

**[BILLING CODE 4810-33-P]**

**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Parts 3, 5, 6, 7, 9, 28, and 34**

**[Docket No. 03-02]**

**RIN 1557-AB97**

**Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals**

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) proposes to amend several of its regulations to update and clarify them in various respects. Proposed revisions to parts 5 and 7 would implement new authority provided to national banks by sections 1204, 1205, and 1206 of the American Homeownership and Economic Opportunity Act of 2000 (AHEOA). Section 1204 permits national banks to reorganize directly to be controlled by a holding company. Section 1205 increases the maximum term of service for national bank directors, permits the OCC to adopt regulations allowing for staggered terms for directors, and permits national banks to apply for permission to have more than 25 directors. Section 1206 permits national banks to merge with one or more of their nonbank affiliates, subject to OCC approval. In order to clarify issues that have arisen in connection with the scope of the OCC's visitorial powers, the proposal would revise part 7. The proposal contains other amendments to parts 5, 7, 9, and 34 as well as several technical corrections.

**DATES:** Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

**ADDRESSES:** Please direct your comments to: Office of the Comptroller of the Currency, 250 E Street, S.W., Public Information Room, Mailstop 1-5, Washington, DC 20219, Attention: Docket No. 03-02; fax number (202) 874-4448; or Internet address: *regs.comments@occ.treas.gov*. Due to delays in the delivery of paper mail in the Washington area, we encourage the submission of comments by fax or e-mail whenever possible. Comments may be inspected and photocopied at the OCC's Public Reference Room, 250 E Street, S.W., Washington, DC. You can make an appointment to inspect comments by calling (202) 874-5043.

**FOR FURTHER INFORMATION CONTACT:** For questions concerning proposed 5.20, contact Richard Cleva, Senior Counsel, Bank Activities and Structure Division, (202) 874-5300; or Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090. For questions concerning proposed 12 CFR 5.32, contact Robert Norris, Senior Licensing Analyst, Licensing Policy and Systems Division, (202) 874-5060; or Lee Walzer, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090. For questions concerning proposed 12 CFR 5.33, contact Crystal Maddox, Senior Licensing Analyst, Licensing Policy and Systems Division, (202) 874-5060; Richard Cleva, Senior Counsel, Bank Activities and Structure Division, (202) 874-5300; or Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090. For questions concerning proposed 12 CFR 7.2024, contact Lee Walzer, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090. For questions concerning proposed 12 CFR 7.4000, contact Mark Tenhundfeld, Assistant Director, or Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090. For questions concerning proposed 12 CFR 34.3, contact Mark Tenhundfeld, Assistant Director, or Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090. For questions

concerning 12 CFR 9.18, contact Beth Kirby, Special Counsel, Securities and Corporate Practices Division, (202) 874-5210.

## **SUPPLEMENTARY INFORMATION:**

### **I. Introduction**

This notice of proposed rulemaking invites comment on changes to our regulations that fall into the following categories:

- Changes to our rules that implement the AHEOA (discussed in Section II of the Supplementary Information);
- Clarifications to our visitorial powers regulations (Section III);
- Amendments to part 5 concerning limited-purpose banks, factors to be considered in business combinations, and operating subsidiary activities eligible for after-the-fact notice requirements; to part 7 concerning national banks' ability to provide tax advice; to part 9 concerning the valuation of collective investment funds; and to part 34 to update regulatory text to conform to a statutory change (Section IV); and
- Various technical changes to correct citations or footnote numbering (Section V).

### **II. Amendments Implementing the AHEOA**

#### **A. Background**

The National Bank Consolidation and Merger Act (12 U.S.C. 215 et seq.) (Merger Act) permits consolidations and mergers involving national banks. Pursuant to 12 U.S.C. 215 and 215a, national banks or state banks<sup>1</sup> may, with OCC approval, merge or consolidate with a national bank located in the same state, resulting in a national bank. National banks also may

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<sup>1</sup> The term "state bank" is defined to include state-chartered banks, banking associations, trust companies, savings banks (other than mutual savings banks), and other banking institutions engaged in the business of receiving deposits. 12 U.S.C. 215b. This section also contains other definitions.

merge or consolidate with Federal thrifts under 12 U.S.C. 215c, resulting in either a national bank or Federal thrift. Pursuant to 12 U.S.C. 215a-1, an insured national bank may merge or consolidate with an insured bank located in a different state.

Prior to the enactment of the AHEOA on December 27, 2000,<sup>2</sup> the Merger Act did not address mergers or consolidations involving a national bank and its nonbank affiliates.

However, section 1206<sup>3</sup> of the AHEOA amended the Merger Act to permit national banks to merge with one or more of their nonbank affiliates with the approval of the OCC (Section 1206 Merger).

Other provisions of the AHEOA liberalize statutory reorganization and corporate governance requirements for national banks. Section 1204<sup>4</sup> amends the Merger Act to expedite the procedures that a national bank may use when it reorganizes to become a subsidiary of a holding company. Section 1205<sup>5</sup> of the AHEOA liberalizes the requirements governing the number and length of service of national bank directors.

This rulemaking contains proposed amendments to parts 5 and 7 to implement these changes made by the AHEOA.

## **B. Description of the Proposal**

### 1. Reorganization into a Holding Company Subsidiary—Proposed § 5.32 (new)

Pursuant to section 1204, a national bank, with the OCC's approval and the affirmative vote of shareholders holding at least two-thirds of the bank's outstanding capital stock, may

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<sup>2</sup> Pub. L. 106-569, 114 Stat. 2944.

<sup>3</sup> Pub. L. 106-569, sec. 1206, 114 Stat. 2944, 3034 (codified at 12 U.S.C. 215a-3).

<sup>4</sup> Pub. L. 106-569, sec. 1204, 114 Stat. 2944, 3033 (codified at 12 U.S.C. 215a-2).

<sup>5</sup> Pub. L. 106-569, sec. 1205, 114 Stat. 2944, 3033-3034 (amending 12 U.S.C. 71 and 71a).

reorganize to become a subsidiary of a bank holding company or a company that will become a bank holding company through the reorganization.

The proposal implements this provision in proposed new § 5.32. Paragraph (a) states the authority for engaging in section 1204 transactions. Paragraph (b) repeats the scope of the statute and provides that § 5.32 applies to a reorganization of a national bank into a subsidiary of a bank holding company or of a company that will become a bank holding company through the reorganization.

Pursuant to proposed § 5.32(c), a national bank must submit an application to, and obtain approval from, the OCC prior to participating in a reorganization under paragraph (b).

In accordance with proposed § 5.32(d)(1), the application will be deemed approved by the OCC as of the 30<sup>th</sup> day after the OCC receives it, unless the OCC otherwise notifies the applicant national bank. Approval of applications under § 5.32 is subject to the condition that the bank give the OCC 60 days' prior notice of any material change in its business plan or any material change from the proposed changes described in the bank's plan of reorganization. Paragraph (d)(2) of proposed § 5.32 implements the statutory requirements that apply to the content of the reorganization plan. The plan must: (1) specify how the reorganization is to be carried out; (2) be approved by a majority of the national bank's board of directors; (3) specify the amount and type of consideration that the bank holding company will provide for the stock of the bank, the date on which the shareholders' rights to participate in the exchange are to be determined, and the procedure for carrying out the exchange; (4) be submitted to the shareholders of the reorganizing bank at a meeting called in accordance with the procedures

outlined in section 3 of the Merger Act;<sup>6</sup> and (5) where applicable, describe any changes to the bank's business plan resulting from the reorganization. Consistent with section 3 of the Merger Act, the proposal also requires that at least two-thirds of the bank's shareholders approve a reorganization. Paragraph (d)(3) of proposed § 5.32 provides that the OCC will review the financial and managerial resources and future prospects of the national bank when considering a section 1204 reorganization.

Proposed § 5.32(e) provides dissenters' rights protections for section 1204 reorganizations. As provided in the Merger Act, this subsection permits any shareholder who has voted against the reorganization at a meeting or given notice in writing at or prior to the meeting to receive the value of his or her shares by providing a written request to the bank within 30 days after the consummation of the reorganization.

Section 5.32(f) of the proposal states that § 5.32 does not affect the applicability of the Bank Holding Company Act of 1956 (BHCA) to a transaction covered under § 5.32(b); applicants must indicate in their § 5.32 applications the status of any BHCA application they are required to file with the Board of Governors of the Federal Reserve System.

The OCC's approval of a § 5.32 application will expire if a national bank has not completed the reorganization within one year of the date of such approval. This is stated in proposed paragraph (g) of § 5.32.

Finally, proposed paragraph (h)(1) states that applicants shall inform shareholders of all material aspects of a reorganization and comply with applicable requirements in the Federal

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<sup>6</sup> Section 3 of the Merger Act, 12 U.S.C. 215a(a)(2), provides generally that a shareholders' meeting will be called by the bank's directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in a newspaper of general circulation where the bank is located and after sending notice to each shareholder of record by certified or registered mail at least 10 days prior to the meeting.

securities laws and the OCC's securities regulations in 12 CFR part 11. Proposed paragraph (h)(2) states that applicants that are not subject to registration requirements under the Securities Exchange Act of 1934 shall submit proxy materials or information statements used in connection with a reorganization to the appropriate OCC district office no later than when such materials are sent to shareholders.

2. Section 1206 Mergers—Proposed § 5.33 (revised)

Section 1206 of the AHEOA provides new authority for a national bank to merge with one or more of its nonbank affiliates, subject to the OCC's approval. Current § 5.33 sets forth application and notice procedures for national banks entering into business combinations, such as mergers and consolidations with other national banks or state-chartered banks, as well as OCC review and approval standards for such transactions. The proposal amends § 5.33 to include Section 1206 Mergers within its scope.

The proposal adds new application and prior OCC approval requirements for Section 1206 Mergers at the end of redesignated § 5.33(c). These requirements are similar to those for mergers of a national bank or state bank into a national bank under 12 U.S.C. 215a.

A number of new definitions are added to § 5.33(d) in order to implement section 1206. Current § 5.33(d) defines only the terms "business combination," "business reorganization," "home state," and "interim bank." The proposal amends the definition of "business combination" to include Section 1206 Mergers, but leaves the definitions of the other three terms unchanged.

Proposed § 5.33(d)(1) adds a definition of "bank" and defines it as any national bank or state bank. This definition is added because the term is used in the definition for "nonbank affiliate."

Proposed § 5.33(d)(4) defines the term "company" to mean a corporation, limited liability

company, partnership, business trust, association, or similar organization. This term is proposed to be added because it is used in the definition of "nonbank affiliate" and "control."

Proposed § 5.33(d)(5) defines "control," which is used in the definition of "nonbank affiliate." Under the proposal, for business combinations under §§ 5.33(g)(4) and (5), a company or shareholder will be deemed to control another company if (1) the company or shareholder, directly or indirectly, or acting through one or more other persons owns, controls, or has power to vote 25 per cent or more of any class of voting securities of the other company, or (2) the company or shareholder controls in any manner the election of a majority of the directors or trustees of the other company.

Because section 1206 provides merger authority for entities previously not included within the scope of § 5.33, the proposal adds the definition of "nonbank affiliate" to describe the entities that are covered by section 1206. Proposed § 5.33(d)(8) defines "nonbank affiliate" of a national bank as any company that controls, is controlled by, or is under common control with the national bank. However, banks and Federal savings associations are not included as "affiliates" because mergers with such entities are governed by statutes other than section 1206. Nonbank subsidiaries are considered to be nonbank affiliates for purposes of § 5.33.

Section 5.33(e)(3)(ii) currently requires that, if as a result of a business combination, a national bank obtains control of a new subsidiary, the bank must provide the same information regarding the new subsidiary's activities that would be required if the applicant were establishing a new subsidiary under either 12 CFR 5.34 (which addresses operating subsidiaries) or 12 CFR 5.39 (which addresses financial subsidiaries). The current rule contains an exception if the subsidiary was a subsidiary of a national bank. The proposal modifies this provision to take into account the fact that the bank may now merge with a nonbank affiliate that has a subsidiary.

Section 5.33(f) sets forth exceptions to the rules that generally govern the OCC's application procedures, such as requirements for the publication of notice or for hearings. Pursuant to § 5.33(f)(1), a national bank applicant that is subject to specific statutory notice requirements for business combinations is not subject to §§ 5.8(a), (b), or (c), which require, and prescribe the timing and contents of, public notice. Instead, a national bank applicant must follow the notice requirements in the applicable statute.

A national bank applicant in a Section 1206 Merger resulting in a national bank would be required to follow the notice requirements of 12 U.S.C. 215a. A national bank applicant in a Section 1206 Merger resulting in a nonbank affiliate would be required to follow the notice requirements of 12 U.S.C. 214a. We propose to amend § 5.33(f)(1) by adding references to the special procedures to be followed in Section 1206 Mergers.

In addition, we propose to state in § 5.33(f)(1) that §§ 5.10 (regarding public comments) and 5.11 (regarding requests for hearings) are not applicable as a general rule to Section 1206 Mergers. However, we also reserve the discretion to determine that some or all of the provisions in § 5.10 and § 5.11 apply in a Section 1206 Merger if an application presents significant and novel policy, supervisory, or legal issues.

Finally, we propose to make two technical changes to paragraph (f)(1). The reference to paragraph (g) for mergers or consolidations with a Federal savings association would be amended to refer more specifically to paragraph (g)(2) and the reference to a resulting state bank in the parenthetical following this reference would be corrected to refer to a national bank.

The proposal also adds a new § 5.33(g)(4) to address Section 1206 Mergers of national banks with their nonbank affiliates when the resulting entity is a national bank. Section 5.33(g)(4)(i) states that a national bank may enter into this type of Section 1206 Merger when the

law of the state or other jurisdiction under which the nonbank affiliate is organized allows the nonbank affiliate to engage in such mergers. This section also requires a national bank to obtain the OCC's approval.<sup>7</sup> Proposed § 5.33(g)(4)(ii) states that a national bank entering into such a merger must follow the procedures and requirements contained in 12 U.S.C. 215a (which addresses the merger of state banks into national banks), as if the nonbank entity were a state bank. The proposal applies the procedures and requirements in 12 U.S.C. 215a because section 215a addresses the same issues that arise in a Section 1206 Merger and its requirements are familiar to national banks. In addition, we believe that these procedures and requirements impose the least amount of burden on the participants consistent with our supervisory objectives in reviewing the proposed transactions. Proposed § 5.33(g)(4)(iii) states that a nonbank affiliate entering into such a merger is to follow the procedures in the law of the state or other jurisdiction under which the nonbank entity is organized. Proposed § 5.33(g)(4)(iv) states that the rights of dissenting shareholders and appraisal of dissenters' shares of stock in the nonbank entity shall be determined in accordance with the laws of the state or other jurisdiction under which the nonbank entity is organized. Finally, § 5.33(g)(4)(v) of the proposal states that the corporate existence of each institution participating in the merger shall be continued in the resulting national bank, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating institutions shall be 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, as if the nonbank affiliate were a state bank.

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<sup>7</sup> If the national bank involved is insured, the transaction may also be subject to approval by the FDIC under the Bank Merger Act, 12 U.S.C. 1828(c).

Further, the proposal adds a new § 5.33(g)(5), which addresses Section 1206 Mergers of uninsured national banks with their nonbank affiliates when the resulting entity is a nonbank affiliate. The proposal limits this type of Section 1206 Merger to national banks that are not insured banks (as defined in 12 U.S.C. 1813(h)). Prior to the enactment of section 1206, there was no efficient way for a national bank to cease its deposit-taking business, surrender its charter, and combine its business with that of an affiliate because no statutory provisions addressed this type of transaction. The section 1206 authority allows this transaction to take place in a merger and therefore allows the OCC to establish the procedures necessary when an uninsured national bank wishes to surrender its national charter but continue conducting lines of business that are authorized for the nonbank affiliate.

Proposed § 5.33(g)(5)(i) states that this type of Section 1206 Merger may be entered into when the law of the state or other jurisdiction under which the nonbank affiliate is organized allows such mergers. It also provides that an uninsured national bank must obtain the OCC's approval for the transaction. Section 5.33(g)(5)(ii) states that a national bank entering into such a merger shall follow the procedures and requirements contained in 12 U.S.C. 214a (which addresses the merger of national banks into state banks), as if the nonbank entity were a state bank. Section 5.33(g)(5)(iii) states that a nonbank affiliate entering into such a merger shall follow the procedures and requirements in the law of the state or other jurisdiction under which the nonbank entity is organized. Section 5.33(g)(5)(iv) of the proposal states that dissenting national bank shareholders 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. In addition, the OCC may conduct an appraisal or reappraisal of dissenters' shares of stock in a national bank involved in a merger with a nonbank affiliate that results in a nonbank affiliate if

all parties agree that the determination is final and binding on each party and agree on how the OCC's expenses relating to the appraisal will be divided among the parties and paid to the OCC. The rights of dissenting shareholders and appraisal of dissenters' shares of stock in the nonbank entity shall be determined in accordance with the laws of the state or other jurisdiction under which the nonbank entity is organized.

In addition, § 5.33(g)(5)(v) of the proposal states that the corporate existence of each entity participating in the merger shall be continued in the resulting nonbank affiliate, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating national bank shall be 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.

Finally, the proposal adds a new paragraph (j)(1)(iv) to § 5.33 that permits applications for certain transactions under § 5.33(g)(4) to receive streamlined treatment. In order to qualify for such treatment, the acquiring bank must be an eligible bank, the resulting national bank must be well capitalized immediately following consummation of the transaction, the applicants in a pre-filing communication must request and obtain approval from the appropriate district office to use the streamlined application, and the total assets acquired in the transaction must 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.

### 3. National Bank Directors—Proposed § 7.2024 (new)

Section 1205 of the AHEOA amends section 5145 of the Revised Statutes of the United States (12 U.S.C. 71) and the Banking Act of 1933 (12 U.S.C. 71a) regarding national bank

directors. Section 1205 increases the maximum term a director may serve from one to not more than three years and permits a national bank to adopt bylaws that provide for staggering the terms of its directors in accordance with the OCC's regulations. In addition, this section permits the OCC to exempt a national bank from the otherwise applicable requirement that it have no more than 25 directors.

The proposal adds a new § 7.2024 conforming the OCC's rules to these provisions. Pursuant to proposed § 7.2024(a), national banks may adopt bylaws that provide for staggering the terms of their directors. Proposed § 7.2024(b) increases the permissible maximum term of national bank directors from one year to three years. Finally, subsection (c) provides that a national bank may increase the size of its board of directors above the statutory limit of 25 provided that the bank satisfies the notice requirements set out in that section.

### **III. Visitorial Powers**

#### **A. Background**

##### 1. 12 CFR 7.4000

Current § 7.4000(a) provides that only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, subject to exceptions provided in Federal law. Section 7.4000(a) goes on to define the regulatory, supervisory, and enforcement actions included within our visitorial powers, while § 7.4000(b) sets out several exceptions to our exclusive authority that are created by Federal law.<sup>8</sup>

These provisions interpret and implement 12 U.S.C. 484. Paragraph (a) of that section states—

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<sup>8</sup> Paragraph (c) of 12 CFR 7.4000 clarifies that the OCC owns reports of examination and addresses a bank's obligations with respect to these reports. This paragraph is unaffected by this rulemaking.

No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

Paragraph (b) of the statute then permits lawfully authorized state auditors or examiners to review a national bank's records "solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws."

In recent years, various questions have arisen with respect to the scope of the OCC's visitorial powers over national banks. In general, the questions fall into two broad categories: First, what activities conducted by a national bank are subject to the OCC's exclusive visitorial powers? At one end of the spectrum of activities, for example, are those, comprising the content of the business of banking and activities incidental thereto, expressly authorized or recognized as permissible for national banks by Federal statute or regulation, or by OCC issuance or interpretation. At the other end would be activities, not necessarily unique to a particular business, subject to public safety standards, such as fire codes and zoning requirements, that typically apply without reference to the content of an entity's business. Second, what is the meaning of certain exceptions to the OCC's exclusive visitorial powers that are provided in the statute, specifically the exception for visitorial powers "vested in the courts of justice?"

This rulemaking contains amendments to § 7.4000 to clarify the application of section 484 to both areas. The first amendment adds a new paragraph (3) to § 7.4000(a) that clarifies the extent of national bank activities subject to the OCC's exclusive visitorial authority. The second amendment revises § 7.4000(b) to reflect the exceptions explicitly set out in section 484(a) for

visitorial powers "vested in the courts of justice" and for Congress, and clarifies the OCC's interpretation of the "vested in the courts of justice" exception.

To present these proposed changes in context, we first discuss the background and purpose of section 484, and then summarize case law and OCC interpretations in which questions concerning visitorial powers are addressed. We conclude with a summary of the proposed amendments to § 7.4000.

## 2. The National Charter and the Role of Visitorial Powers

Congress enacted the National Currency Act (Currency Act) in 1863 and the National Bank Act the year after for the purpose of establishing a new national banking system that would operate distinctly and separately from the existing system of state banks. The Currency Act and National Bank Act were enacted to create a uniform and secure national currency and a system of national banks designed to help stabilize and support the post-Civil War national economy.

Both proponents and opponents of the new national banking system expected that it would supersede the existing system of state banks.<sup>9</sup> Given this anticipated impact on state

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<sup>9</sup> Representative Samuel Hooper, who reported the bill to the House, stated in support of the legislation that one of its purposes was "to render the law [Currency Act] so perfect that the State banks may be induced to organize under it, in preference to continuing under their State charters." Cong. Globe, 38<sup>th</sup> Cong. 1<sup>st</sup> Sess. 1256 (March 23, 1864). While he did not believe that the legislation was necessarily harmful to the state bank system, he did "look upon the system of State banks as having outlived its usefulness . . . ." *Id.* Opponents of the legislation believed that it was intended to "take from the States . . . all authority whatsoever over their own State banks, and to vest that authority . . . in Washington . . ." Cong. Globe, 38<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1267 (March 24, 1864) (statement of Rep. Brooks). Rep. Brooks made that statement to support the idea that the legislation was intended to transfer control over banking from the states to the Federal government. Given that the legislation's objective was to replace state banks with national banks, its passage would, in Rep. Brooks' opinion, mean that there would be no state banks left over which the states would have authority. Thus, by observing that the legislation was intended to take authority over state banks from the states, Rep. Brooks was not suggesting that the Federal government would have authority over state banks; rather, he was explaining the bill in a context that assumed the demise of state banks. Rep. Pruyn opposed the bill stating that the legislation would "be the greatest blow yet inflicted upon the States . . ." Cong. Globe, 38<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1271 (March 24, 1864). See also John Wilson Million, The Debate on the National Bank Act of 1863, 2 Journal of Political Economy 251, 267 (1893-94) regarding the Currency Act. ("Nothing can be more obvious from the debates than that the national system was to supersede the system of state banks.").

banks and the resulting diminution of control by the states over banking in general,<sup>10</sup> proponents of the national banking system were concerned that states<sup>11</sup> would attempt to undermine it. Remarks of Senator Sumner illustrate the sentiment of many legislators of the time: "Clearly, the bank must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions." Cong. Globe, 38th Cong., 1st Sess., at 1893 (April 27, 1864).<sup>12</sup>

The allocation of any supervisory responsibility for the new national banking system to the states would have been inconsistent with this need to protect national banks from state interference. Congress, accordingly, established a Federal supervisory regime and created a Federal agency within the Department of Treasury—the OCC—to carry it out. Congress granted the OCC the broad authority "to make a thorough examination of all the affairs of [a national] bank,"<sup>13</sup> and solidified this Federal supervisory authority by vesting the OCC with exclusive visitorial powers over national banks. These provisions assured, among other things, that the OCC would have comprehensive authority to examine all the affairs of a national bank and

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<sup>10</sup> See, e.g., Tiffany v. National Bank of the State of Missouri, 85 U.S. 409, 412-413 (1874) ("It cannot be doubted, in view of the purpose of Congress in providing for the organization of national banking associations, that it was intended to give them a firm footing in the different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition . . . . National banks have been national favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the general government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the states, or to ruinous competition with state banks."). See also B. Hammond, Banks and Politics in America from the Revolution to the Civil War, 725-34 (1957); P. Studenski & H. Krooss, Financial History of the United States, 155 (1st ed. 1952).

<sup>11</sup> For ease of reference, we use the term "state" in this preamble in a way that includes other non-Federal governmental entities.

<sup>12</sup> See also Anderson v. H&R Block, 287 F.3d 1038, 1045 (11<sup>th</sup> Cir. 2002) ("congressional debates amply demonstrate Congress's desire to protect national banks from state legislation . . .").

<sup>13</sup> Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, codified at 12 U.S.C. 481.

protected national banks from potential state hostility by establishing that the authority to examine and supervise national banks is vested only in the OCC, unless otherwise provided by Federal law.<sup>14</sup>

Courts have consistently recognized the unique status of the national banking system and the limits placed on states by the National Bank Act. The Supreme Court stated in one of the first cases to address the role of the national banking system that "[t]he national banks organized under the [National Bank Act] are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end." Farmers' and Mechanics' National Bank v. Dearing, 91 U.S. 29, 33 (1875).

Subsequent opinions of the Supreme Court have been equally clear about national banks' unique role and status. See Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299, 314-315 (1978) ("Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that, . . . Congress intended to facilitate . . . a 'national banking system'." (citation omitted)); Franklin National Bank of Franklin Square v. New York, 347 U.S. 373, 375 (1954) ("The United States has set up a system of national banks as Federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositories."); Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896) ("National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States.").

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<sup>14</sup> Writing shortly after the Currency Act and National Bank Act were enacted, then-Secretary of the Treasury, and formerly the first Comptroller of the Currency, Hugh McCulloch observed that "Congress has assumed entire control of the currency of the country, and, to a very considerable extent, of its banking interests, prohibiting the interference of State governments . . ." Cong. Globe, 39th Cong., 1st Sess., Misc. Doc. No. 100, at 2 (April 23, 1866).

In Guthrie v. Harkness, 199 U.S. 148 (1905), the Supreme Court recognized how the National Bank Act furthered the objectives of Congress:

Congress had in mind, in passing this section [i.e., section 484] that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and, authorizing the appointment of a receiver, to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.

Id. at 159.

The Supreme Court also has recognized the clear intent on the part of Congress to limit the authority of states over national banks precisely so that the nationwide system of banking that was created in the Currency Act could develop and flourish. For instance, in Easton v. Iowa, 188 U.S. 220 (1903), the Court stated that Federal legislation affecting national banks—

has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States . . . . It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute . . . . [W]e are unable to perceive that Congress intended to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and

confusion would necessarily result from control possessed and exercised by two independent authorities.

Id. at 229, 231-232 (emphasis added). The Court in Farmers' and Mechanics' Bank, after observing that national banks are means to aid the government, stated—

Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is "an abuse, because it is the usurpation of power which a single State cannot give."

Farmers' and Mechanics' Bank, 91 U.S. at 34 (citation omitted).

Consistent with the need for a uniform system of laws and uniform supervision that would foster the nationwide banking system, courts have interpreted the OCC's visitorial powers expansively. The Supreme Court in Guthrie noted that the term "visitorial" as used in section 484 derives from English common law, which used the term "visitation" to refer to the act of a superintending officer who visits a corporation to examine its manner of conducting business and enforce observance of the laws and regulations (citing First National Bank of Youngstown v. Hughes, 6 F. 737, 740 (6<sup>th</sup> Cir. 1881), appeal dismissed, 106 U.S. 523 (1883)). Guthrie, 199 U.S. at 158. "Visitors" of corporations "have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings." Id. (citations omitted). The Guthrie Court also noted that visitorial powers include bringing "judicial proceedings" against a corporation to enforce compliance with applicable law. Id.<sup>15</sup>

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<sup>15</sup> Enforcement through judicial proceedings was the most common—and perhaps exclusive—means of exercising the visitorial power to enforce compliance with applicable law at the time section 484 was enacted into law. Administrative actions were not widely used until well into the 20th century. Thus, by vesting the OCC with exclusive visitorial power, section 484 vests the OCC with the exclusive authority to enforce, whether through judicial or administrative proceedings—except where otherwise provided by Federal law.

See also Peoples Bank v. Williams, 449 F. Supp. 254, 259 (W. D. Va. 1978) (visitorial powers involve the exercise of the right of inspection, superintendence, direction, or regulation over a bank's affairs). Thus, section 484 establishes the OCC as the exclusive regulator of the business of national banks, except where otherwise provided by Federal law.

The OCC's exclusive visitorial authority complements principles of Federal preemption, to accomplish the objectives of the National Bank Act. The Supremacy Clause of the United States Constitution<sup>16</sup> provides that Federal law prevails over any conflicting state law. An extensive body of judicial precedent has developed over the nearly 140 years of existence of the national banking system, explaining and defining the standards of Federal preemption of state laws as applied to national banks.<sup>17</sup> Visitorial power is a closely related authority, which

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<sup>16</sup> U.S. Const. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

<sup>17</sup> See, e.g., Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 26, 32, 33 (1996) ("grants of both enumerated and incidental 'powers' to national banks [are] grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." States may not "prevent or significantly interfere with the national bank's exercise of its powers."); Franklin National Bank, 347 U.S. at 378-379 (1954) (federal law preempts state law when there is a conflict between the two; "The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful [the state's] policy, . . . it must give way to contrary federal policy."); Anderson National Bank v. Lockett, 321 U.S. 233, 248, 252 (1944) (state law may not "infringe the national banking laws or impose an undue burden on the performance of the banks' functions" or "unlawful[ly] encroac[h] on the rights and privileges of national banks"); First National Bank v. Missouri, 263 U.S. 640, 656 (1924) (Federal law preempts state laws that "interfere with the purposes of [national banks'] creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States."); First National Bank of San Jose v. California, 262 U.S. 366, 368-369 (1923) ("[National banks] are instrumentalities of the federal government . . . [A]ny attempt by a state to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation, or impairs the efficiency of the bank to discharge the duties for which it was created."); McClellan v. Chipman, 164 U.S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destro[y] or hampe[r]" national bank functions); First National Bank of Louisville v. Commonwealth of Kentucky, 76 U.S. (9 Wall.) 353, 362-63 (1870) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government"); Bank of America et al. v. City and County of San Francisco et al., 309 F.3d 551, 561 (9<sup>th</sup> Cir. 2002) ("[s]tate attempts to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties.") (citation omitted); Association of Banks in Insurance, Inc. v. Duryee, 270 F.3d 397, 403-404 (6<sup>th</sup> Cir. 2001) ("The Supremacy Clause 'invalidates state laws that "interfere with, or are contrary to," federal law' . . . . A

Congress specifically addressed in section 484 to enable national banks to avoid inconsistent and potentially hostile application of standards by state authorities. Together, Federal preemption and the OCC's exclusive visitorial authority are defining characteristics of the national bank charter, which have fostered the development of the nationwide system of Federally chartered banks envisioned by Congress which now operates as part of the flourishing dual banking system of national and state-chartered banks in the United States.

Congress recently affirmed the OCC's exclusive visitorial powers with respect to national banks operating on an interstate basis in the Riegle-Neal Interstate Banking Act of 1994 (Riegle-Neal).<sup>18</sup> Although Riegle-Neal makes interstate branches of national banks subject to specified types of laws of a "host" state in which the bank has an interstate branch to the same extent as a branch of a state bank of that state, except when Federal law preempts the application of such state laws to national banks, the statute then makes clear that even where the state law is applicable, authority to enforce the law is vested in the OCC. See 12 U.S.C. 36(f)(1)(B) ("The provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency."). This approach is another, and very recent, recognition of the broad scope of the OCC's exclusive visitorial powers with respect to national banks.

## **B. Description of the Visitorial Powers Proposal**

This rulemaking proposes to amend § 7.4000 in two ways. First, it adds a new paragraph (3) to § 7.4000(a) that identifies the scope of the activities of national banks for which the OCC's

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state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal.") (citations omitted).

<sup>18</sup> Pub. L. 103-328, 108 Stat. 2338 (Sept. 29, 1994).

visitorial powers are exclusive. Second, it amends § 7.4000(b) to reflect the exceptions to our exclusive visitorial authority as set out in section 484. We have also added an exception in proposed new § 7.4000(b)(vi) recognizing the authority for functional regulators to exercise the authority provided under the Gramm-Leach-Bliley Act.<sup>19</sup>

Circumstances when OCC visitorial authority is exclusive. As we have discussed, the purpose of section 484 is to enable national banks to conduct the banking business they are authorized to conduct under Federal law, subject only to the "visitation," i.e., inspection and supervision of their activities and the ability to compel compliance with standards for their operations, that is authorized under Federal law. Consistent with this purpose, the OCC's visitorial powers are exclusive (except where otherwise provided by Federal law) with respect to activities comprising or in furtherance of the content of national banks' business, that are expressly authorized or recognized as permissible for national banks under Federal law, including the OCC's regulations and interpretations. Examples include application of state standards (to the extent they are not preempted) to the content of the business conducted by a national bank, such as standards concerning the bank's transactions and relations with its customers, or directives or prescriptions regarding the components of, or income or expenses of, the bank's business. In these situations, section 484 directs that, unless Federal law supplies an exception, the OCC is exclusively authorized to determine what standards apply to a national bank's activities and whether a national bank's conduct complies with applicable standards, and to enforce adherence to those standards.

Proposed new § 7.4000(a)(3) would embody this clarification. It states, in paragraph (i), that, unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with

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<sup>19</sup> Pub. L. 106-102, § 302, 113 Stat. 1338, 1407-08 (Nov. 12 1999), codified at 15 U.S.C. 6712.

respect to activities expressly authorized or recognized as permissible for national banks under Federal law or regulation, or by OCC issuance or interpretation, including the content of those activities and the manner in which, and standards whereby, those activities are conducted. Proposed paragraph (ii) then provides that the question of whether the OCC possesses the exclusive authority to assess the applicability of a state law and determine and enforce compliance by national banks is determined solely by Federal law, including section 484 and § 7.4000.<sup>20</sup> Pursuant to § 7.4006, these standards also determine the scope of the OCC's exclusive visitorial authority with respect to national banks' operating subsidiaries.<sup>21</sup>

Exceptions to OCC exclusive visitorial authority. Section 484 also creates several exceptions to the exclusive visitorial authority it creates. Our current rule acknowledges, in § 7.4000(a), that our exclusive authority is subject to various exceptions created by Federal law. Current § 7.4000(b) lists several instances where Federal law creates such an exception. However, the current rule does not address two exceptions expressly set out in section 484(a): the exceptions "vested in the courts of justice" and for Congress (and its committees). We propose to amend § 7.4000(b) to include the exceptions for courts of justice and Congress, and, in so doing, clarify how the "vested in the courts of justice" exception operates.<sup>22</sup>

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<sup>20</sup> To the extent questions arise as to whether an activity is within the scope of the OCC's exclusive visitorial powers as defined in the regulation, the OCC is prepared to issue interpretive opinions on a case-by-case basis.

<sup>21</sup> See 66 FR 34784, 34788 (July 2, 2001). In the preamble to our final rule containing § 7.4006 we noted that the OCC's operating subsidiary regulation, 12 CFR 5.34(e)(3), states that "an operating subsidiary conducts its activities subject to the same authorization, terms, and conditions that apply to the conduct of those activities by its parent [national] bank." Further, we noted that "[o]perating subsidiaries often have been described as the equivalent of departments or divisions of their parent banks."

<sup>22</sup> We have not encountered questions concerning the application of the exception for Congress and its committees. Therefore, we propose only to include that exception in our rule without elaboration.

The "vested in the courts of justice" exception to the OCC's exclusive visitorial powers is best understood by referring to the purpose of the statute, the plain language of the "vested in the courts of justice" exception, and the structure of section 484. These points are addressed in order, below.

Courts must be able to compel a national bank to produce books and records in connection with private litigation involving the bank. However, one might argue that the issuance of a subpoena by a court would itself be a "visitation," even if the underlying litigation was not. Such a reading would effectively immunize national banks from civil litigation, a result that Congress clearly did not intend.

Accordingly, section 484 recognizes an exception to the OCC's exclusive visitorial authority for visitorial powers "vested in the courts of justice." This exception is consistent with case law, settled well before section 484 was enacted into law, concluding that courts are vested with certain inherent powers. See, e.g., United States v. Hudson and Goodwin, 11 U.S. 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institutions."); State v. Morrill, 16 Ark. 384, 1855 WL 607 (Ark.) (1855) (finding that there are express and implied powers, including the power to punish action found in contempt of court, that are inherently vested in courts). In order to avoid a constitutionally impermissible usurpation of the judiciary's powers, Congress included the "vested in the courts of justice" exception in section 484 and thereby recognized the inherent authority of courts of justice to exercise those powers required to fulfill the courts' responsibilities.

Congress clearly did not intend, however, to create new visitorial authority that could be exercised by state authorities when it recognized the authority of courts of justice. It would be completely contrary to the express purposes of section 484 to read the "vested in the courts of

justice" exception as enabling state authorities to accomplish exactly what Congress deliberately and expressly intended states not to be able to do—namely, inspect and supervise the activities of national banks and compel their adherence to a variety of state-set standards.

This purpose is effectuated by the plain language of the statute. The exception permits the exercise of "visitorial powers" that are "vested in the courts of justice," powers, in other words, that courts possess. Section 484 does not create new powers for state executive, legislative, or administrative authorities to supervise and regulate national banks. It grants no new authority and thus does not authorize states to bring suits or enforcement actions that they do not otherwise have the power to bring.

To read the exception to permit state authorities to inspect, regulate, supervise, direct, or restrict the activities of national banks simply by filing a complaint in a court would be to create a visitorial power that states do not otherwise possess under Federal law. Section 484 by its express terms simply does not create such boundless visitorial powers for state authorities.<sup>23</sup> Where section 484 does recognize visitorial authority for states in section 484(b), by contrast, it is specific and narrow, and expressly stated as an exception to the general exclusivity of the OCC's visitorial powers recognized in section 484(a).

This construction of the "vested in the courts of justice" exception also is supported by the rule of statutory construction that holds that "[s]tatutory language must be read in context and a phrase 'gathers meaning from the words around it.'"<sup>24</sup> Jones v. United States, 527 U.S. 373, 389 (1999) (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)); Tasini v. New York

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<sup>23</sup> We note that one Federal district court has reached a different conclusion, but we respectfully disagree with the parts of the opinion in First Union National Bank et al. v. Burke, 48 F. Supp. 2d 132, 145-146 (D. Ct. 1999), that suggest a different reading of the exception, since the opinion did not analyze the purpose, plain language, and structure of section 484. Moreover, we note that the Burke court agrees that a state may not directly enforce state law against national banks. See 48 F. Supp. 2d at 146.

Times Company, Inc., 206 F.3d 161, 166-167 (2<sup>nd</sup> Cir. 2000), cert. granted, 531 U.S. 978 (2000), aff'd, 533 U.S. 483 (2001) (noscitur a sociis applied to a statute similar in format to section 484).

Immediately following the "vested in the courts of justice" exception is an exception that preserves visitorial authority for Congress or any committee thereof. This exception addresses the need of Congress and its committees to issue subpoenas compelling the production of bank records or witnesses in fulfillment of congressional oversight responsibilities. Similarly, the exception set out in paragraph (b) of section 484 (preserving a state's ability to examine a national bank's books and records as necessary to ensure compliance with state unclaimed property and escheat laws) is narrowly focused on a specific purpose. Thus, the statutory context of the "vested in the courts of justice" exception also leads to the conclusion that it is comparably focused on a particular function, not an exception that endorses an indirect route to accomplish precisely what Congress clearly sought to prevent—state regulation and inspection of the banking business of national banks.<sup>25</sup>

Under this construction of section 484, states remain free to seek a declaratory judgment from a court as to whether a particular state law applies to the Federally-authorized business of a national bank or is preempted. However, if a court rules that a state law is not preempted, enforcement of a national bank's compliance with that law is within the OCC's exclusive purview. See National State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981, 988 (3rd Cir. 1980) ("[W]e find ourselves unable to agree with the district court's determination that state officials

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<sup>24</sup> This maxim is sometimes referred to as the noscitur a sociis doctrine.

<sup>25</sup> The noscitur a sociis doctrine as applied to the original National Bank Act also leads to the conclusion that only the OCC may enforce applicable laws. The visitorial powers language initially appeared in section 54 of the National Bank Act. The section that preceded it governed the forfeiture of a bank's charter upon a knowing violation of the National Bank Act, while the section that followed addressed penalties for embezzling. This location of section 484 in a series of enforcement-related provisions underscores the point that Congress intended for the OCC to have the exclusive authority to bring enforcement actions against national banks.

have the power to issue cease and desist orders against national banks for violations of the [state's] antiredlining statute. Congress has delegated enforcement of statutes and regulations against national banks to the Comptroller of the Currency."<sup>26</sup>

In addition, this position does not preclude private civil actions or actions brought by other governmental entities pursuant to a Federal grant of authority. See, e.g., Guthrie, supra, 199 U.S. 148 (an individual shareholder action against a bank for access to its books and records); Bank of America National Trust & Savings Ass'n v. Douglas, 105 F.2d 100 (D.C. Cir. 1939) (service of subpoenas on a national bank by the SEC in connection with an investigation under the Securities Exchange Act of 1934).

Accordingly, in light of the purpose of the "vested in the courts of justice" exception, its plain language, and the narrow focus of other exceptions in section 484, we propose to amend § 7.4000(b) to state that national banks shall be subject to such visitorial powers as are vested in the courts of justice to issue orders or writs compelling the production of information or witnesses. We propose further to clarify that this exception does not create or expand any authority of states or other governmental entities to inspect, regulate, or supervise national banks' activities, or to compel national banks' adherence to restrictions or mandates concerning the content of those activities or the manner in which, or standards whereby, those activities are conducted.

#### **IV. Additional Changes to Parts 5, 7, 9, and 34**

##### **A. Part 5 Amendments**

Section 5.20 of our regulations contains the requirements that govern the organization of a national bank. The proposal amends § 5.20(e)(1) to provide that the newly organized bank

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<sup>26</sup> This applies to enforcement of criminal statutes as well. Easton v. Iowa, 188 U.S. 220 (1903).

may be a special purpose national bank that limits its activities to fiduciary activities or to any other activities within the business of banking. The purpose of this proposed change is to clarify that a limited purpose national bank may exist with respect to activities other than fiduciary activities, provided the activities in question are within the business of banking.

Section 5.33(e) of our regulations contains a listing of factors the OCC considers in evaluating applications for business combinations. These factors are based upon the factors set forth in the Bank Merger Act, 12 U.S.C. 1828(c), and the Community Reinvestment Act, 12 U.S.C. 2903. As part of the USA PATRIOT Act,<sup>27</sup> Congress amended the Bank Merger Act by adding an additional factor to be considered in evaluating merger transactions. This factor requires the responsible agencies to consider the effectiveness of any insured depository institution involved in a proposed merger in combating money laundering activities.<sup>28</sup> The proposal conforms our regulations with the statute by adding the factor at § 5.33(e)(1)(v).

Current § 5.34(e)(5)(iv) permits certain national banks to acquire or establish an operating subsidiary or perform a new activity in an existing operating subsidiary by providing after-the-fact notice to the OCC if the operating subsidiary conducts certain activities listed in § 5.34(e)(5)(v). That list currently includes the underwriting of credit-related insurance consistent with section 302 of the Gramm-Leach-Bliley Act. However, in Corporate Decision 2001-10 (April 23, 2001) and Corporate Decision 2000-16 (August 29, 2000), the OCC found that credit-related reinsurance products satisfy GLBA section 302's statutory requirements and are "authorized products." The proposal therefore amends 12 CFR 5.34(e)(5)(v)(L) to add

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<sup>27</sup> Pub. L. 107-56 (Oct. 26, 2001).

<sup>28</sup> The FDIC recently updated its Statement of Policy on Bank Merger Transactions to include this new factor at 67 FR 48178 (July 23, 2002). This update only provides the new provision. The complete Policy Statement as it existed before this update may be found at 63 FR 44761 (August 20, 1998).

reinsuring of credit-related insurance to the list of activities eligible for after-the-fact notice requirements.

## **B. Part 7 Amendment**

As corporate transactions have become more sophisticated, an integral part of financial and transactional advice with respect to mergers and other corporate restructurings inevitably involves providing advice on the tax implications of those transactions. Recently amended § 5.34(e)(5)(v)(J) and (K) permit national banks to provide tax planning services and to provide financial and transactional advice on structuring, arranging, and executing financial transactions, including mergers, acquisitions, and divestitures. Providing tax planning services encompasses tax consulting in order for a bank to be able to offer comprehensive services in this area.

Accordingly, the proposal deletes as outdated the prohibition against serving as an expert tax consultant that currently appears at § 7.1008.<sup>29</sup>

## **C. Part 9 Amendment**

Currently, 12 CFR 9.18(b)(4)(i) requires valuation of collective investment funds at least every three months. However, certain funds are only required to be valued once a year. Those funds must be (a)(2) funds that are primarily invested in real estate or other assets that are not readily marketable. A growing number of collective investment funds, including (a)(1) funds, however, are comprised of a mix of assets that are readily marketable and assets that are not readily marketable. Those funds do not qualify for the one-year valuation because they are not (a)(2) funds primarily invested in real estate or other assets that are not readily marketable.

However, a one-year valuation may be appropriate for assets in those funds that are not readily

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<sup>29</sup> National banks engaged in providing the services permitted by 12 CFR 5.34(e)(5)(v)(J) and (K) must comply with applicable regulations of the Internal Revenue Service (IRS) governing the provision of such services. Information about the IRS regulations may be obtained at [www.irs.treas.gov](http://www.irs.treas.gov).

marketable. Thus, we propose to amend the regulation to require quarterly valuation of readily marketable assets in all collective investment funds, including (a)(1) funds. Assets that are not readily marketable will be valued at least once a year regardless of whether the assets are in (a)(1) or (a)(2) funds or whether the funds' assets are primarily invested in real estate or other assets that are not readily marketable. For purposes of an admission or withdrawal date, this provision does not negate the need to provide a current value at the time of such admission or withdrawal.

#### **D. Part 34 Amendment**

Section 34.3 restates the comprehensive authority vested in the OCC by 12 U.S.C. 371 to regulate real estate lending by national banks. Section 371 authorizes national banks to engage in real estate lending, making that authority subject only to 12 U.S.C. 1828(o) (real estate lending safety and soundness standards) and "such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." The text of the regulation was not revised to reflect a statutory amendment to section 371 referring to 12 U.S.C. 1828(o) and thus the proposal updates the regulation to reflect that change to the underlying statute. Other portions of the regulation remain unchanged, as are the implementing provisions of section 34.4, which set out by regulation certain types of state laws that are specifically preempted (section 34.4(a)), and provide that the OCC will apply recognized principles of Federal preemption in considering whether other types of state laws apply to real estate lending by national banks for purposes of issuing orders pursuant to section 371 (section 34.4(b)).

#### **V. Technical Amendments**

The proposal contains the following technical amendments:

- 12 CFR part 3, appendix A, section 3(a)(2)(ix) currently cross-references a definition of “General obligation of a State or political subdivision” but contains the wrong regulatory citation for that definition. The definition in question has been moved from 12 CFR 1.3(g) to 12 CFR 1.2(b). The proposed revision will correct the citation. Also in part 3 appendix A, section 4(a)(11)(ii) the references to sections (4)(a)(8)(i) and (ii) are corrected to refer to sections (4)(a)(9)(i) and (ii), respectively.
- The citations to FDIC regulations in current 12 CFR 6.4(c)(1)(i) and (ii) are incorrect. The proposal amends the citations to correct them.
- Current 12 CFR 7.1016(a) contains a footnote reference and accompanying footnote text. The footnote reference number is 30, but should be 1. The proposal makes this change.
- Current 12 CFR 9.20(b) contains a reference to SEC rules 17 CFR 240.17Ad-1 through 240.17Ad-16. A new rule, 240.17Ad-17, has been added, so the proposal changes the reference to 240.17Ad-16 to reflect the addition.
- Current 12 CFR 28.16(e), dealing with uninsured deposit notices, makes a reference to an FDIC regulation, 12 CFR 346.7, which was removed in 1998. The proposal would correct this citation to refer to the current rule for uninsured deposit notices which can now be found at 12 CFR 347.207.

### **Request for Comments**

The OCC invites comment on all aspects of the proposed regulation.

### **Solicitation of Comments on Use of Plain Language**

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106-102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. We invite your comments on how to

make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

### **Community Bank Comment Request**

In addition, we invite your comments on the impact of this proposal on community banks. The OCC recognizes that community banks operate with more limited resources than larger institutions and may present a different risk profile. Thus, the OCC specifically requests comments on the impact of this proposal on community banks' current resources and available personnel with the requisite expertise, and whether the goals of the proposed regulation could be achieved, for community banks, through an alternative approach.

### **Regulatory Flexibility Act**

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will 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.

Pursuant to section 605(b) of the RFA, the OCC hereby certifies that this proposal will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed. The amendments to the OCC's regulations relating to the AHOEA are permissive provisions that will be used only by banks that wish to take advantage of the new transactions, procedures, or corporate governance options permitted by the statute as implemented by the regulations. Proposed 12 CFR 5.33(g)(5) reduces burden by implementing a simpler way to accomplish a merger of a national bank into one of its nonbank affiliates. The amendments regarding the OCC's visitorial powers simply identify the scope of activities for which the agency's visitorial powers are exclusive and clarify how an exception to such powers applies. These amendments simply provide the OCC's analysis and do not impose any new requirements or burdens. As such, they will not result in any adverse economic impact.

#### **Executive Order 12866**

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

#### **Unfunded Mandates Reform Act of 1995**

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that the

proposed rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

### **Paperwork Reduction Act**

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 information collection requirements in this notice of proposed rulemaking are contained in §§ 5.32, 5.33, and 7.2024.

OMB has reviewed and approved the information collection requirements contained in this rule under OMB Control Number 1557-0014, in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

The Comptroller's Corporate Manual (Manual) explains the OCC's policies and procedures for the formation of a new national bank, entry into the national banking system by other institutions, and corporate expansion and structural changes by existing national banks. The Manual embodies all required procedures, forms, and regulations regarding OCC corporate decisions.

The information collection requirements imposed by §§ 5.32 and 5.33 are contained in the Business Combinations booklet in the Manual and are part of the total requirement.

The respondents are national banks.

Estimated number of respondents: 270

Estimated number of responses: 270

Average hours per response: 20.6

Estimated total burden hours: 5,562

The information collection requirements imposed by § 7.2024 are included in the Corporate Organization booklet in the Manual, along with several other corporate requirements.

The respondents are national banks.

Estimated number of respondents: 1,000

Estimated number of responses: 1,000

Average hours per response: .5 hour

Estimated total burden hours: 500 hours

The burden estimates represent total burden for national banks' compliance with the information collection requirements associated with corporate organization matters and business combination activities.

The OCC has a continuing interest in the public's opinion regarding collections of information. The OCC invites comments on:

- (1) Whether the collection of information contained in the proposed rulemaking is necessary for the proper performance of the OCC's functions, including whether the information has practical utility;
- (2) The accuracy of the OCC's estimate of the burden of the information collection, including the validity of the methodology and assumptions used;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected;
- (4) Ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology; and
- (5) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Comments may be sent to:

Jessie Dunaway, Clearance Officer, Office of the Comptroller of the Currency, 250 E Street, SW, Mailstop 8-4, Washington, DC 20219. Comments may also be sent by fax to 202-874-4889 or by e-mail to [jessie.dunaway@occ.treas.gov](mailto:jessie.dunaway@occ.treas.gov).

Joseph F. Lackey, Jr., Desk Officer, Office of Information and Regulatory Affairs, Attention: 1557-0014, Office of Management and Budget, Room 10235, Washington, DC 20503. Comments may also be sent by e-mail to [jlackeyj@omb.eop.gov](mailto:jlackeyj@omb.eop.gov).

### **Executive Order 13132**

Executive Order 13132 requires Federal agencies, including the OCC, to certify their compliance with that Order when they transmit to the Office of Management and Budget any draft final regulation that has Federalism implications. Under the Order, a regulation has Federalism implications if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." In the case of a regulation that has Federalism implications and that preempts state law, the Order imposes certain consultation requirements with state and local officials; requires publication in the preamble of a Federalism summary impact statement; and requires the OCC to make available to the Director of the Office of Management and Budget any written communications submitted by state and local officials. By the terms of the Order, these requirements apply to the extent that they are practicable and permitted by law and, to that extent, must be satisfied before the OCC promulgates a final regulation.

This proposal may have Federalism implications, as that term is used in the Order. Therefore, before promulgating a final regulation based on this proposal, the OCC will, to the

extent practicable and permitted by law, seek consultation with state and local officials, include a Federalism summary impact statement in the preamble to the final rule, and make available to the Director of OMB any written communications we receive from state or local officials.

### **List of Subjects**

#### 12 CFR Part 3

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

#### 12 CFR Part 5

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

#### 12 CFR Part 6

National banks.

#### 12 CFR Part 7

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

#### 12 CFR Part 9

Estates, Investments, National banks, Reporting and recordkeeping requirements, Trusts and trustees.

#### 12 CFR Part 28

Foreign banking, National banks, Reporting and recordkeeping requirements.

#### 12 CFR Part 34

Mortgages, National banks, Reporting and recordkeeping requirements.

### **Authority and Issuance**

For the reasons set forth in the preamble, parts 3, 5, 6, 7, 9, 28, and 34 of chapter I of title 12 of the Code of Federal Regulations are proposed to be amended as follows:

**PART 3—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES**

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

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

**Appendix A to Part 3—[Amended]**

2. In appendix A to part 3:

A. In section 3, amend paragraph (a)(2)(ix) by removing "12 CFR 1.3(g)" and adding in its place "12 CFR 1.2(b)"; and

B. In section 4, amend paragraph (a)(11)(ii) by removing, "section(4)(a)(8)(i) and (ii)" and adding in its place "section (4)(a)(9)(i) and (ii)".

\* \* \* \* \*

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

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

**Authority:** 12 U.S.C. 1 et seq., 93a; 215a-2; 215a-3; and section 5136A of the Revised Statutes (12 U.S.C. 24a).

**Subpart B—Initial Activities**

4. In § 5.20, a new second sentence is added to paragraph (e)(1) to read as follows:

**§ 5.20 Organizing a Bank.**

\* \* \* \* \*

(e) Statutory requirements—(1) General. \* \* \* The bank may be a special purpose bank that limits its activities to fiduciary activities or to any other activities within the business of

banking. \* \* \*

\* \* \* \* \*

### **Subpart C—Expansion of Activities**

5. A new § 5.32 is added to read as follows:

#### **§ 5.32 Expedited procedures for certain reorganizations.**

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

(b) Scope. This section prescribes the procedures for OCC review and approval of a national bank's reorganization to become a subsidiary of a bank holding company or a company that will, upon consummation of such reorganization, become a bank holding company.

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

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

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

- (i) Specifies the manner in which the reorganization shall be carried out;
- (ii) Is approved by a majority of the entire board of directors of the national bank;
- (iii) Specifies:

(A) The amount and type of consideration that the bank holding company will provide to the shareholders of the reorganizing bank for their shares of stock of the bank;

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

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

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

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

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

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

(f) Approval under the Bank Holding Company Act. This section does not affect the applicability of the Bank Holding Company Act of 1956. Applicants shall indicate in their

application the status of any application required to be filed with the Board of Governors of the Federal Reserve System.

(g) Expiration of approval. Approval expires if a national bank has not completed the reorganization within one year of the date of approval.

(h) Adequacy of disclosure. (1) An applicant shall inform shareholders of all material aspects of a reorganization and comply with applicable requirements of the Federal securities laws and the OCC's securities regulations at 12 CFR part 11.

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

6. In § 5.33:

A. Paragraph (a) is revised;

B. Paragraph (b) is redesignated as paragraph (c), paragraph (c) is redesignated as paragraph (b), newly redesignated paragraph (b) is revised and a sentence is added at the end of newly redesignated paragraph (c);

C. Paragraphs (d)(1), (d)(2), (d)(3), and (d)(4) are redesignated as paragraphs (d)(2), (d)(3), (d)(6), and (d)(7), respectively; newly designated paragraph (d)(2) is revised; and new paragraphs (d)(1), (d)(4), (d)(5), and (d)(8) are added;

D. New paragraph (e)(1)(v) is added;

E. Paragraph (e)(3)(ii) is revised;

F. The second sentence of paragraph (f)(1) is revised and two new sentences are added at the end;

- G. New paragraphs (g)(4) and (g)(5) are added;
- H. At the end of paragraph (j)(1)(ii), remove the term "or";
- I. At the end of paragraph (j)(1)(iii), remove "." and add "; or"; and
- J. New paragraph (j)(1)(iv) is added to read as follows:

**§ 5.33 Business combinations.**

(a) Authority. 12 U.S.C. 24(Seventh), 93a, 181, 214a, 214b, 215, 215a, 215a-1, 215a-3, 215c, 1815(d)(3), 1828(c), 1831u, and 2903.

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

(1) OCC review and approval of an application for a business combination between a national bank and another depository institution resulting in a national bank or between a national bank and one of its nonbank affiliates; and

(2) Requirements of notices and other procedures for national banks involved in other combinations with depository institutions.

(c) Licensing requirements. \* \* \* A national bank shall 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—(1) Bank means any national bank or any state bank.

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

\* \* \* \* \*

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

(5) For business combinations under §§ 5.33(g)(4) and (5), 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 per cent 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 shall be deemed to own or control another company by virtue of its ownership or control of shares in a fiduciary capacity.

\* \* \* \* \*

(8) 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.

(e) \* \* \*

(1) \* \* \*

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

\* \* \* \* \*

(3) \* \* \*

(ii) An applicant proposing to acquire, through a business combination, a subsidiary of any entity other than a national bank must provide the same information and analysis of the

subsidiary's activities that would be required if the applicant were establishing the subsidiary pursuant to 12 CFR §§ 5.34 or 5.39.

\* \* \* \* \*

(f) Exceptions to rules of general applicability. (1) National bank applicant. \* \* \* A national bank applicant shall follow, as applicable, the public notice requirements contained in 12 U.S.C. 1828(c)(3) (business combinations), 12 U.S.C. 215(a) (consolidation under a national bank charter), 12 U.S.C. 215a(a)(2) (merger under a national bank charter), paragraph (g)(2) of this section (merger or consolidation with a Federal savings association resulting in a national bank), paragraph (g)(4) of this section (merger with a nonbank affiliate under a national bank charter), and paragraph (g)(5) (merger with nonbank affiliate not under national bank charter). Sections 5.10 and 5.11 ordinarily do not apply to mergers of a national bank with its nonbank affiliate. However, if the OCC concludes that an application presents significant and novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.10 and 5.11 apply.

\* \* \* \* \*

(g) \* \* \*

(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.

(ii) A national bank entering into the merger shall 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 shall 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 shall 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 shall be continued in the resulting national bank, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating institutions shall be 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) A national bank entering into the merger shall 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 shall 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 shall 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 shall be continued in the resulting nonbank affiliate, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating national bank shall be 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.

\* \* \* \* \*

(j) \* \* \*

(1) \* \* \*

(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 applicants in a prefiling communication request and obtain

approval from the appropriate district 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.

\* \* \* \* \*

7. In 5.34, paragraph (e)(5)(v)(L) is revised to read as follows:

**§ 5.34 Operating Subsidiaries.**

\* \* \* \* \*

(e) \* \* \*

(5) \* \* \*

(v) \* \* \*

(L) Underwriting and reinsuring credit related insurance to the extent permitted under section 302 of the GLBA (15 U.S.C. 6712).

\* \* \* \* \*

**PART 6—PROMPT CORRECTIVE ACTION**

8. The authority citation for part 6 continues to read as follows:

**Authority:** 12 U.S.C. 93a, 1831o.

**Subpart A—Capital Categories**

9. In § 6.4, paragraphs (c)(1)(i) and (ii) are revised to read as follows:

**§ 6.4 Capital measures and capital category definitions.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) Maintains the pledge of assets required under 12 CFR 347.210; and

(ii) Maintains the eligible assets prescribed under 12 CFR 347.211 at 108 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

\* \* \* \* \*

## **PART 7—BANK ACTIVITIES AND OPERATIONS**

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

**Authority:** 12 U.S.C. 1 et seq., 71, 71a, 92, 92a, 93, 93a, 481, 484, 1818.

### **Subpart A—Bank Powers**

11. Section 7.1008 is revised to read as follows:

#### **§ 7.1008 Preparing income tax returns for customers or public.**

A national bank may assist its customers in preparing their tax returns, either gratuitously or for a fee.

12. In § 7.1016(a), footnote 30 is redesignated as footnote 1.

### **Subpart B—Corporate Practices**

13. A new § 7.2024 is added to read as follows:

#### **§ 7.2024 Staggered terms for national bank directors and size of bank board.**

(a) Staggered terms. Any national bank may adopt bylaws that provide for staggering the terms of its directors. National banks shall provide the OCC with copies of any bylaws so amended.

(b) Maximum term. Any national bank director may hold office for a term that does not exceed three years.

(c) Number of directors. A national bank's board of directors shall consist of no fewer than 5 and no more than 25 members. A national bank may, after notice to the OCC, increase the size of its board of directors above the twenty-five member limit. A national bank seeking to increase the number of its directors must notify the OCC any time the proposed size would exceed 25 directors. The bank's notice shall specify the reason(s) for the increase in the size of the board of directors beyond the statutory limit.

#### **Subpart D—Preemption**

14. In § 7.4000:

A. Paragraphs (a)(3)(i) and (a)(3)(ii) are added; and

B. Paragraph (b) is revised to read as follows:

#### **§ 7.4000 Visitorial powers.**

(a) \* \* \*

(3)(i) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to activities expressly authorized or recognized as permissible for national banks under Federal law or regulation, or by OCC issuance or interpretation, including the content of those activities and the manner in which, and standards whereby, those activities are conducted.

(ii) The question of whether the OCC possesses the exclusive visitorial authority to assess the applicability of a state law to a national bank, and determine and enforce compliance with that law, shall be determined exclusively by Federal law, including 12 U.S.C. 484 and this § 7.4000.

(b) Exceptions to the general rule. Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) Exceptions authorized by Federal law. National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(ii) Review at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with those laws (12 U.S.C. 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3505(c));

(iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);

(v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm–Leach–Bliley Act, Pub. L. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

(2) Exception for courts of justice. National banks are subject to such visitorial powers as are vested in the courts of justice to issue orders or writs compelling the production of information or witnesses. This exception does not authorize state or other governmental entities to inspect, regulate, or supervise the activities of national banks, or to compel production of information or adherence to restrictions or requirements concerning the content of those activities or the manner in which, or standards whereby, those activities are conducted.

(3) Exception for Congress. National banks are subject to such visitorial powers as shall be, or have been, exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

\* \* \* \* \*

## **PART 9—FIDUCIARY ACTIVITIES OF NATIONAL BANKS**

15. The authority citation for part 9 continues to read as follows:

**Authority:** 12 U.S.C. 24 (Seventh), 92a, and 93a; 15 U.S.C. 78q, 78q-1, and 78w.

16. In § 9.18, paragraph (b)(4)(i) is revised to read as follows:

### **§ 9.18 Collective investment funds.**

\* \* \* \* \*

(b) \* \* \*

(4) Valuation—(i) Frequency of valuation. A bank administering a collective investment fund shall determine the value of the fund's readily marketable assets at least once every three months. A bank shall determine the value of the fund's assets that are not readily marketable at least once a year.

\* \* \* \* \*

17. In § 9.20, amend paragraph (b), by removing the term "240.17Ad-16" and adding in its place the term "240.17Ad-17."

## **PART 28—INTERNATIONAL BANKING ACTIVITIES**

18. The authority citation for part 28 continues to read as follows:

**Authority:** 12 U.S.C. 1 et seq., 24(Seventh), 93a, 161, 602, 1818, 3101 et seq., and 3901 et seq.

### **Subpart B—Federal Branches and Agencies of Foreign Banks**

19. In § 28.16, amend paragraph (e), by removing the term "12 CFR 346.7" and adding in its place the term "12 CFR 347.207."

\* \* \* \* \*

## **PART 34—REAL ESTATE LENDING AND APPRAISALS**

### **Subpart A—General**

20. The authority citation for part 34 continues to read as follows:

**Authority:** 12 U.S.C. 1 et seq., 29, 93a, 371, 1701j-3, 1828(o), and 3331 et seq.

21. Section 34.3 is revised to read as follows:

### **§ 34.3 General rule.**

(a) A national bank may make, arrange, purchase, or sell loans or extensions of credit, or interests therein, that are secured by liens on, or interests in, real estate ("real estate loans"), subject to 12 U.S.C. 1828(o) and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

Dated: January 27, 2003

**John D. Hawke, Jr.**

*Comptroller of the Currency*