for 30 days following the date on which the amendment is filed unless the OCC accelerates, denies, or postpones the registration in accordance with Section 17A(c) of the Securities Exchange Act of 1934.

(3) *Withdrawal from registration*. Any registered national bank transfer agent that ceases to engage in activities that require registration under Section 17A(c) of the Securities Exchange Act of 1934 may file a written notice of withdrawal from registration with the OCC. Deregistration shall be effective 60 days after filing.

(4) *Reports*. Every registration or amendment filed under this section shall constitute a report or application within the meaning of Sections 17, 17A(c), and 32(a) of the Securities Exchange Act of 1934.

(b) *Operational and Reporting Requirements*. The rules adopted by the Securities and Exchange Commission pursuant to Section 17A of the Securities Exchange Act of 1934 prescribing operational and reporting requirements for transfer agents apply to the domestic activities of registered national bank transfer agents.

**PART 10—MUNICIPAL SECURITIES DEALERS**

36. The authority citation for part 10 is revised to read as follows:

**Authority:** 12 U.S.C. 93a, 481, and 1818; 15 U.S.C. 78o-4(c)(5) and 78q-78w.

37. In § 10.1 revise paragraph (a) to read as follows:

**§ 10.1 Scope.**

\* \* \*

(a) Any national bank and separately identifiable department or division of a national bank (collectively, a national bank) that acts as a municipal securities dealer, as that term is defined in section 3(a)(30) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(30)); and

\* \* \* \* \*

**PART 11—SECURITIES EXCHANGE ACT DISCLOSURE RULES**

38. The authority citation for part 11 continues to read as follows:

**Authority:** 12 U.S.C. 93a, 15 U.S.C. 78l, 78m, 78n, 78p, 78w, 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265.

39. In § 11.1 revise paragraph (a) to read as follows:

**§ 11.1 Authority and OMB control number.**

(a) *Authority.* The Office of the Comptroller of the Currency (OCC) is vested with the powers, functions, and duties otherwise vested in the Securities and Exchange Commission (Commission) to administer and enforce the provisions of sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Securities Exchange Act of 1934, as amended (1934 Act) (15 U.S.C. 78l, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p), regarding national banks with one or more classes of securities subject to the registration provisions of sections 12(b) and (g) of the 1934 Act (registered national banks). Further, the OCC has general rulemaking authority under 12 U.S.C. 93a, to promulgate rules and regulations concerning the activities of national banks.

\* \* \* \* \*

**PART 12—RECORDKEEPING AND CONFIRMATION REQUIREMENTS FOR SECURITIES TRANSACTIONS**

40. The authority citation for part 12 continues to read as follows:

**Authority:** 12 U.S.C. 24, 92a, and 93a.

**§ 12.7 [Amended]**

41. Amend § 12.7(a)(4) by removing “ten business days after the end of the calendar quarter” and adding “the deadline specified in SEC rule 17j-1 (17

CFR 270.17j-1) for quarterly transaction reports” in its place.

**PART 16—SECURITIES OFFERING DISCLOSURE RULES**

42. The authority citation for part 16 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.* and 93a.

43. In § 16.2 revise paragraph (b) to read as follows:

**§ 16.2 Definitions.**

\* \* \* \* \*

(b) *Bank* means an existing national bank, a national bank in organization, or a Federal branch or agency of a foreign bank.

\* \* \* \* \*

44. Amend § 16.5 as follows:

- a. Revise paragraph (a); and
- b. Add a new paragraph (h), to read as follows:

**§ 16.5 Exemptions.**

\* \* \* \* \*

(a) If the securities are exempt from registration under section 3 of the Securities Act (15 U.S.C. 77c), but only by reason of an exemption other than section 3(a)(2) (exemption for bank securities), section 3(a)(11) (exemption for intrastate offerings), and section 3(a)(12) of the Securities Act (exemption for bank holding company formation).

\* \* \* \* \*

(h) In a transaction that satisfies the requirements of § 16.9 of this part.

**§ 16.6 [Amended]**

45. Amend § 16.6 by:

- a. In paragraph (a) introductory text, removing the phrase “§§ 16.3, 16.15(a) and (b), and 16.20” and adding in its place “§§ 16.3 and 16.15(a) and (b)”;
- b. In paragraph (a)(3), adding “, if issued in certificate form,” after “each note or debenture”.

**§ 16.7 [Amended]**

46. Amend § 16.7 as follows:

- a. Remove paragraph (a)(3);
- b. In paragraph (a)(1), add the word “and” after the semicolon; and
- c. In paragraph (a)(2), remove “; and” and replace it with a period.

47. Add a new § 16.9 to read as follows:

**§ 16.9 Securities offered and sold in holding company dissolution.**

Offers and sales of bank issued securities in connection with the dissolution of the holding company of the bank are exempt from the registration and prospectus requirements of § 16.3 pursuant to § 16.5(h), provided all of the following requirements are met:

(a) The offer and sale of bank-issued securities occurs solely as part of a dissolution in which the security holders exchange their shares of stock in a holding company that had no significant assets other than securities of the bank, for bank stock;

(b) The security holders receive, after the dissolution, substantially the same proportional share interests in the bank as they held in the holding company;

(c) The rights and interests of the security holders in the bank are substantially the same as those in the holding company prior to the transaction; and

(d) The bank has substantially the same assets and liabilities as the holding company had on a consolidated basis prior to the transaction.

**§ 16.20 [Removed]**

48. Remove § 16.20.

**PART 19—RULES OF PRACTICE AND PROCEDURE**

49. The authority citation for part 19 continues to read as follows:

**Authority:** 5 U.S.C. 504, 554-557; 12 U.S.C. 93(b), 93a, 164, 505, 1817, 1818, 1820, 1831m, 1831o, 1972, 3102, 3018(a), 3909 and 4717; 15 U.S.C. 78(h) and (i), 78o-4(c), 78o-5, 78q-1, 78s, 78u, 78u-2, 78u-3, and 78w; 28 U.S.C. 2461 note, 31 U.S.C. 330, 5321; and 42 U.S.C. 4012a.

50. In § 19.3, revise paragraph (g) to read as follows:

**§ 19.3 Definitions.**

\* \* \* \* \*

(g) *Institution* includes any national bank or Federal branch or agency of a foreign bank.

\* \* \* \* \*

**§ 19.100 [Amended]**

51. In § 19.100, second sentence, remove the phrase “(except that in removal and prohibition cases instituted pursuant to 12 U.S.C. 1818, the administrative law judge will file the record and the recommended decision with the Board of Governors of the Federal Reserve System)”.

**§ 19.110 [Amended]**

52. In § 19.110, remove the phrase “bank affairs” and add in its place “the affairs of any depository institution”.

53. Revise § 19.111 to read as follows:

**§ 19.111 Suspension, removal, or prohibition.**

The Comptroller may serve a notice of suspension or order of removal or prohibition on an institution-affiliated party. A copy of such notice or order will be served on any depository institution that the subject of the notice

or order is affiliated with at the time the notice or order is issued, whereupon the institution-affiliated party involved must immediately cease service to, or participation in the affairs of, that depository institution and, if so determined by the OCC, any other depository institution. The notice or order will indicate the basis for suspension, removal or prohibition and will inform the institution-affiliated party of the right to request in writing an opportunity to show at an informal hearing that continued service to or participation in the conduct of the affairs of any depository institution has not posed, does not pose, or is not likely to pose a threat to the interests of the depositors of, or has not threatened, does not threaten, or is not likely to threaten to impair public confidence in, any relevant depository institution. The written request must be sent by certified mail to, or served personally with a signed receipt on the District Deputy Comptroller in the OCC district in which the bank in question is located; if the bank is supervised by Large Bank Supervision, to the Senior Deputy Comptroller for Large Bank Supervision for the Office of the Comptroller of the Currency; if the bank is supervised by Mid-Size/Community Bank Supervision, to the Senior Deputy Comptroller for Mid-Size/Community Bank Supervision for the Office of the Comptroller of the Currency; or if the institution-affiliated party is no longer affiliated with a particular national bank, to the Deputy Comptroller for Special Supervision, Washington, DC 20219. The request must state specifically the relief desired and the grounds on which that relief is based. For purposes of this section, the term *depository institution* means any depository institution of which the petitioner is or was an institution-affiliated party at the time at which the notice or order was issued by the Comptroller.

**§ 19.112 [Amended]**

54. In § 19.112, amend paragraphs (a), (b), and (c) by removing the phrase “the District Deputy Comptroller or Administrator, the Deputy Comptroller for Multinational Banking, or the Deputy Comptroller or Director for Special Supervision,” wherever it appears and adding in its place “the District Deputy Comptroller, the Senior Deputy Comptroller for Large Bank Supervision, the Senior Deputy Comptroller for Mid-Size/Community Bank Supervision or the Deputy Comptroller for Special Supervision.”

**§ 19.113 [Amended]**

55. In § 19.113, amend paragraph (c) by removing the phrase “the bank” and adding in its place “any depository institution”.

56. Revise § 19.241 to read as follows:

**§ 19.241 Scope.**

This subpart, which implements section 36(g)(4) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1831m(g)(4)), provides rules and procedures for the removal, suspension, or debarment of independent public accountants and their accounting firms from performing independent audit and attestation services required by section 36 of the FDI Act (12 U.S.C. 1831m) for insured national banks and Federal branches and agencies of foreign banks.

**PART 21—MINIMUM SECURITY DEVICES AND PROCEDURES, REPORTS OF SUSPICIOUS ACTIVITIES, AND BANK SECRECY ACT COMPLIANCE PROGRAM**

57. The authority citation for part 21 continues to read as follows:

**Authority:** 12 U.S.C. 93a, 1818, 1881–1884, and 3401–3422; 31 U.S.C. 5318.

58. In § 21.1, revise the first sentence of paragraph (a) to read as follows:

**§ 21.1 Purpose and scope of subpart A of this part.**

(a) This subpart is issued by the Comptroller of the Currency pursuant to section 3 of the Bank Protection Act of 1968 (12 U.S.C. 1882) and is applicable to all national banking associations.

\* \* \* \* \*

**PART 22—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS**

59. The authority citation for part 22 continues to read as follows:

**Authority:** 12 U.S.C. 93a, 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

60. In § 22.2 revise paragraph (b) to read as follows:

**§ 22.2 Definitions.**

\* \* \* \* \*

(b) *Bank* means a national bank.

\* \* \* \* \*

**PART 23—LEASING**

61. The authority citation for part 23 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 24 (Seventh), 24 (Tenth), and 93a.

**§ 23.6 [Amended]**

62. Amend § 23.6 by:

a. Adding the phrase “, as implemented by Regulation W, 12 CFR

part 223” after “12 U.S.C. 371c and 371c-1” in the first sentence and before “as applicable” in the third sentence;

b. Adding “, as implemented by 12 CFR part 32” after “12 U.S.C. 84” in the first sentence; and

c. Adding “, as implemented by part 32”, after “12 U.S.C. 84” in the fourth sentence.

**PART 24—COMMUNITY AND ECONOMIC DEVELOPMENT ENTITIES, COMMUNITY DEVELOPMENT PROJECTS, AND OTHER PUBLIC WELFARE INVESTMENTS**

63. The authority citation for part 24 continues to read as follows:

**Authority:** 12 U.S.C. 24 (Eleventh), 93a, 481, and 1818.

64. Amend § 24.1 by:

a. Removing in paragraph (a) the colon after the word “Authority” and adding a period in its place;

b. Revising paragraphs (b) and (d); and

c. Adding paragraph (e).

The revisions and addition read as follows:

**§ 24.1 Authority, purpose, and OMB control number.**

\* \* \* \* \*

(b) *Purpose.* This part implements 12 U.S.C. 24 (Eleventh). It is the OCC’s policy to encourage a national bank to make investments described in § 24.3, consistent with safety and soundness. This part provides the standards and procedures that apply to these investments.

\* \* \* \* \*

(d) A national bank that makes loans or investments that are authorized under both 12 U.S.C. 24 (Eleventh) and other provisions of the Federal banking laws may do so under such other provisions without regard to the provisions of 12 U.S.C. 24 (Eleventh) or this part.

(e) Investments made, or written commitments to make investments made, prior to October 13, 2006, pursuant to 12 U.S.C. 24 (Eleventh) and this part, continue to be subject to the statutes and regulations in effect prior to the enactment of the Financial Services Regulatory Relief Act of 2006 (Pub. L. 109–351).

65. Amend § 24.2 by:

a. Revising paragraph (c);

b. Amending paragraph (f) by removing “12 CFR 25.12(n)” and adding “12 CFR 25.12(m)” in its place;

c. Redesignating paragraphs (g) through (i) as paragraphs (h) through (j), respectively; and

d. Adding new paragraph (g).

The revision and addition read as follows:

**§ 24.2 Definitions.**

\* \* \* \*

(c) *Community and economic development entity* (CEDE) means an entity that makes investments or conducts activities that promote the public welfare by benefiting primarily low- and moderate-income areas or individuals.

\* \* \* \*

(g) *Benefiting primarily low- and moderate-income areas or individuals*, when used to describe an investment, means:

(1) A majority (more than 50 percent) of the investment benefits low- and moderate-income areas or individuals; or

(2) The express, primary purpose of the investment (evidenced, for example, by government eligibility requirements) is to benefit low- and moderate-income areas or individuals.

\* \* \* \*

66. Revise § 24.3 to read as follows:

**§ 24.3 Public welfare investments.**

A national bank or national bank subsidiary may make an investment directly or indirectly under this part if the investment promotes the public welfare by benefiting primarily low- and moderate-income areas or individuals.

67. Amend § 24.4 by:

a. Revising the first sentence in paragraph (a); and

b. Removing, in the second sentence of paragraph (a), “10” and adding “15” in its place.

The revision reads as follows:

**§ 24.4 Investment limits.**

(a) \* \* \* A national bank’s aggregate outstanding investments under this part may not exceed 5 percent of its capital and surplus, unless the bank is at least adequately capitalized and the OCC determines, by written approval of a written request by the bank to exceed the 5 percent limit, that a higher amount of investments will not pose a

significant risk to the deposit insurance fund. \* \* \*

\* \* \* \*

68. Amend § 24.5 by:

a. Removing, in paragraph (a)(1), the space between the number “24” and the term “(Eleventh)”;

b. Amending paragraphs (a)(2) and (b)(1) by removing “Director, Community Development Division,” and adding “Community Affairs Department,” in its place;

c. Adding a second sentence at the end of paragraph (a)(2);

d. In paragraph (a)(5), removing “Community Development Division” where it appears in the first and second sentences and adding “Community Affairs Department” in its place; and

e. Adding a new sentence after the first sentence in paragraph (b)(1).

The additions read as follows:

**§ 24.5 Public welfare investment after-the-fact notice and prior approval procedures.**

(a) \* \* \*

(2) \* \* \* The after-the-fact notification may also be e-mailed to *CommunityAffairs@occ.treas.gov*, faxed to (202) 874-4652, or provided electronically via National BankNet at <http://www.occ.treas.gov>.

\* \* \* \*

(b) \* \* \* (1) \* \* \* The investment proposal may also be e-mailed to *CommunityAffairs@occ.treas.gov*, faxed to (202) 874-4652, or submitted electronically via National BankNet at <http://www.occ.treas.gov>. \* \* \*

69. Amend § 24.6 by:

a. Revising the introductory text;

b. Amending paragraph (b)(1) by removing the phrase “or other targeted redevelopment areas”;

c. Revising paragraphs (b)(2) and (d)(1);

d. Amending paragraphs (b)(3) and (b)(4) by removing the phrase “or targeted redevelopment areas”;

e. Amend paragraph (d)(3) by removing the word “previously” and

f. Adding paragraph (d)(4).

The revisions and addition read as follows:

**§ 24.6 Examples of qualifying public welfare investments.**

The following are examples of qualifying public welfare investments to the extent they benefit primarily low- and moderate-income areas or individuals as set forth in § 24.3:

\* \* \* \*

(b) \* \* \*

(2) Investments that finance small businesses or small farms, including minority- and women-owned small businesses or small farms that, although not located in low- and moderate-income areas, create a significant number of permanent jobs for low- and moderate-income individuals.

\* \* \* \*

(d) \* \* \*

(1) Investments that provide credit counseling, financial literacy, job training, community development research, and similar technical assistance for non-profit community development organizations, low- and moderate-income individuals or areas, or small businesses, including minority- and women-owned small businesses, located in low- and moderate income areas or that produce or retain permanent jobs, the majority of which are held by low- and moderate-income individuals.

\* \* \* \*

(4) Investments in minority- and women-owned depository institutions that serve primarily low- and moderate-income individuals or low- and moderate-income areas.

70. Revise Appendix 1 to Part 24 to read as follows:

**Appendix 1 to Part 24—CD-1—National Bank Community Development (Part 24) Investments**

BILLING CODE 4810-33-P





Comptroller of the Currency  
Administrator of National Banks

**CD-1 – National Bank Community  
Development (Part 24) Investments**

For Official Use Only

OMB Number  
1557-0194

A national bank or national bank subsidiary may make an investment directly or indirectly under this part if the investment promotes the public welfare by benefiting primarily low- and moderate-income areas or individuals under the community development investment authority in 12 USC 24(Eleventh) and its implementing regulation, 12 CFR 24 (Part 24). Part 24 contains the OCC guidelines to determine whether an investment is designed to promote the public welfare by benefiting primarily low- and moderate-income areas or individuals and procedures that apply to those investments. National banks must submit the completed form to provide an after-the-fact notice or to request prior approval of a public welfare investment to the Community Affairs Department, Office of the Comptroller of the Currency, Washington, DC 20219. Please contact the Community Affairs Department at (202) 874-4930 or [CommunityAffairs@occ.treas.gov](mailto:CommunityAffairs@occ.treas.gov) for more information.

**PLEASE PROVIDE THE FOLLOWING INFORMATION ABOUT THE INVESTING BANK.**

Bank name:	Mailing address ( <i>street or P.O. box</i> ):
Bank charter number:	City, State, ZIP Code:
Telephone number:	Fax number:
E-mail address:	URL:

**CONTACT FOR INFORMATION:**

Name of bank contact responsible for form's information:	Name of bank contact responsible for CD investment (if different):
Mailing address ( <i>street or P.O. box</i> ):	Mailing address ( <i>street or P.O. box</i> ):
City, State, ZIP Code:	City, State, ZIP Code:
Telephone number:	Telephone number:
Fax number:	Fax number:
E-mail address:	E-mail address:

**PLEASE INDICATE THE PROCESS THE BANK REQUESTS BY CHECKING THE APPROPRIATE BOX, BELOW.**

After-the-fact notice (12 CFR 24.5(a)) - complete sections 1 and 2.

Prior approval (12 CFR 24.5(b)) - complete section 2.

## Form Part 24

**Section 1 – After-The-Fact Notice Only (12 CFR 24.5(a))**

**A bank may provide an after-the-fact notice of its Part 24 investment if the bank responds affirmatively to all of the following requirements.**

The bank is "well-capitalized," as defined in 12 CFR 24.2(j). Yes  No

The bank has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System. Yes  No

The bank's most recent Community Reinvestment Act rating is satisfactory or outstanding. Yes  No

The bank is not under a cease and desist order, consent order, formal written agreement, or Prompt Corrective Action directive.

Yes  No

Including this investment, the bank's aggregate outstanding investments and commitments under Part 24 do not exceed 5 percent of its capital and surplus, unless the OCC has provided written approval of a written request by the bank allowing the bank to provide after-the-fact notices for investments that would raise the aggregate amount of the bank's Part 24 investments beyond 5 percent of its capital and surplus.

Yes  No

The investment does not involve properties carried on the bank's books as "other real estate owned." Yes  No

The OCC has not determined, in published guidance, that the investment is inappropriate for the after-the-fact notification.

Yes  No

**Has the bank responded affirmatively to all of the above requirements in order to provide an after-the-fact notice of its Part 24 investment?** [The OCC may have provided written notification that the bank may submit Part 24 after-the-fact notices. If so, please provide the date or a copy of the OCC's written notification.]

Yes  (The bank may make an investment authorized by 12 USC 24(Eleventh) and this part and notify the OCC within 10 working days by submitting a completed after-the-fact notice.)

No  (The bank must seek prior OCC approval of its investment and submit a completed investment proposal before making the investment.)

**(To complete the after-the-fact notice process or to request prior OCC approval, please proceed to section 2 of this form.)**

## Form Part 24

## Section 2 — All Requests

**1. Please indicate how the bank's investment is consistent with Part 24 requirements for public welfare investments, under 12 CFR 24.3.**

a. Check at least one of the following that applies to the bank's investment:

The investment benefits primarily low- and moderate-income individuals.

The investment benefits primarily low- and moderate-income areas.

**2. Please indicate how the bank's investment is consistent with Part 24 requirements for investment limits under 12 CFR 24.4 by responding to the following questions.**

a. Dollar amount of the bank's investment that is the subject of this submission: \_\_\_\_\_.

b. Percentage of the bank's capital and surplus represented by the bank's investment that is the subject of this submission: \_\_\_\_\_%.

c. Percentage of the bank's capital and surplus represented by the aggregate outstanding Part 24 investments and commitments, including this investment: \_\_\_\_\_%.

d. Does this investment expose the bank to unlimited liability?

Yes  (This investment cannot be made under Part 24.)

No

**3. Please attach a brief description of the bank's investment. (See 12 CFR 24.5(a)(3)(i) and (b)(2)(i)). Include the following information in the description.**

a. The name of the community and economic development entity (CEDE) into which the bank's investment has been (or will be) made.

b. The type of bank investment (equity, debt, or other).

c. The activity or activities of the CEDE in which the bank has invested (or will invest). (See examples of qualifying investment activities described in 12 CFR 24.6 (a), (b), (c), and (d).)

d. How the investment is structured so that it does not expose the bank to unlimited liability, such as by describing the structure of the CEDE (e.g., CDC subsidiary, multi-bank CDC, multi-investor CDC, limited partnership, limited liability company, community development bank, community development financial institution, community development entity, community development venture capital fund, community development lending consortia, community development closed-end mutual funds, non-diversified closed-end investment companies, or any other CEDE) and by providing any other relevant information.

e. The geographic area served by the CEDE.

f. The total funding or other support by community development partners involved in the project (e.g., government or public agencies, nonprofits, other investors), if known.

g. Supplemental information (e.g., prospectus, annual report, Web address that contains information about the CEDE in which the investment is or will be made), if available.

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**Form Part 24****4. Evidence of qualification is readily available for examination purposes.**

The bank maintains information concerning this investment in a form readily accessible and available for examination that supports the certifications contained in this form and demonstrates that the investment meets the standards set out in 12 CFR 24.3, including, where applicable, the criteria of 12 CFR 25.23.

Yes  No

**5. Certification**

The undersigned hereby certifies that the foregoing information in this form is accurate and complete. It is further certified that the undersigned is authorized to file this form on Part 24 investments for the bank.

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Form Part 24

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**DESCRIPTION OF THE BANK'S CD INVESTMENT. (See information previously requested)**

*(Type the description of the bank's Part 24 investment here. You may type as much text as necessary. You will have access to all of MS Word's editing features.)*

**PART 26—MANAGEMENT OFFICIAL INTERLOCKS**

71. The authority citation for part 26 continues to read as follows:

**Authority:** 12 U.S.C. 93a and 3201–3208.

72. In § 26.1 revise paragraph (c) to read as follows:

**§ 26.1 Authority, purpose, and scope.**

\* \* \* \* \*

(c) *Scope.* This part applies to management officials of national banks and their affiliates.

**§ 26.2 [Amended]**

73. In § 26.2 remove paragraph (i) and redesignate paragraphs (j) through (q) as (i) through (p), respectively.

74. Revise § 26.8 to read as follows:

**§ 26.8 Enforcement.**

Except as provided in this section, the OCC administers and enforces the Interlocks Act with respect to national banks and their affiliates, and may refer any case of a prohibited interlocking relationship involving these entities to the Attorney General of the United States to enforce compliance with the Interlocks Act and this part. If an affiliate of a national bank is subject to the primary regulation of another Federal depository organization supervisory agency, then the OCC does not administer and enforce the Interlocks Act with respect to that affiliate.

**PART 27—FAIR HOUSING HOME LOAN DATA SYSTEM**

75. The authority citation for part 27 continues to read as follows:

**Authority:** 5 U.S.C. 301; 12 U.S.C. 1 *et seq.*, 93a, 161, 481, and 1818; 15 U.S.C. 1691 *et seq.*; 42 U.S.C. 3601 *et seq.*; 12 CFR part 202.

76. In § 27.1 revise paragraph (a) to read as follows:

**§ 27.1 Scope and OMB control number.**

(a) *Scope.* This part applies to the activities of national banks and their subsidiaries, which make home loans for the purpose of purchasing, construction-permanent financing, or refinancing of residential real property.

\* \* \* \* \*

77. In § 27.2 revise paragraph (c) to read as follows:

**§ 27.2 Definitions.**

\* \* \* \* \*

(c) *Bank* means a national bank and any subsidiaries of a national bank.

\* \* \* \* \*

**PART 28—INTERNATIONAL BANKING ACTIVITIES**

78. 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.*

**§ 28.11 [Amended]**

79. In § 28.11, remove the phrase “, pursuant to an agreement between the parent foreign bank and the FRB,” in paragraph (s).

**§ 28.12 [Amended].**

80. In § 28.12, remove the phrase “30th day after the OCC receives the filing,” in paragraph (e)(3) and add in its place “15th day after the close of the applicable public comment period, or the 45th day after the filing is received by the OCC, whichever is later,”.

81. In § 28.50, revise paragraph (c) to read as follows:

**§ 28.50 Authority, purpose, and scope.**

\* \* \* \* \*

(c) *Scope.* This subpart requires national banks to establish reserves against the risks presented in certain international assets and sets forth the accounting for various fees received by the banks when making international loans.

82. In § 28.51, revise paragraph (a) to read as follows:

**§ 28.51 Definitions.**

\* \* \* \* \*

(a) *Banking institution* means a national bank.

\* \* \* \* \*

**PART 31—EXTENSIONS OF CREDIT TO INSIDERS AND TRANSACTIONS WITH AFFILIATES**

83. The authority citation for part 31 is revised to read as follows:

**Authority:** 12 U.S.C. 93a, 375a(4), 375b(3), and 1817(k).

**§ 31.1 [Amended]**

84. Amend § 31.1 by removing “1817(k), and 1972(2)(G),” and adding in its place “and 1817(k),”.

85. Revise Appendix A to part 31 as follows:

**Appendix A to Part 31— Interpretations: Deposits Between Affiliated Banks**

a. *General rule.* A deposit made by a bank in an affiliated bank is treated as a loan or extension of credit to the affiliate bank under 12 U.S.C. 371c, as this statute is implemented by the Federal Reserve Board’s Regulation W, 12 CFR part 223. Thus, unless an

exemption from Regulation W is available, these deposits must be secured in accordance with 12 CFR 223.14. However, a national bank may not pledge assets to secure private deposits unless otherwise permitted by law (*see, e.g.*, 12 U.S.C. 90 (permitting collateralization of deposits of public funds); 12 U.S.C. 92a (trust funds); and 25 U.S.C. 156 and 162a (Native American funds)). Thus, unless one of the exceptions to 12 CFR part 223 noted in paragraph b. of this interpretation applies, unless another exception applies that enables a bank to meet the collateral requirements of § 223.14, or unless a party other than the bank in which the deposit is made can legally offer and does post the required collateral, a national bank may not:

1. Make a deposit in an affiliated national bank;
2. Make a deposit in an affiliated State-chartered bank unless the affiliated State-chartered bank can legally offer collateral for the deposit in conformance with applicable State law and 12 CFR 223.14; or
3. Receive deposits from an affiliated bank.

b. *Exceptions.* The restrictions of 12 CFR part 223 (other than 12 CFR 223.13, which requires affiliate transactions to be consistent with safe and sound banking practices) do not apply to deposits:

1. Made in an affiliated depository institution or affiliated foreign bank provided that the deposit represents an ongoing, working balance maintained in the ordinary course of correspondent business. *See* 12 CFR 223.42(a); or
2. Made in an affiliated, insured depository institution that meets the requirements of the “sister bank” exemption under 12 CFR 223.41(a) or (b).

**Appendix B to Part 31—[Amended]**

86. Amend Appendix B to part 31 by removing the third sentence under the heading “Exclusions to Definition.”

**PART 32—LENDING LIMITS**

87. The authority citation for part 32 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 84, and 93a.

**§ 32.1 [Amended]**

88. In § 32.1(c)(1), add the phrase “and (e), as implemented by section 223.2(a) of Regulation W” after “12 U.S.C. 371c(b)(1)”.

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

89. 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.*

90. Amend § 34.22 by:

a. Designating the existing text as paragraph (a), and by adding the following heading;

b. In newly designated paragraph (a), adding to the first sentence the words “or combination of indices” after the words “specify an index”; and

c. Adding a new paragraph (b).

The addition and revision read as follows:

**§ 34.22 Index.**

(a) *In General.* \* \* \*

(b) *Exception.* Thirty days after filing a notice with the OCC, a national bank may use an index other than one described in paragraph (a) of this section unless, within that 30-day period, the OCC has notified the bank that the notice presents supervisory concerns or raises significant issues of law or policy. If the OCC provides such notice to the bank, the bank may not use that index unless it applies for and receives the OCC’s prior written approval.

**PART 37—DEBT CANCELLATION CONTRACTS AND DEBT SUSPENSION AGREEMENTS**

91. The authority citation for part 37 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 24 (Seventh), 93a, 1818.

**§ 37.7 [Amended]**

92. Amend the last sentence in § 37.7(a) by removing the phrase “§ 37.6(b)” and adding the phrase “§ 37.6(d)” in its place.

**PART 40—PRIVACY OF CONSUMER FINANCIAL INFORMATION**

93. The authority citation for part 40 continues to read as follows:

**Authority:** 12 U.S.C. 93a; 15 U.S.C. 6801 *et seq.*

94. In § 40.1 revise the last sentence of paragraph (b)(1) to read as follows:

**§ 40.1 Purpose and scope.**

\* \* \* \* \*

(b) Scope. (1) \* \* \* These are national banks, Federal branches and

Federal agencies of foreign banks, and any subsidiaries of such entities except a broker or dealer that is registered under the Securities Exchange Act of 1934, a registered investment adviser (with respect to the investment advisory activities of the adviser and activities incidental to those investment advisory activities), an investment company registered under the Investment Company Act of 1940, an insurance company that is subject to supervision by a State insurance regulator (with respect to insurance activities of the company and activities incidental to those insurance activities), and an entity that is subject to regulation by the Commodity Futures Trading Commission.

\* \* \* \* \*

Dated: May 25, 2007.

**John C. Dugan,**

*Comptroller of the Currency.*

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