

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

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

**Source:** 61 FR 4862, Feb. 9, 1996, unless otherwise noted.

### **Subpart A—Bank Powers**

#### **§ 7.1000 National bank ownership of property.**

(a) *Investment in real estate necessary for the transaction of business—(1) General.* Under 12 U.S.C. 29(First), a national bank may invest in real estate that is necessary for the transaction of its business.

(2) *Type of real estate.* For purposes of 12 U.S.C. 29(First), this real estate includes:

(i) Premises that are owned and occupied (or to be occupied, if under construction) by the bank, its branches, or its consolidated subsidiaries;

(ii) Real estate acquired and intended, in good faith, for use in future expansion;

(iii) Parking facilities that are used by customers or employees of the bank, its branches, and its consolidated subsidiaries;

(iv) Residential property for the use of bank officers or employees who are:

(A) Located in remote areas where suitable housing at a reasonable price is not readily available; or

(B) Temporarily assigned to a foreign country, including foreign nationals temporarily assigned to the United States; and

(v) Property for the use of bank officers, employees, or customers, or for the temporary lodging of such persons in areas where suitable commercial lodging is not readily available, provided that the purchase and operation of the property qualifies as a deductible business expense for Federal tax purposes.

(3) *Permissible means of holding.* A national bank may acquire and hold real estate under this paragraph (a) by any reasonable and prudent means, including ownership in fee, a leasehold estate, or in an interest in a cooperative. The bank may hold this real estate directly or through one or more subsidiaries. The bank may organize a bank premises subsidiary as a corporation, partnership, or similar entity (e.g., a limited liability company).

(b) *Fixed assets.* A national bank may own fixed assets necessary for the transaction of its business, such as fixtures, furniture, and data processing equipment.

(c) *Investment in bank premises—(1) Investment limitation; approval.* 12 U.S.C. 371d governs when OCC approval is required for national bank investment in bank premises. A bank may seek approval from the OCC in accordance with the procedures set forth in 12 CFR 5.37.

(2) *Option to purchase.* An unexercised option to purchase bank premises or stock in a corporation holding bank premises is not an investment in bank premises. A national bank must receive OCC approval to exercise the option if the price of the option and the bank's other investments in bank premises exceed the amount of the bank's capital stock.

(d) *Other real property—(1) Lease financing of public facilities.* A national bank may purchase or construct a municipal building, school building, or other similar public facility and, as holder of legal title, lease the facility to a municipality or other public authority having resources sufficient to make all rental payments as they become due. The lease agreement must provide that the lessee will become the owner of the building or facility upon the expiration of the lease.

(2) *Purchase of employee's residence.* To facilitate the efficient use of bank personnel, a national bank may purchase the residence of an employee who has been transferred to another area in order to spare the employee a loss in the prevailing real estate market. The bank must arrange for early divestment of title to such property.

[61 FR 4862, Feb. 9, 1996, as amended at 61 FR 60387, Nov. 27, 1996]

### **§ 7.1001 National bank acting as general insurance agent.**

Pursuant to 12 U.S.C. 92, a national bank may act as an agent for any fire, life, or other insurance company in any place the population of which does not exceed 5,000 inhabitants. This provision is applicable to any office of a national bank when the office is located in a community having a population of less than 5,000, even though the principal office of such bank is located in a community whose population exceeds 5,000.

### **§ 7.1002 National bank acting as finder.**

(a) *General.* It is part of the business of banking under 12 U.S.C. 24(Seventh) for a national bank to act as a finder, bringing together interested parties to a transaction.

(b) *Permissible finder activities.* A national bank that acts as a finder may identify potential parties, make inquiries as to interest, introduce or arrange contacts or meetings of interested parties, act as an intermediary between interested parties, and otherwise bring parties together for a transaction that the parties themselves negotiate and consummate. The following list provides examples of permissible finder activities. This list is illustrative and not exclusive; the OCC may determine that other activities are permissible pursuant to a national bank's authority to act as a finder.

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

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

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

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

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

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

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

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

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

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

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

[67 FR 35004, May 17, 2002]

### **§ 7.1003 Money lent at banking offices or at other than banking offices.**

(a) *General.* For purposes of what constitutes a branch within the meaning of 12 U.S.C. 36(j) and 12 CFR 5.30, "money" is deemed to be "lent" only at the place, if any, where the borrower in-person receives loan proceeds directly from bank funds:

(1) From the lending bank or its operating subsidiary; or

(2) At a facility that is established by the lending bank or its operating subsidiary.

(b) *Receipt of bank funds representing loan proceeds.* Loan proceeds directly from bank funds may be received by a borrower in person at a place that is not the bank's main office and is not licensed as a branch without violating 12 U.S.C. 36, 12 U.S.C. 81 and 12 CFR 5.30, provided that a third party is used to deliver the funds and the place is not established by the lending bank or its operating subsidiary. A third party includes a person who satisfies the requirements of §7.1012(c)(2), or one who customarily delivers loan proceeds directly from bank funds under accepted industry practice, such as an attorney or escrow agent at a real estate closing.

#### **§ 7.1004 Loans originating at other than banking offices.**

(a) *General.* A national bank may use the services of, and compensate persons not employed by, the bank for originating loans.

(b) *Approval.* An employee or agent of a national bank or of its operating subsidiary may originate a loan at a site other than the main office or a branch office of the bank. This action does not violate 12 U.S.C. 36 and 12 U.S.C. 81 if the loan is approved and made at the main office or a branch office of the bank or at an office of the operating subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank.

#### **§ 7.1005 Credit decisions at other than banking offices.**

A national bank and its operating subsidiary may make a credit decision regarding a loan application at a site other than the main office or a branch office of the bank without violating 12 U.S.C. 36 and 12 U.S.C. 81, provided that "money" is not deemed to be "lent" at those other sites within the meaning of §7.1003.

#### **§ 7.1006 Loan agreement providing for a share in profits, income, or earnings or for stock warrants.**

A national bank may take as consideration for a loan a share in the profit, income, or earnings from a business enterprise of a borrower. A national bank also may take as consideration for a loan a stock warrant issued by a business enterprise of a borrower, provided that the bank does not exercise the warrant. The share or stock warrant may be taken in addition to, or in lieu of, interest. The borrower's obligation to repay principal, however, may not be conditioned upon the value of the profit, income, or earnings of the business enterprise or upon the value of the warrant received.

#### **§ 7.1007 Acceptances.**

A national bank is not limited in the character of acceptances it may make in financing credit transactions. Bankers' acceptances may be used for such purpose, since the making of acceptances is an essential part of banking authorized by 12 U.S.C. 24.

#### **§ 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.

[68 FR 70131, Dec. 17, 2003]

#### **§ 7.1009 National bank holding collateral stock as nominee.**

A national bank that accepts stock as collateral for a loan may have such stock transferred to the bank's name as nominee.

#### **§ 7.1010 Postal service by national bank.**

(a) *General.* A national bank may maintain and operate a postal substation on banking premises and receive income from it. The services performed by the substation are those permitted under applicable rules

of the United States Postal Service and may include meter stamping of letters and packages, and the sale of related insurance. The bank may advertise, develop, and extend the services of the substation for the purpose of attracting customers to the bank.

(b) *Postal regulations.* A national bank operating a postal substation shall do so in accordance with the rules and regulations of the United States Postal Service. The national bank shall keep the books and records of the substation separate from those of other banking operations. Under 39 U.S.C. 404 and any regulations issued pursuant thereto, the United States Postal Service may inspect the books and records of the substation.

#### **§ 7.1011 National bank acting as payroll issuer.**

A national bank may disburse to an employee of a customer payroll funds deposited with the bank by that customer. The bank may disburse those funds by direct payment to the employee, by crediting an account in the employee's name at the disbursing bank, or by forwarding funds to another institution in which an employee maintains an account.

#### **§ 7.1012 Messenger service.**

(a) *Definition.* For purposes of this section, a "messenger service" means any service, such as a courier service or armored car service, used by a national bank and its customers to pick up from, and deliver to, specific customers at locations such as their homes or offices, items relating to transactions between the bank and those customers.

(b) *Pick-up and delivery of items constituting nonbranching activities.* Pursuant to 12 U.S.C. 24 (Seventh), a national bank may establish and operate a messenger service, or use, with its customers, a third party messenger service. The bank may use the messenger service to transport items relevant to the bank's transactions with its customers without regard to the branching limitations set forth in 12 U.S.C. 36, provided the service does not engage in branching functions within the meaning of 12 U.S.C. 36(j). In establishing or using such a facility, the national bank may establish terms, conditions, and limitations consistent with this section and appropriate to assure compliance with safe and sound banking practices.

(c) *Pick-up and delivery of items constituting branching functions by a messenger service established by a third party.* (1) Pursuant to 12 U.S.C. 24 (Seventh), a national bank and its customers may use a messenger service to pick up from, and deliver to customers items that relate to branching functions within the meaning of 12 U.S.C. 36, provided the messenger service is established and operated by a third party. In using such a facility, a national bank may establish terms, conditions, and limitations, consistent with this section and appropriate to assure compliance with safe and sound banking practices.

(2) The OCC reviews whether a messenger service is established by a third party on a case-by-case basis, considering all of the circumstances. However, a messenger service is clearly established by a third party if:

(i) A party other than the national bank owns or rents the messenger service and its facilities and employs the persons who provide the service;

(ii)(A) The messenger service retains the discretion to determine in its own business judgment which customers and geographic areas it will serve; or

(B) If the messenger service and the bank are under common ownership or control, the messenger service actually provides its services to the general public, including other depository institutions, and retains the discretion to determine in its own business judgment which customers and geographic areas it will serve;

(iii) The messenger service maintains ultimate responsibility for scheduling, movement, and routing;

(iv) The messenger service does not operate under the name of the bank, and the bank and the messenger service do not advertise, or otherwise represent, that the bank itself is providing the service, although the

bank may advertise that its customers may use one or more third party messenger services to transact business with the bank;

(v) The messenger service assumes responsibility for the items during transit and for maintaining adequate insurance covering thefts, employee fidelity, and other in-transit losses; and

(vi) The messenger service acts as the agent for the customer when the items are in transit. The bank deems items intended for deposit to be deposited when credited to the customer's account at the bank's main office, one of its branches, or another permissible facility, such as a back office facility that is not a branch. The bank deems items representing withdrawals to be paid when the items are given to the messenger service.

(3) A national bank may defray all or part of the costs incurred by a customer in transporting items through a messenger service. Payment of those costs may only cover expenses associated with each transaction involving the customer and the messenger service. The national bank may impose terms, conditions, and limitations that it deems appropriate with respect to the payment of such costs.

(d) *Pickup and delivery of items pertaining to branching activities where the messenger service is established by the national bank.* A national bank may establish and operate a messenger service to transport items relevant to the bank's transactions with its customers if such transactions constitute one or more branching functions within the meaning of 12 U.S.C. 36(j), provided the bank receives approval to establish a branch pursuant to 12 CFR 5.30.

[61 FR 4862, Feb. 9, 1996, as amended at 64 FR 60098, Nov. 4, 1999]

#### **§ 7.1014 Sale of money orders at nonbanking outlets.**

A national bank may designate bonded agents to sell the bank's money orders at nonbanking outlets. The responsibility of both the bank and its agent should be defined in a written agreement setting forth the duties of both parties and providing for remuneration of the agent. The bank's agents need not report on sales and transmit funds from the nonbanking outlets more frequently than at the end of the third business day following receipt of the funds.

#### **§ 7.1015 Receipt of stock from a small business investment company.**

A national bank may purchase the stock of a small business investment company (SBIC) (see 15 U.S.C. 682(b)), and may receive the benefits of such stock ownership (e.g., stock dividends). The receipt and retention of a dividend by a national bank from an SBIC in the form of stock of a corporate borrower of the SBIC is not a purchase of stock within the meaning of 12 U.S.C. 24 (Seventh).

#### **§ 7.1016 Independent undertakings to pay against documents.**

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

<sup>1</sup> Examples of such laws or rules of practice include: The applicable version of Article 5 of the Uniform Commercial Code (UCC) (1962, as amended 1990) or revised Article 5 of the UCC (as amended 1995) (available from West Publishing Co., 1/800/328-4880); the Uniform Customs and Practice for Documentary Credits (International Chamber of Commerce (ICC) Publication No. 500) (available from ICC Publishing, Inc., 212/206-1150; <http://www.iccwbo.org>); the International Standby Practices (ISP98) (ICC Publication No. 590) (available from the Institute of International Banking Law & Practice, 301/869-9840; <http://www.iiblp.org>); the United Nations Convention on

Independent Guarantees and Stand-by Letters of Credit (adopted by the U.N. General Assembly in 1995 and signed by the U.S. in 1997) (available from the U.N. Commission on International Trade Law, 212/963–5353); and the Uniform Rules for Bank-to-Bank Reimbursements Under Documentary Credits (ICC Publication No. 525) (available from ICC Publishing, Inc., 212/206–1150; <http://www.iccwbo.org>); as any of the foregoing may be amended from time to time.

(b) *Safety and soundness considerations*—(1) *Terms*. As a matter of safe and sound banking practice, banks that issue independent undertakings should not be exposed to undue risk. At a minimum, banks should consider the following:

(i) The independent character of the undertaking should be apparent from its terms (such as terms that subject it to laws or rules providing for its independent character);

(ii) The undertaking should be limited in amount;

(iii) The undertaking should:

(A) Be limited in duration; or

(B) Permit the bank to terminate the undertaking either on a periodic basis (consistent with the bank's ability to make any necessary credit assessments) or at will upon either notice or payment to the beneficiary; or

(C) Entitle the bank to cash collateral from the applicant on demand (with a right to accelerate the applicant's obligations, as appropriate); and

(iv) The bank either should be fully collateralized or have a post-honor right of reimbursement from the applicant or from another issuer of an independent undertaking. Alternatively, if the bank's undertaking is to purchase documents of title, securities, or other valuable documents, the bank should obtain a first priority right to realize on the documents if the bank is not otherwise to be reimbursed.

(2) *Additional considerations in special circumstances*. Certain undertakings require particular protections against credit, operational, and market risk:

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

(ii) In the event that the undertaking provides for automatic renewal, the terms for renewal should be consistent with the bank's ability to make any necessary credit assessments prior to renewal;

(iii) In the event that a bank issues an undertaking for its own account, the underlying transaction for which it is issued must be within the bank's authority and comply with any safety and soundness requirements applicable to that transaction.

(3) *Operational expertise*. The bank should possess operational expertise that is commensurate with the sophistication of its independent undertaking activities.

(4) *Documentation*. The bank must accurately reflect the bank's undertakings in its records, including any acceptance or deferred payment or other absolute obligation arising out of its contingent undertaking.

(c) *Coverage*. An independent undertaking within the meaning of this section is not subject to the provisions of §7.1017.

[61 FR 4862, Feb. 9, 1996, as amended at 64 FR 60099, Nov. 4, 1999; 68 FR 70131, Dec. 17, 2003]



### **§ 7.1017 National bank as guarantor or surety on indemnity bond.**

A national bank may lend its credit, bind itself as a surety to indemnify another, or otherwise become a guarantor (including, pursuant to 12 CFR 28.4, guaranteeing the deposits and other liabilities of its Edge corporations and Agreement corporations and of its corporate instrumentalities in foreign countries), if:

(a) The bank has a substantial interest in the performance of the transaction involved (for example, a bank, as fiduciary, has a sufficient interest in the faithful performance by a cofiduciary of its duties to act as surety on the bond of such cofiduciary); or

(b) The transaction is for the benefit of a customer and the bank obtains from the customer a segregated deposit that is sufficient in amount to cover the bank's total potential liability. A segregated deposit under this section includes collateral:

(1) In which the bank has perfected its security interest (for example, if the collateral is a printed security, the bank must have obtained physical control of the security, and, if the collateral is a book entry security, the bank must have properly recorded its security interest); and

(2) That has a market value, at the close of each business day, equal to the bank's total potential liability and is composed of:

(i) Cash;

(ii) Obligations of the United States or its agencies;

(iii) Obligations fully guaranteed by the United States or its agencies as to principal and interest; or

(iv) Notes, drafts, or bills of exchange or bankers' acceptances that are eligible for rediscount or purchase by a Federal Reserve Bank; or

(3) That has a market value, at the close of each business day, equal to 110 percent of the bank's total potential liability and is composed of obligations of a State or political subdivision of a State.

[61 FR 4862, Feb. 9, 1996, as amended at 64 FR 60099, Nov. 4, 1999]

### **§ 7.1018 Automatic payment plan account.**

A national bank may, for the benefit and convenience of its savings depositors, adopt an automatic payment plan under which a savings account will earn dividends at the current rate paid on regular savings accounts. The depositor, upon reaching a previously designated age, receives his or her accumulated savings and earned interest in installments of equal amounts over a specified period.

### **§ 7.1020 Purchase of open accounts.**

(a) *General.* The purchase of open accounts is a part of the business of banking and within the power of a national bank.

(b) *Export transactions.* A national bank may purchase open accounts in connection with export transactions; the accounts should be protected by insurance such as that provided by the Foreign Credit Insurance Association and the Export-Import Bank.

### **§ 7.1021 National bank participation in financial literacy programs.**

A national bank may participate in a financial literacy program on the premises of, or at a facility used by, a school. The school premises or facility will not be considered a branch of the bank if:

(a) The bank does not establish and operate the school premises or facility on which the financial literacy program is conducted; and

(b) The principal purpose of the financial literacy program is educational. For example, a program is educational if it is designed to teach students the principles of personal economics or the benefits of saving for the future, and is not designed for the purpose of profit-making.

[66 FR 34791, July 2, 2001]

## **Subpart B—Corporate Practices**

### **§ 7.2000 Corporate governance procedures.**

(a) *General.* A national bank proposing to engage in a corporate governance procedure shall comply with applicable Federal banking statutes and regulations, and safe and sound banking practices.

(b) *Other sources of guidance.* To the extent not inconsistent with applicable Federal banking statutes or regulations, or bank safety and soundness, a national bank may elect to follow the corporate governance procedures of the law of the state in which the main office of the bank is located, the law of the state in which the holding company of the bank is incorporated, the Delaware General Corporation Law, Del. Code Ann. tit. 8 (1991, as amended 1994, and as amended thereafter), or the Model Business Corporation Act (1984, as amended 1994, and as amended thereafter). A national bank shall designate in its bylaws the body of law selected for its corporate governance procedures.

(c) *No-objection procedures.* The OCC also considers requests for its staff's position on the ability of a national bank to engage in a particular corporate governance procedure in accordance with the no-objection procedures set forth in Banking Circular 205 or any subsequently published agency procedures.<sup>2</sup> Requests should demonstrate how the proposed practice is not inconsistent with applicable Federal statutes or regulations, and is consistent with safe and sound banking practices.

<sup>2</sup> Available upon request from the OCC Communications Division, 250 E Street, SW., Washington, DC 20219, (202) 874-4700.

### **§ 7.2001 Notice of shareholders' meetings.**

A national bank must mail shareholders notice of the time, place, and purpose of all shareholders' meetings at least 10 days prior to the meeting by first class mail, unless the OCC determines that an emergency circumstance exists. Where a national bank is a wholly-owned subsidiary, the sole shareholder is permitted to waive notice of the shareholder's meeting. The articles of association, bylaws, or law applicable to a national bank may require a longer period of notice.

### **§ 7.2002 Director or attorney as proxy.**

Any person or group of persons, except the bank's officers, clerks, tellers, or bookkeepers, may be designated to act as proxy. The bank's directors or attorneys may act as proxy if they are not also employed as an officer, clerk, teller or bookkeeper of the bank.

### **§ 7.2003 Annual meeting for election of directors.**

When the day fixed for the regular annual meeting of the shareholders falls on a legal holiday in the state in which the bank is located, the shareholders' meeting shall be held, and the directors elected, on the next following banking day.

## **§ 7.2004 Honorary directors or advisory boards.**

A national bank may appoint honorary or advisory members of a board of directors to act in advisory capacities without voting power or power of final decision in matters concerning the business of the bank. Any listing of honorary or advisory directors must distinguish between them and the bank's board of directors or indicate their advisory status.

## **§ 7.2005 Ownership of stock necessary to qualify as director.**

(a) *General.* A national bank director must own a qualifying equity interest in a national bank or a company that has control of a national bank. The director must own the qualifying equity interest in his or her own right and meet a certain minimum threshold ownership.

(b) *Qualifying equity interest—(1) Minimum required equity interest.* For purposes of this section, a qualifying equity interest includes common or preferred stock of the bank or of a company that controls the bank that has not less than an aggregate par value of \$1,000, an aggregate shareholders' equity of \$1,000, or an aggregate fair market value of \$1,000.

(i) The value of the common or preferred stock held by a national bank director is valued as of the date purchased or the date on which the individual became a director, whichever value is greater.

(ii) In the case of a company that owns more than one national bank, a director may use his or her equity interest in the controlling company to satisfy, in whole or in part, the equity interest requirement for any or all of the controlled national banks.

(iii) Upon request, the OCC may consider whether other interests in a company controlling a national bank constitute an interest equivalent to \$1,000 par value of national bank stock.

(2) *Joint ownership and tenancy in common.* Shares held jointly or as a tenant in common are qualifying shares held by a director in his or her own right only to the extent of the aggregate value of the shares which the director would be entitled to receive on dissolution of the joint tenancy or tenancy in common.

(3) *Shares in a living trust.* Shares deposited by a person in a living trust (inter vivos trust) as to which the person is a trustee and retains an absolute power of revocation are shares owned by the person in his or her own right.

(4) *Other arrangements—(i) Shares held through retirement plans and similar arrangements.* A director may hold his or her qualifying interest through a profit-sharing plan, individual retirement account, retirement plan, or similar arrangement, if the director retains beneficial ownership and legal control over the shares.

(ii) *Shares held subject to buyback agreements.* A director may acquire and hold his or her qualifying interest pursuant to a stock repurchase or buyback agreement with a transferring shareholder under which the director purchases the qualifying shares subject to an agreement that the transferring shareholder will repurchase the shares when, for any reason, the director ceases to serve in that capacity. The agreement may give the transferring shareholder a right of first refusal to repurchase the qualifying shares if the director seeks to transfer ownership of the shares to a third person.

(iii) *Assignment of right to dividends or distributions.* A director may assign the right to receive all dividends or distributions on his or her qualifying shares to another, including a transferring shareholder, if the director retains beneficial ownership and legal control over the shares.

(iv) *Execution of proxy.* A director may execute a revocable or irrevocable proxy authorizing another, including a transferring shareholder, to vote his or her qualifying shares, provided the director retains beneficial ownership and legal control over the shares.

(c) *Non-qualifying ownership.* The following are not shares held by a director in his or her own right:

(1) Shares pledged by the holder to secure a loan. However, all or part of the funds used to purchase the required qualifying equity interest may be borrowed from any party, including the bank or its affiliates;

(2) Shares purchased subject to an absolute option vested in the seller to repurchase the shares within a specified period; and

(3) Shares deposited in a voting trust where the depositor surrenders:

(i) Legal ownership (depositor ceases to be registered owner of the stock);

(ii) Power to vote the stock or to direct how it shall be voted; or

(iii) Power to transfer legal title to the stock.

[61 FR 4862, Feb. 9, 1996, as amended at 64 FR 60099, Nov. 4, 1999]

### **§ 7.2006 Cumulative voting in election of directors.**

When electing directors, a shareholder shall have as many votes as the number of directors to be elected multiplied by the number of the shareholder's shares. The shareholder may cast all these votes for one candidate, or distribute the votes among as many candidates as the shareholder chooses. If, after the first ballot, subsequent ballots are necessary to elect directors, a shareholder may not vote shares that he or she has already fully cumulated and voted in favor of a successful candidate.

### **§ 7.2007 Filling vacancies and increasing board of directors other than by shareholder action.**

(a) *Increasing board of directors.* If authorized by the bank's articles of association, between shareholder meetings a majority of the board of directors may increase the number of the bank's directors within the limits specified in 12 U.S.C. 71a. The board of directors may increase the number of directors only by up to two directors, when the number of directors last elected by shareholders was 15 or fewer, and by up to four directors, when the number of directors last elected by shareholders was 16 or more.

(b) *Vacancies.* If a vacancy occurs on the board of directors, including a vacancy resulting from an increase in the number of directors, the vacancy may be filled by the shareholders, a majority of the board of directors remaining in office, or, if the directors remaining in office constitute fewer than a quorum, by an affirmative vote of a majority of all the directors remaining in office.

### **§ 7.2008 Oath of directors.**

(a) *Administration of the oath.* A notary public, including one who is a director but not an officer of the national bank, may administer the oath of directors. Any person, other than an officer of the bank, having an official seal and authorized by the state to administer oaths, may also administer the oath.

(b) *Execution of the oath.* Each director attending the organization meeting shall execute either a joint or individual oath. A director not attending the organization meeting (the first meeting after the election of the directors) shall execute the individual oath. A director shall take another oath upon re-election, notwithstanding uninterrupted service. Appropriate sample oaths are located in the "Comptroller's Corporate Manual".

(c) *Filing and recordkeeping.* A national bank must file the original executed oaths of directors with the OCC and retain a copy in the bank's records in accordance with the Comptroller's Corporate Manual filing and recordkeeping instructions for executed oaths of directors.

[61 FR 4862, Feb. 9, 1996, as amended at 64 FR 60099, Nov. 4, 1999]

### **§ 7.2009 Quorum of the board of directors; proxies not permissible.**

A national bank shall provide in its articles of association or bylaws that for the transaction of business, a quorum of the board of directors is at least a majority of the entire board then in office. A national bank director may not vote by proxy.

### **§ 7.2010 Directors' responsibilities.**

The business and affairs of the bank shall be managed by or under the direction of the board of directors. The board of directors should refer to OCC published guidance for additional information regarding responsibilities of directors.

### **§ 7.2011 Compensation plans.**

Consistent with safe and sound banking practices and the compensation provisions of 12 CFR part 30, a national bank may adopt compensation plans, including, among others, the following:

(a) *Bonus and profit-sharing plans.* A national bank may adopt a bonus or profit-sharing plan designed to ensure adequate remuneration of bank officers and employees.

(b) *Pension plans.* A national bank may provide employee pension plans and make reasonable contributions to the cost of the pension plan.

(c) *Employee stock option and stock purchase plans.* A national bank may provide employee stock option and stock purchase plans.

### **§ 7.2012 President as director; chief executive officer.**

Pursuant to 12 U.S.C. 76, the president of a national bank must be a member of the board of directors, but a director other than the president may be elected chairman of the board. A person other than the president may serve as chief executive officer, and this person is not required to be a director of the bank.

### **§ 7.2013 Fidelity bonds covering officers and employees.**

(a) *Adequate coverage.* All officers and employees of a national bank must have adequate fidelity coverage. The failure of directors to require bonds with adequate sureties and in sufficient amount may make the directors liable for any losses that the bank sustains because of the absence of such bonds. Directors should not serve as sureties on such bonds.

(b) *Factors.* The board of directors should determine the amount of such coverage, premised upon a consideration of factors, including:

- (1) Internal auditing safeguards employed;
- (2) Number of employees;
- (3) Amount of deposit liabilities; and
- (4) Amount of cash and securities normally held by the bank.

### **§ 7.2014 Indemnification of institution-affiliated parties.**

(a) *Administrative proceedings or civil actions initiated by Federal banking agencies.* A national bank may only make or agree to make indemnification payments to an institution-affiliated party with respect to an administrative proceeding or civil action initiated by any Federal banking agency, that are reasonable and

consistent with the requirements of 12 U.S.C. 1828(k) and the implementing regulations thereunder. The term "institution-affiliated party" has the same meaning as set forth at 12 U.S.C. 1813(u).

(b) *Administrative proceeding or civil actions not initiated by a Federal banking agency*—(1) *General*. In cases involving an administrative proceeding or civil action not initiated by a Federal banking agency, a national bank may indemnify an institution-affiliated party for damages and expenses, including the advancement of expenses and legal fees, in accordance with the law of the state in which the main office of the bank is located, the law of the state in which the bank's holding company is incorporated, or the relevant provisions of the Model Business Corporation Act (1984, as amended 1994, and as amended thereafter), or Delaware General Corporation Law, Del. Code Ann. tit. 8 (1991, as amended 1994, and as amended thereafter), provided such payments are consistent with safe and sound banking practices. A national bank shall designate in its bylaws the body of law selected for making indemnification payments under this paragraph.

(2) *Insurance premiums*. A national bank may provide for the payment of reasonable premiums for insurance covering the expenses, legal fees, and liability of institution-affiliated parties to the extent that the expenses, fees, or liability could be indemnified under paragraph (b)(1) of this section.

#### **§ 7.2015 Cashier.**

A national bank's bylaws, board of directors, or a duly designated officer may assign some or all of the duties previously performed by the bank's cashier to its president, chief executive officer, or any other officer.

#### **§ 7.2016 Restricting transfer of stock and record dates.**

(a) *Conditions for stock transfer*. Under 12 U.S.C. 52, a national bank may impose conditions upon the transfer of its stock reasonably calculated to simplify the work of the bank with respect to stock transfers, voting at shareholders' meetings, and related matters and to protect it against fraudulent transfers.

(b) *Record dates*. A national bank may close its stock records for a reasonable period to ascertain shareholders for voting purposes. The board of directors may fix a record date for determining the shareholders entitled to notice of, and to vote at, any meeting of shareholders. The record date should be in reasonable proximity to the date that notice is given to the shareholders of the meeting.

#### **§ 7.2017 Facsimile signatures on bank stock certificates.**

The president and cashier, or other officers authorized by the bank's bylaws, shall sign each national bank stock certificate. The signatures may be manual or facsimile, including electronic means of signature. Each certificate must be sealed with the seal of the association.

#### **§ 7.2018 Lost stock certificates.**

If a national bank does not provide for replacing lost, stolen, or destroyed stock certificates in its articles of association or bylaws, the bank may adopt procedures in accordance with §7.2000.

#### **§ 7.2019 Loans secured by a bank's own shares.**

(a) *Permitted agreements, relating to bank shares*. A national bank may require a borrower holding shares of the bank to execute agreements:

(1) Not to pledge, give away, transfer, or otherwise assign such shares;

(2) To pledge such shares at the request of the bank when necessary to prevent loss; and

(3) To leave such shares in the bank's custody.

(b) *Use of capital notes and debentures.* A national bank may not make loans secured by a pledge of the bank's own capital notes and debentures. Such notes and debentures must be subordinated to the claims of depositors and other creditors of the issuing bank, and are, therefore, capital instruments within the purview of 12 U.S.C. 83.

### **§ 7.2020 Acquisition and holding of shares as treasury stock.**

(a) *Acquisition of outstanding shares.* Pursuant to 12 U.S.C. 59, including the requirements for prior approval by the bank's shareholders and the OCC imposed by that statute, a national bank may acquire its outstanding shares and hold them as treasury stock, if the acquisition and retention of the shares is, and continues to be, for a legitimate corporate purpose.

(b) *Legitimate corporate purpose.* Examples of legitimate corporate purposes include the acquisition and holding of treasury stock to:

(1) Have shares available for use in connection with employee stock option, bonus, purchase, or similar plans;

(2) Sell to a director for the purpose of acquiring qualifying shares;

(3) Purchase a director's qualifying shares upon the cessation of the director's service in that capacity if there is no ready market for the shares;

(4) Reduce the number of shareholders in order to qualify as a Subchapter S corporation; and

(5) Reduce costs associated with shareholder communications and meetings.

(c) *Prohibition.* It is not a legitimate corporate purpose to acquire or hold treasury stock on speculation about changes in its value.

[64 FR 60099, Nov. 4, 1999]

### **§ 7.2021 Preemptive rights.**

A national bank in its articles of association must grant or deny preemptive rights to the bank's shareholders. Any amendment to a national bank's articles of association which modifies such preemptive rights must be approved by a vote of the holders of two-thirds of the bank's outstanding voting shares.

### **§ 7.2022 Voting trusts.**

The shareholders of a national bank may establish a voting trust under the applicable law of a state selected by the participants and designated in the trust agreement, provided the implementation of the trust is consistent with safe and sound banking practices.

### **§ 7.2023 Reverse stock splits.**

(a) *Authority to engage in reverse stock splits.* A national bank may engage in a reverse stock split if the transaction serves a legitimate corporate purpose and provides adequate dissenting shareholders' rights.

(b) *Legitimate corporate purpose.* Examples of legitimate corporate purposes include a reverse stock split to:

- (1) Reduce the number of shareholders in order to qualify as a Subchapter S corporation; and
- (2) Reduce costs associated with shareholder communications and meetings.

[64 FR 60099, Nov. 4, 1999]

#### **§ 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 25 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.

[68 FR 70131, Dec. 17, 2003]

### **Subpart C—Bank Operations**

#### **§ 7.3000 Bank hours and closings.**

(a) *Bank hours.* A national bank's board of directors should review its banking hours, and, independently of any other bank, take appropriate action to establish a schedule of banking hours.

(b) *Emergency closings.* Pursuant to 12 U.S.C. 95(b)(1), the Comptroller of the Currency (Comptroller), a state, or a legally authorized state official may declare a day a legal holiday if emergency conditions exist. That day is a legal holiday for national banks or their offices in the affected geographic area (*i.e.*, throughout the country, in a state, or in part of a state). Emergency conditions include natural disasters and civil and municipal emergencies (*e.g.*, severe flooding, or a power emergency declared by a local power company or government requesting that businesses in the affected area close). The Comptroller issues a proclamation authorizing the emergency closing in accordance with 12 U.S.C. 95 at the time of the emergency condition, or soon thereafter. When the Comptroller, a State, or a legally authorized State official declares a legal holiday due to emergency conditions, a national bank may temporarily limit or suspend operations at its affected offices. Alternatively, the national bank may continue its operations unless the Comptroller by written order directs otherwise.

(c) *Ceremonial closings.* A state or a legally authorized state official may declare a day a legal holiday for ceremonial reasons. When a state or a legally authorized state official declares a day to be a legal holiday for ceremonial reasons, a national bank may choose to remain open or to close.

(d) *Liability.* A national bank should assure that all liabilities or other obligations under the applicable law due to the bank's closing are satisfied.

[61 FR 4862, Feb. 9, 1996, as amended at 66 FR 34791, July 2, 2001]

#### **§ 7.3001 Sharing space and employees.**

(a) *Sharing space.* A national bank may:

- (1) Lease excess space on bank premises to one or more other businesses (including other banks and financial institutions);



(2) Share space jointly held with one or more other businesses; or

(3) Offer its services in space owned or leased to other businesses.

(b) *Sharing employees.* When sharing space with other businesses as described in paragraph (a) of this section, a national bank may provide, under one or more written agreements among the bank, the other businesses, and their employees, that:

(1) A bank employee may act as agent for the other business; or

(2) An employee of the other business may act as agent for the bank.

(c) *Supervisory conditions.* When a national bank engages in arrangements of the types listed in paragraphs (a) and (b) of this section, the bank shall ensure that:

(1) The other business is conspicuously, accurately, and separately identified;

(2) Shared employees clearly and fully disclose the nature of their agency relationship to customers of the bank and of the other businesses so that customers will know the identity of the bank or business that is providing the product or service;

(3) The arrangement does not constitute a joint venture or partnership with the other business under applicable state law;

(4) All aspects of the relationship between the bank and the other business are conducted at arm's length, unless a special arrangement is warranted because the other business is a subsidiary of the bank;

(5) Security issues arising from the activities of the other business on the premises are addressed;

(6) The activities of the other business do not adversely affect the safety and soundness of the bank;

(7) The shared employees or the entity for which they perform services are duly licensed or meet qualification requirements of applicable statutes and regulations pertaining to agents or employees of such other business; and

(8) The assets and records of the parties are segregated.

(d) *Other legal requirements.* When entering into arrangements, of the types described in paragraphs (a) and (b) of this section, and in conducting operations pursuant to those arrangements the bank must ensure that each arrangement complies with 12 U.S.C. 29 and 36 and with any other applicable laws and regulations. If the arrangement involves an affiliate or a shareholder, director, officer or employee of the bank:

(1) The bank must ensure compliance with all applicable statutory and regulatory provisions governing bank transactions with these persons or entities;

(2) The parties must comply with all applicable fiduciary duties; and

(3) The parties, if they are in competition with each other, must consider limitations, if any, imposed by applicable antitrust laws.

#### **Subpart D—Preemption**

#### **§ 7.4000 Visitorial powers.**

(a) *General rule.* (1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

(2) For purposes of this section, visitorial powers include:

(i) Examination of a bank;

(ii) Inspection of a bank's books and records;

(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and

(iv) Enforcing compliance with any applicable federal or state laws concerning those activities.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(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. 3305(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. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(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.

(c) *Report of examination.* The report of examination made by an OCC examiner is designated solely for use in the supervision of the bank. The bank's copy of the report is the property of the OCC and is loaned to the bank and any holding company thereof solely for its confidential use. The bank's directors, in keeping with their responsibilities both to depositors and to shareholders, should thoroughly review the report. The report may be made available to other persons only in accordance with the rules on disclosure in 12 CFR part 4.

[61 FR 4862, Feb. 9, 1996, as amended at 64 FR 60100, Nov. 4, 1999; 69 FR 1904, Jan. 13, 2004]

#### **§ 7.4001 Charging interest at rates permitted competing institutions; charging interest to corporate borrowers.**

(a) *Definition.* The term "interest" as used in 12 U.S.C. 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, creditor-imposed not sufficient funds (NSF) fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

(b) *Authority.* A national bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state. If state law permits different interest charges on specified classes of loans, a national bank making such loans is subject only to the provisions of state law relating to that class of loans that are material to the determination of the permitted interest. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company, without being so licensed, but subject to state law limitations on the size of loans made by small loan companies.

(c) *Effect on state definitions of interest.* The Federal definition of the term "interest" in paragraph (a) of this section does not change how interest is defined by the individual states (nor how the state definition of interest is used) solely for purposes of state law. For example, if late fees are not "interest" under state law where a national bank is located but state law permits its most favored lender to charge late fees, then a national bank located in that state may charge late fees to its intrastate customers. The national bank may also charge late fees to its interstate customers because the fees are interest under the Federal definition of interest and an allowable charge under state law where the national bank is located. However, the late fees would not be treated as interest for purposes of evaluating compliance with state usury limitations because state law excludes late fees when calculating the maximum interest that lending institutions may charge under those limitations.

(d) *Usury.* A national bank located in a state the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by a corporate borrower.

[61 FR 4862, Feb. 9, 1996, as amended at 66 FR 34791, July 2, 2001]

#### **§ 7.4002 National bank charges.**

(a) *Authority to impose charges and fees.* A national bank may charge its customers non-interest charges and fees, including deposit account service charges.

(b) *Considerations.* (1) All charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers.

(2) The establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. A national bank establishes non-interest charges and fees in accordance

with safe and sound banking principles if the bank employs a decision-making process through which it considers the following factors, among others:

- (i) The cost incurred by the bank in providing the service;
- (ii) The deterrence of misuse by customers of banking services;
- (iii) The enhancement of the competitive position of the bank in accordance with the bank's business plan and marketing strategy; and
- (iv) The maintenance of the safety and soundness of the institution.

(c) *Interest.* Charges and fees that are "interest" within the meaning of 12 U.S.C. 85 are governed by §7.4001 and not by this section.

(d) *State law.* The OCC applies preemption principles derived from the United States Constitution, as interpreted through judicial precedent, when determining whether State laws apply that purport to limit or prohibit charges and fees described in this section.

(e) *National bank as fiduciary.* This section does not apply to charges imposed by a national bank in its capacity as a fiduciary, which are governed by 12 CFR part 9.

[66 FR 34791, July 2, 2001]

#### **§ 7.4003 Establishment and operation of a remote service unit by a national bank.**

A remote service unit (RSU) is an automated facility, operated by a customer of a bank, that conducts banking functions, such as receiving deposits, paying withdrawals, or lending money. A national bank may establish and operate an RSU pursuant to 12 U.S.C. 24(Seventh). An RSU includes an automated teller machine, automated loan machine, and automated device for receiving deposits. An RSU may be equipped with a telephone or televideo device that allows contact with bank personnel. An RSU is not a "branch" within the meaning of 12 U.S.C. 36(j), and is not subject to state geographic or operational restrictions or licensing laws.

[64 FR 60100, Nov. 4, 1999]

#### **§ 7.4004 Establishment and operation of a deposit production office by a national bank.**

(a) *General rule.* A national bank or its operating subsidiary may engage in deposit production activities at a site other than the main office or a branch of the bank. A deposit production office (DPO) may solicit deposits, provide information about deposit products, and assist persons in completing application forms and related documents to open a deposit account. A DPO is not a branch within the meaning of 12 U.S.C. 36(j) and 12 CFR 5.30(d)(1) so long as it does not receive deposits, pay withdrawals, or make loans. All deposit and withdrawal transactions of a bank customer using a DPO must be performed by the customer, either in person at the main office or a branch office of the bank, or by mail, electronic transfer, or a similar method of transfer.

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

[64 FR 60100, Nov. 4, 1999]

#### **§ 7.4005 Combination of loan production office, deposit production office, and remote service unit.**

A location at which a national bank operates a loan production office (LPO), a deposit production office (DPO), and a remote service unit (RSU) is not a "branch" within the meaning of 12 U.S.C. 36(j) by virtue of that combination. Since an LPO, DPO, or RSU is not, individually, a branch under 12 U.S.C. 36(j), any combination of these facilities at one location does not create a branch.

[64 FR 60100, Nov. 4, 1999]

#### **§ 7.4006 Applicability of State law to national bank operating subsidiaries.**

Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

[66 FR 34791, July 2, 2001]

#### **§ 7.4007 Deposit-taking.**

(a) *Authority of national banks.* A national bank may receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

(b) *Applicability of state law.* (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized deposit-taking powers are not applicable to national banks.

(2) A national bank may exercise its deposit-taking powers without regard to state law limitations concerning:

(i) Abandoned and dormant accounts;<sup>3</sup>

<sup>3</sup> This does not apply to state laws of the type upheld by the United States Supreme Court in *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233 (1944), which obligate a national bank to "pay [deposits] to the persons entitled to demand payment according to the law of the state where it does business." *Id.* at 248–249.

(ii) Checking accounts;

(iii) Disclosure requirements;

(iv) Funds availability;

(v) Savings account orders of withdrawal;

(vi) State licensing or registration requirements (except for purposes of service of process); and

(vii) Special purpose savings services;<sup>4</sup>

<sup>4</sup> State laws purporting to regulate national bank fees and charges are addressed in 12 CFR 7.4002.

(c) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' deposit-taking powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;<sup>5</sup>

<sup>5</sup> *But see* the distinction drawn by the Supreme Court in *Easton v. Iowa*, 188 U.S. 220, 238 (1903) between “crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States.” The Court stated that “[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction \* \* \*. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States.” *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

(6) Taxation;

(7) Zoning; and

(8) Any other law the effect of which the OCC determines to be incidental to the deposit-taking operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

[69 FR 1916, Jan. 13, 2004]

#### **§ 7.4008 Lending.**

(a) *Authority of national banks.* A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

(b) *Standards for loans.* A national bank shall not make a consumer loan subject to this §7.4008 based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.

(c) *Unfair and deceptive practices.* A national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and regulations promulgated thereunder in connection with loans made under this §7.4008.

(d) *Applicability of state law.* (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.

(2) A national bank may make non-real estate loans without regard to state law limitations concerning:

(i) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(ii) The ability of a creditor to require or obtain insurance for collateral or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(iii) Loan-to-value ratios;

(iv) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(v) Escrow accounts, impound accounts, and similar accounts;

(vi) Security property, including leaseholds;

(vii) Access to, and use of, credit reports;

(viii) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(ix) Disbursements and repayments; and

(x) Rates of interest on loans. <sup>6</sup>

<sup>6</sup> The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. See 12 U.S.C. 85; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

(e) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law; <sup>7</sup>

<sup>7</sup> See *supra* note 5 regarding the distinction drawn by the Supreme Court in *Easton v. Iowa*, 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States."

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

(6) Taxation;

(7) Zoning; and

(8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

[69 FR 1916, Jan. 13, 2004]

#### **§ 7.4009 Applicability of state law to national bank operations.**

(a) *Authority of national banks.* A national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.

(b) *Applicability of state law.* Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks.

(c) *Applicability of state law to particular national bank activities.* (1) The provisions of this section govern with respect to any national bank power or aspect of a national bank's operations that is not covered by another OCC regulation specifically addressing the applicability of state law.

(2) State laws on the following subjects are not inconsistent with the powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national bank powers:

(i) Contracts;

(ii) Torts;

(iii) Criminal law <sup>8</sup>

<sup>8</sup> *Id.*

(iv) Rights to collect debts;

(v) Acquisition and transfer of property;

(vi) Taxation;

(vii) Zoning; and

(viii) Any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out in paragraph (a) of this section.

[69 FR 1917, Jan. 13, 2004]

## **Subpart E—Electronic Activities**

**Source:** 67 FR 35004, May 17, 2002, unless otherwise noted.

### **§ 7.5000 Scope.**

This subpart applies to a national bank's use of technology to deliver services and products consistent with safety and soundness.

### **§ 7.5001 Electronic activities that are part of, or incidental to, the business of banking.**

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

(b) *Restrictions and conditions on electronic activities.* The OCC may determine that activities are permissible under 12 U.S.C. 24 (Seventh) or other statutory authority only if they are subject to standards or



conditions designed to provide that the activities function as intended and are conducted safely and soundly, in accordance with other applicable statutes, regulations, or supervisory policies.

(c) *Activities that are part of the business of banking.* (1) An activity is authorized for national banks as part of the business of banking if the activity is described in 12 U.S.C. 24 (Seventh) or other statutory authority. In determining whether an electronic activity is part of the business of banking, the OCC considers the following factors:

(i) Whether the activity is the functional equivalent to, or a logical outgrowth of, a recognized banking activity;

(ii) Whether the activity strengthens the bank by benefiting its customers or its business;

(iii) Whether the activity involves risks similar in nature to those already assumed by banks; and

(iv) Whether the activity is authorized for state-chartered banks.

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

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

(i) Whether the activity facilitates the production or delivery of a bank's products or services, enhances the bank's ability to sell or market its products or services, or improves the effectiveness or efficiency of the bank's operations, in light of risks presented, innovations, strategies, techniques and new technologies for producing and delivering financial products and services; and

(ii) Whether the activity enables the bank to use capacity acquired for its banking operations or otherwise avoid economic loss or waste.

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

#### **§ 7.5002 Furnishing of products and services by electronic means and facilities.**

(a) *Use of electronic means and facilities.* A national bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver, subject to §7.5001(b) and applicable OCC guidance. The following list provides examples of permissible activities under this authority. This list is illustrative and not exclusive; the OCC may determine that other activities are permissible pursuant to this authority.

(1) Acting as an electronic finder by:

(i) Establishing, registering, and hosting commercially enabled web sites in the name of sellers;

(ii) Establishing hyperlinks between the bank's site and a third-party site, including acting as a "virtual mall" by providing a collection of links to web sites of third-party vendors, organized by-product type and made available to bank customers;

(iii) Hosting an electronic marketplace on the bank's Internet web site by providing links to the web sites of third-party buyers or sellers through the use of hypertext or other similar means;

(iv) Hosting on the bank's servers the Internet web site of:

(A) A buyer or seller that provides information concerning the hosted party and the products or services offered or sought and allows the submission of interest, bids, offers, orders and confirmations relating to such products or services; or

(B) A governmental entity that provides information concerning the services or benefits made available by the governmental entity, assists persons in completing applications to receive such services or benefits and permits persons to transmit their applications for such services or benefits;

(v) Operating an Internet web site that permits numerous buyers and sellers to exchange information concerning the products and services that they are willing to purchase or sell, locate potential counterparties for transactions, aggregate orders for goods or services with those made by other parties, and enter into transactions between themselves;

(vi) Operating a telephone call center that provides permissible finder services; and

(vii) Providing electronic communications services relating to all aspects of transactions between buyers and sellers;

(2) Providing electronic bill presentment services;

(3) Offering electronic stored value systems; and

(4) Safekeeping for personal information or valuable confidential trade or business information, such as encryption keys.

(b) *Applicability of guidance and requirements not affected.* When a national bank performs, provides, or delivers through electronic means and facilities an activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver, the electronic activity is not exempt from the regulatory requirements and supervisory guidance that the OCC would apply if the activity were conducted by non-electronic means or facilities.

(c) *State laws.* As a general rule, and except as provided by Federal law, State law is not applicable to a national bank's conduct of an authorized activity through electronic means or facilities if the State law, as applied to the activity, would be preempted pursuant to traditional principles of Federal preemption derived from the Supremacy Clause of the U.S. Constitution and applicable judicial precedent. Accordingly, State laws that stand as an obstacle to the ability of national banks to exercise uniformly their Federally authorized powers through electronic means or facilities, are not applicable to national banks.

### **§ 7.5003 Composite authority to engage in electronic activities.**

Unless otherwise prohibited by Federal law, a national bank may engage in an electronic activity that is comprised of several component activities if each of the component activities is itself part of or incidental to the business of banking or is otherwise permissible under Federal law.

### **§ 7.5004 Sale of excess electronic capacity and by-products.**

(a) A national bank may, in order to optimize the use of the bank's resources or avoid economic loss or waste, market and sell to third parties electronic capacities legitimately acquired or developed by the bank for its banking business.

(b) With respect to acquired equipment or facilities, legitimate excess electronic capacity that may be sold to others can arise in a variety of situations, including the following:

(1) Due to the characteristics of the desired equipment or facilities available in the market, the capacity of the most practical optimal equipment or facilities available to meet the bank's requirements exceeds its present needs;

(2) The acquisition and retention of additional capacity, beyond present needs, reasonably may be necessary for planned future expansion or to meet the expected future banking needs during the useful life of the equipment;

(3) Requirements for capacity fluctuate because a bank engages in batch processing of banking transactions or because a bank must have capacity to meet peak period demand with the result that the bank has periods when its capacity is underutilized; and

(4) After the initial acquisition of capacity thought to be fully needed for banking operations, the bank experiences either a decline in level of the banking operations or an increase in the efficiency of the banking operations using that capacity.

(c) Types of electronic capacity in equipment or facilities that banks may have legitimately acquired and that may be sold to third parties if excess to the bank's needs for banking purposes include:

(1) Data processing services;

(2) Production and distribution of non-financial software;

(3) Providing periodic back-up call answering services;

(4) Providing full Internet access;

(5) Providing electronic security system support services;

(6) Providing long line communications services; and

(7) Electronic imaging and storage.

(d) A national bank may sell to third parties electronic by-products legitimately acquired or developed by the bank for its banking business. Examples of electronic by-products that banks may have legitimately acquired that may be sold to third parties if excess to the bank's needs include:

(1) Software acquired (not merely licensed) or developed by the bank for banking purposes or to support its banking business; and

(2) Electronic databases, records, or media (such as electronic images) developed by the bank for or during the performance of its permissible data processing activities.

#### **§ 7.5005 National bank acting as digital certification authority.**

(a) It is part of the business of banking under 12 U.S.C. 24(Seventh) for a national bank to act as a certificate authority and to issue digital certificates verifying the identity of persons associated with a particular public/private key pair. As part of this service, the bank may also maintain a listing or repository of public keys.

(b) A national bank may issue digital certificates verifying attributes in addition to identity of persons associated with a particular public/private key pair where the attribute is one for which verification is part of or incidental to the business of banking. For example, national banks may issue digital certificates verifying certain financial attributes of a customer as of the current or a previous date, such as account balance as of a particular date, lines of credit as of a particular date, past financial performance of the customer, and verification of customer relationship with the bank as of a particular date.

(c) When a national bank issues a digital certificate relating to financial capacity under this section, the bank shall include in that certificate an express disclaimer stating that the bank does not thereby promise or represent that funds will be available or will be advanced for any particular transaction.

### **§ 7.5006 Data processing.**

(a) *Eligible activities.* It is part of the business of banking under 12 U.S.C. 24(Seventh) for a national bank to provide data processing, and data transmission services, facilities (including equipment, technology, and personnel), data bases, advice and access to such services, facilities, data bases and advice, for itself and for others, where the data is banking, financial, or economic data, and other types of data if the derivative or resultant product is banking, financial, or economic data. For this purpose, economic data includes anything of value in banking and financial decisions.

(b) *Other data.* A national bank also may perform the activities described in paragraph (a) of this section for itself and others with respect to additional types of data to the extent convenient or useful to provide the data processing services described in paragraph (a), including where reasonably necessary to conduct those activities on a competitive basis. The total revenue attributable to the bank's data processing activities under this section must be derived predominantly from processing the activities described in paragraph (a) of this section.

### **§ 7.5007 Correspondent services.**

It is part of the business of banking for a national bank to offer as a correspondent service to any of its affiliates or to other financial institutions any service it may perform for itself. The following list provides examples of electronic activities that banks may offer correspondents under this authority. This list is illustrative and not exclusive; the OCC may determine that other activities are permissible pursuant to this authority.

- (a) The provision of computer networking packages and related hardware;
- (b) Data processing services;
- (c) The sale of software that performs data processing functions;
- (d) The development, operation, management, and marketing of products and processing services for transactions conducted at electronic terminal devices;
- (e) Item processing services and related software;
- (f) Document control and record keeping through the use of electronic imaging technology;
- (g) The provision of Internet merchant hosting services for resale to merchant customers;
- (h) The provision of communication support services through electronic means; and
- (i) Digital certification authority services.

### **§ 7.5008 Location of a national bank conducting electronic activities.**

A national bank shall not be considered located in a State solely because it physically maintains technology, such as a server or automated loan center, in that state, or because the bank's products or services are accessed through electronic means by customers located in the state.

### **§ 7.5009 Location under 12 U.S.C. 85 of national banks operating exclusively through the Internet.**

For purposes of 12 U.S.C. 85, the main office of a national bank that operates exclusively through the Internet is the office identified by the bank under 12 U.S.C. 22(Second) or as relocated under 12 U.S.C. 30 or other appropriate authority.

**§ 7.5010 Shared electronic space.**

National banks that share electronic space, including a co-branded web site, with a bank subsidiary, affiliate, or another third-party must take reasonable steps to clearly, conspicuously, and understandably distinguish between products and services offered by the bank and those offered by the bank's subsidiary, affiliate, or the third-party.