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§ 4.83 Rule of construction.

This subpart does not alter the legal status of guidelines authorized by statute, including but not limited to, 12 U.S.C. 1831p-1, to create binding legal obligations.

APPENDIX A TO SUBPART F OF PART 4— STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE

STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE

The OCC is issuing this statement to explain the role of supervisory guidance and to describe the OCC's approach to supervisory guidance.

Difference Between Supervisory Guidance and Laws or Regulations

(1) The OCC issues various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, and frequently asked questions, to its supervised institutions. A law or regulation has the force and effect of law.³⁶ Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the OCC does not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the OCC's supervisory expectations or priorities and articulates the OCC's general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the OCC generally considers consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to the industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

Ongoing Efforts To Clarify the Role of Supervisory Guidance

(2) The OCC is clarifying the following policies and practices related to supervisory guidance:

(i) The OCC intends to limit the use of numerical thresholds or other "bright-lines" in describing expectations in supervisory guidance. Where numerical thresholds are used,

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the OCC intends to clarify that the thresholds are exemplary only and not suggestive of requirements. The OCC will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.

(ii) Examiners will not criticize (through the issuance of matters requiring attention), a supervised financial institution for, and the OCC will not issue an enforcement action on the basis of, a "violation" of or "non-compliance" with supervisory guidance. In some situations, examiners may reference (including in writing) supervisory guidance to provide examples of safe and sound conduct, appropriate consumer protection and risk management practices, and other actions for addressing compliance with laws or regulations.

(iii) Supervisory criticisms should continue to be specific as to practices, operations, financial conditions, or other matters that could have a negative effect on the safety and soundness of the financial institution, could cause consumer harm, or could cause violations of laws, regulations, final agency orders, or other legally enforceable conditions.

(iv) The OCC has at times sought, and may continue to seek, public comment on supervisory guidance. Seeking public comment on supervisory guidance does not mean that the guidance is intended to be a regulation or have the force and effect of law. The comment process helps the OCC to improve its understanding of an issue, to gather information on institutions' risk management practices, or to seek ways to achieve a supervisory objective most effectively and with the least burden on institutions.

(v) The OCC will aim to reduce the issuance of multiple supervisory guidance documents on the same topic and will generally limit such multiple issuances going forward.

(vi) The OCC will continue efforts to make the role of supervisory guidance clear in communications to examiners and to supervised financial institutions and encourage supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

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

Sec.

5.1 Scope.

Subpart A—Rules of General Applicability

5.2 Rules of general applicability.

5.3 Definitions.

³⁶Government agencies issue regulations that generally have the force and effect of law. Such regulations generally take effect only after the agency proposes the regulation to the public and responds to comments on the Proposal in a final rulemaking document.

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- 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).

SOURCE: 61 FR 60363, Nov. 27, 1996, unless otherwise noted.

§ 5.1 Scope.

This part establishes rules, policies and procedures of the Office of the Comptroller of the Currency (OCC) for corporate activities and transactions involving national banks and Federal savings associations. It contains information on rules of general and specific

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applicability, where and how to file, and requirements and policies applicable to filings. This part also establishes the corporate filing procedures for Federal branches and agencies of foreign banks.

[80 FR 28414, May 18, 2015]

Subpart A—Rules of General Applicability

SOURCE: 80 FR 28414, May 18, 2015, unless otherwise noted.

§5.2 Rules of general applicability.

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

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

(c) *Comptroller's Licensing Manual.* The "Comptroller's Licensing Manual" provides additional filing guidance, including policies and procedures. This Manual and sample forms are available at www.occ.gov.

(d) *Electronic filing.* The OCC encourages electronic filing for all filings. The Comptroller's Licensing Manual describes the OCC's electronic filing procedures.

[80 FR 28414, May 18, 2015, as amended at 85 FR 80434, Dec. 11, 2020]

§5.3 Definitions.

As used in this part:

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

Appropriate Federal banking agency has the meaning set forth in section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

Appropriate OCC licensing office means the OCC office that is responsible for processing applications or notices to engage in various corporate activities or transactions, as described at www.occ.gov.

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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.

Capital and surplus means:

(1) 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 part 3 of this chapter:

(i) A qualifying community banking organization's tier 1 capital, as used under §3.12 of this chapter; plus

(ii) A qualifying community banking organization's allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, as reported in the national bank's or Federal savings association's Consolidated Report of Condition and Income (Call Report); or

(2) For all other national banks and Federal savings associations:

(i) A national bank's or Federal savings association's tier 1 and tier 2 capital calculated under the OCC's risk-based capital standards set forth in part 3 of this chapter, as applicable, as reported in the Call Report, respectively; plus

(ii) The balance of the 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 institution's tier 2 capital, for purposes of the calculation of risk-based capital described in paragraph (2)(i) of this definition, as reported in the Call Report.

Deppository institution means any bank or savings association.

Eligible bank or eligible savings association means a national bank or Federal savings association that:

(1) Is well capitalized under §5.3;

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

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

(4) Has a consumer compliance rating of 1 or 2 under the Uniform Interagency Consumer Compliance Rating System; and

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

Eligible depository institution means:

(1) With respect to a national bank, a State bank or a Federal or State savings association that meets the criteria for an “eligible bank or eligible savings association” under § 5.3 and is FDIC-insured; and

(2) With respect to a Federal savings association, a State or national bank or a State savings association that meets the criteria for an “eligible bank or eligible savings association” under § 5.3 and is FDIC-insured.

FDIC means the Federal Deposit Insurance Corporation.

Filer means a person or entity that submits a notice or application to the OCC under this part.

Filing means an application or notice submitted to the OCC under this part.

GAAP means generally accepted accounting principles as used in the United States.

MSA means metropolitan statistical area as defined by the Director of the Office of Management and Budget.

Nonconforming assets and nonconforming activities mean assets or activities, respectively, that are impermissible for national banks or Federal savings associations to hold or conduct, as applicable, or, if permissible, are held or conducted in a manner that exceeds limits applicable to national banks or Federal savings associations, as applicable. Assets include investments in subsidiaries or other entities.

Notice, in general, means a submission notifying the OCC that a national bank or Federal savings association intends to engage in or has commenced certain corporate activities or transactions. The specific meaning of *notice* depends on the context of the rule in which it is used and may provide the OCC with authority to disapprove the notice or may be informational requiring no official OCC action.

OTS means the former Office of Thrift Supervision.

Previously approved activity means:

(1) In the case of a national bank, any activity approved in published OCC precedent for a national bank, an operating subsidiary of a national bank, or a non-controlling investment of a national bank; and

(2) In the case of a Federal savings association, any activity approved in published OCC or OTS precedent for a Federal savings association, an operating subsidiary of a Federal savings association, or a pass-through investment of a Federal savings association.

Principal city means an area designated as a “principal city” by the Office of Management and Budget.

Short-distance relocation means moving the premises of a branch or main office of a national bank or a branch or home office of a Federal savings association within a:

(1) One thousand foot-radius of the site if the branch, main office, or home office is located within a principal city of an MSA;

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

(3) Two-mile radius of the site if the branch, main office, or home office is not located within an MSA.

Well capitalized means:

(1) In the case of a national bank or Federal savings association, the capital level described in 12 CFR 6.4(b)(1);

(2) In the case of a Federal branch or agency, the capital level described in 12 CFR 4.7(b)(1)(iii); or

(3) In the case of another depository institution, the capital level designated as “well capitalized” by the institution’s appropriate Federal banking agency pursuant to section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o).

Well managed means:

(1) In the case of a national bank or Federal savings association:

(i) Unless otherwise determined in writing by the OCC, the national bank or Federal savings association has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System in connection with its most recent examination, and

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at least a rating of 2 for management, if such a rating is given; or

(ii) In the case of a national bank or Federal savings association that has not been examined by the OCC, the existence and use of managerial resources that the OCC determines are satisfactory.

(2) In the case of a Federal branch or agency of a foreign bank:

(i) Unless determined otherwise in writing by the OCC, the Federal branch or agency has received a composite ROCA supervisory rating (which rates risk management, operational controls, compliance, and asset quality) of 1 or 2 at its most recent examination, and at least a rating of 2 for risk management, if such a rating is given; or

(ii) In the case of a Federal branch or agency that has not been examined by the OCC, the existence and use of managerial resources that the OCC determines are satisfactory.

(3) In the case of another depository institution:

(i) Unless otherwise determined in writing by the appropriate Federal banking agency, the institution has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (or an equivalent rating under an equivalent rating system) in connection with the most recent examination or subsequent review of the depository institution and, at least a rating of 2 for management, if such a rating is given; or

(ii) In the case of another depository institution that has not been examined by its appropriate Federal banking agency, the existence and use of managerial resources that the appropriate Federal banking agency determines are satisfactory.

[85 FR 80434, Dec. 11, 2020]

§5.4 Filing required.

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

(b) *Availability of forms.* Forms and instructions for filing are available at www.occ.gov.

(c) *Other agency's applications or filings.* At the request of the filer, the OCC may accept an application or

other filing submitted to another Federal agency that covers the proposed action or transaction and contains substantially the same information as required by the OCC. The OCC also may require the filer to submit supplemental information.

(d) *Where to file.* A filer should address a filing or other submission under this part to the appropriate OCC licensing office or appropriate OCC supervisory office, unless the OCC advises a filer otherwise. Relevant addresses are listed on www.occ.gov.

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

(f) *Prefiling meeting.* Before submitting a filing to the OCC, a potential filer is encouraged to contact the appropriate OCC licensing office to determine the need for a prefiling meeting. The OCC decides whether to require a prefiling meeting on a case-by-case basis. Submission of a draft business plan or other relevant information before any prefiling meeting may expedite the filing review process. A potential filer considering a novel, complex, or unique proposal is encouraged to contact the appropriate OCC licensing office to schedule a prefiling meeting early in the development of its proposal for the early identification and consideration of policy issues. Information on model business plans can be found in the Comptroller's Licensing Manual.

(g) *Certification.* A filer must certify that any filing or supporting material submitted to the OCC contains no material misrepresentations or omissions. The OCC may review and verify any information filed in connection with a notice or an application. Any person responsible for any material misrepresentation or omission in a filing or supporting materials may be subject to enforcement action and other penalties,

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including criminal penalties provided in 18 U.S.C. 1001.

[80 FR 28414, May 18, 2015, as amended at 85 FR 80435, Dec. 11, 2020]

§ 5.5 Filing fees.

(a) *Procedure.* A filer must submit the appropriate filing fee, if any, in connection with its filing. Filing fees must be paid by check payable to the OCC or by other means acceptable to the OCC. Additional information on filing fees, including where to file, can be found in the Comptroller's Licensing Manual. The OCC generally does not refund the filing fees.

(b) *Fee schedule.* The OCC publishes a fee schedule in the "Notice of Comptroller of the Currency Fees," as described in 12 CFR 8.8.

[80 FR 28414, May 18, 2015, as amended at 85 FR 80436, Dec. 11, 2020]

§ 5.6 [Reserved]

§ 5.7 Investigations.

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

(b) *Fingerprints.* For certain filings, the OCC collects fingerprints for submission to the Federal Bureau of Investigation for a national criminal history background check.

(c) *Fees.* As described in 12 CFR 8.6, the OCC may assess fees for investigations or examinations conducted under paragraph (a) of this section. The OCC publishes a fee schedule in the "Notice of Comptroller of the Currency Fees," as described in 12 CFR 8.8.

[80 FR 28414, May 18, 2015, as amended at 85 FR 80436, Dec. 11, 2020]

§ 5.8 Public notice.

(a) *In general.* A filer must publish a public notice of its filing in a newspaper of general circulation in the community in which the filer proposes to engage in business, on the date of filing, or as soon as practicable before or after the date of filing. This notice must be published in the English language but if the OCC determines that the primary language of a significant number of adult residents of the community is a language other than

English, the OCC may require that an additional notice(s) simultaneously be published in the community in the appropriate language(s).

(b) *Contents of the public notice.* The public notice must state that a filing is being made, the date of the filing, the name and address of the filer, the subject matter of the filing (including the name of the institution that is the subject of the filing), that the public may submit comments to the appropriate OCC licensing office, the address of the appropriate OCC licensing office where comments should be sent, the closing date of the public comment period (if known at the time of publication of the notice), that the public portion of the filing is available on request, that the public may find information about the filing (including the closing date of the comment period) in the OCC's Weekly Bulletin available at www.occ.gov, and any other information that the OCC requires.

(c) *Confirmation of public notice.* Promptly following publication, the filer must mail or otherwise deliver to the appropriate OCC licensing office a statement containing the date of publication, the name and address of the newspaper that published the public notice, a copy of the public notice, and any other information that the OCC requires.

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

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

(f) *Public notice by the OCC.* In addition to the foregoing, the OCC may require or give public notice and request

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comment on any filing and in any manner the OCC determines appropriate for the particular filing.

(g) *New public notice.* At the OCC's discretion, a filer may be required to publish a new public notice if:

(1) The filer submits either a revised filing or new or additional information related to a filing;

(2) A major issue of law or change in circumstance arises after a filing; or

(3) The OCC determines that a new public notice is appropriate.

[80 FR 28414, May 18, 2015, as amended at 82 FR 8103, Jan. 23, 2017; 85 FR 80436, Dec. 11, 2020]

§5.9 Public availability.

(a) *In general.* The OCC provides a copy of the public file to any person who requests it. A requestor should submit a written request for the public file concerning a pending filing to the appropriate OCC licensing office. A requestor should submit a written request for the public file concerning a decided or closed filing to the OCC's Freedom of Information Act Officer, Communications Division, at the address listed on www.occ.gov. The OCC may impose a fee in accordance with 12 CFR 4.17 and at the rate the OCC publishes in the "Notice of Comptroller of the Currency Fees," described in 12 CFR 8.8.

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

(c) *Confidential treatment.* The filer or an interested person submitting information may request that specific information be treated as confidential under the Freedom of Information Act, 5 U.S.C. 552 (see 12 CFR 4.12(b)). A submitter should draft its request for confidential treatment narrowly to extend only to those portions of a document it considers confidential. If a submitter requests confidential treatment for information that the OCC does not consider to be confidential, the OCC may

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include that information in the public file after providing notice to the submitter. Moreover, at its own initiative, the OCC may determine that certain information should be treated as confidential and withhold that information from the public file. A person requesting information withheld from the public file should submit the request to the OCC's Freedom of Information Act Officer, Communications Division, under the procedures described in 12 CFR part 4, subpart B. That request may be subject to the predisclosure notice procedures of 12 CFR 4.16.

[80 FR 28414, May 18, 2015, as amended at 85 FR 80436, Dec. 11, 2020]

§5.10 Comments.

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

(b) *Comment period—(1) In general.* Unless otherwise stated, the comment period is 30 days after publication of the public notice required by §5.8(a). If a new public notice is required under §5.8(g), the OCC may require a new comment period of up to 30 days after publication of the new public notice.

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

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

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

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

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

[80 FR 28414, May 18, 2015, as amended at 85 FR 80436, Dec. 11, 2020]

§5.11 Hearings and other meetings.

(a) *Hearing requests.* Prior to the end of the comment period, any person may

submit to the appropriate OCC office a written request for a hearing on a filing. The request must describe the nature of the issues or facts to be presented and the reasons why written submissions would be insufficient to make an adequate presentation of those issues or facts to the OCC. A person requesting a hearing must simultaneously submit a copy of the request to the filer.

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

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

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

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

(e) *Participation in the hearing.* Any person who wishes to appear (participant) must notify the appropriate OCC licensing office of their intent to participate in the hearing within 10 days from the date the OCC issues the Notice of Hearing. At least five days before the hearing, each participant must submit to the appropriate OCC licensing office, the filer, and any other person the OCC requires, the names of wit-

nesses and one copy of each exhibit the participant intends to present.

(f) *Hearing transcripts.* The OCC arranges for a hearing transcript. The person requesting the hearing may be required to bear the cost of one copy of the transcript for their use.

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

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

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

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

(i) *Other meetings.*—(1) *Public meetings.* The OCC may arrange for a public meeting in connection with a filing, either upon receipt during the comment period of a written request for such a meeting or upon the OCC's own initiative, if the OCC finds that written submissions are insufficient to address facts or issues raised in the filing or otherwise determines that a meeting will benefit the decision-making process. Public meetings will be arranged and presided over by a presiding officer.

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

(3) *Issues at meetings.* The OCC may limit the issues considered at a meeting to those it determines are relevant or material.

(4) *Meeting format.* The OCC may conduct a meeting in the format that it determines is appropriate, including a

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telephone conference, a face-to-face meeting, or a more formal meeting.

[80 FR 28414, May 18, 2015, as amended at 85 FR 80436, Dec. 11, 2020]

§ 5.12 Computation of time.

In computing the period of days, the OCC does not include the day of the act or event (e.g., the date a filing is received by the OCC) from which the period begins to run. When the last day of a time period is a Saturday, Sunday, or Federal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday or Federal holiday.

[80 FR 28414, May 18, 2015, as amended at 85 FR 80436, Dec. 11, 2020]

§ 5.13 Decisions.

(a) *In general.* The OCC may approve, conditionally approve, or deny a filing after appropriate review and consideration of the record. In reviewing a filing, the OCC may consider the activities, resources, or condition of an affiliate of the filer that may reasonably reflect on or affect the filer. It also may consider information available from any source, including any comments submitted by interested parties or views expressed by interested parties at meetings with the OCC.

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

(2) *Expedited review.* The OCC grants qualifying national banks and Federal savings associations expedited review within a specified time after filing or commencement of the public comment period for certain filings.

(i) The OCC may extend the expedited review period or remove a filing from expedited review procedures if it concludes that the filing, or an adverse comment regarding the filing, presents a significant supervisory, CRA (if applicable), or compliance concern or raises a significant legal or policy issue

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requiring additional OCC review. The OCC will provide the filer with a written explanation if it decides not to process an application from a qualifying national bank or Federal savings association under expedited review pursuant to this paragraph.

(ii) Adverse comments that the OCC determines do not raise a significant supervisory, CRA (if applicable), or compliance concern or a significant legal or policy issue; are frivolous, non-substantive, or filed primarily as a means of delaying action on the filing; or raise a CRA concern that has been satisfactorily resolved do not affect the OCC's decision under paragraph (a)(2)(i) of this section. The OCC considers a comment to be non-substantive if it is a generalized opinion that a filing should or should not be approved or a conclusory statement, lacking factual or analytical support. The OCC considers a CRA concern to have been satisfactorily resolved if the OCC previously reviewed (e.g., in an examination, other supervisory activity, or a prior filing made by the current filer) a concern presenting substantially the same issue in substantially the same assessment area during substantially the same time, and the OCC determines that the concern would not warrant denial or imposition of a condition on approval of the application.

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

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

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

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

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

(c) *Required information and abandonment of filing.* A filing must contain information required by the applicable section set forth in this part. To the extent necessary to evaluate an application, the OCC may require a filer to provide additional information. The OCC may deem a filing abandoned if information required or requested by the OCC in connection with the filing is not furnished within the time period specified by the OCC. The OCC may return an application without a decision if it finds the filing to be materially deficient. A filing is materially deficient if it lacks sufficient information for the OCC to make a determination under the applicable statutory or regulatory criteria.

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

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

(f) *Appeal.* A filer may file an appeal of an OCC decision in writing with the Deputy Comptroller for Licensing or with the Ombudsman at the address listed on www.occ.gov. In the event that the Deputy Comptroller for Licensing was the deciding official of the matter appealed, or was involved personally and substantially in the matter, the appeal may be referred instead to the Chief Counsel or the Ombudsman.

(g) *Extension of time.* When the OCC approves or conditionally approves a filing, the OCC generally gives the filer a specified period of time to commence

that new or expanded activity. The OCC does not generally grant an extension of the time specified to commence a new or expanded corporate activity approved under this part, unless the OCC determines that the delay is beyond the filer's control.

(h) *Nullifying a decision.* The OCC may nullify any decision on a filing either prior to or after consummation of the transaction if:

(1) The OCC discovers a material misrepresentation or omission in any information provided to the OCC in the filing or supporting materials;

(2) The decision is contrary to law, regulation, or OCC policy thereunder; or

(3) The decision was granted due to clerical or administrative error, or a material mistake of law or fact.

(i) *Modifying, Suspending, or Rescinding a Decision.* The OCC may modify, suspend, or rescind a decision on a filing if a material change in the information or circumstance on which the OCC relied occurs prior to the date of the consummation of the transaction to which the decision pertains.

[80 FR 28414, May 18, 2015, as amended at 85 FR 80436, Dec. 11, 2020]

Subpart B—Initial Activities**§5.20 Organizing a national bank or Federal savings association.**

(a) *Authority.* 12 U.S.C. 21, 22, 24(Seventh), 26, 27, 92a, 93a, 1814(b), 1816, 1462a, 1463, 1464, 2903, and 5412(b)(2)(B).

(b) *Licensing requirements.* Any person desiring to establish a national bank or a Federal savings association must submit an application and obtain prior OCC approval. An existing national bank or Federal savings association desiring to change the purpose of its charter must submit an application and obtain prior OCC approval.

(c) *Scope.* This section describes the procedures and requirements governing OCC review and approval of an application to establish a national bank or a Federal stock or mutual savings association, including a national bank or a Federal savings association with a special purpose. Information regarding an

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application to establish an interim national bank or an interim Federal savings association solely to facilitate a business combination is set forth in § 5.33. This section also describes the requirements for an existing national bank or Federal savings association to change the purpose of its charter and refers such institutions to § 5.53 for the procedures to follow.

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

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

(2) *Control* means with respect to an application to establish a national bank, control as used in section 2(a)(2) of the Bank Holding Company Act, 12 U.S.C. 1841(a)(2), and with respect to an application to establish a Federal savings association, control as used in section 10(a)(2) of the Home Owners' Loan Act, 12 U.S.C. 1467a(a)(2).

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

(4) *Holding company* means any company that controls or proposes to control a national bank or a Federal savings association whether or not the company is a bank holding company under section 2 of the Bank Holding Company Act, 12 U.S.C. 1841(a)(1), or a savings and loan holding company under section 10 of the Home Owners' Loan Act, 12 U.S.C. 1467a.

(5) *Lead depository institution* means the largest depository institution controlled by a bank holding company or savings and loan holding company based on a comparison of the average total assets controlled by each deposi-

tory institution as reported in its Consolidated Report of Condition and Income required to be filed for the immediately preceding four calendar quarters.

(6) *Institution* means either a national bank or Federal savings association.

(7) *Organizer* means a member of the organizing group.

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

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

(10) *Principal shareholder* means a person who directly or indirectly or acting in concert with one or more persons or companies, or together with members of their immediate family, will own, control, or hold 10 percent or more of the voting stock of the proposed national bank or Federal savings association.

(e) *Requirements*—(1) *In general.* (i) The OCC charters a national bank under the authority of the National Bank Act of 1864, as amended, 12 U.S.C. 1 *et seq.* The bank may be a special purpose bank that limits its activities to fiduciary activities or to any other activities within the business of banking. A special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: Receiving deposits; paying checks; or lending money. The name of a proposed national bank must include the word "national."

(ii) The OCC charters a Federal savings association under the authority of section 5 of the Home Owners' Loan Act, 12 U.S.C. 1464, which in an application to establish a Federal savings association requires the OCC to consider:

(A) Whether the filers are persons of good character and responsibility;

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(B) Whether a necessity exists for the association in the community to be served;

(C) Whether there is a reasonable probability of the association's usefulness and success; and

(D) Whether the association can be established without undue injury to properly conducted existing local savings associations and home financing institutions.

(iii) In determining whether to approve an application to establish a national bank or Federal savings association, the OCC verifies that the proposed national bank or Federal savings association has complied with the following requirements. A national bank or a Federal savings association must:

(A) File either articles of association (for a national bank), or a charter and by-laws (for a Federal savings association) with the OCC;

(B) In the case of an application to establish a national bank, file an organization certificate containing specified information with the OCC;

(C) Ensure that all capital stock is paid in, or in the case of a Federal mutual savings association, ensure that at least a minimum amount of capital is paid in; and

(D) Have at least five elected directors.

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

(3) *Federal Deposit Insurance.* Preliminary approval for an application to establish a Federal savings association will be conditioned on the savings association applying for and receiving approval for deposit insurance from the FDIC. Final approval for an application to establish a Federal savings association will not be issued until receipt by the OCC of written confirmation by the FDIC that the accounts of the Federal savings association will be insured by the FDIC.

(f) *Policy—(1) In general.* In determining whether to approve an application to establish a national bank or Federal savings association, the OCC is guided by the following principles:

(i) Maintaining a safe and sound banking system;

(ii) Encouraging a national bank or Federal savings association to provide fair access to financial services by helping to meet the credit needs of its entire community;

(iii) Ensuring compliance with laws and regulations; and

(iv) Promoting fair treatment of customers including efficiency and better service.

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

(A) Has organizers who are familiar with national banking laws and regulations or Federal savings association laws and regulations, respectively;

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

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

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

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

(F) Does not have a title that misrepresents the nature of the institution or the services it offers.

(ii) In evaluating an application to establish a Federal savings association, the OCC considers whether the proposed Federal savings association will be operated as a qualified thrift lender under section 10(m) of the Home Owners' Loan Act, 12 U.S.C. 1467a(m).

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

(3) *OCC evaluation.* The OCC evaluates a proposed institution's organizing group and its business plan or operating plan together. The OCC's judgment concerning one may affect the evaluation of the other. An organizing

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group and its business plan or operating plan must be stronger in markets where economic conditions are marginal or competition is intense.

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

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

(3) *Financial resources*. (i) Each organizer must have a history of responsibility, personal honesty, and integrity. Personal wealth is not a prerequisite to become an organizer or director of a national bank or Federal savings association. However, directors' stock purchases, or, in the case of a Federal mu-

tual savings association, capital contributions, individually and in the aggregate, should reflect a financial commitment to the success of the institution that is reasonable in relation to their individual and collective financial strength. A director should not have to depend on institution dividends, fees, or other compensation to satisfy financial obligations.

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

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

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

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

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

- (i) An existing holding company;
- (ii) Individuals currently affiliated with other depository institutions; or

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

(h) *Business plan or Operating plan—*
(1) *In general.* (i) Organizers of a proposed national bank or Federal savings association must submit a business plan or operating plan that adequately addresses the statutory and policy considerations set forth in paragraphs (e) and (f)(2) of this section. In the case of a proposed Federal savings association the plan must also specifically address meeting qualified thrift lender requirements. The plan must reflect sound banking principles and demonstrate realistic assessments of risk in light of economic and competitive conditions in the market to be served.

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

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

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

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

(4) *Capital.* A proposed bank or Federal savings association must have suf-

ficient initial capital, net of any organizational expenses that will be charged to the institution's capital after it begins operations, to support the institution's projected volume and type of business.

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

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

(iii) Because community support is important to the long-term success of a national bank or Federal savings association, the organizing group must include plans for attracting and maintaining community support.

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

(7) *Fiduciary powers.* The business plan or operating plan must indicate if the proposed institution intends to exercise fiduciary powers. The information required by § 5.26 must be filed with the charter application. A separate application is not required.

(i) *Procedures—*(1) *Prefiling meeting.* The OCC normally requires a prefiling meeting with the organizers of a proposed national bank or Federal savings association before the organizers file an application. Organizers should be familiar with the OCC's chartering policy

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and procedural requirements in the Comptroller's Licensing Manual before the prefiling meeting. The prefiling meeting normally is held in the district office where the application will be filed but may be held at another location at the request of the filer.

(2) *Business plan or operating plan.* An organizing group must file a business plan or operating plan that addresses the subjects discussed in paragraph (h) of this section.

(3) *Biographical and financial reports.* (i) Each proposed organizer, director, executive officer, or principal shareholder must submit to the appropriate OCC licensing office:

(A) The information prescribed in the Interagency Biographical and Financial Report, available at www.occ.gov; and

(B) Legible fingerprints.

(ii) The OCC may require additional information about any proposed organizer, director, executive officer, or principal shareholder, if appropriate. The OCC may waive any of the information requirements of this paragraph if the OCC determines that it is in the public interest.

(4) *Contact person.* The organizing group must designate a contact person to represent the organizing group in all contacts with the OCC. The contact person must be an organizer and proposed director of the new national bank or Federal savings association, except a representative of the sponsor or sponsors may serve as contact person if an application is sponsored by an existing holding company, individuals currently affiliated with other depository institutions, or individuals who, in the OCC's view, are otherwise collectively experienced in banking and have demonstrated the ability to work together effectively.

(5) *Decision notification.* The OCC notifies the contact person and other relevant parties in writing of its decision on an application.

(6) *Activities.* (i) Before the OCC grants final approval, a proposed national bank or Federal savings association must be established as a legal entity. A national bank becomes a legal entity after it has filed its organization certificate and articles of association with the OCC as required by law. A

Federal savings association becomes a legal entity after it has filed its proposed charter and bylaws with the OCC. A proposed national bank may offer and sell securities prior to OCC preliminary approval of the proposed national bank's charter application, provided that the proposed national bank has filed articles of association, an organization certificate, and a completed charter application and the bank complies with paragraph (i)(6)(iii) of this section. A proposed Federal stock savings association may offer and sell securities prior to OCC preliminary approval of the proposed Federal stock savings association's charter application, provided that the proposed Federal stock savings association has filed a proposed charter, bylaws, and a completed charter application and the Federal stock savings association complies with paragraph (i)(6)(iii) of this section.

(ii)(A) After the OCC grants preliminary approval, the organizing group must elect a board of directors, take steps necessary to organize the proposed national bank or Federal savings association and prepare it for commencing business.

(B) A proposed national bank may not conduct the business of banking until the OCC grants final approval and issues a charter. A proposed Federal savings association may not commence business until the OCC grants final approval and issues a charter, which must be in the form provided in this part.

(iii) For all capital obtained through a public offering a proposed national bank or Federal savings association must use an offering circular that complies with the OCC's securities offering regulations, 12 CFR part 16, as applicable. All securities of a particular class in the initial offering must be sold at the same price.

(iv) A national bank or Federal savings association in organization must raise its capital before it commences business. Preliminary approval expires if the proposed national bank or Federal savings association does not raise the required capital within 12 months from the date the OCC grants preliminary approval. Preliminary approval expires if the proposed national bank

or Federal savings association does not commence business within 18 months from the date of preliminary approval, unless the OCC grants an extension. If preliminary approval expires, all cash collected on subscriptions must be returned.

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

(1) Notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under §5.13(a)(2); or

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

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

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

(3) *Investments.* A national bank or Federal savings association may invest

up to 10 percent of its capital and surplus in a bankers' bank and may own five percent or less of any class of a bankers' bank's voting securities.

(l) *Special purpose institutions.*—(1) *In general.* A filer for a national bank or Federal savings association charter that will limit its activities to fiduciary activities, credit card operations, or another special purpose must adhere to established charter procedures with modifications appropriate for the circumstances as determined by the OCC. A filer for a national bank or Federal savings association charter that will have a community development focus must also adhere to established charter procedures with modifications appropriate for the circumstances as determined by the OCC. A national bank that seeks to invest in a bank or savings association with a community development focus must comply with applicable requirements of 12 CFR part 24. A Federal savings association that seeks to invest in a bank or savings association with a community development focus must comply with §160.36 or any other applicable requirements.

(2) *Changes in charter purpose.* An existing national bank or Federal savings association whose activities are limited to a special purpose that desires to change to another special purpose, to add another special purpose, or to no longer be limited to a special purpose charter must submit an application and obtain prior OCC approval under §5.53. An existing national bank or Federal savings association whose activities are not limited that desires to limit its activities and become a special purpose institution must submit an application and obtain prior OCC approval under §5.53.

[80 FR 28418, May 18, 2015, as amended at 82 FR 8103, Jan. 23, 2017; 85 FR 80437, Dec. 11, 2020; 85 FR 80437, Dec. 11, 2020]

§5.21 Federal mutual savings association charter and bylaws.

(a) *Authority.* 12 U.S.C. 1462a, 1463, 1464, and 2901 *et seq.*

(b) *Licensing requirements.* A Federal mutual savings association must file an application, notice, or other filing as prescribed by this section when adopting or amending its charter or bylaws.

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(c) *Scope.* This section describes the procedures and requirements governing charters and bylaws for Federal mutual savings associations.

(d) *Exceptions to rules of general applicability.* Notwithstanding any other provision of this part, §§ 5.8 through 5.11 do not apply to this section.

(e) *Charter form.* Except as provided in paragraphs (f) and (g) of this section, a Federal mutual savings association must have a charter in the following form. A charter for a Federal mutual savings bank must substitute the term "savings bank" for "association." The term "trustee" may be substituted for the term "director." Associations adopting this charter with existing borrower members must grandfather those borrower members who were members as of the date of issuance of the new charter by the OCC. Such borrowers will have one vote for the period of time such borrowings are in existence.

Federal Mutual Charter

Section 1. Corporate title. The full corporate title of the Federal savings association is _____.

Section 2. Office. The home office is located in _____ [city, state].

Section 3. Duration. The duration of the association is perpetual.

Section 4. Purpose and powers. The purpose of the association is to pursue any or all of the lawful objectives of a Federal mutual savings association chartered under section 5 of the Home Owners' Loan Act and to exercise all the express, implied, and incidental powers conferred thereby and by all acts amendatory thereof and supplemental thereto, subject to the Constitution and laws of the United States as they are now in effect, or as they may hereafter be amended, and subject to all lawful and applicable rules, regulations, and orders of the Office of the Comptroller of the Currency ("OCC").

Section 5. Capital. The association may raise capital by accepting payments on savings and demand accounts and by any other means authorized by the OCC.

Section 6. Members. All holders of the association's savings, demand, or other authorized accounts are members of the association. In the consideration of all questions requiring action by the members of the association, each holder of an account is permitted to cast one vote for each \$100, or fraction thereof, of the withdrawal value of the member's account. No member, however, may cast more than 1,000 votes. All accounts are nonassessable.

Section 7. Directors. The association is under the direction of a board of directors. The authorized number of directors may not be fewer than five nor more than fifteen persons, as fixed in the association's bylaws, except that the number of directors may be decreased to a number less than five or increased to a number greater than fifteen with the prior approval of the OCC.

Section 8. Capital, surplus, and distribution of earnings. The association will maintain for the purpose of meeting losses the amount of capital required by section 5 of the Home Owners' Loan Act and by regulations of the OCC. The association will distribute net earnings on its accounts on such basis and in accordance with such terms and conditions as may from time to time be authorized by the OCC: *Provided*, That the association may establish minimum-balance requirements for accounts to be eligible for distribution of earnings. All holders of accounts of the association will be entitled to equal distribution of assets, *pro rata* to the value of their accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association. Moreover, in any such event, or in any other situation in which the priority of such accounts is in controversy, all such accounts will, to the extent of their withdrawal value, be debts of the association having the same priority as the claims of general creditors of the association not having priority (other than any priority arising or resulting from consensual subordination) over other general creditors of the association.

Section 9. Amendment of charter. Adoption of any preapproved charter amendment will be effective after such preapproved amendment has been approved by the members at a legal meeting. Any other amendment, addition, change, or repeal of this charter must be approved by the OCC prior to approval by the members at a legal meeting, and will be effective upon filing with the OCC in accordance with regulatory procedures.

Attest: _____
Secretary of the Association

By: _____
President or Chief Executive Officer of the Association

Attest: _____
Deputy Comptroller for Licensing

By: _____
Comptroller of the Currency
Effective Date: _____

(f) *Charter amendments.* In order to adopt a charter amendment, a Federal mutual savings association must comply with the following requirements:

(1) *Board of directors approval.* The board of directors of the association must adopt a resolution proposing the

charter amendment that states the text of such amendment;

(2) *Form of filing*—(i) *Application requirement.* Except as provided in paragraph (f)(2)(ii) of this section, a Federal mutual savings association must file the proposed charter amendment with, and obtain the prior approval of, the OCC.

(A) *Expedited review.* Except as provided in paragraph (f)(2)(i)(B) of this section, the charter amendment will be deemed approved as of the 30th day after filing, unless the OCC notifies the filer that the amendment is denied or that the amendment contains procedures of the type described in paragraph (f)(2)(i)(B) of this section and is not eligible for expedited review, provided the association follows the requirements of its charter in adopting the amendment.

(B) *Amendments exempted from expedited review.* Expedited review is not available for a charter amendment that would render more difficult or discourage a merger, proxy contest, the assumption of control by a mutual account holder of the association, or the removal of incumbent management; or involve a significant issue of law or policy.

(ii) *Notice requirement.* No application under paragraph (f)(2)(i) of this section is required if the text of the amendment is contained within paragraphs (e) or (g) of this section. In such case, the Federal mutual savings association must submit a notice with the charter amendment to the OCC within 30 days after adoption.

(3) *Effectiveness.* A charter amendment is effective after approval by the OCC, if required pursuant to paragraph (f)(2) of this section, and adoption by the association, provided the association follows the requirements of its charter in adopting the amendment.

(g) *Optional charter amendments.* The following charter amendments are subject to the notice requirement in paragraph (f)(2)(ii) of this section if adopted without change:

(1) *Purpose and powers.* Add a second paragraph to section 4, as follows:

*Section 4. Purpose and powers. * * * The association has the express power: (i) To act as fiscal agent of the United States when designated for that purpose by the Secretary of*

the Treasury, under such regulations as the Secretary may prescribe, to perform all such reasonable duties as fiscal agent of the United States as may be required, and to act as agent for any other instrumentality of the United States when designated for that purpose by any such instrumentality; (ii) To sue and be sued, complain and defend in any court of law or equity; (iii) To have a corporate seal, affixed by imprint, facsimile or otherwise; (iv) To appoint officers and agents as its business requires and allow them suitable compensation; (v) To adopt bylaws not inconsistent with the Constitution or laws of the United States and rules and regulations adopted thereunder and under this Charter; (vi) To raise unlimited capital by accepting payments on savings, demand, or other accounts, as are authorized by rules and regulations made by the OCC, and the holders of all such accounts or other accounts as will, to such extent as may be provided by such rules and regulations, be members of the association and will have such voting rights and such other rights as are thereby provided; (vii) To issue notes, bonds, debentures, or other obligations, or securities, provided by or under any provision of Federal statute as from time to time is in effect; (viii) To provide for redemption of insured accounts; (ix) To borrow money without limitation and pledge and otherwise encumber any of its assets to secure its debts; (x) To lend and otherwise invest its funds as authorized by statute and the rules and regulations of the OCC; (xi) To wind up and dissolve, merge, consolidate, convert, or reorganize; (xii) To purchase, hold, and convey real estate and personalty consistent with its objects, purposes, and powers; (xiii) To mortgage or lease any real estate and personalty and take such property by gift, devise, or bequest; and (xiv) To exercise all powers conferred by law. In addition to the foregoing powers expressly enumerated, this association has the power to do all things reasonably incident to the accomplishment of its express objects and the performance of its express powers.

(2) *Title change.* A Federal mutual savings association that complies with §5.42 may amend its charter by substituting a new corporate title in section 1.

(3) *Home office.* A Federal mutual savings association may amend its charter by substituting a new home office in section 2, if it has complied with applicable requirements of §5.40.

(4) *Maximum number of votes.* A Federal mutual savings association may amend its charter by substituting any number of votes per member between 1 and 1000 in section 6.

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(h) *Reissuance of charter.* A Federal mutual savings association that has amended its charter may apply to have its charter, including the amendments, reissued by the OCC. Such request for reissuance should be filed at the appropriate OCC licensing office and contain signatures required under paragraph (e) of this section, together with such supporting documents as may be needed to demonstrate that the amendments were properly adopted.

(i) *Availability of chartering documents.* A Federal mutual savings association must make available a true copy of its charter and bylaws and all amendments thereto to accountholders at all times in each office of the savings association, and must upon request deliver to any accountholders a copy of such charter and bylaws or amendments thereto.

(j) *Bylaws for Federal mutual savings associations—(1) In general.* A Federal mutual savings association must operate under bylaws that contain provisions that comply with all requirements specified by the OCC in this paragraph and that are not otherwise inconsistent with the provisions of this paragraph; the association's charter; and all other applicable laws, rules, and regulations *provided that*, a bylaw provision inconsistent with the provisions of this paragraph may be adopted with the approval of the OCC. Bylaws may be adopted, amended or repealed by a majority of the votes cast by the members at a legal meeting or a majority of the association's board of directors. The bylaws for a Federal mutual savings bank must substitute the term "savings bank" for "association". The term "trustee" may be substituted for the term "director".

(2) *Requirements.* The following requirements are applicable to Federal mutual savings associations:

(i) *Annual meetings of members.* (A) An association must provide for and conduct an annual meeting of its members for the election of directors and at which any other business of the association may be conducted. Such meeting must be held at any convenient place the board of directors may designate, and at a date and time within 150 days after the end of the association's fiscal year. The association's by-

laws may provide for telephonic or electronic participation of members at an annual meeting. Members participating in an annual meeting telephonically or electronically will be deemed present in person for purposes of the quorum requirement in paragraph (j)(2)(v) of this section.

(B) At each annual meeting, the officers must make a full report of the financial condition of the association and of its progress for the preceding year and must outline a program for the succeeding year.

(C) If the association's bylaws provide for telephonic or electronic participation in member meetings, the association must follow the procedures for telephonic or electronic participation of the State corporate governance provisions it is permitted to elect pursuant to paragraph (j)(3)(ii) of this section, if those State corporate governance 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) (with "member" substituting for "stockholder"); or the Model Business Corporation Act (with "member" substituting for "shareholder"), provided, however, that such procedures are not inconsistent with applicable Federal statutes and regulations and safety and soundness. The association must indicate the use of these procedures in its bylaws.

(ii) *Special meetings of members.* Procedures for calling any special meeting of the members and for conducting such a meeting must be set forth in the bylaws. The board of directors of the association or the holders of 10 percent or more of the voting capital must be entitled to call a special meeting. The association's bylaws may provide for telephonic or electronic participation of members at a special meeting pursuant to the procedures specified in paragraph (j)(2)(i)(C) of this section. Members participating in a special meeting telephonically or electronically will be deemed present in person for purposes of the quorum requirement in paragraph (j)(2)(v) of this section. For purposes of this paragraph, "voting capital" means FDIC-insured deposits as of the voting record date.

(iii) *Notice of meeting of members.* Notice specifying the date, time, and place of the annual or any special meeting and adequately describing any business to be conducted must be published for two successive weeks immediately prior to the week in which such meeting will convene in a newspaper of general circulation in the city or country in which the principal place of business of the association is located, or mailed postage prepaid at least 15 days and not more than 45 days prior to the date on which such meeting will convene to each of its members of record. A similar notice must be posted in a conspicuous place in each of the offices of the association during the 14 days immediately preceding the date on which such meeting will convene. The bylaws may permit a member to waive in writing any right to receive personal delivery of the notice. When any meeting is adjourned for 30 days or more, notice of the adjournment and reconvening of the meeting must be given as in the case of the original meeting.

(iv) *Fixing of record date.* The bylaws must provide for the fixing of a record date and a method for determining from the books of the association the members entitled to vote. Such date may not be more than 60 days nor fewer than 10 days prior to the date on which the action, requiring such determination of members, is to be taken. The same determination must apply to any adjourned meeting.

(v) *Member quorum.* Any number of members present and voting, represented in person or by proxy, at a regular or special meeting of the members constitutes a quorum. A majority of all votes cast at any meeting of the members determines any question, unless otherwise required by regulation. At any adjourned meeting, any business may be transacted that might have been transacted at the meeting as originally called. Members present at a duly constituted meeting may continue to transact business until adjournment.

(vi) *Voting by proxy.* Procedures must be established for voting at any annual or special meeting of the members by proxy pursuant to the rules and regulations of the OCC. Proxies may be given telephonically or electronically as long

as the holder uses a procedure for verifying the identity of the member. All proxies with a term greater than eleven months or solicited at the expense of the association must run to the board of directors as a whole, or to a committee appointed by a majority of such board.

(vii) *Communications between members.* Provisions relating to communications between members must be consistent with §144.8 of this chapter. No member, however, may have the right to inspect or copy any portion of any books or records of a Federal mutual savings association containing:

- (A) A list of depositors in or borrowers from such association;
- (B) Their addresses;
- (C) Individual deposit or loan balances or records; or
- (D) Any data from which such information could be reasonably constructed.

(viii) *Number of directors, membership.* The bylaws must set forth a specific number of directors, not a range. The number of directors may not be fewer than five nor more than fifteen, unless a higher or lower number has been authorized by the OTS prior to July 21, 2011 or by the OCC. Each director of the association must be a member of the association. Directors may be elected for periods of one to three years and until their successors are elected and qualified, but if a staggered board is chosen, provision must be made for the election of approximately one-third or one-half of the board each year, as appropriate. State-chartered savings banks converting to Federal savings banks may include alternative provisions for the election and term of office of directors so long as such provisions are authorized by the OCC, and provide for compliance with the standard provisions of this paragraph no later than six years after the conversion to a Federal savings association.

(ix) *Meetings of the board.* The board of directors determines the place, frequency, time, procedure for notice, which must be at least 24 hours unless waived by the directors, and waiver of notice for all regular and special meetings. The board also may permit telephonic or electronic participation at meetings. The bylaws may provide for

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action to be taken without a meeting if unanimous written consent is obtained for such action. A majority of the authorized directors constitutes a quorum for the transaction of business. The act of a majority of the directors present at any meeting at which there is a quorum will be the act of the board.

(x) *Officers, employees and agents.* (A) The bylaws must contain provisions regarding the officers of the association, their functions, duties, and powers. The officers of the association must consist of a president, one or more vice presidents, a secretary, and a treasurer or comptroller, each of whom must be elected annually by the board of directors. Such other officers and assistant officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed in the bylaws. Any two or more offices may be held by the same person, except the offices of president and secretary.

(B) Any officer may be removed by the board of directors with or without cause, but such removal, other than for cause, must be without prejudice to the contractual rights, if any, of the person so removed. Termination for cause, for purposes of this section and §5.22, includes termination because of the person's personal dishonesty; incompetence; willful misconduct; breach of fiduciary duty involving personal profit; intentional failure to perform stated duties; willful violation of any law, rule, or regulation (other than traffic violations or similar offenses) or final cease and desist order; or material breach of any provision of an employment contract.

(xi) *Vacancies, resignation or removal of directors.* In the event of a vacancy on the board, the board of directors may, by its affirmative vote, fill such vacancy, even if the remaining directors constitute less than a quorum. A director elected to fill a vacancy may serve only until the next election of directors by the members. The bylaws must set out the procedure for the resignation of a director. Directors may be removed only for cause, as defined in paragraph (j)(2)(x)(B) of this section, by a vote of the holders of a majority

of the shares then entitled to vote at an election of directors.

(xii) *Powers of the board.* The board of directors has the power to exercise any and all of the powers of the association not expressly reserved by the charter to the members.

(xiii) *Nominations for directors.* The bylaws must provide that nominations for directors may be made at the annual meeting by any member and must be voted upon, except, however, the bylaws may require that nominations by a member must be submitted to the secretary and then prominently posted in the principal place of business at least 10 days prior to the date of the annual meeting. However, if such provision is made for prior submission of nominations by a member, then the bylaws must provide for a nominating committee, which, except in the case of a nominee substituted as a result of death or other incapacity, must submit nominations to the secretary and have such nominations similarly posted at least 15 days prior to the date of the annual meeting.

(xiv) *New business.* The bylaws must provide procedures for the introduction of new business at the annual meeting.

(xv) *Amendment.* Bylaws may include any provision for their amendment that would be consistent with applicable law, rules, and regulations and adequately addresses its subject and purpose.

(A) Amendments will be effective:

(1) After approval by a majority vote of the authorized board, or by a majority of the vote cast by the members of the association at a legal meeting; and

(2) After receipt of any applicable regulatory approval.

(B) When an association fails to meet its quorum requirement, solely due to vacancies on the board, the bylaws may be amended by an affirmative vote of a majority of the sitting board.

(xvi) *Miscellaneous.* The bylaws also may address any other subjects necessary or appropriate for effective operation of the association.

(3) *Form of filing*—(i) *Application requirement.* Except as provided in paragraphs (j)(3)(ii) or (j)(3)(iii) of this section, a Federal mutual savings association must file the proposed bylaw

amendment with, and obtain the prior approval of, the OCC.

(A) *Expedited review.* Except as provided in paragraph (j)(3)(i)(B) of this section, the bylaw amendment will be deemed approved as of the 30th day after filing, unless the OCC notifies the filer that the bylaw amendment is denied or that the amendment contains procedures of the type described in paragraph (j)(3)(i)(B) of this section and is not eligible for expedited review, provided the association follows the requirements of its charter and bylaws in adopting the amendment.

(B) *Amendments not subject to expedited review.* A bylaw amendment is not subject to expedited review if it would render more difficult or discourage a merger, proxy contest, the assumption of control by a mutual account holder of the association, or the removal of incumbent management; involve a significant issue of law or policy, including indemnification, conflicts of interest, and limitations on director or officer liability; or be inconsistent with the requirements of this paragraph or with applicable laws, rules, regulations, or the association's charter.

(ii) *Corporate governance election and notice requirement.* A Federal mutual 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, provided that such provisions are not inconsistent with applicable Federal statutes, regulations, and safety and soundness, and such provisions are not of the type described in paragraph (j)(3)(i)(B) of this section. If this election is selected, a Federal mutual association must designate in its bylaws the provision or provisions from the body of law selected for its corporate governance provisions, and must submit 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)(3)(i)(B) of this section.

(iii) *No filing required.* No filing is required for purposes of paragraph (j)(3) of this section if a bylaw amendment adopts the language of the OCC's model or optional bylaws without change.

(4) *Effectiveness.* A bylaw amendment is effective after approval by the OCC, if required, and adoption by the association, provided that the association follows the requirements of its charter and bylaws in adopting the amendment.

(5) *Effect of subsequent charter or bylaw change.* Notwithstanding any subsequent change to its charter or bylaws, the authority of a Federal mutual savings association to engage in any transaction is determined only by the association's charter or bylaws then in effect.

[80 FR 28421, May 18, 2015, as amended at 82 FR 8103, Jan. 23, 2017; 85 FR 31948, May 28, 2020; 85 FR 80437, Dec. 11, 2020; 85 FR 83726, Dec. 22, 2020]

§5.22 Federal stock savings association charter and bylaws.

(a) *Authority.* 12 U.S.C. 1462a, 1463, 1464, and 2901 *et seq.*

(b) *Licensing requirements.* A Federal stock savings association must file an application, notice, or other filing as prescribed by this section when adopting or amending its charter or bylaws.

(c) *Scope.* This section describes the procedures and requirements governing charters and bylaws for Federal stock savings associations.

(d) *Exceptions to rules of general applicability.* Notwithstanding any other provision of this part, §§5.8 through 5.11 do not apply to this section.

(e) *Charter form.* The charter of a Federal stock association must be in the following form, except as provided in this section. An association that has converted from the mutual form pursuant to part 192 of this chapter must include in its charter a section establishing a liquidation account as required by §192.485 of this chapter. A charter for a Federal stock savings bank must substitute the term "savings bank" for "association." Charters may also include any preapproved optional provision contained in this section.

Federal Stock Charter

Section 1. Corporate title. The full corporate title of the association is ____.

Section 2. Office. The home office is located in ____ [city, state].

Section 3. Duration. The duration of the association is perpetual.

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Section 4. Purpose and powers. The purpose of the association is to pursue any or all of the lawful objectives of a Federal savings association chartered under section 5 of the Home Owners' Loan Act and to exercise all of the express, implied, and incidental powers conferred thereby and by all acts amendatory thereof and supplemental thereto, subject to the Constitution and laws of the United States as they are now in effect, or as they may hereafter be amended, and subject to all lawful and applicable rules, regulations, and orders of the Office of the Comptroller of the Currency ("OCC").

Section 5. Capital stock. The total number of shares of all classes of the capital stock that the association has the authority to issue is ___, all of which is common stock of par [or if no par is specified then shares have a stated] value of ___ per share. The shares may be issued from time to time as authorized by the board of directors without the approval of its shareholders, except as otherwise provided in this Section 5 or to the extent that such approval is required by governing law, rule, or regulation. The consideration for the issuance of the shares must be paid in full before their issuance and may not be less than the par [or stated] value. Neither promissory notes nor future services may constitute payment or part payment for the issuance of shares of the association. The consideration for the shares must be cash, tangible or intangible property (to the extent direct investment in such property would be permitted to the association), labor, or services actually performed for the association, or any combination of the foregoing. In the absence of actual fraud in the transaction, the value of such property, labor, or services, as determined by the board of directors of the association, is conclusive. Upon payment of such consideration, such shares are deemed to be fully paid and nonassessable. In the case of a stock dividend, that part of the retained earnings of the association that is transferred to common stock or paid-in capital accounts upon the issuance of shares as a stock dividend is deemed to be the consideration for their issuance.

Except for shares issued in the initial organization of the association or in connection with the conversion of the association from the mutual to stock form of capitalization, no shares of capital stock (including shares issuable upon conversion, exchange, or exercise of other securities) may be issued, directly or indirectly, to officers, directors, or controlling persons of the association other than as part of a general public offering or as qualifying shares to a director, unless the issuance or the plan under which they would be issued has been approved by a majority of the total votes eligible to be cast at a legal meeting. The holders of the common stock exclusively possess all voting power. Each

holder of shares of common stock is entitled to one vote for each share held by such holder, except as to the cumulation of votes for the election of directors, unless the charter provides that there will be no such cumulative voting. Subject to any provision for a liquidation account, in the event of any liquidation, dissolution, or winding up of the association, the holders of the common stock will be entitled, after payment or provision for payment of all debts and liabilities of the association, to receive the remaining assets of the association available for distribution, in cash or in kind. Each share of common stock must have the same relative rights as and be identical in all respects with all the other shares of common stock.

Section 6. Preemptive rights. Holders of the capital stock of the association are not entitled to preemptive rights with respect to any shares of the association which may be issued.

Section 7. Directors. The association will be under the direction of a board of directors. The authorized number of directors, as stated in the association's bylaws, may not be fewer than five nor more than fifteen except when a greater or lesser number is approved by the OCC.

Section 8. Amendment of charter. Except as provided in Section 5, no amendment, addition, alteration, change or repeal of this charter may be made, unless such is proposed by the board of directors of the association, approved by the shareholders by a majority of the votes eligible to be cast at a legal meeting, unless a higher vote is otherwise required, and approved or preapproved by the OCC.

Attest: _____
Secretary of the Association

By: _____
President or Chief Executive Officer of the Association

Attest: _____
Deputy Comptroller for Licensing

By: _____
Comptroller of the Currency

Effective Date: _____

(f) *Charter amendments.* In order to adopt a charter amendment, a Federal stock savings association must comply with the following requirements:

(1) *Board of directors approval.* The board of directors of the association must adopt a resolution proposing the charter amendment that states the text of such amendment;

(2) *Form of filing—(i) Application requirement.* Except as provided in paragraph (f)(2)(ii) of this section, a Federal stock savings association must file the

proposed charter amendment with, and obtain the prior approval of the OCC.

(A) *Expedited review.* Except as provided in paragraph (f)(2)(i)(B) of this section, the charter amendment will be deemed approved as of the 30th day after filing, unless the OCC notifies the filer that the amendment is denied or that the amendment contains procedures of the type described in paragraph (f)(2)(ii)(B) of this section and is not subject to expedited review, provided the association follows the requirements of its charter in adopting the amendment.

(B) *Amendments exempted from expedited review.* Expedited review is not available for a charter amendment that would render more difficult or discourage a merger, tender offer, or proxy contest, the assumption of control by a holder of a block of the association's stock, the removal of incumbent management, or involve a significant issue of law or policy.

(ii) *Notice requirement.* No application under paragraph (f)(2)(i) of this section is required if the amendment is contained within paragraphs (e) or (g) of this section. In such case, the Federal stock savings association must submit a notice with the charter amendment to the OCC within 30 days after adoption.

(3) *Effectiveness.* A charter amendment is effective after approval by the OCC, if required, and adoption by the association, provided the association follows the requirements of its charter in adopting the amendments.

(g) *Optional charter amendments.* The following charter amendments are subject to the notice requirement in paragraph (f)(2)(ii) of this section if adopted without change:

(1) *Title change.* A Federal stock association that complies with §5.42 of this chapter may amend its charter by substituting a new corporate title in section 1.

(2) *Home office.* A Federal savings association may amend its charter by substituting a new home office in section 2, if it has complied with applicable requirements of §5.40.

(3) *Number of shares of stock and par value.* A Federal stock association may amend Section 5 of its charter to change the number of authorized

shares of stock, the number of shares within each class of stock, and the par or stated value of such shares.

(4) *Capital stock.* A Federal stock association may amend its charter by revising Section 5 to read as follows:

Section 5. Capital stock. The total number of shares of all classes of capital stock that the association has the authority to issue is ___, of which ___ is common stock of par [or if no par value is specified the stated] value of ___ per share and of which [list the number of each class of preferred and the par or if no par value is specified the stated value per share of each such class]. The shares may be issued from time to time as authorized by the board of directors without further approval of shareholders, except as otherwise provided in this Section 5 or to the extent that such approval is required by governing law, rule, or regulation. The consideration for the issuance of the shares must be paid in full before their issuance and may not be less than the par [or stated] value. Neither promissory notes nor future services may constitute payment or part payment for the issuance of shares of the association. The consideration for the shares must be cash, tangible or intangible property (to the extent direct investment in such property would be permitted), labor, or services actually performed for the association, or any combination of the foregoing. In the absence of actual fraud in the transaction, the value of such property, labor, or services, as determined by the board of directors of the association, will be conclusive. Upon payment of such consideration, such shares will be deemed to be fully paid and nonassessable. In the case of a stock dividend, that part of the retained earnings of the association that is transferred to common stock or paid-in capital accounts upon the issuance of shares as a stock dividend will be deemed to be the consideration for their issuance.

Except for shares issued in the initial organization of the association or in connection with the conversion of the association from the mutual to the stock form of capitalization, no shares of capital stock (including shares issuable upon conversion, exchange, or exercise of other securities) may be issued, directly or indirectly, to officers, directors, or controlling persons of the association other than as part of a general public offering or as qualifying shares to a director, unless their issuance or the plan under which they would be issued has been approved by a majority of the total votes eligible to be cast at a legal meeting.

Nothing contained in this Section 5 (or in any supplementary sections hereto) entitles the holders of any class of a series of capital stock to vote as a separate class or series or to more than one vote per share, except as to

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the cumulation of votes for the election of directors, unless the charter otherwise provides that there will be no such cumulative voting: *Provided*, That this restriction on voting separately by class or series does not apply:

i. To any provision which would authorize the holders of preferred stock, voting as a class or series, to elect some members of the board of directors, less than a majority thereof, in the event of default in the payment of dividends on any class or series of preferred stock;

ii. To any provision that would require the holders of preferred stock, voting as a class or series, to approve the merger or consolidation of the association with another corporation or the sale, lease, or conveyance (other than by mortgage or pledge) of properties or business in exchange for securities of a corporation other than the association if the preferred stock is exchanged for securities of such other corporation: *Provided*, That no provision may require such approval for transactions undertaken with the assistance or pursuant to the direction of the OCC or the Federal Deposit Insurance Corporation;

iii. To any amendment which would adversely change the specific terms of any class or series of capital stock as set forth in this Section 5 (or in any supplementary sections hereto), including any amendment which would create or enlarge any class or series ranking prior thereto in rights and preferences. An amendment which increases the number of authorized shares of any class or series of capital stock, or substitutes the surviving association in a merger or consolidation for the association, is not considered to be such an adverse change.

A description of the different classes and series (if any) of the association's capital stock and a statement of the designations, and the relative rights, preferences, and limitations of the shares of each class of and series (if any) of capital stock are as follows:

A. *Common stock*. Except as provided in this Section 5 (or in any supplementary sections thereto) the holders of the common stock exclusively possess all voting power. Each holder of shares of the common stock is entitled to one vote for each share held by each holder, except as to the cumulation of votes for the election of directors, unless the charter otherwise provides that there will be no such cumulative voting.

Whenever there has been paid, or declared and set aside for payment, to the holders of the outstanding shares of any class of stock having preference over the common stock as to the payment of dividends, the full amount of dividends and of sinking fund, retirement fund, or other retirement payments, if any, to which such holders are respectively entitled in preference to the common stock, then dividends may be paid on the common stock and on any class or series of stock entitled

to participate therewith as to dividends out of any assets legally available for the payment of dividends.

In the event of any liquidation, dissolution, or winding up of the association, the holders of the common stock (and the holders of any class or series of stock entitled to participate with the common stock in the distribution of assets) will be entitled to receive, in cash or in kind, the assets of the association available for distribution remaining after: (i) Payment or provision for payment of the association's debts and liabilities; (ii) distributions or provision for distributions in settlement of its liquidation account; and (iii) distributions or provision for distributions to holders of any class or series of stock having preference over the common stock in the liquidation, dissolution, or winding up of the association. Each share of common stock will have the same relative rights as and be identical in all respects with all the other shares of common stock.

B. *Preferred stock*. The association may provide in supplementary sections to its charter for one or more classes of preferred stock, which must be separately identified. The shares of any class may be divided into and issued in series, with each series separately designated so as to distinguish the shares thereof from the shares of all other series and classes. The terms of each series must be set forth in a supplementary section to the charter. All shares of the same class must be identical except as to the following relative rights and preferences, as to which there may be variations between different series:

a. The distinctive serial designation and the number of shares constituting such series;

b. The dividend rate or the amount of dividends to be paid on the shares of such series, whether dividends are cumulative and, if so, from which date(s), the payment date(s) for dividends, and the participating or other special rights, if any, with respect to dividends;

c. The voting powers, full or limited, if any, of shares of such series;

d. Whether the shares of such series are redeemable and, if so, the price(s) at which, and the terms and conditions on which, such shares may be redeemed;

e. The amount(s) payable upon the shares of such series in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association;

f. Whether the shares of such series are entitled to the benefit of a sinking or retirement fund to be applied to the purchase or redemption of such shares, and if so entitled, the amount of such fund and the manner of its application, including the price(s) at which such shares may be redeemed or purchased through the application of such fund;

g. Whether the shares of such series are convertible into, or exchangeable for, shares

of any other class or classes of stock of the association and, if so, the conversion price(s) or the rate(s) of exchange, and the adjustments thereof, if any, at which such conversion or exchange may be made, and any other terms and conditions of such conversion or exchange.

h. The price or other consideration for which the shares of such series are issued; and

i. Whether the shares of such series which are redeemed or converted have the status of authorized but unissued shares of serial preferred stock and whether such shares may be reissued as shares of the same or any other series of serial preferred stock.

Each share of each series of serial preferred stock must have the same relative rights as and be identical in all respects with all the other shares of the same series.

The board of directors has authority to divide, by the adoption of supplementary charter sections, any authorized class of preferred stock into series, and, within the limitations set forth in this section and the remainder of this charter, fix and determine the relative rights and preferences of the shares of any series so established.

Prior to the issuance of any preferred shares of a series established by a supplementary charter section adopted by the board of directors, the association must file with the OCC a dated copy of that supplementary section of this charter established and designating the series and fixing and determining the relative rights and preferences thereof.

(5) *Limitations on subsequent issuances.* A Federal stock association may amend its charter to require shareholder approval of the issuance or reservation of common stock or securities convertible into common stock under circumstances which would require shareholder approval under the rules of the New York Stock Exchange if the shares were then listed on the New York Stock Exchange.

(6) *Cumulative voting.* A Federal stock association may amend its charter by substituting the following sentence for the second sentence in the third paragraph of Section 5: "Each holder of shares of common stock will be entitled to one vote for each share held by such holder and there will be no right to cumulate votes in an election of directors."

(7) *Anti-takeover provisions following mutual to stock conversion.* Notwithstanding the law of the State in which the association is located, a Federal stock association may amend its char-

ter by renumbering existing sections as appropriate and adding a new section 8 as follows:

Section 8. Certain Provisions Applicable for Five Years. Notwithstanding anything contained in the Association's charter or bylaws to the contrary, for a period of [specify number of years up to five] years from the date of completion of the conversion of the Association from mutual to stock form, the following provisions will apply:

A. *Beneficial Ownership Limitation.* No person may directly or indirectly offer to acquire or acquire the beneficial ownership of more than 10 percent of any class of an equity security of the association. This limitation does not apply to a transaction in which the association forms a holding company without change in the respective beneficial ownership interests of its stockholders other than pursuant to the exercise of any dissenter and appraisal rights, the purchase of shares by underwriters in connection with a public offering, or the purchase of less than 25 percent of a class of stock by a tax-qualified employee stock benefit plan as defined in 12 CFR 192.25.

In the event shares are acquired in violation of this section 8, all shares beneficially owned by any person in excess of 10 percent will be considered "excess shares" and will not be counted as shares entitled to vote and may not be voted by any person or counted as voting shares in connection with any matters submitted to the stockholders for a vote.

For purposes of this section 8, the following definitions apply:

1. The term "person" includes an individual, a group acting in concert, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization or similar company, a syndicate or any other group formed for the purpose of acquiring, holding or disposing of the equity securities of the association.

2. The term "offer" includes every offer to buy or otherwise acquire, solicitation of an offer to sell, tender offer for, or request or invitation for tenders of, a security or interest in a security for value.

3. The term "acquire" includes every type of acquisition, whether effected by purchase, exchange, operation of law or otherwise.

4. The term "acting in concert" means (a) knowing participation in a joint activity or parallel action towards a common goal of acquiring control whether or not pursuant to an express agreement, or (b) a combination or pooling of voting or other interests in the securities of an issuer for a common purpose pursuant to any contract, understanding, relationship, agreement or other arrangement, whether written or otherwise.

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B. *Cumulative Voting Limitation.* Stockholders may not cumulate their votes for election of directors.

C. *Call for Special Meetings.* Special meetings of stockholders relating to changes in control of the association or amendments to its charter may be called only upon direction of the board of directors.

(h) *Anti-takeover provisions.* The OCC may grant approval to a charter amendment not listed in paragraph (g) of this section regarding the acquisition by any person or persons of its equity securities provided that the association files as part of its application pursuant to paragraph (f)(2)(i) of this section an opinion, acceptable to the OCC, of counsel independent from the association that the proposed charter provision would be permitted to be adopted by a corporation chartered by the State in which the principal office of the association is located. Any such provision must be consistent with applicable statutes, regulations, and OCC policies. Further, any such provision that would have the effect of rendering more difficult a change in control of the association and would require for any corporate action (other than the removal of directors) the affirmative vote of a larger percentage of shareholders than is required by this part, may not be effective unless adopted by a percentage of shareholder vote at least equal to the highest percentage that would be required to take any action under such provision.

(i) *Reissuance of charter.* A Federal stock association that has amended its charter may apply to have its charter, including the amendments, reissued by the OCC. Such requests for reissuance should be filed with the appropriate OCC licensing office, and contain signatures required in the form "Federal Stock Charter" in paragraph (e) of this section, together with such supporting documents as needed to demonstrate that the amendments were properly adopted.

(j) *Bylaws for Federal stock savings associations—(1) In general.* Bylaws may be adopted, amended or repealed by either a majority of the votes cast by the shareholders at a legal meeting or a majority of the board of directors. A bylaw provision inconsistent with paragraph (k), (l), (m) or (n) of this sec-

tion may be adopted only with the approval of the OCC.

(2) *Form of filing—(i) Application requirement.* Except as provided in paragraphs (j)(2)(ii) or (j)(2)(iii) of this section, a Federal stock savings association must file the proposed bylaw amendment with, and obtain the prior approval of, the OCC.

(A) *Expedited review.* Except as provided in paragraph (j)(2)(i)(B) of this section, the bylaw amendment will be deemed approved as of the 30th day after filing, unless the OCC notifies the filer that the application is denied or that the amendment contains procedures of the type described in paragraph (j)(2)(i)(B) of this section and is not eligible for expedited review, provided the association follows the requirements of its charter and bylaws in adopting the amendment.

(B) *Amendments exempted from expedited review.* Expedited review is not available for a bylaw amendment that would:

(1) Render more difficult or discourage a merger, tender offer, or proxy contest, the assumption of control by a holder of a large block of the association's stock, or the removal of incumbent management; or

(2) Be inconsistent with paragraphs (k) through (n) of this section, with applicable laws, rules, regulations or the association's charter or involve a significant issue of law or policy, including indemnification, conflicts of interest, and limitations on director or officer liability.

(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.

(iii) *No filing required.* No filing is required for purposes of paragraph (j)(2) of this section if a bylaw amendment adopts the language of the OCC's model or optional bylaws without change.

(3) *Effectiveness.* A bylaw amendment is effective after approval by the OCC, if required, and adoption by the association, provided that the association follows the requirements of its charter and bylaws in adopting the amendment.

(4) *Effect of subsequent charter or bylaw change.* Notwithstanding any subsequent change to its charter or bylaws, the authority of a Federal savings association to engage in any transaction is determined only by the association's charter or bylaws then in effect.

(k) *Shareholders of Federal stock savings associations—(1) Shareholder meetings—(i) In general.* A meeting of the shareholders of the association for the election of directors and for the transaction of any other business of the association must be held annually within 150 days after the end of the association's fiscal year. Unless otherwise provided in the association's charter, special meetings of the shareholders may be called by the board of directors or on the request of the holders of 10 percent or more of the shares entitled to vote at the meeting, or by such other persons as may be specified in the bylaws of the association.

(ii) *Location of shareholder meetings—(A) In general.* All annual and special meetings of shareholders of the association may be held at any convenient

place the board of directors may designate. The association's bylaws may provide for the telephonic or electronic participation of shareholders in these meetings. Shareholders participating in an annual or special meeting telephonically or electronically will be deemed present in person for purposes of the quorum requirement in paragraph (k)(5) of this section.

(B) *Procedures for telephonic or electronic participation.* If the association's bylaws provide for telephonic or electronic participation in shareholder meetings, the association must elect to follow corporate governance provisions for these meetings pursuant to paragraph (j)(2)(ii) of this section that include procedures for telephonic or electronic participation in shareholder meetings. The association must indicate the use of these elected procedures in its bylaws.

(2) *Notice of shareholder meetings.* Written notice stating the place, day, and hour of the meeting and the purpose or purposes for which the meeting is called must be delivered not fewer than 20 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the chair of the board, the president, the secretary, or the directors, or other persons calling the meeting, to each shareholder of record entitled to vote at such meeting. If mailed, such notice will be deemed to be delivered when deposited in the mail, addressed to the shareholder at the address appearing on the stock transfer books or records of the association as of the record date prescribed in paragraph (k)(3) of this section, with postage thereon prepaid. When any shareholders' meeting, either annual or special, is adjourned for 30 days or more, notice of the adjourned meeting must be given as in the case of an original meeting. Notwithstanding anything in this section, however, a Federal stock association that is wholly owned is not subject to the shareholder notice requirement.

(3) *Fixing of record date.* For the purpose of determining shareholders entitled to notice of or to vote at any

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meeting of shareholders or any adjournment thereof, or shareholders entitled to receive payment of any dividend, or in order to make a determination of shareholders for any other proper purpose, the board of directors must fix in advance a date as the record date for any such determination of shareholders. Such date in any case may not be more than 60 days and, in case of a meeting of shareholders, not less than 10 days prior to the date on which the particular action, requiring such determination of shareholders, is to be taken. When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, such determination will apply to any adjournment thereof.

(4) *Voting lists.* (i) At least 20 days before each meeting of the shareholders, the officer or agent having charge of the stock transfer books for the shares of the association must make a complete list of the stockholders of record entitled to vote at such meeting, or any adjournments thereof, arranged in alphabetical order, with the address and the number of shares held by each. This list of shareholders must be kept on file at the home office of the association and is subject to inspection by any shareholder of record or the stockholder's agent during the entire time of the meeting. The original stock transfer book will constitute *prima facie* evidence of the stockholders entitled to examine such list or transfer books or to vote at any meeting of stockholders. Notwithstanding anything in this section, however, a Federal stock association that is wholly owned is not subject to the voting list requirements.

(ii) In lieu of making the shareholders list available for inspection by any shareholders as provided in paragraph (k)(4)(i) of this section, the board of directors may perform such acts as required by paragraphs (a) and (b) of Rule 14a-7 of the General Rules and Regulations under the Securities and Exchange Act of 1934 (17 CFR 240.14a-7) as may be duly requested in writing, with respect to any matter which may be properly considered at a meeting of shareholders, by any shareholder who is entitled to vote on such matter and who must defray the reasonable ex-

penses to be incurred by the association in performance of the act or acts required.

(5) *Shareholder quorum.* A majority of the outstanding shares of the association entitled to vote, represented in person or by proxy, constitutes a quorum at a meeting of shareholders. The shareholders present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter will be the act of the stockholders, unless the vote of a greater number of stockholders voting together or voting by classes is required by law or the charter. Directors, however, are elected by a plurality of the votes cast at an election of directors.

(6) *Shareholder voting—(i) Proxies.* Unless otherwise provided in the association's charter, at all meetings of shareholders, a shareholder may vote in person or by proxy executed in writing by the shareholder or by a duly authorized attorney in fact. Proxies may be given telephonically or electronically as long as the holder uses a procedure for verifying the identity of the shareholder. Proxies solicited on behalf of the management must be voted as directed by the shareholder or, in the absence of such direction, as determined by a majority of the board of directors. No proxy maybe valid more than eleven months from the date of its execution except for a proxy coupled with an interest.

(ii) *Shares controlled by association.* Neither treasury shares of its own stock held by the association nor shares held by another corporation, if a majority of the shares entitled to vote for the election of directors of such other corporation are held by the association, may be voted at any meeting or counted in determining the total number of outstanding shares at any given time for purposes of any meeting.

(7) *Nominations and new business submitted by shareholders.* Nominations for directors and new business submitted by shareholders must be voted upon at

the annual meeting if such nominations or new business are submitted in writing and delivered to the secretary of the association at least five days prior to the date of the annual meeting. Ballots bearing the names of all the persons nominated must be provided for use at the annual meeting.

(8) *Informal action by stockholders.* If the bylaws of the association so provide, any action required to be taken at a meeting of the stockholders, or any other action that may be taken at a meeting of the stockholders, may be taken without a meeting if consent in writing has been given by all the stockholders entitled to vote with respect to the subject matter.

(1) *Board of directors—(1) General powers and duties.* The business and affairs of the association must be under the direction of its board of directors. Directors need not be stockholders unless the bylaws so require.

(2) *Number and term.* The bylaws must set forth a specific number of directors, not a range. The number of directors may not be fewer than five nor more than fifteen, unless a higher or lower number has been authorized by the OTS prior to July 21, 2011 or the OCC. Directors must be elected for a term of one to three years and until their successors are elected and qualified. If a staggered board is chosen, the directors must be divided into two or three classes as nearly equal in number as possible and one class must be elected by ballot annually.

(3) *Regular meetings.* The board of directors determines the place, frequency, time and procedure for notice of regular meetings. The bylaws may provide for telephonic or electronic participation at these meetings.

(4) *Quorum.* A majority of the number of directors constitutes a quorum for the transaction of business at any meeting of the board of directors. The act of the majority of the directors present at a meeting at which a quorum is present will be the act of the board of directors, unless a greater number is prescribed by regulation of the OCC.

(5) *Vacancies.* Any vacancy occurring in the board of directors may be filled by the affirmative vote of a majority of the remaining directors even with less

than a quorum of the board of directors. A director elected to fill a vacancy may serve only until the next election of directors by the shareholders. Any directorship to be filled by reason of an increase in the number of directors may be filled by election by the board of directors for a term of office continuing only until the next election of directors by the shareholders.

(6) *Removal or resignation of directors.* (i) At a meeting of shareholders called expressly for that purpose, any director may be removed only for cause, as termination for cause is defined in §5.21(j)(2)(x)(B), by a vote of the holders of a majority of the shares then entitled to vote at an election of directors. Associations may provide for procedures regarding resignations in the bylaws.

(ii) If less than the entire board is to be removed, no one of the directors may be removed if the votes cast against the removal would be sufficient to elect a director if then cumulatively voted at an election of the class of directors of which such director is a part.

(iii) Whenever the holders of the shares of any class are entitled to elect one or more directors by the provisions of the charter or supplemental sections thereto, the provisions of this section apply, in respect to the removal of a director or directors so elected, to the vote of the holders of the outstanding shares of that class and not to the vote of the outstanding shares as a whole.

(7) *Executive and other committees.* The board of directors, by resolution adopted by a majority of the full board, may designate from among its members an executive committee and one or more other committees. No committee may have the authority of the board of directors with reference to: The declaration of dividends; the amendment of the charter or bylaws of the association; recommending to the stockholders a plan of merger, consolidation, or conversion; the sale, lease, or other disposition of all, or substantially all, of the property and assets of the association otherwise than in the usual and regular course of its business; a voluntary dissolution of the association; a revocation of any of the foregoing; or the approval of a transaction in which

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any member of the executive committee, directly or indirectly, has any material beneficial interest. The designation of any committee and the delegation of authority thereto does not operate to relieve the board of directors, or any director, of any responsibility imposed by law or regulation.

(8) *Notice of special meetings.* Written notice of at least 24 hours regarding any special meeting of the board of directors or of any committee designated thereby must be given to each director in accordance with the bylaws, although such notice may be waived by the director. The attendance of a director at a meeting constitutes a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any meeting need be specified in the notice or waiver of notice of such meeting. The bylaws may provide for telephonic or electronic participation at a special meeting.

(9) *Action without a meeting.* Any action required or permitted to be taken by the board of directors at a meeting may be taken without a meeting if a consent in writing, setting forth the actions so taken, is signed by all of the directors.

(10) *Presumption of assent.* A director of the association who is present at a meeting of the board of directors at which action on any association matter is taken is presumed to have assented to the action taken unless their dissent or abstention is entered in the minutes of the meeting or unless a written dissent to such action is filed with the person acting as the secretary of the meeting before the adjournment thereof or is forwarded by registered mail to the secretary of the association within five days after the date on which a copy of the minutes of the meeting is received. Such right to dissent does not apply to a director who voted in favor of such action.

(11) *Age limitation on directors.* A Federal association may provide a bylaw on age limitation for directors. Bylaws on age limitations must comply with all Federal laws, rules and regulations.

(m) *Officers—(1) Positions.* The officers of the association must consist of a president, one or more vice presidents, a secretary, and a treasurer or comptroller, each of whom must be elected by the board of directors. The board of directors may also designate the chair of the board as an officer. The offices of the secretary and treasurer or comptroller may be held by the same person and the vice president may also be either the secretary or the treasurer or comptroller. The board of directors may designate one or more vice presidents as executive vice president or senior vice president.

(2) *Removal.* Any officer may be removed by the board of directors whenever in its judgment the best interests of the association will be served thereby; but such removal, other than for cause, as termination for cause is defined in § 5.21(j)(2)(x)(B), will be without prejudice to the contractual rights, if any, of the person so removed.

(3) *Age limitation on officers.* A Federal association may provide a bylaw on age limitation for officers. Bylaws on age limitations must comply with all Federal laws, rules, and regulations.

(n) *Certificates for shares and their transfer—(1) Certificates for shares.* Certificates representing shares of capital stock of the association must be in such form as determined by the board of directors and approved by the OCC. The name and address of the person to whom the shares are issued, with the number of shares and date of issue, must be entered on the stock transfer books of the association. All certificates surrendered to the association for transfer must be cancelled and no new certificate may be issued until the former certificate for a like number of shares has been surrendered and cancelled, except that in the case of a lost or destroyed certificate a new certificate may be issued upon such terms and indemnity to the association as the board of directors may prescribe.

(2) *Transfer of shares.* Transfer of shares of capital stock of the association may be made only on its stock transfer books. Authority for such transfer may be given only by the holder of record or by a legal representative, who must furnish proper evidence of such authority, or by an attorney

authorized by a duly executed power of attorney and filed with the association. The transfer may be made only on surrender for cancellation of the certificate for the shares. The person in whose name shares of capital stock stand on the books of the association is deemed by the association to be the owner for all purposes.

[80 FR 28425, May 18, 2015, as amended at 82 FR 8103, Jan. 23, 2017; 85 FR 31948, May 28, 2020; 85 FR 80440, Dec. 11, 2020; 85 FR 83726, Dec. 22, 2020]

§5.23 Conversion to become a Federal savings association.

(a) *Authority.* 12 U.S.C. 35, 1462a, 1463, 1464, 1467a, 2903, and 5412(b)(2)(B).

(b) *Scope.* (1) This section describes procedures and standards governing OCC review and approval of an application by a mutual depository institution to convert to a Federal mutual savings association or an application by a stock depository institution to convert to a Federal stock savings association.

(2) As used in this section, depository institution means any commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank, or a credit union chartered in the United States and having its principal office located in the United States.

(c) *Licensing requirements.* A depository institution that is mutual in form ("mutual depository institution") must submit an application and obtain prior OCC approval to convert to a Federal mutual savings association. A stock depository institution must submit an application and obtain prior OCC approval to convert to a Federal stock savings association. At the time of conversion, the filer must have deposits insured by the FDIC. An institution that is not already insured by the FDIC must apply to the FDIC, and obtain FDIC approval, for deposit insurance before converting.

(d) *Conversion of a mutual depository institution or a stock depository institution to a Federal savings association—(1) Policy.* Consistent with the OCC's chartering policy, it is OCC policy to allow conversion to a Federal savings asso-

ciation charter by another financial institution that can operate safely and soundly as a Federal savings association in compliance with applicable laws, regulations, and policies. This includes consideration of the factors set out in section 5(e) of the Home Owners' Loan Act, 12 U.S.C. 1464(e). The converting financial institution must obtain all necessary regulatory and shareholder or member approvals. The OCC may deny an application by any mutual depository institution or stock depository institution to convert to a Federal mutual savings association charter or Federal stock association charter, respectively, on the basis of the standards for denial set forth in §5.13(b) or when conversion would permit the filer to escape supervisory action by its current regulators.

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

(ii) *Application.* A mutual depository institution or a stock depository institution must submit its application to convert to a Federal mutual savings association or Federal stock depository association, respectively, to the appropriate OCC licensing office and must send a copy of the application to its current appropriate Federal banking agency. The application must:

(A) Identify each branch that the resulting financial institution expects to operate after conversion;

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

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

(D) Unless otherwise advised by the OCC in a prefiling communication, include an opinion of counsel that, in the case of State-chartered institutions, the conversion is not in contravention of applicable State law, or in the case

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of Federally-chartered institutions, the conversion is not in contravention of applicable Federal law;

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

(F) Identify all subsidiaries, service corporation investments, bank service company investments, and other equity investments that will be retained following the conversion, and provide the information and analysis of the subsidiaries' activities and the service corporation investments and other equity investments that would be required if the converting mutual institution or stock institution were a Federal mutual savings association or Federal stock savings association, respectively, establishing each subsidiary or making each service corporation or other equity investment pursuant to § 5.35, § 5.38, § 5.58, or § 5.59, or other applicable law and regulation;

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

(H) Include a business plan if the converting institution has been operating for less than three years, plans to make significant changes to its business after the conversion, or at the request of the OCC;

(I) Include a list of all outstanding conditions or other requirements imposed by the institution's current appropriate Federal banking agency and, if applicable, current State bank supervisor or State attorney-general in any cease and desist order, written agreement, other formal enforcement order, memorandum of understanding, approval of any application, notice or request, commitment letter, board resolution, or in any other manner, including the converting institution's analysis whether any such actions prohibit conversion under 12 U.S.C. 35, and the converting institution's plans regarding adhering to such conditions and requirements after conversion;

(J) If the converting institution does not meet the qualified thrift lender test of 12 U.S.C. 1467a(m), include a plan to achieve compliance within a

reasonable period of time and a request for an exception from the OCC;

(K) Include a list of directors and senior executive officers, as defined in § 5.51, of the converting institution; and

(L) Include a list of individuals, directors, and shareholders who directly or indirectly, or acting in concert with one or more persons or companies, or together with members of their immediate family, do or will own, control, or hold 10 percent or more of the institution's voting stock.

(iii) The OCC may permit a Federal savings association to retain nonconforming assets of a converting institution for the time period prescribed by the OCC following a conversion, subject to conditions and an OCC determination of the carrying value of the retained assets consistent with the requirements of section 5(c) of the Home Owners' Loan Act (12 U.S.C. 1464(c)) relating to loans and investments. The OCC may permit a Federal savings association to continue nonconforming activities of a converting institution for the time period prescribed by the OCC following a conversion, subject to conditions.

(iv) The OCC may require directors and senior executive officers of the converting institution to submit the Interagency Biographical and Financial Report, available at www.occ.gov, and legible fingerprints.

(v) Approval for an institution to convert to a Federal savings association expires if the conversion has not occurred within six months of the OCC's approval of the application, unless the OCC grants an extension of time.

(vi) When the OCC determines that the filer has satisfied all statutory and regulatory requirements and any other conditions, the OCC issues a charter. The charter provides that the institution is authorized to begin conducting business as a Federal mutual savings association or a Federal stock savings association as of a specified date.

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

determine that any or all parts of §§ 5.8, 5.10, and 5.11 apply.

(4) *Expedited review.* An application by an eligible bank to convert to a Federal savings association charter is deemed approved by the OCC as of the 45th day after the filing is received by the OCC, unless the OCC notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

(e) *Conversion of a mutual depository institution to a Federal mutual savings association—supplemental rules.* In addition to the rules and procedures set forth in paragraph (d) of this section, a filer converting from a mutual depository institution to a Federal mutual savings association must comply with the following: After a Federal charter is issued to a converting institution, the association's members must after due notice, or upon a valid adjournment of a previous legal meeting, hold a meeting to elect directors and take care of all other actions necessary to fully effectuate the conversion and operate the association in accordance with law and these rules and regulations. Immediately thereafter, the board of directors must meet, elect officers, and transact any other appropriate business.

(f) *Conversion of a national bank to a Federal stock savings association—supplemental rules—(1) Additional procedures.* A national bank may convert to a Federal stock savings association. In addition to the rules and procedures set forth in paragraph (d) of this section, a national bank that desires to convert to a Federal stock savings association must follow the requirements and procedures set forth in 12 U.S.C. 214a as if it were converting to a State bank and include in its application information demonstrating compliance with the applicable requirements of 12 U.S.C. 214a.

(2) *Termination and change of status.* The appropriate OCC licensing office provides instructions to the converting national bank for terminating its status as a national bank and beginning its status as a Federal savings association.

(g) *Continuation of business and entity.* The existence of the converting institution continues in the resulting Fed-

eral savings association. The resulting Federal savings association is considered the same business and entity as the converting institution, although as to rights, powers, and duties, the resulting Federal savings association is a Federal savings association. Any and all of the assets and other property (whether real, personal, mixed, tangible or intangible, including choses in action, rights, and credits) of the converting institution become assets and property of the resulting Federal savings association when the conversion occurs. Similarly, any and all of the obligations and debts of and claims against the converting institution become obligations and debts of and claims against the Federal savings association when the conversion occurs.

[80 FR 28430, May 18, 2015, as amended at 85 FR 80445, Dec. 11, 2020]

§ 5.24 Conversion to become a national bank.

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

(b) *Licensing requirements.* A State bank, a stock State savings association, or a Federal stock savings association must submit an application and obtain prior OCC approval to convert to a national bank charter. A Federal mutual savings association that plans to convert to a national bank must first convert to a Federal stock savings association under 12 CFR part 192.

(c) *Scope.* (1) This section describes procedures and standards governing OCC review and approval of an application by a State bank, a stock State savings association, or a Federal stock savings association to convert to a national bank charter.

(2) As used in this section, *State bank* includes a State bank as defined in 12 U.S.C. 214(a).

(d) *Policy.* Consistent with the OCC's chartering policy, it is OCC policy to allow conversion to a national bank charter by another financial institution that can operate safely and soundly as a national bank in compliance with applicable laws, regulations, and policies. A converting financial institution also must obtain all necessary regulatory and shareholder approvals. The OCC may deny an application by any

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State bank, stock State savings association, and any Federal stock savings association to convert to a national bank charter on the basis of the standards for denial set forth in § 5.13(b), or when conversion would permit the filer to escape supervisory action by its current regulators.

(e) *Procedures*—(1) *Prefiling communications*. The filer should consult with the appropriate OCC licensing office prior to filing if it anticipates that its application will raise unusual or complex issues. If a prefiling meeting is appropriate, it will normally be held at the OCC licensing office where the application will be filed, but may be held at another location at the request of the filer.

(2) *Application*. A State bank, a Stock state savings association, or a Federal stock savings association must submit its application to convert to a national bank to the appropriate OCC licensing office and send a copy to its current appropriate Federal banking agency. The application must:

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

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

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

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

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

(vi) Identify all subsidiaries, bank service company investments, and other equity investments that will be retained following the conversion, and provide the information and analysis of the subsidiaries' activities, the bank service company investments, and the other equity investments that would be required if the converting bank or sav-

ings association were a national bank establishing each subsidiary or making each bank service company investment or other equity investment pursuant to § 5.34, § 5.35, § 5.36, § 5.39, 12 CFR part 1, or other applicable law and regulation;

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

(viii) Include a business plan if the converting institution has been operating for fewer than three years, plans to make significant changes to its business after the conversion, or at the request of the OCC;

(ix) List all outstanding conditions or other requirements imposed by the institution's current appropriate Federal banking agency and, if applicable, current State bank supervisor or State attorney-general in any cease and desist order, written agreement, other formal enforcement order, memorandum of understanding, approval of any application, notice or request, commitment letter, board resolution, or in any other manner, including the converting institution's analysis whether the conversion is prohibited under 12 U.S.C. 35, and State the institution's plans regarding adhering to such conditions or requirements after conversion;

(x) Include a list of directors and senior executive officers, as defined in § 5.51, of the converting institution; and

(xi) Include a list of individuals, directors, and shareholders who directly or indirectly, or acting in concert with one or more persons or companies, or together with members of their immediate family, do or will own, control, or hold 10 percent or more of the institution's voting stock.

(3) The OCC may permit a national bank to retain nonconforming assets of a State bank or stock State savings association, subject to conditions and an OCC determination of the carrying value of the retained assets, pursuant to 12 U.S.C. 35. The OCC may permit a national bank to continue nonconforming activities of a State bank or stock State savings association, or to retain the nonconforming assets or nonconforming activities of a Federal

stock savings association, for a reasonable period of time following a conversion, subject to conditions imposed by the OCC.

(4) The OCC may require directors and senior executive officers of the converting institution to submit the Interagency Biographical and Financial Report, available at www.occ.gov, and legible fingerprints.

(5) Approval for an institution to convert to a national bank expires if the conversion has not occurred within six months of the OCC's approval of the application, unless the OCC grants an extension of time.

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

(f) *Conversion of a Federal stock savings association to a national bank—supplemental rules*—(1) *Additional information.* A Federal stock savings association may convert to a national bank. In addition to the rules and procedures set forth in paragraph (e) of this section, a Federal stock savings association that desires to convert to a national bank must include in its application information demonstrating compliance with applicable laws regarding the permissibility, requirements, and procedures for conversions, including any applicable stockholder or account holder approval requirements.

(2) *Termination and change of status.* The appropriate OCC licensing office provides instructions to the converting Federal stock savings association for terminating its status as a Federal stock savings association and beginning its status as a national bank.

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

(h) *Expedited review.* An application by an eligible savings association to convert to a national bank charter is

deemed approved by the OCC as of the 45th day after the filing is received by the OCC, unless the OCC notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

(i) *Continuation of business and corporate entity.* The corporate existence of the converting institution continues in the resulting national bank. The resulting national bank is considered the same business and corporate entity as the converting institution, although as to rights, powers, and duties, the resulting national bank is a national bank. Any and all of the assets and other property (whether real, personal, mixed, tangible or intangible, including choses in action, rights, and credits) of the converting institution become assets and property of the resulting national bank when the conversion occurs. Similarly, any and all of the obligations and debts of and claims against the converting institution become obligations and debts of and claims against the national bank when the conversion occurs.

[80 FR 28432, May 18, 2015, as amended at 85 FR 80446, Dec. 11, 2020]

§ 5.25 Conversion from a national bank or Federal savings association to a State bank or State savings association.

(a) *Authority.* 12 U.S.C. 93a, 214a, 214b, 214c, 214d, 1462a, 1463, 1464, and 5412(b)(2)(B).

(b) *Licensing requirement.* A national bank must give notice to the OCC before converting to a State bank (including a State bank as defined in 12 U.S.C. 214(a)) or a State savings association. A Federal savings association must give notice to the OCC before converting to a State savings association or a State bank. A Federal mutual savings association that plans to convert to a stock State bank must first convert to a Federal stock savings association under 12 CFR part 192.

(c) *Scope.* This section describes the procedures for a national bank seeking to convert to a State bank or a State savings association or for a Federal savings association seeking to convert to a State savings association or a State bank.

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(d) *Procedures*—(1) *National banks*. A national bank may convert to a State bank (including a State bank as defined in 12 U.S.C. 214(a)) or a State savings association in accordance with 12 U.S.C. 214a and 214c, without prior OCC approval, subject to compliance with 12 U.S.C. 214d. Termination of a national bank's status as a national bank occurs upon the bank's completion of the requirements of 12 U.S.C. 214a, and upon the OCC's receipt of the bank's national bank charter in connection with the consummation of the conversion.

(2) *Federal savings associations*. A Federal savings association may convert to a State savings association or to a State bank, without prior OCC approval, subject to compliance with 12 U.S.C. 1464(i)(6). Termination of a Federal savings association's status as a Federal savings association occurs upon receipt of the Federal savings association's charter in connection with the consummation of the conversion.

(3) *Notice of intent*. (i) A national bank that desires to convert to a State bank (including a State bank as defined in 12 U.S.C. 214(a)) or State savings association, or a Federal savings association that desires to convert to a State savings association or a State bank, must submit a notice of intent to convert to the appropriate OCC licensing office. The national bank or Federal savings association must file this notice with the OCC at the time it files a conversion application with the appropriate State authority or the prospective appropriate Federal banking agency. The national bank or Federal savings association also must transmit a copy of the conversion application to the prospective appropriate Federal banking agency if it has not already done so.

(ii) The notice must include:

(A) A copy of the conversion application; and

(B) An analysis demonstrating that the conversion is in compliance with laws of the applicable jurisdictions regarding the permissibility, requirements, and procedures for conversions, including any applicable stockholder or account holder approval requirements.

(4) *Consultation*. The OCC may consult with the appropriate State au-

thorities or the prospective appropriate Federal banking agency regarding the proposed conversion.

(5) *Termination of status*. After receipt of the notice, the appropriate OCC licensing office provides instructions to the national bank or Federal savings association for terminating its status as a national bank or Federal savings association.

(e) *Exceptions to rules of general applicability*. Sections 5.5 through 5.8 and 5.10 through 5.13 do not apply to this section.

[80 FR 28433, May 18, 2015, as amended at 85 FR 80446, Dec. 11, 2020]

§ 5.26 Fiduciary powers of national banks and Federal savings associations.

(a) *Authority*. 12 U.S.C. 92a, 1462a, 1463, 1464(n), and 5412(b)(2)(B).

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

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

(2) Where two or more Federal savings associations consolidate or merge, and any of the Federal savings associations has, prior to the consolidation or merger, received approval from the OCC or the OTS to exercise fiduciary powers and that approval is in force at the time of the consolidation or merger, the resulting Federal savings association may exercise fiduciary powers in the same manner and to the same extent as the Federal savings association to which approval was originally granted;

(3) Where a national bank with prior OCC approval to exercise fiduciary

powers is the resulting bank in a merger or consolidation with a State bank, State savings association, or Federal savings association and the national bank will exercise fiduciary powers in the same manner and to the same extent to which approval was originally granted; and

(4) Where a Federal savings association with prior approval from the OCC or the OTS to exercise fiduciary powers is the resulting savings association in a merger or consolidation with a State bank, State savings association, or national bank and the Federal savings association will exercise fiduciary powers in the same manner and to the same extent to which approval was originally granted.

(c) *Scope.* This section sets forth the procedures governing OCC review and approval of an application, and in certain cases the filing of a notice, by a national bank or Federal savings association to exercise fiduciary powers. Fiduciary activities of national banks are subject to the provisions of 12 CFR part 9. Fiduciary activities of Federal savings associations are subject to the provisions of 12 CFR part 150.

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

(e) *Procedure—(1) In general.* The following institutions must obtain approval from the OCC in order to exercise fiduciary powers:

(i) A national bank or Federal savings association without fiduciary powers;

(ii) A national bank without fiduciary powers that desires to exercise fiduciary powers as the resulting bank after merging with a State bank, State savings association, or Federal savings association with fiduciary powers or a Federal savings association without fiduciary powers that desires to exercise fiduciary powers as the resulting sav-

ings association after merging with a State bank, State savings association or national bank with fiduciary powers;

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

(iv) A national bank or Federal savings association that has received approval from the OCC to exercise limited fiduciary powers that desires to exercise full fiduciary powers.

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

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

(B) A statement that the capital and surplus of the national bank or Federal savings association is not less than the capital and surplus required by State law of State banks, trust companies, and other corporations exercising comparable fiduciary powers;

(C) Sufficient biographical information on proposed senior trust management personnel, as identified by the OCC, to enable the OCC to assess their qualifications, including, if requested by the OCC, legible fingerprints and the Interagency Biographical and Financial Report, available at www.occ.gov;

(D) A description of the locations where the national bank or Federal savings association will conduct fiduciary activities;

(E) If requested by the OCC, an opinion of counsel that the proposed activities do not violate applicable Federal or State law, including citations to applicable law; and

(F) Any other information necessary to enable the OCC to sufficiently assess the factors described in paragraph (e)(2)(iii) of this section.

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

(iii) When reviewing any application filed under this section, the OCC considers factors such as the following:

(A) The financial condition of the national bank or Federal savings association;

(B) The adequacy of the national bank's or Federal savings association's capital and surplus and whether it is sufficient under the circumstances and not less than the capital and surplus required by State law or State banks, trust companies, and other corporations exercising comparable fiduciary powers;

(C) The character and ability of proposed trust management, including qualifications, experience, and competency. The OCC must approve any trust management change the bank or savings association makes prior to commencing trust activities;

(D) The adequacy of the proposed business plan, if applicable;

(E) The needs of the community to be served; and

(F) Any other factors or circumstances that the OCC considers proper.

(3) *Expedited review.* An application by an eligible bank or eligible savings association to exercise fiduciary powers is deemed approved by the OCC as of the 30th day after the application is received by the OCC, unless the OCC notifies the bank or savings association prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under §5.13(a)(2).

(4) *Permit.* Approval of an application under this section constitutes a permit under 12 U.S.C. 92a for national banks and 12 U.S.C. 1464(n) for Federal savings associations to conduct the fidu-

ciary powers requested in the application.

(5) *Notice required.* A national bank or Federal savings association that has ceased to conduct previously approved fiduciary powers for 18 consecutive months must provide the OCC with a notice describing the nature and manner of the activities proposed to be conducted and containing the information required by paragraph (e)(2)(i) of this section 60 days prior to commencing any fiduciary activity.

(6) *Notice of fiduciary activities in additional States.* (i) Except as provided in paragraphs (e)(6)(iii) through (iv) of this section, a national bank or Federal savings association with existing OCC approval to exercise fiduciary powers must provide written notice to the OCC no later than 10 days after it begins to engage in any of the activities specified in §9.7(d) of this chapter in a State in addition to the State or States described in the application for fiduciary powers that the OCC has approved.

(ii) A notice submitted pursuant to paragraph (e)(6)(i) of this section must identify the new State or States involved, identify the fiduciary activities to be conducted, and describe the extent to which the activities differ materially from the fiduciary activities the national bank or Federal savings association previously conducted.

(iii) No notice under paragraph (e)(6)(i) of this section is required if the national bank or Federal savings association provides the information required by paragraph (e)(6)(ii) of this section through other means, such as a merger application.

(iv) No notice is required if the national bank or Federal savings association is conducting only activities ancillary to its fiduciary business through a trust representative office or otherwise.

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

(8) *Expiration of approval.* Approval expires if a national bank or Federal

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savings association does not commence fiduciary activities within 18 months from the date of approval, unless the OCC grants an extension of time.

[80 FR 28433, May 18, 2015, as amended at 85 FR 80446, Dec. 11, 2020]

Subpart C—Expansion of Activities**§ 5.30 Establishment, acquisition, and relocation of a branch of a national bank.**

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

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

(c) *Scope—(1) In general.* This section describes the procedures and standards governing OCC review and approval of an application by a national bank to establish a new branch or to relocate a branch.

(2) *Branch established through a conversion or business combination.* The standards of this section governing review and approval of applications by the OCC and, as applicable, 12 U.S.C. 36(b), but not the application procedures set forth in this section, apply to branches acquired or retained in a conversion approved under § 5.24 or a business combination approved under § 5.33. A branch acquired or retained in a conversion or business combination is subject to the application procedures set forth in § 5.24 or § 5.33.

(d) *Definitions—(1) Branch* includes any branch bank, branch office, branch agency, additional office, or any branch place of business established by a national bank in the United States or its territories at which deposits are received, checks paid, or money lent.

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

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

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

ceives deposits only through the mail); or

(B) It is located at the site of, or is an extension of, an approved main office or branch office of the national bank. The OCC determines whether a facility is an extension of an existing main office or branch office on a case-by-case basis. For this purpose, the OCC will consider a drive-in or pedestrian facility located within 500 feet of a public entrance to an existing main office or branch office to be an extension of the existing main office or branch office, provided the functions performed at the drive-in or pedestrian facility are limited to functions that are ordinarily performed at a teller window.

(iii) A branch does not include a remote service unit (RSU) as described in 12 CFR 7.1027. This encompasses RSUs that are automated teller machines (ATMs), including interactive ATMs. A branch also does not include a loan production office, a deposit production office, a trust office, an administrative office, a data processing office, or any other office that does not engage in at least one of the activities in paragraph (d)(1) of this section.

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

(3) *Intermittent branch* means a branch that is operated by a national bank for one or more limited periods of time to provide branch banking services at a specified recurring event, on the grounds or premises where the event is held or at a fixed site adjacent to the grounds or premises where the event is held, and exclusively during the occurrence of the event. Examples of an intermittent branch include the operation of a branch on the campus of, or at a fixed site adjacent to the campus of, a specific college during school registration periods; or the operation of a branch during a State fair on State fairgrounds or at a fixed site adjacent to the fairgrounds.

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

(5) *Mobile branch* is a branch of a national bank, other than a messenger service branch, that does not have a single, permanent site, and includes a vehicle that travels to various public

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locations to enable customers to conduct their banking business. A mobile branch may provide services at various regularly scheduled locations or it may be open at irregular times and locations such as at county fairs, sporting events, or school registration periods. A mobile branch may be stationed continuously at a single location within the geographic area it is approved to serve for a period of up to four months. A branch license is needed for each mobile unit.

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

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

(1) Maintaining a safe and sound banking system;

(2) Encouraging a national bank to provide fair access to financial services by helping to meet the credit needs of its entire community;

(3) Ensuring compliance with laws and regulations; and

(4) Promoting fair treatment of customers including efficiency and better service.

(f) *Procedures*—(1) *In general.* Except as provided in paragraphs (f)(2) or (f)(3) of this section, each national bank proposing to establish a branch must submit to the appropriate OCC licensing office a separate application for each proposed branch.

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

(3) *Jointly established branches.* If a national bank proposes to establish a branch jointly with one or more national banks or other depository institutions, only one of the national banks must submit a branch application. The national bank submitting the applica-

tion may act as agent for all national banks in the group of depository institutions proposing to share the branch. The application must include the name and main office address of each national bank in the group.

(4) *Intermittent branches.* Prior to operating an intermittent branch, a national bank must file a branch application and publish notice in accordance with § 5.8, both of which must identify the event at which the branch will be operated; designate a location for operation of the branch which must be on the grounds or premises at which the event is held or on a fixed site adjacent to those grounds or premises; and specify the approximate time period during which the event will be held and during which the branch will operate, including whether operation of the branch will be on an annual or otherwise recurring basis. If the branch is approved, then the bank need not obtain approval each time it seeks to operate the branch in accordance with the original application and approval.

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

(6) *Expedited review.* An application submitted by an eligible bank to establish or relocate a branch is deemed approved by the OCC as of the 15th day after the close of the applicable public comment period or the 45th day after the filing is received by the OCC (or in the case of a short-distance relocation the 30th day after the filing is received by the OCC), whichever is later, unless the OCC notifies the bank prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2). An application to establish or relocate more than one branch is deemed approved by the OCC as of the 15th day after the close of the last public comment period.

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

(h) *Exceptions to rules of general applicability.* (1) A national bank filing an

application for a mobile branch or messenger service branch must publish a public notice, as described in §5.8, in the communities in which the bank proposes to engage in business.

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

(3) The OCC may waive or reduce the public notice and comment period, as appropriate, with respect to an application to establish a branch to restore banking services to a community affected by a disaster or to temporarily replace banking facilities where, because of an emergency, the bank cannot provide services or must curtail banking services.

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

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

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

[80 FR 28435, May 18, 2015, as amended at 85 FR 80447, Dec. 11, 2020; 85 FR 83726, Dec. 22, 2020]

§5.31 Establishment, acquisition, and relocation of a branch and establishment of an agency office of a Federal savings association.

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

(b) *Licensing requirements.* A Federal savings association must submit an application and obtain prior OCC approval in order to establish or relocate a branch or to establish an agency office or conduct additional activities at an agency office, if required under this section.

(c) *Scope—(1) In general.* This section describes the procedures and standards governing OCC review and approval of an application by a Federal savings as-

sociation to establish a new branch or to relocate a branch and the circumstances in which a Federal savings association may establish or relocate a branch without application to the OCC. It also describes the authority of a Federal savings association to establish an agency office.

(2) *Branch established through a conversion or business combination.* The standards of this section governing review and approval of applications by the OCC, but not the application procedures set forth in this section, apply to branches acquired or retained in a conversion approved under §5.23 or a business combination approved under §5.33. A branch acquired or retained in a conversion or business combination is subject to the application procedures set forth in §5.23 or §5.33.

(3) *Branching by savings associations in the District of Columbia.* This section also implements section 5(m) of the Home Owners' Loan Act, 12 U.S.C. 1464(m), addressing branching by savings associations in the District of Columbia.

(d) *Definitions.* (1) A *branch* of a Federal savings association for purposes of this section is a branch office as defined in 12 CFR 145.92(a).

(2) *Home State* means the State in which the Federal savings association's home office is located.

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

(1) Maintaining a safe and sound banking system;

(2) Encouraging a Federal savings association to provide fair access to financial services by helping to meet the credit needs of its entire community;

(3) Ensuring compliance with laws and regulations; and

(4) Promoting fair treatment of customers including efficiency and better service.

(f) *Procedures—(1) Application requirements.* (i) Except as provided in paragraph (f)(2) of this section, each Federal savings association proposing to establish or relocate a branch must submit to the appropriate OCC licensing office a separate application for each proposed branch.

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

(iii) *Expedited review.* If an application to establish or relocate a branch is required of an eligible savings association, the application is deemed approved by the OCC as of the 15th day after the close of the applicable public comment period or the 45th day after the filing is received by the OCC, whichever is later, unless the OCC notifies the savings association prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2). An application to establish or relocate more than one branch is deemed approved by the OCC as of the 15th day after the close of the last public comment period.

(2) *Exceptions.* Except as provided in paragraph (j) of this section, a Federal savings association is not required to submit an application and receive OCC approval under the following circumstances:

(i) *Drive-in or pedestrian offices.* A Federal savings association may establish a drive-in or pedestrian office that is located within 500 feet of a public entrance to its existing home or branch office, provided the functions performed at the office are limited to functions that are ordinarily performed at a teller window.

(ii) *Short-distance relocation.* A Federal savings association may change the permanent location of an existing branch office to a site that is within the market area and short-distance location area.

(iii) *Highly rated Federal savings associations.* A Federal savings association that is an eligible savings association may change the permanent location of, or establish a new, branch office if it meets all of the following requirements:

(A) It published a public notice under § 5.8 of its intent to change the location of the branch office or establish a new branch office. The public notice must be published at least 35 days before the proposed action establishment or relocation. If the notice is published more than 12 months before the proposed action, the publication is invalid.

(B) If the Federal savings association intends to change the location of an existing branch office, it must post a notice of its intent in a prominent location in the existing office to be relocated. This notice must be posted for 30 days from the date of publication of the initial public notice described in paragraph (f)(2)(iii)(A) of this section.

(C)(1) No person files a comment opposing the proposed action within 30 days after the date of the publication of the public notice; or

(2) A person files a comment opposing the proposed action and the OCC determines that the comment raises issues that are not relevant to the approval standards for an application for a branch or that OCC action in response to the comment is not required.

(3) *Notice of branch opening.* If a Federal savings association is not required to file an application to establish or relocate a branch pursuant to paragraph (f)(2)(iii) of this section, the Federal savings association must file a notice with the OCC with the date the branch was established or relocated and the address of the branch within 10 days after the opening of the branch.

(g) *Exceptions to rules of general applicability.* (1) The OCC may waive or reduce the public notice and comment period, as appropriate, with respect to an application to establish a branch to restore banking services to a community affected by a disaster or to temporarily replace banking facilities where, because of an emergency, the savings association cannot provide services or must curtail banking services.

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

(h) *Expiration of approval.* Approval expires if a branch has not commenced business within 18 months after the date of approval unless the OCC grants an extension.

(i) *Branch closings.* A Federal savings association must comply with the applicable requirements of 12 U.S.C.

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1831r-1 with respect to procedures for branch closings.

(j) *Section 5(m) of the Home Owners' Loan Act.* (1) Under section 5(m)(1) of the Home Owners' Loan Act (12 U.S.C. 1464(m)(1)), no savings association may establish or move any branch in the District of Columbia or move its principal office in the District of Columbia without the OCC's prior written approval.

(2) Any Federal savings association that must obtain approval of the OCC under 12 U.S.C. 1464(m)(1) must follow the application procedures of this section. Any State savings association that must obtain approval of the OCC under 12 U.S.C. 1464(m)(1) must follow the application procedures of this section as if it were a Federal savings association.

(3) For purposes of 12 U.S.C. 1464(m)(1), a branch in the District of Columbia includes any location at which accounts are opened, payments are received, or withdrawals are made. This includes an Automated Teller Machine that performs one or more of these functions.

(k) *Agency offices*—(1) *In general.* A Federal savings association may establish or maintain an agency office to engage in one or more of the following activities:

(i) Servicing, originating, or approving loans and contracts;

(ii) Managing or selling real estate owned by the Federal savings association; and

(iii) Conducting fiduciary activities or activities ancillary to the association's fiduciary business in compliance with §5.26(e).

(2) *Additional services*—(i) *In general.* A Federal savings association may request, and the OCC may approve, any service not listed in paragraph (k)(1) of this section, except for payment on savings accounts.

(ii) *Application required.* A Federal savings association desiring to engage in such additional services must submit an application to the appropriate OCC licensing office.

(iii) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to filings under this paragraph (k)(2). However, if the OCC concludes that an application presents sig-

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

(3) *Records.* A Federal savings association must maintain records of all business it transacts at an agency office. It must maintain these records at the agency office, and must transmit copies to a home or branch office.

[80 FR 28436, May 18, 2015, as amended at 85 FR 80447, Dec. 11, 2020]

§5.32 Expedited procedures for certain reorganizations of a national bank.

(a) *Authority.* 12 U.S.C. 93a and 215a-2.

(b) *Scope.* This section prescribes the procedures for OCC review and approval of a national bank's reorganization to become a subsidiary of a bank holding company or a company that will, upon consummation of such reorganization, become a bank holding company. For purposes of this section, a "bank holding company" means any company that owns or controls a national bank, or will own or control one as a result of the reorganization.

(c) *Licensing requirements.* A national bank must submit an application to, and obtain approval from, the OCC prior to participating in a reorganization described in paragraph (b) of this section.

(d) *Procedures*—(1) *General.* An application filed in accordance with this section is deemed approved on the 30th day after the OCC receives the application, unless the OCC notifies the bank otherwise. Approval is subject to the condition that the bank provide the OCC with 60 days' prior notice of any significant deviation from the bank's business plan or any significant deviation from the proposed changes to the bank's business plan described in the bank's plan of reorganization.

(2) *Reorganization plan.* The application must include a reorganization plan that:

(i) Specifies the manner in which the reorganization will be carried out;

(ii) Is approved by a majority of the entire board of directors of the national bank;

(iii) Specifies:

(A) The amount and type of consideration that the bank holding company

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will provide to the shareholders of the reorganizing bank for their shares of stock of the bank;

(B) The date as of which the rights of each shareholder to participate in that exchange will be determined; and

(C) The manner in which the exchange will be carried out;

(iv) Is submitted to the shareholders of the reorganizing bank at a meeting to be held at the call of the directors in accordance with the procedures prescribed in connection with a merger of a national bank under section 3 of the National Bank Consolidation and Merger Act, 12 U.S.C. 215a(a)(2); and

(v) Describes any changes to the bank's business plan resulting from the reorganization.

(3) *Financial and managerial resources and future prospects.* In reviewing an application under this section, the OCC will consider the impact of the proposed affiliation on the financial and managerial resources and future prospects of the national bank.

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

(e) *Rights of dissenting shareholders.* Any shareholder of a bank who has voted against an approved reorganization at the meeting referred to in paragraph (d)(2)(iv) of this section, or who has given notice of dissent in writing to the presiding officer at or prior to that meeting, is entitled to receive the value of their shares by providing a written request to the bank within 30 days after the consummation of the reorganization, as provided by section 3 of the National Bank Consolidation and Merger Act, 12 U.S.C. 215a(b) and (c), for the merger of a national bank.

(f) *Approval under the Bank Holding Company Act.* This section does not affect the applicability of the Bank Holding Company Act of 1956. Filers must indicate in their application the status of any application required to be filed with the Board of Governors of the Federal Reserve System.

(g) *Expiration of approval.* Approval expires if a national bank has not com-

pleted the reorganization within one year of the date of approval.

(h) *Adequacy of disclosure.* (1) A filer must inform shareholders of all material aspects of a reorganization and comply with applicable requirements of the Federal securities laws, including the OCC's securities regulations at 12 CFR part 11.

(2) Any filer not subject to the registration provisions of the Securities Exchange Act of 1934 must submit the proxy materials or information statements it uses in connection with the reorganization to the appropriate OCC licensing office no later than when the materials are sent to the shareholders.

[68 FR 70129, Dec. 17, 2003, as amended at 80 FR 28437, May 18, 2015; 85 FR 80447, Dec. 11, 2020]

§ 5.33 Business combinations involving a national bank or Federal savings association.

(a) *Authority.* 12 U.S.C. 24(Seventh), 93a, 181, 214a, 214b, 215, 215a, 215a-1, 215a-3, 215b, 215c, 1462a, 1463, 1464, 1467a, 1828(c), 1831u, 2903, and 5412(b)(2)(B).

(b) *Scope.* This section sets forth the provisions governing business combinations and the standards for:

(1) OCC review and approval of an application by a national bank or a Federal savings association for a business combination resulting in a national bank or Federal savings association; and

(2) Requirements of notices and other procedures for national banks and Federal savings associations involved in other combinations in which a national bank or Federal savings association is not the resulting institution.

(c) *Licensing requirements.* As prescribed by this section, a national bank or Federal savings association must submit an application and obtain prior OCC approval for a business combination when the resulting institution is a national bank or Federal savings association. As prescribed by this section, a national bank or Federal savings association must give notice to the OCC

prior to engaging in any other combination where the resulting institution will not be a national bank or Federal savings association.¹ A national bank must submit an application and obtain prior OCC approval for any merger between the national bank and one or more of its nonbank affiliates.

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

(1) *Bank* means any national bank or any State bank.

(2) *Business combination* means:

(i) Any merger or consolidation between a national bank or a Federal savings association and one or more depository institutions or State trust companies, in which the resulting institution is a national bank or Federal savings association;

(ii) In the case of a Federal savings association, any merger or consolidation with a credit union in which the resulting institution is a Federal savings association;

(iii) In the case of a national bank, any merger between a national bank and one or more of its nonbank affiliates;

(iv) The acquisition by a national bank or a Federal savings association of all, or substantially all, of the assets of another depository institution; or

(v) The assumption by a national bank or a Federal savings association of any deposit liabilities of another insured depository institution or any deposit accounts or other liabilities of a credit union or any other institution that will become deposits at the national bank or Federal savings association.

(3) [Reserved]

(4) *Company* means a corporation, limited liability company, partnership, business trust, association, or similar organization.

(5) For business combinations under paragraphs (g)(4) and (5) of this section, a company or shareholder is deemed to control another company if:

(i) Such company or shareholder, directly or indirectly, or acting through one or more other persons owns, controls, or has power to vote 25 percent or

more of any class of voting securities of the other company; or

(ii) Such company or shareholder controls in any manner the election of a majority of the directors or trustees of the other company. No company is deemed to own or control another company by virtue of its ownership or control of shares in a fiduciary capacity.

(6) *Credit union* means a financial institution subject to examination by the National Credit Union Administration Board.

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

(8) *Interim national bank or interim Federal savings association* means a national bank or Federal savings association that does not operate independently but exists solely as a vehicle to accomplish a business combination.

(9) *Nonbank affiliate* of a national bank means any company (other than a bank or Federal savings association) that controls, is controlled by, or is under common control with the national bank.

(10) *Other combination* means:

(i) Any merger or consolidation between a national bank or a Federal savings association and one or more depository institutions or State trust companies, in which the resulting institution is not a national bank or Federal savings association;

(ii) In the case of a Federal stock savings association, any merger or consolidation with a credit union in which the resulting institution is a credit union;

(iii) The transfer by a national bank or a Federal savings association of any deposit liabilities to another insured depository institution, a credit union or any other institution; or

(iv) The acquisition by a national bank or a Federal savings association of all, or substantially all, of the assets, or the assumption of all or substantially all of the liabilities, of any company other than a depository institution.

(11) *Savings association and State savings association* have the meaning set

¹Other combinations, as defined in paragraph (d)(10) of this section, do not require an application under this section. However, some may require an application under § 5.53.

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forth in section 3(b) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b).

(12) *State trust company* means a trust company organized under State law that is not engaged in the business of receiving deposits, other than trust funds.

(e) *Policy and related filing requirements—(1) Factors—(i) In general.* When the OCC evaluates any application for a business combination, the OCC considers the following factors:

(A) The capital level of any resulting national bank or Federal savings association;

(B) The conformity of the transaction to applicable law, regulation, and supervisory policies;

(C) The purpose of the transaction;

(D) The impact of the transaction on safety and soundness of the national bank or Federal savings association; and

(E) The effect of the transaction on the national bank's or Federal savings association's shareholders (or members in the case of a mutual savings association), depositors, other creditors, and customers.

(ii) *Bank Merger Act.* When the OCC evaluates an application for a business combination under the Bank Merger Act, the OCC also considers the following factors:

(A) *Competition.* (1) The OCC considers the effect of a proposed business combination on competition. The filer must provide a competitive analysis of the transaction, including a definition of the relevant geographic market or markets. A filer may refer to the Comptroller's Licensing Manual for procedures to expedite its competitive analysis.

(2) The OCC will deny an application for a business combination if the combination would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the business of banking in any part of the United States. The OCC also will deny any proposed business combination whose effect in any section of the United States may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the probable effects of the transaction

in meeting the convenience and needs of the community clearly outweigh the anticompetitive effects of the transaction. For purposes of weighing against anticompetitive effects, a business combination may have favorable effects in meeting the convenience and needs of the community if the depository institution being acquired has limited long-term prospects, or if the resulting national bank or Federal savings association will provide significantly improved, additional, or less costly services to the community.

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

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

(D) *Money laundering.* The OCC considers the effectiveness of any insured depository institution involved in the business combination in combating money laundering activities, including in overseas branches.

(E) *Financial stability.* The OCC considers the risk to the stability of the United States banking and financial system.

(F) *Deposit concentration limit.* The OCC will not approve a transaction that would violate the deposit concentration limit in 12 U.S.C. 1828(c)(13) for interstate merger transactions, as defined in 12 U.S.C. 1828(c)(13)(C)(i).

(iii) *Community Reinvestment Act—(A) In General.* The OCC takes into account the filer's Community Reinvestment Act (CRA) record of performance in considering an application for a business combination. The OCC's conclusion of whether the CRA performance is or is not consistent with approval of

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an application is considered in conjunction with the other factors of this section.

(B) *Interstate mergers under 12 U.S.C. 1831u.* The OCC considers the CRA record of performance of the filer and its resulting bank affiliates and the filer's record of compliance with applicable State community reinvestment laws when required by 12 U.S.C. 1831u(b)(3).

(C) *CRA Sunshine.* A filer must:

(1) Disclose whether it has entered into and disclosed a covered agreement, as defined in 12 CFR 35.2, in accordance with 12 CFR 35.6 and 35.7; and

(2) Provide summaries of, or documents relating to, all substantive discussions with respect to the development of the content of a covered agreement disclosed in (e)(1)(iii)(C)(1) that include the names of participants, dates, and synopsis of the discussions.

(iv) *Interstate mergers under 12 U.S.C. 1831u.* The OCC considers the standards and requirements contained in 12 U.S.C. 1831u for interstate merger transactions between insured banks, when applicable.

(2) *Acquisition and retention of branches.* A filer must disclose the location of any branch it will acquire and retain in a business combination, including approved but unopened branches. The OCC considers the acquisition and retention of a branch under the standards set out in §5.30 or §5.31, as applicable, but it does not require a separate application.

(3) *Subsidiaries.* (i) A filer must identify any subsidiary, financial subsidiary investment, bank service company investment, service corporation investment, or other equity investment to be acquired in a business combination and state the activities of each subsidiary or other company in which the filer would be acquiring an investment. The OCC does not require a separate application or notice under §§5.34, 5.35, 5.36, 5.38, 5.39, 5.58, and 5.59.

(ii) A national bank filer proposing to acquire, through a business combination, a subsidiary, financial subsidiary investment, bank service company investment, service corporation investment, or other equity investment of any entity other than a national bank must provide the same information and

analysis of the subsidiary's activities, or of the investment, that would be required if the filer were establishing the subsidiary, or making such investment, pursuant to §§5.34, 5.35, 5.36, or 5.39.

(iii) A Federal savings association filer proposing to acquire, through a business combination, a subsidiary, bank service company investment, service corporation investment, or other equity investment of any entity other than a Federal savings association must provide the same information and analysis of the subsidiary's activities, or of the investment, that would be required if the filer were establishing the subsidiary, or making such investment, pursuant to §§5.35, 5.38, 5.58, or 5.59.

(4) *Interim national bank or interim Federal savings association*—(i) *Application.* A filer for a business combination that plans to use an interim national bank or interim Federal savings association to accomplish the transaction must file an application to organize an interim national bank or interim Federal savings association as part of the application for the related business combination.

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

(iii) *Corporate status.* An interim national bank or interim Federal savings association becomes a legal entity and may enter into legally valid agreements when it has filed, and the OCC has accepted, the interim national bank's duly executed articles of association and organization certificate or the Federal savings association's charter and bylaws. OCC acceptance occurs:

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

(B) On the date the interim national bank files articles of association and an organization certificate that conform to the form for those documents

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provided by the OCC in the Comptroller's Licensing Manual or the date the interim Federal savings association files a charter and bylaws that conform to the requirements set out in this part 5.

(iv) *Other corporate procedures.* A filer should consult the Comptroller's Licensing Manual to determine what other information is necessary to complete the chartering of the interim national bank as a national bank or the interim Federal savings association as a Federal savings association.

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

(ii) Any resulting Federal savings association must conform to the requirements of sections 5(c) and 10(m) of the Home Owners' Loan Act (12 U.S.C. 1464(c) and 1467a(m)) within the time period prescribed by the OCC.

(6) *Fiduciary powers.* (i) A filer must state whether the resulting national bank or Federal savings association intends to exercise fiduciary powers pursuant to § 5.26(b).

(ii) If a filer intends to exercise fiduciary powers after the combination and requires OCC approval for such powers, the filer must include the information required under § 5.26(e)(2).

(7) *Expiration of approval.* Approval of a business combination, and conditional approval to form an interim national bank or interim Federal savings association, if applicable, expires if the business combination is not consummated within six months after the date of OCC approval, unless the OCC grants an extension of time.

(8) *Adequacy of disclosure.* (i) A filer must inform shareholders of all material aspects of a business combination and must comply with any applicable requirements of the Federal securities laws and securities regulations of the

OCC. Accordingly, a filer must ensure that all proxy and information statements prepared in connection with a business combination do not contain any untrue or misleading statement of a material fact, or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

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

(f) *Exceptions to rules of general applicability—(1) National bank or Federal savings association filer—(i) In general.* Sections 5.8, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.10 and 5.11 apply.

(ii) *Statutory notice.* If an application is subject to the Bank Merger Act or to another statute that requires notice to the public, a national bank or Federal savings association filer must follow the public notice requirements contained in 12 U.S.C. 1828(c)(3) or the other statute and §§ 5.8(b) through 5.8(e), 5.10, and 5.11.

(2) *Interim national bank or interim Federal savings association.* Sections 5.8, 5.10, and 5.11 do not apply to an application to organize an interim national bank or interim Federal savings association. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that any or all parts of §§ 5.8, 5.10, and 5.11 apply. The OCC treats an application to organize an interim national bank or interim Federal savings association

as part of the related application to engage in a business combination and does not require a separate public notice and public comment process.

(3) *State bank, or State savings association, State trust company, or credit union as resulting institution.* Sections 5.7 through 5.13 do not apply to transactions covered by paragraphs (g)(7) through (g)(9) of this section.

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

(2) *Interstate consolidations and mergers under 12 U.S.C. 215a-1 resulting in a national bank.* (i) With the approval of the OCC, an insured national bank may consolidate or merge with an insured out-of-State bank, as defined in 12 U.S.C. 1831u(g)(8), with the national bank as the resulting institution.

(ii) Unless it has elected to follow the procedures set out in paragraph (h) of this section, the resulting national bank entering into the consolidation or merger must comply with the procedures of 12 U.S.C. 215 or 215a, as applicable.

(iii) Unless it has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i), any national bank that will not be the resulting bank in a consolidation or merger pursuant to 12 U.S.C. 215a-1 must comply with the procedures of 12 U.S.C. 215 or 215a, as applicable.

(iv) *Corporate existence.* The corporate existence of each bank participating in a consolidation or merger continues in the resulting national bank, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating bank are transferred to the resulting national bank, as set forth in 12 U.S.C. 215(b), (e), and (f) or 12 U.S.C. 215a(a), (e), and (f), as applicable.

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

(A) Unless it has elected to follow the procedures set out in paragraph (h) of this section, a national bank entering into the consolidation or merger must follow the procedures of 12 U.S.C. 215 or 215a, respectively, as if the Federal savings association were a national bank.

(B)(1) A Federal savings association entering into the consolidation or merger must comply with the requirements of paragraph (n) of this section and follow the procedures set out in paragraph (o) of this section.

(2) For purposes of this paragraph (g)(3), a combination in which a national bank acquires all or substantially all of the assets, or assumes all or substantially all of the liabilities, of a Federal savings association will be treated as a consolidation for the Federal savings association.

(ii)(A) Unless the national bank has elected to follow the procedures set out in paragraph (h) of this section, national bank shareholders who dissent from a plan to consolidate may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 215 as if the Federal savings association were a national bank.

(B) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations pursuant to paragraph (o)(1)(i)(A) of this section, Federal savings association shareholders who dissent from a plan to consolidate or merge may receive in cash the value of their Federal savings association shares if they comply with the requirements of 12 U.S.C. 215 or 215a as if the Federal savings association were a national bank.

(C) Unless the national bank or Federal savings association has elected to follow the procedures applicable to

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State banks or State savings associations, respectively, pursuant to paragraph (h)(1)(i) or (o)(1)(i)(A) of this section, respectively, the OCC will conduct an appraisal or reappraisal of the value of a national bank or Federal savings association held by dissenting shareholders in accordance with the provisions of 12 U.S.C. 215 or 215a, as applicable, except that the costs and expenses of any appraisal or reappraisal may be apportioned and assessed by the Comptroller as he or she may deem equitable against all or some of the parties. In making this determination the Comptroller will consider whether any party has acted arbitrarily or not in good faith in respect to the rights provided by this paragraph.

(iii) The consolidation or merger agreement must address the effect upon, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution.

(4) *Mergers of a national bank with its nonbank affiliates under 12 U.S.C. 215a-3 resulting in a national bank.* (i) With the approval of the OCC, a national bank may merge with one or more of its nonbank affiliates, with the national bank as the resulting institution, in accordance with the provisions of this paragraph, provided that the law of the State or other jurisdiction under which the nonbank affiliate is organized allows the nonbank affiliate to engage in such mergers. If the national bank is an insured bank, the transaction is also subject to approval by the FDIC under the Bank Merger Act, 12 U.S.C. 1828(c).

(ii) Unless it has elected to follow the procedures set out in paragraph (h) of this section, a national bank entering into the merger must follow the procedures of 12 U.S.C. 215a as if the nonbank affiliate were a State bank, except as otherwise provided herein.

(iii) A nonbank affiliate entering into the merger must follow the procedures for such mergers set out in the law of the State or other jurisdiction under which the nonbank affiliate is organized.

(iv) The rights of dissenting shareholders and appraisal of dissenters' shares of stock in the nonbank affiliate

entering into the merger must be determined in the manner prescribed by the law of the State or other jurisdiction under which the nonbank affiliate is organized.

(v) The corporate existence of each institution participating in the merger continues in the resulting national bank, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating institutions are transferred to the resulting national bank, as set forth in 12 U.S.C. 215a(a), (e), and (f) in the same manner and to the same extent as in a merger between a national bank and a State bank under 12 U.S.C. 215a(a), as if the nonbank affiliate were a State bank.

(5) *Mergers of an uninsured national bank with its nonbank affiliates under 12 U.S.C. 215a-3 resulting in a nonbank affiliate.* (i) With the approval of the OCC, a national bank that is not an insured bank as defined in 12 U.S.C. 1813(h) may merge with one or more of its nonbank affiliates, with the nonbank affiliate as the resulting entity, in accordance with the provisions of this paragraph, provided that the law of the State or other jurisdiction under which the nonbank affiliate is organized allows the nonbank affiliate to engage in such mergers.

(ii) Unless it has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i) of this section, a national bank entering into the merger must follow the procedures of 12 U.S.C. 214a, as if the nonbank affiliate were a State bank, except as otherwise provided in this section.

(iii) A nonbank affiliate entering into the merger must follow the procedures for such mergers set out in the law of the State or other jurisdiction under which the nonbank affiliate is organized.

(iv)(A) National bank shareholders who dissent from an approved plan to merge may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 214a as if the nonbank affiliate were a State bank. The OCC may conduct an appraisal or reappraisal of dissenters' shares of stock in a national bank involved in the merger if all parties agree that the determination is final

and binding on each party and agree on how the total expenses of the OCC in making the appraisal will be divided among the parties and paid to the OCC.

(B) The rights of dissenting shareholders and appraisal of dissenters' shares of stock in the nonbank affiliate involved in the merger must be determined in the manner prescribed by the law of the State or other jurisdiction under which the nonbank affiliate is organized.

(v) The corporate existence of each entity participating in the merger continues in the resulting nonbank affiliate, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating national bank are transferred to the resulting nonbank affiliate as set forth in 12 U.S.C. 214b, in the same manner and to the same extent as in a merger between a national bank and a State bank under 12 U.S.C. 214a, as if the nonbank affiliate were a State bank.

(6) *Consolidations and mergers of a Federal savings association with other Federal savings associations, national banks, State banks, State savings banks, State savings associations, State trust companies, or credit unions resulting in a Federal savings association.* (i) With the approval of the OCC, a Federal savings association may consolidate or merge with another Federal savings association, a national bank, a State bank, a State savings association, a State trust company, or a credit union with the Federal savings association as the resulting institution by complying with the following procedures:

(A)(1) The filer Federal savings association must comply with the requirements of paragraph (n) of this section and follow the procedures set out in paragraph (o) of this section.

(2) For purposes of this paragraph (g)(6), a combination in which a Federal savings association acquires all or substantially all of the assets, or assumes all or substantially all of the liabilities, of another other participating institution will be treated as a consolidation for the acquiring Federal savings association and as a consolidation by a Federal savings association whose assets are acquired, if any.

(B)(1) Unless it has elected to follow the procedures applicable to State

banks under paragraph (h)(1)(i) of this section, a national bank entering into a merger or consolidation with a Federal savings association when the resulting institution will be a Federal savings association must comply with the requirements of 12 U.S.C. 214a and 12 U.S.C. 214c as if the Federal savings association were a State bank. However, for these purposes the references in 12 U.S.C. 214c to "law of the State in which such national banking association is located" and "any State authority" mean "laws and regulations governing Federal savings associations" and "Office of the Comptroller of the Currency" respectively.

(2) Unless the national bank has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i) of this section, national bank shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 214a as if the Federal savings association were a State bank. The OCC will conduct an appraisal or reappraisal of the value of the national bank shares held by dissenting shareholders in accordance with the provisions of 12 U.S.C. 214a, except that the costs and expenses of any appraisal or reappraisal may be apportioned and assessed by the Comptroller as he or she may deem equitable against all or some of the parties. In making this determination the Comptroller will consider whether any party has acted arbitrarily or not in good faith in respect to the rights provided by this paragraph.

(C)(1) A Federal savings association entering into a merger or consolidation with another Federal savings association when the resulting institution will be the other Federal savings association must comply with the requirements of paragraph (n) of this section and the procedures of paragraph (o) of this section.

(2) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations under paragraph (o)(1)(i)(A), Federal savings association shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their Federal savings

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association shares if they comply with the requirements of 12 U.S.C. 214a as if the other Federal savings association were a State bank. The OCC will conduct an appraisal or reappraisal of the value of the Federal savings association shares held by dissenting shareholders in accordance with the provisions of 12 U.S.C. 214a, except that the costs and expenses of any appraisal or reappraisal may be apportioned and assessed by the Comptroller as he or she may deem equitable against all or some of the parties. In making this determination the Comptroller will consider whether any party has acted arbitrarily or not in good faith in respect to the rights provided by this paragraph.

(3) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations under paragraph (o)(1)(i)(A), the plan of merger or consolidation must provide the manner of disposing of the shares of the resulting Federal savings association not taken by the dissenting shareholders of the Federal savings association.

(D)(I) A State bank, State savings association, State trust company, or credit union entering into a consolidation or merger with a Federal savings association when the resulting institution will be a Federal savings association must follow the procedures for such consolidations or mergers set out in the law of the State or other jurisdiction under which the State bank, State savings association, State trust company, or credit union is organized.

(2) The rights of dissenting shareholders and appraisal of dissenters' shares of stock in the State bank, State savings association, or State trust company, entering into the consolidation or merger will be determined in the manner prescribed by the law of the State or other jurisdiction under which the State bank, State savings association, or State trust company is organized.

(ii) The consolidation or merger agreement must address the effect upon, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution.

(7) *Consolidations and mergers under 12 U.S.C. 214a of a national bank with State banks resulting in a State bank as defined in 12 U.S.C. 214(a)*—(i) *In general.* Prior OCC approval is not required for the merger or consolidation of a national bank with a State bank as defined in 12 U.S.C. 214(a). Termination of a national bank's existence and status as a national banking association is automatic, and its charter cancelled, upon completion of the statutory and regulatory requirements for engaging in the consolidation or merger and consummation of the consolidation or merger.

(ii) *Procedures.* A national bank desiring to merge or consolidate with a State bank as defined in 12 U.S.C. 214(a) when the resulting institution will be a State bank must comply with the requirements and follow the procedures of 12 U.S.C. 214a and 214c and must provide notice to the OCC under paragraph (k) of this section.

(iii) *Dissenters' rights and appraisal procedures.* National bank shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 214a. The OCC conducts an appraisal or reappraisal of the value of the national bank shares held by dissenting shareholders as provided for in 12 U.S.C. 214a.

(iv) *Liquidation account.* The consolidation or merger agreement must address the effect upon, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution.

(8) *Interstate consolidations and mergers between an insured national bank and insured State banks resulting in a State bank*—(i) *In general.* Prior OCC approval is not required for the merger or consolidation of an insured national bank with an insured out-of-State State bank, as defined in 12 U.S.C. 1831u(g)(8), with the State bank as the resulting institution, that has been approved by the appropriate Federal banking agency for the State bank. Termination of a national bank's existence and status as a national banking association is automatic, and its charter cancelled, upon completion of the statutory and regulatory requirements for engaging

in the consolidation or merger and consummation of the consolidation or merger.

(ii) *Procedures.* Unless it has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i) of this section, the national bank entering into the consolidation or merger must comply with the procedures of 12 U.S.C. 214a, as applicable.

(iii) *Notice.* The national bank must provide a notice to the OCC under paragraph (k) of this section.

(9) *Consolidations and mergers of a Federal savings association with State banks, State savings banks, State savings associations, State trust companies, or credit unions resulting in a State bank, State savings bank, State savings association, State trust company, or credit union—(i) Policy.* Prior OCC approval is not required for the merger or consolidation of a Federal savings association with a State bank, State savings bank, State savings association, State trust company, or credit union when the resulting institution will be a State institution or credit union. Termination of a national bank's or Federal savings association's existence and status as a national banking association or Federal savings association is automatic, and its charter cancelled, upon completion of the statutory and regulatory requirements for engaging in the consolidation or merger and consummation of the consolidation or merger.

(ii) *Procedures.* (A) A Federal savings association desiring to merge or consolidate with a State bank, State savings bank, State savings association, State trust company, or credit union when the resulting institution will be a State institution or credit union must comply with the requirements of paragraph (n) of this section and the procedures of paragraph (o) of this section and must provide notice to the OCC under paragraph (k) of this section.

(B) For purposes of this paragraph (g)(9), a combination in which a State bank, State savings bank, State savings association, State trust company, or credit union acquires all or substantially all of the assets, or assumes all or substantially all of the liabilities, of a Federal savings association must be treated as a consolidation by the Federal savings association.

(iii) *Dissenters' rights and appraisal procedures.* (A) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations under paragraph (o)(1)(i)(A), Federal savings association shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their Federal savings association shares if they comply with the requirements of 12 U.S.C. 214a as if the Federal savings association were a national bank. The OCC conducts an appraisal or reappraisal of the value of the Federal savings association shares held by dissenting shareholders only if all parties agree that the determination will be final and binding. The parties also must agree on how the total expenses of the OCC in making the appraisal will be divided among the parties and paid to the OCC.

(B) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations under paragraph (o)(1)(i)(A), the plan of merger or consolidation must provide the manner of disposing of the shares of the resulting State institution not taken by the dissenting shareholders of the Federal savings association.

(iv) *Liquidation account.* The consolidation or merger agreement must address the effect upon, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution.

(h) *Procedural requirements for national bank combinations—(1) Permissible elections.* A national bank participating in a combination pursuant to paragraph (g)(2), (g)(3), (g)(4), (g)(5), (g)(6), or (g)(8) of this section may elect to follow with respect to the combination:

(i) The procedures applicable to a State bank chartered by the State where the national bank's main office is located; or

(ii) Paragraph (p) of this section, if applicable.

(2) *Rules of Construction.* For purposes of paragraph (h)(1) of this section:

(i) Any references to a State agency in the applicable State procedures should be read as referring to the OCC; and

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(ii) Unless otherwise specified in Federal law, all filings required by the applicable State procedures must be made to the OCC.

(i)–(j) [Reserved]

(k) *Exit notice to OCC*—(1) *Notice required.* As provided in paragraphs (g)(7)(ii), (g)(8)(iii), and (g)(9)(ii) of this section, a national bank or Federal savings association engaging in a consolidation or merger in which it is not the filer and the resulting institution must file a notice rather than an application to the appropriate OCC licensing office advising of its intention.

(2) *Timing of notice.* The national bank or Federal savings association must submit the notice at the time the application to merge or consolidate is filed with the responsible agency under the Bank Merger Act, 12 U.S.C. 1828(c), or if there is no such filing then no later than 30 days prior to the effective date of the merger or consolidation.

(3) *Content of notice.* The notice must include the following:

(i)(A) A short description of the material features of the transaction, the identity of the acquiring institution, the identity of the State or Federal regulator to whom the application was made, and the date of the application; or

(B) A copy of a filing made with another Federal or State regulatory agency seeking approval from that agency for the transaction under the Bank Merger Act or other applicable statute;

(ii) The planned consummation date for the transaction;

(iii) Information to demonstrate compliance by the national bank or Federal savings association with applicable requirements to engage in the transactions (e.g., board approval or shareholder or accountholder requirements); and

(iv) If the national bank or Federal savings association submitting the notice maintains a liquidation account established pursuant to part 192 of this chapter, the notice must state that the resulting institution will assume such liquidation account.

(4) *Termination of status.* The national bank or Federal savings association must advise the OCC when the transaction is about to be consummated.

Termination of a national bank's or Federal savings association's existence and status as a national banking association or Federal savings association is automatic, and its charter cancelled, upon completion of the statutory and regulatory requirements and consummation of the consolidation or merger. When the national bank or Federal savings association files the notice under paragraph (k)(1) of this section, the OCC provides instructions to the national bank or Federal savings association for terminating its status as a national bank or Federal savings association, including surrendering its charter to the OCC immediately after consummation of the transaction.

(5) *Expiration.* If the action contemplated by the notice is not completed within six months after the OCC's receipt of the notice, a new notice must be submitted to the OCC, unless the OCC grants an extension of time.

(1) *Mergers and consolidations; transfer of assets and liabilities to the resulting institution.* (1) In any consolidation or merger in which the resulting institution is a national bank or Federal savings association, on the effective date of the merger or consolidation, all assets and property (real, personal and mixed, tangible and intangible, choses in action, rights, and credits) then owned by each participating institution or which would inure to any of them, immediately by operation of law and without any conveyance, transfer, or further action, become the property of the resulting national bank or Federal savings association. The resulting national bank or Federal savings association is deemed to be a continuation of the entity of each participating institution, and will succeed to such rights and obligations of each participating institution and the duties and liabilities connected therewith.

(2) The authority in paragraph (1)(1) of this section is in addition to any authority granted by applicable statutes for specific transactions and is subject to the National Bank Act, the Home Owners' Loan Act, and other applicable statutes.

(m) *Certification of combination; effective date.* (1) When a national bank or Federal savings association is the filer

and will be the resulting entity in a consolidation or merger, after receiving approval from the OCC, it must complete any remaining steps needed to complete the transaction, provide the OCC with a certification that all other required regulatory or shareholder approvals have been obtained, and inform the OCC of the planned consummation date.

(2) When the transaction is consummated, the filer must notify the OCC of the consummation date. The OCC will issue a letter certifying that the combination was effective on the date specified in the filer's notice.

(n) Authority for and certain limits on business combinations and other transactions by Federal savings associations.

(1) Federal savings associations may enter into business combinations only in accordance with this section, the Bank Merger Act, and sections 5(d)(3)(A) and 10(s) of the Home Owners' Loan Act (12 U.S.C. 1464(d)(3)(A) and 1467a(s)).

(2) A Federal savings association may consolidate or merge with another depository institution, a State trust company or a credit union, may engage in another business combination listed in paragraphs (d)(2)(iv) and (v) of this section, or may engage in any other combination listed in paragraph (d)(10), provided that:

(i) The combination is in compliance with, and receives all approvals required under, any applicable statutes and regulations;

(ii) Any resulting Federal savings association meets the requirements for insurance of accounts; and

(iii) A consolidation or merger involving a mutual savings association or the transfer of all or substantially all of the deposits of a mutual savings association must result in a mutually held depository institution that is insured by the FDIC, unless:

(A) The transaction is approved under part 192 governing mutual to stock conversions;

(B) The transaction involves a mutual holding company reorganization under 12 U.S.C. 1467a(o) or a similar transaction under State law; or

(C) The transaction is part of a voluntary liquidation for which the OCC has provided non-objection under § 5.48.

(3) Where the resulting institution is a Federal mutual savings association, the OCC may approve a temporary increase in the number of directors of the resulting institution provided that the association submits a plan for bringing the board of directors into compliance with the requirements of § 5.21(e) within a reasonable period of time.

(4)(i) The Federal savings associations described in paragraph (n)(4)(ii) of this section below must provide affected accountholders with a notice of a proposed account transfer and an option of retaining the account in the transferring Federal savings association. The notice must allow affected accountholders at least 30 days to consider whether to retain their accounts in the transferring Federal savings association.

(ii) The following savings associations must provide the notices:

(A) A Federal mutual savings association transferring account liabilities to an institution the accounts of which are not insured by the Deposit Insurance Fund or the National Credit Union Share Insurance Fund; and

(B) Any Federal mutual savings association transferring account liabilities to a stock form depository institution.

(o) *Procedural requirements for Federal savings association approval of combinations*—(1) *In general*—(i) *Permissible elections.* A Federal savings association participating in a combination may elect to follow the applicable procedures with respect to the combination:

(A) The procedures applicable to a State savings association chartered by the State where the Federal savings association's home office is located; or

(B) The standard procedures provided in paragraph (o)(2) of this section.

(ii) *Rules of Construction.* For purposes of paragraph (o)(1)(i) of this section:

(A) Any references to a State agency in the applicable State procedures should be read as referring to the OCC; and

(B) Unless otherwise specified in Federal law, all filings required by the applicable State procedures must be made to the OCC.

(2) *Standard procedures*—(i) *Board approval.* Before a Federal savings association files a notice or application for

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any consolidation or merger, the combination and combination agreement must be approved by majority vote of the entire board of each constituent Federal savings association in the case of Federal stock savings associations or a two-thirds vote of the entire board of each constituent Federal savings association in the case of Federal mutual savings associations.

(ii) *Shareholder vote—(A) General rule.* Except as otherwise provided in this paragraph (o)(2)(ii), an affirmative vote of two-thirds of the outstanding voting stock of any constituent Federal stock savings association is required for approval of a consolidation or merger. If any class of shares is entitled to vote as a class pursuant to § 5.22(g)(4), an affirmative vote of a majority of the shares of each voting class and two-thirds of the total voting shares is required. The required vote must be taken at a meeting of the savings association.

(B) *General exception.* Stockholders of the resulting Federal stock savings association need not authorize a consolidation or merger if the transaction meets the requirements of paragraph (p) of this section.

(C) *Exceptions for certain combinations involving an interim association.* Stockholders of a Federal stock savings association need not authorize by a two-thirds affirmative vote consolidations or mergers involving an interim Federal savings association or interim State savings association when the resulting Federal stock savings association is acquired pursuant to the regulations of the Board of Governors of the Federal Reserve System at 12 CFR 238.15(e) (relating to the creation of a savings and loan holding company by a savings association). In those cases, an affirmative vote of 50 percent of the shares of the outstanding voting stock of the Federal stock savings association plus one affirmative vote is required. If any class of shares is entitled to vote as a class pursuant to the charter provisions in § 5.22(g)(4), an affirmative vote of 50 percent of the shares of each voting class plus one affirmative vote is required. The required votes must be taken at a meeting of the association.

(3) *Change of name or home office.* If the name of the resulting Federal savings association or the location of the home office of the resulting Federal savings association will change as a result of the business combination, the resulting Federal savings association must amend its charter accordingly.

(4) *Mutual member vote.* Notwithstanding any other provision of this section, the OCC may require that a consolidation, merger or other business combination be submitted to the voting members of any mutual savings association participating in the proposed transaction at duly called meetings and that the transaction, to be effective, must be approved by such voting members.

(p) *Exception to voting requirements.* Shareholders of a resulting national bank or Federal stock savings association need not authorize a consolidation or merger if:

(1) Either:

(i) The transaction does not involve an interim bank or an interim savings association; or

(ii) The transaction involves an interim bank or an interim savings association and the existing shareholders of the national bank or Federal stock savings association will directly hold the shares of the resulting national bank or Federal stock savings association;

(2) The national bank's articles of association or the Federal stock savings association's charter, as applicable, is not changed;

(3) Each share of stock outstanding immediately prior to the effective date of the consolidation or merger is to be an identical outstanding share or a treasury share of the resulting national bank or Federal stock savings association after such effective date; and

(4) Either:

(i) No shares of voting stock of the resulting national bank or Federal stock savings association and no securities convertible into such stock are to be issued or delivered under the plan of combination; or

(ii) The authorized unissued shares or the treasury shares of voting stock of the resulting national bank or Federal stock savings association to be issued or delivered under the plan of merger

or consolidation, plus those initially issuable upon conversion of any securities to be issued or delivered under such plan, do not exceed 20 percent of the total shares of voting stock of such national bank or Federal stock savings association outstanding immediately prior to the effective date of the consolidation or merger.

[85 FR 80448, Dec. 11, 2020; 86 FR 1255, Jan. 8, 2021, as amended at 89 FR 78218, Sept. 25, 2024]

§ 5.34 Operating subsidiaries of a national bank.

(a) *Authority.* 12 U.S.C. 24 (Seventh), 24a, 25b, 93a, 3102(b).

(b) *Licensing requirements.* A national bank must file an application or notice as prescribed in this section to acquire or establish an operating subsidiary, or to commence a new activity in an existing operating subsidiary.

(c) *Scope.* This section sets forth authorized activities and application or notice procedures for national banks engaging in activities through an operating subsidiary. The procedures in this section do not apply to financial subsidiaries authorized under § 5.39. Unless provided otherwise, this section applies to a Federal branch or agency that acquires, establishes, or maintains any subsidiary that a national bank is authorized to acquire or establish under this section in the same manner and to the same extent as if the Federal branch or agency were a national bank, except that the ownership interest required in paragraphs (e)(2) and (f)(2)(i)(C)(2) of this section applies to the parent foreign bank of the Federal branch or agency and not to the Federal branch or agency. The OCC may, at any time, limit a national bank's investment in an operating subsidiary or may limit or refuse to permit any activities in an operating subsidiary for supervisory, legal, or safety and soundness reasons.

(d) *Definition.* For purposes of this section, *authorized product* means a product that would be defined as insurance under section 302(c) of the Gramm-Leach-Bliley Act (15 U.S.C. 6712) that, as of January 1, 1999, the OCC had determined in writing that national banks may provide as principal or national banks were in fact

lawfully providing the product as principal, and as of that date no court of relevant jurisdiction had, by final judgment, overturned a determination by the OCC that national banks may provide the product as principal. An authorized product does not include title insurance, or an annuity contract the income of which is subject to treatment under section 72 of the Internal Revenue Code of 1986 (26 U.S.C. 72).

(e) *Standards and requirements—(1) Authorized activities.* (i) A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority, including:

(A) Providing authorized products as principal; and

(B) Providing title insurance as principal if the national bank or subsidiary thereof was actively and lawfully underwriting title insurance before November 12, 1999, and no affiliate of the national bank (other than a subsidiary) provides insurance as principal. A subsidiary may not provide title insurance as principal if the State had in effect before November 12, 1999, a law which prohibits any person from underwriting title insurance with respect to real property in that State.

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

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

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

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

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

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

(A) A subsidiary in which the bank's investment is made pursuant to specific authorization in a statute or OCC regulation (e.g., a bank service company under 12 U.S.C. 1861 *et seq.*, a financial subsidiary under section 5136A of the Revised Statutes (12 U.S.C. 24a), or a community development corporation subsidiary under 12 U.S.C. 24 (Eleventh) and 12 CFR part 24;

(B) A subsidiary in which the bank has acquired, in good faith, shares through foreclosure on collateral, by way of compromise of a doubtful claim, or to avoid a loss in connection with a debt previously contracted; and

(C) A trust formed for purposes of securitizing assets held by the bank as part of its banking business.

(iii) Notwithstanding the requirements of paragraph (e)(2)(i) of this section,

(A) A national bank must have reasonable policies and procedures to preserve the limited liability of the bank and its operating subsidiaries; and

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

(3) *Examination and supervision.* An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank, unless otherwise specifically provided by statute, regulation, or published OCC policy, including sections 1044 and 1045 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 25b) with respect to the application of State law. If the OCC determines that the operating

subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the operating subsidiary, or discontinue specified activities. OCC authority under this paragraph is subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

(4) *Consolidation of figures*—(i) *National banks.* Pertinent book figures of the parent national bank and its operating subsidiary will be combined for the purpose of applying statutory or regulatory limitations when combination is needed to effect the intent of the statute or regulation, e.g., for purposes of 12 U.S.C. 56, 59, 60, 84, and 371d.

(ii) *Federal branches or agencies.* Transactions conducted by all of a foreign bank's Federal branches and agencies and State branches and agencies, and their operating subsidiaries, will be combined for the purpose of applying any limitation or restriction as provided in 12 CFR 28.14.

(f) *Procedures*—(1) *Application required.* (i) Except for an operating subsidiary that qualifies for the notice procedures in paragraph (f)(2) of this section or is exempt from application or notice requirements under paragraph (f)(6) of this section, a national bank must first submit an application to, and receive prior approval from, the OCC to establish or acquire an operating subsidiary or to perform a new activity in an existing operating subsidiary.

(ii) The application must explain, as appropriate, how the bank "controls" the enterprise, describing in full detail structural arrangements where control is based on factors other than bank ownership of more than 50 percent of the voting interest of the subsidiary and the ability to control the management and operations of the subsidiary by holding voting interests sufficient to select the number of directors needed to control the subsidiary's board

and to select and terminate senior management. In the case of a limited partnership or limited liability company that does not qualify for the notice procedures set forth in paragraph (f)(2) of this section, the bank must provide a statement explaining why it is not eligible. The application also must include a complete description of the bank's investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the bank and the subsidiary, and other information necessary to adequately describe the proposal. To the extent that the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank must describe the type of insurance activity in which the company is engaged and has present plans to conduct. The bank must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable. The application must state whether the operating subsidiary will conduct any activity at a location other than the main office or a previously approved branch of the bank. The OCC may require a filer to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In these cases, the OCC encourages filers to have a prefilings meeting with the OCC. Any bank receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(2) *Notice process only for certain qualifying filings.* (i) Except for an operating subsidiary that is exempt from application or notice procedures under paragraph (f)(6) of this section, a national bank that is well capitalized and well managed may establish or acquire an operating subsidiary, or perform a new activity in an existing operating subsidiary, by providing the appropriate OCC licensing office written notice prior to, or within 10 days after, acquiring or establishing the subsidiary, or commencing the new activity, if:

(A) The activity is listed in paragraph (f)(5) of this section or, except as provided in paragraph (f)(2)(ii) of this section, the activity is substantively the same as a previously approved activity and the activity will be conducted in accordance with the same terms and conditions applicable to the previously approved activity;

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

(C) The bank or an operating subsidiary thereof:

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

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

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

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

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

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

(i) In the case of a subsidiary that is a limited partnership, the bank or an operating subsidiary thereof is the sole general partner of the limited partnership, provided that under the partnership agreement, limited partners have no authority to bind the partnership by

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virtue solely of their status as limited partners;

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

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

(3) Is required to consolidate its financial statements with those of the subsidiary under GAAP.

(ii) A national bank must file an application under paragraph (f)(1) of this section if a State has or will charter or license the proposed operating subsidiary as a bank, trust company, or savings association.

(iii) The written notice must include a complete description of the bank's investment in the subsidiary and of the activity conducted and a representation and undertaking that the activity will be conducted in accordance with OCC policies contained in guidance issued by the OCC regarding the activity. To the extent that the notice relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank must describe the type of insurance activity in which the company is engaged and has present plans to conduct. The bank also must list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable. Any bank receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

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

determine that some or all provisions in §§ 5.8, 5.10, and 5.11 apply.

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

(5) *Activities eligible for notice.* The following activities qualify for the notice procedures in paragraph (f)(2) of this section, provided the activity is conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a national bank:

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

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

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

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

(v) Providing courier services between financial institutions;

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

(vii) Providing check guaranty, verification and payment services;

(viii) Providing data processing, data warehousing and data transmission products, services, and related activities and facilities, including associated equipment and technology, for the bank or its affiliates;

- (ix) Acting as investment adviser (including an adviser with investment discretion) or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and mortgage or real estate investment trusts, furnishing economic forecasts or other economic information, providing investment advice related to futures and options on futures, and providing consumer financial counseling;
- (x) Providing tax planning and preparation services;
- (xi) Providing financial and transactional advice and assistance, including advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings;
- (xii) Underwriting and reinsuring credit related insurance to the extent permitted under section 302 of the Gramm-Leach-Bliley Act (15 U.S.C. 6712);
- (xiii) Leasing of personal property and acting as an agent or adviser in leases for others;
- (xiv) Providing securities brokerage or acting as a futures commission merchant, and providing related credit and other related services;
- (xv) Underwriting and dealing, including making a market, in bank permissible securities and purchasing and selling as principal, asset backed obligations;
- (xvi) Acting as an insurance agent or broker, including title insurance to the extent permitted under section 303 of the Gramm-Leach-Bliley Act (15 U.S.C. 6713);
- (xvii) Reinsuring mortgage insurance on loans originated, purchased, or serviced by the bank, its subsidiaries, or its affiliates, provided that if the subsidiary enters into a quota share agreement, the subsidiary assumes less than 50 percent of the aggregate insured risk covered by the quota share agreement. A “quota share agreement” is an agreement under which the reinsurer is liable to the primary insurance underwriter for an agreed upon percentage of every claim arising out of the covered book of business ceded by the primary insurance underwriter to the reinsurer;
- (xviii) Acting as a finder pursuant to 12 CFR 7.1002 to the extent permitted by published OCC precedent for national banks;²
- (xix) Offering correspondent services to the extent permitted by published OCC precedent for national banks;
- (xx) Acting as agent or broker in the sale of fixed or variable annuities;
- (xxi) Offering debt cancellation or debt suspension agreements;
- (xxii) Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the subsidiary, parent bank, or other financial institutions;
- (xxiii) Acting as a transfer or fiscal agent;
- (xxiv) Acting as a digital certification authority to the extent permitted by published OCC precedent for national banks, subject to the terms and conditions contained in that precedent;
- (xxv) Providing or selling public transportation tickets, event and attraction tickets, gift certificates, pre-paid phone cards, promotional and advertising material, postage stamps, and Electronic Benefits Transfer (EBT) script, and similar media, to the extent permitted by published OCC precedent for national banks, subject to the terms and conditions contained in that precedent;
- (xxvi) Providing data processing, and data transmission services, facilities (including equipment, technology, and personnel), databases, advice and access to such services, facilities, databases and advice, for the parent bank and for others, pursuant to 12 CFR 7.5006 to the extent permitted by published OCC precedent for national banks;
- (xxvii) Providing bill presentation, billing, collection, and claims-processing services;
- (xxviii) Providing safekeeping for personal information or valuable confidential trade or business information, such as encryption keys, to the extent

²See, e.g., the OCC’s monthly publication “Interpretations and Actions.” Beginning with the May 1996 issue, electronic versions of “Interpretations and Actions” are available at www.occ.gov.

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permitted by published OCC precedent for national banks;

(xxix) Providing payroll processing;

(xxx) Providing branch management services;

(xxxi) Providing merchant processing services except when the activity involves the use of third parties to solicit or underwrite merchants; and

(xxxii) Performing administrative tasks involved in benefits administration.

(6) *No application or notice required.* A national bank may acquire or establish an operating subsidiary, or perform a new activity in an existing operating subsidiary, without filing an application or providing notice to the OCC, if the bank is well managed and well capitalized and the:

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

(ii) Activities in which the new subsidiary will engage continue to be legally permissible for the subsidiary;

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

(iv) The standards set forth in paragraphs (f)(2)(i)(B) and (C) of this section are satisfied.

(7) *Fiduciary powers.* (i) If an operating subsidiary proposes to accept fiduciary appointments for which fiduciary powers are required, such as acting as trustee or executor, then the national bank must have fiduciary powers under 12 U.S.C. 92a and the subsidiary also must have its own fiduciary powers under the law applicable to the subsidiary.

(ii) Unless the subsidiary is a registered investment adviser, if an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the national bank must have prior OCC approval to exercise fiduciary powers pursuant to § 5.26 and 12 CFR part 9.

(8) *Expiration of approval.* Approval expires if the national bank has not es-

tablished or acquired the operating subsidiary or commenced the new activity in an existing operating subsidiary within 12 months after the date of the approval, unless the OCC shortens or extends the time period.

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

[80 FR 28444, May 18, 2015, as amended at 85 FR 80455, Dec. 11, 2020]

§ 5.35 Bank service company investments by a national bank or Federal savings association.

(a) *Authority.* 12 U.S.C. 93a, 1462a, 1463, 1464, 1861–1867, and 5412(b)(2)(B).

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

(c) *Scope.* This section describes the procedures and requirements regarding OCC review and approval of a notice by a national bank or Federal savings association to invest in the equity of a bank service company. The OCC may, at any time, limit a national bank's or Federal savings association's investment in a bank service company or may limit or refuse to permit any activities in any bank service company for which a national bank or Federal savings association is the principal investor for supervisory, legal, or safety and soundness reasons.

(d) *Definitions.*—(1) *Bank service company* means a corporation or limited liability company organized to provide

services authorized by the Bank Service Company Act, 12 U.S.C. 1861 *et seq.*, all of whose capital stock is owned by one or more insured depository institutions in the case of a corporation, or all of the members of which are one or more insured depository institutions in the case of a limited liability company.

(2) *Limited liability company* means any company, partnership, trust, or similar business entity organized under the law of a State (as defined in section 3(a)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(a)(3)) which provides that a member or manager of such company is not personally liable for a debt, obligation, or liability of the company solely by reason of being, or acting as, a member or manager of such company.

(3) *Depository institution* for purposes of this section, means, except when such term appears in connection with the term 'insured depository institution', an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(h)), a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(1)), a financial institution subject to examination by the appropriate Federal banking agency or the National Credit Union Administration Board, or a financial institution the accounts or deposits of which are insured or guaranteed under State law and are eligible to be insured by the FDIC or the National Credit Union Administration Board.

(4) *Insured depository institution*, for purposes of this section, has the same meaning as in section 3(c)(2) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(2).

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

(6) *Principal investor* means the insured depository institution that has the largest amount invested in the equity of a bank service company. In any case where two or more insured depository institutions have equal amounts invested and no other insured depository institution has a larger amount

invested, the bank service company must designate one of those insured depository institutions as its principal investor.

(e) *Standards and requirements.* A national bank or Federal savings association may invest in a bank service company that conducts activities described in paragraphs (f)(3) and (f)(4) of this section and activities (other than taking deposits) permissible for the national bank or Federal savings association and other insured depository institution shareholders or members of the bank service company.

(f) *Procedures*—(1) *OCC notice and approval required.* Except as provided in paragraphs (f)(3) and (f)(4) of this section, a national bank or Federal savings association that intends to invest in the equity of a bank service company, or to perform new activities in an existing bank service company, must submit a notice to and receive prior approval from the OCC. The notice must include the information required by paragraph (g) of this section. The OCC approves or denies a proposed investment within 60 days after the filing is received by the OCC, unless the OCC notifies the bank prior to that date that the filing presents a significant supervisory or compliance concern, or raises a significant legal or policy issue.

(2) *Expedited review for certain activities.* (i) A notice to invest in the equity of a bank service company, or to perform new activities in an existing bank service company, that meets the requirements of this paragraph is deemed approved by the OCC as of the 30th day after the notice is received by the OCC, unless the OCC notifies the filer prior to that date that the filing is not eligible for expedited review or the expedited review process is extended. Any bank or savings association making an investment pursuant to this paragraph is deemed to have agreed that the bank service company will conduct the activity in a manner consistent with the published OCC guidance.

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

(A) The national bank or Federal savings association is well capitalized and well managed; and

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(B) The bank service company engages only in activities that are permissible for the bank service company under 12 U.S.C. 1864 and that are listed in §5.34(f)(5) or §5.38(f)(5), as applicable.

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

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

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

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

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

(2) A complete description of the activities the bank service company will conduct and a representation and undertaking that the activities will be conducted in accordance with OCC guidance. To the extent the notice relates to the initial affiliation of the national bank or Federal savings association with a company engaged in insurance activities, the national bank or Federal savings association should de-

scribe the type of insurance activity that the company is engaged in and has present plans to conduct. The national bank or Federal savings association also must list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable;

(3) A complete description of the national bank's or Federal savings association's investment in the bank service company and information demonstrating that the national bank or Federal savings association will comply with the investment limitations of paragraph (i) of this section; and

(4) Information demonstrating that the bank service company will perform only those services that each insured depository institution shareholder or member is authorized to perform under applicable Federal or State law and will perform such services only at locations in a State in which each such shareholder or member is authorized to perform such services unless performing services that are authorized by the Federal Reserve Board under the authority of 12 U.S.C. 1865(b).

(h) *Examination and supervision.* Each bank service company in which a national bank or Federal savings association is the principal investor is subject to examination and supervision by the OCC in the same manner and to the same extent as that national bank or Federal savings association. OCC authority under this paragraph is subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

(i) *Investment limitations.* A national bank or Federal savings association must comply with the investment limitations specified in 12 U.S.C. 1862.

[80 FR 28448, May 18, 2015, as amended at 85 FR 80458, Dec. 11, 2020]

§5.36 Other equity investments by a national bank

(a) *Authority.* 12 U.S.C. 1 *et seq.*, 24(Seventh), 93a, and 3101 *et seq.*

(b) *Scope.* National banks are permitted to make various types of equity investments pursuant to 12 U.S.C.

24(Seventh) and other statutes. These investments are in addition to those subject to §§5.34, 5.35, 5.37, and 5.39. This section describes the procedure governing the filing of the application or notice that the OCC requires in connection with certain of these investments. Other permissible equity investments may be reviewed on a case-by-case basis by the OCC.

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

(1) *Enterprise* means any corporation, limited liability company, partnership, trust, or similar business entity.

(2) *Non-controlling investment* means an equity investment made pursuant to 12 U.S.C. 24(Seventh) that is not governed by procedures prescribed by another OCC rule. A *non-controlling investment* does not include a national bank holding interests in a trust formed for the purposes of securitizing assets held by the bank as part of its banking business or for the purposes of holding multiple legal titles of motor vehicles or equipment in conjunction with lease financing transactions.

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

(i) An agricultural credit corporation;

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

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

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

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

(e) *Non-controlling investments; notice procedure.* Except as provided in paragraphs (f), (g), and (h) of this section, a national bank may make a non-controlling investment, directly or through its operating subsidiary, in an enterprise that engages in an activity described in §5.34(f)(5) or in an activity that is substantively the same as a pre-

viously approved activity by filing a written notice. The bank must file this written notice with the appropriate OCC licensing office no later than 10 days after making the investment. The written notice must:

(1) Describe the structure of the investment and the activity or activities conducted by the enterprise in which the bank is investing. To the extent the notice relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable;

(2) State:

(i) Which paragraphs of §5.34(f)(5) describe the activity; or

(ii) If the activity is substantively the same as a previously approved activity:

(A) How the activity is substantively the same as a previously approved activity;

(B) The citation to the applicable precedent; and

(C) That the activity will be conducted in accordance with the same terms and conditions applicable to the previously approved activity;

(3) Certify that the bank is well capitalized and well managed at the time of the investment;

(4) Describe how the bank has the ability to prevent the enterprise from engaging in activities that are not set forth in §5.34(f)(5) or not contained in published OCC precedent for previously approved activities, or how the bank otherwise has the ability to withdraw its investment;

(5) Describe how the investment is convenient and useful to the bank in carrying out its business and not a mere passive investment unrelated to the bank's banking business;

(6) Certify that the bank's loss exposure is limited as a legal matter and that the bank does not have unlimited liability for the obligations of the enterprise; and

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(7) Certify that the enterprise in which the bank is investing agrees to be subject to OCC supervision and examination, subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

(f) *Non-controlling investment; application procedure*—(1) *In general*. A national bank must file an application and obtain prior approval before making or acquiring, either directly or through an operating subsidiary, a non-controlling investment in an enterprise if the non-controlling investment does not qualify for the notice procedure set forth in paragraph (e) of this section because the bank is unable to make the representation required by paragraph (e)(2) or the certifications required by paragraphs (e)(3) or (e)(7) of this section. The application must include the information required in paragraphs (e)(1) and (e)(4) through (e)(6) of this section and, if possible, the information required by paragraphs (e)(2), (e)(3), and (e)(7) of this section. If the bank is unable to make the representation set forth in paragraph (e)(2) of this section, the bank's application must explain why the activity in which the enterprise engages is a permissible activity for a national bank and why the filer should be permitted to hold a non-controlling investment in an enterprise engaged in that activity. A bank may not make a non-controlling investment if it is unable to make the representations and certifications specified in paragraphs (e)(1) and (e)(4) through (e)(6) of this section.

(2) *Expedited review*. An application submitted by a national bank is deemed approved by the OCC as of the 10th day after the application is received by the OCC if:

(i) The national bank makes the representation required by paragraph (e)(2) and the certification required by paragraph (e)(3) of this section;

(ii) The book value of the national bank's non-controlling investment for which the application is being submitted is no more than 1% of the bank's capital and surplus;

(iii) No more than 50% of the enterprise is owned or controlled by banks

or savings associations subject to examination by an appropriate Federal banking agency or credit unions insured by the National Credit Union Association; and

(iv) The OCC has not notified the national bank that the application has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

(g) *Non-controlling investment; no application or notice required*. A national bank may make or acquire, either directly or through an operating subsidiary, a non-controlling investment in an enterprise without an application or notice to the OCC, if the:

(1) Activities of the enterprise are limited to those activities previously reported by the bank in connection with the making or acquiring of a non-controlling investment;

(2) Activities of the enterprise continue to be legally permissible for a national bank;

(3) The bank's non-controlling investment will be made in accordance with any conditions imposed by the OCC in approving any prior non-controlling investment in an enterprise conducting these same activities; and

(4) The bank is able to make the representations and certifications specified in paragraphs (e)(3) through (e)(7) of this section.

(h) *Non-controlling investments in entities holding assets in satisfaction of debts previously contracted*. Certain non-controlling investments may be eligible for expedited treatment where the bank's investment is in an entity holding assets in satisfaction of debts previously contracted or the bank acquires shares of a company in satisfaction of debts previously contracted.

(1) *Notice required*. A national bank that is well capitalized and well managed may acquire a non-controlling investment, directly or through its operating subsidiary, in an enterprise that engages in the activities of holding and managing assets acquired by the parent bank through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted, by filing a written notice in accordance with this paragraph (h)(1). The activities of the enterprise

must be conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a national bank. The bank must file the written notice with the appropriate OCC licensing office no later than 10 days after making the non-controlling investment. This notice must include a complete description of the bank's investment in the enterprise and the activities conducted, a description of how the bank plans to divest the non-controlling investment or the underlying assets within applicable statutory time frames, and a representation and undertaking that the bank will conduct the activities in accordance with OCC policies contained in guidance issued by the OCC regarding the activities. Any national bank receiving approval under this paragraph (h)(1) is deemed to have agreed that the enterprise will conduct the activity in a manner consistent with published OCC guidance.

(2) *No notice or application required.* A national bank is not required to file a notice or application under this §5.36 if it acquires a non-controlling investment in shares of a company through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted.

(i) *Non-controlling investments by Federal branches.* A Federal branch that is well capitalized and well managed may make a non-controlling investment in accordance with paragraph (e) of this section in the same manner and subject to the same conditions and requirements as a national bank, and subject to any additional requirements that may apply under 12 CFR 28.10(c).

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

[61 FR 60363, Nov. 27, 1996, as amended at 65 FR 12913, Mar. 10, 2000; 65 FR 41560, July 6, 2000; 68 FR 70698, Dec. 19, 2003; 73 FR 22239, Apr. 24, 2008; 79 FR 11310, Feb. 28, 2014; 80 FR 28449, May 18, 2015; 85 FR 80458, Dec. 11, 2020]

§5.37 Investment in national bank or Federal savings association premises.

(a) *Authority.* 12 U.S.C. 29, 93a, 371d, 1464(c)(2), 1464(c)(4)(B), 1828(m), and 5412(b)(2)(B).

(b) *Scope.* This section addresses a national bank's or Federal savings association's investment in banking premises and other premises-related investments, loans, or indebtedness. This section also sets forth the quantitative investment limitations and procedures governing the OCC's review and approval of an application by a national bank or Federal savings association to invest in these premises.

(c) *Definitions.* The following definitions apply for purposes of this section.

(1) *Banking premises* includes:

(i) Premises that are owned and occupied (or to be occupied, if under construction) by a national bank or Federal savings association, its respective branches, or its consolidated subsidiaries;

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

(iii) Remodeling costs to existing premises;

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

(v) Parking facilities that are used by customers or employees of the national bank or Federal savings association.

(2) *Capital stock* means, for national banks and Federal stock savings associations, the amount of common stock outstanding and unimpaired plus the amount of perpetual preferred stock outstanding and unimpaired. With respect to Federal mutual savings associations, "capital stock" should be read to mean the amount of the association's retained earnings.

(d) *Procedure—(1) Premises application—(i) When required.* A national bank or Federal savings association must submit an application to the appropriate OCC supervisory office to invest in banking premises, or in the stock, bonds, debentures, or other such obligations of any corporation, partnership, or similar entity (e.g., a limited liability company) holding the premises of the national bank or Federal savings association, or to make loans

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to or upon the security of the stock of such corporation, if the aggregate of all such investments and loans, together with the indebtedness incurred by any such corporation that is an affiliate of the national bank or Federal savings association, as defined in 12 U.S.C. 221a or 12 U.S.C. 1462, respectively, will exceed the amount of the capital stock of the national bank or Federal savings association, or, in the case of a Federal mutual savings association the amount of retained earnings.

(ii) *Contents of premises application.* The application must include:

(A) A description of the national bank's or Federal savings association's present investment in banking premises;

(B) The investment in banking premises that the national bank or Federal savings association intends to make, and the business reason for making the investment; and

(C) The amount by which the national bank's or Federal savings association's aggregate investment will exceed the amount of the national bank's or Federal stock savings association's capital stock, or, in the case of a Federal mutual savings association, the amount of retained earnings.

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

(3) *Premises notice process—(i) General rule.* Notwithstanding paragraph (d)(1)(i) of this section, a national bank or Federal savings association that is rated 1 or 2 under the Uniform Financial Institutions Rating System (CAM-ELS) may make an aggregate invest-

ment in banking premises up to 150 percent of the national bank's or Federal savings association's capital and surplus without the OCC's prior approval, provided that the national bank or Federal savings association is well capitalized and will continue to be well capitalized after the investment or loan is made. However, the national bank or Federal savings association must notify the appropriate OCC supervisory office in writing of the investment within 30 days after the investment or loan is made. The written notice must include a description of the national bank's or Federal savings association's investment or loan.

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

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

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

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

§ 5.38 Operating subsidiaries of a Federal savings association.

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

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

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

(d) [Reserved]

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

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

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

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

(B) The parent savings association owns and controls more than 50 percent of the voting (or similar type of controlling) interest of the operating sub-

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

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

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

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

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

(B) A subsidiary in which the savings association has acquired, in good faith, shares through foreclosure on collateral, by way of compromise of a doubtful claim, or to avoid a loss in connection with a debt previously contracted; and

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

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

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

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

(3) *Examination and supervision.* An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent Federal savings association, unless otherwise specifically provided by statute, regulation, or published OCC policy, including sections 1045 and 1046 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12

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

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

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

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

(ii) The application must explain, as appropriate, how the savings association “controls” the enterprise, describing in full detail structural arrangements where control is based on factors other than savings association ownership of more than 50 percent of the voting interest of the subsidiary and the ability to control the management and operations of the subsidiary by holding voting interests sufficient to select the number of directors needed to control the subsidiary’s board and to select and terminate senior management. In the case of a limited partnership or limited liability company that does not qualify

for the expedited review procedure set forth in paragraph (f)(2) of this section, the savings association must provide a statement explaining why it is not eligible. The application also must include a complete description of the savings association’s investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the savings association and the subsidiary, and other information necessary to adequately describe the proposal. To the extent that the application relates to the initial affiliation of the savings association with a company engaged in insurance activities, the savings association must describe the type of insurance activity in which the company is engaged and has present plans to conduct. The savings association must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable. The application must state whether the operating subsidiary will conduct any activity at a location other than the home office or a previously approved branch of the savings association. The OCC may require a filer to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In these cases, the OCC encourages filers to have a prefilings meeting with the OCC. Any savings association receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

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

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conduct the activity in a manner consistent with published OCC guidance.

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

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

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

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

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

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

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

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

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

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

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

(i) In the case of a subsidiary that is a limited partnership, the savings association or an operating subsidiary thereof is the sole general partner of the limited partnership, provided that under the partnership agreement, limited partners have no authority to bind the partnership by virtue solely of their status as limited partners;

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

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

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

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

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

(5) *Activities eligible for expedited review.* The following activities qualify for the expedited review procedures in

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paragraph (f)(2) of this section, provided the activity is conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a Federal savings association:

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

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

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

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

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

(vi) Providing check payment services;

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

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

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

(x) Leasing of personal property;

(xi) Providing securities brokerage;

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

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

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

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

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

(xvi) Offering debt cancellation or debt suspension agreements;

(xvii) Providing escrow services;

(xviii) Acting as a transfer agent; and

(xix) Providing or selling postage stamps.

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

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

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

(8) *Expiration of approval.* Approval expires if the Federal savings association has not established or acquired the operating subsidiary, or commenced the new activity in an existing operating subsidiary within 12 months after the date of the approval, unless the OCC shortens or extends the time period.

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

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

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

§ 5.39 Financial subsidiaries of a national bank.

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

(b) *Approval requirements.* A national bank must file an application as prescribed in this section prior to acquir-

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

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

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

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

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

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

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

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

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

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

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

(ii) A national bank is specifically authorized to control by the express

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terms of a Federal statute (other than section 5136A of the Revised Statutes), and not by implication or interpretation, such as by section 25 of the Federal Reserve Act (12 U.S.C. 601-604a), section 25A of the Federal Reserve Act (12 U.S.C. 611-631), or the Bank Service Company Act (12 U.S.C. 1861 *et seq.*)

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

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

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

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

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

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

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

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

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

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

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

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

lation, unless the order or regulation is modified by the Board of Governors of the Federal Reserve System);

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) The national bank must have procedures for identifying and managing

financial and operational risks within the bank and the financial subsidiary that adequately protect the national bank from such risks;

(5) Except for a subsidiary of a bank that is considered a financial subsidiary under paragraph (d)(5) of this section solely because the subsidiary engages in the sale of insurance as agent or broker in a manner that is not permitted for national banks, sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c-1), as implemented by Regulation W, 12 CFR part 223, apply to transactions involving a financial subsidiary in the following manner:

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

(ii) [Reserved]

(iii) A bank's purchase of or investment in a security issued by a financial subsidiary of the bank must be valued at the greater of:

(A) The total amount of consideration given (including liabilities assumed) by the bank, reduced to reflect amortization of the security to the extent consistent with GAAP, or

(B) The carrying value of the security (adjusted so as not to reflect the bank's *pro rata* portion of any earnings retained or losses incurred by the financial subsidiary after the bank's acquisition of the security).

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

(v) Any extension of credit to a financial subsidiary of a bank by an affiliate of the bank is treated as an extension of credit by the bank to the financial subsidiary if the extension of credit is treated as capital of the financial subsidiary under any Federal or State law, regulation, or interpretation applicable to the subsidiary; and

(vi) Any other extension of credit by an affiliate of a bank to a financial subsidiary of the bank may be considered an extension of credit by the bank to the financial subsidiary if the Board of Governors of the Federal Reserve System determines that such treatment is necessary or appropriate to

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prevent evasions of the Federal Reserve Act and the Gramm-Leach-Bliley Act.

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

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

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

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

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

(B) Describe the activity or activities conducted by the financial subsidiary. To the extent the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable;

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

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

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

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

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

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

(ii) Describe the activity or activities to be conducted in the financial subsidiary. To the extent the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable;

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

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

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

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

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

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

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

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

sidiary. A national bank that fails to continue to satisfy these requirements will be subject to the following procedures and requirements:

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

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

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

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

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

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by the financial subsidiary if the instrument qualifies as capital of the subsidiary under Federal or State law, regulation, or interpretation applicable to the subsidiary.

(k) *Examination and supervision.* A financial subsidiary is subject to examination and supervision by the OCC, subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

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

APPENDIX A TO SUBPART C OF PART 5— POLICY STATEMENT REGARDING STATUTORY FACTORS UNDER THE BANK MERGER ACT

I. INTRODUCTION

The purpose of this policy statement is to provide insured depository institutions (institutions) and the public with a better understanding of how the Office of the Comptroller of the Currency (OCC) considers certain statutory factors under the Bank Merger Act (BMA), 12 U.S.C. 1828(c). The matters discussed in this statement are intended to provide greater transparency, facilitate interagency coordination, and enhance public engagement.

II. GENERAL PRINCIPLES OF OCC REVIEW

The OCC aims to act promptly on all applications. The agency's range of potential actions on applications includes approval, denial, and requesting that an applicant withdraw the application because any shortcomings are unlikely to be resolved in a timely manner. Applications that tend to withstand scrutiny more easily and are more likely to be approved expeditiously generally feature all of the following indicators:

1. The acquirer is well capitalized under §5.3, and the resulting institution will be well capitalized;
2. The resulting institution will have total assets less than \$50 billion;
3. The acquirer has a Community Reinvestment Act (CRA) rating of Outstanding or Satisfactory;
4. The acquirer has composite and management ratings of 1 or 2 under the Uniform Financial Institution Ratings System (UFIRS) or ROCA rating system;
5. The acquirer has a consumer compliance rating of 1 or 2 under the Uniform Interagency Consumer Compliance Rating System (CC Rating System), if applicable;

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6. The acquirer has no open formal or informal enforcement actions;

7. The acquirer has no open or pending fair lending actions, including referrals or notifications to other agencies;

8. The acquirer is effective in combatting money laundering activities;

9. The target's total assets are less than or equal to 50% of acquirer's total assets;

10. The target is an eligible depository institution as defined in §5.3;

11. The proposed transaction clearly would not have a significant adverse effect on competition;

12. The OCC has not identified a significant legal or policy issue; and

13. No adverse comment has raised a significant CRA or consumer compliance concern.

If certain indicators that raise supervisory or regulatory concerns are present, the OCC is unlikely to find that the statutory factors under the BMA are consistent with approval unless and until the applicant has adequately addressed or remediated the concern. The following are examples of indicators that raise supervisory or regulatory concerns:

1. The acquirer has a CRA rating of Needs to Improve or Substantial Noncompliance.

2. The acquirer has a consumer compliance rating of 3 or worse.

3. The acquirer has UFIRS or ROCA composite or management ratings of 3 or worse or the most recent report of examination otherwise indicates that the acquirer is not financially sound or well managed.

4. The acquirer is a global systemically important banking organization or subsidiary thereof.

5. The acquirer has open or pending Bank Secrecy Act/Anti-money Laundering, fair lending, or consumer compliance actions, including enforcement actions, referrals, or notifications to other agencies.

6. The acquirer has failed to adopt, implement, and adhere to all the corrective actions required by a formal enforcement action in a timely manner, or there have been multiple enforcement actions against the acquirer executed or outstanding during a three-year period.

III. FINANCIAL STABILITY

A. Factors Considered

The BMA requires the OCC to consider “the risk to the stability of the United States banking or financial system” when reviewing transactions subject to the Act. In reviewing a BMA application under this factor, the OCC considers the following factors:

1. Whether the proposed transaction would result in a material increase in risks to financial system stability due to an increase in size of the combining institutions.

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2. Whether the proposed transaction would result in a reduction in the availability of substitute providers for the services offered by the combining institutions.
3. Whether the resulting institution would engage in any business activities or participate in markets in a manner that, in the event of financial distress of the resulting institution, would cause significant risks to other institutions.
4. Whether the proposed transaction would materially increase the extent to which the combining institutions contribute to the complexity of the financial system.
5. Whether the proposed transaction would materially increase the extent of cross-border activities of the combining institutions.
6. Whether the proposed transaction would increase the relative degree of difficulty of resolving or winding up the resulting institution's business in the event of failure or insolvency.
7. Any other factors that could indicate that the transaction poses a risk to the U.S. banking or financial system.

B. Balancing Test

1. *In general:* The OCC applies a balancing test when considering the factors in section III.A. of this appendix in light of all the facts and circumstances available regarding the proposed transaction, including weighing the financial stability risk posed by the proposed transaction against the financial stability risk posed by denial of the proposed transaction, particularly if the proposed transaction involves a troubled target. The OCC considers each factor both individually and in combination with others. Even if only a single factor indicates that the proposed transaction would pose a risk to the stability of the U.S. banking or financial system, the OCC may determine that there would be an adverse effect of the proposal on the stability of the U.S. banking or financial system. Finally, the OCC also considers whether the proposed transaction would provide any stability benefits and whether enhanced prudential standards applicable as a result of the proposed transaction would offset any potential risks.

2. *Conditions:* The OCC's review of the financial stability factors will include, as appropriate, whether to impose conditions on approval of the transaction. The OCC may impose conditions, enforceable under 12 U.S.C. 1818, to address and mitigate financial stability risk concerns, such as requiring asset divestitures by the resulting institution, imposing higher minimum capital requirements, or imposing other financial stability-related conditions.

3. *Recovery planning and heightened standards:* The OCC's review of the financial stability factors will consider the impact of the proposed transaction in light of:

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b. Standards applicable to the resulting institution pursuant to 12 CFR part 30, appendix D, "OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches"; and

c. Standards applicable to the resulting institution's recovery planning pursuant to 12 CFR part 30, appendix E, "OCC Guidelines Establishing Standards for Recovery Planning by Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches".

4. *Concurrent filings:* the OCC's review of the financial stability factors may consider the facts, circumstances, and representations of concurrent filings for related transactions, including the impact of the related transactions to the proposed transaction under review by the OCC.

IV. FINANCIAL AND MANAGERIAL RESOURCES AND FUTURE PROSPECTS

The OCC is required by the BMA to consider the managerial resources, financial resources, and future prospects of the combining and the resulting institutions. The OCC considers each of these factors independently for both the combining and resulting institutions. However, because these factors are directly related to one another, the OCC also considers these factors holistically.

A. Overarching Considerations

1. The OCC tailors its consideration of the financial and managerial resources and future prospects of the combining and resulting institutions to their size, complexity, and risk profile.

2. The OCC considers these factors within the context of the prevailing economic and operating environment.

3. The OCC is more likely to approve combinations where the acquirer has sufficient financial and managerial resources to ensure safe and sound operations of the resulting institution than when:

a. The acquirer has a less than satisfactory supervisory record, including its financial and managerial resources;

b. The acquirer has experienced rapid growth;

c. The acquirer has engaged in multiple acquisitions with overlapping integration periods;

d. The acquirer has failed to comply with conditions imposed in prior OCC licensing decisions; or

e. The acquirer is functionally the target in the transaction.

4. The OCC normally does not approve a combination that would result in a depository institution with less than adequate capital or liquidity, less than satisfactory management, or poor earnings prospects.

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5. The OCC considers all comments received on proposed business combinations. However, the OCC's consideration of an institution's financial and managerial resources and future prospects are necessarily based on confidential supervisory information. While the OCC will provide an appropriate discussion of comments pertaining to the financial resources, managerial resources, and future prospects factors, it will generally not discuss or otherwise disclose confidential supervisory information in public decision letters.

B. Individual Factors

1. Financial Resources:

a. The OCC reviews the existing and proposed institutions' current and pro forma capital levels.

i. The OCC reviews for compliance with the applicable capital ratios required by 12 CFR part 3 and the Prompt Corrective Action capital categories established by 12 CFR 6.4.

ii. The OCC may not approve a combination application filed by an insured depository institution that is undercapitalized as defined in 12 CFR 6.4 unless it has approved the institution's capital restoration plan or the Board of Directors of the Federal Deposit Insurance Corporation has determined that the transaction would fulfill the purposes of 12 U.S.C. 1831o.

b. The OCC closely scrutinizes transactions that increase the risk to the bank's financial condition and resilience, including bank capital, liquidity, and earnings, that can arise from any of the eight categories of risk included in the OCC's Risk Assessment System: credit, interest rate, liquidity, price, operational, compliance, strategic, and reputation.

c. In relation to the financial resources factor, the OCC considers management's ability to address increased risks that would result from the transaction.

d. A transaction involving an acquirer with a strong supervisory record relative to capital, liquidity, and earnings is more likely to satisfy the review factors. By contrast, a transaction involving an acquirer with a recent less than satisfactory financial or supervisory record is less likely to satisfy this factor.

2. Managerial Resources: The OCC considers several factors when considering the managerial resources of the institutions.

a. The OCC considers the supervisory record and current condition of both the acquirer and target to determine if the resulting institutions will have sufficient managerial resources to manage the resulting institution.

i. A significant number of MRAs suggests there may be insufficient managerial resources. Additionally, the OCC considers both institutions' management ratings under the UFIRS or ROCA system and component ratings under the CC Rating System, Uni-

form Rating System for Information Technology, and Uniform Interagency Trust Rating System, as applicable.

ii. When applicable, the OCC also considers the relevant Risk Assessment System (RAS) conclusions for the combining institutions.

iii. The OCC considers the context in which a rating or RAS element was assigned and any additional information resulting from ongoing supervision.

iv. Less than satisfactory ratings at the target do not preclude the approval of a transaction provided that the acquirer can employ sufficiently robust risk management and financial resources to correct the weaknesses at the target.

b. The OCC considers whether the acquirer has conducted sufficient due diligence of the target depository institution to understand the business model, systems compatibility, and weaknesses of the target. To facilitate the OCC's review, the acquirer's management team should demonstrate its plans and ability to address the acquirer's previously identified weaknesses, remediate the target's weaknesses, and exercise appropriate risk management for the size, complexity, and risk profile of the resulting institution.

c. The OCC also considers the acquirer's analysis and plans to integrate the combining institutions' operations, including systems and information security processes, products, services, employees, and cultures. The OCC's consideration and degree of scrutiny reflects the applicant's track record with information technology governance, business continuity resilience, and, as applicable, integrating acquisitions.

d. The OCC considers the acquirer's plans to identify and manage systems compatibility and integration issues, such as information technology compatibility and the implications for business continuity resilience. Any combination in which the OCC identifies systems integration concerns may lead to additional review.

i. A critical component of these plans includes the acquirer's identification and assessment of overreliance on manual controls, strategies for automating critical processes, and the strategies and capacity for modernization of aging and legacy information technology systems.

ii. The OCC may impose conditions, enforceable pursuant to 12 U.S.C. 1818, if it determines that information technology systems compatibility and integration represent a supervisory significant concern. These conditions may include requirements and time frames for specific remedial actions and specific measures for assessing and evaluating the depository institution's systems integration progress.

iii. The OCC may deny the application if the integration issues or other issues present significant supervisory concerns, and the

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issues cannot be resolved through appropriate conditions or otherwise.

e. The OCC also considers the proposed governance structure of the resulting institution. This includes governance in decision-making processes, the board management oversight structure, and the risk management system, including change management. This also includes expansion of existing activities, introduction of new or more complex products or lines of business, and implications for managing existing and acquired subsidiaries and equity investments. When applicable, the resulting institution's governance is also considered in the context of the institution's relationship with its holding company and the scope of the holding company's activities.

3. Future Prospects:

a. The OCC considers the resulting institution's future prospects in light of its assessment of the institutions' financial and managerial resources.

b. The OCC also considers the proposed operations of the resulting institution. The OCC's consideration and degree of scrutiny reflects the acquirer's record of integrating acquisitions.

i. The OCC considers whether the integration of the combining institutions would allow it to function effectively as a single unit.

ii. The OCC considers the resulting institution's business plan or strategy and management's ability to implement it in a safe and sound manner.

iii. The OCC also considers the combination's potential impact on the resulting institution's continuity planning and operational resilience.

V. CONVENIENCE AND NEEDS

A. The OCC considers the probable effects of the proposed business combination on the community to be served. Review of the convenience and needs factor is prospective and considers the likely impact on the community of the resulting institution after the transaction is consummated, including but not limited to:

1. Any plans to close, consolidate, limit, or expand branches or branching services, including in low- or moderate-income (LMI) areas;

2. Any plans to reduce the availability or increase the cost of banking services or products, or plans to provide expanded or less costly banking services or products to the community;

3. Any plans to maintain, reduce, or improve credit availability throughout the community, including, for example, access to home mortgage, consumer, small business, and small farm loans;

4. Job losses or reduced job opportunities from branch staffing changes, including branch closures or consolidations;

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5. Community investment or development initiatives, including, for example, community reinvestment, community development investment, and community outreach and engagement strategies; and

6. Efforts to support affordable housing initiatives and small businesses.

B. The OCC considers comments received during the comment period and information provided during any public hearing or meeting related to the proposed business combination. To the extent public comments or discussions address issues involving confidential supervisory information, however, the OCC generally will not discuss or otherwise disclose that confidential supervisory information in public decision letters and forums.

C. The OCC considers the CRA record of performance of an applicant in evaluating a business combination application. The OCC's forward-looking evaluation of the convenience and needs factor under the BMA is separate and distinct from its consideration of the CRA record of performance of an applicant in helping to meet the credit needs of the relevant community, including LMI neighborhoods.

VI. PUBLIC COMMENT PERIOD AND PUBLIC MEETINGS

A. Public Comment Period

1. Unless an exception applies, a combination under the BMA is subject to a 30-day comment period following publication of the notice of the proposed combination. The OCC may extend the comment period in certain instances:

a. When a filer fails to file all required publicly available information on a timely basis or makes a request for confidential treatment not granted by the OCC;

b. When requested and the OCC determines that additional time is necessary to develop factual information necessary to consider the filing; and

c. When the OCC determines that other extenuating circumstances exist.

2. The OCC may find that additional time is necessary to develop factual information if a filer's response to a comment does not fully address the matters raised in the comment, and the commenter requests an opportunity to respond.

3. Examples of extenuating circumstances necessitating an extension include:

a. Transactions in which public meetings are held to allow for public comment after the meeting;

b. Unusual transactions (e.g., novel or complex transactions); and

c. Natural or other disasters occurring in geographic regions affecting the public's ability to timely submit comments.

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B. Public Meetings

1. While the BMA does not require the OCC to hold meetings or hearings, the OCC has three methods for seeking oral input: (1) public hearing, (2) public meeting, and (3) private meeting. Public meetings are the most- employed public option.

2. The OCC will balance the public's interest in the transaction with the value or harm of a public meeting to the decision- making process (e.g., although there may be increased public interest in a transaction, a public meeting will not be held if it would not inform the OCC's decision on an application or would otherwise harm the decision- making process).

3. Criteria informing the OCC's decision on whether to hold public meetings include:

a. The extent of public interest in the proposed transaction.

b. Whether a public meeting is appropriate in order to document or clarify issues presented by a particular transaction based on issues the public raises during the public comment process.

c. Whether a public meeting would provide useful information that the OCC would not otherwise be able to obtain in writing.

d. The significance of the transaction to the banking industry. Relevant considerations may include the asset sizes of the institutions involved (e.g., resulting institution will have \$50 billion or more in total assets) and concentration of the resulting institution in one or more markets.

e. The significance of the transaction to the communities affected. Relevant considerations may include the effects of the transaction on the convenience and needs of the community to be served, including a consideration of a bank's CRA strategy and the extent to which the acquirer and target are currently serving the convenience and needs of their communities.

f. The acquirer's and target's CRA, consumer compliance, fair lending, and other pertinent supervisory records, as applicable.

[89 FR 78218, Sept. 25, 2024]

Subpart D—Other Changes in Activities and Operations

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

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

(b) *Scope.* This section describes OCC procedures and approval standards for an application or a notice by a national bank to change the location of its main office or by a Federal savings associa-

tion to change the location of its home office.³ A national bank or Federal savings association must follow the procedures described in paragraph (c) of this section to relocate its main office or home office, as applicable.

(c) *Licensing requirements and procedures*—(1) *Main office or home office relocation to an authorized branch location within city, town, or village limits.* A national bank or Federal savings association may change the location of its main office or home office, as applicable, to an authorized branch location (approved or existing branch site) within the limits of the same city, town, or village. The national bank or Federal savings association must give prior notice to the appropriate OCC licensing office before the relocation. The notice must include the new address of the main office or home office, as applicable, and the effective date of the relocation.

(2) *To any other location*—(i) *National banks.* A national bank must submit an application to the appropriate OCC licensing office and obtain prior OCC approval to relocate its main office to any other location in the city, town, or village in which the main office of the bank is located other than an authorized branch location or to any other location within 30 miles of the limits of such city, town, or village. If relocating the main office outside the limits of its city, town, or village, a national bank must also obtain the approval of shareholders owning two-thirds of the voting stock of the bank

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

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and must amend its articles of association.

(ii) *Federal savings associations.* A Federal savings association must submit an application to the appropriate OCC licensing office and obtain prior OCC approval to relocate its home office to any location other than an authorized branch location within the city, town, or village in which the home office of the savings association is located. If relocating the home office outside the limits of its city, town, or village, a Federal savings association must obtain any shareholder or member approval required under its charter for such relocation and must amend its charter.

(3) *Establishment of a branch at site of former main office or home office.* A national bank or Federal savings association desiring to establish a branch at its former main office or home office location, as applicable, must follow the provisions of §5.30 or §5.31, respectively.

(4) *Expedited review.* A main office or home office relocation application submitted by an eligible bank or eligible savings association under paragraph (c)(2) of this section is deemed approved by the OCC as of the 15th day after the close of the public comment period or the 45th day after the filing is received by the OCC (or in the case of a short-distance relocation the 30th day after the filing is received by the OCC), whichever is later, unless the OCC notifies the bank or savings association prior to that time that the filing has been removed from expedited review, or the expedited review period is extended, under §5.13(a)(2).

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

(ii) The comment period on any application filed under paragraph (c)(2) of this section to engage in a short-dis-

tance relocation of a main office or home office is 15 days.

(d) *Expiration of approval.* Approval expires if the national bank or Federal savings association has not opened its main office or home office, as applicable, at the relocated site within 18 months of the date of approval, unless the OCC grants an extension.

[80 FR 28452, May 18, 2015, as amended at 85 FR 80462, Dec. 11, 2020]

§5.42 Corporate title of a national bank or Federal savings association.

(a) *Authority.* 12 U.S.C. 21a, 30, 93a, 1462a, 1463, 1464, 1467a, 2901 *et. seq.* and, 5412(b)(2)(B).

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

(c) *Standards.* (1) A national bank or Federal savings association may change its corporate title provided that the new title complies with applicable laws, including 18 U.S.C. 709, regarding false advertising and the misuse of names to indicate a Federal agency, and any applicable OCC guidance.

(2) For a national bank, the new title must include the word "national."

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

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

(3) *Amendment to charter.* A Federal savings association must amend its charter in accordance with §5.21 or §5.22, as applicable, to change its title.

(4) *Exceptions to rules of general applicability.* Sections 5.8, 5.9, 5.10, 5.11, and 5.13 do not apply to a national bank or Federal savings association's change of corporate title. However, if the OCC concludes that the notice presents a

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significant or novel policy, supervisory, or legal issue, the OCC may determine that any or all parts of §§ 5.8, 5.9, 5.10, 5.11, and 5.13 apply.

[80 FR 28453, May 18, 2015, as amended at 85 FR 80462, Dec. 11, 2020]

§ 5.43 National bank director residency and citizenship waivers.

(a) *Authority.* 12 U.S.C. 72 and 93a.

(b) *Scope.* This section describes the procedures for the OCC to waive the residency and citizenship requirements for national bank directors set forth at 12 U.S.C. 72.

(c) *Application Procedures—(1) Residency.* A national bank may request a waiver of the residency requirement for any number of directors by filing a written application with the OCC. The OCC may grant a waiver on an individual basis or for any number of director positions. The waiver is valid until the OCC revokes it in accordance with paragraph (d) of this section, or, if granted on an individual basis, until the individual no longer serves on the board.

(2) *Citizenship.* A national bank may request a waiver of the citizenship requirements for individuals who comprise up to a minority of the total number of directors by filing a written application with the OCC. The OCC may grant a waiver on an individual basis. A citizenship waiver is valid until the individual no longer serves on the board or the OCC revokes the waiver in accordance with paragraph (d) of this section.

(3) *Biographical and Financial Reports.* (i) Each subject of a citizenship waiver application must submit to the appropriate OCC licensing office the information prescribed in the Interagency Biographical and Financial Report, available at www.occ.gov.

(ii) The OCC may require additional information about any subject of a citizenship waiver application, including legible fingerprints, if appropriate. The OCC may waive any of the information requirements of paragraph (c)(3)(i) if the OCC determines that doing so is in the public interest.

(4) *Exceptions to rules of general applicability.* Sections 5.8, 5.9, 5.10, and 5.11 do not apply to this section.

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(d) *Revocation of waiver—(1) Procedure.* The OCC may revoke a residency or citizenship waiver. Before revocation, the OCC will provide written notice to the national bank and affected director(s) of its intention to revoke a residency or citizenship waiver and the basis for its intention. The bank and affected director(s) may respond in writing to the OCC within 10 calendar days, unless the OCC determines that a shorter period is appropriate in light of relevant circumstances. The OCC will consider the written responses of the bank and affected director(s), if any, prior to deciding whether or not to revoke a residency or citizenship waiver. The OCC will notify the national bank and the director of the OCC's decision to revoke a residency or citizenship waiver in writing.

(2) *Effective date.* The OCC's decision to revoke a residency or citizenship waiver is effective:

(i) If the director or national bank, or both, appeals pursuant to paragraph (e) of this section, upon the director's receipt of the decision of the Comptroller, an authorized delegate, or the appellate official, to uphold the initial decision to revoke the residency or citizenship waiver; or

(ii) If neither the director nor national bank appeals pursuant to paragraph (e) of this section, upon the expiration of the period to appeal.

(e) *Appeal.* (1) A director or national bank, or both, may seek review by appealing the OCC's decision to revoke a residency or citizenship waiver to the Comptroller, or an authorized delegate, within 15 days of the receipt of the OCC's written decision to revoke. The director or national bank, or both, may appeal on the grounds that the reasons for revocation are contrary to fact or arbitrary and capricious. The appellant must submit all documents and written arguments that the appellant wishes to be considered in support of the appeal.

(2) The Comptroller, or an authorized delegate, may designate an appellate official who was not previously involved in the decision leading to the appeal at issue. The Comptroller, an authorized delegate, or the appellate official considers all information submitted with the original application for the residency or citizenship waiver,

the material before the OCC official who made the initial decision, and any information submitted by the appellant at the time of appeal.

(3) The Comptroller, an authorized delegate, or the appellate official will independently determine whether the reasons given for the initial decision to revoke are contrary to fact or arbitrary and capricious. If they determine either to be the case, the Comptroller, an authorized delegate, or the appellate official may reverse the initial decision to revoke the waiver.

(4) Upon completion of the review, the Comptroller, an authorized delegate, or the appellate official will notify the appellant in writing of the decision. If the initial decision is upheld, the decision to revoke the waiver is effective pursuant to paragraph (d)(2)(i) of this section.

(f) *Prior waivers.* Any waiver granted by the OCC before January 11, 2021 remains in effect unless revoked pursuant to paragraph (d) of this section or, for a waiver granted to an individual, until the individual no longer serves on the board.

[85 FR 80462, Dec. 11, 2020]

§ 5.45 Increases in permanent capital of a Federal stock savings association.

(a) *Authority.* 12 U.S.C. 1462a, 1463, 1464, 1467a, 1831o and 5412(b)(2)(B).

(b) *Licensing requirements.* Generally a Federal stock savings association is not required to apply for an increase in capital unless the method of increase itself requires a filing (such as issuance of a new class of stock). However, in certain circumstances, a Federal stock savings association is required to submit an application and obtain OCC approval.

(c) *Scope.* This section describes procedures and standards relating to a transaction resulting in an increase in a Federal stock savings association's permanent capital.

(d) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to increases in a Federal stock savings association's permanent capital.

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

(1) *Capital plan* means a plan describing the manner and schedule by which a Federal stock savings association will attain specified capital levels or ratios and a capital restoration plan filed with the OCC under 12 U.S.C. 1831o and 12 CFR 6.5.

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

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

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

(ii) Direct capital contributions representing the amounts paid in to the Federal stock savings association other than for capital stock;

(iii) The amount transferred from retained net income; and

(iv) The amount transferred from retained net income reflecting stock dividends.

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

(5) *Retained net income* means the net income of a specified period less the amount of all dividends and other capital distributions declared in that period.

(f) *Policy.* In determining whether to approve a proposed increase in a Federal stock savings association's permanent capital, the OCC considers whether the change is:

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

(2) Provides an adequate capital structure; and

(3) If appropriate, complies with the Federal stock savings association's capital plan.

(g) *Procedures*—(1) *When prior approval is required.* A Federal stock savings association must submit an application to the appropriate OCC licensing office and obtain prior OCC approval to increase its permanent capital if the Federal stock savings association is:

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

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

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

(2) *Content of application.* The application must:

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

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

(iii) State if the Federal stock savings association is subject to a capital plan with the OCC and how the proposed change would conform to a capital plan or if a capital plan is otherwise required in connection with the proposed change in permanent capital.

(3) *Expedited review.* An eligible savings association's application is deemed approved by the OCC 15 days after the date the OCC receives the application, unless the OCC notifies the savings association prior to that date that the application is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2).

(4) *Notice of increase.* (i) If prior approval is required pursuant to this paragraph (g), after a Federal stock savings association completes an increase in capital it must submit a notice to the appropriate OCC licensing office. The notice must contain:

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

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

(C) A statement that the Federal stock savings association has complied with all laws, regulations and conditions imposed by the OCC.

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

(h) *Offers and sales of stock.* A Federal stock savings association must comply with the Securities Offering Disclosure Rules in 12 CFR part 16 for offers and sales of common and preferred stock.

(i) *Shareholder approval.* A Federal stock savings association must obtain the necessary shareholder approval required by statute for any change in its permanent capital.

[80 FR 28453, May 18, 2015, as amended at 82 FR 8104, Jan. 23, 2017; 85 FR 80463, Dec. 11, 2020]

§ 5.46 Changes in permanent capital of a national bank.

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

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

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

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

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

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

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

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

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

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

(iii) The amount transferred from undivided profits; and

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

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

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

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

(2) Provides an adequate capital structure; and

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

(g) *Increases in permanent capital*—(1) *Approval*—(i) *Prior approval not required*. If a national bank is not required to file an application and obtain prior approval under paragraph (g)(1)(ii) of this section, the bank need not submit an application. It must submit the notice of capital increase under paragraph (i)(3) of this section. The increase in capital is deemed approved by the OCC as of the date the increase was made, once the bank has filed the notice of capital increase and the OCC certifies the increase, as provided in paragraph (i)(3).

(ii) *Prior approval required*. In addition to a notice of capital increase under paragraph (i)(3) of this section, a national bank must submit an application under paragraph (i)(1) or (i)(2) of this section and obtain prior OCC approval to increase its permanent capital if the bank is:

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

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

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

(2) *Preferred stock*. Notwithstanding paragraph (g)(1)(i) of this section, in the case of a sale of preferred stock, the national bank must also submit provisions in the articles of association concerning preferred stock dividends, voting and conversion rights, retirement of the stock, and rights to exercise control over management to the appropriate OCC licensing office prior to the sale of the preferred stock. The provisions will be deemed approved by the OCC within 15 days of its receipt, unless the OCC notifies the filer otherwise, including a statement of the reason for the delay.

(h) *Decreases in permanent capital*. A national bank must submit an application and obtain prior approval under paragraph (i)(1) or (i)(2) of this section for any reduction of its permanent capital. A national bank may request approval for a reduction in capital for multiple quarters. The request need only specify a total dollar amount for the requested period and need not specify amounts for each quarter.

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

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

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

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

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

(2) *Expedited review*. An eligible bank's application is deemed approved by the OCC 15 days after the date the OCC receives the application described in paragraph (i)(1) of this section, unless the OCC notifies the bank prior to that date that the application has been removed from expedited review, or the expedited review process is extended, under §5.13(a)(2). An eligible bank seeking to decrease its capital may request OCC approval for up to four consecutive quarters. The request need only specify a total dollar amount for the four-quarter period and need not specify amounts for each quarter. An eligible bank may decrease its capital pursuant to such a plan only if the bank maintains its eligible bank status before and after each decrease in its capital.

(3) *Notice of increase*. (i) After a bank completes an increase in capital it must submit a notice to the appropriate OCC licensing office. The notice must be acknowledged before a notary public by the bank's president, vice president, or cashier and contain:

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

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

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

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

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

(ii) After it receives the notice of capital increase, the OCC issues a certification specifying the amount of the increase and the effective date (*i.e.*, the date on which the increase occurred). In the case of a capital increase for which prior approval was not required pursuant to paragraph (g)(1)(i), the increase is deemed certified by the OCC seven days after receipt of the notice if the OCC has not issued a certification prior to that date.

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

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

(6) *Exception for accounting adjustments.* (i) Changes to the permanent capital accounts that result solely from application of GAAP are not subject to the prior approval or notice requirements in paragraph (i)(1), (3), or (4) of this section, as applicable.

(ii) Within 30 days after the end of the quarter in which the adjustment occurred, a bank must notify the OCC if the accounting adjustment resulted in an increase or decrease to permanent capital in an amount greater than 5% of the bank's total permanent capital prior to the adjustments; or, if the bank is subject to a letter, order, directive, written agreement, or otherwise related to changes in permanent capital. The notification must include the amount and description of the adjustment, including the applicable provision of GAAP.

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

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

[80 FR 28454, May 18, 2015, as amended at 82 FR 8104, Jan. 23, 2017; 85 FR 80463, Dec. 11, 2020]

§5.47 Subordinated debt issued by a national bank.

(a) *Authority.* 12 U.S.C. 1831o, and 3907.

(b) *Scope.* This section sets forth the requirements applicable to all subordinated debt issued by national banks and the procedures for OCC review and approval of a national bank's application to issue or prepay subordinated debt and a notice to include subordinated debt in tier 2 capital.

(c) *Definitions.* The following definitions apply to this section:

Capital plan means a plan describing the means and schedule by which a national bank will attain specified capital levels or ratios, including a capital restoration plan filed with the OCC under 12 U.S.C. 1831o and 12 CFR 6.5.

Original maturity means the stated maturity of the subordinated debt note. If the subordinated debt note does not have a stated maturity, then original maturity means the earliest possible date the subordinated debt note may be redeemed, repurchased, prepaid, terminated, or otherwise retired by the national bank pursuant to the terms of the subordinated debt note.

Payment on subordinated debt means principal and interest, and premium, if any.

Subordinated debt document means any document pertaining to an issuance of subordinated debt, and any renewal, extension, amendment, modification, or replacement thereof, including the subordinated debt note and any global note, pricing supplement, note agreement, trust indenture, paying agent agreement, or underwriting agreement.

Tier 2 capital has the same meaning as set forth in 12 CFR 3.20(d).

(d) *Requirements for issuance of subordinated debt.* A national bank issuing subordinated debt must satisfy the requirements of this paragraph (d).

(1) *Minimum terms.* The terms of any subordinated debt note issued by a national bank must:

(i) Have a minimum original maturity of at least five years;

(ii) Not be a deposit and not insured by the FDIC;

(iii) Be subordinated to the claims of depositors;

(iv) Be unsecured, which would include prohibiting the establishment of any legally enforceable fund earmarked for payment of the subordinated debt note through:

(A) A sinking fund; or

(B) A compensating balance or any other funds or assets subject to a legal right of offset, as defined by applicable State law;

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

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

(vii) Provide that, where applicable, no payment (including payment pursuant to an acceleration clause, redemption prior to maturity, repurchase, or exercising a call option) may be made without prior OCC approval.

(2) *Corporate authority.* A subordinated debt document must not include any provision or covenant that unduly restricts or otherwise acts to unduly limit the authority of a national bank or interferes with the OCC's supervision of the national bank. Specifically, this would include a provision or covenant that:

(i) Maintains a certain minimum amount in its capital accounts or other metric, such as minimum capital assets, liquidity, or loan ratios;

(ii) Unreasonably restricts a national bank's ability to raise additional capital through the issuance of additional subordinated debt or other regulatory capital instruments;

(iii) Provides for default and acceleration of the subordinated debt as the result of a change in control, if such change in control results from the OCC's exercise of its statutory authority to require a national bank to sell stock in that national bank, enter into

a merger or consolidation, or be acquired by a bank holding company;

(iv) Requires the prior approval of a purchaser or holder of the subordinated debt note in the case of a voluntary merger by a national bank where the resulting institution:

(A) Assumes the due and punctual performance of all conditions of the subordinated debt note and agreement; and

(B) Is not in default of the various covenants of the subordinated debt; and

(v) Provides for default and acceleration of the subordinated debt as the result of a default by a subsidiary (including a limited liability company) of the national bank, unless:

(A) There is a separate agreement between the subsidiary and the purchaser of the national bank's subordinated debt note; and

(B) Such agreement has been reviewed and approved by the OCC.

(3) *Disclosure requirements.* (i) A national bank must disclose clearly on the face of any subordinated debt note the following language in all capital letters:

(A) THIS OBLIGATION IS NOT A DEPOSIT AND IS NOT INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION; and

(B) THIS OBLIGATION IS SUBORDINATED TO CLAIMS OF DEPOSITORS AND GENERAL CREDITORS, IS UNSECURED, AND IS INELIGIBLE AS COLLATERAL FOR A LOAN BY [INSERT NAME OF ISSUING NATIONAL BANK].

(ii) A national bank must disclose clearly and accurately in the subordinated debt note:

(A) The order and level of subordination, and in addition to being subordinated to the claims of depositors, provide that, at a minimum, the subordinated debt note is subordinate and junior in its right of payment to the obligations of all creditors, including both secured and unsecured or general creditors, except those specifically designated as ranking on a parity with, or subordinated to, the subordinated debt note;

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(B) A general description of the OCC's regulatory authority with respect to a national bank in danger of insolvency that includes:

(1) With respect to insolvency, that the FDIC, acting as receiver, has authority to transfer a national bank's obligation under the subordinated debt note and to supersede or void any default, acceleration, or subordination that may have occurred;

(2) If a national bank that is "undercapitalized" as defined by applicable law fails to satisfactorily implement a required capital restoration plan, the national bank may be subject to all the additional restrictions and requirements applicable to a "significantly undercapitalized" institution, as defined by applicable law, including being required to sell shares in the national bank, being acquired by a depository institution holding company, or being merged or consolidated with another depository institution, and this authority supersedes and voids any defaults that may have occurred; and

(3) If a national bank is "critically undercapitalized," as defined by applicable law, the national bank is prohibited from making principal or interest payments on the subordinated debt note without prior regulatory approval; and

(C) A description of the OCC's authority under 12 CFR 3.11 to limit distributions, including interest payments on any tier 2 capital instrument if the national bank has full discretion to permanently or temporarily suspend such payments without triggering an event of default, if applicable to the subordinated debt issuance.

(D) A statement that the obligation may be fully subordinated to interests held by the U.S. government in the event that the national bank enters into a receivership, insolvency, liquidation, or similar proceeding.

(iii) A national bank must comply with the Securities Offering Disclosure Rules in 12 CFR part 16.

(e) *Additional requirements to qualify as tier 2 capital.* In order to qualify as tier 2 capital, a national bank's subordinated debt must meet the requirements in 12 CFR 3.20(d).

(f) *Process and procedures—(1) Issuance of subordinated debt—(i) Approval—(A)*

Eligible bank. An eligible bank is required to receive prior approval from the OCC to issue any subordinated debt, in accordance with paragraph (g)(1)(i) of this section, if:

(1) The national bank will not continue to be an eligible bank after the transaction;

(2) The OCC has previously notified the national bank that prior approval is required; or

(3) Prior approval is required by law.

(B) *National bank not an eligible bank.* A national bank that is not an eligible bank must receive prior OCC approval to issue any subordinated debt, in accordance with paragraph (g)(1)(i) of this section.

(ii) *Application to include subordinated debt in tier 2 capital.* A national bank that intends to include subordinated debt in tier 2 capital must submit an application to the OCC for approval, in accordance with paragraph (h) of this section, before or within ten days after issuing the subordinated debt. Where a national bank's application to issue subordinated debt has been deemed to be approved, in accordance with paragraph (g)(2)(i) of this section, and the national bank does not contemporaneously receive approval from the OCC to include the subordinated debt as tier 2 capital, the national bank must submit an application for approval to include subordinated debt in tier 2 capital, pursuant to paragraph (h) of this section, after issuance of the subordinated debt. A national bank may not include subordinated debt in tier 2 capital unless the national bank has filed the application with the OCC and received approval from the OCC that the subordinated debt issued by the national bank qualifies as tier 2 capital.

(2) *Prepayment of subordinated debt—*

(i) *Subordinated debt not included in tier 2 capital—(A) Eligible bank.* An eligible bank is required to receive prior approval from the OCC to prepay any subordinated debt that is not included in tier 2 capital (including acceleration, repurchase, redemption prior to maturity, and exercising a call option), in accordance with paragraph (g)(1)(ii) of this section, only if:

(1) The national bank will not be an eligible bank after the transaction;

(2) The OCC has previously notified the national bank that prior approval is required;

(3) Prior approval is required by law; or

(4) The amount of the proposed prepayment is equal to or greater than one percent of the national bank's total capital, as defined in 12 CFR 3.2.

(B) *National bank not an eligible bank.* A national bank that is not an eligible bank must receive prior OCC approval to prepay any subordinated debt that is not included in tier 2 capital (including acceleration, repurchase, redemption prior to maturity, and exercising a call option), in accordance with paragraph (g)(1)(ii) of this section.

(ii) *Subordinated debt included in tier 2 capital.* All national banks must receive prior OCC approval to prepay subordinated debt included in tier 2 capital, in accordance with paragraph (g)(1)(ii) of this section.

(3) *Material changes to existing subordinated debt documents.* A national bank must receive prior approval from the OCC in accordance with paragraph (g)(1)(iii) of this section prior to making a material change to an existing subordinated debt document if the bank would have been required to receive OCC approval to issue the security under paragraph (f)(1)(i) of this section or to include it in tier 2 capital under paragraph (h) of this section.

(g) *Prior approval procedure*—(1) *Application*—(i) *Issuance of subordinated debt.* A national bank required to obtain OCC approval before issuing subordinated debt must submit an application to the appropriate OCC licensing office. The application must include:

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

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

(C) A copy of the proposed subordinated note and any other subordinated debt documents; and

(D) A statement that the subordinated debt issue complies with all applicable laws and regulations.

(ii) *Prepayment of subordinated debt.* A national bank required to obtain OCC approval before prepaying subordinated

debt, pursuant to paragraph (f)(2) of this section, must submit an application to the appropriate OCC licensing office. The application must include:

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

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

(C) A copy of the subordinated debt note the national bank is proposing to prepay and any other subordinated debt documents; and

(D) Either:

(1) A statement explaining why the national bank believes that following the proposed prepayment the national bank would continue to hold an amount of capital commensurate with its risk; or

(2) A description of the replacement capital instrument that meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20, including the amount of such instrument, and the time frame for issuance.

(iii) *Material changes to existing subordinated debt.* A national bank required to obtain OCC approval before making a material change to an existing subordinated debt document, pursuant to paragraph (f)(3) of this section, must submit an application to the appropriate OCC licensing office. The application must include:

(A) A description of all proposed changes;

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

(C) A copy of the revised subordinated debt documents reflecting all proposed changes; and

(D) A statement that the proposed changes to the subordinated debt documents complies with all applicable laws and regulations.

(iv) *Additional information.* The OCC reserves the right to request additional relevant information, as appropriate.

(2) *Approval*—(i) *General.* The application is deemed approved by the OCC as of the 30th day after the filing is received by the OCC, unless the OCC notifies the national bank prior to that

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date that the filing presents a significant supervisory or compliance concern or raises a significant legal or policy issue.

(ii) *Prepayment.* Notwithstanding this paragraph (g)(2)(i) of this section, if the application for prior approval is for prepayment, the national bank must receive affirmative approval from the OCC. If the OCC requires the national bank to replace the subordinated debt, the national bank must receive affirmative approval that the replacement capital instrument meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20 and must issue the replacement instrument prior to prepaying the subordinated debt, or immediately thereafter.⁴

(iii) *Tier 2 capital.* Following notification to the OCC pursuant to paragraph (f)(1)(ii) of this section that the national bank has issued the subordinated debt, the OCC will notify the national bank whether the subordinated debt qualifies as tier 2 capital.

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

(h) *Application procedure for inclusion in tier 2 capital.* (1) A national bank must submit an application to the appropriate OCC licensing office in writing before or within ten days after issuing subordinated debt that it intends to include in tier 2 capital. A national bank may not include such subordinated debt in tier 2 capital unless the national bank has received approval from the OCC that the subordinated debt qualifies as tier 2 capital.

(2) The application must include:

(i) The terms of the issuance;

(ii) The amount or projected amount and date or projected date of receipt of funds;

(iii) The interest rate or expected calculation method for the interest rate;

(iv) Copies of the final subordinated debt documents; and

(v) A statement that the issuance complies with all applicable laws and regulations.

⁴A national bank may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

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(i) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to transactions governed by this section.

(j) *Subordinated debt issued under the Emergency Capital Investment Program.* A provision or covenant included in a subordinated debt document does not unduly restrict or otherwise act to unduly limit the authority of a national bank or interfere with the OCC's supervision of the national bank, for purposes of paragraph (d)(2) of this section, if the provision or covenant is included pursuant to requirements imposed by the U.S. Department of the Treasury and the subordinated debt is issued under the U.S. Department of the Treasury's Emergency Capital Investment Program pursuant to section 104A of the Community Development Banking and Financial Institutions Act of 1994, added by the Consolidated Appropriations Act, 2021.

[79 FR 75421, Dec. 18, 2014, as amended at 80 FR 28455, May 18, 2015; 85 FR 80464, Dec. 11, 2020; 86 FR 15080, Mar. 22, 2021]

§ 5.48 Voluntary liquidation of a national bank or Federal savings association.

(a) *Authority.* 12 U.S.C. 93a, 181, 182, 1463, 1464, and 5412(b)(1)(B).

(b) *Licensing requirements.* A national bank or a Federal savings association considering going into voluntary liquidation must provide preliminary notice to the OCC. The bank or savings association must also file a notice with the OCC once a liquidation plan is definite. The bank or savings association may not begin liquidation unless the OCC has notified it that the OCC does not object to the liquidation plan.

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

(d) *Standards—(1) In general.* In reviewing a proposed liquidation plan, the OCC will consider:

(i) The purpose of the liquidation;

(ii) Its impact on the safety and soundness of the national bank or Federal savings association; and

(iii) Its impact on the bank's or savings association's depositors, other creditors, and customers.

(2) *National banks.* For national banks, the OCC also will review liquidation plans for compliance with 12 U.S.C. 181 and 182.

(3) *Federal mutual savings associations.* For Federal mutual savings associations, the OCC also will assess the advisability of, and alternatives to, liquidation and the effect of liquidation on all concerned.

(e) *Procedure—(1) Preliminary notice of voluntary liquidation.* A national bank or Federal savings association that is considering going into voluntary liquidation must provide preliminary notice to the appropriate OCC licensing office.

(2) *Submission of liquidation plan and nonobjection.* (i) After a national bank or Federal savings association provides preliminary notice under paragraph (e)(1) of this section, if the bank or savings association plans to proceed with liquidation, it must submit a voluntary liquidation plan to the OCC. A liquidation plan may be effected in whole or part through purchase and assumption transactions.

(ii) The national bank or Federal savings association must receive the OCC's non-objection to the liquidation plan before beginning the liquidation.

(3) *Notice upon commencing liquidation—(i) In general.* When the board of directors and the shareholders of a solvent national bank or Federal savings association, or in the case of a Federal mutual savings association, the board of directors and the members, have voted to voluntarily liquidate, the bank or savings association must:

(A) File a notice with the appropriate OCC licensing office; and

(B) provide notice to depositors, other known creditors, and known claimants of the bank or savings association.

(ii) *National banks.* A vote to liquidate a national bank must comply with 12 U.S.C. 181. In addition, a national bank must publish notice in accordance with 12 U.S.C. 182.

(iii) *Federal savings associations.* A Federal savings association must publish public notice if so directed by the OCC.

(4) *Report of condition.* The national bank's or Federal savings association's liquidating agent or committee must submit a report to the appropriate OCC licensing office at the start of liquidation showing the bank's or savings association's balance sheet as of the start of liquidation. The liquidating national bank or Federal savings association must submit reports of the condition of its commercial, trust, and other departments to the appropriate OCC licensing office by filing the quarterly Consolidated Reports of Condition and Income (Call Reports).

(5) *Report of progress.* The national bank's or Federal savings association's liquidating agent or committee must submit a "Report of Progress of Liquidation" annually to the appropriate OCC licensing office until the liquidation is complete.

(6) *Final report.* The national bank's or Federal savings association's liquidating agent or committee must submit a final report at the conclusion of liquidation showing that all creditors have been satisfied, remaining assets have been distributed to shareholders, resolutions to dissolve the bank or savings association have been adopted, and the bank or savings association has been dissolved. The national bank or Federal savings association also must return its charter certificate to the OCC.

(f) *Expedited liquidations in connection with acquisitions—(1) In general.* When an acquiring depository institution in a business combination purchases all the assets, and assumes all the liabilities, including all contingent liabilities, of a target national bank or Federal savings association, the target national bank or Federal savings association may be dissolved immediately after the combination. However, if any liabilities will remain in the target national bank or Federal savings association, then the standard liquidation procedures apply. This paragraph (f) does not apply to dissolutions of Federal mutual savings associations, which are subject to the standard liquidation procedures.

(2) *Procedure.* After its board of directors and shareholders have voted to liquidate and the national bank or Federal savings association has notified

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the appropriate OCC licensing office of its plans, the bank or savings association may surrender its charter and dissolve immediately, if:

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

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

[80 FR 28455, May 18, 2015, as amended at 82 FR 8104, Jan. 23, 2017; 85 FR 80465, Dec. 11, 2020]

§ 5.50 Change in control of a national bank or Federal savings association; reporting of stock loans.

(a) *Authority.* 12 U.S.C. 93a, 1817(j), and 1831aa.

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

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

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

(i) The acquisition of additional shares of a national bank or Federal savings association by a person who:

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

(B) Under paragraph (f)(2)(ii) of this section, would be presumed to have controlled that bank or Federal sav-

ings association continuously since March 9, 1979, if the transaction will not result in that person's direct or indirect ownership or power to vote 25 percent or more of any class of voting securities of the national bank or Federal savings association; or, in other cases, where the OCC determines that the person has controlled the bank or savings association continuously since March 9, 1979;

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

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

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

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

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

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

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

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

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

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

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

(A) "Good faith" means that a person must either make, renew, or acquire a loan secured by voting securities of a national bank or Federal savings association in advance of any knowledge of a default or of the substantial likelihood that a default is forthcoming. A person who purchases a previously defaulted loan, or a loan for which there is a substantial likelihood of default, secured by voting securities of a national bank or Federal savings association may not rely on this paragraph (c)(3)(v) to foreclose on that loan, seize or purchase the underlying collateral, and acquire control of the national bank or Federal savings association without complying with the prior notice requirements of this section.

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

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

(1) *Acquire* when used in connection with the acquisition of stock of a national bank or Federal savings association means obtaining ownership, control, power to vote, or sole power of disposition of stock, directly or indirectly or through one or more transactions or subsidiaries, through purchase, assignment, transfer, pledge, exchange, succession, or other disposition of voting stock, including:

(i) An increase in percentage ownership resulting from a redemption, repurchase, reverse stock split or a similar transaction involving other securities of the same class, and

(ii) The acquisition of stock by a group of persons and/or companies acting in concert, which is deemed to occur upon formation of such group.

(2) *Acting in concert* means:

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

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

(3) *Company* means any corporation, partnership, trust, association, joint venture, pool, syndicate, unincorporated organization, joint-stock company or similar organization.

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

(5) *Controlling shareholder* means any person who directly or indirectly or acting in concert with one or more persons or companies, or together with members of their immediate family, owns, controls, or holds with power to vote 10 percent or more of the voting stock of a company or controls in any manner the election or appointment of a majority of the company's board of directors.

(6) *Depository institution* means a depository institution as defined in section 3(c)(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(1).

(7) *Federal savings association* means a Federal savings association or a Federal savings bank chartered under section 5 of the Home Owners' Loan Act, 12 U.S.C. 1464.

(8) *Immediate family* includes a person's spouse, father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, children, stepchildren, grandparent, grandchildren,

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father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, and the spouse of any of the forgoing.

(9) *Management official* means any president, chief executive officer, chief operating officer, vice president, director, partner, or trustee, or any other person who performs or has a representative or nominee performing similar policymaking functions, including executive officers of principal business units or divisions or subsidiaries who perform policymaking functions, for a national bank, savings association, or a company, whether or not incorporated.

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

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

(12) *Similar organization* for purposes of paragraph (d)(3) of this section means a combination of parties with the potential for or practical likelihood of continuing rather than temporary existence, where the parties thereto have knowingly and voluntarily associated for a common purpose pursuant to identifiable and binding relationships which govern the parties with respect to either:

(i) The transferability and voting of any stock or other indicia of participation in another entity, or

(ii) Achievement of a common or shared objective, such as to collectively manage or control another entity.

(13) *Stock* means common or preferred stock, general or limited partnership shares or interests, or similar interests.

(14) *Voting securities* means:

(i) Shares of stock, if the shares or interests, by statute, charter, or in any manner, allow the holder to vote for or select directors (or persons exercising similar functions) of the issuing national bank or Federal savings association, or to vote on or to direct the conduct of the operations or other signifi-

cant policies of the issuing national bank or Federal savings association. However, preferred stock or similar interests are not voting securities if:

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

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

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

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

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

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

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through the acquisition of shares of a bank holding company, they are subject to the notice requirements of this section.

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

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

(f) *Procedures—(1) Exceptions to rules of general applicability.* Sections 5.8(a), 5.9, 5.10, 5.11, and 5.13(a) through (f) do not apply to filings under this section. When complying with §5.8(b) no address is required for a notice filed by one or more individuals under this section.

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

(ii) The following persons are presumed to be acting in concert for purposes of this section:

(A) A company and any controlling shareholder, partner, trustee or management official of such company if both the company and the person own stock in the national bank or Federal savings association;

(B) A person and the members of the person's immediate family;

(C) Companies under common control;

(D) Persons that have made, or propose to make, a joint filing under section 13 or 14 of the Securities Exchange Act of 1934, 15 U.S.C. 78m or 78n, and the rules thereunder promulgated by the Securities and Exchange Commission;

(E) A person or company will be presumed to be acting in concert with any trust for which such person or company serves as trustee, except that a tax-qualified employee stock benefit plan as defined in 12 CFR 192.25 is not be presumed to be acting in concert with its trustee or person acting in a similar fiduciary capacity solely for the purposes of determining whether to combine the holdings of a plan and its trustee or fiduciary; and

(F) Persons that are parties to any agreement, contract, understanding, relationship, or other arrangement, whether written or otherwise, regarding the acquisition, voting or transfer of control of voting securities of a national bank or Federal savings association, other than through a revocable proxy in connection with a proxy solicitation for the purposes of conducting business at a regular or special meeting of the institution, if the proxy terminates within a reasonable period after the meeting.

(iii) The OCC presumes, unless rebutted, that an acquisition or other disposition of voting securities through which any person proposes to acquire ownership of, or the power to vote, 10 percent or more of a class of voting securities of a national bank or Federal savings association is an acquisition by a person of the power to direct the bank's or savings association's management or policies if:

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

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

(iv) The OCC will consider a rebuttal of the presumption of control where

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the person or company intends to have no more than one representative on the board of directors of the national bank or Federal savings association.

(v) The presumption of control may not be rebutted if the total equity investment by the person or company in the national bank or Federal savings association, including 15 percent or more of any class of voting securities, equals or exceeds one third of the total equity of the national bank or Federal savings association.

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

(vii) If two or more persons, not acting in concert, each propose to acquire simultaneously equal percentages of 10 percent or more of a class of a national bank's or Federal savings association's voting securities, and either the acquisitions are of a class of securities subject to the registration requirements of section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 78l, or immediately after the transaction no other shareholder of the national bank or Federal savings association would own or have the power to vote a greater percentage of the class, each of the acquiring persons must either file a notice or rebut the presumption of control.

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

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

(A) The notice must contain the information required under 12 U.S.C. 1817(j)(6)(A), and the information prescribed in the Interagency Biographical and Financial Report. This form is available at www.occ.gov. The OCC may waive any of the informational requirements of the notice if the OCC determines that it is in the public interest.

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

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

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

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

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

(iii) Within the 60-day period, the OCC may inform the filer that the acquisition has been disapproved, has not been disapproved, or that the OCC will extend the 60-day review period for up to an additional 30 days. The period or the OCC's review of a notice may be further extended not to exceed two additional times for not more than 45 days each time if:

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(A) The OCC determines that any acquiring party has not furnished all the information required under this part;

(B) In the OCC's judgment, any material information submitted is substantially inaccurate;

(C) The OCC has been unable to complete an investigation of each acquirer because of any delay caused by, or the inadequate cooperation of, such acquirer; or

(D) The OCC determines that additional time is needed to investigate and determine that no acquiring party has a record of failing to comply with the requirements of subchapter II of chapter 53 of title 31 of the United States Code.

(4) *Conditional actions.* The OCC may impose conditions on its action not to disapprove a notice to assure satisfaction of the relevant statutory criteria for non-objection to a notice.

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

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

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

(iii) Either the financial condition of any acquiring person or the future prospects of the institution is such as might jeopardize the financial stability of the bank or Federal savings association or prejudice the interests of the depositors of the bank or Federal savings association;

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

bank or Federal savings association, or in the interest of the public, to permit that person to control the bank or Federal savings association;

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

(vi) The OCC determines that the proposed transaction would result in an adverse effect on the Deposit Insurance Fund.

(6) *Notification of disapproval*—(i) *Written notice by OCC.* If the OCC disapproves a notice, it will notify the filer in writing within three days after the decision. The OCC's written disapproval will contain a statement of the basis for disapproval and indicate that the filer may request a hearing.

(ii) *Hearing Request.* The filer may request a hearing by the OCC within 10 days of receipt of disapproval, pursuant to the procedures in 12 CFR part 19, subpart H. Following final agency action under 12 CFR part 19, further review by the courts is available. (See 12 U.S.C. 1817(j)(5)).

(iii) *Failure to request a hearing.* If a filer fails to request a hearing with a timely request, the notice of disapproval constitutes a final and unappealable order.

(g) *Disclosure*—(1) *Announcement.* The filer must publish an announcement in a newspaper of general circulation in the community where the affected national bank or Federal savings association is located within 10 days of filing. The OCC may authorize a delayed announcement if an immediate announcement would not be in the public interest.

(i) In addition to the information required by §5.8(b), the announcement must include the name of the national bank or Federal savings association named in the notice and the comment period (i.e., 20 days from the date of the announcement). The announcement also must state that the public portion of the notice is available upon request.

(ii) Notwithstanding any other provisions of this paragraph (g), if the OCC determines in writing that an emergency exists and that the announcement requirements of this paragraph (g) would seriously threaten the safety and soundness of the national bank or

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Federal savings association to be acquired, including situations where the OCC must act immediately in order to prevent the probable failure of a national bank or Federal savings association, the OCC may waive or shorten the publication requirement.

(2) *Release of information.* (i) Upon the request of any person, the OCC releases the information provided in the public portion of the notice and makes it available for public inspection and copying as soon as possible after a notice has been filed. In certain circumstances the OCC may determine that the release of the information would not be in the public interest. In addition, the OCC makes the date that the notice is filed, the disposition of the notice and the date thereof, and the consummation date of the transaction, if applicable, publicly available in the OCC's "Weekly Bulletin."

(ii) The OCC handles requests for the non-public portion of the notice as requests under the Freedom of Information Act, 5 U.S.C. 552, and other applicable law.

(h) *Reporting requirement.* After the consummation of the change in control, the national bank or Federal savings association must notify the OCC in writing of any changes or replacements of its chief executive officer or of any director occurring during the 12-month period beginning on the date of consummation. This notice must be filed within 10 days of such change or replacement and must include a statement of the past and current business and professional affiliations of the new chief executive officers or directors.

(i) *Reporting of stock loans—(1) Requirements.* (i) Any foreign bank, or any affiliate thereof, must file a consolidated report with the appropriate OCC supervisory office of the national bank or Federal savings association if the foreign bank or any affiliate thereof, has credit outstanding to any person or group of persons that, in the aggregate, is secured, directly or indirectly, by 25 percent or more of any class of voting securities of the same national bank or Federal savings association.

(ii) The foreign bank, or any affiliate thereof, must also file a copy of the report with its appropriate OCC supervisory office if that office is different

from the national bank's or Federal savings association's appropriate OCC supervisory office. If the foreign bank, or any affiliate thereof, is not supervised by the OCC, it must file a copy of the report filed with the OCC with its appropriate Federal banking agency.

(iii) Any shares of the national bank or Federal savings association held by the foreign bank, or any affiliate thereof, as principal must be included in the calculation of the number of shares in which the foreign bank or any affiliate thereof has a security interest for purposes of paragraph (i)(1)(i) of this section.

(2) *Definitions.* For purposes of this paragraph (i):

(i) *Foreign bank and affiliate* have the same meanings as in section 1 of the International Banking Act of 1978, 12 U.S.C. 3101.

(ii) *Credit outstanding* includes any loan or extension of credit; the issuance of a guarantee, acceptance, or letter of credit, including an endorsement or standby letter of credit; and any other type of transaction that extends credit or financing to a person or group of persons.

(iii) *Group of persons* includes any number of persons that a foreign bank, or an affiliate thereof, has reason to believe:

(A) Are acting together, in concert, or with one another to acquire or control shares of the same insured national bank or Federal savings association, including an acquisition of shares of the same national bank or Federal savings association at approximately the same time under substantially the same terms; or

(B) Have made, or propose to make, a joint filing under 15 U.S.C. 78m regarding ownership of the shares of the same depository institution.

(3) *Exceptions.* Compliance with paragraph (i)(1) of this section is not required if:

(i) The person or group of persons referred to in paragraph (i)(1) of this section has disclosed the amount borrowed and the security interest therein to the appropriate OCC licensing office in connection with a notice filed under this section or any other application filed with the appropriate OCC licensing office as a substitute for a notice

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under this section, such as for a national bank or Federal savings association charter; or

(ii) The transaction involves a person or group of persons that has been the owner or owners of record of the stock for a period of one year or more or, if the transaction involves stock issued by a newly chartered bank or Federal savings association, before the bank's or Federal savings association's opening.

(4) *Report requirements.* (i) The consolidated report must indicate the number and percentage of shares securing each applicable extension of credit, the identity of the borrower, and the number of shares held as principal by the foreign bank and any affiliate thereof.

(ii) The foreign bank and all affiliates thereof must file the consolidated report in writing within 30 days of the date on which the foreign bank or affiliate thereof first believes that the security for any outstanding credit consists of 25 percent or more of any class of voting securities of a national bank or Federal savings association.

(5) *Other reporting requirements.* A foreign bank or any affiliate thereof, supervised by the OCC and required to report credit outstanding secured by the shares of a depository institution to another Federal banking agency also must file a copy of the report with its appropriate OCC supervisory office.

[80 FR 28456, May 18, 2015, as amended at 82 FR 8104, Jan. 23, 2017; 85 FR 80465, Dec. 11, 2020]

§5.51 Changes in directors and senior executive officers of a national bank or Federal savings association.

(a) *Authority.* 12 U.S.C. 1831i, 3102(b), and 5412(b)(2)(B).

(b) *Scope.* This section describes the circumstances when a national bank or a Federal savings association must notify the OCC of a change in its directors and senior executive officers, and the OCC's authority to disapprove those notices.

(c) *Definitions*—(1) *Director* means an individual who serves on the board of directors of a national bank or a Federal savings association, except:

(i) A director of a foreign bank that operates a Federal branch; and

(ii) An advisory director who does not have the authority to vote on matters before the board of directors or any committee of the board of directors and provides solely general policy advice to the board of directors or any committee.

(2) *Federal savings association* means a Federal savings association or Federal savings bank chartered under 12 U.S.C. 1464.

(3) *National bank* includes a Federal branch for purposes of this section only.

(4) *Senior executive officer* means the president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, chief investment officer, chief risk officer, and any other individual the OCC identifies in writing to the national bank or Federal savings association who exercises significant influence over, or participates in, major policy making decisions of the national bank or Federal savings association without regard to title, salary, or compensation. The term also includes employees of entities retained by a national bank or Federal savings association to perform such functions in lieu of directly hiring the individuals, and, with respect to a Federal branch operated by a foreign bank, the individual functioning as the chief managing official of the Federal branch.

(5) *Technically complete notice* means a notice that provides all the information requested in paragraph (e)(2) of this section, including complete explanations where material issues arise regarding the competence, experience, character, or integrity of proposed directors or senior executive officers, and any additional information that the OCC may request following a determination that the notice was not technically complete.

(6) *Technically complete notice date* means the date on which the OCC has received a technically complete notice.

(7) *Troubled condition* means a national bank or Federal savings association that

(i) Has a composite rating of 4 or 5 under the Uniform Financial Institutions Rating System (CAMELS);

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(ii) Is subject to a cease and desist order, a consent order, or a formal written agreement, that requires action to improve the financial condition of the national bank or Federal savings association unless otherwise informed in writing by the OCC; or

(iii) Is informed in writing by the OCC that, based on information pertaining to such national bank or Federal savings association, it has been designated in "troubled condition" for purposes of this section.

(d) *Prior notice.* A national bank or Federal savings association must provide written notice to the OCC at least 90 calendar days before adding or replacing any member of its board of directors, employing any individual as a senior executive officer of the national bank or Federal savings association, or changing the responsibilities of any senior executive officer so that the individual would assume a different senior executive officer position, if:

(1) The national bank or Federal savings association is not in compliance with minimum capital requirements, as prescribed in 12 CFR part 3 or is otherwise in troubled condition; or

(2) The OCC determines, in writing, in connection with the review by the agency of the plan required under section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o), or otherwise, that such prior notice is appropriate.

(e) *Procedures—(1) Filing notice.* A national bank or Federal savings association must file a notice with its appropriate supervisory office. When a national bank or Federal savings association files a notice, the individual to whom the filing pertains must attest to the validity of the information pertaining to that individual. The 90-day review period begins on the technically complete notice date.

(2) *Content of notice.* (i) The notice must include:

(A) The information required under 12 U.S.C. 1817(j)(6)(A), and the information prescribed in the Interagency Notice of Change in Director or Senior Executive Officer, the biographical and certification portions of the Interagency Biographical and Financial Report ("IBFR"), and unless otherwise determined by the OCC in writing, the

financial portion of the IBFR. These forms are available from the OCC;

(B) Legible fingerprints of the individual, except that fingerprints are not required for any individual who, within the three years immediately preceding the initial submission date of the notice currently under review, has been the subject of a notice filed with the OCC or the OTS pursuant to 12 U.S.C. 1831i, or this section, and has previously submitted fingerprints; and

(C) Such other information required by the OCC.

(ii) *Modification of content requirements.* The OCC may require or accept other information in place of the content requirements in paragraph (e)(2)(i) of this section.

(3) *Requests for additional information.*

(i) Following receipt of a technically complete notice, the OCC may request additional information. Such request must be in writing, must explain why the information is needed, and must specify a time period during which the information must be provided.

(ii) If the national bank or Federal savings association cannot provide the information requested by the OCC within the time specified in paragraph (e)(3)(i) of this section, the national bank or Federal savings association may request in writing that the OCC suspend processing of the notice. The OCC will advise the national bank or Federal savings association in writing whether the suspension request is granted and, if granted, the length of the suspension.

(iii) If the national bank or Federal savings association fails to provide the requested information within the time specified in paragraphs (e)(3)(i) or (ii) of this section, the OCC may deem the filing abandoned under §5.13(c) or may review the notice based on the information provided.

(4) *Notice of disapproval.* The OCC may disapprove an individual proposed as a member of the board of directors or as a senior executive officer if the OCC determines on the basis of the individual's competence, experience, character, or integrity that it would not be in the best interests of the depositors of the national bank or Federal savings association or the public to permit the

individual to be employed by, or associated with, the national bank or Federal savings association. The OCC must send a written notice of disapproval to both the national bank or Federal savings association and the individual stating the basis for disapproval.

(5) *Notice of intent not to disapprove.* An individual proposed as a member of the board of directors or as a senior executive officer may begin service before the expiration of the review period if the OCC notifies the individual and the national bank or Federal savings association in writing that the OCC does not disapprove the proposed director or senior executive officer and all other applicable legal requirements are satisfied.

(6) *Waiver of prior notice*—(i) *Waiver request.* (A) A national bank or Federal savings association may send a letter to the appropriate supervisory office requesting a waiver of the prior notice requirement.

(B) The OCC may grant the waiver if it issues a written finding that:

(1) Delay could adversely affect the safety and soundness of the national bank or Federal savings association;

(2) Delay would not be in the public interest; or

(3) Other extraordinary circumstances justify waiver of prior notice.

(C) The OCC will determine the length of the waiver on a case-by-case basis. All waivers that the OCC grants under this paragraph (e)(6) are subject to the condition that the national bank or Federal savings association must file a technically complete notice under this section within the time period specified by the OCC.

(D) Subject to paragraph (e)(6)(i)(C) of this section, the proposed individual may assume the position on an interim basis until the earliest of the following events:

(1) The individual and the national bank or the Federal savings association receive a notice of intent not to disapprove, at which time the individual may assume the position on a permanent basis, provided all other applicable legal requirements are satisfied;

(2) The individual and the national bank or the Federal savings associa-

tion receive a notice of disapproval within 90 calendar days after the submission of a technically complete notice. In this event the individual must immediately resign from the position upon receipt of the notice of disapproval and may assume the position on a permanent basis only if the notice of disapproval is reversed on appeal and all other applicable legal requirements are satisfied; or

(3) The OCC does not act within 90 calendar days after the submission of a technically complete notice. In this event, the individual may assume the position on a permanent basis 91 calendar days after the submission of a technically complete notice.

(E) If the technically complete notice is not filed within the time period specified in the waiver, the proposed individual must immediately resign their position. Thereafter, the individual may assume the position only after a technically complete notice has been filed, all other applicable requirements are satisfied, and:

(1) The national bank or the Federal savings association receives a notice of intent not to disapprove;

(2) The review period expires; or

(3) A notice of disapproval has been overturned on appeal as set forth in paragraph (f) of this section.

(F) Notwithstanding the grant of a waiver, the OCC has authority to issue a notice of disapproval within 30 days of the expiration of such waiver.

(ii) *Automatic waiver.* An individual who has been elected to the board of directors of a national bank or Federal savings association may serve as a director on an interim basis before a notice has been filed under this section, provided the individual was not nominated by management, and the national bank or Federal savings association submits a notice under this section not later than seven days after the individual has been notified of the election. The individual may serve on an interim basis until the occurrence of the earliest of the events described in paragraphs (e)(6)(i)(D)(1), (2), or (3) of this section.

(7) *Commencement of service.* An individual proposed as a member of the

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board of directors or as a senior executive officer who satisfies all other applicable legal requirements may assume the office on a permanent basis:

(i) Prior to the expiration of the review period, only if the OCC notifies the national bank or Federal savings association in writing that the OCC does not disapprove the proposed director or senior executive officer pursuant to paragraph (e)(5) of this section; or

(ii) Following the expiration of the review period, unless:

(A) The OCC issues a written notice of disapproval during the review period; or

(B) The national bank or Federal savings association does not provide additional information within the time period required by the OCC pursuant to paragraph (e)(3) of this section and the OCC deems the notice to be abandoned pursuant to § 5.13(c).

(8) *Exceptions to rules of general applicability.* Sections 5.8, 5.9, 5.10, 5.11, and 5.13(a) through (f) do not apply to a notice for a change in directors and senior executive officers, except that § 5.13(c) will apply to the extent provided for in paragraphs (e)(3)(iii) and (e)(7) of this section.

(f) *Appeal.* (1) If the national bank or Federal savings association, the proposed individual, or both, disagree with a disapproval, they may seek review by appealing the disapproval to the Comptroller, or an authorized delegate, within 15 days of the receipt of the notice of disapproval. The national bank or Federal savings association or the individual may appeal on the grounds that the reasons for disapproval are contrary to fact or insufficient to justify disapproval. The appellant must submit all documents and written arguments that the appellant wishes to be considered in support of the appeal.

(2) The Comptroller, or an authorized delegate, may designate an appellate official who was not previously involved in the decision leading to the appeal at issue. The Comptroller, an authorized delegate, or the appellate official considers all information submitted with the original notice, the material before the OCC official who made the initial decision, and any information submitted by the appellant at the time of the appeal.

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(3) The Comptroller, an authorized delegate, or the appellate official will independently determine whether the reasons given for the disapproval are contrary to fact or insufficient to justify the disapproval. If either is determined to be the case, the Comptroller, an authorized delegate, or the appellate official may reverse the disapproval.

(4) Upon completion of the review, the Comptroller, an authorized delegate, or the appellate official will notify the appellant in writing of the decision. If the original decision is reversed, the individual may assume the position in the national bank or Federal savings association for which he or she was proposed.

[80 FR 28460, May 18, 2015, as amended at 85 FR 80466, Dec. 11, 2020]

§ 5.52 Change of address of a national bank or Federal savings association.

(a) *Authority.* 12 U.S.C. 93a, 161, 481, 1462a, 1463, 1464 and 5412(b)(2)(B).

(b) *Scope.* This section describes the obligation of a national bank or a Federal savings association to notify the OCC of any change in its address.

(c) *Notice process.* (1) Any national bank with a change in the address of its main office or in its post office box or a Federal savings association with a change in the address of its home office or post office box must send a written notice to the appropriate OCC licensing office.

(2) No notice is required if the change in address results from a transaction approved under this part or if notice has been provided pursuant to § 5.40(c)(1) with respect to the relocation of a main office or home office to a branch location in the same city, town or village.

(d) *Exceptions to rules of general applicability.* Sections 5.8, 5.9, 5.10, 5.11, and 5.13 do not apply to changes in a national bank's or Federal savings association's address.

[80 FR 28462, May 18, 2015, as amended at 85 FR 80466, Dec. 11, 2020]

Comptroller of the Currency, Treasury**§5.53****§ 5.53 Substantial asset change by a national bank or Federal savings association.**

(a) *Authority.* 12 U.S.C. 93a, 1818, 1462a, 1463, 1464, 1467a, and 5412(b)(2)(B).

(b) *Scope.* This section requires a national bank or a Federal savings association to obtain the approval of the OCC for a substantial asset change.

(c) *Definition—(1) In general.* Except as provide in paragraph (c)(2) of this section, *substantial asset change* means:

(i) The sale or other disposition of all, or substantially all, of the national bank's or Federal savings association's assets in a transaction or a series of transactions;

(ii) After having sold or disposed of all, or substantially all, of its assets, subsequent purchases or other acquisitions or other expansions of the national bank's or Federal savings association's operations;

(iii) Any other purchases, acquisitions or other expansions of operations that are part of a plan to increase the size of the national bank or Federal savings association by more than 25 percent in a one year period;

(iv) Any other material increase or decrease in the size of the national bank or Federal savings association or a material alteration in the composition of the types of assets or liabilities of the national bank or Federal savings association (including the entry or exit of business lines), on a case-by-case basis, as determined by the OCC; or

(v) Any change in the purpose of the charter of the national bank or Federal savings association as described in § 5.20(1)(2).

(2) *Exceptions.* The term “substantial asset change” does not include, and this section does not apply, to a change in composition of all, or substantially all, of a bank's or savings association's assets:

(i) That the bank or savings association undertakes in response to direction from the OCC (*e.g.*, in an enforcement action pursuant to 12 U.S.C. 1818);

(ii) That is part of a voluntary liquidation under § 5.48, if the bank or savings association in liquidation has obtained the OCC's non-objection to its plan of liquidation under § 5.48 and has stipulated in its notice of liquidation to the OCC that its liquidation will be

completed, the bank or savings association dissolved and its charter returned to the OCC within one year of the date it filed the notice of liquidation, unless the OCC extends the time period;

(iii) That occurs as a result of a bank's or savings association's ordinary and ongoing business of originating and securitizing loans; or

(iv) That are subject to OCC approval under another application to the OCC.

(d) *Procedures—(1) Consultation.* A national bank or Federal savings association considering a transaction or series of transactions that may constitute a material change under paragraph (c)(1)(iv) of this section must consult with the appropriate OCC supervisory office for a determination whether the OCC will require an application under this section. In determining whether to require an application, the OCC considers the size and nature of the transaction and the condition of the institutions involved.

(2) *Approval requirement.* A national bank or Federal savings association must file an application and obtain the prior written approval of the OCC before engaging in a substantial asset change.

(3) *Factors—(1) In general.* (A) In determining whether to approve an application filed under paragraph (d)(2) of this section, the OCC considers the following factors:

(1) The capital level of any resulting national bank or Federal savings association;

(2) The conformity of the transaction to applicable law, regulation, and supervisory policies;

(3) The purpose of the transaction;

(4) The impact of the transaction on safety and soundness of the national bank or Federal savings association; and

(5) The effect of the transaction on the national bank or Federal savings association's shareholders, depositors, other creditors, and customers.

(B) The OCC may deny the application if the transaction would have a negative effect in any of these respects.

(ii) *Additional factors.* The OCC's review of any substantial asset change that involves the purchase or other acquisition or other expansions of the

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bank's or savings association's operations or that involves a change in the purpose of the bank's or association's charter, as described in § 5.20(1)(2), will include, in addition to the foregoing factors, the factors governing the organization of a bank or savings association under § 5.20.

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

[80 FR 28462, May 18, 2015, as amended at 82 FR 8104, Jan. 23, 2017; 85 FR 80466, Dec. 11, 2020]

§ 5.55 Capital distributions by Federal savings associations.

(a) *Authority.* 12 U.S.C. 1462a, 1463, 1464, 1467a, 1831o, and 5412(b)(2)(B).

(b) *Licensing requirements.* A Federal savings association must file an application before making a capital distribution, as provided in this section.

(c) *Scope.* This section applies to all capital distributions by a Federal savings association and sets forth the procedures and standards relating to a capital distribution.

(d) *Definitions.* The following definitions apply to this section:

(1) *Affiliate* means an affiliate, as defined under regulations of the Board of Governors of the Federal Reserve System regarding transactions with affiliates, 12 CFR part 223 (Regulation W).

(2) *Capital distribution* means:

(i) A distribution of cash or other property to owners of a Federal savings association made on account of their ownership, but excludes:

(A) Any dividend consisting only of the shares of the savings association or rights to purchase the shares; or

(B) If the savings association is a Federal mutual savings association, any payment that the savings association is required to make under the terms of a deposit instrument and any other amount paid on deposits that the OCC determines is not a distribution for the purposes of this section;

(ii) A Federal savings association's payment to repurchase, redeem, retire or otherwise acquire any of its shares or other ownership interests; any payment to repurchase, redeem, retire, or otherwise acquire debt instruments included in its total capital under 12 CFR part 3; and any extension of credit to finance an affiliate's acquisition of the savings association's shares or interests;

(iii) Any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate restructuring. This includes the Federal savings association's payment of cash or property to shareholders of another association or to shareholders of its holding company to acquire ownership in that association, other than by a distribution of shares;

(iv) Any other distribution charged against a Federal savings association's capital accounts if the savings association would not be well capitalized, as set forth in 12 CFR 6.4, following the distribution; and

(v) Any transaction that the OCC determines, by order or regulation, to be in substance a distribution of capital.

(3) *Control* has the same meaning as in section 10(a)(2) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(2)).

(4) *Net income* means a Federal savings association's net income computed in accordance with GAAP.

(5) *Retained net income* means a Federal savings association's net income for a specified period less total capital distributions declared in that period.

(6) *Shares* means common and preferred stock, and any options, warrants, or other rights for the acquisition of such stock. The term "share" also includes convertible securities upon their conversion into common or preferred stock. The term does not include convertible debt securities prior to their conversion into common or preferred stock or other securities that are not equity securities at the time of a capital distribution.

(e) *Filing requirements*—(1) *Application required.* A Federal savings association must file an application with the OCC before making a capital distribution if:

(i) The Federal savings association would not be at least well capitalized

or would not otherwise remain an eligible savings association following the distribution;

(ii) The total amount of all of the Federal savings association's capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds its net income for that year to date plus retained net income for the preceding two years. If the capital distribution is from retained earnings, the aggregate limitation in this paragraph may be calculated in accordance with § 5.64(c)(2), substituting "capital distributions" for "dividends" in that section;

(iii) The Federal savings association's proposed capital distribution would reduce the amount of or retire any part of its common or preferred stock or retire any part of debt instruments such as notes or debentures included in capital under 12 CFR part 3 (other than regular payments required under a debt instrument approved under § 5.56);

(iv) The Federal savings association's proposed capital distribution is payable in property other than cash;

(v) The Federal savings association is directly or indirectly controlled by a mutual savings and loan holding company or by a company that is not a savings and loan holding company; or

(vi) The Federal savings association's proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between the Federal savings association and the OCC or the OTS, or violate a condition imposed on the Federal savings association in an application or notice approved by the OCC or the OTS.

(2) *No application required.* A Federal savings association may make a capital distribution without filing an application with the OCC if it does not meet the filing requirements in paragraph (e)(1) of this section.

(3) *Informational copy of Federal Reserve System notice required.* If the Federal savings association is a subsidiary of a savings and loan holding company that is filing a notice with the Board of Governors of the Federal Reserve System (Board) for a dividend solely under 12 U.S.C. 1467a(f) and not also under 12 U.S.C. 1467a(o)(11), and no application

under paragraph (e)(1) of this section is required, then the savings association must provide an informational copy to the OCC of the notice filed with the Board, at the same time the notice is filed with the Board.

(f) *Application format—(1) Contents.* The application must:

(i) Be in narrative form;

(ii) Include all relevant information concerning the proposed capital distribution, including the amount, timing, and type of distribution; and

(iii) Demonstrate compliance with paragraph (h) of this section.

(2) *Schedules.* The application may include a schedule proposing capital distributions over a specified period.

(3) *Combined filings.* A Federal savings association may combine the application required under paragraph (e)(1) of this section with any other notice or application, if the capital distribution is a part of, or is proposed in connection with, another transaction requiring a notice or application under this chapter. If submitting a combined filing, the Federal savings association must state that the related notice or application is intended to serve as an application under this section.

(g) *Filing procedures—(1) Application.* When a Federal savings association is required to file an application under paragraph (e)(1) of this section, it must file the application at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by its board of directors. Except as provided in paragraph (g)(2) of this section, the OCC is deemed to have approved an application from an eligible savings association upon the expiration of 30 days after the filing date of the application unless, before the expiration of that time period, the OCC notifies the Federal savings association that:

(i) Additional information is required to supplement the application;

(ii) The application has been removed from expedited review, or the expedited review process is extended, under 5.13(a)(2); or

(iii) The application is denied.

(2) *Applications not subject to expedited review.* An application is not subject to expedited review if:

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- (i) The Federal savings association is not an eligible savings association;
- (ii) The total amount of all of the Federal savings association's capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds its net income for that year to date plus retained net income for the preceding two years;
- (iii) The Federal savings association would not be at least adequately capitalized, as set forth in 12 CFR 6.4, following the distribution; or
- (iv) The Federal savings association's proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between the savings association and the OCC or the OTS, or violate a condition imposed on the savings association in an application or notice approved by the OCC or the OTS.

(3) *OCC filing office*—(i) *Appropriate licensing office*. Except as provided in paragraph (g)(3)(ii) of this section, a Federal savings association that is required to file an application under paragraph (e)(1) of this section or an informational copy of a notice under paragraph (e)(3) of this section must submit the application or notice to the appropriate OCC licensing office.

(ii) *Appropriate supervisory office*. A Federal savings association that is required to file an application under paragraph (e)(1) of this section for capital distributions involving solely a cash dividend from retained earnings or involving a cash dividend from retained earnings and a concurrent cash distribution from permanent capital must submit the application to the appropriate OCC supervisory office.

(h) *OCC review of capital distributions*. After review of an application submitted pursuant to paragraph (e)(1) of this section:

(1) The OCC may deny the application in whole or in part, if it makes any of the following determinations:

(i) The Federal savings association will be undercapitalized, significantly undercapitalized, or critically undercapitalized as set forth in 12 CFR 6.4, as applicable, following the capital distribution. If so, the OCC will determine if the capital distribution is permitted under 12 U.S.C. 1831o(d)(1)(B).

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(ii) The proposed capital distribution raises safety or soundness concerns.

(iii) The proposed capital distribution violates a prohibition contained in any statute, regulation, agreement between the Federal savings association and the OCC or the OTS, or a condition imposed on the Federal savings association in an application or notice approved by the OCC or the OTS.

(2) The OCC may approve the application in whole or in part. Notwithstanding paragraph (h)(1)(iii) of this section, the OCC may waive any waivable prohibition or condition to permit a distribution.

(i) *Exceptions to rules of general applicability*. Sections 5.8, 5.10, and 5.11 do not apply to capital distributions made by Federal savings associations.

[80 FR 28463, May 18, 2015, as amended at 85 FR 80466, Dec. 11, 2020]

§ 5.56 Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as Federal savings association supplementary (tier 2) capital.

(a) *Scope and definitions*. (1) A Federal savings association must comply with this section in order to include subordinated debt securities or mandatorily redeemable preferred stock (“covered securities”) in tier 2 capital under 12 CFR 3.20(d) and to prepay covered securities included in tier 2 capital. A savings association that does not include covered securities in tier 2 capital is not required to comply with this section. Covered securities not included in tier 2 capital are subject to the requirements of § 163.80 of this chapter.

(2) For purposes of this section, mandatorily redeemable preferred stock means mandatorily redeemable preferred stock that was issued before July 23, 1985 or issued pursuant to regulations and memoranda of the Federal Home Loan Bank Board and approved in writing by the Federal Savings and Loan Insurance Corporation for inclusion as regulatory capital before or after issuance.

(b) *Application procedures*—(1) *Application to include covered securities in tier 2 capital*—(i) *Application required*. A Federal savings association must file an application seeking the OCC's approval of the inclusion of covered securities in

tier 2 capital. The savings association may file its application before or after it issues covered securities, but may not include covered securities in tier 2 capital until the OCC approves the application and the securities are issued.

(ii) *Expedited review.* The OCC is deemed to have approved an application from an eligible savings association to include covered securities in tier 2 capital upon the expiration of 30 days after the filing date of the application unless, before the expiration of that time period, the OCC notifies the Federal savings association that:

(A) Additional information is required to supplement the application;

(B) The application has been removed from expedited review or the expedited review process is extended under § 5.13(a)(2); or

(C) The OCC denies the application.

(iii) *Securities offering rules.* A Federal savings association also must comply with the securities offering rules at 12 CFR part 16 by filing an offering circular for a proposed issuance of covered securities, unless the offering qualifies for an exemption under that part.

(2) *Application required to prepay covered securities included in tier 2 capital—*

(i) *In general.* A Federal savings association must file an application to, and receive prior approval from, the OCC before prepaying covered securities included in tier 2 capital. The application must include:

(A) A statement explaining why the Federal savings association believes that following the proposed prepayment the savings association would continue to hold an amount of capital commensurate with its risk; or

(B) A description of the replacement capital instrument that meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20, including the amount of such instrument and the time frame for issuance.

(ii) *Replacement covered security.* If the OCC conditions approval of prepayment on a requirement that a Federal savings association must replace the covered security with a covered security of an equivalent amount that satisfies the requirements for tier 1 or tier 2 capital, the savings association must file an application to issue the replacement cov-

ered security and must receive prior OCC approval.

(c) *General requirements.* A covered security issued under this section must satisfy the requirements for tier 2 capital in 12 CFR 3.20(d).

(d) *Securities requirements for inclusion in tier 2 capital.* To be included in tier 2 capital, covered securities must satisfy the requirements in 12 CFR 3.20(d). In addition, such covered securities must meet the following requirements:

(1) *Form.* (i) Each certificate evidencing a covered security must:

(A) Bear the following legend on its face, in bold type: "This security is *not* a savings account or deposit and it is *not* insured by the United States or any agency or fund of the United States;"

(B) State that the security is subordinated on liquidation, as to principal, interest, and premium, to all claims against the savings association that have the same priority as savings accounts or a higher priority;

(C) State that the security is not secured by the savings association's assets or the assets of any affiliate of the savings association. An affiliate means any person or company that controls, is controlled by, or is under common control with the savings association;

(D) State that the security is not eligible collateral for a loan by the savings association;

(E) State the prohibition on the payment of dividends or interest at 12 U.S.C. 1828(b) and, in the case of subordinated debt securities, state the prohibition on the payment of principal and interest at 12 U.S.C. 1831o(h), 12 CFR 3.11, and any other relevant restrictions;

(F) For subordinated debt securities, state or refer to a document stating the terms under which the savings association may prepay the obligation;

(G) Where applicable, state or refer to a document stating that the savings association must obtain OCC's prior approval before the acceleration of payment of principal or interest on subordinated debt securities, redemption of subordinated debt securities prior to maturity, repurchase of subordinated debt securities, or exercising a call option in connection with a subordinated debt security; and

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(H) State that the security may be fully subordinated to interests held by the U.S. government in the event that the savings association enters into a receivership, insolvency, liquidation, or similar proceeding;

(ii) A Federal savings association must include such additional statements as the OCC may prescribe for certificates, purchase agreements, indentures, and other related documents.

(2) *Indenture.* (i) Except as provided in paragraph (d)(2)(ii) of this section, a Federal savings association must use an indenture for subordinated debt securities. If the aggregate amount of subordinated debt securities publicly offered (excluding sales in a non-public offering as defined in 12 CFR 16.7) and sold in any consecutive 12-month or 36-month period exceeds \$5,000,000 or \$10,000,000 respectively (or such lesser amount that the Securities and Exchange Commission may establish by rule or regulation under 15 U.S.C. 77ddd), the indenture must provide for the appointment of a trustee other than the savings association or an affiliate of the savings association (as defined in paragraph (d)(1)(i)(C) of this section) and for collective enforcement of the security holders' rights and remedies.

(ii) A Federal savings association is not required to use an indenture if the subordinated debt securities are sold only to accredited investors, as that term is defined in 15 U.S.C. 77b(a)(15). A savings association must have an indenture that meets the requirements of paragraph (d)(2)(i) of this section in place before any debt securities for which an exemption from the indenture requirement is claimed, are transferred to any non-accredited investor. If a savings association relies on this exemption from the indenture requirement, it must place a legend on the debt securities indicating that an indenture must be in place before the debt securities are transferred to any non-accredited investor.

(e) *Review by the OCC.* (1) In reviewing applications under this section, the OCC will consider whether:

(i) The issuance of the covered securities is authorized under applicable laws and regulations and is consistent

with the savings association's charter and bylaws;

(ii) The savings association is at least adequately capitalized under 12 CFR 6.4 and meets the regulatory capital requirements at 12 CFR 3.10;

(iii) The savings association is or will be able to service the covered securities;

(iv) The covered securities are consistent with the requirements of this section;

(v) The covered securities and related transactions sufficiently transfer risk from the Deposit Insurance Fund; and

(vi) The OCC has no objection to the issuance based on the savings association's overall policies, condition, and operations.

(2) The OCC's approval is conditioned upon no material changes to the information disclosed in the application submitted to the OCC. The OCC may impose such additional requirements or conditions as it may deem necessary to protect purchasers, the savings association, the OCC, or the Deposit Insurance Fund.

(f) *Amendments.* If a Federal savings association amends the covered securities or related documents following the completion of the OCC's review, it must obtain the OCC's approval under this section before it may include the amended securities in tier 2 capital.

(g) *Sale of covered securities.* The Federal savings association must complete the sale of covered securities within one year after the OCC's approval under this section. A savings association may request an extension of the offering period by filing a written request with the OCC. The savings association must demonstrate good cause for the extension and file the request at least 30 days before the expiration of the offering period or any extension of the offering period.

(h) *Issuance of a replacement regulatory capital instrument in connection with prepaying a covered security.* The OCC may require a Federal savings association seeking prior approval to prepay a covered security included in tier 2 capital to issue a replacement covered security of an equivalent amount that qualifies as tier 1 or tier 2 capital under 12 CFR 3.20. If the OCC imposes

such a requirement, the savings association must complete the sale of such covered security prior to, or immediately after, the prepayment.⁵

(i) *Reports.* A Federal savings association must file the following information with the OCC within 30 days after the savings association completes the sale of covered securities includable as tier 2 capital. If the savings association filed its application following the completion of the sale, it must submit this information with its application:

(1) A written report indicating the number of purchasers, the total dollar amount of securities sold, the net proceeds received by the savings association from the issuance, and the amount of covered securities, net of all expenses, to be included as tier 2 capital;

(2) Three copies of an executed form of the securities and a copy of any related documents governing the issuance or administration of the securities; and

(3) A certification by the appropriate executive officer indicating that the savings association complied with all applicable laws and regulations in connection with the offering, issuance, and sale of the securities.

[80 FR 28464, May 18, 2015, as amended at 85 FR 80467, Dec. 11, 2020]

§5.58 Pass-through investments by a Federal savings association.

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

(b) *Scope.* Federal savings associations are permitted to make various types of equity investments pursuant to 12 U.S.C. 1464 and other statutes, including pass-through investments authorized under 12 CFR 160.32(a). These investments are in addition to those subject to §§ 5.35, 5.37, 5.38, and 5.59. This section describes the procedure governing the filing of the application or notice that the OCC requires in connection with certain of these investments. The OCC may review other permissible equity investments on a case-by-case basis.

⁵ A Federal savings association may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

(c) *Licensing requirements.* A Federal savings association must file a notice or application as prescribed in this section to make a pass-through investment authorized under 12 CFR 160.32(a).

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

(1) *Enterprise* means any corporation, limited liability company, partnership, trust, or similar business entity.

(2) *Pass-through investment* means an investment authorized under 12 CFR 160.32(a). A *pass-through investment* does not include a Federal savings association holding interests in a trust formed for the purposes of securitizing assets held by the savings association as part of its business or for the purposes of holding multiple legal titles of motor vehicles or equipment in conjunction with lease financing transactions.

(e) *Pass-through investments; notice procedure.* Except as provided in paragraphs (f) through (i) of this section, a Federal savings association may make a pass-through investment, directly or through its operating subsidiary, in an enterprise that engages in an activity described in § 5.38(f)(5) or in an activity that is substantively the same as a previously approved activity by filing a written notice. The Federal savings association must file this written notice with the appropriate OCC licensing office no later than 10 days after making the investment. The written notice must:

(1) Describe the structure of the investment and the activity or activities conducted by the enterprise in which the Federal savings association is investing. To the extent the notice relates to the initial affiliation of the Federal savings association with a company engaged in insurance activities, the savings association should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The Federal savings association must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable;

(2) State:

(i) Which paragraphs of § 5.38(f)(5) describe the activity; or

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(ii) If the activity is substantively the same as a previously approved activity:

(A) How, the activity is substantively the same as a previously approved activity;

(B) The citation to the applicable precedent; and

(C) That the activity will be conducted in accordance with the same terms and conditions applicable to the previously approved activity;

(3) Certify that the Federal savings association is well capitalized and well managed at the time of the investment;

(4) Describe how the Federal savings association has the ability to prevent the enterprise from engaging in an activity that is not set forth in § 5.38(f)(5) or not contained in published OCC (including published former OTS) precedent for previously approved activities, or how the savings association otherwise has the ability to withdraw its investment;

(5) Describe how the investment is convenient and useful to the Federal savings association in carrying out its business and not a mere passive investment unrelated to the savings association's banking business;

(6) Certify that the Federal savings association's loss exposure is limited as a legal matter and that the savings association does not have unlimited liability for the obligations of the enterprise; and

(7) Certify that the enterprise in which the Federal savings association is investing agrees to be subject to OCC supervision and examination, subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

(f) *Pass-through investments; application procedure*—(1) *In general.* A Federal savings association must file an application and obtain prior approval before making or acquiring, either directly or through an operating subsidiary, a pass-through investment in an enterprise if the pass-through investment does not qualify for the notice procedure set forth in paragraph (e) of this section because the savings association is unable to make the representation

required by paragraph (e)(2) or the certification required by paragraphs (e)(3) or (e)(7) of this section. The application must include the information required in paragraphs (e)(1) and (e)(4) through (e)(6) of this section and, if possible, paragraphs (e)(2), (e)(3), and (e)(7) of this section. If the Federal savings association is unable to make the representation set forth in paragraph (e)(2) of this section, the savings association's application must explain why the activity in which the enterprise engages is a permissible activity for a Federal savings association and why the filer should be permitted to hold a pass-through investment in an enterprise engaged in that activity. A Federal savings association may not make a pass-through investment if it is unable to make the representations and certifications specified in paragraphs (e)(1) and (e)(4) through (e)(6) of this section.

(2) *Expedited review.* An application submitted by a Federal savings association is deemed approved by the OCC as of the 10th day after the application is received by the OCC if:

(A) The Federal savings association makes the representation required by paragraph (e)(2) and the certification required by paragraph (e)(3) of this section;

(B) The book value of the Federal savings association's pass-through investment for which the application is being submitted is no more than 1% of the savings association's capital and surplus;

(C) No more than 50% of the enterprise is owned or controlled by banks or savings associations subject to examination by an appropriate Federal banking agency or credit unions insured by the National Credit Union Association; and

(D) The OCC has not notified the Federal savings association that the application has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

(3) *Investments requiring a filing under 12 U.S.C. 1828(m).* Notwithstanding any other provision in this section, if an enterprise in which a Federal savings association proposes to invest would be a subsidiary of the Federal savings association for purposes of 12 U.S.C.

1828(m) and the enterprise would not be an operating subsidiary or a service corporation, the Federal savings association must file an application with the OCC under paragraph (f)(3) of this section at least 30 days prior to making the investment and obtain prior approval from the OCC before making the investment. The application must include the information required in paragraphs (e)(1) and (e)(4) through (e)(6) of this section and, if possible, paragraphs (e)(2), (e)(3), and (e)(7) of this section. If the Federal savings association is unable to make the representation set forth in paragraph (e)(2) of this section, the savings association's application must explain why the activity in which the enterprise engages is a permissible activity for a Federal savings association and why the filer should be permitted to hold a pass-through investment in an enterprise engaged in that activity. A Federal savings association may not make a pass-through investment if it is unable to make the representations and certifications specified in paragraphs (e)(1) and (e)(4) through (e)(6) of this section.

(g) *Pass-through investments; no application or notice required.* A Federal savings association may make or acquire, either directly or through an operating subsidiary, a pass-through investment in an enterprise, without an application or notice to the OCC, if:

(1) The activities of the enterprise are limited to those activities previously reported by the savings association in connection with the making or acquiring of a pass-through investment;

(2) The activities in the enterprise continue to be legally permissible for a Federal savings association;

(3) The savings association's pass-through investment will be made in accordance with any conditions imposed by the OCC or OTS in approving any prior pass-through investment conducting these activities;

(4) The savings association is able to make the representations and certifications specified in paragraphs (e)(3) through (e)(7) of this section; and

(5) The enterprise will not be a subsidiary for purposes of 12 U.S.C. 1828(m).

(h) *Pass-through investments in enterprises holding assets in satisfaction of debts previously contracted.* Certain pass-through investments may be eligible for expedited treatment where the Federal savings association's investment is in an enterprise holding assets in satisfaction of debts previously contracted or the savings association acquires shares of a company in satisfaction of debts previously contracted.

(1) *Notice required.* A Federal savings association that is well capitalized and well managed may acquire a pass-through investment, directly or through its operating subsidiary, in an enterprise that engages in the activities of holding and managing assets acquired by the parent savings association through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted, by filing a written notice in accordance with this paragraph (h)(1). The activities of the enterprise must be conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a Federal savings association. The Federal savings association must file the written notice with the appropriate OCC licensing office no later than 10 days after making the pass-through investment. This notice must include a complete description of the Federal savings association's investment in the enterprise and the activities conducted, a description of how the savings association plans to divest the pass-through investment or the underlying assets within applicable statutory time frames, and a representation and undertaking that the savings association will conduct the activities in accordance with OCC policies contained in guidance issued by the OCC regarding the activities. Any Federal savings association receiving approval under this paragraph (h)(1) is deemed to have agreed that the enterprise will conduct the activity in a manner consistent with published OCC guidance.

(2) *No notice or application required.* A Federal savings association is not required to file a notice or application under this § 5.58 if it acquires a non-controlling investment in shares of a

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company through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted.

(i) *Additional exception to filing requirement.* A Federal savings association may make a pass-through investment without filing a notice or application to the OCC if all of the following conditions are met:

(1) The investment is in an investment company the portfolio of which consists exclusively of assets that the Federal savings association may hold directly;

(2) The Federal savings association is not investing more than 10 percent of its total capital (or, in the case of a Federal savings association that is a qualifying community banking organization that has elected to use the community bank leverage ratio framework, 10 percent of its tier 1 capital, as used under §3.12 of this chapter) in one company;

(3) The book value of the Federal savings association's aggregate pass-through investments does not exceed 25 percent of its total capital (or, in the case of a Federal savings association that is a qualifying community banking organization that has elected to use the community bank leverage ratio framework, 25 percent of its tier 1 capital, as used under §3.12 of this chapter) after making the investment;

(4) The investment would not give Federal savings association direct or indirect control of the company; and

(5) The Federal savings association's liability is limited to the amount of its investment.

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

[80 FR 28466, May 18, 2015, as amended at 84 FR 61794, Nov. 13, 2019; 84 FR 69297, Dec. 18, 2019; 85 FR 80468, Dec. 11, 2020; 86 FR 1255, Jan. 8, 2021]

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§ 5.59 Service corporations of Federal savings associations.

(a) *Authority.* 12 U.S.C. 1462a, 1463, 1464(c)(4)(B), 1828, and 5412(b)(2)(B).

(b) *Licensing requirements.* When required by section 18(m) of the Federal Deposit Insurance Act (12 U.S.C. 1828(m)), a Federal savings association must file an application as prescribed in this section to:

(1) Acquire or establish a service corporation; or

(2) Commence a new activity in an existing service corporation subsidiary.

(c) *Scope.* This section sets forth the OCC's requirements regarding service corporations of Federal savings associations, and sets forth procedures governing OCC review and approval of filings by Federal savings associations to establish or acquire service corporations and filings by Federal savings associations to conduct new activities in existing service corporation subsidiaries, pursuant to the authority provided in section 5(c)(4)(B) of the Home Owners' Loan Act, 12 U.S.C. 1464(c)(4)(B).

(d) *Definitions*—(1) *Control* has the meaning set forth at 12 U.S.C. 1841 and the Federal Reserve Board's regulations thereunder, at 12 CFR part 225.

(2) *GAAP-consolidated subsidiary* means a service corporation in which a Federal savings association has a direct or indirect ownership interest and whose assets are consolidated with those of the savings association for purposes of reporting under GAAP.

(3) *Ownership interest* means any equity interest in a business organization, including stock, limited or general partnership interests, or shares in a limited liability company.

(4) *Service corporation* means any entity that satisfies all of the requirements for service corporations in 12 U.S.C. 1464(c)(4)(B) and this part, and that is designated by the investing Federal savings association as a service corporation pursuant to this section. A service corporation may be a first-tier service corporation of a Federal savings association or may be a lower-tier service corporation.

(5) *Service corporation subsidiary* means a service corporation of a Federal savings association that is controlled by that savings association.

(e) *Standards and requirements*—(1) *Ownership*. Only Federal or State-chartered savings associations with home offices in the State where the relevant Federal savings association has its home office may have an ownership interest in a first-tier service corporation. A Federal savings association need not have any minimum percentage ownership interest or have control of a service corporation in order to designate an entity as a service corporation.

(2) *Geographic restrictions*. A first-tier service corporation must be organized under the laws of the State where the relevant Federal savings association's home office is located.

(3) *Authorized activities*. A service corporation may engage in any of the designated permissible service corporation activities listed in paragraph (f) of this section, subject to any applicable filing requirement under paragraph (h) of this section. In addition, a Federal savings association may request OCC approval for a service corporation to engage in any other activity reasonably related to the activities of financial institutions.

(4) *Investment limitations*. A Federal savings association's investment in service corporations is subject to the limitations set forth in paragraph (g) of this section. The assets of a Federal savings association's service corporations are not subject to the investment limitations applicable to the savings association under section 5(c) of the Home Owners' Loan Act, 12 U.S.C. 1464(c).

(5) *Form of organization*. A service corporation may be organized as a corporation, or may be organized in any other organizational form that provides the same protections as the corporate form of organization, including limited liability.

(6) *Qualified thrift lender test*. In accordance with 12 U.S.C. 1467a(m)(5), a Federal savings association may determine whether to consolidate the assets of a particular service corporation for purposes of calculating qualified thrift investments. If a service corporation's assets are not consolidated with the assets of the Federal savings association for that purpose, the savings association's investment in the service cor-

poration will be considered in calculating the savings association's qualified thrift investments.

(7) *Supervisory, legal or safety or soundness considerations*. (i) Each service corporation must be well managed and operate safely and soundly. In addition, each service corporation must pursue financial policies that are safe and consistent with the purposes of savings associations. Each service corporation must maintain sufficient liquidity to ensure its safe and sound operation.

(ii) The OCC may, at any time, limit a Federal savings association's investment in a service corporation, or limit or refuse to permit any activity of a service corporation, for supervisory, legal, or safety or soundness reasons.

(8) *Separate corporate identity*. Federal savings associations and service corporations thereof must be operated in a manner that demonstrates to the public that each maintains a separate corporate existence. Each must operate so that:

(i) Their respective business transactions, accounts, and records are not intermingled;

(ii) Each observes the formalities of their separate corporate procedures;

(iii) Each is held out to the public as a separate enterprise; and

(iv) Unless the parent Federal savings association has guaranteed a loan to the service corporation, all borrowings by the service corporation indicate that the savings association is not liable.

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

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and make such records available for examination by the OCC.

(10) *Certain pre-existing non-controlling investments.* A Federal savings association that made a non-controlling investment in a service corporation before May 18, 2015, but did not submit a filing under 12 U.S.C. 1828(m) with respect to such service corporation investment, is not required to file a service corporation application with respect to such investment pursuant to paragraph (b), provided that the Federal savings association does not acquire additional stock or similar interests in the service corporation, and the service corporation does not engage in any activities in which it was not engaged as of May 18, 2015.

(f) *Authorized service corporation activities.* Subject to the prior filing requirements set forth in paragraph (h) of this section and the provisions of paragraph (e)(3) of this section, a service corporation may engage in the following activities:

(1) *Any activity that all Federal savings associations may conduct directly.*

(2) *Business and professional services.* Service corporations may engage in the following activities only when such activities are limited to financial documents or financial clients or are generally finance-related:

- (i) Accounting or internal audit;
 - (ii) Advertising, market research and other marketing;
 - (iii) Clerical;
 - (iv) Consulting;
 - (v) Courier;
 - (vi) Data processing;
 - (vii) Data storage facilities operation and related services;
 - (viii) Office supplies, furniture, and equipment purchasing and distribution;
 - (ix) Personnel benefit program development or administration;
 - (x) Printing and selling forms that require Magnetic Ink Character Recognition (MICR) encoding;
 - (xi) Relocation of personnel;
 - (xii) Research studies and surveys;
 - (xiii) Software development and systems integration; and
 - (xiv) Remote service unit operation, leasing, ownership or establishment.
- (3) *Credit-related activities.* (i) Abstracting;

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(ii) Acquiring and leasing personal property;

- (iii) Appraising;
- (iv) Collection agency;
- (v) Credit analysis;

(vi) Check or credit card guaranty and verification;

(vii) Escrow agent or trustee (under deeds of trust, including executing and delivery of conveyances, reconveyances and transfers of title); and

- (viii) Loan inspection.

(4) *Consumer services.* (i) Financial advice or consulting;

- (ii) Foreign currency exchange;
- (iii) Home ownership counseling;

- (iv) Income tax return preparation;

- (v) Postal services;

- (vi) Stored value instrument sales;

- (vii) Welfare benefit distribution;

(viii) Check printing and related services; and

(ix) Remote service unit operation, leasing, ownership, or establishment.

(5) *Real estate related services.* (i) Acquiring real estate for prompt development or subdivision, for construction of improvements, for resale or leasing to others for such construction, or for use as manufactured home sites, in accordance with a prudent program of property development;

(ii) Acquiring improved real estate or manufactured homes to be held for rental or resale, for remodeling, renovating or demolishing and rebuilding for resale or rental, or to be used for offices and related facilities of a stockholder of the service corporation;

(iii) Maintaining and managing real estate; and

(iv) Real estate brokerage for property owned by a savings association that owns capital stock of the service corporation, or a lower-tier service corporation in which the service corporation invests.

(6) *Securities activities, liquidity management, and coins.* (i) Execution of transactions in securities on an agency or riskless principal basis solely upon the order and for the account of customers or the provision of investment advice. The service corporation must register with the Securities and Exchange Commission and State securities regulators, as required by applicable Federal and State law and regulations;

- (ii) Liquidity management;
- (iii) Issuing notes, bonds, debentures, or other obligations or securities; and
- (iv) Purchase or sale of coins issued by the U.S. Treasury.

(7) *Investments.* (i) Tax-exempt bonds used to finance residential real property for family units;

(ii) Tax-exempt obligations of public housing agencies used to finance housing projects with rental assistance subsidies;

(iii) Small business investment companies and new markets venture capital companies licensed by the U.S. Small Business Administration;

(iv) Rural business investment companies licensed by the U.S. Department of Agriculture; and

(v) Investing in savings accounts of an investing thrift.

(8) *Community development investments.* Community and economic development or public welfare investments that are permissible under part 24 of this chapter.

(9) *Charitable activities.* Establishing or acquiring a corporation that is recognized by the Internal Revenue Service as organized for charitable purposes under 26 U.S.C. 501(c)(3) of the Internal Revenue Code and making a reasonable contribution to capitalize it, *provided* that the corporation engages exclusively in activities designed to promote the well-being of communities in which the owners of the service corporation operate.

(10) *Activities conducted as agent.* Activities conducted on behalf of a customer on other than an "as principal" basis.

(11) *Incidental activities.* Activities reasonably incident to those listed in paragraphs (f)(1) through (f)(10) of this section if the service corporation engages in those activities.

(g) *Limitations on investments in service corporations—(1) In general.* Under the authority of section 5(c)(4)(B) of the Home Owners' Loan Act (12 U.S.C. 1464(c)(4)(B)), a Federal savings association may invest up to 3 percent of its assets in the capital stock, obligations, and other securities of service corporations. Any investment that would cause a Federal savings association's investment in service corporations, in the aggregate, to exceed 2 per-

cent of assets, or made while the savings association's investments in service corporations exceeds 2 percent of assets, must serve primarily community, inner city, or community and economic development or public welfare purposes consistent with 12 CFR part 24. A Federal savings association must designate the investments serving those purposes.

(2) *Loans.* In addition to the amounts that a Federal savings association may invest under paragraph (g)(1) of this section, and to the extent that a Federal savings association has authority under other provisions of section 5(c) of the Home Owners' Loan Act (12 U.S.C. 1464(c)), this part 5, and 12 CFR part 160, and available capacity within any applicable investment limits, a Federal savings association may make loans to any service corporation subject to the following conditions:

(i) Loans to service corporations other than a GAAP-consolidated subsidiary are subject to the lending limits in part 32 of this chapter.

(ii) The OCC may limit the amount of loans to any service corporation where safety and soundness considerations warrant such action.

(3) *Definition.* For purposes of this paragraph (g), the terms "loans" and "obligations" include all loans and other debt instruments (except accounts payable incurred in the ordinary course of business and paid within 60 days) and all guarantees or take-out commitments of such loans or debt instruments.

(4) *GAAP-consolidated subsidiaries.* Both debt and equity investments in service corporations that are GAAP-consolidated subsidiaries are considered investments in subsidiaries for purposes of 12 CFR part 3.

(h) *Filing requirements—(1) Application.* (i) When required by section 18(m) of the Federal Deposit Insurance Act (12 U.S.C. 1828(m)), a Federal savings association must file an application at least 30 days before:

(A) Acquiring or establishing a service corporation; or

(B) Commencing a new activity in an existing service corporation subsidiary.

(ii) The application must include a complete description of the savings association's investment in the service

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corporation, the proposed activities of the service corporation, the organizational structure and management of the service corporation, the relations between the savings association and the service corporation, and other information necessary to adequately describe the proposal. If the service corporation proposes to engage in insurance activities, the savings association must describe the type of insurance activity in which the service corporation proposes to engage. The savings association must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the service corporation holds a resident license or charter, as applicable. The OCC may require a filer to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In these cases, the OCC encourages filers to have a prefiling meeting with the OCC. Any savings association receiving approval under this paragraph is deemed to have agreed that the service corporation will conduct the activity in a manner consistent with published OCC guidance.

(2) *Expedited review.* (i) An application to establish or acquire a service corporation, or to perform a new activity in an existing service corporation subsidiary, that meets the requirements of this paragraph is deemed approved by the OCC as of the 30th day after the filing is received by the OCC, unless the OCC notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review period is extended, under § 5.13(a)(2). Any savings association receiving approval under this paragraph is deemed to have agreed that the service corporation will conduct the activity in a manner consistent with published OCC guidance.

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

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

(B) The service corporation engages only in one or more of the preapproved activities listed in paragraph (f) of this section.

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

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

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

(i) *Exercise of salvage powers through service corporations.* (1) In accordance with this section, a Federal savings association may exercise its salvage power to make a contribution or a loan (including a guarantee of a loan made by any other person) to a service corporation ("salvage investment") that exceeds the maximum amount otherwise permitted under law or regulation. A Federal savings association must notify the appropriate supervisory office at least 30 days before making such a salvage investment. The notification must demonstrate:

(i) The salvage investment protects the savings association's interest in the service corporation;

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(ii) The salvage investment is consistent with safety and soundness; and
(iii) The savings association considered alternatives to the salvage investment and determined that such alternatives would not adequately satisfy paragraphs (i)(1)(i) and (ii) of this section.

(2) If the OCC notifies the Federal savings association within 30 days of the filing of the notification that the notification presents supervisory concerns, or raises significant issues of law or policy, the Federal savings association must apply for and receive the OCC's prior written approval before making the salvage investment.

(3) If a service corporation is a GAAP-consolidated subsidiary, the salvage investment will be considered an investment in a subsidiary for purposes of 12 CFR part 3.

(j) *Failure to comply with the requirements applicable to service corporations.* If a service corporation fails to meet any of the requirements of this section, the Federal savings association must notify the appropriate OCC licensing office. Unless the Federal savings association is otherwise advised by the OCC, if the service corporation cannot comply with the requirements of this section within 90 days of failing to meet such requirements, or otherwise resolve such failure to comply with this section, the Federal savings association must promptly dispose of its investment in the service corporation.

[80 FR 28467, May 18, 2015, as amended at 85 FR 80469, Dec. 11, 2020]

Subpart E—Payment of Dividends by National Banks**§5.60 Authority, scope, and exceptions to rules of general applicability.**

(a) *Authority.* 12 U.S.C. 56, 60, and 93a.

(b) *Scope.* Except as otherwise provided, the restrictions in this subpart apply to the declaration and payment of all dividends by a national bank, including dividends paid in property. However, the provisions contained in §5.64 do not apply to dividends paid in stock of the bank.

(c) *Exceptions to the rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to this subpart.

§5.61 Definitions.

For the purposes of subpart E, the following definitions apply:

(a) *Capital stock, capital surplus, and permanent capital* have the same meaning as set forth in §5.46.

(b) *Retained net income* means the net income of a specified period less the total amount of all dividends declared in that period.

§5.62 Date of declaration of dividend.

A national bank must use the date a dividend is declared for the purposes of determining compliance with this subpart.

[61 FR 60363, Nov. 27, 1996, as amended at 85 FR 80469, Dec. 11, 2020]

§5.63 Capital limitation under 12 U.S.C. 56.

(a) *General limitation.* Except as provided by 12 U.S.C. 59 and §5.46, a national bank may not withdraw, or permit to be withdrawn, either in the form of a dividend or otherwise, any portion of its permanent capital. Further, a national bank may not declare a dividend in excess of undivided profits.

(b) *Preferred stock.* The provisions of 12 U.S.C. 56 do not apply to dividends on preferred stock. However, if the undivided profits of the national bank are not sufficient to cover a proposed dividend on preferred stock, the proposed dividend constitutes a reduction in capital subject to 12 U.S.C. 59 and §5.46.

§5.64 Earnings limitation under 12 U.S.C. 60.

(a) *Definitions.* As used in this section, the term "current year" means the calendar year in which a national bank declared, or proposes to declare, a dividend. The term "current year minus one" means the year immediately preceding the current year. The term "current year minus two" means the year that is two years prior to the current year. The term "current year minus three" means the year that is three years prior to the current year. The term "current year minus four" means the year that is four years prior to the current year.

(b) *Dividends from undivided profits.* Subject to 12 U.S.C. 56 and this subpart, the directors of a national bank

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may declare and pay dividends of so much of the undivided profits as they judge to be expedient.

(c) *Earnings limitations under 12 U.S.C. 60*—(1) *General rule.* For purposes of 12 U.S.C. 60, unless approved by the OCC in accordance with paragraph (c)(3) of this section, a national bank may not declare a dividend if the total amount of all dividends (common and preferred), including the proposed dividend, declared by the national bank in any current year exceeds the total of the national bank's net income for the current year to date, combined with its retained net income of current year minus one and current year minus two, less the sum of any transfers required by the OCC and any transfers required to be made to a fund for the retirement of any preferred stock.

(2) *Excess dividends in prior periods.* (i) If in current year minus one or current year minus two the bank declared dividends in excess of that year's net income, the excess does not reduce retained net income for the three-year period specified in paragraph (c)(1) of this section, provided that the amount of excess dividends can be offset by retained net income in current year minus three or current year minus four. If the bank declared dividends in excess of net income in current year minus one, the excess is offset by retained net income in current year minus three and then by retained net income in current year minus two. If the bank declared dividends in excess of net income in current year minus two, the excess is first offset by retained net income in current year minus four and then by retained net income in current year minus three.

(ii) If the bank's retained net income in current year minus three and current year minus four was insufficient to offset the full amount of the excess dividends declared, as calculated in accordance with paragraph (c)(2)(i) of this section, then the amount that is not offset will reduce the retained net income available to pay dividends in the current year.

(iii) The calculation in paragraphs (c)(2)(i) and (c)(2)(ii) of this section applies only to retained net loss that results from dividends declared in excess of a single year's net income and does

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not apply to other types of current earnings deficits.

(3) *Prior approval required.* A national bank may declare a dividend in excess of the amount described in paragraphs (c)(1) and (c)(2) of this section, provided that the dividend is approved by the OCC. A national bank must submit a request for prior approval of a dividend under 12 U.S.C. 60 to the appropriate OCC supervisory office.

[73 FR 22241, Apr. 24, 2008, as amended at 80 FR 28470, May 18, 2015; 85 FR 80469, Dec. 11, 2020]

§ 5.65 Restrictions on undercapitalized institutions.

Notwithstanding any other provision in this subpart, a national bank may not declare or pay any dividend if, after making the dividend, the national bank would be "undercapitalized" as defined in 12 CFR part 6.

§ 5.66 Dividends payable in property other than cash.

In addition to cash dividends, directors of a national bank may declare dividends payable in property, with the approval of the OCC. A national bank must submit a request for prior approval of a noncash dividend to the appropriate OCC licensing office. The dividend is equivalent to a cash dividend in an amount equal to the actual current value of the property, regardless of whether the book value is higher or lower under GAAP. Before the dividend is declared, the bank should show the difference between actual value and book value on the books of the national bank as a gain or loss, as applicable, and the dividend should then be declared in the amount of the actual current value of the property being distributed.

[85 FR 80469, Dec. 11, 2020]

§ 5.67 Fractional shares.

A national bank issuing additional stock may adopt arrangements to preclude the issuance of fractional shares. The bank may remit the cash equivalent of the fraction not being issued to those to whom fractional shares would otherwise be issued. The cash equivalent is based on the market value of the stock, if there is an established and

active market in the national bank's stock. In the absence of such a market, the cash equivalent is based on a reliable and disinterested determination as to the fair market value of the stock if such stock is available. The bank may propose an alternate method in the application for the stock issuance filed with the OCC.

[85 FR 80470, Dec. 11, 2020]

Subpart F—Federal Branches and Agencies

§ 5.70 Federal branches and agencies.

(a) *Authority.* 12 U.S.C. 93a and 3101 *et seq.*

(b) *Scope.* This subpart describes the filing requirements for corporate activities and transactions involving Federal branches and agencies of foreign banks. Substantive rules and policies for specific applications are contained in 12 CFR part 28.

(c) *Definitions.* For purposes of this subpart:

(1) To *establish* a Federal branch or agency means to:

(i) Open and conduct business through an initial or additional Federal branch or agency;

(ii) Acquire directly, through merger, consolidation, or similar transaction with another foreign bank, the operations of a Federal branch or agency that is open and conducting business;

(iii) Acquire a Federal branch or agency through the acquisition of a foreign bank subsidiary that will cease to operate in the same corporate form following the acquisition;

(iv) Convert a State branch or State agency operated by a foreign bank, or a commercial lending company controlled by a foreign bank, into a Federal branch or agency;

(v) Relocate a Federal branch or agency within a State or from one State to another; or

(vi) Convert a Federal agency or a limited Federal branch into a Federal branch.

(2) *Federal branch* includes a limited Federal branch unless otherwise provided.

(d) *Filing requirements*—(1) *General.* Unless otherwise provided in 12 CFR part 28, a Federal branch or agency

must comply with the applicable requirements of this part.

(2) *Applications.* A foreign bank must submit an application and obtain prior approval from the OCC before it:

(i) Establishes a Federal branch or agency; or

(ii) Exercises fiduciary powers at a Federal branch. A foreign bank may submit an application to exercise fiduciary powers at the time of filing an application for a Federal branch license or at any subsequent date.

(3) *Biographical and Financial Reports.*

The OCC may require any senior executive officer of a Federal branch or agency submitting a filing to submit an Interagency Biographical and Financial Report, available at www.occ.gov, and legible fingerprints.

[61 FR 60363, Nov. 27, 1996, as amended at 68 FR 70698, Dec. 19, 2003; 85 FR 80470, Dec. 11, 2020]

PART 6—PROMPT CORRECTIVE ACTION

Subpart A—Capital Categories

Sec.

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6.2 Definitions.

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AUTHORITY: 12 U.S.C. 93a, 1831o, 5412(b)(2)(B).

SOURCE: 78 FR 62275, Oct. 11, 2013, unless otherwise noted.