

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Parts 4, 5, 7, 145, and 160**

[Docket ID OCC–2020–0003]

RIN 1557–AE74

**Activities and Operations of National Banks and Federal Savings Associations****AGENCY:** Office of the Comptroller of the Currency, Treasury.**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency is issuing a final rule to revise and reorganize its regulations relating to the activities and operations of national banks and Federal savings associations and to amend its rules relating Federal savings association corporate governance. This rule clarifies and codifies recent OCC interpretations, integrates certain regulations for national banks and Federal savings associations, and updates or eliminates outdated regulatory requirements that no longer reflect the modern financial system. Additionally, this rule includes related technical changes throughout these and other OCC regulations.

**DATES:** The rule is effective April 1, 2021.

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**SUPPLEMENTARY INFORMATION:****I. Background**

The Office of the Comptroller of the Currency (OCC) periodically reviews its regulations to eliminate outdated or otherwise unnecessary regulatory provisions and, where possible, to clarify or revise requirements imposed on national banks and Federal savings associations.<sup>1</sup> The elimination of unnecessary regulatory impediments together with efforts to revise regulations to reflect changes in the financial industry help to promote

<sup>1</sup> For example, the OCC recently issued a final rule relating to policies and procedures for corporate activities and transactions involving national banks and Federal savings associations, 12 CFR part 5, that updates and clarifies these policies and procedures and eliminate unnecessary requirements consistent with safety and soundness. See 85 FR 80404 (Dec. 11, 2020).

economic growth for consumers, businesses and communities.

These reviews are in addition to the OCC's decennial review of its regulations as required by the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA).<sup>2</sup> These reviews also consider, where appropriate, opportunities to integrate rules that apply to national banks with similar rules that apply to Federal savings associations in light of the transfer to the OCC of all functions of the former Office of Thrift Supervision (OTS) relating to Federal savings association by Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).<sup>3</sup>

As part of this process, the Office of the Comptroller of the Currency (OCC) published a notice of proposed rulemaking (proposal or proposed rule) on July 7, 2020 to revise and reorganize subparts A through D of 12 CFR part 7, Activities and Operations.<sup>4</sup> The OCC proposed to update part 7 to address developing issues and industry practices, to clarify OCC interpretive positions, and to integrate certain national bank rules by adding Federal savings associations. As examples, the proposed revisions to subpart A included new regulations covering tax equity finance transactions, derivatives activities, and payment system memberships. The proposed revisions to subpart B addressed corporate governance issues, such as expanding the ability of national banks to choose corporate governance provisions under State or other law, clarifying permissible anti-takeover provisions, and adding provisions relating to capital stock-related activities of national banks. The OCC also proposed to update and integrate rules relating to bank hours and closings in subpart C and to update rules relating to loan production and deposit production offices and remote service units in subpart D and to move these sections to subpart A to improve

<sup>2</sup> Public Law 104–208 (1996), codified at 12 U.S.C. 3311(b). Section 2222 of EGRPRA requires that, at least once every 10 years, the OCC along with the other Federal banking agencies and the Federal Financial Institutions Examination Council (FFIEC) conduct a review of their regulations to identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions. Specifically, EGRPRA requires the agencies to categorize and publish their regulations for comment, eliminate unnecessary regulations to the extent that such action is appropriate, and submit a report to Congress summarizing their review. The agencies completed their second EGRPRA review on March 2017 and published their report in the *Federal Register*. 82 FR 15900 (March 30, 2017).

<sup>3</sup> Public Law 111–203, 124 Stat. 1376 (2010) (transferring to the OCC all functions of the former OTS relating to Federal savings associations).

<sup>4</sup> 85 FR 40794 (July 7, 2020).

the organization of part 7.<sup>5</sup> As a companion to the proposed rule, the OCC also issued an Advance Notice of Proposed Rulemaking (ANPR) inviting ideas for revisions on the OCC's rules on electronic banking activities located at subpart E of 12 CFR part 7 and 12 CFR part 155.<sup>6</sup>

The OCC also proposed more general changes throughout part 7 including removing outdated or superfluous regulations; consolidating related regulations into one section; and making various technical changes throughout part 7. In addition, the OCC proposed to integrate a number of rules in part 7 to include Federal savings associations.

The OCC notes that pursuant to section 4(b) of the International Banking Act,<sup>7</sup> many of the provisions in part 7 apply to Federal branches and agencies. This act provides that, subject to certain exceptions, the operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location.<sup>8</sup> This final rule amends some of the provisions in part 7 to include Federal branches and agencies for ease of reference. However, the lack of inclusion of Federal branches and agencies in a particular provision does not necessarily indicate that the provisions is inapplicable to Federal branches and agencies.

The OCC received 16 comment letters on the proposal from banking organizations and other interested parties. These comments and the OCC's response are discussed in the next section of this **SUPPLEMENTARY INFORMATION**. As described in more detail below, the OCC is adopting the proposal as a final rule with accompanying modifications where noted. The final rule becomes effective on April 1, 2021.

<sup>5</sup> The OCC has separately issued a final rule that amends 12 CFR 7.4001. See 84 FR 33530 (June 2, 2020) (Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred). The OCC also issued an interim final rule that amends 12 CFR 7.1001 and 7.1003, which this rulemaking finalizes. See 85 FR 31943 (May 28, 2020) (Director, Shareholder, and Member Meetings). Further, the OCC has issued a final rule that adds a new § 7.1031, National Banks and Federal Savings Associations as Lenders. See 85 FR 68742 (October 30, 2020).

<sup>6</sup> See 85 FR 40827 (July 7, 2020) (National Bank and Federal Savings Association Digital Activities).

<sup>7</sup> 12 U.S.C. 3101 *et seq.* (Pub. L. 95–369).

<sup>8</sup> 12 U.S.C. 3102(b) (Pub. L. 95–369). See also 12 CFR 28.13.

## II. Description of the Proposed Rule

### Subpart A—National Banks and Federal Savings Association Powers

Activities That Are Part of, or Incidental to, the Business of Banking (New § 7.1000)

Section 7.5001 identifies the criteria the OCC uses to determine whether an electronic activity is authorized for national banks as part of, or incidental to, the business of banking under 12 U.S.C. 24(Seventh) or other statutory authority. While this section details those criteria in the context of electronic activities, the OCC uses these same criteria to determine whether any activity is part of, or incidental to, the business of banking. To confirm the broader applicability of the criteria listed in § 7.5001, the OCC proposed to remove the word “electronic” from this section and move § 7.5001 to subpart A of part 7 as new § 7.1000. As part of this move, the proposal redesignated current § 7.1000 as § 7.1024. These changes better organize OCC rules and clarify that the criteria of this new § 7.1000 apply to any potential national bank activity and not just those that are electronic in nature. Further, the OCC believes that new § 7.1000 belongs at the beginning of part 7 because it provides the framework for all national bank powers that follow in subpart A.

The OCC also proposed a technical change to redesignated § 7.1000(c)(1). The current rule provides a four factor test to determine whether an activity is part of the business of banking. However, this four-factor test is not necessary for activities that are specifically included in 12 U.S.C. 24(Seventh) or other statutory authority because they are by express statutory language within the business of banking. Therefore, the proposed rule added language to clarify that this four-factor test applies to activities not specifically included in 12 U.S.C. 24(Seventh) or other statutory authority. This clarification reflects the OCC’s long-standing use of the four-factor test to determine whether an activity not expressly included in a statute is within the business of banking.<sup>9</sup>

The OCC received one comment that supported new § 7.1000. Therefore, the OCC is adopting § 7.1000 as proposed.

The final rule also corrects a technical error in the proposed rule. Current § 7.5001(d)(3) contains an illustrative

list of electronic activities that are incidental to the business of banking.

The proposed rule inadvertently removed this list and the final rule restores it as § 7.5001, with conforming changes to the cross-reference to new § 7.1000. The OCC notes that it is reviewing this list in the broader context of potential changes to all of subpart E pursuant to the ANPR on National Bank and Federal Savings Association Digital Activities and may make further changes in the future.<sup>10</sup>

### National Bank and Federal Savings Association Acting as Finder (§ 7.1002)

The OCC proposed a technical change to its regulation at § 7.1002 relating to when a national bank acts as a finder and invited comment on the inclusion of Federal savings association finder activities in part 7. For the reasons discussed below, the OCC is adopting this technical change and also is amending § 7.1002 to include Federal savings association finder activities.

The OCC has long permitted a national bank to act as a finder to bring together buyers and sellers of financial and nonfinancial products and services.<sup>11</sup> The OCC’s regulations include two separate rules relating to permissible national bank finder activities. Section 7.1002, which codifies OCC interpretive letters, provides that finder activities are part of the business of banking.<sup>12</sup> This section also describes permissible finder activities; provides an illustrative, non-exclusive list of permissible finder activities; clarifies that a national bank’s finder authority does not allow it to engage in brokerage activities that have not been found to be permissible for national banks; and authorizes a national bank to advertise and accept fees for finder services unless otherwise prohibited by Federal law. Section 7.5002 provides that a national bank generally may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that is otherwise permissible. Section 7.5002(a)(1) clarifies that a national bank may act as an electronic finder and includes a list of permissible electronic finder activities.

The OCC proposed amending its regulations by adding a new § 7.1002(b)(8) that would cross-reference the permissible electronic finder activities listed in § 7.5002(a)(1). This change would reference all examples of

permissible finder activities for national banks in one rule.

The OCC received one comment letter on § 7.1002. The commenter recommended revising the list of examples to reflect how finder authority is exercised in the modern financial system. The commenter specifically suggested that the OCC consider consolidating the finder authority in §§ 7.1002 and 7.5002. The OCC disagrees with this recommendation. The cross-reference sufficiently clarifies that additional finder activities are listed in that section. Further, the OCC’s ANPR on National Bank and Federal Savings Association Digital Activities requested comment on the electronic finder activities list in 12 CFR 7.5002(a)(1).<sup>13</sup> Through that rulemaking process, the OCC will consider further revisions related to electronic finder activities. A cross-reference will capture these possible revisions without again having to revise § 7.1002. The OCC also may consider consolidating the finder authority in §§ 7.1002 and 7.5002 during the subpart E revision process.

The commenter further suggested that the final rule add to the list in § 7.1002(b) the making or receiving of a referral to or from a third party for a fee, and more generally suggested that the rule permit banks to accept reasonable finder fees. The OCC notes that § 7.1002 contemplates making referrals for a fee, and the list of examples in § 7.1002 includes “[a]rranging for third-party providers to offer reduced rates to those customers referred by the bank.”<sup>14</sup> The OCC also believes that continuing to limit fees to those permitted by Federal law is appropriate. Therefore, the final rule does not add a reasonableness requirement. However, the OCC notes that the reasonableness of fees received may raise other concerns and that § 7.4002(b) provides considerations for national banks in setting non-interest charges and fees.

The commenter’s recommendation to add receiving a referral for a fee also involves adding a bank receiving and paying for finder services from a third party. Longstanding OCC interpretations confirm that banks may pay for finder services, subject to fact-specific considerations.<sup>15</sup> However, § 7.1002 covers banks acting as finders, and the proposal did not address the authority

<sup>13</sup> See 85 FR 40827, at 40830.

<sup>14</sup> 12 CFR 7.1002(b)(3).

<sup>15</sup> See, e.g., OCC Interpretive Letter No. 504 (May 18, 1990) (describing how “finder’s fees [paid by a bank] must be high enough to be attractive to potential sources of referrals, yet not so high as to be financially detrimental to the Bank or create an appearance of profit sharing, which could lead to the inference of a joint venture or partnership”).

<sup>9</sup> The Supreme Court has held that the business of banking is not limited to the enumerated powers listed in 12 U.S.C. 24(Seventh) but encompasses more broadly activities that are part of or incidental to the business of banking. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258–60 (1995).

<sup>10</sup> See 85 FR 40827.

<sup>11</sup> See, e.g., OCC Interpretive Letter No. 607 (Aug. 24, 1992).

<sup>12</sup> See, e.g., OCC Interpretive Letter No. 824 (Feb. 27, 1998).

of banks to be finder clients. Accordingly, the OCC does not believe that the final rule should add provisions on banks receiving and paying for finder services.

The same commenter recommended the OCC confirm that payment or collection of finder fees as a share of revenue is permitted. Section 7.1002(d) permits finder fees that do not violate Federal law and does not expressly prohibit specific fee arrangements. The OCC has permitted collection and payment of finder fees as a share of revenue in certain contexts.<sup>16</sup> However, revenue sharing arrangements may raise supervisory and legal concerns, including whether they result in a joint venture and unlimited liability, which national banks do not have the power to assume.<sup>17</sup> Rather than codify the permissibility of any specific fee arrangement, the OCC believes that continuing to permit banks to accept fees except as otherwise prohibited by Federal law is appropriate. As described above, the final rule does not add provisions on banks paying finder services, whether those fees are based on revenue or not.

The commenter further recommended that the final rule codify prior OCC interpretations finding that the sharing of revenue or profit alone in a referral relationship would not constitute a joint venture under State law if the parties express an intent not to create a joint venture. The proposal did not address joint ventures, and we are not inclined to address it in this rulemaking.

The commenter also recommended that the OCC confirm that a bank is not required to disclose finder fees paid or collected. The proposal did not address fee disclosure, and the OCC is not inclined to adopt this recommendation. We also note that OCC precedent requires disclosure of finder fees in certain contexts and inadequate disclosure may raise supervisory and legal concerns.<sup>18</sup>

While finder activities are part of the business of banking for a national bank,

a Federal savings association may engage in finder activities only to the extent that the activities are incidental to Federal savings association powers authorized under the Home Owners' Loan Act (HOLA) (12 U.S.C. 1461 *et seq.*).<sup>19</sup> The former OTS determined that, if certain factors are met, a Federal savings association may collect fees for referring customers to third parties<sup>20</sup> and may provide services and products to customers indirectly through a third-party discount program<sup>21</sup> as activities incidental to their statutorily enumerated powers. The OCC also has recognized Federal savings association finder authority in its Retail Nondeposit Investment Products Booklet of the Comptroller's Handbook.<sup>22</sup>

As noted above, the OCC did not propose amendments to § 7.1002 related to Federal savings associations but invited comment on whether it should add a separate provision to § 7.1002 to set forth Federal savings association finder authority. In the preamble to the proposed rule, the OCC offered options to integrate Federal savings associations into § 7.1002. It described a provision for a Federal savings association to engage in finder activities to the extent that those activities are incidental to Federal savings association powers expressly authorized under the HOLA. The OCC also suggested a list of Federal savings association finder activities that the former OTS or the OCC have determined are permissible, such as collecting fees for referring customers to third parties and providing services and products indirectly to customers through a third-party discount program. The OCC specifically requested comment on what other Federal savings association finder activities the OCC could add to this list.

No commenters directly responded to the request for input on Federal savings association finder activities. However, one commenter recommended that the rule include new examples of how national banks and Federal savings associations have exercised finder authority. Because the current rule is limited to national banks, the OCC interprets this comment as a

recommendation to incorporate Federal savings associations in § 7.1002.

The OCC agrees that the authority of Federal savings associations to act as finders should be codified in the OCC's regulations. Therefore, the final rule clarifies that Federal savings associations may act as finders to the extent those activities are incidental to their expressly authorized powers under HOLA. In determining whether an activity is incidental, the OCC considers whether (1) the activity facilitates or is similar to the conduct of an activity that Congress expressly authorized, (2) the activity relates to Federal savings associations' intended role as financial intermediaries, (3) the activity is necessary to enable the Federal savings association to remain competitive and relevant in the modern economy, and (4) the activity is consistent with the purpose and function Congress envisioned for Federal savings associations.<sup>23</sup> Each factor need not support the permissibility of an activity, and the relative weights of each factor may vary.<sup>24</sup>

The source of finder authority for Federal savings associations is more limited and fact-specific than for national banks. The former OTS' approval of referral fees dealt with referrals to registered investment advisors and considered how those services related to a Federal savings association's expressly authorized powers.<sup>25</sup> Similarly, the former OTS' approval of the third-party discount program considered how the product offerings would facilitate expressly authorized activities of Federal savings associations.<sup>26</sup> The final rule includes both referrals and third-party discount programs as illustrative examples of the types of finder services that a Federal savings association may provide. However, certain referral and discount programs may not be within the incidental powers of Federal savings associations. Therefore, the final rule clarifies that the examples are permissible if they are incidental to a Federal savings association's express powers. It also states that the OCC may

<sup>16</sup> See, e.g., *id.*; OCC Interpretive Letter No. 824.

<sup>17</sup> See, e.g., OCC Interpretive Letter No. 504 ("National banks are not permitted to be members of general partnerships or, by extension, joint ventures."); *Merchants' Nat. Bank of Cincinnati v. Wehrmann*, 202 U.S. 295, 301 (1906) (describing the assumption of unlimited personal liability as "precisely what a national bank has no authority to do"); OCC Interpretive Letter No. 1022 (Feb. 15, 2005).

<sup>18</sup> See, e.g., OCC Interpretive Letter No. 850 (Jan. 27, 1999) (citing OCC precedent on disclosure of finder fees in connection with the marketing of trust services); OCC Corporate Decision No. 2002-11 (June 28, 2002) (describing potential conflicts of interest from receiving finder fees and the OCC's expectation that the bank's "interest in promoting specific" products and services be disclosed).

<sup>19</sup> The OCC and the predecessor agencies previously responsible for the supervision of Federal savings associations "have long recognized that federal savings associations possess 'incidental' powers, i.e., powers that are incident to the express powers of federal savings associations as set forth in the Home Owners' Loan Act." OTS Op. Acting Ch. Couns. at 3 (Mar. 25, 1994).

<sup>20</sup> OTS Op. Ch. Couns. (May 5, 2000).

<sup>21</sup> OTS Op. Ch. Couns. (Aug. 5, 2008).

<sup>22</sup> OCC, Comptroller's Handbook: Retail Nondeposit Investment Products Booklet at 9 (Jan. 2015).

<sup>23</sup> See OTS Op. Ch. Couns. (May 5, 2000). All precedents (orders, resolutions, determinations, agreements, regulations, interpretive rules, interpretations, guidelines, procedures, and other advisory materials) made, prescribed, or allowed to become effective by the former OTS or its Director that apply to Federal savings associations remain effective until the OCC modifies, terminates, sets aside, or supersedes those precedents. 12 U.S.C. 5414(b).

<sup>24</sup> See OTS Op. Ch. Couns. (May 5, 2000).

<sup>25</sup> See *id.*

<sup>26</sup> OTS Op. Ch. Couns. (Aug. 5, 2008).

determine that other activities are permissible.

Consistent with the current rule's treatment of national banks, the final rule permits Federal savings associations to advertise the availability of and accept a fee for finder services, unless otherwise prohibited by Federal law, and does not enable a Federal savings association to engage in brokerage activities that have not been found to be permissible for Federal savings associations.

As a result of adding Federal savings associations to § 7.1002, the final rule revises paragraph (a) to include the general description of finder activity currently included in paragraph (b) and the statement of authority for both national bank and Federal savings association finder activity. Paragraph (b)(1) includes the nonexclusive list of permissible finder activities for national banks. Paragraph (b)(2) includes the nonexclusive list of permissible finder activities for Federal savings associations. Paragraphs (c) and (d) remain unchanged except for the addition of Federal savings associations.

#### Money Lent by a National Bank at Banking Offices or at Facilities Other Than Banking Offices (§ 7.1003)

Twelve U.S.C. 81 provides that a national bank must transact business in the place specified in its organization certificate and in any branches established or maintained in accordance with 12 U.S.C. 36. The OCC interprets 12 U.S.C. 81 to mean that money is deemed to be lent at a bank's main office unless there is a sufficient nexus tying the transaction to another location, in which case that location must be licensed as a branch office.

Twelve U.S.C. 36 and 12 CFR 5.30 define "branch" as a place of business established by the national bank where "deposits are received, or checks paid, or money lent." Section 7.1003 provides that for purposes of what constitutes a branch within the meaning of 12 U.S.C. 36 and 12 CFR 5.30, "money" is deemed to be "lent" only at the place, if any, where the borrower in-person receives loan proceeds directly from bank funds either (1) from the lending bank or its operating subsidiary or (2) at a facility that is established by the lending bank or its operating subsidiary. Section 7.1003(b) further provides that a borrower may receive loan proceeds directly from bank funds in person at a place that is not the bank's main office and is not licensed as a branch without violating 12 U.S.C. 36, 12 U.S.C. 81, and 12 CFR 5.30, provided that a third party is used to deliver the funds and the place is not established by the lending

bank or its operating subsidiary. This paragraph defines a third party to include a person who satisfies the requirements of § 7.1012(c)(2) or one who customarily delivers loan proceeds directly from bank funds under accepted industry practice, such as an attorney or escrow agent at a real estate closing.

The OCC proposed amending § 7.1003 to incorporate an OCC interpretation that further clarifies when the OCC considers money to be lent at a location other than the main office. Specifically, proposed paragraph (c) provided that a national bank operating subsidiary may distribute loan proceeds from its own funds or bank funds directly to the borrower in person at offices the operating subsidiary established without violating 12 U.S.C. 36, 12 U.S.C. 81, and 12 CFR 5.30 if the operating subsidiary provides similar services on substantially similar terms and conditions to customers of unaffiliated entities, including unaffiliated banks.<sup>27</sup> Based on Supreme Court precedent,<sup>28</sup> OCC interpretations have recognized that a facility must provide a convenience to bank customers that gives the bank a competitive advantage in obtaining customers for the facility to be considered a branch for purposes of 12 U.S.C. 36 and 12 CFR 5.30.<sup>29</sup> The OCC has found that a facility where members of the public, customers, and noncustomers alike receive substantially similar services on substantially similar terms is not a facility created to attract bank customers and thus the establishment of this type of facility offers no competitive advantage to the national bank.<sup>30</sup> Proposed paragraph (c) reflects this OCC precedent.

The OCC received two comments on this proposed change. One commenter stated that if the distribution of loan proceeds by national bank operating subsidiaries does not constitute lending money then, consistent with OCC precedent, the rule should also require that the operating subsidiary actively solicit and service noncustomers and that providing services to noncustomers comprise the predominate share of the

subsidiary's business. Otherwise, the commenter stated, the proposed rule will result in competitive inequality and thus be detrimental to the dual banking system. The OCC disagrees with this commenter and does not believe it needs to alter proposed paragraph (c) to be consistent with OCC precedent. The provision in the proposed regulation that the operating subsidiary "provides similar services on substantially similar terms and conditions to customers of unaffiliated entities including unaffiliated banks" should be understood to include the requirement that the bank act substantially similarly in soliciting business from customers and noncustomers. Therefore, the proposed change adequately reflects OCC precedent.

The second commenter supported the proposed changes but suggested that § 7.1003 be broadened to apply equally to facilities of either the national bank or its operating subsidiary. The OCC believes that even if a facility of the national bank itself attempted to provide services to both customers and noncustomers on substantially similar terms and conditions, the public would still perceive it as favoring bank customers and would associate it with the bank, thus giving it a competitive advantage in attracting bank customers. Thus, the OCC declines to extend this provision to include national bank facilities.

For the reasons discussed above, the OCC is adopting § 7.1003 as proposed, with a clarifying change to the section heading, clarifying changes throughout to reference "national banks" instead of "banks," and the removal of an unnecessary comma in paragraph (c).

#### Establishment of a Loan Production Office by a National Bank (§ 7.1004)

#### Credit Decisions at Other Than Banking Offices of a National Bank (§ 7.1005)

Section 7.1004 provides that a national bank may use the services of persons not employed by the bank for originating loans. It also provides that an employee or agent of a national bank or its subsidiary may originate a loan at a site other than the main office or a branch office of the bank without violating the branching and place of business requirements of 12 U.S.C. 36 and 12 U.S.C. 81 if the loan is approved and made at the main office or a branch office of the bank or at an office of an operating subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank. Section 7.1005 provides that a national bank and its operating subsidiary may make a credit decision regarding a loan

<sup>27</sup> See Interpretive Letter No. 814 (Nov. 3, 1997).

<sup>28</sup> In *First National Bank in Plant City v. Dickinson*, the Supreme Court explained that because the purpose of 12 U.S.C. 36 is to maintain competitive equality, it is relevant in construing the term "branch" to consider whether the facility gives the bank an advantage in its competition for customers. *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 136-137 (1969).

<sup>29</sup> See OCC Interpretive Letter No. 635 (July 23, 1993). See also 61 FR 60342, at 60347 (Nov. 27, 1996).

<sup>30</sup> See OCC Interpretive Letter No. 814 (Nov. 3, 1997).

application at a site other than the main office or a branch office of the bank provided that “money” is not “lent” at those other sites within the meaning of § 7.1003.

Section 7.1004 is not intended to prescribe where a bank must perform certain activities but rather to help avoid violations of the branching laws by defining a “safe harbor” for loan origination activities that will not constitute branching.<sup>31</sup> Section 7.1005, in turn, which addresses credit decisions made at a site other than offices of the bank, is based on OCC precedent finding that it is permissible for loans originated at an LPO to be approved at separate back office facilities not located on the premises of, or contiguous to, a main or branch office of the bank.<sup>32</sup> When the OCC adopted § 7.1005, it noted that it was retaining § 7.1004 despite the potential tension between the two sections because § 7.1004 is a judicially recognized safe harbor and that it did not view a lending related activity that falls outside the scope of § 7.1004, as with § 7.1005, as necessarily violating branching statutes.<sup>33</sup>

The OCC proposed amending § 7.1004 to describe the permitted activities as “loan production activities,” and to remove § 7.1005 to simplify and streamline its rules. As proposed, paragraph (a) of § 7.1004 provided that a national bank or its operating subsidiary may engage in loan production activities at a site other than the main office or a branch office of the bank. Proposed paragraph (a) permitted a national bank or its operating subsidiary to solicit loan customers, market loan products, assist persons in completing application forms and related documents to obtain a loan, originate and approve loans, make credit decisions regarding a loan application, and offer other lending-related services such as loan information and applications at a loan production office without violating 12 U.S.C. 36 and 12 U.S.C. 81, provided that “money” is not deemed to be “lent” at that site within the meaning of § 7.1003 and the site does not accept deposits or pay withdrawals. This description of activities is not intended to alter the description of “money lent” in § 7.1003 nor affect the scope of activities that are permissible for a national bank to perform at a non-branch location. Rather, the OCC proposed this description to clarify the activities a national bank may conduct

at a loan production office. The OCC proposed to redesignate former paragraph (a) as paragraph (b) and amend it to reference loan production activities instead of originating loans.

One commenter opposed combining §§ 7.1004 and 7.1005, stating this would allow national bank LPOs to conduct both loan origination and loan approval at an office accessible to the public without causing that LPO to be a branch because under the rule it would not be engaged in lending money. This commenter contends that OCC interpretive rulings and regulations have consistently maintained that money is lent at an office that conducts both loan origination and loan approval because the combination or aggregation of these activities constitutes the substantial equivalent of lending money for purposes of the definition of branch (“aggregation theory”). The commenter therefore claims that although the OCC stated that proposed § 7.1004 was not intended to “affect the scope of activities that are permissible for a national bank to perform at a non-branch location,” this revision does expand the scope of permissible LPO activities and thereby narrows the scope of activities subject to branching restrictions.

The OCC disagrees with this commenter. The proposed revisions to §§ 7.1004 and 7.1005 are consistent with the OCC’s precedent and practice for the last two decades.

The OCC abandoned in the 1990s the aggregation theory relied upon by the commenter.<sup>34</sup> Current § 7.1004 is a safe harbor based on specific judicial precedent.<sup>35</sup> The proposed revisions remove the § 7.1004 safe harbor because it is redundant with the broader permissibility standard in § 7.1005.

Because proposed § 7.1004 is consistent with the OCC precedent discussed, no changes are needed in response to this comment.

This commenter also stated that the proposed “non-branch” rules conflict with the limits on National Bank Act preemption prescribed by Congress that provide that National Bank Act preemption does not apply to agents, affiliates or subsidiaries of national banks. The OCC disagrees with this comment. The Dodd-Frank Act’s limits on preemption for agents, affiliates, or subsidiaries of national banks are not implicated by this rulemaking. The

proposal incorporated OCC interpretations of what constitutes a branch and a non-branch office and does not raise new preemption issues.

Lastly, this commenter stated that the proposed rule enables banks to avoid Community Reinvestment Act (CRA) obligations associated with licensed branches by expanding what can occur at non-branch national bank offices. However, the new CRA regulation provides that “[a] bank must delineate an assessment area encompassing each location where the bank maintains a main office, a branch, or a non-branch deposit-taking facility that is not an ATM . . . .”<sup>36</sup> Thus, national banks cannot use non-branch locations to avoid complying with the CRA.

For the reasons discussed above, the OCC adopts § 7.1004 as proposed.

Loan Agreement Providing for a National Bank Share in Profits, Income, or Earnings or for Stock Warrants (§ 7.1006)

Section 7.1006 permits a national bank to take as consideration for a loan: (1) A share in the profit, income, or earnings from a business enterprise of a borrower or (2) a stock warrant issued by the business enterprise of a borrower provided the bank does not exercise the warrant. This arrangement is known as an “equity kicker.” Section 7.1006 further provides that the national bank may take the share or stock warrant in addition to, or in lieu of, interest. However, the national bank may not condition the borrower’s ability to repay principal on the value of the profit, income, earnings of the business enterprise or upon the value of the warrant received.

The former OTS and its predecessor, the Federal Home Loan Bank Board, permitted a Federal savings association to take a share of profit, income, or earnings as consideration for a loan. OTS found this to be not inconsistent with Federal savings association lending authority under HOLA<sup>37</sup> to maintain parity with the commercial lending practices of national banks.<sup>38</sup> In addition, the former OTS permitted a Federal savings association to acquire warrants as an incidental power of its authority to make secured loans for commercial, corporate, or business purposes under HOLA and applied the

<sup>34</sup> OCC Interpretive Letter No. 667 (Oct. 12, 1994); OCC Interpretive Letter No. 902 (Nov. 16 2000); 61 FR 4849, at 4851 (Feb. 9, 1996); 60 FR 11924, at 11926 (March 3, 1995).

<sup>35</sup> See *Indep. Bankers Ass’n of America v. Heilmann*, 627 F.2d 486, 487 (D.C. Cir. 1980), as discussed in 61 FR 4849, at 4851 (Feb. 9, 1996).

<sup>36</sup> 12 CFR 25.09; 85 FR 34734, at 34798 (June 5, 2020).

<sup>37</sup> 12 U.S.C. 1464(c)(2).

<sup>38</sup> Unpublished letter from Jordan Luke, Gen. Couns., Federal Home Loan Bank Board (Dec. 19, 1988), available on Westlaw: OTS, 1988 WL 1022319.

<sup>31</sup> OCC Interpretive Letter No. 634 (July 23, 1993).

<sup>32</sup> OCC Interpretive Letter No. 667 (Oct. 12, 1994).

<sup>33</sup> 61 FR 4849, at 4851 (Feb. 9, 1996).

same restrictions on exercising those warrants as applied to national banks.<sup>39</sup>

The OCC proposed to amend § 7.1006 to include Federal savings associations and to codify these interpretations to clarify this authority and to better provide parity with national banks. The OCC received no comments on the proposed change and adopts it in the final rule as proposed.

#### National Bank Holding Collateral Stock as Nominee (§ 7.1009)

Section 7.1009 states that a national bank may transfer stock it has received as collateral for a loan into the bank's name as nominee.<sup>40</sup> The OCC proposed to delete this provision as unnecessary.

The OCC permits a bank to perfect its security interests in collateral under applicable State laws consistent with the Uniform Commercial Code.<sup>41</sup> In situations where a bank holds stock as collateral, one method to perfect that interest under State law is to list the bank as nominee on the stock certificate. However, recent versions of the Uniform Commercial Code<sup>42</sup> provide other potentially less burdensome methods to perfect an interest in securities collateral, for example, by obtaining control over a brokerage account holding the stock. Therefore, the OCC believes that § 7.1009 is not necessary. Removing this provision streamlines the rule while not substantively changing the methods national banks may use to perfect their interests in stock or other securities obtained as collateral for loans, which continue to include being listed as nominee if permitted under State law.

The OCC received one comment on this provision. The commenter argued that removing the provision may cause national banks to believe the OCC is now requiring the use of the least burdensome method for perfecting stock collateral and it is now impermissible to hold collateral stock as nominee. The commenter requested that the OCC retain the provision in the rule.

The OCC disagrees with the commenter's suggestion. Nothing in the former provision or in removing the provision requires a national bank to use the least burdensome method for perfecting its interest in stock collateral or prohibits other methods of perfection. As explained above, the OCC permits a bank to use any legally acceptable method to perfect its security interests

in stock collateral under applicable State laws,<sup>43</sup> including by being listed as nominee. In contrast, specifically identifying only a single method to perfect an interest in stock collateral as in § 7.1009 could lead a bank to believe that being listed as nominee is the only acceptable method for perfection. Therefore, the OCC is removing § 7.1009 as proposed.

#### Postal Services by National Banks and Federal Savings Associations (§ 7.1010)

Section 7.1010 provides that a national bank may operate and receive income from a postal substation on banking premises. It describes permissible services and states that a national bank may advertise to attract customers to the bank. It also requires the bank to operate the substation in accordance with the rules and regulations of the United States Postal Service (USPS) and to keep books and records on the substation, which are subject to inspection by the USPS, separate from those of other banking operations.

The OCC proposed to amend § 7.1010 to also apply to Federal savings associations. This would be consistent with the position taken in agency guidance.<sup>44</sup> The OCC also proposed to replace the phrase "operate a postal substation" with "provide postal services" because the term "postal substation" is no longer used in USPS regulations. This change in terminology clarifies that national banks and Federal savings associations may offer a limited menu of postal services and are not required to operate full-service post offices.

The OCC received no comments on these proposed amendments and adopts § 7.1010 as proposed.

#### National Bank and Federal Savings Association Investments in Small Business Investment Companies (§ 7.1015)

Fifteen U.S.C. 682(b)(1) permits a national bank to invest in one or more small business investment companies (SBICs) or in any entity established solely to invest in SBICs, provided that the total amount of all SBIC investments does not exceed five percent of the bank's capital and surplus.<sup>45</sup> Section 7.1015 provides that a national bank

may purchase stock of a SBIC and receive benefits of the stock ownership. This section further provides that the receipt and retention of a dividend from a SBIC in the form of stock of a corporate borrower of the SBIC is not a purchase of stock within the meaning of 12 U.S.C. 24(Seventh).

The OCC proposed to amend § 7.1015 to provide that a national bank may invest in a SBIC or in any entity established solely to invest in SBICs, and that purchasing stock in a SBIC is one example of this type of investment. This amendment more closely aligns § 7.1015 to 15 U.S.C. 682(b). In addition, the OCC proposed to amend § 7.1015 to provide that a national bank's SBIC investments are subject to appropriate capital limitations.

Fifteen U.S.C. 682(b)(2) provides a Federal savings association with similar authority to invest in SBICs.<sup>46</sup> This authority is codified in OCC regulations at 12 CFR 160.30. To clarify this authority, the OCC proposed to add a reference to Federal savings association SBIC authority in § 7.1015 and cross-reference to 12 CFR 160.30.

The OCC also proposed to amend § 7.1015 to clarify that a national bank or Federal savings association may invest in a SBIC that is either (1) already organized and has obtained a license from the Small Business Administration or (2) in the process of being organized. The OCC has previously interpreted this authority to permit a national bank to invest in a SBIC that is in the process of being organized.<sup>47</sup>

The OCC did not receive any comments on the proposed amendments to this section. Therefore, the OCC adopts these changes as proposed.

However, the OCC received one comment requesting that the OCC clarify that a national bank may retain an investment in a SBIC that has surrendered its license to operate as a SBIC during its wind-down period so long as it does not make new investments (other than investments in cash equivalents). The commenter further noted that this change would align with the Volcker Rule implementing regulations, which exclude SBICs from the definition of "covered fund," and which were recently revised to make clear that this exclusion would continue to apply where a SBIC issuer has voluntarily

<sup>39</sup> See OCC, Comptroller's Handbook: Asset-Based Lending at 21–22 (2017).

<sup>40</sup> The former OTS previously concluded that Federal savings associations are authorized to operate a postal substation on premises. See OTS Op. Acting Ch. Couns. (Mar. 25, 1994).

<sup>41</sup> National banks also may invest in SBICs pursuant to their community development investment authority. See 12 U.S.C. 24(Eleventh); 12 CFR part 24.

<sup>42</sup> As with national banks, Federal savings associations also may invest in SBICs pursuant to their community development investment authority. See 12 U.S.C. 1464(c)(4)(B) and 12 CFR 5.59 (Service corporations of Federal savings associations).

<sup>43</sup> See OCC Interpretive Letter No. 832 (June 18, 1998).

<sup>39</sup> *Id.*

<sup>40</sup> See 12 U.S.C. 24(Seventh).

<sup>41</sup> See OCC, Comptroller's Handbook: Asset-Based Lending at 21–22 (2017).

<sup>42</sup> Primarily Articles 8 and 9, which have been substantively adopted by all U.S. jurisdictions. See <https://www.uniformlaws.org/acts/ucc>.

surrendered its license to operate as a SBIC in accordance with 13 CFR 107.1900 and does not make new investments (other than investments in cash equivalents) after such voluntary surrender. Further, the commenter suggested that introducing similar clarity into part 7 would provide certainty to banks wanting to invest in SBICs and would increase investment in small businesses.

The OCC agrees with the commenter that it would be helpful to clarify that a bank may retain an interest in a SBIC during its wind-down period. This change would align with the Volcker Rule implementing regulations, and it would provide certainty to banks planning to invest in SBICs. Therefore, the OCC is revising its final rule to clarify that a national bank may retain an investment in a SBIC that has surrendered its license to operate as a SBIC during its wind-down period so long as it does not make new investments in a SBIC that is winding down (other than investments in cash equivalents).

#### Independent Undertakings Issued by a National Bank or Federal Savings Association To Pay Against Documents (§ 7.1016)

Pursuant to 12 CFR 7.1016, a national bank may issue letters of credit and other independent undertakings within the scope of the applicable laws or rules of practice. Section 7.1016(b) provides that a national bank entering into an independent undertaking should not expose itself to undue risk and also outlines certain safety and soundness considerations for these activities. Section 7.1016 also describes specific required or recommended protections for certain undertakings, provides that a national bank should possess operational expertise that is commensurate with the sophistication of its independent undertaking activities, and requires a bank to accurately reflect its undertakings in its records.

Pursuant to § 160.50, a Federal savings association may issue letters of credit and may issue other independent undertakings as are approved by the OCC, subject to the restrictions in § 160.120. Section 160.120 contains provisions that are largely similar to the provisions applicable to national banks in § 7.1016.<sup>48</sup> However, §§ 160.50 and 160.120 provide that, unless it is a letter of credit, a Federal savings association only may issue independent undertakings that have been approved by the OCC. The OTS explained when

it updated its regulation that Federal savings associations were not traditionally involved in international banking transactions, which utilized these independent undertakings, as were national banks.<sup>49</sup> The OTS stated that the approval requirement provided “the appropriate balance between giving thrifts greater flexibility to potentially engage in new types of transactions while at the same time ensuring that thrifts have properly evaluated the risks posed by a particular transaction consistent with prudent banking practice.”<sup>50</sup>

The OCC proposed to apply § 7.1016 to Federal savings associations and to remove §§ 160.50 and 160.120 because of the similarities between the national bank and Federal savings association independent undertaking regulations. The OCC also proposed technical changes to the footnote to § 7.1016 to reflect updates to the laws and rules of practice cited. The OCC did not receive any comments on these amendments and adopts them as proposed.

The OCC also proposed to clarify that Federal branches and agencies of foreign banks may issue letters of credit and other independent undertakings, consistent with the conditions outlined in § 7.1016.<sup>51</sup> Two commenters requested clarification as to whether the proposed reference to Federal branches and agencies in § 7.1016 implies that other sections in part 7 are not intended to apply to Federal branches and agencies. One commenter recommended that the final rule clarify that nothing in proposed § 7.1016 is meant to imply that other sections of part 7 do not apply equally to Federal branches and agencies as to national banks and Federal savings associations, consistent with the International Banking Act. After considering these comments, the OCC has decided to remove the language regarding Federal branches and agencies. Although the OCC did not intend the clarification that Federal branches and agencies of foreign banks may issue letters of credit and other independent undertakings, consistent with the conditions outlined in § 7.1016, to affect the applicability of the International Banking Act and 12 CFR 28.13 to other sections of part 7, it

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Section 4(b) of the International Banking Act, 12 U.S.C. 3102(b) (Pub. L. 95–369) provides that the operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location. *See also* 12 CFR 28.13.

understands that the inclusion of this language in § 7.1016 regarding Federal branches and agencies and not in other sections in part 7 may introduce confusion. Instead, the OCC expects to add this language to § 7.1016 and other provisions of part 7, as appropriate, in a future rulemaking.<sup>52</sup>

One commenter recommended that the OCC reinforce that the risk management considerations outlined for letters of credit and independent undertakings in § 7.1016 are not mandatory safety and soundness conditions by removing them from the text of the rule. The OCC disagrees. Section 7.1016(b) provides safety and soundness considerations for banks that issue independent undertakings. Section 7.1016(b)(1) states that, as a matter of safety and soundness, banks that issue independent undertakings should not be exposed to undue risk and should, at a minimum, consider the following before issuing independent undertakings: (1) Whether the terms make clear the independence of the undertaking; (2) whether the amount of the undertaking is limited; (3) whether the undertaking is limited in duration or, if not, whether the bank has an ability to end the undertaking or demand cash collateral from the applicant; and (4) whether the undertaking will be collateralized or include a reimbursement right. Section 7.1016(b) provides additional considerations in special circumstances to protect against credit, operational, and market risk. Section 7.1016(b)(3) states that the national bank or Federal savings association should possess operational expertise that is commensurate with the sophistication of its independent undertaking activities. By using the word “should,” these provisions clearly indicate that the listed safety and soundness considerations are not mandatory. Furthermore, the OCC finds that it is helpful to include these recommended considerations in the rule text so that national banks and Federal savings associations understand what the OCC may consider to be undue risk.

#### Financial Literacy Programs Not Branches of National Banks (§ 7.1021)

Twelve CFR 7.1021 provides that a national bank may participate in a financial literacy program on the

<sup>52</sup> As indicated below, the final rule adds Federal branches and agencies to § 7.3000, National bank and Federal savings association hours. Because of the difference in corporate structure of these entities as compared to national branches and Federal savings associations, it is necessary to have separate language for Federal branches and agencies in this provision.

<sup>48</sup> *See* 61 FR 50951, at 50958 (Sept. 30, 1996).

premises of, or at a facility used by, a school. Section 7.1021 also provides that the school premises or facility will not be considered a branch of the bank if: (1) The bank does not establish and operate the school premises or facility on which the financial literacy program is conducted; and (2) the principal purpose of the program is educational.

Facilities or premises are only considered to be branches of a national bank if they are established and operated by the national bank. The proposal provided that the OCC would consider establishment and operation in this context on a case by case basis, considering the facts and circumstances. However, the proposal stated that the premises or facility would not be a branch of the national bank if the bank met the safe harbor test in 12 CFR 7.1012(c)(2) applicable to messenger services established by third parties. The proposal also stated that the factor discussed in § 7.1012(c)(2)(i) could be met if bank employee participation in the financial literacy program consisted of managing the program or conducting or engaging in financial education activities provided the school or other organization retained control over the program and over the premises or facilities at which the program is held.

Further, the OCC proposed expanding the scope of financial literacy programs beyond schools to encompass other community-based organizations, such as non-profit organizations, that provide financial literacy programs. Finally, the proposal moved the definition of financial literacy program to the beginning of the section to clarify that, while a financial literacy program is a program for which the primary purpose is educational, this is not a factor in determining whether the premises or facility is a branch for purposes of section 36.

One commenter provided recommendations for simplifying the requirements for operating financial literacy programs. This commenter suggested incorporating the relevant standards for operating a financial literacy program within the messenger service safe harbor directly into the rule, without cross-referencing the messenger service rule. This commenter also suggested that § 7.1021 directly state, as a stand-alone provision, that a bank employee may manage the financial literacy program or engage in other financial education activities, provided the organization retains control over the program and premises at which the program is held. Along the same lines, this commenter recommended expressly permitting a bank employee to accept checks at a financial literacy program

event, subject to certain safeguards to prevent operation of the program as a branch—such as having a school official accept the checks and deposit them in a portable lockbox which the branch employee could then be responsible for bringing to the branch. Further, this commenter recommended removing language from the proposal indicating that the OCC would consider the facts and circumstances on a case-by-case basis in determining whether other financial literacy programs outside of the safe harbor constitute a branch. Additionally, this commenter suggested not referring to the messenger service safe harbor as a “test” in order to avoid the implication of additional compliance and audit requirements for the operation of financial literacy programs.

The OCC disagrees with this commenter’s recommendations for the reasons set forth below and thus adopts § 7.1021 as proposed. First, the OCC believes that cross referencing the messenger service regulation at § 7.1012 is the best approach for § 7.1021 because the safe harbor for a messenger service may evolve through regulatory changes, statutory changes, new judicial decisions, or new OCC interpretations. By using a cross reference, the OCC automatically incorporates into the financial literacy regulation all evolutions of the messenger service precedent.

Second, the OCC disagrees with the commenter’s suggestion that a bank employee may manage the financial literacy program or engage in other financial education activities without the facility being considered a branch so long as the school or organization retains control over the program and over the premises or facilities at which the program is held. Whether a third party other than a national bank owns or rents the facility involved is only one factor in the safe harbor described in § 7.1012(c)(2) for a messenger service to be clearly “established” by a third-party. The OCC does not believe it is appropriate to disregard all the other factors necessary to qualify for the safe harbor when considering school literacy programs as analysis of other factors in § 7.1012 may be determinative under some circumstances. However, it will continue to evaluate programs that do not fulfill all the factors of the safe harbor on an individual basis.

Third, the OCC disagrees with the commenter’s recommendation of setting forth a provision that expressly permits a bank employee to accept checks at a financial literacy program event, subject to certain safeguards to prevent operation of the program as a branch. A

person transporting items related to branching functions to the bank would be a messenger service, and messenger services are considered branches unless they are established by a third-party.<sup>53</sup> If the service is being performed by a bank employee as part of his duties, it is not established by a third party.

Fourth, the OCC is retaining the language regarding the agency’s commitment on a case-by-case basis to evaluate situations outside of the safe harbor. This language is meant to clarify that premises and facilities in such situations will not automatically be found to be branches. This language is not meant to impose an obligation on banks to always submit a request to the OCC for a determination before implementing a financial literacy program outside of the scope of the safe harbor. Banks may forgo asking for an OCC interpretation if they are comfortable with how their program would fit into the OCC’s expectations and precedent.

Finally, the OCC clarifies that, by use of the term “test,” it does not mean to impose any extra audit or other compliance requirements on these programs or to suggest that these programs must be subjected to measurement, ratings, or other performance measures. The OCC has routinely referred to safe harbors as “tests” in interpretive letters, guidance, and regulations without the implication of additional obligations.

For the reasons explained above, the OCC is adopting § 7.1021 as proposed.

National Banks’ Authority To Buy and Sell Exchange, Coin, and Bullion (§ 7.1022) Federal Savings Associations, Prohibition on Industrial or Commercial Metal Dealing or Investing (§ 7.1023)

The OCC proposed a technical change to §§ 7.1022 and 7.1023. Section 7.1022 prohibits a national bank from acquiring or selling industrial or commercial metal for purposes of dealing or investing. Section 7.1022 excludes industrial and commercial metals from the national bank authority to “buy and sell exchange, coin, and bullion.” Section 7.1023 similarly prohibits a Federal savings association from dealing or investing in industrial or commercial metal. Both sections require a national bank and a Federal savings association to dispose of any industrial or commercial metal held as a result of dealing or investing in that metal as soon as practicable, but not later than one year from the effective date of the

<sup>53</sup> See *First Nat’l Bank of Plant City v. Dickinson*, 396 U.S. 122 (1969); *Brown v. Clarke*, 878 F.2d 627 (2d Cir. 1989).



regulation. The OCC may grant up to four separate one-year extensions if the bank makes a good faith effort to dispose of the metal and the retention of the metal for an additional year is not inconsistent with the safe and sound operation of the bank. The OCC proposed to replace the phrase “one year from the effective date of this regulation” with the actual effective date of that final rule, April 1, 2018 in each section. The OCC received no comments on this technical change and adopts it as proposed.

#### Tax Equity Finance Transactions by National Banks and Federal Savings Associations (New § 7.1025)

The OCC proposed a new § 7.1025 that codifies the authority of national banks and Federal savings associations to engage in tax equity finance (TEF) transactions under 12 U.S.C. 24(Seventh) and 1464 lending authority, respectively.<sup>54</sup> As defined in proposed paragraph (b)(1), a TEF transaction is a transaction in which a national bank or Federal savings association provides equity financing to fund a project that generates tax credits and other tax benefits and the use of an equity-based structure allows the transfer of those tax credits and other tax benefits to the bank or savings association. Specifically, the OCC proposed in paragraph (a) of § 7.1025 that a national bank and Federal savings association may engage in a TEF transaction pursuant to 12 U.S.C. 24(Seventh) and 1464, respectively, if the transaction is the functional equivalent of a loan, as provided in proposed paragraph (c), and if the TEF transaction satisfies the applicable conditions of proposed paragraph (d). Paragraphs (c) and (d) are described below in the context of the comments received.

The OCC received eight comments on this section. One commenter stated that the proposed rule would increase administrative compliance burden and suggested the OCC should not codify a rule that addresses the underwriting process but rather should generally require the institutions it regulates to establish safety and soundness standards consistent with other extensions of credit. The OCC disagrees with this comment. Proposed § 7.1025 distills current precedent and standards. Rather than attempt to prescribe the underwriting process for national banks and Federal savings associations, the proposal required national banks and Federal savings associations to use underwriting and credit approval

criteria and standards that are substantially equivalent to the underwriting and credit approval criteria and standards used for traditional loans. This is consistent with the notion that a permissible TEF transaction is the functional equivalent of a loan.

One commenter stated that there is an existing rental affordability crisis and therefore the OCC should not impose burdensome requirements and restrictions on tax equity finance transactions that might reduce low income housing tax credit investment. The OCC believes the clarity and safety and soundness benefits of § 7.1025 outweigh any potential burden. Moreover, § 7.1025 provides an additional authority for national banks and Federal savings associations to make TEF transactions. It does not limit or impede a national bank or Federal savings association from participating in transactions under other existing authorities. Therefore, if a national bank or Federal savings association wishes to engage in a low income housing tax credit investment under existing public welfare investment or community development authority, it could do so as long as it meets the requirements of those existing authorities.

Relatedly, the OCC received eight comments requesting that the OCC confirm that TEF authority is separate and apart from the public welfare investment authority and community development investment authority under 12 U.S.C. 24(Eleventh), 12 U.S.C. 1464(c)(3)(A), 12 CFR part 24, 12 CFR 160.30, and 12 CFR 160.36, and will not be a replacement authority. To the extent an investment would qualify under multiple authorities, the national bank or Federal savings association may determine which authority it is using to engage in the transaction. To eliminate any confusion on this point, the final rule adds a sentence to § 7.1025(a) indicating that the authority under § 7.1025 is pursuant to 12 U.S.C. 24(Seventh) and 1464 lending authority and is separate from, and does not limit, other investment authorities available to national banks and Federal savings associations.

One commenter supported the intent of the proposed rule but suggested the OCC needs to familiarize itself with, and contemplate the impact of, certain Internal Revenue Service (IRS) rules and standards relating to TEF transactions and structures, including sections 49

and 50 of the Internal Revenue Code, Revenue Procedure 2007–65 and Revenue Procedure 2014–12, and whether the proposed rule would make renewable energy TEF transactions non-compliant with these laws and IRS Procedures. The OCC is familiar with sections 49 and 50 of the Internal Revenue Code, Revenue Procedures 2007–65 and 2014–12, as well as other IRS rules and guidance on tax credits, and believes the TEF provision would not prevent a national bank or Federal savings association from complying with IRS rules, procedures, and standards. Therefore, OCC is finalizing § 7.1025(a) as proposed.

The OCC proposed to define a “tax equity finance transaction” in § 7.1025(b)(1) as a transaction in which a national bank or Federal savings association provides equity financing to fund a project that generates tax credits and other tax benefits and the use of an equity-based structure allows the transfer of those credits to the bank or savings association. The OCC received two comments on this provision. One commenter suggested that the OCC should review current draft legislation for impacts on the terms “generation” and “renewable” if energy storage is added to section 48 of the Internal Revenue Code. Proposed § 7.1025(b)(1) defines a tax equity finance transaction in part to mean a transaction that generates tax credits and other benefits. In response, the OCC notes that, because the definition does not limit tax equity finance transactions to only those that relate to energy generation, if section 48 were amended to add energy storage, national banks and Federal savings associations would be able to engage in transactions involving energy storage that met the requirements of § 7.1025.

Another commenter noted that a TEF structure may involve other tax benefits in addition to tax credits, such as deductions and other items that fall under the category of tax equity. The OCC acknowledges that tax benefits may take many forms and is revising proposed § 7.1025(b)(1), redesignated as § 7.1025(b)(3) in the final rule, to change “generates tax credits and other tax benefits” to “generates tax credits or other tax benefits.”

The OCC also requested comment on whether national banks and Federal savings associations are currently participating in TEF transactions through fund-based structures and, if not, whether national banks and Federal savings associations would want to participate in TEF transactions through fund-based structures. A fund-based structure is a structure in which a national bank or Federal savings

<sup>54</sup> For a discussion of existing precedent on such authority, see 85 FR 40794 (July 7, 2020).

association invests in a fund that is invested or will invest in multiple TEF transactions. Seven commenters responded to this question and suggested that the final rule should allow TEF investments through investment funds or other funds-based structures. For the reasons discussed by commenters, including diversifying risk, enabling smaller investments, and permitting less experienced national banks and Federal savings associations to participate alongside more experienced TEF investors, the OCC will permit TEF investments through investment funds as long as the investment meets all of the requirements and conditions of § 7.1025. The OCC is revising proposed § 7.1025(b)(1), redesignated as § 7.1025(b)(3) in the final rule, to change “. . . to fund a project that generates tax credits . . .” to “. . . to fund a project or projects that generate tax credits . . .”

The OCC is adopting the proposed definition of “tax equity finance transaction” with these two changes discussed above.

The proposed rule included an aggregate total dollar limitation on TEF transactions that a national bank or Federal savings association could engage in based on a percentage of a national bank or Federal savings association’s capital and surplus. The OCC proposed to define “capital and surplus” in § 7.1025(b)(2) by cross-referencing to its definition in the OCC’s lending limit rule at 12 CFR part 32.<sup>55</sup> As defined in the lending limit rule, for qualifying community banking organizations that have elected to use the community bank leverage ratio framework as set forth under the OCC’s Capital Adequacy Standards at 12 CFR part 3, “capital and surplus” means a qualifying community banking organization’s tier 1 capital, as used under 12 CFR 3.12, plus a qualifying community banking organization’s allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, as reported in the Consolidated Reports of Condition and Income (Call Report). For all other national banks and Federal savings associations, “capital and surplus” means a national bank’s or savings association’s tier 1 and tier 2 capital, calculated under the risk-based capital standards applicable to the institution as reported in the Call Report, plus the balance of a national bank’s or Federal

savings association’s allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, not included in the bank’s or savings association’s tier 2 capital, for purposes of the calculation of risk-based capital, as reported in the national bank’s or savings association’s Call Report. The OCC received no comments on proposed § 7.1025(b)(2) and is finalizing it as proposed.

Under proposed § 7.1025(c), a TEF transaction would qualify as the functional equivalent of a loan if it meets seven requirements that derive from OCC interpretations. First, paragraph (c)(1) provides that the TEF transaction structure must be necessary for making the tax credits and other tax benefits available to the national bank or Federal savings association. One commenter suggested that the OCC should clarify that the tax equity finance transaction structure may be necessary for making the tax credits or other tax benefits available. The OCC acknowledges that tax benefits may take many forms and is revising proposed § 7.1025(c)(1) to change “making the tax credits and other tax benefits available” to “making the tax credits or other tax benefits available.” With this revision, the OCC is finalizing § 7.1025(c)(1).

Second, paragraph (c)(2) provides that the TEF transaction must be of limited tenure and not indefinite. Under this requirement, a national bank or Federal savings association would need to be able to achieve its targeted return in a reasonable time, and the TEF transaction would need to have a defined termination point. A national bank or Federal savings association could satisfy this requirement if the TEF transaction will terminate within a reasonable time of the transaction’s initiation or if a project sponsor has an option to purchase a national bank’s or Federal savings association’s interest at or near fair market value. The national bank or Federal savings association cannot control whether it retains the interest indefinitely. The proposed rule permitted a national bank or Federal savings association to retain a limited investment interest if that interest is required by law to obtain continuing tax benefits from the TEF transaction. The OCC received five comments on this requirement.

Three commenters requested clarification that the 15-year holding period for LIHTC investments would not violate the limited tenure requirement. The OCC confirms that under § 7.1025(c)(2), a national bank or Federal savings association may hold an investment in order to obtain and retain tax benefits as required by law,

including holding the investment to comply with the 15-year recapture period for LIHTC investments.

Three commenters suggested that a requirement that the sponsor have a call option would have adverse tax consequences in certain TEF transactions and suggested removing that requirement. However, proposed § 7.1025(c)(2) does not require that a sponsor must have a call option in order to comply with § 7.1025; it requires only that the transaction is of limited tenure and is not indefinite, such as a limited investment interest requirement by law to obtain continuing tax benefits. The OCC used a call option as an example in the preamble to the proposed rule as one way a national bank or Federal savings association could comply with the limited tenure requirement. The OCC did not intend this to be an exhaustive list.

One commenter suggested the OCC clarify in the final rule that TEF investments may be retained for the duration needed to obtain the expected rate of return consistent with market practices for such an investment. The OCC agrees with the commenter and is revising § 7.1025(c)(2) to require that the transaction is of limited time and is not indefinite, including retaining a limited investment interest that is (1) required by law to obtain continuing tax benefits or (2) needed to obtain the expected rate of return.

One commenter suggested proposed § 7.1025 could result in the sale of an investment at a price lower than the bank could otherwise obtain. Although a national bank or Federal savings association may exit a TEF transaction through a sale to a third party, the OCC does not expect that sale to be immediate if it would result in fire sale pricing. One commenter suggested the OCC should clarify that it is permissible to have a purchase option price that includes an amount necessary for a national bank or Federal savings association to achieve its expected rate of return. The OCC notes that an option to purchase may include an amount necessary for a national bank or Federal savings association to achieve its expected rate of return, and the OCC believes this would be consistent with the requirements and conditions of § 7.1025.

One commenter requested the OCC explicitly permit other structures that are required by law to obtain tax benefits. This commenter cited to Internal Revenue Service Revenue Procedure 2014–12, which the commenter stated provides a safe harbor for an exit structure in which the investor “puts” its interest back to the

<sup>55</sup> The OCC recently amended the definition of “capital and surplus” in 12 CFR 32.2 in its recent community bank leverage ratio rule. See 84 FR 61776 (November 13, 2019).

project instead of the sponsor having an option to purchase the interest at or near fair market value. The OCC agrees with the commenter that transaction structures that provide different exit options may satisfy § 7.1025(c) as long as the national bank or Federal savings association does not control whether it retains the interest indefinitely. However, the safe harbor provided in IRS Revenue Procedure 2014–12, in which the national bank or Federal savings association would have a put option that it could have the sponsor purchase the interest at or near market value, would not satisfy, by itself, the requirements of § 7.1025(c)(2) because a put option alone would allow the national bank or Federal savings association to decide whether it would hold the investment indefinitely (*i.e.*, let the put expire). The national bank or Federal savings association could couple the put option with another exit mechanism in which both the IRS safe harbor and the requirements of the TEF provision are met, such as a put option coupled with a contract provision providing that after a certain amount of time has passed or a certain rate of return has been reached, the interest will revert from the national bank or Federal savings association to the sponsor. With the change described above, the OCC is finalizing § 7.1025(c)(2).

Third, paragraph (c)(3) provides that the tax benefits and other payments received by the national bank or Federal savings association from the TEF transaction must repay the investment and provide an implied rate of return. As a result of this proposed requirement, the national bank's or Federal savings association's underwriting could not place undue reliance on the value of any residual stake in the project and the proceeds of disposition following the expiration of the tax credits' compliance period. The OCC received two comments on proposed § 7.1025(c)(3). One commenter suggested that the OCC should clarify in the final rule that the calculation of the rate of return is the expected rate of return at the time the investment is initially made and revise § 7.1025(c)(3) to refer to the expected rate of return at original underwriting. The OCC agrees with the commenter and is revising § 7.1025(c)(3) to refer to the expected rate of return at the time of underwriting.

One commenter suggested that the OCC consider *Sacks v. Commissioner, Internal Revenue Service*<sup>56</sup> and its use

of "implied rate of return" so that the final rule does not render moot the decision in this case that recognized the congressional purposes underlying Federal tax credits and held that a pretax profit was not required for economic substance purposes. The OCC does not believe that § 7.1025(c)(3) renders this case moot. Consistent with *Sacks*,<sup>57</sup> § 7.1025(c)(3) does not require a pretax profit, rather, it simply requires an expected rate of return that contemplates the tax credit and other benefits.

One commenter suggested that in matters concerning any residual stake in the project, the IRS true lease authority must be understood, and the OCC should not force or cause a renewable energy project sponsor to violate IRS requirements. Proposed § 7.1025(c)(3) does not contain residual stake language. Rather, as the preamble to the proposed rule explained, a national bank's or Federal savings association's underwriting should not place undue reliance on the value of any residual stake in the project. The OCC does not believe that this language in any way would cause or force a project sponsor to violate IRS requirements. With the revision discussed above, the OCC is finalizing § 7.1025(c)(3).

Fourth, paragraph (c)(4) provides that the national bank or Federal savings association must not rely on appreciation of value in the project or property rights underlying the project for repayment. As discussed in OCC Interpretive Letter No. 1139 (November 13, 2013), wind turbines, solar panels, and other ancillary equipment are not considered real property under 12 U.S.C. 29, and acquisition of interests in real estate incidental to the provision of financing is not inconsistent with 12 U.S.C. 29. The OCC received no comments on this requirement and is finalizing § 7.1025(c)(4) as proposed.

Fifth, paragraph (c)(5) provides that the national bank or Federal savings association must use underwriting and credit approval criteria and standards that are substantially equivalent to the underwriting and credit approval criteria and standards used for a traditional commercial loan. To comply with this requirement, the documents governing the TEF transaction should contain terms and conditions equivalent to those found in documents governing typical lending relationships and transactions. The OCC received no comments on this requirement and is finalizing § 7.1025(c)(5) as proposed.

Sixth, paragraph (c)(6) provides that the national bank or Federal savings

association must be a passive investor in the transaction and must not be able to direct the affairs of the project company. This means that the national bank or Federal savings association is not able to direct day-to-day operations of the project. However, the OCC does not consider temporary management activities in the context of foreclosure or similar proceedings as violating this requirement. One commenter suggested that the OCC should clarify in the final rule that customary protective rights and covenants are permitted and do not violate the "passive investor" requirement of § 7.1025(c)(6). The OCC agrees that customary protective rights and covenants are permitted and do not violate § 7.1025(c)(6). However, the OCC does not believe changing the proposed rule text is necessary. TEF transactions are the functional equivalent of loans and many of the same terms, conditions, and covenants found in lending and lease financing transactions are permissible for TEF transactions. In some cases, these terms, conditions, and covenants may be necessary to comply with the requirement in § 7.1025(c)(5) that underwriting and credit approval criteria and standards must be substantially the same as those used for traditional commercial loans. The OCC is finalizing § 7.1025(c)(6) as proposed.

Seventh, paragraph (c)(7) provides that the national bank or Federal savings association must appropriately account for the transaction initially and on an ongoing basis and document contemporaneously its accounting assessment and conclusion. Although TEF transactions can be the functional equivalent of loans pursuant to a national bank's or Federal savings association's lending authority, the accounting treatment of tax equity investments may differ from the treatment of a loan. Two commenters noted that investments in housing credit transactions are structured as equity investments and requested that those investments be treated as equity investments and not loans for Federal income purposes. The OCC acknowledges that although a transaction may be the functional equivalent of a loan for permissibility purposes, it may be treated as an equity investment for accounting or tax purposes. Section 7.1025(c) provides that a national bank or Federal savings association must appropriately account for the transaction initially and on an ongoing basis and document its accounting assessment and conclusion. The OCC is finalizing § 7.1025(c)(7) as proposed.

Proposed paragraph (d) provides that a national bank or Federal savings

<sup>56</sup> *Sacks v. Commissioner, Internal Revenue Service*, 69 F.3d 982, 991 (9th Cir. 1995).

<sup>57</sup> See 69 F.3d at 991.

association only may engage in TEF transactions if it meets the following four additional requirements. First, proposed paragraph (d)(1) provides that the national bank or Federal savings association cannot control the sale of energy, if any, from the project. To satisfy this requirement, a national bank or Federal savings association could enter into a long-term contract with creditworthy counterparties to sell energy from the project, as articulated in OCC Interpretive Letter 1139, or have the project sponsor bear responsibility for selling generated power into the energy market so long as those sales are stabilized by a hedge contract that provides reasonable price and cash flow certainty, as articulated in OCC Interpretive Letter No. 1141 (April 22, 2014). One commenter suggested that the final rule should clarify that national banks and Federal savings associations have appropriate flexibility in satisfying this requirement and that the OCC should not require a long-term contract or hedge if the national bank or Federal savings association has otherwise determined that exposure to cash flow certainty has been adequately mitigated. The OCC confirms that national banks and Federal savings associations have flexibility to satisfy this requirement. Proposed § 7.1025(d)(1) requires that national banks and Federal savings associations cannot control the sale of energy from a project, but the provision does not prescribe that certain agreements or arrangements must be used. Although, the preamble for proposed § 7.1025(d)(1) lists two examples of ways a national bank or Federal savings association could comply with the requirement, these examples are not the only ways a national bank or Federal savings association could satisfy this requirement.

One commenter suggested the OCC should confirm that contracts for the sale of energy can be entered into with affiliates of the national bank or Federal savings association participating in the TEF transaction, so long as such contracts are consistent with the TEF requirements and do not create negative tax consequences. The OCC confirms that a national bank or Federal savings association may enter into energy sale contracts with affiliates as long as the requirements of § 7.1025 are met and any transaction with an affiliate complies with 12 U.S.C. 371c, 12 U.S.C. 371c-1, 12 CFR part 223, and any other applicable laws and regulations regarding affiliate transactions. Similarly, one commenter requested that the OCC explicitly confirm that the

project company's hedging counterparty does not need to be an unaffiliated third party and may be the national bank or Federal savings association itself or an affiliate of the national bank or Federal savings association. The OCC confirms that a project company's hedging counterparty need not be an unaffiliated third party and may be an affiliate of the national bank or Federal savings association so long as the sale meets the requirements of § 7.1025 and any applicable affiliate transactions laws and regulations, including 12 U.S.C. 371c and 371c-1, and 12 CFR part 223, and is conducted in a safe and sound manner (e.g., the counterparty is creditworthy). However, a national bank or Federal savings association itself may not be the hedging counterparty for one of its TEF investments.

One commenter requested the OCC clarify that the right of a national bank or Federal savings association to prohibit certain sales does not constitute inappropriate control of the right to sell power. The OCC confirms a national bank or Federal savings association may prohibit certain sales or institute certain credit or other requirements for third party purchasers of the energy if done pursuant to prudent underwriting to ensure the project's success and not in an attempt to control, influence, or manipulate the energy market. One commenter requested the OCC recognize that a TEF project may sell a portion of the electricity that it generates into the merchant market, and not pursuant to a power purchase agreement or a hedge contract, and permit a national bank or Federal savings association to invest in such projects as long as it has reasonably determined that any merchant sales by the project company contribute favorably to the overall financial health of the project company. The OCC confirms a TEF project may sell energy into a merchant market as long as the national bank or Federal savings association is not controlling the sale of the energy and the TEF transaction otherwise complies with the requirements and conditions of § 7.1025.

One commenter suggested that certain terms, such as "long term," "creditworthy," and "sell" make the provision unworkable given market realities. The OCC recognizes that there may be changes in market practice and standards in the evolving space of TEF transactions, and renewable energy transactions in particular. For that reason, § 7.1025(d)(1) does not prescribe how a national bank or Federal savings association must comply with the requirement not to control energy from the sale of the project. Rather,

§ 7.1025(d)(1) simply requires that a national bank or Federal savings association must not control the sale of energy from the project. In the preamble to the proposed rule, the OCC provided a couple of examples of how a national bank or Federal savings association may satisfy the requirement, but these examples are illustrative only. The terms "creditworthy" and "sell" do not appear in the proposed rule text and instead are used in the proposed rule's preamble to describe examples of how a national bank or Federal savings association may satisfy the requirement in § 7.1025(d)(1). The OCC is finalizing § 7.1025(d)(1) as proposed.

Second, proposed paragraph (d)(2) provides that the national bank or Federal savings association must limit the total dollar amount of TEF transactions to no more than five percent of its capital and surplus unless the OCC determines, by written approval of a written request by the national bank or Federal savings association to exceed the five percent limit, that a higher aggregate limit will not pose an unreasonable risk to the national bank or Federal savings association and that the TEF transactions in the national bank's or Federal savings association's portfolio will not be conducted in an unsafe or unsound manner. In no case may a bank's or Federal savings association's total dollar amount of TEF transactions exceed fifteen percent of its capital and surplus. As provided for public welfare investments under 12 U.S.C. 24(Eleventh) and 12 CFR part 24, a national bank is generally subject to a five percent aggregate investment limit and this limit encourages a national bank to maintain appropriate risk diversification.<sup>58</sup> The OCC specifically requested comment on whether the OCC should use an alternate measure when calculating the aggregate investment limit and whether the proposed five percent aggregate investment limit is appropriate. One commenter suggested that the final rule should not impose a cap on TEF transactions and instead should continue to be subject to the limits set forth in 12 CFR part 32 and other concentration risk limits, which are appropriate and adequate to any concentration or similar risks presented by TEF transactions. One commenter also suggested that only a small number of national banks and Federal savings associations are able to participate in TEF transactions and that these banks would quickly hit this arbitrary five percent limit. The OCC is retaining the proposed five percent aggregate limit,

<sup>58</sup> 12 U.S.C. 24(Eleventh); 12 CFR 24.4(a).

which can be increased up to 15 percent with written approval from the OCC. The OCC interpretations that this provision is codifying include a three percent cap on TEF transactions.<sup>59</sup> The OCC believes that a limit is necessary but that the limit can be safely increased to five percent. Although TEF transactions will be subject to the legal lending limits on loans to one borrower as the commenter correctly pointed out, the OCC believes maintaining the aggregate transaction limitation will allow the OCC to assess how the authority is implemented and any safety and soundness concerns that may arise. The OCC is finalizing § 7.1025(d)(2) as proposed.

Third, proposed paragraph (d)(3) provides that the national bank or Federal savings association must have provided written notification to the OCC prior to engaging in each TEF transaction that includes its evaluation of the risks posed by the transaction. The OCC received four comments on this requirement. The commenters suggested that the OCC should not require national banks and Federal savings associations to provide prior written notification and instead should be allowed to provide after-the-fact notification or follow the post-notification procedures available under the public welfare investment authority.<sup>60</sup> One commenter also suggested that prior notice for each transaction is overly burdensome and of little value to examiners, and, if necessary, the OCC should limit it to when a bank first engages in TEF activity and not require it for each subsequent transaction. The OCC disagrees with these comments. A national bank or Federal savings association may use the appropriate post-investment notification procedures for investments made pursuant to the public welfare investment authority or other applicable existing authorities, but to the extent that a national bank or Federal savings association is using TEF authority under § 7.1025, it must comply with the requirements and conditions contained in the provision, including prior written notification, before engaging in each transaction. Examiner-in-Charge (EIC) non-objection was required under the OCC's existing interpretations for TEF transactions. The OCC is not creating a new requirement but, rather, is modifying the non-objection requirement to a less onerous notice requirement. The OCC may assess over time whether prior notices

are necessary for subsequent transactions or whether after-the-fact notices would be sufficient, and may revise § 7.1025 as appropriate at that time. A well-managed national bank or Federal savings association engaging in TEF transactions under § 7.1025 authority must provide prior notice as required by § 7.1025 whether engaging in the activity at the bank or savings association-level or through an operating subsidiary. The OCC is finalizing § 7.1025(d)(3) as proposed, with one clarifying change. The final rule clarifies that the notice is to be provided to the appropriate OCC supervisory office, and adds a definition of this term at § 7.1025(b)(1) to mean the OCC office that is responsible for the supervision of a national bank or Federal savings association, as described in subpart A of 12 CFR part 4.<sup>61</sup>

Fourth, proposed paragraph (d)(4) provides that the national bank or Federal savings association must be able to identify, measure, monitor, and control the associated risks of its tax equity finance transaction activities individually and as a whole on an ongoing basis to ensure that it conducts such activities in a safe and sound manner. The OCC received one comment related to this provision regarding the use of the word "control." The commenter suggested that the final rule should eliminate the word "control" or otherwise acknowledge that it is not meant to suggest that national banks and Federal savings associations should have more than the limited control over TEF transaction activities that is consistent with the passive nature of these investments. The OCC clarifies that use of the word "control" in relation to risk management of TEF activities is consistent with the passive nature of these transactions and a national bank or Federal savings association satisfying this condition would not be in conflict with the passivity requirement of § 7.1025(c)(6). Similar to how a national bank or Federal savings association identifies, measures, monitors, and controls risks related to loans and other extensions of credit but does not exercise control over the business of the borrower, a national bank or Federal savings association would identify, measure, monitor and control risks related to the transaction but would not be exercising control over the operations of the project or projects underlying the

TEF transaction. The OCC is finalizing § 7.1025(d)(4) as proposed.

The OCC requested comment on whether national banks or Federal savings associations routinely obtain legal opinions regarding the availability of tax credits in connection with these types of finance transactions. One commenter suggested that a national bank or Federal savings association should not be required to obtain a legal opinion on the tax benefits of a TEF transaction, but rather the OCC should require a good faith, reasoned basis for making that determination. The commenter suggested that it is not market practice to obtain a legal opinion that says a TEF structure is "necessary" in order for the tax benefits to be available. Instead, the commenter suggested the OCC should recognize that national banks and Federal savings associations employ a range of approaches to evaluating the tax benefits of TEF transactions.

The OCC agrees with the commenter that there should be flexibility related to the legal analysis underlying the tax availability determination. However, the OCC believes that the final rule should require the national bank or Federal savings association to have a reasonable basis for determining the availability of tax credits in connection with TEF transactions. Therefore, the OCC is including in the final rule a more flexible provision. Specifically, new § 7.1025(d)(5) requires a national bank or Federal savings association to obtain a legal opinion, or to have other good faith, reasoned bases for making the determination that tax credits or other tax benefits are available before engaging in a TEF transaction. A legal opinion includes either an outside counsel opinion or an opinion provided by a national bank or Federal savings association's internal or in-house counsel. Although a legal opinion is not the only means to fulfill this requirement, a good faith, reasoned basis requires more than simply accepting a statement from a person or entity promoting an investment. A national bank or Federal savings association may not rely solely on the assurances of a person or entity promoting a TEF transaction that tax credits will be available.

Proposed paragraph (e) provides that the TEF transaction must be subject to the substantive legal requirements of a loan, including the lending limits prescribed by 12 U.S.C. 84, as implemented by 12 CFR part 32, and, if the active investor or project sponsor of the transaction is an affiliate of the national bank or Federal savings association, the restrictions on

<sup>59</sup> OCC Interpretive Letter 1139 (Nov. 13, 2013); OCC Interpretive Letter 1141 (Apr. 22, 2014).

<sup>60</sup> 12 CFR 24.5(a).

<sup>61</sup> This final rule also makes technical changes to part 4, subpart A. See the "Technical Changes" section of this SUPPLEMENTARY INFORMATION.

transactions with affiliates prescribed by 12 U.S.C. 371c and 371c-1, as implemented by 12 CFR part 223. If a national bank or Federal savings association is relying on its lending authority to participate in a TEF transaction, the TEF transaction would be subject to regulatory requirements applicable to loans, including any applicable legal lending limits and affiliate transaction restrictions to the extent applicable. However, the regulatory capital treatment of a national bank or Federal savings association's participation in a TEF transaction would be determined according to the regulatory capital rule (12 CFR part 3). The OCC received no comments on § 7.1025(e) and is finalizing this provision as proposed.

The OCC specifically requested comment on whether the final rule should prohibit a national bank or Federal savings association from entering into TEF transactions for projects involving residential installation TEF transactions not involving utility-scale standalone power-generation facilities. One commenter suggested that the final rule should not prohibit these transactions so as not to arbitrarily reserve it for only one segment of the market. The OCC concurs with this comment and will not limit TEF transactions to only those involving standalone utility-scale power generation facilities in the final rule. A national bank or Federal savings association may participate in a TEF transaction if it meets the requirements and conditions of § 7.1025 and the OCC has not raised safety and soundness concerns related to the particular transaction.

The OCC also requested comment on whether the final rule should permit national banks or Federal savings associations to invest in TEF transactions involving detached single-family residences, multi-family residences, or non-utility commercial buildings. Five commenters suggested that the OCC should permit national banks and Federal savings associations from entering into these transactions, with one commenter suggesting the OCC should affirm longstanding OCC precedent that the legal permissibility of a TEF transaction is agnostic as to end-user segment and underlying asset. The OCC confirms that it will not prohibit a national bank or Federal savings association from entering into TEF projects involving detached single-family residences, multi-family residences, or non-utility-scale commercial buildings. As is the case with loans and leases, the legal permissibility of a TEF transaction is

not dependent on the end-user segment and underlying asset. Therefore, the OCC is finalizing § 7.1025 without a prohibition on residential TEF transactions.

One commenter also requested that the OCC confirm there is no prohibition on, and that tax credit availability would not be affected by, national banks funding a portion of their TEF investment during late stage construction if required to qualify for the tax benefits and adequate protections are in place. The OCC confirms that there is no prohibition on national banks or Federal savings associations funding a portion of their TEF investment during late stage construction if required to qualify for the tax benefits and adequate protections are in place. However, the OCC cannot opine on whether late stage investment would affect the availability of the tax credit and such inquiries should be directed to the IRS.

Further, the OCC requested comment on whether national banks and Federal savings associations should have other contractual remedies available before entering into a TEF transaction. Two commenters suggested that the final rule should not prescribe any particular contractual remedies for TEF transactions, including guarantees or indemnities, but rather, should allow national banks and Federal savings associations the flexibility to choose the most appropriate remedies for a given transaction. Another commenter suggested that requiring certain contractual provisions is not necessary, noting that it is common for national banks and Federal savings association to require such remedies as a business practice when making other investments even though the OCC does not require them and that such remedies are best left up to national banks and Federal savings associations. The OCC agrees with these commenters that national banks and Federal savings associations should be afforded the flexibility to choose contractual remedies as appropriate. Therefore, the OCC is finalizing § 7.1025 without requiring specific contractual remedies.

National Bank and Federal Savings Association Payment System Memberships (New § 7.1026)

*Section 7.1026 Payment System Memberships.* National banks may join payment systems.<sup>62</sup> OTS precedent also permits Federal savings associations to

<sup>62</sup> See, e.g., OCC Conditional Approval Letter No. 220 (Dec. 2, 1996); OCC Interpretive Letter No. 993 (May 16, 1997); OCC Interpretive Letter No. 1140 (Jan. 13, 2014); OCC Interpretive Letter No. 1157 (Nov. 12, 2017).

join payment systems.<sup>63</sup> The OCC proposed a new rule that would codify OCC interpretations regarding national bank membership in payment systems and apply this new provision to Federal savings associations. Specifically, proposed § 7.1026 required a national bank or Federal savings association to provide 30-day prior notice to the OCC before joining a payment system if the bank or savings association would be exposed to open-ended liability. The national bank or Federal savings association would need to provide the OCC with a 30-day after-the-fact notice before joining any other payment system where the bank or savings association is not exposed to open-ended liability. These notices must contain representations that the national bank or Federal savings association has identified and evaluated the risks posed by membership in the payment system and will measure, monitor, and control those risks after membership. The proposal permitted a national bank or Federal savings association to consider its liability to a particular payment system to be limited if the bank or savings association obtains an independent legal opinion confirming this limited liability prior to joining the payment system. Finally, the proposal required a national bank or Federal savings association to notify its appropriate OCC supervisory office if its ongoing review identifies a safety and soundness concern as soon as that concern is identified and to take appropriate actions to remediate the risk. Several commenters expressed general support for the proposed approach for joining payment systems and, as explained further below, the OCC is adopting the proposal largely as proposed.

*Definitions.* In proposed § 7.1026(b), the OCC defined several terms used throughout the new section. First, the proposal defined "appropriate OCC supervisory office" as the OCC office that is responsible for the supervision of a national bank or Federal savings association, as described in subpart A of 12 CFR part 4. The OCC received no comments on this definition and is adopting it as proposed.

Second, because different payment systems may use different terminology, the OCC defined "member" to include a national bank or Federal savings association designated as a "member," a "participant," or other similar role by a payment system, including by a payment system that requires the

<sup>63</sup> See, e.g., 12 CFR 145.17; OTS Op. Ch. Couns. (Sept. 15, 1995); OTS Op. Ch. Couns. (Dec. 22, 1995).

national bank or Federal savings association to share in operational losses or maintain a reserve with the payment system to offset potential liability for operational losses. The OCC received one comment that indirect members of payment systems should not be included in the definition of “member” unless they are bound by the rules of the payment system and such rules, including any open-ended liabilities imposed, purport to extend to such indirect members. The OCC agrees with this commenter that it would be appropriate to include indirect members only in these specific circumstances and, thus, is amending the definition of “member” in the final rule to reflect this comment.

Third, the OCC defined “open-ended liability” as liability for operational losses that is not capped under the rules of the payment system and includes indemnifications provided to third parties as a condition of membership in the payment system. For example, as a condition of membership in particular payment systems, national banks and Federal savings associations may provide open-ended indemnifications to Federal Reserve Banks that act as service providers for the payment systems.<sup>64</sup> This definition is consistent with the definition of open-ended liability in OCC Interpretive Letter 1140.

The OCC received one comment on this definition expressing concern that it did not clearly include a situation in which the indemnification giving rise to an open-ended liability is imposed directly upon the participant by the Federal Reserve Bank, which is acting as a service provider to payment system participants. The OCC agrees with this commenter that the participant would be exposed to open-ended liability in that case and is modifying the definition of “open-ended liability” to reflect the situation described by the commenter. As a result, open-ended liability in the final rule means liability for operational losses that is not capped under the rules of the payment system, and includes indemnifications of third parties provided as a condition of membership in the payment system.

Fourth, although memberships in payment systems expose national banks and Federal savings associations to a variety of risks, OCC legal precedent only has addressed whether a national bank may assume open-ended liability for operational losses at the payment system. The OCC defined “operational loss” as a charge resulting from sources other than defaults by other members of

the payment system. The OCC pointed to examples listed in OCC Interpretive Letter 1140<sup>65</sup> and requested comment on whether these examples should be included in the definition of “operational loss.” The OCC also asked whether other examples should be included in that list. One commenter supported including the examples in the text of the regulation and recommended adding cybersecurity breaches. A second comment letter also supported adding cybersecurity breaches but did not believe the list of examples should be included in the definition of “operational loss” in the regulatory text. The OCC believes that adding the non-exhaustive list of examples to the body of the regulation will provide greater clarity. The OCC also agrees that it is appropriate to add cybersecurity breaches to the list. Thus, the final rule defines operational loss to mean a charge resulting from sources other than defaults by other members of the payment system. The final rule also adds examples of these operational losses. This nonexclusive list cites losses due to: employee misconduct, fraud, misjudgment, or human error; management failure; information systems failures; disruptions from internal or external events that result in the degradation or failure of services provided by the payment system; security breaches or cybersecurity events; or payment or settlement delays, constrained liquidity, contagious disruptions, and resulting litigation.

Finally, the OCC defined “payment system” in § 7.1026 to mean a “financial market utility” as defined in 12 U.S.C. 5462(6), wherever operating, and that includes both retail and wholesale payment systems. Section 5462(6) provides that “a financial market utility” means “any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person” with certain exclusions.<sup>66</sup> This definition

excluded derivatives clearing organizations registered under the Commodity Exchange Act<sup>67</sup> and clearing agencies registered under the Securities Exchange Act of 1934,<sup>68</sup> and foreign organizations that would be considered a derivatives clearing organization or clearing agency were it operating in the United States.<sup>69</sup> This definition therefore includes payment systems that operate either in the U.S. or in a foreign jurisdiction. The OCC requested comment on whether this definition appropriately encompasses both foreign and domestic payment systems that national banks and Federal savings associations may join. One commenter requested that the OCC provide guidance for banks and savings associations applying this definition to international clearing organizations or agencies that may not meet the technical requirements necessary to register under the Commodity Exchange Act or Securities Exchange Act of 1934. The OCC notes that the carve-out for clearing organizations and clearing agencies reflects that OCC precedent distinguishes between companies and organizations performing payments, clearing, and settlement functions.<sup>70</sup> While the proposed rule would codify OCC precedent related to payment system memberships, it would not affect OCC precedent applicable to memberships in clearing and settlement organizations. For example, a national bank or Federal savings association wishing to join a foreign organization subject to OCC Interpretive Letter Nos. 929 or 1102 would continue to follow the process outlined in that precedent rather than the process outlined in § 7.1026. The OCC believes this is sufficiently clear in the proposed rule

controlled by such entities, provided that the exclusions in this clause apply only with respect to the activities that require the entity to be so registered” nor “any broker, dealer, transfer agent, or investment company, or any futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator, solely by reason of functions performed by such institution as part of brokerage, dealing, transfer agency, or investment company activities, or solely by reason of acting on behalf of a financial market utility or a participant therein in connection with the furnishing by the financial market utility of services to its participants or the use of services of the financial market utility by its participants, provided that services performed by such institution do not constitute critical risk management or processing functions of the financial market utility.” 12 U.S.C. 5462(6)(B).

<sup>67</sup> 7 U.S.C. 1 *et seq.*

<sup>68</sup> 15 U.S.C. 78a *et seq.*

<sup>69</sup> The OCC maintains separate precedent relevant to memberships in these organizations. *See, e.g.*, OCC Interpretive Letter No. 929 (Feb. 11, 2002); OCC Interpretive Letter No. 1102 (Oct. 14, 2008).

<sup>70</sup> *Id.*

<sup>64</sup> OCC Interpretive Letter No. 1157 (Nov. 12, 2017).

<sup>65</sup> OCC Interpretive Letter No. 1140 (Jan. 13, 2014).

<sup>66</sup> Financial market utility “does not include: designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act, or national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, and swap execution facilities registered under the Securities Exchange Act of 1934, solely by reason of their providing facilities for comparison of data respecting the terms of settlement of securities or futures transactions effected on such exchange or by means of any electronic system operated or

and, therefore, finalizes this definition as proposed.

*Notice requirements.* Proposed § 7.1026(c) required a national bank or Federal savings association to provide written notice to the appropriate OCC supervisory office at least 30 days prior to joining a payment system that would expose it to open-ended liability. If the payment system does not expose the national bank or Federal savings association to open-ended liability, the proposed rule required the national bank or Federal savings association to provide after-the-fact written notice within 30 days of joining a payment system. The OCC believes membership in a payment system that exposes members to open-ended liability creates additional risks for national banks and Federal savings associations. Thus, the OCC believes prior notice to the OCC is appropriate in these situations.<sup>71</sup>

One comment letter supported this process. A second commenter, however, argued that the proposal may make it more difficult for a national bank or Federal savings association to join a new payment system because it would impose an additional regulatory burden not required for non-OCC regulated institutions. The OCC does not agree with this commenter. As explained above and in the preamble to the proposed rule, the notice requirement for payment system memberships codifies existing requirements from a series of interpretive letters governing national bank payment system memberships. Since the publication of these interpretive letters, OCC-regulated institutions have continued to join new payment systems. The OCC believes that this clarity facilitates payment systems memberships by OCC-regulated institutions rather than hindering them and therefore the OCC adopts paragraph (c) as proposed.

*Content of notice.* Proposed § 7.1026(d) provided that all notices filed under § 7.1026(c) must include representations that the national bank or Federal savings association has complied with the safety and soundness review required by proposed § 7.1026(e)(1) before joining the payment system and will comply with the safety and soundness review and the

notification requirements in proposed § 7.1026(e)(2) and (3) after joining the system. For after-the-fact notices pursuant to paragraph (c)(2), the proposed rule required a national bank or Federal savings association to include a representation that either the rules of the payment system do not impose liability for operational losses on members or that the national bank's or Federal savings association's liability for operational losses is limited by the rules of the payment system to specific and appropriate limits that do not exceed the lower of the legal lending limit specified by 12 CFR part 32 or a limit established for the national bank or Federal savings association by the OCC. One comment letter noted that the proposed notice requires that national banks and Federal savings associations complete their risk assessment of the payment system before joining. However, this commenter explained that some aspects of a national bank's or Federal savings association's risk management processes may occur after joining. Specifically, the commenter cited integration with a payment system's IT functions. The OCC recognizes that full access to the payment system's IT infrastructure may be necessary to analyze fully its potential risks. However, the OCC still expects banks and savings associations to identify in advance these limitations. Thus, the OCC is finalizing paragraph (d) as proposed, with a minor change in wording of the section heading in paragraph (d)(2).

*Safety and soundness procedures.* The OCC relies upon a number of resources to communicate in detail its safety and soundness guidance for national bank and Federal savings association memberships in payment systems.<sup>72</sup> At a minimum, the OCC believes a national bank or Federal savings association must be able to identify, evaluate, and control its risks from membership in a particular payment system before joining the system and on an ongoing basis.<sup>73</sup> As a prerequisite to joining a payment system and on a continual basis after joining,

proposed § 7.1026(e) required the national bank or Federal savings association to (1) identify and evaluate the risks posed by membership in the payment system, taking into account whether the liability of the bank or savings association is limited, and (2) measure, monitor, and control those risks. The preamble to the proposal explained that national banks and Federal savings associations should review the standards outlined in OCC Interpretive Letter 1140 and OCC Banking Circular 235 to assist with the requirements in paragraph (e). The proposal also required a national bank or Federal savings association to notify the appropriate OCC supervisory office if its ongoing risk management identifies a safety and soundness concern, such as a material change to the bank's or savings association's liability or indemnification responsibilities, as soon as that concern is identified and to take appropriate actions to remediate the risk. The OCC received several comments related to this section.

First, several commenters responded favorably to the OCC's question about whether the characteristics from Interpretive Letter 1140 should be included in the final rule. In Interpretive Letter 1140, the OCC identified key components of a payment system that appropriately mitigates risk and indicated it would expect a national bank to consider these characteristics when analyzing the payment system. The OCC also explained in Interpretive Letter 1140 the characteristics of an effective risk management program at a national bank. These commenters thought doing so would provide greater certainty about the OCC's expectations. Although not an exhaustive list, the OCC agrees that listing the risk management program criteria from Interpretive Letter 1140 in the regulatory text would assist banks and savings associations as they conduct reviews of payment system memberships. The OCC is including in the final rule a new paragraph (f) that recites the criteria it previously outlined in Interpretive Letter 1140.

One commenter also asked the OCC to provide additional guidance about which of these criteria are most important and the circumstances under which each component should be considered in the analysis of a bank or savings association. The OCC does not believe it would be appropriate to identify further individual scenarios in which specific factors would apply because national banks and Federal savings associations are best positioned to evaluate the applicability and

<sup>71</sup> The proposed notice requirement would not apply to existing payment system memberships. However, as explained below, the proposed rule required national banks and Federal savings associations to continuously inform the OCC of changes to bank or savings association operations that would affect the institution's risk profile. Thus, the OCC would be made aware of any payment system membership at a bank or savings association even though the specific timing and information required by this proposed rule would not apply to existing payment systems memberships.

<sup>72</sup> See, e.g., FFIEC IT Examination Handbook on Retail Payment Systems (Apr. 2016); FFIEC IT Examination Handbook on Wholesale Payment Systems (July 2004); Comptroller's Handbook: Payment Systems and Funds Transfer Activities (March 1990); OCC Banking Circular 235 (May 10, 1989).

<sup>73</sup> For example, OCC Banking Circular 235 states "Management of each national bank is responsible for assessing risk in each payment, clearing, and settlement system in which the bank participates. Management must adopt adequate policies, procedures, and controls with respect to these activities." The OCC applied this Banking Circular to Federal savings associations on Oct. 1, 2014.



importance of each factor given the wide variety of global payment systems as well as the varied complexity of and risk tolerances at individual banks and savings associations. The OCC expects banks and savings associations to review the standards and identify the components that are applicable to the payment system and financial institution at issue. Thus, the OCC is not including this information in the final rule.

Finally, a commenter asked that where the open-ended liability derives from a Federal Reserve Bank acting as a service provider to the payment system participant, the OCC clarify that due diligence and risk management activities should be related to the entity providing the service for which the indemnity or open-ended liability is imposed. The OCC agrees that national banks and Federal savings associations should evaluate the risks that derive from all aspects of the payment system membership, including the risks from service providers to whom the payment system member must indemnify or provide open-ended liability as a condition of membership. However, the OCC expects the due diligence and risk management analysis to apply whether the payment system membership introduces open-ended liability or not. The OCC believes that the language in paragraph (e) of the proposal is sufficiently clear and is adopting this section as proposed.

The OCC noted in the preamble to the proposed rule that a national bank's or Federal savings association's liability will vary from payment system to payment system. The rules of some payment systems may expose members to open-ended liability for operational losses but, in reality, the national bank's or Federal savings association's liability may be capped in some other way. For example, a jurisdiction could have a law that prohibits open-ended liability or restricts the amount of liability to the assets of the entity located in that jurisdiction. If that law applies to the payment system, it could effectively cap a member's operational liability. In other situations, a member may negotiate a separate agreement with a payment system that allows the member to limit its potential liability and, as a result, the risks of membership in that payment system. In recognition of these situations, the proposed rule permitted a national bank or Federal savings association to consider its open-ended liability to a particular payment system to be limited for purposes of the review required by proposed § 7.1026(e)(1) and (2) if the bank or savings association obtains an independent legal opinion

prior to joining the payment system. That legal opinion must describe how the payment system allocates liability for operational losses and conclude the potential liability for the national bank or Federal savings association is limited to specific and appropriate limits that do not exceed the legal lending limit specified by 12 CFR part 32 or a lower limit established for the national bank or Federal savings association by the OCC. This legal opinion would enable the OCC to verify that the liability of the national bank or Federal savings association is limited even though the rules of the payment system do not provide any limits.

Two commenters objected to the independent legal opinion requirement. These commenters argued that the OCC should instead require national banks and Federal savings associations to follow a lower standard and provide just a reasonable basis for concluding that its liability is limited. These commenters also suggested that an opinion from in-house counsel should suffice. The OCC does not agree that lowering the standard would be appropriate. However, the OCC believes it is important to make clear that the legal opinion is *not* required to join any payment system; it is only required for the bank or savings association to treat its liability as limited when the payment systems rules indicate open-ended liability. The OCC, however, is persuaded by the commenters' view that an in-house legal opinion is sufficient. Thus, the OCC is amending the final rule to remove the requirement that the legal opinion be independent of the bank or savings association. The final rule does, however, specifically provide for a written opinion. Even with this change, the OCC expects that this option will be exercised rarely. In fact, the OCC believes that this option will be available only in unusual circumstances, typically for a payment system that operates in a foreign jurisdiction where the laws of that jurisdiction effectively limit the liability of the national bank or Federal savings association. The OCC is offering the written legal opinion as an additional option for institutions wishing to join a payment system in which the rules do not limit the liability of members, but the national bank or Federal savings association believes another factor effectively limits its potential liability. If a payment system's rules impose open-ended liability, national banks and Federal savings associations still may join the payment system even if they do not elect—or are unable to obtain—a written legal opinion provided that they

conduct the appropriate safety and soundness analysis and provide the appropriate OCC supervisory office with the 30-day prior notice required by § 7.1026(c)(1). As the OCC explained in the preamble to the proposed rule, a national bank or Federal savings association that obtains a legal opinion may consider its open-ended liability to be limited so long as there were no material changes to the liability or indemnification requirements of the national bank or Federal savings association after the bank or savings association joined the payment system. If there is a material change, the national bank or Federal savings association may no longer rely on that written legal opinion to demonstrate that its liability is limited and must notify the appropriate OCC supervisory office and remediate its risks as described in § 7.1026(e)(3).

One commenter asked for clarification that, once a bank or savings association has joined a payment system and obtained a legal opinion, it does not need to undertake that process again unless there is a material change to the liability or indemnification provisions applicable to the bank or savings association. The OCC intended this result and, thus, is modifying the final rule to clarify that, so long as there are no material changes to the liability or indemnification requirements applicable to the bank or savings association since the issuance of the written legal opinion, the bank or savings association may consider its open-ended liability to be limited.

**Establishment and Operation of a Remote Service Unit by a National Bank (New § 7.1027/Former § 7.4003)**

Section 7.4003 provides that a national bank can establish and operate a remote service unit (RSU) pursuant to 12 U.S.C. 24(Seventh). This section also states that an RSU does not constitute a branch under 12 U.S.C. 36(j) and is not subject to State geographic or operational restrictions or licensing laws. Section 7.4003 defines an RSU as an automated facility, operated by a customer of a bank, that conducts banking functions, such as receiving deposits, paying withdrawals, or lending money. This section provides examples of an RSU, specifically listing an automated teller machine (ATM), automated loan machine, automated device for receiving deposits, personal computer, telephone, and other similar electronic devices. Finally, this section provides that an RSU may be equipped with a telephone or tele-video device that allows contact with bank personnel.

The OCC proposed to amend § 7.4003 to expand the definition of an RSU to include either an automated or unstaffed facility and to add drop boxes to the list of RSU examples. Although the OCC has historically treated drop boxes as branches, the OCC believes that interpreting both the terms ATM and RSU to require automation leads to incongruous results where a non-automated facility such as a drop box is considered a branch but an automated facility such as an ATM is not, despite a drop box functioning less like a full branch than an ATM. The OCC also proposed to move § 7.4003 to subpart A of part 7 as new § 7.1027 so that it would be in the same subpart as other branching provisions of part 7.

The OCC received one comment on the proposed amendments to § 7.4003. The commenter opposes the changes to § 7.4003 and states that excluding drop boxes from the definition of branch by including them in the definition of RSU is inconsistent with Supreme Court precedent. The commenter states that the change is inconsistent with OCC precedent and the OCC does not have the authority to include drop boxes and other unstaffed facilities within the RSU/ATM exclusion. The commenter also states that when Congress amended 12 U.S.C. 36(j) to exclude ATMs and RSUs from the definition of branch, it chose to only exclude automated facilities and purposefully chose not to exclude drop boxes or other unstaffed facilities that lack automation. Finally, the commenter states that regardless of where the RSU regulations are placed, to the extent that the OCC maintains that State operational and licensing restrictions are preempted with respect to non-branch offices, then, in expanding the scope of permissible non-branch office activities, the OCC is making a “preemption determination” under the National Bank Act that must comply with the procedural and substantive requirements applicable to such determinations.

These comments misunderstand the interaction between judicial precedent and the insertion of the term “remote service unit” into 12 U.S.C. 36(j) and ignore the plain language of 12 U.S.C. 36(j). The Supreme Court decision in *First National Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122 (1969) (*Plant City*), which held that a drop box constituted a branch, was decided before Congress amended 12 U.S.C. 36(j) to exclude RSUs and ATMs from the definition of branch.<sup>74</sup> Therefore, the *Plant City* decision did not address whether drop boxes fit

within the definition of an RSU and thus are exempted from the 12 U.S.C. 36 branching restrictions.

Interpreting 12 U.S.C. 36(j) in a way that defines ATMs and RSUs in a distinct manner is a better reading of the plain language of 12 U.S.C. 36(j) and leads to the logical conclusion that non-automated, unstaffed facilities such as drop boxes should be included in the definition of RSU. Specifically, interpreting “automated teller machine” and “remote service unit” to be synonymous (*i.e.*, automated, unstaffed facilities) would construe two different phrases to have the same meaning and renders the second phrase useless. Congress included the term “automated” in the phrase “automated teller machine” but did not include the term “automated” in the phrase “remote service unit,” suggesting that Congress did not necessarily intend for the term “remote service unit” to only apply to automated facilities. Though the OCC has historically treated drop boxes as branches based on the fact that drop boxes are not automated, the agency is now adopting a new position based on a reading of the plain language of the statute that avoids rendering statutory language superfluous and producing illogical results whereby drop boxes are considered branches despite having less branch-like functionality than ATMs.

The OCC also disagrees with the commenter’s statement that the proposed amendments to § 7.4003 constitute a “preemption determination” under the National Bank Act. Case law is clear that it is Federal law, not State law, that determines what is considered a “branch” of a national bank for the purposes of 12 U.S.C. 36(j).<sup>75</sup> The OCC is merely clarifying how it interprets the ambiguous language in 12 U.S.C. 36(j). As noted above, Congress did not define “automated teller machine” or “remote service unit” in 12 U.S.C. 36(j), so the OCC must interpret these phrases to resolve this silence.<sup>76</sup> This is not a “preemption determination” pursuant

to the National Bank Act. Accordingly, the OCC adopts these changes as proposed.

Establishment and Operation of a Deposit Production Office by a National Bank (New § 7.1028/Former § 7.4004)

Section 7.4004 provides that a national bank or its operating subsidiary may engage in deposit production activities at a site other than the main office or a branch of the bank, and further provides that a deposit production office (DPO) may solicit deposits, provide information about deposit products, and assist persons in completing application forms and related documents to open a deposit account. Section 7.4004 specifically states that a DPO is not a branch so long as the site does not receive deposits, pay withdrawals, or make loans. It further states that all deposit and withdrawal transactions of a bank customer using a DPO must be performed by the customer, either in person at the main office or a branch office of the bank or by mail, electronic transfer, or a similar method of transfer. Finally, this section states that a national bank may use the services of, and compensate, persons not employed by the bank in its deposit production activities. As with § 7.4003, the OCC proposed to move § 7.4004 to subpart A of part 7 as new § 7.1028 to place it in the same subpart as other interpretations regarding branching and non-branching functions. This change improves the organization of part 7. The OCC proposed no other changes to this section except for a non-substantive change to its wording. The OCC received no comments on new § 7.1028 and adopts it as proposed.

Combination of National Bank Loan Production Office, Deposit Production Office, and Remote Service Unit (New § 7.1029/Former § 7.4005)

Section 7.4005 provides that a location at which a national bank operates a loan production office (LPO), a DPO, and an RSU is not a “branch” within the meaning of 12 U.S.C. 36(j) by virtue of that combination of operations because none of these locations individually constitutes a branch. The OCC proposed to add language regarding the extent of the permissible interaction between bank personnel and the RSU at a facility that combines an LPO or a deposit production office with an RSU. Specifically, the OCC proposed to add language that provides that an RSU at a combined location must be primarily operated by the customer with at most delimited assistance from bank

<sup>75</sup> See *First National Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122, 133–34 (1969) (rejecting the contention by *amicus curiae* National Association of Supervisors of State Banks that State law definitions of what constitutes “branch banking” must control the content of the Federal definition of “branch.”).

<sup>76</sup> See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”).

<sup>74</sup> EGRPRA, Section 2204 (1996).

personnel.<sup>77</sup> The OCC also proposed to move § 7.4005 to subpart A of part 7, as new § 7.1029. The OCC received no comments on these changes and adopts them as proposed.

#### Permissible Derivatives Activities for National Banks (New § 7.1030)

The proposal included a new § 7.1030 addressing derivatives activities permissible for national banks.<sup>78</sup> This new section incorporated and streamlined the framework in OCC interpretive letters discussing bank-permissible derivatives activities.<sup>79</sup> The proposed rule addressed five functional categories of permissible derivatives activities: (1) Derivatives referencing underlyings a national bank may purchase directly as an investment; (2) derivatives with any underlying to hedge the risks arising from bank-permissible activities; (3) derivatives with any underlying that are customer-driven, cash-settled and either perfectly-matched or portfolio-hedged; (4) derivatives with any underlying that are customer-driven and physically-settled by transitory title transfer; and (5) derivatives with any underlying that are customer-driven, physically-settled (other than by transitory title transfer), and physically-hedged. The OCC is adopting § 7.1030 with the substantive and technical changes described below.

**Authority.** Under the proposal, paragraph (a) of new § 7.1030 specified that the section is issued pursuant to 12 U.S.C. 24(Seventh). Paragraph (a) further specified that a national bank may only engage in derivatives transactions in accordance with the requirements of this section. The OCC did not receive any comments on this paragraph and is adopting paragraph (a) as proposed.

**Definitions.** In paragraph (b), the proposed rule incorporated several terms that are commonly used in OCC

derivatives interpretive letters. The proposed rule also defined certain terms for the first time to promote transparency and consistency among institutions. For the reasons described below, the OCC is adopting these definitions as proposed.

• **Customer-driven.** The proposed rule defined “customer-driven” to mean a transaction entered into for a customer’s valid and independent business purpose. As explained in the preamble to the proposed rule,<sup>80</sup> this approach is consistent with the definition used in OCC interpretive letters.<sup>81</sup> The preamble explained that this focus on the customer recognizes that a number of derivatives activities are permissible for a national bank because the bank is acting as a financial intermediary for the customer. A customer-driven transaction would not include a transaction entered into for the purpose of speculating in derivative, currency, commodity, or security prices.<sup>82</sup> Similarly, a customer-driven transaction would not include a transaction the principal purpose of which is to deliver to a national bank assets that the national bank could not invest in directly.

The OCC received one comment on this proposed definition. The commenter said that the final rule should clarify that “customer-driven” derivatives activities continue to include the types of permissible derivatives transactions described in Interpretive Letter 1018. The commenter also said the final rule should make clear that, while speculation cannot be the purpose for which the national bank enters into the transaction, no such limitation is imposed as to the purpose for which the customer enters into the transaction and that the OCC should confirm that an otherwise bank-permissible derivative transaction entered into by a national bank as a financial intermediary would be viewed as “customer-driven,” so long as the national bank and its customer have bilaterally negotiated and agreed to the terms of the transaction, regardless of the execution mechanism selected by the bank and its customer. Finally, the commenter said that the limitation in the proposed definition specifying that

a customer-driven transaction does not include “a transaction the principal purpose of which is to deliver to a national bank assets that the national bank could not invest in directly” does not prohibit physically settled derivatives.

The OCC intended the proposed definition to reflect the term “customer-driven” as it has been used in prior OCC interpretations, and the OCC does not believe any changes to the definition are necessary in response to the commenter. First, the definition does not prohibit customer-driven mirror trades through affiliates as described in Interpretive Letter 1018.<sup>83</sup> National banks should be aware that these activities are subject to sections 23A and 23B of the Federal Reserve Act and 12 CFR part 32.<sup>84</sup>

Second, the OCC does not believe any changes to the definition of “customer-driven” are necessary to confirm that a national bank, rather than its customer, may not have a speculative purpose. The proposed definition applies to a transaction entered into for a customer’s “valid and independent business purpose.” The OCC recognizes that bank customers’ valid and independent business purposes may include the customer obtaining directional exposure to an underlying, for example, as part of the customer’s investment strategy.<sup>85</sup> The requirement that a transaction be “customer-driven” applies only to the national bank; it does not apply to the bank’s customer. Therefore, the OCC does not believe that any changes to the definition of “customer-driven” are necessary to confirm that the rule does not limit a national bank’s customer’s valid and independent business purpose.

Third, the OCC declines to adopt the commenter’s proposed interpretation that a derivative transaction entered into by a national bank as a financial intermediary would be viewed as “customer-driven,” so long as the national bank and its customer have bilaterally negotiated and agreed to the terms of the transaction, regardless of the execution mechanism selected by the bank and its customer. A national bank may use both over-the-counter trades or trading platforms to execute

<sup>77</sup> This language is based on published OCC precedent. See OCC Interpretive Letter No. 1165 (June 28, 2019).

<sup>78</sup> Permissible financial derivatives transactions for Federal savings associations are addressed separately in 12 CFR 163.172.

<sup>79</sup> OCC legal interpretations have confirmed certain derivatives activities are permissible for national banks under 12 U.S.C. 24(Seventh). Congress has recognized national banks’ authority to engage in derivatives activities in various statutes. See, e.g., 12 U.S.C. 84 (incorporating credit exposure from derivatives into the legal lending limit); Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338, section 206(a)(6) (defining “identified banking product” to include any swap agreement except an equity swap with a retail customer); 12 U.S.C. 371c (defining “covered transaction” between a bank and its affiliates to include a derivative transaction); Dodd-Frank Act section 716 (15 U.S.C. 8305); Dodd-Frank Act section 731 (7 U.S.C. 6s); Dodd-Frank Act section 764 (15 U.S.C. 780–10).

<sup>80</sup> 85 FR 40794, at 40804.

<sup>81</sup> E.g., OCC Interpretive Letter No. 1160 (Aug. 22, 2018).

<sup>82</sup> OCC interpretations have specified that customer-driven derivatives transactions do not include transactions entered into by the bank for the purpose of speculating in the underlying commodity or security prices. See e.g., OCC Interpretive Letter No. 1033 (Jun. 14, 2005); OCC Interpretive Letter No. 892 (Sept. 13, 2000); OCC Interpretive Letter No. 684 (Aug. 4, 1995); OCC No-Objection Letter 90–1 (Feb. 16, 1990).

<sup>83</sup> Interpretive Letter 1018 specified that the bank would only mirror derivative transactions with subsidiaries and affiliates that are customer-driven and bank permissible. OCC Interpretive Letter No. 1018 (Feb. 10, 2005).

<sup>84</sup> See also Margin and Capital Requirements for Covered Swap Entities, 85 FR 39754, at 39764 (July 1, 2020) (discussing the views of the Board of Governors of the Federal Reserve System (Federal Reserve Board) on the application of sections 23A and 23B to swaps between a bank and its affiliate).

<sup>85</sup> See, e.g., OCC Interpretive Letter No. 1090 (Oct. 25, 2007).

customer-driven transactions. However, the fact that a trade is bilaterally negotiated does not, on its own, mean that the trade is customer-driven (*i.e.*, is entered into for a customer's valid and independent business purpose and does not have the principal purpose of delivering to a national bank assets that the national bank could not invest in directly). For example, a bilaterally negotiated transaction between a national bank and a third party that, under the facts and circumstances, has the purpose of giving the national bank speculative exposure to underlying commodity or security prices would not be considered customer-driven under this definition.

Finally, the OCC confirms that the language in the definition of "customer-driven" stating that the principal purpose of the transaction cannot be to deliver to a national bank assets that the national bank could not invest in directly does not preclude a bank from engaging in permissible physically-settled derivatives activities. Paragraphs (c)(4) and (5) of the final rule explicitly permit national banks to engage in customer-driven physically-settled derivatives financial intermediation transactions. For the foregoing reasons, the OCC is adopting the definition of "customer-driven" as proposed.

• *Perfectly-matched.* The proposal included a definition of "perfectly-matched" that was substantially similar to prior OCC interpretive letters. Specifically, the proposal defined perfectly-matched to mean two back-to-back derivative transactions that offset risk with respect to all economic terms (*e.g.*, amount, maturity, duration, and underlying). The preamble to the proposal specified that, consistent with OCC interpretive letters, this definition would allow transactions to be considered "perfectly-matched" despite a difference in price between two derivatives when that difference reflects the bank's intermediation fee (in the form of a spread).<sup>86</sup>

The OCC received one comment on this proposed definition. First, this commenter said the OCC should adopt a broader concept of "appropriately hedged" rather than distinguishing between the definitions of "perfectly-matched" and "portfolio-hedged," which the commenter viewed as unnecessary. This commenter argued that a bifurcated definitional approach could potentially create ambiguity as to whether there may be certain types of derivative transactions that, while appropriately hedged in some manner

so as to offset the market risk of such transactions, may not fall within either technical definition, and thus would not be bank-permissible. This commenter further argued that, if the final rule maintains the distinction between "perfectly-matched" and "portfolio-hedged," it should expressly confirm that any derivative transaction the risks of which are appropriately offset, whatever the technique, will fall under one of these two definitions. The commenter argued that, if a permissible hedging technique does not fall within the definition of "perfectly-matched," then it should be assumed to fall within the definition of "portfolio-hedged."

The OCC disagrees with the commenter's view that these definitions are unnecessary and that they create ambiguity. OCC interpretations have long used the terms "portfolio-hedged" and "perfectly-matched" in analyzing the permissibility of national bank derivatives activities, and the distinction between these two activities is well-established and useful to the OCC's supervisory activities. The commenter describes certain types of transactions that they believe may not fall into the definition of either perfectly-matched or portfolio-hedged, such as using two or more derivatives to hedge a single customer transaction.<sup>87</sup> The OCC agrees these transactions generally would not fall into the definition of perfectly-matched, as OCC interpretive letters have used this definition consistently to describe mirror transactions with matching economic terms. Customer-driven intermediation transactions that are not perfectly-matched are still permissible if they are conducted as part of a portfolio-hedged derivatives program. As described further below, national banks may permissibly conduct such transactions as part of a portfolio-hedged derivatives program if the portfolio of transactions is hedged based on net unmatched positions or exposures in the portfolio. In response to the commenter's example of hedging a single derivative with multiple offsetting derivatives, the OCC confirms that a national bank would not be precluded from managing derivatives within a portfolio-hedged program on such a basis. The transactions may be permissible as portfolio-hedged derivatives transactions as long as the bank appropriately hedges net residual

risks resulting from the offsetting derivatives transactions.

The commenter also proposed that the OCC adopt a unified term such as "appropriately hedged" in lieu of "perfectly-matched" and "portfolio-hedged." The commenter suggested that such a definition should permit "appropriate and effective" hedging but does not specifically propose how this term should be defined. The definitions "perfectly-matched" and "portfolio-hedged" encompass the methods of hedging a national bank's market risk arising from permissible derivatives financial intermediation activities—whether at the individual transaction level through back-to-back transactions or at the level of net risks within a derivatives portfolio. The OCC believes that incorporating and defining these longstanding hedging approaches reflecting the OCC's interpretive letters will not cast doubt on the permissibility of currently-recognized national bank derivatives activities; furthermore, it reflects the OCC's established expectation that, for derivatives activities relying on portfolio hedging for their permissibility, the national bank should have the appropriate hedging skills and sophistication to manage the net risks of its derivatives portfolio. Accordingly, the final rule retains the definitions for "perfectly-matched" and "portfolio-hedged" as proposed.

The commenter further said that, if the distinction between perfectly-matched and portfolio hedged is retained, the definition of "perfectly-matched" should be revised to treat corresponding transactions as perfectly-matched hedges so long as they substantially offset risk with respect to all material terms, so as to make clear that differences between the transaction with little or no effect on market risk (*e.g.*, different maturity dates between the customer derivative and the offsetting future, or different margin arrangements) do not bar the transactions from being treated as perfectly-matched.<sup>88</sup> The OCC disagrees with this proposed interpretation. OCC precedents have long defined perfectly-matched transactions as transactions that offset risk with respect to all economic terms (*e.g.*, amount, maturity, duration, and underlying). The OCC has described a perfectly-matched

<sup>86</sup> OCC Interpretive Letter No. 1110 (Jan. 30, 2009).

<sup>87</sup> The commenter also raised the example of hedging an equity derivative by holding physical equity positions. This example is discussed below in the section addressing physical hedging activities.

<sup>88</sup> The commenter also discussed physically-hedged transactions that are hedged on a transaction-by-transaction basis. This example is discussed below in relation to the permitted physical hedging activities under § 7.1030(c)(5). As discussed below, such transactions are not considered perfectly-matched under the final rule but are addressed in § 7.1030(c)(5).

transaction as one that does not expose the national bank to price risk associated with the underlying so that the main risk to the bank is credit risk.<sup>89</sup> Two transactions with different economic terms could expose the national bank to other risks. For example, two transactions with different maturity dates could expose the national bank to price risk in the time period between the two maturity dates. Accordingly, the OCC is not expanding the definition of “perfectly-matched” to incorporate such transactions. However, as described above, such transactions may be permissible as part of a portfolio-hedged derivatives program if the national bank appropriately manages net unmatched exposures in the derivatives portfolio.

- *Portfolio-hedged.* The proposal included a definition of portfolio-hedged that was substantially similar to prior OCC interpretive letters. Specifically, the OCC proposes to define “portfolio-hedged” to mean that a portfolio of derivatives transactions is hedged based on net unmatched positions or exposures in the portfolio. The proposed definition refers to unmatched “positions or exposures” to clarify that hedging on a portfolio basis may involve hedging based on various risk exposures with different instruments in accordance with applicable policies and procedures and risk limits of the national bank. This definition is consistent with OCC interpretations that have typically used “portfolio-hedged” to describe the practice of hedging based on net residual risk position in a portfolio of positions.<sup>90</sup> The OCC has explained that this method of hedging can reduce transactional costs and operational risks because fewer transactions need to be executed relative to the number of transactions executed under perfectly-matched hedging (in which the national bank must offset each transaction on an individual basis).<sup>91</sup> As described above, a national bank would not be precluded from managing derivatives within a portfolio-hedged program on a more specific basis (for example, by managing the risk of a particular derivative transaction by entering into two or more offsetting transactions). The OCC did not receive any additional comments on the definition of portfolio-hedged and is adopting the definition as proposed.

- *Physical hedging or physically-hedged.* The proposal defined “physical

hedging” and “physically-hedged” to mean holding title to or acquiring ownership of an asset (for example, by warehouse receipt or book entry) to solely manage the risks arising out of permissible customer-driven derivatives transactions. The OCC intended this definition to be consistent with the description of commodities physical hedging activities that the OCC has identified as permissible in prior interpretive letters and in OCC Bulletin 2015–35 (Aug. 4, 2015). Under the proposal, this definition also applies to physical hedging of customer-driven derivatives referencing securities. The OCC did not receive any comments on the definition of “physically-hedged” and is adopting the definition as proposed.

- *Physical settlement or physically-settled.* The proposal defined “physical settlement” or “physically settled” to mean accepting title to or acquiring ownership of an asset. The preamble to the proposal explained that physical settlement stands in contrast to cash-settled transactions, in which counterparties do not exchange the underlying assets. The preamble to the proposal also explained that physical settlement includes transitory title transfer, which is discussed below. The OCC did not receive any comments on the definition of “physical settlement” or “physically-settled” and is adopting the definition as proposed.

- *Transitory title transfer.* The proposal defined “transitory title transfer” to mean a transaction that is settled by accepting and immediately relinquishing title to an asset. The proposal explained that this definition is intended to be consistent with prior OCC interpretive letters, which explain that transitory title transfer is a means of physical settlement in which a counterparty only briefly holds title to the underlying asset.<sup>92</sup> The preamble explained that, consistent with prior OCC interpretations, transitory title transfer does not entail a national bank taking physical possession of a commodity.<sup>93</sup> The OCC did not receive any comments on the definition of transitory title transfer and is adopting the definition as proposed.

- *Underlying.* The proposal defined the term “underlying” to mean the

reference asset, rate, obligation, or index on which the payment obligation(s) between counterparties to a derivatives transaction is based. The OCC included “underlying” as a defined term because the notice requirement in paragraph 7.1030(d) is triggered when a national bank expands its derivatives activities to include additional types of underlyings. The OCC received one comment on this definition. The commenter said the OCC should clarify that the definition of “underlying” should be construed broadly and flexibly over time, so as not to inadvertently introduce ambiguity with respect to whether a particular asset or quantitative measure may constitute an underlying of a permissible derivative transaction. However, the commenter did not provide examples of any particular asset or quantitative measure that would not be encompassed within the proposed definition. The OCC does not believe any changes to the definition of underlying are necessary to provide appropriate flexibility over time. The proposed definition encompasses any “asset, rate, obligation, or index,” which the OCC believes sufficiently encompasses the underlyings used by national banks as part of their permissible derivatives financial intermediation activities, and that these categories are in and of themselves sufficiently flexible. Accordingly, the final rule adopts the definition of underlying as proposed.

The OCC requested comment on whether the final rule should include a definition of the term “derivative” and whether a definition of this term would be necessary to appropriately scope the proposed provision and whether any definition would be workable in practice. The OCC received one comment that did not support defining “derivative” in the final rule. This commenter said that there is no need for the rule to define “derivative,” as there is generally a common understanding of the term, as reflected in existing precedent. The OCC agrees that there is a common understanding of the term “derivative” and notes that prior OCC interpretations generally have not defined the term. Accordingly, the final rule does not include a specific definition of the term “derivative.” The OCC intends to implement the rule based on the common industry and supervisory understanding regarding the type of transactions that constitute derivatives.

*Permissible Derivatives Activities Generally.* The proposal addressed five categories of permissible derivatives activities. For the reasons described below the final rule retains these five

<sup>89</sup> See, e.g., OCC Interpretive Letter No. 1060 (Apr. 26, 2006).

<sup>90</sup> See e.g., OCC Interpretive Letter No. 1073 (Oct. 19, 2006); OCC Interpretive Letter No. 1060.

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., OCC Interpretive Letter No. 962 (Apr. 21, 2003).

<sup>93</sup> See, e.g., OCC Interpretive Letter No. 1073; OCC Interpretive Letter No. 1060; OCC Interpretive Letter No. 1025 (Apr. 25, 2005); OCC Interpretive Letter No. 962; OCC Interpretive Letter No. 684. See also 81 FR 96353, at 96355 (Dec. 30, 2016) (explaining “transitory title transfer typically does not entail physical possession of a commodity; the ownership occurs solely to facilitate the underlying transaction and lasts only for a moment in time.”).

categories as proposed. These categories are discussed below.

- *Derivatives Referencing*

*Underlyings in which a National Bank May Invest Directly.* Section 7.1030(c)(1) of the proposed rule specified that a national bank may engage in derivatives transactions with payments based on underlyings that a national bank is permitted to purchase directly as an investment. The OCC intended this provision to reflect OCC interpretive letters that have recognized that national banks may engage in derivatives activities where the derivative references assets that a national bank could purchase directly as an investment.<sup>94</sup> The OCC did not receive any comments on paragraph (c)(1) and is adopting this paragraph as proposed. As specified in the preamble to the proposal, paragraph (c)(1) addresses only derivatives on underlyings that a national bank would be permitted to purchase directly as principal. For example, an underlying that a national bank could hold only as a nonconforming investment under 12 CFR part 1 or only in satisfaction of debts previously contracted would not be a permissible underlying under this paragraph.

- *Hedging Bank-Permissible Activities with Derivatives.* Section 7.1030(c)(2) of the proposed rule provided that a national bank may engage in derivatives transactions with any underlying to hedge the risks arising from bank-permissible activities after providing notice to its EIC.<sup>95</sup> The preamble to the proposal explained that the OCC has recognized that a national bank may hedge the risks of bank-permissible activities using derivatives on underlyings in which a national bank may not invest directly.<sup>96</sup> The OCC did

<sup>94</sup> See, e.g., OCC Interpretive Letter No. 494 (Dec. 20, 1989); OCC Interpretive Letter No. 422 (Apr. 11, 1988); OCC No Objection Letter No. 86–13 (Aug. 8, 1986). See also, “Report to Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act” at 86–90 (September 2016), available at <https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/pub-report-to-congress-sec-620-dodd-frank.pdf> (Section 620 Report).

<sup>95</sup> In contrast, if a national bank engaged in hedging using derivatives on underlyings in which a national bank could invest directly, the bank would not need to provide notice because this activity could be conducted under § 7.1030(c)(1) of the rule.

<sup>96</sup> The OCC has also long recognized that a national bank may hedge its risk using derivatives on underlyings that a national bank would be permitted to invest in directly. For example, a national bank may use futures contracts on exchange, coin, or bullion to hedge activities conducted pursuant to a national bank’s statutory authority to buy and sell exchange, coin, or bullion. Similarly, a national bank may use futures to hedge against the risk of loss due to the interest rate

not receive any comments on this section and is adopting it as proposed.

- *Derivatives Financial*

*Intermediation for Customers.* Sections 7.1030(c)(3) through (5) of the proposal addressed derivatives financial intermediation activities. These sections of the proposal were intended to reflect the conclusions of OCC interpretive letters that have recognized that a national bank may act as a financial intermediary in customer-driven<sup>97</sup> derivatives transactions on a variety of reference assets as part of the business of banking.<sup>98</sup> These letters have recognized national banks’ authority to enter into cash-settled, customer-driven derivatives transactions both on a perfectly-matched<sup>99</sup> and portfolio-hedged basis.<sup>100</sup> These letters have also recognized in this context the permissibility of physical settlement by transitory title transfer.<sup>101</sup> Additionally,

fluctuations inherent in bank loan operations, U.S. Treasury Bills, and certificates of deposit. These activities may be conducted under § 7.1030(c)(1) of the final rule.

<sup>97</sup> A “customer-driven” transaction is one entered into for a customer’s valid and independent business purposes. See, e.g., OCC Interpretive Letter No. 1160; OCC Interpretive Letter No. 892. This definition is addressed in § 7.1030(b) of the rule.

<sup>98</sup> See, e.g., OCC Interpretive Letter No. 937 (Jun. 27, 2002); OCC Interpretive Letter No. 892; No-Objection Letter 87–5 (Jul. 20, 1987).

<sup>99</sup> See, e.g., OCC Interpretive Letter No. 1110 (longevity indexes); OCC Interpretive Letter No. 1101 (Jul. 7, 2008) (certain risk indexes); OCC Interpretive Letter No. 1089 (Oct. 15, 2007); (specific property indexes); OCC Interpretive Letter No. 1081 (May 15, 2007) (specific property indexes); OCC Interpretive Letter No. 1079 (Apr. 19, 2007) (inflation indexes); OCC Interpretive Letter No. 1065 (Jul. 24, 2006) (petroleum products, agricultural oils, grains and grain derivatives, seeds, fibers, foodstuffs, livestock/meat products, metals, wood products, plastics and fertilizer); OCC Interpretive Letter No. 1063 (Jun. 1, 2006) (hogs, lean hogs, pork bellies, lumber, corrugated cardboard, and polystyrene); OCC Interpretive Letter No. 1059 (Apr. 13, 2006) (old corrugated cardboard #11, polypropylene: injection molding (copoly), polypropylene: All grades, Dow Jones AIG Commodity Index); OCC Interpretive Letter No. 1056 (Mar. 29, 2006) (frozen concentrate orange juice, polypropylene); OCC Interpretive Letter No. 1039 (Sept. 13, 2005) (crude oil, natural gas, heating oil, natural gasoline, gasoline, unleaded gas, gasoil, diesel, jet fuel, jet-kerosene, residual fuel oil, naphtha, ethane, propane, butane, isobutane, crack spreads, lightends, liquefied petroleum gases, natural gas liquids, distillates, oil products, coal, emissions allowances, benzene, dairy, cattle, wheat, corn, soybeans, soybean meal, soybean oil, cocoa, coffee, cotton, orange juice, sugar, paper, rubber, steel, aluminum, zinc, lead, nickel, tin, cobalt, iridium, rhodium, freight, high density polyethylene (plastic), ethanol, methanol, newsprint, paper (linerboard), pulp (kraft), and recovered paper (newsprint)).

<sup>100</sup> See, e.g., OCC Interpretive Letter No. 1073 (aluminum, nickel, lead, zinc, and tin); OCC Interpretive Letter No. 1060 (coal); OCC Interpretive Letter No. 1040 (emissions allowances); OCC Interpretive Letter No. 937 (electricity).

<sup>101</sup> See OCC Interpretive Letter No. 1073 (aluminum, nickel, lead, zinc, and tin); OCC Interpretive Letter No. 1060 (coal); OCC Interpretive

these letters have recognized that a national bank may engage in customer-driven financial intermediation derivatives activities that are physically-settled (other than by transitory title transfer) and to physically hedge those derivatives in certain circumstances.<sup>102</sup> The OCC proposed to incorporate and streamline the framework contained in its interpretive letters addressing derivatives financial intermediation activities in paragraphs 7.1030(c)(3) through (5). These paragraphs are adopted largely as proposed but with the targeted changes discussed below.

The OCC received one comment addressing these sections. This commenter recommended revising § 7.1030(c) to allow national banks to physically hedge cash-settled derivatives, in addition to physically-settled derivatives. This commenter also said, to the extent the final rule continues to differentiate between cash-and physically-settled trades, the final rule should also confirm that, where a national bank has a physically-settled trade, the settlement of which it directs to an affiliate, the trade would be deemed to be cash-settled. The final rule incorporates one change in response to this comment to clarify the rule’s application to physical hedging involving transactions other than commodity derivatives. OCC interpretive letters and guidance addressing physical hedges of commodity derivatives are typically limited to hedges of physically-settled transactions.<sup>103</sup> The OCC therefore disagrees with the commenter’s suggestion that OCC interpretations generally permit physical hedging for

Letter No. 1025 (electricity); Interpretive Letter No. 962 (electricity). The term “transitory title transfer” means accepting and instantaneously relinquishing title to the commodity, as a party in a “chain of title” transfer. OCC Interpretive Letter No. 1025.

<sup>102</sup> See, e.g., OCC Interpretive Letter No. 1040; OCC Interpretive Letter No. 892; OCC Interpretive Letter No. 684. OCC interpretive letters have explained that physical delivery can help to reduce the risk in customer-driven commodity derivatives transactions if the activity is conducted in accordance with safe and sound banking practices and would achieve a more accurate and precise hedge than a cash-settled transaction.

<sup>103</sup> See OCC Interpretive Letter No. 1040 (“The Bank may conduct the proposed customer-driven, physically settled emissions derivative business and hedge risks arising from these permissible banking activities as an extension of its existing energy-related commodities derivatives business . . . .”); OCC Interpretive Letter No. 684 (“the OCC concludes that it is legally permissible for a national bank to hedge the financial exposure arising from otherwise permissible banking activities in markets that involve physical delivery of commodities and, in connection with such hedging activities, to make or take physical delivery of commodities . . . .”); OCC Bulletin 2015–35, Quantitative Limits on Physical Commodity Transactions (Aug. 4, 2015).

cash-settled derivatives. However, the OCC recognizes that interpretive letters addressing physical hedges of equity derivatives do not always include the same condition.<sup>104</sup> In light of prior interpretations' treatment of equity derivatives transactions, the final rule removes the condition that a physical hedge of a derivative other than a commodity derivative must hedge a physically-settled transaction. The final rule effects this change by removing "physically-settled (other than by transitory title transfer)" from § 7.1030(c)(5) and including physical settlement as a requirement for physical hedging involving commodities in new § 7.1030(e)(5)(iii). These changes clarify that physical hedging involving securities is permissible for cash-settled transactions, but physical hedging involving commodities is permissible only to hedge physically-settled transactions. In response to the comment regarding physically-settled transactions where physical settlement is directed to an affiliate, the OCC confirms that the type of transactions described in Interpretive Letter 949 are permissible under the final rule as long as the transactions are cash-settled with respect to the national bank.<sup>105</sup>

Additionally, this commenter recommended that the OCC clarify the application of the definitions "perfectly-matched" and "portfolio-hedged" to physically-hedged derivatives transactions. The commenter described that a derivative transaction that is physically hedged on an individual basis, such as a total return swap that is hedged via holding the underlying equity position would not necessarily be covered by the definition of "perfectly-matched" which is limited to two back-to-back derivatives transactions. As discussed above, the OCC believes it is preferable to retain the definition of "perfectly-matched" as used in prior OCC interpretations. However, to address the commenter's concern that the activities described in § 7.1030(c)(5) will not be perfectly matched under this definition, the final rule replaces the term "perfectly-matched" with "hedged on a transaction-by-transaction basis." This change is consistent with prior interpretations that describe physical hedging on a transaction-by-transaction

basis rather than on a "perfectly-matched" basis.<sup>106</sup>

Relative to prior OCC interpretations, the final rule makes fewer distinctions based on the particular underlying or how the national bank hedges its derivatives financial intermediation activity. While prior interpretations typically analyzed both the underlying and the bank's method for hedging the customer-driven derivative (*i.e.*, perfectly-matched versus portfolio-hedged), the final rule permits customer-driven, cash-settled derivatives transactions on any underlying, whether perfectly-matched or portfolio-hedged. The OCC recognizes that financial intermediation in derivatives continues to evolve and that the markets for derivatives on underlyings that the OCC has not previously addressed through interpretations may have sufficient liquidity and depth to allow a bank to conduct the activity as a financial intermediary. Similarly, the OCC recognizes that these same factors may allow a national bank to hedge its customer-driven derivatives activities in evolving ways—whether by portfolio hedging or physical hedging—consistent with conducting the activity as a financial intermediary. Accordingly, the OCC is adopting these provisions with the targeted changes described above.

The proposal requested comment on whether the rule should reflect any additional safety and soundness standards regarding the underlyings that are permissible for financial intermediation in derivatives and how national banks may hedge these activities. The proposal specifically requested comment on whether the regulation should include additional language relating to the liquidity of the market for permissible customer-driven derivatives activities. The OCC did not receive any comments on this request and is not adopting any additional safety and soundness standards or language related to the underlyings that are permissible for derivatives financial intermediation activities. As with any national bank permissible activity, general safety and soundness standards apply to these activities.<sup>107</sup> In addition, the final rule adopts specific requirements for physical hedging

activities in § 7.1030(e) and (c)(5) (prohibiting a national bank from taking physical delivery of any commodity by receipt of physical quantities of the commodity on bank premises).

*Notice requirement.* Section 7.1030(d) of the proposal required a national bank to provide written notice to its EIC prior to engaging in activity using derivatives referencing assets that a national bank could not invest in directly. The OCC intended this provision to be consistent with OCC interpretations that included a process in which the national bank provides notice to its EIC about the business and management practices the bank will employ in performing the derivatives activity as financial intermediation.<sup>108</sup> The OCC received one comment addressing the notice process. This commenter said that the notice requirements should be revised to ensure consistency in supervisory standards and to clarify that the proper role of supervisors in evaluating derivatives activities relates to consistently applying safety and soundness standards, not evaluating legal permissibility. Specifically, this commenter said the final rule should clearly distinguish between the legal permissibility of derivatives transactions (to be governed by § 7.1030 and the OCC's legal interpretations thereof) from firm-specific prudential concerns, to be reviewed by the EIC and supervisory team; require an EIC to consult with OCC leadership before raising any categorical safety and soundness concerns about an activity; and provide for consistent and uniform standards with respect to evaluating the safety and soundness of certain types of derivatives activities as a categorical matter, with the EIC and supervisory team focusing only on idiosyncratic, bank-specific aspects of the relevant activity.

First, the OCC believes the rule appropriately identifies safety and soundness and legal permissibility considerations. For example, paragraph (c) identifies the legally permissible categories of derivatives activities, while paragraphs (d) and (e) establish the supervisory notice requirement and

<sup>104</sup> See OCC Interpretive Letter No. 892; OCC Interpretive Letter No. 1090.

<sup>105</sup> OCC Interpretive Letter No. 949 provides that the equity derivatives transactions under consideration in that letter would be cash settled with respect to the national bank and "[i]f under the terms of certain contracts the customer is permitted to elect physical settlement, an affiliate of the bank will make or receive physical delivery." OCC Interpretive Letter No. 949 (Sept. 19, 2002).

<sup>106</sup> OCC Interpretive Letter No. 1040 ("The Bank also proposes to hedge the market risk associated with the proposed emissions derivatives transactions on a transaction-by-transaction or portfolio basis, primarily with physical emissions allowances.").

<sup>107</sup> As discussed below, the final rule includes new paragraph (f), which explicitly provides that a national bank must adhere to safe and sound banking practices in conducting the activities described in § 7.1030.

<sup>108</sup> For example, OCC Interpretive Letter No. 1160 contemplates that a bank would provide written notification to its EIC prior to commencing a derivatives financial intermediation business for a reference asset addressed in prior OCC interpretive letters. This process replaced the no-objection process that was typically included in prior OCC interpretive letters. See, e.g., OCC Interpretive Letter No. 1065. The notice provision of the final rule also replaces the no-objection process contemplated in OCC interpretive letters addressing hedging activities using derivatives on underlyings in which a national bank could not invest directly. See OCC Interpretive Letter No. 896 (Aug. 21, 2000).

additional safety and soundness requirements, respectively. For further clarity, however, the final rule adds a new paragraph (f) confirming that a national bank must adhere to safe and sound banking practices in conducting the activities described in § 7.1030. The provision specifically requires a bank to have a risk management system (policies, processes, personnel, and control system) that effectively manages (*i.e.*, identifies, measures, monitors, and controls) these activities' interest rate, credit, liquidity, price, operational, compliance, and strategic risks. This provision clarifies that, in addition to being within a national bank's legal authority, derivatives activities must also be conducted in a safe and sound manner. As part of their regular supervisory activities, OCC supervisors consider both whether activities are safe and sound, as well as if they are conducted in compliance with applicable law.

The final rule does not require supervisory staff to consult with OCC leadership before raising "categorical safety and soundness concerns" about a derivatives activity as the commenter suggested. Nor does the final rule prescribe uniform regulatory standards specific to evaluating the safety and soundness of certain types of derivatives activities. Making assessments with respect to the safety and soundness of an activity is the key function of OCC supervisors. The OCC has established generally applicable safety and soundness standards by regulation<sup>109</sup> and has issued extensive guidance on the examination process.<sup>110</sup> Requiring additional internal processes before an examiner may raise concerns regarding an activity could interfere with this important function. Accordingly, OCC supervisors will examine national bank derivatives activities as part of their regular and ongoing examination and supervision activities.

The OCC expects the notice requirement in the final rule to enhance prudential supervision of national bank derivatives activities by ensuring that banks evaluate the risks of the activities both at inception and on an ongoing basis. In addition, the OCC expects that incorporating notice as a regulatory requirement will ensure consistency in notice practices across OCC-supervised institutions. Like the proposal, the final rule requires the written notice to include information that is substantially similar to the information that is discussed in Interpretive Letter 1160.

Specifically, the written notice must include a detailed description of the proposed activity, including the relevant underlying(s); the anticipated start date of activity; and a detailed description of the national bank's risk management system (policies, processes, personnel, and control systems) for identifying, measuring, monitoring, and controlling the risks of the activity.

The notice requirement does not impose a prior approval requirement. Rather, the notice is designed to make OCC supervisors aware of a national bank's derivatives activities so that such activities can be appropriately scoped into OCC's ongoing supervision and oversight of the bank's safety and soundness. In addition, having awareness of a bank's derivatives activities will enable the OCC to raise questions as to whether the derivatives activity can be conducted in a safe and sound manner, or whether the derivatives activity is within the scope of those legally authorized for a national bank, before the bank activities commence or at any time, as is the case with any other permissible bank activities.

Like the proposal, § 7.1030(d)(1) of the final rule requires a national bank to provide its EIC notice prior to engaging in any of the derivatives hedging or financial intermediation activities described in § 7.1030(c)(2) through (5) for the first time. This notice requirement applies, for example, if a bank has previously engaged in cash-settled derivatives with respect to a particular underlying as described in § 7.1030(c)(3) but seeks to begin physically settling transactions as described in § 7.1030(c)(4) or (5). Likewise, a national bank must provide notice prior to first engaging in derivatives hedging activities pursuant to § 7.1030(c)(2) or expanding the bank's derivatives hedging activities to include a new category of underlying. Also like the proposal, under § 7.1030(d)(2) of the final rule, the bank must submit written notice at least 30 days before the national bank commences the derivatives activity.

The OCC requested comment on whether it was sufficiently clear when a notice would be required and what would constitute a "new category of underlying." The OCC specifically requested comments on whether the regulation text should list these categories and, if so, whether the regulation should specify that any new derivatives activities not falling within one of the specified categories also requires notice. The OCC received one comment in response to this request.

This commenter said that the final rule should not define categories of "underlying" by regulation, but rather should take a substantially more principles-based approach to determining when prior notice is required that looks primarily to the risk management implications and challenges of any potential new derivatives activity. Specifically, this commenter said the final rule should make clear that prior notice is required only when a national bank commences a new activity or modifies an existing activity that would expose the bank to, and require the bank to manage and control, a material and substantially new type of market risk. The commenter also said that no notice should be required under the final rule where a national bank engages in permissible derivatives activity that is hedged either (1) using mirrored transactions that involve no market risk or (2) on a nearly perfectly-matched basis that involve only de minimis residual market risk. In contrast, this commenter argued, where a national bank is engaged in derivatives activities that are hedged on a portfolio basis pursuant to which the bank is actively managing an inventory of market risks, imposing a notice requirement is appropriate as it would facilitate supervisory review of a bank's risk management and internal controls in implementing that hedging strategy.

The OCC disagrees and finds that, even when a national bank believes it is not exposed to a materially new type of market risk, there is supervisory value in receiving notice of the new activities. The considerations identified by the commenter—facilitating supervisory review of a bank's risk management and internal controls in implementing its hedging strategy—are relevant whether the activity is hedged on a perfectly-matched or portfolio-hedged basis.<sup>111</sup> Receiving a notice will allow supervisors to incorporate the activities into their overall supervisory strategy. The OCC disagrees that notice should not be required for derivatives transactions that the national bank determines involve de minimis market risk. Receiving notices in such circumstances is particularly important for banks that are engaging in derivatives activities for the first time or

<sup>111</sup> The notice requirement is expected to enhance supervision by providing OCC supervisors with comprehensive, up-to-date information on the activities in which the national bank is engaged. This information will assist OCC supervisors by ensuring they have an opportunity to assess a bank's ability to engage in derivatives activities in a safe and sound manner prior to the bank commencing the activity and provide them ongoing information as those activities expand to new categories.

<sup>109</sup> 12 CFR part 30.

<sup>110</sup> See, e.g., the Examination Process Series of the Comptroller's Handbook (June 2018).



expanding a limited derivatives business to incorporate additional derivatives products. The OCC believes that the notice process is a reasonable requirement in light of its value to supervisors. The notice process requires a limited amount of information that should be readily available to the bank and does not require that the bank receive approval prior to conducting the activity. Accordingly, the OCC continues to believe the notice process will provide an efficient notice standard for national banks engaging in derivatives activities. For the foregoing reasons, the OCC is adopting the notice requirement as proposed.

One commenter said that the final rule should make clear that national banks may continue to rely on guidance that they have previously received regarding the permissibility of derivatives activities and need not provide notice under proposed new § 7.1030 to continue to engage in activities that were commenced under the prior interpretive and supervisory framework before the final rule became effective. As described in the proposal, national banks that have provided notice to or received statements of no-objection from their EICs for particular derivatives activities consistent with the process in prior OCC interpretive letters would not be required to submit new notices for those activities.

*Additional requirements for physical hedging activities.* Section 7.1030(e) of the proposal incorporated the practices from prior interpretive letters and guidance related to physical hedging with securities and commodities.<sup>112</sup> The proposal included certain modifications to these practices to promote consistency in the practices national banks employ with respect to physical hedging activities. Specifically, the proposal applied the framework in interpretive letters addressing physical hedging using securities to all physical hedging activities involving underlyings in which a national bank could not invest directly. Under the proposed rule, a national bank could engage in physical hedging only if: (1) The national bank holds the underlying solely to hedge risks arising from derivatives transactions originated by customers for the customers' valid and independent business purposes; (2) the physical hedging activities offer a cost-effective means to hedge risks arising from permissible banking activities; (3) the national bank does not take anticipatory or maintain residual

positions in the underlying except as necessary for the orderly establishment or unwinding of a hedging position; and (4) the national bank does not acquire equity securities for hedging purposes that constitute more than five percent of a class of voting securities of any issuer.<sup>113</sup> The OCC did not receive any comments on these proposed requirements for physical hedging activities. Because these requirements continue to accurately reflect OCC supervisory expectations for physical hedging activities, the OCC is adopting the requirements as proposed.

Consistent with OCC interpretive letters and guidance concerning physical hedging with commodities in which a national bank could not invest directly,<sup>114</sup> the proposed rule imposed additional requirements on physical hedging with commodities. Under the proposed rule, a national bank would be permitted to engage in physical hedging with commodities only if the national bank's physical position in a particular physical commodity (including, as applicable, delivery point, purity, grade, chemical composition, weight, and size) is no more than five percent of the gross notional value of the national bank's derivatives that (1) are in that same particular commodity and (2) allow for physical settlement within 30 days. Title to commodities acquired and immediately sold in a transitory title transaction would not count against this five percent limit.<sup>115</sup> Consistent with OCC interpretive letters,<sup>116</sup> the proposed rule permitted physical hedging involving commodities only if the physical position more effectively reduces risk than a cash-settled hedge involving the same commodity. The proposal also specified that a national bank may not take physical delivery of any commodity by receipt of physical

quantities of the commodity on bank premises. The OCC explained in the preamble to the proposal that these requirements apply to physical hedging activities involving commodities due to the unique risks of physical commodity activities.<sup>117</sup>

The OCC received one comment addressing these requirements. First, this commenter said the final rule should require that any physical hedge be "at least as effective as," not more effective than, a cash-settled hedge. Second, this commenter said, to better align the five percent limit with financial risk management practices, this limit should be calculated based on the type of market risk (*i.e.*, the denominator with respect to a given transaction should include all transactions that implicate substantially equivalent market risk). Third, the commenter said the OCC should expressly confirm that the five percent limit is intended to be calculated in the same manner described in OCC Bulletin 2015–35 and that the OCC should provide greater clarity and specificity regarding the derivatives that are included in the five percent test's denominator because they "allow for physical settlement within 30 days."

The OCC disagrees with the first two comments. The purpose of § 7.1030(e) of the proposal was to incorporate the OCC's existing interpretations and supervisory guidance into regulation. Under existing interpretations, a physical hedge should be more effective than a cash-settled hedge involving the same commodity in light of the additional risks associated with physical hedging.<sup>118</sup> In other words, if a national bank has a choice between hedging with a cash-settled derivative or a physical commodity, all else being equal, the bank should choose the cash-settled derivative that involves less risk to the bank. This general principle is consistent with OCC interpretations that have found cash-settled transactions raise fewer supervisory concerns compared to physically-settled transactions.<sup>119</sup> Accordingly, the final rule continues to require a national bank to utilize cash-settled transactions when such transactions are equally effective as physical hedges.

Under existing OCC guidance, the five percent limit on physical hedging activities applies to a particular

<sup>113</sup> Certain of the practices described in prior OCC interpretive letters were not included in the proposed rule text because they are generally applicable safety and soundness standards that can be evaluated and addressed under other existing sources of law, including, as applicable, 12 U.S.C. 1818. For example, several interpretive letters discuss that a national bank should have appropriate risk management policies and procedures for its physical hedging activities. In addition, several interpretive letters have also specified that a bank may not engage in physical hedging activities for the purpose of speculating in security or commodity prices. As described above, customer-driven financial intermediation as defined in the proposal (and adopted in the final rule) would not include activities entered into for the purpose of speculation.

<sup>114</sup> See OCC Bulletin 2015–35; OCC Interpretive Letter No. 684.

<sup>115</sup> Consistent with OCC Interpretive Letter No. 1040, this five percent limit would not apply to physical hedging using emissions allowances.

<sup>116</sup> See OCC Interpretive Letter No. 684; OCC Interpretive Letter No. 632 (Jun. 30, 1993).

<sup>117</sup> See 85 at 40809. See also Section 620 Report (describing the price risks and operational risks specific to physical commodities activities).

<sup>118</sup> See OCC Interpretive Letter No. 684; OCC Interpretive Letter No. 632.

<sup>119</sup> See generally OCC Interpretive Letter No. 1039; OCC Interpretive Letter No. 632; No-Objection Letter 87–5.

<sup>112</sup> See OCC Bulletin 2015–35; OCC Interpretive Letter No. 935 (May 14, 2002); OCC Interpretive Letter No. 892; OCC Interpretive Letter No. 684.

commodity, as defined by the commodity's delivery point, purity, grade, chemical composition, weight, and size (as applicable).<sup>120</sup> This condition is intended to ensure a bank's physical hedging activities remain a nominal portion of the national bank's risk management activities.<sup>121</sup> Further, applying the limit based on a particular commodity ensures that the national bank keeps physical inventory of a particular commodity to levels commensurate with its need to make or take physical delivery of that commodity.<sup>122</sup> It remains important that a national bank's physical hedging activities amount to no more than a nominal portion of a bank's risk management activities and that the inventory of a particular commodity is limited to levels commensurate with the bank's need to make or take physical delivery of that commodity. Accordingly, the final rule continues to apply the limit to each particular physical commodity (including, as applicable, delivery point, purity, grade, chemical composition, weight, and size). The OCC believes that applying the limit based on a broader category, such as all transactions that implicate substantially equivalent market risk, would not be administrable and could lead to inconsistent calculation of the limit.

In response to the commenter's third comment on the five percent limit, the OCC confirms that the limit is meant to align with OCC Bulletin 2015–35. In particular, a national bank's physical position in a particular physical commodity (including, as applicable, delivery point, purity, grade, chemical composition, weight, and size) must not be more than five percent of the gross notional value of the bank's derivatives that are in that particular physical commodity and allow for physical settlement within 30 days. Like OCC Bulletin 2015–35, this limit applies to transactions that contemplate physical delivery within 30 days, *i.e.*, the denominator includes derivatives that can or will physically settle within 30 days.

#### *Subpart B—National Bank Corporate Practices*

##### National Bank Corporate Governance (§ 7.2000)

As noted, the OCC continually seeks to update its regulations to stay current with industry changes and technological advances, subject to Federal law and

consistent with the safe and sound operation of the banking system. As part of this process, the OCC proposed updating and modernizing § 7.2000, which provides a regulatory framework for national bank corporate governance. As described by the OCC in various conditional approvals,<sup>123</sup> “corporate governance procedures” generally refer to requirements involving the operation and mechanics of the internal organization of a national bank, including relations among owners-investors, directors, and officers, and do not include requirements that relate to the banking powers or activities of a national bank or relationships between a national bank and customers or third parties. Examples of corporate governance procedures include, but are not limited to, share exchanges, anti-takeover provisions, and the use of blank check procedures in issuing preferred stock. The OCC issued § 7.2000 in 1996 to provide national banks with increased flexibility to structure their corporate governance procedures consistent with the particular needs of the bank while providing shareholders and others with adequate notice of the corporate standards on which a bank will rely.<sup>124</sup> The OCC has not substantively changed § 7.2000 since its adoption.<sup>125</sup>

Section 7.2000 currently provides that a national bank proposing to engage in a corporate governance procedure must comply with applicable Federal banking statutes and regulations and safe and sound banking practices. In addition, § 7.2000 provides that to the extent not inconsistent with applicable Federal banking statutes or regulations, or bank safety and soundness, a national bank may elect to follow the corporate governance procedures of the law of the State in which the main office of the bank is located, the law of the State in which the holding company of the bank is incorporated, Delaware General Corporation Law, or the Model Business Corporation Act. Further, § 7.2000 requires that a national bank designate in its bylaws the body of law selected for its corporate governance procedures. Finally, § 7.2000 describes the process for obtaining OCC staff positions on the ability of a national bank to engage in a particular corporate governance procedure.

<sup>123</sup> See *e.g.*, OCC Conditional Approval No. 859 (June 13, 2008); OCC Conditional Approval No. 696 (June 9, 2005).

<sup>124</sup> 61 FR 4849, at 4854 (Feb. 9, 1996).

<sup>125</sup> Non-substantive amendments to § 7.2000 changed the address and telephone number of the OCC Communications Office. See 79 FR 15641 (March 21, 2014); 80 FR 28345 (May 18, 2015).

The OCC proposed to amend § 7.2000 to reduce burden, provide greater clarity, and modernize the national bank charter with respect to corporate governance provisions. The proposed amendments also would address anomalous results that may arise when a national bank eliminates its holding company. As a general matter, the OCC proposed changing the term “corporate governance procedure” used in § 7.2000 to “corporate governance provisions” and to revise paragraph (a) of § 7.2000 accordingly. As discussed in the proposal, the OCC believes that “corporate governance procedure” may be construed more narrowly than intended and omit corporate governance practices that are not procedural in nature. The OCC proposed revising paragraph (a) to provide the corporate governance provisions in a national bank's articles of association and bylaws and the bank's conduct of its corporate governance affairs must comply with applicable Federal banking statutes and regulations and safe and sound banking practices. The OCC received no comments on proposed paragraph (a) and adopts it as proposed. As discussed in the proposal, the OCC does not intend this change to affect the application of prior OCC interpretations of corporate governance procedures to § 7.2000.

The OCC also proposed increasing a national bank's flexibility in choice of corporate governance provisions in three ways. First, the OCC proposed revising paragraph (b) of § 7.2000 to authorize a national bank to elect the corporate governance provisions of the law of any State in which any branch of the bank is located in addition to the law of the State in which the bank's main office is located, to the extent not inconsistent with applicable Federal banking statutes or regulations or safety and soundness. The OCC received no comments on this change and adopts it as proposed. Accordingly, a national bank is no longer limited to using the corporate governance provisions of the State where its main office is located. For example, a national bank with its main office in State A and branches in State B and State C may elect to use the corporate governance provisions of the law of one of State A, State B, or State C.

Second, the OCC proposed revising paragraph (b) to authorize the national bank to use the law of the State where one holding company of the bank is incorporated. The current rule indicates that a national bank may use the law of the State where the holding company of the bank is incorporated. This amendment expressly recognizes the

<sup>120</sup> OCC Bulletin 2015–35.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

possibility that a national bank may be controlled by more than one holding company and that those holding companies may be incorporated by different States. Under this amendment, the bank is able to pick the law of the State of any one of its holding companies. The OCC received no comments on this change and adopts it as proposed, with a technical change for consistency within paragraph (b).

Third, the OCC proposed adding a new paragraph (c) that would allow a national bank to continue to use the corporate governance provisions of the law of the State where its holding company is incorporated even if the holding company is later eliminated or no longer controls the bank, and the national bank is not located in that State. This amendment removes an impediment to a national bank that may choose to eliminate its holding company or is no longer controlled by that holding company but wishes to retain longstanding and familiar corporate governance provisions. The OCC received one comment supporting proposed paragraph (c) and adopts it as proposed.

The OCC also proposed revising current paragraph (c) of § 7.2000 (proposed to be redesignated as § 7.2000(d)). Current paragraph (c) provides that the OCC considers requests for the OCC staff's position on the ability of a national bank to engage in a particular State corporate governance procedure in accordance with the no-objection procedures set forth in OCC Banking Circular 205 or any subsequently published agency procedures, and that requests should demonstrate how the proposed practice is not inconsistent with applicable Federal statutes or regulations and is consistent with bank safety and soundness. The OCC issued Banking Circular 205 on July 26, 1985 and has not modified it since. However, a national bank also may request the views of the OCC on an interpretation of national banking statutes and regulations independent of the process in Banking Circular 205, which has been the more common approach since 1985.

In order to update paragraph (c), the OCC proposed removing the requirement that banks requesting the OCC's views on State corporate governance law use the no-objection procedure. The proposal also listed the information that a request must contain. Similar to what is set forth in OCC Banking Circular 205, this information includes: (1) The name of the bank; (2) citations to the State statutes or regulations involved; (3) a discussion as to whether a similarly situated State

bank is subject to or may adopt the corporate governance provision; (4) identification of all Federal banking statutes or regulations that are on the same subject as, or otherwise have a bearing on, the subject of the proposed State corporate governance provision; and (5) an analysis of how the proposed corporate governance provision is not inconsistent with applicable Federal statutes or regulations nor with bank safety and soundness. The OCC received no comments on proposed paragraph (d) and adopts it as proposed. The OCC notes that this provision does not preclude a national bank from seeking informal consultation with OCC staff. However, if the bank wants to receive a written response from OCC staff, it must follow the procedure in this proposed paragraph (d).

The final rule revises the heading of § 7.2000 to reflect the change in terminology from corporate governance procedures to corporate governance provisions. The final rule also makes a technical change to the heading not previously proposed to clarify that this provision applies to national banks. As a result, the heading now reads "National bank corporate governance."

The OCC requested comment on whether a national bank also should be able to adopt a combination of corporate governance provisions from the laws of several different States where the national bank and any holding companies are located, thus potentially resulting in a national bank following corporate governance provisions that derive from a combination of States' laws, or whether a national bank should be limited to electing and using the corporate governance provisions of a single State. The OCC received one comment on this request. The commenter raised potential litigation issues with adopting a combination of corporate governance provisions, questioning whether courts will respect combined elections of law where there are minimal contacts with a State whose law has been elected, and citing a trend in court decisions on the validity of choice of law as part of contractual agreements. Given this concern and the lack of positive comments regarding this change, as well as the possible confusion for the bank, shareholders, the OCC, and others that may arise with the use of multiple States' corporate governance laws, the OCC is not amending the final rule at this time to permit the adoption of corporate governance provisions from the laws of several different States.

Further, the OCC requested comment on whether it should make, to the extent appropriate, similar revisions to the

regulations pertaining to corporate governance provisions for Federal savings associations in 12 CFR 5.21 and 5.22. Under current law, all Federal savings associations may elect to use the corporate governance provisions of the laws of the State where the home office of the association is located. Federal stock savings associations also may elect the laws of the State where any holding company of the association is incorporated or chartered; Delaware General Corporation law; or the Model Business Corporation Act, provided that such procedures may be elected to the extent not inconsistent with applicable Federal statutes and regulations and safety and soundness, and such procedures are not prohibited by part 5. One commenter stated that Federal mutual savings associations should have the same leeway in making a choice of law as national banks. Accordingly, the OCC is revising §§ 5.21 and 5.22 to permit additional flexibility for Federal savings associations to allow parity with national banks, as applicable and pursuant to permissible law. As a result of this final rule, Federal savings associations also may elect to use the corporate governance provisions of any State in which a branch of the association is located and, in the case of Federal stock savings associations, the law of any State in which any current or former holding company of the association is incorporated or chartered. The final rule also changes "institution" to "association" in § 5.21 for consistency.

In addition, the OCC requested comment on whether the final rule should change the term "corporate governance procedures" to "corporate governance provisions" in §§ 5.21 and 5.22 to be consistent with the change in terminology proposed for § 7.2000. The OCC did not receive any comments on this request. For clarity and conformity, the OCC is making this technical change to §§ 5.21 and 5.22.

The OCC received two additional comments regarding § 7.2000. One commenter requested that the OCC review the form articles of association and bylaws to confirm that they are consistent with applicable Federal banking statutes and regulations. The commenter asserted that these forms contain requirements that are not mandated by Federal banking statutes and regulations. As the commenter's request does not specifically request any specific revisions to § 7.2000, the OCC is adopting the amendments as proposed. However, the OCC notes that it periodically reviews its model articles of association and bylaws in the ordinary course of business.

Another commenter recommended that the OCC add a provision to part 7 recognizing the authority of a national bank to adopt exculpatory clauses in their articles and/or bylaws under applicable State law or the Model Code. The commenter's request for a provision on national bank authority to adopt exculpatory clauses raises an issue that the OCC did not specifically address in the proposal. The proposed revisions were not intended to address or sanction specific substantive provisions of State corporate law. As the OCC did not contemplate the commenter's requested provision in the proposed rule, the OCC declines to further revise § 7.200 at this time. However, the agency may consider this and similar issues in future rulemakings.

#### National Bank Adoption of Anti-Takeover Provisions (§ 7.2001)

The OCC proposed to add a new § 7.2001 to address the extent to which a national bank may include anti-takeover provisions in its articles of association or bylaws.<sup>126</sup> Anti-takeover provisions are examples of corporate governance provisions<sup>127</sup> covered by 12 CFR 7.2000. As discussed above, under § 7.2000(b) a national bank may elect to follow the corporate governance provisions of specified State law to the extent it is (1) not inconsistent with applicable Federal banking statutes or regulations and (2) not inconsistent with bank safety and soundness.

The OCC received one comment related to proposed § 7.2001. The commenter raised several concerns about how the provision would apply to mutual institutions. The OCC notes that proposed § 7.2001 applies only to national banks, not Federal mutual savings associations. Further, national banks may only be organized as corporations and not as banks in the mutual form of organization. The proposal noted it did not apply to Federal savings associations and that existing provisions on this subject applicable to stock Federal savings associations were not affected by the proposal.<sup>128</sup> Therefore, the OCC adopts § 7.2001 as proposed, with one clarifying change to paragraph (d).

As noted in the proposed rule, the purpose of § 7.2001 is to provide the OCC's views about the permissibility of several types of anti-takeover

provisions. Specifically, paragraph (a) of § 7.2001 provides that a national bank may, pursuant to 12 CFR 7.2000(b), adopt anti-takeover provisions included in State corporate governance law if the provisions are not inconsistent with Federal banking statutes or regulations and not inconsistent with bank safety and soundness.

Paragraph (b) of § 7.2001 sets forth the type of anti-takeover provisions in State corporate governance provisions that the OCC specifically has determined are not inconsistent with Federal banking statutes or regulations.<sup>129</sup> This list is not exclusive and the OCC may find that other State anti-takeover laws are not inconsistent with Federal banking statutes or regulations. A national bank may elect to follow these provisions, subject to the bank safety and soundness limitation discussed below.

*Restrictions on business combinations with interested shareholders.* These State provisions prohibit, or permit the corporation to prohibit in its certificate of incorporation or other governing document, the corporation from engaging in a business combination with an interested shareholder or any related entity for a specified period of time (e.g., three years) from the date on which the shareholder first becomes an interested shareholder (subject to certain exceptions, such as board approval). An interested shareholder is one that owns an amount of stock specified in the State statute, e.g., at least fifteen percent. Federal banking statutes and regulations do not address, directly or indirectly, this type of restriction for national banks. Although Federal banking statutes authorize national banks to engage in specified consolidations and mergers,<sup>130</sup> this authorization does not preclude a bank's shareholders from adopting a provision that limits the consolidations and mergers into which the bank would enter. Therefore, State restrictions on business combinations with interested shareholders are not inconsistent with Federal law.

*Poison pill.* A "poison pill" is a State statutory provision that provides, or that permits the corporation to provide in its certificate of incorporation or other governing document, that all shareholders, other than the hostile acquirer, have the right to purchase additional stock at a substantial discount upon the occurrence of a

triggering event. Because no Federal banking statutes or regulations directly or indirectly address these shareholder purchase rights, State poison pill laws are not inconsistent with Federal law.<sup>131</sup>

*Requiring all shareholder actions to be taken at a meeting.* These State provisions provide, or permit the corporation to provide in its certificate of incorporation or other governing document, that all actions to be taken by shareholders must occur at a meeting and prohibit shareholders from taking action by written consent. Certain Federal banking statutes require shareholder approval to be taken at a meeting<sup>132</sup> while other sections require shareholder approval but do not specify a meeting.<sup>133</sup> There is no provision in Federal law authorizing national bank shareholders to take action by written consent in lieu of a meeting. Furthermore, nothing in Federal law precludes a national bank's articles of association from requiring a meeting for any action. Therefore, this type of State provision is not inconsistent with Federal law.

*Limits on shareholders' authority to call special meetings.* These State provisions provide, or permit the corporation to provide in its certificate of incorporation or other governing document, that only the board of directors, and not shareholders, have the right to call special meetings of the shareholders or, if shareholders have the right, require a high percentage of shareholders to call the meeting. Because Federal banking statutes or regulations do not address, directly or indirectly, the right of shareholders of a national bank to call special meetings, these type of State laws are not inconsistent with Federal law.

*Shareholder removal of a director only for cause.* These State provisions provide, or permit the corporation to provide in its certificate of incorporation or other governing document, that shareholders may remove a director only for cause, rather than both for cause and without cause. The National Bank Act and OCC regulations do not have a specific provision addressing director removal

<sup>131</sup> However, shareholders, including the hostile acquirer, should consider the implications under the Change in Bank Control Act or Bank Holding Company Act if a shareholder, or shareholders acting in concert, acquire sufficient shares to constitute "control."

<sup>132</sup> See 12 U.S.C. 71, 214a, 215, 215a, and 215a-2.

<sup>133</sup> See 12 U.S.C. 30, 51a, 57, and 59. However, 12 U.S.C. 21a provides that any action requiring approval of the stockholders be obtained by approval by a majority vote of the voting shares at a meeting, unless the statutory provision addressing the action requires greater level of approval.

<sup>126</sup> OCC regulations currently include provisions addressing adoption of anti-takeover provisions by stock Federal savings associations. See 12 CFR 5.22(g)(7), (h) and (j)(2)(i)(A). The OCC did not propose to amend those provisions.

<sup>127</sup> The final rule changes this terminology in § 7.2000 to "corporate governance provisions."

<sup>128</sup> See 85 FR 40794, at 40810, note 108.

<sup>129</sup> Permitting the use of staggered boards is another anti-takeover provision. New § 7.2001 does not include staggered boards because they are now expressly permitted under the National Bank Act. 12 U.S.C. 71; 12 CFR 7.2024.

<sup>130</sup> See 12 U.S.C. 215, 215a, 215a-1, 215a-3, and 215c.

by shareholders. Removal only for cause is consistent with the OCC's model national bank Articles of Association, which provide for removal for cause and for failure to meet statutory director qualifications.<sup>134</sup> Therefore, State provisions requiring shareholder removal of a director only for cause are not inconsistent with Federal law.

Paragraph (c) of § 7.2001 sets forth the type of anti-takeover provisions in State corporate governance provisions that the OCC has determined are inconsistent with Federal banking statutes or regulations. A national bank may not elect to follow these provisions. These provisions are set forth below.

*Supermajority voting requirements.* These State statutory provisions require, or permit the corporation to require in its certificate of incorporation or other governing document, that a supermajority of the shareholders approve specified matters. A requirement that a supermajority vote of shareholders must approve some transactions is inconsistent with Federal law when applied to transactions for which a Federal statute or regulation includes an express specific shareholder approval level. Certain provisions of the National Bank Act specify shareholder approval by a two-thirds vote<sup>135</sup> and other provisions require majority shareholder approval.<sup>136</sup> When a provision in the National Bank Act specifies the level of shareholder vote required for approval, it is inconsistent with Federal law to follow a State corporate governance provision that permits or requires a different level or an additional shareholder approval requirement for a subset of shareholders.

*Restrictions on a shareholder's right to vote all the shares it owns.* These State statutory provisions prohibit, or permit the corporation in its certificate of incorporation or other governing document to prohibit, a person from voting shares acquired that increase their percentage of ownership of the company's stock above a certain level. This type of provision is inconsistent with the National Bank Act, which expressly provides that each shareholder is entitled to one vote on each share of stock held by the shareholder on all matters other than elections for directors, where cumulative voting may be allowed if so provided in the articles of

association.<sup>137</sup> A State corporate governance provision that interferes with this express right to vote is inconsistent with Federal law.

As indicated above, § 7.2000(b) permits a national bank to elect to follow a State corporate governance provision only if it is not inconsistent with Federal law and bank safety and soundness. Paragraph (d) of § 7.2001 addresses the impact of bank safety and soundness on adoption of anti-takeover provisions.

Anti-takeover provisions may make it harder for a bank to be acquired by another bank or by investors or to raise capital by discouraging share purchases by a potential acquiror. Thus, when a bank is in a weak condition, anti-takeover provisions the OCC has determined are not inconsistent with Federal law nevertheless would be inconsistent with bank safety and soundness if they would impair the possibility of restoring the bank to sound condition. These provisions would then be impermissible.

Accordingly, paragraph (d) provides that any State corporate governance provision, including anti-takeover provisions, that would render more difficult or discourage an injection of capital by purchase of bank stock, a merger, the acquisition of the bank, a tender offer, a proxy contest, the assumption of control by a holder of a large block of the bank's stock, or the removal of the incumbent board of directors or management is inconsistent with bank safety and soundness if: (1) The bank is less than adequately capitalized (as defined in 12 CFR part 6); (2) the bank is in troubled condition (as defined in 12 CFR 5.51(c)(7)); (3) grounds for the appointment of a receiver under 12 U.S.C. 191 are present, as determined by the OCC; or (4) the bank is otherwise in less than satisfactory condition, as determined by the OCC. The OCC notes that the final rule adds "as determined by the OCC" to paragraph (d)(3) to clarify for a bank when this condition would be present.

However, paragraph (d) also provides that an anti-takeover provision is not inconsistent with bank safety and soundness if, at the time it adopts the provision, the national bank: (1) Is not subject to any of the foregoing conditions and (2) includes along with the provision a limitation that the provision is not effective if one or more of the foregoing conditions occur or if the OCC otherwise directs the bank not to follow the provision for supervisory reasons.

Paragraph (e) provides for OCC case-by-case review of anti-takeover provisions. The OCC reviewed each type of State anti-takeover provision described in paragraph (b) for consistency with Federal banking statutes and regulations only at a general level, without reviewing the specific terms of a proposed provision to be adopted by a particular bank. While the OCC has concluded that the types of provisions set out in paragraph (b) are not inconsistent with Federal banking statutes and regulations in general, the specific provision a particular bank adopts may contain features that could change the result of the OCC's review. Similarly, some anti-takeover provisions may be inconsistent with bank safety and soundness for a particular national bank because of its individual circumstances, even if it is not subject to the conditions listed in paragraph (d).

In order to address the need for individual determinations when appropriate, paragraph (e) provides that the OCC may determine that a State anti-takeover provision, as proposed or adopted by an individual national bank, is (1) inconsistent with Federal banking statutes or regulations, even if it is of a type included in paragraph (b) or (2) inconsistent with bank safety and soundness other than as provided in paragraph (d). The OCC may begin a case-by-case review on its own initiative. In addition, a bank that wishes the OCC to review the permissibility of the specific State anti-takeover provisions it has adopted or proposes to adopt may request the OCC's review, under the procedures set forth at 12 CFR 7.2000(d).

Finally, paragraph (f) addresses the method a national bank, its shareholders, and its directors must use to adopt each anti-takeover provision. In general, the bank must follow the requirements for board of director and shareholder approval set out in the State corporate governance statute it is electing to follow. However, if the provision is included in the bank's articles of association, the bank's shareholders must approve the amendment of the articles pursuant to 12 U.S.C. 21a, even if the State law does not require approval by the shareholders. Further, if the State corporate governance law requires the provision to be in the company's articles of incorporation, certificate of incorporation, or similar document, the national bank must include the provision in its articles of association. If the State corporate governance law does not require the provision to be in the company's articles of incorporation,

<sup>134</sup> See Articles of Association, Charters, and Bylaw Amendments (Forms), Comptroller's Licensing Manual (June 19, 2017) (Model Articles of Association, Article Fourth, last paragraph).

<sup>135</sup> See 12 U.S.C. 30, 57, 59, 181, 214a, 215, 215a, and 215a-2.

<sup>136</sup> See 12 U.S.C. 21a and 51a.

<sup>137</sup> 12 U.S.C. 61.

certificate of incorporation, or similar document but allows it to be in the bylaws, then the national bank must include the provision in either its articles of association or in its bylaws. However, if the State corporate governance law requires shareholder approval for changes to the corporation's bylaws, then the national bank must include the provision in its articles of association.

#### National Bank Director or Attorney as Proxy (§ 7.2002)

Twelve U.S.C. 61 prohibits an officer, clerk, teller, or bookkeeper of the national bank from acting as proxy for shareholder voting. Section 7.2002 codifies this prohibition in OCC regulations and provides that any person or group of persons, except the bank's officers, clerks, tellers, or bookkeepers, may be designated to act as proxy. The OCC proposed to amend this section to clarify that the proxy referenced in the section is for shareholder voting, as provided in the statute. The OCC received no comments on this clarification and adopts it as proposed with technical changes. The final rule revises the section heading and rule text to clarify that this provision applies to national banks. The OCC intends no substantive changes to § 7.2002.

#### National Bank Shareholder Meetings; Board of Directors Meetings (§ 7.2003)

The OCC is finalizing changes it made to part 7 in an interim final rule entitled *Director, Shareholder, and Member Meetings*, published in the **Federal Register** on May 28, 2020.<sup>138</sup> Among other things, this interim final rule amended § 7.2003 to permit national banks to provide for telephonic or electronic participation at shareholder and board of directors meetings.<sup>139</sup> To accomplish this, the OCC combined former 12 CFR 7.2001, which provided for procedures for notifying shareholders of shareholder meetings, into former § 7.2003, which provided the rule for annual shareholder meetings that fall on a holiday; added new telephonic and electronic participation language to 12 CFR 7.2003 as new paragraphs (c) and (d); and retitled § 7.2003 as "Shareholder meetings; Board of directors meetings." Former § 7.2001 became § 7.2003(a). Former § 7.2003 became § 7.2003(b). Combining §§ 7.2001 and 7.2003 put all

amendments related to shareholder meetings in one section.

The OCC received one substantive comment letter that supported these amendments. In response to a request for comment included in the preamble to this interim final rule, this commenter opposed any new risk management standards to mitigate any security risks arising from telephonic or electronic meetings, noting that new standards would be unnecessary given current safeguards and regulatory requirements. The OCC is finalizing the amendments made by the interim final rule to §§ 7.2001 and 7.2003 with conforming and technical changes. The final rule replaces references in § 7.2003 to "corporate governance procedures" to "corporate governance provisions," to conform to the change in this terminology made by § 7.2000 of this final rule. The final rule also makes a technical change to the heading to add national banks. The OCC notes that it is not imposing any new risk management standards for telephonic or electronic meetings though this final rule.

Specifically, § 7.2003(c) permits a national bank to provide for telephonic or electronic participation at shareholder meetings. Further, paragraph (c) requires a national bank to have procedures for telephonic or electronic participation in shareholder meetings. A national bank may choose these procedures from several sources: (1) The corporate governance provisions it has elected to follow pursuant to § 7.2000(b), if those elected procedures include telephonic or electronic participation procedures; (2) the Delaware General Corporation Law; or (3) the Model Business Corporation Act. However, these procedures must not be inconsistent with applicable Federal statutes and regulations and safety and soundness. This provision ensures that a national bank has procedures in place for remote participation at shareholder meetings even if the corporate governance law it has elected to follow does not contain procedures for remote participation at shareholder meetings or if it has not elected to follow any particular corporate governance law pursuant to § 7.2000(b). To inform shareholders of its choice of procedures, this paragraph requires the national bank to indicate the use of these procedures in its bylaws.

Paragraph (d) of § 7.2003 provides that a national bank may provide for telephonic or electronic participation at a meeting of its board of directors. This provision codifies OCC Interpretive Letter No. 860<sup>140</sup> and makes the

national bank rule consistent with rules for Federal savings associations.

#### Oath of National Bank Directors (§ 7.2008)

The OCC is making technical changes to § 7.2008 in this final rule not included in the proposed rule. Currently, § 7.2008 provides that a notary public, including one who is a director but not an officer of the national bank, may administer the oath of directors, and that any person, other than an officer of the bank, having an official seal and authorized by the State to administer oaths, also may administer the oath. However, the statute governing the oath of bank directors, 12 U.S.C. 73, requires that the oath be taken before a notary public or any other State authorized officer other than an officer of the director's bank. Further, OCC instructions conform to the statute by requiring the director to take the oath before a notary public or other authorized State official.<sup>141</sup> The final rule corrects the regulation to require that this oath be administered by a notary public or any person having an official seal and authorized by the State to administer oaths, other than an officer of the national bank, thereby conforming this rule to the statute. Further, the final rule clarifies that the State-authorized officer not a notary may be a director of the bank, as may the notary public under the current rule, as long as that person is not also an officer of the bank.

#### Quorum of a National Bank Board of Directors; Proxies Not Permissible (§ 7.2009)

Section 7.2009 requires a national bank to provide in its articles of association or bylaws that a quorum of the board of directors is at least a majority of the entire board then in office. Section 7.2009 also prohibits bank officers from voting by proxy. The OCC did not propose any substantive changes to this section. However, the OCC received one comment on § 7.2009 requesting that the OCC revise it to allow national banks to adopt the quorum requirements of the law of the relevant State, the Delaware General Corporation Law, or the Model Business Corporation Act. Both the Model Business Corporation Act and Delaware General Corporation Law permit corporate boards to deem one third of all members sufficient to establish a quorum.

The OCC disagrees with this comment. The current requirement in

<sup>138</sup> 85 FR 31943 (May 28, 2020). This rule was effective May 28, 2020.

<sup>139</sup> The OCC finalized amendments made by this interim final rule to part 5 in its recent Licensing Amendments final rule. See 85 FR 80404 (Dec. 11, 2020).

<sup>140</sup> OCC Interpretive Letter No. 860 (Apr. 5, 1999).

<sup>141</sup> See "General Instructions—Oath of Bank Directors" at [www.occ.gov/static/licensing/Instructions-Oaths-NB.pdf](http://www.occ.gov/static/licensing/Instructions-Oaths-NB.pdf).

§ 7.2009 that at least a majority of the Board meet to constitute a quorum is designed to ensure the safety and soundness of bank operations. Any lesser quorum requirement could result in greater absenteeism in managing the affairs of the bank and enable a smaller minority of directors to dictate the direction of corporate affairs, which would heighten risks to safety and soundness. The OCC did not propose an amendment to the quorum requirements of § 7.2009 and declines to do so in this final rule.

#### National Bank Directors' Responsibilities (§ 7.2010)

Twelve CFR 7.2010 provides that the business and affairs of a bank shall be managed by or under the direction of the board of directors and that boards of directors should refer to published OCC guidance for additional information regarding responsibilities of directors. The OCC did not propose substantive changes to § 7.2010.

Two commenters discussed the second sentence of § 7.2010, which states that the board of directors should refer to OCC published guidance for additional information regarding responsibilities of directors. One commenter stated that the sentence might be read as codifying guidance and suggested that the referenced guidance may be incorrect, inconsistent, or omit information that is germane to the duties and responsibilities of bank directors. Another commenter stated that the reference to guidance in § 7.2010 should be revised to avoid suggesting that guidance has the force of law. This commenter recommended that the OCC revise § 7.2010 to delete the second sentence and establish any specific legal standards regarding director responsibilities through the rulemaking process. The OCC notes that § 7.2010 only refers boards of directors to OCC guidance for additional information and does not suggest that guidance has the force of law nor that the guidance contains all pertinent information. This guidance may be helpful to boards of directors by discussing existing legal requirements applicable to directors and, consistent with the Interagency Statement Clarifying the Role of Supervisory Guidance,<sup>142</sup> outlining the OCC's supervisory expectations.

<sup>142</sup> Interagency Statement Clarifying the Role of Supervisory Guidance, <https://www.occ.gov/news-issuances/news-releases/2018/nr-ia-2018-97a.pdf> (Sept. 11, 2018). The OCC, Federal Deposit Corporation (FDIC), and Federal Reserve Board issued a proposed rule codifying this statement on November 5, 2020. 85 FR 70512.

One commenter also suggested that the OCC repeal § 7.2010 in its entirety or revise it to replace the current text with a statement that the standards of conduct applicable to directors are governed by the law of the State elected by the bank or the Model Business Corporation Act. The OCC is not including this suggested revision in the final rule. The OCC has not previously interpreted directors to be subject only to the standards of conduct established by the law of the State elected by the bank or the Model Business Corporation Act and doing so may conflict with other statutory or regulatory standards applicable to bank directors.

#### President as Director of a National Bank (§ 7.2012)

Twelve U.S.C. 76 provides that the president of the bank must be a member of the board and be chairman thereof, but that the board may designate a director in lieu of the president to be chairman, who must perform duties as assigned by the board. Section 7.2012 codifies this statutory requirement in the OCC's rules by providing that pursuant to 12 U.S.C. 76, the president of a national bank must be a member of the board of directors, but a director other than the president may be elected chairman of the board. This section further provides that a person other than the president may serve as the chief executive officer, and that this person is not required to be a director of the bank. When first proposing this rule, the OCC acknowledged that it was adding this second sentence to provide that a person other than the president or a director may serve as chief executive officer of a bank.<sup>143</sup>

The OCC proposed two changes to this section and did not receive any comments. As a result, the OCC is adopting these changes to § 7.2012 as proposed. First, the final rule provides that the person serving as, or in the function of, president of a national bank, regardless of title, must be a member of the board of directors. This change aligns the regulation with the OCC's view that the bank officer positions in 12 U.S.C. 76 and other provisions of the National Bank Act refer to functions rather than required titles. If a national bank does not have an individual serving in the position of president but does have another officer serving the function of president, the individual serving in the function of president must be a member of the board of directors. The person serving the function of president is generally the

<sup>143</sup> 60 FR 11924 (March 3, 1995). This rule was finalized in 1996. 61 FR 4849 (Feb. 9, 1996).

individual appointed to oversee the national bank's day-to-day activities.<sup>144</sup> This change provides national banks with flexibility in employee titles and management organization. The OCC notes that 12 U.S.C. 24(Fifth) provides national banks with the authority to set the duties of their officers. National banks should ensure that their employee titles do not create unnecessary confusion.

Second, the final rule removes the provision in § 7.2012 that states that a person other than the president may serve as chief executive officer, and this person is not required to be a director of the bank. This provision is unnecessary. The position of chief executive officer is not referenced in statute and, as indicated above, national banks have discretion to set the duties of their officers. Further, this provision would conflict with the first revision to this section. Because function rather than title govern under this amendment, the final rule requires a chief executive officer that serves the function of president to be a member of the board.

The OCC also is making a technical change to the section heading not included in the proposed rule to reflect that fact that § 7.2012 applies only to national banks.

#### Indemnification of National Bank and Federal Savings Association-Affiliated Parties (§§ 7.2014, 145.121)

The OCC proposed amending and reorganizing § 7.2014, Indemnification of institution-affiliate parties (by national banks), applying revised § 7.2014 to Federal savings associations, and removing § 145.121, Indemnification of directors, officers and employees (by Federal savings associations). As discussed below, the OCC is adopting § 7.2014 as proposed, with a technical change to the section heading.

Section 7.2014 addresses indemnification of institution-affiliated parties (IAPs) by national banks in cases involving an administrative proceeding or civil action initiated by a Federal banking agency, as well as cases that do not involve a Federal banking agency. Under § 7.2014(a), a national bank only may make or agree to make indemnification payments to an IAP with respect to an administrative proceeding or civil action initiated by a Federal banking agency if those payments are reasonable and consistent with the requirements of 12 U.S.C.

<sup>144</sup> See OCC, "The Director's Book: Role of Directors for National Banks and Federal Savings Associations" (November 2020) available at [www.OCC.gov](http://www.OCC.gov).

1828(k) and the implementing regulations thereunder. Pursuant to section 1828(k), the FDIC may prohibit, by regulation or order, any indemnification payment made with regard to an administrative proceeding or civil action instituted by the appropriate Federal banking agency that results in a final order under which the IAP: (1) Is assessed a civil money penalty; (2) is removed or prohibited from participating in conduct of the affairs of the insured depository institution; or (3) is required to take certain affirmative actions in regards to an insured depository institution.<sup>145</sup> Section 1828(k) defines “indemnification payment” to mean any payment (or any agreement to make any payment) by any insured depository institution to pay or reimburse an IAP for any liability or legal expense with regard to any administrative proceeding or civil action instituted by the appropriate Federal banking agency that results in a final order under which the IAP: (1) Is assessed a civil money penalty; (2) is removed or prohibited from participating in conduct of the affairs of the insured depository institution; or (3) is required to take certain affirmative actions in regards to an insured depository institution.<sup>146</sup> Section 7.2014(a) defines “institution-affiliated party” by reference to 12 U.S.C. 1813(u).

Section 7.2014(b)(1) permits a national bank to indemnify IAPs for damages and expenses, including the advancement of legal fees and expenses, in cases involving an administrative proceeding or civil action that is not initiated by a Federal banking agency in accordance with the law of the State in which the main office of the bank is located, the law of the State in which the bank’s holding company is incorporated, or the relevant provisions of the Model Business Corporation Act or Delaware General Corporation Law,

<sup>145</sup> In prohibiting such payments, the FDIC may take into account several factors listed in the statute, such as whether there is a reasonable basis to believe the IAP has committed fraud, breached a fiduciary duty, or committed insider abuse; is substantially responsible for the insolvency of the depository institution; has violated any Federal or State banking law or regulation that has had a material effect on the financial condition of the institution; or was in a position of managerial or fiduciary responsibility. See 12 U.S.C. 1828(k)(2). The FDIC has forbidden certain indemnification payments by regulation. See 12 CFR 359.1(l)(1) (definition of “prohibited indemnification payment”); 12 CFR 359.3 (forbidding prohibited indemnification payments, except as provided in part 359).

<sup>146</sup> See 12 U.S.C. 1828(k)(5)(A); see also 12 U.S.C. 1818(b)(6) (defining affirmative actions that an IAP may be required to take in regard to insured depository institutions for purposes of section 1828(k)(5)(A)).

provided such payments are consistent with safe and sound banking practices.

Additionally, pursuant to § 7.2014(b)(2), a national bank may provide for the payment of reasonable premiums for insurance covering the expenses, legal fees, and liability of IAPs to the extent that these costs could be indemnified under administrative proceedings or civil actions not initiated by a Federal banking agency, as provided in § 7.2014(b)(1).

Twelve CFR 145.121 addresses indemnification of directors, officers and employees by Federal savings associations. Section 145.121(b) requires a Federal savings association to indemnify any person against whom an action is brought or threatened because that person is or was a director, officer, or employee of the association. This indemnification is subject to the requirements of § 145.121(c) and (g). Section 145.121(c) provides that indemnification only may be made available to the IAP if (1) there is a final judgment on the merits in the IAP’s favor; or (2) in the case of settlement, final judgment against the IAP, or final judgment in the IAP’s favor other than on the merits, if a majority of the disinterested directors of the Federal savings association determine that the IAP was acting in good faith. It also provides that the association give the OCC at least 60 days’ notice of its intention to indemnify an IAP and provides that the association may not indemnify the IAP if the OCC advises the savings association in writing that the OCC objects. Section 145.121(g) makes the indemnification subject to 12 U.S.C. 1821(k).

Pursuant to § 145.121(d), a Federal savings association may obtain insurance to protect it and its directors, officers, and employees from potential losses arising from claims for acts committed in their capacity as directors, officers, or employees. However, a Federal savings association may not obtain insurance that provides for payment of losses incurred as a consequence of willful or criminal misconduct.

Pursuant to § 145.121(e), if a majority of the directors of a Federal savings association conclude that, in connection with an action, a person may become entitled to indemnification, the directors may authorize payment of reasonable costs and expenses arising from the defense or settlement of the action. Before making advance payment of expenses, the savings association is required to obtain an agreement that the savings association will be repaid if the person on whose behalf payment is

made is later determined not to be entitled to the indemnification.

Pursuant to § 145.121(f), an association that has a bylaw in effect relating to indemnification of its personnel must be governed solely by that bylaw, except that its authority to obtain insurance must be governed by § 145.121(d), which, as described above, authorizes the purchase of indemnification insurance unless the insurance pays for losses created by willful or criminal misconduct. Section 145.121(g) states that the indemnification provided for in § 145.121 for Federal savings associations is subject to and qualified by 12 U.S.C. 1821(k), which addresses personal liability for directors and officers in certain civil actions.

The OCC proposed adding Federal savings associations to § 7.2014 so that both charters would be required to comply with § 7.2014 and removing § 145.121. Because § 7.2014 applies to IAPs as well as officers, directors, and employees, and § 145.121 applies only to officers, directors and employees, this amendment enlarges the scope of indemnification rules for Federal savings associations. As a result, the OCC’s indemnification rules also would apply to certain Federal savings association controlling shareholders, independent contractors, consultants, and other persons identified in 12 U.S.C. 1813(u). The OCC received no comments on this integration of Federal savings associations into § 7.2014 and therefore adopts this integration as proposed.

The OCC also proposed other amendments to § 7.2014. First, the OCC proposed amending current § 7.2014(b)(1), redesignated as § 7.2014(a) and retitled, to provide that State law on indemnification may apply to all administrative proceedings or civil actions for which an IAP can be indemnified, not just actions that are initiated by a person or entity not a Federal banking agency as under the current rule. This revision clarifies the application of State law on indemnification to actions initiated by Federal banking agencies. However, current § 7.2014(a), redesignated as § 7.2014(b), would still apply. Specifically, under redesignated § 7.2014(b), with respect to proceedings or civil actions initiated by a Federal banking agency, a national bank or Federal savings association only may make or agree to make indemnification payments to an IAP that are reasonable and consistent with the requirements of



section 1828(k) and implementing regulations thereunder.<sup>147</sup>

The OCC also proposed a technical change to redesignated § 7.2014(a). As indicated above, the current rule states that in cases involving an administrative proceeding or civil action not initiated by a Federal banking agency, a national bank may indemnify an IAP in accordance with the law of the State in which the main office of the bank is located, the law of the State in which the bank's holding company is incorporated, or the relevant provisions of the Model Business Corporation Act or Delaware General Corporation Law, provided such payments are consistent with safe and sound banking practices. Because these sources of law are identical to the law a national bank may elect to follow pursuant to current § 7.2000(b) or the law a Federal savings association may elect to follow pursuant to current § 5.21 or § 5.22, the OCC proposed to replace the language on sources of State law in this provision with a statement that the bank or savings association may indemnify an IAP for damages and expenses in accordance with the law of the State the bank or savings association has designated for its corporate governance under the provisions of § 7.2000, § 5.21, or § 5.22, as applicable. Because the OCC is enlarging the choice of law for both national banks and Federal savings associations in this final rule, this cross-reference incorporates these new State law options.<sup>148</sup>

One commenter suggested that the OCC clarify in the final rule under redesignated § 7.2014(a) how the OCC would evaluate whether indemnification payments to IAPs are "consistent with safety and soundness." For example, the commenter suggested that the OCC confirm that the types of indemnification permissible under Delaware General Corporation Law generally would be permissible for national banks and Federal savings associations, except where such payment would introduce safety and soundness risk by measurably reducing bank capital and/or liquidity levels. The

<sup>147</sup> The OCC also proposed to move the cross-reference to the definition of IAP in redesignated § 7.2014(b) to redesignated paragraph (a) and to make stylistic changes to the wording of redesignated § 7.2014(b).

<sup>148</sup> As explained *supra*, the OCC is amending § 7.2000 to also allow national banks to follow the corporate governance provisions of the law of any State in which any branch of the bank is located or where a holding company of the bank is incorporated even if the holding company is later eliminated or no longer controls the bank and the national bank is not located in that State. The final rule makes this same change to §§ 5.21 and 5.22 for Federal savings associations.

OCC disagrees with this comment. OCC determinations of whether indemnification payments to IAPs are "consistent with safety and soundness" are made on a case-by-case basis based on the specific facts and circumstances of a particular case, and do not depend on State law. In the absence of specific facts and circumstances, the OCC declines to expound in the final rule upon how the OCC would evaluate the safety and soundness of indemnification payments to IAPs.

The commenter also suggested that the OCC include in the final rule under redesignated § 7.2014(a) a process for appealing the OCC's invalidation of indemnification payments or an indemnification agreement on safety and soundness grounds. The OCC did not propose an appeals process, and therefore is not including one in the final rule. If a national bank or Federal savings association disputes an OCC invalidation of an indemnification payment or agreement, it may file an appeal with the OCC pursuant to the OCC's Bank Appeals Process.<sup>149</sup>

For the reasons discussed above, the OCC adopts redesignated § 7.2014(a) as proposed.

Second, the OCC proposed amending § 7.2014(b)(2), redesignated as § 7.2014(d), to allow a national bank or Federal savings association to provide for the payment of reasonable insurance premiums in connection with all actions involving an IAP that could be indemnified under § 7.2014, whether or not initiated by a Federal banking agency. The OCC received no comments on this change and adopts it as proposed. The OCC believes this change will resolve confusion regarding how current § 7.2014(b)(2) is applied. This change also will better align OCC regulations on the payment of insurance premiums with the FDIC's regulations and 12 U.S.C. 1828(k).<sup>150</sup>

Third, the OCC proposed adding a new paragraph (c) to require a national bank or Federal savings association, before advancing funds to an IAP under § 7.2014, to obtain a written agreement that the IAP will reimburse the bank or savings association for any portion of indemnification that the IAP is ultimately found not to be entitled to under 12 U.S.C. 1828(k) and implementing regulations, except to the

<sup>149</sup> Information about the OCC's Bank Appeals Process is available at [occ.gov](http://occ.gov).

<sup>150</sup> The FDIC's implementing regulations under section 1828(k), 12 CFR part 359, explicitly allow the payment of insurance premiums in anticipation of actions brought by a Federal banking agency, provided the insurance is not used to reimburse the cost of a judgment or civil monetary penalty. See 12 CFR 359.1(l)(2).

extent the bank's or savings association's expenses have been reimbursed by an insurance policy or fidelity bond.<sup>151</sup> This requirement is similar to the requirement in § 145.121(e) currently applicable to Federal savings associations and therefore will not impose any additional burdens on Federal savings associations. Further, FDIC regulations,<sup>152</sup> State law,<sup>153</sup> and the Model Business Corporation Act<sup>154</sup> contain similar requirements for IAPs to reimburse institutions for funds to which they are later found not to be entitled. As most national banks are subject to the FDIC's indemnification regulations<sup>155</sup> or have elected under 12 CFR 7.2000(b) to follow State corporate law imposing reimbursement requirements for advancement of funds, the OCC believes that this change will not impose any additional burden on national banks and will merely codify existing practices. This change also will ensure that national banks, and Federal savings associations, do not provide indemnification to IAPs that is ultimately in contravention of the statutory limits of section 1828(k).

One commenter suggested that the OCC confirm in the final rule that the written agreement required under § 7.2014(c) may provide for the reimbursement of expenses, in addition to damages and other costs. The commenter noted that proposed § 7.2014(c) implies that expenses may be covered by a written agreement, because it notes that the written agreement may cover any portion of the indemnification payment "except to the extent that the bank's or savings association's expenses have been reimbursed by an insurance policy or fidelity bond." The OCC does not believe that the final rule creates any uncertainty regarding whether the written agreement may provide for the reimbursement of expenses, in addition to damages and other costs. As the commenter notes, and the OCC agrees, the written agreement may cover any portion of the indemnification payment "except to the extent that the bank's or savings association's expenses have been reimbursed by an insurance policy

<sup>151</sup> National banks are required to purchase fidelity coverage by 12 CFR 7.2013.

<sup>152</sup> See 12 CFR 359.5(a)(4).

<sup>153</sup> See, e.g., 8 Del. C. section 145(e); Utah Code section 16-10a-904; 805 Ill. Comp. Stat. 5/8.75(e); see also N.Y. Bus. Corp. Law section 725(a) (requiring repayment, but not explicitly requiring a written agreement).

<sup>154</sup> See Model Bus. Corp. Act section 8.53(a).

<sup>155</sup> Federal savings associations are also subject to the FDIC's indemnification regulations.

or fidelity bond.” The OCC therefore adopts § 7.2014(c) as proposed.

One commenter suggested that rather than amending § 7.2014, the OCC should repeal the entire regulation and the comparable regulation for Federal savings associations, § 145.121. The commenter noted that 12 CFR part 359 and 12 U.S.C. 1828(k) already govern indemnification to IAPs in administrative and court proceedings brought by a Federal banking agency; and the proposed language in 12 CFR 7.2000 makes the separate indemnification provisions relating to non-part 359 proceedings unnecessary. The OCC disagrees with the commenter’s suggestion. The OCC believes that having OCC-specific regulations provides clarity for OCC-supervised banks and savings associations. The OCC therefore has not made any changes to the final rule in response to this comment.

The commenter also suggested that, if the OCC does not repeal § 7.2014, the OCC should delete language in § 7.2014 that reserves the power of the OCC to overturn any bank board decision on indemnification and advancement of expenses. The OCC disagrees with this comment. The OCC must retain supervisory authority to object to indemnification payments if they threaten the safety and soundness of the institution. The OCC notes that it would only exercise this authority under those circumstances. The OCC therefore has not made any changes to the final rule in response to this comment.

This commenter also suggested that, if the OCC does not repeal § 7.2014, the OCC should include the right to advance expenses in both matters subject to 12 CFR part 359 and those that are not. The commenter further suggested that the OCC should expand coverage for indemnification unrelated to part 359-type matters to those who may not fall under the definition of IAPs, noting that State statutes typically cover potentially other individuals. The OCC also disagrees with these comments. Section 7.2014 already includes the right to advance expenses in both matters subject to 12 CFR part 359, which implements 12 U.S.C. 1828(k), and those that are not. As noted above, § 7.2014 addresses indemnification of IAPs by national banks in cases involving an administrative proceeding or civil action initiated by a Federal banking agency, as well as cases that do not involve a Federal banking agency. Further, the OCC believes the scope of the coverage for indemnification to IAPs is appropriate and sufficiently broad. “IAP” has the same meaning as set forth

at 12 U.S.C. 1813(u), and thus § 7.2014 applies not only to officers, directors, and employees of the bank, but also to controlling shareholders, independent contractors, consultants, and other persons identified in 12 U.S.C. 1813(u). The OCC therefore has not made any changes to the final rule in response to these comments.

The OCC believes that revised § 7.2014 incorporates the provisions of current § 145.121 that should be applicable to both national banks and Federal savings associations, while maintaining appropriate flexibility for both types of institutions. As noted above, revised § 7.2014 will apply to actions brought by a Federal banking agency and actions not brought by a Federal banking agency, as in § 145.121, while retaining the statutory limits of section 1828(k).<sup>156</sup> Revised § 7.2014 also includes the reimbursement agreement requirement, as in § 145.121(e). However, the OCC did not propose to include in § 7.2014 the provision in § 145.121 that requires Federal savings associations to indemnify persons against whom an action is brought under certain circumstances, such as if they are successful on the merits of the action,<sup>157</sup> nor the provision requiring a board vote to authorize indemnification under certain circumstances.<sup>158</sup> In place of these requirements, revised § 7.2014 permits Federal savings associations to incorporate State law on indemnification. Because State law governing indemnification generally incorporates these aspects of current § 145.121, the OCC expects that Federal savings associations will continue to be subject to similar provisions governing indemnification as before. For example, State law generally requires mandatory indemnification if an employee is successful on the merits,<sup>159</sup> as well as a board vote authorizing indemnification in almost all circumstances.<sup>160</sup> Because

<sup>156</sup> Section 145.121(g) subjects and qualifies the indemnification provided for by current § 145.121 to 12 U.S.C. 1821(k). In contrast, current § 7.2014 explicitly subjects national bank indemnification to the restrictions of 12 U.S.C. 1828(k). Section 1828(k) directly addresses indemnification and is applicable to any insured depository institution. See 12 U.S.C. 1828(k)(5)(A). Section 1821(k) addresses personal liability for directors and officers and is also applicable to any insured depository institution. Both of these statutes apply, and will continue to apply to national banks and Federal savings associations but proposed § 7.2014 retains the citation to section 1828(k) as the more relevant citation for indemnification purposes.

<sup>157</sup> See § 145.121(b).

<sup>158</sup> See § 145.121(c)(1)(ii)(C).

<sup>159</sup> See, e.g., 8 Del. C. 145(c); New York BCL section 723(a); 805 ILCS 5/8.75(c); Model Bus. Corp. Act, section 8.52 (2016).

<sup>160</sup> See, e.g., 8 Del. C. 145(d); New York BCL section 723(b); 805 ILCS 5/8.75(d); Model Bus. Corp. Act, sections 8.53(c), 8.55 (2016).

national banks also may incorporate State indemnification law, they will be subject to these State indemnification provisions as well. The OCC specifically requested comment on whether, instead of relying on State law, the final rule should include the requirement from § 145.121 that, in the case of settlement, final judgment against the IAP, or final judgment in the IAP’s favor other than on the merits, a majority of the disinterested directors determine that the IAP was acting in good faith before the institution may indemnify the IAP. One commenter replied to the OCC’s request for comment, and did not support including this requirement in the final rule. The commenter argued that this requirement is generally more restrictive than typical State law and may discourage qualified candidates from serving on the board of a national bank or Federal savings association, and that there is no compelling public interest served by subjecting national bank or Federal savings association directors to greater risk of personal liability than directors of other corporations. The OCC agrees with the commenter, and therefore, the OCC is not including the requirement in the final rule.

The OCC also did not propose to include in § 7.2014 the provision in § 145.121 that requires a 60-day prior notice to the OCC before making an indemnification because it believes this provision is burdensome and unnecessary.<sup>161</sup> However, the OCC requested comment on whether the final rule should include this prior notice requirement and, if so, what benefits prior approval would provide that would outweigh any additional regulatory burden. One commenter replied to the OCC’s request for comment and did not support including this prior-notice requirement. The commenter argued, and the OCC agrees, that the regulatory burden of such a notice would outweigh any benefit. Therefore, the OCC is not including this requirement in the final rule.

Restricting Transfer of National Bank Stock and Record Dates; Stock Certificates (§ 7.2016)

Facsimile Signatures on Bank Stock Certificates (§ 7.2017)

Lost Stock Certificates (§ 7.2018)

Sections 12 CFR 7.2016, 7.2017, and 7.2018 contain specific requirements related to national bank stock transfers and stock certificates. Many of these requirements are mandated by 12 U.S.C. 52. However, some of these

<sup>161</sup> See § 145.121(c)(2).

requirements are outdated because national banks today rarely issue physical stock certificates.

Section 7.2016(a) states that, pursuant to section 52, a national bank may impose conditions on the transfer of its stock reasonably calculated to simplify the work of the bank with respect to stock transfers, voting at shareholders' meetings, and related matters and to protect the bank against fraudulent transfers. Consistent with the statute, § 7.2016(b) allows a national bank to close its stock records for a reasonable period to ascertain shareholders for voting purposes. The board also may fix record dates, which should be reasonable in proximity to the date notice is given to shareholders of the meeting. Section 7.2017 states that the president and cashier of the bank, or other officers authorized by the bank's bylaws, shall sign each stock certificate. These signatures may be manual or facsimile and may be electronic. Each certificate also must be sealed with the seal of the bank.

To streamline OCC rules, the OCC proposed combining §§ 7.2016 and 7.2017 into one section, § 7.2016, that would apply to both stock transfers and stock certificate requirements. The OCC also proposed making OCC rules on stock certificates more flexible. As noted above, section 12 U.S.C. 52 requires certain officers of the association to sign every bank stock certificate and for it to be sealed with the seal of the association. However, banks now generally hold stock in "book-entry" form, which is not a format that supports signatures or stamps. Although section 52 places requirements on physical stock certificates, the OCC does not believe that the language of that section requires banks to actually issue stock in certificated form. Notably, section 52 also states that "[t]he capital stock of each association shall be . . . transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association."<sup>162</sup> This language allows banks to provide for book-entry transfer in their by-laws or articles of association, even if this type of transfer is incompatible with the use of signatures and seals. Therefore, the OCC proposed stating that a national bank may prescribe the manner in which its stock must be transferred in its by-laws or articles of association. The OCC also proposed specifying that a national bank that does issue stock in certificate form must comply with the requirements of section 52, including: (1) The name and location of the bank; (2) name and

holder of record of the stock; (3) the number and class of shares which the certificate represents; (4) if the bank issues more than one class of stock, the respective rights, preferences, privileges, voting rights, powers, restrictions, limitations, and qualifications of each class of stock issued (unless incorporated by reference to the articles of association); (5) signatures of the president and cashier of the bank, or such other officers as the bylaws of the bank provide; and (6) the seal of the bank. The OCC proposed to continue allowing banks to meet the signature requirements of section 52 through the use of electronic means or by facsimiles, as is permitted by current § 7.2017.

Finally, the OCC proposed to remove § 7.2018 as unnecessary. Section 7.2018 states that if the bank's articles of association or bylaws do not provide for replacing lost, stolen, or destroyed stock certificates, the bank may adopt procedures under 12 CFR 7.2000. Section 7.2000 generally permits national banks to adopt corporate governance procedures<sup>163</sup> in accordance with State law, to the extent not inconsistent with applicable Federal laws and regulations or with bank safety and soundness. Therefore, this provision is unnecessary.

The OCC received no comments on these changes to §§ 7.2016 and 7.2018. Therefore, the OCC adopts these changes to § 7.2016 and removes §§ 7.2017 and 7.2018 as proposed. The OCC also is making a technical change to the section heading not included in the proposed rule to reflect that fact that § 7.2016 applies only to national banks.

#### Acquisition and Holding of Shares as Treasury Stock (§ 7.2020)

The OCC proposed to remove 12 CFR 7.2020. Section 7.2020 provides that a national bank may repurchase its outstanding shares and hold them as treasury stock as a capital reduction under 12 U.S.C. 59 if the repurchase and retention is for a "legitimate corporate purpose" and not for speculative purposes. The OCC issued § 7.2020 in 1996 as an exception to the provision in 12 U.S.C. 83 that prohibited a national bank from being the "purchaser or holder" of its own shares. However, in 2000, Congress amended section 83 to remove this prohibition.<sup>164</sup> Therefore, § 7.2020 is unnecessary. The OCC received no comments on this change

and the final rule removes § 7.2020 as proposed. The OCC notes that removing § 7.2020 would not limit the OCC's authority over share repurchases. Share repurchases are considered reductions in capital and would continue to be subject to OCC and shareholder approval under 12 U.S.C. 59 and 12 CFR 5.46.

#### Capital Stock-Related Activities of a National Bank (new § 7.2025)

The OCC proposed new § 7.2025 to codify various OCC interpretations of the National Bank Act involving capital stock issuances and repurchases. The OCC received no comment on this new section and adopts it as proposed.

Section 7.2025 explains the shareholder approval requirements for the issuance of authorized common stock; the issuance, repurchase, and redemption of preferred stock pursuant to blank check procedures; and share repurchase programs. Generally, an increase or decrease in the amount of a national bank's common or preferred stock is a change in permanent capital subject to the notice and approval requirements of 12 CFR 5.46 and applicable law.<sup>165</sup> Section 7.2025(a) sets forth the general requirements for changes in permanent capital. Paragraphs (b) through (d) of § 7.2025 provide more specific requirements for shareholder approval of various types of issuances and repurchases. Section 7.2025(e) identifies certain permissible features for preferred stock.

*Issuance of previously approved and authorized common stock.* The issuance of common stock is governed by 12 U.S.C. 57, which provides that a national bank may, with the approval of the OCC, and by a vote of shareholders owning two-thirds of the stock of the bank, increase its capital stock to any sum. The OCC has interpreted 12 U.S.C. 57 to require a two-thirds shareholder vote to amend the articles of association to increase the number of authorized shares.<sup>166</sup> The OCC also has long interpreted section 57 to permit a national bank's board of directors to issue common stock without obtaining additional shareholder approval at the time of the issuance so long as the issuance does not exceed the amount of common stock previously approved and

<sup>165</sup> See generally 12 U.S.C. 51a, (preferred stock issuance), 57 (increase in capital), and 59 (reduction of capital).

<sup>166</sup> See, e.g., Articles of Association, Charter, and Bylaw Amendments, Comptroller's Licensing Manual (June 2017), p. 3 (indicating that two-thirds of a national bank's shareholders must vote to increase or decrease the authorized number of common shares in the articles of association).

<sup>163</sup> The proposed rule changed this terminology in § 7.2000 to "corporate governance provisions."

<sup>164</sup> Public Law 106-569, Title XII, section 1207(a), 114 Stat. 3034 (American Homeownership and Economic Opportunity Act of 2000).

<sup>162</sup> See 12 U.S.C. 52, first paragraph.

authorized by shareholders.<sup>167</sup> Section 7.2025(b) codifies this interpretation. Specifically, paragraph (b) provides that, in compliance with 12 U.S.C. 57, a national bank may issue common stock up to an amount previously approved and authorized in the national bank's articles of association by holders of two-thirds of the national bank's shares without obtaining additional shareholder approval for each subsequent issuance within the authorized amount.

*Issuance, repurchase, and redemption of preferred stock pursuant to certain procedures.* Twelve U.S.C. 51a requires a majority of shareholders vote to approve a national bank's issuance of preferred stock. However, the statute does not specify when in the process the bank must obtain shareholder approval. In OCC Interpretive Letter 921, the OCC determined that a national bank could adopt, subject to required shareholder approval, a provision in its articles of association or an amendment to its articles authorizing the bank's board of directors to issue preferred stock using blank check procedures ("blank check preferred stock").<sup>168</sup> Blank check preferred stock refers to preferred stock for which the board is empowered to issue and determine the terms of authorized and unissued preferred stock. To be permissible, blank check preferred stock must be permitted by the corporate governance procedures adopted by the bank under § 7.2000.<sup>169</sup>

The OCC also determined that shareholders' adoption or approval of a blank check preferred stock article constitutes the shareholder action required by 12 U.S.C. 51a and 51b to issue and establish the terms of preferred stock. The subsequent issuance of the preferred stock within the authorized limits would not require additional shareholder approval. Interpretive Letter 921 did not specifically address blank check preferred procedures that include the authority, and the shareholder action required, to repurchase and redeem blank check preferred stock.

The redemption or repurchase of preferred stock is a reduction in capital. Twelve U.S.C. 59 requires the approval of two-thirds of shareholders for a

national bank to reduce capital, but it does not specify when in the process the bank must obtain shareholder approval. In Interpretive Letter 1162, the OCC determined that the holders of two-thirds of a national bank's shares may approve in advance redemptions of blank check preferred stock by voting to amend the articles of association to authorize the issuance and redemption of blank check preferred shares.<sup>170</sup>

Section 7.2025(c) codifies these interpretations and permits blank check procedures, if approved in advance by the bank's shareholders, that authorize the issuance, repurchase, and redemption of preferred stock without additional shareholder approval at the time of issuance, repurchase, or redemption, if certain conditions are met. Paragraph (c) provides that, subject to the requirements of 12 U.S.C. 51a, 51b, and 59, a national bank may adopt procedures to authorize the board of directors to issue, determine the terms of, repurchase, or redeem one or more series of preferred stock, if permitted by the corporate governance provisions adopted by the bank under 12 CFR 7.2000. This provision further provides that, to satisfy the shareholder approval requirements of 12 U.S.C. 51a and 59, shareholders must approve the adoption of these procedures in advance through an amendment to the national bank's articles of association, and that any amendment that authorizes both the issuance and the repurchase and redemption of shares must be approved by holders of two-thirds of the national bank's shares.

*Share repurchase programs.* In Interpretive Letter 1162, the OCC determined that the shareholder approval requirement in 12 U.S.C. 59 may be satisfied by a two-thirds shareholder vote approving an amendment to the bank's articles of association authorizing the board of directors to implement share repurchase programs. A share repurchase program authorizes the board of directors to repurchase the national bank's common or preferred stock from time to time under board-determined parameters that can limit the frequency, type, aggregate limit, or purchase price of repurchases, without obtaining additional shareholder approval at the time the shares are repurchased. Section 7.2025(d) codified this interpretation by providing that, subject to the requirements of 12 U.S.C. 59, a national bank may establish a program for the repurchase, from time to time, of the national bank's common or preferred

stock, if permitted by the corporate governance provisions adopted by the bank under 12 CFR 7.2000. Paragraph (d) also provides that, to satisfy the shareholder approval requirement of 12 U.S.C. 59, the repurchase program must be approved in advance by the holders of two-thirds of the national bank's shares, including through an amendment to the national bank's articles of association that authorizes the board of directors to implement share repurchase programs from time to time under board-determined parameters that can limit the frequency, type, aggregate limit, or purchase price of repurchases.

*Preferred stock features.* Section 7.2025(e) clarifies that a national bank may issue and maintain noncumulative preferred stock. This provision codifies a longstanding OCC interpretation that 12 U.S.C. 51b, by its terms, describes limitations on the portion of the preferred stock dividend which may be cumulative. It does not require that preferred stock dividends must always be cumulative.<sup>171</sup> Specifically, § 7.2025(e) provides that a national bank's preferred stock may be cumulative or non-cumulative and may or may not have voting rights on one or more series.

#### *Subpart C—National Bank and Federal Savings Association Operations*

##### *National Bank and Federal Savings Association Operating Hours and Closings (§ 7.3000)*

The OCC proposed to amend § 7.3000, National bank hours and closings, to include Federal savings associations, to update it, and to make technical and clarifying changes. The OCC received one comment on § 7.3000, in support of the proposed updates to the types of emergency conditions that may result in the declaration of a legal holiday. Therefore, the OCC adopts the amendments to § 7.3000 as proposed, with technical changes to the section and paragraph (a) headings.

Twelve U.S.C. 95(b)(1) specifically authorizes the Comptroller to designate a legal holiday because of emergency conditions occurring in any State or part of a State for national banks located in

<sup>167</sup> A previous version of § 5.46 (1981) provided that shareholder approval would not be required to increase common stock through the issuance of a class of common up to an amount previously approved by shareholders. Subsequent amendments to § 5.46, which the OCC intended to simplify 12 CFR part 5, omitted this language but did not change this interpretation.

<sup>168</sup> OCC Interpretive Letter No. 921 (Dec. 13, 2001).

<sup>169</sup> The final rule changes this terminology in § 7.2000 to "corporate governance provisions."

<sup>170</sup> OCC Interpretive Letter No. 1162 (July 6, 2018).

<sup>171</sup> In part, section 51b provides that preferred shareholders "shall be entitled to receive such cumulative dividends . . . as may be provided in the articles of association . . . and no dividends shall be declared or paid on common stock until cumulative dividends on preferred stock have been paid in full . . ." The OCC has previously interpreted section 51a as providing national banks with broad authority to issue preferred stock, including preferred stock bearing noncumulative dividends, notwithstanding the language of section 51b. See OCC Letter from Martin Goodman, OCC Assoc. Ch. Couns. (Oct. 3, 1977).

that State or affected area. Section 95(b)(1) also provides that when a State or State official authorized by law designates any day as a legal holiday for ceremonial or emergency reasons, that day is a legal holiday and a national bank located in that State or affected part of the State may close or remain open unless the Comptroller directs otherwise by written order. Section 7.3000 implements this statutory provision. Specifically, current § 7.3000(b) provides that when the Comptroller, a State, or a legally authorized State official declares a day a legal holiday due to emergency conditions, a national bank may temporarily limit or suspend its operations at its affected offices. Alternatively, the bank may continue its operations, unless the Comptroller directs otherwise by written order. This rule provides that emergency conditions include natural disasters and civil and municipal emergencies, such as severe flooding or a power emergency declared by a local power company or government requesting that businesses in the affected area close. Section 7.3000(c) states that a State or a legally authorized State official may declare a day a legal holiday for ceremonial reasons and provides that when a State legal holiday is declared for ceremonial reasons, a national bank may choose to remain open or to close. Section 7.3000(d) provides that a national bank should assure that all liabilities or other obligations under the applicable law due to the bank's closing are satisfied, e.g., notice to depositors about funds availability pursuant to 12 CFR 229.13(g)(4).

There is no equivalent statute or corresponding regulation for Federal savings associations. However, a former OTS regulation at 12 CFR 510.2(b) permitted the OTS to waive or relax any limitations pertaining to the operations of a Federal savings associations in any area affected by a determination by the President of the United States that a major disaster or emergency had occurred. Amending § 7.300 to include Federal savings associations clarifies for these institutions how a legal holiday is declared and the implications of a legal holiday declaration, as well as provide consistency between national bank and Federal savings association operations on legal holidays.<sup>172</sup>

<sup>172</sup> We note that the Comptroller is directed under section 4 of the HOLA (12 U.S.C. 1463(a)(1)(A)) to provide for the "safe and sound operation" of Federal savings associations. The OTS relied on this HOLA authority when it issued § 510.2(b) (see 54 FR 49411, at 49456 (Nov. 30, 1989)) and this final rule furthers that objective. See also 12 U.S.C. 1(a)

As proposed, in addition to adding Federal savings associations, the final rule clarifies and updates the emergency closing provisions of § 7.3000. First, the final rule clarifies that § 7.3000 also applies to Federal branches and agencies of foreign banks. Although current § 7.3000 applies to Federal branches and agencies pursuant to section 4(b) of the International Banking Act, 12 U.S.C. 3102(b), the OCC believes it is appropriate to specify this application in the rule.<sup>173</sup>

Second, the final rule clarifies that the Comptroller may declare "any day" a legal holiday, instead of "a day," to more accurately reflect the statutory language and to clarify that the Comptroller may declare more than one day due to the emergency condition as a legal holiday.

Third, the final rule amends § 7.3000(b) to state that emergency conditions may be "caused by acts of nature or of man." This amendment mirrors the language in 12 U.S.C. 95(b)(1) and clarifies the broad scope of possible emergency conditions that could justify a legal holiday.

Fourth, the final rule updates the types of emergency conditions listed in the rule to include disasters other than natural disasters, public health or safety emergencies, and cyber threats or other unauthorized intrusions, and updates the list of examples to include pandemics, terrorist attacks, and cyber-attacks on bank systems.

Fifth, the final rule provides that the Comptroller may issue a declaration of a legal holiday in anticipation of the emergency condition, in addition to at the time of the emergency or soon thereafter. This codifies the current practice of the Comptroller in most cases, which permits national banks, Federal savings associations, and Federal branches and agencies to better plan for the possible closing.

Sixth, the final rule provides that in the absence of a Comptroller declaration of a bank holiday, a national bank, Federal savings associations, or Federal branch or agency may choose to temporarily close offices in response to an emergency condition. If a bank, savings association, or branch or agency

(charging the OCC with assuring the safety and soundness of institutions subject to its jurisdiction).

<sup>173</sup> As indicated previously in this preamble, section 4(b) of the International Banking Act, 12 U.S.C. 3102(b), provides that the operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location. See also 12 CFR 28.13.

temporarily closes pursuant to this provision, it should notify the OCC of such temporary closure as soon as feasible. This provision provides additional flexibility to OCC-regulated institutions during emergency conditions and codifies similar language currently included in the OCC's Licensing Manual.<sup>174</sup>

Seventh, the final rule clarifies in § 7.3000(c) that a State legal holiday may be for the entire State or part of the State, as indicated in 12 U.S.C. 95(b)(1).

Eighth, as provided in the statute, the final rule provides in § 7.3000(c) that the Comptroller may by written order direct the affected institution to close or remain open during a State legal holiday declared for ceremonial reasons, as with a State legal holiday declared due to an emergency.

Finally, the final rule adds a new paragraph, § 7.3000(e), to provide a definition of "State" that is consistent with the definition in 12 U.S.C. 95(b)(2).

Also as proposed, the final rule also makes a number of technical changes to § 7.3000. The final rule replaces the word "country" with "United States" in the phrase describing affected geographic area to make this phrase more precise; deletes the superfluous citation to 12 U.S.C. 95 in § 7.3000(b); and deletes the superfluous first sentence of current § 7.3000(c), which states that a State or a legally authorized State official may declare a day a legal holiday for ceremonial reasons.

In making these changes, the OCC is reorganizing § 7.3000(b) and (c) so that all provisions relating to Comptroller declared legal holidays for emergency conditions are in § 7.3000(b) and all provisions related to State declared legal holidays for emergency and ceremonial reasons are in § 7.3000(c). This reorganization more clearly sets forth the standards for Comptroller and State declared legal holidays and corresponds better with the statutory text.

Section 7.3000 also provides, in paragraph (a), that a national bank's board of directors should review its banking hours and, independently of any other bank, take appropriate actions to establishing a schedule of its banking hours. As proposed, the final rule updates this provision by replacing "banking hours" with "hours of operations for customers." The final rule also makes technical corrections to the section and paragraph heading to reflect this change in terminology. Furthermore, the final rule includes Federal savings associations and Federal branches and agencies in this provision.

<sup>174</sup> See Comptroller's Licensing Manual, Branch Closings (June 2017).

Because Federal branches and agencies typically do not have a board of directors, § 7.3000(a) provides that an equivalent person or committee for a Federal branch or agency should review that entity's operating hours and take appropriate action to establish a schedule of operating hours for customers.

#### Sharing National Bank or Federal Savings Association Space and Employees (§ 7.3001)

Section 7.3001 permits national banks and Federal savings associations to lease excess space on bank or savings association premises to other businesses, share space jointly held with other businesses, offer its services in space owned by or leased to other businesses, and share employees when sharing space. The OCC proposed to add a cross-reference to redesignated § 7.1024, National bank or Federal savings association ownership of property, in § 7.3001(a)(1) to clarify that the requirements of § 7.1024 apply to the sharing of office space and employees pursuant to § 7.3001. The OCC did not receive any comments on this change and adopts it as proposed.

#### Additional Issues and General Comments

*Application to Federal savings associations generally.* The OCC received several comments on the applicability of the proposed revisions in the proposed rule to Federal savings associations and, in particular, mutual savings associations. One commenter stated that national banks and Federal savings associations have different enabling acts, and it is not clear that applying national bank rules to Federal savings associations is a good fit. The OCC is cognizant of the fact that national banks and Federal savings associations have different enabling statutes and takes those differences into account when determining whether, and when, to integrate the rules applicable to national banks and Federal savings associations. In other areas, the OCC has retained different regulations for national banks and Federal savings associations, as dictated by provisions of the National Bank Act and the HOLA, respectively.

The same commenter noted that mutual associations are a distinct and very different entity from a governance perspective and requested that mutual savings associations have the same leeway in making a choice of law as national banks. This commenter also stated that mutual savings associations should not be denied the benefit of State law simply because national banks are

denied those provisions by their enabling act. The OCC notes that the proposal as well as the final rule do not deny Federal mutual savings associations the benefit of State law. In fact, as noted above in the preamble discussion of § 7.2000, the final rule permits additional flexibility for Federal savings associations with respect to a choice of corporate governance law to allow parity with national banks. In suggesting and adopting these changes, the OCC recognized the distinction between Federal savings associations and national banks by considering choice of law issues for these different charters separately.

Another commenter suggested the OCC should explore further ways to harmonize national bank and Federal savings association regulations, including potential Federal savings association use of 12 U.S.C. 24 and 12 CFR part 24, to invest directly in public welfare investments. The OCC regularly reviews its regulations to determine opportunities to harmonize Federal savings associations and national bank regulations, where appropriate. The OCC staff notes that 12 CFR 160.36 already permits Federal savings associations to make *de minimis* investments in community development investments of the type permitted by 12 CFR part 24 for a national bank, and 12 U.S.C. 1464(c)(3)(A) and 12 CFR 160.30 authorize community development investments by Federal savings associations.

A commenter suggested that any attempt to revise the corporate governance documents of a subsidiary Federal stock savings association of a mutual holding company (MHC) should be harmonized with the Federal Reserve Board's regulation on mutual holding companies, Regulation MM.<sup>175</sup> The same commenter suggested that one of the principal problems with governance for mutual savings associations is a faulty assumption that depositor members have an active interest in participating in the association's corporate affairs.<sup>176</sup> While the OCC considered and is amending for Federal savings associations only the choice of State law for the corporate governance provisions, the OCC is not considering a general overhaul of all the Federal mutual savings association governance regulations in this rulemaking. The OCC may consider revising other governance provisions relating to Federal mutual savings associations in a separate

<sup>175</sup> 12 CFR part 239.

<sup>176</sup> Federal savings association mutual members have certain statutory and regulatory voting rights. See 12 U.S.C. 1464; 12 CFR 5.21.

rulemaking and, if practical, in conjunction with a Federal Reserve Board review of Regulation MM.

The same commenter indicated that, while the right to vote shares above a certain percentage limit and supermajority voting provisions may be prohibited for national banks, these provisions normally are permitted for Federal savings associations. The commenter suggested that the OCC explicitly state these provisions are permissible for Federal savings associations. In response, the OCC notes that it has permitted certain anti-takeover and supermajority vote provisions for Federal savings associations, either specifically provided by regulation or authorized by the applicable State law, provided that any supermajority vote provisions are adopted by a percentage of the shareholder vote at least equal to the highest percentage that would be required to take any action under such provision.<sup>177</sup> Also, the OCC generally does not approve supermajority provisions that require approval of more than 80 percent of the voting shares.<sup>178</sup>

*Electronic filings and procedures.* One commenter encouraged the OCC to permit digital and remote filing procedures, such as electronic fingerprinting, digital signatures, and virtual notarization. Specifically, the commenter suggested that the requirements for filing oaths of directors should be modernized by permitting submissions in electronic form instead of the original hard copy; allowing the notary to be a bank officer; and as an alternative to notarization, allowing certification of oaths by the Secretary or an Assistant Secretary of the financial institution. The OCC notes that has already updated its licensing regulation to encourage the use of electronic filings, including permitting digital signatures in the OCC's Central Application Tracking System (CATS). Further, the OCC is unable to update to virtual notarization because notarization is governed by State law.

#### Technical Changes

In addition to the technical changes discussed above, the OCC proposed numerous technical changes throughout 12 CFR part 7. The OCC received no comments on these changes and adopts them as proposed. Specifically, the final rule:

- Replaces the word "shall" with "must," "will," or other appropriate

<sup>177</sup> 12 CFR 5.22(h).

<sup>178</sup> See Articles of Association, Charters, and Bylaw Amendments (Forms), Comptroller's Licensing Manual (June 19, 2017), Anti-Takeover Provisions, p. 11.

language, which is the more current rule writing convention for imposing an obligation and is the recommended drafting style of the **Federal Register**;

- Uniformly capitalizes the words “State” and “Federal” in conformance with **Federal Register** drafting style;
- Replaces the term “bank” and “savings association” with “national bank” or “Federal savings association,” respectively, where appropriate;
- Clarifies punctuation and update or conform spelling of various terms; and
- Conforms paragraph heading style.

The OCC also is making technical changes to 12 CFR 5.30 to reflect changes made by the final rule. Specifically, the final rule removes drop boxes from the definition of branch in § 5.30(d)(1)(i), pursuant to the change made by § 7.1027, and replaces the cross-reference to § 7.4003 in § 5.30(d)(i)(iii) with § 7.1027, as redesignated by this final rule.

In addition, the OCC is making a conforming change to the heading of subpart B and technical changes to various section headings in subpart B to better identify their application only to national banks.

Finally, the OCC is making technical changes to 12 CFR 4.5 to replace outdated information on office locations and responsibilities. The OCC cross-references 12 CFR part 4, subpart A, when using the term “appropriate OCC supervisory office” in 12 CFR 7.1025 and 7.1026. Twelve CFR part 4, subpart A, sets forth the physical addresses of OCC offices, including supervisory offices. The OCC is updating one address in 12 CFR 4.5, *Other OCC Supervisory Offices*, to provide the correct location of Midsize Bank Supervision (MBS) headquarters in 12 CFR 4.5(a). The OCC also is amending the description of MBS duties in 12 CFR 4.5(a) to better reflect its current responsibilities.

#### IV. Regulatory Analyses

##### A. Paperwork Reduction Act

Certain provisions of the final rule contain “collection of information” requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC reviewed the final rule and determined that it revises certain information collection requirements previously cleared by OMB under OMB

Control No. 1557–0204. The OCC has submitted the revised information collection to OMB for review under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB’s implementing regulations (5 CFR part 1320).

##### Current Actions

The information collection requirements are as follows:

- *Tax Equity Finance Transactions*—Written requests are required to increase the aggregate limit on tax equity finance transactions. Prior written notification to OCC is required for each tax equity finance transaction. § 7.1025.

- *Payment Systems*—Thirty (30) days advance written notice is required before joining a payment system that would expose the institution to open-end liability. An after-the-fact written notice must be filed within 30 days of becoming a member of a payment system that does not expose the institution to open-end liabilities with certain representations. Both notices must include safety and soundness representations. § 7.1026.

- *Derivatives Activities*—Thirty (30) days prior written notice is required before engaging in certain derivatives hedging activities, expanding derivatives hedging activities to include a new category of underlying, engaging in certain customer-driven financial intermediation derivatives activities, and expanding customer-driven financial intermediation derivatives activities to include a new category of underlying. § 7.1030.

- *State Corporate Governance*—Requests for OCC’s staff position on the ability of national bank to engage in particular State corporate governance provision must include name, citations, discussion of similarly suited State banks, identification of Federal banking statutes and regulations, and analysis of consistency with statutes, regulations, and safety and soundness. § 7.2000.

- *Indemnification of institution-affiliated parties—Administrative proceeding or civil actions not initiated by a Federal banking agency*—A written agreement that an IAP will reimburse the institution for any portion of non-reimbursed indemnification that the IAP is found not entitled to is required before advancing funds to an IAP. Federal savings associations no longer required to provide OCC prior notice of indemnification. § 7.2014.

- *Issuing Stock in Certificate Form*—National banks must include certain information, signatures and seal when issuing stock in certificate form. § 7.2016.

*Title of Information Collection:* Bank Activities and Operations.

*Frequency:* Event generated.

*Affected Public:* Businesses or other for-profit.

*Estimated number of respondents:* 213.

*Total estimated annual burden:* 586 hours.

##### B. Regulatory Flexibility Act

In general, the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires an agency, in connection with a final rule, to prepare a Final Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the Small Business Administration for purposes of the RFA to include commercial banks and savings institutions with total assets of \$600 million or less and trust companies with total assets of \$41.5 million or less). However, under section 605(b) of the RFA, this analysis is not required if an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities and publishes its certification and a short explanatory statement in the **Federal Register** along with its rule.

The OCC currently supervises approximately 1,156 institutions (commercial banks, trust companies, Federal savings associations, and branches or agencies of foreign banks, collectively banks), of which 745 are small entities.<sup>179</sup> Because the rule applies to all OCC-supervised depository institutions, the rule will affect all small OCC-supervised entities and thus, a substantial number of them. However, almost all of the provisions in the final rule clarify or codify existing requirements, provide relief from existing requirements, increase flexibility, or reduce burden. One provision in the final rule, § 7.2012, which will require a person serving as, or in the function of, bank president, regardless of title, to be a member of the bank’s board of directors, could impose a new requirement on banks subject to the prior notice requirement for any change in directors pursuant to 12 CFR 5.51. However, the number of banks that are subject to this prior notice requirement that do not currently have

<sup>179</sup> Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if it should classify an institution as a small entity. The OCC used December 31, 2019, to determine size because a “financial institution’s assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” See footnote 8 of the U.S. Small Business Administration’s *Table of Size Standards*.

a president serving on the board of directors is limited. As a result, the final rule will not impose new mandates on more than a limited number of banks. Therefore, the OCC believes the costs associated with the final rule, if any, would be minimal and thus the final rule would not have a significant economic impact on any small OCC-supervised entities. For these reasons, the OCC certifies that the final rule will not have a significant economic impact on a substantial number of small entities supervised by the OCC. Accordingly, a Final Regulatory Flexibility Analysis is not required.

#### C. Unfunded Mandates Reform Act of 1995

The OCC has analyzed the final rule under the factors in the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501 *et seq.* Under this analysis the OCC considered whether the final rule 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 (\$157 million as adjusted annually for inflation). The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

As discussed above, the final rule would not impose new mandates on more than a limited number of banks. Therefore, the OCC concludes that the final rule would not result in an expenditure of \$157 million or more annually by State, local, and tribal governments, or by the private sector. As a result, the OCC finds that the final rule does not trigger the UMRA cost threshold. Accordingly, the OCC has not prepared the written statement described in section 202 of the UMRA.

#### D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA), 12 U.S.C. 4802(a), in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, the OCC must consider, consistent with principles of safety and soundness and the public interest (1) any administrative burdens that the final rule would place on depository institutions, including small depository institutions and customers of depository institutions and (2) the benefits of the final rule. The has considered the changes made by this final rule and

believes that the overall effective date of April 1, 2021 will provide OCC-regulated institutions with adequate time to comply with the rule. With respect to administrative compliance requirements, the OCC has considered the administrative burdens and the benefits of this final rule and believes that any burdens are necessary for safety and soundness and proper OCC supervision. As examples, the final rule, requires a person serving as, or in the function of, a bank president, regardless of title to be a member of the bank's board of directors (§ 7.2012) and contains notice requirements with respect to payment system membership and derivatives activities. The final rule's benefits include clarifying existing requirements, codifying existing OCC interpretations and guidance, removing unnecessary provisions, and updating and modernizing certain provisions. Further discussion of the consideration by the OCC of these administrative compliance requirements is found in other sections of the final rule's **SUPPLEMENTARY INFORMATION** section.

#### E. The Congressional Review Act

For purposes of Congressional Review Act, the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a "major" rule.<sup>180</sup> If a rule is deemed a "major rule" by OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.<sup>181</sup> The Congressional Review Act defines a "major rule" as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (3) a significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.<sup>182</sup>

OMB has determined that this final rule is not a major rule. As required by the Congressional Review Act, the OCC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

#### F. Effective Date

The APA<sup>183</sup> requires that a substantive rule must be published not less than 30 days before its effective date, except for: (1) Substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.<sup>184</sup> Section 302(b) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) requires that regulations issued by a Federal banking agency<sup>185</sup> imposing additional reporting, disclosure, or other requirements on insured depository institutions take effect on the first day of a calendar quarter that begins on or after the date of publication of the final rule, unless, among other things, the agency determines for good cause that the regulations should become effective before such time.<sup>186</sup> The April 1, 2021, effective date of this final rule meets both the APA and RCDRIA effective date requirements as it will take effect at least 30 days after its publication date of December 22, 2020 and on the first day of a calendar quarter following publication, April 1, 2021. However, the OCC notes that RCDRIA provides that insured depository institutions may comply with regulations that impose additional reporting, disclosure, or other requirements before the regulation's effective date.<sup>187</sup>

Pursuant to section 553(b)(B) of the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an "agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."<sup>188</sup> As described in the final rule's **SUPPLEMENTARY INFORMATION** section, the final rule includes a number of technical, clarifying, or conforming amendments that the OCC did not include in its proposed rule. Because these amendments are not substantive and merely correct or clarify the rule, update the rule to reflect current law, or fix citation and regulatory text format, the OCC believes that public notice of these changes is unnecessary and therefore that it has good cause to adopt

<sup>183</sup> Codified at 5 U.S.C. 551 *et seq.*

<sup>184</sup> 5 U.S.C. 553(d).

<sup>185</sup> For purposes of RCDRIA, "Federal banking agency" means the OCC, FDIC, and Board. See 12 U.S.C. 4801.

<sup>186</sup> 12 U.S.C. 4802(b).

<sup>187</sup> 12 U.S.C. 4802(b)(2).

<sup>188</sup> 5 U.S.C. 553(b).

<sup>180</sup> 5 U.S.C. 801 *et seq.*

<sup>181</sup> 5 U.S.C. 801(a)(3).

<sup>182</sup> 5 U.S.C. 804(2).



these changes without notice and comment. Furthermore, the final rule's amendment to 12 CFR part 4, subpart A, relates to the organization of the OCC. Rules related to agency organization are not subject to APA notice and comment.<sup>189</sup>

**List of Subjects**

*12 CFR Part 4*

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

*12 CFR Part 5*

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

*12 CFR Part 7*

Computer technology, Credit, Derivatives, Federal savings associations, Insurance, Investments, Metals, National banks, Reporting and recordkeeping requirements, Securities, Security bonds.

*12 CFR Part 145*

Electronic funds transfers, Public deposits, Federal savings associations.

*12 CFR Part 160*

Consumer protection, Investments, Manufactured homes, Mortgages, Reporting and recordkeeping requirements, Savings associations, Securities.

For the reasons set out in the preamble, the OCC amends 12 CFR chapter I as follows:

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

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

**Authority:** 5 U.S.C. 301, 552; 12 U.S.C. 1, 93a, 161, 481, 482, 484(a), 1442, 1462a, 1463, 1464 1817(a), 1818, 1820, 1821, 1831m, 1831p–1, 1831o, 1833e, 1867, 1951 *et seq.*, 2601 *et seq.*, 2801 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3401 *et seq.*, 5321, 5412, 5414; 15 U.S.C. 77uu(b), 78q(c)(3); 18 U.S.C. 641, 1905, 1906; 29 U.S.C. 1204; 31 U.S.C. 5318(g)(2), 9701; 42 U.S.C. 3601; 44 U.S.C. 3506, 3510; E.O. 12600 (3 CFR, 1987 Comp., p. 235).

**§ 4.5 [Amended]**

- 2. Amend § 4.5(a) by:
  - a. Removing the second sentence; and
  - b. Removing the phrase “1 South Wacker Drive, Suite 2000, Chicago, IL 60606” and adding in its place the phrase “425 South Financial Place, Suite 1700, Chicago, IL 60605”.

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

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

**Authority:** 12 U.S.C. 1 *et seq.*, 24a, 35, 93a, 214a, 215, 215a, 215a–1, 215a–2, 215a–3, 215c, 371d, 481, 1462a, 1463, 1464, 1817(j), 1831i, 1831u, 2901 *et seq.*, 3101 *et seq.*, 3907, and 5412(b)(2)(B).

**§ 5.21 [Amended]**

- 4. Amend § 5.21 by:
  - a. In paragraphs (j)(2)(i)(C) and (j)(3)(ii), removing the phrase “corporate governance procedures” wherever it appears and adding in its place the phrase “corporate governance provisions”;
  - b. In paragraph (j)(3)(ii):
    - i. Removing the phrase “the State where the home office of the institution” and adding in its place “any State in which the home office or any branch of the association”; and
    - ii. Removing the phrase “such procedures” wherever it appears and adding in its place the phrase “such provisions”.
- 5. Amend § 5.22 by:
  - a. Revising paragraph (j)(2)(ii); and
  - b. In paragraph (k)(1)(ii)(B), removing the phrase “corporate governance procedures” and adding in its place the phrase “corporate governance provisions”.

The revision reads as follows:

**§ 5.22 Federal stock savings association charter and bylaws.**

\* \* \* \* \*

- (j) \* \* \*
- (2) \* \* \*

(ii) *Corporate governance election and notice requirement.* A Federal stock association may elect to follow the corporate governance provisions of: The laws of any State in which the home office or any branch of the association is located; the laws of any State in which a holding company of the association is incorporated or chartered; Delaware General Corporation law; or the Model Business Corporation Act, provided that such provisions may be elected to the extent not inconsistent with applicable Federal statutes and regulations and safety and soundness, and such provisions are not of the type

described in paragraph (j)(2)(i)(B) of this section. If this election is selected, a Federal stock association must designate in its bylaws the provision or provisions from the body or bodies of law selected for its corporate governance provisions, and must file a notice containing a copy of such bylaws, within 30 days after adoption. The notice must indicate, where not obvious, why the bylaw provisions meet the requirements stated in paragraph (j)(2)(i)(B) of this section. A Federal stock savings association that has elected to follow the corporate governance provisions of the law of the State in which its holding company is incorporated may continue to use those provisions even if the association is no longer controlled by that holding company.

\* \* \* \* \*

**§ 5.30 [Amended]**

- 6. Amend § 5.30 by:
  - a. In paragraph (d)(1)(i), adding the word “or” after the phrase “temporary facility,” and removing the phrase “, or a drop box”;
  - b. In paragraph (d)(1)(iii), removing the citation “12 CFR 7.4003” and adding in its place the citation “12 CFR 7.1027”.

**PART 7—ACTIVITIES AND OPERATIONS**

■ 7. The authority citation for part 7 is revised to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 25b, 29, 71, 71a, 92, 92a, 93, 93a, 95(b)(1), 371, 371d, 481, 484, 1462a, 1463, 1464, 1465, 1818, 1828, 3102(b), and 5412(b)(2)(B).

**§ 7.1000 [Redesignated]**

- 8. Redesignate § 7.1000 as § 7.1024.
- 9. Add a new § 7.1000 to read as follows:

**§ 7.1000 Activities that are part of, or incidental to, the business of banking.**

(a) *Purpose.* This section identifies the criteria that the Office of the Comptroller of the Currency (OCC) uses to determine whether an activity is authorized as part of, or incidental to, the business of banking under 12 U.S.C. 24(Seventh) or other statutory authority.

(b) *Restrictions and conditions on activities.* The OCC may determine that activities are permissible under 12 U.S.C. 24(Seventh) or other statutory authority only if they are subject to standards or conditions designed to provide that the activities function as intended and are conducted safely and soundly, in accordance with other applicable statutes, regulations, or supervisory policies.

<sup>189</sup> *Id.*

(c) *Activities that are part of the business of banking.* (1) An activity is permissible for national banks as part of the business of banking if the activity is authorized under 12 U.S.C. 24(Seventh) or other statutory authority. In determining whether an activity that is not specifically included in 12 U.S.C. 24(Seventh) or other statutory authority is part of the business of banking, the OCC considers the following factors:

- (i) Whether the activity is the functional equivalent to, or a logical outgrowth of, a recognized banking activity;
- (ii) Whether the activity strengthens the bank by benefiting its customers or its business;
- (iii) Whether the activity involves risks similar in nature to those already assumed by banks; and
- (iv) Whether the activity is authorized for State-chartered banks.

(2) The weight accorded each factor set out in paragraph (c)(1) of this section depends on the facts and circumstances of each case.

(d) *Activities that are incidental to the business of banking.* (1) An activity is authorized for a national bank as incidental to the business of banking if it is convenient or useful to an activity that is specifically authorized for national banks or to an activity that is otherwise part of the business of banking. In determining whether an activity is convenient or useful to such activities, the OCC considers the following factors:

- (i) Whether the activity facilitates the production or delivery of a bank's products or services, enhances the bank's ability to sell or market its products or services, or improves the effectiveness or efficiency of the bank's operations, in light of risks presented, innovations, strategies, techniques and new technologies for producing and delivering financial products and services; and
- (ii) Whether the activity enables the bank to use capacity acquired for its banking operations or otherwise avoid economic loss or waste.

(2) The weight accorded each factor set out in paragraph (d)(1) of this section depends on the facts and circumstances of each case.

- 10. Revise § 7.1002 to read as follows:

**§ 7.1002 National bank and Federal savings association acting as finder.**

(a) *In general.* A finder may identify potential parties, make inquiries as to interest, introduce or arrange contacts or meetings of interested parties, act as an intermediary between interested parties, and otherwise bring parties together for a transaction that the parties themselves

negotiate and consummate. It is part of the business of banking under 12 U.S.C. 24(Seventh) for a national bank to act as a finder. A Federal savings association may act as a finder to the extent those activities are incidental to the powers expressly authorized by the Home Owners' Loan Act (HOLA) (12 U.S.C. 1461 *et seq.*).

(b) *Permissible finder activities—(1) National banks.* The following list provides examples of permissible finder activities for national banks. This list is illustrative and not exclusive; the OCC may determine that other activities are permissible pursuant to a national bank's authority to act as a finder:

(i) Communicating information about providers of products and services, and proposed offering prices and terms to potential markets for these products and services;

(ii) Communicating to the seller an offer to purchase or a request for information, including forwarding completed applications, application fees, and requests for information to third-party providers;

(iii) Arranging for third-party providers to offer reduced rates to those customers referred by the national bank;

(iv) Providing administrative, clerical, and record keeping functions related to the national bank's finder activity, including retaining copies of documents, instructing and assisting individuals in the completion of documents, scheduling sales calls on behalf of sellers, and conducting market research to identify potential new customers for retailers;

(v) Conveying between interested parties expressions of interest, bids, offers, orders, and confirmations relating to a transaction;

(vi) Conveying other types of information between potential buyers, sellers, and other interested parties;

(vii) Establishing rules of general applicability governing the use and operation of the finder service, including rules that:

(A) Govern the submission of bids and offers by buyers, sellers, and other interested parties that use the finder service and the circumstances under which the finder service will pair bids and offers submitted by buyers, sellers, and other interested parties; and

(B) Govern the manner in which buyers, sellers, and other interested parties may bind themselves to the terms of a specific transaction; and

(viii) Acting as an electronic finder pursuant to § 7.5002(a)(1).

(2) *Federal savings associations.* The following list provides examples of finder activities that are permissible for Federal savings associations. This list is

illustrative and not exclusive; the OCC may determine that other activities are permissible pursuant to a Federal savings association's incidental powers:

(i) Referring customers to a third party; and

(ii) Providing services and products to customers indirectly through a third-party discount program.

(c) *Limitation.* The authority to act as a finder does not enable a national bank or a Federal savings association to engage in brokerage activities that have not been found to be permissible for national banks or Federal savings associations, respectively.

(d) *Advertisement and fee.* Unless otherwise prohibited by Federal law, a national bank or Federal savings association may advertise the availability of, and accept a fee for, the services provided pursuant to this section.

- 11. Amend § 7.1003 by:

- a. In paragraph (a):

- i. Revising the paragraph heading;

- ii. Adding the word "national" before the word "bank" wherever it appears;

- b. In paragraph (b):

- i. Adding the word "*national*" before the word "*bank*" in the paragraph heading;

- ii. Adding the word "national" before the word "bank" wherever it appears; and

- iii. Adding the word "national" before the word "bank's"; and

- c. Adding paragraph (c).

The revisions and addition read as follows:

**§ 7.1003 Money lent by a national bank at banking offices or at facilities other than banking offices.**

(a) *In general.* \* \* \*

(c) *Services on equivalent terms to those offered customers of unrelated banks.* An operating subsidiary owned by a national bank may distribute loan proceeds from its own funds or bank funds directly to the borrower in person at offices the operating subsidiary has established without violating 12 U.S.C. 36, 12 U.S.C. 81 and 12 CFR 5.30 provided that the operating subsidiary provides similar services on substantially similar terms and conditions to customers of unaffiliated entities including unaffiliated banks.

- 12. Revise § 7.1004 to read as follows:

**§ 7.1004 Establishment of a loan production office by a national bank.**

(a) *In general.* A national bank or its operating subsidiary may engage in loan production activities at a site other than the main office or a branch of the bank. A national bank or its operating subsidiary may solicit loan customers,

market loan products, assist persons in completing application forms and related documents to obtain a loan, originate and approve loans, make credit decisions regarding a loan application, and offer other lending-related services such as loan information and applications at a loan production office without violating 12 U.S.C. 36 and 12 U.S.C. 81, provided that “money” is not deemed to be “lent” at that site within the meaning of § 7.1003 and the site does not accept deposits or pay withdrawals.

(b) *Services of other persons.* A national bank may use the services of, and compensate, persons not employed by the bank in its loan production activities.

#### § 7.1005 [Removed and Reserved]

- 13. Remove and reserve § 7.1005.

#### § 7.1006 [Amended]

- 14. Amend § 7.1006 by:
  - a. In the section heading, adding the phrase “or Federal savings association” after the phrase “national bank”;
  - b. Adding the phrase “or Federal savings association” after the phrase “national bank” wherever it appears in the first and second sentences; and
  - c. Adding the phrase “or savings association” after the phrase “provided that the bank” in the second sentence.

#### § 7.1009 [Removed and Reserved]

- 15. Remove and reserve § 7.1009.
- 16. Revise § 7.1010 to read as follows:

#### § 7.1010 Postal services by national banks and Federal savings associations.

(a) *In general.* A national bank or Federal savings association may provide postal services and receive income from those services. The services performed are those permitted under applicable rules of the United States Postal Service and may include meter stamping of letters and packages and the sale of related insurance. The national bank or Federal savings association may advertise, develop, and extend the services to attract customers to the institution.

(b) *Postal regulations.* A national bank or Federal savings association providing postal services must do so in accordance with the rules and regulations of the United States Postal Service. The national bank or Federal savings association must keep the books and records of the postal services separate from those of other banking operations. Under 39 U.S.C. 404 and regulations issued under that statute (see 39 CFR chapter I), the United States Postal Service may inspect the books and records pertaining to the postal services.

#### § 7.1012 [Amended]

- 17. Amend § 7.1012 by:
  - a. In paragraph (c)(1), removing the phrase “pick up from, and deliver” and adding in its place the phrase “pick up from and deliver”; and
  - b. In paragraph (c)(2)(vi), removing the words “back office” and adding in its place the word “back-office”.
- 18. Revise § 7.1015 to read as follows:

#### § 7.1015 National bank and Federal savings association investments in small business investment companies.

(a) *National banks.* A national bank may invest in a small business investment company (SBIC) or in any entity established solely to invest in SBICs, including purchasing the stock of a SBIC, subject to appropriate capital limitations (see e.g., 15 U.S.C. 682(b)), and may receive the benefits of such stock ownership (e.g., stock dividends). The receipt and retention of a dividend by a national bank from a SBIC in the form of stock of a corporate borrower of the SBIC is not a purchase of stock within the meaning of 12 U.S.C. 24(Seventh).

(b) *Federal savings associations.* Federal savings associations may invest in a SBIC or in any entity established solely to invest in SBICs as provided in 12 CFR 160.30.

(c) *Qualifying SBIC.* A national bank or Federal savings association may invest in a SBIC that is either:

- (1) Already organized and has obtained a license from the Small Business Administration; or
  - (2) In the process of being organized.
- (d) *SBIC wind-down.* A national bank or Federal savings association may retain an interest in a SBIC that has voluntarily surrendered its license to operate as a SBIC in accordance with 13 CFR 107.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph (d), means high quality, highly liquid investments whose maturity corresponds to the issuer’s expected or potential need for funds and whose currency corresponds to the issuer’s assets) after such voluntary surrender.

- 19. Amend § 7.1016 by:
  - a. Revising the section heading and paragraphs (a) and (b)(1) introductory text;
  - b. In paragraphs (b)(1)(iii)(B) and (C), (b)(2)(iii), and (b)(3) and (4), removing the word “bank” and adding in its place the phrase “national bank or Federal savings association”;
  - c. In paragraphs (b)(1)(iii)(B), (b)(2)(iii), and (b)(4), adding the phrase “or savings association’s” after the word “bank’s”;

- d. Revising paragraphs (b)(1)(iv) and (b)(2)(i); and
- e. In paragraph (b)(2)(ii), removing the word “bank’s” and adding in its place the phrase “national bank’s or Federal savings association’s”.

The revisions read as follows:

#### § 7.1016 Independent undertakings issued by a national bank or Federal savings association to pay against documents.

(a) *In general.* A national bank or Federal savings association may issue and commit to issue letters of credit and other independent undertakings within the scope of applicable laws or rules of practice recognized by law.<sup>1</sup> Under such independent undertakings, the national bank’s or Federal savings association’s obligation to honor depends upon the presentation of specified documents and not upon nondocumentary conditions or resolution of questions of fact or law at issue between the applicant and the beneficiary. A national bank or Federal savings association also may confirm or otherwise undertake to honor or purchase specified documents upon their presentation under another person’s independent undertaking within the scope of such laws or rules.

(b) \* \* \* (1) *Terms.* As a matter of safe and sound banking practice, national banks and Federal savings associations that issue independent undertakings should not be exposed to undue risk. At a minimum, national banks and Federal savings associations should consider the following:

- \* \* \* \* \*
- (iv) The national bank or Federal savings association either should be fully collateralized or have a post-honor right of reimbursement from the applicant or from another issuer of an independent undertaking. Alternatively, if the national bank’s or Federal savings association’s undertaking is to purchase documents of title, securities, or other valuable documents, the bank or savings association should obtain a first priority right to realize on the documents if the

<sup>1</sup> Examples of such laws or rules of practice include: The applicable version of Article 5 of the Uniform Commercial Code (UCC) (1962, as amended 1990) or revised Article 5 of the UCC (as amended 1995); the Uniform Customs and Practice for Documentary Credits (International Chamber of Commerce (ICC) Publication No. 600 or any applicable prior version); the Supplements to UCP 500 & 600 for Electronic Presentation (eUCP v. 1.0, 1.1, & 2.0) (Supplements to the Uniform Customs and Practices for Documentary Credits for Electronic Presentation); International Standby Practices (ISP98) (ICC Publication No. 590); the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (adopted by the U.N. General Assembly in 1995 and signed by the U.S. in 1997); and the Uniform Rules for Bank-to-Bank Reimbursements Under Documentary Credits (ICC Publication No. 725).

bank or savings association is not otherwise to be reimbursed.

(2) \* \* \*

(i) In the event that the undertaking is to honor by delivery of an item of value other than money, the national bank or Federal savings association should ensure that market fluctuations that affect the value of the item will not cause the bank or savings association to assume undue market risk;

\* \* \* \* \*

■ 20. Revise § 7.1021 to read as follows:

**§ 7.1021 Financial literacy programs not branches of national banks.**

A financial literacy program is a program the principal purpose of which is to be educational for members of the community. The premises of, or a facility used by, a school or other organization at which a national bank participates in a financial literacy program is not a branch for purposes of 12 U.S.C. 36 provided the bank does not establish and operate the premises or facility. The OCC considers establishment and operation in this context on a case by case basis, considering the facts and circumstances. However, the premises or facility is not a branch of the national bank if the safe harbor test in § 7.1012(c)(2) applicable to messenger services established by third parties is satisfied. The factor discussed in § 7.1012(c)(2)(i) can be met if bank employee participation in the financial literacy program consists of managing the program or conducting or engaging in financial education activities provided the school or other organization retains control over the program and over the premises or facilities at which the program is held.

**§ 7.1022 [Amended]**

■ 21. Amend § 7.1022 by:

- a. In paragraph (d), removing the word “shall” and adding in its place the word “may” wherever it appears; and
- b. In paragraph (e), in the first sentence, removing the word “shall” and adding in its place the word “must” and removing the phrase “the effective date of this regulation” and adding in its place the phrase “April 1, 2018”.

**§ 7.1023 [Amended]**

■ 22. Amend § 7.1023 by:

- a. In paragraph (c), removing the word “shall” and adding in its place the word “may” and removing the words “federal savings association” and adding in its place the words “Federal savings association”; and
- b. In paragraph (d):
- i. In the first sentence:
- A. Removing the word “shall” and adding in its place the word “must”;

- B. Removing the phrase “the effective date of this regulation” and adding in its place the phrase “April 1, 2018”; and
- ii. Removing, in the second sentence, the phrase “federal savings association” and adding in its place the phrase “Federal savings association”.

**§ 7.1024 [Amended]**

■ 23. Amend newly redesignated § 7.1024 by:

- a. In paragraphs (c)(2)(i) and (ii) and (d), removing the word “shall” and adding in its place the word “must”; and
- b. In paragraph (e), removing the word “shall” and adding in its place the word “may”.

■ 24. Add § 7.1025 to read as follows:

**§ 7.1025 Tax equity finance transactions by national banks and Federal savings associations.**

(a) *Tax equity finance transactions.* A national bank or Federal savings association may engage in a tax equity finance transaction pursuant to 12 U.S.C. 24(Seventh) and 1464 only if the transaction is the functional equivalent of a loan, as provided in paragraph (c) of this section, and the transaction satisfies applicable conditions in paragraph (d) of this section. The authority to engage in tax equity finance transactions under this section is pursuant to 12 U.S.C. 24(Seventh) and 1464 lending authority and is separate from, and does not limit, other investment authorities available to national banks and Federal savings associations.

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

(1) *Appropriate OCC supervisory office* means the OCC office that is responsible for the supervision of a national bank or Federal savings association, as described in subpart A of 12 CFR part 4;

(2) *Capital and surplus* has the same meaning that this term has in 12 CFR 32.2.

(3) *Tax equity finance transaction* means a transaction in which a national bank or Federal savings association provides equity financing to fund a project or projects that generate tax credits or other tax benefits and the use of an equity-based structure allows the transfer of those credits and other tax benefits to the national bank or Federal savings association.

(c) *Functional equivalent of a loan.* A tax equity finance transaction is the functional equivalent of a loan if:

(1) The structure of the transaction is necessary for making the tax credits or other tax benefits available to the

national bank or Federal savings association;

(2) The transaction is of limited tenure and is not indefinite, including retaining a limited investment interest that is required by law to obtain continuing tax benefits or needed to obtain the expected rate of return;

(3) The tax benefits and other payments received by the national bank or Federal savings association from the transaction repay the investment and provide the expected rate of return at the time of underwriting;

(4) Consistent with paragraph (c)(3) of this section, the national bank or Federal savings association does not rely on appreciation of value in the project or property rights underlying the project for repayment;

(5) The national bank or Federal savings association uses underwriting and credit approval criteria and standards that are substantially equivalent to the underwriting and credit approval criteria and standards used for a traditional commercial loan;

(6) The national bank or Federal savings association is a passive investor in the transaction and is unable to direct the affairs of the project company; and

(7) The national bank or Federal savings association appropriately accounts for the transaction initially and on an ongoing basis and has documented contemporaneously its accounting assessment and conclusion.

(d) *Conditions on tax equity finance transactions.* A national bank or Federal savings association may engage in tax equity finance transactions only if:

(1) The national bank or Federal savings association cannot control the sale of energy, if any, from the project;

(2) The national bank or Federal savings association limits the total dollar amount of tax equity finance transactions undertaken pursuant to this section to no more than five percent of its capital and surplus, unless the OCC determines, by written approval of a written request by the national bank or Federal savings association to exceed the five percent limit, that a higher aggregate limit will not pose an unreasonable risk to the national bank or Federal savings association and that the tax equity finance transactions in the national bank's or Federal savings association's portfolio will not be conducted in an unsafe or unsound manner; provided, however, that in no case may a national bank or Federal savings association's total dollar amount of tax equity finance transactions undertaken pursuant to this section exceed 15 percent of its capital and surplus;

(3) The national bank or Federal savings association has provided written notification to the appropriate OCC supervisory office, prior to engaging in each tax equity finance transaction that includes its evaluation of the risks posed by the transaction;

(4) The national bank or Federal savings association can identify, measure, monitor, and control the associated risks of its tax equity finance transaction activities individually and as a whole on an ongoing basis to ensure that such activities are conducted in a safe and sound manner; and

(5) The national bank or Federal savings association obtains a legal opinion or has other good faith, reasoned bases for making a determination that tax credits or other tax benefits are available before engaging in a tax equity finance transaction.

(e) *Applicable legal requirements.* The transaction is subject to the substantive legal requirements of a loan, including the lending limits prescribed by 12 U.S.C. 84 and 12 U.S.C. 1464(u), as appropriate, as implemented by 12 CFR part 32, and if the active investor or project sponsor of the transaction is an affiliate of the bank, to the restrictions on transactions with affiliates prescribed by 12 U.S.C. 371c and 371c-1, as implemented by 12 CFR part 223.

■ 25. Add § 7.1026 to read as follows:

**§ 7.1026 National bank and Federal savings association payment system memberships.**

(a) *In general.* National banks and Federal savings associations may become members of payment systems, subject to the requirements of this section.

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

(1) *Appropriate OCC supervisory office* means the OCC office that is responsible for the supervision of a national bank or Federal savings association, as described in subpart A of 12 CFR part 4;

(2) *Member* includes a national bank or Federal savings association designated as a “member,” or “participant,” or other similar role by a payment system, including by a payment system that requires the national bank or Federal savings association to share in operational losses or maintain a reserve with the payment system to offset potential liability for operational losses. This definition includes indirect members only if they agree to be bound by the rules of the payment system and the rules of the payment system indicate indirect members are covered;

(3) *Open-ended liability* refers to liability for operational losses that is not capped under the rules of the payment system and includes indemnifications of third parties provided as a condition of membership in the payment system;

(4) *Operational loss* means a charge resulting from sources other than defaults by other members of the payment system. Examples of operational losses include losses that are due to: Employee misconduct, fraud, misjudgment, or human error; management failure; information systems failures; disruptions from internal or external events that result in the degradation or failure of services provided by the payment system; security breaches or cybersecurity events; or payment or settlement delays, constrained liquidity, contagious disruptions, and resulting litigation; and

(5) *Payment system* means “financial market utility” as defined in 12 U.S.C. 5462(6), wherever operating, and includes both retail and wholesale payment systems. Payment system does not include a derivatives clearing organization registered under the Commodity Exchange Act, a clearing agency registered under the Securities Exchange Act of 1934, or foreign organization that would be considered a derivatives clearing organization or clearing agency were it operating in the United States.

(c) *Notice requirements*—(1) *Prior notice required.* A national bank or Federal savings association must provide written notice to its appropriate OCC supervisory office at least 30 days prior to joining a payment system that exposes it to open-ended liability.

(2) *After-the-fact notice.* A national bank or Federal savings association must provide written notice to its appropriate OCC supervisory office within 30 days of joining a payment system that does not expose it to open-ended liability.

(d) *Content of notice*—(1) *In general.* A notice required by paragraph (c) of this section must include representations that the national bank or Federal savings association:

(i) Has complied with the safety and soundness review requirements in paragraph (e)(1) of this section; and

(ii) Will comply with the safety and soundness review and notification requirements in paragraphs (e)(2) and (3) of this section.

(2) *Payment system with limits on liability or no liability.* A notice filed under paragraph (c)(2) of this section also must include a representation that either:

(i) The rules of the payment system do not impose liability for operational losses on members; or

(ii) The national bank’s or Federal savings association’s liability for operational losses is limited by the rules of the payment system to specific and appropriate limits that do not exceed the lower of:

(A) The legal lending limit under 12 CFR part 32; or

(B) The limit set for the bank or savings association by the OCC.

(e) *Safety and soundness procedures.*

(1) Prior to joining a payment system, a national bank or Federal savings association must:

(i) Identify and evaluate the risks posed by membership in the payment system, taking into account whether the liability of the bank or savings association is limited; and

(ii) Ensure that it can measure, monitor, and control the risks identified pursuant to paragraph (e)(1)(i) of this section.

(2) After joining a payment system, a national bank or Federal savings association must manage the risks of the payment system on an ongoing basis. This ongoing risk management must:

(i) Identify and evaluate the risks posed by membership in the payment system, taking into account whether the liability of the bank or savings association is limited; and

(ii) Measure, monitor, and control the risks identified pursuant to paragraph (e)(2)(i) of this section.

(3) If the national bank or Federal savings association identifies risks during the ongoing risk management required by paragraph (e)(2) of this section that raise safety and soundness concerns, such as a material change to the bank’s or savings association’s liability or indemnification responsibilities, the national bank or Federal savings association must:

(i) Notify the appropriate OCC supervisory office as soon as the safety and soundness concern is identified; and

(ii) Take appropriate actions to remediate the risk.

(4) A national bank or Federal savings association that believes its open-ended liability is otherwise limited (*e.g.*, by negotiated agreements or laws of an appropriate jurisdiction) may consider its liability to be limited for purposes of the reviews required by paragraphs (e)(1) and (2) of this section so long as:

(i) Prior to joining the payment system, the bank or savings association obtains a written legal opinion that:

(A) Describes how the payment system allocates liability for operational losses; and

(B) Concludes the potential liability for operational losses for the national bank or Federal savings association is in fact limited to specific and appropriate limits that do not exceed the lower of:

(1) The legal lending limit under 12 CFR part 32; or

(2) The limit set for the bank or savings association by the OCC; and

(ii) There are no material changes to the liability or indemnification requirements applicable to the bank or savings association since the issuance of the written legal opinion.

(f) *Safety and soundness considerations.* (1) A national bank or Federal savings association should evaluate, at a minimum, the following payment system characteristics when conducting an analysis required by paragraph (e) of this section:

(i) Does the processing occur on a real-time gross settlement basis or provide reasonable assurance (e.g., prefunding, etc.) that members will meet settlement obligations?

(ii) How does the payment system's rules limit its liability to members?

(iii) Does the payment system have insurance coverage and/or self-insurance arrangements to cover operational losses?

(iv) Do the payment system's rules provide an unambiguous pro-rata loss allocation methodology under its indemnity provisions and does the methodology provide members the opportunity to reduce or eliminate liability exposure by decreasing or ceasing use of the payment system?

(v) Do the payment system's rules provide for unambiguous membership withdrawal procedures that do not require the prior approval of the system?

(vi) Does the payment system have appropriate admission and continuing participation requirements for system participants? Such requirements should address, among other things:

(A) The participants' access to sufficient financial resources to meet obligations arising from participation;

(B) The adequacy of participants' operational capacities to meet obligations arising from participation; and

(C) The adequacy of the participants' own risk management processes.

(vii) Does the payment system have processes and controls in place to verify and monitor on an ongoing basis the compliance of each participant with admission and participation requirements?

(viii) Does the payment system have written policies and procedures for addressing participant failures to meet ongoing participation requirements?

(ix) Are the payment system's rules relating to the system's emergency

authorities unambiguous and may they be amended or otherwise altered without prior notification to all members and an opportunity to withdraw?

(x) Is the payment system governed by uniform, comprehensive and clear legal standards in its operating jurisdiction that address payment and/or settlement activities?

(xi) Is the payment system subject to and in compliance (or observance) with the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions (CPSS—IOSCO) Principles for Financial Market Infrastructures?

(xii) Is the payment system designated as a systemically important financial market utility (SIFMU) by the Financial Stability Oversight Counsel (FSOC) or is it the international or foreign equivalent?

(xiii) Does the payment system provide members with information relevant to governance, risk management practices, and operations in a timely manner and with sufficient transparency and particularity for the bank to ascertain with reasonable certainty the bank's level of risk exposure to the system?

(xiv) Is the payment system operated by or subject to oversight of a central bank or regulatory authority?

(xv) Is the payment system legally organized as a not-for-profit enterprise or is it owned and operated by a government entity?

(xvi) Does the payment system have appropriate systems and controls for communicating to members in a timely manner about material events that relate to or could result in potential operational losses, e.g. fraud, system failures, natural disasters, etc.?

(xvii) Has the payment system ever exercised its authority under indemnification provisions?

(2) A national bank or Federal savings association should consider, at a minimum, the following characteristics of its risk management program when conducting an analysis required by paragraph (e) of this section:

(i) Does the bank or savings association have appropriate board supervision and managerial and staff expertise?

(ii) Does the bank or savings association have comprehensive policies and operating procedures with respect to its risk identification, measurement and management information systems that are routinely reviewed?

(iii) Does the bank or savings association have effective risk controls

and processes to oversee and ensure the continuing effectiveness of the risk management process? The program should include a formal process for approval of payment system memberships as well as ongoing monitoring and measurement of activity against predetermined risk limits.

(iv) Does the bank or savings association's membership evaluation process include assessments and analyses of:

(A) The credit quality of the entity;

(B) The entity's risk management practices;

(C) Settlement and default procedures of the entity;

(D) Any default or loss-sharing precedents and any other applicable limits or restrictions of the entity;

(E) Key risks associated with joining the entity; and

(F) The incremental effect of additional memberships in aggregate exposure to payment system risk?

(v) Does the bank or savings association's risk management program include policies and procedures that identify and estimate the level of potential operational risks, at both inception of membership and on an ongoing basis?

(vi) Does the bank or savings association have auditing procedures to ensure the integrity of risk measurement, control and reporting systems?

(vii) Does the program include mechanisms to monitor, estimate, and maintain control over the bank or savings association's potential liabilities for operational losses on an ongoing basis. This should include:

(A) Limits and other controls with respect to each identified risk factor;

(B) Reports generated throughout the processes that accurately present the nature and level(s) of risk taken and demonstrate compliance with approved policies and limits; and

(C) Identification of the business unit and/or individuals responsible for measuring and monitoring risk exposures, as well as those individuals responsible for monitoring compliance with policies and risk exposure limits.

(viii) Does a bank or savings association with memberships in multiple payment systems have the ability to monitor and report aggregate risk exposures and measurement against risk limits both at the sponsoring business line level and the total exposure organizationally?

■ 26. Add § 7.1027 to read as follows:

**§ 7.1027 Establishment and operation of a remote service unit by a national bank.**

A remote service unit (RSU) is an automated or unstaffed facility, operated

by a customer of a bank with at most delimited assistance from bank personnel, that conducts banking functions such as receiving deposits, paying withdrawals, or lending money. A national bank may establish and operate an RSU pursuant to 12 U.S.C. 24(Seventh). An RSU includes an automated teller machine, automated loan machine, automated device for receiving deposits, personal computer, telephone, other similar electronic devices, and drop boxes. An RSU may be equipped with a telephone or tele-video device that allows contact with bank personnel. An RSU is not a "branch" within the meaning of 12 U.S.C. 36(j), and is not subject to State geographic or operational restrictions or licensing laws.

■ 27. Add § 7.1028 to read as follows:

**§ 7.1028 Establishment and operation of a deposit production office by a national bank.**

(a) *In general.* A national bank or its operating subsidiary may engage in deposit production activities at a site other than the main office or a branch of the bank. A national bank or its operating subsidiary may solicit deposits, provide information about deposit products, and assist persons in completing application forms and related documents to open a deposit account at a deposit production office (DPO). A DPO is not a branch within the meaning of 12 U.S.C. 36(j) and 12 CFR 5.30(d)(1) so long as it does not receive deposits, pay withdrawals, or make loans. All deposit and withdrawal transactions of a bank customer using a DPO must be performed by the customer, either in person at the main office or a branch office of the bank, or by mail, electronic transfer, or a similar method of transfer.

(b) *Services of other persons.* A national bank may use the services of, and compensate, persons not employed by the bank in its deposit production activities.

■ 28. Add § 7.1029 to read as follows:

**§ 7.1029 Combination of national bank loan production office, deposit production office, and remote service unit.**

A location at which a national bank operates a loan production office (LPO), a deposit production office (DPO), and a remote service unit (RSU) is not a "branch" within the meaning of 12 U.S.C. 36(j) by virtue of that combination. Since an LPO, DPO, or RSU is not, individually, a branch under 12 U.S.C. 36(j), any combination of these facilities at one location does not create a branch. The RSU at such a combined location must be primarily

operated by the customer with at most delimited assistance from bank personnel.

■ 29. Add § 7.1030 to read as follows:

**§ 7.1030 Permissible derivatives activities for national banks.**

(a) *Authority.* This section is issued pursuant to 12 U.S.C. 24(Seventh). A national bank may only engage in derivatives transactions in accordance with the requirements of this section.

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

(1) *Customer-driven* means a transaction is entered into for a customer's valid and independent business purpose (and a customer-driven transaction does not include a transaction the principal purpose of which is to deliver to a national bank assets that the national bank could not invest in directly);

(2) *Perfectly-matched* means two back-to-back derivatives transactions that offset risk with respect to all economic terms (*e.g.*, amount, maturity, duration, and underlying);

(3) *Portfolio-hedged* means a portfolio of derivatives transactions that are hedged based on net unmatched positions or exposures in the portfolio;

(4) *Physical hedging* or *physically-hedged* means holding title to or acquiring ownership of an asset (for example, by warehouse receipt or book-entry) solely to manage the risks arising out of permissible customer-driven derivatives transactions;

(5) *Physical settlement* or *physically-settled* means accepting title to or acquiring ownership of an asset;

(6) *Transitory title transfer* means accepting and immediately relinquishing title to an asset; and

(7) *Underlying* means the reference asset, rate, obligation, or index on which the payment obligation(s) between counterparties to a derivative transaction is based.

(c) *In general.* A national bank may engage in the following derivatives transactions after notice in accordance with paragraph (d) of this section, as applicable:

(1) Derivatives transactions with payments based on underlyings a national bank is permitted to purchase directly as an investment;

(2) Derivatives transactions with an underlying to hedge the risks arising from bank-permissible activities;

(3) Derivatives transactions as a financial intermediary with any underlying that are customer-driven, cash-settled, and either perfectly-matched or portfolio-hedged;

(4) Derivatives transactions as a financial intermediary with any

underlying that are customer-driven, physically-settled by transitory title transfer, and either perfectly-matched or portfolio-hedged; and

(5) Derivatives transactions as a financial intermediary with any underlying that are customer-driven, physically-hedged, and either portfolio-hedged or hedged on a transaction-by-transaction basis, and provided that:

(i) The national bank does not take physical delivery of any commodity by receipt of physical quantities of the commodity on bank premises; and

(ii) Physical hedging activities meet the requirements of paragraph (e) of this section.

(d) *Notice procedure.* (1) A national bank must provide notice to its Examiner-in-Charge prior to engaging in any of the following with respect to derivatives transactions with payments based on underlyings that a national bank is not permitted to purchase directly as an investment:

(i) Engaging in derivatives hedging activities pursuant to paragraph (c)(2) of this section;

(ii) Expanding the bank's derivatives hedging activities pursuant to paragraph (c)(2) of this section to include a new category of underlying for derivatives transactions;

(iii) Engaging in customer-driven financial intermediation derivatives activities pursuant to paragraph (c)(3), (4), or (5) of this section; and

(iv) Expanding the bank's customer-driven financial intermediation derivatives activities pursuant to paragraph (c)(3), (4), or (5) of this section to include any new category of underlyings.

(2) The notice pursuant to paragraph (d)(1) of this section must be submitted in writing at least 30 days before the national bank commences the activity and include the following information:

(i) A detailed description of the proposed activity, including the relevant underlyings;

(ii) The anticipated start date of the activity; and

(iii) A detailed description of the bank's risk management system (policies, processes, personnel, and control systems) for identifying, measuring, monitoring, and controlling the risks of the activity.

(e) *Additional requirements for physical hedging activities.* (1) A national bank engaging in physical hedging activities pursuant to paragraph (c)(5) of this section must hold the underlying solely to hedge risks arising from derivatives transactions originated by customers for the customers' valid and independent business purposes.

(2) The physical hedging activities must offer a cost-effective means to hedge risks arising from permissible banking activities.

(3) The national bank must not take anticipatory or maintain residual positions in the underlying except as necessary for the orderly establishment or unwinding of a hedging position.

(4) The national bank must not acquire equity securities for hedging purposes that constitute more than 5 percent of a class of voting securities of any issuer.

(5) With respect to physical hedging involving commodities:

(i) A national bank's physical position in a particular physical commodity (including, as applicable, delivery point, purity, grade, chemical composition, weight, and size) must not be more than 5 percent of the gross notional value of the bank's derivatives that are in that particular physical commodity and allow for physical settlement within 30 days. Title to commodities acquired and immediately sold by a transitory title transfer does not count against the 5 percent limit;

(ii) The physical position must more effectively reduce risk than a cash-settled hedge referencing the same commodity; and

(iii) The physical position hedges a physically-settled customer-driven commodity derivative transaction(s).

(f) *Safe and sound banking practices.* A national bank must adhere to safe and sound banking practices in conducting the activities described in this section. The bank must have a risk management system (policies, processes, personnel, and control system) that effectively manages (identifies, measures, monitors, and controls) these activities' interest rate, credit, liquidity, price, operational, compliance, and strategic risks.

■ 30. Revise the heading for subpart B to read as follows:

#### **Subpart B—Corporate Practices**

■ 31. Amend § 7.2000 by:

■ a. Revising the section heading and paragraph (a);

■ b. In paragraph (b):

■ i. Removing the word “procedures” wherever it appears and adding in its place the word “provisions”;

■ ii. Removing the phrase “the state in which the main office of the bank” and adding in its place the phrase “any State in which the main office or any branch of the bank”;

■ iii. Removing the phrase “the state in which the holding company of the bank” and adding in its place the phrase “any State in which a holding company of the bank”; and

■ iv. Removing the word “shall” and adding in its place the word “must”;

■ d. Redesignating paragraph (c) as paragraph (d) and revising it; and

■ e. Adding a new paragraph (c).

The addition and revisions are as follows:

#### **§ 7.2000 National bank corporate governance.**

(a) *In general.* The corporate governance provisions in a national bank's articles of association and bylaws and the bank's conduct of its corporate governance affairs must comply with applicable Federal banking statutes and regulations and safe and sound banking practices.

\* \* \* \* \*

(c) *Continued use of former holding company State.* A national bank that has elected to follow the corporate governance provisions of the law of the State in which its holding company is incorporated may continue to use those provisions even if the bank is no longer controlled by that holding company.

(d) *Request for OCC staff position.* A national bank may request the views of OCC staff on the permissibility of a national bank's adoption of a particular State corporate governance provision. Requests must include the following information:

(1) The name of the national bank;

(2) Citation to the State statutes or regulations involved;

(3) A discussion as to whether a similarly situated State bank is subject to or may adopt the corporate governance provision;

(4) Identification of all Federal banking statutes or regulations that are on the same subject as, or otherwise have a bearing on, the subject of the proposed State corporate governance provision; and

(5) An analysis of how the proposed practice is not inconsistent with applicable Federal statutes or regulations and is not inconsistent with bank safety and soundness.

■ 32. Add § 7.2001 to read as follows:

#### **§ 7.2001 National bank adoption of anti-takeover provisions.**

(a) *In general.* Pursuant to § 7.2000(b), a national bank may adopt anti-takeover provisions included in State corporate governance law if the provisions are not inconsistent with Federal banking statutes or regulations and not inconsistent with bank safety and soundness.

(b) *State anti-takeover provisions that are not inconsistent with Federal banking statutes or regulations.* State anti-takeover provisions that are not inconsistent with Federal banking

statutes or regulations include the following:

(1) *Restrictions on business combinations with interested shareholders.* State provisions that prohibit, or that permit the corporation to prohibit in its certificate of incorporation or other governing document, the corporation from engaging in a business combination with an interested shareholder or any related entity for a specified period of time from the date on which the shareholder first becomes an interested shareholder, subject to certain exceptions such as board approval. An interested shareholder is one that owns an amount of stock specified in the State provision.

(2) *Poison pill.* State provisions that provide, or that permit the corporation to provide in its certificate of incorporation or other governing document, that all the shareholders, other than the hostile acquiror, have the right to purchase additional stock at a substantial discount upon the occurrence of a triggering event.

(3) *Requiring all shareholder actions to be taken at a meeting.* State provisions that provide, or that permit the corporation to provide in its certificate of incorporation or other governing document, that all actions to be taken by shareholders must occur at a meeting and that shareholders may not take action by written consent.

(4) *Limits on shareholders' authority to call special meetings.* State provisions that provide, or that permit the corporation to provide in its certificate of incorporation or other governing document, that:

(i) Only the board of directors, and not the shareholders, have the right to call special meetings of the shareholders; or

(ii) If shareholders have the right to call special meetings, a high percentage of shareholders is needed to call the meeting.

(5) *Shareholder removal of a director only for cause.* State provisions that provide, or that permit the corporation to provide in its certificate of incorporation or other governing document, that shareholders may remove a director only for cause, and not both for cause and without cause.

(c) *State anti-takeover provisions that are inconsistent with Federal banking statutes or regulations.* The following State anti-takeover provisions are inconsistent with Federal banking statutes or regulations:

(1) *Supermajority voting requirements.* State provisions that require, or that permit the corporation to require in its certificate of incorporation



or other governing document, a supermajority of the shareholders to approve specified matters are inconsistent when applied to matters for which Federal banking statutes or regulations specify the required level of shareholder approval.

(2) *Restrictions on a shareholder's right to vote all the shares it owns.* State provisions that prohibit, or that permit the corporation in its certificate of incorporation or other governing document to prohibit, a person from voting shares acquired that increase their percentage of ownership of the company's stock above a certain level are inconsistent when applied to shareholder votes governed by 12 U.S.C. 61.

(d) *Bank safety and soundness—(1) In general.* Except as provided in paragraph (d)(2) of this section, any State corporate governance provision, including anti-takeover provisions, that would render more difficult or discourage an injection of capital by purchase of bank stock, a merger, the acquisition of the bank, a tender offer, a proxy contest, the assumption of control by a holder of a large block of the bank's stock, or the removal of the incumbent board of directors or management is inconsistent with bank safety and soundness if:

- (i) The bank is less than adequately capitalized (as defined in 12 CFR part 6);
- (ii) The bank is in troubled condition (as defined in 12 CFR 5.51(c)(7));
- (iii) Grounds for the appointment of a receiver under 12 U.S.C. 191, as determined by the OCC, are present; or
- (iv) The bank is otherwise in less than satisfactory condition, as determined by the OCC.

(2) *Exception.* Anti-takeover provisions are not inconsistent with bank safety and soundness if, at the time the bank adopts the provisions:

- (i) The bank is not subject to any of the conditions in paragraph (d)(1) of this section; and
- (ii) The bank includes, in its articles of association or its bylaws, as applicable pursuant to paragraph (f) of this section, a limitation that would make the provisions ineffective if:

(A) The conditions in paragraph (d)(1) of this section exist; or

(B) The OCC otherwise directs the bank not to follow the provision for supervisory reasons.

(e) *Case-by-case review—(1) OCC determination.* Based on the substance of the provision or the individual circumstances of a national bank, the OCC may determine that a State anti-takeover provision, as proposed or adopted by a bank, is:

(i) Inconsistent with Federal banking statutes or regulations, notwithstanding paragraph (b) of this section; or

(ii) Inconsistent with bank safety and soundness other than as provided in paragraph (d) of this section.

(2) *Review.* The OCC may initiate a review, or a bank may request OCC review pursuant to § 7.2000(d), of a State anti-takeover provision.

(f) *Method of adoption for anti-takeover provisions—(1) Board and shareholder approval.* A national bank must follow the provisions for approval by the board of directors and approval of shareholders for the adoption of an anti-takeover provision in the State corporate governance law it has elected to follow. However, if the provision is included in the bank's articles of association, the bank's shareholders must approve the amendment of the articles pursuant to 12 U.S.C. 21a, even if the State law does not require approval by the shareholders.

(2) *Documentation.* If the State corporate governance law requires the anti-takeover provision to be in the company's articles of incorporation, certificate of incorporation, or similar document, the national bank must include the provision in its articles of association. If the State corporate governance law does not require the provision to be in the company's articles of incorporation, certificate of incorporation, or similar document, but allows it to be in the bylaws, then the national bank must include the provision in either its articles of association or in its bylaws, provided, however, that if the State corporate governance law requires shareholder approval for changes to the corporation's bylaws, then the national bank must include the provision in its articles of association.

■ 33. Amend § 7.2002 by:

- a. Revising the section heading;
- b. Removing the word "bank's" and adding in its place the phrase "national bank's" wherever it appears; and
- c. Adding the phrase "for shareholder voting" after the word "proxy" wherever it appears.

The revision reads as follows:

**§ 7.2002 National bank director or attorney as proxy.**

\* \* \* \* \*

■ 34. Revise § 7.2003 to read as follows:

**§ 7.2003 National bank shareholder meetings; Board of directors meetings.**

(a) *Notice of shareholders' meetings.* A national bank must mail shareholders notice of the time, place, and purpose of all shareholders' meetings at least 10 days prior to the meeting by first class

mail, unless the OCC determines that an emergency circumstance exists. Where a national bank is a wholly-owned subsidiary, the sole shareholder is permitted to waive notice of the shareholder's meeting. The articles of association, bylaws, or law applicable to a national bank may require a longer period of notice.

(b) *Annual meeting for election of directors.* When the day fixed for the regular annual meeting of the shareholders falls on a legal holiday in the State in which the bank is located, the shareholders' meeting must be held, and the directors elected, on the next following banking day.

(c) *Virtual participation at shareholder meetings—(1) In general.* A national bank may provide for telephonic or electronic participation at shareholder meetings.

(2) *Procedures.* A national bank must follow the procedures for telephonic or electronic participation in a shareholder meeting of the corporate governance provisions it has elected to follow pursuant to § 7.2000(b), if those elected provisions include telephonic or electronic participation procedures; the Delaware General Corporation Law, Del. Code Ann. Tit. 8 (1991, as amended 1994, and as amended thereafter); or the Model Business Corporation Act, provided, however, that such procedures are not inconsistent with applicable Federal statutes and regulations and safety and soundness. The national bank must indicate the use of these procedures in its bylaws.

(d) *Virtual participation at board of directors meetings.* A national bank may provide for telephonic or electronic participation at a meeting of its board of directors.

■ 35. Revise the heading for § 7.2004 to read as follows:

**§ 7.2004 Honorary national bank directors or advisory boards.**

\* \* \* \* \*

■ 36. Amend § 7.2005 by:

- a. Revising the section heading and the heading in paragraph (a); and
- b. Removing in paragraph (c)(3)(ii), the word "shall" and adding in its place the word "must".

The revision reads as follows:

**§ 7.2005 Ownership of stock necessary to qualify as director of a national bank.**

(a) *In general.* \* \* \*

\* \* \* \* \*

■ 37. Amend § 7.2006 by:

- a. Revising the section heading; and
- b. In the first sentence, removing the phrase "When electing directors, a shareholder shall" and adding in its

place the phrase “When electing national bank directors, a shareholder must”.

The revision reads as follows:

**§ 7.2006 Cumulative voting in election of national bank directors.**

\* \* \* \* \*

■ 38. Amend § 7.2007 by:

- a. Revising the section heading;
- b. In paragraph (a), adding the word “national” before the phrase “bank’s articles of association” in the first sentence; and
- c. In paragraph (b), removing the phrase “If a vacancy occurs on the board of directors,” and adding in its place the phrase “If a vacancy occurs on the national bank’s board of directors.”.

The revision reads as follows:

**§ 7.2007 Filling vacancies and increasing board of directors of a national bank other than by shareholder action.**

\* \* \* \* \*

■ 39. Amend § 7.2008 by:

- a. Revising the section heading and paragraph (a); and
- b. In paragraph (b):
  - i. Removing the phrase “Each director shall execute” and adding in its place the phrase “Each national bank director must execute” in the first sentence; and
  - ii. Removing the phrase “A director shall take” and adding in its place the phrase “A national bank director must take” in the second sentence.

The revision reads as follows:

**§ 7.2008 Oath of national bank directors.**

(a) *Administration of the oath.* The oath of directors must be administered by:

- (1) A notary public, including one who is a director but not an officer of the national bank; or
- (2) Any person, including one who is a director but not an officer of the national bank, having an official seal and authorized by the State to administer oaths.

\* \* \* \* \*

■ 40. Amend § 7.2009 by:

- a. Revising the section heading; and
- b. Removing the word “shall” and adding in its place the word “must”.

The revision reads as follows:

**§ 7.2009 Quorum of a national bank board of directors; proxies not permissible.**

\* \* \* \* \*

■ 41. Amend § 7.2010 by:

- a. Revising the section heading; and
- b. Removing the phrase “affairs of the bank shall” and adding in its place the phrase “affairs of a national bank must” in the first sentence.

The revision reads as follows:

**§ 7.2010 National bank directors’ responsibilities.**

\* \* \* \* \*

■ 42. Revise the heading of § 7.2011 to read as follows:

**§ 7.2011 National bank compensation plans.**

\* \* \* \* \*

■ 43. Revise § 7.2012 to read as follows:

**§ 7.2012 President as director of a national bank.**

Pursuant to 12 U.S.C. 76, the person serving as, or in the function of, president of a national bank, regardless of title, must be a member of the board of directors. A director other than the person serving as, or in the function of, president may be elected chairman of the board.

■ 44. Revise the heading of § 7.2013 to read as follows:

**§ 7.2013 Fidelity bonds covering national bank officers and employees.**

\* \* \* \* \*

■ 45. Revise § 7.2014 to read as follows:

**§ 7.2014 Indemnification of national bank and Federal savings association institution-affiliated parties.**

(a) *Indemnification under State law.* Subject to the limitations of paragraph (b) of this section, a national bank or Federal savings association may indemnify an institution-affiliated party for damages and expenses, including the advancement of expenses and legal fees, in accordance with the law of the State the bank or savings association has designated for its corporate governance pursuant to § 7.2000(b) (for national banks), 12 CFR 5.21(j)(3)(ii) (for Federal mutual savings associations), or 12 CFR 5.22(j)(2)(ii) (for Federal stock savings associations), provided such payments are consistent with safe and sound banking practices. The term “institution-affiliated party” has the same meaning as set forth at 12 U.S.C. 1813(u).

(b) *Administrative proceedings or civil actions initiated by Federal banking agencies.* With respect to an administrative proceeding or civil action initiated by any Federal banking agency, a national bank or Federal savings association may only make or agree to make indemnification payments to an institution-affiliated party that are reasonable and consistent with the requirements of 12 U.S.C. 1828(k) and 12 CFR chapter III.

(c) *Written agreement required for advancement.* Before advancing funds to an institution-affiliated party under this section, a national bank or Federal savings association must obtain a

written agreement that the institution-affiliated party will reimburse the bank or savings association, as appropriate, for any portion of that indemnification that the institution-affiliated party is ultimately found not to be entitled to under 12 U.S.C. 1828(k) and 12 CFR chapter III, except to the extent that the bank’s or savings association’s expenses have been reimbursed by an insurance policy or fidelity bond.

(d) *Insurance premiums.* A national bank or Federal savings association may provide for the payment of reasonable premiums for insurance covering the expenses, legal fees, and liability of institution-affiliated parties to the extent that the expenses, fees, or liability could be indemnified under this section.

■ 46. Revise the heading of § 7.2015 to read as follows:

**§ 7.2015 National bank cashier.**

\* \* \* \* \*

■ 47. Amend § 7.2016 by:

- a. Revising the section heading;
- b. Redesignating paragraphs (a) and (b) as paragraphs (a)(1) and (2), respectively, and adding a heading for paragraph (a); and
- c. Adding a new paragraph (b).

The revision and additions read as follows:

**§ 7.2016 Restricting transfer of national bank stock and record dates; stock certificates.**

(a) *Restricting transfer of stock and record dates*—\* \* \*

(b) *Bank stock certificates.* (1) A national bank may prescribe the manner in which its stock must be transferred in its bylaws or articles of association. A bank issuing stock in certificated form must comply with the requirements of 12 U.S.C. 52, including as to:

- (i) The name and location of the bank;
- (ii) The name of the holder of record of the stock represented thereby;
- (iii) The number and class of shares which the certificate represents;
- (iv) If the bank issues more than one class of stock, the respective rights, preferences, privileges, voting rights, powers, restrictions, limitations, and qualifications of each class of stock issued (unless incorporated by reference to the articles of association);
- (v) Signatures of the president and cashier of the bank, or such other officers as the bylaws of the bank provide; and
- (vi) The seal of the bank.

(2) The requirements of paragraph (b)(1)(v) of this section may be met through the use of electronic means or by facsimile.

**§§ 7.2017 and 7.2018 [Removed]**

■ 48. Remove §§ 7.2017 and 7.2018.

■ 49. Revise the heading of § 7.2019 to read as follows:

**§ 7.2019 Loans secured by a national bank's own shares.**

\* \* \* \* \*

**§ 7.2020 [Removed]**

■ 50. Remove § 7.2020.

■ 51. Revise the heading of § 7.2021 to read as follows:

**§ 7.2021 National bank preemptive rights.**

\* \* \* \* \*

■ 52. Amend § 7.2022 by:

- a. Revising the section heading; and
- b. Removing the word “state” and adding in its place the word “State”.

The revision reads as follows:

**§ 7.2022 National bank voting trusts.**

\* \* \* \* \*

■ 53. Revise the heading of § 7.2023 to read as follows:

**§ 7.2023 National bank reverse stock splits.**

\* \* \* \* \*

**§ 7.2024 [Amended]**

■ 54. Amend § 7.2024(a) and (c) by removing the word “shall” and adding in its place the word “must” wherever it appears.

■ 55. Add § 7.2025 to read as follows:

**§ 7.2025 Capital stock-related activities of a national bank.**

(a) *In general.* A national bank must obtain the necessary shareholder approval required by 12 U.S.C. 51a, 57, or 59 for any change in its permanent capital. An increase or decrease in the amount of a national bank's common or preferred stock is a change in permanent capital subject to the notice and approval requirements of 12 CFR 5.46 and applicable law. A national bank may obtain the required shareholder approval of changes in permanent capital, as provided in paragraphs (b), (c), and (d) of this section.

(b) *Issuance of previously approved and authorized common stock.* In compliance with 12 U.S.C. 57, a national bank may issue common stock up to an amount previously approved and authorized in the national bank's articles of association by holders of two-thirds of the national bank's shares without obtaining additional shareholder approval for each subsequent issuance within the authorized amount.

(c) *Issuance, repurchase, and redemption of preferred stock pursuant to certain procedures.* Subject to the requirements of 12 U.S.C. 51a and 59, a national bank may adopt procedures to

authorize the board of directors to issue, determine the terms of, repurchase, and redeem one or more series of preferred stock, if permitted by the corporate governance provisions adopted by the bank under § 7.2000. To satisfy the shareholder approval requirements of 12 U.S.C. 51a and 59, the adoption of such procedures must be approved by shareholders in advance through an amendment to the national bank's articles of association. Any amendment to a national bank's articles of association that authorizes both the issuance and the repurchase and redemption of shares must be approved by holders of two-thirds of the national bank's shares.

(d) *Share repurchase programs.* Subject to the requirements of 12 U.S.C. 59, a national bank may establish a program for the repurchase, from time to time, of the national bank's common or preferred stock, if permitted by the corporate governance provisions adopted by the bank under § 7.2000. To satisfy the shareholder approval requirement of 12 U.S.C. 59, the repurchase program must be approved in advance by the holders of two-thirds of the national bank's shares, including through an amendment to the national bank's articles of association that authorizes the board of directors to repurchase the national bank's common or preferred stock from time to time under board-determined parameters that can limit the frequency, type, aggregate limit, or purchase price of repurchases.

(e) *Preferred Stock Features.* A national bank's preferred stock may be cumulative or non-cumulative and may or may not have voting rights on one or more series.

■ 56. Revise the heading for subpart C to read as follows:

**Subpart C—National Bank and Federal Savings Association Operations**

■ 57. Revise § 7.3000 to read as follows:

**§ 7.3000 National bank and Federal savings association operating hours and closings.**

(a) *Operating hours.* The board of directors of a national bank or Federal savings association, or an equivalent person or committee of a Federal branch or agency, should review its hours of operations for customers and, independently of any other bank, savings association, or Federal branch or agency, take appropriate action to establish a schedule of operating hours for customers.

(b) *Emergency closings declared by the Comptroller.* Pursuant to 12 U.S.C. 95(b)(1) and 1463(a)(1)(A), the

Comptroller of the Currency (Comptroller), may declare any day a legal holiday if emergency conditions exist. That day is a legal holiday for national banks, Federal savings associations, and Federal branches or agencies in the affected geographic area (*i.e.*, throughout the United States, in a State, or in part of a State), and national banks, Federal savings associations, and Federal branches and agencies may temporarily limit or suspend operations at their affected offices, unless the Comptroller by written order directs otherwise. Emergency conditions may be caused by acts of nature or of man and may include natural and other disasters, public health or safety emergencies, civil and municipal emergencies, and cyber threats or other unauthorized intrusions (*e.g.*, severe flooding, a pandemic, terrorism, a cyber-attack on bank systems, or a power emergency declared by a local power company or government requesting that businesses in the affected area close). The Comptroller may issue a proclamation authorizing the emergency closing in anticipation of the emergency condition, at the time of the emergency condition, or soon thereafter. In the absence of a Comptroller declaration of a bank holiday, a national bank, Federal savings associations, or Federal branch or agency may choose to temporarily close offices in response to an emergency condition. The national bank, Federal savings associations, or Federal branch or agency should notify the OCC of such temporary closure as soon as feasible.

(c) *Emergency and ceremonial closings declared by a State or State official.* In the event a State or a legally authorized State official declares any day to be a legal holiday for emergency or ceremonial reasons in that State or part of the State, that same day is a legal holiday for national banks, Federal savings associations, and Federal branches or agencies or their offices in the affected geographic area. National banks, Federal savings associations, and Federal branches or agencies or their affected offices may close their affected offices or remain open on such a State-designated holiday, unless the Comptroller by written order directs otherwise.

(d) *Liability.* A national bank, Federal savings association, or Federal branch or agency should assure that all liabilities or other obligations under the applicable law due to its closing are satisfied.

(e) *Definition.* For the purpose of this subpart, the term “State” means any of the several States, the District of Columbia, the Commonwealth of Puerto

Rico, the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, or any other territory or possession of the United States.

**§ 7.3001 [Amended]**

■ 58. Amend § 7.3001 by:

■ a. In paragraph (a)(1), removing the phrase “Lease excess space” and adding in its place the phrase “Consistent with § 7.1024, lease excess space”;

■ b. In paragraph (c) introductory text, removing the word “shall” and adding in its place the word “must”; and

■ c. In paragraph (c)(3), removing the word “state” and adding in its place the word “State”.

**§§ 7.4003 through 7.4005 [Removed]**

■ 59. Remove §§ 7.4003 through 7.4005.

■ 60. Revise § 7.5001 to read as follows:

**§ 7.5001 Electronic activities that are incidental to the business of banking.**

In addition to the electronic activities specifically permitted in § 7.5004 (sale of excess electronic capacity and by-products) and § 7.5006 (incidental non-financial data processing), the OCC has

determined that the following electronic activities are incidental to the business of banking, pursuant to § 7.1000. This list of activities is illustrative and not exclusive; the OCC may determine that other activities are permissible pursuant to this authority.

(a) Website development where incidental to other banking services;

(b) Internet access and email provided on a non-profit basis as a promotional activity;

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

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

**PART 145—FEDERAL SAVINGS ASSOCIATIONS—OPERATIONS**

■ 61. The authority citation for part 145 continues to read as follows:

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

**§ 145.121 [Removed]**

■ 62. Remove § 145.121.

**PART 160—LENDING AND INVESTMENT**

■ 63. The authority citation for part 160 continues to read as follows:

**Authority:** 12 U.S.C. 1462a, 1463, 1464, 1467a, 1701j–3, 1828, 3803, 3806, 5412(b)(2)(B); 42 U.S.C. 4106.

**§ 160.50 [Removed]**

■ 64. Remove § 160.50.

**§ 160.120 [Removed]**

■ 65. Remove § 160.120.

**Brian P. Brooks,**

*Acting Comptroller of the Currency.*

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