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## **DEPARTMENT OF THE TREASURY**

### **Office of the Comptroller of the Currency**

#### **12 CFR Part 51**

[Docket ID OCC-2016-0017]

**RIN 1557-AE07**

### **Receiverships for Uninsured National Banks**

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is adopting a final rule addressing the conduct of receiverships for national banks that are not insured by the Federal Deposit Insurance Corporation (FDIC) (uninsured banks) and for which the FDIC would not be appointed as receiver. The final rule implements the provisions of the National Bank Act (NBA) that provide the legal framework for receiverships of such institutions. The final rule adopts the rule as proposed without change.

**DATES:** This final rule is effective on [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mitchell Plave, Special Counsel, Legislative and Regulatory Activities Division, (202) 649-5490, or for persons who are deaf or hard of hearing, TTY, (202) 649-5597, or Richard Cleva, Senior Counsel, Bank Activities and Structure

Division, (202) 649-5500, Office of the Comptroller of the Currency, 400 7<sup>th</sup> Street, SW., Washington, DC 20219.

## **SUPPLEMENTARY INFORMATION:**

### **I. Introduction**

On September 13, 2016, the OCC published a proposed rule to implement the provisions of the NBA that provide the legal framework for receiverships for uninsured banks,<sup>1</sup> 12 U.S.C. 191 – 200, with comments due by November 14, 2016.<sup>2</sup> The OCC received 11 comments concerning the proposal. For the reasons discussed in section III of the SUPPLEMENTARY INFORMATION, the OCC is adopting the rule as proposed, without change.

### **II. Background**

As of December 2, 2016, the OCC supervised 52 uninsured banks, all of which are national trust banks.<sup>3</sup> Uninsured national trust banks have fundamentally different business models compared to commercial and consumer banks and savings associations and therefore face very different types of risks. National trust banks typically have few assets on the balance sheet, usually composed of cash on deposit with an insured depository institution, investment securities, premises and equipment, and intangible assets. These banks exercise fiduciary and custody powers, do not make loans, do not rely on deposit funding, and consequently have simple liquidity management programs. In view of these differences, the OCC typically requires these banks to hold capital in a specific minimum amount; as a result they hold capital in amounts that exceed substantially the “well capitalized” standard that applies when national

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<sup>1</sup> All Federal savings associations (FSAs), including trust-only FSAs, are required to be insured. For this reason, this final rule does not apply to FSAs, given that receiverships for FSAs would be conducted by the FDIC.

<sup>2</sup> Receiverships for Uninsured National Banks, 81 FR 62835 (September 13, 2016) (Proposed Rule).

<sup>3</sup> The OCC may charter national banks whose operations are limited to those of a trust company and related activities (national trust bank). See, e.g., 12 U.S.C. 27(a); 12 CFR 5.20(l).

banks calculate their capital pursuant to the OCC's rules in 12 CFR part 3.

The business model of national trust banks is to generate income in the form of fees by offering fiduciary and custodial services that generally fall into one or more of a few broad categories. Some national trust banks focus on institutional asset management, providing trust and custodial services for investment portfolios of pension plans, foundations and endowments, and other entities, often with an investment management component. A few other national trust banks serve primarily as a fiduciary and custodian to facilitate the establishment of Individual Retirement Accounts by customers of an affiliated mutual fund complex or broker-dealer firm. Some national trust banks provide custodial services, such as corporate trust accounts, under which the bank performs services for others in connection with their issuance, transfer, and registration of debt or equity securities. Other custody accounts may be a holding facility for customer securities, where the bank assists institutional customers with global settlement and safekeeping of the customer's securities.

Many of the uninsured national trust banks are subsidiaries or affiliates of a full-service insured national bank or are affiliates of an insured state bank. Other uninsured national trust banks are not affiliated with an insured depository institution, but are affiliated with an investment management firm or other financial services firm. Still other uninsured national trust banks have no affiliation with a larger parent company.<sup>4</sup>

The OCC appoints and oversees receivers for uninsured banks under the provisions of the NBA<sup>5</sup> and the substantial body of case law applying the statutory provisions and common law

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<sup>4</sup> For additional discussion of the business model of uninsured national trust banks, see Proposed Rule, 81 FR at 62836 – 62837.

<sup>5</sup> 12 U.S.C. 191 – 200.

receivership principles to national bank receiverships.<sup>6</sup> The FDIC is the required receiver only for an insured national (or state) bank.<sup>7</sup> Based on the statutory history of the NBA and FIRREA, it is likely that the Federal Deposit Insurance Act (FDIA) would not apply to an OCC receivership of an uninsured bank conducted by the OCC, and that such a receivership would be governed exclusively by the NBA, the common law of receivers, and cases applying the statutes and common law to national bank receiverships. While FIRREA and the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) greatly expanded the FDIC's powers in resolving failed insured depository institutions, the OCC believes that those additional powers are not available to the OCC as receiver of uninsured banks under the NBA.

The OCC has not appointed a receiver for an uninsured bank since shortly after the Congress established the FDIC in response to the banking panics of 1930-1933. National trust banks face very different types of risks because of the fundamentally different business model of national trust banks compared to commercial and consumer banks and savings associations. These risks include operational, compliance, strategic, and reputational risks without the credit and liquidity risks that additionally affect the solvency of commercial and consumer banks. While any of these risks can result in the precipitous failure of a bank or savings association, from a historical perspective, trust banks have been more likely to decline into a weakened condition, allowing the OCC and the institution the time needed to find other solutions for rehabilitating the institution or to successfully resolve the institution without the need to appoint a receiver.

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<sup>6</sup> For a discussion of the statutory history relating to receiverships of national banks conducted by the OCC, under the NBA, and by the FDIC, pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), see Proposed Rule, 81 FR at 62836.

<sup>7</sup> Section 11(c)(2)(A)(ii) of the FDIA provides that the FDIC "shall" be appointed receiver, and "shall" accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution by the appropriate Federal banking agency, notwithstanding any other provision of Federal law. 12 U.S.C. 1821(c)(2)(A)(ii). The term "Federal depository institution" includes national banks. 12 U.S.C. 1813(c)(4).

The OCC believes it would nevertheless be beneficial to financial market participants and the broader community of regulators for the OCC to clarify the receivership framework for uninsured banks. Although the OCC conducted 2,762 receiverships pursuant to this framework in the years prior to the creation of the FDIC,<sup>8</sup> and the associated legal issues are the subject of a robust body of published judicial precedents, the details have not been widely articulated in recent jurisprudence or legal commentary. This final rule may also facilitate synergies with the ongoing efforts of U.S. and international financial regulators since the financial crisis to enhance our readiness to respond effectively to the different critical financial distresses that could manifest themselves unexpectedly in the diverse types of financial firms presently operating in the market.

## **II. Public Comments on the Proposed Rule**

The OCC received 11 comments from the public in response to the OCC's notice of proposed rulemaking and the alternatives the OCC discussed therein. The commenters included individuals, a state trust company, and a think tank, as well as representatives of consumer groups, financial reform advocacy groups, state banking regulators, banking institutions, and bitcoin firms. These submissions offered issues and viewpoints about selected portions of the proposed rule's regulatory provisions for the OCC's consideration; these are discussed in connection with the discussion of the OCC's rationale for issuing the associated portions of the final rule, in Section III of this **SUPPLEMENTARY INFORMATION**.

As part of the notice of proposed rulemaking, the OCC also asked for the public's input on a number of specific questions and received comments on two of these questions. One question was whether any unique considerations would be raised by applying the proposed rule's

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<sup>8</sup> Annual Report of the Comptroller of the Currency for the Year Ended October 31, 1934 at 33 (discussing the status of active and closed receiverships under the jurisdiction of the Comptroller between 1865 and 1934).

framework for receivership of uninsured national banks, which are all national trust banks at present, to other uninsured banks that would be organized to engage in the delivery of banking services in new and innovative ways, such as special purpose national banks engaged in financial technology (fintech) activities.<sup>9</sup>

On this receivership framework question, two commenters expressed concerns that the earlier-established legal regime for receiverships under the NBA and associated judicial precedent does not include select elements subsequently created for insured depository institutions under FIRREA and FDICIA, and thus might not be as effective outside the trust bank sphere in application to the receivership of special purpose national banks engaged in fintech activities. These commenters said the OCC should refrain from chartering these special purpose national banks until the law changes to address this difference. One commenter expressed concern that the rule's incorporation of the NBA's priority requirements for payment of receivership claims, which include no preference for consumer claims over other general creditors, might have the effect of distorting incentives among debt investors across special purpose national banks, and more broadly contribute to moral hazard.

The OCC understands these comments to be urging, in effect, changes in the statutory receivership provisions underlying the rule. Absent Congressional action to do so, however, the current provisions of the NBA are the ones that would govern should it become necessary to appoint a receiver for an uninsured national bank. The OCC believes it is best to be clear, through a regulation implementing those NBA provisions, about the framework that would apply in order to avoid clouding the ongoing discussion about the chartering of special purpose national banks engaged in fintech activities with uncertainty about how uninsured institutions are

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<sup>9</sup> See Proposed Rule, 81 FR at 62837 (discussing the OCC's initiative on responsible innovation in the Federal banking system, and the OCC's authority to charter special purpose banks that engage in selected core non-depository services within the business of banking).

resolved.

More broadly, some commenters said the OCC should consider receivership and cost issues in deciding whether to charter special purpose national banks engaged in fintech activities, or the terms on which they could be chartered. Two commenters said the nature of a fintech firm's business diverges widely from banks, and that creditor loss rates in a receivership for an uninsured special purpose national bank engaged in fintech activities may exceed levels that are tolerable in the resolution of a chartered bank. These commenters said this was a contra-indication for chartering such banks, but one of the commenters further elaborated that the OCC can and should exercise particularly close supervision of these firms and thereby reduce the risk of receiverships ever taking place. Another commenter said that fintech firms do not have national trust banks' track record for remaining solvent and avoiding receivership, and the OCC should mitigate potential concerns about receivership costs by imposing capital support agreements and similar obligations in chartering special purpose national banks that engage in fintech activities.

In contrast to these views about the uniqueness of special purpose national banks engaged in fintech activities, one commenter said that a fintech firm, such as a digital currency exchange, performs a function comparable to a national trust bank that obtains payments on behalf of customers and provides security for those funds, and therefore such institutions do not pose unique considerations for the receivership framework. Another commenter said the functions of special purpose national banks that engage in fintech activities could be even simpler than a national trust bank, such as a special purpose national bank that provides fintech payment services where each customer transaction is brief and segregated. For special purpose national banks engaged in fintech activities involving lending, this commenter stated the customer

relationships are somewhat longer but still discrete, and that the OCC could adequately eliminate concerns about the impact of a receivership by ensuring the bank's plans for back-up servicing and orderly wind-up were robust.

Some commenters discussed additional topics not touching on the receivership issues covered by the notice of proposed rulemaking, but more germane to the desired framework for creating, regulating, and supervising special purpose national banks that engage in fintech activities or uninsured national trust banks. These broader comments do not pertain to the OCC's adoption of the final rule for uninsured banks and many of them implicate issues that the OCC would need to evaluate on a case-by-case basis in connection with a decision on whether to charter a particular special purpose national bank that engages in fintech activities. The OCC has recently published and invited comment on a paper discussing these issues.<sup>10</sup> We will consider the broader comments on fintech chartering submitted as part of this rulemaking together with those we receive in response to the paper.

In the second question asked in the preamble to the Proposed Rule, the OCC asked for alternatives that would take into account the cost considerations that could arise for the OCC if the administrative expenses of an uninsured national bank receivership exceeded the assets in the receivership.<sup>11</sup> In response to this question, one commenter urged the OCC not to impose assessment costs for special purpose national banks that engage in fintech activities on insured national banks, and another commenter further urged the OCC not to impose assessment costs for such banks on uninsured national trust banks. The OCC continues to consider what approach

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<sup>10</sup> See Exploring Special Purpose National Bank Charters for Fintech Companies (Dec. 2016), available at <https://www.occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf>.

<sup>11</sup> See Proposed Rule, 81 Fed. Reg. at 62838 (discussing the receiver's priority claim to liquidation proceeds for administrative expenses, the OCC's potential direct expenses for its receivership functions, and funding alternatives, such as building resources to defray these costs through the OCC's regulations governing the OCC's collection of assessments from uninsured national banks).

to assessments would be appropriate should it approve charters for special purpose national banks engaged in fintech activities. Any resulting modification to the OCC's assessment structure would be proposed for public comment in a separate rulemaking.

#### **IV. The Final Rule**

##### *Overview*

The final rule incorporates the framework set forth in the NBA for the Comptroller to appoint a receiver for an uninsured bank, generally under the same grounds for appointment of the FDIC as receiver for insured national banks. The uninsured bank may challenge the appointment in court, and the NBA affords jurisdiction to the appropriate United States district court for this purpose. The OCC will provide the public with notice of the appointment, as well as instructions for submitting claims against the uninsured bank in receivership. The Comptroller may appoint any person as receiver, including the OCC or another government agency. The receiver carries out its duties under the direction of the Comptroller.

The final rule also follows the statutory framework under the NBA with respect to claims, under which persons with claims against an uninsured bank in receivership will file their claims with the receiver for the failed uninsured bank, for review by the OCC. In the event the OCC denies the claim, the only remedy available to the claimant is to bring a judicial action against the uninsured bank's receivership estate and assert the claim *de novo*. A person is also free to initiate a claim by bringing an action against the receivership estate in court for adjudication and then submit the judgment to the OCC to participate in ratable dividends of liquidation proceeds along with other approved and adjudicated claims.<sup>12</sup>

Approved or adjudicated claims are paid solely out of the assets of the uninsured national bank in receivership. This reflects the legal distinction between the OCC as regulatory agency

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<sup>12</sup> See First Nat'l Bank of Bethel v. Nat'l Pahquioque Bank, 81 U.S. 383, 401 (1871).

and the OCC acting in a receivership capacity. In the former, the OCC oversees national banks, FSAs, and Federal branches and Federal agencies, supervising them under the charge of assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction. As receiver, the OCC appoints and oversees receivers for uninsured national banks, thereby facilitating the winding down of bank operations, assets, and accounts while minimizing disruptions to customers and creditors of the institution. Under the “separate capacities” doctrine, which has long been recognized in litigation involving the FDIC, it is well established that the agency, when acting in one capacity, is not liable for claims against the agency acting in its other capacity.<sup>13</sup>

As provided in the final rule, the receiver liquidates the assets of the uninsured bank, with court approval, and pays the proceeds into an account as directed by the OCC. The categories of claims and the priority thereof for payment are set out in the final rule. The final rule also clarifies certain powers held by the receiver.

#### *Section-by-Section Analysis*

Section 51.1 of the final rule identifies the purpose and scope of the final rule and clarifies that the rule applies to receiverships conducted by the OCC under the NBA for national banks that are not insured by the FDIC.<sup>14</sup> The final rule does not extend to receiverships for uninsured Federal branches, although elements of the framework may be similar for uninsured Federal branch receiverships, which would also be resolved under provisions of the NBA.

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<sup>13</sup> For a discussion of the separate capacities doctrine and related case law, *see* Proposed Rule, 81 FR at 62838.

<sup>14</sup> A nationwide organization of state regulators requested clarity on how the NBA receivership framework for uninsured national banks and the OCC’s proposed rule thereunder would interact with the processes established for debtors and creditors pursuant to the U.S. Bankruptcy Code. The OCC is not aware of any opinion of a U.S. Bankruptcy Court, or any other U.S. court, finding that an uninsured national bank is eligible to be a debtor subject to a petition under the Code.

Section 51.2 of the final rule is based on 12 U.S.C. 191 and 192 and concerns appointment of a receiver. The final rule sets out the Comptroller's authority to appoint any person, including the OCC or another government agency, as receiver for an uninsured bank and provides that the receiver performs its duties subject to the approval and direction of the Comptroller.<sup>15</sup> If the Comptroller were to appoint the OCC as receiver, the OCC would act in a receivership capacity with respect to the uninsured bank in receivership, rather than in the OCC's supervisory capacity.

As discussed earlier, this dual capacity (OCC as supervisor versus OCC as receivership sponsor for an uninsured bank) recognizes that, while the NBA makes the receivership oversight and claims review functions of the Comptroller part of the OCC's responsibilities, the receivership oversight role is unique and distinct from the OCC's role as a Federal regulatory agency and supervisor of national banks and FSAs. This is comparable to the dual capacity of the FDIC's receivership function for insured depository institutions pursuant to the FDIA.

Section 51.2 of the final rule also provides that the Comptroller may require the receiver to post a bond or other security and the receiver may hire staff and professional advisors, with the approval of the Comptroller, if needed to carry out the receivership. This section also identifies the grounds for appointment of a receiver for an uninsured bank and notes that uninsured banks may seek judicial review of the appointment pursuant to 12 U.S.C. 191.

Section 51.3 of the final rule provides that the OCC will provide notice to the public of the appointment of a receiver for the uninsured bank. The final rule specifies that one

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<sup>15</sup> But see 12 U.S.C. § 1821(c)(6) (Comptroller may appoint the FDIC as conservator or receiver and the FDIC has discretion to accept such appointment); id. section 1821(c)(2)(C) (FDIC "not subject to any other agency" when acting as conservator or receiver"). Read together, these provisions likely mean that the provision in § 51.2 concerning oversight of the receiver by the Comptroller would not apply to the FDIC acting as conservator or receiver for an uninsured institution, should the Comptroller appoint the FDIC and the FDIC accept such an appointment.

component of this notice will include publication in a newspaper of general circulation selected by the OCC for three consecutive months, as required by 12 U.S.C. 193. As a component of the OCC's notice to the public about the receivership, the OCC will also provide instructions for creditors and other claimants seeking to submit claims with the receiver for the uninsured bank.

As noted in the proposed rule, the OCC believes that the purpose of section 193 may be better served by publication through means in addition to the statutorily required publication in a newspaper. For example, the OCC could provide direct notice to customers and creditors of the uninsured bank to the extent the uninsured bank's records included current contact information. The OCC could also arrange to provide notice through electronic channels that customers would typically use to contact the uninsured bank, such as the uninsured bank's website. The OCC believes that an effective set of notice protocols would best be established on a case-by-case basis, in light of a specific uninsured bank's fiduciary and custodial activities, the types of customers served by the bank, coordination with other notice protocols under way for any related entity that is also undergoing resolution activity, and similar factors. The OCC requested comment on alternative means of communicating with customers of uninsured banks.

One commenter, a trade association for banks, suggested that the OCC employ notice mechanisms that are consistent with the way in which the failed bank typically communicates with its clients and counterparties. The commenter suggested, for example, that a receiver for an institution with clients in other countries should communicate with those clients in the language typically used by the institution in its communications with those clients. The OCC agrees that this approach would be appropriate in such cases and reiterates that effective forms of notice, beyond the statutorily required notice in a newspaper, will be evaluated on a case-by-case basis.

Section 51.4 of the final rule addresses the submission of claims to the receiver for an

uninsured bank. Under § 51.4(a), a person with a claim against the receivership may submit a claim to the OCC, which will consider the claim and make a determination concerning its validity and approved amount. This process reflects the provisions in 12 U.S.C. 193 and 194 regarding presentation of claims and payment of dividends on claims that are proved to the satisfaction of the Comptroller. Section 51.4 also provides that the Comptroller will establish a deadline for filing claims with the receiver, which could not be earlier than 30 days after the three-month publication of notice required by § 51.3. This provision reflects NBA case law that permits the Comptroller to establish a date for filing claims against the receiver for a failed bank.<sup>16</sup>

Section 51.4(b) of the final rule clarifies that persons with claims against an uninsured bank in receivership may present their claims to a court of competent jurisdiction for adjudication in addition to, or as an alternative to, filing a claim with the OCC. If successful in court, such persons will be required to submit a copy of the final judgment to the OCC to participate in ratable dividends of liquidation proceeds along with claims against the bank in receivership submitted to, and approved by, the OCC. The final rule requires submission of a copy of the court's final judgment to the OCC. This provision is based on 12 U.S.C. 193 and 194.

In this regard, the receivership regime established by the NBA differs somewhat from the approach set out in other resolution regimes, such as the bankruptcy provisions of the United States Code and the receivership provisions of the FDIA. Under those resolution regimes, creditors and claimants must generally submit their claims to the receivership estate for centralized administration and disposition, and claims that are not submitted by the claims deadline are barred from any participation in liquidation payments. The NBA provisions are

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<sup>16</sup> See Queenan v. Mays, 90 F.2d 525, 531 (10th Cir. 1937).

different in that claimants are provided the opportunity to submit claims to the OCC for evaluation, but are not foreclosed from pursuing judicial resolution by filing litigation (or continuing a pre-existing lawsuit) in a court of competent jurisdiction against the uninsured bank in receivership.

The claims filing deadline established by the Comptroller pursuant to § 51.4(a) of the final rule is the date by which claimants seeking review under the OCC's claims process must make their submission. Nevertheless, a claimant that has not made a submission to the OCC by the deadline is not barred from initiating judicial claims against the uninsured bank in receivership solely by virtue of missing the claims deadline.<sup>17</sup>

The NBA's receivership provisions are like the receivership regime established by the FDIC under the FDIA, however, in that the avenue available to a party whose claim has been denied by the FDIC or OCC, when performing the agencies' receivership claims functions, is to file (or continue) a *de novo* judicial action asserting the facts and legal theory of the claim against the receivership of the bank. The NBA does not contemplate or support further action by the claimant in an administrative or judicial forum against the OCC seeking review of the claim determination.

Section 51.4(c) of the final rule provides that if a person with a claim against an uninsured bank in receivership also has an obligation owed to the bank, the claim and obligation will be set off against each other and only the net balance remaining after set-off will be considered as a claim. To this end, § 51.4(a) also includes language referring to claims for set-

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<sup>17</sup> See First Nat'l Bank of Bethel v. Nat'l Pahquioque Bank, 81 U.S. 383, 401 (1871); Queenan v. Mays, 90 F.2d 525, 531 (10th Cir. 1937). As noted earlier, it is incumbent on a claimant that pursues the judicial route and ultimately obtains judicial relief to submit the final judicial determination and award to the OCC, in order to participate in the OCC's periodic ratable dividends of liquidation proceeds of the receivership estate. Except with respect to a valid and enforceable security interest in specific property of the uninsured bank established as part of a final judicial determination, there are no assets or funds available to a successful judicial claimant other than the ratable dividend process set out in 12 U.S.C. 194 and described in § 51.8 of the final rule.

off. The right of set-off where parties have mutual obligations has long been recognized as an equitable principle.<sup>18</sup> Well-settled case law has held that a receivership creditor's or other claimant's equitable right to a set-off is not precluded by the ratable distribution requirement of the NBA, provided such set-off is otherwise legally valid.<sup>19</sup> If, after set-off, an amount is owed to the creditor, the creditor may file a claim for the net amount remaining as any other general creditor. Conversely, if, after set-off, an amount is owed to the bank, the creditor does not have a claim and the net amount remaining is an asset of the uninsured bank, which the receiver may obtain in connection with marshalling the assets (as described further in § 51.7(a) of the final rule).

The OCC requested comment on whether there are additional characteristics of set-offs or other situations in which set-off may arise that should be included in the rule. One commenter, a trade association for banks, said that the administration of set-offs may be complex, given that the trust and fiduciary business is a fee-based industry. The commenter offered the example of instances in which fees have been accrued or are otherwise in the process of payment to one or more service providers at the time of receivership. The commenter suggested that the final rule acknowledge that a given resolution may involve bespoke, fact-specific set-off situations that would need to be carefully considered, while also serving the need for the receiver or a successor fiduciary to be in a position to continue providing fiduciary services during the receivership.

The OCC believes that, on balance, it is not necessary to make this kind of an addition to the language of the final rule. Section 51.4 as a whole is designed to make the basic framework of claim submission transparent to creditors of the uninsured bank, and set-off is included as an

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<sup>18</sup> See, e.g., Scammon v. Kimball, 92 U.S. 362 (1876); Blount v. Windley, 95 U.S. 173, 177 (1877); Carr v. Hamilton, 129 U.S. 252 (1889).

<sup>19</sup> See Scott v. Armstrong, 146 U.S. 499, 510 (1892); InterFirst Bank of Abilene, N.A. v. FDIC, 777 F.2d 1092, 1095-1096 (5th Cir. 1985); FDIC v. Mademoiselle of California, 379 F.2d 660, 663 (9th Cir. 1967).

element of this framework. As the commenter states, the OCC's determination of particular claims will require consideration of fact-specific situations prior to reaching a disposition, and this extends to considerations of set-offs. The final rule is designed to accommodate with flexibility the consideration of such factors in the context in which each claim is postured.

Section 51.5 of the final rule sets out the order of priorities for payment of administrative expenses of the receiver and claims against the uninsured bank in receivership. Under this section, the OCC will pay these expenses and claims in the following order: (1) administrative expenses of the receiver; (2) unsecured creditors, including secured creditors to the extent their claim exceeds their valid and enforceable security interest; (3) creditors of the uninsured bank, if any, whose claims are subordinated to general creditor claims; and (4) shareholders of the uninsured bank. The order is based on case law and, in the case of the first priority for administrative expenses, on 12 U.S.C. 196.<sup>20</sup>

A creditor or other claimant with a security interest that was valid and enforceable as to its terms prior to the appointment of the receiver is entitled to exercise that security interest, outside the priority of distributions set out in the final rule.<sup>21</sup> If the collateral value exceeds the amount of the claim as it was immediately prior to the receiver's appointment, the surplus remains an asset of the uninsured bank, and the receiver may obtain it in connection with marshalling the assets (as further described in § 51.7(a) of the final rule).<sup>22</sup>

Liens arising from judicial determinations after the initiation of the receivership, as well as contractual liens that are triggered due to the appointment of a receiver or other post-

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<sup>20</sup> See Ticonic Nat'l Bank v. Sprague, 303 U.S. 406, 410-411 (1938); Merrill v. Nat'l Bank of Jacksonville, 173 U.S. 131, 146 (1899); Scott v. Armstrong, 146 U.S. 499, 510 (1892); Bell v. Hanover Nat'l Bank, 57 F. 821, 822 (C.C.S.D.N.Y. 1893).

<sup>21</sup> Ticonic Nat'l Bank v. Sprague, 303 U.S. 406, 410-411 (1938); Bell v. Hanover Nat'l Bank, 57 F. 821, 822 (C.C.S.D.N.Y. 1893).

<sup>22</sup> Bell v. Hanover Nat'l Bank, 57 F. 821, 822 (C.C.S.D.N.Y. 1893).

appointment events, are not enforceable. This is because recognition of these liens would afford these claimants a priority that is not recognized under the established legal priorities described in § 51.5 of the final rule. Similarly, a secured creditor is not entitled to a priority distribution of any portion of the claim that is not covered by the value of the collateral because the creditor is in the position of a general unsecured creditor for that portion of the claim and must participate in ratable liquidation distributions on par with other unsecured creditors.<sup>23</sup>

Assets held by the uninsured bank at the time of the receiver's appointment in a fiduciary or custodial capacity, as identified on the bank's books and records, are not general assets of the bank. Section 51.8(b) of the final rule reiterates this point. In the same vein, the claim of the customer for the return of the customer's fiduciary or custodial assets is separate from, and not subject to, the priority set out in § 51.5. Fiduciary and custodial customers of the bank have direct claims on those assets pursuant to their fiduciary or custodial account contracts. However, the priority of a fiduciary or custodial customer's other claims against the bank, if any, would remain subject to the priority described in § 51.5. For example, a fiduciary customer's claim for a refund of prepaid investment management fees that were attributable to periods after the receiver returned the fiduciary assets to the customer generally would be a general unsecured claim covered by § 51.5(b). The claims process described in § 51.4(b) is available to a fiduciary customer, for both a direct claim for the return of fiduciary assets, as well as a receivership claim for amounts the customer believes it is owed by the bank.

The OCC requested comment on whether there are other Federal statutes regarding specific types of claims that may be applicable to a receivership of an uninsured bank under the NBA and that would give certain claims a different priority, such as claims owed to the Federal government. One commenter, a coalition that advocates for reform in the financial services

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<sup>23</sup> Merrill v. Nat'l Bank of Jacksonville, 173 U.S. 131, 146 (1899).

industry, agreed that customer assets held by a bank in a fiduciary capacity should not be considered assets of the bank, but questioned why other claims of the customer, such as a claim for a refund of prepaid investment management fees that were attributable to periods after the receiver returned the fiduciary assets to the customer, would be treated as a unsecured general creditor claim. The commenter suggested that such customer funds would have less protection in a receivership for an uninsured bank than they would under certain modern receivership and bankruptcy statutes that set forth claim priorities which include preference to customer claims over other general creditor claims.

The OCC is required, by statute, to pay claims on a ratable basis. As discussed in connection with the description of § 51.8 of the final rule, this requirement has been interpreted by the courts as requiring the OCC to make distributions on OCC-approved claims and judicial awards on an equal footing, determining the amount of each creditor's claim as it stands at the point of insolvency. As a result, the controlling ratable payment statute does not support a rule that makes distinctions in distribution priority between customer and general creditor claimants.

Section 51.6 of the final rule provides that all administrative expenses of the receiver for an uninsured bank will be paid out of the assets of the receivership before payment of claims against the receivership. This reflects the requirements in 12 U.S.C. 196. The final rule also states that receivership expenses will include pre-receivership and post-receivership obligations that the receiver determines are necessary and appropriate to facilitate the orderly liquidation or other resolution of the uninsured bank in receivership. To further illustrate the kinds of expenses that § 196 affords a first priority claim on the uninsured bank's receivership assets, § 51.6 enumerates examples of such administrative expenses, such as wages and salaries of employees, expenses for professional services, contractual rent pursuant to an existing lease or rental

agreement, and payments to third-party or affiliated service providers, when the receiver determines these expenses are of benefit to the receivership.

Section 51.7 of the final rule contains provisions describing the powers and duties of the receiver and the disposition of fiduciary and custodial accounts. As described in § 51.7, the receiver will take over the assets and operation of the uninsured bank, take action to realize on debts owed to the uninsured bank, sell the property of the bank, and liquidate the assets of the uninsured bank for payment of claims against the receivership. Section 51.7(a)(1)-(5) lists some of the major powers and duties for the receiver set out in 12 U.S.C. 192 and clarified by the courts, including taking possession of the books and records of the bank, collecting on debts and claims owed to the bank, selling or compromising bad or doubtful debts (with court approval), and selling the bank's real and personal property (also with court approval).

Section 51.7(b) of the final rule provides for the receiver to close the uninsured bank's fiduciary and custodial appointments, or transfer such accounts to a successor fiduciary or custodian under 12 CFR 9.16 or other applicable Federal law. The uninsured banks currently in existence focus on fiduciary and custodial services, so this function of the receiver will be of primary importance. This provision recognizes that the receiver's power to wind up the affairs of the uninsured bank in receivership, acting with court approval to make disposition of bank assets, should properly encompass the power to transfer fiduciary or custodial appointments and any associated assets in appropriate circumstances.

Transfer of fiduciary appointments may occur under the terms of the instrument creating the relationship, if it provides for transfer, or under a fiduciary transfer statute, if one is applicable. The OCC believes there are strong public policy interests in endeavoring to replace fiduciaries and custodians expeditiously, without an interruption in service to their customers, if

transfer can be arranged to a qualified successor, maintaining the same duties and standards of care with respect to the customers that previously pertained to their accounts at the uninsured bank in receivership. The alternative, given that the uninsured bank must be wound down and cannot provide services in the future, is to stop managing and reinvesting the customer's assets, stop responding to directions to transfer or receive assets in custody, close the accounts, and seek instructions from the account holders or the courts regarding return of associated assets. For institutional customers, this is likely to cause significant interruption of the intricate machinery of their financial operations. For individuals, it can potentially result in loss of asset value in adverse markets, or loss of income due to foregone reinvestments.

Across the United States, there are disparate and often conflicting legal rules restricting or conditioning transfers of an appointment of a fiduciary for a beneficiary residing within the state. Depending on the geographic area across which the uninsured bank has established fiduciary relationships with its customers, and the standardization of its fiduciary account agreements or appointing instruments, it may be practicable for the receiver to transition an uninsured bank's fiduciary and custody accounts to a qualified successor through the mechanisms provided by applicable local law. On the other hand, if faced with dispersed customers, diverse account agreements or appointments of different vintage, or even the absence of an applicable law of transfer for customers in certain states, reliance on these methods may be so cumbersome as to effectively prevent accomplishment of the transfers in a timely way.

In order to address these potential problems, the OCC, relying on the support of existing case law, is including language in the final rule to make it clear that the uninsured bank receiver's power under 12 U.S.C. 192 to sell, with court approval, the real and personal property of the bank includes the power to transfer the bank's fiduciary accounts and related assets,

subject to the approval of the court exercising jurisdiction over the receiver's efforts to transfer the bank's assets. The final rule is consistent with case law recognizing that a receiver for a national bank may properly arrange asset purchase and liability assumption transactions to move the business of a failed bank to a successor on an integrated basis, as part of the power to transfer assets, as well as analogous case law concerning the transfer of fiduciary and custodial assets by the FDIC, acting as receiver of failed insured depository institutions.<sup>24</sup>

Section 51.7(c) of the final rule incorporates, in general terms, the powers, duties, and responsibilities of receivers for national banks under the NBA and under judicial precedents determining the authorities and responsibilities of receivers for national banks. Examples of these powers include: (1) the authority to repudiate certain contracts, including: (a) purely executory contracts, upon determining that the contracts would be unduly burdensome or unprofitable for the receivership estate,<sup>25</sup> (b) contracts that involve fraud or misrepresentation,<sup>26</sup> and (c) in limited cases, non-executory contracts that are contrary to public policy;<sup>27</sup> (2) the authority to recover fraudulent transfers;<sup>28</sup> and (3) the authority to enforce collection of notes from debtors and collateral, regardless of the existence of side arrangements that would otherwise defeat the collectability of such notes.<sup>29</sup>

Section 51.7(d) of the final rule requires the receiver to make periodic reports to the OCC concerning the status and proceedings of the receivership.

Section 51.8 of the final rule contains provisions regarding the payment of dividends on

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<sup>24</sup> See NCNB Texas National Bank v. Cowden, 895 F.2d 1488 (5<sup>th</sup> Cir. 1990) (holding that the FDIC, as receiver of insolvent bank, had authority to transfer fiduciary appointments to a bridge bank prior to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989).

<sup>25</sup> Bank One Texas v. Prudential Life Ins. Co., 878 F. Supp. 943, 964-66 (N.D. Tex. 1995).

<sup>26</sup> A. Corbin, Corbin on Contracts § 228 at 320 (1952) (addressing contracts voidable for fraud, duress, or mistake).

<sup>27</sup> Cf. Fidelity Deposit Co. of Md. v. Conner, 973 F.2d 1236, 1241 (5<sup>th</sup> Cir. 1992).

<sup>28</sup> See Peters v. Bain, 133 U.S. 670 (1890) (applying state substantive law to determine whether to void a transfer); Rogers v. Marchant, 91 F.2d 660, 663 (4<sup>th</sup> Cir. 1937).

<sup>29</sup> D'Oench, Duhme & Co., Inc. v. FDIC, 315 U.S. 447, 458 (1942). A. Corbin, Corbin on Contracts, § 228 at 320 (1952) (addressing contracts voidable for fraud, duress or mistake).

claims against the uninsured bank and the distribution of any remaining proceeds to shareholders. This section provides that, after administrative expenses of the receivership have been paid, the OCC will make ratable dividends from available receivership funds based on the priority of claims in proposed § 51.5 for claims that have been proved to the OCC's satisfaction or adjudicated in a court of competent jurisdiction, as provided in 12 U.S.C. 194. The OCC will make payment of dividends, if any, periodically, at the discretion of the OCC, as the receiver liquidates the assets of the uninsured bank.

The final rule's inclusion of the "ratable dividend" requirement is designed to incorporate the associated standards about the proper application of this statutory directive, which the judiciary has articulated over the years. The ratable dividend requirement directs the OCC to make distributions on OCC-approved claims and judicial awards on an equal footing, determining the amount of each creditor's claim as it stands at the point of insolvency. As one example, a court's award of interest on an unpaid debt to the date of a judgment rendered in the plaintiff's favor after the receiver was appointed does not increase the amount of the plaintiff's claim for purposes of making ratable dividends. As another example, the ratable dividend requirement generally restricts claims against the bank receivership for debts that were not due and owing at the appointment of the receiver and arose for the first time as a consequence of the appointment or a post-appointment event.

The OCC requested comment on alternatives to the proposed rule's approach to paying dividends on claims, under which the OCC would exercise its discretion under section 194 to determine the timing of the distributions on established claims. Under one alternative presented in the proposed rule, the OCC would refrain from paying any dividends until all claims have been submitted and validated, with final allowed claim amounts established. As we noted in the

proposal, this approach presents the possibility that proven claims may be delayed for a significant amount of time pending more protracted resolution of other claims. Under a second option presented in the proposed rule, the OCC would make ongoing dividends on proven claims, subject to the receiver's retaining a percentage of the funds on hand at the time of the distribution as a pool of dividends for catch-up distributions to a successful plaintiff later.

The OCC did not receive comments on these alternative approaches for making ratable distributions on claims against a receivership. For this reason, and because the proposed rule's approach to payment of dividends provides the OCC with the discretion to tailor the dividend process to facts and circumstances of a particular receivership, the final rule adopts § 51.8 as proposed.

Section 51.8(a)(2) of the final rule recognizes the basic legal premise under the NBA receivership provisions and judicial interpretations thereof that any dividend payments to creditors and other claimants of an uninsured bank will be made solely from receivership funds, if any, paid to the OCC by the receiver after payment of the expenses of the receiver. This provision is also consistent with the established dichotomy of the OCC's supervisory and receivership capacities in the NBA, as discussed earlier.

Section 51.8(b) of the final rule similarly recognizes that assets held by an uninsured national bank at the time of the receiver's appointment in a fiduciary or custodial capacity, as designated on the bank's books and records, are not part of the bank's general assets and liabilities held in connection with its other business and will not be considered a source for payment for unrelated claims of creditors and other claimants. This provision is intended to make clear that the receiver will segregate identified fiduciary and custodial assets and either transfer those assets to other fiduciaries or custodians as described in connection with § 51.7(b),

or close the accounts and endeavor to make the associated assets available to the account holders or their representatives through other means.

One commenter, a trade association for banks, agreed with the treatment of fiduciary assets in the proposed rule, but questioned whether § 51.8(b) indicates with sufficient clarity that fiduciary assets will not be treated as assets of the bank in receivership. As stated in the final rule, fiduciary and custodial assets “will not be considered as part of the bank’s general assets...”. The OCC reiterates that, under this section, assets held by an uninsured bank in a fiduciary or custodial capacity, as designated on the bank’s books and records, are not part of the bank’s general assets and liabilities held in connection with its other business and will not be a source for payment for unrelated claims of creditors and other claimants.

Section 51.8(d) of the final rule provides that, after all administrative expenses and claims have been paid in full, any remaining proceeds will be paid to shareholders in proportion to their stock ownership, also as provided in 12 U.S.C. 194.

Section 51.9 of the final rule contains provisions for termination of receiverships in which there are assets remaining after all administrative expenses and all claims had been paid. This is the scenario addressed by 12 U.S.C. 197. In such a case, section 197 requires the Comptroller to call a meeting of the shareholders of the bank at which the shareholders would decide whether to continue oversight by the Comptroller, or whether to end the receivership and appoint a liquidating agent to continue the liquidation of the remaining assets, under the direction of the board of directors and shareholders, as in a liquidation that had commenced under 12 U.S.C. 181.

There may be other circumstances under which termination would take place, such as when there are no receivership assets remaining after completion of receivership activities.

Under this scenario, the receiver for an uninsured bank has liquidated all of the bank's assets, closed or transferred all fiduciary accounts to a successor fiduciary, paid all administrative expenses, and either paid creditor claims in full and distributed the remaining proceeds to shareholders, as provided in § 51.8(c) of the final rule, or made ratable dividends of all remaining proceeds to creditors as provided in § 51.8(a), but no additional assets remain in the estate. Under these circumstances, the provisions in 12 U.S.C. 197 for termination would not apply.

## **V. Regulatory Analysis**

### **A. Paperwork Reduction Act**

Under the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*), the OCC may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid Office of Management and Budget (OMB) control number. The final rule contains no information collection requirements under the PRA.

### **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, generally requires that, in connection with a rulemaking, an agency prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small entities. However, the regulatory flexibility analysis otherwise required under the RFA is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined in regulations promulgated by the Small Business Administration (SBA) to include commercial banks and savings institutions, and trust companies, with assets of \$550 million or less and \$38.5 million or less, respectively) and publishes its certification and a brief

explanatory statement in the **Federal Register** together with the rule.

The OCC currently supervises approximately 1,032 small entities. The scope of the final rule extends to uninsured banks. The maximum number of OCC-supervised small uninsured banks that could be subject to the receivership framework described in the final rule is approximately 18.<sup>30</sup> Accordingly, the OCC certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

#### OCC Unfunded Mandates Reform Act of 1995 Determination

The OCC has analyzed the final rule under the factors in the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532). Under this analysis, the OCC considered whether the final rule includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (adjusted annually for inflation). As detailed in the **SUPPLEMENTARY INFORMATION**, the OCC currently supervises 52 uninsured banks, all of which are uninsured trust banks, and has not appointed a receiver for an uninsured bank since 1933. Unlike commercial and consumer banks and savings associations, which generally face credit and liquidity risks, national trust banks primarily face operational, reputational, and strategic risks. While any of these risks could result in the precipitous failure of a bank or savings association, from a historical perspective, trust banks have been more likely to decline into a weakened condition, allowing the OCC and the institution the time needed to find other solutions for rehabilitating the institution or to successfully resolve the institution without the need to appoint a receiver. As such, we believe the OCC is unlikely to place an uninsured trust bank into receivership. For this reason, and

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<sup>30</sup> Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if we should classify an institution we supervise as a small entity. We used December 31, 2015, to determine size because a financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. See footnote 8 of the U.S. SBA's Table of Size Standards.

because the final rule does not impose any implementation requirements, the OCC concludes that the final rule will not result in an expenditure of \$100 million or more by state, local, and tribal governments, or by the private sector, in any one year.

### **List of Subjects in 12 CFR Part 51**

Administrative practice and procedure, Banks, Banking, National banks, Procedural rules, Receiverships.

Authority and Issuance

For the reasons set forth in the preamble and under the authority of 12 U.S.C. 16, 93a, 191-200, 481, 482, 1831c, and 1867 the Office of the Comptroller of the Currency adds part 51 to chapter I of title 12, Code of Federal Regulations to read as follows:

### **PART 51 -- RECEIVERSHIPS FOR UNINSURED NATIONAL BANKS**

Sec.

- 51.1 Purpose and scope.
- 51.2 Appointment of receiver.
- 51.3 Notice of appointment of receiver.
- 51.4 Claims.
- 51.5 Order of priorities.
- 51.6 Administrative expenses of receiver.
- 51.7 Powers and duties of receiver; disposition of fiduciary and custodial accounts.
- 51.8 Payment of claims and dividends to shareholders.
- 51.9 Termination of receivership.

Authority: 12 U.S.C. 16, 93a, 191-200, 481, 482, 1831c, and 1867.

#### **§ 51.1 Purpose and scope.**

(a) Purpose. This part sets out procedures for receiverships of national banks conducted by the Office of the Comptroller of the Currency (OCC) under the receivership provisions of the National Bank Act (NBA). These receivership provisions apply to national banks that are not

insured by the Federal Deposit Insurance Corporation (FDIC).

(b) Scope. This part applies to the appointment of a receiver for uninsured national banks (uninsured banks) and the operation of a receivership after appointment of a receiver for an uninsured bank under 12 U.S.C. 191.<sup>31</sup>

### **§ 51.2 Appointment of receiver.**

(a) In general. The Comptroller of the Currency (Comptroller) may appoint any person, including the OCC or another government agency, as receiver for an uninsured bank. The receiver performs its duties under the direction of the Comptroller and serves at the will of the Comptroller. The Comptroller may require the receiver to post a bond or other security. The receiver, with the approval of the Comptroller, may employ such staff and enter into contracts for professional services as are necessary to carry out the receivership.

(b) Grounds for appointment. The Comptroller may appoint a receiver for an uninsured bank based on any of the grounds specified in 12 U.S.C. 191(a).

(c) Judicial review. If the Comptroller appoints a receiver for an uninsured bank, the bank may seek judicial review of the appointment as provided in 12 U.S.C. 191(b).

### **§ 51.3 Notice of appointment of receiver.**

Upon appointment of a receiver for an uninsured bank, the OCC will provide notice to the public of the receivership, including by publication in a newspaper of general circulation for three consecutive months. The notice of the receivership will provide instructions for creditors and other claimants seeking to submit claims with the receiver for the uninsured bank.

### **§ 51.4 Claims.**

(a) Submission of claims for consideration by the OCC. (1) Persons who have claims against the receivership for an uninsured bank may present such claims, along with supporting

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<sup>31</sup> This part does not apply to receiverships for uninsured Federal branches or uninsured Federal agencies.

documentation, for consideration by the OCC. The OCC will determine the validity and approve the amounts of such claims.

(2) The OCC will establish a date by which any person seeking to present a claim against the uninsured bank for consideration by the OCC must present their claim for determination. The deadline for filing such claims will not be less than 30 days after the end of the three-month notice period in § 51.3.

(3) The OCC will allow any claim against the uninsured bank received on or before the deadline for presenting claims if such claim is established to the OCC's satisfaction by the information on the uninsured bank's books and records or otherwise submitted. The OCC may disallow any portion of any claim by a creditor or claim of a security, preference, set-off, or priority which is not established to the satisfaction of the OCC.

(b) Submission of claims to a court. Persons with claims against an uninsured bank in receivership may present their claims to a court of competent jurisdiction for adjudication. Such persons must submit a copy of any final judgment received from the court to the OCC, to participate in ratable dividends along with other proved claims.

(c) Right of set-off. If a person with a claim against an uninsured bank in receivership also has an obligation owed to the bank, the claim and obligation will be set off against each other and only the net balance remaining after set-off shall be considered as a claim, provided such set-off is otherwise legally valid.

### **§ 51.5 Order of priorities.**

The OCC will pay receivership expenses and proved claims against the uninsured bank in receivership in the following order of priority:

(a) Administrative expenses of the receiver;

(b) Unsecured creditors of the uninsured bank, including secured creditors to the extent their claim exceeds their valid and enforceable security interest;

(c) Creditors of the uninsured bank, if any, whose claims are subordinated to general creditor claims; and

(d) Shareholders of the uninsured bank.

**§ 51.6 Administrative expenses of receiver.**

(a) Priority of administrative expenses. All administrative expenses of the receiver for an uninsured bank shall be paid out of the assets of the bank in receivership before payment of claims against the receivership.

(b) Scope of administrative expenses. Administrative expenses of the receiver for an uninsured bank include those expenses incurred by the receiver in maintaining banking operations during the receivership, to preserve assets of the uninsured bank, while liquidating or otherwise resolving the affairs of the uninsured bank. Such expenses include pre-receivership and post-receivership obligations that the receiver determines are necessary and appropriate to facilitate the orderly liquidation or other resolution of the uninsured bank in receivership.

(c) Types of administrative expenses. Administrative expenses for the receiver of an uninsured bank include:

(1) Salaries, costs, and other expenses of the receiver and its staff, and costs of contracts entered into by the receiver for professional services relating to performing receivership duties; and

(2) Expenses necessary for the operation of the uninsured bank, including wages and salaries of employees, expenses for professional services, contractual rent pursuant to an existing lease or rental agreement, and payments to third-party or affiliated service providers, that in the

opinion of the receiver are of benefit to the receivership, until the date the receiver repudiates, terminates, cancels, or otherwise discontinues the applicable contract.

**§ 51.7 Powers and duties of receiver; disposition of fiduciary and custodial accounts.**

(a) Marshalling of assets. In resolving the affairs of an uninsured bank in receivership, the receiver:

(1) Takes possession of the books, records and other property and assets of the uninsured bank, including the value of collateral pledged by the uninsured bank to the extent it exceeds valid and enforceable security interests of a claimant;

(2) Collects all debts, dues and claims belonging to the uninsured bank, including claims remaining after set-off;

(3) Sells or compromises all bad or doubtful debts, subject to approval by a court of competent jurisdiction;

(4) Sells the real and personal property of the uninsured bank, subject to approval by a court of competent jurisdiction, on such terms as the court shall direct; and

(5) Deposits all receivership funds collected from the liquidation of the uninsured bank in an account designated by the OCC.

(b) Disposition of fiduciary and custodial accounts. The receiver for an uninsured bank closes the bank's fiduciary and custodial appointments and accounts or transfers some or all of such accounts to successor fiduciaries and custodians, in accordance with 12 CFR 9.16, and other applicable Federal law.

(c) Other powers. The receiver for an uninsured bank may exercise other rights, privileges, and powers authorized for receivers of national banks under the NBA and the common law of receiverships as applied by the courts to receiverships of national banks

conducted under the NBA.

(d) Reports to OCC. The receiver for an uninsured bank shall make periodic reports to the OCC on the status and proceedings of the receivership.

(e) Receiver subject to removal; modification of fees. (1) The Comptroller may remove and replace the receiver for an uninsured bank if, in the Comptroller's discretion, the receiver is not conducting the receivership in accordance with applicable Federal laws or regulations or fails to comply with decisions of the Comptroller with respect to the conduct of the receivership or claims against the receivership.

(2) The Comptroller may reduce the fees of the receiver for an uninsured bank if, in the Comptroller's discretion, the Comptroller finds the performance of the receiver to be deficient, or the fees of the receiver to be excessive, unreasonable, or beyond the scope of the work assigned to the receiver.

#### **§ 51.8 Payment of claims and dividends to shareholders.**

(a) Claims. (1) After the administrative expenses of the receivership have been paid, the OCC shall make ratable dividends from time to time of available receivership funds according to the priority described in § 51.5, based on the claims that have been proved to the OCC's satisfaction or adjudicated in a court of competent jurisdiction.

(2) Dividend payments to creditors and other claimants of an uninsured bank will be made solely from receivership funds, if any, paid to the OCC by the receiver after payment of the expenses of the receiver.

(b) Fiduciary and custodial assets. Assets held by an uninsured bank in a fiduciary or custodial capacity, as designated on the bank's books and records, will not be considered as part of the bank's general assets and liabilities held in connection with its other business, and will not

be considered a source for payment of unrelated claims of creditors and other claimants.

(c) Timing of dividends. The payment of dividends, if any, under paragraph (a) of this section, on proved or adjudicated claims will be made periodically, at the discretion of the OCC, as the receiver liquidates the assets of the uninsured bank.

(d) Distribution to shareholders. After all administrative expenses of the receiver and proved claims of creditors of the uninsured bank have been paid in full, to the extent there are receivership assets to make such payments, any remaining proceeds shall be paid to the shareholders, or their legal representatives, in proportion to their stock ownership.

#### **§ 51.9 Termination of receivership.**

If there are assets remaining after full payment of the expenses of the receiver and all claims of creditors for an uninsured bank and all fiduciary accounts of the bank have been closed or transferred to a successor fiduciary and fiduciary powers surrendered, the Comptroller shall call a meeting of the shareholders of the uninsured bank, as provided in 12 U.S.C. 197, for the shareholders to decide the manner in which the liquidation will continue. The liquidation may continue by:

(a) Continuing the receivership of the uninsured bank under the direction of the Comptroller; or

(b) Ending the receivership and oversight by the Comptroller and replacing the receiver with a liquidating agent to proceed to liquidate the remaining assets of the uninsured bank for the benefit of the shareholders, as set out in 12 U.S.C. 197.

Date: December 15, 2016

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**Thomas J. Curry,**

Comptroller of the Currency.

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