DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 3, 5, 7, 16 and 28

[Docket No. 96–24]

RIN 1557–AB27

Rules, Policies, and Procedures for Corporate Activities

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 governing corporate applications and notices. This final rule is another component of the OCC's Regulation Review Program to update and streamline OCC regulations, focus regulations on key safety and soundness concerns and agency objectives, and reduce unnecessary regulatory costs and other burdens.

The final rule revises and reorganizes the OCC's regulation for national bank corporate activities and transactions. It also modernizes and clarifies the rules, reduces unnecessary regulatory burden and, consistent with statutory requirements, imposes regulatory requirements only where needed to address safety and soundness concerns or to accomplish other statutory responsibilities of the OCC.

EFFECTIVE DATE: December 31, 1996.

FOR FURTHER INFORMATION CONTACT: Stuart E. Feldstein, Assistant Director, Legislative and Regulatory Activities, (202) 874–5090; Karen McSweeney, Attorney, Legislative and Regulatory Activities, (202) 874–5090; Jerome Edelstein, Senior Counsel, Bank Activities and Structure, (202) 874–5300; or Cheryl A. Martin, Senior Licensing Policy and Systems Analyst, Licensing Policy and Systems Division, (202) 874–5060. Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

The Proposal

On November 29, 1994, the OCC published a notice of proposed rulemaking (59 FR 61034, Nov. 29, 1994) (proposal) to revise 12 CFR part 5—the OCC's rule governing the policies and procedures for national bank corporate transactions and activities.

The proposal sought to implement the goals of the OCC's Regulation Review Program by eliminating unnecessary regulatory burden and streamlining procedures for corporate applications and transactions while protecting the safety and soundness of the national banking system. The proposal also restructured various sections of part 5 to create a more readable and understandable regulation, and it updated other sections by incorporating interpretive rulings and significant OCC interpretive positions where necessary.

Comments Received and Changes Made

The final rule implements most of the initiatives contained in the proposal. However, the OCC has made a number of changes in the final rule in response to the comments received and to further reduce unnecessary regulatory burden.

The OCC received 71 comment letters on the proposal. The vast majority of these comments supported the OCC's proposed changes to part 5. The comment letters received by the OCC included 34 from banks, bank holding companies, and related entities, 16 from trade associations (including bank, securities, real estate, insurance, newspaper, and travel agency), four from community groups, four from private businesses, five from members of Congress, two from Federal regulators, two from unaffiliated individuals, three from law firms, and one from a clearinghouse.

Commenters strongly favored reducing unnecessary regulatory burden, updating and clarifying the rules, and streamlining the application process. Overall, most commenters commended the OCC's efforts, and some commenters offered variations on certain of the proposed changes.

Overview of the Final Rule

The OCC reviewed part 5 to update and streamline corporate filing procedures for national banks and to reduce unnecessary regulatory burden consistent with safe and sound banking practices and other regulatory responsibilities of the OCC.

The final rule contains a fundamental restructuring of the OCC's approach to the corporate application process by creating a new expedited review process for many types of applications submitted by healthy banks whose applications should entail low levels of risk. This new process enables the OCC to calibrate the extent of regulatory review an application receives to focus more resources on applications that are novel, are complex, or present potentially greater risk to the applicant bank.

Section-by-Section Discussion

Most commenters focused on specific provisions of the proposal with many recommending further changes. The OCC carefully considered each of the comment letters and has made a number of changes to the proposal in response to those comments and recommendations. The following section-by-section discussion identifies and discusses comments and changes to the proposal. A table summarizing the sections of the former part 5 changed by the final rule is included at the end of this preamble.

Scope (§ 5.1)

The proposal clarified the purpose of part 5 and transferred information concerning the role of the OCC's Multinational Banking Department to § 5.3, *Definitions,* and § 5.4, *Filing required.* The OCC received no comments on this section.

The OCC adopts the changes contained in the proposal and clarifies the corporate filing procedures for Federal branches and agencies. The final rule also adds a new subpart F, which outlines the filing procedures for Federal branches and agencies and directs readers to 12 CFR part 28 for further information.

Rules of General Applicability (§ 5.2)

The proposal consolidated the rules of general applicability for part 5 into a single section. The proposal also relocated the definitions to § 5.3, *Definitions,* and the information regarding denials to § 5.13, *Decisions.* Proposed § 5.2(b) described the limited circumstances under which the OCC may adopt materially different procedures for a filing or class of filings.

Two commenters expressed concern that proposed § 5.2(b) would allow the OCC too much latitude to adopt procedures other than those set forth in part 5. One commenter suggested limiting the circumstances under which the OCC may adopt materially different procedures. The OCC has historically limited its discretion under this provision to special circumstances, thus enabling the OCC to respond promptly to emergencies such as Hurricane Andrew. This continues to be the OCC's intent, and the final rule includes this language to reflect this approach.

Definitions (§ 5.3)

The proposal consolidated in § 5.3 definitions previously located throughout part 5. The proposal also added new definitions to clarify the part generally and updated existing definitions to make them more accurate and precise.

The proposal added a definition of ''short-distance relocation,'' used in connection with both branch and main office relocations. ''Short-distance

relocation'' was defined as moving the premises of a branch or main office within a one thousand-foot radius of the current site if it is located within a central city of a Metropolitan Statistical Area (MSA) designated by the Department of Commerce; a one mile radius of the site if it is located within an MSA designated by the Department of Commerce, but not within a central city; or a two-mile radius of the site if it is not located within an MSA.

In response to a request by two commenters, the final rule contains a definition of the term ''central city'' used to define a short-distance relocation. This definition recognizes that the Office of Management and Budget has succeeded the Commerce Department as the agency that identifies central cities for certain purposes. Under the final rule, a central city is a city or cities identified as a central city by the Director of the Office of Management and Budget. This provides a simple, unambiguous test for determining when relocation applications are subject to a ten-day public comment period instead of a 30-day comment period.

Another commenter stated that having two designations for sites located within an MSA was confusing. This commenter suggested removing the first prong of the definition (*i.e.*, within a one thousand foot-radius of a site located within a central city of an MSA). The OCC believes that the distances in the proposed definition are appropriate for different types of metropolitan areas. Therefore, the final rule does not change this aspect of the proposal.

Two other commenters urged the OCC to include more flexible language in the definition of ''short-distance relocation.'' However, using any test other than a bright-line test could create further uncertainties. Therefore, the OCC adopts this definition as proposed.

The final rule also modifies the proposed definition of ''appropriate district office'' by identifying the OCC's International Banking and Finance Department as the ''appropriate district office'' for Federal branches and agencies.

The proposal also contained a definition of ''eligible bank,'' a concept central to the new system of expedited review for certain applications filed with the OCC. The proposal defined the term ''eligible bank'' as a national bank that is well capitalized as defined in 12 CFR part 6, has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (CAMEL), has a CRA rating of ''Satisfactory'' or better, and is not subject to certain formal OCC enforcement actions.

The OCC received 15 comment letters on the definition of eligible bank. Eleven commenters supported the definition. Four commenters opposed the definition and the concept of expedited processing.

A number of commenters expressed concern that by making banks with ''Satisfactory'' or ''Outstanding'' CRA ratings eligible for expedited processing, the OCC was establishing a ''safe harbor'' against public challenge to an applicant bank's CRA performance. This is neither the purpose nor the effect of the eligible bank concept. In fact, § 5.13 of the final rule explicitly enables the OCC to remove a filing from expedited review procedures if the OCC concludes, among other things, that an adverse comment presents a significant CRA concern that, in the OCC's view, has not previously been satisfactorily resolved. Thus, as discussed in greater detail later, § 5.13 ensures that the OCC will fully and carefully consider all significant adverse CRA comments, including those involving eligible banks.

Several commenters also expressed concern that CAMEL ratings would become publicly available as a result of this new process. Some commenters suggested eliminating the CAMEL rating from the list of criteria necessary to qualify as an eligible bank, thus placing more emphasis on the capital adequacy of the bank filing the application. Other commenters suggested adopting altogether different criteria such as the Federal Deposit Insurance Corporation's (FDIC's) assessment risk classifications.

The OCC carefully considered these concerns and concluded that the suggested alternatives do not adequately address the criteria that are critical in permitting a bank to use expedited review. For example, limiting the definition to criteria focused primarily on capital adequacy eliminates important supervisory considerations regarding management of the bank. Moreover, while the FDIC's assessment risk classification system has attractive features, it appears better suited for the FDIC's insurance purposes than for determining which banks would qualify for expedited application processing. Therefore, the OCC adopts the definition of eligible bank as proposed.

The final rule also adds a definition of ''eligible depository institution,'' a term used in § 5.24, *Conversions,* and § 5.33, *Business combinations.* An eligible depository institution is a state bank or a Federal or state savings association that meets the ''eligible bank'' criteria under § 5.3(g) and is FDIC-insured, except that the bank's primary Federal regulator makes the determinations regarding certain of the eligible bank criteria.

The OCC also adopts the other definitions as proposed with some minor changes.

Filing Required (§ 5.4)

The proposal clarified the application and notice filing requirements and permitted an applicant to file with the OCC forms that the applicant had submitted to another Federal agency, if the forms covered the proposed action and contained substantially the same information that the OCC would require.

Each commenter addressing this section supported the proposal. Therefore, the OCC adopts this section as proposed, with minor modifications and one new burden-reducing feature.

The final rule contains a new provision that allows an applicant to incorporate by reference information that the applicant submitted to the OCC or another Federal agency with a previous application or other filing. Material incorporated by reference must be current and responsive to the information requested by the OCC, and the applicant must attach a copy of the relevant material to its application. This provision allows an applicant to avoid compiling lengthy background or supporting documentation each time it submits an application to the OCC and also ensures that the information is current, accurate, and accessible to the OCC.

Fees (§ 5.5)

The proposal removed unnecessary information from former § 5.5, such as procedures for determining the fee schedule, and referred to 12 CFR 8.8 regarding the ''Notice of Comptroller of the Currency fees.'' Two commenters suggested that the OCC create a differential fee structure for eligible banks. The OCC intends to implement this suggestion in the near future. Therefore, the OCC adopts this section as proposed with minor clarifying changes.

Investigations (§ 5.7)

The proposal clarified and condensed the relevant information and incorporated the fee provision pertaining to investigations. Two commenters suggested that the OCC limit the circumstances under which it may request additional information in connection with a filing. However, the proposal provides needed flexibility to evaluate factual and legal issues that arise during the course of a filing. Thus, the final rule retains the general authority for the OCC to seek additional information in connection with a filing

and to deem a filing abandoned if the requested information is not furnished within the specified time period. However, this provision is moved to § 5.13.

Public Notice (§ 5.8)

The proposal required an applicant to publish a public notice of its filing in a newspaper widely available in each geographic area in which the applicant proposed to engage in business.

Several commenters urged the OCC not to make this change, but rather to retain the language in the former regulation. Under former § 5.8(a), a bank must publish public notice in a newspaper of general circulation in the community in which the applicant proposes to engage in business. These commenters stated that the former standard provided more effective notice to the public.

The OCC agrees with the commenters that the former standard better advises the public of filings submitted to the OCC and does not unduly burden applicants. Thus, the final rule retains the language from the former regulation.

The proposal also provided under § 5.8(f) that the OCC may require or give public notice and request comment on any filing and in any manner the OCC determines appropriate for the particular filing. In addition, in circumstances where the public notice requirements of § 5.8 do not apply to a particular filing, the OCC may determine to give public notice if the filing presents a significant and novel policy, supervisory, or legal issue. The proposal also authorized the OCC to require public notice in addition to any notice otherwise required under this part.

The proposal also added several provisions to reduce unnecessary regulatory burden. For example, the proposal allowed an applicant to publish a single notice in certain circumstances for two or more filings and permitted the OCC to accept a notice published by an applicant for another Federal agency in lieu of the public notice requirements of part 5.

The OCC adopts these proposed changes with some minor modifications. First, in connection with publishing a single notice for multiple transactions, the final rule amends proposed § 5.8(d) to require the applicant to explain in the notice how the transactions that are the subject of the notice are related.

Second, in § 5.8(e), the final rule clarifies that the OCC may accept a single joint notice containing the information required by the OCC and the other Federal agency, provided that the notice states that comments must be submitted to both the OCC and the other Federal agency.

Public Availability (§ 5.9)

The proposal condensed this section to reflect the current OCC practice of granting requests for information on particular filings.

Two commenters suggested that the OCC include standards for confidential treatment of information concerning applications. The final rule clarifies that the OCC follows the Freedom of Information Act (FOIA), 5 U.S.C. 552, in determining whether to treat information as confidential.

The OCC final rule also adds language to clarify that requests for the public file on pending applications should be directed to the appropriate district office, and requests for the public file on applications or notices that have been closed or decided should be directed to the Disclosure Officer, Communications Division. The revisions also clarify what constitutes the public file and that an applicant or interested person submitting information may request confidential treatment for specific information.

Comments (§ 5.10)

The proposal reorganized this section, removed unnecessary and repetitive information, and clarified the remaining provisions. The proposal also established the time period for interested persons to submit comments.

The proposal included a provision that allowed the OCC to extend the comment period if the applicant failed to file all required supporting data in time to permit review by interested persons, if any person requesting an extension of time provided ''adequate justification,'' or if the OCC determined that other extenuating circumstances existed. The proposal also removed a provision that automatically granted a 14-day extension of the comment period for individuals whose request for a hearing had been denied.

Several commenters recommended that the OCC clarify the term ''adequate justification.'' In response to these comments, the final rule removes the phrase ''adequate justification'' and provides that a person requesting an extension of the comment period must satisfactorily demonstrate to the OCC that he or she needs additional time to develop factual information that the OCC determines is necessary to consider the application.

One commenter also objected to the proposed elimination of the 14-day automatic extension of the comment period for interested persons upon the OCC's denial of a hearing request. The commenter suggested that the OCC permit a person to submit additional information at any time once a person has filed timely comments. Other commenters supported the elimination of the 14-day automatic extension of the comment period and suggested placing additional restrictions on the comment period.

The OCC believes that the proposal strikes an appropriate balance between providing an opportunity for interested persons to comment on an application and the need for an applicant to have some reliable time frame for the application process. In particular, the OCC notes that as a general matter it considers late-filed comments on a filing if doing so would not inappropriately delay action on a filing. The OCC adopts this provision as proposed.

The final rule also removes the hearing-related provisions from proposed § 5.10, *Comments and requests for hearings,* and places them in § 5.11, *Hearings and other meetings.*

Hearings and Other Meetings (§ 5.11)

The proposal reorganized and streamlined this section. Under the proposal, any person could submit a written request for a hearing. The proposal noted that the OCC generally grants a hearing request only upon a determination that written submissions would be insufficient or that a hearing would benefit the decisionmaking process or be in the public interest.

Some commenters recommended that the OCC adopt more stringent requirements for determining when to grant a hearing. Other commenters suggested that the OCC make the standards for granting a hearing more lenient. The OCC believes that this provision represents an equitable and balanced approach because it provides an adequate basis for an individual to request a hearing, but provides more clarity with respect to the circumstances under which the OCC will grant the request. The OCC adopts this provision substantially as proposed.

The proposal also provided that the person requesting a hearing would no longer bear the cost of the hearing room or the OCC's transcripts. The person requesting the hearing would continue to assume the cost of one copy of the transcript for his or her use.

Some commenters suggested that the OCC continue to require the person requesting the hearing to bear the cost of the hearing room and transcription of the proceedings. These commenters believed that by not imposing these costs the number of requests might increase. This could increase the burden

and costs associated with filing an application. However, the ability to cover these costs is not a factor in determining whether to grant a request for a hearing. The OCC has consistently considered requests to waive these costs on a case-by-case basis. Thus, the final rule does not change the proposal in this regard.

The final rule also adds new provisions for the OCC to arrange meetings between interested parties to an application in settings less formal than a hearing. Under the final rule, the OCC may arrange for a public meeting in connection with an application, either upon receipt of a written request for such a meeting which is made during the comment period or upon the OCC's own initiative. The OCC also may arrange a private meeting with an applicant or other interested parties to an application, or with an applicant and other interested parties to an application, in order to clarify and narrow the range of differences on an application.

The final rule also makes a structural change to this section and § 5.10, *Comments,* by adopting proposed § 5.10(c)–(e) as part of § 5.11 to consolidate all the information on hearings into one section.

Computation of Time (§ 5.12)

The proposal made no substantive changes to this section, and the OCC received no comments on this section. Therefore, the OCC adopts this section as proposed.

Decisions (§ 5.13)

The proposal reorganized and clarified the various types of OCC decisions on filings. It also explained that the OCC grants eligible banks expedited processing for certain filings and clarified the circumstances under which the OCC may determine not to grant expedited processing for a filing by an eligible bank. Under the proposal, the OCC would have decided not to process an application under the expedited procedures if it had concluded that the filing or an adverse public comment received prior to the OCC's decision presented a significant supervisory, CRA (if applicable), or compliance concern, or raised a significant legal or policy issue.

The great majority of commenters strongly supported the proposed revisions to this section, with a number of commenters suggesting additional changes. In response to the comments, the OCC changed the final rule to clarify both when the expedited review process might be extended and the circumstances under which an application will be removed from the expedited review process. As set forth below, these changes are designed to balance the concerns of those interested in removing undue delays from the application process with the need fairly to assess legitimate CRA concerns.

Under the final rule, the OCC will remove a filing from the expedited review category if the OCC concludes that the filing, or an adverse comment regarding the filing, presents a significant supervisory, CRA (if applicable), or compliance concern, or raises a significant legal or policy issue requiring additional OCC review. With respect to adverse comments that present CRA concerns, the final rule clarifies that a significant CRA concern exists if the OCC concludes that: (1) a bank's CRA rating is less than satisfactory, institution-wide, or, where applicable, in a state or multistate MSA; or (2) a bank's CRA performance is less than satisfactory in an MSA or in the non-MSA portion of a state in which it seeks to expand through approval of an application for a deposit facility as defined in 12 U.S.C. § 2902(3).

The final rule also adds a new provision to recognize that in certain circumstances it may be necessary to extend the review process in order to evaluate further whether to remove an application from expedited review processing. Under the final rule, the OCC may extend the review process up to an additional ten days in circumstances where a comment contains specific assertions concerning a bank's CRA performance. Under the final rule, the OCC may extend the review period if these specific assertions, if true, would indicate a reasonable possibility that: (1) a bank's CRA rating would be less than satisfactory, institution-wide, or, where applicable, in a state or multistate MSA; or (2) a bank's CRA performance would be less than satisfactory in an MSA or in the non-MSA portion of a state in which it seeks to expand through approval of an application for a deposit facility as defined in 12 U.S.C. § 2902(3). This provision allows the OCC additional time to assess specific CRA assertions by a commenter and determine whether additional review, which would warrant removal of the application from the expedited review category, is needed.

The OCC notes, however, that it may not be necessary to trigger the extra ten-day review period in all cases. For example, the OCC may already have sufficient current information to permit it to assess the particular assertions contained in the comment. In these cases, the OCC's information would provide the basis for concluding whether or not to remove an application from expedited review processing without extending the period an additional ten days.

In other circumstances, the OCC is prepared, within the additional time allowed, promptly to conduct a targeted investigation of CRA performance. These inquiries could be conducted, for example, whenever additional detailed information is needed to evaluate CRA comments involving particular branches or assessment areas. In these situations, the information obtained from the inquiry would allow the OCC to determine whether the comment raises a ''significant'' unresolved CRA concern necessitating further review and removal from expedited review processing. The OCC will provide the applicant with a written explanation if it decides not to process an application from an eligible bank under expedited review pursuant to § 5.13(a).

The OCC also notes that it may deny or condition approval of an application, including under the expedited review procedures, even if the bank has an overall satisfactory CRA rating in order to ensure satisfactory performance in a particular state or multistate MSA, or, where applicable, in an MSA or the non-MSA portion of states.

The proposal also set forth certain circumstances where adverse CRA comments would not remove an application from expedited review processing. Under the proposal, adverse comments that did not raise significant supervisory, CRA (where applicable), or compliance concerns, or significant legal or policy issues, or that were frivolous, filed primarily to delay action on the filing, or that raised negative CRA issues that already had been resolved between the commenter and the applicant would not prevent an eligible bank's filing from receiving expedited processing. Several commenters suggested that the OCC clarify the phrase ''resolved by the commenter and the applicant.''

The OCC understands the difficulties in having all parties agree that an issue has been ''resolved.'' Therefore, rather than have the commenter and the applicant decide that an issue has been resolved, the final rule clarifies the circumstances under which the OCC will determine an issue to have been satisfactorily resolved. Under the final rule, the OCC considers a CRA concern to have been satisfactorily resolved if the OCC previously reviewed (*e.g.*, in an examination or in connection with an application) a CRA concern presenting substantially the same issue in substantially the same area during

substantially the same time, and the OCC determines that the concern would not warrant denial or imposition of a condition on approval of the application. The final rule also removes reference to comments ''filed for competitive reasons'' from these processing criteria because the OCC has concluded that such standard would likely be impractical to apply.

The proposal also set forth the circumstances under which the OCC would reconsider a denial of a filing and consolidated the paragraph regarding OCC reconsideration of applications.

One commenter suggested that the OCC include a reference to the OCC's Ombudsman in the regulation. The final rule notes that an applicant may file an appeal with the Ombudsman or the Deputy Comptroller for Bank Organization and Structure.

The proposal also added a provision explaining that the OCC does not generally grant a national bank an extension of time to commence a corporate activity once approved by the OCC. Some commenters indicated that the OCC should provide more flexibility for certain transactions that are beyond the applicant's control. The OCC recognizes this concern and has modified the rule accordingly. Under the final rule, the OCC generally will not grant an extension of time to commence a new or expanded corporate activity, unless the OCC determines that the delay is beyond the applicant's control.

The proposal also provided that the OCC could nullify any decision if there was a material misrepresentation or omission in the underlying filing, or if the decision was contrary to law, regulation, or OCC policy, or was granted due to a clerical or administrative error or a material mistake of law or fact. Two commenters suggested that the OCC should revise the proposal regarding its authority to nullify a decision. However, the OCC believes that this approach will not prove burdensome to applicants and will preserve the integrity of the application process. Therefore, the OCC adopts the language contained in the proposal.

Finally, the OCC has changed this section to clarify that a filing must contain all information required by the relevant regulation and that a filing may be deemed abandoned if required information is not furnished as required or within a specified time period.

Organizing a Bank (§ 5.20)

The proposal clarified, streamlined, and reorganized this section to focus on those issues central to charter applications. It also incorporated and consolidated provisions regarding special purpose national banks, such as national banks limited to fiduciary activities.

The OCC received few comments addressing this section. One commenter recommended an expedited review process for ''well-capitalized'' bank holding companies establishing *de novo* banks. Another commenter urged the OCC to consider the financial and managerial resources of a sponsoring bank holding company rather than those of the organizers.

The OCC agrees with the commenters that an application to organize a new bank that is sponsored by a bank holding company whose lead depository institution meets certain requirements does not present the same level of safety and soundness and other supervisory concerns as other applications to organize a bank. Thus, the final rule provides that the OCC will preliminarily approve a charter application sponsored by a bank holding company whose lead depository institution is an eligible bank or eligible depository institution, as of the 15th day after the close of the comment period or 45 days after a filing is received by the OCC, whichever is later, unless the OCC notifies the applicant that it is not eligible for expedited review, or the expedited review process is extended, under § 5.13, or the OCC determines that the proposed bank will offer banking services that are materially different from those offered by the lead depository institution. The final rule defines the term ''lead depository institution'' in § 5.20(d)(5) as the largest depository institution controlled by the bank holding company based on a comparison of the average total assets controlled by each depository institution as reported in its Consolidated Report of Condition and Income for the immediately preceding four calendar quarters. The final rule also clarifies that the OCC considers the financial and managerial resources of the sponsor, rather than the organizing group, if the organizing group is sponsored by an existing holding company, individuals currently affiliated with other depository institutions, or individuals who, in the OCC's view, are otherwise collectively experienced in banking and have demonstrated the ability to work together effectively.

The proposal also maintained the OCC's ability, as a condition of charter approval, to object to and preclude the hiring of any officer, or appointment or election of any director, for two years following the commencement of the bank's business. This provision is retained in the final rule.

The final rule also provides that a national bank that seeks to invest in a bank with a community development focus must comply with the applicable requirements of 12 CFR part 24.

Conversion (§ 5.24)

The proposal reorganized and streamlined the OCC's rules governing charter conversions involving national banks. Among other things, the proposal clarified the types of entities that may convert to a national bank and established procedures for conversions from a national bank to another form of charter. The proposal also added specific language throughout this section to clarify the precise requirements and law applicable to an institution converting to a national bank charter.

The proposal also provided more explicit procedures for a financial institution converting to a national bank charter. The proposal required institutions converting to a national bank charter to identify all subsidiaries the institution seeks to retain following the conversion and to provide the information and analysis of the subsidiary's activities that would be required under § 5.34. In addition, as did the proposal, the final rule requires institutions converting to a national bank charter to identify nonconforming assets (including nonconforming subsidiaries) and nonconforming activities that the institution holds or engages in. The OCC considers requests to retain nonconforming assets of a state bank pursuant to its authority under 12 U.S.C. 35.

The OCC adopts the language in the proposal with a few clarifying changes and one additional change intended to reduce regulatory burden. The final rule establishes an expedited review procedure for healthy state banks or Federal or state savings associations (eligible depository institutions as defined in § 5.3(h)) that wish to convert to a national bank charter. Under this provision, an application by an eligible depository institution to convert to a national bank is deemed approved as of the 30th day after a filing is received by the OCC, unless the bank is notified that it is not eligible for expedited review under the standards contained in § 5.13(a)(2).

Fiduciary Powers (§ 5.26)

The proposal reorganized the OCC's application procedures for fiduciary powers and clarified the circumstances under which the OCC requires a national bank to obtain approval to

exercise fiduciary powers. The proposal also provided that a separate application to exercise fiduciary powers was not required when: (1) two or more national banks merge or consolidate and one of the banks has previously received approval to exercise fiduciary powers that is in effect at the time of the merger, or (2) a national bank with fiduciary powers is the resulting bank in a merger or consolidation with a state bank without fiduciary powers. An applicant applying for a charter for a national bank limited to fiduciary activities should file its application under § 5.20.

Two commenters supported the revisions to § 5.26. The OCC adopts the changes contained in the proposal with two substantive additions intended to further reduce paperwork burdens for a national bank filing an application under this section. Under the final rule, if approval to exercise fiduciary powers is desired in connection with any other transaction subject to an application under this part, an applicant may include its request for approval to exercise fiduciary powers as part of its other application. The OCC does not require a separate application to exercise fiduciary powers in these circumstances.

The final rule also streamlines the application procedure for a national bank meeting the eligible bank criteria contained in § 5.3(g). Under the final rule, an eligible bank need not submit an opinion of counsel to the OCC. However, in certain circumstances, the OCC may request this information prior to the bank commencing the activity.

Finally, the final rule clarifies that when a national bank with prior OCC approval to exercise fiduciary powers commences fiduciary activities in a new state, the bank need not file an additional application under this section, and is only required to file a written notice with the OCC within ten days after commencing the activities.

Establishment, Acquisition, and Relocation of a Branch (§ 5.30)

The proposal comprehensively revised the OCC's branching regulation to update the definition of the types of facilities that constitute a ''branch'' and to streamline procedures for acquiring and moving branches.

The OCC received numerous comments on this section. The OCC carefully considered all the comments, and the final rule reflects changes made in response to those comments and also incorporates recent statutory changes.

A. Definition of ''Branch''

Proposed § 5.30(d)(1)(ii)(A) excluded from the definition of a branch a facility to which ''the bank does not permit members of the public to have physical access * * * (*e.g.*, an office established by the bank that receives deposits only through the mail).'' This aspect of the proposal reflected the position taken by the OCC in several interpretive letters.

Several commenters specifically supported this provision but sought further clarification. One commenter was concerned that prohibiting access to ''members of the public'' would prohibit access even to those members of the public, such as delivery people, that are at the site for reasons other than to conduct banking transactions.

The final rule excludes from the definition of ''branch'' a facility that would otherwise qualify as a branch because it is established by a national bank and engages in one or more branching functions (receipt of deposits, payment of withdrawals, or making loans) but which prohibits access to members of the public for purposes of conducting one or more branching functions. The OCC expects that facilities that come within this exception will not be designed to undertake in-person branching transactions with customers nor would they invite members of the public to visit such sites to conduct branching transactions.

Proposed § 5.30(d)(1)(ii)(B) clarified that the term ''branch'' does not include a facility that is ''generally available to customers of other banks to receive substantially similar services pertaining to their accounts at other banks on the basis of substantially similar terms and conditions.'' As recognized by a number of commenters, the primary impact of this provision would have been to exclude from the definition of branch ATMs that are linked to networks and, thus, provide services to bank customers and non-customers alike. However, as a result of recent statutory changes contained in Section 2205 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Public Law 104–208, Sept. 30, 1996 (110 Stat. 3009), ATMs and remote service units are no longer considered branches and, thus, are not subject to the limitations on national bank branching imposed by the McFadden Act and codified at 12 U.S.C. 36. Consequently, the OCC has deleted this provision from the final rule and has also revised the final rule to state specifically that ATMS and remote service units are not branches. The OCC also recognizes, however, that other situations may still arise where a particular facility should not be considered to be a bank branch because it, in fact, provides services generally on a nondiscriminatory basis with respect to accounts that its customers hold as well as accounts held by noncustomers in other banks and depository institutions. The OCC believes these issues are best considered on a case-by-case basis based on the particular circumstances involved.

B. Messenger Service

Proposed § 5.30(f)(2)(iii) sets forth procedural rules specific to the establishment of messenger services. One commenter asked the OCC to define the term ''messenger service.'' The OCC believes that defining the term ''messenger service'' will clarify the applicability of these provisions and thus adds a definition that cross-references the definition of ''messenger service'' in 12 CFR 7.1012. In addition, the provisions permitting multiple messenger service applications to be combined has been retained in the final rule.

C. Public Notice for a Mobile Branch

Proposed § 5.30(h)(1) stated the publication requirements for a mobile branch application. One commenter requested clarification on the publication requirements. An applicant must publish public notice for a mobile branch or messenger service application in a newspaper that meets the requirements of § 5.8 for each area in which the mobile facility will provide branching services. An applicant need only publish public notice in one newspaper that meets those requirements in each area that it intends to serve. In addition, the final rule adds a definition of ''mobile branch'' which includes a branch, other than a messenger service facility, that does not have a single, fixed site, such as a van that travels to various public locations to enable customers to conduct their banking business. Each mobile unit requires a branching license. This is because a mobile facility is available at public sites to customers generally, unlike a messenger service facility that only serves specific customers at places such as their homes or businesses.

D. Reduced Comment Period

Proposed § 5.30(h)(2) provided a ten-day comment period for an application to establish an ATM branch and to engage in a short-distance branch relocation. While many commenters explicitly supported these reduced comment periods, several commenters thought that the OCC should apply the ten-day comment period more broadly.

In applying a reduced comment period for ATM branches and short-distance relocations, the OCC attempted to identify those types of applications

that are less likely to raise legal and policy concerns which generally lead to public comment. Short-distance relocations, which are unlikely in most states to raise legal concerns and where the relocated branch will serve the same area as the former branch, are less likely to raise concerns giving rise to public comment. Consequently, the final rule does not expand the availability of the reduced comment period. However, because the statutory change excluded ATMs from the term ''branch'' as that term is used in the McFadden Act, the final regulation applies the reduced comment period only to short distance relocations and increases the comment period to 15 days. Similarly, because of the statutory change with respect to ATMs and remote service units, the proposed rule permitting a national bank to seek approval for multiple ATMs and unstaffed branches in one application is no longer necessary.

E. Temporary Branches

The proposal requested comment on whether to apply streamlined procedures to temporary branches. All commenters who addressed this issue supported some form of streamlined processing for temporary branches. Therefore, the final rule contains a statement that the OCC will consider a request to waive or reduce the public notice and comment period with respect to an application to restore banking services to a community affected by a disaster or temporarily replace banking facilities where, because of an emergency, the bank temporarily cannot provide or must curtail banking services. Also, the procedures set forth in OCC Advisory Letters 94–3, 94–4, and 94–6 regarding branches at colleges and universities continue to be valid.

The final rule also provides that the OCC may waive or reduce the public notice and comment period, with respect to an application to establish a temporary branch, if: (1) the applicant bank has a CRA rating of ''Satisfactory'' or better; and (2) the temporary branch, if established by a state bank to operate in the manner proposed, would be permissible under state law without state approval. For these purposes, the final rule defines a temporary branch as a branch that is located at a fixed site and from the time of its opening is scheduled to close, and will permanently close, as of a certain date no longer than one year after it is first opened. Of course, if a proposal for a temporary branch does not meet these requirements, the bank can still apply to establish the branch under the standard branch application procedures.

Business Combinations (§ 5.33)

The proposal substantially reorganized, condensed, and simplified this section. The proposal used the term ''business combination,'' rather than ''merger,'' to avoid confusion on specific transactions and incorporated pertinent information regarding interim banks from former §§ 5.20 and 5.21. The proposal also provided for expedited review of certain corporate reorganizations (*e.g.*, a holding company could combine certain subsidiary banks under an expedited review process).

The proposal adopted the procedures of 12 U.S.C. 214a, 214c, 215, and 215a for combinations between national banks and Federal savings associations, with appropriate modifications to conform the style of § 5.33(g) with the rest of § 5.33 and part 5. In addition, similar to the treatment of conversions, references in 12 U.S.C. 214c to the ''law of the State in which such national banking association is located'' and ''any State authority'' mean ''the laws and regulations governing Federal savings associations'' and ''Office of Thrift Supervision,'' respectively.

The proposal also revised this section to reflect certain provisions of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law 103–328, Sept. 29, 1994, 108 Stat. 2338 (Riegle-Neal Act), regarding interstate business combinations.

The overwhelming number of comments received supported the proposed changes to § 5.33. Therefore, the OCC adopts this section substantially as proposed with an additional burden-reducing feature. This new provision in the final rule permits certain healthy banks to use a streamlined application form under expedited review procedures to effect certain types of business combinations. The OCC believes that this approach will significantly reduce paperwork burden for these banks while maintaining the focus of the OCC's review on those areas that pose significant risks to national banks.

Under the final rule, an applicant may file an abbreviated application form as instructed in the Manual and qualify for expedited processing of its application if: (1) at least one party to the transaction is an eligible bank and all other parties to the transaction are eligible banks or eligible depository institutions, the resulting national bank will be well capitalized immediately following the consummation of the transaction, and the total assets of the target depository institution are not more than 50 percent of the total assets of the acquiring bank, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application; (2) the acquiring national bank is an eligible bank, the target bank is not an eligible bank or an eligible depository institution, the resulting national bank will be well capitalized immediately following consummation of the transaction, and either (a) the appropriate district office has approved the use of the streamlined form; or (b) the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application. A streamlined application form will, of course, continue to require information necessary for the OCC to make a determination under the standards of the Bank Merger Act and this regulation, which include the convenience and needs of the community to be served and relevant CRA considerations.

Under the final rule, these applications, together with applications that qualify as ''business reorganizations,'' will be deemed approved by the OCC as of the 45th day after the filing is received by the OCC or the 15th day after the close of the comment period, whichever is later, unless the OCC notifies the bank that the filing is not eligible for expedited review, or the expedited review process is extended, under the standards in § 5.13.

In addition, with respect to business reorganizations, the final rule incorporates the eligible depository institution concept into the expedited review process for these transactions. Thus, a business combination between an eligible bank and eligible depository institution controlled by the same holding company would receive expedited processing.

Operating Subsidiaries (§ 5.34)

The proposal contained comprehensive revisions to § 5.34, *Operating subsidiaries,* and solicited public comment on a number of issues. The overwhelming majority of commenters supported the changes contained in the proposal. A number of commenters opposed specific provisions, two commenters asserted that the OCC lacked authority to issue the regulation under 12 U.S.C. 93a, and several other commenters urged specific changes. A discussion of the comments and the changes made in the final rule is set forth below.

A. Procedures

The proposal restructured the OCC approval requirements for an application by a national bank to establish or acquire an operating subsidiary, or to commence a new activity in an existing operating subsidiary. Essentially, operating subsidiary proposals would fall into one of three categories: (1) after-the-fact notice for certain types of activities; (2) expedited processing for certain other types of activities, when proposed to be conducted by financially strong and well-managed banks; and (3) standard processing in other cases. These revised procedures would expedite application processing for less complex activities and thus reduce unnecessary regulatory burden and enable the OCC to focus attention on novel or complex filings.

First, the after-the-fact notice procedures required a national bank to file a notice with the OCC within ten days after acquiring or establishing the subsidiary or commencing the new activity. The national bank was required to be ''adequately capitalized'' or ''well capitalized'' and not deemed to have been in ''troubled condition'' for purposes of § 5.51. In addition, the subsidiary could only engage in certain preapproved activities that were listed as eligible for after-the-fact notice.

The second category of procedures provided for expedited review of applications requiring prior OCC approval. To qualify for expedited review, a national bank was required to be an eligible bank, and the activity proposed had to be on the list of activities permissible for expedited processing. These applications were deemed approved 30 days after filing, unless the OCC notified the applicant prior to that date that the application was not eligible for expedited review under § 5.13(a)(2).

The third category of procedures generally covered all other operating subsidiary situations.

The OCC received 20 comments addressing these procedures. The majority of commenters supported the proposed changes.

Four commenters recommended moving certain activities from the expedited review to the notice category. These recommendations generally concerned activities related to foreign exchange, coin and bullion, leasing of personal property, securities brokerage, lending activities and providing investment advice. Two commenters also suggested adding property appraisal services to the notice list.

In the final rule, the OCC retains the activities in the categories set forth in the proposal with a few changes. The proposal included in the notice category providing financial and transactional advice to customers and assisting customers in structuring, arranging, and executing various financial transactions, provided the bank and its affiliates did not participate as principal. These transactions included mergers and acquisitions, swaps and derivatives, foreign exchange and related transactions, and arranging commercial real estate equity financing. The final rule removes the prohibition on participating as principal with respect to swaps and derivatives and foreign exchange and related transactions, since these are activities frequently undertaken directly by banks as part of their banking business. These notice category provisions relating to swaps and derivatives, and foreign exchange transactions, were then combined with the provision in the expedited category relating to dealing, trading, and investing in foreign exchange, coin and bullion and retained in the expedited processing category.

The final rule also moves the following activities from the expedited processing category to the notice category: (1) Activities that relate to making, purchasing, selling, servicing and warehousing loans, or interests therein; and (2) activities related to leasing of personal property. However, these activities are not eligible for the notice category where the notice involves the direct or indirect acquisition by the bank of any low-quality asset from an affiliate in connection with any transaction subject to § 5.34. The terms ''low-quality asset'' and ''affiliate'' have the same meaning as provided in section 23A of the Federal Reserve Act, 12 U.S.C. 371c.

In response to comments, the final rule adds to the expedited processing category real estate appraisal services conducted for the subsidiary, the bank, or other financial institutions. The final rule also adds to the notice category establishing and operating a subsidiary to own, hold, or manage all or part of the parent bank's investment securities portfolio.

Finally, the final rule updates activities relating to data processing to recognize that national banks are engaging in an increasing range of activities through electronic means. Under the final rule, the notice category relating to data processing activities is revised to cover activities involving data processing and warehousing products, services and related activities, including equipment and technology, performed for the operating subsidiary, its parent bank, and their affiliates. The final rule also includes in the expedited processing category data processing and warehousing products, services and related activities, including data processing equipment and technology permissible under 12 U.S.C. 24(Seventh) and 12 CFR 7.1019. The activities in the expedited processing category may be performed externally for parties other than the subsidiary itself, its parent bank, and their affiliates.

The notice category contains less complex, commonly accepted banking-related activities that the OCC has previously approved for operating subsidiaries on a case-by-case basis. The activities in the expedited review category are also activities that the OCC has previously approved but that are more complex, may require more specialized expertise, and, at this time, warrant prior OCC review. The OCC intends to revisit the activities contained in these categories on a regular basis and make changes as experience dictates.

The final rule also provides that notices and expedited approvals submitted to the OCC must contain a representation and undertaking that the activity will be conducted in accordance with OCC policy contained in published OCC guidance. This provision ensures that banks seeking expedited review and after-the-fact notice procedures conform their activities to parameters defined by the OCC. A bank may also apply through the standard processing procedures to engage in any activity that may not conform with OCC published guidance.

B. Ownership of the Operating Subsidiary

Former § 5.34 required a national bank to own at least 80 percent of the voting stock of a corporation to qualify as an operating subsidiary. The proposal would have amended this provision to require the parent bank to own more than 50 percent of the voting stock.

The majority of commenters supported the proposed change, noting that this provision would increase a national bank's flexibility to structure its internal organization.

A number of commenters also urged the OCC to permit a national bank to own 50 percent or less of a subsidiary under § 5.34 where the bank has effective working control over the subsidiary through other means. The OCC has carefully considered these comments and agrees that the bank's control of the operating subsidiary should be the determinative factor, whether that control is through a majority of the voting interest or though other means. Accordingly, the final rule

permits a national bank to own more than 50 percent of the voting (or similar type of controlling) interest of an operating subsidiary, or 50 percent or less of the voting (or similar) interest of the subsidiary if the bank otherwise controls the subsidiary and no other party controls more than 50 percent of the voting (or similar type of controlling) interest of the subsidiary.

However, to recognize that effective working control arrangements will come in a variety of forms, the final rule requires a national bank to file an application for OCC approval under the standard application procedures where the national bank proposes to own 50 percent or less of the voting (or similar) interest of the subsidiary. Thus, regardless of the type of activity that the subsidiary proposes to engage in, a national bank would not qualify for the notice or expedited review if it proposes to acquire 50 percent or less of the voting (or similar) interest of an operating subsidiary. This will permit the OCC to conduct a case-by-case review to ensure that the national bank has effective control over the subsidiary and that the bank is not exposed to undue risks. In determining whether there is control, one factor the OCC will consider is whether generally accepted accounting principles or Consolidated Reports of Condition and Income instructions would require consolidation of the bank and its subsidiaries.

The proposal also solicited comment on whether § 5.34 should include interests in entities other than corporations, such as limited liability companies (LLCs). The OCC received 11 comments addressing this issue, all of which supported including LLCs under the operating subsidiary rule. Some commenters also suggested broadening the rule to include other similar entities.

LLCs and other similar entities, *e.g.*, business trusts, have recently emerged in many states as an alternative to the corporate form of ownership. These entities are hybrid business organizations with characteristics of corporations (limited liability) and partnerships (tax treatment). As such, the entities have certain key attributes of corporations and joint ventures that the OCC has long permitted banks to participate in—bank control of the entity and limitation or insulation of the bank's liability for the entity's activities. Authorizing investments in these and other similar types of entities as operating subsidiaries increases the flexibility of national banks to structure their operations. Moreover, to date, the OCC's experience with LLCs has not revealed any additional risks unique to these entities. Thus, the final rule provides that an operating subsidiary that a national bank may invest in includes a corporation, limited liability company, or similar entity, if the parent bank owns more than 50 percent of the entity's voting (or similar type of controlling) interest, or otherwise controls the subsidiary and no other party controls more than 50 percent of the voting (or similar type of controlling) interest in the subsidiary. However, as is the case with national bank investments in operating subsidiaries that are corporations, only the standard application procedures apply to investments of 50 percent or less of the voting (or similar) interest where the parent bank otherwise controls the LLC or similar entity.

The final rule retains the language in the former rule relating to consolidation of book figures of a parent bank and operating subsidiary with some modifications. Under the final rule, pertinent book figures of the parent bank and its operating subsidiary must be combined in order to apply certain statutory limitations to the parent bank and its subsidiary on a combined basis, such as dividend limitations and lending limits. *See e.g.*, 12 U.S.C. 56, 60, 84 and 371d. However, in determining compliance with statutory limits based on regulatory capital, the bank will be required to make any reductions in regulatory capital required by 5.34(f), discussed later.

C. Fiduciary Powers

The proposal also requested comment on whether § 5.34 should require a national bank to obtain approval to exercise fiduciary powers as a precondition to providing investment advice, either in the bank or through a subsidiary.

The OCC received seven comments on this issue and all opposed the requirement. A number of commenters viewed the requirement as overly broad. Moreover, commenters noted that requiring a national bank to obtain prior OCC approval could result in different treatment for national banks and state-chartered banks.

The OCC has carefully considered these comments, and the final rule provides that if an operating subsidiary proposes to exercise investment discretion on behalf of customers or to provide investment advice for a fee, the bank must obtain OCC approval to exercise fiduciary powers, and the subsidiary will be subject to the requirements of 12 CFR part 9, except in two circumstances. First, the bank is not required to obtain approval to exercise fiduciary powers if the subsidiary is registered under the Investment Advisers Act of 1940, 15 U.S.C. 80b–1 *et seq.* Second, approval is not required if the subsidiary is registered, or has filed a notice, under the applicable provisions of sections 15, 15B or 15C of the Securities Exchange Act of 1934, 15 U.S.C. 78o, 78o–4, or 78o–5, as a broker, dealer, municipal securities dealer, government securities broker or government securities dealer; and the subsidiary's performance of investment advisory services as described in 15 U.S.C. 80b–2(a)(11) is solely incidental to the conduct of its business as broker or dealer and there is no special compensation to the subsidiary for those advisory services. This approach ensures effective regulation of the entity exercising the investment discretion in accordance with industry standards and avoids duplicative layers of regulatory oversight.

D. New Procedure for Certain Activities

The proposal revised former § 5.34(d)(2)(i) to provide that ''unless otherwise provided by statute or regulation, *or determined by the OCC in writing*, all provisions of Federal banking laws and regulations applicable to the operations of the parent bank apply to the operations of the bank's operating subsidiaries.'' (*Emphasis added*). The proposed revised standard would have allowed the OCC to determine, on a case-by-case basis, whether a bank could conduct through a subsidiary an activity *within the business of banking or incidental thereto*, but for one reason or another prohibited to a national bank directly to conduct or conduct in that manner, as in the case where (1) a specific prohibition applies to a parent bank but not to the bank's subsidiary, or (2) the legal authority to conduct the activity is otherwise restricted to the subsidiary.

The OCC received 46 comments on this provision. Approximately 75 percent of the commenters supported the provision in some fashion, most very strongly. Among other things, commenters noted that the proposal would: (1) provide banks with corporate flexibility and a meaningful alternative to structure their operations; (2) improve efficiencies; and (3) foster competition in the development and delivery of banking products and services to benefit consumers and businesses.

Several commenters opposed the proposal, however. These commenters included several trade associations that generally questioned bank entry into certain lines of business. A number of these commenters also urged the OCC not to take action on the proposal until

Congress acted on the scope of permissible bank affiliate powers.

Commenters also raised concerns with the OCC's authority to adopt the proposal and with safety and soundness issues associated with the proposal. Among other things, commenters asserted that: (1) the OCC lacks the authority to adopt the provision under 12 U.S.C. 24(Seventh) because the proposal would be inconsistent with the statutory language and legislative history of 12 U.S.C. 24(Seventh); (2) the proposal is inconsistent with past OCC precedent; (3) the provision may be inconsistent with sections 16 and 21 of the Banking Act of 1933 (Act of June 16, 1933, Ch. 89, section 16 and section 21, 48 Stat. 162, 184, and 189) (the 1933 Act or the Glass-Steagall Act); (4) the proposal may be inconsistent with the Bank Holding Company Act because that Act should be viewed as the exclusive method by which bank affiliates may engage in bank-ineligible activities; (5) the OCC lacks the authority to adopt the proposed changes under 12 U.S.C. 93a because that authority does not apply to securities activities of national banks under the Glass-Steagall Act [1]; and (6) the proposal would expose national banks to unacceptable safety and soundness risks.

The OCC has carefully considered all of these concerns, and, for the reasons discussed below, has determined to adopt various changes to this portion of the proposal to address issues raised by the commenters. In sum, under the procedures prescribed by § 5.34 of the final rule, a national bank may establish or acquire an operating subsidiary to conduct, or may conduct in an existing operating subsidiary, activities that are part of or incidental to the business of banking, as determined by the Comptroller of the Currency, pursuant to 12 U.S.C. 24(Seventh), and other activities permitted for national banks or their subsidiaries under other statutory authority. In certain circumstances, as described in § 5.34(f), this may include permitting a national bank to acquire or establish an operating subsidiary to conduct, or to conduct in an existing operating subsidiary, an activity that is permissible for the subsidiary under the foregoing standards but different from that permissible for the parent national bank. In these circumstances the activity will be subject to a number of safeguards, discussed below, and the OCC will publish a notice in the Federal Register and request comment prior to taking action on the application if the proposed activity has not been previously approved by the OCC.[2] For subsequent applications for the same activity, the OCC also may publish a notice and seek comment.

The final rule contains a number of built-in safeguards, responding to issues raised by commenters, to ensure that any new activities are conducted safely and soundly. Moreover, new activities will be approved only after case-by-case consideration has afforded the OCC the opportunity not only to require conformance with the conditions detailed in the final rule but also with any additional conditions that may be appropriate for a particular activity and for the particular applicant bank. This approach—tailoring the scope of the approval, if approval is appropriate, to the circumstances of the activity in question—allows the OCC to fulfill its continuing obligation to ensure that risk is identified, managed and controlled.

The following sections discuss in detail the particular concerns raised by certain commenters.

1. Authority Under 12 U.S.C. 24(Seventh) for the Final Operating Subsidiary Rule

Some commenters asserted that 12 U.S.C. 24(Seventh) prohibits a national bank from owning stock for its own account and that the OCC does not have the authority to permit national bank operating subsidiaries. These commenters also contended that, because of this, the OCC lacks the authority under 12 U.S.C. 24(Seventh) to issue a final rule permitting a national bank subsidiary to conduct an activity deemed to be part of the business of banking or incidental thereto, but different from that permitted for its parent bank to conduct directly.

The commenters who asserted that 12 U.S.C. 24(Seventh) precludes a national bank from owning any stock in a corporation point to the language in 12 U.S.C. 24(Seventh) that states: ''Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase [by the bank] of any shares of stock of any corporation.''

This language, which was added to 12 U.S.C. 24(Seventh) by section 16 of the 1933 Act has, for decades, been consistently interpreted by the OCC as preventing national banks from undertaking the types of speculative stock purchases that were the object of the 1933 Act, not as a bar to the ability of national banks to have subsidiaries or to own stock, where such ownership is otherwise authorized. This interpretation is entirely consistent with the language of 12 U.S.C. 24(Seventh) cited above—that the new provisions added in 1933 do not *authorize* national banks to purchase corporate stock, but to the extent other authority exists to do so, that authority remains intact.[3] Thus, such ownership as is ''otherwise permitted by law'' remains permissible. One such ''law'' is the powers sentence in 12 U.S.C. 24(Seventh), which was unaffected by the section 16 changes. This analysis is amply supported by the legislative history accompanying the enactment of this language.[4]

The key national bank powers portion of section 24(Seventh), which has existed essentially unchanged since its enactment in 1864, states that a national bank is expressly authorized to carry on the business of banking and to exercise ''all such incidental powers as shall be necessary'' to carry on that business. The courts have construed the term ''necessary'' to mean ''convenient and useful''. *See Arnold Tours, Inc.* v. *Camp,* 472 F.2d 427 (1st Cir. 1972).

In *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Insurance Co.*, 115 S.Ct. 810, 130 L.Ed. 2d 740 (1995), (VALIC), the Supreme Court confirmed that a national bank's permissible activities are not limited to the five enumerated powers described in the powers sentence of 12 U.S.C. 24(Seventh) and activities incidental to those enumerated powers. ''[T]he Comptroller * * * has discretion to authorize activities beyond those specifically enumerated. The exercise of the Comptroller's discretion, however, must be kept within reasonable bounds.'' *Id.* at 814, n.2.

It is clear that the authority under 12 U.S.C. 24(Seventh) includes activities that are incident to being in business generally, and that a bank, as a business, may engage in activities that are

[1] The Securities and Exchange Commission expressed no objection to the OCC's proposal regarding expanded activities for operating subsidiaries subject to the understanding that: (1) the OCC intended that securities activities conducted in operating subsidiaries are subject to regulation under the Federal securities laws, and (2) the OCC's proposal was not intended as a steppingstone to permit activities previously not permitted for a bank to conduct itself to be shifted from an operating subsidiary to the bank. If, in fact, securities activities are approved for an operating subsidiary, these understandings will be correct.

[2] This new notice process will allow commenters to present any issues they believe the OCC should take into account in connection with the particular bank and its proposed activity, *e.g.*, legal issues, safety and soundness concerns, and service to the bank's community.

[3] *See* Legal Opinion from Julie L. Williams, Chief Counsel, to Eugene A. Ludwig, Comptroller of the Currency, ''Legal Authority for Revised Operating Subsidiary Regulation,'' (November 18, 1996), (Legal Opinion), at 9–14.

[4] *See* Legal Opinion at 8–11.

convenient and useful to the conduct of that business. For example, such powers as having employees and borrowing money to conduct operations fall into this category. Moreover, Congress has repeatedly recognized and regulated these business activities of banks without deeming it necessary to authorize them explicitly because they are authorized by the powers sentence in 12 U.S.C. 24(Seventh). Thus, for example, various statutes refer to duties of bank employees and place limits on the ownership of bank premises, assuming their existence in each case.[5]

The use of subsidiaries is convenient and useful to national banks in conducting their banking business, and the ability of national banks to own subsidiaries under the authority of 12 U.S.C. 24(Seventh) is well founded. For example, the changes made to 12 U.S.C. 24(Seventh) by the 1927 McFadden Act, (Act of February 25, 1927, Ch. 191, section 2(b), 44 Stat. 1226) (1927 Act) and the 1933 Act confirm that national banks have authority to own subsidiaries pursuant to their incidental powers. In each instance, the statute placed limitations on bank subsidiary activities, presupposing the ability of the bank to own and operate a subsidiary in the first place, even though such ownership was not expressly identified in the statute as a bank power. For example, the 1927 Act limited the *amount* a national bank could invest in a corporation conducting a safe deposit business, thereby acknowledging that banks already had authority to own this type of corporation under 12 U.S.C. 24(Seventh). Similarly, in one of many examples from the 1933 Act supporting this proposition, that Act limited the amount that a national bank could invest in a bank premises subsidiary corporation, thereby acknowledging the continued lawfulness of the investment.[6] The 1933 Act also imposed limits on transactions by national banks (and state member banks) with their ''affiliates,'' which were defined to include companies that were controlled by a bank.[7] The scope of these provisions would make no sense unless Congress believed that national banks had the authority in the first place to control a company as a subsidiary.

Nor does the OCC believe that the ownership of a subsidiary is convenient or useful to its parent bank *only* when the subsidiary can do no more than duplicate the activities permissible for its parent bank. Clearly, the ability to operate something other than a precise clone of itself could be convenient or useful to a bank in various situations. Those situations have boundaries, however, since not just the ownership of the subsidiary, but also what it *does*, must be part of or incidental to the business of banking, or otherwise authorized for the bank or the subsidiary.

Accordingly, under the final rule, a national bank operating subsidiary remains limited in its activities to those that are part of or incidental to the business of banking as determined by the OCC, or otherwise permissible for national banks or their subsidiaries under other statutory authority. The final rule confirms, however, that this may include activities different from what the parent national bank may conduct directly, *if*, in the circumstances presented, the reason or rationale for restricting the parent bank's ability to conduct the activity does not apply to the subsidiary, and if the ability of the subsidiary to conduct the activity would not frustrate a congressional purpose of preventing the activity from being undertaken by its parent bank.[8]

Under the final rule, therefore, the OCC must evaluate an operating subsidiary application involving this type of activity on a case-by-case basis. For each activity, the OCC will consider the particular activity at issue, and weigh: (1) the form and specificity of the restriction applicable to the parent bank; (2) *why* the restriction applies to the parent bank; and (3) whether it would frustrate the purpose underlying the restriction on the parent bank to permit a subsidiary of the bank to engage in the particular activity. The OCC's evaluation of all these factors will also take into account safety and soundness implications of the activity, the regulatory safeguards that apply to the operating subsidiary and to the activity itself, any conditions that may be imposed in conjunction with an application approval, and any additional undertakings by the bank or the operating subsidiary that address the foregoing factors.

2. Consistency of the Final Rule With Past OCC Precedent

Some commenters have asserted that prior OCC characterizations of a national bank operating subsidiary as a ''department of the bank'' and other statements on the permissible activities of an operating subsidiary preclude the OCC from determining that an operating subsidiary may conduct an activity not directly permissible for the parent bank, even if the activity is part of or incidental to the business of banking. The OCC recognizes that some may have viewed the terminology it has used as representing a legal conclusion regarding the outer bounds of the activities permissible for a national bank operating subsidiary. However, neither the OCC's position nor judicial precedent is that limiting.

It is true that the OCC has generally taken a policy position that the Federal banking laws applicable to a national bank should also apply to its operating subsidiary. That this did not represent a legal determination that an operating subsidiary may *never* permissibly conduct activities different from those allowed its parent bank is illustrated, however, by exceptions contained in even relatively early OCC approvals. *See, e.g.*, Letter from Deputy Comptroller DeShazo (October 25, 1967); Letter from Deputy Comptroller Watson (January 1968). *See also*, Interpretive letter No. 289, *reprinted in* [1983–1984 Transfer Binder] Fed. Banking L. Rep. (CCH) para. 85,453 (approving an operating subsidiary to act as a general partner of a partnership formed to establish ATMs).[9] *See also Independent Bankers Ass'n of Georgia* v. *Board of Governors of the Federal Reserve System*, 516 F.2d 1206 (D.C. Cir. 1975) (a national bank could lawfully conduct, through a subsidiary that was a holding company, banking operations at various locations in a state that would have been barred for the bank directly under the state's branching laws).

The final rule resolves the ambiguities of OCC precedents by clarifying that the permissible activities of an operating subsidiary are not necessarily a carbon copy of the permissible activities of its parent. However, the activities still must qualify as a part of the business of banking or incidental thereto, or be permissible for national banks or their subsidiaries under other statutory authority, and the final rule also provides a specific (and public) process for evaluating applications that involve this type of activity.

This approach is based not only on extensive reanalysis of the relevant statutes and legislative history, but also on the availability of enhanced supervisory tools for ensuring that these activities are conducted safely and soundly. The OCC is not precluded from modifying its policies where the modification is lawful and where enhanced flexibility can be appropriately monitored and contained via the imposition of conditions as

[5] *See* Legal Opinion at 2–5.

[6] *See* Legal Opinion at 4–7, 13.

[7] *See* Legal Opinion at 12–14.

[8] *See* Legal Opinion at 19–24.

[9] *See* Legal Opinion at 21–23.

warranted and the availability of improved supervisory tools. *Cf. Smiley* v. *Citibank,* 116 S.Ct. 1730, 135 L.Ed. 2d 25 (1996). For example, as discussed later, Congress has provided the bank regulatory agencies enhanced authority to levy civil money penalties and issue cease and desist orders to deter unsafe or unsound activities. In addition, an extensive ''prompt corrective action'' regime of mandatory and discretionary supervisory tools was enacted in 1991 to enable regulators to protect the financial stability of all types of insured depository institutions.

3. Consistency With the Glass-Steagall Act

Some commenters also suggested that the proposal would not be consistent with various provisions of the Glass-Steagall Act. These commenters contended that §§ 16 and 21 of the Glass-Steagall Act prevent commercial and investment banking functions from being conducted by a single entity.

The OCC notes that these comments are premised on the assumption that the OCC will approve *specific* types of activities under this regulation and go on to provide the commenters' views about the legality of conducting those types of activities in an operating subsidiary. However, the final rule only establishes a process that enables the OCC to consider and act on a broader range of corporate activities than is permitted for operating subsidiaries under former part 5. By issuing this portion of the final rule, the OCC is not addressing or approving any particular activity for national bank operating subsidiaries. The OCC will evaluate applications to engage in any new operating subsidiary activity on a case-by-case basis following a comprehensive review of any supervisory, policy or legal concerns, consistent with the new procedures for public notice and comment set forth in the final rule.

4. Consistency With the Bank Holding Company Act

Some commenters asserted that the regulation is inconsistent with the Bank Holding Company Act (BHCA) because the BHCA is the exclusive means by which bank holding company affiliates can engage in activities not permissible for banks to conduct themselves. Some of these commenters asserted, for example, that the BHCA, which permits bank holding companies to engage in ineligible securities activities through nonbank subsidiaries provides the exclusive method by which Congress intended to permit bank affiliates to engage in activities such as ineligible securities activities.

As noted above, however, this final rule only establishes a *process* for the OCC to consider a broader range of subsidiary activities. Approval of a particular activity will be subject to the application process set forth in the regulation. To the extent that specific activities are questioned by commenters those issues will be addressed in the context of a specific application; they are not presented by a rule that only establishes an application process. Moreover, the process in the regulation does not authorize ''nonbank'' activities; only activities that are ''part of the business of banking or incidental thereto,'' or permitted for national banks or their subsidiaries under other statutory authority, could be permitted.

The OCC also notes that courts have specifically held that the BHCA does not govern the permissible activities of banks or their subsidiaries. For example, in *Independent Insurance Agents of America, Inc.* v. *Board of Governors of the Federal Reserve System,* 890 F.2d 1275 (2d Cir. 1989) (Merchants II), *cert. denied,* 498 U.S. 810 (1990), the Second Circuit upheld a Federal Reserve Board (FRB) order concluding that the BHCA's activity restrictions did not apply to the activities of a bank subsidiary of a bank holding company. In upholding the order, the court noted that the FRB had a ''reasonable'' interpretation of the BHCA, one that confided decisions regarding the scope of permissible activities of bank subsidiaries to the banks' national and state chartering authorities. *Id.* at 1284.

Shortly thereafter, in *Citicorp* v. *Board of Governors of the Federal Reserve System,* 936 F.2d 66 (2nd Cir. 1991), *cert. denied,* 502 U.S. 1031 (1992), the court applied the reasoning of *Merchants II to a situation involving a subsidiary* of a bank in a bank holding company structure. In vacating a FRB order that required a state bank owned by a bank holding company to terminate certain activities conducted through the state bank's subsidiary, the court found that the BHCA ''cannot sensibly be interpreted to reimpose the authority of the [FRB] on a generation-skipping basis to regulate the subsidiary's subsidiary.'' *Id.* at 68. The activities of the bank's subsidiary in question were, according to the court, appropriately the responsibility of the bank's chartering authority to address.[10]

[10] *Cf.* Section (4)(c)(5) of the Bank Holding Company Act, 12 U.S.C. 1843(c)(5), that provides that the investment and activities restrictions contained in section 4 of that Act do not apply to ''shares which are of the kinds and amounts eligible for investment by national banking associations'' under section 24 of the National Bank Act.

5. OCC Authority Under 12 U.S.C. 93a

Some commenters asserted that the OCC lacks the authority under 12 U.S.C. 93a to issue § 5.34. Federal law at 12 U.S.C. 93a authorizes the Comptroller of the Currency to issue rules and regulations to carry out the responsibilities of the office, except that the authority conferred by 12 U.S.C. 93a does not apply to 12 U.S.C. 36 or the Glass-Steagall Act. These commenters contended that 12 U.S.C. 93a does not confer authority on the OCC to establish national bank powers that they do not have under existing law.

The OCC believes that these commenters misunderstood the effect of the proposal. As already described earlier, the final rule establishes a procedure under which the OCC will consider applications for activities for operating subsidiaries on a case-by-case basis. Moreover, as discussed earlier, these activities must be part of or incidental to the business of banking, or permitted for national banks or their subsidiaries under other statutory authority.

Further, § 5.34 does not purport to diminish or otherwise affect the application of the Glass-Steagall Act to national banks. Glass-Steagall Act prohibitions are still applicable to the same degree as prior to the adoption of the rule. The final rule only recognizes that operating subsidiaries are entities, distinct from a bank, whose activities are not necessarily required to be an exact duplicate of the activities permitted for their parent bank. In other words, the final rule only recognizes the *possibility* that some activity restrictions that apply to a national bank may not apply to a bank's subsidiary. Thus, in this rulemaking, the OCC has not exercised its authority under 12 U.S.C. 93a to adopt that principle as a matter of law or as a final interpretation.

6. Safety and Soundness Considerations

Some commenters also argued that the proposal would permit banks through their operating subsidiaries to engage in risky activities that would jeopardize the deposit insurance system.

The OCC does not today, and will not under this revised rule, approve applications for operating subsidiaries to engage in activities that would endanger the stability of their parent banks. Moreover, the OCC does not assume that new activities would necessarily involve more risk than many well-recognized banking activities conducted by banks today. The OCC also has available a number of measures to address safety and soundness issues that may arise in connection with

activities conducted under the authority of this section. These safeguards include certain requirements added to the final rule in response to commenters' suggestions, the ability to condition application approvals on a case-by-case basis, and statutory changes in recent years that have provided the banking agencies with additional supervisory tools.

For example, in the proposal the OCC noted that it would impose appropriate conditions in connection with the approval of a particular operating subsidiary application in order to ensure bank safety and soundness. After careful deliberation, the OCC has decided to include in the final rule a number of additional conditions that would apply to the parent bank and/or the subsidiary when the subsidiary engages in an activity authorized under § 5.34(d), but different from that permitted for the bank directly to conduct.

The safeguards that are built into the final rule fall into two categories. First, because the use of a separate subsidiary structure can enhance the safety and soundness of conducting new activities by distinguishing the subsidiary's activities from those of the parent bank (as a legal matter) and allowing more focused management and monitoring of its operations,[11] the final rule contains a number of requirements that are intended to emphasize the importance of the subsidiary's independent legal and corporate existence.

Specifically, the final rule requires the subsidiary to: (1) be physically separate and distinct in its operations from the parent bank, including ensuring that the employees of the subsidiary are compensated by the subsidiary, although this requirement would not be construed to prohibit the parent bank and the subsidiary from sharing the same facility, provided that any area in which the subsidiary conducts business with the public is distinguishable, to the extent practicable, from the area in which customers of the bank conduct business with the bank; (2) be held out as a separate and distinct entity from the bank in its written material and direct contact with outside parties, with all written marketing material clearly stating that the subsidiary is a separate entity from the bank and the obligations of the subsidiary are not obligations of the bank; (3) not have the same name as its parent bank, and if the subsidiary has a name similar to its parent bank to take appropriate steps to minimize the risk of customer confusion, including clarifying the separate character of the two entities and the extent to which their respective obligations are insured or not insured by the Federal Deposit Insurance Corporation; (4) be adequately capitalized according to relevant industry measures and maintain capital adequate to support its activities and to cover reasonably expected expenses and losses; (5) maintain separate accounting and corporate records; (6) conduct its operations pursuant to independent policies and procedures that are also intended to inform customers that the subsidiary is an organization separate from the bank; (7) contract with the bank for any services only on terms and conditions substantially comparable to those available to or from independent entities; (8) observe appropriate separate corporate formalities, such as separate board of directors' meetings; (9) maintain a board of directors at least one-third of whom shall not be directors of the bank and shall have relevant expertise capable of overseeing the subsidiary's activities; and (10) have internal controls appropriate to manage the financial and operational risks associated with the subsidiary. These internal controls should also be maintained by the bank.

Second, if the subsidiary is engaged in a principal capacity in activities authorized under § 5.34(f), certain supervisory tools will be particularly useful to protect the financial soundness of the bank. For example, the final rule provides that the bank's capital and total assets shall each be reduced by an amount equal to the amount of the bank's equity investment in the subsidiary, and the subsidiary's assets and liabilities shall not be consolidated with those of the bank. For risk-based capital purposes, 50 percent of the bank's equity investment in the subsidiary must be deducted from Tier 1 capital and 50 percent from Tier 2 capital. In addition, the OCC may require the bank to calculate its capital on a consolidated basis for purposes of determining whether the bank is adequately capitalized under 12 CFR part 6.

The final rule also provides that a national bank must satisfy the eligible bank criteria contained in § 5.3(g) before commencement of the activity, and thereafter, taking into account the required capital deduction described above. The eligible bank criteria helps to ensure that only financially strong and well-managed banks will undertake these activities through their subsidiaries. If the bank ceases to be well capitalized for two consecutive quarters, it must submit a plan to the OCC detailing how it will become well capitalized.

The final rule also contains safeguards on transactions between the bank and this type of subsidiary. Under the final rule, the standards of sections 23A and 23B of the Federal Reserve Act, 12 U.S.C. 371c and 371c–1, shall apply to, and shall be enforced and applied by the OCC with respect to, transactions between the bank and the subsidiary. The application of these sections will limit a bank's investments in and extensions of credit to this type of subsidiary to 10 percent of the bank's capital, require extensions of credit to be fully collateralized, and apply arm's-length safeguards to transactions between the bank and the subsidiary.

Collectively, these conditions will help to contain risk, reduce potential conflicts of interest, and help to ensure the safe and sound operation of the parent bank. The arm's-length standards also address concerns regarding inappropriate subsidization by the bank of its subsidiary. In addition, the OCC retains the authority to impose additional safeguards, either on a case-by-case or activity-by-activity basis, to address safety and soundness issues presented by particular types of operations. To the extent that the OCC's future experience with the safeguards contained in the regulation indicates that the safeguards need to be supplemented, or that other measures would more effectively or efficiently accomplish their intended objectives, the OCC will propose appropriate changes to the regulation.

Finally, Federal legislation in recent years has provided the federal banking agencies with additional supervisory tools to address promptly supervisory concerns that may arise in connection with activities engaged in by banks or their subsidiaries. For example, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 provided substantial civil money penalties for national banks engaging in unsafe and unsound banking practices or for violations of conditions imposed in writing in connection with the grant of an application or other request by a national bank. Likewise, the Federal Deposit Insurance Corporation Improvement Act of 1991, (Pub. L. 102–242, Dec. 19, 1991, 105 Stat. 2236), established a framework for prompt corrective action when banks fail to meet specified capital requirements, including the ability of the OCC to require an undercapitalized institution to divest any subsidiary that may pose

[11] *See e.g.*, OCC Interpretive Letter No. 725 (May 10, 1996) *reprinted in* Fed. Banking L. Rep. (CCH) Para. 81,040 (special purpose subsidiary established by NationsBank, N.A.). The FDIC in a recent proposal also recognized that conducting activities in a subsidiary can be helpful in containing risks to the bank. See 61 FR 43,486 (August 23, 1996).

a significant risk to the parent bank or that is likely to cause a significant dissipation of the institution's assets or earnings. These and other available supervisory actions provide the OCC with a substantial array of tools—not available until relatively recently—to address risks presented by national bank operating subsidiaries.

Bank Service Companies (§ 5.35)

Proposed § 5.35 streamlined the application requirements and clarified certain aspects of the rule. The proposal also minimized regulatory burden with respect to low-risk activities by implementing changes resulting from the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325, Sept. 23, 1994, 108 Stat. 2160 (Riegle Act), and conforming § 5.35 with the procedures proposed for operating subsidiaries.

The commenters supported the proposal, and, specifically, the expedited review procedure and parallel construction to § 5.34.

The OCC adopts this section as proposed, with modifications and other technical changes to conform this section to § 5.34. The section is also changed from the proposal to account for the new provisions in section 2613 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 that authorize bank service companies to organize as limited liability companies.

Other Equity Investments (§ 5.36)

The proposal restructured the section and removed OCC approval requirements for equity investments in an agricultural credit corporation or in a savings association to be acquired under section 13 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. 1823. Instead, the proposal covered only investments authorized by statutes enacted after February 12, 1990, that are not covered by other OCC regulations.

The proposal also incorporated an application process that conformed with other sections in part 5. The proposal maintained the 30-day time frame for approval of other equity investments but simplified the language to correspond to other similar provisions. The OCC also requested comment on whether to remove the section.

The OCC received two comment letters, each supporting removal of the provision. However, the OCC continues to believe that although an application may not be warranted, some notification to the OCC of certain equity investments by national banks facilitates examiner supervision and bank safety and soundness. Therefore, the final rule clarifies that 12 U.S.C. 24(Seventh) and other statutes authorize national banks to make various types of equity investments. With respect to equity investments in an agricultural credit corporation, a savings association eligible to be acquired under section 13 of the FDIA, 12 U.S.C. 1823, and equity investments authorized by statute after February 12, 1990 and not covered by other applicable OCC regulation, the OCC will continue to require the bank to file a notice with the appropriate district office within 10 days after the investment. Other types of equity investments permitted for national banks will be reviewed by the OCC, as appropriate, on a case-by-case basis.

Investment in Bank Premises (§ 5.37)

The proposal transferred certain provisions previously located in 12 CFR part 7, clarified the circumstances under which OCC approval is required for national bank investment in bank premises in excess of the bank's capital stock, and described the procedures for submitting an application for OCC review. The proposal also provided that, notwithstanding the capital stock limitation, an eligible bank may provide an after-the-fact notice for aggregate investments in bank premises up to 20 percent of the bank's ''capital and surplus'' as defined in § 5.3(d).

Commenters generally supported the proposed provision, especially the expedited review process. However, a number of commenters had additional recommendations. Most suggestions focused on proposed § 5.37(c)(3), which provided for a notice procedure for eligible banks making qualifying investments in bank premises.

The OCC has reviewed the commenters' suggestions and the after-the-fact notice procedures and determined that the examination and supervision process contains sufficient safeguards to prevent excessive investments in bank premises. Therefore, the final rule makes a number of changes to further increase the amount a national bank may invest in bank premises without seeking OCC approval and to conform with recent changes in the Economic Growth and Regulatory Paperwork Reduction Act of 1996. Under the final rule, a bank that has a CAMEL rating of 1 or 2 may make an aggregate investment in bank premises up to 150 percent of the bank's capital and surplus (as defined in § 5.3(d)) without submitting an application for prior approval to the appropriate district office, provided that the bank is well capitalized both before and after the loan or investment is made. The bank must provide a description of the investment to the appropriate district office within 30 days following the transaction.

The final rule also defines the term ''bank premises'' by adopting certain provisions of the Call Report line item on Bank Premises and Fixed Assets. Under the final rule, ''bank premises'' is defined as: (1) premises that are owned and occupied (or to be occupied, if under construction) by the bank, its branches, or its consolidated subsidiaries; (2) capitalized leases and leasehold improvements, vaults, and fixed machinery and equipment; (3) remodeling costs to existing premises; (4) real estate acquired and intended, in good faith, for use in future expansion; or (5) parking facilities that are used by customers or employees of the bank, its branches, and its consolidated subsidiaries. The inclusion of this definition will clarify the types of investments and loans subject to this section.

Another commenter suggested the OCC clarify whether the entire investment in bank premises must be made within eighteen months to avoid the expiration of approval. The changes in the final rule to § 5.13(g) for situations beyond the control of the applicant adequately address this concern.

Change in Location of Main Office (§ 5.40)

The proposal reorganized this section and streamlined the procedures to change the location of a national bank's main office.

All comments received by the OCC on this section supported the proposal. One commenter suggested including a notice procedure for a temporary relocation of a main office in the event that the permanent location is not immediately available. The OCC plans to include further guidance on this issue in the Manual. The OCC adopts this section substantially as proposed.

Corporate Title (§ 5.42)

The proposal rearranged this section for greater clarity and specifically alerted banks to the restrictions in 18 U.S.C. 709 regarding the use of certain titles. No comments were received on this section. The OCC adopts this section substantially as proposed.

Changes in Permanent Capital (§ 5.46)

The proposal restructured and streamlined this section to clarify the requirements for a change to a national bank's permanent capital and to reduce regulatory burden. The proposal no longer required letters of intent, preliminary approval, and notification of changes in par value (unless related

to selling stock for consideration other than cash). By dividing the relevant information by subject matter, the proposal clarified the procedures by which a national bank may make a change in its permanent capital and drew a clear distinction between procedures increasing and decreasing permanent capital.

The proposal also sought to facilitate increases in permanent capital by clarifying that most increases in permanent capital do not require OCC approval. Generally, a national bank need only file a letter of notification with the OCC after the sale or completion of the transaction. The proposal also provided an expedited review procedure for eligible banks.

All the comments received on this section supported the OCC's proposal. The OCC believes these procedures significantly clarify and streamline the process for changes in permanent capital. Therefore, the OCC is adopting this section as proposed with an additional change to further reduce regulatory burden.

Under proposed § 5.46, a national bank had to submit an application and receive OCC approval each time it intended to decrease its permanent capital. The final rule provides that an eligible bank may submit an application for expedited processing that would cover planned reductions of capital and distributions that would result in a distribution of cash or assets or a transfer to undivided profits for up to four consecutive quarters (*i.e.*, one year), rather than requiring four separate applications and related application fees. To qualify for this treatment, the bank must continue to be an eligible bank following each reduction in its capital. In addition, the application must include the specified information for each quarter covered by the application.

Subordinated Debt as Capital (§ 5.47)

Under the proposal, unless the OCC has previously notified a national bank that prior approval is required, a national bank needed no prior approval to prepay subordinated debt.

Most comments received on proposed § 5.47 supported the OCC's proposal to allow a national bank to issue subordinated debt as Tier 2 capital without prior OCC approval. However, one commenter noted that prior regulatory approval and knowledge of reductions in capital may be an important element of monitoring safety and soundness, and thus, prepayments of subordinated debt should be subject to OCC approval.

The OCC shares the commenter's desire to ensure the safe and sound operation of banks, particularly those institutions that are not well capitalized. Therefore, the OCC has changed the proposal to provide that only banks that remain eligible banks may dispense with prior OCC approval for the prepayment of subordinated debt. This will ensure the continued monitoring of prepayments of subordinated debt by institutions more likely to present safety and soundness concerns (*i.e.*, banks that are not well capitalized, have a CAMEL rating of 3, 4, or 5, or are subject to certain OCC orders, agreements or directives). The OCC also retains the authority to notify any other bank that demonstrates safety and soundness concerns that the bank must obtain prior OCC approval to issue or prepay subordinated debt. The OCC believes that this approach ensures continued monitoring of safety and soundness concerns without unduly restricting well-capitalized, well-managed banks.

In addition, the final rule adds provisions relating to the issuance of subordinated debt to count as Tier 3 capital in addition to Tier 2 capital.

Voluntary Liquidation (§ 5.48)

The proposal reorganized and simplified this section. It clarified that a national bank preparing to voluntarily liquidate must file a notice with the OCC once the bank's shareholders have voted to voluntarily liquidate the bank pursuant to 12 U.S.C. 182. The proposal stated that the bank must also publish a public notice pursuant to that statute.

The proposal also reduced the burden of dissolving shell banks remaining after whole-bank purchase and assumptions involving transactions between affiliated or non-affiliated banks, provided the acquiring bank is adequately capitalized.

The comment received by the OCC supported this provision. Therefore, the OCC adopts this section as proposed with minor clarifying changes.

Change in Bank Control; Reporting of Stock Loans (§ 5.50)

The proposal substantially reorganized, clarified, and simplified this section. Among other things, the proposal removed paragraphs that were repetitive or confusing and incorporated a number of OCC interpretations regarding § 5.50. The proposal also applied the standards of the Change in Bank Control Act of 1978 (CBCA), 12 U.S.C. 1817(j), to uninsured national banks.

The comments received by the OCC supported the proposed changes to this section and suggested some additional clarifications. The OCC adopts this section as proposed with a few modifications.

The newspaper publication required by proposed § 5.50(g)(1) required an applicant to publish a public announcement of its filing in a newspaper widely available in the geographic area where the affected national bank is located. This change is similar to that proposed in § 5.8, and commenters recommended that the OCC retain the language in the former regulation because they believed that it provides the public with more effective notice. The OCC agrees with the commenters, and the final rule retains the language in the former regulation, *i.e.*, requiring banks to publish a public announcement in a newspaper of general circulation in the community where the affected national bank is located.

Another commenter suggested that the OCC should revise proposed § 5.50(f)(2)(ii) (A) and (B) so that an acquiror must satisfy both factors to create a rebuttable presumption that an acquisition is made by a person with the power to direct the bank's management or policies. The OCC concluded that this change in the OCC's longstanding policy would be too restrictive and, therefore, the final rule adopts this provision as proposed.

One commenter also suggested that the term ''default'' in the definition of ''good faith'' be defined to mean only a failure to make timely payments of interest or principal or a material default with respect to other obligations in a loan agreement. Because these situations may be fact dependent, the OCC did not add limiting language in the final rule.

Finally, the final rule reflects recent amendments contained in section 2226 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 to the CBCA stock loan reporting requirements. These amendments eliminate the stock loan reporting requirements for all entities other than foreign banks and their affiliates. The OCC notes that for purposes of reporting loans secured by the stock of a national bank without FDIC deposit insurance, federal branches and agencies of foreign banks only are subject to these reporting requirements.

Change in Directors or Senior Executive Officers (§ 5.51)

The proposal provided for certain exceptions to reduce unnecessary regulatory burden, addressed agency appeal issues, and made additional housekeeping-type changes to conform § 5.51 to the rest of part 5.

The comments received by the OCC on this section all supported the changes to this section. The final rule adopts this section as proposed with additional changes to conform to the recent changes contained in section 2209 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996. These changes removed the requirement of this section to provide prior written notice to the OCC to add or replace directors or senior executive officers if the national bank: (1) has operated as a depository institution for less than two years; or (2) has undergone a change in control within the preceding two years that required it to file a notice under the CBCA. These changes also extend the prior review period to 90 days and remove the requirements for suspending the review period.

Change of Address (§ 5.52)

The proposal added this section to part 5 to require a national bank that changes its address to inform the OCC of that change in a timely manner.

The OCC received no comments on this section. The final rule adopts this section substantially as proposed.

Dividends—Subpart E

The proposal organized the information in the current §§ 5.61 and 5.62 into a new subpart to communicate better the standards and procedures underlying a national bank's payment of dividends and to conform to recent statutory changes. The proposal also clarified definitions and procedures.

Commenters generally supported the proposed changes. A few commenters suggested providing circumstances under which a bank could pay dividends in kind without prior OCC approval. The OCC continues to believe, however, that dividends other than for cash raise potential valuation issues and should continue to receive prior OCC review.

The OCC adopts this subpart substantially as proposed with one exception. The final rule clarifies that § 5.64, which implements the dividend restrictions contained in 12 U.S.C. 60, does not apply to stock dividends. The provision is intended to prevent impairment of the bank's capital structure through payment of excessive dividends. The OCC believes that payments of stock dividends, which do not result in a distribution of cash or assets, do not raise these concerns.

Federal Branches and Agencies—Subpart F

The proposal discussed relocating provisions relating to applications of Federal branches and agencies, former §§ 5.23, 5.25, 5.41, and 5.43, to 12 CFR part 28 to consolidate all of the regulations concerning Federal branches and agencies and international activities of national banks in one regulation. The proposal invited comment on the advisability of relocating these provisions. The OCC received one comment letter generally supporting the relocation of the provisions relating to Federal branches and agencies.

The OCC determined that while it is desirable to consolidate all of the regulations concerning Federal branches and agencies and international activities of national banks in one regulation, it is also desirable to address all procedures relating to the filing of applications and notices in part 5. Therefore, the final rule includes a new subpart F outlining the corporate procedures for Federal branches and agencies and refers readers to part 28 for substantive rules and policies relating to Federal branches and agencies of foreign banks.

Technical Amendment to 12 CFR Part 3

The final rule contains two technical and conforming amendments to capital adequacy, 12 CFR part 3. These changes clarify that in most circumstances prior OCC approval is not required for the issuance and prepayment of subordinated debt.

Technical Amendment to 12 CFR Part 7

The final rule contains two technical changes to part 7 removing provisions that are now accounted for in part 5. A technical change is also made to § 7.1000 to cross-reference the applicable provisions in part 5 relating to investments in bank premises.

Technical Amendment to 12 CFR Part 16

The final rule contains a technical and conforming change to 12 CFR 16.20(d). The final rule changes the reference from § 5.33(b)(6)(ii) to § 5.33(e)(8).

Technical Amendment to 12 CFR Part 28

The final rule contains technical corrections to § 28.2(b) and § 28.10.

DERIVATION TABLE

[This table directs readers to the provision(s) of the former regulation, if any, upon which the provision in the final rule is based]

Revised provision	Original provision	Comments
§ 5.1	§ 5.1	Modified.
§ 5.2(a)	§ 5.2(a)	Modified.
(b)	§ 5.2(b)	Modified.
(c)	§ 5.14	Modified.
	§ 5.3	Removed.
§ 5.3(a)		Added.
(b)	§ 5.2(e)	Significant change.
(c)		Added.
(d)		Added.
(e)		Added.
(f)		Added.
(g)		Added.
(h)		Added.
(i)		Added.
(j)	§ 5.2(d)	Modified.
(k)		Added.
(l)		Added.
§ 5.4(a)	§ 5.4	Significant change.
(b)	§ 5.4	Modified.
(c)		Added.
(d)	§ 5.4	Significant change.
(e)		Added.
§ 5.5	§ 5.5	Significant change.

DERIVATION TABLE—Continued

[This table directs readers to the provision(s) of the former regulation, if any, upon which the provision in the final rule is based]

Revised provision	Original provision	Comments
	§ 5.6	Removed.
§ 5.7(a)	§ 5.7	Modified.
(b)	§§ 5.5(c), 5.7	No change.
§ 5.8(a)	§ 5.8(a)	Modified.
(b)	§ 5.8(a)	Modified.
(c)	§ 5.8(a)	Modified.
(d)		Added.
(e)		Added.
(f)		Added.
§ 5.9(a)	§ 5.9(b)	Modified.
(b)	§ 5.9(a)	Significant change.
(c)	§ 5.9(a)	Significant change.
§ 5.10(a)	§ 5.10(a)	Modified.
(b)	§ 5.10(a)	Significant change.
§ 5.11(a)	§ 5.10(b)	Modified.
(b)	§ 5.10(b)	Modified.
(c)	§ 5.10(c)	Modified.
§ 5.11(d)(1)	§ 5.11(a)	Modified.
(d)(2)	§ 5.11(d)	Modified.
(e)	§ 5.11(c)	Modified.
(f)	§ 5.10(b)(5)	Modified.
(g)(1)	§ 5.11(e)(1)	Modified.
(g)(2)	§ 5.11(e)(3)	Modified.
(g)(3)	§ 5.11(e)(3)	Significant change.
(h)	§ 5.11(f)	Modified.
(i)		Added.
§ 5.12	§ 5.12	No change.
§ 5.13(a)	§ 5.13 (b), (c)	Significant change.
(a)(1)		Added.
(a)(2)		Added.
(b)	§ 5.13(c)	Significant change.
(c)	§ 5.7	Modified.
(d)	§ 5.13(a)	Modified.
(e)	§ 5.13(a)	Modified.
(f)	§ 5.13(d)	Significant change.
(g)		Added.
(h)	§ 5.13(e)	Significant change.
	§ 5.14	Removed.
§ 5.20(a)	§ 5.20(b)	Significant change.
(b)		Added.
(c)	§§ 5.20(a), 5.21(a), 5.22(a)(2), 5.27(b)	Significant change.
(d)(1)	§ 5.27(c)	Modified.
(d)(2)–(7)		Added.
(e)(1)	§ 5.20(b), (d)(4)(v)	Significant change.
(e)(2)	§ 5.20(b)	Modified.
(f)(1)	§ 5.20(d)	Significant change.
(f)(2)	§ 5.20(c), (d)	Significant change.
(f)(3)	§ 5.20(d)(1), (d)(1)(ii)	Modified.
(g)(1)	§ 5.20(d)(2)(i)	Modified.
(g)(2)	§ 5.20(d)(3)(ii)	Modified.
(g)(3)(i)	§ 5.20(d)(2)(ii)	No change.
(g)(3)(ii)	§ 5.20(d)(2)(iii)	No change.
(g)(3)(iii)	§ 5.20(d)(2)(iv)	No change.
(g)(4)(i)	§ 5.20(d)(4)(iii)(A)	Modified.
(g)(4)(ii)	§ 5.20(d)(4)(iii)(C)	Modified.
(g)(5)	§ 5.20(d)(1)(iv), (d)(2)(iii)	Significant change.
(h)(1)	§ 5.20(d)(1)(i), (d)(3)	Significant change.
(h)(2)	§ 5.20(d)(3)(i)	Modified.
(h)(3)(i)	§ 5.20(d)(3)(ii)(A)	Modified.
(h)(3)(ii)	§ 5.20(d)(3)(ii)(C)	Significant change.
(h)(4)	§ 5.20(d)(3)(iii)	Significant change.
(h)(5)(i)	§ 5.20(d)(3)(iv), (d)(3)(iv)(A)	Significant change.
(h)(5)(ii)	§ 5.20(b), (d)(3)(iv)	Modified.
(h)(5)(iii)	§ 5.20(d)(3)(iv)(B)	Modified.
(h)(6)	§ 5.20(d)(3)(v), (d)(3)(v)(A)	Modified.
(h)(7)		Added.
(i)(1)	§ 5.20(e)	Significant change.
(i)(2)	§ 5.20(d)	Significant change.
(i)(3)	§ 5.20(d)(1)(iii)	Significant change.
(i)(4)	§ 5.20(d)(1)(iii)	Significant change.
(i)(5)(i)	§ 5.20(f)	Modified.

DERIVATION TABLE—Continued

[This table directs readers to the provision(s) of the former regulation, if any, upon which the provision in the final rule is based]

Revised provision	Original provision	Comments
(i)(5)(ii)	§ 5.20(d)(4)(ii)	No change.
(i)(5)(iii)	§ 5.20(d)(3)(iii), (g)	Modified.
(j)		Added.
(k)(1)	§ 5.27(e)(1)	Modified.
(k)(2)	§ 5.27(e)(2)	Modified.
(k)(3)	§ 5.27(d)	Significant change.
(l)	§ 5.22(a)(2), (c)	Significant change.
	§ 5.21	Incorporated into § 5.33.
	§ 5.22	Incorporated into § 5.20.
	§ 5.23	Incorporated into § 5.70.
§ 5.24(a)	§ 5.24(a)	Modified.
(b)		Added.
(c)		Added.
(d)(1)	§ 5.24(c)(1)	Significant change.
(d)(2)(i)		Added.
(d)(2)(ii)	§ 5.24(c)(2)	Significant change.
(d)(2)(iii)		Added.
(d)(2)(iv)	§ 5.24(c)(4)	Modified.
(d)(2)(v)	§ 5.24(c)(4)	Modified.
(d)(3)	§ 5.24(b)	No change.
(d)(4)		Added.
(e)(1)	§ 5.24(d)(1)	Significant change.
(e)(2)	§ 5.24(d)(2)	Modified.
(e)(3)	§ 5.24(d)(1)	Modified.
(f)		Added.
	§ 5.25	Incorporated into § 5.70.
§ 5.26(a)	§ 5.26(a)	No change.
(b)	§ 5.26(d)	Significant change.
(c)	§ 5.26(b)	Significant change.
(d)	§ 5.26(d)	Significant change.
(e)(1)	§ 5.26(d)	Significant change.
(e)(2)	§ 5.26(e)	Significant change.
(e)(3)	§ 5.26(f)	Significant change.
(e)(4)	§ 5.26(g)	Significant change.
(e)(5)		Added.
(e)(6)	§ 5.26(b)	Modified.
(e)(7)	§ 5.26(h)	Modified.
	§ 5.27	Incorporated into § 5.20.
§ 5.30(a)	§ 5.30(a)	Modified.
(b)	§ 5.30(a)	Modified.
(c)		Added.
(d)(1)	§§ 5.30(b), 5.31(b)	Significant change.
(d)(2)		Added.
(d)(3)		Added.
(d)(4)		Added.
(d)(5)		Added.
(e)	§ 5.30(c)	Significant change.
(f)(1)		Added.
(f)(2)		Added.
(f)(3)		Added.
(f)(4)	§ 5.30(g)	No change.
(f)(5)		Added.
(g)		Added.
(h)(1)		Added.
(h)(2)		Added.
(h)(3)		Added.
(h)(4)		Added.
(i)	§ 5.30(f)	Modified.
(j)		Added.
	§ 5.31	Incorporated into § 5.30.
	§ 5.32	Incorporated into § 5.70.
§ 5.33(a)	§ 5.33(a)	Significant change.
(b)		Added.
(c)		Added.
(d)(1)		Added.
(d)(2)		Added.
(d)(3)		Added.
(d)(4)	§ 5.21(a)	Significant change.
(e)(1)	§ 5.33(b)(2)	Significant change.
(e)(1)(i)	§ 5.33 (b)(2)(i), (b)(3), (b)(4)	Significant change.
(e)(1)(ii)	§ 5.33 (b)(2)(iii), (b)(2)(iv), (b)(6)	Significant change.

DERIVATION TABLE—Continued

[This table directs readers to the provision(s) of the former regulation, if any, upon which the provision in the final rule is based]

Revised provision	Original provision	Comments
(e)(1)(iii)	§ 5.33 (b)(2)(ii), (b)(5)	Significant change.
(e)(1)(iv)	§ 5.33 (b)(2)(ii), (b)(5)	Significant change.
(e)(2)		Added.
(e)(3)		Added.
(e)(4)(i)	§ 5.21	Significant change.
(e)(4)(ii)	§ 5.21 (e), (f)	Significant change.
(e)(4)(iii)	§ 5.21(g)	Significant change.
(e)(4)(iv)	§ 5.21(h)	Significant change.
(e)(5)	§ 5.33(b)(8)	Significant change.
(e)(6)		Added.
(e)(7)		Added.
(e)(8)	§ 5.33(b)(6)(ii)	Significant change.
(f)(1)		Added.
(f)(2)	§ 5.21(c)	Modified.
(f)(3)		Added.
(g)(1)	§ 5.33(c)(1)	Significant change.
(g)(2)	§ 5.33(c)(2)	Significant change.
(g)(3)(i)	§ 5.33(h)(1)	Significant change.
(g)(3)(ii)	§ 5.33(h)(2)	Modified.
(g)(3)(iii)	§ 5.33(h)(3)	Significant change.
(h)		Added.
(i)		Added.
(j)		Added.
§ 5.34(a)	§ 5.34(a)	Modified.
(b)		Added.
(c)		Added.
(d)(1)	§ 5.34 (c), (d)	Significant change.
(d)(2)	§ 5.34(c)	Significant change.
(d)(3)	§ 5.34(d)(3)	Modified.
(d)(4)	§ 5.34(d)(2)(ii)	Modified.
(e)(1)(i)	§ 5.34(d)(1)(i)	Significant change.
(e)(1)(ii)	§ 5.34(b)	Modified.
(e)(1)(iii)	§ 5.34(d)(1)(iii)	Modified.
(e)(2)		Added.
(e)(3)		Added.
(e)(4)	§ 5.34(d)(1)(iv)	Significant change.
(e)(5)		Added.
(f)		Added.
§ 5.35(a)	§ 5.35(a)	Modified.
(b)		Added.
(c)		Added.
(d)(1)–(5)	§ 5.35(c)	Significant change.
(e)	§ 5.35(d)	Significant change.
(f)(1)	§ 5.35 (e)(1), (e)(2)	Significant change.
(f)(2)		Added.
(f)(3)		Added.
(f)(4)	§ 5.35(e)(1)(i)(D)	Modified.
(f)(5)	§ 5.35(e)(1)(i)(B)	Significant change.
(f)(6)	§ 5.35(b)	Modified.
(g)	§ 5.35(e)(1)(ii)(A)	Modified.
(h)	§ 5.35(f)	Modified.
(i)(1)	§ 5.35(e)(1)(ii)(A)	Modified.
(i)(2)		Added.
§ 5.36(a)	§ 5.36(a)	Modified.
(b)	§ 5.36(c)	Modified.
(c)(1)	§ 5.36(d)(1)	Significant change.
(c)(2)	§ 5.36(d)(1)	Significant change.
(c)(3)	§ 5.36(d)(1)	Modified.
(d)	§ 5.36(b)	Modified.
§ 5.37		Added.
§ 5.40(a)	§ 5.40(a)	Modified.
(b)		Added.
(c)		Added.
(d)(1)	§ 5.40(d)(1)	No change.
(d)(2)	§ 5.40 (d)(2), (d)(3)	Significant change.
(d)(3)	§ 5.40(d)(4)	Modified.
(d)(4)		Added.
(d)(5)	§ 5.40(c)	Modified.
(e)	§ 5.40(h)	Modified.
	§ 5.41	Incorporated into § 5.70.
§ 5.42(a)	§ 5.42(a)	Modified.

DERIVATION TABLE—Continued

[This table directs readers to the provision(s) of the former regulation, if any, upon which the provision in the final rule is based]

Revised provision	Original provision	Comments
(b)		Added.
(c)	§ 5.42(c)	Significant change.
(d)(1)	§ 5.42(d)	Modified.
(d)(2)	§ 5.42(e)	Modified.
(d)(3)	§ 5.42(b)	Modified.
	§ 5.43	Incorporated into § 5.70.
	§ 5.44	Removed.
	§ 5.45	Removed.
§ 5.46(a)	§ 5.46(a)	Modified.
(b)		Added.
(c)		Added.
(d)	§ 5.46(b)	Modified.
(e)(1)		Added.
(e)(2)		Added.
(e)(3)		Added.
(e)(4)		Added.
(f)	§ 5.46(f)	Significant change.
(g)	§ 5.46(f) (2)–(5)	Significant change.
(h)	§ 5.46(f)(5), (f)(6)	Significant change.
(i)(1)	§ 5.46(g)(1)	Significant change.
(i)(2)	§ 5.46(f)(1)(i)	Significant change.
(i)(3)	§ 5.46(g)(2), (g)(3)	Significant change.
(i)(4)		Added.
(i)(5)	§ 5.46(g)(4)	Significant change.
(j)	§ 5.46(c)	Modified.
(k)	§ 5.46(d)	Significant change.
§ 5.47(a)	§ 5.47(a)	No change.
(b)	§ 5.47(b)	Modified.
(c)	§ 5.47(c)	No change.
(d)(1)	§ 5.47(d)(1)	No change.
(d)(2)	§ 5.47(d)(2)	No change.
(d)(3)		Added.
(e)(1)	§ 5.47(e)(1)	No change.
(e)(2)		Added.
(e)(3)	§ 5.47(e)(2)	Modified.
(f)(1)	§ 5.47(f)(1)	No change.
(f)(2)	§ 5.47(f)(2)	Modified.
(g)	§ 5.47(g)	Modified.
(h)	§ 5.47(h)	No change.
(i)	§ 5.47(i)	No change.
§ 5.48(a)	§ 5.48(a)	Modified.
(b)		Added.
(c)	§ 5.48(b)	Modified.
(d)		Added.
(e)(1)	§ 5.48(c)	Significant change.
(e)(2)	§ 5.48(e)	Significant change.
(e)(3)	§ 5.48(f)	Modified.
(f)(1)		Added.
(f)(2)		Added.
(g)	§ 5.48(d)	Modified.
§ 5.50(a)	§ 5.50(a)	Modified.
(b)		Added.
(c)(1)		Added.
(c)(2)(i)	§ 5.50 (f)(1), (f)(2)	Modified.
(c)(2)(ii)	§ 5.50(f)(1)	Modified.
(c)(2)(iii)	§ 5.50(f)(4)	No change.
(c)(2)(iv)	§ 5.50(f)(5)	No change.
(c)(2)(v)	§ 5.50(f)(6)	No change.
(c)(2)(vi)	§ 5.50(f)(7)	Modified.
(c)(3)	§ 5.50(g)(4)	Significant change.
(d)(1)		Added.
(d)(2)		Added.
(d)(3)	§ 5.50(d) (ftnt 1)	Modified.
(d)(4)		Added.
(d)(5)	§ 5.50(c), (d)(1) (ftnt 2)	Modified.
(d)(6)	§ 5.50(c)	Modified.
(e)(1)	§ 5.50(g)(1)(i), (g)(1)(iii)	Significant change.
(e)(2)	§ 5.50(g)(1)(ii), (g)(3)(iii)	Modified.
(e)(3)	§ 5.50(g)(1)(iii), (g)(5)	Modified.
(f)(1)	§ 5.50(b)	Significant change.
(f)(2)(i)	§ 5.50(d)(1)	Modified.

DERIVATION TABLE—Continued

[This table directs readers to the provision(s) of the former regulation, if any, upon which the provision in the final rule is based]

Revised provision	Original provision	Comments
(f)(2)(ii)	§ 5.50(d)(1)(i), (d)(1)(ii)	Modified.
(f)(2)(iii)	§ 5.50(d)(2)	No change.
(f)(2)(iv)	§ 5.50(d)(1), (d)(3)	Significant change.
(f)(2)(v)	§ 5.50(d)(3)	Significant change.
(f)(3)(i)	§ 5.50 (e)(2), (g)(2)	Modified.
(f)(3)(i)(A), (B)	§ 5.50(g)(2)	Modified.
(f)(3)(ii)	§ 5.50(g)(1)(v)	Modified.
(f)(3)(ii)(A)	§ 5.50(g)(1)(v)	Modified.
(f)(3)(ii)(B)	§ 5.50(h)(1)	Significant change.
(f)(3)(ii)(C)		Added(1)
(f)(3)(iii)	§ 5.50(g)(1)(iv)	Modified(1)
(f)(4)	§ 5.50(g)(5)	Significant change(1)
(f)(5)	§ 5.50(g)(1)(iv)	Significant change(1)
(g)(1)	§ 5.50(h)(1)	Significant change(1)
(g)(2)	§ 5.50(h)(2)	Significant change(1)
(h)		Added(1)
§ 5.51(a)	§ 5.51(a)	No change(1)
(b)		Added(1)
(c)(1)	§ 5.51(c)(1)	Modified(1)
(c)(2)	§ 5.51(c)(2)	Modified(1)
(c)(3)	§ 5.51(c)(3)	Modified(1)
(c)(4)	§ 5.51(c)(4)	Modified(1)
(c)(5)	§ 5.51(c)(5)	No change(1)
(c)(6)	§ 5.51(c)(6)	No change(1)
(d)	§ 5.51(d)	Modified(1)
(e)(1)	§ 5.51(e)(1)	Modified(1)
(e)(2)	§ 5.51(e)(2)	No change(1)
(e)(3)	§ 5.51(e)(3)	Modified(1)
(e)(4)	§ 5.51(e)(5)	Modified(1)
(e)(5)	§ 5.51(e)(6)	No change(1)
(e)(6)	§ 5.51(e)(7)	Modified(1)
(e)(7)	§ 5.51(e)(8)	No change(1)
(e)(8)	§ 5.51(b)	Modified(1)
(f)(1)	§ 5.51(f)(1)	No change(1)
(f)(2)	§ 5.51(f)(2)	No change(1)
(f)(3)	§ 5.51(f)(3)	No change(1)
(f)(4)	§ 5.51(f)(4)	No change(1)
§ 5.52		Added(1)
§ 5.60(a)	§§ 5.61(a), 5.62(a)	Significant change(1)
(b)		Added(1)
(c)	§§ 5.61(b), 5.62(b)	Modified(1)
§ 5.61(a)		Added(1)
(b)		Added(1)
§ 5.62		Added(1)
§ 5.63(a)	§ 5.61(a)	Significant change(1)
(b)	§ 5.61(e)	Modified(1)
§ 5.64(a)	§ 5.62(a)(1)	Significant change(1)
(b)	§ 5.62(a)(2)	Modified(1)
(c)	§ 5.61(d)(3)	Significant change(1)
(c)(1)	§ 5.61(d)(3)(i)	No change(1)
(c)(2)	§ 5.61(d)(3)(ii)	Modified(1)
§ 5.65		Added(1)
§ 5.66	12 CFR § 7.2024	No change(1)
§ 5.67	12 CFR § 7.2023	No change(1)
§ 5.70	§§ 5.23, 5.25, 5.27, 5.32, 5.41, 5.43	Significant change(1)

Regulatory Flexibility Act

It is hereby certified 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 required. This regulation will reduce somewhat the regulatory burden on national banks, regardless of size, by simplifying and clarifying existing regulatory requirements.

Executive Order 12866

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

Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. Because the OCC

has determined that the final rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of more than $100 million in any one year, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered. As discussed in the preamble, the final rule has the effect of reducing burden and increasing the efficiency of corporate activities and corporate transactions undertaken by national banks.

List of Subjects

12 CFR Part 3

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

12 CFR Part 5

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

12 CFR Part 7

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

12 CFR Part 16

National banks, Reporting and recordkeeping requirements, Securities.

12 CFR Part 28

Foreign banking, National banks, Reporting and recordkeeping requirements.

Authority and Issuance

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

PART 3—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

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

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

2. In § 3.100, the heading of paragraph (f) and paragraph (f)(1) are revised to read as follows:

§ 3.100 Capital and surplus.

* * * * *

(f) *Requirements and restrictions: Limited life preferred stock, mandatory convertible debt, and other subordinated debt*—(1) *Requirements.* Issues of limited life preferred stock and subordinated notes and debentures (except mandatory convertible debt) shall have original weighted average maturities of at least five years to be included in the definition of *surplus.* In addition, a subordinated note or debenture must also:

(i) Be subordinated to the claims of depositors;

(ii) State on the instrument that it is not a deposit and is not insured by the FDIC;

(iii) Be unsecured;

(iv) Be ineligible as collateral for a loan by the issuing bank;

(v) Provide that once any scheduled payments of principal begin, all scheduled payments shall be made at least annually and the amount repaid in each year shall be no less than in the prior year; and

(vi) Provide that no prepayment (including payment pursuant to an acceleration clause or redemption prior to maturity) shall be made without prior OCC approval unless the bank remains an eligible bank, as defined in 12 CFR 5.3(g), after the prepayment.

* * * * *

3. In appendix A to part 3, section 2, paragraph (b)(4) is revised and footnote 5 is removed and reserved to read as follows:

Appendix A to Part 3—Risk-Based Capital Guidelines

* * * * *

Section 2. Components of capital.

* * * * *

(b) *Tier 2 Capital.* * * *

(4) Term subordinated debt instruments, and intermediate-term preferred stock and related surplus are included in Tier 2 capital, but only to a maximum of 50% of Tier 1 capital as calculated after deductions pursuant to section 2(c) of this appendix. To be considered capital, term subordinated debt instruments shall meet the requirements of § 3.100(f)(1). However, pursuant to 12 CFR 5.47, the OCC may, in some cases, require that the subordinated debt be approved by the OCC before the subordinated debt may qualify as Tier 2 capital or may require prior approval for any prepayment (including payment pursuant to an acceleration clause or redemption prior to maturity) of the subordinated debt. Also, at the beginning of each of the last five years for the life of either type of instrument, the amount that is eligible to be included as Tier 2 capital is reduced by 20% of the original amount of that instrument (net of redemptions).

* * * * *

4. Part 5 is revised to read as follows:

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

Sec.

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

§ 5.1 Scope.

This part establishes rules, policies and procedures of the Office of the Comptroller of the Currency (OCC) for corporate activities and transactions involving national banks. It contains information on rules of general and specific applicability, where and how to file, and requirements and policies applicable to filings. This part also establishes the corporate filing procedures for Federal branches and agencies of foreign banks.

Subpart A—Rules of General Applicability

§ 5.2 Rules of general applicability.

(a) *General.* The rules in this subpart apply to all sections in this part unless otherwise stated.

(b) *Exceptions.* The OCC may adopt materially different procedures for a particular filing, or class of filings, in exceptional circumstances, such as natural disasters or unusual transactions, after providing notice of the change to the applicant and to any other party that the OCC determines should receive notice.

(c) *Additional information.* The ''Comptroller's Corporate Manual'' (Manual) provides additional guidance, including policies, procedures, and sample forms. The Manual is sent to all national banks and is available for a fee by writing to the Comptroller of the Currency, P.O. Box 70004, Chicago, IL 60673–0004.

§ 5.3 Definitions.

(a) *Applicant* means a person or entity that submits a notice or application to the OCC under this part.

(b) *Application* means a submission requesting OCC approval to engage in various corporate activities and transactions.

(c) *Appropriate district office* means:

(1) The OCC's Multinational Banking Department for all national banks that are subsidiaries of a designated multinational holding company;

(2) The district office for the OCC district where the national bank's supervisory office is located for all other banks; or

(3) The OCC's International Banking and Finance Department for Federal branches and agencies.

(d) *Capital and surplus* means:

(1) A bank's Tier 1 and Tier 2 capital calculated under the OCC's risk-based capital standards set forth in Appendix A to 12 CFR part 3 as reported in the bank's Consolidated Report of Condition and Income filed under 12 U.S.C. 161; plus

(2) The balance of a bank's allowance for loan and lease losses not included in the bank's Tier 2 capital, for purposes of the calculation of risk-based capital described in paragraph (d)(1) of this section, as reported in the bank's Consolidated Report of Condition and Income filed under 12 U.S.C. 161.

(e) *Central city* means the city or cities identified as central cities by the Director of the Office of Management and Budget.

(f) *Depository institution* means any bank or savings association.

(g) *Eligible bank* means a national bank that:

(1) Is well capitalized as defined in 12 CFR 6.4(b)(1);

(2) Has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (CAMEL);

(3) Has a Community Reinvestment Act (CRA), 12 U.S.C. 2901 *et seq.*, rating of ''Outstanding'' or ''Satisfactory''; and

(4) Is not subject to a cease and desist order, consent order, formal written agreement, or Prompt Corrective Action directive (*see* 12 CFR part 6, subpart B) or, if subject to any such order, agreement, or directive, is informed in writing by the OCC that the bank may be treated as an ''eligible bank'' for purposes of this part.

(h) *Eligible depository institution* means a state bank or a Federal or state savings association that meets the criteria for an ''eligible bank'' under § 5.3(g) and is FDIC-insured.

(i) *Filing* means an application or notice submitted to the OCC under this part.

(j) *National bank* means any national banking association and any bank or trust company located in the District of Columbia operating under the OCC's supervision.

(k) *Notice* means a submission notifying the OCC that a national bank intends to engage in or has commenced certain corporate activities or transactions.

(l) *Short-distance relocation* means moving the premises of a branch or main office within a:

(1) One thousand foot-radius of the site if the branch is located within a central city of an MSA;

(2) One-mile radius of the site if the branch is not located within a central city, but is located within an MSA; or

(3) Two-mile radius of the site if the branch is not located within an MSA.

§ 5.4 Filing required.

(a) *Filing.* A depository institution shall file an application or notice with the OCC to engage in corporate activities and transactions as described in this part.

(b) *Availability of forms.* Individual sample forms and instructions for filings are available in the Manual and from each district office.

(c) *Other applications accepted.* At the request of the applicant, the OCC may accept an application form or other filing submitted to another Federal agency that covers the proposed action or transaction and contains substantially the same information as required by the OCC. The OCC may also require the applicant to submit supplemental information.

(d) *Where to file.* An applicant should address a filing or other submission under this part to the attention of the Licensing Manager at the appropriate district office. However, the OCC may advise an applicant through a pre-filing communication to send the filing or submission directly to the Bank Organization and Structure Department or elsewhere as otherwise directed by the OCC. Relevant addresses are listed in the Manual.

(e) *Incorporation of other material.* An applicant may incorporate any material contained in any other application or filing filed with the OCC or other Federal agency by reference, provided that the material is attached to the application and is current and responsive to the information requested by the OCC. The filing must clearly indicate that the information is so incorporated and include a cross-reference to the information incorporated.

§ 5.5 Fees.

An applicant shall submit the appropriate filing fee, if any, in connection with its filing. An applicant shall pay the fee by check payable to the Comptroller of the Currency or by other means acceptable to the OCC. The OCC publishes a fee schedule annually in the ''Notice of Comptroller of the Currency fees,'' described in 12 CFR 8.8. The OCC generally does not refund the filing fees.

§ 5.6 [Reserved]

§ 5.7 Investigations.

(a) *Authority.* The OCC may examine or investigate and evaluate facts related to a filing to the extent necessary to reach an informed decision.

(b) *Fees.* The OCC may assess fees for investigations or examinations conducted under paragraph (a) of this section. The OCC publishes the rates, described in 12 CFR 8.6, annually in the ''Notice of Comptroller of the Currency fees.''

§ 5.8 Public notice.

(a) *General.* An applicant shall publish a public notice of its filing in a newspaper of general circulation in the community in which the applicant proposes to engage in business, on the date of filing, or as soon as practicable before or after the date of filing.

(b) *Contents of the public notice.* The public notice shall state that a filing is being made, the date of the filing, the name of the applicant, the subject matter of the filing, that the public may submit comments to the OCC, the address of the appropriate office(s) where comments should be sent, the closing date of the public comment period, and any other information that the OCC requires.

(c) *Confirmation of public notice.* The applicant shall mail or otherwise deliver a statement containing the date of publication, the name and address of the newspaper that published the public

notice, a copy of the public notice, and any other information that the OCC requires, to the appropriate district office promptly following publication.

(d) *Multiple transactions.* The OCC may consider more than one transaction, or a series of transactions, to be a single filing for purposes of the publication requirements of this section. When filing a single public notice for multiple transactions, the applicant shall explain in the notice how the transactions are related.

(e) *Joint public notices accepted.* Upon the request of an applicant for a transaction subject to the OCC's public notice requirements and public notice required by another Federal agency, the OCC may accept publication of a single joint notice containing the information required by both the OCC and the other Federal agency, provided that the notice states that comments must be submitted to both the OCC and, if applicable, the other Federal agency.

(f) *Public notice by the OCC.* In addition to the foregoing, the OCC may require or give public notice and request comment on any filing and in any manner the OCC determines appropriate for the particular filing.

§ 5.9 Public availability.

(a) *General.* The OCC provides a copy of the public file to any person who requests it. A requestor should submit a request for the public file concerning a pending application to the appropriate district office. A requestor should submit a request for the public file concerning a decided or closed application to the Disclosure Officer, Communications Division, at the address listed in the Manual. Requests should be in writing. The OCC may impose a fee in accordance with 12 CFR 4.17 and with the rates the OCC publishes annually in the ''Notice of Comptroller of the Currency Fees'' described in 12 CFR 8.8.

(b) *Public file.* A public file consists of the portions of the filing, supporting data, supplementary information, and information submitted by interested persons, to the extent that those documents have not been afforded confidential treatment. Applicants and other interested persons may request that confidential treatment be afforded information submitted to the OCC pursuant to paragraph (c) of this section.

(c) *Confidential treatment.* The applicant or an interested person submitting information may request that specific information be treated as confidential under the Freedom of Information Act, 5 U.S.C. 552 (*see* 12 CFR 4.12(b)). A submitter should draft its request for confidential treatment narrowly to extend only to those portions of a document it considers to be confidential. If a submitter requests confidential treatment for information that the OCC does not consider to be confidential, the OCC may include that information in the public file after providing notice to the submitter. Moreover, at its own initiative, the OCC may determine that certain information should be treated as confidential and withhold that information from the public file. A person requesting information withheld from the public file should submit the request to the Disclosure Officer, Communications Division, under the procedures described in 12 CFR part 4, subpart B. That request may be subject to the predisclosure notice procedures of 12 CFR 4.16.

§ 5.10 Comments.

(a) *Submission of comments.* During the comment period, any person may submit written comments on a filing to the appropriate district office.

(b) *Comment period*—(1) *General.* Unless otherwise stated, the comment period is 30 days after publication of the public notice required by § 5.8(a).

(2) *Extension.* The OCC may extend the comment period if:

(i) The applicant fails to file all required publicly available information on a timely basis to permit review by interested persons or makes a request for confidential treatment not granted by the OCC that delays the public availability of that information;

(ii) Any person requesting an extension of time satisfactorily demonstrates to the OCC that additional time is necessary to develop factual information that the OCC determines is necessary to consider the application; or

(iii) The OCC determines that other extenuating circumstances exist.

(3) *Applicant response.* The OCC may give the applicant an opportunity to respond to comments received.

§ 5.11 Hearings and other meetings.

(a) *Hearing requests.* Prior to the end of the comment period, any person may submit to the appropriate district office a written request for a hearing on a filing. The request must describe the nature of the issues or facts to be presented and the reasons why written submissions would be insufficient to make an adequate presentation of those issues or facts to the OCC. A person requesting a hearing shall simultaneously submit a copy of the request to the applicant.

(b) *Action on a hearing request.* The OCC may grant or deny a request for a hearing and may limit the issues to those it deems relevant or material. The OCC generally grants a hearing request only if the OCC determines that written submissions would be insufficient or that a hearing would otherwise benefit the decisionmaking process. The OCC also may order a hearing if it concludes that a hearing would be in the public interest.

(c) *Denial of a hearing request.* If the OCC denies a hearing request, it shall notify the person requesting the hearing of the reason for the denial.

(d) *OCC procedures prior to the hearing*—(1) *Notice of Hearing.* The OCC issues a Notice of Hearing if it grants a request for a hearing or orders a hearing because it is in the public interest. The OCC sends a copy of the Notice of Hearing to the applicant, to the person requesting the hearing, and anyone else requesting a copy. The Notice of Hearing states the subject and date of the filing, the time and place of the hearing, and the issues to be addressed.

(2) *Presiding officer.* The OCC appoints a presiding officer to conduct the hearing. The presiding officer is responsible for all procedural questions not governed by this section.

(e) *Participation in the hearing.* Any person who wishes to appear (participant) shall notify the appropriate district office of his or her intent to participate in the hearing within ten days from the date the OCC issues the Notice of Hearing. At least five days before the hearing, each participant shall submit to the appropriate district office, the applicant, and any other person the OCC requires, the names of witnesses, and one copy of each exhibit the participant intends to present.

(f) *Transcripts.* The OCC arranges for a hearing transcript. The person requesting the hearing generally bears the cost of one copy of the transcript for his or her use.

(g) *Conduct of the hearing*—(1) *Presentations.* Subject to the rulings of the presiding officer, the applicant and participants may make opening statements and present witnesses, material, and data.

(2) *Information submitted.* A person presenting documentary material shall furnish one copy to the OCC, and one copy to the applicant and each participant.

(3) *Laws not applicable to hearings.* The Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the Federal Rules of Evidence (28 U.S.C. Appendix), the Federal Rules of Civil Procedure (28 U.S.C. Rule 1 *et seq.*), and the OCC's Rules of Practice and Procedure (12 CFR part 19) do not apply to hearings under this section.

(h) *Closing the hearing record.* At the applicant's or participant's request, the OCC may keep the hearing record open for up to 14 days following the OCC's receipt of the transcript. The OCC resumes processing the filing after the record closes.

(i) *Other meetings*—(1) *Public meetings.* The OCC may arrange for a public meeting in connection with an application, either upon receipt of a written request for such a meeting which is made during the comment period, or upon the OCC's own initiative. Public meetings will be arranged and presided over by a representative of the OCC.

(2) *Private meetings.* The OCC may arrange a meeting with an applicant or other interested parties to an application, or with an applicant and other interested parties to an application, to clarify and narrow the issues and to facilitate the resolution of the issues.

§ 5.12 Computation of time.

In computing the period of days, the OCC includes the day of the act (*e.g.*, the date an application is received by the OCC) from which the period begins to run and the last day of the period, regardless of whether it is a Saturday, Sunday, or legal holiday.

§ 5.13 Decisions.

(a) *General.* The OCC may approve, conditionally approve, or deny a filing after appropriate review and consideration of the record. In deciding an application under this part, the OCC may consider the activities, resources, or condition of an affiliate of the applicant that may reasonably reflect on or affect the applicant.

(1) *Conditional approval.* The OCC may impose conditions on any approval, including to address a significant supervisory, CRA (if applicable), or compliance concern, if the OCC determines that the conditions are necessary or appropriate to ensure that approval is consistent with relevant statutory and regulatory standards and OCC policies thereunder and safe and sound banking practices.

(2) *Expedited review.* The OCC grants eligible banks expedited review within a specified time after filing or commencement of the public comment period, including any extension of the comment period granted pursuant to § 5.10, as described in applicable sections of this part.

(i) The OCC may extend the expedited review process for a filing subject to the CRA up to an additional 10 days if a comment contains specific assertions concerning a bank's CRA performance that, if true, would indicate a reasonable possibility that:

(A) A bank's CRA rating would be less than satisfactory, institution-wide, or, where applicable, in a state or multistate MSA; or

(B) A bank's CRA performance would be less than satisfactory in an MSA, or in the non-MSA portion of a state, in which it seeks to expand through approval of an application for a deposit facility as defined in 12 U.S.C. 2902(3).

(ii) The OCC will remove a filing from expedited review procedures, if the OCC concludes that the filing, or an adverse comment regarding the filing, presents a significant supervisory, CRA (if applicable), or compliance concern, or raises a significant legal or policy issue, requiring additional OCC review. The OCC will provide the applicant with a written explanation if it decides not to process an application from an eligible bank under expedited review pursuant to this paragraph (a)(2)(ii). For purposes of this section, a significant CRA concern exists if the OCC concludes that:

(A) A bank's CRA rating is less than satisfactory, institution-wide, or, where applicable, in a state or multistate MSA; or

(B) A bank's CRA performance is less than satisfactory in an MSA, or in the non-MSA portion of a state, in which it seeks to expand through approval of an application for a deposit facility as defined in 12 U.S.C. 2902(3).

(iii) Adverse comments that the OCC determines do not raise a significant supervisory, CRA (if applicable), or compliance concern, or a significant legal or policy issue, or are frivolous, filed primarily as a means of delaying action on the filing, or that raise a CRA concern that the OCC determines has been satisfactorily resolved, do not affect the OCC's decision under paragraphs (a)(2)(i) or (a)(2)(ii) of this section. The OCC considers a CRA concern to have been satisfactorily resolved if the OCC previously reviewed (*e.g.*, in an examination or an application) a concern presenting substantially the same issue in substantially the same assessment area during substantially the same time, and the OCC determines that the concern would not warrant denial or imposition of a condition on approval of the application.

(iv) If a bank files an application for any activity or transaction that is dependent upon the approval of another application under this part, or if requests for approval for more than one activity or transaction are combined in a single application under applicable sections of this part, none of the subject applications may be deemed approved upon expiration of the applicable time periods, unless all of the applications are subject to expedited review procedures and the longest of the time periods expires without the OCC issuing a decision or notifying the bank that the filings are not eligible for expedited review under the standards in paragraph (a)(2)(ii) of this section.

(b) *Denial.* The OCC may deny a filing if:

(1) A significant supervisory, CRA (if applicable), or compliance concern exists with respect to the applicant;

(2) Approval of the filing is inconsistent with applicable law, regulation, or OCC policy thereunder; or

(3) The applicant fails to provide information requested by the OCC that is necessary for the OCC to make an informed decision.

(c) *Required information and abandonment of filing.* A filing must contain information required by the applicable section set forth in this part. To the extent necessary to evaluate an application, the OCC may require an applicant to provide additional information. The OCC may deem a filing abandoned if information required or requested by the OCC in connection with the filing is not furnished within the time period specified by the OCC.

(d) *Notification of final disposition.* The OCC notifies the applicant, and any person who makes a written request, of the final disposition of a filing, including confirmation of an expedited review under this part. If the OCC denies a filing, the OCC notifies the applicant in writing of the reasons for the denial.

(e) *Publication of decision.* The OCC will issue a public decision when a decision represents a new or changed policy or presents issues of general interest to the public or the banking industry. In rendering its decisions, the OCC may elect not to disclose information that the OCC deems to be private or confidential.

(f) *Appeal.* An applicant may file an appeal of an OCC decision with the Deputy Comptroller for Bank Organization and Structure or with the Ombudsman. Relevant addresses and telephone numbers are located in the Manual.

(g) *Extension of time.* When the OCC approves or conditionally approves a filing, the OCC generally gives the applicant a specified period of time to commence that new or expanded activity. The OCC does not generally grant an extension of the time specified to commence a new or expanded corporate activity approved under this

part, unless the OCC determines that the delay is beyond the applicant's control.

(h) *Nullifying a decision*—(1) *Material misrepresentation or omission.* An applicant shall certify that any filing or supporting material submitted to the OCC contains no material misrepresentations or omissions. The OCC may review and verify any information filed in connection with a notice or an application. If the OCC discovers a material misrepresentation or omission after the OCC has rendered a decision on the filing, the OCC may nullify its decision. Any person responsible for any material misrepresentation or omission in a filing or supporting materials may be subject to enforcement action and other penalties, including criminal penalties provided in 18 U.S.C. 1001.

(2) *Other nullifications.* The OCC may nullify any decision on a filing that is:

(i) Contrary to law, regulation, or OCC policy thereunder; or

(ii) Granted due to clerical or administrative error, or a material mistake of law or fact.

Subpart B—Initial Activities

§ 5.20 Organizing a bank.

(a) *Authority.* 12 U.S.C. 21, 22, 24(Seventh), 26, 27, 92a, 93a, 1814(b), 1816, and 2903.

(b) *Licensing requirements.* Any person desiring to establish a national bank shall submit an application and obtain prior OCC approval.

(c) *Scope.* This section describes the procedures and requirements governing OCC review and approval of an application to establish a national bank, including a national bank with a special purpose. Information regarding an application to establish an interim national bank solely to facilitate a business combination is set forth in § 5.33.

(d) *Definitions.* For purposes of this section:

(1) *Bankers' bank* means a bank owned exclusively (except to the extent directors' qualifying shares are required by law) by other depository institutions or depository institution holding companies (as that term is defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813), the activities of which are limited by its articles of association exclusively to providing services to or for other depository institutions, their holding companies, and the officers, directors, and employees of such institutions and companies, and to providing correspondent banking services at the request of other depository institutions or their holding companies.

(2) *Control* means control as used in section 2 of the Bank Holding Company Act, 12 U.S.C. 1841(a)(2).

(3) *Final approval* means the OCC action issuing a charter certificate and authorizing a national bank to open for business.

(4) *Holding company* means any company that controls or proposes to control a national bank whether or not the company is a bank holding company under section 2 of the Bank Holding Company Act, 12 U.S.C. 1841(a)(1).

(5) *Lead depository institution* means the largest depository institution controlled by a bank holding company based on a comparison of the average total assets controlled by each depository institution as reported in its Consolidated Report of Condition and Income required to be filed for the immediately preceding four calendar quarters.

(6) *Organizing group* means five or more persons acting on their own behalf, or serving as representatives of a sponsoring holding company, who apply to the OCC for a national bank charter.

(7) *Preliminary approval* means a decision by the OCC permitting an organizing group to go forward with the organization of the proposed national bank. A preliminary approval generally is subject to certain conditions that an applicant must satisfy before the OCC will grant final approval.

(e) *Statutory requirements*—(1) *General.* The OCC charters a national bank under the authority of the National Bank Act of 1864, as amended, 12 U.S.C. 1 *et seq.* The name of a proposed bank must include the word ''national.'' In determining whether to approve an application to establish a national bank, the OCC verifies that the proposed national bank has complied with the following requirements of the National Bank Act. A national bank shall:

(i) Draft and file articles of association with the OCC;

(ii) Draft and file an organization certificate containing specified information with the OCC;

(iii) Ensure that all capital stock is paid in; and

(iv) Have at least five elected directors.

(2) *Community Reinvestment Act.* Twelve CFR part 25 requires the OCC to take into account a proposed insured national bank's description of how it will meet its CRA objectives.

(f) *Policy*—(1) *General.* The marketplace is normally the best regulator of economic activity, and competition within the marketplace promotes efficiency and better customer service. Accordingly, it is the OCC's policy to approve proposals to establish national banks, including minority-owned institutions, that have a reasonable chance of success and that will be operated in a safe and sound manner. It is not the OCC's policy to ensure that a proposal to establish a national bank is without risk to the organizers or to protect existing institutions from healthy competition from a new national bank.

(2) *Policy considerations.* (i) In evaluating an application to establish a national bank, the OCC considers whether the proposed bank:

(A) Has organizers who are familiar with national banking laws and regulations;

(B) Has competent management, including a board of directors, with ability and experience relevant to the types of services to be provided;

(C) Has capital that is sufficient to support the projected volume and type of business;

(D) Can reasonably be expected to achieve and maintain profitability; and

(E) Will be operated in a safe and sound manner.

(ii) The OCC may also consider additional factors listed in section 6 of the Federal Deposit Insurance Act, 12 U.S.C. 1816, including the risk to the Federal deposit insurance fund, and whether the proposed bank's corporate powers are consistent with the purposes of the Federal Deposit Insurance Act and the National Bank Act.

(3) *OCC evaluation.* The OCC evaluates a proposed national bank's organizing group and its operating plan together. The OCC's judgment concerning one may affect the evaluation of the other. An organizing group and its operating plan must be stronger in markets where economic conditions are marginal or competition is intense.

(g) *Organizing group*—(1) *General.* Strong organizing groups generally include diverse business and financial interests and community involvement. An organizing group must have the experience, competence, willingness, and ability to be active in directing the proposed national bank's affairs in a safe and sound manner. The bank's initial board of directors generally is comprised of many, if not all, of the organizers. The operating plan and other information supplied in the application must demonstrate an organizing group's collective ability to establish and operate a successful bank in the economic and competitive conditions of the market to be served. Each organizer should be knowledgeable about the operating plan. A poor operating plan reflects adversely on the organizing

group's ability, and the OCC generally denies applications with poor operating plans.

(2) *Management selection.* The initial board of directors must select competent senior executive officers before the OCC grants final approval. Early selection of executive officers, especially the chief executive officer, contributes favorably to the preparation and review of an operating plan that is accurate, complete, and appropriate for the type of bank proposed and its market, and reflects favorably upon an application. As a condition of the charter approval, the OCC retains the right to object to and preclude the hiring of any officer, or the appointment or election of any director, for a two-year period from the date the bank commences business.

(3) *Financial resources.* (i) Each organizer must have a history of responsibility, personal honesty, and integrity. Personal wealth is not a prerequisite to become an organizer or director of a national bank. However, directors' stock purchases, individually and in the aggregate, should reflect a financial commitment to the success of the national bank that is reasonable in relation to their individual and collective financial strength. A director should not have to depend on bank dividends, fees, or other compensation to satisfy financial obligations.

(ii) Because directors are often the primary source of additional capital for a bank not affiliated with a holding company, it is desirable that an organizer who is also proposed as a director of the national bank be able to supply or have a realistic plan to enable the bank to obtain capital when needed.

(iii) Any financial or other business arrangement, direct or indirect, between the organizing group or other insider and the proposed national bank must be on nonpreferential terms.

(4) *Organizational expenses.* (i) Organizers are expected to contribute time and expertise to the organization of the bank. Organizers should not bill excessive charges to the bank for professional and consulting services or unduly rely upon these fees as a source of income.

(ii) A proposed national bank shall not pay any fee that is contingent upon an OCC decision. Such action generally is grounds for denial of the application or withdrawal of preliminary approval. Organizational expenses for denied applications are the sole responsibility of the organizing group.

(5) *Sponsor's experience and support.* A sponsor must be financially able to support the new bank's operations and to provide or locate capital when needed. The OCC primarily considers the financial and managerial resources of the sponsor and the sponsor's record of performance, rather than the financial and managerial resources of the organizing group, if an organizing group is sponsored by:

(i) An existing holding company;

(ii) Individuals currently affiliated with other depository institutions; or

(iii) Individuals who, in the OCC's view, are otherwise collectively experienced in banking and have demonstrated the ability to work together effectively.

(h) *Operating plan*—(1) *General.* (i) Organizers of a proposed national bank shall submit an operating plan that adequately addresses the statutory and policy considerations set forth in paragraphs (e) and (f)(2) of this section. The plan must reflect sound banking principles and demonstrate realistic assessments of risk in light of economic and competitive conditions in the market to be served.

(ii) The OCC may offset deficiencies in one factor by strengths in one or more other factors. However, deficiencies in some factors, such as unrealistic earnings prospects, may have a negative influence on the evaluation of other factors, such as capital adequacy, or may be serious enough by themselves to result in denial. The OCC considers inadequacies in an operating plan to reflect negatively on the organizing group's ability to operate a successful bank.

(2) *Earnings prospects.* The organizing group shall submit *pro forma* balance sheets and income statements as part of the operating plan. The OCC reviews all projections for reasonableness of assumptions and consistency with the operating plan.

(3) *Management.* (i) The organizing group shall include in the operating plan information sufficient to permit the OCC to evaluate the overall management ability of the organizing group. If the organizing group has limited banking experience or community involvement, the senior executive officers must be able to compensate for such deficiencies.

(ii) The organizing group may not hire an officer or elect or appoint a director if the OCC objects to that person at any time prior to the date the bank commences business.

(4) *Capital.* A proposed bank must have sufficient initial capital, net of any organizational expenses that will be charged to the bank's capital after it begins operations, to support the bank's projected volume and type of business.

(5) *Community service.* (i) The operating plan must indicate the organizing group's knowledge of and plans for serving the community. The organizing group shall evaluate the banking needs of the community, including its consumer, business, nonprofit, and government sectors. The operating plan must demonstrate how the proposed bank responds to those needs consistent with the safe and sound operation of the bank. The provisions of this paragraph may not apply to an application to organize a bank for a special purpose.

(ii) As part of its operating plan, the organizing group shall submit a statement that demonstrates its plans to achieve CRA objectives.

(iii) Because community support is important to the long-term success of a bank, the organizing group shall include plans for attracting and maintaining community support.

(6) *Safety and soundness.* The operating plan must demonstrate that the organizing group (and the sponsoring company, if any), is aware of, and understands, national banking laws and regulations, and safe and sound banking operations and practices. The OCC will deny an application that does not meet these safety and soundness requirements.

(7) *Fiduciary services.* The operating plan must indicate if the proposed bank intends to offer fiduciary services. The information required by § 5.26 shall be filed with the charter application. A separate application is not required.

(i) *Procedures*—(1) *Prefiling meeting.* The OCC normally requires a prefiling meeting with the organizers of a proposed national bank before the organizers file an application. Organizers should be familiar with the OCC's chartering policy and procedural requirements in the Manual before the prefiling meeting. The prefiling meeting normally is held in the district office where the application will be filed but may be held at another location at the request of the applicant.

(2) *Operating plan.* An organizing group shall file an operating plan that addresses the subjects discussed in paragraph (h) of this section.

(3) *Spokesperson.* The organizing group shall designate a spokesperson to represent the organizing group in all contacts with the OCC. The spokesperson shall be an organizer and proposed director of the new bank, except a representative of the sponsor or sponsors may serve as spokesperson if an application is sponsored by an existing holding company, individuals currently affiliated with other depository institutions, or individuals who, in the OCC's view, are otherwise collectively experienced in banking and

have demonstrated the ability to work together effectively.

(4) *Decision notification.* The OCC notifies the spokesperson and other interested persons in writing of its decision on an application.

(5) *Post-decision activities.* (i) Before the OCC grants final approval, a proposed national bank must be established as a legal entity. A national bank becomes a legal entity after it has filed its organization certificate and articles of association with the OCC as required by law. In addition, the organizing group shall elect a board of directors. The proposed bank may not conduct the business of banking until the OCC grants final approval.

(ii) For all capital obtained through a public offering a proposed national bank shall use an offering circular that complies with the OCC's securities offering regulations, 12 CFR part 16.

(iii) A national bank in organization shall raise its capital before it commences business. Preliminary approval expires if a national bank in organization does not raise the required capital within 12 months from the date the OCC grants preliminary approval. Approval expires if the national bank does not commence business within 18 months from the date the OCC grants preliminary approval.

(j) *Expedited review.* An application to establish a full-service national bank that is sponsored by a bank holding company whose lead depository institution is an eligible bank or eligible depository institution is deemed preliminarily approved by the OCC as of the 15th day after the close of the public comment period or the 45th day after the filing is received by the OCC, whichever is later, unless the OCC:

(1) Notifies the applicant prior to that date that the filing is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2); or

(2) Notifies the applicant prior to that date that the OCC has determined that the proposed bank will offer banking services that are materially different than those offered by the lead depository institution.

(k) *National bankers' banks*—(1) *Activities and customers.* In addition to the other requirements of this section, when an organizing group seeks to organize a national bankers' bank, the organizing group shall list in the application the anticipated activities and customers or clients of the proposed national bankers' bank.

(2) *Waiver of requirements.* At the organizing group's request, the OCC may waive requirements that are applicable to national banks in general if those requirements are inappropriate for a national bankers' bank and would impede its ability to provide desired services to its market. An applicant must submit a request for a waiver with the application and must support the request with adequate justification and legal analysis. A national bankers' bank that is already in operation may also request a waiver. The OCC cannot waive statutory provisions that specifically apply to national bankers' banks pursuant to 12 U.S.C. 27(b)(1).

(3) *Investments.* A national bank may invest up to ten percent of its capital and surplus in a bankers' bank and may own five percent or less of any class of a bankers' bank's voting securities.

(l) *Special purpose banks.* An applicant for a national bank charter that will limit its activities to fiduciary activities, credit card operations, or another special purpose shall adhere to established charter procedures with modifications appropriate for the circumstances as determined by the OCC. An applicant for a national bank charter that will have a community development focus shall also adhere to established charter procedures with modifications appropriate for the circumstances as determined by the OCC. In addition to the other requirements in this section, a bank limited to fiduciary activities, credit card operations, or another special purpose may not conduct that business until the OCC grants final approval for the bank to commence operations. A national bank that seeks to invest in a bank with a community development focus must comply with applicable requirements of 12 CFR part 24.

§ 5.24 Conversion.

(a) *Authority.* 12 U.S.C. 35, 93a, 214a, 214b, 214c, and 2903.

(b) *Licensing requirements.* A state bank (including a ''state bank'' as defined in 12 U.S.C. 214(a)) or a Federal savings association shall submit an application and obtain prior OCC approval to convert to a national bank charter. A national bank shall give notice to the OCC before converting to a state bank (including a ''state bank'' as defined in 12 U.S.C. 214(a)) or Federal savings association.

(c) *Scope.* This section describes procedures and standards governing OCC review and approval of an application by a state bank or Federal savings association to convert to a national bank charter. This section also describes notice procedures for a national bank seeking to convert to a state bank or Federal savings association.

(d) *Conversion of a state bank or Federal savings association to a national bank*—(1) *Policy.* Consistent with the OCC's chartering policy, it is OCC policy to allow conversion to a national bank charter by another financial institution that can operate safely and soundly as a national bank in compliance with applicable laws, regulations, and policies. The OCC may deny an application by any state bank (including a ''state bank'' as defined in 12 U.S.C. 214(a)) and any Federal savings association to convert to a national bank charter on the basis of the standards for denial set forth in § 5.13(b), or when conversion would permit the applicant to escape supervisory action by its current regulator.

(2) *Procedures.* (i) Prefiling communications. The applicant should consult with the appropriate district office prior to filing if it anticipates that its application will raise unusual or complex issues. If a prefiling meeting is appropriate, it will normally be held in the district office where the application will be filed, but may be held at another location at the request of the applicant.

(ii) A state bank (including a state bank as defined in 12 U.S.C. 214(a)) or Federal savings association shall submit its application to convert to a national bank to the appropriate district office. The application must:

(A) Be signed by the president or other duly authorized officer;

(B) Identify each branch that the resulting bank expects to operate after conversion;

(C) Include the institution's most recent audited financial statements (if any);

(D) Include the latest report of condition and report of income (the most recent daily statement of condition will suffice if the institution does not file these reports);

(E) Unless otherwise advised by the OCC in a prefiling communication, include an opinion of counsel that, in the case of a state bank, the conversion is not in contravention of applicable state law, or in the case of a Federal savings association, the conversion is not in contravention of applicable Federal law;

(F) State whether the institution wishes to exercise fiduciary powers after the conversion;

(G) Identify all subsidiaries that will be retained following the conversion, and provide the information and analysis of the subsidiaries' activities that would be required if the converting bank or savings association were a national bank establishing each subsidiary pursuant to § 5.34; and

(H) Identify any nonconforming assets (including nonconforming subsidiaries) and nonconforming activities that the institution engages in, and describe the plans to retain or divest those assets.

(iii) The OCC may permit a national bank to retain such nonconforming assets of a state bank, subject to conditions and an OCC determination of the carrying value of the retained assets, pursuant to 12 U.S.C. 35.

(iv) Approval for an institution to convert to a national bank expires if the conversion has not occurred within six months of the OCC's preliminary approval of the application.

(v) When the OCC determines that the applicant has satisfied all statutory and regulatory requirements, including those set forth in 12 U.S.C. 35, and any other conditions, the OCC issues a charter certificate. The certificate provides that the institution is authorized to begin conducting business as a national bank as of a specified date.

(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 and novel policy, supervisory, or legal issues, the OCC may determine that any or all parts of §§ 5.8, 5.10, and 5.11 apply.

(4) *Expedited review.* An application by an eligible depository institution to convert to a national bank charter is deemed approved by the OCC as of the 30th day after the filing is received by the OCC, unless the OCC notifies the applicant prior to that date that the filing is not eligible for expedited review under § 5.13(a)(2).

(e) *Conversion of a national bank to a state bank*—(1) *Procedure.* A national bank may convert to a state bank, in accordance with 12 U.S.C. 214c, without prior OCC approval. Termination of the national bank's status as a national bank occurs upon the bank's completion of the requirements of 12 U.S.C. 214a, and upon the appropriate district office's receipt of the bank's national bank charter (or copy) in connection with the consummation of the transaction.

(2) *Notice of intent.* A national bank that desires to convert to a state bank shall submit to the appropriate district office a notice of its intent to convert. The national bank shall file this notice when it first submits a request to convert to the appropriate state authorities. The appropriate district office then provides instructions to the national bank for terminating its status as a national bank.

(3) *Exceptions to the rules of general applicability.* Sections 5.5 through 5.8, and 5.10 through 5.13, do not apply to the conversion of a national bank to a state bank.

(f) *Conversion of a national bank to a Federal savings association.* A national bank may convert to a Federal savings association without prior OCC approval. The requirements and procedures set forth in paragraph (e) of this section and 12 U.S.C. 214a and 12 U.S.C. 214c apply to a conversion to a Federal savings association, except as follows:

(1) In paragraph (e) of this section references to ''appropriate state authorities'' mean ''appropriate Federal authorities''; and

(2) References in 12 U.S.C. 214c to the ''law of the State in which the national banking association is located'' and ''any State authority'' mean ''laws and regulations governing Federal savings associations'' and ''Office of Thrift Supervision,'' respectively.

§ 5.26 Fiduciary powers.

(a) *Authority.* 12 U.S.C. 92a.

(b) *Licensing requirements.* A national bank must submit an application and obtain prior approval from, or in certain circumstances file a notice with, the OCC in order to exercise fiduciary powers. No approval or notice is required in the following circumstances:

(1) Where two or more national banks consolidate or merge, and any of the banks has, prior to the consolidation or merger, received OCC approval to exercise fiduciary powers and that approval is in force at the time of the consolidation or merger, the resulting bank may exercise fiduciary powers in the same manner and to the same extent as the national bank to which approval was originally granted; and

(2) Where a national bank with prior OCC approval to exercise fiduciary powers is the resulting bank in a merger or consolidation with a state bank.

(c) *Scope.* This section sets forth the procedures governing OCC review and approval of an application, and in certain cases the filing of a notice, by a national bank to exercise fiduciary powers. A national bank's fiduciary activities are subject to the provisions of 12 CFR part 9.

(d) *Policy.* The exercise of fiduciary powers is primarily a management decision of the national bank. The OCC generally permits a national bank to exercise fiduciary powers if the bank is operating in a satisfactory manner, the proposed activities comply with applicable statutes and regulations, and the bank retains qualified fiduciary management.

(e) *Procedure*—(1) *General.* The following institutions must obtain approval from the OCC in order to offer fiduciary services to the public:

(i) A national bank without fiduciary powers;

(ii) A national bank without fiduciary powers that desires to exercise fiduciary powers after merging with a state bank or savings association with fiduciary powers; and

(iii) A national bank that results from the conversion of a state bank or a state or Federal savings association that was exercising fiduciary powers prior to the conversion.

(2) *Application.* (i) Except as provided in paragraph (e)(2)(ii) of this section, a national bank that desires to exercise fiduciary powers shall submit to the OCC an application requesting approval. The application must contain:

(A) A statement requesting full or limited powers (specifying which powers);

(B) An opinion of counsel that the proposed activities do not violate applicable Federal or state law, including citations to applicable law;

(C) A statement that the capital and surplus of the national bank is not less than the capital and surplus required by state law of state banks, trust companies, and other corporations exercising comparable fiduciary powers;

(D) Sufficient biographical information on proposed trust management personnel to enable the OCC to assess their qualifications; and

(E) A description of the locations where the bank will conduct fiduciary activities.

(ii) If approval to exercise fiduciary powers is desired in connection with any other transaction subject to an application under this part, the applicant covered under paragraph (e)(1)(ii) or (e)(1)(iii) of this section may include a request for approval of fiduciary powers, including the information required by paragraph (e)(2)(i) of this section, as part of its other application. The OCC does not require a separate application requesting approval to exercise fiduciary powers under these circumstances.

(3) *Expedited review.* (i) An application by an eligible bank to exercise fiduciary powers is deemed approved by the OCC as of the 30th day after the application is received by the OCC, unless the OCC notifies the bank prior to that date that the filing is not eligible for expedited review under § 5.13(a)(2).

(ii) An eligible bank applying for fiduciary powers may omit the opinion of counsel required by paragraph (e)(2)(i)(B) of this section unless such opinion is specifically requested by the OCC.

(4) *Permit.* Approval of an application under this section constitutes a permit under 12 U.S.C. 92a to conduct the fiduciary powers requested in the application.

(5) *Notice of fiduciary activities.* No further application under this section is required when a national bank with prior OCC approval to exercise fiduciary powers commences fiduciary activities in a state in addition to the state(s) described in the application for which it received OCC approval to exercise fiduciary powers. Instead, the bank shall provide written notice to the OCC within ten days after commencing fiduciary activities. The written notice must identify the state involved and describe the fiduciary activities to be conducted to the extent that they materially differ from fiduciary activities the bank was previously authorized to conduct.

(6) *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 and novel policy, supervisory, or legal issues, the OCC may determine that any or all parts of §§ 5.8, 5.10, and 5.11 apply.

(7) *Expiration of approval.* Approval expires if a national bank does not commence fiduciary activities within 18 months from the date of approval.

Subpart C—Expansion of Activities

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

(a) *Authority.* 12 U.S.C. 1–42, and 2901–2907.

(b) *Licensing requirements.* A national bank shall submit an application and obtain prior OCC approval in order to establish or relocate a branch.

(c) *Scope.* This section 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. The standards of this section and, as applicable, 12 U.S.C. 36(b), but not the procedures set forth in this section, apply to a branch established as a result of a business combination approved under § 5.33. A branch established through a business combination is subject only to the procedures set forth in § 5.33.

(d) *Definitions*—(1) *Branch* includes any branch bank, branch office, branch agency, additional office, or any branch place of business established by a national bank in the United States or its territories at which deposits are received, checks paid, or money lent. A branch does not include an automated teller machine (ATM) or a remote service unit.

(i) A branch established by a national bank includes a mobile facility, temporary facility, drop box or a seasonal agency, as described in 12 U.S.C. 36(c).

(ii) A facility otherwise described in this paragraph (d)(1) is not a branch if:

(A) The bank establishing the facility does not permit members of the public to have physical access to the facility for purposes of making deposits, paying checks, or borrowing money (*e.g.*, an office established by the bank that receives deposits only through the mail); or

(B) It is located at the site of, or is an extension of, an approved main or branch office of the national bank. The OCC determines whether a facility is an extension of an existing main or branch office on a case-by-case basis.

(2) *Home state* means the state in which the national bank's main office is located.

(3) *Messenger service* has the meaning set forth in 12 CFR 7.1012.

(4) *Mobile branch* is a branch, other than a messenger service branch, that does not have a single, permanent site, and includes a vehicle that travels to various public locations to enable customers to conduct their banking business. A mobile branch may provide services at various regularly scheduled locations or it may be open at irregular times and locations such as at county fairs, sporting events, or school registration periods. A branch license is needed for each mobile unit.

(5) *Temporary branch* means a branch that is located at a fixed site and which, from the time of its opening, is scheduled to, and will, permanently close no later than a certain date (not longer than one year after the branch is first opened) specified in the branch application and the public notice.

(e) *Policy.* In determining whether to approve an application to establish or relocate a branch, the OCC is guided by the following principles:

(1) Maintaining a sound banking system;

(2) Encouraging a national bank to help meet the credit needs of its entire community;

(3) Relying on the marketplace as generally the best regulator of economic activity; and

(4) Encouraging healthy competition to promote efficiency and better service to customers.

(f) *Procedures*—(1) *General.* Except as provided in paragraph (f)(2) of this section, each national bank proposing to establish a branch shall submit to the appropriate district office a separate application for each proposed branch.

(2) *Messenger services.* A national bank may request approval, through a single application, for multiple messenger services to serve the same general geographic area. (*See* 12 CFR 7.1012). Unless otherwise required by law, the bank need not list the specific locations to be served.

(3) *Jointly established branches.* If a national bank proposes to establish a branch jointly with one or more national banks or depository institutions, only one of the national banks must submit a branch application. The national bank submitting the application may act as agent for all national banks in the group of depository institutions proposing to share the branch. The application must include the name and main office address of each national bank in the group.

(4) *Authorization.* The OCC authorizes operation of the branch when all requirements and conditions for opening are satisfied.

(5) *Expedited review.* An application submitted by an eligible bank to establish or relocate a branch is deemed approved by the OCC 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 prior to that date that the filing is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2). An application to establish or relocate more than one branch is deemed approved by the OCC as of the 15th day after the close of the last public comment period.

(g) *Interstate branches.* A national bank that seeks to establish and operate a de novo branch in any state other than the bank's home state or a state in which the bank already has a branch shall satisfy the standards and requirements of 12 U.S.C. 36(g).

(h) *Exceptions to rules of general applicability.* (1) A national bank filing an application for a mobile branch or messenger service branch shall publish a public notice, as described in § 5.8, in the communities in which the bank proposes to engage in business.

(2) The comment period on an application to engage in a short-distance branch relocation is 15 days.

(3) The OCC may waive or reduce the public notice and comment period, as appropriate, with respect to an application to establish a branch to restore banking services to a community affected by a disaster or to temporarily replace banking facilities where, because of an emergency, the bank

cannot provide services or must curtail banking services.

(4) The OCC may waive or reduce the public notice and comment period, as appropriate, for an application by a national bank with a CRA rating of Satisfactory or better to establish a temporary branch which, if it were established by a state bank to operate in the manner proposed, would be permissible under state law without state approval.

(i) *Expiration of approval.* Approval expires if a branch has not commenced business within 18 months after the date of approval.

(j) *Branch closings.* A national bank shall comply with the requirements of 12 U.S.C. 1831r–1 with respect to procedures for branch closings.

§ 5.33 Business combinations.

(a) *Authority.* 12 U.S.C. 24(Seventh), 93a, 181, 214a, 215, 215a, 215a–1, 215c, 1815(d)(3), 1828(c), 2903, and Sec. 102, Pub. L. 103–328, 108 Stat. 2338.

(b) *Licensing requirements.* A national bank shall submit an application and obtain prior OCC approval for a business combination between the national bank and another depository institution when the resulting institution is a national bank. A national bank shall give notice to the OCC prior to engaging in a combination where the resulting institution will not be a national bank.

(c) *Scope.* This section sets forth the standards for OCC review and approval of an application for a business combination resulting in a national bank and for notices and other procedures for national banks involved in all forms of combinations.

(d) *Definitions*—(1) *Business combination* means any merger or consolidation between a national bank and one or more depository institutions in which the resulting institution is a national bank, the acquisition by a national bank of all, or substantially all, of the assets of another depository institution, or the assumption by a national bank of deposit liabilities of another depository institution.

(2) *Business reorganization means either:*

(i) A business combination between eligible banks, or between an eligible bank and an eligible depository institution, that are controlled by the same holding company or that will be controlled by the same holding company prior to the date of the combination; or

(ii) A business combination between an eligible bank and an interim bank chartered in a transaction in which a person or group of persons exchanges its shares of the eligible bank for shares of a newly formed holding company and receives after the transaction substantially the same proportional share interest in the holding company as it held in the eligible bank (except for changes in interests resulting from the exercise of dissenters' rights), and the reorganization involves no other transactions involving the bank.

(3) *Home state* means, with respect to a national bank, the state in which the main office of the bank is located and, with respect to a state bank, the state by which the bank is chartered.

(4) *Interim bank* means a national bank that does not operate independently but exists solely as a vehicle to accomplish a business combination.

(e) *Policy*—(1) *Factors.* The OCC considers the following factors in evaluating an application for a business combination:

(i) *Competition.* (A) The OCC considers the effect of a proposed business combination on competition. The applicant shall provide a competitive analysis of the transaction, including a definition of the relevant geographic market or markets. An applicant may refer to the Manual for procedures to expedite its competitive analysis.

(B) The OCC will deny an application for a business combination if the combination would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the business of banking in any part of the United States. The OCC also will deny any proposed business combination whose effect in any section of the United States may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the probable effects of the transaction in meeting the convenience and needs of the community clearly outweigh the anticompetitive effects of the transaction. For purposes of weighing against anticompetitive effects, a business combination may have favorable effects in meeting the convenience and needs of the community if the depository institution being acquired has limited long-term prospects, or if the resulting national bank will provide significantly improved, additional, or less costly services to the community.

(ii) *Financial and managerial resources and future prospects.* The OCC considers the financial and managerial resources and future prospects of the existing or proposed institutions.

(iii) *Convenience and needs of community.* The OCC considers the probable effects of the business combination on the convenience and needs of the community served. The applicant shall describe these effects in its application, including any planned office closings or reductions in services following the business combination and the likely impact on the community. The OCC also considers additional relevant factors, including the resulting national bank's ability and plans to provide expanded or less costly services to the community.

(iv) *Community reinvestment.* 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.

(2) *Acquisition and retention of branches.* An applicant shall disclose the location of any branch it will acquire and retain in a business combination. The OCC considers the acquisition and retention of a branch under the standards set out in § 5.30, but it does not require a separate application under § 5.30.

(3) *Subsidiaries.* (i) An applicant shall identify any subsidiary to be acquired in a business combination and state the activities of each subsidiary. The OCC does not require a separate application under § 5.34.

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

(4) *Interim bank*—(i) *Application.* An applicant for a business combination that plans to use an interim bank to accomplish the transaction shall file an application to organize an interim bank as part of the application for the related business combination.

(ii) *Conditional approval.* The OCC grants conditional approval to form an interim bank when it acknowledges receipt of the application for the related business combination.

(iii) *Corporate status.* An interim bank becomes a legal entity and may enter into legally valid agreements when it has filed, and the OCC has accepted, the interim bank's duly executed articles of

association and organization certificate. OCC acceptance occurs:

(A) On the date the OCC advises the interim bank that its articles of association and organization certificate are acceptable; or

(B) On the date the interim bank files articles of association and an organization certificate that conform to the form for those documents provided by the OCC in the Manual.

(iv) *Other corporate procedures.* An applicant should consult the Manual to determine what other information is necessary to complete the chartering of the interim bank as a national bank.

(5) *Nonconforming assets.* An applicant shall identify any nonconforming activities and assets, including nonconforming subsidiaries, of other institutions involved in the business combination, that will not be disposed of or discontinued prior to consummation of the transaction. The OCC generally requires a national bank to divest or conform nonconforming assets, or discontinue nonconforming activities, within a reasonable time following the business combination.

(6) *Fiduciary powers.* An applicant shall state whether the resulting bank intends to exercise fiduciary powers pursuant to § 5.26(b) (1) or (2).

(7) *Expiration of approval.* Approval of a business combination, and conditional approval to form an interim bank charter, if applicable, expires if the business combination is not consummated within one year after the date of OCC approval.

(8) *Adequacy of disclosure.* (i) An applicant shall inform shareholders of all material aspects of a business combination and shall comply with any applicable requirements of the Federal securities laws and securities regulations of the OCC. Accordingly, an applicant shall ensure that all proxy and information statements prepared in connection with a business combination do not contain any untrue or misleading statement of a material fact, or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

(ii) A national bank applicant with one or more classes of securities subject to the registration provisions of section 12 (b) or (g) of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*(b) or 78*l*(g), shall file preliminary proxy material or information statements for review with the Director, Securities and Corporate Practices Division, OCC, Washington, DC 20219, and with the appropriate district office. Any other applicant shall submit the proxy materials or information statements it uses in connection with the combination to the appropriate district office no later than when the materials are sent to the shareholders.

(f) *Exceptions to rules of general applicability*—(1) *National bank applicant.* Section 5.8 (a) through (c) does not apply to a national bank applicant that is subject to specific statutory notice requirements for a business combination. A national bank applicant shall follow, as applicable, the public notice requirements contained in 12 U.S.C. 1828(c)(3) (business combinations), 12 U.S.C. 215(a) (consolidation under a national bank charter), 12 U.S.C. 215a(a)(2) (merger under a national bank charter), and paragraph (g) of this section (merger or consolidation with a Federal savings association resulting in a state bank).

(2) *Interim bank.* Sections 5.8, 5.10, and 5.11 do not apply to an application to organize an interim bank. However, if the OCC concludes that an application presents significant and novel policy, supervisory, or legal issues, the OCC may determine that any or all parts of §§ 5.8, 5.10, and 5.11 apply. The OCC treats an application to organize an interim bank as part of the related application to engage in a business combination and does not require a separate public notice and public comment process.

(3) *State bank or Federal savings association as resulting institution.* Sections 5.2 and 5.5 through 5.13 do not apply to transactions covered by paragraph (g)(3) of this section.

(g) *Approval procedures and treatment of dissenting shareholders in consolidations and mergers*—(1) *Consolidations and mergers with other national banks and state banks as defined in 12 U.S.C. 215b(1) resulting in a national bank.* A national bank entering into a consolidation or merger authorized pursuant to 12 U.S.C. 215 or 215a, respectively, is subject to the approval procedures and requirements with respect to treatment of dissenting shareholders set forth in those provisions.

(2) *Consolidations and mergers with Federal savings associations under 12 U.S.C. 215c resulting in a national bank.* (i) With the approval of the OCC, any national bank and any Federal savings association may consolidate or merge with a national bank as the resulting institution by complying with the following procedures:

(A) A national bank entering into the consolidation or merger shall follow the procedures of 12 U.S.C. 215 or 215a, respectively, as if the Federal savings association were a state or national bank.

(B) A Federal savings association entering into the consolidation or merger also shall follow the procedures of 12 U.S.C. 215 or 215a, respectively, as if the Federal savings association were a state bank or national bank, except where the laws or regulations governing Federal savings associations specifically provide otherwise.

(ii) The OCC may conduct an appraisal or reappraisal of dissenters' shares of stock in a national bank involved in a consolidation or merger with a Federal savings association if all parties agree that the determination is final and binding on each party.

(3) *Merger or consolidation of a national bank resulting in a state bank as defined in 12 U.S.C. 214(a) or a Federal savings association*—(i) *Policy.* Prior OCC approval is not required for the merger or consolidation of a national bank with a state bank or Federal savings association when the resulting institution will be a state bank or Federal savings association. Termination of a national bank's status as a national banking association is automatic upon completion of the requirements of 12 U.S.C. 214a, in accordance with 12 U.S.C. 214c, in the case of a merger or consolidation when the resulting institution is a state bank, or paragraph (g)(3)(iii) of this section, in the case of a merger or consolidation when the resulting institution is a Federal savings association, and consummation of the transaction.

(ii) *Procedures.* A national bank desiring to merge or consolidate with a state bank or a Federal savings association when the resulting institution will be a state bank or Federal savings association shall submit a notice to the appropriate district office advising of its intention. The national bank shall submit this notice at the time the application to merge or consolidate is filed with the responsible agency under the Bank Merger Act, 12 U.S.C. 1828(c). The OCC then provides instructions to the national bank for terminating its status as a national bank, including requiring the bank to provide the appropriate district office with the bank's charter (or a copy) in connection with the consummation of the transaction.

(iii) *Special procedures for merger or consolidation into a Federal savings association.* (A) With the exception of the procedures in paragraph (g)(3)(iii)(B) of this section, a national bank entering into a merger or consolidation with a Federal savings association when the resulting institution will be a Federal savings association shall comply with the requirements of 12 U.S.C. 214a and 12 U.S.C. 214c as if the Federal savings

association were a state bank. However, for these purposes the references in 12 U.S.C. 214c to ''law of the State in which such national banking association is located'' and ''any State authority'' mean ''laws and regulations governing Federal savings associations'' and ''Office of Thrift Supervision,'' respectively.

(B) National bank shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 214a as if the Federal savings association were a state bank. The OCC conducts an appraisal or reappraisal of the value of the national bank shares held by dissenting shareholders only if all parties agree that the determination will be final and binding. The parties shall also agree on how the total expenses of the OCC in making the appraisal will be divided among the parties and paid to the OCC. The plan of merger or consolidation must provide, consistent with the requirements of the Office of Thrift Supervision, the manner of disposing of the shares of the resulting Federal savings association not taken by the dissenting shareholders of the national bank.

(h) *Interstate combinations.* A business combination between banks under the authority of 12 U.S.C. 1831u(a)(1) must satisfy the standards and requirements and comply with the procedures of 12 U.S.C. 1831u and the procedures of 12 U.S.C. 215 and 215a as applicable. For purposes of this section, 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.

(i) *Expedited review for business reorganizations and streamlined applications.* A filing that qualifies as a business reorganization as defined in paragraph (d)(2) of this section, or a filing that qualifies as a streamlined application as described in paragraph (j) of this section, is deemed approved by the OCC as of the 45th day after the application is received by the OCC, or the 15th day after the close of the comment period, whichever is later, unless the OCC notifies the applicant that the filing is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2). An application under this paragraph must contain all necessary information for the OCC to determine if it qualifies as a business reorganization or streamlined application.

(j) *Streamlined applications.* (1) An applicant may qualify for a streamlined business combination application in the following situations:

(i) At least one party to the transaction is an eligible bank, and all other parties to the transaction are eligible banks or eligible depository institutions, the resulting national bank will be well capitalized immediately following consummation of the transaction, and the total assets of the target institution are no more than 50 percent of the total assets of the acquiring bank, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application;

(ii) The acquiring bank is an eligible bank, the target bank is not an eligible bank or an eligible depository institution, the resulting national bank will be well capitalized immediately following consummation of the transaction, and the applicants in a prefiling communication request and obtain approval from the appropriate district office to use the streamlined application; or

(iii) The acquiring bank is an eligible bank, the target bank is not an eligible bank or an eligible depository institution, the resulting bank will be well capitalized immediately following consummation of the transaction, and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application.

(2) When a business combination qualifies for a streamlined application, the applicant should consult the Manual to determine the abbreviated application information required by the OCC. The OCC encourages prefiling communications between the applicants and the appropriate district office before filing under paragraph (j) of this section.

§ 5.34 Operating subsidiaries.

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

(b) *Licensing requirements.* A national bank generally shall submit an application and obtain prior OCC approval to establish or commence new activities in an operating subsidiary. In certain circumstances, a national bank need only notify the OCC after it has established or commenced specified activities in an operating subsidiary.

(c) *Scope.* This section sets forth authorized activities and application and notice procedures for the establishment and operation of an operating subsidiary by a national bank.

(d) *Standards and requirements*—(1) *Authorized activities.* A national bank may establish or acquire an operating subsidiary to conduct, or may conduct in an existing operating subsidiary, activities that are part of or incidental to the business of banking, as determined by the Comptroller of the Currency, pursuant to 12 U.S.C. 24(Seventh), and other activities permissible for national banks or their subsidiaries under other statutory authority.

(2) *Qualifying subsidiaries.* For purposes of this section, an operating subsidiary in which a national bank may invest includes a corporation, limited liability company, or similar entity if the parent bank owns more than 50 percent of the voting (or similar type of controlling) interest of the subsidiary; or the parent bank otherwise controls the subsidiary and no other party controls more than 50 percent of the voting (or similar type of controlling) interest of the subsidiary. However, the following subsidiaries are not operating subsidiaries subject to this section:

(i) A subsidiary in which the bank's investment is made pursuant to specific authorization in a statute or OCC regulation (*e.g.*, a community development corporation subsidiary under 12 CFR part 24); and

(ii) 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.

(3) *Examination and supervision.* Each operating subsidiary is subject to examination and supervision by the OCC. In conducting activities authorized under this section, unless otherwise provided by statute or regulation (including paragraph (f) of this section), applicable provisions of Federal banking law and regulations pertaining to the operations of the parent bank shall apply to the operations of the bank's operating subsidiary. If, upon examination, the OCC determines that the subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety and soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the subsidiary, or discontinue specified activities.

(4) *Consolidation of figures.* Pertinent book figures of the parent bank and its operating subsidiary shall be combined for the purpose of applying statutory limitations when combination is needed

to effect the intent of the statute, *e.g.*, for purposes of 12 U.S.C. 56, 60, 84 and 371d. However, in determining compliance with statutory limits based on regulatory capital, the bank shall make any reductions in regulatory capital required by paragraph (f) of this section.

(e) *Procedures*—(1) *General*—(i) *Application required.* (A) Except as provided in paragraphs (e)(2) and (e)(4) of this section, a national bank that intends to acquire or establish an operating subsidiary, or to perform a new activity in an existing subsidiary, shall submit an application to, and receive approval from, the OCC before acquiring or establishing the subsidiary, or commencing the new activity. The application 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. It also must state whether the bank intends to conduct any activity of the operating subsidiary at a location other than the main office or a previously approved branch of the bank. The OCC may require the applicant to submit a legal analysis if the proposal is novel, unusually complex or raises substantial unresolved legal issues. In such cases, the OCC encourages applicants to have a pre-filing meeting with the OCC.

(B) Notwithstanding any other provision in this section, a national bank shall file an application and obtain prior approval before acquiring or establishing an operating subsidiary, or performing a new activity in an existing subsidiary, if the bank controls the subsidiary but owns 50 percent or less of the voting (or similar type of controlling) interest of the subsidiary. These applications are not subject to paragraph (e)(4) of this section and are not eligible for the notice procedures in paragraph (e)(2) of this section or the expedited review procedures in paragraph (e)(3) of this section.

(ii) *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 and novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.10, and 5.11 apply.

(iii) *OCC review and approval.* The OCC reviews a national bank's application to determine whether the proposed activities are legally permissible for an operating subsidiary 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 national bank. As part of this process, the OCC may request additional information and analysis from the applicant.

(2) *Notice process for certain activities*—(i) *General.* A national bank that is ''adequately capitalized'' or ''well capitalized'' as those terms are defined in 12 CFR part 6, and has not been notified that it is in ''troubled condition'' as defined in § 5.51, may acquire or establish 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 activity, provided the activity is listed in paragraph (e)(2)(ii) of this section. 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. 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) *Activities eligible for notice.* The following activities qualify for the preapproved notice procedures:

(A) Holding property, such as real estate, personal property, securities, or other assets, acquired by the bank through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted;

(B) Business services for the bank or its affiliates. Furnishing services for the internal operations of the bank or its affiliates, including: accounting, auditing, appraising, advertising and public relations, data processing and data transmission services, databases, or facilities;

(C) Financial advice and consulting for the bank or its affiliates;

(D) Selling money orders, savings bonds, or travelers checks;

(E) Management consulting, operational advice, and specialized services for other depository institutions;

(F) Courier services between financial institutions;

(G) Providing check guaranty and verification services;

(H) Data processing and warehousing products, services, and related activities, including associated equipment and technology, for the operating subsidiary, its parent bank, and their affiliates;

(I) Acting as investment or financial adviser, (not involving the exercise of investment discretion), or providing financial counseling, including:

(*1*) Serving as the advisory company for a mortgage or real estate investment trust;

(*2*) Furnishing general economic information and advice, general economic statistical forecasting services, and industry studies;

(*3*) Providing financial advice to state or local governments or foreign governments with respect to issuance of securities;

(*4*) Providing tax planning and preparation; and

(*5*) Providing consumer financial counseling;

(J) Providing financial and transactional advice to customers and assisting customers in structuring, arranging, and executing various financial transactions (provided that the bank and its affiliates do not participate as a principal), including:

(*1*) Mergers, acquisitions, divestitures, joint ventures, leveraged buyouts, recapitalizations, capital structurings, and financial transactions (including private and public financings and loan syndications); and conducting financial feasibility studies; and

(*2*) Arranging commercial real estate equity financing;

(K) Investment advice, (not involving the exercise of investment discretion), on futures and options on futures;

(L) Making, purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein, for the subsidiary's account, or for the account of others, including consumer loans, credit cards loans, commercial loans, residential mortgage loans, and commercial mortgage loans. The notice procedure is not available under this paragraph, however, if the notice involves the direct or indirect acquisition by the bank of any low-quality asset from an affiliate in connection with a transaction subject to this section. For purposes of this paragraph (e)(2)(ii)(L), the terms ''low-quality asset'' and ''affiliate'' have the same meaning as provided in section 23A of the Federal Reserve Act, 12 U.S.C. 371c;

(M) Leasing of personal property, including:

(*1*) Leases in which the bank may invest pursuant to 12 U.S.C. 24(Seventh);

(*2*) Leases in which the bank may invest pursuant to 12 U.S.C. 24(Tenth); and

(*3*) Acting as agent, broker, or adviser in leases for others. The notice process for any leasing activity under this paragraph is not available, however, if the notice involves the direct or indirect acquisition by the bank of any low-quality asset from an affiliate in connection with a transaction subject to this section. For purposes of this paragraph (M), the terms ''low-quality asset'' and ''affiliate'' have the same meaning as provided in section 23A of the Federal Reserve Act, 12 U.S.C. 371c; or

(N) Owning, holding, and managing all or part of the parent bank's investment securities portfolio.

(3) *Expedited review*—(i) *General.* An eligible bank may acquire or establish an operating subsidiary to engage in the activities listed in paragraph (e)(3)(ii) of this section, or may perform such activities in an existing operating subsidiary, by submitting an application to the appropriate district office and receiving approval thereof. Such an application is deemed approved by the OCC 30 days after the filing is received by the OCC, unless the OCC notifies the bank prior to that date that the filing is not eligible for expedited review under § 5.13(a)(2). The application must include a complete description of the bank's investment in the subsidiary and of the activity to be conducted and a representation and undertaking that the activity will be conducted in accordance with the OCC policies contained in guidance issued by the OCC regarding the activity. All approvals are subject to the condition that the subsidiary conduct the activity in a manner consistent with OCC policies contained in the published guidance. The OCC also may impose additional conditions in connection with any approval under this section.

(ii) *Activities eligible for expedited review.* The following activities qualify for expedited review:

(A) Providing securities brokerage, related securities credit, and related activities, including investment advice;

(B) Underwriting and dealing in securities permissible for a national bank under 12 U.S.C. 24(Seventh) and 12 CFR part 1;

(C) Acting as futures commission merchant;

(D) Serving as an investment adviser for investment companies under the Investment Company Act of 1940, 15 U.S.C. 80a–1 *et seq.*;

(E) Providing financial and transactional advice to customers and assisting customers in structuring, arranging, and executing various financial transactions relating to swaps and other derivatives and foreign exchange, coin and bullion, and related transactions;

(F) Data processing and warehousing products, services, and related activities, including associated equipment and technology permissible under 12 U.S.C. 24(Seventh) and 12 CFR 7.1019; or

(G) Real estate appraisal services for the subsidiary, parent bank or other financial institution.

(4) *No application or notice required.* A bank may acquire or establish an operating subsidiary without filing an application or providing notice to the OCC, provided the bank is adequately capitalized or well capitalized and the:

(i) Activities of the new subsidiary are limited to those activities previously reported by the bank in connection with the establishment or acquisition of a prior operating subsidiary;

(ii) Establishment or acquisition of the prior operating subsidiary was deemed permissible by the OCC;

(iii) Activities in which the new subsidiary will engage continue to be deemed legally permissible by the OCC; and

(iv) Activities of the new subsidiary will be conducted in accordance with any conditions imposed by the OCC in approving the conduct of these activities for any prior operating subsidiary of the bank.

(5) *Fiduciary powers.* If an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the national bank must have prior OCC approval to exercise fiduciary powers pursuant to § 5.26 and the subsidiary shall be subject to the requirements of 12 CFR part 9, unless:

(i) The subsidiary is registered under the Investment Advisers Act of 1940, 15 U.S.C. 80b–1 *et seq.*; or

(ii) The subsidiary is registered, or has filed a notice, under the applicable provisions of sections 15, 15B or 15C of the Securities Exchange Act of 1934, 15 U.S.C. 78o, 78o–4, or 78o–5, as a broker, dealer, municipal securities dealer, government securities broker or government securities dealer; and the subsidiary's performance of investment advisory services as described in 15 U.S.C. 80b–2(a)(11) is solely incidental to the conduct of its business as broker or dealer and there is no special compensation to the subsidiary for those advisory services.

(f) *Additional requirements for certain permissible activities.* A national bank may acquire or establish an operating subsidiary to engage in an activity authorized under § 5.34(d) for the subsidiary but different from that permissible for the parent national bank, or may perform such activities in an existing operating subsidiary, subject to the following additional requirements:

(1) *Notice and comment.* If the OCC has not previously approved the proposed activity, the OCC will provide public notice and opportunity for comment on the application by publishing notice of the application in the Federal Register. For subsequent applications to conduct the activity, the OCC may also publish notice of the application in the Federal Register and provide an opportunity for public comment.

(2) *Corporate requirements.* The following corporate requirements apply:

(i) The subsidiary shall be physically separate and distinct in its operations from the parent bank, including ensuring that the employees of the subsidiary are compensated by the subsidiary. However, this requirement shall not be construed to prohibit the parent bank and the subsidiary from sharing the same facility, provided that any area in which the subsidiary conducts business with the public is distinguishable, to the extent practicable, from the area in which customers of the bank conduct business with the bank;

(ii) The subsidiary shall be held out as a separate and distinct entity from the bank in its written material and direct contact with outside parties. All written marketing material shall clearly state that the subsidiary is a separate entity from the bank and the obligations of the subsidiary are not obligations of the bank;

(iii) The subsidiary's name shall not be the same name as its parent bank, and a subsidiary that has a name similar to its parent bank shall take appropriate steps to minimize the risk of customer confusion, including with respect to the separate character of the two entities and the extent to which their respective obligations are insured or not insured by the Federal Deposit Insurance Corporation;

(iv) The subsidiary shall be adequately capitalized according to relevant industry measures and shall maintain capital adequate to support its activities and to cover reasonably expected expenses and losses;

(v) The subsidiary shall maintain separate accounting and corporate records;

(vi) The subsidiary shall conduct its operations pursuant to independent policies and procedures that are also intended to inform customers that the

subsidiary is an organization separate from the bank;

(vii) Contracts between the subsidiary and the bank for any services shall be on terms and conditions substantially comparable to those available to or from independent entities;

(viii) The subsidiary shall observe appropriate separate corporate formalities, such as separate board of directors' meetings;

(ix) The subsidiary shall maintain a board of directors at least one-third of whom shall not be directors of the bank and shall have relevant expertise capable of overseeing the subsidiary's activities; and

(x) The subsidiary and the parent bank shall have internal controls appropriate to manage the financial and operational risks associated with the subsidiary.

(3) *Supervisory requirements.* When the subsidiary will conduct an activity described in this paragraph (f) as principal, the following additional requirements apply:

(i) The bank's capital and total assets shall each be reduced by an amount equal to the bank's equity investment in the subsidiary (for purposes of risk-based capital this deduction shall be made equally from Tier 1 and Tier 2 capital), and the subsidiary's assets and liabilities shall not be consolidated with those of the bank. The OCC may, however, require the bank to calculate its capital on a consolidated basis for purposes of determining whether the bank is adequately capitalized under 12 CFR part 6;

(ii) The standards of sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c–1) shall apply to, and shall be enforced and applied by the OCC with respect to, transactions between the bank and the subsidiary; and

(iii) The bank must qualify as an eligible bank under the criteria set forth at § 5.3(g), both prior to commencement of the activity, and thereafter, taking into account the capital deduction required by paragraph (f)(3)(i) of this section. If the bank ceases to be well capitalized for two consecutive quarters, it shall submit to the OCC, within the period specified by the OCC, an acceptable plan to become well capitalized.

§ 5.35 Bank service companies.

(a) *Authority.* 12 U.S.C. 93a and 1861–1867.

(b) *Licensing requirements.* Except where otherwise provided, a national bank shall submit a notice and obtain prior OCC approval to invest in the equity of a bank service company or to perform new activities in an existing bank service company.

(c) *Scope.* This section describes the procedures and requirements regarding OCC review and approval of a notice to invest in a bank service company.

(d) *Definitions*—(1) *Bank service company* means a corporation or limited liability company organized to provide services authorized by the Bank Service Company Act, 12 U.S.C. 1861 *et seq.*, all of whose capital stock is owned by one or more insured banks in the case of a corporation, or all of the members of which are one or more insured banks in the case of a limited liability company.

(2) *Limited liability company* means any non-corporate company, partnership, trust, or similar business entity organized under the law of a State (as defined in section 3 of the Federal Deposit Insurance Act) which provides that a member or manager of such company is not personally liable for a debt, obligation, or liability of the company solely by reason of being, or acting as, a member or manager of such company.

(3) *Depository institution,* for purposes of this section, means an insured bank, a financial institution subject to examination by the Office of Thrift Supervision, or the National Credit Union Administration Board, or a financial institution whose accounts or deposits are insured or guaranteed under state law and eligible to be insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration Board.

(4) *Invest* includes making any advance of funds to a bank service company, whether by the purchase of stock, the making of a loan, or otherwise, except a payment for rent earned, goods sold and delivered, or services rendered before the payment was made.

(5) *Principal investor* means the insured bank that has the largest amount invested in the equity of a bank service company. In any case where two or more insured banks have equal amounts invested, the bank service company shall designate one of the banks as its principal investor.

(e) *Standards and requirements.* A national bank may invest in the equity of a bank service company that conducts, or through an existing bank service company may conduct, activities described in paragraphs (f)(4) and (f)(5) of this section, and activities (other than taking deposits) permissible for the national bank and other state and national bank shareholders or members in the bank service company.

(f) *Procedures*—(1) *OCC notice and approval required.* Except as provided in paragraphs (f)(2) and (f)(5) of this section, a national bank that intends to make an investment in the equity of a bank service company, or to perform new activities in an existing bank service company, shall submit a notice to and receive prior approval from the OCC. The OCC approves or denies a proposed investment within 60 days after the filing is received by the OCC, unless the OCC notifies the bank prior to that date that the filing presents a significant supervisory or compliance concern, or raises a significant legal or policy issue. The notice must include the information required by paragraph (g) of this section.

(2) *Notice process only for certain activities.* A national bank that is ''adequately capitalized'' or ''well capitalized,'' as defined in 12 CFR part 6, and has not been notified that it is in ''troubled condition,'' as defined in § 5.51, may invest in the equity of a bank service company, or perform a new activity in an existing bank service company, by providing the appropriate district office written notice within ten days after the investment, provided that the bank service company engages only in the activities listed in § 5.34(e)(2)(ii). No prior OCC approval is required. 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. Any bank receiving approval under paragraph (f)(2) of this section is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with the published OCC guidance.

(3) *Expedited review.* Notwithstanding paragraph (f)(1) of this section, a notice by an eligible bank that seeks to make an investment in the equity of a bank service company, or to perform a new activity in an existing bank service company, is deemed approved by the OCC 30 days after the filing is received by the OCC, provided that the bank service company will engage in an activity listed in § 5.34(e)(3)(ii), unless the OCC notifies the bank prior to that date that the filing is not eligible for expedited review under § 5.13(a)(2). The written notice must include a complete description of the bank's investment in the subsidiary and of the activity to be conducted and a representation and undertaking that the activity will be conducted in accordance with OCC policies contained in guidance regarding the activity. Approval under this paragraph (f)(3) is subject to the

condition that the bank service company conduct the activity in a manner consistent with OCC policies contained in guidance issued by the OCC regarding the activity. The OCC also may impose additional conditions in connection with any approval under this section.

(4) *Investments requiring no approval.* A national bank does not need OCC approval to invest in a bank service company, or to perform a new activity in an existing bank service company, if the bank service company will provide the following services only for depository institutions: check and deposit posting and sorting; computation and posting of interest and other credits and charges; preparation and mailing of checks, statements, notices, and similar items; or any other clerical, bookkeeping, accounting, statistical, or similar function.

(5) *Federal Reserve approval.* A national bank also may, with the approval of the Board of Governors of the Federal Reserve System (Federal Reserve Board), invest in the equity of a bank service company that provides any other service (except deposit taking) that the Federal Reserve Board has determined, by regulation, to be permissible for a bank holding company under 12 U.S.C. 1843(c)(8).

(6) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to a request for approval to invest in a bank service corporation. However, if the OCC concludes that an application presents significant and novel policy, supervisory, or legal issues, the OCC may determine that any or all parts of §§ 5.8, 5.10, and 5.11 apply.

(g) *Required information.* A notice required under paragraph (f)(1), of this section must contain the following:

(1) The name and location of the bank service company;

(2) A complete description of the activities the bank service company will conduct;

(3) Information demonstrating that the bank will comply with the investment limitations of paragraph (h) of this section;

(4) Information demonstrating that the bank service company and all banks investing in the bank service company are located in the same state, unless the Federal Reserve Board has approved an exception to this requirement under the authority of 12 U.S.C. 1864(b); and

(5) Information demonstrating that the bank service company will conduct these activities only at locations in a state where the investing bank could be authorized to perform the activities directly.

(h) *Examination and supervision.* Each bank service company in which a national bank is the principal investor is subject to examination and supervision by the OCC in the same manner and to the same extent as that national bank.

(i) *Investment and other limitations*—(1) *Investment limitations.* A bank may not invest more than ten percent of its capital and surplus in a bank service company. In addition, the bank's total investments in all bank service companies may not exceed five percent of the bank's total assets.

(2) *Other limitations.* Expect as provided in paragraph (f)(5) of this section, a bank service company shall only conduct activities that the national bank could conduct directly. If the bank service company has both national and state bank shareholders or members, the activities conducted must also be permissible for the state bank shareholders or members.

§ 5.36 Other equity investments.

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

(b) *Scope.* National banks are permitted to make various types of equity investments pursuant to 12 U.S.C. 24(Seventh) and other statutes. These investments are in addition to those subject to §§ 5.34, 5.35, and 5.37. This section describes the procedure governing the filing of the notice that the OCC requires in connection with certain of these investments. Other investments authorized under this section may be reviewed on a case-by-case basis by the OCC.

(c) *Procedure.* (1) A national bank must provide the appropriate district office with written notice within ten days after making an equity investment in the following:

(i) An agricultural credit corporation;

(ii) A savings association eligible to be acquired under section 13 of the Federal Deposit Insurance Act (12 U.S.C. 1823); and

(iii) Any other equity investment that may be authorized by statute after February 12, 1990, if not covered by other applicable OCC regulation.

(2) The written notice required by paragraph (c)(1) of this section must include a description, and the amount, of the bank's investment.

(3) The OCC reserves the right to require additional information as necessary.

(d) *Exceptions to rules of general applicability.* Sections 5.8, 5.9, 5.10, and 5.11 of this part do not apply to filings for other equity investments.

§ 5.37 Investment in bank premises.

(a) *Authority.* 12 U.S.C. 29, 93a, and 371d.

(b) *Scope.* This section sets forth the procedures governing OCC review and approval of applications by national banks to invest in bank premises or in certain bank premises related investments, loans, or indebtedness, as described in paragraph (d)(1)(i) of this section.

(c) *Definition—Bank premises* for purposes of this section includes the following:

(1) Premises that are owned and occupied (or to be occupied, if under construction) by the bank, its branches, or its consolidated subsidiaries;

(2) Capitalized leases and leasehold improvements, vaults, and fixed machinery and equipment;

(3) Remodeling costs to existing premises;

(4) Real estate acquired and intended, in good faith, for use in future expansion; or

(5) Parking facilities that are used by customers or employees of the bank, its branches, and its consolidated subsidiaries.

(d) *Procedure*—(1) *Application.* (i) A national bank shall submit an application to the appropriate district office to invest in bank premises, or in the stock, bonds, debentures, or other such obligations of any corporation holding the premises of the bank, or to make loans to or upon the security of the stock of such corporation, if the aggregate of all such investments and loans, together with the indebtedness incurred by any such corporation that is an affiliate of the bank, as defined in 12 U.S.C. 221a, will exceed the amount of the capital stock of the bank.

(ii) The application must include:

(A) A description of the bank's present investment in bank premises;

(B) The investment in bank premises that the bank intends to make, and the business reason for making the investment; and

(C) The amount by which the bank's aggregate investment will exceed the amount of the bank's capital stock.

(2) *Approval.* An application for national bank investment in bank premises or in certain bank premises' related investments, loans or indebtedness, as described in paragraph (d)(1)(i) of this section, is deemed approved as of the 30th day after the filing is received by the OCC, unless the OCC notifies the bank prior to that date that the filing presents a significant supervisory, or compliance concern, or raises a significant legal or policy issue. An approval for a specified amount under this section remains valid up to that amount until the OCC notifies the bank otherwise.

(3) *Notice process.* Notwithstanding paragraph (d)(1)(i) of this section, a bank that is rated 1 or 2 under the Uniform Financial Institutions Rating System (CAMEL) may make an aggregate investment in bank premises up to 150 percent of the bank's capital and surplus without the OCC's prior approval, provided that the bank is well capitalized as defined in 12 CFR part 6 and will continue to be well capitalized after the investment or loan is made. However, the bank shall notify the appropriate district 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 bank's investment.

(4) *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 and novel policy, supervisory, or legal issues, the OCC may determine that any or all parts of §§ 5.8, 5.10, and 5.11 apply.

Subpart D—Other Changes in Activities and Operations

§ 5.40 Change in location of main office.

(a) *Authority* 12 U.S.C. 30, 93a, and 2901 through 2907.

(b) *Licensing requirements.* A national bank shall give prior notice to the OCC to relocate its main office within city, town, or village limits to an authorized branch location. A national bank shall submit an application and obtain prior OCC approval to relocate its main office to any other location in the city, town, or village, or within 30 miles of the limits of the city, town, or village in which the main office of the bank is located.

(c) *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.

(d) *Procedure*—(1) *Main office relocation to an authorized branch location within city, town, or village limits.* A national bank may change the location of its main office to an authorized branch location (approved or existing branch site) within the limits of the same city, town, or village. The national bank shall submit a notice to the appropriate district office before the relocation. The notice must include the new address of the main office and the effective date of the relocation.

(2) *To any other location.* To relocate its main office to any other location, a national bank shall file an application to relocate with the appropriate district office. If relocating the main office outside the limits of its city, town, or village, a national bank shall also:

(i) Obtain the approval of shareholders owning two-thirds of the voting stock of the bank; and

(ii) Amend its articles of association.

(3) *Establishment of a branch at site of former main office.* A national bank desiring to establish a branch at its former main office location shall obtain OCC approval pursuant to the standards of § 5.30.

(4) *Expedited review.* A main office relocation application submitted by an eligible bank under paragraph (d)(2) of this section is deemed approved by the OCC as of the 15th day after the close of the public comment period or the 45th day after the filing is received by the OCC, whichever is later, unless the OCC notifies the bank prior to that time that the filing is not eligible for expedited review, or the expedited review period is extended, under § 5.13(a)(2).

(5) *Exceptions to rules of general applicability.* (i) Sections 5.8, 5.9, 5.10, and 5.11 do not apply to a main office relocation to an authorized branch location within the limits of the city, town, or village as described in paragraph (d)(1) of this section. However, if the OCC concludes that the notice under paragraph (d)(1) of this section presents a significant and novel policy, supervisory, or legal issue, the OCC may determine that any or all parts of §§ 5.8, 5.9, 5.10, and 5.11 apply.

(ii) The comment period on any application filed under paragraph (d)(2) of this section to engage in a short-distance relocation of a main office is 15 days.

(e) *Expiration of approval.* Approval expires if the national bank has not opened its main office at the relocated site within 18 months of the date of approval.

§ 5.42 Corporate title.

(a) *Authority.* 12 U.S.C. 21a, 30, and 93a.

(b) *Scope.* This section describes the method by which a national bank may change its corporate title.

(c) *Standards.* A national bank may change its corporate title provided that the new title includes the word ''national'' and complies with other applicable Federal laws, including 18 U.S.C. 709, regarding false advertising and the misuse of names to indicate a Federal agency, and any applicable OCC guidance.

(d) *Procedures*—(1) *Notice process.* A national bank shall promptly notify the appropriate district office if it changes its corporate title. The notice must contain the old and new titles and the effective date of the change.

(2) *Amendment to articles of association.* A national bank whose corporate title is specified in its articles of association shall amend its articles, in accordance with the procedures of 12 U.S.C. 21a, to change its title.

(3) *Exceptions to rules of general applicability.* Sections 5.8, 5.9, 5.10, 5.11, and 5.13(a) do not apply to a national bank's change of corporate title. However, if the OCC concludes that the application presents a significant and novel policy, supervisory, or legal issue, the OCC may determine that any or all parts of §§ 5.8, 5.9, 5.10, 5.11, and 5.13(a) apply.

§ 5.46 Changes in permanent capital.

(a) *Authority.* 12 U.S.C. 21a, 51, 51a, 51b, 51b–1, 52, 56, 57, 59, 60, and 93a.

(b) *Licensing requirements.* A national bank shall submit an application and obtain OCC approval to decrease its permanent capital. Generally, a national bank need only submit a notice to increase its permanent capital, although, in certain circumstances, a national bank shall be required to submit an application and obtain OCC approval.

(c) *Scope.* This section describes procedures and standards relating to a transaction resulting in a change in a national bank's permanent capital.

(d) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to changes in a national bank's permanent capital.

(e) *Definitions.* For the purposes of this section the following definitions apply:

(1) *Capital plan* means a plan describing the manner and schedule by which a national bank will attain specified capital levels or ratios, including a plan to achieve minimum capital ratios filed with the appropriate district office under 12 CFR 3.7 and a capital restoration plan filed with the OCC under 12 U.S.C. 1831o and 12 CFR 6.5.

(2) *Capital stock* means the total amount of common stock and preferred stock.

(3) *Capital surplus* means the total of:

(i) The amount paid in on capital stock in excess of the par or stated value;

(ii) Direct capital contributions representing the amounts paid in to the national bank other than for capital stock;

(iii) The amount transferred from undivided profits required by 12 U.S.C. 60; and

(iv) The amount transferred from undivided profits reflecting stock dividends.

(4) *Permanent capital* means the sum of capital stock and capital surplus.

(f) *Policy.* In determining whether to approve a proposed change to a national bank's permanent capital, the OCC considers whether the change is:

(1) Consistent with law, regulation, and OCC policy thereunder;

(2) Provides an adequate capital structure; and

(3) If appropriate, complies with the bank's capital plan.

(g) *Increases in permanent capital*—(1) *Prior approval*—(i) *Criteria.* A national bank need not obtain prior OCC approval to increase its permanent capital unless the bank is:

(A) Required to receive OCC approval pursuant to letter, order, directive, written agreement or otherwise;

(B) Selling common or preferred stock for consideration other than cash; or

(C) Receiving a material noncash contribution to capital surplus.

(ii) *Application and letter of notification.* A national bank that proposes to increase its permanent capital and that must receive OCC approval under paragraph (g)(1)(i) of this section shall file an application under paragraph (i)(1) of this section and a letter of notification under paragraph (i)(3) of this section. A national bank not required to obtain prior approval under paragraph (g)(1)(i) of this section for an increase in capital shall file only the letter of notification under paragraph (i)(3) of this section.

(2) *Preferred stock.* Notwithstanding paragraph (g)(1)(i) of this section, in the case of a sale of preferred stock, the national bank shall also submit provisions in the articles of association concerning preferred stock dividends, voting and conversion rights, retirement of the stock, and rights to exercise control over management to the appropriate district office prior to the sale of the preferred stock. The provisions will be deemed approved by the OCC within 30 days of its receipt, unless the OCC notifies the applicant otherwise, including a statement of the reason for the delay.

(h) *Decreases in permanent capital.* A national bank shall submit an application and obtain prior approval under paragraph (i)(1) or (i)(2) of this section for any reduction of its permanent capital.

(i) *Procedures*—(1) Prior approval. A national bank proposing to make a change in its permanent capital that requires prior OCC approval under paragraphs (g) or (h) of this section shall submit an application to the appropriate district office. The application must:

(i) Describe the type and amount of the proposed change in permanent capital and explain the reason for the change;

(ii) In the case of a reduction in capital, provide a schedule detailing the present and proposed capital structure;

(iii) In the case of a material noncash contribution to capital, provide a description of the method of valuing the contribution; and

(iv) State if the bank is subject to a capital plan with the OCC and how the proposed change would conform to a capital plan or if a capital plan is otherwise required in connection with the proposed change in permanent capital.

(2) *Expedited review.* An eligible bank's application is deemed approved by the OCC 30 days after the date the OCC receives the application described in paragraph (i)(1) of this section, unless the OCC notifies the bank prior to that date that the application is not eligible for expedited review under § 5.13(a)(2). A bank seeking to decrease its capital may request OCC approval for up to four consecutive quarters. An eligible bank may decrease its capital pursuant to such a plan only if the bank maintains its eligible bank status before and after each decrease in its capital.

(3) *Letter of notification.* After a bank completes an increase in capital it shall submit a letter of notification to the appropriate district office in order to obtain a certification from the OCC. The proposed change is deemed approved by the OCC and certified seven days after the date on which the OCC receives the letter of notification. The letter of notification must be acknowledged before a notary public by the bank's president, vice president, or cashier and contain:

(i) A description of the transaction, unless already provided pursuant to paragraph (i)(1) of this section;

(ii) The amount, including the par value of the stock, and effective date of the increase;

(iii) A certification that the funds have been paid in, if applicable;

(iv) A certified copy of the amendment to the articles of association, if required; and

(v) A statement that the bank has complied with all laws, regulations and conditions imposed by the OCC.

(4) *Notice process.* A national bank that decreases its capital in accordance with paragraphs (i)(1) or (i)(2) of this section shall notify the appropriate district office following the completion of the transaction.

(5) *Expiration of approval.* Approval expires if a national bank has not completed its change in permanent capital within one year of the date of approval.

(j) *Offers and sales of stock.* A national bank shall comply with the Securities Offering Disclosure Rules in 12 CFR part 16 for offers and sales of common and preferred stock.

(k) *Shareholder approval.* A national bank shall obtain the necessary shareholder approval required by statute for any change in its permanent capital.

§ 5.47 Subordinated debt as capital.

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

(b) *Licensing requirements.* A national bank does not need prior OCC approval to issue subordinated debt, or to prepay subordinated debt (including payment pursuant to an acceleration clause or redemption prior to maturity) provided the bank remains an eligible bank after the transaction, unless the OCC has previously notified the bank that prior approval is required, or unless prior approval is required by law. No prior approval is required for the bank to count the subordinated debt as Tier 2 or Tier 3 capital. However, a bank issuing subordinated debt shall notify the OCC after issuance if the debt is to be counted as Tier 2 or Tier 3 capital.

(c) *Scope.* This section sets forth the procedures for OCC review and approval of an application to issue or prepay subordinated debt.

(d) *Definitions*—(1) *Capital plan* means a plan describing the means and schedule by which a national bank will attain specified capital levels or ratios, including a plan to achieve minimum capital ratios filed with the appropriate district office under 12 CFR 3.7 and a capital restoration plan filed with the OCC under 12 U.S.C. 1831o and 12 CFR 6.5.

(2) *Tier 2 capital* has the same meaning as set forth in 12 CFR 3.2(d).

(3) *Tier 3 capital* has the same meaning as set forth in 12 CFR part 3, appendix B, section 2(d).

(e) *Qualification as regulatory capital.* (1) A national bank's subordinated debt qualifies as Tier 2 capital if the subordinated debt meets the requirements in 12 CFR part 3, appendix A, section 2(b)(4), and complies with the ''OCC Guidelines for Subordinated Debt'' in the Manual.

(2) A national bank's subordinated debt qualifies as Tier 3 capital if the subordinated debt meets the requirements in 12 CFR part 3, section 2(d) of Appendix B.

(3) If the OCC notifies a national bank that it must obtain OCC approval before issuing subordinated debt, the subordinated debt will not qualify as Tier 2 or Tier 3 capital until the bank obtains OCC approval for its inclusion in capital.

(f) *Prior approval procedure*—(1) *Application.* A national bank required to obtain OCC approval before issuing or prepaying subordinated debt shall submit an application to the appropriate district office. The application must include:

(i) A description of the terms and amount of the proposed issuance or prepayment;

(ii) A statement of whether the bank is subject to a capital plan or required to file a capital plan with the OCC and, if so, how the proposed change conforms to the capital plan;

(iii) A copy of the proposed subordinated note format and note agreement; and

(iv) A statement of whether the subordinated debt issue complies with all laws, regulations, and the ''OCC Guidelines for Subordinated Debt'' in the Manual.

(2) *Approval*—(i) *General.* The application is deemed approved by the OCC as of the 30th day after the filing is received by the OCC, unless the OCC notifies the bank prior to that date that the filing presents a significant supervisory, or compliance concern, or raises a significant legal or policy issue.

(ii) *Tier 2 and Tier 3 capital.* When the OCC notifies the bank that the OCC approves the bank's application to issue or prepay the subordinated debt, it also notifies the bank whether the subordinated debt qualifies as Tier 2 or Tier 3 capital.

(iii) *Expiration of approval.* Approval expires if a national bank does not complete the sale of the subordinated debt within one year of approval.

(g) *Notice procedure.* If a national bank is not required to obtain approval before issuing subordinated debt, the bank shall notify the appropriate district office in writing within ten days after issuing subordinated debt that is to be counted as Tier 2 or Tier 3 capital. The notice must include:

(1) The terms of the issuance;

(2) The amount and date of receipt of funds;

(3) A copy of the final subordinated note format and note agreement; and

(4) A statement that the issue complies with all laws, regulations, and the ''OCC Guidelines for Subordinated Debt Instruments'' in the Manual.

(h) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to the issuance of subordinated debt.

(i) *Issuance of subordinated debt.* A national bank shall comply with the Securities Offering Disclosure Rules in 12 CFR part 16 when issuing subordinated debt even if the bank is not required to obtain prior approval to issue subordinated debt.

§ 5.48 Voluntary liquidation.

(a) *Authority.* 12 U.S.C. 93a, 181, and 182.

(b) *Licensing requirements.* A national bank considering going into voluntary liquidation shall notify the OCC. The bank shall also file a notice with the OCC once a liquidation plan is definite.

(c) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to a voluntary liquidation. However, if the OCC concludes that the notice presents significant and novel policy, supervisory or legal issues, the OCC may determine that any or all parts of §§ 5.8, 5.10, and 5.11 apply.

(d) *Standards.* A national bank may liquidate in accordance with the terms of 12 U.S.C. 181 and 182.

(e) *Procedure*—(1) *Notice of voluntary liquidation.* When the shareholders of a solvent national bank have voted to voluntarily liquidate, the bank shall file a notice with the appropriate district office and publish public notice in accordance with 12 U.S.C. 182.

(2) *Report of condition.* The liquidating bank shall submit reports of the condition of its commercial, trust, and other departments to the appropriate district office by filing the quarterly Consolidated Reports of Condition and Income (Call Reports).

(3) *Report of progress.* The liquidating agent or committee shall submit a ''Report of Progress of Liquidation'' annually to the appropriate district office until the liquidation is complete.

(f) *Expedited liquidations in connection with acquisitions*—(1) *General.* When an acquiring depository institution in a business combination purchases all the assets, and assumes all the liabilities, including contingent liabilities, of a target national bank, the acquiring depository institution may dissolve the target national bank immediately after the combination. However, if any liabilities will remain in the target national bank, then the standard liquidation procedures apply.

(2) *Procedure.* After its shareholders have voted to liquidate and the national bank has notified the appropriate district office of its plans, the bank may surrender its charter and dissolve immediately, if:

(i) The acquiring depository institution certifies to the OCC that it has purchased all the assets and assumed all the liabilities, including contingent liabilities, of the national bank in liquidation; and

(ii) The acquiring depository institution and the national bank in liquidation have published notice that the bank will dissolve after the purchase and assumption to the acquiror. This is included in the notice and publication for the purchase and assumption required under the Bank Merger Act, 12 U.S.C. 1828(c).

(g) *National bank as acquiror.* If another national bank plans to acquire a national bank in liquidation through merger or through the purchase of the assets and the assumption of the liabilities of the bank in liquidation, the acquiring bank shall comply with the Bank Merger Act, 12 U.S.C. 1828(c), and § 5.33.

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

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

(b) *Licensing requirements.* Any person seeking to acquire control of a national bank shall provide 60 days prior written notice of a change in control to the OCC, except where otherwise provided in this section.

(c) *Scope*—(1) *General.* This section describes the procedures and standards governing OCC review of notices for a change in control of a national bank and reports of stock loans.

(2) *Exempt transactions.* The following transactions are not subject to the requirements of this section:

(i) The acquisition of additional shares of a national bank by a person who:

(A) Has, continuously since March 9, 1979, (or since that institution commenced business, if later) held power to vote 25 percent or more of the voting securities of that bank; or

(B) Under paragraph (f)(2)(ii) of this section, would be presumed to have controlled that bank continuously since March 9, 1979, if the transaction will not result in that person's direct or indirect ownership or power to vote 25 percent or more of any class of voting securities of the national bank; or, in other cases, where the OCC determines that the person has controlled the bank continuously since March 9, 1979;

(ii) Unless the OCC otherwise provides in writing, the acquisition of additional shares of a national bank by a person who has lawfully acquired and maintained continuous control of the bank under paragraph (f) of this section after complying with the procedures and filing the notice required by this section;

(iii) A transaction subject to approval under section 3 of the Bank Holding Company Act, 12 U.S.C. 1842, section 18 of Federal Deposit Insurance Act, 12 U.S.C. 1828, or section 10 of the Home Owners' Loan Act, 12 U.S.C. 1467a;

(iv) Any transaction described in section 2(a)(5) or 3(a) (A) or (B) of the Bank Holding Company Act, 12 U.S.C. 1841(a)(5) and 1842(a) (A) and (B), by a person described in those provisions;

(v) A customary one-time proxy solicitation or receipt of *pro rata* stock dividends; and

(vi) The acquisition of shares of a foreign bank that has a Federally licensed branch in the United States. This exemption does not extend to the reports and information required under paragraph (h) of this section.

(3) *Prior notice exemption.* The following transactions are not subject to the prior notice requirements of this section but are otherwise subject to this section, including filing a notice and paying the appropriate filing fee, within 90 calendar days after the transaction occurs:

(i) The acquisition of control as a result of acquisition of voting shares of a national bank through testate or intestate succession;

(ii) The acquisition of control as a result of acquisition of voting shares of a national bank as a bona fide gift;

(iii) The acquisition of voting shares of a national bank resulting from a redemption of voting securities;

(iv) The acquisition of control of a national bank as a result of actions by third parties (including the sale of securities) that are not within the control of the acquiror; and

(v) The acquisition of control as a result of the acquisition of voting shares of a national bank in satisfaction of a debt previously contracted in good faith.

(A) ''Good faith'' means that a person must either make or acquire a loan secured by voting securities of a national bank in advance of any known default. A person who purchases a previously defaulted loan secured by voting securities of a national bank may not rely on this paragraph (c)(3)(v) to foreclose on that loan, seize or purchase the underlying collateral, and acquire control of the national bank without complying with the prior notice requirements of this section.

(B) To ensure compliance with this section, the acquiror of a defaulted loan secured by a controlling amount of a national bank's voting securities shall file a notice prior to the time the loan is acquired unless the acquiror can demonstrate to the satisfaction of the OCC that the voting securities are not the anticipated source of repayment for the loan.

(d) *Definitions.* As used in this section:

(1) *Acquisition* includes a purchase, assignment, transfer, or pledge of voting securities, or an increase in percentage ownership of a national bank resulting from a redemption of voting securities.

(2) *Acting in concert* means:

(i) Knowing participation in a joint activity or parallel action towards a common goal of acquiring control whether or not pursuant to an express agreement; or

(ii) A combination or pooling of voting or other interests in the securities of an issuer for a common purpose pursuant to any contract, understanding, relationship, agreement, or other arrangement, whether written or otherwise.

(3) *Control* means the power, directly or indirectly, to direct the management or policies of a national bank or to vote 25 percent or more of any class of voting securities of a national bank.

(4) *Notice* means a filing by a person in accordance with paragraph (f) of this section.

(5) *Person* means an individual or a corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity, and includes voting trusts and voting agreements and any group of persons acting in concert.

(6) *Voting securities* means:

(i) Shares of common or preferred stock, or similar interests, if the shares or interests, by statute, charter, or in any manner, allow the holder to vote for or select directors (or persons exercising similar functions) of the issuing national bank, or to vote on or to direct the conduct of the operations or other significant policies of the issuing national bank. However, preferred stock or similar interests are not voting securities if:

(A) Any voting rights associated with the shares or interests are limited solely to voting rights customarily provided by statute regarding matters that would significantly affect the rights or preference of the security or other interest. This includes the issuance of additional amounts of classes of senior securities, the modification of the terms of the security or interest, the dissolution of the issuing national bank, or the payment of dividends by the issuing national bank when preferred dividends are in arrears;

(B) The shares or interests are a passive investment or financing device and do not otherwise provide the holder with control over the issuing national bank; and

(C) The shares or interests do not allow the holder by statute, charter, or in any manner, to select or to vote for the selection of directors (or persons exercising similar functions) of the issuing national bank.

(ii) Securities, other instruments, or similar interests that are immediately convertible, at the option of the owner or holder thereof, into voting securities.

(e) *Policy*—(1) *General.* The OCC seeks to enhance and maintain public confidence in the banking system by preventing a change in control of a national bank that could have serious adverse effects on a bank's financial stability or management resources, the interests of the bank's customers, the Federal deposit insurance fund, or competition.

(2) *Acquisitions subject to the Bank Holding Company Act.* (i) If corporations, partnerships, certain trusts, associations, and similar organizations, that are not already bank holding companies, are not required to secure prior Federal Reserve Board approval to acquire control of a bank under section 3 of the Bank Holding Company Act, 12 U.S.C. 1842, they are subject to the notice requirements of this section.

(ii) Certain transactions, including foreclosures by depository institutions and other institutional lenders, fiduciary acquisitions by depository institutions, and increases of majority holdings by bank holding companies, are described in sections 2(a)(5)(D) and 3(a) (A) and (B) of the Bank Holding Company Act, 12 U.S.C. 1841(a)(5)(D) and 12 U.S.C. 1842(a) (A) and (B), but do not require the Federal Reserve Board's prior approval. For purposes of this section, they are considered subject to section 3 of the Bank Holding Company Act, 12 U.S.C 1842, and do not require either a prior or subsequent notice to the OCC under this section.

(3) *Assessing financial condition.* In assessing the financial condition of the acquiring person, the OCC weighs any debt servicing requirements in light of the acquiring person's overall financial strength; the institution's earnings performance, asset condition, capital adequacy, and future prospects; and the likelihood of the acquiring party making unreasonable demands on the resources of the institution.

(f) *Procedures*—(1) *Exceptions to rules of general applicability.* Sections 5.8(a), 5.9, 5.10, 5.11, and 5.13(a) through (f) do not apply to filings under this section.

(2) *Who must file.* (i) Any person seeking to acquire the power, directly or indirectly, to direct the management or policies, or to vote 25 percent or more of a class of voting securities of a national bank, shall file a notice with the OCC 60 days prior to the proposed acquisition, unless the acquisition is exempt under paragraph (c)(2) of this section.

(ii) The OCC presumes, unless rebutted, that an acquisition or other disposition of voting securities through which any person proposes to acquire ownership of, or the power to vote, ten percent or more of a class of voting securities of a national bank is an acquisition by a person of the power to direct the bank's management or policies if:

(A) The securities to be acquired or voted are subject to the registration requirements of section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 78l; or

(B) Immediately after the transaction no other person will own or have the power to vote a greater proportion of that class of voting securities.

(iii) Other transactions resulting in a person's control of less than 25 percent of a class of voting securities of a national bank are not deemed by the OCC to result in control for purposes of this section.

(iv) If two or more persons, not acting in concert, each propose to acquire simultaneously equal percentages of ten percent or more of a class of a national bank's voting securities, and either the acquisitions are of a class of securities subject to the registration requirements of section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 78l, or immediately after the transaction no other shareholder of the national bank would own or have the power to vote a greater percentage of the class, each of the acquiring persons shall either file a notice or rebut the presumption of control.

(v) An acquiring person may seek to rebut the presumption established in paragraph (f)(2)(ii) of this section by presenting relevant information in writing to the appropriate district office. The OCC shall respond in writing to any person that seeks to rebut the presumption of control. No rebuttal filing is effective unless the OCC indicates in writing that the information submitted has been found to be sufficient to rebut the presumption of control.

(3) *Filings.* (i) The OCC does not accept a notice of a change in control unless it is technically complete, i.e., the information provided is responsive to every item listed in the notice form and is accompanied by the appropriate fee.

(A) The notice must contain personal and biographical information, detailed financial information, details of the proposed change in control, information on any structural or managerial changes contemplated for the institution, and other relevant information required by the OCC. The OCC may waive any of the informational requirements of the notice if the OCC determines that it is in the public interest.

(B) When the acquiring person is an individual, or group of individuals acting in concert, the requirement to provide personal financial data may be satisfied with a current statement of assets and liabilities and an income summary, together with a statement of any material changes since the date of the statement or summary. However, the OCC may require additional information, if appropriate.

(ii) The OCC has 60 days from the date it declares the notice to be technically complete to review the notice.

(A) When the OCC declares a notice technically complete, the appropriate district office sends a letter of acknowledgment to the applicant indicating the technically complete date.

(B) As set forth in paragraph (g) of this section, the applicant shall publish an announcement within 10 days of filing the notice with the OCC. The publication of the announcement triggers a 20-day public comment period. The OCC may waive or shorten the public comment period if an emergency exists. The OCC also may shorten the comment period for other good cause. The OCC may act on a proposed change in control prior to the expiration of the public comment period if the OCC makes a written determination that an emergency exists.

(C) An applicant shall notify the OCC immediately of any material changes in a notice submitted to the OCC, including changes in financial or other conditions, that may affect the OCC's decision on the filing.

(iii) Within the 60-day period, the OCC may inform the applicant that the acquisition has been disapproved, has not been disapproved, or that the OCC will extend the 60-day review period. The applicant may request a hearing by the OCC within 10 days of receipt of a disapproval (see 12 CFR part 19, subpart H, for hearing initiation procedures). Following final agency action under 12 CFR part 19, further review by the courts is available.

(4) *Disapproval of notice.* The OCC may disapprove a notice if it finds that any of the following factors exist:

(i) The proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States;

(ii) The effect of the proposed acquisition of control in any section of the country may be substantially to lessen competition or to tend to create a monopoly or the proposed acquisition of control would in any other manner be in restraint of trade, and the anticompetitive effects of the proposed acquisition of control are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served;

(iii) The financial condition of any acquiring person is such as might jeopardize the financial stability of the bank or prejudice the interests of the depositors of the bank;

(iv) The competence, experience, or integrity of any acquiring person, or of any of the proposed management personnel, indicates that it would not be in the interest of the depositors of the bank, or in the interest of the public, to permit that person to control the bank;

(v) An acquiring person neglects, fails, or refuses to furnish the OCC all the information it requires; or

(vi) The OCC determines that the proposed transaction would result in an adverse effect on the Bank Insurance Fund or the Savings Association Insurance Fund.

(5) *Disapproval notification.* If the OCC disapproves a notice, it mails a written notification to the proposed acquiring person within three days after the decision containing a statement of the basis for disapproval.

(g) *Disclosure*—(1) *Announcement.* The applicant shall publish an announcement in a newspaper of general circulation in the community where the affected national bank is located within ten days of filing. The OCC may authorize a delayed announcement if an immediate announcement would not be in the public interest.

(i) In addition to the information required by § 5.8(b), the announcement must include the name of the national bank named in the notice and the comment period (*i.e.*, 20 days from the date of the announcement). The announcement also must state that the public portion of the notice is available upon request.

(ii) Notwithstanding any other provisions of this paragraph (g), if the OCC determines in writing that an emergency exists and that the announcement requirements of this paragraph (g) would seriously threaten the safety and soundness of the national bank to be acquired, including situations where the OCC must act immediately in order to prevent the probable failure of a national bank, the OCC may waive or shorten the publication requirement.

(2) *Release of information.* (i) Upon the request of any person, the OCC releases the information provided in the public portion of the notice and makes it available for public inspection and copying as soon as possible after a notice has been filed. In certain circumstances the OCC may determine that the release of the information would not be in the public interest. In addition, the OCC makes a public announcement of a technically complete notice, the disposition of the notice, and the consummation date of the transaction, if applicable, in the OCC's ''Weekly Bulletin.''

(ii) The OCC handles requests for the non-public portion of the notice as requests under the Freedom of Information Act, 5 U.S.C. 552, and other applicable law.

(h) *Reporting of stock loans*—(1) *Requirements.* (i) Any foreign bank, or any affiliate thereof, shall file a consolidated report with the appropriate district office of the national bank if the foreign bank or any affiliate thereof, has credit outstanding to any person or group of persons that, in the aggregate, is secured, directly or indirectly, by 25 percent or more of any class of voting securities of the same national bank.

(ii) The foreign bank, or any affiliate thereof, shall also file a copy of the report with its appropriate district office if that office is different from the national bank's appropriate district office. If the foreign bank, or any affiliate thereof, is not supervised by the OCC, it shall file a copy of the report filed with the OCC with its appropriate Federal banking agency.

(iii) Any shares of the national bank held by the foreign bank, or any affiliate thereof, as principal must be included in the calculation of the number of shares in which the foreign bank or any affiliate thereof has a security interest for purposes of paragraph (h)(1)(i) of this section.

(2) *Definitions.* For purposes of this paragraph (h):

(i) *Foreign bank and affiliate* have the same meanings as in section 1 of the International Banking Act of 1978, 12 U.S.C. 3101.

(ii) *Credit outstanding* includes any loan or extension of credit; the issuance of a guarantee, acceptance, or letter of credit, including an endorsement or standby letter of credit; and any other type of transaction that extends credit or financing to a person or group of persons.

(iii) *Group of persons* includes any number of persons that a foreign bank, or an affiliate thereof, has reason to believe:

(A) Are acting together, in concert, or with one another to acquire or control shares of the same insured national bank, including an acquisition of shares of the same national bank at approximately the same time under substantially the same terms; or

(B) Have made, or propose to make, a joint filing under 15 U.S.C. 78m regarding ownership of the shares of the same depository institution.

(3) *Exceptions.* Compliance with paragraph (h)(1) of this section is not required if:

(i) The person or group of persons referred to in paragraph (h)(1) of this section has disclosed the amount borrowed and the security interest therein to the appropriate district office in connection with a notice filed under this section or any other application filed with the appropriate district office as a substitute for a notice under this section, such as for a national bank charter; or

(ii) The transaction involves a person or group of persons that has been the owner or owners of record of the stock for a period of one year or more or, if the transaction involves stock issued by a newly chartered bank, before the bank's opening.

(4) *Report requirements.* (i) The consolidated report must indicate the number and percentage of shares securing each applicable extension of credit, the identity of the borrower, and the number of shares held as principal by the foreign bank and any affiliate thereof.

(ii) The foreign bank and all affiliates thereof shall file the consolidated report in writing within 30 days of the date on which the foreign bank or affiliate thereof first believes that the security for any outstanding credit consists of 25 percent or more of any class of voting securities of a national bank.

(5) *Other reporting requirements.* A foreign bank or any affiliate thereof, supervised by the OCC and required to report credit outstanding secured by the shares of a depository institution to another Federal banking agency also shall file a copy of the report with its appropriate district office.

§ 5.51 Changes in directors and senior executive officers.

(a) *Authority.* 12 U.S.C. 1831i.

(b) *Scope.* This section describes the circumstances when a national bank must notify the OCC of a change in its directors and senior executive officers, and the OCC's authority to disapprove those notices.

(c) *Definitions*—(1) *Director* means a person who serves on the board of directors of a national bank except:

(i) A director of a foreign bank that operates a Federal branch; and

(ii) An advisory director who does not have the authority to vote on matters before the board of directors and provides solely general policy advice to the board of directors.

(2) *National bank,* as defined in § 5.3(j), includes a Federal branch for purposes of this section only.

(3) *Senior executive officer* means the chief executive officer, chief operating officer, chief financial officer, chief lending officer, chief investment officer, and any other individual the OCC identifies to the national bank who exercises significant influence over, or participates in, major policy making decisions of the bank without regard to title, salary, or compensation. The term also includes employees of entities retained by a national bank to perform such functions in lieu of directly hiring the individuals, and, with respect to a Federal branch operated by a foreign bank, the individual functioning as the chief managing official of the Federal branch.

(4) *Technically complete notice* means a notice that provides all the information requested in paragraph (e)(2) of this section, including complete explanations where material issues arise regarding the competence, experience, character, or integrity of proposed directors or senior executive officers, and any additional information that the OCC may request following a determination that the original submission of the notice was not technically complete.

(5) *Technically complete notice date* means the date on which the OCC has received a technically complete notice.

(6) *Troubled condition* means a national bank that:

(i) Has a composite rating of 4 or 5 under the Uniform Financial Institutions Rating System (CAMEL);

(ii) Is subject to a cease and desist order, a consent order, or a formal written agreement, unless otherwise informed in writing by the OCC; or

(iii) Is informed in writing by the OCC that as a result of an examination it has been designated in ''troubled condition'' for purposes of this section.

(d) *Prior notice.* A national bank shall provide written notice to the OCC at least 90 days before adding or replacing any member of its board of directors, employing any person as a senior executive officer of the national bank, or changing the responsibilities of any senior executive officer so that the person would assume a different executive officer position, if:

(1) The national bank is not in compliance with minimum capital

requirements applicable to such institution, as prescribed in 12 CFR part 3, or is otherwise in troubled condition; or

(2) The OCC determines, in connection with the review by the agency of the plan required under section 38 of the Federal Deposit Insurance Act, 12 USC 1831o, or otherwise, that such prior notice is appropriate.

(e) *Procedures*—(1) *Filing notice.* A national bank shall file a notice with its appropriate supervisory office. When a national bank files a notice, the individual to whom the filing pertains shall attest to the validity of the information pertaining to that individual. The 90-day review period begins on the technically complete notice date.

(2) *Content of notice.* A notice must contain the identity, personal history, business background, and experience of each person whose designation as a director or senior executive officer is subject to this section. The notice must include:

(i) A description of his or her material business activities and affiliations during the five years preceding the date of the notice;

(ii) A description of any material pending legal or administrative proceedings to which he or she is a party;

(iii) Any criminal indictment or conviction by a state or Federal court; and

(iv) Legible fingerprints of the person, except that fingerprints are not required for any person who, within the three years immediately preceding the date of the present notice, has been subject to a notice filed with the OCC pursuant to section 32 of the FDIA, 12 U.S.C. 1831i, or this section and has previously submitted fingerprints.

(3) *Requests for additional information.* Following receipt of a technically complete notice, the OCC may request additional information, in writing where feasible, and may specify a time period during which the information must be provided.

(4) *Notice of disapproval.* The OCC may disapprove an individual proposed as a member of the board of directors or as a senior executive officer if the OCC determines on the basis of the individual's competence, experience, character, or integrity that it would not be in the best interests of the depositors of the national bank or the public to permit the individual to be employed by, or associated with, the national bank. The OCC sends a notice of disapproval to both the national bank and the disapproved individual stating the basis for disapproval.

(5) *Notice of intent not to disapprove.* An individual proposed as a member of the board of directors or as a senior executive officer may begin service before the expiration of the review period if the OCC notifies the national bank that the OCC does not disapprove the proposed director or senior executive officer.

(6) *Waiver of prior notice.* (i) A national bank may send a letter to the appropriate supervisory office requesting a waiver of the prior notice requirement. The OCC may waive the prior notice requirement but not the filing required under this section. The OCC may grant a waiver if it finds that delay could harm the national bank or the public interest, or that other extraordinary circumstances justify waiving the prior notice requirement. The length of any waiver depends on the circumstances in each case. If the OCC grants a waiver, the national bank shall file the required notice within the time period specified in the waiver, and the proposed individual may assume the position on an interim basis until the individual and the national bank receive a notice of disapproval or, if an appeal has been filed, until a notice of disapproval has been upheld on appeal as set forth in paragraph (f) of this section. If the required notice is not filed within the time period specified in the waiver, the proposed individual shall resign his or her position. Thereafter, the individual may assume the position on a permanent basis only after the national bank receives a notice of intent not to disapprove, after the review period elapses, or after a notice of disapproval has been overturned on appeal as set forth in paragraph (f) of this section. A waiver does not affect the OCC's authority to issue a notice of disapproval within 30 days of the expiration of such waiver.

(ii) In the case of the election at a meeting of the shareholders of a new director not proposed by management, a waiver is granted automatically and the elected individual may begin service as a director. However, under these circumstances, the national bank shall file the required notice with the appropriate supervisory office as soon as practical, but not later than seven days from the date the individual is notified of the election. The individual's continued service is subject to the conditions specified in paragraph (e)(6)(i) of this section.

(7) *Commencement of service.* An individual proposed as a member of the board of directors or as a senior executive officer may assume the office following the end of the review period, which begins on the technically complete notice date, unless:

(i) The OCC issues a notice of disapproval during the review period; or

(ii) The national bank does not provide additional information within the time period required by the OCC pursuant to paragraph (e)(3) of this section and the OCC deems the notice to be abandoned pursuant to § 5.13(c).

(8) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, 5.11, and 5.13 (a) through (f) do not apply to a notice for a change in directors and senior executive officers.

(f) *Appeal*—(1) If the national bank, the proposed individual, or both, disagree with a disapproval, they may seek review by appealing the disapproval to the Comptroller, or an authorized delegate, within 15 days of the receipt of the notice of disapproval. The national bank or the individual may appeal on the grounds that the reasons for disapproval are contrary to fact or insufficient to justify disapproval. The appellant shall submit all documents and written arguments that the appellant wishes to be considered in support of the appeal.

(2) The Comptroller, or an authorized delegate, may designate an appellate official who was not previously involved in the decision leading to the appeal at issue. The Comptroller, an authorized delegate, or the appellate official considers all information submitted with the original notice, the material before the OCC official who made the initial decision, and any information submitted by the appellant at the time of the appeal.

(3) The Comptroller, an authorized delegate, or the appellate official shall independently determine whether the reasons given for the disapproval are contrary to fact or insufficient to justify the disapproval. If either is determined to be the case, the Comptroller, an authorized delegate, or the appellate official may reverse the disapproval.

(4) Upon completion of the review, the Comptroller, an authorized delegate, or the appellate official shall notify the appellant in writing of the decision. If the original decision is reversed, the individual may assume the position in the bank for which he or she was proposed.

§ 5.52 Change of address.

(a) *Authority.* 12 U.S.C. 93a, 161, and 481.

(b) *Scope.* This section describes the obligation of a national bank to notify the OCC of any change in its address. However, no notice is required if the

change in address results from a transaction approved under this part.

(c) *Notice process.* Any national bank with a change in the address of its main office or in its post office box shall send a written notice to the appropriate district office.

(d) *Exceptions to rules of general applicability.* Sections 5.8, 5.9, 5.10, 5.11, and 5.13 do not apply to changes in a national bank's address.

Subpart E—Payment of Dividends

§ 5.60 Authority, scope, and exceptions to rules of general applicability.

(a) *Authority.* 12 U.S.C. 56, 60, and 93a.

(b) *Scope.* Except as otherwise provided, the restrictions in this subpart apply to the declaration and payment of all dividends by a national bank, including dividends paid in property. However, the provisions contained in § 5.64 do not apply to dividends paid in stock of the bank.

(c) *Exceptions to the rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to this subpart.

§ 5.61 Definitions.

For the purposes of subpart E, the following definitions apply:

(a) *Capital stock, capital surplus,* and *permanent capital* have the same meaning as set forth in § 5.46.

(b) *Retained net income* means the net income of a specified period less the total amount of all dividends declared in that period.

§ 5.62 Date of declaration of dividend.

A national bank shall use the date a dividend is declared for the purposes of determining compliance with this subpart.

§ 5.63 Capital limitation under 12 U.S.C. 56.

(a) *General limitation.* Except as provided by 12 U.S.C. 59 and § 5.46, a national bank may not withdraw, or permit to be withdrawn, either in the form of a dividend or otherwise, any portion of its permanent capital. Further, a national bank may not declare a dividend in excess of undivided profits.

(b) *Preferred stock.* The provisions of 12 U.S.C. 56 do not apply to dividends on preferred stock. However, if the undivided profits of the national bank are not sufficient to cover a proposed dividend on preferred stock, the proposed dividend constitutes a reduction in capital subject to 12 U.S.C. 59 and § 5.46.

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

(a) *Transfers to capital surplus.* Subject to the restrictions in 12 U.S.C. 56 and this subpart, the directors of a national bank may declare and pay dividends as frequently and of such amount of undivided profits as they judge prudent. However, a national bank may not declare a dividend unless capital surplus equals or exceeds the capital stock of the bank, except:

(1) In the case of an annual dividend, the bank may declare a dividend if the bank transfers 10 percent of its net income for the preceding four quarters to capital surplus; or

(2) In the case of a quarterly or semiannual dividend, or any other special dividend, the bank may declare a dividend if the bank transfers 10 percent of its net income for the preceding two quarters to capital surplus.

(b) *Earnings limitation.* For purposes of 12 U.S.C. 60, 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 calendar year exceeds the total of the national bank's retained net income of that year to date, combined with its retained net income of the preceding two years, unless the dividend is approved by the OCC. A national bank shall submit a request for OCC approval of a dividend under 12 U.S.C. 60 to the appropriate district office.

(c) *Surplus surplus.* Any amount in capital surplus in excess of capital stock required by 12 U.S.C. 60(a) (referred to as ''surplus surplus'') may be transferred to undivided profits and available as dividends, provided:

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

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

§ 5.65 Restrictions on undercapitalized institutions.

Notwithstanding any other provision in this subpart, a national bank may not declare or pay any dividend if, after making the dividend, the national bank would be ''undercapitalized'' as defined in 12 CFR part 6.

§ 5.66 Dividends payable in property other than cash.

In addition to cash dividends, directors of a national bank may declare dividends payable in property, with the approval of the OCC. Even though the property distributed has been previously charged down or written off entirely, the dividend is equivalent to a cash dividend in an amount equal to the actual current value of the property. Before the dividend is declared, the bank should show the excess of the actual value over book value on the books of the national bank as a recovery, and the dividend should then be declared in the amount of the full book value (equivalent to the actual current value) of the property being distributed.

§ 5.67 Fractional shares.

To avoid complicated recordkeeping in connection with fractional shares, a national bank issuing additional stock by stock dividend, upon consolidation or merger, or otherwise, may adopt arrangements such as the following to preclude the issuance of fractional shares. The bank may:

(a) Issue scripts or warrants for trading;

(b) Make reasonable arrangements to provide those to whom fractional shares would otherwise be issued an opportunity to realize at a fair price upon the fraction not being issued through its sale, or the purchase of the additional fraction required for a full share, if there is an established and active market in the national bank's stock;

(c) Remit the cash equivalent of the fraction not being issued to those to whom fractional shares would otherwise be issued. The cash equivalent is based on the market value of the stock, if there is an established and active market in the national bank's stock. In the absence of such a market, the cash equivalent is based on a reliable and disinterested determination as to the fair market value of the stock if such stock is available; or

(d) Sell full shares representing all the fractions at public auction, or to the highest bidder after having solicited and received sealed bids from at least three licensed stock brokers. The national bank shall distribute the proceeds of the sale *pro rata* to shareholders who otherwise would be entitled to the fractional shares.

Subpart F—Federal Branches and Agencies

§ 5.70 Federal branches and agencies.

(a) *Authority.* 12 U.S.C. 93a and 3101 *et seq.*

(b) *Scope.* This subpart describes the filing requirements for corporate activities and transactions involving Federal branches and agencies of foreign banks. Substantive rules and policies for

specific applications are contained in 12 CFR part 28.

(c) *Definitions.* For purposes of this subpart:

(1) *Change the status of an office* means conversion of a:

(i) State branch or state agency operated by a foreign bank, or a commercial lending company controlled by a foreign bank, into a Federal branch, limited Federal branch, or Federal agency;

(ii) Federal agency to a Federal branch or limited Federal branch;

(iii) Federal branch to a limited Federal branch or Federal agency; or

(iv) Limited Federal branch to a Federal branch or Federal agency.

(2) To *establish* a Federal branch or agency means to:

(i) Open and conduct business through a Federal branch or agency;

(ii) Acquire directly, through merger, consolidation, or similar transaction with another foreign bank, the operations of a Federal branch or agency that is open and conducting business;

(iii) Acquire a Federal branch or agency through the acquisition of a foreign bank subsidiary that will cease to operate in the same corporate form following the acquisition;

(iv) Change the status of an office; or

(v) Relocate a Federal branch or agency within a state or from one state to another.

(d) *Filing requirements*—(1) *General.* Unless otherwise provided in 12 CFR part 28, a Federal branch or agency shall comply with the applicable requirements of this part.

(2) *Applications.* A foreign bank shall submit an application and obtain prior approval from the OCC before it:

(i) Establishes a Federal branch, Federal agency, or limited Federal branch; or

(ii) Exercises fiduciary powers at a Federal branch. A foreign bank may submit an application to exercise fiduciary powers at the time of filing an application for a Federal branch license or at any subsequent date.

PART 7—INTERPRETIVE RULINGS

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

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

6. In § 7.1000, paragraph (a)(2)(i) is amended by removing ''owned or'' and adding ''owned and'' and paragraph (c)(1) is revised to read as follows:

§ 7.1000 National bank ownership of property.

* * * * *

(c) *Investment in bank premises*—(1) *Investment limitation; approval.* 12 U.S.C. 371d governs when OCC approval is required for national bank investment in bank premises. A bank may seek approval from the OCC in accordance with the procedures set forth in 12 CFR 5.37.

* * * * *

§§ 7.2023 and 7.2024 [Removed]

7. Part 7 is amended by removing §§ 7.2023 and 7.2024.

PART 16—SECURITIES OFFERING DISCLOSURE RULES

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

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

9. In § 16.20 paragraph (d) is revised to read as follows:

§ 16.20 Current and periodic reports.

* * * * *

(d) Paragraph (a) of this section does not apply if the bank files the registration statement in connection with a merger, consolidation, or acquisition of assets subject to 12 CFR 5.33(e)(8).

PART 28—INTERNATIONAL BANKING ACTIVITIES

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

Authority: 12 U.S.C. 1 *et seq.*, 93a, 161, 602, 1818, 3102, 3108, and 3901 *et seq.*

11. In § 28.2, paragraph (b) is revised to read as follows:

§ 28.2 Definitions.

* * * * *

(b) *Edge corporation* means a corporation that is organized under section 25A of the FRA, 12 U.S.C. 611 through 631.

* * * * *

12. Section 28.10 is revised to read as follows:

§ 28.10 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued pursuant to the authority in the International Banking Act of 1978 (IBA), 12 U.S.C. 3101 *et seq.*, and 12 U.S.C. 93a.

(b) *Purpose and scope.* This subpart implements the IBA pertaining to the licensing, supervision, and operations of Federal branches and agencies in the United States. For corporate procedures pertaining to Federal branches and agencies, refer to 12 CFR part 5.

13. In section 28.11, paragraphs (f) and (v) are revised to read as follows:

§ 28.11 Definitions.

* * * * *

(f) *Edge corporation* means a corporation that is organized under section 25A of the FRA, 12 U.S.C. 611 through 631.

* * * * *

(v) *Manual* means the Comptroller's Corporate Manual (*see* 12 CFR 5.2(c)).

* * * * *

Dated: November 20, 1996.

Eugene A. Ludwig,

Comptroller of the Currency.

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