

rated 1 or 2 under the Uniform Financial Institutions Rating System (CAM-ELS) may make an aggregate investment in banking premises up to 150 percent of the national bank's or Federal savings association's capital and surplus without the OCC's prior approval, provided that the national bank or Federal savings association is well capitalized and will continue to be well capitalized after the investment or loan is made. However, the national bank or Federal savings association must notify the appropriate OCC supervisory office in writing of the investment within 30 days after the investment or loan is made. The written notice must include a description of the national bank's or Federal savings association's investment or loan.

(ii) *Exception.* If a Federal savings association that would otherwise be eligible for the premises notice process described in paragraph (d)(3)(i) of this section proposes to establish or acquire a subsidiary to make an investment in banking premises, or if investing in banking premises would be a new activity for such a subsidiary, the Federal savings association would not be eligible for the premises notice process and would be required to comply with the provisions of §5.59 in the case of a service corporation, or §5.38 in the case of an operating subsidiary.

(4) *Service corporation.* A Federal savings association that invests in banking premises through a service corporation is not subject to the premises application and premises notice requirements of paragraph (d) of this section; however, it must include this investment when calculating the quantitative limitations in paragraph (d) of this section, and must comply with §5.59.

(5) *Exceptions to rules of general applicability.* Sections 5.8, 5.9, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that any or all parts of §§5.8, 5.9, 5.10, and 5.11 apply.

[80 FR 28449, May 18, 2015, as amended at 84 FR 4240, Feb. 14, 2019; 84 FR 61794, Nov. 13, 2019; 84 FR 69297, Dec. 18, 2019; 85 FR 80459, Dec. 11, 2020]

§5.38 Operating subsidiaries of a Federal savings association.

(a) *Authority.* 12 U.S.C. 1462a, 1463, 1464, 1465, 1828, and 5412(b)(2)(B).

(b) *Licensing requirements.* When required by section 18(m) of the Federal Deposit Insurance Act (12 U.S.C. 1828(m)), a Federal savings association must file an application as prescribed in this section to acquire or establish an operating subsidiary, or to commence a new activity in an existing operating subsidiary.

(c) *Scope.* This section sets forth authorized activities and application procedures for Federal savings associations engaging in activities through an operating subsidiary. The OCC may, at any time, limit a Federal savings association's investment in an operating subsidiary or may limit or refuse to permit any activities in an operating subsidiary for supervisory, legal, or safety and soundness reasons.

(d) [Reserved]

(e) *Standards and requirements—(1) Authorized activities.* (i) A Federal savings association may conduct in an operating subsidiary activities that are permissible for a Federal savings association to engage in directly.

(ii) In addition to OCC authorization, before it begins business an operating subsidiary also must comply with other laws applicable to it and its proposed business, including applicable licensing or registration requirements, if any, such as registration requirements under securities laws.

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

(A) The savings association has the ability to control the management and operations of the subsidiary, and no other person or entity has the ability to exercise effective control or influence over the management or operations of the subsidiary to an extent equal to or greater than that of the savings association or an operating subsidiary thereof;

(B) The parent savings association owns and controls more than 50 percent

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of the voting (or similar type of controlling) interest of the operating subsidiary, or the parent savings association otherwise controls the operating subsidiary and no other party controls a percentage of the voting (or similar type of controlling) interest of the operating subsidiary greater than the savings association's interest; and

(C) The operating subsidiary is consolidated with the savings association under GAAP.

(ii) Subject to the requirements in this section, a Federal savings association may hold another insured depository institution as an operating subsidiary.

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

(A) A subsidiary in which the savings association's investment is made pursuant to specific authorization in a statute or OCC regulation (*e.g.*, a service corporation under 12 U.S.C. 1464(c)(4) or a bank service company under 12 U.S.C. 1861 *et seq.*);

(B) A subsidiary in which the savings association 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; and

(C) A trust formed for purpose of securitizing assets held by the savings association as part of its business.

(iv) Notwithstanding the requirements of paragraph (e)(2)(i) of this section:

(A) A Federal savings association must have reasonable policies and procedures to preserve the limited liability of the savings association and its operating subsidiaries; and

(B) OCC regulations may not be construed as requiring a Federal savings association and its operating subsidiaries to operate as a single entity.

(3) *Examination and supervision.* An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent Federal savings association, unless otherwise specifically provided by statute, regulation, or published OCC policy, including sections 1045 and 1046 of

the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 25b and 1465) with respect to the application of State law. If the OCC determines that the operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or soundness of the savings association, the OCC will direct the savings association or operating subsidiary to take appropriate remedial action, which may include requiring the savings association to divest or liquidate the operating subsidiary, or discontinue specified activities. OCC authority under this paragraph is subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

(4) *Consolidation of figures.* (i) Except as provided in paragraph (e)(4)(ii) of this section, pertinent book figures of the parent Federal savings association and its operating subsidiary must be combined for the purpose of applying statutory or regulatory limitations when combination is needed to effect the intent of the statute or regulation, *e.g.*, for purposes of 12 U.S.C. 1464(c) and 1464(u).

(ii) Consolidation for purposes of calculating portfolio assets and qualified thrift investments is subject to 12 U.S.C. 1467a(m)(5).

(f) *Procedures*—(1) *Application required.* (i) A Federal savings association must first submit an application to, and receive prior approval from, the OCC to establish or acquire an operating subsidiary, or to perform a new activity in an existing operating subsidiary.

(ii) The application must explain, as appropriate, how the savings association “controls” the enterprise, describing in full detail structural arrangements where control is based on factors other than savings association 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 or limited liability company that does not qualify for the expedited review procedure set forth in paragraph (f)(2) of this section, the savings association must provide a statement explaining why it is not eligible. The application also must include a complete description of the savings association's investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the savings association 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 savings association with a company engaged in insurance activities, the savings association must describe the type of insurance activity in which the company is engaged and has present plans to conduct. The savings association 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 home office or a previously approved branch of the savings association. The OCC may require a filer to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In these cases, the OCC encourages filers to have a pre-filing meeting with the OCC. Any savings association 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.

(2) *Expedited review.* (i) An application to establish or acquire an operating subsidiary, or to perform a new activity in an existing operating subsidiary, that meets the requirements of this paragraph is deemed approved by the OCC as of the 30th day after the filing is received by the OCC, unless the OCC notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review process is extended under § 5.13(a)(2). Any savings association receiving ap-

proval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(ii) An application is eligible for expedited review if all of the following requirements are met:

(A) The savings association is well capitalized and well managed;

(B) The activity is listed in paragraph (f)(5) this section or is substantively the same as a previously approved activity and the activity will be conducted in accordance with the same terms and conditions applicable to the previously approved activity;

(C) The entity is a corporation, limited liability company, limited partnership or trust; and

(D) The savings association or an operating subsidiary thereof:

(I) Has the ability to control the management and operations of the subsidiary and no other person or entity has the ability to exercise effective control or influence over the management or operations of the subsidiary to an extent equal to or greater than that of the savings association or an operating subsidiary thereof. The ability to control the management and operations means:

(i) In the case of a subsidiary that is a corporation, the savings association or an operating subsidiary thereof holds voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management;

(ii) In the case of a subsidiary that is a limited partnership, the savings association or an operating subsidiary thereof has the ability to control the management and operations of the subsidiary by controlling the selection and termination of senior management;

(iii) In the case of a subsidiary that is a limited liability company, the savings association or an operating subsidiary thereof has the ability to control the management and operations of the subsidiary by controlling the selection and termination of senior management; or

(iv) In the case of a subsidiary that is a trust, the savings association or an operating subsidiary thereof has the ability to replace the trustee at will;

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(2) Holds more than 50 percent of the voting, or equivalent, interests in the subsidiary, and:

(i) In the case of a subsidiary that is a limited partnership, the savings association 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;

(ii) In the case of a subsidiary that is a limited liability company, the savings association or an operating subsidiary thereof is the sole managing member of the limited liability company, provided that under the limited liability company agreement, other limited liability company members have no authority to bind the limited liability company by virtue solely of their status as members; or

(iii) In the case of a subsidiary that is a trust, the savings association or an operating subsidiary thereof is the sole beneficial owner of the trust; and

(3) Is required to consolidate its financial statements with those of the subsidiary under GAAP. A filer proposing to qualify for expedited review must include in the application all necessary information showing the application meets the requirements.

(3) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.10, and 5.11 apply.

(4) *OCC review and approval.* The OCC reviews a Federal savings association's application to determine whether the proposed activities are legally permissible under Federal savings association law and to ensure that the proposal is consistent with safe and sound banking practices and OCC policy and does not endanger the safety or soundness of the parent Federal savings association. As part of this process, the OCC may request additional information and analysis from the filer.

(5) *Activities eligible for expedited review.* The following activities qualify for the expedited review procedures in paragraph (f)(2) of this section, pro-

vided the activity is conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a Federal savings association:

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

(ii) Providing services to or for the savings association or its affiliates, including accounting, auditing, appraising, advertising and public relations, and financial advice and consulting;

(iii) Making loans or other extensions of credit, and selling money orders and travelers checks;

(iv) Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein;

(v) Providing management consulting, operational advice, and services for other financial institutions;

(vi) Providing check payment services;

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

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

(ix) Underwriting and reinsuring credit life and disability insurance;

(x) Leasing of personal property;

(xi) Providing securities brokerage;

(xii) Underwriting and dealing, including making a market, in savings association permissible securities and purchasing and selling as principal, asset backed obligations;

(xiii) Acting as an insurance agent or broker for credit life, disability, and

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unemployment insurance; single property interest insurance; and title insurance;

(xiv) Offering correspondent services to the extent permitted by published OCC precedent for Federal savings associations;

(xv) Acting as agent or broker in the sale of fixed annuities;

(xvi) Offering debt cancellation or debt suspension agreements;

(xvii) Providing escrow services;

(xviii) Acting as a transfer agent; and

(xix) Providing or selling postage stamps.

(6) *Redesignation.* A Federal savings association that proposes to redesignate a service corporation as an operating subsidiary must submit a notification to the OCC at least 30 days prior to the redesignation date. The notification must include a description of how the redesignated service corporation meets all of the requirements of this section to be an operating subsidiary, a resolution of the savings association's board of directors approving the redesignation, and the proposed effective date of the redesignation. The savings association may effect the redesignation on the proposed date unless the OCC notifies the savings association otherwise prior to that date. The OCC may require an application if the redesignation presents policy, supervisory, or legal issues.

(7) *Fiduciary powers.* (i) If an operating subsidiary proposes to accept fiduciary appointments for which fiduciary powers are required, such as acting as trustee or executor, then the Federal savings association must have fiduciary powers under section 5(n) of the Home Owners' Loan Act, 12 U.S.C. 1464(n), and the subsidiary also must have its own fiduciary powers under the law applicable to the subsidiary.

(ii) Unless the subsidiary is a registered investment adviser, if an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the Federal savings association must have prior OCC approval to exercise fiduciary powers pursuant to §5.26 (or a predecessor provision) and 12 CFR part 150.

(8) *Expiration of approval.* Approval expires if the Federal savings associa-

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

(g) *Grandfathered operating subsidiaries.* Notwithstanding the requirements for a qualifying operating subsidiary in paragraph (e)(2) of this section and unless otherwise notified by the OCC with respect to a particular operating subsidiary, an entity that a Federal savings association lawfully acquired or established as an operating subsidiary before May 18, 2015, may continue to operate as a Federal savings association operating subsidiary under this section, provided that the savings association and the operating subsidiary were, and continue to be, conducting authorized activities in compliance with the standards and requirements applicable when the savings association established or acquired the operating subsidiary.

(h) *Issuances of securities by operating subsidiaries.* An operating subsidiary may not state or imply that the securities it issues are covered by Federal deposit insurance. An operating subsidiary may not issue any security the payment, maturity, or redemption of which may be accelerated upon the condition that the controlling Federal savings association is insolvent or has been placed into receivership. For as long as any securities are outstanding, the controlling Federal savings association must maintain all records generated through each securities issuance in the ordinary course of business, including but not limited to a copy of the prospectus, offering circular, or similar document concerning such issuance, and make such records available for examination by the OCC.

[80 FR 28450, May 18, 2015, as amended at 85 FR 80459, Dec. 11, 2020]

§5.39 Financial subsidiaries of a national bank.

(a) *Authority.* 12 U.S.C. 24a and 93a.

(b) *Approval requirements.* A national bank must file an application as prescribed in this section prior to acquiring a financial subsidiary or engaging in activities authorized pursuant to