

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–2008–0004]

RIN 1557–AC79

Regulatory Review Amendments

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

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is revising its rules in order to reduce unnecessary regulatory burden, update certain rules, and make certain technical, clarifying, and conforming changes to its regulations. These revisions result 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 efficiently 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 revisions also further 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of 1996, which, among other provisions, directs the OCC to identify and, if appropriate, eliminate regulations that are outdated, unnecessary, or unduly burdensome.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: This rule is effective on July 1, 2008. National banks, and foreign banks taking actions with respect to Federal branches and agencies, may elect to comply voluntarily with any applicable provision of the rule at any time prior to this effective date.

FOR FURTHER INFORMATION CONTACT:

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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 and Summary of Proposed Rule**

On July 3, 2007, the OCC published a notice of proposed rulemaking¹ to amend a variety of our regulations to reduce or eliminate unnecessary regulatory burden, incorporate prior OCC interpretive opinions, harmonize our rules with those issued by other Federal agencies, make technical and conforming amendments to improve clarity and consistency, and conform our rules with the statutory changes made by the Financial Services Regulatory Relief Act of 2006 (FSRRA)² and section 8 of the 2004 District of Columbia Omnibus Authorization Act (DC Bank Act).³

This rulemaking results from our most recent review of our regulations to identify opportunities to streamline our rules or regulatory processes. The rulemaking also furthers the purposes of section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA),⁴ which directed the OCC and the other member agencies of the Federal Financial Institutions Examination Council to identify regulations that are outdated, unnecessary, or unduly burdensome, and to eliminate them if appropriate.⁵

The OCC received 8 comment letters in response to this proposal. Two of the commenters, a large bank and a bank trade association, expressed support for all, or almost all, of the proposed

changes. Another commenter, also a bank trade association, commended the OCC for proposing “modest changes” and expressed its hope that the OCC would seek to make more significant regulatory improvements in the future. One commenter, an individual, opposed any lessening of regulatory supervision of national banks. Six of the 8 comment letters focused on specific provisions of the proposal—those relating to part 1, investment securities (§ 1.1), operating subsidiaries (§ 5.34(e)), financial guarantees (§ 7.1017), sales of nonconvertible debt (§ 16.6), and adjustable rate mortgages (§ 34.22). These comments, and the OCC's response to them, are discussed where relevant in the section-by-section description of the final rule.

Commenters suggested changes to only a few of our proposed amendments and the OCC is adopting the remaining amendments in final form as proposed, with minor clarifying or technical changes to a few provisions, as noted in the section-by-section description.

The most significant of the amendments made by this final rule include the following:

- Amendments to part 1, which pertains 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 when an entity qualifies as an operating subsidiary;
 - 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 with greater flexibility to facilitate customers' financial transactions by

¹ 72 FR 36550.

² *Public Law 109–351*, 120 Stat. 1966 (Oct. 13, 2006).

³ *Public Law 108–386*, 118 Stat. 2228 (2004). The DC Bank Act took effect on October 30, 2004.

⁴ See EGRPRA, *Public Law 104–208*, § 2222, 110 Stat. 3009–394, 3009–314–315 (Sept. 30, 1996), codified at 12 U.S.C. 3311.

⁵ 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), published six notices seeking comment on ways to reduce unnecessary regulatory burden and has conducted outreach meetings with bankers and consumer groups. On November 1, 2007, the Federal Financial Institutions Examination Council, which includes these agencies and the National Credit Union Administration, published a Joint Report to Congress on this regulatory review process, as required by EGRPRA. 72 FR 62036 (Nov. 1, 2007). For additional information about the agencies' EGRPRA review, see <http://www.EGRPRA.gov>.

issuing financial guarantees, provided the financial guarantees are reasonably ascertainable in amount and consistent 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. The final rule also includes certain technical and conforming amendments to our rules, including:
 - Changes to part 4 (the OCC's organizational rules) and part 5 to reflect the OCC's most current organizational structure.
 - Changes to conform the OCC's regulations—at parts 5, 23 (leasing), 31 (extensions of credit to insiders and transactions with affiliates), and 32 (lending limits)—to Regulation W issued by the Federal Reserve Board,⁶ which governs transactions between Federal Reserve member banks and their affiliates and implements sections 23A and 23B of the Federal Reserve Act.⁷
 - 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 the DC Bank Act, 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.⁸

• Amendments to conform our regulations to the changes made by the 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) Require a CBCA notice to 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.
- Amendments to part 24 (community development investments) that implement section 305 of the FSRRA.

Description of Comments Received and Final Rule

Part 1—Investment Securities

Part 1 of our regulations (12 CFR part 1) prescribes the standards under which a national bank 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. This final rule clarifies the applicable standards by codifying existing precedent and provides 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.⁹ 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. To complement these specific categories, we proposed a new provision to recognize that the OCC also may determine, on a case-by-case basis, that

a national bank may acquire an investment security that is not specifically listed in the regulation, provided the OCC determines that bank's investment is consistent with the character of investment securities permitted under section 24 (Seventh) and with safe and sound banking practices. We received no substantive comments on this provision and, accordingly, it is adopted essentially as proposed, with a minor revision clarifying that investments found by the OCC to be permissible under Section 1.1(d) constitute eligible investments under 12 U.S.C. 24.

In making a determination under amended § 1.1, the OCC will consider all relevant factors, including an evaluation of the risk characteristics of the particular instrument compared to those 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 such limits or conditions as are appropriate under the circumstances.

In addition, this final rule 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.

One commenter requested that the OCC continuously update the electronic version of our annual publication of permissible activities for national banks, "*Significant Legal, Licensing, and Community Development Precedents*,"¹⁰ to add precedents issued pursuant to § 1.1, as well as other activities, more frequently than once a year. We note, however, that, in addition to this annual, cumulative summary of significant precedents, we also publish the full text of these precedents in *Interpretations and Actions*, consistent with the OCC's policy of providing public notice of significant legal opinions and other important precedents. *Interpretations and Actions* is published monthly and is available both in printed form and on the OCC's internet site at <http://www.occ.treas.gov>. We believe this method of publicizing our precedent adequately serves the purpose of providing prompt notice of our opinions and decisions to national banks and the public and, accordingly, are making no changes at this time to our schedule of updating our "*Significant Legal,*

⁶ 12 CFR part 223.

⁷ 12 U.S.C. 371c and 371c-1.

⁸ 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.

⁹ 12 U.S.C. 24 (Seventh).

¹⁰ Our most recent *Significant Legal, Licensing, and Community Development Precedents* document, dated June 2007, is available on our Web site at <http://www.occ.gov/sigpre.pdf>.

Licensing, and Community Development Precedents" publication.

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, as explained in the preamble to the proposed rule, 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 may be comparable to its exposure when it purchases shares of identically rated and marketable pooled vehicles composed of part 1 investment securities.

The proposal amended § 1.3(h) to codify OCC precedents that permit a national bank to purchase shares in investment vehicles where the underlying assets are not limited to investment securities permissible under part 1, so long as the underlying assets otherwise are bank permissible.¹¹ Specifically, the proposal deleted the phrase "under this part" both times it appears in § 1.3(h) and revised the heading to read "Pooled investments" 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. The proposal also provided that pooled investments made pursuant to § 1.3(h) must meet certain credit quality and marketability standards generally applicable to investment securities. We received no comments on this amendment and are adopting it in final form with the addition of the following clarifying language.

Specifically, the final version of § 1.3(h) includes an explicit reminder that pooled investments under this section must comply with § 1.5 and conform with applicable published OCC precedent.¹² Under, 12 CFR 1.5, when conducting investment activities described in § 1.3, a national bank must

adhere to safe and sound banking practices and the specific requirements of part 1. Thus, the bank must consider, as appropriate, the interest rate, credit, liquidity, price, foreign exchange, transaction, compliance, strategic, and reputation risks presented by a proposed activity; the particular activities undertaken by the bank must be appropriate for that bank; and the bank must conclude that the obligor can satisfy its obligations.

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.¹³ Section 1.2(f) further defines a "marketable" security as one that is: (1) Registered under the Securities Act of 1933 (Securities Act),¹⁴ (2) a municipal revenue bond exempt from registration under the Securities Act, (3) offered or sold pursuant to Securities and Exchange Commission (SEC) Rule 144A¹⁵ 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."¹⁶

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.¹⁷ The standard of marketability in the "reliable estimates" provision differs from, and is more limited 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). We proposed to harmonize these marketability standards by amending § 1.3 to reflect the same standard as in § 1.2. We received no comments on this proposal, and therefore adopt it as proposed.

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 final rule removes DC banks from the definition of "bank" set forth in § 2.2(a) to conform to the DC Bank Act.

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, central governments that are not members of the Organization for Economic Development (OECD) receive a zero percent risk weight to the extent the bank has local currency liabilities in that country. To align the rule more closely with foreign exchange risk, we proposed to amend Appendix A to part 3 by removing the current restriction on the location of the offsetting liability, thus providing a zero percent risk weight to the extent the bank has liabilities in that *currency*. We received no comments on this amendment and are adopting the changes as proposed, with a conforming technical amendment.

This final rule also removes DC banks from the definition of "bank" in § 3.2(b). Pursuant to the DC Bank Act, DC banks now will be subject to the regulatory capital requirements prescribed either by the FDIC or the Federal Reserve Board, depending on whether the DC 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 proposed rule updated § 4.4 to reflect that the Large Bank Supervision Department supervises the largest national banks under the OCC's current organizational structure. It also amended § 4.5 by updating OCC district office addresses and the geographical coverage of those offices resulting from the OCC's district office realignments. We received no comments on these changes and are adopting the changes as proposed, with additional updates to the geographical coverage of OCC district offices.

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

¹¹ 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).

¹² See, e.g. OCC Interpretive Letters No. 779 (April 3, 1997) and 911 (June 4, 2001). See also OCC BC 181 (Rev), "Purchases of Loans In Whole or In Part—Participations" (Aug. 2, 1984), and "Interagency Policy Statement on Investment Securities," 63 FR 20191 (April 23, 1998).

¹³ 12 CFR 1.2(e).

¹⁴ 15 U.S.C. 77a, et. seq.

¹⁵ 17 CFR 230.144A.

¹⁶ 12 CFR 1.2(f).

¹⁷ See 12 CFR 1.3(i)(1).

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. However, an opinion of counsel is not required for expedited applications filed by "eligible banks."¹⁸ Because our experience has been that an opinion of counsel often is not necessary to enable the OCC to conclude that the proposed fiduciary activities are permissible, we proposed to eliminate this requirement for all applications to exercise fiduciary activities, unless the OCC specifically requests an opinion. We received no comments on this amendment and adopt it as proposed. We note that the removal of this requirement 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. As the preamble to our proposed rule noted, 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.

To reduce the regulatory burden associated with these multiple filings, we proposed to eliminate subsequent

applications for recurring, temporary branches that serve the same site at regular intervals. We received no comments on this amendment, and we adopt it as proposed.

Specifically, the final rule 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,¹⁹ for one or more limited periods of time each year at a specified site during a specified recurring event. Under this final rule, if the OCC grants a national bank approval to operate an intermittent branch, no further application or notice to the OCC is required. This amendment 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 means through which to exercise their powers to conduct the business of banking. The final rule makes 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.²⁰

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. 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 would have revised this standard to provide that a national bank may invest in an operating subsidiary if it satisfies the following 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 OCC received two comments that addressed this issue. One commenter asserted that the proposal was too broad and that there are many structures that have legitimate business purposes where the bank controls a majority of the voting and operational rights but other passive or non-controlling investors have economic rights. Another commenter noted that the requirement to consolidate under GAAP would narrow the circumstances under which national banks may establish operating subsidiaries.

The OCC continues to believe that these changes are appropriate to clarify that the requirement that a national bank control its operating subsidiary encompasses the bank's control of the business activities of the subsidiary to appropriately reflect 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 operations of which are consolidated with those of the bank as an accounting matter. Therefore, the OCC has adopted the rule essentially as proposed, with a few revisions to resolve ambiguity in the proposed text.

As noted above, the first element of the proposed rule required the bank to have 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. The proposal could have been read to mean that a 50 percent voting interest in the subsidiary, without more, would have satisfied that criterion. The final rule revises the proposal to make clear that the standard has three elements: (i) The parent bank has the ability to control the management and operations of the subsidiary; (ii) the bank owns and controls more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary, or the parent bank otherwise controls the operating subsidiary and no other party controls more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary; *and* (iii) the operating subsidiary is

¹⁸ 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).

¹⁹ 12 U.S.C. 36.

²⁰ 12 CFR 5.34(e).

consolidated with the bank under GAAP.²¹ These changes help to ensure that in all circumstances a parent bank must have true operating control over an entity for it to be an operating subsidiary.

Two commenters also suggested grandfathering operating subsidiaries that were established prior to these changes. These commenters noted that to do otherwise could disrupt existing arrangements and impose administrative burdens on banks to restructure their subsidiaries to comply with the new rule.

The final rule adds a grandfathering provision responsive to these concerns. The provision makes clear that, unless otherwise notified by the OCC with respect to a particular operating subsidiary, an operating subsidiary a national bank lawfully acquired or established and operated as an operating subsidiary before the publication date of this rule will not be treated as in violation of § 5.34 as revised, provided that the bank and the operating subsidiary are, and continue to be, in compliance with the standards and requirements applicable when the bank established or acquired the operating subsidiary. This grandfathering applies only to operating subsidiaries in existence and conducting authorized activities on April 24, 2008.

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.²² Therefore, the proposal clarified that a bank may invest in an operating subsidiary organized as a limited partnership, provided it satisfies the other requirements of § 5.34.

We did not receive any comments on that provision and are adopting the change as proposed.

²¹ The OCC will address on a case-by-case basis the appropriate treatment of a national bank's investment in a subsidiary in which the bank satisfies (i) and (ii), but not (iii) because the subsidiary is not consolidated with the bank under GAAP.

²² See Corporate Decision No. 2004–16 (Sept. 10, 2004).

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 would have permitted a bank to use the after-the-fact notice procedures if the financial statements of the bank and subsidiary were consolidated under GAAP, and the bank had 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.

The final rule slightly revises the criteria for after-the-fact notices to permit the bank to use that procedure when the bank and proposed subsidiary meet (1) all the requirements for a notice that do not pertain to control, (2) the financial statements of the bank and subsidiary are consolidated under GAAP, and (3) 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; and (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 control or safety and soundness concerns. Other arrangements will be reviewed under the full application process.

The proposal also contained an additional standard for a national bank seeking to hold a limited partnership as an operating subsidiary through an after-the-fact notice. Under that additional standard, the proposed limited partnership 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). We explained that this approach would allow the OCC to review more complex arrangements through the application process.

We received two comments that addressed the after-the-fact notice procedure for limited partnerships. These commenters expressed concern that limiting after-the-fact notice in this manner would inappropriately require an application process in situations that do not present heightened complexity or risk. We agree with the commenters that the after-the-fact notice process could be modestly expanded without presenting new operational risks or policy considerations. Accordingly, we have revised the standard for investments in limited partnership operating subsidiaries to qualify for after-the-fact notice.

Under the final rule, the after-the-fact notice eligibility standards for limited partnerships are similar to those for corporate entities, except that, in the case of a limited partnership, the bank or its operating subsidiary must be the sole general partner of the limited partnership and, under the partnership agreement, the limited partners must have no authority to bind the partnership by virtue solely of their status as limited partners. This will allow banks to use the less burdensome after-the-fact notice procedures while still ensuring that transactions that raise issues of potential liability for general partners are subject to the higher scrutiny available under the application process.

In addition, the final rule adds the following to the list of activities eligible for after-the-fact notice:

- 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.²³
- Providing safekeeping for personal information or valuable confidential trade or business information, such as encryption keys, to the extent permitted by published OCC precedent.²⁴
- Payroll processing.²⁵

²³ See OCC Interpretive Letter No. 712 (Feb. 29, 1996).

²⁴ See 12 CFR 7.5002(a)(4).

²⁵ See Conditional Approval No. 384 (April 25, 2000) and Corporate Decision No. 2002–2 (Jan. 9, 2002).

- Branch management services.²⁶
- Merchant processing except when the activity involves the use of third parties to solicit or underwrite merchants.²⁷
- Administrative tasks involved in benefits administration.²⁸

The OCC has previously found these activities to be permissible for a national bank and generally to pose low safety and soundness risks. We did not receive any comments on these additional activities eligible for after-the-fact notice and are adopting the above changes as proposed.

We have determined, however, not to add to this list those activities approved for a non-controlling investment by a national bank or its operating subsidiary pursuant to 12 CFR 5.36(e)(2) because the circumstances of such non-controlling investment activities could be such that they should be evaluated on a case-by-case basis when proposed to be conducted by an operating subsidiary controlled by a national bank.

Application procedures. Current § 5.34(e)(5)(i) sets forth the rules for when a national bank must file an operating subsidiary application. The final rule modifies these provisions to make them consistent with the changes to the qualifying subsidiary and after-the-fact notice provisions of § 5.34 discussed previously. In particular, the final rule requires 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 and the ability to control the management and operations of the subsidiary by holding voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management. The final rule also requires, in the case of an application to establish a limited partnership as an operating subsidiary, that a bank provide a statement explaining why it is not eligible for the after-the-fact notice procedures. Finally, the final rule 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.

²⁶ See Conditional Approval No. 612 (Dec. 21, 2003).

²⁷ See Conditional Approvals Nos. 582 (March 12, 2003) and 583 (March 12, 2003).

²⁸ See Corporate Decision No. 98-13 (Feb. 9, 1998).

Bank Service Companies (§ 5.35)

Section 602 of the FSRRA amended the Bank Service Company Act²⁹ 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 amended 12 CFR 5.35 to reflect this change in the statutory geographic restrictions on the operations of bank service companies. It also changed "insured bank" to "insured institution" throughout the section, where relevant, to reflect the fact that savings associations now may invest in bank service companies. We received no comments on these amendments and adopt them as proposed.

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.³⁰ 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. Our proposal revised the accounting requirements needed for after-the-fact notice, added an application procedure where a bank or the proposed non-controlling investment do not qualify for the after-the-fact procedure, and made 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). We received no comments on any of these amendments to § 5.36 and adopt them as proposed, with some minor technical changes in terminology for clarification purposes and a revision to a clarifying amendment to § 5.36(b).

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.

As in the proposal, the final rule addresses this issue by removing 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 final rule also accordingly removes 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 final rule 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(e) permits use of the after-the-fact notice procedure only when the bank can make the representations and certifications required by that section.³¹

³¹ Section 5.36(e) currently requires that a written after-the-fact notice contain the following eight 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 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

²⁹ 12 U.S.C. 1861 *et seq.*

³⁰ 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.

The rule provides no procedure for a national bank to follow when it cannot provide all of the required representations and certifications. The final rule revises § 5.36 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 proposed activity does not qualify under the standards set forth in the rule (as described in § 5.36(e)(2)), or because the bank is not well capitalized or well managed (as described in § 5.36(e)(3)). The final rule does not require a national bank to file either an application or notice under this section if the investment is authorized by a separate provision of OCC regulations, such as 12 CFR part 1 (investment securities) or part 24 (community development). In these cases, a national bank would follow the procedures required by these provisions.

The final rule specifically requires the application to provide the other representations and certifications required in paragraph (e) for after-the-fact notices as well as the representation required by (e)(2) (pertaining to the OCC's prior determination that the investment is permissible) or the certification required by (e)(3) (pertaining to the bank's capital level and rating for management), as appropriate. A bank may not make a non-controlling investment in an entity if the bank cannot provide the representations or certifications that the rule requires, other than those in paragraphs (e)(2) or (e)(3). In addition, if the bank is unable to make the representation described 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.

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

enterprise in which it is investing or ensure its ability to withdraw its investment; (5) the accounting certification described in the preamble text (which this final rule removes); (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 final rule removes this accounting certification); 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.

applicable legal standards and appropriate supervisory requirements.

The proposal made two conforming changes to the scope of § 5.36(b) to conform to these changes. We have revised one of these changes in the final rule. This change would have removed the last sentence of § 5.36(b), which currently provides that other investments authorized under § 5.36 may be reviewed on a case-by-case basis. After further review, we have decided to maintain this sentence with minor technical revisions, as the scope section covers all equity investments not governed by other OCC regulations, not solely non-controlling investments.

DPC assets. As in the proposal, the final rule 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 § 5.34, 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 final rule 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 office³² 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

³² 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.

accordance with OCC policies contained in guidance issued by the OCC regarding the activities.

The final rule also amends § 5.36 to clarify that an application or notice is not required when a national bank acquires DPC assets. This change conforms 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 final rule streamlines the application process for a national bank seeking OCC approval of a change in its permanent capital. The OCC did not receive any comments on this change and we are adopting it as proposed.

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 final rule amends § 5.46(i)(2) to change the expedited review period from 30 days to 15 days.

The final rule 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. 57.³³ Under the final rule, a national bank seeking to increase permanent capital continues to be required to send a notice to the OCC, but the bank will no longer receive a paper certification from the OCC. The OCC will deem the transaction approved and certified by operation of law seven days after our receipt of the bank's notice. The OCC intends to update the notification and certification procedures for increases in permanent capital in the Capital and Dividends Booklet of the *Comptroller's Licensing*

³³ 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.

Manual and on E-Corp (the OCC's electronic filing system) to reflect this final rule.

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 any 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.

We proposed to amend § 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 amended § 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. We did not receive any comments on these amendments and adopt them unchanged in the final rule.

As noted in the preamble to the proposed rule, 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 conforms our regulations to the procedures regarding control by family members in these transactions set forth in OTS and Federal Reserve Board regulations. We intend to amend the *Comptroller's Licensing Manual* to address the process by which an applicant can rebut this presumption.³⁴

³⁴ See 12 CFR 574.4 (OTS) and 12 CFR 225.41(b)(3) and 225.41(d) (Federal Reserve Board).

The proposed rule also made two amendments to § 5.50 to implement provisions of the FSRRA. We received no comments on these amendments and adopt them as proposed. First, section 705 of the FSRRA amended 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 final rule 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.

Second, sections 702 and 716 of the FSRRA amended 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 final rule 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 proposed rule made the following conforming and technical changes to part 5. None of the commenters addressed these changes and we adopt them in the final rule as proposed.

Definition of national bank (§ 5.3(j)). This amendment removes the reference to DC banks from the definition of "national bank" found in § 5.3(j). As a result, 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 final rule 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. The final rule amends § 5.13(c) to 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 final rule replaces the title "Deputy Comptroller for Bank Organization and Structure" with the title "Deputy Comptroller for Licensing" to reflect 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 required by OCC policy or the terms of the National Bank Act.³⁵

³⁵ 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.

Accordingly, the final rule 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 qualifies as a body corporate under the National Bank Act by filing articles of association and an organization certificate, has filed a completed charter application, 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*.

The final rule also amends paragraph (i)(3) of § 5.20, which requires the organizing group to designate a spokesperson to represent the group in its contacts with the OCC, by replacing the term "spokesperson" with the term "contact person" each time that term appears. This change aligns 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)³⁶ and the Community Reinvestment Act of 1977 (CRA).³⁷ 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 final rule revises the wording of § 5.33(e)(1) to make 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)³⁸ 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 final rule 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 institution is a national bank. The final rule 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 final rule corrects a statutory citation in paragraph (g)(3)(i).

The final rule 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 final rule adds a reference in this paragraph to 12 U.S.C. 214a, 214b, and 214c to cover these transactions. It 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.³⁹ This change eliminates any implication in this paragraph that the procedures of 12 U.S.C. 215 or 215a are intended to apply to branch acquisitions.

Finally, we are amending § 5.33 to specify that the definitions set forth in § 5.33(d) are only applicable to § 5.33, and are revising 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 final rule makes 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.⁴⁰

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). The final rule adds a cross-reference to Regulation W in the definition of "affiliate" at § 5.39(d)(1) and amends § 5.39(h)(5) to reflect this exception in Regulation W's definition of financial subsidiary.

In addition, the final rule 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), we are amending § 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).

We also are adding 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.⁴¹ Section 5.50, however, does not include one of the procedures required by section 1817(j) relating to changes in management

³⁶ 12 U.S.C. 1828(c).

³⁷ 12 U.S.C. 2901 *et seq.*

³⁸ 15 U.S.C. 78l(b) or 78l(g).

³⁹ *Public Law* 103–328, 108 Stat. 2338 (Sept. 29, 1994).

⁴⁰ 12 U.S.C. 371c and 371c–1.

⁴¹ Section 5.50 covers uninsured national banks as well as insured national banks.

officials following a change in control. This omission may be misleading to banks that consult our rules 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. The final rule adds a new paragraph to § 5.50(h) to incorporate 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 amended 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 final rule 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 issuance 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 eliminated this requirement and makes other minor changes to clarify and simplify dividend calculations.

The final rule 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 final rule 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. 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. The final rule also clarifies how to calculate permissible dividends applying the carry-back interpretation described in Interpretive Letter No. 816. The amendment 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 final rule also makes a technical amendment to 12 CFR 5.46, governing changes in permanent capital, to reflect that section 60 as amended by the FSRRA 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 added a new subsection authorizing national banks to guarantee financial obligations of a customer, subsidiary, or affiliate under additional circumstances, provided the amount of the bank's obligation is reasonably ascertainable and otherwise consistent with applicable law.

As explained in the preamble to the proposed rule, 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.⁴²

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.⁴³ 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

⁴² See OCC Interpretive Letter No. 937 (June 27, 2002).

⁴³ 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.") and 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).

to provide financial services in evolving markets.⁴⁴

In the preamble to the proposed rule, we described the regulatory change as authorizing a national bank to act as a guarantor or surety provided the guaranty or surety is financial in nature, reasonably ascertainable, and otherwise consistent with applicable law. One commenter asked that we define or modify the terms “financial in nature,” “reasonably ascertainable in amount,” and “complies with applicable law.” Specifically, it recommended that we define “financial in nature” to reference only those activities determined by the Federal Reserve Board and Treasury Department to be “financial in nature” as required under 12 U.S.C. 1843(k)(2)(A), require that the risk in such transactions be “ascertainable as to amount” rather than “reasonably ascertainable in amount,” and specifically list those laws that apply to financial guarantees. For the following reasons, we have not incorporated these suggestions in the regulatory text.

First, the regulatory text as proposed, and in this final rule, provides that a national bank may “*guarantee financial obligations* of a customer, subsidiary, or affiliate” provided that the other elements of the standard are satisfied (emphasis added). The text does not use the phrase “financial in nature.” That phrase appears only in the preamble and was intended merely to distinguish the types of guarantees referenced in the amendment which are of a financial character from other non-financial guarantees, which are not made permissible by the amendment. The phrase was not intended to connote the range of activities made permissible for financial holding companies or financial subsidiaries pursuant to the Gramm-Leach-Bliley Act,⁴⁵ and our preamble reference to the Gramm-Leach-Bliley Act was intended only to demonstrate that guaranteeing a financial obligation is itself an activity that Congress has recognized as permissible and appropriate for a financial services firm. However, to eliminate any uncertainty about the scope of the guaranty authority described in subsection (b), we have added to the regulation language clarifying that only an obligation that is financial in character is permissible.

The final rule also retains the requirements, without change, that the amount of the bank’s obligation is

“reasonably ascertainable in amount” and “otherwise consistent with applicable law.” The requirement that the guaranty or surety be “reasonably ascertainable in amount” 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. Moreover, the statement that the guaranty or surety must be “consistent with applicable law” recognizes that other provisions of law may be applicable to particular transactions. As mentioned in the preamble to the proposal, these 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) and limitations on transactions between a bank and its affiliates (sections 23A and 23B of the Federal Reserve Act). It is not feasible to inventory all laws that could apply to the financial guaranty transactions permitted under the amendment as the commenter requested, and we believe the examples suffice to make clear that other laws may restrict this type of transaction. Finally, we reiterate the point made in the preamble to the proposal that the limitations on transactions that would constitute “insurance” as principal pursuant to section 302 of the Gramm-Leach-Bliley Act are unaffected by the amendment.⁴⁶

The preamble to the proposal also indicated that the OCC would consider whether to provide guidance on risks and risk management in connection with the issuance of guarantees by national banks. One commenter responded by requesting that we stipulate specific risk management standards for any financial guaranty and surety powers we approve, including, among other things, requirements that the financial guaranty is prudently priced and appropriately capitalized and reserved. Another commenter noted that guidance on risks and risk management would be helpful to the extent that regulatory expectations vary depending on the method by which a national bank acts as guarantor or surety. However, this commenter recommended that we narrowly tailor this guidance to focus on related regulatory expectations and not dictate terms of agreements entered into by private parties.

We agree that adequate risk measurement and management processes tailored to manage and control the risks of financial guaranty activities are necessary to ensure that a

bank is conducting its financial guaranty activity in a safe and sound manner. These include appropriate standards set by the board of directors, managerial and staff expertise, policies and operating procedures, risk identification and measurement, and ongoing evaluation of the specific guarantees issued; management information systems; and an effective risk control function that oversees and ensures the appropriateness of the risk management process. Such risk measurement and risk management processes should be of a scope and scale appropriate for the nature and complexity of the bank’s financial guaranty activities.

Another commenter suggested that we require national banks to conduct financial guaranty business through separately capitalized affiliates that are prohibited from accepting deposits. The OCC declines to adopt this approach. As indicated above, acting as a guarantor involves the core banking powers of both lending and acting as financial intermediary and is therefore a permissible banking activity that need not be conducted only in a separate legal entity. OCC rules prescribe the appropriate regulatory capital treatment for guarantor activities. Moreover, the circumstances under which the revised provision authorizes guarantor activities—the financial guaranty is reasonably ascertainable in amount and complies with applicable law—are safeguards promoting the conduct of these transactions in a safe and sound manner. Accordingly, it is not necessary to require national banks to conduct this activity in a separately capitalized affiliate.

Two commenters specifically addressed capital requirements for guarantees permitted under this amendment. One commenter recommended that, because of the “financial equivalence” of financial guarantees and letters of credit, the capital requirements for a financial guaranty issued by a national bank should be the same as the capital requirements applicable to a letter of credit in a stated amount equal to the maximum, as opposed to the expected or “reasonably anticipated,” obligation of the bank under the financial guaranty. Another commenter asked us to clarify that current capital standards governing recourse and direct credit substitutes apply to financial guarantees.

Under the current risk-based capital guidelines, the risk associated with a bank’s guarantees is generally based on the face amount of the guaranty, where the face amount is usually measured as

⁴⁴ See *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995).

⁴⁵ *Public Law 106–102*, 113 Stat. 1338 (Nov. 12, 1999).

⁴⁶ *Public Law 106–102*, 113 Stat. 1338, 1407 (Nov. 12, 1999), codified at 15 U.S.C. 6712.

the stated maximum contractual amount of that guaranty.⁴⁷ However, there are instances where the exposure measure might be less than the face amount; for example, when the guaranty is conditional or contingent upon the fulfillment of other criteria.

As to recourse and direct credit substitutes, the OCC notes that the capital regulation for securitization exposures applies to all direct credit substitutes, which are defined to include guarantees and financial standby letters of credit that provide credit support to securitizations. Also, with respect to certain banks that will be subject to the Internal Ratings Based and Advanced Measurement Approaches (generally known as “Basel II”), the capital treatment for all guaranty exposures is governed by the advanced Internal Ratings Based Approach.⁴⁸

Accordingly, for the reasons set forth above, we adopt the proposed financial guarantor provision, with the one clarifying change described previously.

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 amended 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 Corporation Act and most States’ corporate codes, which provide that cumulative voting is optional. Our proposal amended 12 CFR 7.2006 to incorporate this change. We received no comments on this amendment and adopt it as proposed.

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 included several additions to this regulation. None of the comment letters addressed these electronic banking-related amendments and we adopt them in the final rule as proposed, with updates to the citations listed in the

footnote to § 7.1016. These amendments are described below.

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 are amending § 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;⁴⁹ Internet access and e-mail provided on a non-profit basis as a promotional activity;⁵⁰ advisory and consulting services on electronic activities where the services are incidental to customer use of electronic banking services;⁵¹ 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, Public Law 108–100 (12 U.S.C. 5001–5018).⁵² 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.

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 amending § 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 proposal also amended the footnote in § 7.1016 to include a reference to the International Chamber of Commerce (ICC) 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 credit. We have updated this citation in the final rule to reflect the new version of the ICC’s Uniform Customs and Practices for Documentary Credits, Publication No. 600, which became effective in July 2007. We also have made a corresponding update to the citation to the ICC’s Uniform Customs and Practices for Documentary Credits already included in the current footnote.

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.⁵³ This final rule 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.⁵⁴ 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.⁵⁵

Our proposal asked commenters to identify any other areas of subpart E that should be revised to recognize the evolving role of technology. We received no comments in response to this request and have not made any additional amendments to subpart E in this final rule.

⁴⁹ See OCC Corporate Decision No. 2002–13, July 31, 2002.

⁵⁰ See OCC Conditional Approval No. 612, Nov. 21, 2003.

⁵¹ See OCC Corporate Decision No. 2002–11, June 28, 2002.

⁵² See OCC Interpretive Letter No. 1036, Aug. 10, 2005.

⁵³ 12 CFR 7.5004.

⁵⁴ See, e.g., Corporate Decision 2003–6, March 17, 2003.

⁵⁵ See 12 CFR 7.5001(c) and 7.5001(d).

⁴⁷ 12 CFR part 3, Appendix A.

⁴⁸ See, generally 12 CFR part 3, Appendix C, part IV (Risk-Weighted Assets for General Credit Risk) and part V (Risk-Weighted Assets for Securitization Exposures), 72 FR 69288 (December 7, 2007).

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 proposed to amend its transfer agent rule at § 9.20 to clarify the procedures applicable to national bank transfer agents. None of the comment letters addressed these amendments, and the final rule includes these amendments as proposed.

Specifically, 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.

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 final rule 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 with the OCC. 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 with the OCC as previously required.

In addition, to reflect the SEC's revision and renumbering of its transfer agent rules, the final rule removes the specific citations in § 9.20(b) to the SEC's rules in favor of a more general reference. This 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.

Part 10—Municipal Securities Dealers

As in our proposal, the final rule amends § 10.1(a) to eliminate the application of part 10 to DC banks, consistent with the DC Bank Act.

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)). As in the proposal, this final rule 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.⁵⁶ However, in July 2004 the SEC amended Rule 17j-1 to expand this ten-day deadline to 30 days.⁵⁷

To conform part 12 with the current SEC filing deadline in SEC Rule 17j-1, the proposed rule amended § 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. We received no comments on this change and adopt it as proposed. This amendment will enable bank employees that are subject to both SEC Rule 17j-1 and 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.

⁵⁶ 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).

⁵⁷ 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. The proposed rule made a number of amendments to Part 16. We received only one comment on these part 16 amendments, relating to § 16.6 (sale of nonconvertible debt). As explained below, we decline to revise our proposed amendment to § 16.6, and adopt all of our amendments to part 16 as proposed.⁵⁸

Definitions (§ 16.2)

As in the proposal, the final rule eliminates DC banks from the definition of "bank" in § 16.2(b), consistent with the DC Bank Act.

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 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. Our proposal amended § 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, would continue to apply to all bank sales of nonconvertible debt, whether issued in certificate or book entry form.

We received one comment on this proposed amendment that recommended that we also remove the requirements in § 16.6 that the debt be offered and sold only to accredited investors and sold in minimum denominations of \$250,000, as these requirements do not apply to State member banks and State-licensed branches of non-U.S. banks. We decline to make this change. These requirements—sales only to accredited investors and only in a minimum denomination of \$250,000—serve as important investor/consumer protection tools and foster safe and sound banking practices. Therefore, the final rule makes no changes from the proposal in this regard.

⁵⁸ We note that the OCC has made an additional amendment to Part 16 in a separate rulemaking. This amendment reduces unnecessary regulatory burden by amending § 16.15 to provide a general waiver of certain requirements for organizing groups seeking to establish a national bank charter. See 73 FR 12009 (March 6, 2008).

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.⁵⁹ 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.⁶⁰

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.⁶¹ Accordingly, as proposed, we have eliminated 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. As in the proposal, the final rule resolves this 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 final rule 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.

As we noted in the preamble to the proposed rule, these requirements parallel the conditions that must be satisfied in order for securities issued in connection with an acquisition by a holding company of a bank (pursuant to section 3(a) of the Bank Holding Company Act of 1956) to be eligible for exemption from the registration requirements of section 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 final rule also makes conforming amendments to part 16 by amending § 16.5(a) to clarify that the exemption under section 3(a)(12) of the Securities Act is not available 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.⁶² 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.⁶³ 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.⁶⁴ The OCC adopted this periodic and current reporting requirement in consideration of the interests of potential purchasers in a bank's public offering to have 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 apply 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.

As in the proposal, the final rule eliminates § 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 will be subject to

⁶² See Exchange Act § 12(i), 15 U.S.C. 78l(i), 12 CFR part 335, and 12 CFR part 11.

⁶³ Section 12(g) of the Exchange Act also requires a bank to have more than \$1 million of assets.

⁶⁴ 59 FR 54789 (Nov. 2, 1994).

⁵⁹ 17 CFR 230.501 *et seq.*

⁶⁰ 17 CFR 230.503.

⁶¹ Specifically, Form D serves a useful purpose for the SEC as 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).

the Exchange Act periodic and current reporting requirements.⁶⁵ We also make a conforming change to § 16.6 by deleting the reference to § 16.20 in that section.

As noted in the preamble to our proposal, this change will not significantly diminish financial information about a bank that will be available to investors, as 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), is publicly available to investors. This change 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 Act⁶⁶ and our proposed rule amended part 19 to reflect these changes. We also proposed to update the titles of OCC officials referenced in §§ 19.111 and 19.112 and to eliminate the applicability of part 19 to DC banks by deleting a reference to DC banks in the definition of "institution" in § 19.3(g) and in the scope section of subpart P, § 19.241, which relates to the removal, suspension, and debarment of accountants from performing audit services. No commenter discussed these amendments, and we adopt them as proposed, with two technical amendments, as discussed below.

More specifically, section 303 of the FSRRA changed 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 12 U.S.C. 1818(e)(4) 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 repealed 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. Our final rule amends § 19.100, pertaining to OCC adjudications, to reflect this 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.⁶⁷ Section 708 of the FSRRA revised 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 clarified 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 clarified 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 final rule amends §§ 19.110, and 19.111, and 19.113 to conform to these amendments. We also have made a technical correction to our amendment to § 19.111, adding back in language inadvertently removed from our current rule relating to the time period allowed for an institution-affiliated party to request a hearing. In addition, the final rule includes a technical amendment to both §§ 19.110 and 19.111 not included in the proposed rule. Specifically, we are inserting the phrase "pursuant to 12 U.S.C. 1818(g)" in these two paragraphs to clarify that these provisions provide procedures for suspensions and removals of institution-affiliated parties charged with a felony.

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 commit such acts. Subpart B ensures that national banks file a Suspicious Activity Report when 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.

As in the proposed rule, the final rule removes references to DC banks in the scope section of part 21 to clarify that part 21 no longer applies to DC banks, pursuant to the DC Bank Act.

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. As in the proposed rule, this final rule 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. The proposal added 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. We proposed this change 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. The proposal also added to § 23.6 a cross-reference to 12 CFR part 32, which implements 12 U.S.C. 84, for consistency in reader reference. We adopt these amendments as proposed, with minor corrections to the regulatory text.

Part 24—Community Development Investments

The FSRRA made a number of changes to section 24 (Eleventh), the authorizing statute for 12 CFR part 24. 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

⁶⁵ See Exchange Act § 12(i), 15 U.S.C. 78l(i) and 12 CFR part 11.

⁶⁶ 12 U.S.C. 1818.

⁶⁷ *Id.* at 1818(g).

“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).” 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.⁶⁸ In addition, the FSRRA 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 revised part 24 to conform to these changes. In addition, the proposal made changes to the procedure that applies when a national bank requests OCC approval to exceed the investment limit, and made a number of conforming and technical changes to part 24. The commenters did not address these amendments to part 24. We therefore adopt them in the final rule as proposed, with the exception of § 24.2(c) in which we correct a drafting error. These amendments are described below.

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

The final rule amends the definition of a CEDE in § 24.2(c) to implement the FSRRA change to the public welfare test. Paragraph (c) now 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”. We also have made a technical correction to the **Federal Register** formatting instructions, which in the proposed rule had inadvertently removed the remaining part of this definition that contained a non-exclusive list of examples of the types of entities that may be CEDEs. The final rule replaces this text.

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

As indicated above, 12 U.S.C. 24 (Eleventh) now 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 final rule 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.” As we noted in the preamble to the proposed rule, this 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.⁶⁹

Public Welfare Investments (§§ 24.3, 24.1)

The final rule revises § 24.3, which contains the authorization to make investments pursuant to section 24 (Eleventh), to conform with the changes made by the FSRRA. The final rule also adds a new § 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, 2006.⁷⁰

Investment Limits (§ 24.4)

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

After-the-Fact Notice and Prior Approval Procedures (§ 24.5)

The final rule 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 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.

As indicated in the preamble to the proposed rule, 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 final rule 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. In other words, under this new, simpler procedure, the bank is not required to tie its written request to exceed the 5 percent limit 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, revised § 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 final rule revises § 24.6 as necessary to reflect the revision of the statutory standard made by section 305 of the FSRRA. The final rule also makes conforming amendments to § 24.6 to clarify that the examples of qualifying

⁶⁸ FSRRA, § 305, 120 Stat. at 1970–71.

⁶⁹ 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).

⁷⁰ 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).

public investments include investments that benefit primarily low- and moderate-income areas or individuals and that: (1) Finance minority- and women-owned small businesses or small farms; (2) provide technical assistance for minority- and women-owned small businesses; or (3) are made in minority- and women-owned depository institutions. As stated in the preamble to the final rule, 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.⁷¹ In addition, the final rule 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 final rule 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 final rule 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) that updates a cross-reference to the definitions of "low-income" and "moderate-income" in § 25.12.
- Amendments to § 24.5 that direct national banks to submit after-the-fact notices and investment proposals needing prior approval to the OCC's Community Affairs Department, instead of to the Director, Community Development Division, and that permit banks to submit these materials via e-mail, fax, or electronically through National BankNet, in addition to the mail. We also are correcting the format of a citation to 12 U.S.C. 24 (Eleventh) in paragraph (a)(1).
- An amendment to § 24.6(b)(2) that replaces the phrase "low- or moderate-income" with "low- and moderate-income," which is consistent with how that phrase appears throughout part 24.
- A conforming technical amendment to § 24.6(d)(3) that would permit other public welfare investments, including investments of a type determined by the OCC to be permissible under the revisions to part 24. Grandfathered

investments that are subject to statutes and regulations in effect prior to October 13, 2006 would not be affected.

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)⁷² which generally prohibits a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anticompetitive effect.⁷³ As in the proposal, this final rule 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. As proposed, the final rule removes DC banks from the scope of part 27 in § 27.1(a) and the definition of "bank" in § 27.2(c).

Part 28—International Banking Activities

The proposed rule made three changes to part 28, which sets forth the OCC's rules on international banking activities of national banks. We received no comments on these changes and adopt them as proposed.

The first amendment 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,

⁷² 12 U.S.C. 3201 *et seq.*

⁷³ 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 amended part 26 to reflect this FSRRA provision through a separate rulemaking conducted jointly with those agencies. The OCC and the other Federal banking agencies issued a final rule implementing this change on July 16, 2007. See 72 FR 38753.

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. We note that this change 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.

Second, we are making 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, as noted in the preamble to the proposed rule, 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 final rule 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.

Finally, we are eliminating 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 final rule eliminates 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

⁷¹ See 12 U.S.C. 2907(b)(1)–(3).

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 proposed to remove our interpretation on that issue from Appendix A to part 31.

In addition, we proposed 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 proposed 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 removed 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 made 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 removed this inaccuracy.

None of the commenters addressed these amendments to part 31, and we adopt them as proposed.

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 authorized a national bank (as well as an insured State member bank) 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.

The proposal added 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 directly cites the specific statute that defines an affiliate to include a financial subsidiary as well as the implementing provision of Regulation W. We received no comments on this amendment and adopt it as proposed.

This amendment to § 32.1 makes 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.⁷⁴ 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. The proposal amended § 34.22 to provide national banks with additional flexibility with respect to the indices upon which ARM rates may be based. Specifically, the amendment permitted 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 permitted 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

⁷⁴ 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 exempted 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.

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.

We received one comment on this amendment to Part 34, which requested that we clarify that national banks may purchase, as well as originate, loans that use indices other than those permissible under the current rule. The commenter stated that this would permit the OCC to exercise the same level of oversight and supervision with regard to purchases as applies to originations and to ensure that the indices on which purchased ARM loans are based are also consistent with the principles of safety and soundness and fairness and transparency to the borrower.

Part 34 currently addresses a national bank’s purchase of loans that do not conform with the requirements of the part. Generally, loans purchased from unrelated parties are not subject to the ARM criteria specified by part 34, but loans acquired from a subsidiary or an affiliate are subject to those standards. Section 34.21(b) currently provides that:

A national bank may purchase or participate in ARM loans that were not made in accordance with this part, except that loans purchased, in whole or in part, from an affiliate or subsidiary must comply with this part. For purposes of this paragraph, the terms affiliate and subsidiary have the same meaning as in 12 U.S.C. 371c.

Pursuant to § 34.21(b), the index requirements (and the no-objection procedure added by the draft final rule) apply to ARM loans originated by operating subsidiaries. This is consistent with provisions elsewhere in our rules that require operating subsidiaries to conduct activities subject to the same standards as apply to the parent bank.⁷⁵ Consequently, an operating subsidiary should not have nonconforming loans available for purchase by its parent bank unless the bank or operating subsidiary had provided notice to the OCC pursuant to our amendment to § 34.22, and not received a disapproval from the OCC to use an index other than that specified in § 34.22(a).

Section § 34.21(b) also provides that loans that a national bank purchases from an affiliate also must comply with the index requirements. Alternatively, a bank contemplating the purchase of nonconforming loans from an affiliate

⁷⁵ See 12 CFR 34.1, 5.34(e).

could comply with the no-objection procedure by submitting a notice prior to the purchase of the nonconforming loans. Therefore, further amendment to part 34 is not necessary in order to apply the prior notice and no-objection process of amended § 34.22 to ARM loans purchased from subsidiaries and affiliates.

Section 34.21(b) does not apply the index requirements of § 34.22 to the purchase of loans from *nonaffiliates*. The final rule retains this approach with the result that a national bank still may purchase or participate in ARM loans originated by unaffiliated lenders that do not conform with the index requirements of the rule. However, we have added language to 12 CFR 34.21 emphasizing that purchases of loans from any person or entity, whether or not the seller is a subsidiary or affiliate of the bank, must be undertaken prudently and are subject to standards contained in OCC rules and guidance regarding the purchasing of loans. For example, standards are contained in “OCC Guidelines Establishing Standards for Residential Mortgage Lending Practices” set forth in Appendix C of 12 CFR part 30;⁷⁶ OCC Banking Circular No. 181;⁷⁷ the

⁷⁶ Specifically, these standards and practices contained in these Guidelines include: (1) Criteria for entering into and continuing relationships with intermediaries and originators, including due diligence requirements; (2) underwriting and appraisal requirements; (3) standards related to total loan compensation and total compensation of intermediaries, including maximum rates, points, and other charges, and the use of overages and yield-spread premiums, structured to avoid providing an incentive to originate loans with predatory or abusive characteristics; (4) requirements for agreements with intermediaries and originators, including with respect to risks identified in the due diligence process, compliance with appropriate bank policies, procedures and practices and with applicable law (including remedies for failure to comply), protection of the bank against risk, and termination procedures; (5) loan documentation procedures, management information systems, quality control reviews, and other methods through which the bank will verify compliance with agreements, bank policies, and applicable laws, and otherwise retain appropriate oversight of mortgage origination functions, including loan sourcing, underwriting, and loan closings; and (6) criteria and procedures for the bank to take appropriate corrective action, including modification of loan terms and termination of the relationship with the intermediary or originator in question. See 12 CFR part 34, Appendix C, § III(E).

⁷⁷ Banking Circular No. 181 specifically provides that the absence of satisfactory controls over risk may constitute an unsafe or unsound banking practice and thus cause for the OCC to seek appropriate corrective action through its administrative remedies. Satisfactory controls over the purchase of loans and participations in loans ordinarily include, but are not limited to: (1) Written lending policies and procedures governing these transactions; (2) an independent analysis of credit quality by the purchasing bank; (3) agreement by the obligor to make full credit information

“Interagency Guidance on Nontraditional Mortgage Product Risks”;⁷⁸ and the “Interagency Statement on Subprime Mortgage Lending”.⁷⁹

Accordingly, we adopt the final rule as proposed, with the clarifying amendment to § 34.21, described above.

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.⁸⁰ 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). The final rule 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 final rule amends the scope section, § 40.1(b), to eliminate the applicability of part 40 to DC banks.

Effective Date of Final Rule

As noted above, the effective date of this final rule is July 1, 2008. However, national banks, and foreign banks taking actions with respect to Federal branches and agencies, may elect to comply voluntarily with any applicable provision of the final rule at any time prior to the effective date.⁸¹

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 § 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

available to the selling bank; (4) agreement by the selling bank to provide available information on the obligor to the purchaser; and (5) written documentation of recourse arrangements outlining the rights and obligations of each party. See OCC BC 181 (Rev), “Purchases of Loans In Whole or In Part-Participations” (Aug. 2, 1984).

⁷⁸ 71 FR 58609, 58618 (Oct. 4, 2006).

⁷⁹ This statement sets forth expectations for sound lending practices and clear communications with borrowers with respect to subprime mortgage products and lending practices. See 72 FR 37569 (July 10, 2007).

⁸⁰ 67 FR 58962.

⁸¹ See 5 U.S.C. 553(d)(1), which provides that a delayed effective date is not required for a rule that reduces burden or relieves restrictions, and 12 U.S.C. 4802(b)(2), which permits voluntary compliance prior to the effective date of certain rules.

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 final rule 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 § 605(b) of the RFA, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

Executive Order 12866

The OCC has determined that this final rule 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 rule 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), 44 U.S.C. 3501 *et seq.*, 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 final rule were submitted to and preapproved by OMB at the proposed rule stage under OMB control numbers 1557–0014 (Part 5 and Comptroller’s Licensing Manual), 1557–0120 (Part 16, Securities Offering Disclosure Rules), 1557–0194 (Part 24, Community and Economic Development Entities, Community Development Projects, and Other Public Welfare Investments), and 1557–0190 (Part 34, Real Estate Lending and Appraisals). Following publication of this final rule, OMB’s preapproval will become final.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. If a budgetary impact statement is required, § 205 of the Unfunded Mandates Act also

requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that this final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, final rule is not subject to § 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.

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

National banks.

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 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 section heading;
- 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 in this part 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 12 U.S.C. 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. Investment securities that the OCC determines are permissible in accordance with this paragraph constitute eligible investments for purposes of 12 U.S.C. 24.

■ 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); 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 additions read as follows:

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

* * * * *

(h) * * *

(3) Investments made under this paragraph (h) must comply with § 1.5 of this part, conform with applicable published OCC precedent, and 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.

* * * * *

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).

(b) *Bank* means a national banking association.

* * * * *

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

Appendix 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. Any amount of such claims that exceeds the amount of the bank’s liabilities in that currency is assigned to the 100% risk category of section 3(a)(4) of this appendix.

* * * * *

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 the 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 10173–0002.	Connecticut, Delaware, District of Columbia, northeast Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, 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, northeast and southeast Iowa, central Kentucky, Michigan, Minnesota, eastern Missouri, North Dakota, 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, central and western Iowa, Kansas, western Missouri, Montana, Nebraska, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington, Wyoming, and Guam.

* * * * *

§ 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, an organization certificate, and a completed charter application 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. Redesignate paragraph (e)(3)(i) as paragraph (e)(3); and
 - g. Removing 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,”; and
 - 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 as follows:
 - a. Add introductory text at the beginning of paragraph (d);
 - b. Revise the introductory text in paragraph (e)(1);
 - c. Redesignate paragraphs (e)(1)(i), (e)(1)(i)(A), (e)(1)(i)(B), (e)(1)(ii), (e)(1)(iii), (e)(1)(iv), and (e)(1)(v) as paragraphs (e)(1)(i)(A) introductory text, (e)(1)(i)(A)(1), (e)(1)(i)(A)(2), (e)(1)(i)(B), (e)(1)(i)(C), (e)(1)(ii) and (e)(1)(iii) respectively;
 - d. Add a new 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)(i)(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 replacing it with a semicolon;
 - v. Revising paragraph (e)(5)(vi) introductory text;
 - vi. Removing the word “and” at the end of paragraph (e)(5)(vi)(B);
 - vii. Redesignating paragraph (e)(6) as paragraph (e)(7);
 - viii. Replacing the period with a semicolon and adding the word “and” at the end of (e)(5)(vi)(C); and
 - ix. Adding new paragraphs (e)(5)(ii), (e)(5)(v)(Z), (e)(5)(v)(AA), (e)(5)(v)(BB), (e)(5)(v)(CC), (e)(5)(v)(DD), (e)(5)(v)(EE), (e)(5)(v)(FF), (e)(5)(vi)(D), and (e)(6).

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;

(B) The parent bank owns and controls more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary, or the parent bank otherwise controls the operating subsidiary and no other party controls more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary; and

(C) 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, limited liability company, or limited partnership; and

(3) The bank:

(i) Has the ability to control the management and operations of the subsidiary by holding voting interests sufficient to select the number of directors needed to control the subsidiary’s board and to select and terminate senior management (or, in the case of a limited partnership, has the ability to control the management and operations of the subsidiary by controlling the selection and termination of senior management);

(ii) Holds more than 50 percent of the voting, or equivalent, interests in the subsidiary, and, in the case of a limited partnership, the bank or an operating subsidiary thereof is the sole general partner of the limited partnership, provided that under the partnership agreement, limited partners have no authority to bind the partnership by virtue solely of their status as limited partners; and

(iii) Is required to consolidate its financial statements with those of the

subsidiary 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 and the ability to control the management and operations of the subsidiary by holding voting interests sufficient to select the number of directors needed to control the subsidiary’s board and to select and terminate senior management. In the case of a limited partnership that does not qualify for the notice procedures set forth in paragraph (e)(5)(i), the bank should provide a statement explaining why it is not eligible. 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), databases, advice and access to such services, facilities, databases and advice, for the parent bank and for others, pursuant to 12 CFR 7.5006 to the extent permitted by published OCC precedent;

(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; and

(FF) Performing administrative tasks involved in benefits administration.

(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) and (3) of this section are satisfied.

(6) *Grandfathered operating subsidiaries.* Notwithstanding the requirements for a qualifying operating subsidiary in § 5.34(e)(2) and unless otherwise notified by the OCC with respect to a particular operating subsidiary, an entity that a national bank lawfully acquired or established as an operating subsidiary before April 24, 2008 may continue to operate as a national bank operating subsidiary under this section, provided that the bank and the operating subsidiary were, and continue to be, conducting authorized activities in compliance with the standards and requirements applicable when the bank established or acquired the operating subsidiary.

* * * * *

■ 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 of 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. Amend § 5.36 as follows:

■ a. Add “application or” before “notice” in paragraph (b);

■ b. Revise 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); and

■ g. Add new paragraphs (f) and (g).

The additions and revisions read as follows:

§ 5.36 Other equity investments.

* * * * *

(b) * * * Other permissible equity investments may be reviewed on a case-by-case basis by the OCC.

* * * * *

(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) of this section because the bank is unable to make the representation required by paragraph (e)(2) or the certification required by paragraph (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 certifications 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)(1) by adding the phrase "as implemented by Regulation W, 12 CFR part 223," before "as applicable";

■ b. Amend paragraph (h) by:

■ i. Removing the word "Sections" at the beginning of paragraph (h)(5) introductory text 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) introductory text;

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

■ iv. Removing the word "and" at the end of paragraph (h)(5)(iv);

■ v. 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

■ vi. Adding a new 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; and

* * * * *

■ 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:

■ 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 forgoing.

* * * * *

(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 for part 7 continues to read as follows:

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

§ 7.1016 [Amended]

■ 28. Amend footnote 1 to part 7 by:

- a. Removing "Publication No. 500" and inserting in its place "Publication No. 600 or any applicable prior version"; and
- b. Adding "Supplements to UCP 500 & 600 for Electronic Presentation (eUCP v. 1.0 & 1.1) (Supplements to the Uniform Customs and Practices for Documentary Credits for Electronic Presentation) (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 paragraph (a) of this section, a national bank may guarantee obligations of a customer, subsidiary or affiliate that are financial in character, provided the amount of the bank's financial 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);

■ b. Remove “or” from the end of paragraph (f);

■ c. Remove the period at the end of paragraph (g) and add “; or” in its place; and

■ d. 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 and 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 pursuant to 12 U.S.C. 1818(g)”.

■ 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 pursuant to 12 U.S.C. 1818(g) 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, to be received by the OCC within 30 days from the date that the institution-affiliated party was served with such notice or order, 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. Removing "A" at the beginning of the first sentence and adding "All" in its place;
■ b. Adding the phrase "and Regulation W, 12 CFR part 223" after "12 U.S.C. 371c and 371c-1" in the first sentence;
■ c. Adding the phrase "as implemented by Regulation W, 12 CFR part 223," before "as applicable" in the third sentence;
■ d. Adding ", as implemented by 12 CFR part 32," after "12 U.S.C. 84" in the first sentence; and
■ e. 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 the first sentence of 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. Amending paragraphs (a)(2) and (b)(1) by removing "Director, Community Development Division," and adding "Community Affairs Department," in its place;
- b. Adding a second sentence at the end of paragraph (a)(2);
- c. 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
- d. 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 paragraph (b)(3) by removing the phrase "or targeted redevelopment area";
 - e. Amending paragraph (b)(4) by removing the phrase "or targeted redevelopment areas";
 - f. Amending paragraph (d)(2) by removing the word "and";
 - g. Amending paragraph (d)(3) by removing the word "previously", and by removing the period and adding "; and" in its place; and
 - h. 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 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.

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.)

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.	<input type="checkbox"/>
The investment benefits primarily low- and moderate-income areas.	<input type="checkbox"/>

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.

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: _____

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).

■ 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. In § 34.21, revise paragraph (b) and add a new paragraph (c) as follows:

§ 34.21 General rule.

* * * * *

(b) *Purchase of loans not in compliance.* Except as provided in paragraph (c) of this section, a national bank may purchase or participate in

ARM loans that were not made in accordance with this part, provided such purchases are consistent with safe and sound banking practices as described in published OCC guidance, including appropriate diligence regarding the quality and characteristics of the loans, and other applicable regulations.

(c) *Purchase of loans from a subsidiary or affiliate.* ARM loans purchased, in whole or in part, from a subsidiary or affiliate must comply with this part and with other applicable regulations, and be consistent with safe and sound banking practices as described in published OCC guidance, including appropriate diligence regarding the quality and characteristics of the loans. For purposes of this paragraph, the terms affiliate and subsidiary have the same meaning as in 12 U.S.C. 371c.

■ 91. 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

■ 92. 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]

■ 93. 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

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

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

■ 95. 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: February 28, 2008.

John C. Dugan,

Comptroller of the Currency.

[FR Doc. E8-8443 Filed 4-23-08; 8:45 am]

BILLING CODE 4810-33-P