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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 5

[Docket ID OCC-2019-0024]

RIN 1557-AE71

Licensing Amendments

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is proposing to amend its rules relating to policies and procedures for corporate activities and transactions involving national banks and Federal savings associations to update and clarify the policies and procedures, eliminate unnecessary requirements consistent with safety and soundness, and make other technical and conforming changes.

DATES: Comments must be received on or before May 4, 2020.

ADDRESSES: Commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title “Licensing Amendments” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- [Federal eRulemaking Portal – Regulations.gov Classic or Regulations.gov Beta](https://www.regulations.gov)

Regulations.gov Classic: Go to <https://www.regulations.gov/>. Enter “Docket ID OCC-2019-0024” in the Search Box and click “Search.” Click on “Comment Now” to submit public comments. For help with submitting effective comments please click on “View Commenter’s Checklist.” Click on the “Help” tab on the *Regulations.gov* home page to get information on using *Regulations.gov*, including instructions for submitting public comments.

Regulations.gov Beta: Go to <https://beta.regulations.gov/> or click “Visit New *Regulations.gov* Site” from the *Regulations.gov* classic homepage. Enter “Docket ID OCC-2019-0024” in the Search Box and click “Search.” Public comments can be submitted via the “Comment” box below the displayed document information or click on the document title and click the “Comment” box on the top-left side of the screen. For help with submitting effective comments please click on “Commenter’s Checklist.” For assistance with the *Regulations.gov* Beta site please call (877)-378-5457 (toll free) or (703) 454-9859 Monday-Friday, 9am-5pm ET or e-mail to regulations@erulemakinghelpdesk.com.

- E-mail: regs.comments@occ.treas.gov.
- Mail: Chief Counsel’s Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street, SW., suite 3E-218, Washington, DC 20219.
- Hand Delivery/Courier: 400 7th Street, SW., suite 3E-218, Washington, DC 20219.
- Fax: (571) 465-4326.

Instructions: You must include “OCC” as the agency name and “Docket ID OCC-2019-0024” in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, e-mail

addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- Viewing Comments Electronically – Regulations.gov Classic or Regulations.gov Beta:

Regulations.gov Classic: Go to <https://www.regulations.gov/>. Enter “Docket ID OCC-2019-0024” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on “View all documents and comments in this docket” and then using the filtering tools on the left side of the screen. Click on the “Help” tab on the *Regulations.gov* home page to get information on using *Regulations.gov*. The docket may be viewed after the close of the comment period in the same manner as during the comment period.

Regulations.gov Beta: Go to <https://beta.regulations.gov/> or click “Visit New *Regulations.gov Site*” from the *Regulations.gov* classic homepage. Enter “Docket ID OCC-2019-0024” in the Search Box and click “Search.” Click on the “Comments” tab.

Comments can be viewed and filtered by clicking on the “Sort By” drop-down on the right side of the screen or the “Refine Results” options on the left side of the screen. Supporting Materials can be viewed by clicking on the “Documents” tab and filtered by clicking on the “Sort By” drop-down on the right side of the screen or the “Refine Results” options on the left side of the screen.” For assistance with the *Regulations.gov* Beta site please call (877)-

378-5457 (toll free) or (703) 454-9859 Monday-Friday, 9am-5pm ET or e-mail to regulations@erulemakinghelpdesk.com.

The docket may be viewed after the close of the comment period in the same manner as during the comment period.

- **Viewing Comments Personally:** You may personally inspect comments at the OCC, 400 7th Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649-6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649-5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Christopher Crawford, Counsel, Valerie Song, Assistant Director, Rima Kundnani, Senior Attorney, or Heidi Thomas, Special Counsel, (202) 649-5490, Chief Counsel’s Office; or Karen Marcotte, Director for Licensing Activities, (202) 649-7297, Office of the Comptroller of the Currency, 400 7th Street SW., Washington, DC 20219. For persons who are deaf or hearing impaired, TTY, (202) 649-5597.

SUPPLEMENTARY INFORMATION:

I. Background

The OCC periodically reviews its regulations to eliminate outdated or otherwise unnecessary provisions and to clarify or revise requirements imposed on national banks and Federal savings associations where possible and when not inconsistent with safety and soundness. These reviews are in addition to the OCC’s decennial review of its regulations as

required by the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA)¹ As part of this process, the OCC is proposing to revise its rules in 12 CFR part 5 relating to requirements for national banks and Federal savings associations that seek to engage in certain corporate transactions or activities.

Part 5 addresses the range of an institution's existence from chartering to dissolution and includes, among other things, business combinations, branching matters, operating subsidiaries, and dividend payments. In some cases, a bank is required to apply to engage in a certain transaction or activity while in other situations a bank must submit a notice to the OCC either for informational purposes or as a means for providing the OCC with the opportunity to object to the transaction or activity.

II. Description of the Proposed Rule

Rules of General Applicability (Part 5, Subpart A)

Twelve CFR part 5, subpart A, sets forth the OCC's generally applicable rules and procedures for corporate activities and transactions of national banks and Federal savings associations. The OCC proposes substantive and technical changes to subpart A as explained below.

Rules of General Applicability (§ 5.2) Section 5.2(a) states that the procedures in subpart A apply to all part 5 filings, unless otherwise stated. Section 5.2(b) provides that the OCC may adopt materially different procedures for a particular filing or class of filings in exceptional

¹ Pub. L 104-208 (1996), codified at 12 U.S.C. 3311(b). Section 2222 of EGRPRA requires that, at least once every 10 years, the OCC along with the other Federal banking agencies and the Federal Financial Institutions Examination Council (FFIEC) conduct a review of their regulations to identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions. Specifically, EGRPRA requires the agencies to categorize and publish their regulations for comment, eliminate unnecessary regulations to the extent that such action is appropriate, and submit a report to Congress summarizing their review. The agencies completed their second EGRPRA review on March 30, 2017 and published their report in the **Federal Register**. 82 FR 15900 (March 30, 2017).

circumstances or for unusual transactions after providing notice to the applicant and any other party that the OCC determines should receive notice. The OCC is proposing to increase its flexibility to address unusual situations by adding language to clarify that it may adopt materially different procedures as it deems necessary, for example, in exceptional circumstances or for unusual transactions. As discussed below, the OCC also is proposing to change the term “applicant” to “filer” in this section.

Definitions (§ 5.3) Section 5.3 defines terms that are used throughout part 5. The OCC is proposing several new definitions to this section. First, the OCC is proposing definitions for “nonconforming assets” and “nonconforming activities.” The OCC uses, but does not define, these terms in §§ 5.23 and 5.24 (conversions to a Federal savings association or national bank, respectively) and § 5.33 (business combinations). The OCC proposes these definitions to mean assets or activities that are impermissible for a national bank or a Federal savings association to hold or conduct, as applicable, or if permissible, are nonetheless held or conducted in a manner that exceeds limits applicable to national banks or Federal savings associations. Under this proposed definition, the term “assets” would include a national bank’s or Federal savings association’s investments in subsidiaries or other entities.

Second, the OCC proposes to define the term “previously approved activity” to mean, in the case of a national bank, an 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 in the case of a Federal savings association, an 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. The OCC is

proposing this definition to provide more clarity given the repeated use of this standard in §§ 5.34, 5.36, 5.38, and 5.58.²

Third, the OCC proposes to define “well capitalized” in § 5.3. The OCC uses the term “well capitalized” throughout part 5 differently. For example, for national banks and Federal savings associations various sections of part 5 apply the definition of well capitalized that is used in 12 CFR 6.4. For Federal branches and agencies, §§ 5.34, 5.35, and 5.36 apply the standard in 12 CFR 4.7(b)(1)(iii) to qualify for an 18-month examination cycle. Finally, for an insured depository institution that is not a national bank or Federal savings association, § 5.39 applies the applicable standard promulgated by the appropriate Federal banking agency under 12 U.S.C. 1831*o*. The OCC proposes to remove this inconsistency by adding a definition of “well capitalized” to § 5.3 that would apply to all of part 5 and removing the duplicative definitions included in the various sections. Where appropriate, provisions in part 5 would cross-reference to this new definition.

Fourth, the OCC proposes to add the term “well managed” to § 5.3. Currently, part 5 contains two different definitions of “well managed.” Consistent with section 5136A of the Revised Statutes (12 U.S.C. 24a), § 5.39 generally defines “well managed” for purposes of financial subsidiaries as a 1 or 2 composite rating under the Uniform Financial Institutions Rating System and at least a rating of 2 for management. By contrast, §§ 5.34 and 5.38, governing national bank and Federal savings association operating subsidiaries, respectively, generally define “well managed” as a 1 or 2 composite rating without reference to the

² For references to previously approved activities, national banks and Federal savings associations may consult the OCC’s publications *Comparison of the Powers of National Banks and Federal Savings Associations*, available at <https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-comparison-powers-national-banks-fed-sav-assoc.pdf>, and *Activities Permissible for National Banks and Federal Savings Associations, Cumulative*, available at <https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-activities-permissible-for-nat-banks-fed-saving.pdf>.

management rating. Sections 5.35 (bank service company investments), 5.36 (other equity investments by a national bank), and 5.58 (Federal savings association pass-through investments) cross-reference to the §§ 5.34 or 5.38 definition. Additionally, § 5.59(h)(2)(ii)(A) requires a Federal savings association to be well managed to be eligible for expedited review.

The OCC is proposing a single definition of “well managed” applicable throughout part 5 to eliminate confusion between the two definitions and to further the OCC’s supervisory objectives.³ The financial subsidiary statute, 12 U.S.C. 24a, defines “well managed” to include the management rating, and the OCC proposes to use this definition. The proposal uses an equivalent definition for Federal branches and agencies of foreign banks which is a composite ROCA supervisory rating (which rates risk management, operational controls, compliance and assets quality) of 1 or 2, and at least a rating of 2 for risk management. Further, the OCC believes that a national bank, Federal savings association, or Federal branch or agency with a 2 composite rating but a 3 management, or risk management, rating warrants additional scrutiny. The OCC believes that these changes will enhance bank safety and soundness and provide a clearer and more consistent standard for national banks.

The OCC also is considering amending the definition of “short-distance relocation.” Currently, moving the premises of a branch or main office of a national bank or a branch or home office of a Federal savings association is a short-distance relocation if the move is within: (1) a one-thousand foot-radius of the site if the branch, main office, or home office is located within a principal city of a metropolitan statistical area (MSA); (2) a one-mile radius of the site if

³ There is one instance of the term “well managed” in part 5 that does not follow this definition. Specifically, 12 CFR 5.59(e)(7)(i) requires that each Federal savings association “be well managed and operate safely and soundly.” This provision is not directly applicable to any filing procedures but is rather a general statement of appropriate management and safety and soundness standards. For example, pursuant to § 5.59(e)(7)(ii) the OCC may 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.

the branch, main office, or home office is not located within a principal city but is located within an MSA; or (3) a two-mile radius of the site if the branch, main office, or home office is not located within an MSA. Under the branch relocation provisions in § 5.30 (national banks) and § 5.31 (Federal savings associations) and the main office and home office relocation provisions in § 5.40, short-distance relocations have a shorter public comment and OCC approval period than other relocations. Additionally, the OCC generally equates the short-distance relocation provision to be equivalent to a “relocation” for the purposes of branch closing under section 42 of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1831r-1).

The OCC has never adjusted the distances in the definition of short-distance relocation, and the distances do not necessarily reflect the individual circumstances of each bank location. Because of the changes in branching activities, locations, and usage since 1996, such as the increased use of electronic banking, the OCC is considering expanding the distances for short-distance relocations to allow national banks and Federal savings associations greater flexibility in their office locations and to reduce regulatory burden for these types of relocations. Specifically, the OCC is considering expanding the distances in the definition to: (1) a two-thousand foot radius within a principal city of an MSA; (2) a two-mile radius not within a principal city but within an MSA; and (3) a four-mile radius not within an MSA. However, any amendment to this definition would provide that this increase in distance would not apply to a branch that would be relocated from a low- or moderate-income area to a non-low- or moderate-income area. For such relocations, the current definition of a short-distance relocation would continue to apply. The OCC invites comment on whether the OCC should amend § 5.3 to adjust the distances included in the definition of short-distance relocation and if so whether the increase suggested above would be appropriate or whether an alternate increase in distance would better reduce regulatory

burden on national banks and Federal savings associations while providing appropriate notice to customers.

Finally, the OCC is proposing technical changes to § 5.3. First, current § 5.3 defines “applicant” as a “person or entity that submits a notice or application to the OCC under” part 5. However, this usage of the term “applicant” is confusing because it covers persons who submit an application or a notice. Accordingly, the OCC proposes to change the term “applicant” to “filer” to more clearly cover both a person who files an application or a notice. The proposal would make conforming changes throughout part 5.

Second, the proposal would add a new definition for “Appropriate Federal banking agency” that cross-references the definition contained in section 3(q) of the FDI Act, 12 U.S.C. 1813(q).

Third, the proposal would add a new definition clarifying that “MSA” means metropolitan statistical area as defined by the Director of the Office of Management and Budget (OMB).⁴

Fourth, part 5 currently defines “notice” to mean a submission notifying the OCC that a national bank or Federal savings association intends to engage in or has commenced certain activities or transactions. The definition notes that the specific meaning depends on context and “may require the filer to obtain prior OCC approval before engaging in the activity or transaction.” As described later in this *Supplementary Information*, the OCC is proposing to change the term “notice” to “application” for activities or transactions that require prior OCC approval. Therefore, the OCC proposes to remove the quoted language from the definition.

⁴ According to the OMB, “[t]he general concept of a metropolitan statistical area is that of an area containing a large population nucleus and adjacent communities that have a high degree of integration with that nucleus.” 75 F.R. 37246 (June 28, 2010). These standards are then applied to census data to delineate the metropolitan statistical areas.

Fifth, the OCC proposes adding abbreviations for the former OTS, the Federal Deposit Insurance Corporation (FDIC), and generally accepted accounting principles as used in the United States (GAAP) to make their use consistent throughout part 5.

Finally, to reflect the more current regulatory drafting style, the OCC proposes to remove the paragraph designations in § 5.3 and to make conforming changes to cross-references throughout 12 CFR part 5.

Filing required (§ 5.4) Section 5.4 requires depository institutions to file applications or notices with the OCC to engage in certain corporate activities and transactions and provides general information on this filing requirement. Section 5.4(f) currently encourages a potential filer to contact the appropriate OCC licensing office to determine the need for a prefiling meeting, and it specifically provides that the OCC decides whether to require a prefiling meeting on a case-by-case basis. The OCC is proposing to provide more general guidance on when a filer should seek a prefiling meeting with the OCC. Specifically, the OCC proposes to include a new sentence advising potential filers with novel, complex, or unique proposals to contact the appropriate OCC licensing office early in the development of the proposal to help identify and consider relevant policy issues.

Additionally, the OCC proposes to move the certification requirement in current § 5.13(h) to new § 5.4(g). Current § 5.13(h) requires filers to certify that material submitted to the OCC contains no material misrepresentations or omissions. The OCC also may review and verify any information filed in connection with a notice or an application. Section 5.13(h) further provides that material misrepresentations or omissions may be subject to enforcement actions and other penalties, including criminal penalties under 18 U.S.C. 1001. As discussed below, the OCC is proposing to revise § 5.13(h) to clarify the procedures regarding nullification

of decisions. The certification requirement in § 5.13(h) does not fit well in the revised provision so the OCC is proposing to move it to § 5.4 with other provisions relating to the form of the filing.

Filing fees (§ 5.5) Section 5.5(a) provides the procedure for submitting filing fees to the OCC. The current rule requires payment to the OCC by check, money order, cashier's check, or wire transfer. The OCC is proposing to update this provision by providing that a filer can pay the fees by check payable to the OCC or by other means acceptable to the OCC. The OCC does not currently charge filing fees for licensing filings and is not proposing any fees as part of this rulemaking.

Investigations (§ 5.7) Section 5.7 provides the OCC with examination and investigation authority related to a filing. As discussed in the OCC's *Licensing Manual*, the OCC routinely engages in background investigations of filers and other individuals involved in filings for new charters, changes in bank control, and changes in directors and senior executive officers. As part of these background investigations, the OCC collects fingerprints and submits them to the Federal Bureau of Investigation for a national criminal history background check. The OCC is proposing to add a new paragraph (b) to § 5.7 to codify this procedure. The OCC also is proposing conforming changes to other sections in part 5 to clarify when it collects fingerprints.

Public availability, Comments, and Hearings and other meetings (§§ 5.9, 5.10, 5.11) Section 5.9 addresses the public availability and confidential treatment of filings. Section 5.10 provides the process for public comment periods and the submission of public comments. Section 5.11 provides the process for hearings and public and private meetings. The OCC is proposing to change the terms "application" to "filing" and "applicant" to "filer" in these sections to reflect the more general terminology proposed in this rule. Furthermore, each of

these sections currently uses the term “interested persons” to refer to persons other than the filer who seek to interact with a filing or related procedure. The OCC understands the term “interested persons” to mean any person who is or may wish to be involved in the licensing process. Such a person may, but need not, have any particular financial, pecuniary, or other interest in the transaction itself, the filer, or other party to the transaction. The OCC invites comment about whether the term “interested persons” is sufficiently clear, or whether a change in terminology would be helpful to indicate the breadth of this provision.

Decisions (§ 5.13) Section 5.13 contains the OCC’s procedures for acting on a filing. Paragraph (a)(2) of this section provides the procedures for the OCC’s expedited review, including extending the time frame for reviewing or removing a filing from expedited review. The OCC may change the expedited review procedures if it concludes that the filing, or an adverse comment regarding the filing, presents a significant supervisory, Community Reinvestment Act (CRA) (if applicable), or compliance concern or raises a significant legal or policy issue requiring additional OCC review. However, paragraph (a)(2)(ii) provides that the OCC will not change the expedited procedures if it determines, among other things, that an adverse comment does not raise a significant supervisory, CRA (if applicable), or compliance concern or a significant legal or policy issue, or is frivolous or filed primarily as a means of delaying action on the filing. The OCC proposes to add non-substantive comments to this list to better align the regulation with OCC policy and processes. The OCC also proposes to specify that it considers a comment to be “non-substantive” if it is: (1) a generalized opinion that a filing should or should not be approved; or (2) a conclusory statement, lacking factual or analytical support. The OCC intends to apply this non-substantive standard to all comments that it reviews. This change would provide a clear standard for commenters submitting views on a filing.

Section 5.13(a)(2)(ii) also provides that the OCC will not change the expedited procedures if the adverse comment raises a CRA concern that the OCC determines has been satisfactorily resolved. The rule states that the OCC considers a CRA concern to be satisfactorily resolved if the OCC previously reviewed (*e.g.*, in an examination or application) a concern presenting substantially the same issue in substantially the same assessment area during substantially the same time, and the OCC determines that the concern would not warrant denial or imposition of a condition on approval of the application. The OCC proposes to amend this provision to expand what is meant by “previously reviewed” to include other supervisory activity and to provide that the OCC’s review may occur in a prior filing.

The OCC also proposes to amend the introductory text to paragraph (a)(2) to reflect that some expedited review procedures in part 5 do not require the national bank or Federal savings association to be an eligible bank or eligible savings association, as defined in § 5.3. The proposed rule also would clarify paragraphs (a)(2)(i) and (ii) by revising the punctuation and sentence structure so that it is easier to read.

Paragraph (h) of § 5.13 provides that the OCC may nullify a decision on a filing if: (1) the OCC discovers a material misrepresentation or omission after the OCC has rendered a decision on the filing; (2) the decision is contrary to law, regulation, or OCC policy; or (3) the OCC granted the decision due to clerical or administrative error or a material mistake of law or fact. The OCC’s decisions on filings generally contain a statement that the “OCC may modify, suspend or rescind this approval if a material change in the information on which the OCC relied occurs prior to the date of the transaction to which the decision pertains.”

The OCC proposes to revise paragraph (h) to clarify when the OCC may nullify a decision. The revised provision would state that the OCC may nullify a decision on a filing

either prior to or after consummation of the transaction. The proposed rule also would clarify that the OCC may nullify a decision based on a material misrepresentation or omission in any information provided to the OCC in the filing or supporting materials. The OCC is also proposing a new paragraph (i) that would provide that 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.

These revisions are intended to clarify that nullification is based on the facts, law, and policy as they existed at the time of the OCC's decision. By contrast, modification, suspension, or rescission is based on a change in facts or circumstance from the time of the OCC's decision until consummation of the transaction to which the decision pertains. The OCC welcomes comment on how it could further clarify these procedures.

As indicated previously in this *Supplementary Information*, the proposed rule would move the provisions in current § 5.13(h) regarding certification of the submitted filing and penalties for material misrepresentation and omissions in a filing to new paragraph § 5.4(g).

Organizing a national bank or Federal savings association (§ 5.20)

Section 5.20 provides the procedures and requirements involved in organizing a *de novo* national bank or Federal savings association. The OCC is proposing two new definitions to § 5.20(d). First, the OCC would define "principal shareholder" as 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 stock of the proposed national bank or Federal savings association. This definition is consistent with the definition used in the "Background Investigations" booklet of the *Comptroller's Licensing*

Manual and the instructions for the Interagency Biographical and Financial Report.⁵ The OCC is proposing this definition in conjunction with provisions related to background checks and fingerprint collections in proposed § 5.20(i)(3), discussed below.

Second, the OCC proposes to clarify that the term “organizer” means a member of the organizing group. This definition is not clearly stated in § 5.20.

Paragraph (i) contains procedures for filing a charter application. The OCC proposes a new paragraph (i)(3) requiring each proposed organizer, director, executive officer, or principal shareholder to submit to the OCC the information prescribed in the Interagency Biographical and Financial Report and legible fingerprints. New paragraph (i)(3) also would permit the OCC to request additional information, if appropriate, and waive the requirements of that paragraph if the OCC determines it to be in the public interest. As discussed in the “Charters” booklet of the *Comptroller Licensing Manual*, the OCC generally conducts routine background checks on insiders, including proposed organizers, directors, executive officers, and controlling shareholders. The OCC revision, consistent with the background investigation changes in proposed § 5.7(b), would codify this process and authorize the collection of fingerprints for charter applications.

The OCC also is proposing a number of technical changes to § 5.20. First, in the definition of “organizing group” the OCC proposes to change the term “persons” to “individuals” to more accurately reflect who may make up an organizing group. Second, in § 5.20(g)(4)(ii), the OCC proposes to change the phrase “withdrawal of preliminary approval” to “nullification or rescission of preliminary approval” to align with the terminology in proposed §§ 5.13(h) and (i). Third, in § 5.20(i), Decision notification, the OCC proposes to change the term

⁵ The Interagency Biographical and Financial Report is available on the OCC’s website at <https://www.occ.gov/static/licensing/form-ia-biographical-financial-report.pdf>.

“spokesperson” to “contact person” in redesignated paragraph (i)(5) to conform to the use of this term in other paragraphs of this section. Fourth, also in § 5.20(i), redesignated paragraph (i)(5), the OCC proposes to change the term “interested parties” to “relevant parties,” which more accurately describes who the OCC should notify of its decision on an application. Lastly, the OCC proposes to remove the reference to 12 CFR part 197 in § 5.20(i), redesignated paragraph (i)(6)(iii), because the OCC has removed this regulation. The remaining citation, 12 CFR part 16, now applies to both national banks and Federal savings associations.

Federal mutual savings association charter and bylaws (§ 5.21)

Section 5.21 governs the procedures and requirements for charters and bylaws of Federal mutual savings associations. Pursuant to paragraph (f)(2), charter amendments are generally subject to prior approval by the OCC, although under paragraph (g), most applications for charter amendments are subject to expedited review and deemed approved as of the 30th day after filing unless the OCC notifies the filer that it has denied the amendment, or the amendment is not eligible for expedited review. An application is not eligible for expedited review if the charter amendment 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 involves a significant issue of law or policy. Paragraph (g) further provides that a notice is required within 30 days after adoption if the filer adopts the optional charter amendments contained in paragraph (g) without change.

The OCC is proposing to reorganize these provisions to clarify the procedures Federal mutual savings associations must follow in adopting charter amendments, to align the terminology in § 5.21 with general usage in part 5, and to make other clarifying changes. The OCC does not intend these changes to be substantive. Specifically, the OCC proposes including

all of this section's procedural requirements for adopting charter amendments in paragraph (f)(2). These amendments would clarify that charter amendments are subject to a three-part regime: application with expedited review, standard application, or notice. Paragraph (g) would only contain provisions relating to optional charter amendments. Additionally, the OCC proposes to add a new paragraph (f)(3) specifying that a charter amendment is effective once it is: (1) approved by the OCC, if approval is required under paragraph (f)(2); and (2) adopted by the association provided the association follows the requirements of its charter in adopting the amendment.

Paragraph (j) governs the bylaws for Federal mutual savings associations. Paragraph (j)(2)(viii) requires the bylaws to specify that the Federal mutual association's board of directors consist of no fewer than five nor more than fifteen members unless the OCC has authorized a higher or lower number. However, unlike the corresponding provision for Federal stock savings associations, 12 CFR 5.22(l)(2), paragraph (j)(2)(viii) does not explicitly address numbers of directors authorized by the former OTS. Accordingly, the OCC proposes to revise this paragraph to explicitly acknowledge that authorizations by the former OTS remain effective.

Paragraph (j)(3) contains the filing requirements for changes to Federal mutual savings association bylaws. Currently, all bylaw amendments require some sort of filing with the OCC. As with the charter amendments discussed above, the OCC is proposing to reorganize these provisions to clarify the procedures Federal mutual savings associations must follow in adopting bylaw amendments and to align the terminology with that used in part 5. The OCC also proposes to eliminate the filing requirement for savings associations that adopt without change the OCC's model or optional bylaws, thereby reducing burden for these Federal mutual savings associations. As a result, these amendments would specify that bylaw amendments are subject to

a four-part regime: application with expedited review, standard application, notice, and no filing required. As with the charter amendments, the OCC also proposes that 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.

As discussed later in this *Supplementary Information*, the OCC is proposing technical changes throughout part 5, including replacing the word “shall” with another appropriate word or words. These changes, as well as other minor proposed wording changes, are included in the model charter and bylaw provisions provided in § 5.21. The OCC does not intend these proposed changes to require any changes on the part of Federal mutual savings associations that use the current model language. Further, the OCC does not intend that the changes would have any effect on the provisions or effectiveness of a Federal mutual savings association’s current charter or bylaws.

Federal stock savings association charter and bylaws (§ 5.22)

Section 5.22 governs the procedures and requirements for Federal stock savings association charters and bylaws. Section 5.22 generally parallels § 5.21, which applies to Federal mutual savings association charters and bylaws. The OCC proposes equivalent changes to § 5.22 as proposed for § 5.21. The OCC also proposes two additional technical amendments to § 5.22. Section 5.22 contains sample charter and bylaw provisions, and paragraph (g)(7) provides an optional “Section 8” for Federal stock savings association charters following mutual to stock conversions. This optional section contains a definition of “acting in concert.” The OCC proposes minor wording changes to this definition for consistency with the definition of this term in § 5.50(d)(2), changes in bank control. The OCC also proposes correcting a cross-reference to 12 CFR part 192 in paragraph (e).

Conversion to become a Federal savings association (§ 5.23) and Conversion to become a national bank (§ 5.24)

Sections 5.23 and 5.24 are largely parallel rules that provide the procedures and standards for OCC review and approval of an application by an institution to convert to a Federal savings association or national bank, respectively. Sections 5.23(d)(2)(ii)(A) and 5.24(e)(2)(i) each require the president or other duly authorized officer to sign the conversion application. These sections are the only provisions in part 5 that have specific signature requirements for the filing. As discussed above, the OCC is proposing a new provision in § 5.4 requiring that a filing include evidence of authorization for the filing, such as a board resolution. Accordingly, the OCC proposes to remove §§ 5.23(d)(2)(ii)(A) and 5.24(e)(2)(i) as unnecessary.

The “Conversions to Federal Charter” booklet of the *Comptroller’s Licensing Manual* indicates that filers should include a list of directors and senior executive officers of the converting institution as well as 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 converting institution’s stock. The OCC proposes to codify these requirements in §§ 5.23(d)(2)(ii) and 5.24(e)(2). It is necessary to have a complete list of these individuals because the OCC generally conducts routine background investigations as part of the application process. Furthermore, the OCC proposes to add a new paragraph to each of these rules, §§ 5.23(d)(2)(iv) and 5.24(e)(4), providing that the OCC may require directors and senior executive officers of the converting institution to submit the Interagency Biographical and Financial Report and legible fingerprints. This amendment would codify the background investigation process set forth in the “Conversions to Federal Charter” booklet of the *Comptroller’s Licensing Manual* and

specifically authorize the collection of fingerprints for conversion applications, consistent with the background investigation changes proposed to other sections in this rulemaking.

Additionally, §§ 5.23(d)(4) and 5.24(h) provide for expedited review for conversion from an eligible national bank to a Federal savings association, and vice versa. Currently, this conversion application is deemed approved as of the 60th day after the filing is received by the OCC. The OCC believes that it can review and decide these conversion applications in a shorter period because it already supervises an entity eligible to use the expedited review process. Accordingly, the OCC proposes decreasing the time period for the expedited review to 45 days. The OCC also proposes a technical change to § 5.23(d)(4) to remove the modifier “national” before bank as the defined term in § 5.3 is “eligible bank.” This deletion would not change the scope of institutions eligible for expedited review as only a national bank, and not a State bank, may be an eligible bank under the definition in § 5.3.

Fiduciary powers of national banks and Federal savings associations (§ 5.26)

Section 5.26 contains the application requirements and processes for a national bank or Federal savings association to engage in the exercise of fiduciary powers. Paragraph (e)(2)(i)(C) requires a national bank or Federal savings association to submit sufficient biographical information on proposed trust management personnel as part of an application for fiduciary powers. The scope of the term “trust management personnel” is unclear, and therefore the OCC is proposing to clarify that the biographical information is required for proposed senior trust management personnel, as identified by the OCC. The OCC also is proposing that the application include, if requested by the OCC, the Interagency Biographical and Financial Report and legible fingerprints for these individuals, consistent with the background investigation changes proposed to other sections in this rulemaking.

Section 5.26(e)(6) requires a national bank or Federal savings association to submit a written notice to the OCC no later than 10 days after it begins previously approved fiduciary activities in additional States. The OCC proposes to reorganize this paragraph with no additional substantive changes. As proposed, paragraph (e)(6)(i) would generally require a written notice after the national bank or Federal savings association begins any of the activities specified in 12 CFR 9.7(d) in a new State. Paragraph (e)(6)(ii) would require the notice to include the new States, the fiduciary activities to be conducted, and the extent to which the activities differ materially from the fiduciary activities currently conducted. Finally, paragraph (e)(6)(iii) would not require any notice if the information required by paragraph (e)(6)(ii) is provided by other means, such as in a merger application.

Establishment, acquisition, and relocation of a branch of a national bank (§ 5.30)

Section 5.30 describes application procedures to establish and relocate a national bank branch. Paragraph (d) provides definitions applicable to § 5.30. Paragraph (d)(1)(i) lists certain types of facilities that are considered branches. The OCC proposes to reorder this list so that the reference to 12 U.S.C. 36(c) applies only to seasonal agencies and not to the other types of facilities. Additionally, paragraph (d)(1)(iii) specifies that remote service units (RSUs) and certain types of offices are not within the definition of “branch.” The OCC proposes to clarify this provision by adding both a cross reference to the description of RSUs contained in 12 CFR 7.4003 and a reference to automated teller machines (ATMs), including interactive ATMs, codifying OCC Interpretive Letter No. 1165 (August 2019).⁶ As discussed in OCC Interpretive Letter No. 1165, a national bank establishment of an interactive ATM does not constitute

⁶ OCC Interpretive Letter No. 1165, Legal Requirements for the Establishment of Interactive Automated Teller Machines (August 2019), available at <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2019/int1165.pdf>.

establishing a branch if the machine meets the definition of an ATM used for purposes of 12 U.S.C. 36 consistent with OCC interpretations, and the nature of the interactions between the customer and remote bank personnel are delimited as would be the case with an RSU.

The OCC is considering one additional change to the definition of “branch” in paragraph (d). Paragraph (d)(1)(ii)(B) specifies that a drive-in or pedestrian facility located within 500 feet of a public entrance to a main office or branch is not considered a separate branch, provided the functions performed at the drive-in or pedestrian facility are limited to functions that are ordinarily performed at a teller window. The OCC is considering expanding this distance to 1,500 feet to address issues in crowded urban areas. The OCC specifically requests comment on whether this increase in distance, or some other distance, would be appropriate and whether it would be helpful in reducing regulatory burden.

Finally, the OCC proposes a technical change to paragraph (f), which provides the procedures for establishing a national bank branch. Paragraph (f)(1) requires each national bank that proposes to establish a branch to submit an application to the OCC, except in the case of messenger services as specified in paragraph (f)(2). However, paragraph (f)(3) provides that 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 and this bank may act as agent for the other institutions. Even if a single application is submitted for a joint branch, the OCC still considers the relevant factors for each national bank. The OCC proposes including paragraph (f)(3) as an additional exception to the application requirement in paragraph (f)(1), thereby conforming these two paragraphs.

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

Section 5.31 describes application and notice procedures for the establishment, acquisition, or relocation of a Federal savings association branch. Under paragraph (f)(2)(i), a Federal savings association is not required to submit an application for OCC approval to establish a drive-in or pedestrian office located within 500 feet of a public entrance of its home office or a branch. As with national banks, the OCC is considering expanding this distance to 1,500 feet to address issues in crowded urban areas. The OCC specifically requests comment on whether this increase in distance, or some other distance, would be appropriate and whether it would be helpful in reducing regulatory burden.

Paragraph (j), implementing section 5(m) of the Home Owners' Loan Act (HOLA) (12 U.S.C. 1464(m)), requires a Federal or State savings association to obtain prior OCC approval to establish or move a branch or move its principal office in the District of Columbia. The OCC proposes to add a new paragraph (j)(3) to clarify that a branch in the District of Columbia includes any location at which accounts are opened, payments are received, or withdrawals made, including ATMs that perform one or more of these functions. This amendment would implement court opinions finding that ATMs that accept deposits or disburse funds against a customer's account constitute a branch.⁷ Although Congress amended 12 U.S.C. 36(j) to remove ATMs and RSUs from the definition of a national bank "branch," Congress has not similarly amended section 5(m) of the HOLA. Therefore, the OCC and OTS have long taken the position that an ATM established by a savings association in the District of Columbia constitutes a branch requiring approval. Because proposed paragraph (j)(3) codifies the OCC's existing legal interpretation, the OCC does not view this proposed amendment as adding burden to savings associations.

⁷ See *Independent Bankers Ass'n of New York State, Inc. v. Marine Midland Bank, N.A.*, 757 F.2d 453, 458 (2d Cir. 1985) (collecting cases).

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

Section 5.33 provides the application requirements and procedures for business combinations involving national banks and Federal savings associations, such as mergers, consolidations, and certain purchase and assumption transactions. Paragraph (e) of § 5.33 sets forth policies the OCC considers when evaluating business combinations. Paragraph (e)(1)(ii)(F) provides that the OCC will not approve a transaction that would violate the deposit concentration limit in 12 U.S.C. 1828(c)(13). Only interstate merger transactions, as defined 12 U.S.C. 1828(c)(13)(C)(i) are subject to this deposit concentration limit. The OCC proposes adding a reference to 12 U.S.C. 1828(c)(13)(C)(i) in paragraph (e)(1)(ii)(F) for clarity.

Paragraph (e)(1)(iii) provides the OCC's policy for evaluating business combinations under the CRA (12 U.S.C. 2901 *et seq.*). Under 12 U.S.C. 2903(a)(2), the OCC must evaluate an insured national bank's or Federal savings association's CRA record when evaluating its application for a business combination. The OCC proposes three changes to paragraph (e)(1)(iii). First, the OCC proposes a new paragraph (e)(1)(iii)(A) to better describe the OCC's review and to more closely track the statutory requirement that the OCC assess only the CRA record of the filer. Further, the proposal would specify that the OCC's conclusion of whether the CRA performance is or is not consistent with approval of an application is considered in conjunction with the other factors in § 5.33. This amendment codifies the OCC's practice of evaluating all policy factors in light of the whole application, as set forth in the OCC's Policies and Procedures Manual (PPM-6300-2). The OCC practice in this regard is to consider and evaluate a filer's record of performance under the CRA and, more broadly, the filer's plans and ability to enable the combined organization to serve the convenience and needs of its communities. Second, the OCC proposes a new paragraph (e)(1)(iii)(B) to recognize the

expanded community reinvestment compliance review required by 12 U.S.C. 1831u(b)(3) when the filing national bank would have a branch or bank affiliate immediately following the transaction in any State in which the filer had no branch or bank affiliate immediately before the transaction. Third, the OCC proposes a new paragraph (e)(1)(iii)(C) requiring the filer to 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. These regulations implement the CRA sunshine requirements of section 48 of the FDI Act, 12 U.S.C. 1831y. Requiring disclosure of any covered agreements will better permit the OCC to review the filer's CRA record and any CRA-related comments on the filing. Additionally, the OCC is considering whether to require a filer to memorialize and publish any discussion between the filer and any third party with respect to development of any community reinvestment plan, community benefit plan, or similar plan in connection with a business combination. The OCC requests comment on whether to include this requirement in the final rule.

The OCC also proposes a new paragraph (e)(1)(iv) to state that the OCC considers the standards and requirements contained in 12 U.S.C. 1831u for interstate merger transactions between insured banks, when applicable. Current paragraph (h) describes the application of 12 U.S.C. 1831u to combination between insured banks with different home states. As part of the reorganization of paragraphs (g) and (h), discussed below, the OCC proposes instead to include its review of the 12 U.S.C. 1831u factors in paragraph (e)(1) for clarity.

Paragraph (e)(8)(ii) requires a national bank or Federal savings association with one or more classes of securities subject to registration under sections 12(b) or (g) of the Securities Exchange Act of 1934 to file preliminary proxy material or information statements with the Director, Securities and Corporate Practices Division (SCP) of the OCC. As a result of an

internal reorganization, the OCC proposes replacing the reference to SCP in paragraph (e)(8)(ii) with the OCC Chief Counsel's Office.

Paragraph (g) provides procedures for different types of consolidations and mergers. Paragraph (o) provides general procedures for Federal savings association approval of business combinations. These paragraphs provide detailed procedures for national banks and Federal savings associations engaging in several different types of business combinations. Some of these requirements are imposed by statute. Specifically, 12 U.S.C. 215 and 215a provide procedures for consolidations and mergers, respectively, between national banks and State or national banks located in the same State resulting in a national bank. Similarly, 12 U.S.C. 214 through 214d provide procedures for consolidations and mergers between national banks and State banks located in the same State resulting in a State bank. Other consolidation and merger transactions described in § 5.33 do not have any statutory procedures, including interstate consolidations and mergers involving a national bank under 12 U.S.C. 215a-1; consolidations and mergers of national banks and Federal savings associations under 12 U.S.C. 215c and 1467a(s); consolidations and mergers of Federal savings associations and State banks, State savings associations, State trust companies, or credit unions under 12 U.S.C. 1464(d)(3)(A) and 1467a(s); and mergers of national banks with their non-bank affiliates under 12 U.S.C. 215a-3.

The OCC formerly opined in licensing decisions that 12 U.S.C. 215a-1 incorporates the provisions of 12 U.S.C. 215 for consolidations and 12 U.S.C. 215a for mergers.⁸ Twelve U.S.C. 215a-1 is the codification of section 4 of the National Bank Consolidation and Merger Act (NBCMA), which was enacted by section 102(b)(4)(D) of the Riegle-Neal Interstate Banking

⁸ See, e.g., OCC CRA Decision #94 (June 1999).

and Branching Efficiency Act of 1994.⁹ Twelve U.S.C. 215 and 215a are codifications of sections 2 and 3 of the NBCMA, respectively. Section 4 of the NBCMA states that “a national bank may engage in a consolidation or merger *under this Act* with an out-of-State bank if the consolidation or merger is approved” (emphasis added)¹⁰ under 12 U.S.C. 1831u, which governs interstate mergers of insured banks. In prior licensing decisions, the OCC interpreted “under this Act” to mean that a consolidation or merger under section 4 of the NBCMA is also a consolidation or merger under section 2 or 3 of the NBCMA, respectively, and thus subject to the provisions of those sections. However, after further analysis, the OCC believes that the proper reading of section 4 of the NBCMA is that it is self-referential and does not directly incorporate any provisions of sections 2 or 3 of the NBCMA. A consolidation or merger with an out-of-State bank generally may not be approved under sections of 2 and 3 of the NBCMA, which specifically apply to consolidations or mergers, respectively, between banks located in the same State. Accordingly, “under this Act,” as used in section 4 of the NBCMA should not be read as referring to sections 2 or 3 of the NBCMA. As there are no other sections of the NBCMA under which an interstate merger between banks could be conducted, “under this Act” can only be read to refer to section 4 itself. As section 4 of the NBCMA, 12 U.S.C. 215a-1, does not contain any statutory procedures, there are no statutory procedures for interstate bank mergers resulting in a national bank. Therefore, the OCC is proposing several procedures that a national bank or Federal savings association may elect for business combinations for which there are no statutory procedural requirements.

⁹ Pub. L. 103-328, 108 Stat. 2338, 2351.

¹⁰ 12 U.S.C. 215a-1(a).

First, the national bank or Federal savings association may follow the procedures currently provided in paragraph (g) for the specific transaction if there are no statutory procedures.

Second, the national bank or Federal savings association may elect to follow the procedures applicable to a State bank or State savings association, respectively, chartered by the State in which the national bank's main office or the Federal savings association's home office is located. In connection with this election, the OCC proposes rules of construction so that the State procedures function logically for national banks and Federal savings associations. Specifically, any references to a State agency in the applicable State procedures would be read as referring to the OCC. Additionally, unless otherwise specified in Federal law, all filings required by the applicable State procedures would be made to the OCC. Requiring filings prescribed by State law to be made with the OCC, rather than a State agency, is consistent with past OCC practice for certain transactions under State corporate governance procedures adopted pursuant to 12 CFR 7.2000.¹¹

Third, the national bank or Federal savings association that is the acquiring institution in a transaction may follow a *de minimis* procedure not requiring a shareholder vote pursuant to proposed § 5.33(p) if certain criteria are met. Proposed § 5.33(p) is similar to the *de minimis* exception to general shareholder voting requirements for Federal stock savings associations in current § 5.33(o)(3)(ii), which applies if the transaction does not involve an interim savings association; the Federal savings association charter does not change; each share of stock outstanding will be identical to an outstanding share or treasury share after the effective date of the transaction; and either no stock or securities convertible into stock will be issued or delivered

¹¹ See, e.g., OCC Conditional Approval #859 (July 2008).

under the plan of combination, or the authorized unissued shares or treasury shares of the resulting Federal savings association to be issued or delivered, plus those initially issuable upon conversion of any securities to be issued or delivered, do not exceed 15 percent of the total shares of voting stock outstanding immediately prior to the effective date of the consolidation or merger. The OCC proposes making this *de minimis* exception available to a national bank engaging in transactions not subject to statutory procedural requirements as well as a Federal stock savings association in new paragraph (p) with two revisions. First, the OCC proposes permitting certain combinations involving an interim bank or savings association. Specifically, a national bank or Federal stock savings association engaging in a transaction involving an interim bank or saving association would potentially be able to use the procedures in paragraph (p) if the existing shareholders of the national bank or Federal stock savings association would directly hold the shares of the resulting national bank or Federal stock savings association. In promulgating an amendment to the predecessor to current § 5.33(o)(3)(ii), the Federal Home Loan Bank Board, the predecessor to OTS, stated that “[a]lthough the ownership interests of shareholders of a reorganizing association generally do not undergo substantive change upon a reorganization into holding company form, the Board believes that shareholders should, nevertheless, be given an opportunity to approve or disapprove a plan of reorganization.”¹² The OCC believes that in a transaction involving reorganization into a holding company structure, shareholders of the national bank or Federal stock savings association should have the opportunity to vote. However, the OCC believes that a national bank or Federal stock savings association may engage in transactions involving interim banks or savings association that do not involve holding company reorganizations where shareholder votes are not necessary, if the rest

¹² 47 FR 17797 at 17799 (Apr. 26, 1982).

of the requirements of proposed paragraph (p) are met. Second, to provide additional flexibility, the OCC also proposes increasing the maximum issuance of shares eligible under this procedure for both national banks and Federal savings associations from 15 percent of total outstanding shares to 20 percent. This proposal mirrors the 20 percent threshold in similar procedures under Delaware law.¹³

In addition to new paragraph (p), the OCC proposes implementing the changes discussed above through revisions to paragraphs (g), (h), and (o). The proposal redesignates a number of paragraphs in paragraph (g) to keep similar transactions consecutive and to accommodate additional paragraphs. Specifically, the OCC proposes redesignating current paragraphs (g)(2), (g)(3), (g)(6), and (g)(7) as paragraphs (g)(3), (g)(6), (g)(7), and (g)(9), respectively. The proposal includes new paragraph (g)(2) providing procedures for interstate consolidations and mergers under 12 U.S.C. 215a-1 resulting in a national bank and paragraph (g)(8) providing procedures for interstate mergers between an insured national bank and an insured State bank resulting in a State bank. Procedures for these transactions are currently contained in paragraph (h). New paragraphs (g)(2) and (g)(8) generally follow the procedures for intrastate mergers resulting in a national bank or State bank in paragraphs (g)(1) and redesignated paragraph (g)(7), respectively. The proposal includes a new corporate succession provision in new paragraph (g)(2)(iv) for interstate mergers resulting in a national bank to ensure that the resulting bank succeeds to the rights, franchises, and interests, including the fiduciary appointments, of the consolidating or merging banks. The proposal also includes in new and redesignated paragraphs (g)(2), (g)(3), (g)(4), (g)(5), (g)(6), and (g)(8) a reference to a national bank making an election under paragraph (h). Revised paragraph (h) would permit a national bank to elect to follow the

¹³ See Del. Code Ann. tit. 8, § 251(f).

procedures of the laws of the State which the national bank association has elected to follow pursuant to 12 CFR 7.2000(b) or to use the *de minimis* procedure in new paragraph (p) if applicable. The proposal also includes coordinating revisions to cross references to paragraph (g).

For Federal savings associations, the OCC proposes reorganizing paragraph (o) to contain the election procedures. Revised paragraph (o)(1)(i) permits a Federal savings association to follow the procedures applicable to a State savings association chartered by the State where the Federal savings association's home office is located or to follow the standard procedures in revised paragraph (o)(2). As discussed above for national banks, revised paragraph (o)(1)(ii) would direct Federal savings associations to read references to State agencies as the OCC and to make filings generally with the OCC.

Revised paragraph (o)(2) would contain the procedures in current paragraphs (o)(1) and (o)(3) governing board and shareholder votes, respectively. The proposal would change the *de minimis* exception to the shareholder voting requirement in current paragraph (o)(3)(ii), redesignated by this proposal as paragraph (o)(2)(ii)(B), to a cross-reference to new paragraph (p). Current paragraph (o)(2) regarding the Federal savings association's change in name or home office would be redesignated as paragraph (o)(3). Finally, the OCC proposes a technical amendment to revised paragraph (o)(2)(ii)(A), replacing the citation to 12 CFR 152.4 with the current citation, 12 CFR 5.22.

Paragraph (k) requires a national bank or Federal savings association engaging in a consolidation or merger in which it is not the filer and the resulting institution to file a notice with the OCC advising of its intention. This requirement currently applies even when the surviving institution is another national bank or Federal savings association. Because the OCC

already supervises the surviving institution and has acted on the application for consolidation or merger, the OCC proposes removing this requirement for the disappearing national bank or Federal savings association in this type of transaction. In such a case, the OCC already has the information that it needs to process termination and ensure that the disappearing national bank or Federal savings association has met all applicable requirements. The proposal also includes conforming revisions to paragraph (g).

Paragraph (n) provides authority for, and limits on, certain business combinations for Federal savings associations. In addition to consolidations, mergers, and other specified forms of business combinations, this paragraph addresses “other combinations,” the definition of which in section 5.33(d)(10) includes the transfer of any deposit liabilities to another insured depository institution, credit union, or other institution. Paragraph (n)(2)(iii) provides special requirements for mutual savings associations. Specifically, if any combining savings association is a mutual savings association, the resulting institution must be a mutually held depository institution insured by the FDIC, unless the transaction is approved under 12 CFR part 192 governing mutual to stock conversions or the transaction involves a mutual holding company organization under 12 U.S.C. 1467a(o) or a similar transaction under State law. Under the definition of “other combination,” § 5.33(n)(2)(iii) applies to any transfer of deposit liabilities, such as the sale of a branch, even if the mutual savings association still exists as an ongoing institution after the transaction. Accordingly, a branch sale would not be permissible unless the sale is to an insured mutual institution or either the mutual to stock or mutual holding company reorganization exception applied.

The OCC did not intend paragraph (n)(2)(iii) to apply to this type of transfer of deposit liabilities when it last amended this provision in 2015 (2015 Final Rule).¹⁴ In fact, § 5.33(n)(4), which requires mutual savings associations to provide notice to accountholders of a proposed account transfer and to give them the option of retaining the account in the transferring Federal savings association if the account liabilities are transferred to an uninsured institution, contemplates just such an account transfer.

In addition, the anomalous reading of § 5.33(n)(2)(iii) was not present in the pre-integration version of the Federal savings association combination rules.¹⁵ Former 12 CFR 146.2(a)(4) contained a similar restriction on the resulting institution being a mutually held savings association with similar exceptions. However, § 146.2(a) applied to combinations, which was defined in 12 CFR 152.13(b)(1) as a merger or consolidation with another depository institution, or an acquisition of all or substantially all of the assets or assumption of all or substantially all of the liabilities of a depository institution by another depository institution. Accordingly, a branch purchase or other transfer of less than substantially all deposits was not a combination and thus not subject to the restrictions in § 146.2(a)(4). Furthermore, in the preamble to the 2015 Final Rule, the OCC did not describe paragraph (n)(2)(iii) as applying to transfers of less than substantially all deposits.¹⁶

Accordingly, the OCC proposes revising paragraph (n)(2)(iii) to state that a consolidation or merger involving a mutual savings association or the transfer of all or

¹⁴ 80 FR 28346 (May 18, 2015).

¹⁵ The 2015 Final Rule integrated many licensing rules that apply to national banks and Federal savings associations.

¹⁶ The OCC stated, “in a merger or consolidation with a mutual Federal savings association, a mutual savings association must be the resulting institution.” 80 FR 28346 at 28374 (May 18, 2015).

substantially all of the deposits of a mutual savings association must result in a mutually held depository institution insured by the FDIC unless one of the exceptions applies.

The OCC also proposes adding an additional exception to paragraph (n)(2)(iii). The OCC and OTS have permitted transactions where a mutual savings association transferred all of its deposits to a non-mutual savings association institution followed by the voluntary dissolution of the mutual savings association. These transactions are subject to approvals or non-objections by the OCC. However, the literal reading of 5.33(n)(2)(iii) may not permit such transactions. Accordingly, the OCC proposes adding a new paragraph (n)(2)(iii)(C) that provides an exception to the requirement that the resulting institution be an insured mutual institution when the transaction is part of a voluntary liquidation for which the OCC has provided non-objection under § 5.48.

Finally, the OCC proposes technical amendments to paragraph (l) to correct a typographical error and to revise paragraph (o)(2)(ii)(A) to replace the citation to 12 CFR 152.4 with the current citation, 12 CFR 5.22.

Operating subsidiaries of a national bank (§ 5.34)

Section 5.34 provides the licensing requirements for a national bank's acquisition or establishment of an operating subsidiary or commencement of a new activity in an existing operating subsidiary. Paragraph (e)(2)(i) specifies what entities may qualify as an operating subsidiary. Paragraph (e)(2)(i)(A) requires that the national bank must have the ability to control the management and operations of the subsidiary and no other person or entity exercises effective operating control over the subsidiary or has the ability to influence the subsidiary's operations to an extent equal to or greater than that of the bank. The OCC is proposing to clarify this provision by requiring that 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 OCC also is proposing conforming amendments to current § 5.34(e)(5)(ii)(A)(3)(i), redesignated by this proposed rule as § 5.34(f)(2)(i)(C)(I), which contains a parallel requirement for operating subsidiary filings and provides additional requirements for how the national bank must effectively control the operating subsidiary to be eligible to submit a notice to the OCC instead of an application to establish or acquire or engage in an activity in an operating subsidiary.

Section 5.34(e)(2)(ii) identifies certain subsidiaries that are not operating subsidiaries for purposes of § 5.34. The OCC is proposing to replace the word “subsidiaries” with “entities” to further clarify the exclusion. The OCC also is proposing a new paragraph (e)(2)(ii)(C) to specify that a trust formed for purposes of securitizing assets held by the bank as part of its banking business would not be considered an operating subsidiary. This proposal would codify the OCC’s position that securitization trusts generally do not qualify as operating subsidiaries because of the bank’s limited control over the trust and because beneficial interests in trusts lack many of the indicia of traditional equity. The OCC invites comment on the scope of this proposed provision.

Paragraph (e)(5) provides the procedures for operating subsidiary filings. The OCC is proposing to redesignate the majority of paragraph (e)(5) as paragraph (f) and current paragraph (e)(6), addressing grandfathered operating subsidiaries, as paragraph (g). The OCC also is proposing conforming revisions to cross-references.

Redesignated § 5.34(f)(2) contains the requirements for a national bank to qualify for the notice process for operating subsidiary filings. In addition to meeting additional control requirements and being well capitalized and well managed, paragraph (f)(2)(i)(A) permits a

national bank to file a notice instead of an application if the activity is listed in redesignated paragraph (f)(5). The OCC is proposing to expand the scope of this requirement to include any activity that is substantively the same as a previously approved activity and that will be conducted in accordance with the same terms and conditions applicable to the previously approved activity. As discussed above, the proposal defines “previously approved activity” in § 5.3 to mean, for national banks, an 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. The OCC notes that the expansion of the notice requirement to activities that are substantively the same as previously approved activities does not relieve the national bank from the requirement to ensure that the operating subsidiary is only conducting permissible activities and would not affect the OCC’s ability to take action if the OCC finds that the activities are not permissible or are conducted in an unsafe or unsound manner.

Proposed § 5.34(f)(2)(ii) would exempt from this expanded scope of permissible activities eligible for a notice the holding of an entity that is or will be chartered or licensed by a State as a bank, trust company, or savings association as an operating subsidiary. The proposed rule instead would require a national bank to file an application to hold these entities as an operating subsidiary.

The OCC also is considering as an alternative amendment removing all filing requirements for permissible activities, even for those not previously approved by the OCC. Under this alternative amendment, national banks would be able to acquire or establish an operating subsidiary or commence a new activity in an existing operating subsidiary without filing a notice or application if the activity to be engaged in by the operating subsidiary is a permissible national bank activity, provided that the operating subsidiary meets the ownership

and structural aspects currently required for notice and the national bank is well capitalized and well managed. National banks are generally not required to notify or seek approval from the OCC before they engage in new permissible bank activities. Accordingly, removing the application and notice requirement would apply this logic to operating subsidiaries, which may only engage in activities permissible for national banks. Because the use of the operating subsidiary structure requires additional controls on the part of the national bank to ensure that the bank is not subject to unlimited liability and that the appropriate formalities for the subsidiary are met, this alternative amendment would maintain the additional control and well managed and well managed requirement. The OCC requests comment on the proposed amendment to the notice provision, the alternative amendment described above, and any intermediate options, such as removing the filing requirement for activities that are substantively the same as previously approved activities.

Redesignated § 5.34(f)(2)(i)(B) requires that an operating subsidiary eligible to file a notice must be a corporation, limited liability company, or limited partnership. Redesignated paragraphs (f)(2)(i)(C)(1) and (2) contain specific requirements for the management, control, and ownership of these entities to be eligible for the notice process. If a national bank does not meet these requirements, the OCC requires the filer to submit an application so that it may conduct a case-by-case review to ensure that the national bank has effective control over the operating subsidiary and that the bank is not exposed to undue risks.¹⁷ As trusts are currently not entities eligible for notice under redesignated paragraph (f)(2)(i)(B), a national bank must file an application for a trust to be an operating subsidiary. In recent years, the OCC has processed a number of applications for operating subsidiaries organized as trusts. From this experience, the

¹⁷ See 61 F.R. 60350 (Nov. 27, 1996).

OCC believes that a national bank in certain circumstances possesses sufficient control over trust structures that the notice process is appropriate. Accordingly, the OCC is proposing to add trusts to the list of entities eligible for notice in redesignated paragraph (f)(2)(i)(B). To qualify for the notice process, the national bank or an operating subsidiary must have the ability to replace the trustee at will and be the sole beneficial owner of the trust. The OCC believes that these requirements are appropriate in light of the flexible ownership and control permitted by trust structures. Requiring a national bank or its operating subsidiary to be able to replace the trustee at will and to be the sole beneficial owner of the trust would ensure that the bank has sufficient control over the trust making it unnecessary for the OCC to conduct a case-by-case review through an application process. Additionally, the OCC is proposing to reorganize redesignated paragraphs (f)(2)(i)(C)(1) and (2) to reflect the addition of trust structures and to explicitly recognize that the national bank may meet the required control provisions indirectly through another operating subsidiary. The OCC intends no substantive change to the provisions that address corporations, limited liability partnerships, or limited liability companies.

Current 5.34(e)(7) requires national banks to file an annual report with the OCC describing operating subsidiaries that do business directly with consumers. The OCC publishes this information on its website. The OCC is proposing to remove this requirement to reduce burden and because it generally duplicates information contained elsewhere, such as the FFIEC's National Information Center (NIC).¹⁸ In addition, the majority of the operating subsidiaries reported are subject to the jurisdiction of the Consumer Financial Protection Bureau, and not the OCC, for most consumer law issues.

¹⁸ The NIC may be found at <https://www.ffiec.gov/NPW>.

Finally, the OCC is proposing a technical change that would remove the definitions of “well capitalized” and “well managed” from § 5.34(d). As described above, the OCC is proposing to define these terms in § 5.3.

Bank service company investments by a national bank or Federal savings association (§ 5.35)

Section 5.35 addresses national bank and Federal savings association investments in bank service companies as authorized by the Bank Service Company Act (BSCA) (12 U.S.C. 1861-1867). Pursuant to section 2 of the BSCA (12 U.S.C. 1862), paragraph (i) of § 5.35 provides that a national bank or Federal savings association may not invest more than 10 percent of its capital and surplus in a bank service company. In addition, paragraph (i) also provides that the national bank’s or Federal savings association’s total investments in all bank service companies may not exceed five percent of the national bank’s or Federal savings association’s total assets. However, section 2 of the BSCA also specifies that the investment limitations in section 5(c)(4)(B) of the HOLA apply to Federal savings associations with regard to bank service company investments. This limitation is not currently included in paragraph (i). Accordingly, the OCC proposes to revise paragraph (i) to directly reference the limitations in section 2 of the BSCA.

The OCC also is proposing a technical correction to the title of this section that would remove the extraneous word “investment.”

Other equity investments by a national bank (§ 5.36)

Section 5.36 provides the procedures for national banks to make certain types of equity investments. Paragraphs (e) and (f) provide the procedures and requirements for a national bank to make a non-controlling investment that is not prescribed by other OCC rules. The OCC is proposing to clarify the types of national bank equity investments that are subject to § 5.36 by

adding a new definition to paragraph (c) that would define “non-controlling investment” to mean an equity investment made pursuant to 12 U.S.C. 24(Seventh) that is not governed by procedures prescribed by another OCC rule. Additionally, the OCC is proposing to specify in the definition that “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. This would codify OCC interpretation that these interests do not have sufficient indicia of ownership and control to qualify as an equity investment for purposes of § 5.36. The OCC also is proposing a conforming change to paragraphs (e) and (f).

For a national bank to make a noncontrolling investment, current § 5.36 requires a filing with the OCC that: (1) describes the structure of the investment and the activity or activities conducted by the enterprise in which the bank is investing; (2) describes how the bank has the ability to prevent the enterprise from engaging in impermissible activities or has the ability to withdraw its investment; (3) describes how the investment is convenient and useful to the bank in carrying out its business and not a mere passive investment; (4) certifies that the bank’s loss exposure is limited; and (5) certifies that the enterprise agrees to be subject to OCC supervision and examination, subject to the limitations and requirements of section 45 of the FDI Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

A national bank must file an application with the OCC to make a non-controlling investment unless it qualifies for the notice procedure in § 5.36(e). A national bank may file a notice if: (1) the investment meets the above requirements; (2) the enterprise engages in activities that are listed in § 5.34(e)(5)(v) (permissible operating subsidiary activities) or an activity that is substantively the same as that contained in published OCC precedent approving a non-

controlling investment by a national bank or its operating subsidiary; and (3) the bank is well managed and well capitalized. As discussed above for operating subsidiary notices, the OCC is proposing to expand the activities eligible for notice for non-controlling investments to all previously approved activities, as defined in proposed § 5.3. This definition includes activities approved for national banks and their operating subsidiaries, in addition to previously approved non-controlling investments. The proposal also reorganizes paragraph (e) and makes conforming changes to paragraphs (e)(2) and (e)(4). Additionally, the OCC is considering removing the filing requirement for non-controlling investments in enterprises engaging in bank permissible activities, as discussed above for national bank operating subsidiaries. The OCC requests comment on the proposed amendment to the notice provision, the alternative amendment described above, and any intermediate options, such as removing the filing requirement for activities that are substantively the same as previously approved activities.

As noted, whether a national bank is filing a notice under paragraph (e) or an application under paragraph (f), the current rule requires the enterprise in which the bank will make a non-controlling investment to agree to OCC supervision and examination. The OCC is proposing to amend paragraph (f), redesignated as paragraph (f)(1), to permit national banks to file an application for prior approval to invest in an enterprise that has not agreed to be subject to OCC supervision and examination. The OCC believes that this will give national banks greater flexibility to make permissible non-controlling investments, while giving the OCC an opportunity for an in-depth review of the proposed investment to ensure there is no inappropriate risk to the national bank's safety and soundness.

Additionally, the OCC is proposing a new paragraph (f)(2) to provide for expedited review of certain applications for investments in enterprises that do not agree to OCC

supervision and examination that pose minimal risk to the national bank's safety and soundness. An application under proposed paragraph (f)(2) would be deemed approved by the OCC within 10 days after the application is received if five additional requirements are met. First, the enterprise must engage in permissible bank activities as described in proposed paragraph (e) of this section. Second, the national bank must be well managed and well capitalized. These two requirements parallel the requirements for filing a notice. Third, the book value of the national bank's non-controlling investment for which the application is submitted must not be more than 1% of the bank's capital and surplus. Fourth, no more than 50% of the enterprise may be 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. Many enterprises in which national banks make non-controlling investments are owned by a consortium of banks and savings associations and provide services to their owners and others. Given the potentially complex interactions between these enterprises and their owners and the additional risks posed to the owners, the OCC believes that OCC supervision and examination of these enterprises is necessary for the safety and soundness of the investing national banks and Federal savings associations. Accordingly, the proposed rule does not permit investments in these entities without their commitment to OCC supervision and examination, and therefore expedited review of these investments would not be available. Finally, the OCC must not have notified the national bank that the application has been removed from expedited review, or that the expedited review process has been extended, pursuant to the standards contained in § 5.13(a)(2).

In addition, the proposed rule would permit a national bank to make a non-controlling investment without a filing to the OCC in certain circumstances. Under proposed paragraph (g),

a national bank would be permitted to make a non-controlling investment without an application or notice if the activities of the enterprise are limited to those activities previously reported by the bank in connection with making or acquiring a non-controlling investment; the activities in the enterprise continue to be legally permissible for a national bank; 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 the bank is able to make the representations and certifications specified in §§ 5.36(e)(3) through (e)(7), as proposed to be amended. As the national bank would already have a non-controlling investment in an entity conducting particular activities, the OCC believes that there would be little risk in the bank making an additional non-controlling investment in an entity conducting the same activities. Furthermore, the OCC believes that non-controlling investments pose similar risks to national banks as operating subsidiaries, and proposed paragraph (g) would parallel current § 5.34(e)(5)(vi), redesignated in this proposal as § 5.34(f)(6), which permits national banks to make investments in operating subsidiaries without a filing. Therefore, the OCC believes that proposed paragraph (g) would reduce burden without jeopardizing the national bank's safety and soundness. As a conforming amendment, the OCC is proposing to redesignate current paragraphs (g) through (i) as paragraphs (h) through (j), respectively.

Redesignated paragraph (j) provides exceptions to the rules of general applicability. The OCC is proposing to remove the exception to § 5.9, public availability, because some of these investments may be of public interest. Further, the proposal would permit the OCC to determine that some or all provisions in §§ 5.8, 5.10, and 5.11 apply if it concludes that an application presents significant or novel policy, supervisory, or legal issues. This proposed paragraph (j)

would parallel the equivalent provision for operating subsidiary filings in current § 5.34(e)(5)(iii).

Investment in national bank or Federal savings association premises (§ 5.37)

Section 5.37 describes the procedures for national bank and Federal savings association investment in bank premises. Paragraph (d)(1)(i) provides that the procedures of § 5.37 are applicable to investments in the stocks, bonds, debentures, or other obligations of any corporation holding the premises of the national bank or Federal savings association in addition to direct investments in the bank premises. Twelve CFR 7.1000 provides the authority for national bank and Federal savings association investments in bank premises. In addition to the investments listed in § 5.37(d)(1)(i), § 7.1000(a)(3) provides that national banks and Federal savings associations may hold bank premises through a subsidiary organized as a corporation, partnership, or similar entity (*e.g.*, a limited liability company). The OCC proposes to revise § 5.37(d)(1)(i) to recognize the permissibility of holding bank premises through partnerships and similar entities, such as limited liability companies, so that it is consistent with § 7.1000(a)(3).

In addition, the OCC proposes to remove the definition of “capital and surplus” in § 5.37. Because § 5.3 defines this term, it is not necessary to include it in § 5.37. Finally, the OCC proposes to correct a technical error in paragraph (a), replacing “12 U.S.C. 317d” with “12 U.S.C. 371d.”

Operating subsidiaries of a Federal savings association (§ 5.38)

Section 5.38 provides the application requirements for a Federal savings association’s acquisition or establishment of an operating subsidiary or commencement of a new activity in an existing operating subsidiary when required by section 18(m) of the FDI Act (12 U.S.C. 1828(m)). Section 5.38 is largely parallel to § 5.34 for national bank operating subsidiaries,

except that where a national bank would file a notice, a Federal savings association would file an application eligible for expedited review. Accordingly, the OCC is proposing coordinating revisions to § 5.38 including: (1) revising the standard for qualifying subsidiaries in paragraph (e)(2)(i)(A); (2) excluding securitization trusts from the scope of the section in new paragraph (e)(2)(iii)(C); (3) redesignating paragraphs (e)(5), (e)(6), and (e)(7) as paragraphs (f), (g), and (h), respectively; (4) expanding the activities eligible for expedited review to include activities substantially the same as a previously approved activity (as proposed to be defined in § 5.3) and conducted in accordance with the same terms and conditions applicable to the previously approved activity, in redesignated paragraph (f)(2)(ii)(B); (5) expanding the entities eligible for expedited review to include certain trusts where the Federal savings association or its operating subsidiary is the sole beneficiary and has the ability to replace the trustee at will, in redesignated paragraphs (f)(2)(ii)(C) and (D); and (6) explicitly recognizing that the control required by redesignated paragraphs (f)(2)(ii)(D) may be met through an operating subsidiary of the Federal savings association. In addition, the OCC is proposing technical changes that would remove the definitions of “well capitalized” and “well managed” from § 5.38, as in proposed § 5.34, and replace the word “subsidiary” with the more appropriate word “entity” in the introductory text of paragraph (e)(2)(iii).

In addition, the OCC is proposing to correct an inadvertent omission in the 2015 Final Rule by amending redesignated § 5.38(f)(2)(ii)(D)(1), which contains requirements for how a Federal savings association must effectively control an operating subsidiary to be eligible for expedited review of an application. Although the OCC made changes in the 2015 Final Rule to current §§ 5.34(e)(2)(i)(A), 5.34(e)(5)(ii)(A)(3)(i), and 5.38(e)(2)(i)(A) to address commenter’s

concerns regarding the application of the rule to joint ventures,¹⁹ the OCC did not make corresponding conforming changes to current § 5.38(e)(5)(ii)(B)(4)(i), redesignated in this proposal as § 5.38(f)(2)(ii)(D)(I). However, all of these provisions should contain parallel language. Accordingly, the OCC is proposing to revise redesignated § 5.38(f)(2)(ii)(D)(I) so that it parallels current § 5.34(e)(5)(ii)(A)(3)(i), redesignated in this proposal as § 5.34(f)(2)(i)(C)(I).

Financial subsidiaries of a national bank (§ 5.39)

Section 5.39 describes the procedures for national bank acquisition of, and conduct of activities in, a financial subsidiary pursuant to section 5136A of the Revised Statutes (12 U.S.C. 24a). Paragraph (h)(5)(ii) of § 5.39 specifies that the restrictions contained in section 23A(a)(1)(A) of the Federal Reserve Act (12 U.S.C. 371c(a)(1)(A)), do not apply to a covered transaction between a bank and its financial subsidiary. However, section 609 of the Dodd-Frank Wall Street Reform and Consumer Protection Act removed this section 23A exclusion. Accordingly, the OCC proposes to remove paragraph (h)(5)(ii).

The OCC also proposes to clarify the approval process for financial subsidiary activities. First, consistent with other changes in part 5, the OCC proposes to change the terminology for filings under § 5.39 from notice to application. However, the OCC does not intend any substantive change in standards or procedures.

Second, as the OCC recognized in the initial proposal for § 5.39, section 24a states that OCC approval shall be based solely upon specific statutory factors.²⁰ Accordingly, the OCC proposed the current procedures for § 5.39 upon the understanding that the approval may occur

¹⁹ See 80 FR 28346, at 28375 (May 18, 2015).

²⁰ 65 FR 3159 (Jan. 20, 2000).

upon a bank's submission of information demonstrating satisfaction of the statutory criteria.²¹

The OCC proposes to add a new paragraph (i)(3) specifying that an application is deemed approved upon filing of the information required by the procedures of paragraphs (i)(1) or (i)(2) within the time frames provided.

In addition, the OCC is proposing technical changes to paragraph (d) that would remove the definitions of "appropriate Federal banking agency," "well capitalized," and "well managed." As discussed above, the proposal would amend § 5.3 to add these definitions without any substantive changes.

Finally, consistent with other proposed changes in part 5, the OCC proposes changing the terminology for "notice" to "application" thereby conforming the terminology to the licensing action provided in § 5.39. No substantive change is intended from this change in nomenclature.

National bank director residency and citizenship waivers (new § 5.43)

The OCC proposes a new § 5.43 to provide procedures for waivers of the national bank director residency and citizenship requirements. Section 5146 of the Revised Statutes (12 U.S.C. 72) requires every director of a national bank to be a citizen of the United States and that a majority of the directors reside in the State, Territory, or District where the national bank is located, or within one hundred miles of the location of the office of the bank. These requirements reflect the principle of local ownership and control of national banks. Twelve U.S.C. 72 provides the Comptroller the discretion to waive the residency requirement and to waive the citizenship requirement for not more than a minority of the total number of directors.

²¹ *Id.*

The OCC has processed requests for waivers of the residency and citizenship requirements for many years. The “National Bank Director Waivers” booklet of the *Comptroller’s Licensing Manual* currently describes the procedures for requesting and granting waivers. The OCC proposes codifying these procedures in a new 12 CFR 5.43 to better clarify and structure the waiver process.

Proposed paragraph (a) would set forth the authority for the regulation, 12 U.S.C. 72 and 93a, the latter of which grants the OCC general rulemaking authority. Proposed paragraph (b) would set forth the scope of the section as describing the procedures for the OCC to waive the residency and citizenship requirements.

Proposed paragraph (c) would set forth the application procedures. Under paragraph (c)(1), a national bank would file a written application with the OCC to request a waiver of the residency requirement. Proposed paragraph (c)(1) also provides that the OCC may grant this waiver for individual directors or for any number of director positions. The OCC typically grants residency waivers for a certain number of directors on the board rather than to specific individuals. However, the OCC proposes to increase flexibility by permitting either procedure.

Under proposed paragraph (c)(2), a national bank could 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. Proposed paragraph (c)(2) also provides that the OCC may grant a waiver on an individual basis. Given the more prescriptive nature of the citizenship requirement and the greater background investigation that the OCC undertakes on proposed non-citizen directors, OCC practice is to grant waivers to individuals and not to a designated number of directors. Accordingly, the OCC also proposes specifying in paragraph

(c)(2) that a citizenship waiver is valid until the individual leaves the board or the OCC revokes the waiver in accordance with proposed paragraph (d), discussed below.

Proposed paragraph (c)(3)(i) requires the subject of a citizenship waiver application to submit the information prescribed in the Interagency Biographical and Financial Report.

Proposed paragraph (c)(3)(ii) provides that the OCC may require additional information about the subject of a citizenship waiver application, including legible fingerprints, if appropriate. This proposed paragraph also permits the OCC to waive any of the information requirements if the OCC determines that doing so is in the public interest.

Proposed paragraph (c)(4) provides for exceptions to the rules of general applicability. The OCC proposes that §§ 5.8 (public notice), 5.9 (public availability), 5.10 (comments), and 5.11 (hearings and other meetings) not apply to applications for citizenship waivers. The OCC believes that the applications will largely consist of information specific to a bank's internal practices as well as significant private information about the individuals subject to the waiver applications. Accordingly, the OCC does not believe that these applications should be publicly available or subject to public notice, comment, or hearings.

The OCC also would add a new paragraph (d) that would provide procedures for the OCC's revocation of a residency or citizenship waiver. Under these procedures, the OCC would provide written notice before a revocation to the national bank and affected director(s) of its intention to revoke the waiver and the basis for its intention. The bank and the 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. The OCC's decision to revoke a residency or citizenship waiver would be effective, if the director appeals pursuant to proposed paragraph (e), 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. If the director does not appeal, the revocation would be effective the expiration of the period to appeal.

Although 12 U.S.C. 72 does not contain any explicit provisions for revoking a waiver, the OCC believes that the decision to revoke a waiver is consistent with the Comptroller's authority to grant a waiver. Absent this authority, many residency waivers effectively would be perpetual as the OCC generally grants residency waivers for a designated number of director positions. Further, changing geo-political circumstances may in some circumstances warrant the revocation of citizenship waivers, particularly if foreign governments are unduly influencing directors' activities with regard to a national bank.

The OCC recognizes that discretion in revoking residency and citizenship waivers is premised upon the guarantee of due process. Accordingly, the proposed rule provides affected national banks and directors the opportunity to respond to the OCC's intention to revoke a waiver. The OCC will specifically consider written responses prior to deciding on the revocation.

Proposed paragraph (e) would provide an appeals process for a director whose residency or citizenship waiver the OCC has decided to revoke. This proposed appeals process is parallel to that provided for disapprovals of directors and senior executive officers in 12 CFR 5.51, and provides review by the Comptroller, an authorized delegate, or a designated appellate official. A director may appeal on the grounds that the reasons for the initial decision to revoke were

contrary to fact or arbitrary and capricious. 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.

Proposed paragraph (f) provides that waivers outstanding on the effective date of a final rule would remain in effect notwithstanding proposed paragraph (c)(2), unless revoked pursuant to proposed paragraph (d).

Increases in permanent capital of a Federal stock savings association (§ 5.45)

Section 5.45 sets out the OCC's rules addressing increases in permanent capital by a Federal savings association organized in stock form. The OCC is proposing two technical amendments to this section. First, the proposed rule would change the term "Federal savings association" or "savings association" to "Federal stock savings association" each time it appears, except as used in the defined term "eligible savings association," to more accurately reflect the scope of this section. Second, the proposed rule would replace the reference to 12 CFR part 197 in paragraph (h) with 12 CFR part 16, which now applies to Federal savings associations.

The OCC is considering one other change to § 5.45. Under the current rule, Federal savings associations that meet the criteria for an eligible savings association described in § 5.3 may have their applications for capital increases, when required, reviewed under an expedited process. In the OCC's experience, the most relevant factors in considering such applications are the financial and managerial conditions of the requesting Federal savings association, given the more direct relationship between capital, on the one hand, and the financial and managerial conditions, on the other hand. Accordingly, the OCC requests comment on whether the agency

should amend its regulations to focus the eligibility criteria such that only well capitalized and well managed Federal savings associations are eligible to request expedited review of their applications for capital increases. If the OCC makes this change to § 5.45 in the final rule, it also would amend its other capital filing-related rules in part 5 based on this same rationale, §§ 5.46 (Changes in permanent capital of a national bank), 5.47 (Subordinated debt issued by a national bank), 5.55 (Capital distributions by Federal savings associations), and 5.56 (Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as Federal savings association supplementary (tier 2) capital).

Changes in permanent capital of a national bank (§ 5.46)

Section 5.46 sets out the OCC's rules addressing changes in permanent capital for a national bank. Paragraph (g)(1)(ii) provides that prior OCC approval is required for an increase in permanent capital in certain cases. In addition, pursuant to 12 U.S.C. 57, paragraph (i)(3) of § 5.46 requires a bank to submit a notice to the appropriate licensing office after it completes an increase in capital, regardless of whether prior approval is required. The OCC proposes to clarify these procedures for increases in capital requiring prior approval by referencing paragraph (i)(3) in the introductory text of paragraph (g)(1)(ii) and removing it from paragraph (g)(1)(ii)(C). The OCC also proposes to clarify the introductory text of paragraph (g)(1)(ii) to specifically indicate that an application to increase a national bank's permanent capital may be eligible for expedited review under paragraph (i)(2).

Paragraph (h) provides that a national bank must apply and obtain the OCC's prior approval for any reduction in its permanent capital. Paragraph (i)(2) provides expedited review procedures and currently provides that an eligible bank may request approval for decreasing its capital for up to four consecutive quarters. The OCC proposes a number of amendments to

paragraphs (h) and (i) to add flexibility for national banks and to clarify procedures. First, the proposal would amend paragraph (h) to permit a national bank to request approval in a standard application 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. As a result, a national bank may request approval for a reduction in permanent capital over more than four consecutive quarters. However, this request would not be eligible for expedited review so that the OCC may have the time to carefully review the request. Second, the proposed rule would add flexibility to the expedited process in paragraph (i)(2) by specifying that an eligible national bank need only state the total dollar amount rather than per-quarter reductions in requests for four-quarter decreases. As a conforming change, the OCC proposes to amend paragraph (i)(5) to clarify that the OCC's approval of a capital change does not expire within one year of the date of the approval if the OCC specifies a longer period.

Subordinated debt issued by a national bank (§ 5.47)

Section 5.47 describes the requirements applicable to a national bank's issuance of subordinated debt, including subordinated debt intended for inclusion in tier 2 capital. The OCC is proposing to add a new definition of "subordinated debt document" to § 5.47(c) to mean 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. The OCC intends this list of documents to be illustrative and not exclusive.

This change would clarify that a national bank should submit with their applications all material documents needed for the OCC to review the application for compliance with its

regulatory requirements. The OCC reviews ancillary securities documents to ensure that they do not contain language that conflicts with required disclosures or statements made in the subordinated debt note. The OCC invites comment on revisions to the proposed definition and the scope of relevant documents typically employed in subordinated debt issuances. The OCC also is proposing conforming revisions throughout § 5.47 to better reflect this terminology.

Paragraph (d)(3)(ii) contains a list of statements and descriptions that a national bank must clearly and accurately disclose in the subordinated debt note. The OCC proposes adding language to paragraph (d)(3)(ii)(C) to clarify that a national bank is only required to disclose the OCC's authority under 12 CFR 3.11 to limit certain distributions if the disclosure requirement is applicable to the subordinated debt issuance. Specifically, a national bank only will be required to incorporate this disclosure language into a subordinated debt note if the issuing bank, or any successor institution to the issuing bank, would have discretion under the terms of the subordinated debt to permanently or temporarily suspend payments without triggering an event of default. This amendment would provide flexibility and reduce burden by permitting national banks to omit the provisions when warranted.

The OCC also proposes to add a new paragraph (d)(3)(ii)(D) that would require a national bank to disclose in a subordinated debt note that the subordinated debt 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. This proposed requirement mirrors the language in 12 CFR 3.20(d)(1)(xi), which requires advanced approaches banks to disclose this information in the governing agreement, offering circular, or prospectus of an instrument to be included in tier 2 capital. The OCC believes that disclosing this information to potential investors in subordinated debt is beneficial for all national banks, even those that are

not advanced approaches banks or that do not intend to include the debt in tier 2 capital. The proposal would make a conforming change to paragraph (e) introductory text to remove the reference to advanced approaches national banks.

Paragraphs (f)(1)(ii) and (h) govern the procedure for a national bank to include subordinated debt in tier 2 capital. Currently, these provisions provide that a national bank may not include subordinated debt as tier 2 capital unless it has filed a notice with the OCC and received notification from the OCC that the subordinated debt qualifies as tier 2 capital. The OCC proposes to make these paragraphs consistent with the rest of part 5 by changing the terminology from notice to application. This change is not intended to be substantive. The OCC also is proposing clarifying changes to this paragraph.

Additionally, the OCC proposes to provide explicit regulatory authority for a national bank to seek approval to include subordinated debt as tier 2 capital before issuance of the subordinated debt in paragraphs (f)(1)(ii) and (h)(1). National banks routinely seek confirmation from the OCC that subordinated debt will qualify as tier 2 capital prior to issuance to mitigate the risk of issuing nonqualifying subordinated debt. This amendment would codify this practice. Under the proposal, and as with current practice, the OCC would not provide final approval that the subordinated debt qualifies as tier 2 capital until after the debt is issued and final pricing is available. Relatedly, the OCC proposes a conforming revision to paragraph (h)(2)(ii), which requires the application to include the amount and date of receipt of funds, to permit submission of the projected amount and date of receipt.

The OCC also proposes to add a new paragraph (h)(2)(iii) requiring the application to include the interest rate or expected calculation method for the interest rate for the subordinated

debt. This would assist the OCC in reviewing applications for inclusion of the subordinated debt in tier 2 capital.

Paragraphs (f)(2)(ii) and (g)(1)(ii) require OCC approval for a national bank to prepay subordinated debt. The approval requirements for prepayment of subordinated debt include specific additional requirements for prepayment that is in the form of a call option. Specifically, a national bank seeking to prepay subordinated debt in the form of a call option is required to provide: (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. The OCC has found that in the distinction between prepayment and prepayment in the form of a call option is immaterial to OCC review, that the additional requirements are generally satisfied in most prepayment applications, and that the additional information is helpful for the OCC to determine the impact of the prepayment on the national bank's capital levels and safety and soundness. Accordingly, the OCC proposes having a single procedure for the prepayment of subordinated debt that would incorporate the requirements for prepayment in the form of a call option. The proposal contains a coordinating revision to paragraph (g)(2)(ii) regarding OCC approval.

Currently, § 5.47 does not explicitly require a national bank to make a filing with the OCC if the national bank makes a material change to its outstanding subordinated debt note or any related subordinated debt documents. The OCC proposes to add new paragraphs (f)(3) and (g)(1)(iii) to ensure that subordinated debt issuances remain compliant with OCC regulatory requirements, including the requirements for inclusion in tier 2 capital. This revision would

require OCC approval for 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) or to include it in tier 2 capital under paragraph (h). An application to make a material change would include: (1) a description of the proposed changes; (2) a statement of whether the national bank is subject to or required to file a capital plan with the OCC, and if so, how the proposed change conforms to the capital plan; (3) a copy of the revised subordinated debt documents reflecting all proposed changes; and (4) a statement that the proposed changes to the subordinated debt documents comply with all applicable laws and regulations.

The OCC also is proposing to make certain stylistic changes to the rule text of § 5.47 that are not intended to impact the substantive requirements applicable to national banks.

Change in control of a national bank or Federal savings association; reporting of stock loans
(§ 5.50)

Section 5.50 sets forth the procedures and standards for changes in control of national banks and Federal savings associations. Paragraph (d)(8) contains a definition of insured depository institution. However, that term is not used within § 5.50. Accordingly, the OCC proposes to replace that definition with the definition of “depository institution,” to mean a depository institution as defined in section 3(c)(1) of the FDI Act (12 U.S.C. 1813(c)(1)).

Paragraph (f)(3)(iv) states that an applicant may request a hearing by the OCC within 10 days of receipt of a notice disapproving a change in control and that following final agency action under 12 CFR part 19, further review by the courts is available. Paragraph (f)(6) provides that the OCC will notify the proposed acquiror in writing of a disapproval within three days and will indicate the basis of its disapproval. For clarity, the OCC proposes combining these provisions in a revised paragraph (f)(6). The OCC also proposes to add language stating that this

disapproval notice will inform the filer of the availability of a hearing. Additionally, the OCC proposes a new paragraph (f)(6)(iii) specifying that if a filer fails to request a hearing with a timely request, the notice of disapproval constitutes a final and unappealable order. This language is currently included in 12 CFR 19.161 and the OCC believes it also should be included in § 5.50 to put filers on notice of the implications of failure to request a hearing in a timely manner.

Finally, paragraph (g)(2)(i) provides procedures for the OCC's release of information related to a change in control notice, including publication of information in the OCC's Weekly Bulletin. The OCC proposes revising this provision to reflect the information that the OCC publishes in the Weekly Bulletin in practice, namely the date of filing, the disposition of the notice and date thereof, and the consummation date of the transaction, if applicable.

Changes in directors and senior executive officers of a national bank or Federal savings association (§ 5.51)

Section 5.51 implements section 914 of the Financial Institutions Reform, Recovery, and Enforcement of 1989 (12 U.S.C. 1831i). Section 914 requires a national bank or Federal savings association to provide prior notice to the OCC of the proposed addition of any individual to the board of directors or the employment of any individual as a senior executive officer of a bank if, among other things, the bank is in troubled condition. Paragraph (c)(4) defines "senior executive officer" to mean the president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, chief investment 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 bank or 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 functions in lieu of directly hiring the individuals, and the individual functioning as the chief managing official of the Federal branch of a foreign bank. The OCC proposes to add chief risk officer to the definition of senior executive officer given the increase in that role at many national banks and Federal savings associations. The OCC invites comment on whether it should add others to the definition or remove any currently included in the definition.

Paragraph (c)(7) provides the definition of “troubled condition,” which is one of the circumstances in which a national bank or Federal savings association is required to file a notice under § 5.51. Pursuant to paragraph (c)(7)(ii), this definition includes a national bank or Federal savings association that is subject to a cease and desist order, a consent order, or a formal written agreement, unless otherwise informed in writing by the OCC. The OCC is proposing to amend paragraph (c)(7)(ii) to specify that the cease and desist order, consent order, or formal written agreement must require the bank or savings association to improve its financial condition for the institution to be considered in “troubled condition” solely as a result of the enforcement action. The OCC expects to inform a bank in writing when an enforcement action does not require action to improve the financial condition of the bank. The OCC’s general policy is not to apply troubled condition status to national banks or Federal savings associations solely as a result of cease and desist orders, consent orders, or formal written agreements that do not require improvement in the financial condition of the bank or savings association, such as enforcement actions that address certain compliance-related deficiencies that do not affect the financial condition of the bank or savings association. Typically, the OCC has specifically noted in these actions that the bank or savings association is not in troubled condition as a result of the action. This proposal would update the definition of troubled condition in § 5.51 to align with the

OCC's current supervisory practice. The OCC notes that this practice is consistent with that of the Federal Reserve Board (Board) and the FDIC, and the proposed revision would align the OCC's regulations with the Board's and FDIC's regulations implementing section 914.²²

Capital distributions by Federal savings associations (§ 5.55)

Section 5.55 provides standards and procedures for capital distributions made by Federal savings associations. Paragraph (d)(2) defines "capital" as total capital, computed under 12 CFR part 3. The OCC proposes to delete this definition as unnecessary because all references to "capital" are either in relation to the defined term "capital distribution" or contain an explicit reference to calculations under 12 CFR part 3. Additionally, the OCC proposes a new definition of "control," to have the same meaning as in section 10(a)(2) of the HOLA (12 U.S.C. 1467a(a)(2)), and to use this term to describe control relationships, rather than the current use of the term "subsidiary" in § 5.55.

Current paragraph (e)(1) requires a Federal savings association to file an application if it is not an eligible savings association. Current paragraphs (e)(2) and (g)(2) require eligible savings associations to file a notice if certain requirements are met. Consistent with other proposed changes in part 5, the OCC proposes to change the terminology for notice to application and to make corresponding changes throughout § 5.55. As a result, filings that are currently notices would be applications subject to expedited review. In addition, the OCC proposes to reorganize paragraphs (e) and (g) to clarify the procedures; however no substantive change is intended. The OCC also would make additional stylistic revisions to current paragraph (e)(4) to clarify that the notice mentioned in this paragraph is that of the notice filed with the Board of Governors of the Federal Reserve System.

²² See 12 CFR 225.71(d) (Board); 12 CFR 303.101(c) (FDIC).

Further, the OCC proposes one substantive change to the application procedures. Current paragraph (e)(1)(ii) requires a Federal savings association to file an application if the total amount of all its 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. Under 12 CFR 5.64(c)(2), a national bank may calculate its dividends in excess of a single year's current net income by offsetting certain excess dividends against retained net income from each of the prior two years, with the potential to incorporate net income from up to four years prior to the current year when determining the maximum dividend payout possible without prior OCC approval. To provide additional flexibility, the OCC would permit a Federal savings association to conduct this calculation when determining whether this application requirement applies. Specifically, if the capital distribution is from retained earnings, a Federal savings association would be able to calculate the aggregate limitation for a capital distribution in accordance with 12 CFR 5.64(c)(2), substituting "capital distributions" for "dividends" in that section.

Paragraph (f)(2) provides that the capital distribution application may include a schedule proposing capital distributions over a specified period, not to exceed 12 months. The OCC proposes to remove this 12-month limitation to allow a Federal savings association more flexibility for its distributions and to align this provision with the analogous national bank provision, 12 CFR 5.46(i)(1)(ii).

Additionally, the OCC is proposing a new paragraph (g)(3) to clarify the appropriate OCC filing office for capital distribution applications and notices. In general, a Federal savings association would file with the appropriate OCC licensing office. However, the Federal savings association must submit the application to the appropriate OCC supervisory office if the

application involves solely a cash dividend from retained earnings or involves a cash dividend from retained earnings and a concurrent cash distribution from permanent capital.

Finally, the OCC is proposing to reorganize paragraph (h), which addresses OCC review of an application, by providing separate paragraphs for OCC denials and approvals. As a result, proposed paragraph (h)(1) would address OCC denials and include the majority of current paragraph (h) and proposed paragraph (h)(2) would address OCC approvals. In doing so, the proposal would clarify that the OCC may approve an application in whole or in part and that the OCC may waive any waivable prohibition or condition to permit a distribution. The proposal also would change the cross-reference in the current introductory text to the more appropriate paragraph (e)(1).

Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as Federal savings association supplementary (tier 2) capital (§ 5.56)

Section 5.56 provides the requirements and procedures for a Federal savings association to include subordinated debt and mandatorily redeemable preferred stock (collectively, “covered securities”) in tier 2 capital. Paragraph (b) provides the filing procedures, including the application and notice procedures. Under § 5.56, the OCC must approve an application or notice before a Federal savings association may include covered securities as tier 2 capital. As proposed in § 5.47, the OCC proposes to make this process consistent with the rest of part 5 by changing the terminology from notice to application where appropriate throughout § 5.56. The proposal also would clarify that a savings association may not include covered securities in tier 2 capital until the OCC approves the application and the securities are issued. This change is not intended to be substantive.

Paragraph (b)(2) requires an application and prior approval from the OCC for a Federal savings association to prepay covered securities included in tier 2 capital. Similar to the national bank requirement in § 5.47, §§ 5.56(b)(2)(ii) and (h) contain additional application requirements for and OCC review of prepayments in the form of a call option. As provided above in the discussion for § 5.47, and for the same reasons, the OCC is proposing to incorporate the application requirements currently applicable to prepayment in the form of a call option to all prepayment applications. The OCC is proposing one additional technical change in § 5.56(b)(2) to replace a reference to “a tier 1 or tier 2 instrument” to refer to “tier 1 or tier 2 capital.”

Paragraph (d)(1) contains disclosure requirements for covered securities. The OCC proposes to add a new paragraph (d)(1)(i)(H) to require the covered security to state that it 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. As discussed above regarding § 5.47, a Federal savings association that is an advanced approaches institution must make this disclosure under 12 CFR 3.20(d)(1)(xi). The OCC believes that disclosing this information to potential investors in the covered security is beneficial for all Federal savings associations, even those that are not advanced approaches Federal savings associations or that do not intend to include the debt in tier 2 capital.

In addition, the proposed rule would replace the reference to 12 CFR part 197 in paragraphs (b)(1)(iii) and (d)(2)(i) with 12 CFR part 16, which now applies to Federal savings associations. The OCC also is proposing to make certain purely stylistic changes to the rule text of § 5.56 that are not intended to impact the substantive requirements applicable to Federal savings associations.

Pass-through investments by a Federal savings association (§ 5.58)

Section 5.58 provides the licensing procedures for Federal savings associations making pass-through investments. Although based on different authority, § 5.58 is largely analogous to the provisions in § 5.36 governing national bank non-controlling investments. Accordingly, the OCC is proposing amendments to § 5.58 similar to those proposed for § 5.36, and for the same reasons.

First, the OCC is proposing to amend paragraph (d), Definitions, by defining “pass-through investment” as an investment authorized under 12 CFR 160.32(a). As discussed above for the proposed definition of “non-controlling investment” in § 5.36, the proposed definition for “pass-through investment” would exclude a Federal savings association holding interests in a trust formed for the purposes of securitizing assets held by the bank 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. The OCC also is proposing to amend paragraph (d) by removing the definitions of “well capitalized” and “well managed.” As described above, the OCC is proposing to define these terms in § 5.3.

Second, the proposal would expand the activities eligible for notice to include activities that are substantially the same as previously approved activities, as proposed to be defined in § 5.3. In making this change, the proposal reorganizes paragraph (e) and makes conforming changes to paragraphs (e)(2) and (e)(4). Additionally, the OCC is considering removing the filing requirement for pass-through investments in enterprises engaging in activities permissible for a Federal savings association, as discussed above for national bank operating subsidiaries and non-controlling investments. The OCC would not remove the filing requirement if the enterprise would be a subsidiary of the Federal savings association for purposes of section 18(m) of the FDIA Act (12 U.S.C. 1828(m)), which generally requires a Federal savings association to

provide 30-days prior notice to the OCC before establishing or acquiring a subsidiary defined in section 3(w)(4) of the FDI Act (12 U.S.C. 1813(w)(4)). The OCC requests comment on the proposed amendment to the notice provision, the alternative amendment described above, and any intermediate options, such as removing the filing requirement for activities that are substantively the same as previously approved activities.

Third, the proposal would revise paragraph (f)(1) to permit a Federal savings association to file an application to make a pass-through investment in an entity that does not agree to OCC supervision and examination. The proposal also would redesignate paragraph (f)(2) as paragraph (f)(3) and add a new paragraph (f)(2) providing for expedited review for certain applications. The qualifications for expedited review are equivalent to those in proposed § 5.36(f).

Fourth, the OCC is proposing to add a new paragraph (g) that would permit a Federal savings association to make a pass-through investment without a notice or application to the OCC. The standards would be equivalent to those in proposed § 5.36(g) except that the enterprise must not be a subsidiary of the Federal savings association for purposes of section 18(m) of the FDI Act. In such a case, an application would be required under § 5.58(f)(2).

Finally, the OCC is proposing to amend redesignated paragraph (j) to provide exceptions to the rules of general applicability in the same manner as proposed § 5.36(j).

Earnings limitation under 12 U.S.C. 60 (§ 5.64)

Section 5.64 describes the calculations for earnings available for dividends under 12 U.S.C. 60. Paragraph (d) provides special rules for what the OCC referred to as “surplus surplus,” which is an amount in capital surplus in excess of capital stock that the national bank can demonstrate came from earnings in prior periods. A national bank had been required to retain a certain percentage of net income as capital surplus whenever it paid dividends. In

addition, a variety of statutes and regulations established limits for banks based on permanent capital, including capital surplus, and ignored any amounts in retained earnings, which provided an incentive for banks to shift earnings into permanent capital. After Congress revised the statutes to provide more flexibility to include retained earnings as capital for purposes of the statutory limits, the OCC permitted banks to distribute these surplus surplus funds as dividends rather than as reductions in permanent capital given the surplus surplus funds' origin as earnings rather than paid in capital. As these statutory and regulatory changes occurred decades ago, national banks have not needed to create new surplus surplus for many years but may still incur recordkeeping burden associated with identifying regulatory surplus surplus within capital surplus. Accordingly, the OCC proposes to remove the concept of surplus surplus and associated procedures described in paragraph (d). However, removal of paragraph (d) would not prevent a bank from distributing amounts contained in the capital surplus accounts. A national bank may make an appropriate filing under 12 CFR 5.46 for a reduction in capital to distribute these funds.

Dividends payable in property other than cash (§ 5.66)

Section 5.66 provides procedures for payment of dividends in non-cash property by national banks. This section currently provides that these dividends are equivalent to a cash dividend in an amount equal to the actual current value of the property, even if the bank previously has charged down or written off the property. Before the dividend is declared, the bank should show the excess of the actual value over book value on its books as a recovery and should declare the dividend in the amount of the full book value (equivalent to the actual current value) of the property being distributed. The OCC proposes to revise this section to clarify that 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. The OCC also

proposes to apply this valuation methodology to all non-cash dividends, not just those for property that has been charged down or written off. Further, the amendment would provide that the bank should show the difference between the actual value and book value on its books as gain or loss, as applicable, prior to recording the non-cash dividend reflecting the actual value of the property. The OCC believes this approach better reflects the value of the property being distributed from the bank, particularly in cases where the non-cash property was recorded at historical cost under GAAP.

Fractional shares (§ 5.67)

Section 5.67 provides a number of potential arrangements that a national bank may adopt to avoid the issuance of fractional shares. The OCC proposes to simplify this section for a national bank by retaining only one of these options, the remittance of the cash equivalent of the fraction not being issued to those to whom fractional shares would otherwise be issued. The OCC believes this procedure is the simplest and is the predominant method of disposing of fractional shares today. Other options in the current rule include issuing warrants for fractional shares or permitting shareholders to purchase additional fractions up to one whole share. While the OCC permitted these methods historically, these methods can create significant recordkeeping costs today when bank stock may be traded in “round lots” of 100 shares or more. Because a transaction that would result in the issuance of fractional shares will generally require an application with the OCC, proposed § 5.67 maintains flexibility for banks by permitting the bank to propose an alternate method in the application for the stock issuance, which could include one of the options proposed to be removed from the rule.

Federal branches and agencies (§ 5.70)

Section 5.70 provides the filing procedures for corporate activities and transactions involving Federal branches and agencies of foreign banks. Consistent with the background investigation changes proposed to other sections, the OCC proposes adding a new paragraph (d)(3) to explicitly permit the OCC to require any senior executive officer of a Federal branch or agency submitting a filing to submit an Interagency Biographical and Financial Report and legible fingerprints.

General Technical Changes

The OCC proposes numerous technical changes throughout 12 CFR part 5. Specifically, the proposed rule would:

- Replace the word “shall” with “must,” “will,” or other appropriate language, which is the more current rule writing convention for imposing an obligation and is the recommended drafting style of the **Federal Register**;
- Replace the term “notice” with the term “application” where prior OCC approval is required, thereby conforming the terminology to the licensing action provided in the provision (notices would continue to include informational filings to the OCC as well as certain transactions that the OCC has the power to disapprove, such as changes in control);
- Amend the expedited review provisions throughout part 5 to refer to the OCC removing a filing from expedited review rather than making a determination that the filing is not eligible for expedited review to accord with the language and procedure in § 5.13(a)(2).
- Revise citations to the U.S. Code and the Code of Federal Regulations by adjusting cross-references and making citations more specific;

- Update and standardize references to the OCC website;
- Simplify gender references by replacing “his or her” with the neutral “their;”
- Uniformly capitalize the word “State,” in conformance with **Federal Register** drafting style; and
- Replace the term “bank” and “savings association” with “national bank” or “Federal savings association,” respectively, where appropriate.

III. Regulatory Analyses

A. Paperwork Reduction Act

Paperwork Reduction Act

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

The OCC reviewed the proposed rulemaking and determined that it revises certain information collection requirements previously cleared by OMB under OMB Control No. 1557-0014. The OCC has submitted the revised information collection to OMB for review under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB’s implementing regulations (5 CFR 1320).

Current Actions

The proposed rulemaking would:

- Add new definitions to add clarity and consistency across Part 5. This includes proposing a single definition of *well managed* applicable throughout Part 5. 12 CFR 5.3.

- Require each proposed organizer, director, executive officer, or principal shareholder to submit information prescribed in the Interagency Biographical and Financial Report and legible fingerprints. This amendment merely codifies current application requirements and will not result in a change in burden. 12 CFR 5.20.
- Eliminate the bylaw amendment notice requirement for Federal savings associations that adopt without change the OCC's model or optional bylaws set forth in the rule. 12 CFR 5.21, 5.22.
- Require that applications to convert to a Federal savings association or national bank include: a list of directors and senior executive officers of the converting institution; and 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 converting institution's stock. This amendment merely codifies current application requirements and will not result in a change in burden. 12 CFR 5.23(d)(2)(ii), 5.24(e)(2).
- Permit the OCC to require directors and senior executive officers of a converting institution to submit the Interagency Biographical and Financial Report and legible fingerprints. This amendment merely codifies current application requirements and will not result in a change in burden. 12 CFR 5.23, 5.24.
- Require that applications for national banks or Federal savings associations that wish to engage in the exercise of fiduciary powers include, if requested by the OCC, the Interagency Biographical and Financial Report and legible fingerprints. 12 CFR 5.26.

- Require a filer of a business combination application under CRA to disclose whether it has entered into and disclosed a covered agreement, as defined in 12 CFR 35.2. 12 CFR 5.33(e)(1)(iii)(B).
- Remove the requirement that a disappearing national bank or Federal savings association consolidating or merging with another OCC-supervised institution provide a notice to the OCC. § 5.33(g), (k).
- For national bank operating subsidiaries, expand the after the fact notice for national banks to activities that are substantially the same as previously approved activities that will be conducted in accordance with the same terms and conditions applicable to the previously approved activity. Expand the list of eligible entities to include trusts provided that the bank or operating subsidiary has the ability to replace the trustee at will and be the sole beneficial owner of the trust. 12 CFR 5.34.
- Remove the requirement for a national bank to file an annual report identifying its operating subsidiaries that do business directly with consumers and are not functionally regulated. 12 CFR 5.34.
- For national bank non-controlling investments and Federal savings association pass-through investments, expand the activities eligible for notice to activities that are substantially the same as previously approved activities., 12 CFR 5.36, 5.58.
- Allow national banks and Federal savings associations to file an application to make a non-controlling investment or a pass-through investment, respectively, in an enterprise that has not agreed to be subject to OCC supervision and examination. 12 CFR 5.36(f), 5.58(f).
- Allow national banks and Federal savings associations to make non-controlling investments or a pass-through investments, respectively, without a filing if the activities of the

enterprise are limited to those previously reported to the OCC in connection with a prior investment. 12 CFR 5.36, 5.58.

- For Federal savings association operating subsidiaries, expand the expedited approval process for Federal savings associations to include activities that are substantially the same as previously approved activities that will be conducted in accordance with the same terms and conditions applicable to the previously approved activity. Expanded the list of eligible entities to include trusts provided that the Federal savings association or operating subsidiary has the ability to replace the trustee at will and be the sole beneficial owner of the trust. 12 CFR 5.38.

- Permit national banks to request approval for a reduction in permanent capital for multiple quarters. 12 CFR 5.46.

- Regarding subordinated debt notes, allow national banks to omit inapplicable provisions when warranted, and require national banks to disclose in subordinated debt notes that the subordinated debt 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. 12 CFR 5.47.

- Revise the standard for when prior approval is required for a national bank's issuance of subordinated debt and for prepayment of any subordinated debt that is not included in tier 2 capital 12 CFR 5.47(f).

- Require OCC approval for a material change to an existing subordinated debt document if the national bank would have been required to receive OCC approval to issue the security under § 5.47(f)(1) or to include it in tier 2 capital under § 5.47(h). 12 CFR 5.47.

- Add the position of *chief risk officer* to the definition of senior executive officer.

This change would require prior OCC approval for the employment of an individual as a chief risk officer by a national bank or Federal savings association in troubled condition. 12 CFR 5.51.

- Require a covered security (inclusion of subordinated debt and mandatorily redeemable preferred stock) issued by a Federal savings association to state that it 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. 12 CFR 5.56.

- Permit the OCC to require any senior executive officer of a Federal branch or agency submitting a filing to submit an Interagency Biographical and Financial Report and legible fingerprints. This amendment merely codifies current application requirements and will not result in a change in burden. 12 CFR 5.70.

Title of Information Collection: Licensing Manual.

Frequency: Event generated.

Affected Public: Businesses or other for-profit.

Estimated number of respondents: 1,196.

Total estimated annual burden: 12,481 hours.

Comments are invited on:

- a. Whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;
- b. The accuracy or the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;
- c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the ADDRESSES section of this document. A copy of the comments may also be submitted to the OMB desk officer by mail to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503; facsimile to (202) 395-6974; or e-mail to oir_submission@omb.eop.gov, Attention, Federal Banking Agency Desk Officer.

B. Regulatory Flexibility Act Analysis

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

The OCC currently supervises approximately 1,196 institutions (commercial banks, trust companies, FSAs, and branches or agencies of foreign banks, collectively banks), of which 782

are small entities.²³ Because the rule applies to all OCC-supervised depository institutions, the proposed rule would affect all small OCC-supervised entities, and thus a substantial number of them.

The OCC classifies the economic impact of total costs on an OCC-regulated entity as significant if the total costs for the entity in a single year are greater than 5 percent of total salaries and benefits, or greater than 2.5 percent of total non-interest expense. The OCC estimates that the monetized direct cost of this rulemaking would range from a low of approximately \$4,560 per bank (40 hours × \$114 per hour²⁴) to a high of approximately \$18,240 per bank (160 hours × \$114 per hour). Using the upper bound average direct cost per bank, the OCC finds the compliance costs would have a significant economic impact on no more than 20 small banks, which is not a substantial number.²⁵ Therefore, the OCC certifies that this regulation, if adopted, would not have a significant economic impact on a substantial number of small entities supervised by the OCC. Accordingly, an Initial Regulatory Flexibility Analysis is not required.

C. Unfunded Mandates Reform Act of 1995

The OCC has analyzed the proposed rule under the factors in the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*). Under this analysis, the OCC considered whether the proposed rule includes a Federal mandate that may result in the expenditure by State,

²³ Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if it should classify an institution as a small entity. The OCC used December 31, 2018, to determine size because a “financial institution’s assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” See footnote 8 of the U.S. Small Business Administration’s *Table of Standards*.

²⁴ This per hour dollar amount is based on the U.S. Bureau of Labor Statistics data for wages (by industry and occupation).

²⁵ The OCC’s threshold for a substantial number of small entities is five percent of OCC-supervised small entities, or 39 as of December 31, 2018.

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). The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

Based on the OCC estimate that the monetized direct cost of this rulemaking would range from a low of approximately \$4,560 per bank to a high of approximately \$18,240 per bank, the OCC's overall estimate of the total effect of the proposed rule ranges from approximately \$5.5 million to approximately \$21.8 million for the approximately 1,196 institutions supervised by the OCC. Therefore, the OCC finds that the proposed rule does not trigger the UMRA cost threshold. Accordingly, the OCC has not prepared the written statement described in section 202 of the UMRA.

D. Riegle Community Development and Regulatory Improvement Act of 1994

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

List of Subjects

12 CFR Part 5

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

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

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

1. The authority citation for part 5 is revised to read as follows:

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

§ 5.2 [Amended]

2. Amend § 5.2 by:

a. In paragraph (b), removing the word “filings,” and adding in its place the phrase “filings as it deems necessary, for example,” and removing the word “applicant” and adding in its place the word “filer”; and

b. In paragraph (c), removing the phrase “on the OCC’s Internet Web page”.

3. Revise § 5.3 to read as follows.

§ 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*.

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 bank's or savings association's 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, as reported in the Call Report.

Depository 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 as defined in § 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
- (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, an 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, an 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;

(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. 1831*o*).

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 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.

4. Amend § 5.4 by:
 - a. In paragraph (a), removing the word “shall” and adding in its place the word “must”;
 - b. In paragraph (b), removing the phrase “on the OCC’s Internet Web page”;
 - c. In paragraph (c), removing the word “applicant” each time that it appears and adding in its place the word “filer”;
 - d. In paragraphs (d) and (e), removing the phrase “an applicant” each time that it appears and adding in its place the phrase “a filer”;
 - e. In paragraph (d), removing the phrase “the OCC’s Internet Web page at”;
 - f. Revising paragraph (f); and
 - g. Adding paragraph (g).

The addition and revision read as follows:

§ 5.4 Filing required.

* * * * *

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

5. Amend § 5.5 by revising paragraph (a) to read as follows:

§ 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.

* * * * *

6. Amend § 5.7 by redesignating paragraph (b) as paragraph (c) and adding a new paragraph (b) to read as follows:

§ 5.7 Investigations.

* * * * *

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

* * * * *

§ 5.8 [Amended]

7. Amend § 5.8 by:

a. In paragraph (a), removing the phrase “An applicant shall publish” and adding in its place the phrase “A filer must publish” and removing the phrase “the applicant proposes” and adding in its place the phrase “the filer proposes”;

b. In paragraphs (a) and (b), removing the word “shall” and adding in its place the word “must”;

c. In paragraphs (b) and (g)(1), removing the word “applicant” and adding in its place the word “filer”;

d. In paragraphs (c) and (d), removing the phrase “applicant shall” and adding in its place the phrase “filer must”; and

e. In paragraph (e) and paragraph (g) introductory text, removing the phrase “an applicant” and adding in its place the phrase “a filer”.

§ 5.9 [Amended]

8. Amend § 5.9 by:

a. In paragraph (b), in the second sentence, removing the word “Applicants” and adding in its place the word “Filers”; and

b. In paragraph (c), removing the word “applicant” and adding in its place the word “filer”.

§ 5.10 [Amended]

9. Amend § 5.10 by:

a. In paragraphs (b)(2)(i) and (b)(3), removing the word “applicant” and adding in its place the word “filer”;

b. In paragraph (b)(2)(ii), removing the word “application” and adding in its place the word “filing”; and

c. In paragraph (b)(3), revising the paragraph heading by removing the word “*Applicant*” and adding in its place the word “*Filer*”.

§ 5.11 [Amended]

10. Amend § 5.11 by:

a. In paragraphs (a), (e), and (g)(2), removing the word “shall” each time it appears and adding in its place the word “must”;

b. In paragraphs (a), (d)(1), (e), (g)(1), and (g)(2), removing the word “applicant” each time it appears and adding in its place the word “filer”;

c. In paragraph (c), removing the word “shall” and adding in its place the word “will”;

d. In paragraphs (e) and (f), removing the phrase “his or her” and adding in its place the word “their”;

e. In paragraph (h), removing the word “applicant’s” and adding in its place the word “filer’s”; and

f. In paragraph (i)(1) removing the phrase “an application” and adding in its place the phrase “a filing” and removing the phrase “the application” and adding in its place the phrase “the filing”; and

g. In paragraph (i)(2), removing the phrase “an applicant” and adding in its place the phrase “a filer”.

§ 5.12 [Amended]

11. Amend § 5.12 by removing the phrase “an application” and adding in its place the phrase “a filing”.

12. Amend § 5.13 by:

- a. In paragraph (a) introductory text and paragraphs (b)(1), (b)(3), (d), and (g), removing the phrase “the applicant” each time that it appears and adding in its place the phrase “the filer”;
- b. Revising paragraph (a)(2) introductory text and paragraphs (a)(2)(i) and (ii);
- c. In paragraphs (c) and (f), removing the phrase “an applicant” and adding in its place the phrase “a filer”;
- d. In paragraph (g), removing the word “applicant’s” and adding in its place the word “filer’s”;
- e. Revising paragraph (h); and
- f. Adding paragraph (i).

The revisions and addition read as follows:

§ 5.13 Decisions.

(a) * * *

(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 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 (1) a generalized opinion that a filing should or should not be approved or (2) 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) 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.

* * * * *

(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.

13. Amend § 5.20 by:

- a. In paragraph (b), paragraph (e)(1)(iii) introductory text, and paragraphs (h)(1)(i), (h)(2), (h)(3), (h)(5)(i), (h)(5)(ii), (h)(5)(iii), (h)(7), (i)(2), (i)(3), (i)(5)(ii)(A), (i)(5)(ii)(B), (i)(5)(iii), (i)(5)(iv), (k)(1), (l)(1), and (l)(2), removing the word “shall” each time that it appears and adding in its place the word “must”;
- b. In paragraph (d)(2), removing the phrase “section 2” and adding in its place “section 2(a)(2)” and removing the phrase “section 10” and adding in its place “section 10(a)(2)”;
- c. Redesignating paragraphs (d)(7) and (8) as paragraphs (d)(8) and (9), respectively, and adding new paragraphs (d)(7) and (d)(10);
- d. In newly redesignated paragraph (d)(8), removing the word “persons” and adding in its place the word “individuals”; and
- e. In newly redesignated paragraph (d)(9), removing the phrase “an applicant” and adding in its place the phrase “a filer”;
- f. In paragraph (e)(1)(ii)(A), removing the word “applicants” and adding in its place the word “filers”; and
- g. In paragraph (e)(3), removing the phrase “Federal Deposit Insurance Corporation (FDIC)” and adding in its place the word “FDIC”;
- h. In paragraph (g)(4) removing the word “shall” and adding in its place the word “may” and removing the phrase “withdrawal of preliminary approval” and adding in its place the phrase “nullification or rescission of a preliminary approval” in paragraph (g)(4)(ii);
- i. In paragraphs (i)(1), (j)(1), and (j)(2), removing the word “applicant” and adding in its place the word “filer”;
- j. Redesignating paragraphs (i)(3) through (5) as paragraphs (i)(4) through (i)(6) and adding a new paragraph (i)(3);

k. In newly redesignated paragraph (i)(5), removing the phrase “spokesperson and other interested persons” and adding in its place the phrase “contact person and other relevant parties”; and

l. In newly redesignated paragraph (i)(6)(iii), removing the phrase “or part 197”;

m. Revising paragraph (j)(1); and

n. In paragraphs (k)(2) and (l)(1), removing the phrase “An applicant” each time that it appears and adding in its place the phrase “A filer”.

The additions and revision read as follows:

§ 5.20 Organizing a national bank or Federal savings association.

* * * * *

(d) * * *

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

* * * * *

(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.

* * * * *

(i) * * *

(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.

* * * * *

(j) * * *

(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

* * * * *

14. Amend § 5.21 by:

a. In paragraph (d), removing the word “shall” and adding in its place the word “do”;

b. In paragraph (e) introductory text, removing the word “shall” and adding in its place the word “must” in the first and second sentence; and removing the word “shall” and adding in its place the word “will” in the last sentence;

c. In the form “Federal Mutual Charter” following paragraph (e):

i. Removing the phrase “shall be” and adding in its place the word “is” each time it appears in Section 2 and Section 7;

ii. In Section 6:

A. Removing the phrase “shall be permitted” and adding in its place the phrase “is permitted”;

B. Removing the phrase “shall cast” and adding in its place the phrase “may cast”; and

C. Removing the phrase “accounts shall be” and adding in its place the phrase “accounts are”;

iii. Removing the phrase “shall not” and adding in its place the phrase “may not” in Section 7; and

iv. Removing the word “shall” and adding in its place the word “will” each time it appears in Section 8 and Section 9;

d. Revising paragraph (f)(2) and adding paragraph (f)(3);

e. Revising paragraph (g) introductory text;

f. In paragraph (g)(1):

i. Removing the phrase “shall have the” and adding in its place the phrase “has the”;

ii. Removing the phrase “shall require” and adding in its place the word “requires”;

iii. Removing the phrase “raise capital, which shall be unlimited,” and adding in its place the phrase “raise unlimited capital”;

iv. Removing the phrase “accounts as shall” and adding in its place the phrase “accounts as will”;

v. Removing the phrase “shall have such” and adding in its place the phrase “will have such”; and

vi. Removing the phrase “shall have power” and adding in its place the phrase “has the power”;

g. Revising paragraph (i); and

h. Revising paragraph (j):

The revisions and addition read as follows.

§ 5.21 Federal mutual savings association charter and bylaws.

* * * * *

(f) * * *

(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:

* * * * *

(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.

(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.

(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. 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 county 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 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 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 their 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 (f)(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) *Notice Requirement.* A Federal mutual association may elect to follow the corporate governance procedures of the laws of the State where the home office of the institution is located, provided that such procedures are not inconsistent with applicable Federal statutes, regulations, and safety and soundness, and such procedures 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 procedures, 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.

15. Amend § 5.22 by:

- a. In paragraph (d), removing the word “shall” and adding in its place the word “do”;
- b. In paragraph (e) introductory text removing the word “shall” each time it appears and adding in its place the word “must” and removing “§ 192.3(c)(13)” and adding in its place “§ 192.485”;
- c. In the form “Federal Stock Charter” following paragraph (e):
 - i. In *Section 2*, removing the phrase “shall be” and adding in its place the word “is”;
 - ii. Revising *Section 5*;
 - iii. In *Section 6*, removing the phrase “shall not be entitled” and adding in its place the phrase “are not entitled”;
 - iv. In *Section 7*, removing the phrase “shall be” and adding in its place the phrase “will be” and removing the phrase “shall not be” and adding in its place the phrase “may not be”; and
 - v. In *Section 8*, removing the phrase “shall be” and adding in its place “may be”;
- d. Revising paragraph (f)(2) and adding paragraph (f)(3);
- e. Revising paragraph (g) introductory text and paragraph (g)(4);
- f. Removing the word “shall” each time it appears and adding in its place the word “will” in paragraph (g)(6); and

- g. Revising paragraph (g)(7);
- h. In paragraph (h):
 - i. Removing the phrase “shall file” and adding in its place the word “files”;
 - ii. Removing the phrase “for approval” and adding in its place the phrase “pursuant to paragraph (f)(2)(i) of this section”;
 - iii. Removing the word “state” and adding in its place the word “State”; and
 - iv. Removing the phrase “shall not” and adding in its place the phrase “may not”;
- i. In paragraph (i), removing the phrase “under (c) of this part” and adding in its place “in the form “Federal Stock Charter” in paragraph (c) of this section”;
- j. Revising paragraphs (j)(2) and (3);
- k. In paragraph (j)(4), removing the phrase “shall be” and adding in its place the word “is”;
- l. Revising paragraphs (k)(1) through (7);
- m. Revising paragraphs (l)(1) through (10);
- n. In paragraph (m)(1) removing the phrase “shall be a president” and adding in its place the phrase “must consist of a president”; removing the phrase “shall be elected” and adding in its place the phrase “must be elected”; and removing the word “chairman” and adding in its place the word “chair”; and
 - o. In paragraph (m)(2) removing the phrase “shall be” and adding in its place the phrase “will be” and removing the phrase “shall conform” and adding in its place the phrase “must conform”; and
- p. Revising paragraph (n).

The addition and revisions read as follows.

§ 5.22 Federal stock savings association charter and bylaws.

* * * * *

(e) * * *

Federal Stock Charter

* * * * *

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.

(f) * * *

(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, provide 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:

* * * * *

(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 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.

* * * * *

(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 charter 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.

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.

* * * * *

(j) * * *

(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) *Notice Requirement.* A Federal stock association may elect to follow the corporate governance procedures of: The laws of the State where the home office of the association is located; the laws of the State where the association’s holding company, if any, is incorporated or chartered; Delaware General Corporation law; or The Model Business Corporation Act, provided that such procedures may be elected to the extent not inconsistent with applicable Federal statutes and regulations and safety and soundness, and such procedures are not 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 procedures, 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.

(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.

* * * * *

(k) *Shareholders of Federal stock savings associations—(1) Shareholder meetings.* 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. All annual and special meetings of shareholders may be held at any convenient place the board of directors may designate.

(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 (i)(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 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 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 (j)(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 expenses 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 may be 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.

* * * * *

(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.

(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 although 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

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 electronic participation at a 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.

* * * * *

(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.

16. Amend § 5.23 by:

a. In paragraph (b)(2), removing the phrase “an industrial bank or a credit union, chartered in” and adding in its place the phrase “an industrial bank, or a credit union chartered in”;

b. In paragraphs (c), (d)(2)(ii), (e), and (f)(1), removing the word “shall” each time that it appears and adding in its place the word “must”;

c. In paragraphs (c), (d)(1), (d)(2)(i), (d)(2)(v), and (d)(4), removing the word “applicant” each time that it appears and adding in its place the word “filer”;

d. In paragraph (c), removing the phrase “Federal Deposit Insurance Corporation (FDIC)” and adding in its place the word “FDIC”;

e. Removing paragraph (d)(2)(ii)(A), redesignating paragraphs (d)(2)(ii)(B) through (J) as paragraphs (d)(2)(ii)(A) through (I), respectively and adding new paragraphs (d)(2)(ii)(K) and (d)(2)(ii)(L);

f. In newly redesignated paragraphs (d)(2)(ii)(D) and (d)(2)(ii)(I), removing the word “state” and adding in its place the word “State”;

g. In newly redesignated paragraph (d)(2)(ii)(G), removing the comma after the phrase “engages in”;

h. In newly redesignated paragraph (d)(2)(ii)(I), removing the word “and” after the phrase “after conversion.”;

i. In newly redesignated paragraph (d)(2)(ii)(J), removing the period after the phrase “from the OCC” and adding in its place a semicolon;

j. In paragraph (d)(2)(iii), removing the word “HOLA” and adding in its place “Home Owners’ Loan Act (12 U.S.C. 1464(c))”;

k. Redesignating paragraphs (d)(2)(iv) through (v) as paragraphs (d)(2)(v) through (vi) and adding a new paragraph (d)(2)(iv);

l. Revising paragraph (d)(4); and

m. In paragraph (e), removing the phrase “an applicant” and adding in its place the phrase “a filer”;

o. In paragraph (f)(1), removing the word “state” and adding in its place the word “State”; and

p. In paragraph (g) removing the phrase “shall continue” and adding in its place the word “continues” and removing the phrase “shall be” and adding in its place the word “is”.

The additions and revision read as follows.

§ 5.23 Conversion to become a Federal savings association

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(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.

* * * * *

(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.

* * * * *

(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).

* * * * *

17. Amend § 5.24 by:

a. In paragraphs (b), (c)(1), (c)(2), (d), (e)(2) introductory text, and (e)(3), removing the word “state” each time that it appears and adding in its place the word “State”;

b. In paragraphs (b), (e)(2) introductory text, and (f), removing the word “shall” each time that it appears and adding in its place the word “must”;

c. In paragraph (c)(2), removing the word “state” and adding in its place the word “State”;

d. In paragraphs (d), (e)(1), and (h), removing the word “applicant” each time that it appears and adding in its place the word “filer”;

e. Removing paragraph (e)(2)(i) and redesignating paragraphs (e)(2)(ii) through (x) as paragraphs (e)(2)(i) through (ix), respectively, and adding paragraphs (e)(2)(x) through (xi);

f. In newly redesignated paragraphs (e)(2)(iv) and (e)(2)(ix), removing the word “state” each time that it appears and adding in its place the word “State”;

g. At the end of newly redesignated paragraph (e)(2)(viii), removing the word “and”;

h. At the end of newly redesignated paragraph (e)(2)(ix), removing the period and adding in its place a semicolon;

i. Redesignating paragraphs (e)(4) through (5) as paragraphs (e)(5) through (6), respectively, and adding a new paragraph (e)(4)

j. In newly redesignated paragraph (e)(6), removing the word “applicant” and adding the word “filer” in its place;

k. Revising paragraph (h); and

l. In paragraph (i):

i. In the first sentence, removing the phrase “shall continue” and adding in its place the word “continues”; and

ii. In the second sentence, removing the phrase “shall be” and adding in its place the word “is”.

The additions and revisions read as follows.

§ 5.24 Conversion to become a national bank.

* * * * *

(e) * * *

(2) * * *

(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.

* * * * *

(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.

* * * * *

(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).

* * * * *

§ 5.25 [Amended]

18. Amend § 5.25 by:

a. In the section heading and in paragraphs (b), (c), (d)(1), (d)(2), (d)(3)(i), and (d)(4), removing the word “state” each time that it appears and adding in its place the word “State”

b. In paragraphs (b), (d)(3)(i), and (d)(3)(ii), removing the word “shall” each time it appears and adding in its place the word “must”; and

c. In paragraphs (d)(1) and (d)(3)(i), removing the phrase “defined in 214(a)” each time it appears and adding in its place the phrase “defined in 12 U.S.C. 214(a)”.

19. Amend § 5.26 by:

a. In paragraph (a), removing the phrase “12 U.S.C. 92a and” and adding in its place the phrase “12 U.S.C. 92a,”;

b. In paragraphs (b)(2) and (b)(4), removing the phrase “Office of Thrift Supervision” each time it appears and adding in its place the word “OTS”;

c. In paragraphs (b)(3), (b)(4), (e)(1)(ii), (e)(1)(iii), (e)(2)(i)(B), (e)(2)(i)(E), and (e)(2)(iii)(B), removing the word “state” each time it appears and adding in its place the word “State”; and

d. In paragraph (e)(2)(i) introductory text, removing the word “shall” and adding in its place the word “must”;

e. Revising paragraph (e)(2)(i)(C);

f. In paragraph (e)(2)(ii), removing the word “applicant” and adding in its place the word “filer”; and

g. Revising paragraphs (e)(3) and (6).

The revisions read as follows.

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

* * * * *

(e) * * *

(2) * * *

(i) * * *

(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;

* * * * *

(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).

* * * * *

(6) *Notice of fiduciary activities in additional States.* (i) Except as provided in paragraphs (e)(6)(iii)-(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.

* * * * *

20. Amend § 5.30 by:

a. Removing the word “shall” each time it appears and adding in its place the word “must” in paragraphs (b), (f)(1), (f)(4), (g), (h)(1), and (j);

b. Revising paragraphs (d)(1)(i) and (iii)

c. In paragraph (d)(2), removing the word “*state*” and adding in its place the word “*State*”;

d. In paragraphs (d)(2), (d)(3), (g), and (h)(4), removing the word “state” each time it appears and adding in its place the word “State”;

e. In paragraph (f)(1), removing the phrase “paragraph (f)(2)” and adding in its place the phrase “paragraphs (f)(2) or (f)(3)”; and

f. In paragraph (f)(6), removing the phrase “is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2)” and adding in its place the phrase “has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2)”.

The revisions read as follows.

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

* * * * *

(d) * * *

(1) * * *

(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, an intermittent facility, or a drop box.

* * * * *

(iii) A branch does not include a remote service unit (RSU) as described in 12 CFR 7.4003. 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.

* * * * *

21. Amend § 5.31 by:

a. In paragraph (a) removing the period after “1464” and adding in its place a comma; and adding a comma after “2907”;

b. In paragraphs (b), (f)(1)(i), (f)(3), (i), (k)(2)(ii), and (j)(2), removing the word “shall” and adding in its place the word “must” each time it appears;

c. In paragraphs (c)(3) and (j)(1), removing the word “HOLA” and adding in its place the phrase “Home Owners’ Loan Act”;

d. In paragraph (d)(1), removing the word “*office*”;

e. In paragraph (d)(2), removing the word “*state*” and adding in its place the word “*State*”;

f. In paragraphs (d)(2), (g)(2), and (j)(2), removing the word “state” and adding in its place the word “State” each time in appears;

g. In paragraph (f)(1)(iii), removing the word “Federal” and removing the phrase “is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2)” and adding in its place the phrase “has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2)”;

h. In paragraph (f)(2)(ii), removing the word “§ 5.3(l)” and adding its place the word “§ 5.3”;

i. In paragraph (f)(2)(iii) introductory text, removing the word “§ 5.3(g)” and adding its place “§ 5.3”;

j. In paragraph (j) introductory text, removing the word “*HOLA*” and adding in its place “*Home Owners’ Loan Act*”; and

k. Adding paragraph (j)(3).

The addition reads as follows.

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

* * * * *

(j) * * *

(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.

* * * * *

§ 5.32 [Amended]

22. Amend § 5.32 by:

a. In paragraphs (c), (f), (h)(1), and (h)(2), removing the word “shall” and adding in its place the word “must” each time it appears ;

b. In paragraph (d)(1), removing the phrase “shall be” and adding in its place the word “is”;

c. In paragraph (d)(2)(i), removing the word “shall” and adding in its place the word “will”;

d. In paragraph (e), removing the phrase “his or her” and adding in its place the word “their”;

e. In paragraph (f), removing the word “Applicant” and adding in its place the word “Filers”; and

f. In paragraph (h)(1), removing the phrase “An applicant” and adding in its place the phrase “A filer”; and

g. In paragraph (h)(2), removing the word “applicant” and adding in its place the word “filer”.

23. Revise § 5.33 to read as follows:

§ 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.²⁶ 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:

²⁶ Other 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 12 CFR 5.53.

(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) *Business reorganization* means either:

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

(ii) A business combination between an eligible bank or an eligible savings association and an interim national bank or interim Federal savings association chartered in a transaction in which a person or group of persons exchanges its shares of the eligible bank or eligible savings

association for shares of a newly formed holding company and receives after the transaction substantially the same proportional share interest in the holding company as it held in the eligible bank or eligible savings association (except for changes in interests resulting from the exercise of dissenters' rights), and the reorganization involves no other transactions involving the bank or savings association.

(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 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*—(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 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 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..

(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) An 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 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. 78 l (b) or 78 l (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)(6) or (g)(7) 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 bank 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)(I) 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 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) Consolidation or merger of a Federal savings association with another Federal savings association, a national bank, a State bank, a State savings bank, a State savings association, a State trust company, or a credit union 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)(3), 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 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)(1) 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) *Consolidation or merger under 12 U.S.C. 214a of a national bank with a State bank 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 an insured State bank 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) *Consolidation or merger of a Federal savings association with a State bank, State savings bank, State savings association, State trust company, or credit union 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

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

(i) *Expedited review for business reorganizations and streamlined applications.* A filing that qualifies as a business reorganization as defined in paragraph (d)(3) of this section, or a filing that qualifies as a streamlined application as described in paragraph (j) of this section, is deemed approved by the OCC as of the 15th day after the close of the comment period, unless the OCC notifies the filer that the filing is not eligible for expedited review, or the expedited

review process is extended, under § 5.13(a)(2). An application under this paragraph must contain all necessary information for the OCC to determine if it qualifies as a business reorganization or streamlined application.

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

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

(ii) The acquiring bank or Federal savings association is an eligible bank or eligible savings association, the target bank or savings association is not an eligible bank, eligible savings association, or an eligible depository institution, the resulting national bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the filers in a pre-filing communication request and obtain approval from the appropriate OCC licensing office to use the streamlined application;

(iii) The acquiring bank or Federal savings association is an eligible bank or eligible savings association, the target bank or savings association is not an eligible bank, eligible savings association, or an eligible depository institution, the resulting bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national

bank or acquiring Federal savings association, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application; or

(iv) In the case of a transaction under paragraph (g)(4) of this section, the acquiring bank is an eligible bank, the resulting national bank will be well capitalized immediately following consummation of the transaction, the filers in a prefiling communication request and obtain approval from the appropriate OCC licensing office to use the streamlined application, and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank, as reported in the bank's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application.

(2) Notwithstanding paragraph (j)(1) of this section, a filer does not qualify for a streamlined business combination application if the transaction is part of a conversion under part 192 of this chapter.

(3) When a business combination qualifies for a streamlined application, the filer should consult the Comptroller's Licensing Manual to determine the abbreviated application information required by the OCC. The OCC encourages prefiling communications between the filers and the appropriate OCC licensing office before filing under paragraph (j) of this section.

(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)(2) 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, 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.

(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 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, 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 § 5.22(g), 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.

24. Amend § 5.34 by:

a. In paragraph (a), removing "3101 *et seq.*" and adding in its place "3102(b)";

b. In paragraph (c), removing the phrase "(e)(5)(i)(B) of this section shall apply" and adding in its place the phrase "(f)(1)(ii) of this section applies";

c. Revising paragraph (d);

d. In paragraphs (e)(1)(i)(B), (e)(3), and (e)(4)(ii), removing the word "state" and adding in its place the word "State" each time it;

e. Revising paragraph (e)(2)(i)(A);

- f. In paragraph (e)(2)(i)(C), removing the phrase “generally accepted accounting principles (GAAP)” and adding in its place the word “GAAP”;
- g. In paragraph (e)(2)(ii) introductory text, removing the word “subsidiaries” and adding in its place the word “entities”;
- h. Removing the word “and” in paragraph (e)(2)(ii)(A);
- i. Removing the period and adding in its place “; and” in paragraph (e)(2)(ii)(B);
- j. Adding paragraph (e)(2)(ii)(C);
- k. In paragraph (e)(2)(iii)(B), removing the word “shall” and adding in its place the word “may”;
- l. In paragraphs (e)(4)(i) and (e)(4)(ii), removing the word “shall” and adding in its place the word “will”;
- m. Removing paragraph (e)(7);
- n. Redesignating paragraphs (e)(5) and (e)(6) as paragraphs (f) and (g), respectively ; and
- o. Revising newly redesignated paragraph (f).

The addition and revisions read as follows.

§ 5.34 Operating subsidiaries of a national bank.

* * * * *

(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) * * *

(2) * * *

(i) * * *

(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;

* * * * *

(ii) * * *

(C) A trust formed for purposes of securitizing assets held by the bank as part of its banking business.

* * * * *

(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 prefiling 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, as defined in § 5.3, 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, as defined in § 5.3, 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:

(I) 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 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

² See, 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.

- (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, prepaid 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;
- (xvi) 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 presentment, 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 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 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.

* * * * *

25. Amend § 5.35 by:

a. Revising the section heading;

b. In paragraphs (b) and (d)(6), removing the word “shall” and adding in its place the word “must” each time it appears ;

c. In paragraphs (d)(2), (d)(3), (g)(2), and (g)(4), removing the word “state” and adding in its place the word “State” each time in appears;

d. In paragraph (d)(2) removing the phrase “section 3 of the Federal Deposit Insurance Act” and adding in its place the phrase “section 3(a)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(a)(3)” ;

e. In paragraph (d)(3):

i. After the words “an insured bank”, removing the phrase “(section 3 of the Federal Deposit Insurance Act)” and adding in its place the phrase “(section 3(c) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c))” ;

ii. After the words “a savings association”, removing the phrase “(section 3 of the Federal Deposit Insurance Act)” and adding in its place the phrase “(section 3(b)(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(1))”;

iii. Removing the phrase “Federal Deposit Insurance Corporation” and adding in its place the word “FDIC”;

f. In paragraph (d)(4), removing the phrase “section 3 of the Federal Deposit Insurance Act” and adding in its place the phrase “section 3(c)(2) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(2)”;

g. Revising paragraph (f)(2)(ii)(A);

h. In paragraph (f)(2)(ii)(B), removing the phrase “§ 5.34(e)(5)(v) or § 5.38(e)(5)(v)” and adding in its place the phrase “§ 5.34(f)(5) or § 5.38(f)(5)”;

i. Revising paragraph (i).

The revision and addition read as follows.

§ 5.35 Bank service company investments by a national bank or Federal savings association.

* * * * *

(f) * * *

(2) * * *

(ii) * * *

(A) The national bank or Federal savings association is well capitalized and well managed as defined in § 5.3; and

* * * * *

(i) *Investment limitations.* A national bank or Federal savings association must comply with the investment limitations specified in 12 U.S.C. 1862.

* * * * *

26. Amend § 5.36 by:

- a. In paragraph (a), removing the phrase “and 93a” and adding in its place the phrase “93a, and 3101 *et seq.*”;
- b. In paragraph (b), removing the phrase “and 5.37” and adding in its place the phrase “5.37, and 5.39”;
- c. Revising paragraph (c);
- d. Revising paragraph (e) introductory text;
- e. In paragraph (e)(1), removing the word “state” and adding in its place the word “State” each time it appears;
- f. Revising paragraphs (e)(2) through (4)
- g. Revising paragraph (f);
- h. Redesignating paragraphs (g) through (i) as paragraph (h) through (j);
- i. Adding new paragraph (g);
- j. In newly redesignated paragraph (h)(1), adding the phrase “, as defined in § 5.3” after the phrase “well managed”;
- k. Revising newly redesignated paragraphs (i) and (j).

The addition and revisions read as follows.

§ 5.36 Other equity investments by a national bank.

* * * * *

(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.

* * * * *

(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 previously approved activity, as defined in § 5.3, 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:

* * * * *

(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, as defined in § 5.3:

(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, as defined in § 5.3, 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, as defined in § 5.3, or how the bank otherwise has the ability to withdraw its investment;

* * * * *

(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 the information required by paragraphs (e)(2), (e)(3), and (e)(7) of this section, if possible. 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.

* * * * *

(i) *Non-controlling investments by Federal branches.* A Federal branch that is well capitalized and well managed, as defined in § 5.3, 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, 5.10, 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.

§ 5.37 [Amended]

27. Amend § 5.37 by:

- a. In paragraph (a), removing “317d” and adding in its place “371d”;
- b. Removing paragraph (c)(3);
- c. In paragraph (d)(1)(i) and (d)(3)(i), removing the word “shall” and adding in its place the word “must” each time it appears;
- d. In paragraph (d)(1)(i), removing the phrase “any corporation” and adding in its place the phrase “any corporation, partnership, or similar entity (*e.g.*, a limited liability company)”;
- e. In paragraph (d)(3)(i), removing the phrase “as defined in 12 CFR part 6” and adding in its place the phrase “as defined in § 5.3”; and
- f. In paragraph (d)(5), adding “ 5.9,” after “5.8,” each time it appears.

28. Amend § 5.38 by:

- a. In paragraph (a), adding the word “and” before “5412(b)(2)(B)”;
- b. In paragraph (b), adding “(12 U.S.C. 1828(m))” after the word “Act”;
- c. Removing and reserving paragraph (d);
- d. Revising paragraph (e)(2)(i)(A);

- e. In paragraph (e)(2)(i)(C), removing the phrase “generally accepted accounting principles (GAAP)” and adding in its place the word “GAAP”;
- f. In paragraph (e)(2)(iii) introductory text, removing the word “subsidiaries” and adding in its place the word “entities”;
- g. Removing the word “and” at the end of paragraph (e)(2)(iii)(A);
- h. In paragraph (e)(2)(iii)(B), removing the period and adding in its place “; and”;
- i. Adding new paragraph (e)(2)(iii)(C);
- j. In paragraph (e)(2)(iv)(B), removing the word “shall” and adding in its place the word “may”;
- k. In paragraph (e)(3), removing the word “state” and adding in its place the word “State”;
- l. In paragraph (e)(4), removing the word “shall” and adding in its place the word “must”;
- m. Redesignating paragraphs (e)(5) through (7) as paragraphs (f) through (h);
- n. Revising newly redesignated paragraph (f); and
- o. In newly redesignated paragraph (h), removing the word “shall” each time it appears and adding in its place the word “may”.

The addition and revisions read as follows.

§ 5.38 Operating subsidiaries of a Federal savings association.

* * * * *

(e) * * *

(2) * * *

(i) * * *

(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;

* * * * *

(iii) * * *

(C) A trust formed for purpose of securitizing assets held by the savings association as part of its business.

* * * * *

(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 prefiling 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 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, as defined in § 5.3;

(B) The activity is listed in paragraph (f)(5) this section or is substantively the same as a previously approved activity, as defined in § 5.3, 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 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.

29. Amend § 5.39 by:

a. Revising paragraph (a);

b. In paragraph (b), removing the phrase "a notice" and adding in its place the phrase "an application", and removing "§ 5.34(e)(5)" and adding in its place "§ 5.34(f)";

- c. In paragraphs (b), (h)(2), and (j)(1)(ii), removing the word “shall” and adding in its place the word “must” each time it appears;
- d. In paragraph (d)(1), removing the phrase “shall have” and adding in its place the word “has”;
- e. Removing paragraphs (d)(2), (d)(11) and (d)(12) and redesignating paragraphs (d)(3) through (d)(10) as paragraphs (d)(2) through (d)(9);
- f. In paragraphs (e)(1)(ii) and (j)(2), removing the word “state” and adding in its place the word “State” each time it appears;
- g. In paragraph (f)(1), removing the phrase “Gramm-Leach-Bliley Act (GLBA), 113 Stat. 1407-1409, (15 U.S.C. 6712 or 15 U.S.C. 6713)” and adding in its place the phrase “Gramm-Leach-Bliley Act, (15 U.S.C. 6712 or 15 U.S.C. 6713))”;
- h. In paragraph (f)(3), removing the phrase “GLBA, 113 Stat. 1381” and adding in its place the phrase “Gramm-Leach-Bliley Act (12 U.S.C. 1843 note)”;
- i. In paragraph (g)(1), adding the phrase “, as defined in § 5.3” after “well managed”;
- j. In paragraph (h)(2), removing the phrase “generally accepted accounting principles” and adding in its place the word “GAAP”;
- k. Revising paragraph (h)(5)(i);
- l. Removing and reserving paragraph (h)(5)(ii);
- m. In paragraphs (h)(5)(vi), removing the word “GLBA” and adding in its place the phrase “Gramm-Leach-Bliley Act”;
- n. Removing the phrase “shall be” and adding in its place the word “is” in paragraph (h)(6);
- o. Revising paragraph (i);

p. In paragraph (j)(1)(i), removing the phrase “OCC shall” and adding in its place the phrase “OCC will” and removing the phrase “shall be” and adding in its place the word “is”; and

q. In paragraph (k), removing the word “GLBA” and adding in its place the phrase “Gramm-Leach-Bliley Act”.

The revisions read as follows.

§ 5.39 Financial subsidiaries of a national bank.

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

* * * * *

(h) * * *

(5) * * *

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

* * * * *

(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) in an existing subsidiary, the bank may file an application with the appropriate OCC licensing office at the time of acquiring control of, or holding an interest in, a financial subsidiary, or commencing such activity in an existing subsidiary. The application must be labeled “Financial Subsidiary Application” and must:

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

(B) Describe the activity or activities conducted by the financial subsidiary. To the extent the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable;

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

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

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

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

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

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

(ii) Describe the activity or activities to be conducted in the financial subsidiary. To the extent the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable;

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

* * * * *

§ 5.40 [Amended]

30. Amend § 5.40 by:

a. Removing the word “shall” and adding in its place the word “must” each time it appears in paragraphs (b), (c)(1), (c)(2)(i), (c)(2)(ii), and (c)(3); and

b. In paragraph (c)(4), removing the phrase “national bank” and adding in its place the word “bank”, removing the phrase “Federal savings association” and adding in its place the phrase “savings association”, and removing the phrase “is not eligible for” and adding in its place the phrase “has been removed from”.

31. Section 5.42 is amended by:

a. In paragraphs (d)(1) and (d)(2), removing the word “shall” and adding in its place the word “must” each time it appears;

b. Revising paragraph (d)(3);

c. In paragraph (d)(4), removing “5.13(a)” and adding in its place “5.13” each time it appears and removing the word “application” and adding in its place the word “notice”.

The revision reads as follows.

§ 5.42 Corporate title of a national bank or Federal savings association.

* * * * *

(d)* * *

(3) *Amendment to charter.* A Federal savings association must amend its charter in accordance with 12 CFR 5.21 or 5.22, as applicable, to change its title.

* * * * *

32. Section 5.43 is added to read as follows:

§ 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.

(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 this paragraph 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.

(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 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 the director does not appeal pursuant to paragraph (e) of this section, upon the expiration of the period to appeal.

(e) *Appeal.* (1) A director 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 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)(ii) of this section.

(f) *Prior waivers.* Notwithstanding paragraph (c)(2) of this section, any waiver granted by the OCC before [EFFECTIVE DATE OF THE FINAL RULE] remains in effect unless revoked pursuant to paragraph (d) of this section.

§ 5.45 [Amended]

33. Amend § 5.45 by:

a. In paragraphs (b), (e)(1), and (g)(5), removing the phrase “Federal savings association” and adding in its place “Federal stock savings association” each time it appears;

b. In paragraph (f)(3), removing the phrase “savings association’s” and adding in its place “Federal stock savings association’s”;

c. In paragraphs (g)(1) introductory text and (g)(4)(i) introductory text and in paragraphs (g)(2)(iii), (g)(4)(i)(C), (h), and (i), removing the phrase “savings association” and adding in its place “Federal stock savings association” each time it appears;

d. In paragraph (g)(4)(i) introductory text and paragraphs (h) and (i), removing the word “shall” and adding in its place the word “must”; and

e. In paragraph (h), removing the number “197” and adding in its place “16”.

34. Amend § 5.46 by:

a. In paragraph (b), removing the word “shall” and adding in its place the word “must” in the first sentence and removing the word “shall” and adding in its place the word “may” in the second sentence;

b. Revising paragraph (g)(1)(ii);

c. In paragraphs (g)(2), (i)(1) introductory text, (i)(3)(i) introductory text, (i)(4), (j), and (k), removing the word “shall” and adding in its place the word “must” each time it appears;

d. In paragraph (g)(2), removing the word “applicant” and adding in its place the word “filer”;

e. Revising paragraphs (h) and (i)(2);

f. In paragraph (i)(5), adding the phrase “, unless the OCC specifies a longer period” after the word “approval”;

g. In paragraph (i)(6)(i), removing the phrase “U.S. generally accepted accounting principles” and adding in its place the word “GAAP”; and

h. In paragraph (i)(6)(ii), removing the word “U.S.”.

The additions and revisions read as follows.

§ 5.46 Changes in permanent capital of a national bank.

* * * * *

(g) * * *

(1) * * *

(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.

* * * * *

(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) * * *

(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.

* * * * *

35. Amend § 5.47 by:

a. In paragraph (b), removing the phrase "debt notes" and adding in its place the word "debt";

b. Revising paragraph (c);

c. In paragraph (d)(1)(ii), removing the phrase "Federal Deposit Insurance Corporation (FDIC)" and adding in its place the word "FDIC";

d.. In paragraph (d)(1)(iv)(B), removing the word “state” and adding in its place the word “State”;

e. In paragraph (d)(1)(vi), removing the word “shall” and adding in its place the word “must” the first time it appears;

f. In paragraphs (d)(1)(vi) and (vii), removing the word “shall” and adding in its place the word “may” the second time it appears;

g. In paragraph (d)(2) introductory text, removing the word “note” and adding in its place the word “document”;

h. In paragraph (d)(3)(ii)(C), adding the phrase “, if applicable to the subordinated debt issuance” after the word “default”;

i. Adding paragraph (d)(3)(ii)(D);

j. In paragraph (e), removing the phrase “, including, for an advanced approaches national bank, the disclosure requirement in 12 CFR 3.20(d)(1)(xi)”;

k. Revising paragraphs (f), (g) and (h).

The addition and revisions read as follows.

§ 5.47 Subordinated debt issued by a national bank.

* * * * *

(c) *Definitions.* The following definitions apply to this section:

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

(2) *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.

(3) *Payment on subordinated debt* means principal and interest, and premium, if any.

(4) *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.

(5) *Tier 2 capital* has the same meaning as set forth in 12 CFR 3.20(d).

* * * * *

(d) * * *

(3) * * *

(ii) * * *

(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.* * * * *

(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 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.

⁴ A national bank may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

(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.

* * * * *

§ 5.48 [Amended]

36. Amend § 5.48 in paragraphs (b), (e)(1), (e)(2)(i), (e)(3)(i) introductory text, (e)(3)(ii), (e)(3)(iii), (e)(4), (e)(5), (e)(6), and (f)(2)(ii) by removing the word “shall” and adding in its place the word “must” each time it appears.

37. Section 5.50 is amended by:

a. In paragraphs (b), (c)(3)(v)(B), (f)(2)(i), (f)(2)(vii), (f)(3)(ii)(B), (f)(3)(ii)(C), (g)(1) introductory text, (h), (i)(1)(i), (i)(1)(ii), (i)(4)(ii), and (i)(5), removing the word “shall” and adding in its place the word “must” each time it appears;

b. In paragraph (c)(2)(iii), removing the word “(HOLA)”;

- c. In paragraph (d)(1)(ii), removing the phrase “shall be” and adding in its place the word “is”;
- d. In paragraph (d)(5), removing the word “their” and adding in its place the phrase “his or her”;
- e. Removing paragraph (d)(8);
- f. Redesignating paragraphs (d)(6) through (7) as paragraphs (d)(7) through (8);
- g. Adding new paragraph (d)(6);
- h. In newly redesignated paragraph (d)(7), removing the word “HOLA” and adding in its place the phrase “Home Owners’ Loan Act, 12 U.S.C. 1464”;
- i. In paragraph (f)(2)(ii), removing the phrase “shall be” and adding in its place the word “are”;
- j. In paragraph (f)(2)(ii)(E), removing the phrase “defined in § 192.25 of this chapter shall” and adding in its place the phrase “defined in 12 CFR 192.25 is”;
- k. In paragraph (f)(2)(viii), removing the word “shall” and adding in its place the word “will”;
- l. In paragraph (f)(3)(i)(A), removing the phrase “on the OCC’s Internet Web Page,” and adding in its place the word “at”;
- m. In paragraphs (f)(3)(ii)(A), (f)(3)(ii)(B), and (f)(3)(iii) introductory text, removing the word “applicant” and adding in its place the word “filer”;
- n. In paragraph (f)(3)(ii)(C), removing the phrase “An applicant” and adding in its place the phrase “A filer”;
- o. Removing paragraph (f)(3)(iv);
- p. Removing the phrase “*of notice*” in the heading of paragraph (f)(5);

q. Revising paragraph (f)(6);

r. In paragraph (g)(1) introductory text, removing the word “applicant” and adding in its place the word “filer”; and

s. Revising paragraph (g)(2)(i).

The addition and revisions read as follows.

§ 5.50 Change in control of a national bank or Federal savings association; reporting of stock loans.

* * * * *

(d) * * *

(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).

* * * * *

(f) * * *

(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) * * *

(2) * * *

(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."

* * * * *

38. Amend § 5.51 by:

a. Revising paragraph (a);

b. In paragraph (c)(4), adding the phrase "chief risk officer," after the phrase "chief investment officer,"

c. In paragraph (c)(7)(ii), adding the phrase "that requires action to improve the financial condition of the national bank or Federal savings association" after the word "agreement";

d. In paragraph (d) introductory text, and paragraphs (e)(1), (e)(6)(i)(C), (e)(6)(1)(D)(2), (e)(6)(i)(E), and (f)(1), removing the word "shall" and adding in its place the word "must" each time it appears;

e. In paragraph (e)(6)(i)(E), removing the phrase "his or her" and adding in its place the word "their";

f. In paragraph (e)(8), adding ", 5.9," after "5.8"; and

g. In paragraphs (e)(8), (f)(3), and (f)(4), removing the word “shall” and adding in its place the word “will”.

The revision reads as follows.

§ 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).

* * * * *

§ 5.52 [Amended]

39. Amend § 5.52 in paragraph (c)(1) by removing the word “shall” and adding in its place the word “must”.

40. Amend § 5.55 by:

- a. In paragraph (b), removing the phrase “or notice”;
- b. Removing paragraph (d)(2) and redesignating paragraph (d)(3) as paragraph (d)(2);
- c. Adding a new paragraph (d)(3); and
- d. In paragraph (d)(4), removing the phrase “generally accepted accounting principles (GAAP)” and adding in its place the word “GAAP”;
- e. Revising paragraphs (e), (f), (g), and paragraph (h) introductory text;
- f. Redesignating paragraphs (h)(1) through (h)(3) as paragraphs (h)(1)(i) through (h)(1)(iii);
- g. Removing the last sentence of redesignated paragraph (h)(1)(iii); and
- h. Adding new paragraph (h)(1) introductory text and paragraph (h)(2).

The additions and revisions read as follows.

§ 5.55 Capital distributions by Federal savings associations.

* * * * *

(d) * * *

(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)). * * * * *

(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 savings association would not be at least well capitalized, as set forth in 12 CFR 6.4, or would not otherwise remain an eligible savings association following the distribution;

(ii) The total amount of all of the 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 12 CFR 5.64(c)(2), substituting "capital distributions" for "dividends" in that section;

(iii) The 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 savings association's proposed capital distribution is payable in property other than cash;

(v) The savings association is a 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 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.

(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:

- (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:

* * * * *

(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.

* * * * *

41. Amend § 5.56 by:

a. Revising paragraph (b);

b. In paragraph (d)(1)(i)(F), removing the word “and”;

- c. In paragraph (d)(1)(i)(G), removing the period and adding in its place “; and”;
- d. Adding new paragraph (d)(1)(i)(H);
- e. In paragraph (d)(2)(i), removing “12 CFR 197.4” and adding in its place “12 CFR 16.7” and removing the word “shall” and adding in its place the word “may”;
- f. In paragraph (e)(1) introductory text, removing the phrase “notices and”;
- g. In paragraphs (e)(2) and (i), removing the phrase “or notice” each time it appears; and
- h. Revising paragraph (h).

The addition and revisions read as follows.

§ 5.56 Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as Federal savings association supplementary (tier 2) capital.

* * * * *

(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 covered security and must receive prior OCC approval.

* * * * *

(d) * * *

(1) * * *

(i) * * *

(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;

* * * * *

(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

* * * * *

42. Amend § 5.58 by:

a. Revising paragraph (d);

b. Revising paragraph (e) introductory text;

c. In paragraph (e)(1), removing the word “state” each time it appears and adding in its place the word “State”;

d. Revising paragraphs (e)(2), (e)(3), and (e)(4);

e. Revising paragraph (f)(1);

f. Redesignating paragraph (f)(2) as paragraph (f)(3);

⁵ A Federal savings association may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

g. Adding a new paragraph (f)(2);

h. In newly redesignated paragraph (f)(3), removing the word “applicant” and adding in its place the word “filer”;

i. Redesignating paragraphs (g) through (i) as paragraphs (h) through (j), respectively and adding new paragraph (g);

j. In the heading of newly redesignated paragraph (h), removing the word “*entities*” and adding in its place the word “*enterprises*”;

k. In paragraph (h) introductory text, removing the word “entity” and adding in its place the word “enterprises”;

l. In newly redesignated paragraph (i)(3), removing the word “non-controlling” and adding in its place the word “pass-through”; and

m. Revising newly redesignated paragraph (j).

The additions and revisions read as follows.

§ 5.58 Pass-through investments by a Federal savings association.

* * * * *

(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, as defined in § 5.3, 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:

* * * * *

(2) State:

(i) Which paragraphs of § 5.38(f)(5) describe the activity; or

(ii) If the activity is substantively the same as a previously approved activity, as defined in § 5.3:

(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, as defined in § 5.3, 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, as defined in § 5.3; or how the savings association otherwise has the ability to withdraw its investment;

* * * * *

(f) * * * (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 paragraphs (e)(2), (e)(3), and (e)(7) of this section, if possible. 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).

* * * * *

(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:

(i) The activities of the enterprise are limited to those to activities previously reported by the savings association in connection with the making or acquiring of a pass-through investment;

(ii) The activities in the enterprise continue to be legally permissible for a Federal savings association;

(iii) 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;

(iv) The savings association is able to make the representations and certifications specified in paragraphs (e)(3) through (e)(7) of this section; and

(v) The enterprise will not be a subsidiary for purposes of 12 U.S.C. 1828(m).

* * * * *

(j) *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 provision in §§ 5.8, 5.10, and 5.11 apply.

* * * * *

43. Amend § 5.59 by:

- a. In paragraph (a), removing “1464” and adding in its place “1464(c)(4)(B)”;
- b. In paragraph (b) introductory text, adding “(12 U.S.C. 1828(m))” after the phrase “Insurance Act”;
- c. In paragraph (d)(2), removing the phrase “generally accepted accounting principles (GAAP)” and adding in its place the word “GAAP”;
- d. In paragraphs (e)(1), (e)(2), (f)(6)(i), and (h)(1)(ii), removing the word “state” and adding the word “State” each time it appears;
- e. In paragraph (e)(4), removing the word “HOLA” and adding in its place the phrase “Home Owners’ Loan Act, 12 U.S.C. 1464(c)”;
- f. In paragraph (e)(9), removing the word “shall” and adding in its place the word “must” each time it appears;
- g. In paragraph (g)(1), removing the word “HOLA” and adding in its place the phrase “Home Owners’ Loan Act (12 U.S.C. 1464(c)(4)(B))”;
- h. In paragraph (g)(1), removing “§ 24.6” and adding in its place “12 CFR part 24”;
- i. In paragraph (g)(2), removing the phrase “HOLA and parts 5 and 160 of this chapter” and adding in its place the phrase “Home Owners’ Loan Act (12 U.S.C. 1464(c)), this part 5, and 12 CFR part 160”; and
- j. In paragraph (h)(1)(i) introductory text, adding the phrase “(12 U.S.C. 1828(m))” after the word “Act”;

k. In paragraph (h)(1)(ii), removing the phrase “an applicant” and adding in its place the phrase “a filer”, and removing the word “applicants” and adding in its place the word “filers”;

l. In paragraphs (h)(2)(i) and (h)(3), removing the word “applicant” and adding in its place the word “filer” each time it appears;

m. In paragraph (h)(2), removing the phrase “is not eligible for expedited review under § 5.13(a)(2)” and adding in its place the phrase “has been removed from expedited review, or the expedited review period is extended, under § 5.13(a)(2)”; and

n. Revising paragraph (h)(2)(ii)(A).

The revision reads as follows:

§ 5.59 Service corporations of Federal savings associations.

* * * * *

(h) * * *

(2) * * *

(ii) * * *

(A) The savings association is well capitalized and well managed, as defined in § 5.3; and

* * * * *

§ 5.62 [Amended]

44. Section 5.62 is amended by removing the word “shall” and adding in its place the word “must”.

§ 5.64 [Amended]

45. Section 5.64 is amended by:

a. In paragraph (c)(2)(i), removing the word “shall” and adding in its place the word “does”;

b. In paragraph (c)(2)(iii), removing the phrase “shall apply” and adding in its place the word “applies”;

c. In paragraph (c)(3), removing the word “shall” and adding in its place the word “must”; and

d. Removing paragraph (d).

46. Revise § 5.66 to read as follows.

§ 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.

47. Revise § 5.67 to read as follows.

§ 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.

48. Amend § 5.70 by:

a. In paragraphs (c)(1)(iv) and (c)(1)(v), removing the word “state” and adding in its place the word “State” each time it appears;

b. In paragraph (d)(1) and paragraph (d)(2) introductory text, removing the word “shall” and adding in its place the word “must” each time it appears; and

c. Adding new paragraph (d)(3).

The addition reads as follows.

§ 5.70 Federal branches and agencies.

* * * * *

(d) * * *

(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.

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Date: March 5, 2020

Joseph M. Otting,
Comptroller of the Currency.

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