

§5.39

12 CFR Ch. I (1-1-23 Edition)

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

Comptroller of the Currency, Treasury

§ 5.39

section 5136A(a)(2)(A)(i) of the Revised Statutes (12 U.S.C. 24a(a)(2)(A)(i)) through a financial subsidiary. When a financial subsidiary proposes to conduct a new activity permitted under § 5.34, the bank must follow the procedures in § 5.34(f) instead of paragraph (i) of this section.

(c) *Scope.* This section sets forth authorized activities, approval procedures, and, where applicable, conditions for national banks engaging in activities through a financial subsidiary.

(d) *Definitions.* For purposes of this § 5.39:

(1) *Affiliate* has the meaning set forth in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), except that the term “affiliate” for purposes of paragraph (h)(5) of this section has the meaning set forth in sections 23A or 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c-1), as implemented by Regulation W, 12 CFR part 223, as applicable.

(2) *Company* has the meaning set forth in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), and includes a limited liability company (LLC).

(3) *Control* has the meaning set forth in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(4) *Eligible debt* means unsecured long-term debt that is:

(i) Not supported by any form of credit enhancement, including a guaranty or standby letter of credit; and

(ii) Not held in whole or in any significant part by any affiliate, officer, director, principal shareholder, or employee of the bank or any other person acting on behalf of or with funds from the bank or an affiliate of the bank.

(5) *Financial subsidiary* means any company that is controlled by one or more insured depository institutions, other than a subsidiary that:

(i) Engages solely in activities that national banks may engage in directly and that are conducted subject to the same terms and conditions that govern the conduct of these activities by national banks; or

(ii) A national bank is specifically authorized to control by the express terms of a Federal statute (other than section 5136A of the Revised Statutes),

and not by implication or interpretation, such as by section 25 of the Federal Reserve Act (12 U.S.C. 601-604a), section 25A of the Federal Reserve Act (12 U.S.C. 611-631), or the Bank Service Company Act (12 U.S.C. 1861 *et seq.*)

(6) *Insured depository institution* has the meaning set forth in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(7) *Long term debt* means any debt obligation with an initial maturity of 360 days or more.

(8) *Subsidiary* has the meaning set forth in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(9) *Tangible equity* has the meaning set forth in 12 CFR 6.2.

(e) *Authorized activities.* A financial subsidiary may engage only in the following activities:

(1) Activities that are financial in nature and activities incidental to a financial activity, authorized pursuant to 5136A(a)(2)(A)(i) of the Revised Statutes (12 U.S.C. 24a(a)(2)(A)(i)) (to the extent not otherwise permitted under paragraph (e)(2) of this section), including:

(i) Lending, exchanging, transferring, investing for others, or safeguarding money or securities;

(ii) Engaging as agent or broker in any State for purposes of insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, death, defects in title, or providing annuities as agent or broker;

(iii) Providing financial, investment, or economic advisory services, including advising an investment company as defined in section 3 of the Investment Company Act (15 U.S.C. 80a-3);

(iv) Issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly;

(v) Underwriting, dealing in, or making a market in securities;

(vi) Engaging in any activity that the Board of Governors of the Federal Reserve System has determined, by order or regulation in effect on November 12, 1999, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto (subject to the same terms and conditions contained in the order or regulation, unless the order or regulation is

modified by the Board of Governors of the Federal Reserve System);

(vii) Engaging, in the United States, in any activity that a bank holding company may engage in outside the United States and the Board of Governors of the Federal Reserve System has determined, under regulations prescribed or interpretations issued pursuant to section 4(c)(13) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)(13)) as in effect on November 11, 1999, to be usual in connection with the transaction of banking or other financial operations abroad; and

(viii) Activities that the Secretary of the Treasury in consultation with the Board of Governors of the Federal Reserve System, as provided in section 5136A of the Revised Statutes, determines to be financial in nature or incidental to a financial activity; and

(2) Activities that may be conducted by an operating subsidiary pursuant to § 5.34.

(f) *Impermissible activities.* A financial subsidiary may not engage as principal in the following activities:

(1) Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability or death, or defects in title (except to the extent permitted under sections 302 or 303(c) of the Gramm-Leach-Bliley Act, (15 U.S.C. 6712 or 15 U.S.C. 6713)) or providing or issuing annuities the income of which is subject to tax treatment under section 72 of the Internal Revenue Code (26 U.S.C. 72);

(2) Real estate development or real estate investment, unless otherwise expressly authorized by law; and

(3) Activities authorized for bank holding companies by section 4(k)(4)(H) or (I) of the Bank Holding Company Act (12 U.S.C. 1843(k)(4)(H) or (I)), except activities authorized under section 4(k)(4)(H) that may be permitted in accordance with section 122 of the Gramm-Leach-Bliley Act (12 U.S.C. 1843 note).

(g) *Qualifications.* A national bank may, directly or indirectly, control a financial subsidiary or hold an interest in a financial subsidiary only if:

(1) The national bank and each depository institution affiliate of the national bank are well capitalized and well managed;

(2) The aggregate consolidated total assets of all financial subsidiaries of the national bank do not exceed the lesser of 45 percent of the consolidated total assets of the parent bank or \$50 billion (or such greater amount as is determined according to an indexing mechanism jointly established by regulation by the Secretary of the Treasury and the Board of Governors of the Federal Reserve System); and

(3) If the national bank is one of the 100 largest insured banks, determined on the basis of the bank's consolidated total assets at the end of the calendar year, the bank has not fewer than one issue of outstanding debt that meets such standards of creditworthiness or other criteria as the Secretary of the Treasury and the Federal Reserve Board may jointly establish pursuant to Section 5136A of title LXII of the Revised Statutes (12 U.S.C. 24a).

(4) Paragraph (g)(3) of this section does not apply if the financial subsidiary is engaged solely in activities in an agency capacity.

(h) *Safeguards.* The following safeguards apply to a national bank that establishes or maintains a financial subsidiary:

(1) For purposes of determining regulatory capital the national bank may not consolidate the assets and liabilities of a financial subsidiary with those of the bank and must deduct the aggregate amount of its outstanding equity investment, including retained earnings, in its financial subsidiaries from regulatory capital as provided by § 3.22(a)(7) of this chapter;

(2) Any published financial statement of the national bank must, in addition to providing information prepared in accordance with GAAP, separately present financial information for the bank in the manner provided in paragraph (h)(1) of this section;

(3) The national bank must have reasonable policies and procedures to preserve the separate corporate identity and limited liability of the bank and the financial subsidiaries of the bank;

(4) The national bank must have procedures for identifying and managing financial and operational risks within the bank and the financial subsidiary that adequately protect the national bank from such risks;

(5) Except for a subsidiary of a bank that is considered a financial subsidiary under paragraph (d)(5) 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 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c-1), as implemented by Regulation W, 12 CFR part 223, apply to transactions involving a financial subsidiary in the following manner:

(i) A financial subsidiary is deemed to be an affiliate of the bank and is not deemed to be a subsidiary of the bank;

(ii) [Reserved]

(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).

(iv) Any purchase of, or investment in, the securities of a financial subsidiary of a bank by an affiliate of the bank will be considered to be a purchase of or investment in such securities by the bank;

(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

(vi) Any other extension of credit by an affiliate of a bank to a financial subsidiary of the bank may be considered an extension of credit by the bank to the financial subsidiary if the Board of Governors of the Federal Reserve System determines that such treatment is necessary or appropriate to prevent evasions of the Federal Reserve Act and the Gramm-Leach-Bliley Act.

(6) A financial subsidiary is deemed a subsidiary of a bank holding company and not a subsidiary of the bank for purposes of the anti-tying prohibitions set forth in 12 U.S.C. 1971 *et seq.*

(i) *Procedures to engage in activities through a financial subsidiary.* A national bank that intends, directly or indirectly, to acquire control of, or hold an interest in, a financial subsidiary, or to commence a new activity in an existing financial subsidiary, must obtain OCC approval through the procedures set forth in paragraph (i)(1) or (i)(2) of this section.

(1) *Certification with subsequent application.* (i) At any time, a national bank may file a "Financial Subsidiary Certification" with the appropriate OCC licensing office listing the bank's depository institution affiliates and certifying that the bank and each of those affiliates is well capitalized and well managed.

(ii) Thereafter, at such time as the bank seeks OCC approval to acquire control of, or hold an interest in, a new financial subsidiary, or commence a new activity authorized under section 5136A(a)(2)(A)(i) of the Revised Statutes (12 U.S.C. 24a(a)(2)(A)(i)) in an existing subsidiary, the bank may file an application with the appropriate OCC licensing office at the time of acquiring control of, or holding an interest in, a financial subsidiary, or commencing such activity in an existing subsidiary. The application must be labeled "Financial Subsidiary Application" and must:

(A) State that the bank's Certification remains valid;

(B) Describe the activity or activities conducted by the financial subsidiary. To the extent 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 that the company is engaged in 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;

(C) Cite the specific authority permitting the activity to be conducted by

the financial subsidiary. (Where the authority relied on is an agency order or interpretation under section 4(c)(8) or 4(c)(13), respectively, of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)(8) or (c)(13)), a copy of the order or interpretation should be attached);

(D) Certify that the bank will be well capitalized after making adjustments required by paragraph (h)(1) of this section;

(E) Demonstrate the aggregate consolidated total assets of all financial subsidiaries of the national bank do not exceed the lesser of 45 percent of the bank's consolidated total assets or \$50 billion (or the increased level established by the indexing mechanism); and

(F) If applicable, certify that the bank meets the eligible debt requirement in paragraph (g)(3) of this section.

(2) *Combined certification and application.* A national bank may file a combined certification and application with the appropriate OCC licensing office at least five business days prior to acquiring control of, or holding an interest in, a financial subsidiary, or commencing a new activity authorized pursuant to section 5136A(a)(2)(A)(i) of the Revised Statutes (12 U.S.C. 24a(a)(2)(A)(i)) in an existing subsidiary. The written application must be labeled “Financial Subsidiary Certification and Application” and must:

(i) List the bank's depository institution affiliates and certify that the bank and each depository institution affiliate of the bank is well capitalized and well managed;

(ii) Describe the activity or activities to be conducted in the financial subsidiary. To the extent 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 that the company is engaged in 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;

(iii) Cite the specific authority permitting the activity to be conducted by the financial subsidiary. (Where the au-

thority relied on is an agency order or interpretation under section 4(c)(8) or 4(c)(13), respectively, of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)(8) or (c)(13)), a copy of the order or interpretation should be attached);

(iv) Certify that the bank will remain well capitalized after making the adjustments required by paragraph (h)(1) of this section;

(v) Demonstrate the aggregate consolidated total assets of all financial subsidiaries of the national bank do not exceed the lesser of 45% of the bank's consolidated total assets or \$50 billion (or the increased level established by the indexing mechanism); and

(vi) If applicable, certify that the bank meets the eligible debt requirement in paragraph (g)(3) of this section.

(3) *Approval.* An application is deemed approved upon filing the information required by paragraphs (i)(1) or (i)(2) of this section within the time frames provided therein.

(4) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, 5.11, and 5.13 do not apply to activities authorized under this section.

(5) *Community Reinvestment Act (CRA).* A national bank may not apply under this paragraph (i) to commence a new activity authorized under section 5136A(a)(2)(A)(i) of the Revised Statutes (12 U.S.C. 24a(a)(2)(A)(i)), or directly or indirectly acquire control of a company engaged in any such activity, if the bank or any of its insured depository institution affiliates received a CRA rating of less than “satisfactory record of meeting community credit needs” on its most recent CRA examination prior to when the bank would file an application under this section.

(j) *Failure to continue to meet certain qualification requirements—(1) Qualifications and safeguards.* A national bank, or, as applicable, its affiliated depository institutions, must continue to satisfy the qualification requirements set forth in paragraphs (g)(1) and (2) of this section and the safeguards in paragraphs (h)(1), (2), (3) and (4) of this section following its acquisition of control of, or an interest in, a financial subsidiary. A national bank that fails to continue to satisfy these requirements

Comptroller of the Currency, Treasury

§ 5.40

will be subject to the following procedures and requirements:

(i) The OCC will give notice to the national bank and, in the case of an affiliated depository institution to that depository institution's appropriate Federal banking agency, promptly upon determining that the national bank, or, as applicable, its affiliated depository institution, does not continue to meet the requirements in paragraph (g)(1) or (2) of this section or the safeguards in paragraph (h)(1), (2), (3), or (4) of this section. The bank is deemed to have received such notice three business days after mailing of the letter by the OCC;

(ii) Not later than 45 days after receipt of the notice under paragraph (j)(1)(i) of this section, or any additional time as the OCC may permit, the national bank must execute an agreement with the OCC to comply with the requirements in paragraphs (g)(1) and (2) and (h)(1), (2), (3), and (4) of this section;

(iii) The OCC may impose limitations on the conduct or activities of the national bank or any subsidiary of the national bank as the OCC determines appropriate under the circumstances and consistent with the purposes of section 5136A of the Revised Statutes; and

(iv) The OCC may require a national bank to divest control of a financial subsidiary if the national bank does not correct the conditions giving rise to the notice within 180 days after receipt of the notice provided under paragraph (j)(1)(i) of this section.

(2) *Eligible debt requirement.* A national bank that does not continue to meet the qualification requirement set forth in paragraph (g)(3) of this section, applicable where the bank's financial subsidiary is engaged in activities other than solely in an agency capacity, may not directly or through a subsidiary, purchase or acquire any additional equity capital of any such financial subsidiary until the bank meets the requirement in paragraph (g)(3) of this section. For purposes of this paragraph (j)(2), the term "equity capital" includes, in addition to any equity investment, any debt instrument issued by the financial subsidiary if the instrument qualifies as capital of the

subsidiary under Federal or State law, regulation, or interpretation applicable to the subsidiary.

(k) *Examination and supervision.* A financial subsidiary is subject to examination and supervision by the OCC, 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).

[65 FR 12914, Mar. 10, 2000, as amended at 73 FR 22240, Apr. 24, 2008; 77 FR 35258, June 13, 2012; 78 FR 62275, Oct. 11, 2013; 79 FR 11310, Feb. 28, 2014; 80 FR 28452, May 18, 2015; 85 FR 80461, Dec. 11, 2020]

Subpart D—Other Changes in Activities and Operations

§ 5.40 Change in location of a main office of a national bank or home office of a Federal savings association.

(a) *Authority.* 12 U.S.C. 30, 93a, 1462a, 1463, 1464, 1828, 2901–2907, and 5412(b)(2)(B).

(b) *Scope.* This section describes OCC procedures and approval standards for an application or a notice by a national bank to change the location of its main office or by a Federal savings association to change the location of its home office.³ A national bank or Federal savings association must follow the procedures described in paragraph (c) of this section to relocate its main office or home office, as applicable.

(c) *Licensing requirements and procedures—(1) Main office or home office relocation to an authorized branch location*

³A national bank's main office is the place identified in the bank's original organization certificate under 12 U.S.C. 22 or the subsequent location to which the main office has been changed under this § 5.40, 12 U.S.C. 30(b), or other applicable law, as reflected in the national bank's amended articles of association. A Federal savings association's home office is the office identified as such in the savings association's original charter or the subsequent location to which the home office has been changed under this § 5.40, or other applicable law, as reflected in the savings association's amended charter. These terms are functionally the same but are used in our regulations in order to be consistent with the relevant statutes that govern national banks and Federal savings associations, respectively.